

# GOING DUTCH - A MODEL FOR REBALANCING INVESTMENT TREATIES TO ADDRESS HUMAN RIGHTS CONCERNS?

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Legal Briefings

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The Dutch Government is seeking public comments on a new model bilateral investment treaty (BIT) which is proposed to be used as a starting point for renegotiating the Netherlands' existing network of more than 100 agreements.

BITs and multilateral investment treaties seek to encourage foreign direct investment by providing legal protection to investors of the "home" state in relation to qualifying investments made in the "host" state. The standards of protection usually found in these instruments include, for example, protections against arbitrary or discriminatory treatment by the host Government. Investors can enforce these standards by submitting claims to international arbitration.

Investment treaties, and the system of international arbitration via which they have typically been enforced, have been criticised as "one-sided", and as favouring the interests of foreign investors (and the "capital-exporting" states of the Western hemisphere) over the interests of (less-developed) host States.

This criticism has been most pointed in relation to claims where foreign investors' business activities are alleged to have had serious adverse impacts on the environment or human rights in the host state, or which involve challenges to measures introduced by host States ostensibly in pursuit of environmental or social policy. According to critics, arbitration tribunals in such cases have typically ignored the investor's conduct as a factor relevant to the determination of the claim or have failed to pay deference to the host State's "right to regulate".

The proposed revisions to the Dutch model BIT aim to address at least some of these criticisms. Starting with the preamble, it is made clear that the purpose of the BIT is *'to attract and promote responsible foreign investment'*.

A set of entirely new provisions under the heading "Sustainable Development" would impose a general obligation on the state parties to ensure *'high levels of environment and labor protection'* and not to lower levels of protection in these areas in order to encourage investment.

There are also new provisions under which the state parties would *'reaffirm'* their obligations under environmental, labour and human rights treaties and the importance of *'encouraging'* investors to *'voluntarily incorporate into their policies'* international standards of responsible business conduct, such as the OECD Guidelines for Multinational Enterprises and the United Nations Guiding Principles on Human Rights.

Article 23 of the model BIT further provides that *'[w]ithout prejudice to national administrative or criminal law procedures, a Tribunal may, in deciding on the amount of compensation [to award to an investor following a breach of the BIT by the host State], take into account non-compliance by the investor with its commitments under the UN Guiding Principles on Businesses and Human Rights, and the OECD Guidelines for Multinational Enterprises.'*

Although the provisions mentioned above do not directly impose obligations on investors or directly modify the protections afforded to investors, they do foreshadow the introduction of further measures at a domestic level to achieve the aspirations described in relation to environmental and social standards and investor conduct. The inclusion of such provisions may also emphasise to arbitration tribunals that BITs should be interpreted consistently with other international treaties, including those relating to human rights.

But is this necessary? Human rights issues are cropping up in investment arbitration even without express human rights provisions in the underlying treaties. For example, Argentina advanced a counterclaim in a recent case alleging that a Spanish investor had breached the human right to water in their performance of a concession contract for water and sewerage services (see our previous post [here](#)). More recently, a tribunal adjudicating a claim between a Canadian investor and Peru substantially reduced the damages payable to the investor following Peru's wrongful termination of a mining permit on grounds that the strength of local community opposition to the mine made it unlikely the investment would ever yield a profit, and in this regard took into account allegations that the investor had failed to conduct adequate consultation with the local community (see our previous post [here](#)).

The public consultation period for comments on the new Dutch model runs until 18 June.

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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