

**PROPOSAL FOR A HUMAN RIGHTS-COMPATIBLE INTERNATIONAL INVESTMENT AGREEMENT:
ARBITRATION FOR ALL**

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The international investment regime is undergoing profound reforms, such as the proposals to establish a Multilateral Investment Court, and the introduction of investors' obligations within several (model) investment treaties. However, little has been done in relation to the inherently asymmetric structure of the regime. Implicit in the creation of a treaty-based system of investment protection were the assumptions that foreign investors are in a position of weakness vis-à-vis the host State. International Investment Agreements (IIAs) thus confer substantive and procedural rights only on investors. Host States and affected individuals, instead, are bereft of any instrument to hold investors accountable under international law for their misconducts. In short, the international investment regime is a one-way road where only investors are allowed to drive. This very feature of the international investment regime has increasingly been called into question over the past ten-fifteen years. For one thing, investors' economic and political strength may be at times akin to that of many low or medium-income States. More generally, there is a growing consensus that businesses should act in accordance with international human rights and environmental standards. An increasing number of CSR mechanisms already articulated this consensus into a set of principles and guidelines (e.g. OECD Multinational Guidelines, the UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework), and the creation of a system of grievance mechanisms (e.g. OECD National Contact Points and Ombudsman-like institutions). This reform proposal suggests that the asymmetric nature of investor-State arbitration – which remains intact in the most ambitious reform project devised thus far, i.e. the investment court system introduced by the EU– might be redressed by grafting this bundle of tools into the existing (or recently proposed) rules. Our reform proposal rests upon two alternative pillars: The first is to reform investment-treaty arbitration by including both obligations for investors and enforceable rights for investment-affected individuals and groups. The second is to replace investor-state arbitration with public alternative complaint mechanisms (PACoMs). This proposal is grounded on extensive academic research, showing the problematic nature of the asymmetric structure of the investment-treaty arbitration (see appendix with bibliography). The proposal draws inspiration from new generations model treaties from developing countries, articulating obligations for investors (e.g. India Model BIT; the Pan-African Investment Code; Brazil Cooperation and Facilitation Investment Agreement). Our proposals, however, introduce new mechanisms by which these obligations can be enforced by individuals, groups of individuals and States.

Below we set forth the first reform proposal (Reforming Investment-Treaty Arbitration), by outlining a framework, including key model-provisions, which offer a ready-made toolkit for drafters and negotiators. This proposal should be read as a *necessary complement* to other reform efforts, aiming at adding transparency and coherence to the investor-State arbitration system. This proposal is also limited in that it focuses mainly on the obligations of investors and the direct claims of individuals or group of individuals and States, as an instrument to fix the asymmetry.¹

REFORM PROPOSAL TO EXTEND INVESTMENT-TREATY ARBITRATION TO INVESTMENT-AFFECTED COMMUNITIES

Scope of applications and obligations of investors

IAs generally stipulate that their provisions only apply to investments made “in accordance with” the law of the host State. We suggest that these treaty provisions should clearly state that foreign investments enjoy the protection of the applicable IIA on condition that they comply with the relevant corporate social responsibility (CSR) principles, agreed upon at an international level. More specifically, such clauses could read as follows:

[Article #__]

This Treaty shall apply to all investments made by investors of either Contracting Party in the territory of the other Contracting Party, made after the entry into force of this Treaty. This Treaty shall equally apply to the conduct of investors relating to the investment made in the territory of the Host Contracting Party.

[Article #__]

Investments shall be made in accordance with the laws and regulations of the host State and with Part II of the UN Guiding Principles on Business and Human Rights and shall strive to contribute to the sustainable development of the Host Contracting Party.

The investor shall comply with the laws of the Host Contracting Party, including anti-corruption, environmental and labour legislation and shall observe the obligations set out in Part II of the UN Guiding Principles on Business and Human Rights, both before, when applicable, and after the establishment of the investment.

The rights of the investors included herein shall be enforceable under this Treaty on condition that the investor complies with the laws and regulations of the Host Contracting Party and Part II of the UN Guiding Principles on Business and Human Rights.

¹ Given the call for proposal guidelines asking for a short contribution, we omitted the articulation for solutions of important issues, such as **the pivotal issue of the costs of arbitration and the relevance thereof for access to justice**, rules of arbitration etc.

Direct claims of individuals or groups of individuals

The most innovative part of our proposal is to include the possibility for the affected individuals to submit a claim before the competent Tribunal against the investor. Such a model implies both a *locus standi* of the affected individuals or groups of individuals and an extension of the competence of an arbitral tribunal to hear disputes between individuals and groups of individuals and the investor, on the basis of the relevant IIA.

[Article #_]

The jurisdiction of the Tribunal shall extend to any legal dispute related to an investment

(a) between a Contracting Party and an investor of another Contracting Party;

(b) between an individual or groups of individuals of one Contracting Party and an investor of the other Contracting Party(ies).

Applications may be submitted by investors, claiming that their rights under this Treaty have been violated by the Host Contracting Party.

Applications may also be submitted by individuals or groups of individuals claiming to be negatively affected by a violation of investors' obligations included in this Treaty. Non-governmental organizations showing a sufficient interest shall have equal right to submit a claim before this Tribunal, according to the rules and procedures included herein.

Claims can be brought only after having exhausted local remedies.

Applications may also be submitted by the Host Contracting Party claiming a violation of investors' obligations included in this Treaty.

When either the Host Contracting Party or the individuals (or groups of individuals) have initiated proceedings against the investor of the other Contracting Party, either the individuals (or groups of individuals) or the Host Contracting Party respectively may join proceedings.

By investing in the territory of the Host Contracting State, the investor consent to the jurisdiction of the Tribunal. The investor may refuse to grant consent only in written form, by submitting an official letter to the competent authority of the Contracting Party. Refusal to grant consent shall be expressed within three months from the first establishment made in the territory of the other Contracting Party. If the investor is already operating in the Host State when the treaty has entered into force, refusal to grant consent can be expressed in the same form within three months from the time of entering into force of the Treaty. The investor can always withdraw her consent; Any such withdrawal shall take effect upon the expiry of ten/fifteen years after the date of receipt of the note whereby the investor repudiates the Tribunal's jurisdiction. When the investor releases a letter to not grant her consent to the jurisdiction of the Tribunal, the investor loses ex tunc all rights and benefits granted by this Agreement [Treaty], including the right to initiate a dispute before the Tribunal.

When investor's consent is refused or withdrawn, Contracting Parties shall not give consent to any contractual or otherwise agreed dispute settlement clause allowing Investor-State arbitration.

Exhaustion of domestic legal remedies

It is submitted that the access to treaty-based arbitration and other dispute settlement mechanisms provided for by IIAs shall be made conditional upon the exhaustion of domestic remedies. A limited number of IIAs provide for this requirement. This is one of most glaring peculiarities of the international investment regime. The access to international adjudication, including human rights Courts is generally conditional upon the satisfaction of this requirement.

[Article #__]

Any dispute arising from an investment between one Contracting Party and an investor of the other Contracting Party, or between an individual or groups of individuals of one Contracting Party and the investor of the other Contracting Party, should be settled amicably between the two parties to the dispute. If the dispute has not been settled within three months from the date on which it was raised in writing, and domestic judicial and administrative remedies have been exhausted, the investor and the individuals or group of individuals have the right to submit the dispute to international arbitration. Claims under this Treaty can be brought only after having exhausted all domestic remedies. Domestic legal remedies are considered exhausted when eight years have elapsed from the date when the claim has been brought before a first instance domestic Court or Tribunal.

Host State's counterclaims

Counterclaims are poorly regulated in most treaties with investor-treaties arbitration. Arbitral case law shows that the major impediments to the admission of host State counterclaims lies in the language of dispute settlement clauses and in the lack of clear-cut investors' obligations. We submit that IIAs should impose obligations on foreign investors either by making reference to the most commonly used CSR principles or other international standards. To do so, IIAs should include clauses such as the following:

[Article #__]

Contracting Parties may submit counterclaims in the context of an existing investor-State arbitration. Individuals or groups of individuals may join proceedings, if they claim to have been negatively affected by a violation of investors' obligations contested in the counterclaim.

Appendix I : Selected Bibliography

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