Position Paper on the Dutch Model Investment Agreement: Coherence of policies – CSR as part of international investment treaties

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*Prof. dr. Tineke Lambooy LL.M. and dr. Yulia Levashova LL.M. (Nyenrode Business University and Utrecht University), dated 26 January 2019*

The Dutch Model Investment Agreement (hereafter: DMIA) is an agreement that belongs to the new generation of investment agreements, in which the drafters aimed to balance the state’s right to regulate with a proper treatment of foreign investors. The DMIA includes a number of innovative and forward-looking provisions. We think that the text of the DMIA will probably constitute a more acceptable text for host states of Dutch investments than the BITs that the Netherlands previously employed. This is important as several large host states – in which states many Dutch companies operate - are not so eager anymore to continue their existing BITs or to conclude new ones: Indonesia terminated the Dutch-Indonesian BIT in 2015; South Africa decided in 2010 to terminate 20 BITs;[[1]](#footnote-1) India indicated in 2016 to terminate BITs with 58 countries, including 22 EU countries, among which the Netherlands;[[2]](#footnote-2) Bolivia and Ecuador began terminating BITs in 2008; and Brazil was never inclined to enter into BITs.[[3]](#footnote-3)

Additionally, in our view, the DMIA reflects coherence of policies. It links Dutch economic policies – i.e. promoting its business sector abroad - with its international policies – i.e. supporting the achievement of the Sustainable Development Goals (SDGs), the rule of law, and compliance with international human rights, labour, and environmental standards. Corporate Social Responsibility (CSR) combines these different policy goals and it didn’t surprise us that CSR was mentioned multiple times in the DMIA.[[4]](#footnote-4) In this paper, we will discuss some of the innovative and important provisions of the DMIA.

A draft of the DMIA was published for public consultation in May 2018. Over 1,600 responses were received, which were considered in establishing the final text. In October 2018, the Dutch Government adopted the current version with a view to using it as the basis for the Netherlands in the renegotiation process of its non-EU BITs. Indeed, pursuant to the ruling of the European Court of Justice in an international investment law case, i.e. *Slowakische Republik (Slovak Republic) v Achmea BV*,[[5]](#footnote-5)  the Netherlands will have to terminate its BITs with other EU Member States.

*Firstly*, we welcome the inclusion of the provision on ‘the state’s right to regulate’ in Article 2(2) of the DMIA. Making the right to regulate explicit in the body of an investment agreement, as has been also done in the agreements between the EU and Canada (CETA),[[6]](#footnote-6) the EU and Vietnam,[[7]](#footnote-7) and the EU and Singapore,[[8]](#footnote-8) constitutes a strong sign that, in the opinion of the contracting states, the role of tribunals in solving any future international investment disputes is to balance the host state’s public interests with the interests of the investor when interpreting and applying the provisions of the applicable investment agreement. Moreover, in this same Article, it is made clear that each contracting state also has to fulfil legitimate policy objectives other than ensuring investors’ protection. The following policy areas are mentioned: “the protection of public health, safety, environment, public morals, labor rights, animal welfare, social or consumer protection or for prudential-financial reasons.” This is in line with recent case law in international investment disputes and places these type of treaties in a broader perspective. That is, that host states also have other obligations to fulfil, among other pursuant to international human rights treaties, international labour organisation’s conventions (ILO), and environmental protection treaties. In that line, we also appreciate Article 6.5 of the DMIA, in which Article the contracting parties reaffirm their obligations under international human rights, labour and environmental treaties.

Article 2(2) of the DMIA also provides that the ‘mere fact’ of a change to the regulatory framework in a ‘manner which negatively affects an investment or interferes with an investor’s expectations’ will not amount to a breach of investment obligations under the agreement. The goal of this provision is to diminish the possibility of claims on the basis of instability of a general regulatory framework that is often initiated by investors under the ‘Fair and Equitable Treatment’ standard (the FET standard). In this regard, the DMIA’s formulation does not, however, exclude the possibility that in combination with other facts, e.g. manifest arbitrariness (Article 9(2)(c) DMIA), a change to a regulatory framework can certainly play a role in a tribunal’s assessment of the question whether the expectations of an investor were legitimate. Therefore, it is suggested to clarify in the future guidelines that will accompany the DMIA, what the drafters imply by ‘manifest arbitrariness’. This will help to avoid any unwanted interpretation of the FET standard by arbitrators that could negatively affect the state’s right to regulate.

*Secondly,* Article 6 underlines that international investment projects should contribute to sustainable development. We consider this a positive addition to the text of the DMIA as this aligns with the ambition of the Dutch government to prioritise investments that contribute to achieving the SDGs. This Article 6 will help a tribunal to properly interpret the DMIA’s investor protection provisions, specifically in combination with the preambular statements and Article 3 of the DMIA (both refer to promotion of responsible investment, that is investments that contribute to sustainable development). Hence, the investor protection provisions have to be understood not only in the light of the objective of the protection of foreign investment, but also with due consideration to the objective of contributing to sustainable development in the host state.

*Thirdly*, Article 7(3) of the DMIA reaffirms the importance of the investor’s duty to conduct a due diligence process to identify, prevent, mitigate and account for the environmental and social risks and impacts of its investment. This is in line with an investor’s duty under the CSR provisions stipulated in the OECD Guidelines for Multinational Enterprises, the United Nations Guiding Principles on Business and Human Rights, and the Recommendation CM/REC(2016) of the Committee of Ministers to Member States on human rights and business.[[9]](#footnote-9) It is effective from the perspective of coherence of policies to include this provision in the DMIA. It will help to create a better balance between the rights and obligations of states and investors. The importance of investors’ due diligence also emerged in several investment law decisions concerning the protection of the FET standard.[[10]](#footnote-10) Some tribunals underlined that an investor bears the responsibility of appraising the reality and the context of the state, in which the investment is/will be made, by performing a due diligence investigation and conducting risk assessments. In some investment decisions, the extent of an investor’s due diligence investigation constituted a precondition for the protection of legitimate expectations under the FET standard. The DMIA provision is also coherent with new national laws that require companies to perform human rights due diligence in their international supply chains (e.g. the ‘UK Modern Slavery Act 2015’;[[11]](#footnote-11) France’s ‘duty of vigilance law’ of 2017;[[12]](#footnote-12) and in the Netherlands, the ‘Child Labour Due Diligence Bill’, legislative proposal, 2017[[13]](#footnote-13)), and EU regulations (on timber, conflict minerals and chemicals) and OECD policy guidelines (e.g. concerning doing business in fragile states, and in the textile and footwear sector).[[14]](#footnote-14)

*Fourthly,* the inclusion of Article 7 on CSR is a positive development. However, Article 7(2), which clarifies the CSR responsibilities, does not go further than merely ‘to reaffirm the importance of each Contracting Party to encourage investors operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised CSR standards …’. Since the goal of this provision is to stimulate that all investors fulfill the internationally recognised CSR standards, we wonder why it contains the word ‘voluntarily’. The provision could have been phrased without that word, or, in order to make the encouragement stronger, this text could have directly addressed the investors.[[15]](#footnote-15) Examples thereof are the 2016 Morocco-Nigeria Bilateral Investment Agreement (BIT),[[16]](#footnote-16) the 2016 Pan-African Investment Code,[[17]](#footnote-17) and the 2012 South African Development Community (SADC) Model Bilateral Investment Treaty Template.[[18]](#footnote-18)

*Finally,* it would be advisable to incorporate into the DMIA a provision creating the possibility for a host state to initiate a counterclaim against a foreign investor. The option to file a counterclaim against an investor offers a host state an opportunity to remedy and to hold the investor responsible for any human rights abuses or other violations related to an investment.[[19]](#footnote-19) In practice, states have not used the mechanism of counterclaims very often. It has to do with the fact that the jurisdictional requirements for a state to file a counterclaim have proven to be challenging for states to fulfil. In order to avoid reliance on the discretion of tribunals in ruling on potential human rights counterclaims, a provision allowing a host state to file a counterclaim should in our view be included in the text of DMIA, as has been done is the SADC Model BIT and the Draft Pan African Model Code.

1. Public Citizen Global Trade Watch, ‘Termination of Bilateral Investment Treaties Has Not Negatively Affected Countries’ Foreign Direct Investment Inflows’, Public Citizen Research Brief, April 2018; <https://www.citizen.org/sites/default/files/pcgtw_fdi-inflows-from-bit-termination_0.pdf>. [↑](#footnote-ref-1)
2. # Herbert Smith Freehills Arbitration Notes, ‘Mixed messages to investors as India quietly terminates bilateral investment treaties with 58 countries’, 16 March 2017;

   <https://hsfnotes.com/arbitration/2017/03/16/mixed-messages-to-investors-as-india-quietly-terminates-bilateral-investment-treaties-with-58-countries/>. [↑](#footnote-ref-2)
3. Allen & Overy, ‘Trends in investment treaty arbitration: a perspective on Brazil’, 7 November 2017; <http://www.allenovery.com/publications/en-gb/Pages/Trends-in-investment-treaty-arbitration-a-perspective-on-Brazil.aspx>. [↑](#footnote-ref-3)
4. T.E. Lambooy, ‘Corporate social responsibility: legal and semi-legal frameworks supporting CSR’, Kluwer, 2010; <[https://openaccess.leidenuniv.nl/handle/1887/16169](https://mail.nyenrode.nl/owa/redir.aspx?C=eQooWurdUI37SkGIocdlMD8828dcKv1qthaddm4IxYu9xkgoh4TWCA..&URL=https%3a%2f%2fopenaccess.leidenuniv.nl%2fhandle%2f1887%2f16169)>. [↑](#footnote-ref-4)
5. In Slowakische Republik (Slovak Republic) v Achmea BV (Case C-284/16), the European Court of Justice (ECJ) held that the ISDS provisions comprised within intra-EU BITs are incompatible with EU law and therefore unenforceable. On 31 October 2018, Germany's Federal Court of Justice, following the ECJ's ruling, set aside the UNCITRAL arbitration award in favour of Achmea. [↑](#footnote-ref-5)
6. Comprehensive Economic and Trade Agreement between the EU and Canada (CETA; signed on 30 October 2016); <<http://ec.europa.eu/trade/policy/in-focus/ceta/>>. [↑](#footnote-ref-6)
7. The EU-Vietnam FTA, draft text (January 2016); <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>. [↑](#footnote-ref-7)
8. The EU-Singapore FTA (April 2018), Investment Protection Agreement;

   <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>. [↑](#footnote-ref-8)
9. Newsroom, ‘Committee of Ministers adopted Recommendation on human rights and business’, Strasbourg, 7 March 2016; <https://www.coe.int/en/web/human-rights-rule-of-law/-/human-rights-and-busine-1>. It states: Building on the 2011 UN Guiding Principles, the Committee of Ministers of the Council of Europe adopted Recommendation CM/Rec(2016)3on human rights and business, a text that provides more specific guidance to assist member States in preventing and remedying human rights violations by business enterprises and also insists on measures to induce business to respect human rights. The Recommendation elaborates on access to judicial remedy, drawing on Council of Europe expertise and legal standards in the field (civil and criminal liability, reduction of judicial barriers, legal aid, collective claims, etc.). It puts special emphasis on the additional protection needs of workers, children, indigenous people and human rights defenders. [↑](#footnote-ref-9)
10. This information is based on the study of Y. Levashova, ‘The Right of States to Regulate in the Public Interest and the Right of Investors to Receive Fair and Equitable Treatment,’ Kluwer International Arbitration Law Library, forthcoming in 2019. [↑](#footnote-ref-10)
11. Ernst & Young, 2017 publication, ‘The UK Modern Slavery Act 2015 What are the requirements and how should businesses respond?’;

    <https://www.ey.com/Publication/vwLUAssets/ey-the-uk-modern-slavery-act-2015/$FILE/ey-the-uk-modern-slavery-act-2015.pdf>. It provides the following information: Provision 54 of the Act came into force on 29 October 2015. It requires commercial organisations in any sector with a global annual turnover3 [?] of £36m or more who do business in the UK to disclose (in an annual Slavery and Human Trafficking Statement), the steps they are taking to address modern slavery in their business and supply chain4[?]. If an organisation has taken no such measures, this must be disclosed. The Act is estimated to apply to over 12,000 businesses, however, there is currently no mechanism to check which companies are required to report. The transparency requirement applies to any incorporated company or partnership, including limited liability partnerships, that carries on its business, or part of its business, in the UK. The requirement is applicable regardless of the company’s geographic location, thus the obligations also apply to overseas businesses providing goods or services within the UK. Furthermore, organisations that pursue primarily charitable or educational aims or purely public functions are also applicable under the MSA. [↑](#footnote-ref-11)
12. Law no. 2017-399 of 27 March 2017 on the corporate duty of vigilance for parent and instructing companies requires all French companies that have more than 5,000 employees domestically or employ 10,000 employees or more worldwide to implement an effective vigilance plan to address environmental, health and safety and human rights both in their own operations and at their suppliers and sub-contractors. Affecting about 150-200 French corporates, it forces engagement with CSR risks throughout the supply chain, with firms expected to make public their plans and report back on their implementation. See further:

    <https://www.business-humanrights.org/en/frances-law-on-the-corporate-duty-of-vigilance-a-practical-and-multidimensional-analysis-in-english>. [↑](#footnote-ref-12)
13. The bill no. 34.506, “Initiatiefvoorstel-Kuiken Wet zorgplicht kinderarbeid”, is adopted on 7 February 2017 by the Dutch Lower House and currently under evaluation in the Dutch Upper House. The bill prescribes that companies adopt a due diligence policy aimed at avoiding the delivery of goods and services produced by children. This obligation is sanctioned by a penalty;

    <https://www.eerstekamer.nl/wetsvoorstel/34506\_initiatiefvoorstel\_kuiken>. [↑](#footnote-ref-13)
14. For the overview of relevant legislative initiatives on the duty of ‘due diligence,’ see: T. Lambooy, R. Diepeveen, ‘Overzicht actuele ontwikkelingen betreffende niet-financiële informatie’ (Overview of the recent developments concerning non-financial information), Juridisch Up to Date (professional journal for legal practice), 2017-0078, 6 September 2017. We further refer to the EU Timber Regulation; EU Conflict Minerals Regulation; EU REACH; the OECD due diligence guidelines for operating in fragile states; and the OECD Guidelines applicable for the textile and footwear industry. See further: http://trade.ec.europa.eu/doclib/docs/2017/march/tradoc\_155423.pdf. [↑](#footnote-ref-14)
15. For more information on the CSR and investment law, see: Y. Levashova, The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States through International Investment Law, *Utrecht Law Review*, Volume 14, Issue 2, 2018;

    <https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3204456>. [↑](#footnote-ref-15)
16. Morocco-Nigeria BIT (signed 3 December 2016), Article 24;

    <<http://investmentpolicyhub.unctad.org/IIA/treaty/3711>>. [↑](#footnote-ref-16)
17. United Nations Economic Commission for Africa, ‘Conference of African Ministers of Finance, Planning and Economic Development’, UN Doc. E/ECA/CM/50/1 AU/STC/FMEPI/MIN/1(III) (2017), Articles 19-24;

    <https://au.int/sites/default/files/documents/32844-doc-draft\_pan-african\_investment\_code\_december\_2016\_en.pdf> [↑](#footnote-ref-17)
18. South African Development Community (SADC) Model BIT Template of 2012 with Commentaries, Articles 13-15;

    <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2875>>. [↑](#footnote-ref-18)
19. *Urbaser v. Argentina*, ICSID Case No. ARB/07/26 Award (8 December 2016); *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (7 February 2017). [↑](#footnote-ref-19)