

TO THE DEPARTMENT FOR BUSINESS INNOVATION AND SKILLS:

ANALYTICAL FRAMEWORK FOR ASSESSING COSTS AND BENEFITS OF INVESTMENT PROTECTION TREATIES

Version: March 2013

On behalf of LSE Enterprise:

LAUGE N. SKOVGAARD POULSEN
UNIVERSITY OF OXFORD

JONATHAN BONNITCHA
LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE

JASON WEBB YACKEE
UNIVERSITY OF WISCONSIN

INTRODUCTION

The Lisbon Treaty has important implications for the external investment policy of European Union (EU) Member States. Competence for foreign direct investment policy has been transferred to the European Commission and a legislative framework is now in place to pursue EU wide investment treaties with third states. This raises both opportunities and challenges for the United Kingdom (UK). While the UK may continue to negotiate bilateral investment treaties (BITs), it also has to consider proposals for a new generation of European investment treaties. To provide a reasoned basis for choosing between alternative policy options, this report offers specific suggestions for how the UK government can assess the implications of a particular investment treaty. Although we caution against using ‘off-the-shelf’ quantitative indicators to guide policy-making in this area, an appendix to this report identifies potentially useful sources of information to assess whether a treaty may, or may not, provide net benefits.

The magnitude of the costs and benefits of any particular investment treaty will depend on its scope of coverage, generosity of substantive rights, and dispute settlement design. The analytical framework outlined below does not attempt to individually address every issue that would arise in the drafting of each specific provision of an investment treaty. Instead, the framework outlines a set of generic questions of relevance to any investment treaty (almost) irrespective of its specific design. Applying the framework to a particular treaty will require the generic questions outlined in the framework to be answered in light of the specifics of the treaty under consideration.

1. ECONOMIC COSTS AND BENEFITS

ECONOMIC BENEFITS

The most obvious potential economic benefit of an investment treaty is if it increases the volume of investment flowing into the UK. When assessing the economic rationale for entering into an investment treaty, the first question is therefore whether the treaty is likely to have an impact on whether, and how much, investors of the partner state will invest in the UK.

In recent years, a wide range of econometric studies have tried to assess the impact of investment treaties on foreign investment flows. Results have been mixed.¹ A few find a strong effect, some find a small effect, and others find no effect at all. While not irrelevant for policy-makers, these studies are often of limited use in practice. Typically, they are based on highly aggregate investment data. However, comprehensive bilateral (dyadic) investment data is rarely available at the sector level, so it is difficult to assess the *composition* of the investment impact. Even if an investment treaty may not have an impact on net foreign investment to the UK, it could still have an impact on certain kinds of investments in particular sectors. The lack of disaggregated data is a serious problem, as foreign investment in different sectors entails very different patterns of positive and negative externalities.² Other problems include the lack of useful quantitative indicators to control for important covariates such as ‘governance’ or ‘judicial independence’, as well as the failure to adequately address the issue of reverse causality: do investment treaties cause investment flows, or is it the other way around?

To overcome these problems the UK government could consider making use of investor surveys, perhaps in collaboration with other EU Member States or the European Commission. This would allow direct input from corporate decision-makers about whether, and to what extent, an investment treaty is likely to impact their investment decisions.³ Surveys would also help establish how and why an investment treaty is likely to influence investment decisions, information which would assist in the drafting the specific provision of the investment treaty. Are foreign investors concerned about discrimination when dealing with UK regulatory agencies, for instance? Do they fear that the government will introduce protectionist measures at some point in the future? Surveys also allow targeting particular investors within certain sectors, such as oil and mining, or with particular ownership structures, such as sovereign wealth funds (SWFs) or state-owned enterprises (SOEs).

¹ See collection of papers in Sauvart and Sachs 2009.

² For an overview, *see* OECD 2002.

³ For studies using this methodology to assess the economic impact of investment treaties, *see* Poulsen 2010b; Yackee 2011.

Just as there are difficulties in designing and interpreting econometric studies, investor surveys are not without their own challenges. If survey questions are framed poorly, the results are likely to mislead. For instance, since investment treaties rarely impose obligations on investors themselves, asking if a firm would *appreciate* an investment treaty will almost always elicit an affirmative response, even if the firm cannot be expected to use the treaty in practise. Similar care has to be taken to avoid sampling bias. Here, sector and size considerations are again key and within firms it can be difficult to target the right employees. Local managers will rarely have been involved in the investment decision, for instance, and even senior management at headquarters may not always have been involved in the legal vetting of an investment project.

Nevertheless, if designed properly, investor surveys could be a manageable and highly informative input for the UK when considering the potential economic implications of a particular investment treaty proposal. When sampling foreign investors we would suggest targeting industries, where investors from the partner country have, or are expected to have, considerable investments in the UK. Also, if the UK seeks to attract particular types of foreign investment from the partner country, it could be useful to know if the investment treaty is likely to impact those particular investment decisions. For instance, if the UK seeks to attract high-tech investments from a partner like the United States, it would be relevant to target such investors specifically in a survey instrument. As mentioned, it is particularly important to target officials involved in actual investment decisions – perhaps coupled with their in-house legal counsel involved in the legal vetting. Finally, surveys could target corporate actors who influence the decision-making of foreign investors when committing capital in the UK. In this respect, the UK government has the advantage of close access to the global hub for private political risk insurance (PRI). This industry is important, as investment treaties grant protections against many of the same risks as PRI products, such as expropriation insurance, and the economic impact of investment treaties have often been argued to operate via the pricing and availability of investment insurance. To assess whether an individual treaty is likely to have such an impact, and thereby indirectly influence the risk profile of investment

into the UK, surveys could include underwriters within UK Export Credits Guarantee Department (ECGD) and private PRI firms in London.⁴

In Box 1, we outline the key questions such an examination could consider, whether integrated into large-scale investigations or used on a smaller scale in individual conversations with private firms and other corporate actors.

QUESTION

1. To what extent are firms and other investors in the partner state likely to factor in the investment treaty when deciding whether, and how much, to invest in the UK?

SUB-QUESTIONS

1.1 To what extent have firms and other investors in the partner state expressed concerns about the treatment and protection of foreign investment in the UK?

1.2 To what extent do firms and other investors in the partner state find that the proposed investment treaty would solve their concerns (if any) about political risks in the UK?

1.3 To what extent do firms and other investors in the partner state care about investment treaty protections when making investment decisions in other states?

1.4 To what extent will the existence of the investment treaty have an impact on the pricing and availability of investment insurance for investors with existing, or planned, investments in the UK?

BOX 1. ATTRACTING INVESTMENTS TO THE UK

An investment treaty may generate economic benefits for the UK of a different sort, namely by their impact on the activities of UK investors abroad. To the extent this leads to higher dividends paid to UK nationals and/or higher taxes paid to the UK government, this would be a benefit to the UK economy.

⁴ Poulsen 2010b; Yackee 2011.

The benefit to UK investors could operate through different mechanisms. First of all, UK investors may expand their investment activities as a result of legal protections enshrined in the treaty, or they may refrain from scaling back such activities. This could be because the treaty provides protections over and above those prevailing in domestic law within the partner state or because it ‘locks in’ existing economic reforms. Crucially, the treaty may provide some investors with a perception that the commitments of the partner state are ‘credible’ and thus difficult to overturn. Secondly, unlike existing UK BITs some EU-wide investment treaties may include legally binding liberalization provisions. This could open up new market opportunities for UK investors in key sectors or, again, provide a reassurance that existing market access is locked in for the foreseeable future.

Finally, even if an investment treaty may not have an impact on where and how much UK firms invest abroad, it can still influence *how* they structure their investments which may, in turn, have further implications for the costs and benefits to the UK of such investment. For example, if a UK company routes its investment into a partner state via a subsidiary incorporated in a third state, in order to gain the protection of an investment treaty between the partner state and the third state, this could have implications for where, and how, the corporate group’s profits are taxed. To the extent that an investment treaty between the UK and the partner state removes the incentive for ‘investment treaty-shopping’, it could encourage UK companies to invest directly in the partner state. In principle, discouraging UK companies investing abroad from using complex corporate structures could make it more likely that those companies’ profits will be ‘booked’ and taxed in the UK. While tax-planning considerations often play a much greater role in determining corporate structure than the desire to access investment treaty protections, it is, nevertheless, important for policy-makers to be mindful of the potential of investment treaties to influence investors’ strategic decisions about corporate structuring.

Quantifying the extent of these benefits is a difficult task for all the reasons mentioned above, among others. It is difficult, using quantitative indicators, to assess the importance of investment treaties to UK investors seeking to resolve disputes with partner states, not least because most disputes are privately settled and, therefore, do not show up in available datasets. This makes it challenging to investigate the relevance of legal protections for already

established investors. Whether liberalization provisions in investment treaties have a tangible impact on UK investors is equally difficult to assess: often developing state partners liberalize their domestic investment regime around the same time they adopt investment treaties and sorting out the causality of whether it is treaty commitments or domestic reforms that impact UK investment can be a mammoth task. Similarly, whether some UK firms direct their investments via holding companies in third states because of investment treaties, double taxation treaties, or for other reasons is again difficult to assess using econometric methods.

A survey of UK investors may therefore often be a more appropriate tool to assess whether a particular investment treaty is likely to entail economic benefits to UK nationals and/or tax revenues. In Box 2, we outline the key questions such a survey could consider several of which are similar to those in Box 1.

QUESTION

2. To what extent does the investment treaty benefit UK firms and other investors operating, or seeking to invest, in the partner state?

SUB-QUESTIONS

2.1 To what extent have UK firms and other investors expressed concerns about the treatment and protection of foreign investment in the partner state?

2.2 To what extent have UK firms and other investors expressed concerns about violations of investor-state contracts by the partner state?

2.3 To what extent have UK firms and other investors expressed concerns about the independence of courts in the partner state, when dealing with foreign firms and citizens?

2.4 To what extent do UK firms and other investors find that the proposed investment treaty would solve their concerns (if any) about political risks in the partner state?

2.5 To what extent do firms and other potential foreign investors in the partner state care about investment treaty protections when making investment decisions in other states?

2.6 To what extent will the existence of the investment treaty have an impact on the pricing and availability of private and public investment insurance for investors with existing, or planned, investments in the partner state?

2.7 To what extent would UK investors make use of market access provisions in the proposed investment treaty?

2.8 To what extent would the investment treaty reduce the incentive for UK firms and other investors to route their investments into the partner state via third states?

BOX 2. PROTECTING UK INVESTMENT ABROAD

ECONOMIC COSTS

The most obvious potential economic cost of an investment treaty is if it exposes the UK government to costly investor-state arbitration claims. Over the last decade and a half, investors have increasingly relied on investment treaties to file claims against host states. States as diverse as Argentina, South Africa, the United States, Canada and Germany have all been subject to large – and occasionally controversial – investment treaty claims.⁵ Nothing insulates the UK from becoming subject to similar claims in the future. The most significant economic risk would be the possibility of an adverse arbitral award. But even if the UK were to win a claim legal fees as well as administrative and tribunal expenses could still be substantial, as tribunals have not always asked investors to reimburse these costs to the host state.⁶

To assess the economic risks of an UK or EU investment treaty, the first step will be a review of existing, and potential future, stocks of investments in the UK from the partner state. If the partner is a considerable source of inbound investment to the UK this should increase the risk of arbitration claims. More specifically, if there are foreign owned or controlled assets in sectors where investors are prone to rely on investment treaty protections - such as oil, gas and mining⁷ - this would be particularly relevant information. The size of the investments will also be a factor, as pursuing an arbitration claim may not be a feasible option for very small investments – say less than £10 million.⁸ Some investments may also be governed by complex investor-state contracts, such as agreements in utility sectors, which are often the starting point for disputes turning into treaty-based investor state arbitrations. Similarly, if some investors from the partner state are known to have concerns about their treatment and

⁵ In the case of Germany, the most high profile claims have been pursued under the Energy Charter Treaty; eg *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12.

⁶ Costs vary with the complexity of the dispute, but exceptional cases have resulted in legal costs of more than \$5 million. In a cursory review, UNCTAD (2009) found average costs incurred by governments were between \$1 and \$2 million in legal fees and about \$400,000 for tribunal expenses. Franck (2010) finds somewhat smaller figures.

⁷ ICSID 2012.

⁸ On the costs of arbitration, see *infra* note 6.

protection by UK authorities, this would have to be considered as well. Another factor to take into account is whether the treaty extends protections to certain classes of investors, such as SOEs, which have expressed their anxiety with existing or intended regulation within the UK. Finally, the legal culture within the partner state may in some cases also make investors more or less likely to file investment treaty claims.⁹ If investors from the partner state are known to resort to investment treaty arbitration on a regular basis, this would be important.

It would, however, be wrong to conclude that an investment treaty entails negligible economic risks on the basis that the partner state's investors have never relied on an investment treaty in the past, or on the basis that the partner state's investments are not in sectors in which investment treaty arbitration has been common. While some sectors are more prone to investor-state claims than others, investment treaties have been used to resolve or settle disputes in practically all sectors and claims. Moreover, investment treaty claims have been brought by investors with a wide, and expanding, range of nationalities. A full assessment of the potential economic costs of an investment treaty will therefore also have to include a legal review of the particular treaty, as the risk of adverse awards is necessarily contingent on the nature of the substantive and procedural guarantees embedded within it. Moreover, these will have to be compared with the UK legal system in order to outline key structural similarities and differences that will be relevant in estimating the likely economic costs of various investment treaty design options. For example, one relevant observation is that, under English law, damages are not normally awarded to a successful applicant in an action for judicial review of government conduct. On the other hand, a successful claim under an investment treaty challenging the same government conduct would result in an award of damages to the investor.

If the investment treaty imposes obligations on the UK government that go beyond obligations under UK law and/or provides more generous remedies to foreign investors, a third analytical step becomes necessary. Numerous investment treaty disputes concern the actions of sub-national levels of government or the actions of specialised regulatory agencies. While those within the highest levels of the British government may be aware of the

⁹Japanese investors, for instance, are considerably more reluctant to rely on arbitration for the settlement of disputes than Western investors; Wells and Tsuchiya 2012.

investment treaty, those within other parts of government may not be aware of the treaty at the time when they are considering measures that may affect an investor of the partner state. Apart from monitoring bilateral investment profiles and conducting a comparative legal review, an assessment of the economic risks of an investment treaty should therefore include an analysis of whether relevant government agencies are, in fact, aware of their international obligations when dealing with foreign investors. If they are not, this significantly increases the chance of disputes.

To understand the potential economic costs of a particular investment treaty, a combination of economic and legal questions therefore have to be investigated. The most important of these are outlined in Box 3.

QUESTION

3. To what extent does the investment treaty expose the UK to investor-state arbitration claims?

SUB-QUESTIONS

3.1 To what extent do firms and other investors in the partner state own or control assets within the UK? What sectors are these assets in? What is the nature of existing legal regime governing these assets (e.g. are contracts with public authorities involved)?

3.2 To what extent have firms and other investors in the partner state expressed concerns about the treatment and protection of foreign investment in the UK?

3.3 To what extent are firms and other investors in the partner state known to rely on investment treaty arbitration to resolve disputes with their host states?

3.4 To what extent does the investment treaty impose obligations on the UK government that go beyond obligations that would otherwise be owed to those investors under UK law?

3.5 To what extent does the investment treaty grant foreign investors in the UK more generous remedies than would otherwise be available in similar causes of action under UK law?

3.6 To what extent would investor-state arbitration under the investment treaty provide foreign investors in the UK with a path with fewer procedural obstacles to resolve disputes with the UK government?

3.7 To what extent are UK government agencies at national and sub-national levels aware of their international legal obligations, when dealing with foreign investors?

BOX 3. EXPOSING THE UK TO INVESTOR CLAIMS

An EU-wide investment treaty with a partner country may also alter the distribution of investment from the partner country in the EU. This effect, which we describe as ‘investment diversion’ may be either an economic cost or an economic benefit to the UK. Whether investment diversion effects associated with an EU investment treaty are net benefits or costs

to the UK depends on whether an EU-wide investment treaty makes investors of the partner country more or less likely to locate their EU investments in the UK.

In determining the extent of investment diversion effects, the first step is to consider the Questions asked in Box 1, above. If the existence of investment treaties has little impact on the investment decisions of the partner state's investors, then significant investment diversion effects are unlikely. If investment treaties do influence the investment decisions of investors of the partner state, then there is the potential for investment diversion effects. In these circumstances, a further set of questions would become relevant. The extent to which an EU-wide investment treaty is likely to induce investment diversion is likely to depend on the extent to which it changes the relative attractiveness of EU Member States as investment destinations. If the UK currently has a 'strong' investment treaty with the partner state while most other EU Member States have 'weak' investment treaties with the partner state, then an EU-wide investment treaty would make the UK a relatively less attractive destination as compared with other EU Member States. Assuming an inelastic supply of partner investment in the EU, this could lead to investment diversion from the UK to other EU Member States, resulting in a net economic cost to the UK. If the UK currently has a 'weak' investment treaty with the partner country while other EU Member States have 'strong' investment treaties, an EU-wide investment treaty could result in investment diversion effects that are beneficial to the UK. Because we do not think that investment treaties play a major role in driving inward investment decisions in the EU, our view is that investment diversion effects are unlikely to be significant.

To understand the extent of any investment diversion effects associated with the treaty, we suggest that the UK consider the questions outlined in Box 4.

QUESTION

4. To what extent is an EU investment treaty likely to affect the distribution of investment from the partner country in the EU?

SUB-QUESTIONS

4.1 To what extent are firms and other investors in the partner state likely to factor in the investment treaty when deciding whether, and how much, to invest in the EU?

4.2 What level of investment protection is currently provided by investment treaties between the partner State and each of the EU Member States?

4.3 Would an EU wide investment treaty with the partner state make the UK a more attractive destination for investment from the partner country, relative to other EU Member States?

BOX 4. INVESTMENT DIVERSION

2. POLITICAL COSTS AND BENEFITS

POLITICAL BENEFITS

Investment treaties are often credited with “de-politicizing” foreign investment disputes.¹⁰ The potential benefit flows from the dispute settlement provisions of investment treaties, which allow aggrieved foreign investors to bring claims for mistreatment directly against the host state. This direct, private right of action means that foreign investors need not call upon their home government to intervene on their behalf to protect their investments.¹¹

De-politicizing investment disputes could benefit the UK in two general and closely related ways. First, considering the UK as a host state, an investment treaty could prevent the UK government’s treatment of foreign investment from becoming a source of friction at the inter-

¹⁰ Shihata 1986.

¹¹ Indeed, Article 27 of the ICSID Convention prohibits home state governments from exercising formal diplomatic protection on behalf of their investors once the host state and investor have consented to ICSID Arbitration. This does not, however, prevent a home state intervening informally on behalf of their investors.

governmental level. Investment treaties do this by providing for the settlement of investment dispute through arbitration (where arbitration is viewed by the home and host state as a fair and neutral means of resolving the relevant issues). Assessing the scale of this benefit requires judgements about the manner and frequency in which the partner state would challenge the treatment of its investors in the UK, the ability of the treaty to reduce such interventions, and the level of diplomatic discomfort caused by such interventions.

Second, in its capacity as a source of foreign investment in the partner state, the UK government could encourage British investors to pursue their own claims directly, and thereby avoid sensitive diplomatic entanglements that may interfere with broader foreign policy goals.¹² This effect may be especially valuable where UK investors are, or will be, investing in politically sensitive sectors of the partner state's economy that have historically been prone to investor-state disputes. At a more managerial level, we can also imagine that an enhanced ability to say “no” to investor requests for the exercise of informal or formal diplomatic assistance could economise on UK bureaucratic resources, as personnel devoted to aiding aggrieved investors could be shifted to other duties. Again, the extent of this benefit will depend, among other things, on an assessment of the likely volume and severity of complaints by UK investors of mistreatment by the partner state.

We see three analytic steps that could be taken to assess the potential political benefit of a particular investment treaty in depoliticizing investment disputes. These steps are relevant equally to the assessment of the benefit to the UK in its capacity as a source of investment in the partner state and in its capacity as a destination for investment from the partner state.

First, the UK government should consider the likelihood that either state party to the treaty would raise the treatment of ‘their’ investors abroad at the inter-governmental level in the absence of the treaty. As a home state, the UK should analyse its potential susceptibility to pressure from certain UK investors and their business associations for diplomatic aid. Susceptibility may depend on the level, concentration, or sector of actual or potential UK

¹² In the context of the United States, *see* Maurer 2013 forth. Brazil, which has yet to ratify any of its BITs, recently found it necessary to use a range of foreign policy tools to defend Brazilian investors involved in investment disputes in neighbouring states; Maurer 2013, ch. 11.

investment in the partner state. As a host to investment, the UK government should make the same analysis with respect to the partner state. Again, susceptibility could depend on the types of investments that investors from the partner state have made, or are likely to make, in the UK. Some kinds of investments may be more likely to lead to allegations of UK government mistreatment (for example, investments in highly regulated sectors of the UK economy), and the partner state may be more likely to exert diplomatic pressure on behalf of certain kinds of investors (for example, on behalf of the partner state's SOEs investing in the UK). Considering the political system in the partner state will also be important, as some regimes are less vulnerable to pressure from domestic investors than others. If, in the absence of the treaty, neither the UK government nor the partner state is likely to raise concerns at the inter-governmental on behalf of their investors, an investment treaty is less likely to provide political benefits. If, on the other hand, either party is likely to aggressively engage in diplomatic protection, then investment treaty arbitration could be a valuable tool to depoliticize investment disputes.

The second and third analytic steps relate to the valuation of the benefit to the UK of an investment treaty's effect in facilitating the resolution of investment disputes through arbitration. As a second step, the UK government should identify existing and potential sources of political tensions with the partner state. As investment treaties are difficult to change once adopted, and as EU-wide agreements would be exceedingly difficult to change, it is crucial that this assessment considers sources of tension that may arise in the future. Where the relationship with the partner state is sensitive, or may become so in the future, depoliticization of investment disputes is likely to be of greater benefit to the UK, both in its capacity as a source and destination of foreign investment in the partner state.

The third step involves an assessment of whether either party would, in fact, be particularly vulnerable to diplomatic or other political pressure when involved in investment disputes. This analysis should focus on the balance of power between the UK and the partner state. If, as a home state, the UK is likely to be able to assert effective diplomatic pressure on the partner state *without compromising national interests* in the process, depoliticizing investment disputes between the British investors and the partner state may not constitute a significant benefit to the UK. (The converse is also true.) If, as a host state, the UK is vulnerable to

pressure by the partner state, an investment treaty's effect of encouraging the resolution of investment disputes through arbitration would constitute a greater benefit. On the other hand, if the UK is not vulnerable to such pressure, the exercise of diplomatic protection by the partner state is unlikely to cause significant concerns for the UK government. In this latter situation, encouraging the resolution of investment disputes through arbitration would constitute a lesser benefit.

In light of our discussion, we suggest that the main questions the UK government should investigate when considering the political benefits of an investment treaty are those outlined in Box 5.

QUESTION

5. Will the investment treaty de-politicize existing or future investment disputes with the partner state?

SUB-QUESTIONS

5.1 Is the UK government's overall diplomatic or political relationship with the partner state especially complex or sensitive? Is it likely to become increasingly sensitive over the next decades?

5.2 Is either party likely to raise the treatment of their investors abroad at the inter-governmental level?

5.3 Could the UK government be forced to compromise broader national interests when engaging in diplomatic protection?

5.4 Is the UK government vulnerable to diplomatic or political pressure when the other state engages in diplomatic protection?

BOX 5. DE-POLITICIZING INVESTMENT DISPUTES

POLITICAL COSTS

An investment treaty would impose costs on the UK government to the extent that it prevents the UK from regulating in the public interest. In the academic literature, this effect is

variously referred to as a treaty's impact on 'sovereignty',¹³ 'policy space', the 'right to regulate',¹⁴ or as a risk of 'regulatory chill'.¹⁵ For consistency, we use the term 'policy space' throughout to refer to this potential cost. Additional political costs could arise in two further ways: either if investment treaty disputes become a focal point for political controversy; or if the process of negotiating and ratifying investment treaties diverts scarce political and bureaucratic resources away from the pursuit of other initiatives. We discuss each of these three possibilities in turn.

There are considerable conceptual difficulties in determining the extent to which changes that investment treaties may induce in decision-making of the UK government should be understood as constituting a 'cost'. An initial issue concerns the extent to which the obligations contained in an investment treaty actually *constrain* the policy space for the UK. This issue has already been highlighted in our discussion of economic costs. A useful first approximation is the principle that investment treaties only restrict a state's policy space insofar as they prohibit a state from acting in a way that would otherwise be permissible under national law. Thus, any assessment of political costs associated with an investment treaty must begin with a close legal analysis of the provisions of the relevant investment treaty in light of comparable provisions of national law. However, this is only a starting point for the analysis. Constitutional principles aside, national law can be changed by the UK parliament, whereas a bilateral investment treaty between the UK and a partner state would be difficult to amend, and an EU-wide investment treaty would be exceedingly difficult to amend. Thus, an investment treaty potentially entails further political costs insofar as it prevents the UK from making otherwise desirable changes to national law.

A second conceptual issue concerns valuation of the cost of restrictions that an investment treaty places on the UK's policy space. The problem is that some restrictions may entail far greater political costs than others. For example, the fair and equitable treatment provision of an investment treaty is often understood as imposing an obligation to refrain from adopting

¹³ Sornarajah 2008, 205.

¹⁴ Spears 2010, 1042.

¹⁵ Tienhaara 2009, 262.

policies that are incapable of rational justification on any grounds. Such a provision in an investment treaty would encroach on the UK's freedom to adopt completely irrational policies, yet it could hardly be understood as a political cost. In contrast, an obligation to refrain from introducing short-term capital controls during a financial crisis might constitute a significant political cost.

It is not the purpose of this framework to propose an overarching theory of desirable and undesirable forms of government intervention in the UK economy in order to value the costs associated with various restrictions on policy space. Rather, we suggest that the appropriate benchmark for valuing the cost associated with any restriction on policy space is the government of the day's own assessment of the public interest. On this basis, a political cost associated with an investment treaty can be understood as the extent to which it precludes the government of the day from implementing policies that it would prefer to implement in the absence of the investment treaty. Assessing the extent to which the treaty would prevent a government from adopting preferred policies would require a policy analyst to draw inferences about the set of policies that future UK governments may wish to adopt, and to reflect on these policies in light of the legal obligations placed on the government by the investment treaty.

A third conceptual issue concerns the risk of 'double counting' the cost of any restriction that an investment treaty places on UK policy space. Formally, an investment treaty comprises a set of binding rules specifying things that a state must not do, all of which potentially restrict UK policy space.¹⁶ If the UK complies with these obligations it will not incur any economic costs as a result of adverse arbitral awards, however, it may refrain from regulating in ways that it would otherwise regard as desirable. In contrast, if the UK completely ignores an investment treaty it will not suffer from any reduction in policy space *in practice*. It would, instead, expose itself to the risk of economic costs associated with adverse arbitral awards. (This is because an arbitral tribunal is not in a position to force the UK to abandon preferred

¹⁶ An important exception is that of provisions dealing with the expropriation of foreign investment. Such provisions expressly authorise the expropriation of foreign investment, provided that compensation is paid.

policies.¹⁷ Instead, a tribunal would award damages for the breach of the treaty.) For this reason, it is important to reconcile the assessment of the political and economic costs of a given investment treaty.

Considering the implications of these three conceptual issues together, we suggest that an attempt to determine the political costs associated with any limitation on policy space associated with an investment treaty should focus on the questions of:

- Generally, the likely impact of the investment treaty on decision-making throughout government; and
- Specifically, the extent to which the investment treaty is likely to dissuade a decision-maker from adopting a policy that would otherwise be considered desirable.

There is no publicly available evidence, of which we are aware, relating to the impact of existing investment treaties on UK government decision-making. While there has been some examination of the impact of investment treaties on government decision-making in other states,¹⁸ this evidence is of only limited relevance to the UK, given potentially significant differences in the practice of government between states. Moreover, most academic attention has focused on situations in which investors have challenged regulatory policies that were adopted and maintained by governments, rather than situations in which decision-makers were dissuaded from pursuing preferred policies by the existence of an investment treaty. The former set of case studies are relevant to assessing the extent of economic costs associated with adverse arbitral awards under an investment treaty, however only situations of the latter type constitute evidence of political costs resulting from constraint on a state's policy space.

¹⁷ Strictly speaking, an arbitral tribunal does have the authority to award a remedy other than damages, unless that authority is expressly excluded by the investment treaty in question. However, given the practical difficulties in enforcing a non-pecuniary remedy against a respondent state, tribunals have been exceedingly reluctant to order remedies other than damages. We are aware of only two cases in which a tribunal's final decision has involved the award of a remedy other than damages. Both were cases in which the state itself proposed the order of a non-pecuniary remedy: *Goetz v Burundi* ICSID Case No ARB/95/3, Award (Embodying the Parties Settlement Agreement), 10 February 1999 [133]; *ATA Construction and Trading Company v The Hashemite Kingdom of Jordan* ICSID Case No ARB/08/2, Award, 18 May 2010 [131].

¹⁸ Eg Tienhaara 2009, 157.

The UK government is, however, in a good position to make internal inquiries necessary to come to an informed view of the extent of lost policy space that a particular investment treaty entails. These inquiries could be divided into two distinct strands.¹⁹ The first set of inquiries should seek to examine the extent to which the terms of the investment treaty would be internalised in the decision-making process within various parts of the UK government. For example, the policy analyst should ask whether vetting and review procedures would be put in place to prevent the introduction of measures inconsistent with the treaty, and how various decision-makers would be likely to respond in the event of uncertainty about whether a preferred measure was consistent with the treaty. A second set of inquiries should seek to understand how various parts of the UK government would be likely to respond to the initiation, or threat of initiation, or arbitral proceedings by an investor of the partner state. This set of inquiries should pay particular attention to the process within the UK government by which a choice is made between defending a preferred policy and modifying a preferred policy in response to a foreign investor's objection.

In both sets of inquiries, it is important to bear in mind that the conduct of any part of the UK government – including the actions of the UK legislature, specialised regulatory agencies and local authorities – could potentially become the subject of an investment treaty claim. So while inquiries might reasonably focus greater attention on the parts of the UK government that are assessed as at highest risk of adopting policies that could infringe the treaty, it is necessary to consider the impact of the investment treaty on decision-making across all parts of UK government.

In addition to those questions outlined in previous sections, we suggest that following questions in Box 6 be asked internally within the UK government.

¹⁹ This distinction between the 'internalisation' and 'threat' effects of investment treaties on policy-making is outlined in Bonnitca 2011, 135.

QUESTION

6. To what extent will the investment treaty reduce the UK government's 'policy space'?

SUB-QUESTIONS

6.1 What sort of policies may a future UK government wish to implement that could raise questions of compliance with the terms of the investment treaty? To what extent do the terms of the treaty preclude such policies?

6.2 To what extent are the provisions of the treaty likely to be internalised in the decision-making of various different parts of the UK government? What procedures, if any, will be put in place to vet or review policies for consistency with the treaty?

6.3 How would UK government decision-makers be likely to respond to the initiation, or the threat of initiation, of arbitral proceedings by an investor of the partner state? What procedures are in place to manage claims, or threatened claims, under the treaty? How is the UK government likely to decide whether it should defend a challenged policy or modify that policy in light of the investor's objections?

BOX 6. REDUCING POLICY SPACE

A second potential political cost concerns the possibility that high profile claims against the UK government under the investment treaty may provoke controversy within the UK. In the previous section, we discussed the extent to which investment treaties 'depoliticise' investment disputes, in the sense of encouraging them to be resolved through international arbitration, rather than through inter-governmental negotiations. However, disputes resolved through investor-state arbitration may still be the subject of public controversy, especially if the investor's claims or the arbitral tribunal's decision are seen as threatening the UK's policy space in sensitive areas.

The evaluation of this potential cost should be handled with great caution. In a democratic society the fact that a policy, judicial decision or – in the present circumstances – a claim before an arbitral tribunal becomes the subject of popular debate and controversy cannot be understood as constituting a cost in itself. Disagreement about public affairs is a normal, and healthy, incident of democratic government. Nevertheless, if the controversy around a *specific*

claim against the UK triggers widespread opposition to treaties and international cooperation *in general* then, in extreme cases, this backlash could limit the ability of the government of the day to pursue preferred policies on the international plane. We are aware that certain actions of the European Union and decisions of the European Court of Human Rights have, in the past, been controversial in the UK.

We suggest that the UK government consider the questions outlined in Box 7.

QUESTION

7. To what extent might political controversy associated with claims brought against the UK government under an investment treaty constitute a political cost?

SUB-QUESTIONS

7.1 What is the risk of claims by investors of the partner state bringing high profile claims that provoke controversy within the UK?

7.2 What is the risk of the controversy associated with such claims becoming heated and generalised to the extent that it limits the ability of the government of the day to pursue preferred policies on the international plane?

BOX 7. THE POLITICAL COST OF CONTROVERSIAL CLAIMS

Investment treaties may also entail political costs to the extent that they divert diplomatic and bureaucratic resources from pursuing other initiatives. By diplomatic resources, we mean the (limited) capacity of any set of partner states to make progress on multiple international initiatives simultaneously. Making one initiative – in this context, an investment treaty – a priority, inevitably means that other initiatives will be deferred or deprioritised. By bureaucratic resources, we meant the internal allocation of time and resources of the public service necessary to support the negotiation and implementation of the investment treaty. One example is the commitment of resources necessary to conduct the research and reviews that we recommend in this report. The commitment of diplomatic and bureaucratic resources to negotiating and ratifying an investment treaty is a form of opportunity cost; valuing this cost

requires a set of judgements about what could be achieved if these resources were devoted to some other purpose.

The scale of commitment of diplomatic resources required to sign an investment treaty depends largely on the complexity of negotiations. While in the past some BITs were signed and ratified without a great deal of active negotiation between the parties, the rise in investment treaty arbitration has generally made negotiations more difficult and time-consuming than during the 1990s. There is now a greater awareness of the significance of differences in treaty language and most states have their own model treaties, which tend to be longer and more complex than two decades ago. The extent to which this commitment of resources represents an opportunity cost depends on the capacity of the negotiating parties, specifically the question of whether pursuing long and complex negotiations necessary to sign an investment treaty has the effect of delaying or precluding the pursuit of other international initiatives. The value of this opportunity cost depends on judgements about other international initiatives that could be pursued more vigorously if diplomatic resources were not devoted to the negotiations for an investment treaty. Before committing diplomatic resources to the negotiation of an investment treaty, it would be particularly important for a policy analyst to consider whether there are any other trade or investment initiatives that would entail greater benefits to the UK than the investment treaty.

Bureaucratic resources will also be required to develop the UK's investment treaty policy and to support negotiations. For a UK investment treaty, the political cost of allocating bureaucratic resources to the negotiation of an investment treaty, rather than to some other project, falls directly on the UK. For a European investment treaty with a partner state, some of these political costs will be borne by the European Commission. However, this allocation of resources by the European Commission may still entail indirect political costs for the UK, to the extent that the Commission's resources are diverted from other projects that would be beneficial to the UK. Moreover, even in the case of an EU-wide investment treaty, the UK public service is likely to retain a significant role in developing policy and in supporting the Commission's negotiations. Finally, if the UK government implements new procedures to review policies for consistency with the investment treaty, this is likely to entail an additional, on-going commitment of bureaucratic resources. As with the commitment of diplomatic

resources to negotiating an investment treaty, valuing the opportunity cost of a commitment of bureaucratic resources depends on judgements about the benefits of other projects that might otherwise be pursued.

Investment treaties might potentially economise on bureaucratic or diplomatic resources by serving as stepping-stones to the conclusion of other desirable treaties, such as Free Trade Agreements (FTAs). In this view, investment treaty negotiations could facilitate, rather than crowd out, other treaty negotiations. This view finds some support from a recent statistical study, which argues that states that enter into investment treaties are, in some cases, more likely to later enter into an FTA.²⁰ However, as one of us has argued elsewhere, that study is based on a flawed understanding of the practical implications of investment treaties and of the politics of investment treaty rule-making in most developed countries.²¹ While in the case of China, for instance, the Commission has suggested that an EU-China investment treaty could lead the way for a future FTA,²² we are unaware of any reliable empirical evidence to support the *general* proposition that investment treaties tend to facilitate the conclusion of other valuable international agreements. Accordingly, a policy analyst should not assume that an EU or UK investment treaty with a specific partner country is likely to facilitate the negotiation of other treaties, unless there is something unique and peculiar about the negotiating process that clearly justifies such an assumption.

Much of the information that would be necessary to assess the opportunity costs of devoting diplomatic and political resources to the pursuit of an investment treaty with a given partner state is not in the public domain. However, the UK government is likely to be in possession of a great deal of information relevant to assessing and valuing these costs. The UK government is also likely to be able to obtain further relevant information from the European Commission. In Box 8, we outline questions that could be asked internally within the UK government, and of the European Commission, to obtain relevant information.

²⁰ Tobin and Busch 2010.

²¹ Poulsen 2010a

²² Falletti 2012.

QUESTION

8. To what extent does the process of negotiating and ratifying the investment treaty entail opportunity costs in diverting resources away from the pursuit of other international initiatives, including other initiatives to improve investment relations with partner states?

SUB-QUESTIONS

8.1 How great a commitment of diplomatic resources will the negotiation of the investment treaty require from the European Commission and from the UK government?

8.2 To what extent will devoting diplomatic resources to the negotiation of the treaty preclude, limit or delay the pursuit of other international initiatives?

8.3 What specific initiatives could be pursued by the UK or European Commission if diplomatic resources were not allocated to the negotiation of the investment treaty? Specifically, are there other investment or trade initiatives that might be pursued that would entail greater net benefits for the UK?

8.4 How great a commitment of bureaucratic resources will be required to conduct research, develop policy and support the negotiation of the investment treaty? Will an on-going commitment of additional bureaucratic resources be required to review policies for consistency with the investment treaty?

8.5 What is the opportunity cost to the UK of allocating these resources to the pursuit of an investment treaty, rather than other projects?

8.6 Once negotiated, is the ratification of the investment treaty likely to require any additional commitment of resources?

BOX 8. DIVERTING POLITICAL AND BUREAUCRATIC RESOURCES

SUMMARY

Box 9 summarises the points raised in the analytical framework. They are complemented with a set of suggestive indicators in the appendix. Although this analytical framework has focused on the broader political and economic implications of investment treaties, the UK government could equally apply the framework to the drafting of individual provisions of an investment treaty.

	ECONOMIC	POLITICAL
BENEFITS	<p>To what extent will the treaty promote investment flows to the UK?</p> <p>To what extent will the treaty benefit British investors abroad?</p>	<p>To what extent will the treaty de-politicize investment disputes?</p>
COSTS	<p>To what extent will the treaty increase the risk of costly investment treaty claims against the UK?</p> <p>To what extent is an EU investment treaty likely to affect the distribution of investment from the partner country in the EU?</p>	<p>To what extent will the treaty reduce UK ‘policy space’?</p> <p>To what extent might controversy associated with claims brought against the UK government under an investment treaty constitute a political cost?</p> <p>To what extent will negotiating, ratifying and implementing the treaty divert bureaucratic and political resources away from other initiatives?</p>

BOX 9. ANALYTICAL FRAMEWORK FOR ASSESSING COSTS AND BENEFITS OF AN INVESTMENT TREATY

In concluding we note that there will be a degree of overlap between the assessment of the potential costs and benefits of any particular investment treaty. Many of the same questions will be relevant in several different contexts. For example, the extent to which the treaty grants legal rights to investors of the partner state that go beyond the legal rights to which those investors would otherwise be entitled under UK law is relevant to the assessment of both the economic and political costs associated with the treaty. Similarly, questions about the legal and political environment in the partner state will be relevant to the assessment of both the economic and the political benefits associated with the treaty. The overlap between the

assessment of various costs and benefits means that the framework should be applied in an integrated an internally consistent manner.

APPENDIX: POTENTIAL INDICATORS

There are no off-the-shelf datasets that would allow the UK government to fully parameterize our cost-benefit framework. Our framework represents an analytic ideal, and is intended to structure government thinking about the costs and benefits of investment treaties in a general way, facilitating informed but not “scientific” policy decision-making. It is not possible to use our framework, or any other of which we are aware, to produce reliable point estimates of whether treaty x or treaty y would provide the UK with net benefits, or net costs. Rather, the best that can be achieved is for the government to supplement our framework with selected data—some publicly available, some which the government would need to develop itself—that could help to develop an informed, but still informal, sense of whether a particular investment treaty is more or less likely to provide large benefits, and/or to impose large costs.

ECONOMIC BENEFITS

Our Questions 1 and 2, concerning economic benefits, prompt the analyst to consider whether foreign investors looking to invest in the UK are likely to take into account an investment treaty, and whether UK investors looking to invest abroad are likely to do the same thing. While we suggest survey instruments as a promising means of gathering data relevant to answering these questions, resource constraints can make large surveys unfeasible on occasion.

One way around the lack of data on whether investors actually take investment treaties into account is simply to assume that they do indeed take them into account. The limited existing survey work suggests that this is not the case, but this is not definitive for reasons we have discussed elsewhere.²³ Assuming that investors do take investment treaties into account, the next analytic step is to ask whether, given the particular characteristics of the host state, a potential investor is likely to view the host state as prone to the kinds of risks against which investment treaties are supposed to protect. If a potential investor views a host state as *not* particularly risky, then an investment treaty is unlikely to alter the investor’s decision to

²³ Poulsen 2010b, Yackee 2010.

invest. But if a potential investor views the host state *as* particularly risky, then an investment treaty may be more likely to influence the investment decision.

This logic (which informs most of the empirical work on the impact of investment treaties on FDI flows) suggests that the UK policy analyst might rely on off-the-shelf indicators of risk—and particularly, of “political risk”—to gauge whether the treaty partner is likely to be viewed as “risky” by UK investors, or whether the UK is viewed as a “risky” destination for foreign investment. We will assume here that the UK is generally viewed as “low risk”.

There are three potentially useful indicators of political risks for foreign investors:

- (1) Some private companies produce country-level quantitative rankings of various kinds of “risk”. The International Country Risk Guide (ICRG) from the PRS-group, for instance, has a useful indicator for investment risks.²⁴
- (2) PRI providers often quantify the risk of expropriation for the purposes of pricing their investment policies. ECGD might therefore be able to provide useful information – qualitative as well as quantitative - about the investment risks of a particular partner country.
- (3) The OECD produces an FDI Restrictiveness index, which covers a range of restrictions for the operation of foreign enterprises.²⁵

There are significant conceptual and methodological issues involved in using these indicators in the context of our Framework Report. For example, country-level measures of risk may mask significant sector-level variations in risk. Or, a particular indicator’s conception of risk may differ in important ways from the kinds of risks that investment treaties are said to reduce. Furthermore, the empirical or theoretical relationship between these indicators and foreign investment decisions or FDI flows may themselves be uncertain. We would therefore urge caution in relying on any of these indicators to provide a definitive measure of whether

²⁴ The Political Risk services Group, ‘International Country Risk Guide’ www.prsgroup.com/icrg.aspx accessed 11 March 2013.

²⁵ OECD, ‘FDI Regulatory Restrictiveness Index’ www.oecd.org/investment/fdiindex.htm accessed 11 March 2013. The World Bank produces a similar index: World Bank Group, ‘Investment Climate’ www.wbginvestmentclimate.org accessed 11 March 2013.

country x is “risky” in ways relevant to investment treaties, or in ways relevant to specific investors. That said; particularly the second indicator may be useful for distinguishing between countries for which BITs have at least some plausible theoretical potential to influence foreign investment decisions (high risk) and those for which BITs have little or no plausible theoretical potential (low risk).

ECONOMIC COSTS

When considering potential economic costs of an investment treaty, we have suggested that the government should consider the likelihood that the treaty will expose the UK to claims under investment treaties and adverse arbitral awards. From the outset we note that there is only one publicly known case that has been brought against the UK under an existing investment treaty. This apparently non-serious claim was brought by an Indian investor, Mr Ashok Sancheti, and was ultimately discontinued. The lack of claims against the UK to date indicates that the UK does not suffer from endemic or serious problems of failure to comply with investment treaty obligations. However, we caution against extrapolating predictions about the economic costs of future investment treaties from the UK’s past experience. Most of the UK’s existing investment treaties are with states that do not have significant stocks of investment in the UK, whereas many of the states with which the EU is considering negotiating future investment treaties are significant inward investors in the UK. The frequency of investment treaty claims against the UK can reasonably be expected to rise in proportion with the stock of foreign investment in the UK from the partner state. Therefore, in determining the economic cost of an investment treaty, one useful indicator is the size of existing, and potential future, investment stocks in the UK from the partner state. This indicator was discussed in the previous section.

Another useful indicator of the likelihood of claims against the UK is data on past claims pursued against other developed countries. We think the experience of the US and Canada as respondents in investment treaty claims under NAFTA is particularly relevant. This is for two reasons. First, the NAFTA experience of the US and Canada is one of few examples of an investment treaty between a developed state and a partner state that is a significant source of

inward investment. Secondly, both Canada and the US have highly developed legal systems based on common law and, in this sense, are broadly analogous to the UK.

Aggregated information on the legal costs and success rates of investment treaty arbitration is in short supply, but a number of sources are potentially useful:

- (1) The online magazine IAREporter reports extensively on investment treaty arbitrations, including ‘threats’ of claims.²⁶
- (2) While not updated since 2010, UNCTAD has an online database of investment treaty arbitrations with detailed cost information.²⁷
- (3) Susan Franck has compiled data on investment treaty claims, including their costs. While very detailed, only a limited sample of cases had been coded at the time of writing.²⁸

These sources show that, to date, successful investment treaty claims against developed states have been relatively rare. However, as noted above, this observation is at least partly explained by the lack of investment treaties between developed states (as developed states are the primary source of foreign investment in other developed states). Moreover, when claims against developed states have succeeded, they have often resulted in significant damages awards.

Accordingly, while information on past claims can be useful to assess the *potential* for investment treaties to impose economic costs, it is rarely meaningful to talk about the ‘average’ or ‘median’ economic costs of an investment treaty. Investment treaty arbitration is still at a relatively early stage in its development. The size, frequency and success-rate of claims against developed states may well change over the coming years. Rather than extrapolating the costs of past investment treaty claims to produce specific predictions about

²⁶ Investment Arbitration Reporter, www.iareporter.com accessed 11 March 2013.

²⁷ UNCTAD, ‘Database of Treaty-based Investor-State Dispute Settlement Cases (pending and concluded)’ <http://iiadbcases.unctad.org> accessed 11 March 2013.

²⁸ Susan Franck, ‘Generation 1 Dataset and Related Materials’ <http://law.wlu.edu/faculty/page.asp?pageid=1185> accessed 11 March 2013.

the expected costs of a particular treaty, we would encourage the government to use past claims data to produce scenario-analyses. This is a standard decision-making tool when considering low-probability risks, like an expensive investment treaty claim. Analysis of these scenarios, including their likely probability, can then be used to inform the wider cost-benefit analysis.

The focus should be on the size of actual awards, as awards to successful investors are often less than the amount originally claimed. That said, the size of claims may be of some relevance, particularly in assessing the political costs associated with the existence of a claim. For instance, when held against the size of the population, the US\$2.28 billion claim against Belgium would be equivalent to a US\$12.98 billion claim against the UK.²⁹ We think claims of this size are within the range of possibility under future UK investment treaties with other major economic powers, albeit toward the upper end of that range.³⁰ Claims of this size may well have *political* costs for the UK, to the extent that they would reduce support for investment treaty arbitration or international economic cooperation more generally.

POLITICAL BENEFITS

Our primary political benefit is the de-politicization of investor-state dispute settlement. We are not aware of any quantitative empirical studies of or relating to the de-politicization thesis. Those limited studies that do exist consist largely of historical and/or case-study analysis.³¹

It seems feasible for the UK government to develop its own data relevant to the question of de-politicization. For example, the UK government might analyse its diplomatic records to identify modern historical instances in which a UK investor has petitioned the UK government for diplomatic assistance in resolving an investment-related dispute with a host

²⁹ *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v Kingdom of Belgium*, ICSID Case No ARB/12/29.

³⁰ The largest known claim to date is the estimated US\$100 billion claim against Russia in the set of cases arising out of the nationalisation of the Yukos oil company. However, the facts of the dispute are unusual. We do not think inferences about the size of possible claims against the UK can reasonably be drawn from the Yukos dispute.

³¹ Maurer 2013 forth.

state. The dataset could also indicate the extent of any UK government response to the petition, as well as whether a relevant investment treaty was in effect at the time of the petition. We can imagine such a dataset would allow the UK government to gauge empirically whether, historically, the UK government has come under significant pressure from UK investors in the potential treaty partner for diplomatic assistance. The dataset might also be useful for examining whether the UK government is petitioned less frequently when an investment treaty is in place, or whether the UK government is less likely to feel compelled to offer assistance in response to a petition when an investment treaty is in place. This data might be especially useful for thinking about our Questions 5.2 and 5.4, specifically, and about the more general question of whether investment treaties actually do serve to depoliticize investment disputes, at least in the UK's historical experience.

POLITICAL COSTS

Our primary political cost is the extent to which an investment treaty dissuades the UK from adopting measures that would otherwise be considered in the public interest by the government of the day. This (potential) cost stems from the impact of the investment treaty on government decision-making on the UK *in practice*.

We are not aware of any systematic, publicly available data on the impact of investment treaties on government decision-making, either in the UK or elsewhere. To the extent that these issues have been the subject of academic study, they have primarily been examined through case studies, which tend to focus on high profile policy initiatives that subsequently became the subject of investment treaty claims. There is relatively little evidence of measures being withdrawn by governments in response to the threat of investment treaty arbitration, although such cases are not unheard of. These case studies do have some value, but they are unlikely to be representative of the impact of an investment treaty on government decision-making more generally.

One way around the lack of information on the impact of investment treaties is to make some simplifying assumptions. We understand that the UK does not currently have any special procedures in place to ensure that government decision making is consistent with its obligations under existing investment treaties, and that there are no immediate plans to

introduce such procedures. Instead, the UK relies on procedures and checks under UK law to ensure compliance with its investment treaty obligations. Therefore, we suggest that it is reasonable to assume that the obligations of an investment treaty are unlikely to be internalised within UK government decision-making. This assumption answers Question 6.2.

Nevertheless, an investment treaty may still encourage governments to abandon preferred policies to the extent that foreign investors invoke the treaty to oppose particular government measures. It is reasonable to assume that foreign investors will refer to investment treaties when governments propose new measures that significantly affect their investments. For example, Japan Tobacco International's submission to the UK Department of Health's Consultation on the Standardised Packaging of Tobacco Products refers to the investment treaty claim against Australia arising out of the introduction of plain packaging legislation in Australia (even though JTI would not appear to be entitled to the protection of any of the UK's existing investment treaties).³² The extent to which the UK government responds to such challenges by withdrawing or abandoning preferred policies would count as a political cost of the treaty. The likely UK government response to investor objections based on an investment treaty is, in turn, likely to depend on the legal advice available to the decision-maker about the risk of a proposed measure's non-compliance with the investment treaty.

Under these assumptions, the extent to which an investment treaty restricts the UK government's policy space can be estimated by answering Question 6.1. Question 6.1 asks: *What sort of policies may a future UK government wish to implement that could raise questions of compliance with the terms of the investment treaty? To what extent do the terms of the treaty preclude such policies?* This question has two related limbs, one political and one legal.

The best data available to answer the first question is the full set of claims brought against developed countries under investment treaties. An analyst tasked with compiling this data should also include claims that were threatened or initiated by investors, but that never

³² Japan Tobacco International, 'JTI's Response to the UK Department of Health's Consultation on the Standardised Packaging of Tobacco Products' http://www.jti.com/download_file/810/629/ accessed 3 March 2013, p 27.

reached the merits phase, within the set. (We think claims against developing countries are less relevant to the UK, as many involve fact scenarios – unilateral abrogation of investment contracts, physical seizure of investors’ assets, overt discrimination on the grounds of nationality, serious procedural failures in national judicial systems, etc – that are unlikely to arise in the UK, even in the absence of an investment treaty.) Past claims against developed countries provide an indicator of the types of policies that an investment treaty may preclude the UK government from adopting. Relevant policy areas identified in this way would include: financial regulation (*Ping An v Belgium*); energy sector policy (*Vattenfall v Germany*; *AES, Solar & others v Spain*); environmental regulation (*Chemtura v Canada*; *Methanex v US*); and public health policies (*Philip Morris v Australia*); among others.

The second limb of Question 6.1 poses a legal question. The question can only be answered by a close legal reading of the terms of the investment treaty in question. The ‘data’ relevant to answering this question would be purely legal – the decision of tribunals and the writings of legal scholars. It would be relevant to note that many of the policy measures challenged in the claims cited above were found to be compliant with the investment treaties that applied in the cases in question.

Question 8 of the framework identifies an additional political cost associated with the diversion of diplomatic and political resources. There are unlikely to be publicly available indicators that assist in the assessment of this cost. However, this cost should be relatively easy to value through internal inquiries within the UK government. The simplest way to estimate this cost would be for the policy analyst to estimate the number of diplomatic and bureaucratic person-hours necessary to negotiate and implement the treaty, based on past experience negotiating similar agreements. A value could then be imputed to each diplomatic person-hour, and a separate value imputed to each bureaucratic person-hour.

BIBLIOGRAPHY

- BONNITCHA, JONATHAN. (2011). Outline of a Normative Framework for Evaluating Interpretations of Investment Treaty Protections. In *International Investment Law and Arbitration: Evolution and Revolution in Substance and Procedure*, edited by Chester Brown and Kate Miles. Cambridge: Cambridge University Press.
- BONNITCHA, JONATHAN AND EMMA AISBETT. (2013) An Economic Analysis of the Substantive Protections Provided by Investment Treaties. In *Yearbook on International Investment Law & Policy 2011-2012*. New York: Oxford University Press.
- FALLETTI, SÉBASTIEN. (2012) De Gucht cool on Beijing's FTA push. *Europolitics*, Tuesday 23 October.
- FRANCK, SUSAN. (2007) Empirically Evaluating Claims about Investment Treaty Arbitration. *North Carolina Law Review* vol. 86.
- INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID). (2012) The ICSID Caseload – Statistics. Available at: icsid.worldbank.org.
- MAURER, NOEL. (2013 forth.) The Empire Trap: The Rise and Fall of U.S. Intervention to Protect American Property Overseas, 1893-1976. Princeton: Princeton University Press.
- ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD). (2002) Foreign Direct Investment for Development: maximising benefits, minimising costs. Available at: www.oecd.org.
- POULSEN, LAUGE. (2010a) Bilateral Investment Treaties and Preferential Trade Agreements: Is a BIT Really Better Than A Lot? *Investment Treaty News Quarterly* vol. 1 no. 1.
- (2010b) The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence. In *Yearbook on International Investment Law & Policy 2009-2010*, edited by Karl Sauvant. New York: Oxford University Press.
- SAUVANT, KARL AND LISA SACHS, EDS. (2009) The Effect of Treaties on Foreign Direct Investments. New York: Oxford University Press.
- SHIHATA, IBRAHIM F.I. (1986) Towards a greater depoliticization of investment disputes. *ICSID Rev.* vol 1. no. 1.

- SORNARAJAH, MUTHUCUMARASWAMY. (2008) The Neo-Liberal Agenda in Investment Arbitration. In *Redefining Sovereignty in International Economic Law*, edited by Wenhua Shan, Penelope Simons and Dalvinder Singh. Portland: Hart.
- SPEARS, SUZANNE. (2010) The Quest for Policy Space in an New Generation of International Investment Agreements. *Journal of International Economic Law* vol. 13.
- TOBIN, JENNIFER AND MARC BUSCH. (2010) A BIT Is Better Than a Lot: Bilateral Investment Treaties and Preferential Trade Agreements, *World Politics* 62:1.
- TIENHAARA, KYLA. (2009) The Expropriation of Environmental Governance. Cambridge: Cambridge University Press.
- UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD). (2004) *International Investment Disputes on the Rise*. Occasional note. Available at: unctad.org.
- WELLS, LOUIS AND CHIEKO TSUCHIYA. (2012) Japanese multinationals in foreign disputes: Do they behave differently, and does it matter for host countries? In *Yearbook on International Investment Law & Policy 2010-1011*, edited by Karl Sauvant. New York: Oxford University Press.
- YACKEE, JASON WEBB. (2011) Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence. *Virginia Journal of International Law* 51:397-442.
- (2012) Controlling the International Investment Law Agency. *Harvard Journal of International Law* 53:391.