



States of Guernsey
Finance Sector
Development

CONSULTATION ON BILATERAL INVESTMENT TREATIES

10th August 2021

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1. Executive Summary

Bilateral Investment Treaties (“**BITs**”) are widely adopted, between jurisdictions, as a way to promote, and facilitate, foreign investment by creating greater certainty and reducing investor risk.

Guernsey already has a number of BITs, extended to it, through the UK. It has been noted by the Committee *for* Economic Development (the “**Committee**”), that there is little empirical data, evidencing the benefit to the Island’s finance sector and, indirectly, its wider economy of these extensions. This lack of data restricts policy development in this area.

The Committee is issuing this consultation to explore:-

1. the extent to which existing BITs benefit Guernsey;
2. the merits, and potential economic benefits, of having additional BITs extended to Guernsey;
3. strategic options, in respect of policy development, in relation to BITs; and
4. whether the absence of BITs is impeding the activities of Guernsey’s finance sector.

This consultation is seeking responses, from stakeholders including, but not limited to, consumers, local businesses, industry associations and other interested parties who have a specialist knowledge, or interest, in BITs.

Recipients are invited to respond to all, or some, of the questions at their discretion.

Responses will be considered, by the Committee, with a view to further developing policy in relation BITs.

Closing date: **31 October 2021**

2. Introduction

There are currently more than 2,800 BITs in existence and over 150 countries have entered into one, or more, investment treaties.

A list of all BITs which have been extended to Guernsey is attached at Annex 2 to this consultation.

3. Demand and Economic Benefit

The Government Work Plan, approved by the States of Deliberation (the “States”) in March 2021, confirms the States’ support for the finance sector as a key economic driver.

The role of governments, in relation to international investment, typically encompasses the following four policy areas:-

1. investment liberalisation: the elimination of restrictions on the ability of overseas investors to invest in a particular country;
2. investment protection: measures to safeguard investors’ property, interests and rights;
3. investment promotion: activities that seek to market a country to inward investors, including particular geographical locations or economic sectors within that country; and
4. investment facilitation: policies that actively assist inward investors in beginning, or continuing, to invest in a country, including in particular locations or sectors.

This consultation has arisen as a result of (i) Guernsey’s, ongoing, desire to increase its access to international markets and (ii) the opportunities, and risks, associated with the post-Brexit economic environment.

There is, currently, a lack of empirical data regarding (i) the benefit to the local finance sector, and economy generally, of existing BITs and (ii) industry appetite, and requirements, regarding the extension of new BITs to Guernsey.

The Committee is seeking to understand the level of demand for BITs, as well as the potential economic benefits so as to assist in the development of policy proposals.

4. Consultation Paper

The Committee would welcome stakeholder views on:-

1. the questions in Annex 1;
2. where the States should focus its efforts negotiating BITs; and
3. where promotional agencies should focus their efforts in support of the States' policy objectives above.

This consultation includes an outline of the features of BITs and references certain outline suggestions (including jurisdictions) which are included only in order to inform respondents and elicit feedback to the questions.

Respondents are requested to consider, and include, in their replies what business opportunities maybe available by Guernsey entering into new BITs and with which jurisdictions. Comment is also welcome on whether a specific policy, in relation to BITs, is actually necessary, or whether many of the potential benefits are already available.

5. Bilateral Investment Treaties - General Background

A BIT is a form of International Investment Agreement (“**IIA**”). These are agreements, between jurisdictions, which address issues relevant to cross-border investments, usually for the purpose of protection, promotion and liberalisation of such investments. By entering into these agreements jurisdictions are committing themselves to adhering to specific standards on the treatment of foreign investments within their territory.

Current Position

A full list of BITs to which Guernsey is a party to is attached at Annex 2 to this consultation.

There is, currently, no empirical data to demonstrate the benefits BITs provide to the Bailiwick's economy.

It is also unclear whether the absence of BITs has had, or will have, a negative impact on domestic businesses. There is a limited amount of anecdotal evidence, that some business may have been lost as a result of the absence of a BIT¹.

A key objective of this consultation is to seek opinions, and evidence, in this regard.

¹ The Finance Sector Development team has been advised, that there have been instances where, investors have refused to use Guernsey investment structures due to the perceived enhanced investment risk posed by Guernsey's lack of an appropriate BIT.

It should also be noted that foreign overseas investment occurs regardless of BITs, as demonstrated by the diverse range of jurisdictions (with or without BITs) in which Guernsey investment vehicles currently invest.

Key Features of a BIT

A BIT provides terms for private investment by nationals, and companies, of one state in another state.

BITs, typically, provide the following benefits: -

1. that foreign companies are entitled to be treated as favourably as their local competitors and other foreign companies²;
2. they establish clear limits on the expropriation of investments and the entitlement of foreign investors to seek compensation³;
3. they include broad guarantees of treatment for investors in accordance with international law⁴;
4. they grant foreign investors the right to transfer funds into, and out of, the host country without delay using a market rate of exchange⁵. Ensuring the right to transfer funds creates a predictable environment guided by market forces;
5. they limit the ability of host governments to require foreign investors to adopt inefficient, and trade distorting, practices⁶; and
6. they grant foreign investors the right to engage the top managerial personnel of their choice, regardless of nationality; and
7. they offer Alternative Dispute Resolution whereby there is the guarantee of being able to seek resolution under the International Centre for Settlement of

² Foreign investors are entitled to the better of national treatment or most favoured nation treatment subject only to certain limited and specifically described exceptions listed in annexes or protocols in the treaties.

³ "Expropriation" is not limited to physical takings, and can include a wide range of measures that deprive the investor of the economic value of its investment.

⁴ Host countries typically promise "fair and equitable treatment" and "full protection and security" for investments, and promise not to engage in "arbitrary" or "discriminatory" decision-making.

⁵ This covers all transfers related to an investment, including interest, proceeds from liquidation, repatriated profits and infusions of additional financial resources after the initial investment has been made.

⁶ For example, performance requirements, such as local content or export quotas. Investors protected by such BITs can purchase competitive foreign-produced components without undue restriction on inputs in their production of various products, and can also import other foreign-produced products for distribution and sale in the local market. They cannot be forced, as a condition of establishment or operation, to export locally produced goods.

Investment Disputes (“**ICSID**”). It provides the investor with greater knowledge, and certainty, that any dispute would be settled objectively and fairly.

Other Features of a BIT

As a BIT is an agreement, between two jurisdictions, there are therefore rights and obligations on both sides. This manifests not only at a state level but also at a corporate/individual level. For example, as identified above, under a BIT, a Guernsey domiciled company, or investor, could bring a dispute against a foreign/host country before the ICSID, and equally a foreign investor could bring Guernsey before the ICSID.

The cost of such disputes would, more than likely, have to be borne by the States of Guernsey. Although it is understood that the majority of disputes involve a company from a developed jurisdiction in a dispute against a government from a developing nation, there is still a risk that a claim could be made against Guernsey.

6. Current context

Brexit

The States of Guernsey, and the business community, continues to be aware of the risks, and opportunities, which the changing relationship between the UK and the EU may produce.

As such, BITs could be part of a wider strategy for Guernsey, in relation to its changing international presence, and how it trades, with other parts of the world post Brexit.

Crown Dependency position

It is understood that the other Crown Dependencies are interested in progressing BITs for similar reasons in relation to their own economies⁷.

It should be understood that although some cooperation between the Crown Dependencies may be mutually beneficial on the progression of BITs, it is not essential because any single Crown Dependency can progress this work unilaterally.

Guernsey Finance

Guernsey Finance promotes the island’s financial services industry internationally. As a joint industry, and government, initiative it focuses on a number of specific jurisdictions with which Guernsey already carries out a significant level of business. It

⁷ Jersey is a party to 37 BITs and is currently negotiating a new BIT with the UAE.

also focuses on emerging markets which are most likely to bring increased business for Guernsey.

Any conclusions, following this consultation, in relation to which jurisdictions may be of most interest, and worth pursuing, in relation to BITs, would be considered in the context of Guernsey Finance's strategy and the interest of the finance sector as a whole.

7. Opportunities and Risks

Opportunities

It is believed that BITs, which have been extended to Guernsey, offer benefits to Guernsey companies, the broader investment sector and the wider financial services sector which have interests in relevant jurisdictions.

Many developing jurisdictions are seeking investment in, inter-alia, infrastructure and natural resource projects. As a leading jurisdiction, in respect of the facilitation of international capital flows, Guernsey offers a solution to this requirement.

In contrast, to the above, some developing jurisdictions lack of an established track record puts them outside the risk appetite of certain investors. A BIT provides an effective solution, to this issue, by establishing a framework which provides commercial, and legal, certainty thereby reducing investor risk.

BITs can also provide Guernsey with:-

1. even greater international business development and marketing opportunities; and
2. a greater international presence, arguably even more important in a post-Brexit landscape.

As BITs are reciprocal agreements there is also the potential for investment from the other jurisdiction into Guernsey.

There are certain indices⁸ which attempt to put a value on foreign direct investment into, and out of, various jurisdictions. Although such indices provide a macro measure of past investment and future potential, they provide little benefit in assessing the benefit to Guernsey. The gathering of evidence in regard to the scale of potential markets for Guernsey is a key area which this consultation is looking to clarify.

⁸ Lloyds Bank Index and the World Bank

Risks

In addition to the risk (already identified) that there could be a claim, by a foreign investor, against the States before the ICSID, other risks are outlined below.

The future negotiation of additional BITs and (to a lesser extent) the maintenance of existing BITs would result in administrative effort for the States, and marketing effort for local agencies and industry, which may not result in material additional business to Guernsey.

There is a risk that effort may be put into development of BITs in jurisdictions which do not currently have, or in which there is little likelihood of additional, business with Guernsey.

The characteristics of a BIT could be misunderstood. For example, stakeholders may not fully understand that a BIT does not provide any assurance against poor investment decisions.

8. Next Steps

The Committee is asking for feedback, on the consultation questions, by **31 October 2021**.

Following closure, feedback and comments received will be analysed by the Finance Sector Development team, and the Committee, with a view to developing policy for Guernsey in relation to BITs.

9. Responding to the Consultation

Unless specifically requested otherwise, any responses received may be published either in part or in their entirety. Please mark your response clearly if you wish your response and/or name to be kept confidential. All responses may be included in any anonymised summary of comments received.

When submitting your views please indicate whether you are responding on behalf of an organisation.

Please provide your comments by **31 October 2021**.

Electronic responses

The easiest way for many to respond, to this consultation, is to fill in the on-line questionnaire at <https://www.surveymonkey.com/r/BITconsultation>.

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Responses can also be submitted in a format that can be read by Microsoft Word and emailed to **financesectordevelopment@gov.gg**.

Hard copy responses

Alternatively you may print out the questionnaire, complete manually and post your response to:

Finance Sector Development
Committee *for* Economic Development
Market Building
PO Box 451
Fountain Street
St Peter Port
Guernsey
GY1 3GX

Data protection

Your personal data will be used for the purpose of dealing with this consultation only. We will only keep your personal data for as long as is necessary for the purpose for which it was collected, and your data will not be passed on to any other third party without your prior consent. For further information on how your personal data will be used, please refer to the [Committee *for* Economic Development's Fair Processing Notice](#).

Annex 1
List of Questions

Q1: What is your name?

Q2: What is your email address?

Q3: What is the name of your organisation?

Current Economic Benefit

Q4: What levels of investment do you believe already exist between Guernsey investors/Guernsey investment structures and jurisdictions with which Guernsey already has a BIT (overall – not just for your business). For a list of relevant please see Annex 2.

Significant
investment

Some
investment

None /
immaterial
investment

Q5: Please identify jurisdictions, where your business has directly benefited as a result of existing BITs which have been extended to Guernsey.

Q6: Please provide reasons for your response.

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Q7: To what extent are non-domestic entities using Guernsey based businesses aware of BITs?

Very aware Somewhat aware Unaware No opinion

Q8: To what extent does the existence of BITs, extended to Guernsey, influence investors' investment decisions?

Significant influence Some influence No influence No opinion

Q9: Please provide reasons for your response.

Future Economic Benefit

Q10: What economic benefits do you believe there would be for your business and your sector by the Committee pursuing a more proactive strategy in relation to BITs?

Q11: Do you believe that having additional BITs extended to Guernsey could result in more inward investment into Guernsey?

Yes No No view

Developing a BITs strategy

Q12: *What strategic benefits do you believe there would be, for your business, your sector and the wider economy, by the Committee pursuing a more proactive strategy in relation to BITs?*

Q13: *How supportive are you of Guernsey pursuing a more active strategy on BITs to assist the finance sector and wider economy?*

- | | | | | |
|------------------------|------------------------|-----------------------|--------------------------|--------------------------|
| Strongly
supportive | Somewhat
supportive | No opinion | Somewhat
unsupportive | Strongly
unsupportive |
| <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |

Q14: *Please provide reasons for your response.*

Q15: *In your opinion, is a specific policy on BITs necessary?*

- Yes No No view

Q16: *Please provide reasons for your response.*

Q17: *In your opinion, is the finance sector sufficiently aware of the BITs which are currently extended to Guernsey?*

- Yes No No view

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Q18: *In your opinion, is there adequate marketing, by Guernsey Finance, of the BITs which are currently extended to Guernsey?*

Yes No No view

Q19: *In your opinion, would the extension of additional BITs to Guernsey be beneficial to your sector*

Yes No No view

Q20: *In your opinion, would the extension of additional BITs to Guernsey be beneficial to the Finance Sector*

Yes No No view

Q21: *Plases provide reasons for your response.*

Q22: *In your opinion, is the absence of a BIT with any jurisdiction(s) impeding the activities of Guernsey's finance sector?:*

Yes No No view

Q23: *Plases provide reasons for your answer, and identify any relevant jurisdictions.*

Q24: *Please identify any reputational issues related to a BITs strategy which you think the Committee should be aware of:*

Q25: Please identify any other issues that you think the Committee should be aware of in developing a strategy in relation to BITs:

Annex 2

Bilateral Investment Agreements currently extended to Guernsey

Country (date of original agreement)	Notes of Exchange ⁹
Antigua & Barbuda 1987	The agreement was extended to the Bailiwicks of Jersey and Guernsey and the Isle of Man by an Exchange of Notes effected on 13 October and 8 December 1994, with a coming into force date of 8 December 1994.
Belize 1982	The agreement was extended to the Isle of Man and the Bailiwicks of Guernsey and Jersey by an Exchange of Notes effected at Belmopan on 8 and 14 March 1983 with a coming into force date of 14 March 1983.
Bolivia 1988	The agreement was extended to the Bailiwicks of Jersey and Guernsey and the Isle of Man by an Exchange of Notes effected at La Paz on 3 and 9 December 1992, with a coming into force date of 9 December 1992.
Cameroon 1982	The agreement was extended to the Isle of Man and the Bailiwicks of Guernsey and Jersey by an Exchange of Notes effected at Yaounde on 7 December 1990 and 17 January 1991, with a coming into force date of 17 January 1991
Ecuador 1994	The agreement was extended to the Isle of Man and the Bailiwicks of Guernsey and Jersey by an Exchange of Notes effected at Quito dated 22 April and 18 May 1999 respectively, entering into force on 18 May 1999
Grenada 1988	The agreement was extended to the Bailiwicks of Jersey and Guernsey, the Isle of Man by an Exchange of Notes effected at Bridgetown on 16 July and St George's on 20 July 1992 respectively, entering into force on the latter date
Guyana 1989	The agreement was extended to the Bailiwicks of Jersey and Guernsey, the Isle of Man by an Exchange of Notes effected at Georgetown dated 15 and 22 September 1992 respectively, entering into force on the latter date.

⁹ Foreign & Commonwealth Office - Website

CONSULTATION ON BILATERAL INVESTMENT TREATIES

Country (date of original agreement)	Notes of Exchange ⁹
Honduras 1993	The agreement was extended to the Isle of Man and the Bailiwicks of Guernsey and Jersey by an Exchange of Notes effected at Tegucigalpa on 13 September and 11 December, 2001, entering into force on 11 December, 2001.
Hungary 1987	The agreement was extended to the Bailiwicks of Jersey and Guernsey and the Isle of Man by an Exchange of Notes effected at Budapest dated 25 October and 7 November 1991 respectively, entering into force on the latter date
Indonesia 1976	The agreement was extended to the Isle of Man and the Bailiwicks of Guernsey and Jersey by an Exchange of Notes effected at Jakarta dated 20 and 30 July 1999, entering into force on 30 July 1999.
Jamaica 1987	The agreement was extended to the Bailiwicks of Jersey and Guernsey and to the Isle of Man by an Exchange of Notes effected at Kingston dated 31 October and 11 December 1991 respectively, entering into force on the latter date.
Jordan 1979	The agreement was extended to the Bailiwicks of Jersey, Guernsey and the Isle of Man by an Exchange of Notes effected at Amman on 2 and 14 June 1981, with an entering into force date of 14 June 1981.
Kazakhstan 1995	The agreement was extended to the Isle of Man and the Bailiwicks of Guernsey and Jersey by an Exchange of Notes effected at Almaty on 6 and 29 July 1999, with a coming into force date of 29 July 1999.
Korea 1976	The agreement was extended to the Bailiwicks of Jersey and Guernsey and the Isle of Man by an Exchange of Notes effected at Seoul on 23 August and 22 September 1983, with a coming into force date of 22 September 1983.
Latvia 1994	The agreement was extended to the Isle of Man and the Bailiwicks of Guernsey and Jersey by an Exchange of Notes effected at Riga on 3 and 13 March 2000, with a coming into force date of 13 March 2000.
Lesotho 1981	The agreement was extended to the Isle of Man and the Bailiwicks of Guernsey and Jersey by an Exchange of Notes effected at Maseru on 19 January and 16 March 1983, with a coming into force date of 16 March 1983.

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Country (date of original agreement)	Notes of Exchange ⁹
Malta 1986	The agreement was extended to the Isle of Man and the Bailiwicks of Guernsey and Jersey by an Exchange of Notes effected at Valletta on 6 and 21 July 1999, with a coming into force date of 21 July 1999.
Mauritius 1986	The agreement was extended to the Isle of Man and the Bailiwicks of Guernsey and Jersey by an Exchange of Notes effected at Port Louis on 10 July and 12 August 1992 with a coming into force date 12 August 1992.
Mongolia 1991	The agreement was extended to the Isle of Man and the Bailiwicks of Guernsey and Jersey by an Exchange of Notes effected at Ulaanbaatar on 1 and September 1999 with a coming into force date of 30 September 1999.
Nepal 1993	The agreement was extended to the Isle of Man and the Bailiwicks of Guernsey and Jersey by an Exchange of Notes effected at Kathmandu on 20 and 22 April 1999, with a coming into force date of 22 April 1999.
Pakistan 1994	The agreement was extended to the Isle of Man and the Bailiwicks of Guernsey and Jersey by an Exchange of Notes effected at Islamabad on 9 March and 11 October 1999, with a coming into force date of 11 October 1999.
Panama 1983	The agreement was extended to the Isle of Man and the Bailiwicks of Guernsey and Jersey by an Exchange of Notes effected at Panama City on 25 March and 5 May 1999, with a coming into force date of 5 May 1999.
Papua New Guinea 1981	The agreement was extended to the Isle of Man and the Bailiwicks of Guernsey and Jersey by an Exchange of Notes effected at Port Moresby on 4 May 1983, with a coming into force date of 4 May 1983.
Philippines 1980	The agreement was extended to the Isle of Man and the Bailiwicks of Guernsey and Jersey by an Exchange of Notes effected at Manila on 3 and 11 April 1990, with a coming into force date of 11 April 1990.
Romania 1995	The agreement was extended to the Isle of Man and the Bailiwicks of Guernsey and Jersey by an Exchange of Notes effected at Bucharest on 25 February and 22 March 1999, with a coming into force date of 22 March 1999.

CONSULTATION ON BILATERAL INVESTMENT TREATIES

Country (date of original agreement)	Notes of Exchange ⁹
Saint Lucia 1983	The agreement was extended to the Isle of Man and the Bailiwicks of Guernsey and Jersey by an Exchange of Notes effected at Bridgetown on 8 February and 23 October 1984, with a coming into force date of 23 October 1984.
Senegal 1980	The agreement was extended to the Isle of Man and the Bailiwicks of Guernsey and Jersey by an Exchange of Notes effected at Dakar on 19 April and 21 June 1999, with a coming into force date of 21 June 1999.
Sri Lanka 2001	The agreement was extended to the Isle of Man and the Bailiwicks of Guernsey and Jersey by an Exchange of Notes dated 21 November 2001.
Swaziland 1995	The agreement was extended to the Isle of Man and the Bailiwicks of Guernsey and Jersey by an Exchange of Notes effected at Mbabane on 17 October and 21 November 2001, with a coming into force date of 21 November 2001.
Thailand 1978	The agreement was extended to the Isle of Man and the Bailiwicks of Guernsey and Jersey by an Exchange of Notes effected at Bangkok on 27 September and 27 December 1979, with a coming into force date of 27 December 1979.
Trinidad & Tobago 1993	The agreement was extended to the Isle of Man and the Bailiwicks of Guernsey and Jersey by an Exchange of Notes effected at Port of Spain on 10 and 13 January 1994, with a coming into force date of 13 January 1994.
Tunisia 1989	The agreement was extended to the Isle of Man and the Bailiwicks of Guernsey and Jersey by an Exchange of Notes effected at Tunis on 21 May 1991 and 23 December 1992 with a coming into force date of 23 December 1992.
Turkmenistan 1995	The agreement was extended to the Isle of Man and the Bailiwicks of Guernsey and Jersey by an Exchange of Notes effected at Ashgabat on 15 and 17 June 1999 with a coming into force date of 17 June 1999.
Uzbekistan 1993	The agreement was extended to the Isle of Man and the Bailiwicks of Guernsey and Jersey by an Exchange of Notes effected at Tashkent on 30 September and 15 November 1999 with a coming into force date of 15 November 1999.

CONSULTATION ON BILATERAL INVESTMENT TREATIES

Country (date of original agreement)	Notes of Exchange ⁹
Yemen 1982	The agreement was extended to the Isle of Man and the Bailiwicks of Guernsey and Jersey by an Exchange of Notes effected at Sana'a on 21 October 1984 and 9 June 1985, with a coming into force date of 9 June 1985.