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## The 2019 Dutch Model Bilateral Investment Treaty
## Navigating the Turbulent Ocean of Investment Treaty Reform

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# THE 2019 DUTCH MODEL BILATERAL INVESTMENT TREATY – NAVIGATING THE TURBULENT OCEAN OF INVESTMENT TREATY REFORM

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**Keywords**

Investment treaties, , sustainable development, human rights, investment protection, investor-state dispute settlement

**Abstract**

In March 2019, the Netherlands published its new and revised Model BIT. The revision of the Dutch Model BIT occurs in the midst of multilateral and global discissions on the reform of international investment law and arbitration. The Model BIT contains several innovative features, and stands out compared to the previous Dutch Model BIT for including provisions on sustainable development and human rights, for incorporating revised investment protection standards such as fair and equitable treatment (FET) and protection from unlawful expropriation, and for comprising very detailed provisions on investor-state dispute settlement some of which are an important departure from the standard arbitration clauses in BITs. This note will provide an overview of the most salient features of the 2019 Dutch Model BIT, contrasting it to the previous model and contemporary investment treaty practice.

## I. INTRODUCTION

In March 2019, the Netherlands published its new and revised 'Model Investment Agreement' (hereafter "2019 Dutch Model BIT"). The revision of the Dutch Model BIT occurs in the midst of multilateral and global discissions on the reform of international investment law and arbitration. But the revision also needs to be placed in the specific context of the Netherlands, where criticism on the Dutch investment treaty policy has increased over the past years, and where a series of threats of investment claims against the Netherlands have been ventilated.[1] Moreover, the reform cannot be isolated from the competence of the European Union (EU) to deal with foreign direct investment following the adoption of the Lisbon Treaty[2], which has resulted in the development of an EU policy and practice on investment treaties.

The 2019 Dutch Model BIT contains several innovative features and has already attracted attention in scholarship because of that.[3] The Dutch Model BIT also is notable for departing from the earlier 2004 Dutch Model BIT's well-known generous provisions which were aimed at maximizing

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[1] Threats for investment claims against the Netherlands under the Energy Charter Treaty for the decision to close coal power plants have been reported to have existed at least since 2016. See Diekderik Baazil, 'CETA en het klimaat : Vrijhandel als ecologisch gevaar', 26 februari 2020 , available at https://www.groene.nl/artikel/vrijhandel-als-ecologisch-gevaar (accessed 13 January 2021).

[2] See art 207 of the Treaty on the Functioning of the European Union, as amended by the 'Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community', signed at Lisbon, 13 December 2007 *OJ C 306, 17.12.2007, p. 1–271* (entered into force on 1 December 2009).

[3] See amongst others: Kabir A N Duggal and Laurens H van de Ven, 'The 2019 Netherlands Model BIT: riding the new investment treaty waves' (2019) 35 (3) *Arbitration International*, 347–374.

protection of foreign investors[4]. A commentary of the 2004 Dutch Model BIT noted that the objective was to 'establish a comprehensive framework of rules concerning the treatment that the Contracting Parties need to accord to investments, providing foreign investors with a number of extensive guarantees.'[5] Dutch BITs traditionally not only include extensive investment protection standards, but also contain relatively broad definitions both of 'investor' and 'investment'.[6]

The 2019 Dutch Model BIT still contains the usual investment protection provisions for foreign investors and retains access to arbitration for foreign investors, but it does stand out compared to the previous version and other (model) BITs for including provisions on sustainable development and human rights, for incorporating revised investment protection standards such as fair and equitable treatment (FET) and protection from unlawful expropriation, and for comprising very detailed provisions on investor-state dispute settlement some of which are an important departure from the standard arbitration clauses in BITs. The treaty furthermore is strikingly more detailed than the previous draft, and follows the (recent) trend[7] of many investment treaties which seek to carefully detail and meticulously cover a variety of situations and occurrences and procedural questions. All this makes the Model BIT also a very lengthy one compared to the previous version and counting almost double the number of articles.

This note will provide an overview of the most salient features of the 2019 Dutch Model BIT, contrasting it to the previous model and contemporary investment treaty practice. It will point to the most important original features of the new model treaty. I will first discuss the general background to the adoption of the 2019 Dutch Model BIT. I will then discuss the various provisions of the Model, looking in turn at the provisions governing the Model's scope of application, those relating to sustainable development and corporate social responsibility, investment protection standards, and finally investor-state dispute settlement (ISDS).

## II. THE ADOPTION OF THE 2019 DUTCH MODEL BIT

The 2019 Dutch Model BIT is a revised version of an earlier Draft which had been released by the Dutch Ministry of Foreign Affairs in 2018. The 2018 Draft Model BIT had initially been released early 2018 (hereafter "May 2018 Draft Model BIT"), and was followed by a public consultation whereby individuals and interest groups were invited to share their views on the draft text. The Ministry of Foreign Affairs confirmed that it received 1,657.submissions[8] The official documents contain little information on the submissions received, aside from the fact that only around 20 submissions were unique, suggesting that the others were 'standard(ised)' forms which have been submitted.[9]

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[4] The 2004 Dutch Model BIT (March 2004) is available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2859/download (accessed 13 January 2021).

[5] N.J Schrijver and V. Prislan, 'The Netherlands' in C. Brown (ed.) *Commentaries on Selected Model Investment Treaties* (Oxford: Oxford University Press, 2013), 535-591, at p. 547.

[6] This is one of the reasons why that Dutch BITs are widely used in investment arbitrations. Based on the information available on the UNCTAD Investment Dispute Settlement Navigator, Dutch investment treaties formed the basis of approximately 86 investment arbitrations, out of a total of 1061 cases. See https://investmentpolicy.unctad.org/investment-dispute-settlement (accessed 13 January 2021).

[7] See Duggal and van de Ven (n3), 357.

[8] See Letter of the Minister of Foreign Affairs Sigrid Kaag to the President of the Dutch Parliament, 26 October 2018, p. 2, available at https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2018/10/26/kamerbrief-over-modeltekst-investeringsakkoorden/kamerbrief-over-modeltekst-investeringsakkoorden.pdf (accessed 14 January 2021).

[9] In this respect, it can be noted that several NGOs had created a website dedicated to the public consultation (www.tijdvooreerlijkehandel.nl – which can be freely translated as 'time for fair trade'). The website however no

Based on the reactions received, the Ministry issued a revised draft in October 2018 (hereafter "2018 Draft Model BIT"). The 2018 Draft Model BIT contains several modifications, notably in relation to the notion of 'substantial business activities', the scope of application of the treaty, the rule of law and corporate social responsibility provisions, the scope of application of the dispute settlement clause, and challenges to appointed arbitrators.

The 2018 Draft Model BIT has been heralded as a pioneering text aiming at a 'sustainable investment policy', and brining 'more balance to the rights and obligations of investors and states'.[10] The Minister of Foreign Affairs mentioned that the revised Model BIT aims at avoiding abusive uses ('oneigenlijk gebruik') of Dutch BITs through mailbox companies with no substantial activities in the Netherlands, confirming states' right to regulate in the public interest, making explicit commitments on sustainability and corporate social responsibility, weighing in the conduct of investors, clarifying the protection offered to foreign investors, and modernizing investor-state dispute settlement. It is on these points indeed that the new Dutch Model BIT indeed shows a clear departure from the previous Dutch practice.

After a debate in the Dutch Parliament[11], the final text of the Dutch Model BIT was adopted in March 2019. The 2019 Dutch Model BIT does deviate in several respects from the May 2018 Draft although no fundamental changes were made if one compares the October 2018 and 2019 texts of the Model BITs.

The 2019 Dutch Model BIT, and the process leading to its enactment, is not only a mere update of the 2004 Model BIT. There are many reasons behind the initiating of the revisions of the 2004 Dutch Model BIT[12], but three seem to stand out.

First, revision occurred in a context of increased criticism on the contemporary investment law and arbitration regime, and in the midst of attempts to reform both procedural and substantive investment law. Discussions take place notably in the United Nations Commission on International Trade Law (UNCITRAL) Working Group III on the "the possible reform of investor-State dispute settlement (ISDS)".[13] The reforms under consideration however go beyond the issue of dispute settlement, and the areas of "possible reform" have gradually expanded to include amongst others "diversity among arbitrators," "third-party funding," "exhaustion of local remedies," "regulatory chill," and "reflective loss."[14] In parallel and conjunction, the EU is urging to replace investor-state arbitration by an "international investment court". The idea of an "international investment court"

longer is accessible. The website did apparently contain 'an analysis and criticism' of the model BIT by the organizing NGOs. A form on the website could be filled in which one could indicate which criticisms were shared ; these forms where then directly transmitted to the Ministry. See Bart-Jaap Verbeek, 'Organisaties lanceren platform voor kritische inspraak op blauwdruk Nederlandse investeringsverdragen' (31 May 2018), available at https://www.somo.nl/nl/organisaties-lanceren-platform-kritische-inspraak-op-blauwdruk-nederlandse-investeringsverdragen/ (accessed 8 March 2021).

[10] Ibid.

[11] See the Parliamentary Debate on the Model BIT, Doc Nr. TK 62 / 62-3-1 (13 March 2019) available at https://www.tweedekamer.nl/downloads/document?id=3c64ee6e-9fc5-4cef-bf67-e9ad7c71bd99&title=Modeltekst%20investeringsakkoorden.pdf (accessed 13 January 2021).

[12] See for an overview N Lavranos, 'The changing ecosystem of Dutch BITs' (2020) 36(3) *Arbitration International*, 441–457.

[13] U.N. GAOR, 72nd Sess., supplement no. 17, U.N. Doc. A/72/17, paras. 263 & 264 (2017).

[14] UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), Possible Reform of Investor-State Dispute Settlement (ISDS), Note by the Secretariat, 38th Sess., (Vienna, Oct. 14–18, 2019), UN Doc. A/CN.9/WG.III/WP.166, paras. 5 *et seq*. (Jul. 30, 2019) [hereinafter UNCITRAL Working Group III 2019 Note by the Secretariat]. *See also* UNCITRAL Presentation of Reform Options, available at https://uncitral.un.org/en/reformoptions.

was officially launched in 2015 by the European Commission[15] and the European Parliament which requested the Commission to seek to replace investment arbitration by a new system.[16]

Alongside theses attempts at systemic (procedural) reforms, the past years have also seen a gradual recalibration of investment treaties by the States themselves, targeting most notably the substantive standards contained in these treaties, but also procedural issues.[17] Provisions on human rights responsibilities of foreign investors have been included in recent treaties[18], and investment protection standards such as those on expropriation and fair and equitable treatment have been re-designed and (in most cases) tightened.[19] The 2019 Dutch Model BIT follows these trends.

Secondly, the revision needs to be placed in the specific context of the Netherlands. Criticism on the Dutch investment treaty policy has increased over the past year, particularly by NGOs following the EU-wide discussion on the negotiation of the Transatlantic Trade and Investment Partnership with the United States (TTIP).[20] The idea to draft a new Model BIT was made already in 2015 by the former Minister of Foreign Affairs Lilianne Ploumen, and she explicitly linked the drafting of a new Model BIT to the debate surrounding the TTIP.[21]

The reform also cannot be isolated from the competence of the EU to deal with foreign direct investment following the adoption of the Lisbon Treaty.[22] The EU has, as mentioned, been one of the pioneers in proposing a reform of ISDS, and has likewise in its recent treaty practice included revised investment protection standards and provisions relating to the right to regulate, arguing for a "significant break with the past".[23] The 2019 Dutch Model BIT has been inspired by EU investment treaties, such as the Comprehensive Economic Trade Agreement (CETA) with Canada.[24] The reason why the Dutch Model BIT closely follows the EU practice may, beyond the principled agreement with the contents of that practice, also lie in the fact that under EU Regulation 1219/2012, the European Commission needs to authorize the conclusion of new BITs between EU Member States and third states, and may even request to participate in the negotiations.[25] Some

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[15] European Commission, *Concept Paper – Investment in TTIP and Beyond – the Path for Reform: Enhancing the Right to Regulate and Moving from Current Ad Hoc Arbitration Towards an Investment Court* (May 2015).
[16] *See* European Parliament Resolution of 8 July 2015 Containing the European Parliament's Recommendations to the European Commission on the Negotiations for the Transatlantic Trade and Investment Partnership (TTIP).
[17] *See* Eric De Brabandere, *(Re)Calibration, Standard-Setting and the Shaping of Investment Law and Arbitration*, 59 B.C.L. REV. 2607 (2018).
[18] *E.g.*, India Model BIT, Art. 12 (2016).
[19] *E.g.*, Comprehensive Economic and Trade Agreement (CETA) Between Canada, of the One Part, and the European Union and its Member States, of the Other Part, 2017 OJ (L 11), Arts. 8.10 and 8.12.
[20] See e.g. R Knottnerus, R Van Os, H Van der Pas, and P Vervest, P, '*Socialising losses, privatising gains. How Dutch investment treaties harm the public interest'*. Amsterdam:SOMO, BothEnds, Milieudefensie, TNI (2015), available at https://www.somo.nl/wp-content/uploads/2015/01/Socialising-losses-privatising-gains.pdf (accessed 13 January 2021).
[21] See, amongst others, the reply given by the then Minister of Foreign Affaires to questions to that effect in the Dutch Parliament: Tweede Kamer der Staten-Generaal, 'Vragen gesteld door de leden der Kamer, met de daarop door de regering gegeven antwoorden', Aanhangsel van de Handelingen (2014-2015), available at https://zoek.officielebekendmakingen.nl/ah-tk-20142015-2313.html (accessed 15 January 2021).
[22] See art 207 of the Treaty on the Functioning of the European Union, as amended by the 'Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community', signed at Lisbon, 13 December 2007 *OJ C 306, 17.12.2007, p. 1–271* (entered into force on 1 December 2009).
[23] European Commission, Investment Provisions in the CETA (Feb. 2016), http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf.
[24] Comprehensive Economic and Trade Agreement (CETA) Between Canada, of the One Part, and the European Union and its Member States, of the Other Part, 2017 OJ (L 11), Arts. 8.10 and 8.12.
[25] See articles 7-11, Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries (2012) OJ L351, 40–46

alignment between EU treaties and treaties signed by EU Member States, while not necessarily mandatory, is therefore inevitable.

Finally, it should also be added that over the past years, a series of threats of investment claims against the Netherlands have been ventilated, some of which have come to fruition. In particular, in October 2019, it was reported that a Venezuelan Financial Institution, Grupo Financiero BOD, had commenced arbitration proceedings under the Netherlands – Venezuela BIT in response to certain conduct of the Curacao authorities.[26] In addition, it was reported in September 2019 that a German power company, Uniper, had threatened the Netherlands with a potential claim,[27] and more recently, it was reported in February 2021 that RWE AG and RWE Eemshaven Holding II BV had commenced international arbitration proceedings against the Netherlands under the Energy Charter Treaty and the ICSID Convention.[28] Uniper's threatened claim, as well as RWE's claim, both appear to be based on the Netherlands' decision to close coal power plants. Threats of investment claims in relation to this measure have existed at least since 2016[29], and have recently attracted debate in the Dutch Parliament.[30] One does not find references to these threats in parliamentary discussions, but it cannot be excluded that they have partly played in a role in the creation of a more balanced Model BIT.

## III. 'AVOIDING ABUSES': THE SCOPE OF APPLICATION OF THE 2019 DUTCH MODEL BIT

The 2004 Dutch Model BIT was known for its very broad definition of 'investor', and as a consequence, its wide scope of application. The 2004 Model BIT contained a very broad definition of 'investor' which, in respect of legal persons, extended the scope of application of the treaty to not only legal persons constituted under the law of the Netherlands, but also to "legal persons not constituted under the law of that Contracting Party but controlled, directly or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii)".[31]

The 2004 Model BIT has therefore been known to allow corporate (re)structuring in the Netherlands in order to gain access to Dutch investment treaties.[32] Both criteria, indeed impose no other conditions such as original of capital, or substantial business activity. The tribunal in *Rompetrol*

[26] Lisa Bohmer, "After Curacao Authorities Freeze a Bank, the Netherlands Finds itself in an Unusual Position: Being Sued for the First Time under its BIT with Venezuela", *IA Reporter* (6 October 2019), available at <www.iareporter.com> (subscription service accessed on 24 February 2021).
[27] Damien Charlotin, "Netherlands Poised to Face its First Investment Treaty Claim, over Closure of Power Plants", *IA Reporter* (7 September 2019), available at <www.iareporter.com> (subscription service accessed on 24 February 2021).
[28] Lisa Bohmer, "The Netherlands is Facing its First ICSID Arbitration, as German Energy Giant RWE Makes Good on Earlier Threats", *IA Reporter* (3 February 2021), available at <www.iareporter.com> (subscription service accessed on 24 February 2021).
[29] See D Baazil, 'Ceta en het klimaat : Vrijhandel als ecologisch gevaar', 26 februari 2020 , available at https://www.groene.nl/artikel/vrijhandel-als-ecologisch-gevaar (accessed 13 January 2021).
[30] See e.g. Letter of the Minister of Economic Affairs and Climate Eric Wiebes to the President of the Dutch Parliament, 23 January 2020, available at https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2020/01/24/beantwoording-kamervragen-over-de-mogelijke-claim-tegen-de-nederlandse-staat-van-de-energiereuzen-uniper-en-rwe/beantwoording-kamervragen-over-de-mogelijke-claim-tegen-de-nederlandse-staat-van-de-energiereuzen-uniper-en-rwe.pdf (accessed 14 January 2021).
[31] Article 1(b) 2004 Dutch Model BIT.
[32] See eg *Mobil Corporation, Venezuela Holdings BV, Mobil Cerro Negro Holding, Ltd, Mobil Venezolana de Petroleos Holdings, Inc, Mobil Cerro Negro, Ltd, and Mobil Venezolana de Petroleos, Inc v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27, Decision on Jurisdiction, 10 June 2010.

*v Romania* explained -with regards to a definition in the Netherlands-Romania BIT identically worded as the Model BIT- that "*neither corporate control, effective seat, nor origin of capital has any part to play in the ascertainment of nationality*".[33] The 2019 Dutch Model BIT, as noted, was partly drafted to avoid what has been termed 'abusive uses' ('oneigenlijk gebruik') of Dutch BITs through mailbox companies with no substantial activities in the Netherlands.[34] To achieve this, the new model contains a series of interesting provisions.

As to the definition of 'investor', the 2019 Dutch Model BIT requires that legal persons, besides being incorporated in one of the Contracting Parties, need to have "substantial business activities in the territory of that Contracting Party" in order to qualify as investor under the treaty.[35] A legal person incorporated in the Netherlands, which owns or controls directly or indirectly another legal person, will qualify as investor under Article 1(b)(ii) of the Model only if it has "substantial business activities" in the Netherlands. The requirement of "substantial business activities" is not new[36], but the model does add "indicia" to assess the existence or not of "substantial business activities"[37]. The indicia are the presence of a registered office, administration, headquarters and/or management, the number of employees and their qualifications based in a Contracting Party, the turnover generated, and the presence of an office, production facility and/or research laboratory.[38]

Another remarkable feature can be found in Article 16 entitled "Scope of application" of the 2019 Model which is situated in the section on ISDS. Article 16 mandates Tribunals to

> "decline jurisdiction if an investor within the meaning of Article 1(b) of this Agreement, which has changed its corporate structure with a main purpose to gain the protection of this Agreement at a point in time where a dispute had arisen or was foreseeable. This particularly includes situations where an investor has changed its corporate structure with a main purpose to submit a claim to its original home state."[39]

The provision is very explicitly aimed at avoiding corporate restructuring, even if that would include having "substantial business activities" in either State, if corporate restructuring would be done only to gain access the treaty's protection. The exclusion only applies to situations where the corporate restructuring takes place when a dispute had arisen or was foreseeable. This aligns the Model BIT to a series of cases which have confirmed the same principle, even absent an explicit treaty provision to the effect.[40] While the October 2018 Draft included the same provision, but had provided that "the responding Contracting Party may deny the benefits of this Section" in case of corporate restructuring, the 2019 Dutch Model BIT replaced that term by "the Tribunal shall decline jurisdiction", thus unambiguously confirming that the question goes to the jurisdiction of an arbitral tribunal.

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[33] *Rompetrol Group NV v Romania* (ICSID Case No ARB/06/3), Decision on Jurisdiction and Admissibility of 18 April 2008), para 110.
[34] Ibid.
[35] Article 1(b)(ii) 2019 Dutch Model BIT.
[36] Article 18(2) of the 2004 Canadian Model BIT for example already included a 'denial of benefits' clause, amongst others, to this effect, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2820/download (accessed 14 January 2021). Article 1113(2) of Chapter 11 of the NAFTA contains a similar provision available at https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/11.aspx?lang=eng (accessed 14 January 2021).
[37] Article 1(c) 2019 Dutch Model BIT
[38] Article 1(c) 2019 Dutch Model BIT.
[39] Article 16(3) 2019 Dutch Model BIT.
[40] See e.g. *Phoenix Action Ltd v. Czech Republic* (ICSID Case No. ARB/06/5, Award, 15 April 2009, paras. 142-144, and *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, paras. 545-554.

In respect of the definition of "investment", some change can also be noticed compared to the 2004 Model BIT. The 2019 Dutch Model BIT largely keeps the definition of "investment" of the 2004 Model, and also adopts a definition which starts with a wide general definition followed by a non-exhaustive list. But some important modifications were added.

First of all, Article 1(a) adds general characteristics which assets should have in order to qualify as investments. The wide general definition, which in the 2004 was that "investments means every kind of asset"[41], has been supplemented by the need for such assets to have "the characteristics of an investment, which includes a certain duration, the commitment of capital or other resources, the expectation of gain or profit, and the assumption of risk."[42] In doing so, the 2019 Model BIT thus incorporates in part the so-called the "*Salini-criteria*"[43] which had been developed to determine the notion of 'investment' under Article 25 of the ICSID Convention. However, the 2019 Model BIT does not incorporate "contribution to the economic development of the host State of the investment" as a necessary characteristic as had been originally included in the decision of the Tribunal in *Salini v Morocco*.[44] The addition of the necessary characteristics of assets in order to constitute investments follows other recent treaties which have also included the same characteristics.[45]

The non-exhaustive list of forms that investment may take has also been lightly modified. The most notable addition relates to the item "claims to money, to other assets or to any contractual performance having an economic value".[46] The Model Treaty clarifies that "claims to money" does not include claims to money that arise solely from "commercial contracts for the sale of goods or services […], the domestic financing of such contracts, or any related order, judgment, or arbitral award". The generic reference to "claims to money, to other assets or to any performance having an economic value" which was found in the 2004 Dutch Model BIT and which has been interpreted as to broaden the definition of 'investment' beyond the traditional understanding of the term 'asset'[47], is thus abandoned in favour of a stricter definition. In this respect also, the Netherlands brings its Model BIT into line with the contemporary treaty practice of certain other states which have incorporated similar exclusions[48].

A related important modification is the inclusion of an "accordance with host State law" provision. This provision was first included in the October 2018 Draft Model following the public consultation. The provision, however, is not situated in the definition of investment, but constitutes a separate provision in Article 2 "Scope and application" of the Model.[49] Article 2(1) explains that the Treaty will only apply to investments "made in accordance with the applicable law of the host

[41] Article 1(a) 2004 Dutch Model BIT.
[42] Article 1(a) 2019 Dutch Model BIT.
[43] *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction (23 July 2001), para 56.
[44] Ibid., para 56. See however, amongst others: *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, para. 312. The Tribunal in that case refused to consider the investment's contribution to a country's economic development as a relevant criterion, arguing that 'the criteria of resources, duration, and risk would seem fully to serve that objective.'
[45] See eg Article 1 US-Rwanda BIT.
[46] Article 1(a)(iii) 2019 Dutch Model BIT.
[47] Jeswald W Salacuse, *The Law of Investment Treaties* (2nd edn, OUP 2015) 180.
[48] See eg art 1 (i)-(J) Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Mexican States for the promotion and reciprocal protection of investments (signed 12 May 2006, entered into force 25 July 2007) (Mexico-UK BIT).
[49] Article 2(1) 2019 Dutch Model BIT.

Contracting Party at the time the investment is made". The provision is not entirely ground-breaking and reflects earlier treaties.[50]

More generally, Article 2 of the 2019 Dutch Model BIT constitutes a novelty compared to the 2004 Model BIT. The Article adds a series of provisions which seek to limit the scope of application of the treaty. Article 2(2) is a general provision confirming the right to regulate of States to "achieve legitimate policy objectives", such as the public health, safety, public morals and the environment. It further adds that the mere fact of a regulatory change which negatively affects the investment, or interferes with an investor's expectations, is not constitutive of a breach of the treaty. It echoes other treaties, such as CETA which contains a similar provision.[51] Article 2(3) and 2(4) in turn confirm that the parties retain the right to prevent anti-competitive practices, and that nothing in the treaty can be construed as preventing a party from discontinuing or requesting a reimbursement of a subsidy. The latter can also be found in CETA[52], amongst others, and seems to be targeting the 'renewable energy' cases against Spain, Italy and the Czech Republic[53], and cases such as *Micula v Romania* in which a tribunal had found that the withdrawal of tax incentives constitutive of state aid under EU law were in violation of the applicable investment treaty.[54] Since the EU's position is that the award itself constitutes state aid, and hence cannot be implemented[55], the 2019 Dutch Model BIT explicitly targets not only the discontinuation of subsidies and requesting reimbursement thereof, but also the situation where a Contracting State has been "required to compensate the investor".

## IV. RULE OF LAW, SUSTAINABLE DEVELOPMENT CORPORATE SOCIAL RESPONSIBILITY, AND GENDER

Sections 2 and 3 of the 2019 Dutch Model BIT are innovative features of the Model, both in general terms and compared to the 2004 Model BIT. These two sections tackle questions relating to the rule of law, sustainable development and corporate social responsibility. Moreover, the importance the 2019 Dutch Model BIT attaches to sustainable development is also recognized in the Model's preamble which reaffirms the states' "commitment to sustainable development and to enhancing the contribution of international trade and investment to sustainable development". Such questions were largely absent from the 2004 Model BIT.[56]

At the outset, it is important to emphasize that Sections 2 and 3 include provisions which are excluded from the scope of application of the ISDS clause, which only applies to the provisions contained in Section 4 "Investment Protection".[57] Sections 2 and 3 are therefore mostly relevant as either principled provisions and/or as provisions which could be used in the interpretation of

[50] See eg Article 1 of the 1999 and 2006 French Model BITs, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2827/download and https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5874/download (accessed 15 January 2021). See also

[51] See Article 8.9 (1) and (2) CETA.

[52] See Article 8.9 (3) and (4) CETA

[53] See Daniel Behn and Ole Kristian Fauchald, 'Governments under Cross-fire? Renewable Energy and International Economic Tribunals' (2015) 12(2) *Manchester Journal of International Economic Law* 117-149.

[54] *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania*, ICSID Case No ARB/05/20, Award (11 December 2013).

[55] This question was discussed extensively during the requestion for annulment of the arbitral award: *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania*, ICSID Case No ARB/05/20, Decision on Annulment (26 February 2016), paras 70 ff.

[56] With the exception of certain general statements in the preamble of the 2004 Dutch Model BIT, such as the following statement "Recognising that the development of economic and business ties will promote internationally accepted labour standards".

[57] See Art. 16(1) 2019 Dutch Model BIT?

other treaty provisions on investment protection. While here also, the 2019 Dutch Model BIT is certainly not the first treaty to include provisions relating to sustainable development and corporate social responsibility[58], the included provisions contain some interesting and novel designs, including in relation to gender.

Section 2 general covers investment promotion and facilitation. It notably contains an "affirmation" of the 2016 G20 Guiding principles of Global Investment Policymaking[59], and a commitment for states to strive to promote and facilitate investment that contribute to sustainable development.[60] Article 5 of Section 2 relates to the "rule of law" and contains in the first paragraph a series of commitments of States in relation to "good administrative behavior such as consistency, impartiality, openness and transparency". Article 5(2) contains commitments in terms of access to "effective dispute resolution mechanisms and enforcement" and contains also qualities which such procedures should have, such as impartiality, independence and transparency. It is interesting that some of these features have typically been included in the FET standards [61], but are here isolated in another (non-enforceable) provision. Only some of these elements, however, as we shall see, are included the list of measures enunciated as constitutive of breaches of FET under Article ,.

Article 5(3) also deserves attention as it introduces an obligation for states to "take appropriate steps" to ensure access to justice of victims of "business-related human rights abuses". Here also, the mechanisms put in place need to be "impartial, independent, transparent and based on the rules of law". Although the 2016 Indian Model BIT for example reflects a similar idea (but translated in stricter and more mandatory provisions)[62], the provision is rather innovative in investment treaties.

Article 6 ("Sustainable development") contains a commitment of States "to promote the development of international investment in such a way as to contribute to the objective of sustainable development", and an obligation on States to ensure that their investment law and policies provide for "high levels of environmental and labor protection". It further adds a "recognition" that it is inappropriate to lower environmental and labor standards to attract foreign investment.[63] Such provisions are new to the Dutch Model BIT, but here also, one can refer to earlier treaty practice which has incorporated similar provisions in the past mostly in relation to labor and environmental standards.[64] Article 6(5) also obliges the parties to no adopt legislation in relation to sustainable development which would constitute an "unjustifiable discrimination or a disguised restriction on trade an investment".

An interesting addition to the 2019 Model BIT as compared to the 2018 Draft is a provision relating to gender. The provision not only recognizes the important contribution of women to economic

[58] See notably Articles 13-15 of the 2016 Morocco-Nigeria BIT, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download (accessed 27 January 2021). For another recent Model BIT which incorporates such provisions, see Articles 15-18 of the 2019 BLEU Model BIT.

[59] Annex III to the G20 Trade Ministers Meeting Statement, Shanghai (9-10 July 2016) available at https://www.oecd.org/daf/inv/investment-policy/G20-Guiding-Principles-for-Global-Investment-Policymaking.pdf (accessed 18January 2021).

[60] Article 3 (3) and (4) 2019 Dutch Model BIT.

[61] See Andrew P Newcombe and Lluis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 277-279.

[62] Article 13.1 Indian Model BIT. Article 13 relates to the responsibility of the home State of the investor, and the mandatory submission of civil liability actions against the investor in its home State for 'acts, decisions or omissions made in the Home State in relation to the Investment where such acts, decisions or omissions lead to significant damage, personal injuries or loss of life in the Host State.'

[63] Article 6 (1), (2) and (4) 2019 Dutch Model BIT.

[64] See eg article VII Belgium/Luxembourg (BLEU)-Colombia BIT (2009) and Articles 12 and 13 of the 2012 US Model BIT.

growth, but also stresses the importance of "incorporating a gender perspective" to promote inclusive growth, and the need to remove barriers to women's participation the economy. Furthermore, there is commitment to promote equal opportunities and participation for both women and men in the economy. This provision, as was said, is as such excluded from the scope of application of the inverstor-state dispute settlement clause, and it would be hard to conceive it otherwise since these provisions indeed are aimed at interstate relations more than investor-state relations. Yet they do set important standards precisely for interstate relations, and to that extent have an important policy and programmatic function.

Much of what has been said above in relation to Article 6 on sustainable development can also be applied to Article 7 which deals with corporate social responsibility. Investors need to comply with the domestic laws of the host State, including those in relation to human right, environmental protection and labor laws,[65] and are encouraged to voluntarily incorporate internationally recognised standards on corporate social responsibility.[66] Such provisions echo recent trends in treaty drafting, e.g., in the Pan African Investment Code (PAIC) which similarly have included not only general references to corporate social responsibility but also confirmations of the obligations of investors to respect domestic laws.[67] Article 7(3) confirms the importance for investors to conduct due diligence to assess the environmental and social risks of the investment, but the provision seems to not derive any consequence from the failure to do so. Article 7(4) further adds that investors will be liable "in accordance with the rules concerning jurisdiction of their home state" for acts and decisions which lead to damage, personal injuries or loss of live in the host state. The provision is remarkable in investment treaties, since it targets the liability of investors in the *home* state, but at the same time, it does not add any supplementary obligations for state to implement such liability in the domestic law of the home state.

It is also important to here again emphasize that the provision on corporate social responsibility is excluded from the scope of application of the investor-state dispute settlement clause, which would seem to render the obligation to comply with domestic law of the host state unenforceable under the treaty, for example, through counterclaims. Article 7 seems to have the liability of foreign investors for violations of domestic law implemented at the domestic level, rather than the international level.[68] It is also interesting to note that most of Article 7 has been incorporated in the Model BIT following the public consultation; the May 2018 Draft Model BIT indeed only contained one section which covered only the encouragement for investors to voluntarily incorporate internationally recognised standards on corporate social responsibility.

## V. TIGHTENING INVESTMENT PROTECTION STANDARDS

Section 4 of the 20149 Dutch Model BIT contains a series of provisions relating to investment protection. This section contains many of the habitual investment protection standards, although these have been thoroughly redrafted compared to the previous model.

Article 8 (""Non-discriminatory treatment") contains a national treatment (NT) and a most-favoured nations (MFN) clause.[69] In both cases, a first change compared to the 2004 Model BIT

[65] Article 7(1) 2019 Dutch Model BIT.
[66] Article 7(2) 2019 Dutch Model BIT.
[67] Eg Article 22 of the Draft Pan African Investment Code (2016), available at https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf (accessed 27 January 2021).
[68] Cf eg Article 14.11 2016 Indian Model BIT and Article 43 PAIC which have on the contrary, to a certain extent, sought to 'internationalize' such obligations.
[69] Article 8 (1) and (2) 2019 Dutch Model BIT.

relates to the inclusion of the term "in like situations".[70] A second important feature is the clarification that, in relation to MFN, the notion of "treatment" does not extend to substantive obligations under other international investment and trade agreements *in themselves*, absent measures adopted by a State pursuant to those obligations.[71] Dispute settlement procedures in other international investment and trade agreements are also excluded.[72] As a consequence, in light of both carve-outs, the concrete application of MFN and its relevance as a basis for a treaty claim has been reduced.

Article 9(1) covers both FET and full protection and security (FPS). The latter is explicitly limited to full *physical* protection and security, hence excluding any extension of FPS to *legal* protection and security[73]. The FET clause, while generically formulated in Article 9(1), is defined more in detail in Article 9(2), mirroring investment treaties signed by the EU, such as CETA. But, interestingly, the FET provision of the 2019 Dutch Model BIT is not an exact duplicate of the FET provisions found in CETA.

The main gist of both articles is the same, that is to provide a (closed) list of what constitutes a breach of FET. However, the 2019 Dutch Model BIT contain some deviations from CETA in respect of FET. First, a possible extension of the list after review by both parties is likewise included[74] but adds that such a reviews should be considered 'a joint interpretative declaration within the meaning of Article 31, paragraph 3, sub a, of the Vienna Convention on the Law of Treaties.' Secondly, the 2019 Dutch Model BIT has further detailed the elements under litt. (d) and (e). Article 9(2)(d) of the 2019 Dutch Model BIT provides the following "direct or targeted indirect discrimination on wrongful grounds, such as gender, race, nationality, sexual orientation or religious belief", which is more detailed than the equivalent CETA Provision.[75] These grounds of discrimination, as some authors have noted, are interestingly more geared towards discrimination of natural persons rather than corporations.[76] The inclusion of abusive treatment, in this list, also is more detailed than the equivalent provision in CETA: "Abusive treatment of investors such as harassment, coercion, abuse of power, corrupt practices or similar bad faith conduct".[77] A notable absent in the list is the "legitimate expectation" element, but it reappears, as in CETA, in Article 9(4) which provides that a tribunal may take into account whether a Party made "a specific representation to an investor to induce an investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the investment, but that the Party subsequently frustrated."

A third deviation from CETA in respect of FET is the inclusion in Section 5 of Article 9 of the following provision:

> "when a Contracting Party has entered into a written commitment with investors of the other Contracting Party regarding a specific investment, that Contracting Party shall not, either itself or through an entity exercising governmental authority, breach the said

[70] Cf. Article 3(2) 2004 Dutch Model BIT.
[71] Article 8 (3) 2019 Dutch Model BIT.
[72] Article 8 (3) 2019 Dutch Model BIT.
[73] In this respect also, the 2019 Dutch Model BIT aligns itself with CETA which contains a reference to 'full protection and security', but limits the scope of the provision 'to the Party's obligations relating to the physical security of investors and covered investments' (Article 8.10 (1) and (5) CETA).
[74] See Article 9(3) 2019 Dutch Model BIT?
[75] Cf Article 8.10(2)(d) : 'targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief'.
[76] Duggal and van de Ven (n3), 361.
[77] Cf Article 8.10(2)(e) : 'abusive treatment of investors, such as coercion, duress and harassment'.

> commitment through the exercise of governmental authority in a way that causes loss or damage to the investor or its investment."

The provision seems to re-introduce, for a second time, a notion akin to "legitimate expectations" of foreign investors, but in all events limited to "written commitments" and breaches which cause loss or damage to the investor of the investment.

Article 10 of the 2019 Dutch Model BIT contains an extensive provision on "Fiscal Treatment", which has been redacted following the public consultation. The provision first contains an NT and MFN clause which applies to "taxes, fees, charges, and to fiscal deductions and exemptions".[78] At the same time, the provision excludes any tax benefits granted under double taxation treaties, through participation in customs unions, economic unions, etc. or on the basis of reciprocity with third States. Following the public consultation two sections were added: a carve-out for measures taken to prevent tax evasion or avoidance, and a provision confirming that double taxation treaties prevail over the investment treaty.[79]

The provision on expropriation of the 2019 Dutch Model BIT is a profound change compared to the 2004 Model BIT, and here also reflects contemporary treaty practice by the EU notably. As in CETA, elements are included to determine whether a measure constitutes an indirect expropriation, such the economic impact and the duration of the measure.[80] Compared to CETA, it is interesting to note that the elements in the 2019 Dutch Model BIT do not include "the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations".[81] Another important element which makes the 2019 Dutch Model BIT stand out is the method of evaluation of "prompt, adequate and effective compensation", one of the conditions necessary to "lawfully" expropriate investments, directly or indirectly. While the method of valuation is fairly identical to CETA, and adheres to the "fair market value of the investment at the time immediately before the expropriation or the impending expropriation became known", the treaty does extrapolate the valuation method necessary for an expropriation to be lawful to the "method to evaluate the compensation […] in case of unlawful expropriation".[82] In doing so, it abandons the distinction usually made under general international law between compensation as a requirement of the primary norm on lawful expropriation, and the compensation for unlawful expropriation which in principle follows the secondary norms on reparation which are found in the ILC Articles on the Responsibility of States for Internationally Wrongful Acts.[83] The secondary norms on reparation have been considered to apply to unlawful expropriations.[84] To that extent, it counters certain case-laws which have adopted this distinction and made a difference in compensation for lawful and unlawful expropriations.[85]

The 2019 Dutch Model BIT considers that non-discriminatory measures taken in the public interest do not constitute indirect expropriations.[86] Aside from the addition of the need for measures to be applied "in good faith", compared to CETA, the list of "legitimate public interests"

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[78] Article 10(1) 2019 Dutch Model BIT.
[79] Article 10(2) and (3) 2019 Dutch Model BIT.
[80] Article 12(4) 2019 Dutch Model BIT.
[81] Article 2, Annex 8-A CETA.
[82] Article 12(5) 2019 Dutch Model BIT.
[83] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.
[84] David Khachvani, 'Compensation for Unlawful Expropriation: Targeting the Illegality' (2017) 32(2) ICSID Review 385–403, at 388.
[85] *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v Venezuela*, ICSID Case no ARB/07/30, Award, 8 March 2019, paras. 213 ff.
[86] Article 12(8) 2019 Dutch Model BIT.

comprises certain specific elements: public morals, social or consumer protection, promotion and protection of cultural diversity, have been added. The same idea is also recognised in the Model's preamble which mentions that the Treaty's objectives "can be achieved without compromising the right of the Contracting Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment, public morals, labor rights, animal welfare, social or consumer protection or for prudential financial reasons".

## VI. 'MODERNIZING' INVESTOR-STATE DISPUTE SETTLEMENT

The 2019 Dutch Model BIT is clear departure from the 2004 Model BIT in respect of ISDS also. Section 5 of the 2019 Dutch Model BIT contains not less than 9 provisions compared to the single provision in the 2004 Model. This, however, is not surprising. Recent developments have shown that States have a tendency to profoundly expand the level of detail of the dispute settlement clauses in (model) investment treaties, including to further refine and define the scope of application of the clause and applicable procedural rules[87] or to react against certain case-law[88]. Moreover, the EU's proposal to replace investor-state arbitration by an "international investment court" has resulted not only in the alignment of many EU member States to that idea, reflected in the 2019 Dutch Model BIT, but also and more generally in States being more responsive to concerns and reform proposals voiced during the debate that took place in the context of the EU's reform proposals of ISDS. The "public consultation" held by the European Commission in 2015, shows comparatively more attention to investor-state dispute settlement, than to investment protection standards.[89] ISDS is one of the primary sources of criticism asserted by NGOs including in the Netherlands.[90] However, the 2019 Dutch Model BIT preserves the access of foreign investors to international arbitration but at the same time proposes a "modernization" of the procedure.[91] [

While the 2019 Dutch Model BIT contains no references to the possible future establishment of an appellate mechanisms, the Model BIT does refer to the ongoing discussions relating to the possible establishment of a "multilateral investment court". Section 5 indeed starts with an Article explaining that the parties will pursue multilateral reform of ISDS, and that upon the entry into force of an agreement on the creation of a "multilateral investment court", the latter will *replace* the ISDS provisions of the treaty. This is formulated as a mandatory provision, and hence does not give the parties to the treaty the *option* to join the future court. Interestingly, transitional

[87] Cf the 2012 US Model BIT which contains over 10 articles relating to investor-state dispute settlement (Articles 23-34 2012 US Model BIT).
[88] Mavluda Sattorova, 'Reassertion of control and contracting parties' domestic law responses to investment treaty arbitration: between reform, reticence and resistance', in Andreas Kulick (Ed.), *Reassertion of Control over the Investment Treaty Regime* (Cambridge: Cambridge University Press, 2016) 53-80.
[89] See European Commission, Report: Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP) 14 (Jan. 13, 2015)
[90] See, amongst many others, the 'Position Paper' of the Dutch NGO SOMO submitted to the Dutch Parliament for the Round-Table discussion on the Dutch Model BIT, in which the NGO mentions that the overarching question remains whether one wants to keep a system whereby corporations are given a means to exercise political pressure through an "enforcable system of arbitration". Stichting Onderzoek Multinationale Ondernemingen (SOMO), 'SOMO-bijdrage aan rondetafelgesprek Modeltekst Investeringsakkoorden Bijlage: Brief Handel Anders! inzake analyse modeltekst Nederlandse bilaterale investeringsverdragen' (8 November 2018), available at https://www.tweedekamer.nl/debat_en_vergadering/commissievergaderingen/details?id=2018A04650# (accessed 25 January 2021).
[91] Letter of the Minister of Foreign Affairs Sigrid Kaag to the President of the Dutch Parliament, (n8), p. 2.

arrangements will be taken by the States, which will take into account "the legitimate expectations of investors in ongoing disputes".[92]

The scope of application of the ISDS provisions is limited to disputes relating to Section 4 of the treaty containing the investment protection standards.[93] Article 16 also contains several exclusions. A first exclusion concerns the case where an investor, which would in principle fall under the definition provided for in Article 1(b), engages in corporate restructuring once a dispute has arisen of was foreseeable, as I have discussed in section III above. Secondly, investments made through "fraudulent misrepresentation, concealment, corruption, or similar bad faith conduct amounting to an abuse of process" are also excluded.[94] The is in line with Article 2(1) of the Dutch Model BIT which clarifies that the Treaty will only apply to investments "made in accordance with the applicable law of the host Contracting Party at the time the investment is made"; which could be interpreted as to cover also issues such as corruption. The exception in Article 16 also precludes the jurisdiction of an Arbitral Tribunal in case of "similar bad faith conduct amounting to an abuse of process", hence generalizing the exception beyond the need to only conform to the domestic law of the host State. As is the case in relation to the first exception, the final 2019 Model BIT replaced the earlier use of the term "an investor may not submit a claim under this Section"[95] by "the Tribunal shall decline jurisdiction', confirming that the question goes to the jurisdiction of an arbitral tribunal as is not a question of admissibility.[96] A third, and very different, exclusion can be found in the "Protocol on Public Debt" which is part of the Model BIT. Article 1 of the Protocol excludes claims "that a restructuring of public debt of a Contracting Party breaches an obligation" in the Treaty, if the restructuring is a "negotiated" one. For non-negotiated restructurings of public debts, a claim may only be submitted if 270 days have lapsed from the date of the written request for consultation as provided for in Article 18 of the Model Treaty.

The provisions on ISDS show a clear shift away from the mere reliance on international arbitration (and perhaps in due time an investment court) to settle investor-state disputes. Section 5 of the 2019 Dutch Model BIT contains a series of pre-arbitration settlement mechanisms and requirements, which are unambiguously geared at attempting to settle disputes through means other than international arbitration. But the 2019 Dutch Model BIT does not duplicate the provisions of CETA, notably because the 2019 Dutch Model BIT does not adopt the "Investment Court System" of CETA.

Article 17 of the 2019 Dutch Model BIT is a general clause which encourages parties to a dispute to settle the dispute amicably by recourse to negotiates, conciliation of mediation, and emphasizes that such procedures may be used in parallel to arbitration proceedings. An interesting feature, which has added following the parliamentary debated in early 2019, is the addition of a second paragraph requiring the "mutually agreed solutions" to be made public.

Article 18 of the 2019 Dutch Model BIT covers the next step in dispute settlement: "consultations". Consultations are not presented in Article 18 as mandatory, but Article 19(1) of does condition the submission of a claim to arbitration to the initiation of consultation and the absence of a settlement of the dispute within six months from the date of the written request for consultation. Article 18(4) sets a time limit for the request for consultation, which is in principle five years of the date on which the investor first acquired, or should have first acquired, knowledge

[92] Article 15(1) and (2) 2019 Dutch Model BIT.
[93] Article 16(1) Dutch Model BIT.
[94] Article 16(2) Dutch Model BIT.
[95] This language is the one used in Article 18.10(3) CETA.
[96] See on this Eric De Brabandere, "Good Faith', 'Abuse of Process' and the Initiation of Investment Treaty Claims' (2012) 3(3) Journal of International Dispute Settlement, 609-636.

of the treatment complained of. Failure to respect the time limits results in the inadmissibility of the claim, unless the investor can demonstrate that the failure is a result of actions taken by the other Respondent State.[97] A request for consultation is considered to have been withdrawn if the claimant has not submitted a claim to arbitration under Article 19 of the Treaty within eighteen months of submitting the request for consultations.[98]

The 2019 Dutch Model BIT, with the addition of several steps as discussed and further procedural details as will be discussed, retains access to arbitration as the principal legal method of settlement. Article 19(1) provides that investors, upon exhaustion of the consultation stage, can submit a dispute to arbitration under either the ICSID Convention or the UNCITRAL Arbitration Rules (mandatorily administered by the Permanent Court of Arbitration (PCA)). Article 19(5) requires the withdrawal or discontinuation of any domestic or international litigation in respect of the same measures complained of. Article 19(7) explicitly seeks to make consolidation of cases easier and was explicitly targeted to make arbitration proceedings less costly for small and medium enterprises (SMEs), without however defining which corporations would be considered as SMEs. There is also a requirement to disclose the identity of any third-party funder involved in the funding of the claimant, but no penalty has been included in cases of a failure to respect that provisions.[99]

Article 20 contains an extensive provision on the constitution and functioning of the Arbitral Tribunal, thereby seeking to guarantee the "independence and impartiality" of the Tribunal and the transparency of the proceedings.[100] This article incorporates several recent and less recent developments, such as the UNCITRAL Rules on Transparency, requiring also from a tribunal to "give positive consideration" to a requestion for the submission of an *amicus curiae* brief.[101] Interestingly, the provision generalises the application of the UNCITRAL Rules on Transparency even in case of proceedings under the ICSID Convention.

Aside from question of transparency, a major innovation and departure from the standard practice in investment arbitration, is the inclusion of several provisions on the constitution and composition of the arbitral tribunal and conflicts of interests of the appointed arbitrators. Perhaps the most innovative feature is that *all* members of an arbitral tribunal are to be appointed by an appointing authority, which is either the ICSID Secretary-General in case of proceedings under the ICSID Convention, or the PCA Secretary-General in case of arbitration under the UNCITRAL Arbitration Rules.[102] The abandonment of party-appointed arbitrators has triggered criticism since it would run counter the principle of party autonomy[103], but the very notion of party-appointed arbitrators had previously also been categorized as "pernicious" by others.[104] The latter argument seems to have made its way into the 2019 Dutch Model BIT, and hence one of the constitutive characteristics of arbitration has been abandoned.

In exercising its function, the appointing authority should strive for "gender and geographic diversity"[105], and is required to appoint members which "possess the qualifications required in their

[97] Article 18(6) Dutch Model BIT.
[98] Article 18(5) Dutch Model BIT.
[99] Article 19(8) Dutch Model BIT.
[100] Letter of the Minister of Foreign Affairs Sigrid Kaag to the President of the Dutch Parliament (n8), p. 2.
[101] Article 20(13) 2019 Dutch Model BIT.
[102] Article 20(1) 2019 Dutch Model BIT.
[103] Marike R. P. Paulsson, 'The 2019 Dutch Model BIT: Its Remarkable Traits and the Impact on FDI', *Kluwer Arbitration Blog* (18 May 2020), available at http://arbitrationblog.kluwerarbitration.com/category/dutch-model-bit/ (accessed 26 January 2021).
[104] Hans Smit, 'The pernicious institution of the party-appointed arbitrator' (2010) 33 *Columbia FDI Perspectives,* available at https://academiccommons.columbia.edu/doi/10.7916/D8G167Q9.
[105] Article 20(2) 2019 Dutch Model BIT.

respective countries for appointment to judicial office, or be jurists of recognized competence".[106] Such qualifications which are very similar to the requirements for election at the International Court of Justice (ICJ)[107] and those incorporated in Article 8.27(4) CETA for election to the treaty's investment tribunal. The similarity between both is interesting to note, yet also striking, since the Model Treaty fuses the requirements necessary to be appointed as an international judge ( or member of an investment tribunal) and those to be a member of an ad hoc tribunal.

Article 20(5) of the 2019 Dutch Model BIT further requires that the appointing authority to appoint members who "possess the necessary expertise in public international law, which includes environmental and human rights law, international investment law as well as in the resolution of disputes arising under international agreements." Article 8.27(4) CETA had already included a provision requiring similar qualifications, but the 2019 Dutch Model BIT goes even a step further requiring experience in public international law including environmental and human rights law. The latter may somehow be surprising since the provisions on sustainable development and corporate social responsibility are excluded from the ISDS provisions of the Model Treaty. It does however seek to make sure that a tribunal gives consideration to disputes which might involve issues relating to sustainable development and corporate social responsibility.

Another noteworthy feature of the Treaty is the requirement that "members of the Tribunal shall not act as legal counsel or shall not have acted as legal counsel for the last five years in investment disputes under this or any other international agreement."[108] Such a provision explicitly targets so-called "double-hatting" which has been on the forefront of recent criticism on investment arbitration. A prohibition of double-hatting is one of the suggestions included in the ICSID and UNCITRAL Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement.[109] Recent empirical analysis has shown that, overall double-hatting is limited to "a small group of arbitrators with numerous arbitral appointments but a comparatively smaller amount of simultaneous legal counsel work"[110] and proposals for finding an "organic solution" to the issue instead of a regulatory approach have been voiced, notably to avoid that a ban on double-hatting becomes also a barrier "to new and more diverse arbitrators" in ISDS.[111] The 2019 Dutch Model BIT nonetheless outright excludes individuals who also act or have acted as counsel in investment disputes within five years from being appointed to a tribunal. It may be regretted however that the Netherlands does not await any multilateral regulation of the matter, notably in light of the mentioned efforts in the context of the ICSID and UNCITRAL Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement.

Other provision further discuss the independence and impartiality of arbitrators, and include notably the need for arbitrators to comply with the IBA Guidelines on Conflicts of Interest in International Arbitration.[112] Parties also are required to negotiate a code of conduct to include "additional requirements on ethics" for the members of the Tribunal.[113] A procedure is provided

[106] Article 20(5) 2019 Dutch Model BIT.
[107] Cf. Article ICJ Statute: 'The Court shall be composed of a body of inde- pendent judges, elected regardless of their nation- ality from among persons of high moral character, who possess the qualifications required in their re- spective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.'
[108] Article 20(5) 2019 Dutch Model BIT.
[109] Article 6 of the Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement (1 May 2020), available at https://icsid.worldbank.org/resources/code-of-conduct (accessed 26 January 2021).
[110] Malcolm Langford, Daniel Behn and Runar Lie, 'The Ethics and Empirics of Double Hatting', 6(7) *ESIL Reflection* 3 (2017)', p. 4.
[111] J Crook, 'Dual Hats and Arbitrator Diversity: Goals in Tension' 113 AJIL Unbound (20019), 284-289, at p. 289.
[112] Article 20(6) 2019 Dutch Model BIT.
[113] Article 20(6) 2019 Dutch Model BIT.

for challenges to arbitrators, which deviates from the ICSID Convention and Arbitration Rules, and UNCITRAL Arbitration Rules, in that the President of the ICJ is set to decide the challenge.[114] The procedure relating to challenges was added following the public consultation, and was absent in the May 2018 Draft.

Specifically, in relation to the mandate of arbitral tribunals and the conduct of proceedings, the 2019 Dutch Model BIT also contains important additions. Article 20(11) sets non-bifurcated proceedings as the standard. Article 21 deals with "Preliminary Objections" and regulates the time limits for submissions relating to the jurisdiction of arbitral tribunals and manifest unmeritorious claims. Objections to the jurisdiction of tribunals are required to be made "as early as possible", but coupled to the preference for non-bifurcated proceedings in Article 20(11), the Model Treaty does not seem to favour an expeditious decision on jurisdiction, as some other recent treaties have incorporated.[115]

Article 22 of the Model covers matters relating to the award. It notably requires tribunals to decide the case within 24 months of the date of the submission of the claim.[116]

Several paragraphs are also dedicated to the reparation Tribunals can order, which is limited to compensation unless the parties agree on restitution, to the calculation of monetary damages, and to the costs which are in principle shifted to the unsuccessful party, unless the Tribunal finds it unreasonable to do so in light of the circumstance of the case.[117] In this respect, however, it is important to point to Article 22(4) which posits that "monetary damages shall not be greater than the loss suffered by the investor, reduced by any prior damages or compensation already provided in relation to the same factual dispute", a concern which apparently seeks to remedy the concern that awarded compensation is too high.[118]

A final important article is Article 23 ("Behavior of the Investor") which mentions that a Tribunal, in deciding on the amount of compensation, "is expected to take into account non-compliance by the investor with its commitments under the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises." The Article stands out, for it re-introduces, somehow in opposition to Section 3 of the 2019 Dutch Model BIT, the human rights obligations of foreign investors under voluntary guidelines. The provision was redrafted in light of the parliamentary debate in early 2019, following which the initial use of the word "may" was replaced by "is expected to".[119] This provision is thus drafted so as to make "compliance" with the UN Guiding Principles and the OECD Guidelines "a fixed part of the assessment framework" of arbitral tribunals.[120] The provision however, incorporates human rights obligations of foreign investors only as part "the assessment framework" for the *amount of compensation*. To that extent, it may not, as some authors have claimed, in effect turn "soft law CSR obligations into had law

[114] Article 20(7) and (8) 2019 Dutch Model BIT
[115] See eg Article 9.23(4) of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), available at https://www.dfat.gov.au/trade/agreements/not-yet-in-force/tpp/Pages/tpp-text-and-associated-documents (accessed 27 January 2021). The CPTPP requires also objections to the jurisdiction of tribunals to be made 'as soon as possible', but couples this to the Tribunal's obligation to address such objections 'as a preliminary question'.
[116] Article 22(1) 2019 Dutch Model BIT.
[117] Article 22(3)-(5) 2019 Dutch Model BIT.
[118] See Paulsson (n103).
[119] Parliamentary Debate on the Model BIT (n11), p. 5.
[120] Ibid.

obligations"[121] or create a "'risk of having any compensation expropriation forfeited" if investors do not abide CSR guidelines and principles.[122]

## VII. CONCLUSION

Model BITs are at their core a basis for negotiations, and it remains to be seen whether the Model BIT will in an unaltered form be accepted by other States. The likelihood of seeing at least some of the provisions of the 2019 Model in future BITs is, however, high, notably because the Netherlands ranks in the top 10 of the States with most investment treaties, with, according to UNCTAD's International Investment Agreements Navigator, 89 treaties in force, just behind the Belgium-Luxembourg Economic Union which has 91 treaties in force.[123] Nonetheless Model BITs perform also a different function. They not only set a new policy for international investment agreements of a particular State, but, because of their publication and accessibility, they also (perhaps not intentionally) may set new standards which might influence the policies of other States, as the 2019 Dutch Model BIT has also been inspired (in part) by (model) investment treaties.

The 2019 Dutch Model BIT is an important, and perhaps radical, departure from the 2004 Model which was both broad in scope of application and contained broadly formulated investment protection standards. The 2019 Dutch Model BIT aims at avoiding what the Minister of Foreign Affairs has called "abusive uses" of Dutch investment treaties which were precisely the consequence of the breadth of certain provisions. Aside from rectifying these "abusive uses", the 2019 Dutch Model BIT also comprehensively innovates by including provisions on sustainable development corporate social responsibility, features which were absent from the 2004 Model. As was shown, however, several provisions and general principles of the 2019 Dutch Model BIT are an alignment with other recent (and sometimes less recent) treaty practice, and to that extent, certain modifications are not ground-breaking, when compared to other investment treaties. However, even compared to other investment treaties, the 2019 Dutch Model contains some novel designs, such as in relation to gender.

Importantly, the 2019 Dutch Model BIT "modernized" the provisions on ISDS. The latter reflects not only recent developments in the field, notably in relation to transparency and conflicts of interests, but also several elements which have been included in EU investment and trade agreements. It is not the only EU Member state to align itself with both EU practice and CETA: the Belgium-Luxembourg Economic Union (BLEU) proposed a new model BIT in March 2019[124], and contains several provisions which also aligns it to the EU practice. But here again, compared to the 2019 BLEU Model BIT and CETA, the 2019 Dutch Model BIT adds certain innovative rules. The requirement for all members of the Tribunal to be appointed by an appointing authority, and the detailed regulation of the "ethics" of arbitrations, including in relation to challenges, go beyond existing practices.

Looking at the 2019 Dutch Model BIT from the perspective of investment protection standards, we seem to be witnessing a rather normal development which is in line with many of the recent newly drafted (model) investment treaties, notably at the level of the EU. The redrafted investment

[121] N Lavranos, 'The changing ecosystem of Dutch BITs' (2020) 36(3) *Arbitration International*, 441–457, p. 451.
[122] A.M. Paschalidis and N. Lavranos, 'Comparative Analysis between the 2018 and 2004 Dutch Model Bilateral Investment Treaty Texts' (2019) *European Investment Law and Arbitration Review* Online, 4(1), 89-123, p. 90.
[123] See https://investmentpolicy.unctad.org/international-investment-agreements/by-economy (accessed 26 January 2021).
[124] 2019 Belgium Luxembourg Economic Union (BLEU) Model BIT, available at https://www.lachambre.be/flwb/pdf/54/1806/54K1806007.pdf (accessed 18 January 2021).

protection standards of the 2019 Dutch Model BIT, in general, are therefore not sweeping modifications.

Moreover, other recent initiatives, such as the mentioned PAIC or Indian Model BIT, contain innovative features such as counterclaims or the inclusion of obligations of foreign investors in the jurisdiction arbitral tribunals, which have not made their way into the Model text. Nor is the access of third parties to the arbitration proceedings, despite a suggestion to this effect in the Dutch Parliament.[125] An overall appraisal reveals that the 2019 Dutch Model BIT is a very innovative text, but at the same time, in some respects, it offers a more traditional picture. As the Minister of Foreign Affairs remined in Parliament, the new text is an exercise in modernization, in order to find a balance on how to best realize investment protection, but the treaty remains an instrument for the protection of foreign investment.[126]

[125] Parliamentary Debate on the Model BIT (n11), p. 4.
[126] Parliamentary Debate on the Model BIT (n11), p. 5.