

Newsflash: The Netherlands' new Draft Model Bilateral Investment Treaty, a proposal for a new investment protection regime

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Since 2011, the compatibility of the States' consent to investment arbitration in Bilateral Investment Treaties (BIT) with European Union law (EU law) has been strongly discussed in Europe. The discussions have mainly concerned BITs between Member States (intra-EU BITs), but could also impact the European Union (EU) and Member States' policy with regards to BITs concluded between EU-Member States and Third Countries (extra-EU BITs).

On 6 March 2018, the Court of Justice of the European Union (CJEU) rendered its preliminary ruling in the case *Slovak Republic v. Achmea BV (Achmea)*. The Court ruled that the dispute resolution clause in the Netherlands-Slovakia BIT which granted the investor the right to bring proceedings against the Host State before an arbitral tribunal was incompatible with EU law.

Since the *Achmea* preliminary ruling, in May 2018, the Netherlands has made available for public consultation its new Draft Model BIT until the 18 June 2018. In a context where the State decided to terminate all its intra-EU BITs following the CJEU preliminary ruling in *Achmea*, the shift of the Netherlands' position regarding investment protection in its extra-EU BITs is particularly noteworthy. Due to the large number of Dutch BITs currently in place and the frequency they are invoked by investors, the adoption of a new Dutch Draft Model BIT could have major implications in the future developments of investment arbitration.

1. Elaboration and goals of the new Dutch Draft Model BIT

The Draft Model BIT reflects proposals of Dutch arbitrator Albert Jan van den Berg and presents a vision of how investment protection could be reformed in Europe. It aims to "create more balance between the rights and duties of host States and investors" and take into account several factors: first, the shared views of NGOs and the public opinion according to which open standards in Dutch BITs have been too broadly interpreted by arbitrators, thus favouring investors to the detriment of host States; second, the EU views regarding investment protection, the approval of the new Draft Model BIT being contingent upon the European Commission's authorisation; third, the global economic context that imposes the need for the Netherlands to take also into account its interests as a host-State; and finally the recognition of the UN Guiding Principles on Businesses and Human Rights, the UNCITRAL Rules on Transparency and the OECD Guidelines for Multinational Enterprises.

2. Main changes introduced in the Draft Model and implications

While the current Dutch Model BIT, applicable since 2004, provides a wide scope of application - imposing limited requirements for nationals and investors to benefit from investment protection by using vague and broad definitions - the new Draft Model significantly narrows the scope of application of the BIT and provides for more precise and strict criteria to be eligible for protection. The main changes introduced in the 2018 Draft Model BIT concern its scope of application, the substantive protections and the dispute-settlement mechanism:

- An '**investment**' needs to satisfy certain characteristics to be eligible for protection: a 'certain duration', the 'commitment of capital or other resources', the 'assumption of risk', and the 'expectation of gain or profit'. While the Draft Model may seem to formalize the standard commonly used by arbitral tribunals by including the Salini test requirements, the 'expectation of gain or profit' is an additional condition that would exclude from investment protection all economic activities run on a non-profit basis. In addition, other forms of investment are excluded, such as claims to money arising from commercial contracts for the sale of goods or services, and specific limitations are also introduced regarding the restructuring of public debt which is the object of a separate protocol.
- An '**investor**' should have 'substantial business activities' in the Netherlands or to be owned or controlled by a Dutch company that meets the substance requirement itself in order for its investment to be eligible for protection. Such a requirement automatically excludes so-called 'mailbox companies' from investment protection.
- A closed list of six measures or sets of measures that would constitute a breach of '**fair and equitable treatment**' is introduced in the Draft Model BIT. Legitimate expectations by an investor that no fundamental amendments will be made to the regulatory regime in place at the time of the investment will only be protected in case of specific representation to the investor.
- '**Indirect expropriation**' occurs if a measure 'substantially deprives the investor of the fundamental attributes of property of the investment'. It is considered to happen only in the 'rare circumstance' when the impact of a measure is so severe in light of its purpose that it appears to be 'manifestly excessive'. Thus, the definition developed in case law is incorporated into the Draft Model. The standard to be met by investors remains high, since adverse effect on the economic value does not amount to expropriation and States can always resort to the public policy defense.
- In case of the establishment of a '**multilateral investment court**', the Draft Model provides that the chapter regarding the settlement of investor-State disputes will cease to apply. The EU-Vietnam FTA, the EU-Canada CETA and the EU-Singapore trade and investment agreements also incorporate a similar provision.
- When **submitting a claim** claimants are required on the one hand to waive, withdraw or discontinue any other domestic and international proceedings; and on the other hand to disclose the existence, the name and the address of any third party funder (if any). This provision prevents all parallel proceedings, including domestic proceedings that would allow claimants to pursue purely injunctive or declaratory relief. It also introduces unprecedented

disclosure obligations regarding third-party funding.

- The Draft Model provides for specific procedures as regards the **constitution and functioning of the arbitral tribunal**: all members have to be appointed by an appointing authority (the Secretary of the PCA or ICSID), required to 'thoroughly' consult with the disputing parties before the appointment; the chosen institution has to disclose the case's existence and key details such as the parties and arbitrator names, the basis for claim and the relief sought; arbitrators cannot have served as counsel for the last five years in any investment disputes, thus preventing 'two-hatting'; and general rules to be followed by the tribunal are also introduced, such as the rule to avoid bifurcation of the proceedings, to issue the final award within 24 months or the rule to shift costs onto the losing party unless exceptional circumstances render the outcome unreasonable.
- The Draft Model encourages the tribunal to take into account the '**behaviour of the investor**' in deciding on the amount of the compensation. Any non-compliance with the investor of its commitments under the UN Guiding Principles on Businesses and Human Rights as well as the OECD Guidelines for Multinational Enterprises should be taken into account in the tribunal's final decision.

Conclusion

The new Draft Model BIT is a novel and ambitious re-draft of traditional BITs, highlighting many of the elements of choice and balance faced by States entering into BITs today. In terms of scope, it is intended to serve as the basis for re-negotiation of all Dutch extra-EU BITs. It is usual practice between Contracting States to deal with transitional periods in separate agreements when concluding BITs. This is the case of 97% of Dutch BITs. Thus unsurprisingly, no transition clause is to be found in the Draft Model. Therefore, while it is certain that if the EU concludes a BIT with the same third country as the Netherlands the text of the Dutch Model BIT will be automatically replaced as per EU Regulation No. 1219/2012, it is yet uncertain what kind of transitional regime (if any) would apply in the event of re-negotiation.

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