POSITION PAPER ON THE NETHERLANDS MODEL INVESTMENT AGREEMENT (19 OCTOBER 2018)

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The new Netherlands model Investment Agreement (19 October 2018, hereinafter New Model IA) is commendable for several innovations. Laudable changes include Article 2(2), Article 5(3), Articles 6 and 7, referring respectively to the host states' right to regulate, business-related human rights, sustainable development and corporate social responsibility. The drafters should be credited for having included these issues in the treaty texts. Regrettably, many of these provisions are drafted in hortatory jargon, whose legal implications remain at best ambiguous. For reasons of space, this position paper is confined to selected issues and does not provide a comprehensive assessment of the New Model IA.

AN UNJUSTIFIABLE ASYMMETRIC SYSTEM

Overall, the New Model IA falls short of balancing the private interests of foreign investors with the public interest of the host state and its constituencies. Numerous scholars have criticized the asymmetry characterizing the great bulk of international investment agreements.[1] By now there is a wealth of evidence showing how foreign investments may negatively affect local communities and how investors are able to influence the public policy of host countries.[2] In light of this thick body of evidence, it is imperative that new investment agreements, including the New Model IA, establish *enforceable* obligations for investors.

In this respect, Article 7(1) of the New Model BIT introduces obligations for investors, particularly in relation to compliance with domestic laws and regulation of the host state. Article 7(4) introduces a liability rule for the investor 'in accordance with the rules concerning jurisdiction of their home state', which could allegedly be seen as a rule on enforcement. While the rule establishing obligations for investors, as per Article 7(1), is a key and commendable innovation of the New Model IA and should be kept, the formulation of Article 7(4) is redundant, failing to provide an effective avenue for enforcement for at least two reasons. First and foremost, the rules concerning jurisdiction in the home state are far from clear and often lead to a *forum non conveniens*. In some cases investors were granted access to justice through investment arbitration disputes (and occasionally awarded multi-millions dollars damages), whereas the alleged victims remained unapologetically without effective access to justice under domestic law.[3] Secondly, even when the investor home state would grant jurisdiction for investor liability, the investor still retains the right to seize an arbitral tribunal of a parallel investor-host State dispute. Victims remain without voice before an arbitration tribunal, whose decisions are arguably more easily and widely enforceable than decisions of host states' domestic courts.

To make the obligations of investors effectively enforceable, the New Model IA could be reformed as following. [4]

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[1] Frank J. Garcia, Lindita Ciko, Apurv Gaurav and Kirrin Hough, 'Reforming the International Investment Regime: Lessons from International Trade Law' (2015) 18 Journal of International Economic Law 861; Alessandra Arcuri, 'The Great Asymmetry and the Rule of Law in International Investment Arbitration' in L. Sachs, L. Johnson, J. Coleman (eds), *Yearbook on International Investment Law and Policy* (OUP 2018, Forthcoming 2019) Available at https://ssrn.com/abstract=3152808; see also, the AJIL Symposium 'Investor Responsibility: The Next Frontier in International Investment Law' (2019) 113 American Journal of International Law Unbound.

[2] David Schneiderman, 'Investing in Democracy? Political Process and International Investment Law', 60(4) University of Toronto Law Journal 909 (2010); Nicholas Perrone, 'The International Investment Regime and Local Populations: Are the Weakest Voices Unheard?' (2016) 7 Transnational Legal Theory 383; Lorenzo Cotula and Mika Schröder, *Community Perspectives in Investor-State Arbitration* (Land, Investment and Rights Series, IIED 2017); Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?*, Hart (2018)

[3] Examples are the cases *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador*, PCA Case No. 2009-23 and *Copper Mesa Mining Corporation v The Republic of Ecuador,* PCA Case No. 2012-2.

[4] For a more detailed proposal for a human-rights compatible investment treaty, establishing enforceable obligations for investors see: Alessandra Arcuri, Federica Violi, Francesco Montanaro, 'Proposal for a Human-Rights Compatible International Investment

1. The scope of application of the Agreement should be broadened so as to apply also to the conduct of investors. A comma could be added in Article 2 to this end.
2. Article 7(1) should include among the mandatory obligations of investors also those set out in Part II of the UN Guiding Principles on Business and Human Rights, which are the most widely consented set of obligations for businesses operating in foreign jurisdictions.
3. In order to make the obligations of investors enforceable, a provision should be added, so as to grant jurisdiction to the arbitral tribunal established under the treaty to hear disputes initiated by host states, as well as individuals or groups of individuals, claiming to be negatively affected by a violation of investors' obligations. This could be achieved by modifying the text of Article 16(1). As to the consent of investors to arbitration, this could be linked to her decision to invest in the territory of the other Contracting Party. If the investor explicitly refuses to consent to arbitration, she should loose all the rights to initiate a dispute under the Agreement. In this respect, it is noted that one of first economic partnership agreements between the Netherlands and Indonesia already included a provision that made the right to initiate disputes possible also for host states.[5]
4. Article 16(2) on the limits to the tribunal jurisdiction should be expanded so as to apply not only to investors' conduct when the investment is established, but throughout all the phases of the investment, including the post-establishment phase.
5. Access to treaty-based arbitration should be made conditional on exhaustion of domestic legal remedies.
6. A provision should be added to grant the right to host states and individuals (or groups of individuals) to raise counterclaims and join proceedings.
7. The costs of the arbitration proceeding should be regulated, so as to make arbitration truly accessible to local communities and to less-wealthy host states.

INVESTMENT PROTECTION

Some of the provisions relating to investment protection remain ambiguous and can be abused by investors. Article 9(4), for example, reiterates a much-contested jargon on 'legitimate expectations' accruing to investors as a consequence of specific representations made by one of the Contracting Parties. One of the serious problems with this wording is that a Contracting party could make specific representations to investors to the detriment of the public interest of the host country, and it could do so without involving potentially affected local communities. In those cases, people in the host country would see their rights trumped because of the 'legitimate expectations' accruing to investors. From years of investment disputes, it is clear that these terms can be used, amongst other things, to frustrate communities' rights to a healthy environment, rights to land, etc.. For these reasons, it is here recommended to remove Article 9(4) from the Agreement. In this respect, it is also noted that Article 9(3) allows for unchecked reforms of the Contracting Party's obligation to provide fair and equitable treatment; it appears unwarranted to leave the reform of such critical rule to a joint interpretative declaration.

The New Model IA is also problematic in so far as it establishes an umbrella clause in its Article 9(5). This typology of provisions has been contested and it is considered at odds with human rights-compatible investment treaties. Most new (model) investment agreements do not contain such clauses, including CETA. It is accordingly recommended to take out Article 9(5) from the current text. Finally, it is advisable to add an explicit sentence in Article 9 to clarify that this Article is to be read within the limits of what is provided in Article 2(2) of the Agreement.

All in all, and despite some praiseworthy improvements, the New Model IA, as currently drafted, fails to correct the serious deficiencies characterizing international investment law.

Agreement: Arbitration for All', (*UN Forum on Business and Human Rights*, 2018), available at: https://www.ohchr.org/EN/Issues/Business/Pages/IIAs.aspx; see also Alessandra Arcuri and Francesco Montanaro, Justice for All? Protecting the Public Interest in Investment Treaties, Boston College Law Review, 2018, available at https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3715&context=bclr

[5] Cfr. Art. 11 of the Netherlands-Indonesia Agreement on Economic Cooperation (with Protocol and Exchanges of Letters dated 17 June 1968). Signed at Jakarta on 7 July 1968.