

**PROPOSAL FOR A HUMAN RIGHTS-COMPATIBLE INTERNATIONAL INVESTMENT AGREEMENT:
SUBSTITUTE INVESTOR-STATE ARBITRATION WITH PUBLIC ALTERNATIVE COMPLAINT
MECHANISMS (PACoMs)**

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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 second reform proposal (Substituting Investor-State Arbitration with PACoMs), by outlining a framework, including key model-provisions, which offer a ready-made toolkit for drafters and negotiators. This proposal draws on previous research conducted at the Erasmus School of Law and is limited to the discussion of the *main features* of PACoMs.

REFORM PROPOSAL TO SUBSTITUTE INVESTOR-STATE ARBITRATION WITH PUBLIC ALTERNATIVE COMPLAINT MECHANISMS (PACoMs)

Scope of applications and obligations of investors – IIAs 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 include obligations for investors, such as relevant rules articulated in corporate social responsibility (CSR) guidelines, 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.

Public Alternative Complaint Mechanism (PACoM) - We believe that PACoMs could constitute a sound alternative to investment arbitration. For one thing, these instruments are less costly and, hence, more accessible to a wider range of actors (SMEs and individuals). Moreover, given their non-adversarial nature, they foster cooperation and favour consensual dispute resolution. In order to

carry out their mandate, these bodies should comply with the requirements of impartiality, independency, and professionalism.

[Article #_]

Each Party shall designate a public body to receive requests, enquiries and complaints related to a specific investment. This task can be assigned to existing bodies, such as domestic Ombudsbodies or OECD National Contact Points (NCP). The designated body shall comply with the independence, impartiality, experience and knowledge requirements, as regulated by Article XY of this Treaty.

The designated body shall prevent, manage and resolve any issue between:

a) the Contracting Parties

b) the investor and the Host Contracting Party

c) affected individuals or groups of individuals and the investor.

The designated body entrusted with the procedure shall co-operate with the designated bodies of the other Contracting Party(-ies) and should seek dialogue with the business community, workers' organizations, non-governmental organizations representing the public interest, domestic authorities and judicial bodies.

[Article #_]

Investors may submit a request, enquiry or complaint before the designated body of the Host Contracting Party. Requests to this body may also be submitted by the Host Contracting Party, claiming a violation of investors' obligations included in this Treaty.

Individuals or groups of individuals claiming to be negatively affected by a violation of investors' obligations included in this Treaty can submit a request, enquiry or complaint before the designated body of either of the Contracting Parties.¹ Non-governmental organizations showing a sufficient interest shall have equal right to initiate a procedure before the designated body of either Contracting Parties, according to the rules and procedures included herein.

When either the Host Contracting Party or the individuals (or groups of individuals) have initiated a procedure against the investor of the other Contracting Party, either the individuals (or groups of individuals) or the Host Contracting Party respectively may join the same procedure. If two procedures have been initiated before two different designated bodies, the procedure should be joined and the designated bodies should act jointly. The Contracting Parties shall adopt general guidelines for designated bodies to act jointly.

¹ The rationale to grant only individuals (or groups of individuals) the right to choose the designated body of either Contracting Parties is justified by the following: 1) to facilitate their access to justice vis-à-vis the amply demonstrated difficulties they face in this realm (e.g. cost-wise, etc.); 2) this is also a consolidated practice of the already existing NCPs. Moreover, this Model Treaty provides for the right of the Home Contracting Party to initiate an arbitration procedure in defence of its investors (see section below).

[Article #_]

The designated body shall strive to support investors and investments. The designated body shall equally strive to support the respect of the UN Guiding Principles on Business and Human Rights as well as domestic laws, including environmental, labour and anti-corruption laws.

The designated body shall perform its mandate by circulating pertinent information, responding to requests for clarification and promoting dialogue between businesses, public authorities and potentially affected communities and individuals.

When receiving complaints, the designated body shall strive to let the parties achieve a mutually satisfactory solution. When no mutually satisfactory solution is achieved, the designated body will release a Report.

Contracting Parties, investors and affected individuals shall respond to the Report and explain how they intend to take the Report into account in their future actions.

State-to-State Dispute Settlement Mechanism - When conflicts are not solved through PACoMs, States can resort to State-to-State dispute settlement. The Arbitral Tribunal seized of the dispute is obliged to take into consideration an existing report of a designated body and include it in the duty to state reasons for the award. This option could have a series of advantages, especially if compared with *amici curiae* submissions. First of all, arbitrators are generally not obliged to accept *amici curiae*. Such an obligation would instead significantly reduce the discretion of the tribunal as to the consideration given to the interests of affected local communities. Secondly, even when arbitrators do accept *amici curiae*, they still do not always deem it necessary to engage with the arguments included in these applications. Extending the duty to state reasons to the report would circumvent this possibility. Finally, the report could not be blamed of lacking independence from the petitioners. In fact, the deferral would incorporate the report drafted by the designated body itself, which is an impartial body. The clause proposed below is limited to these issues and does not engage with other (equally relevant) procedural questions because of limited space available.

[Article #_]

When a designated body has failed to resolve an issue, Contracting Parties may submit the dispute to arbitration, in accordance with the provision of Articles XY of this Treaty. In their claim, Contracting Parties should refer to the Report of the designated body.

In solving the dispute the Tribunal shall also assess the compliance of investors with its obligations under this Treaty. When the Host Contracting Party is found responsible for violating any of the provisions included herein, the Tribunal shall also take into account established violations of investors' obligations and reduce the amount of awarded damages accordingly.

Individuals or groups of individuals, and investors may submit observations to the Tribunal.

In the final award, the Tribunal shall state explicit reasons regarding the assessment of the Report deferred by the designated body and the observations submitted by individuals or groups of individuals and investors. Arbitrators shall justify how they took the report into account and the reasons by which they decided to endorse or dismiss the arguments included therein.

Appendix I : Selected Bibliography

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