BILATERAL INVESTMENT TREATIES AND INVESTOR-STATE DISPUTE RESOLUTION

Six key facts

1

There are more than **3000 international investment agreements** in force internationally

2

Bilateral Investment Treaties have been part and parcel of the international investment system **since the 1960s**

3

Global FDI totalled around **$1.6 trillion in 2013**—with developing economies accounting for more than 50% of inward flows

4

International investment directly created more than **40 million jobs** over the past two decades

5

Over 40% of investment disputes to date have been settled in favour of host states

6

New **transparency requirements** for investor — state arbitrations were introduced by the UN in 2014

BILATERAL INVESTMENT TREATIES AND INVESTOR-STATE DISPUTE RESOLUTION

Key issues for international business

What are BITs and why do they matter?

- **Investment protection clauses are found in more than 3,000 international investment agreements**, often known as bilateral investment treaties or "BITs". These agreements are sometimes contained in chapters of Free Trade Agreements ("FTAs") that deal specifically with investment issues.

- These agreements have been **recognised by the UN as a key factor in helping countries attract foreign direct investment** ("FDI")—with recent studies indicating that the implementation of BITs can increase a country's annual stock of inward investment by upwards of 10 percent.

- In general, BITs provide protection to investors by: prohibiting favouritism for local investors; ensuring fair compensation for any expropriation or nationalisation of assets; and protecting foreign investors from local content requirements and export quotas. These protections help **provide the stability, predictability and transparency that businesses require when making decisions on where to invest**.

- **FDI and international trade serve as the twin engines of world prosperity**. Since 1980, merchandise trade has expanded by a factor of six and the stock of FDI has expanded by a factor of 20. **Employment growth associated with FDI is impressive**: some 21 million people were employed by foreign affiliates of multinational companies in 1990, rising to 69 million in 2011.

- **To recover from its growth slump, the world economy needs a big dose of new FDI**. At the current rate, US$1.6 trillion, new FDI flows are little more than 2 percent of world GDP. Doubling that rate, to around US$3 trillion annually, would provide a major stimulus to the world economy—helping create jobs, raise living standards and contributing to government tax revenues.

- **Implementing strong investment protection standards should be a policy priority for all governments in order to promote new waves of prosperity-enhancing FDI.**

Investor-state dispute resolution — a BIT of a problem or much ado about nothing?

- **BITs and FTA investment chapters often contain investor-state dispute settlement ("ISDS") provisions** which allow investors to bring a claim in front of an international tribunal where it is alleged that one of the core provisions of an investment agreement has been breached.
- **The inclusion of ISDS provisions in these agreements is neither new nor novel**: they have, in fact, been part and parcel of the international investment system since the late 1960s.
- **ISDS is used in relatively rare—but highly serious—situations, such as where a company's assets are expropriated without proper compensation**.
- **ISDS does not limit the policy space of states to introduce new regulation**. Instead, it helps establish a balance between the right of States to regulate and the rights of investors to protection under international law. Contrary to some suggestions, **investors cannot use investment provisions to bring a claim against a state just because their profits might be affected by a new government policy.**
- The confidential—or "secretive"—nature of ISDS arbitrations has received significant attention from many civil society groups. In this context, it is important to note that there have been **a number of important transparency-related innovations in international arbitration in recent years**. In 2013, for instance, the United Nations Commission on International Trade Law adopted new transparency rules which came come into effect from April 2014.

TTIP — why is the investment chapter important?

- To maximize the potential gains of a new transatlantic deal for businesses, workers and consumers, **negotiators must ensure that the final TTIP agreement contains gold-standard, 21st Century investment provisions**.
- This means that the TTIP investment chapter should include, at a minimum:
  - **broad definitions of investment** to capture the full range of investment vehicles and global supply chains in today's globalised economy;
  - **strong and comprehensive investor protections**;
  - **"pre-establishment" provisions** to minimize protectionism; and
  - **strong, transparent ISDS provisions**, to ensure enforcement by efficiently resolving disputes on the merits of each case.
- The benefits of a strong TTIP investment chapter should not be viewed in isolation. As the largest bilateral trade deal ever negotiated, **third countries will look to TTIP as a model for future free trade agreements**. A gold-standard agreement could play a central role in fostering improved conditions for a much-needed expansion of global investment flows.