

## Trade Justice Movement Submission to the APPG Trade Out of Poverty Inquiry into BREXIT implications for UK-Africa trade

### Introduction

1. The Trade Justice Movement is a coalition of UK-based organisations concerned with trade justice, including trade unions, aid agencies, environment and human rights campaigns, Fair Trade organisations, faith and consumer groups. The movement was founded in 2000 and is supported by more than 60 member organisations with millions of individual members. TJM has strong links to organisations campaigning for trade justice in Africa and in other regions.
2. This submission will focus on the question related to the potential implications for UK-Africa trade relations from the UK leaving the European Union (Brexit), notably ways for the UK government to ensure that post-Brexit trade policies would be pro-poor and equitable for men and women in Africa.
3. The result of the UK referendum on EU membership has given rise to questions about the future of UK trade policy. A new Department for International Trade has been established and it seems likely that the UK will have to negotiate new trade agreements with a range of trading partners, including developing countries, in the coming years. Trade and investment are key priorities for the new Secretary of State for International Development. As of yet the legal status of the UK position within the WTO, but outside the EU, remains unclear.
4. While the Brexit vote creates significant uncertainty, it also presents an opportunity to develop a new approach to trade and investment. MPs can take immediate action to ensure that all new deals with developing countries are designed to support economic transformation and the creation of decent well-paid jobs in developing countries, as well as action to tackle climate change.
  - 4.1. The UK can set the tone for the future direction of trade and investment policy by undertaking an urgent review and reform of the protections it offers to international investors.
  - 4.2. The UK should enhance parliamentary scrutiny of future trade and investment negotiations.
  - 4.3. The UK should ensure that the process and outcome of any future trade and investment negotiations with developing countries is pro-poor and equitable.
5. A significant number of UK MPs, organisations and activists from a range of constituencies have long understood the huge importance of trade and investment for achieving goals ranging from poverty reduction to climate targets. This constituency includes individuals with significant expertise who are well-placed to contribute to the development of a new UK trade and investment strategy.

### Recommendation 1: Review the UK's investment treaty regime<sup>1</sup>

6. **The UK can set the tone for the future direction of trade and investment policy by undertaking an urgent review and reform of the protections it offers to international investors. MPs could:**
  - **Call for an urgent review of the UK's investment protection regime, including UK treaties and the practices of third party funders; and**
  - **Oppose the ratification of any further UK bilateral investment treaties (BITs) until the system is reviewed and improved.**

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1 TJM MP briefing (2 pages): The Case for Reform of UK BITs:  
[http://www.tjm.org.uk/documents/MP\\_Quick\\_Briefing\\_on\\_UK\\_investment\\_regime\\_FINAL\\_090316.pdf](http://www.tjm.org.uk/documents/MP_Quick_Briefing_on_UK_investment_regime_FINAL_090316.pdf)  
TJM report: Worried About UK BITs? The case for reviewing UK investment protection provisions:  
[http://www.tjm.org.uk/documents/Worried\\_about\\_your\\_BITS\\_report\\_FINAL\\_copy.pdf](http://www.tjm.org.uk/documents/Worried_about_your_BITS_report_FINAL_copy.pdf)

7. Bilateral Investment Treaties (BITs) are binding agreements between two countries. They offer protections to international investors that are not available to domestic companies or citizens, with no corresponding responsibilities. The EU assumed competence for investment treaty negotiation under the 2009 Lisbon Treaty. However, the UK retains competence for existing agreements and for agreements under negotiation until such time as EU agreements are ratified covering the same countries. The UK has 105 BITs, the majority of which have reached their 'anytime termination phase', and therefore could be cancelled, according to the terms of the treaties. The UK has signed but not ratified BITs with the following countries: Angola, Brazil, Costa Rica, Ethiopia, Gambia, Kuwait, Libya, Qatar, Vanuatu, Zambia and Zimbabwe.
8. Like the mechanism proposed for TTIP, BITs contain an Investor-to-State Dispute Settlement (ISDS) mechanism, which allows international investors to sue governments in international tribunals if they believe a policy undermines the profitability of their investment. The costs associated with these cases are extremely high, although these are dwarfed by the magnitude of the awards granted to winning investors. There is growing evidence that the fear of facing a case deters governments from taking legitimate policy decisions in relation to important sectors such as health and energy. The outcomes of such cases can have serious and detrimental impacts for women and men living in poverty. There is little evidence that the existence of such deals influence investment decisions.
9. For example, in a claim brought by Standard Chartered Bank against Tanzania, related to the provision of energy, there have been no less than three arbitral proceedings relating to the purchase by the bank (via companies in Hong Kong and Malaysia) of a bundle of investment assets, including a loan for the building and operation of an electricity generation facility in Tanzania. Although, to date, no award has been made in the cases brought by Standard Chartered Bank against Tanzania, the government has stated that the counsel and expert costs for just one of them will amount to more than US\$8 million. In the most recent case, the tribunal ordered the parties to recalculate the electricity tariff, increasing costs for end users.
10. The UK is a global leader in investment protection. It has the second highest number of treaties and at least 48 cases have been initiated by UK companies. Yet UK agreements are out of date: they have not kept pace with global reform trends, nor have they been updated to bring them in line with human rights and environmental commitments. For example, despite being one of the UK's more recently-agreed deals, the BIT between the UK and Ethiopia contains no language to protect Ethiopia's right to regulate to protect the environment and human rights. The definitions of the substantive provisions (including of 'investment' and of 'fair and equitable treatment', for example) remain vague, allowing for the most expansive (and therefore least predictable), investor-friendly interpretation by tribunals.
11. Third party funding (TPF) is an agreement by which a bank, hedge fund or insurance company agrees to pay the costs of a case in exchange for a share of any compensation awarded to their client. Funders generally invest between US\$3 and US\$10 million and expect a return of two to four times upfront investment. Since 2009, the use of TPF has grown significantly and the UK is a hub for many major specialist funders. Claims are increasingly being packaged and traded as investment opportunities. The system lacks checks and balances and there are concerns that it reduce of an amicable settlement to cases and undermine independence of lawyers.
12. The UK should remove ISDS mechanisms from existing deals and cease to include them in future negotiations, instead working with developing countries to design and implement alternative arrangements for investment protection. Potential alternatives include the use of established systems such as investment contracts, commercial political risk insurance, recourse to host-country judicial systems and state-to-state dispute settlement.
13. As part of an eventual review MPs and Ministers should ensure that future arrangements allow developing country governments full freedom to pursue their labour and human rights, environment and international development objectives.

## Recommendation 2: Increase democratic scrutiny of trade deals

14. **The UK should enhance parliamentary scrutiny of future trade and investment negotiations. MPs could request, and potentially introduce new legislation providing for:**
  - **parliamentary debate on negotiating positions before trade and investment negotiations begin,**
  - **publicly accessible negotiating texts, and**
  - **a full debate and vote on all new trade or investment agreements in both houses of parliament.**
  
15. One of the core concerns of those who campaigned for the UK to leave the EU was the democratic deficit in areas of decision-making where the EU institutions had competence, including trade and investment negotiations. There is clear evidence that UK citizens were concerned about the democratic deficit with regard to the negotiation of the Transatlantic Trade and Investment Partnership (TTIP). In October 2015, a petition with 3.2 million signatures, over 500,000 of which came from the UK, called for the Commission “to repeal the negotiating mandate for the Transatlantic Trade and Investment Partnership (TTIP)” with the United States, and “not to conclude the Comprehensive Economic and Trade Agreement (CETA)” with Canada. A consultation by the European Commission on the investment chapter in TTIP received over fifty thousand separate responses (one third of the EU total) from the UK.
  
16. Even where trade and investment deals are deemed to be 'mixed agreements', requiring approval by national parliaments in EU member states, UK politicians have very little opportunity to scrutinise trade and investment deals. Once a deal has been signed it is put before the Houses of Parliament. If within 21 days no motion is passed against it, the deal is ratified. There is no limit on the number of times the government can put a deal before the House. This is despite the significant protections offered to companies under investment agreements and the fact that trade and investment agreements have the potential to expose policy making in the UK and partner countries to significant challenge. For example, trade and investment agreements threaten to restrict governments' ability to phase out of fossil fuels and to support renewable energies.<sup>2</sup>
  
17. In recent years, some attempts have been made to increase Parliamentary scrutiny of trade deals. The House of Commons and the House of Lords carried out inquiries and held debates on the proposed Transatlantic Trade and Investment Partnership (TTIP) between the EU and the United States.<sup>3</sup> In 2014, controversy on the ratification of the bilateral investment treaty (BIT) between the United Kingdom and Colombia, including civil society concerns that the treaty might get in the way of Colombia's land restitution programme, triggered a debate in the House of Lords, albeit after the treaty was ratified.<sup>4</sup> Attempts were made in 2014-15<sup>5</sup> and in 2015-16<sup>6</sup> to introduce a backbench presentation Bill aiming to increase the level of

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2 TJM report: Take Back the Power: Energy Transition and the International Trade and Investment Regime: [http://www.tjm.org.uk/documents/Take\\_back\\_the\\_power\\_-\\_energy\\_transition\\_and\\_the\\_international\\_trade\\_and\\_investment\\_regime\\_FINAL.pdf](http://www.tjm.org.uk/documents/Take_back_the_power_-_energy_transition_and_the_international_trade_and_investment_regime_FINAL.pdf)

3 House of Commons, 2015, Environmental Risks of the Transatlantic Trade & Investment Partnership – Inquiry Report, Environmental Audit Committee (10 March 2015, HC 857), <http://www.parliament.uk/documents/commons-committees/environmental-audit/Letter-trade-commissioner-TTIP.pdf>; House of Commons, 2015, “Letter to EU Trade Commissioner on the Committee’s TTIP Report”, Environmental Audit Committee, 17 March 2015, <http://www.parliament.uk/documents/commons-committees/environmental-audit/Letter-trade-commissioner-TTIP.pdf>; House of Commons, 2015c, Transatlantic Trade and Investment Partnership – Inquiry Report, Business, Innovation and Skills Committee (25 March 2015, HC 804)

<http://www.publications.parliament.uk/pa/cm201415/cmselect/cmbis/804/804.pdf>; House of Lords, 2014, The Transatlantic Trade and Investment Partnership – Inquiry Report, European Union Committee (13 May 2014, HL 179) <http://www.publications.parliament.uk/pa/ld201314/ldselect/ldcom/179/179.pdf>

4 House of Lords, 2014, “The Bilateral Agreement for the Promotion and Protection of Investments between the United Kingdom and Colombia”, 30 July, <http://www.publications.parliament.uk/pa/ld201415/ldhansrd/text/140730-gc0001.htm#14073054000271>

5 <http://services.parliament.uk/bills/2014-15/internationaltradeagreementsscrutiny.html>

6 <http://services.parliament.uk/bills/2015-16/internationaltradeagreementsscrutiny.html>

parliamentary scrutiny of international trade agreements but in both instances the Parliamentary session ended before the Bill could get a second reading.

18. Given the renewed emphasis on negotiating trade deals in light of the result of the referendum on EU membership, MPs should continue to push for greater parliamentary scrutiny of trade negotiations, to ensure that social and environmental standards continue to be upheld and are not compromised in any new trade deals.

**Recommendation 3: Ensure that the process and outcome of any future trade and investment negotiations with developing countries is pro-poor and equitable**

19. **The UK should ensure that the process and outcome of trade investment agreements with developing countries is pro-poor and equitable. MPs could ask Ministers to provide a public statement of the UK Government's approach to trade and investment negotiations, and recommend that it should include the principles outlined below.**
20. Our partners in developing countries have expressed concern that their trade position will weaken as a result of Brexit. Delays in the negotiation of new trade deals between the UK and African and other developing countries may affect exports to the UK. It is crucial that the UK mitigates these risks by putting in place equivalent or improved access to UK markets for developing countries as soon as Brexit happens. Many countries have unilateral trade preference schemes for developing countries and such schemes can be designed so as to be fully compatible with WTO rules.
21. Brexit provides an opportunity for the UK to design a trade preference scheme that improves on the EU arrangements and does not replicate their limitations.<sup>7</sup> It should be a duty-free, quota-free system that covers many tariff lines as possible, with no tariff peaks or escalation, and that allows for regional sourcing by developing countries, through simple and flexible rules of origin to enable maximum regional cumulation and hence value addition for developing countries. Work needs to begin immediately to design transitional arrangements and new a new preference schemes.
22. The following principles could inform future trade and investment negotiations between the UK and developing countries, including countries in Africa:
  - 22.1. The negotiation process should be adapted to take into account the lack of developing country negotiating capacity, and aid for trade should continue to be used to support developing country negotiating capacity;
  - 22.2. The UK should ensure that developing country exports to the UK retain at least equivalent market access to that currently offered by the EU, and rules determining whether exports qualify for preferential access should be simple and easy to comply with;
  - 22.3. UK trade relationships with sub-Saharan African countries should be designed to support African regional integration – e.g. in so far as possible, the same type of preferential access should be offered to all African countries and rules of origin should permit regional sourcing – and aid for trade should continue to be used to support regional infrastructure that reaches smallholder farmers and communities living in poverty;
  - 22.4. Robust and gender-sensitive assessments should be carried out of the potential environmental, economic and social impacts of the core provisions of trade deals with least developed countries (LDCs), and of the potential impact of deals between the UK and large developing countries with

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<sup>7</sup> "Brexit and development: how will developing countries be affected", Max Mendez-Parra, Phyllis Papadavid and Dirk Willem te Velde, Overseas Development Institute, July 2016. <https://www.odi.org/sites/odi.org.uk/files/resource-documents/10685.pdf>

similar exports to those of LDCs, e.g. the potential impact of a deal with Brazil on sugar exports from Swaziland; and

- 22.5. Agreements should allow developing countries to implement the full range of policies necessary to reduce poverty and develop their economies, notably to retain the flexibility to shelter vulnerable sectors from competition in order to achieve overall national development goals.

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