

With Rights Come Responsibilities: Sustainable Development and Gender Empowerment under the 2019 Netherlands Model BIT

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On 22 March 2019, the Netherlands published its new model BIT (“2019 Dutch Model BIT”). The new model text may well set the scene for a new generation of investment treaties, paving the way with progressive rules on sustainable development and gender empowerment.

The 2019 Dutch Model BIT is a refined version of the initial draft that the Dutch Ministry of Foreign Affairs published on 16 May 2018. This initial draft was subject to public consultation. Based on this input, the Ministry amended the draft. The amended draft was discussed in parliament, pursuant to which further changes, including on women empowerment, were included in the 2019 Dutch Model BIT.

Traditionally, Dutch policy toward investment treaty protection has concentrated on protecting investors' interests.[fn]Nico Schrijver, Vid Prislán 'The Netherlands' in Chester Brown (ed) Commentaries on Selected Model Investment Treaties (OUP 2013), p. 540; Minister's Policy Note "Wat de wereld verdient: een nieuwe agenda voor hulp, handel en investeringen" (5 April 2013), p. 36.[/fn] However, since the last Model BIT, which dates from 2004, the public opinion on investor-state arbitration has changed considerably, also in the Netherlands. There have been heated debates on ISDS, regulatory space and mailbox companies that have affected the general stance towards investment treaties.

The 2019 Dutch Model BIT thus incorporates a growing accord that investment is no longer a mere binary relationship between the foreign investor and the host state, but that it is also concerned with many other stakeholders. Both foreign investors and states must account for the wider impact of any projected investments, and take account of negative externalities which investments may bring before, during and after investing. Article 7(3) 2019 Dutch Model BIT outlines this by imposing a duty on the investor to consider the wider impact of the projected investment:

"The Contracting parties reaffirm the importance of investors conducting a due diligence process to identify, prevent, mitigate and account for environmental and social risks and

impacts of its investment”.

Article 6 of the 2019 Dutch Model BIT (entitled “*Sustainable Development*”) contains the parties’ obligation to promote and sustain investments that contribute to sustainable development and “*encourage high levels of environmental and labor protection and shall strive to continue to improve those laws and policies*”.

The 2019 Dutch Model BIT also refers to or incorporates various other international treaties. For example, the 2019 Dutch Model BIT refers to and affirms [the G20 Guiding Principles for Global Investment Policymaking](#) (Article 3(3)), [the Paris Agreement](#), [the fundamental ILO Conventions](#), and [the Universal Declaration of Human Rights](#) (Article 6(6)), as well as international standards on corporate social responsibility, including [the OECD Guidelines for Multinational Enterprises](#), [the UN Guiding Principles on Business and Human Rights and Recommendation CM/REC\(206\)](#) (Articles 7(2), (5)). Further, the 2019 Dutch Model BIT attempts to put some teeth into this obligation to adhere to standards of corporate social responsibility. Under Article 23, a tribunal is “*expected to*” take into account non-compliance by the investor of its commitments under the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.[fn]The UN Working Group on Business and Human Rights has launched a thematic project to “unpack the gender dimension of the [UN Guiding Principles on Business and Human Rights].” See [here](#). If concrete gender-related postulations are identified and connected to the UN Guiding Principles on Business and Human Rights in the future, a failure to meet such gender-related standards by investors could possibly be considered under Article 23 of the 2019 Dutch Model BIT.[/fn]

Next to sustainable development, gender diversity is given more and more attention. Gender diversity was held to [be one of ten hot topics in 2018 at the Kluwer Arbitration Blog](#). This debate, however, often focusses on gender equality in arbitral dispute resolution, specifically the gender division among arbitrators and counsel. The effect of investment treaties on gender equality, and the possibilities investment treaties can bring to empower women’s economic participation, are notions that thus far have gained little concrete foothold in investment treaties. This aspect of the gender discussion is better developed in international forums. According to Goal 5.a of [the UN Sustainable Development Goals](#), UN States shall “*undertake reforms to give women equal rights to economic resources, as well as access to ownership and control over land and other forms of property, financial services, inheritance and natural resources, in accordance with national laws*”. Further, 118 WTO Members signed [the Buenos Aires Joint Declaration on Trade and Women’s Economic Empowerment](#) in 2017, which is poised to catalyse gender focussed multilateral trade policy.

The gender-related provisions in the 2019 Dutch Model BIT are therefore all the more interesting. Article 6(3) 2019 Dutch Model BIT provides:

“The Contracting Parties emphasize the important contribution by women to economic growth through their participation in economic activity, including in international investment. They acknowledge the importance of incorporating a gender perspective into the promotion of inclusive economic growth. This includes removing barriers to women’s participation in the economy and the key role that gender-responsive policies play in achieving sustainable development. The Contracting Parties commit to promote equal opportunities and participation for women and men in the economy. Where beneficial, the Contracting Parties shall carry out cooperation activities to improve the participation of women in the economy, including in international investment”.

These provisions make clear that under the 2019 Dutch Model BIT, it no longer suffices for states to merely sit back and steer away from measures that impact foreign investments, but that they have an active duty to empower women to partake in the opportunities of foreign investment. States can no longer ignore women as important stakeholders in international investments.

Further, gender-based discrimination is expressly qualified as a “*wrongful ground*” that constitutes a breach of fair and equitable treatment under Article 9(2) 2019 Dutch Model BIT. Such discrimination could regard both natural as legal persons, and should prevent unequal treatment based on gender. However, challenging adherence to and enforcement of these gender-related obligations may prove in practice, the incorporation of gender-equalizing standards is a welcome development.

Gender-related considerations in investment treaties are a rare breed, especially as treaty provisions and not merely as preambular language. They can, however, be found in some trade agreements with investment chapters. The 2019 amendment to the Canada-Chile Free Trade Agreement (CCFTA) includes [a stand-alone chapter on trade and gender](#), which lays down numerous commitments on Canada and Chile to promote gender equality and the inclusion of women on economic growth. It provides for cooperation activities between the two countries on this subject, and set up a Trade and Gender Committee to further that process. Nonetheless, none of these commitments are enforceable under the dispute resolution mechanism of the CCFTA pursuant to Article N *bis*-06.

Similarly, a gender-related provision was introduced by the 2018 amendment to [the Canada-Israel Free Trade Agreement](#). Section 4 lists that one of the treaty’s objectives is to

“promote gender equality and encourage women’s economic empowerment and the use of voluntary corporate social responsibility standards and principles, as well as promote access for small and medium-sized enterprises to the opportunities created by the Agreement”.

A third example is [the Chile-Uruguay Free Trade Agreement](#), which in Article 14 contains elaborate gender-related rules on gender empowerment, gender equality and cooperation activities between the two countries in this area.

The 2019 Dutch Model BIT may, therefore, be seen as taking a concrete step to further to introduce tools improving women’s empowerment in treaty-governed international investment. Together with its provisions on sustainable development, the 2019 Dutch Model BIT thus fosters a more equitable and inclusive investment regime that looks beyond the narrow, binary relationship between that of foreign investor and state. This is undoubtedly a positive development and the authors hope that subsequent treaties incorporate and build upon such obligations.

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