

# Dutch Bilateral Investment Treaties

A gateway to 'treaty shopping' for investment protection by multinational companies



**Roos van Os & Roeline Knottnerus**

October 2011

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Multinational companies (MNCs) investing abroad have been using Dutch bilateral investment treaties (BITs) to sue host country governments for over 100 billion dollars for alleged damages to the profitability of their investments. This is one of the outcomes of new SOMO research into the unknown and opaque field of Dutch BITs and their legal impacts. In addition, the majority of companies enjoying generous investment protections offered by Dutch BITs are so-called 'mailbox companies', Companies with no employees on their payroll and no real economic activity in the Netherlands. It is a known fact that many transnational companies choose the jurisdiction of the Netherlands as the base for their global trade and investment operations because of its favorable tax regime that facilitates corporate tax avoidance strategies (SOMO, 2007).

This SOMO report highlights the until now unexplored role Dutch investment protection policy plays in establishment decisions of MNCs. The report argues that current Dutch investment policies are used for treaty shopping, allowing for investor–state dispute settlement based on broad-based BIT definitions that pose a danger to policy space and the safeguarding of public goods and interests. Treaty shopping is not only highly problematic from a sustainable development perspective for southern countries, but increasingly for northern states as well.



This paper is the first in a series of publications analysing the impact of Dutch foreign and economic policy on sustainable development and public interests. The series is part of a project entitled 'Private gain from public loss' in which policies aiming to attract foreign business or investment to or through the Netherlands (the so-called 'vestigingsbeleid', or business location policy) will be analysed in the framework of development policy coherence.

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**Amsterdam, October 2011**

## Acknowledgements

A number of people deserve special thanks for their valuable comments and suggestions about this report: Nathalie Bernasconi (IISD), Hege Elisabeth Kjos (UvA), Myriam Vander Stichele and Ronald Gijssbertsen (SOMO) and Joris Tieleman for his much-appreciated research assistance. Please note that those who have given feedback do not necessarily agree with the contents of the report. Full responsibility for the report rests with the authors.

## About SOMO

SOMO is an independent, non-profit research and network organisation working on social, ecological and economic issues related to sustainable development. Since 1973, the organisation has been investigating multinational corporations and the consequences of their activities for people and the environment around the world. SOMO supports social organisations by providing training, coordinating networks and generating and disseminating knowledge on multinational corporations in a context of international production, trade, finance and regulation.

## Colophon

**Titel:** Dutch Bilateral Investment Treaties

**Ondertitel:** A gateway to 'treaty shopping' for investment protection by multinational companies

**Datum:** October 2011

**Authors:** Roos van Os & Roeline Knottnerus

**Layout design:** Frans Schupp

**ISBN:** 978-90-71284-84-7

This publication is made possible with financial assistance from The Dutch Ministry of Foreign Affairs. The content of this publication is the sole responsibility of SOMO and can in no way be taken to reflect the views of The Dutch Ministry of Foreign Affairs.

**Published by:**



Stichting Onderzoek Multinationale Ondernemingen  
Centre for Research on Multinational Corporations

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# Introduction

## 1.1 General Context

The Netherlands is a popular “base camp” for (intermediate) holding and financial companies. An estimated 20,000 so-called mailbox or letterbox companies, with no substantial commercial or operational presence, have been created by multinational companies (MNCs) in order to benefit from fiscal and other commercial benefits.<sup>1</sup> These incentives are deliberately put in place by the Dutch government for international business groups that act through the Netherlands. While its favourable tax climate is the main ground that makes the Netherlands an attractive jurisdiction for holding companies, the Dutch foreign investment policy, with its extensive investment protection treaties, is also highly valued by investors from around the world.

The Netherlands boasts an extensive network of bilateral investment treaties (BITs) that offer investors the highest levels of protection and security in other contracting states. There are currently around 95 of these BITs in force.<sup>2</sup> Foreign investors, often incorporated in the Netherlands for fiscal considerations, tend to use the Netherlands as a base camp for investment in the developing world.<sup>3</sup> The broad definitions, substantive provisions and investor-friendly conditions make the Netherlands a favoured candidate for what is has been dubbed “treaty shopping”.<sup>4</sup> This is confirmed by the publicly available list of pending and concluded cases, which suggests that in several cases opportunistic reasons underpin the choice of the Netherlands as a jurisdiction in which to base investments.<sup>5</sup>

The theory and corporate practices of treaty shopping [...] so popular with transnational industry have gained increasing critical attention.<sup>6</sup> With the exponential growth of international trade and investment over the last 30 years, the broad definitions used in BITs are extending far-reaching protections to assets and economic actors beyond the original intentions of the signatories to these agreements. With unwanted and unforeseen consequences increasingly coming to the fore in the wake of globalisation, some countries have recently begun to place limits on the opportunities for “shell companies” to benefit from investment protection. Increasingly, the governance gap between existing extra-territorial operations of MNCs and the absence of any effective global regulatory oversight is perceived as undesirable, especially in light of issues related to sustainable development and states’

<sup>1</sup> M. van Dijk, F. Weyzig and R. Murphy, “The Netherlands: A tax Haven?” (2006) SOMO, <[http://somo.nl/html/paginas/pdf/netherlands\\_tax\\_haven\\_2006\\_NL.pdf](http://somo.nl/html/paginas/pdf/netherlands_tax_haven_2006_NL.pdf)> accessed 24 June 2011

<sup>2</sup> See for a total overview of BITs signed by the Netherlands: <<http://www.rijksoverheid.nl/onderwerpen/internationaal-ondernemen/documenten-en-publicaties/rapporten/2010/02/22/ibo-landenlijst.html>> accessed 24 June 2011

<sup>3</sup> See: M. Skinner, C.A. Miles and S. Luttrell, “Access and advantage in investor-state arbitration: The law and practice of treaty shopping” (2010) 3 JWELB 260

<sup>4</sup> Ibid; Skinner et al. states that “Treaty Shopping” connotes the conduct of foreign investors who deliberately seek to acquire the benefits of an investment treaty by making foreign investments or bringing claims from third countries that have more favourable treaty terms with the target host state.”

<sup>5</sup> See the UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases <<http://www.unctad.org/iia-dbcases/>> and the Investment Treaty Arbitration website <<http://ita.law.uvic.ca/>> accessed 25 June 2011

<sup>6</sup> See: M. Skinner, C.A. Miles and S. Luttrell, “Access and advantage in investor-state arbitration: The law and practice of treaty shopping” (2010) 3 JWELB 260; J.P Blyschak, “Access and advantage expanded: Mobil Corporation v. Venezuela and other recent arbitration awards on treaty shopping” (2011) 1 JWELB 32; UNCTAD, “Scope and Definition”, (2011) UNCTAD Series on Issues in International Investment Agreements II, <[http://www.unctad.org/en/docs/diaeia20102\\_en.pdf](http://www.unctad.org/en/docs/diaeia20102_en.pdf)> accessed 25 June 2011



policy space to regulate.<sup>7</sup> Globalisation of business has so far been a process that has mainly secured and legalized the rights of business, at times beneficial but often detrimental to (global) public goods and the wider public interest. The opportunities offered by BIT networks to engage in treaty shopping for investment protection are a case in point, destructive as they are to government attempts to regain a firmer grip on capital in a globalized world order. The European Parliament recently adopted a resolution which calls for a survey to investigate whether overly wide definitions of BITs in relation to investors/investment have led to abusive practices in European countries, and has urged that this assessment be used to clarify and narrow down the legal definition of the terms “investor” and “investment” used in these treaties, in order to bring about a much needed rebalancing of investor rights and obligations.<sup>8</sup>

## 1.2 Aim and Focus

This paper, written partly in response to the European Parliament’s call for an assessment of the impacts of the provisions in EU member states’ BITs, focuses on the Netherlands as a hub for treaty shopping for investment protection. The Netherlands as a “treaty haven” for international investment arbitration has been growing in importance over recent decades. The country features prominently as a jurisdiction in investment arbitration cases, a fact which has been duly noted in various scholarly articles on jurisdiction in investment disputes. However, a systematic analysis of treaty provisions in BITs signed by the Netherlands and case law in which “Dutch” companies are involved is still largely lacking. This paper offers a first attempt at such an analytical overview by examining the impacts of Dutch policy and practice in relation to its BITs on treaty shopping practices and corporate restructuring via the Netherlands. This topic is discussed throughout the paper in the context of the renewed attention for the relation between the international investment regime and concerns regarding sustainable development, including environmental issues and states’ duty to protect human rights.

It has been argued that Dutch policy with regard to investment treaties is incompatible with its corporate social responsibility (CSR) policies and its development policy. Important recent initiatives and instruments supported by the Dutch government, including the newly adopted UN Business and Human Rights Guiding Principles and the 2011 renewed OECD Guidelines for Multinational Enterprises, should give rise to a systematic revision of the key principles underlying Dutch investment policy and the Dutch stance in the current European policy debate on the contours of its future common investment policy. We have written this report to facilitate discussion among politicians and policy-makers and civil society organisations, with the aim of contributing to an investment policy that coheres better with international development objectives.

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<sup>7</sup> Human Rights Council, Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 2011 A/HRC/8/5 at 3, online: <<http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>> accessed 24 June 2011

<sup>8</sup> European Parliament resolution: “Recalls that the standard EU Member State BIT uses a broad definition of “foreign investor”; asks the Commission to assess where this has led to abusive practices; asks the Commission to provide a clear definition of a foreign investor based on this assessment and drawing on the latest OECD benchmark definition of FDI” European Parliament resolution of 6 April 2011 on the future European international investment policy (2010/2203(INI))

### 1.3 Research methods

The study is based primarily on desk research. Numerous internet sources were accessed, including the UNCTAD Database of Treaty-Based Investor–State Dispute Settlement Cases and the Investment Treaty Arbitration website. All sources are cited in footnotes in the text.

In general, a disclaimer is required. Although there is a marked trend towards transparency about international investment arbitration, neither the arbitration framework as such nor the majority of IIAs, including the Dutch model BIT, contain many specific rules and regulations with regard to the level of transparency or access to case-related documents. Rather, what rules there are focus on guaranteeing the confidentiality of awards. As a result, an unknown number of cases remains undisclosed and unreported, with settlements reached behind closed doors and/or related documents remaining hidden. As there is no single up-to-date database on arbitration cases to draw on, and the Dutch government does not publish an inclusive list of arbitrations in which Dutch investors are claimants, the analysis presented in this report has been based on information gathered by combining multiple sources, and it must be assumed that the data presented is incomplete.

In accordance with SOMO's standard research methodology, the Dutch Ministry of Economic Affairs, Agriculture and Innovation, as the prime object of the study, was informed of the research in advance, and was given a standard period in which to review a draft report, to comment and to correct any factual errors prior to publication. The Ministry decided not to respond formally, as it neither recognises nor supports the tone, findings or conclusions of the report. It prefers to respond at a time and in a manner that suits its own agenda.<sup>9</sup> As the information regarding the complainant companies discussed in this report is based solely on tribunal awards and other secondary sources, it was not sent to them for comments.

### 1.4 Structure

The structure of this paper is as follows: Section two provides some general background by discussing the main characteristics of the international investment regime, the successive generations of investment treaties, the impacts of international investment agreements (IIAs) on development, and a literature review of treaty shopping. Section three examines both past and present Dutch policy with regard to investment agreements, as well as current developments arising from ongoing European integration. The scope of the Dutch investment treaties is explored in section four, with a special focus on those aspects relevant to treaty shopping. Section five examines a number of illustrative cases brought by Dutch investors, touches upon quantifiable aspects and provides a substantive overview of awards in which treaty shopping surfaces as a relevant aspect. The paper closes with a conclusion and recommendations.

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<sup>9</sup> Translated email correspondence with the Dutch Ministry of Economic Affairs, Agriculture and Innovation, 29 August 2011



## 2. Background

### 2.1 The International Investment Regime

Since Germany and Pakistan entered into the first ever IIA in 1959, countries have concluded more than 3,000.<sup>10</sup> These agreements most often take the form of a bilateral investment treaty (BIT). In addition, investment protection is increasingly included in free trade agreements (FTAs), with the most notable example being the North American Free Trade Agreement (NAFTA).<sup>11</sup> In this paper, the terms BIT and IIA are used interchangeably.

From a historical perspective, investment treaties are developed by capital-exporting countries to promote investment and protect their nationals in capital-importing countries. With capital flowing predominantly from more advanced countries to less developed ones, the bulk of these investment treaties have traditionally been concluded between developed countries and developing countries. Recent global geopolitical changes, however, have caused this trend to shift, with an increasing number of South–South agreements now being signed.<sup>12</sup> The rationale behind IIAs is that by offering investors enhanced security by guaranteeing a layer of protection beyond that provided by the laws of the host state, they will help to attract foreign investment. However, the relation between investment protection agreements and inward investment flows remains, at best, controversial.<sup>13</sup> In contrast to many other international agreements between states, but like double taxation treaties, investment agreements tend to be rather briefly worded. Broadly speaking, investment agreements usually comprise three elements:

<sup>10</sup> UNCTAD, World Investment Report 2010: investing in a low carbon economy, (2010) United Nations, p. 81, <[http://www.unctad.org/en/docs/wir2010\\_en.pdf](http://www.unctad.org/en/docs/wir2010_en.pdf)> accessed 24 June 2011 The first BITs were concerned with the promotion of investment rather than the protection.

<sup>11</sup> North American Free Trade Agreement, Opened for signature 17 December 1992, 32 ILM 289 (entered into force 1 January 1994). Chapter 11 of NAFTA is investment treaty between Canada, the United States and Mexico. See <<http://www.nafta-sec-alena.org/en/view.aspx?x=343>> accessed 13 July 2011.

<sup>12</sup> R. Dolzer and C. Schreuer, Principles of International Investment Law (Oxford Univ. Press, Oxford 2008) p.21

<sup>13</sup> UNCTAD, The role of international investment agreements in attracting foreign direct investment to developing countries (Geneva: United Nations 2009) The most important argumentation underpinning the system of investment treaties is that IIAs generate investment flows, in particular between the contracting parties of the agreement. An underlying argument is that inward investment stimulates the economic development of countries, a causal relation that can not be taken for granted. See: M. van Dijk and M. Vander Stichele, “Is foreign investment good for development?” (2008) SOMO Paper, March 2008. <[www.somo.nl/publications-n/Publication\\_2478/at\\_download/fullfile](http://www.somo.nl/publications-n/Publication_2478/at_download/fullfile)> accessed 24 June 2011 The relationship between trade, investment, economic growth and (sustainable) development is far from clear-cut. In addition, empirical evidence is equally ambiguous on the relation between investment treaties and inward investment flows. In recent years, there has been a large amount of (mostly quantitative) research on this subject. S. Rose-Ackerman and J. Tobin, Foreign direct investment and the business environment in developing countries: the impact of bilateral investment treaties, (2005), Yale Law & Economics Research Paper, No. 293; E. Neumayer and L. Spess, Do bilateral investment treaties increase foreign direct investment to developing countries? (2005) World Development 33(10) 1567–1585; J. Yackee, Do Bilateral Investment Treaties promote FDI? Some Hints from Alternative Evidence (2010) Virginia Journal of International Law, 51-2, p. 397-442. An exhaustive review of the literature falls outside the scope of this paper. But in general, there seems to be little evidence that treaties lead to significant more inward investment flows. Other factors, such as political stability, overall levels of economic development and exchange rates appear to be more important determinants of foreign direct investment (FDI). The question remains to what extent IIAs are decisive in investment decisions of multinational enterprises (MNEs). Brazil, an attractive destination for FDI but with no effective BITs in place, is an appealing example in this respect. UNCTAD, World Investment Report 2003: FDI Policies for Development: National and International Perspectives. New York and Geneva: United Nations 2003) at 53. Fourteen BITs have been signed by Brazil and none are in force.

1. Definitions – among others, of what constitutes an “investment” and who counts as an “investor” – establishing the scope of the treaty;
2. Substantive obligations for host countries, which include, but are not limited to, non-discrimination principles (national and most-favoured nation treatment), protection against expropriation, fair and equitable treatment;
3. Provisions on investor–state dispute resolution that provide for international arbitration.

In this last element investment treaties differ from any other treaty, in that they allow foreign investors to sue a host state, often without exhaustion of local remedies, before an international tribunal if they believe that the IIA governing their investment has been violated. Disputes are resolved by international arbitration, usually under the auspices of one of the following: the International Centre for Settlements of Investment Disputes (ICSID), in Washington DC; the United Nations Commission on International Trade Law (UNCITRAL); the International Chamber of Commerce (ICC), in Paris; or the Stockholm Chamber of Commerce (SCC). ICSID arbitration is often assumed to be superior, as it is a self-contained, independent and internationalized system of dispute resolution that is not supervised or corrected by national courts.<sup>14</sup> As the number of IIAs began to increase, so did the number of arbitrations. The number of investor–state disputes grew from 6 known cases in 1995 to 226 in 2005. In 2010, the number of known treaty-based investor–state dispute settlement cases filed under IIAs grew by at least 25, bringing the total to 390 by the end of that year.<sup>15</sup>

## 2.2 Different Generations of Investment Agreements

In reviewing investment treaties, it is helpful to distinguish between the different generations of IIAs.<sup>16</sup> The BITs signed between 1959 and the mid-1980s are generally referred to as the “first generation”, and those signed between the mid-1980s and the mid-1990s as the “second generation”. “Third generation” agreements are those concluded since 1995. The first two generations of IIAs saw a substantial increase in investment protection, particularly through the inclusion of the investor–state dispute settlement mechanism – although very few awards were made. Significantly, these first and second generation BITs continued to operate under the radar, well away from public scrutiny. Where arbitration cases were brought, they concerned BITs with developing countries, and the adverse effects were felt mainly in those developing countries. This changed in the 1990s, when major capital-exporting countries, such as the United States and Canada, revised their approaches after foreign investors from third countries brought their first arbitration suits against them under the BITs that they themselves had negotiated. This spurred a debate about the very nature of the current regime of international investment law. In essence, the controversy centres on the balance between the interests of investment and investors on the one hand and the regulatory power and interest of host states, and non-economic objectives, on the other.<sup>17</sup>

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<sup>14</sup> A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties, Standards of Treatment*, (Wolters Kluwer 2009), p.27

<sup>15</sup> UNCTAD, *Latest Developments in investor–state Dispute settlement (2011) IIA Issue Note*, 1, <[http://www.unctad.org/en/docs/webdiaeia20113\\_en.pdf](http://www.unctad.org/en/docs/webdiaeia20113_en.pdf)> accessed 24 June 2011

<sup>16</sup> A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties, Standards of Treatment*. (Wolters Kluwer 2009), p. 46-48; M. Sornarajah, “A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration” in K.P. Sauvant with M. Chiswick-Patterson, eds., *Appeals Mechanism in International Investment Disputes* (Oxford: Oxford University Press, 2008)

<sup>17</sup> A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties, Standards of Treatment*. (Wolters Kluwer, 2009), p.63 L. Markert, *The Crucial Question of Future Investment Treaties: Balancing Investors’ Rights and Regulatory Interests of Host State*, (2011) *International Investment Law and EU Law*, EJIEL, p.145-171

Since the mid-1990s, a third generation of BITs has been gradually emerging. UNCTAD distinguishes between four broad trends in this new generation of investment agreements.<sup>18</sup> First, there is a deviation from the traditional open-ended asset-based definition of investment, in order to prevent abusive practices in which assets were covered that were not intended by the parties to be covered investments. Next, revised wording of various substantive treaty obligations emerges as new patterns of BITs formulation. Third, agreements emerge that address a set of issues broader than specific economic aspects: for example, protection of health, safety, and the environment, the promotion of internationally recognized labour rights, and the maintenance of standards provisions. Lastly, innovations regarding investor–state dispute settlement procedures are emerging, including enhanced transparency in arbitrations and more detailed provisions on investor–state dispute settlement in order to provide more legally oriented, predictable and orderly conduct at the different stages of the process.

This paper zooms in on the trends relating to the narrowing down of definitions and the developments in investor–state dispute settlement in particular, as these are key to determining the scope of treaty shopping practices that are the paper’s main focus. The text looks at these developments in the context of the relationship between BITs and economic development, which is discussed in the next paragraph.

## 2.3 Treaty Shopping: A Literature Review

### 2.3.1 What is treaty shopping?

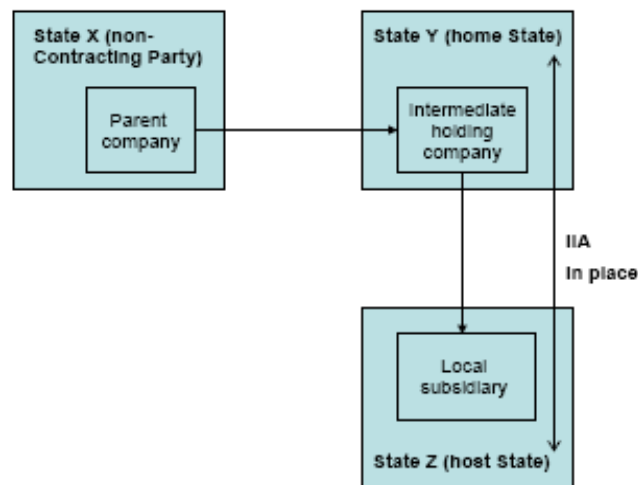
“Treaty shopping” refers to the conduct of foreign investors in acquiring the benefits of investment treaties in their actual or planned host state through third countries, through which their investment needs to be routed.<sup>19</sup> To provide an example, Zimbabwe and the United States have not signed a BIT, while the Netherlands and Zimbabwe have signed one. A US investor who wishes to invest in Zimbabwe can acquire BIT protection in that country by structuring its investment through the Netherlands, or any other country that has signed a favourable investment treaty with Zimbabwe.

Principally, there are two ways to structure the investment in order to gain the BIT protection. Either the US investor can incorporate a legal entity in the Netherlands and make the investment directly via this entity, or the investor can make the investment indirectly in Zimbabwe through any legal entity or entities (located in any country) that is owned by a Dutch legal entity. This is called an *indirectly controlled investor* (Section 4 shows this is the trademark of the Dutch BIT). This latter option – structuring investment through several legal entities – can also create huge tax advantages. The reason that the Netherlands is such a popular hub for intermediate or holding companies is the existence there of a combination of several investor-friendly policies.

<sup>18</sup> UNCTAD, Recent developments in international investment agreements, (2005) IIA monitor No. 2, <  
[http://www.unctad.org/en/docs/webiteiit20051\\_en.pdf](http://www.unctad.org/en/docs/webiteiit20051_en.pdf)> accessed 24 June 2011

<sup>19</sup> M. Skinner, C.A. Miles and S. Luttrell, “Access and advantage in investor-state arbitration: The law and practice of treaty shopping” (2010) 3 JWELB 260

**Figure 1 Investment by an investor from a non-Contracting Party through an intermediate company established in the Contracting Party<sup>20</sup>**



Apart from this, two forms of treaty shopping can be distinguished.<sup>21</sup> The first relates to the back end of an investment, and is the more controversial, as the corporate restructuring is done after a dispute has arisen. It will be shown below that this is generally considered illegal. The second, and most common, method takes place at the front end of the investment process. A company is set up in a country which the investor believes has a favourable BIT with the host state. By means of such “nationality planning”, the investor seeks to gain access to both substantive and procedural provisions that are more advantageous than those offered by the BITs entered into by its own home state.

### **2.3.2 Controversies around treaty shopping**

Treaty shopping is a controversial issue. Opinions differ on both the legality and desirability of treaty shopping, often depending on one’s interest and position within the international investment system. Here, some arguments for and against are considered.

#### **Legal but undesirable?**

According to many observers, investment treaties are founded on the principle that host states deliberately trade away some of their sovereignty in exchange for opportunities to attract investment flows.<sup>22</sup> In this view, it should not matter to host states where investment capital originates, nor what relations corporate investors maintain with the states of their incorporation.<sup>23</sup> Countries negotiate treaties on the basis that an IIA achieves its purpose as long as it attracts foreign capital, and that the country of the capital’s origin is of little importance. This line of reasoning makes treaty shopping a perfectly legal and acceptable practice under the current regime. Dolzer and Schreuer state that

<sup>20</sup> UNCTAD, 2011. p.87 and Loyens & Loeff, The Netherlands, A gateway to the world, online publication, date unknown, see <<http://www.loyensloeff.com/en-US/AboutUs/CountryDesks/Documents/gatewaytotheworld.pdf>> accessed 10 July 2011

<sup>21</sup> M. Skinner, C.A. Miles and S. Luttrell, “Access and advantage in investor-state arbitration: The law and practice of treaty shopping” (2010) 3 JWELB 260

<sup>22</sup> R. Dolzer and C. Schreuer, Principles of International Investment Law (Oxford Univ. Press, Oxford 2008) ; C. Schreuer at the conference 50 years of BITs, (2009) Frankfurt, Germany,

<sup>23</sup> UNCTAD, “Scope and Definition”, (2011) UNCTAD Series on Issues in International Investment Agreements II, <[http://www.unctad.org/en/docs/diaeia20102\\_en.pdf](http://www.unctad.org/en/docs/diaeia20102_en.pdf)> accessed 25 June 2011

nationality planning or treaty shopping is not illegal or unethical in principle, though states may perceive it as undesirable and increasingly take measures against such practices.<sup>24</sup>

### Consent, but not to future consequences

A more formalistic argument holds that states have the power to design and consent to investment treaties they are in need of. Consistent state practice in wording and design, including broad definitions of “investment” and “investor” that allow treaty shopping, would show that states do not object to current practice.<sup>25</sup> As a result, nationality as a decisive factor in whether or not investment protections extend to specific investors can be seen as an increasingly elusive criterion in a globalised world. In this set-up, investment protection is governed by a patchwork of mainly bilateral investment treaties, which to all intents and purposes functions as a multilateral system of investment protection.<sup>26</sup> Some states may well perceive treaty shopping is unproblematic. However, an article with the provocative title “Why LDCs Sign Treaties that Hurt Them”<sup>27</sup> shows that not all capital-importing countries’ negotiators fully grasped all implications of IIAs at the time of signing. That past governments were in many cases not fully, if at all, aware of the future consequences of the BITs they were concluding is confirmed by the recent critical reactions to treaty shopping from countries in Latin America and southern Africa, who have recently begun to adopt a much warier approach to international investment treaties.<sup>28</sup>

### Reciprocity

A conventional argument against treaty shopping is that it violates the principle of reciprocity. Investment treaties, like most bilateral treaties, establish reciprocal rights and obligations between the contracting states.<sup>29</sup> Treaty shopping runs counter to this principle, in that an entity with no substantial ties to a contracting state could avail itself of the treaty protections that its own state may not be willing to reciprocate to investors from the host state. In order to prevent treaty standards overruling more general standards of international law, various scholars have proposed a so-called “external standard approach”. In this view, the criteria relating to investors/investment in IIAs should be supplemented with additional external criteria – for example through conditions set through ICSID<sup>30</sup> – in order to

<sup>24</sup> R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford Univ. Press, Oxford 2008) ; C. Schreuer at the conference 50 years of BITs, (2009) Frankfurt, Germany,

<sup>25</sup> The ILA/German Branch, *The Determination of Nationality of Investors in International Investment. Agreements (IIAs)* (2009) Transnational International Law Research Centre, Online report, p. 65 <<http://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft%20106.pdf> > accessed 24 June 2011

<sup>26</sup> Schill for example argues that “*multi-jurisdictional structuring [...] shows that bilateralism as an ordering paradigm for international investment relations is unfeasible, because investors can virtually opt for the BIT regime they prefer.*” S. W. Schill, “The Multilateralization of International Investment Law: The Emergence of a Multilateral System of Investment Protection on the Basis of Bilateral Treaties” (2008). Society of International Economic Law (SIEL) Inaugural Conference Paper, No. 18/08.

<sup>27</sup> A. T. Guzman, *Why LDCs Sign Treaties That Hurt them Explaining the Popularity of Bilateral Investment Treaties* (1998) 38 VA J. INT’L L. p.639-688

<sup>28</sup> L.T. Wells, *The Emerging Global Regime for Investment: A Response*, (2010) 52 Harv. Int’l L.J. Online p. P.46-48

<sup>29</sup> M. Sornarajah, *International Law on Foreign Investment* (Cambridge University. Press Cambridge 2004), p. 8; C. McLachlan, L. Shore, M. Weiniger, *International Investment Arbitration* (Oxford. University Press 2007)

<sup>30</sup> C. Schreuer, “ICSID Convention: A Commentary” (CUP, Cambridge 2000). p.139-141. Much has been written on whether the ICSID convention provides for additional criteria or conditions for both the investor and investment. The Convention itself does not define the term “investment”. It is, however, possible to identify certain typical characteristics of investment under the Convention: i) duration of the project; ii) regularity of profit and return; iii) risk for both sides; iv) a substantial commitment; and v) the operation being significant to the host state’s development.

<sup>30</sup> Tribunal awards show that ICSID jurisdiction is not open to just any kind of operation that the parties might qualify as an investment.

ensure an effective connection between the corporation and the home state. It must be said, however, that reciprocity in investment agreements does not work in the same way as in classical state agreements, as IIAs are focused on the mutual benefits of the host state and the investor, and the investor is to some extent a direct right-holder.<sup>31</sup> Nevertheless, the next paragraph shows that conditions related to human rights could in theory be included in a reciprocal deal around investment protection, and therefore could be undermined by investors who shop around for the most attractive jurisdiction to invest from.

### **Sustainable development**

More wide-ranging is the argument that treaty shopping is highly undesirable from the perspective of sustainable development.<sup>32</sup> What is beneficial for companies (gaining access to investment protection) is not necessarily beneficial to a host state, in terms of welfare or sustainable development. Treaty shopping can expose a host country to claims by companies to which it would not otherwise allow entry. Also, in various cases local MNCs have structured investment through other states in order to access investment protection not available to local competitors. A better balance between investor rights and obligations in IIAs is required. Norms for investors are already starting to emerge within the so-called corporate social responsibility (CSR) framework, even though references to such issues are as yet of a non-binding nature.<sup>33</sup> Given the fact that several developing, emerging and developed countries have begun critically to reassess their BITs framework,<sup>34</sup> it is likely that countries will want in the future to include investor obligations, including human rights and environmental clauses that apply both to the states and to investors. However, the phenomenon of treaty shopping could detract from government efforts to reform or rebalance investment treaties.<sup>35</sup>

*“Government regulation of companies, industries or commodities on the grounds of human rights or other sustainable development considerations (e.g. certified commodities or environmental criteria) may be undermined by treaty shopping practices when treaty shoppers opt for ‘treaty havens’ that abstain from including stipulations of this kind, even though the BITs of the host country and the actual home country of the investor may well contain provisions that allow for such regulatory action.”<sup>36</sup>*

### **Governance gap**

Such problems are compounded by the governance gap between the extra-territorial operations of MNCs and the (binding) regulatory oversight of governments, which is still mainly national or regional, though global non-binding and corporate social responsibility norms have taken a giant leap forward in the last decade. UN Special Representative on Business & Human Rights, has touched upon the governance gap in the following manner:

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<sup>31</sup> Dolzer and Schreuer, p.23

<sup>32</sup> P. Muchlinski, “Corporations and the Uses of Law: International Investment Arbitration as a “Multilateral Legal Order” (2011). Oñati Socio-Legal Series, Vol. 1, No. 4, <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1832562](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1832562)> accessed 24 June 2011

<sup>33</sup> UNCTAD, “Scope and Definition”, (2011) UNCTAD Series on Issues in International Investment Agreements II, <[http://www.unctad.org/en/docs//diaeia20102\\_en.pdf](http://www.unctad.org/en/docs//diaeia20102_en.pdf)> accessed 25 June 2011

<sup>34</sup> Australia, India, South Africa, etc

<sup>35</sup> L. Peterson, Human Rights and Bilateral Investment Treaties, (2009), Rights and Democracy, <[http://www.dd-rd.ca/site/\\_PDF/publications/globalization/HIRA-volume3-ENG.pdf](http://www.dd-rd.ca/site/_PDF/publications/globalization/HIRA-volume3-ENG.pdf)> accessed 24 June 2011

<sup>36</sup> P. Muchlinski, “Corporations and the Uses of Law: International Investment Arbitration as a “Multilateral Legal Order” (2011). Oñati Socio-Legal Series, Vol. 1, No. 4,“ <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1832562](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1832562)> accessed 24 June 2011

*“The root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.”<sup>37</sup>*

Following six years of work and consultations with governments, businesses and civil society groups, the UN Human Rights Council endorsed in June 2011 the Guiding Principles for Business and Human Rights submitted by the Special Representative. One guiding principle concerns the governance gap in direct relation to IIAs: “States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.”<sup>38</sup> Whereas this illustrates that positive steps are being taken at international level, the fact remains that investor rights are still carved in hard law and have a directly enforceable character, while investor obligations and regulations comprise soft norms and so-called guiding principles. There is, however, some international customary and criminal law, such as the duty not to commit genocide or crimes against humanity, that applies also to corporations. But “Investor protections have expanded with little regard to States’ duties to protect, skewing the balance between the two. Consequently, host States can find it difficult to strengthen domestic social and environmental standards, including those related to human rights, without fear of foreign investor challenge, which can take place under binding international arbitration.”<sup>39</sup> The practice of treaty shopping increases the possibilities to take advantage of gaps in effective governance of multinational companies. Treaty havens such as the Netherlands are often effectively incapable of, as well as morally averse to, taking control, and taking seriously its home-country responsibility for outward investment and investors, especially as these investors are often located only administratively in the Netherlands.

Having reviewed the different arguments and perspectives on treaty shopping, we shall examine two important cases exemplifying this phenomenon, so as to gain insight into the approach of investment tribunals.

## 2.4 Influential Case Law on Treaty Shopping

This section highlights two key cases that illustrate how controversial the issue of treaty shopping is, even at the level of international arbitration.<sup>40</sup> Investment tribunals have not yet provided an unambiguous answer to the question of how to approach treaty-shopping practices. Arbitrators have expressed varying degrees of discomfort, but they generally point to the fact that many states have

<sup>37</sup> Human Rights Council, Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 2011 A/HRC/8/5 at 3, online: <<http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>> accessed 24 June 2011

<sup>38</sup> Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 2011 A/HRC/17/31, <<http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>> assessed 24 June 2011

<sup>39</sup> G. Ruggie, Promotion of all Human Rights, Civil, Political, Economic, Social and Cultural rights, including the Right to Development. Business and Human Rights: Towards Operationalizing the „Protect, Respect and Remedy” Framework, report to the UN Human Rights Council, May 2009, A/HRC/11/13. p.28-37

<sup>40</sup> Further case law arising specifically from BITs signed by the Netherlands will be discussed in Section four.



chosen to use broad definitions in order to encompass any legal entity incorporated in the home state.<sup>41</sup>

### **Tokios Tokelés v. Ukraine**

Tokios Tokelés, a company incorporated in Lithuania, brought a claim against the Ukrainian government for breaching certain BIT obligations between Ukraine and Lithuania.<sup>42</sup> In response, Ukraine asserted that Tokios Tokelés was in fact owned and controlled by Ukrainian nationals, and that “to find jurisdiction in this case would be tantamount to allowing Ukrainian nationals to pursue international arbitration against their own government, which the Respondent argues would be inconsistent with the object and purpose of the ICSID Convention”. Tokios Tokelés v. Ukraine is considered one of the first important cases on treaty shopping. While the BIT exclusively relied on an incorporation test, Ukraine asked the Tribunal to “pierce the corporate veil”.<sup>43</sup>

The majority Tribunal ruled in favour of Tokios, basing its decision on a reading of the term “investor” as used in the BIT between the two countries. The BIT terms provided, among other things, that, with respect to Lithuania, an investor is defined as any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations.<sup>44</sup> The Tribunal stated that a narrow reading mainly based on the terms of the Ukraine–Lithuania BIT is allowed by the ICSID Convention, “which leaves to the reasonable discretion of the parties the task of defining key terms. We should be loath to undermine it.”<sup>45</sup> As the company did not create the local subsidiary to gain access to ICSID arbitration, and the enterprise was founded six years before the BIT entered into force, the Tribunal added that there was “no evidence in the record that the Claimant used its formal legal nationality for any improper purpose.”<sup>46</sup>

However, the Tribunal’s ruling was controversial, even among its own members. The president of the Tribunal strongly dissented, by holding the opinion that the ruling of the Tribunal undermined the object and purpose of the ICSID Convention:<sup>47</sup>

*“The ICSID mechanism and remedy are not meant for, and are not to be construed as, allowing – and even less encouraging – nationals of a State party to the ICSID Convention to use a foreign corporation, whether pre-existent or created for that purpose, as a means of evading the jurisdiction of their domestic courts and the application of their national law. It is meant to protect – and thus encourage – international investment.”<sup>48</sup>*

This case illustrates the dichotomy, discussed in section 1.4 above, between those who believe that investment arbitration should be primarily and almost exclusively based on the norms concluded by the states and those that hold that additional standards and conditions, such as laid down in the ICSID Convention, are required to ensure that investments live up to certain standards in order to be protected by BITs, and fall under the jurisdiction of the ICSID.

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<sup>41</sup> L. Peterson, Investment Treaty News: 2006 – A Year in Review (2007) International Institute for Sustainable Development (IISD), <[http://www.iisd.org/pdf/2007/itn\\_year\\_review\\_2006.pdf](http://www.iisd.org/pdf/2007/itn_year_review_2006.pdf)> accessed 24 June 2011

<sup>42</sup> Tokios Tokelés v. Ukraine – ICSID Case No. ARB/02/18. Decision on Jurisdiction, (29 April 2009); see also discussion by Skinner et al. (n 1)

<sup>43</sup> Ibid Para 23

<sup>44</sup> Ukraine–Lithuania BIT. Article 1(2)(b)(II)

<sup>45</sup> Ibid Para 82

<sup>46</sup> Ibid Para 56

<sup>47</sup> Tokios Tokelés v. Ukraine – ICSID Case No. ARB/02/18 Dissenting Opinion of Prosper Weil (April 29, 2004),

<sup>48</sup> Ibid Para 30

## Phoenix Action Ltd v. Czech Republic

The claim in *Phoenix Action* arose out of an Israeli company's acquisition of two Czech metal companies, which were involved in proceedings before Czech courts. The companies were sold to Phoenix Action Ltd (*Phoenix*), a company incorporated under the laws of Israel but controlled by nationals of the Czech Republic.<sup>49</sup> Two months after the purchase, Phoenix notified the Czechs of the existence of an investment dispute. The Czech Republic argued that,

*"Phoenix's allegations as to a violation of its rights as a foreign investor fall outside the jurisdiction of the Tribunal mainly because 'Phoenix is nothing more than an ex post facto creation of a sham Israeli entity created by a Czech fugitive from justice, Vladimír Beňo, to create diversity of nationality'."*<sup>50</sup>

In addition,

*"it considered that '(t)his case represents one of the most egregious cases of "treaty-shopping" that the investment arbitration community has seen in recent history [...] and that such abusive treaty-shopping is directly at odds with the fundamental object and purpose of the ICSID Convention and the BIT, which are meant to encourage international investment'."*<sup>51</sup>

The Czechs further argued against jurisdiction of the Tribunal as the acts said to constitute a violation of the BIT took place before Phoenix acquired the companies.<sup>52</sup>

Apart from these and other jurisdictional objections, the Czech Republic stated that Phoenix abused the corporate structure, as not Phoenix but the Czech companies were the real parties to the interest. Therefore the Tribunal ought to look beyond the apparent facts and lift the corporate veil.<sup>53</sup> The Tribunal unanimously decided that the dispute fell outside the jurisdiction of the ICSID and the competence of the Tribunal. The investment was, according to the Tribunal, not "an economic investment, based on the actual or future value of the companies, but, indeed, simply a rearrangement of assets within a family, to gain access to ICSID jurisdiction to which the initial investor was not entitled."<sup>54</sup> The Tribunal was unequivocal in its judgment that "the evidence indeed shows that the Claimant made an 'investment' not for the purpose of engaging in economic activity, but for the sole purpose of bringing international litigation against the Czech Republic."<sup>55</sup>

These two cases illustrate the controversial nature of treaty shopping within arbitral practice. Whereas the Tribunal ruling in the Phoenix case unanimously judged the company to have crossed the line of what is permissible, the Tokios Tokelés case shows that – even though opinions within the ruling Tribunal diverged heavily – companies may equally be allowed to get away with treaty-shopping practices to sue (indirectly) their home governments.<sup>56</sup> In the next chapters, which provide a detailed analysis of Dutch BIT practices, several cases will be discussed in which Dutch BITs were invoked.

<sup>49</sup> Phoenix Action, Ltd v. the Czech Republic - ICSID Case No. ARB/06/5 Award (April 15, 2009); See also discussion by M. Skinner, C.A. Miles and S. Luttrell, "Access and advantage in investor-state arbitration: The law and practice of treaty shopping" (2010) 3 JWELB 260

<sup>50</sup> Ibid Para 34

<sup>51</sup> Ibid Para 34

<sup>52</sup> Ibid Para 35

<sup>53</sup> Ibid Para 40

<sup>54</sup> Ibid Para 140

<sup>55</sup> Ibid Para 142

<sup>56</sup> Formally there is no principle of stare decisis in international investment arbitration, therefore international investment tribunals are not bound by rulings of former tribunals, though, awards often refer to other case law. See G. Kaufmann Kolher, "Arbitral precedent: dream, necessity or excuse?" (2007) 23 Arbitration Intl 357

## 3. Dutch policy on BITs

### 3.1 Foundation

Closely following Germany and other European countries, the Netherlands was among the first actively to pursue BITs with developing countries. Its first BIT was concluded with Tunisia in 1963, followed by treaties with Cameroon and Cote d'Ivoire in 1965.<sup>57</sup> As of early 2010, the Netherlands had signed BITs with 98 countries, of which 91 are currently in force.<sup>58</sup> Currently, the Netherlands maintains one of the largest BIT networks in the world.<sup>59</sup>

The content of the agreements being concluded has not changed substantially since the first BITs were signed. BITs of the first generation were more concerned with promotion of investment rather than pure protection. Currently, the Netherlands negotiates its BITs on the basis of a model treaty developed in 2003 in close cooperation with Dutch industry, which resembles to a great extent the 1994 model.<sup>60</sup> With variations, most treaties, which are published on the government website,<sup>61</sup> follow the model treaty. The Dutch Model BIT is in line with the approach taken by many European countries: short provisions, without a lot of detail; broad definitions of investments; prohibitions on host governments from discriminating against foreign investments in favour of domestic investments or investments from third states; requirements for governments to ensure fair and equitable treatment of foreign investments; obligations on host governments to allow foreign investors to transfer funds and repatriate capital; requirements for prompt, adequate compensation for expropriation of foreign investors' property; and an endorsement for investors seeking relief for alleged harm by bringing direct claims against host states through international arbitration.<sup>62</sup> In the Dutch Model BIT, social and environmental objectives are referred to in the preamble only in a non-binding and non-committal manner.

<sup>57</sup> M. Skinner, C.A. Miles and S. Luttrell, "Access and advantage in investor-state arbitration: The law and practice of treaty shopping" (2010) 3 JWELB 260

<sup>58</sup> See for a total overview of BITs signed by the Netherlands: <<http://www.rijksoverheid.nl/onderwerpen/internationaal-ondernemen/documenten-en-publicaties/rapporten/2010/02/22/ibo-landenlijst.html>> accessed 24 June 2011

<sup>59</sup> See UNCTAD Bilateral Investment Treaties Database: <[http://www.unctadxi.org/templates/docsearch\\_\\_\\_\\_779.aspx](http://www.unctadxi.org/templates/docsearch____779.aspx)> accessed 24 June 2011

<sup>60</sup> Evaluation report of the Ministry of Economic Affairs on trade politics, Ministerie van Economische Zaken (2007), Beleidsdoorlichting handelspolitiek: Eindrapport, Tweede Kamer, vergaderjaar 2007-2008, 30 991, nr. 3, Den Haag.

<sup>61</sup> See: <<http://www.rijksoverheid.nl/onderwerpen/internationaal-ondernemen/documenten-en-publicaties/rapporten/2010/02/22/ibo-landenlijst.html>> accessed 24 June 2011

<sup>62</sup> N. Bernasconi-Osterwalder and L. Johnson, "Belgium's Model Bilateral Investment Treaty: A Commentary". (2010) Brussels-Geneva, IISD-Oxfam Solidarity, <http://www.s2bnetwork.org/s2bnetwork/download/Belgian%20Model%20BIT%20Commentary%208%20March%202010%20FINAL.pdf?id=372>> accessed 24 June 2011

### Box I: How Bits are concluded in the Netherlands

The procedure to conclude a BIT does not differ much from any other international treaty. Once the governments of the two countries involved have decided on each other's importance as trading partners, negotiations are opened. Depending on the stakes, these negotiations often take place in several rounds, giving an opportunity for each team of diplomats to go back and discuss the drafts with their home base. Very few people are aware of these negotiations and there is mostly no public discussion or awareness among civil society, while interested business representatives are very often informed or consulted. When the negotiations are concluded, the delegations initial the treaty. Next, their governments will have to sign the text formally, a task which is usually delegated to the Minister of Foreign Affairs or an ambassador. In the Netherlands, the treaty is subsequently published in the Netherlands' Treaty Series *Tractatenblad*, submitted to the Council of State (*Raad van State*) for an advisory opinion and sent to parliament (House of Representatives and Senate). If the House of Representatives and the Senate do not respond within 30 days, the treaty is automatically accepted. If at least one-fifth of the House or one-fifth of the Senate decide they want a vote on this treaty, there will be a vote. Usually, however, these votes are mere formalities. After this procedure the treaty enters into force, usually a month or so after the final signing.

To exit a BIT is a lot more difficult than to enter one. Article 14, the concluding article of the Dutch model BIT, gives a standard duration of 15 years after signing, during which no one-sided change or withdrawal is allowed. Unless notice of termination is given by either contracting party at least six months before the date of the expiry of its validity, the BIT is tacitly extended for periods of ten years, whereby each contracting party reserves the right to terminate the Agreement upon notice of at least six months before the subsequent date of expiry. The model treaty further contains a clause whereby, upon termination of the treaty, any investment made prior to termination of a BIT will continue to be protected by the treaty's provisions for a further 15 years.

The Dutch policy on investment treaties is part of a broader policy aimed at creating a competitive and attractive business climate in the Netherlands.<sup>63</sup> The Netherlands' investor-friendly bilateral investment treaties are not the only trump card used to attract multinationals to incorporate inside the Dutch borders. An even bigger pull factor is the favourable tax system and strong network of bilateral tax treaties that the Netherlands maintains. The blend of its tax system and investment protection has had the side-effect of attracting an estimated 20,000 letterbox companies.<sup>64</sup> With regard to investment, their presence does not appear to worry the Dutch government. In fact, in a 2007 letter to Parliament, a former Dutch trade secretary went so far as to say that whether or not investors invoking Dutch BITs are actually Dutch in any substantial way is an issue for the tribunal dealing with their complaint and no concern of the Dutch government.<sup>65</sup>

The Dutch efforts in concluding BITs have fluctuated over the years, mostly in response to negotiations on investment in multilateral fora, such as the OECD Multilateral Agreement on Investment (MAI) at the end of the 1990s, and the WTO several years later. The official Dutch position is that it still favours a multilateral investment agreement over bilateral treaties, as a multilateral treaty would create a level playing field and is more transparent.<sup>66</sup> After multilateral initiatives failed in the OECD and WTO in the late 1990s and early 2000, the Netherlands decided to refocus on bilateral treaties. A round of negotiations was launched, aimed at signing investment treaties with several strategic countries and some large energy-producing countries. At this time, Dutch efforts focused

<sup>63</sup> As the then trade secretary Mr Frank Heemskerk put it in 2008, the amount of energy invested in signing and drafting business-friendly BITs is partly based on the government policy to create such an attractive business climate. In Brief van Staatssecretaris Economische Zaken Heemskerk aan de Tweede Kamer, 1 februari 2008. <<http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2008/02/01/vragen-van-de-leden-irrgang-en-van-bommel-beiden-sp-over-bilaterale-investeringsverdrag-tussen-nederland-en-bolivia.html>> Accessed 24 June 2011

<sup>64</sup> M. van Dijk et al.

<sup>65</sup> Brief van Staatssecretaris Economische Zaken

<sup>66</sup> Evaluation report of the Ministry of Economic Affairs on trade politics, Ministerie van Economische Zaken (2007), *Beleidsdoorlichting handelspolitiek: Eindrapport, Tweede Kamer, vergaderjaar 2007-2008*, 30 991, nr. 3, Den Haag. p. 33

exclusively on these strategic countries. Other countries wanting to conclude a BIT with the Netherlands were advised simply to sign the Dutch model BIT, with little scope for negotiation.<sup>67</sup>

The core of Dutch investment policy to this day has been to create a “transparent, stable and free international investment climate.”<sup>68</sup> The conclusion of BITs is based on the premise of a positive correlation between investment agreements and trade and investment flows between countries. Furthermore, the policy aligns to the notion that investment promotes knowledge spill-overs and stimulates the host country’s economy, and as such is beneficial for developing countries.<sup>69</sup> Perhaps even more importantly, BITs offer an attractive business climate in the Netherlands and provide Dutch and foreign investors incorporated in the Netherlands with maximum protection abroad. There is no comprehensive empirical support provided for these suppositions, however, nor has the Netherlands ever carried out a methodical analysis of possible costs and benefits of its policy, let alone one which has taken into account the (social and environmental) cost of treaty shopping for the home and the host country. Despite the lack of any conclusive evidence to underpin its assumptions, the Dutch government proceeded to negotiate ever more BITs with African partner countries as part of its development agenda.<sup>70</sup>

#### **Box II: BITs and focus on development and CSR policies of the Netherlands**

BITs are promoted as an integral part of the Netherlands’ foreign policy. Poverty reduction has always been put forward as a core element of this policy. A key question, then, is whether and how BITs can be seen to contribute to this objective. The Dutch government has long promoted economic growth as the most important pre-condition for sustainable poverty reduction in poor countries, and private-sector development as the main engine to boost that growth. In its 2011 budget, the Dutch Foreign Office confirms that broad policy coherence, including through promotion of the development dimension of international trade and financial systems, is a key focus of Dutch development policy. The recommendation to poor countries is and remains: “open up your markets to attract investment capital and lift people out of poverty”. What is new is the unabashed promotion of “enlightened self-interest” by the present right-wing coalition government, which presents enhanced quality and effectiveness of Dutch trade and investment promotion as a main means towards achieving sustainable poverty reduction.

The Dutch government aims to include Corporate Social Responsibility (CSR) in *all* of the government’s activities to promote trade. While CSR is relevant terrain for many different policy fields and ministries, the Ministry of Economic Affairs, Agriculture and Innovation (EL& I) has a coordinating role. Central to the Dutch government’s CSR policy is promoting an entrepreneurial attitude that is receptive to the expectations of society. Underlying this policy is the government’s vision of the corporate social responsibility 2008–2011. The normative base is founded on the OECD Guidelines for Multinational Enterprises, the UN Global Compact and the ILO’s Tripartite Declaration on Multinational Enterprises. However, CSR starts where the law ends, and is, for the Dutch government, by nature voluntary.<sup>71</sup> While there are many instruments created to promote the CSR of Dutch companies abroad, the link between protection of rights in BITs and the Dutch duty to limit harm done by Dutch companies is absent. It does not appear that the Dutch government is considering introducing CSR into its policy regarding BITs.

In a 2011 debate on BITs and Free Trade Agreements, trade secretary Bleker confirmed once more that the BITs are meant to apply to every investor registered in the Netherlands, including for those with only a letterbox. He further noted, surprisingly, that the Dutch policy outlines not only rights but also clear duties for companies –

<sup>67</sup> Ibid p. 32

<sup>68</sup> Ibid p. 33

<sup>69</sup> Ibid p. 30

<sup>70</sup> Ibid p. 31

<sup>71</sup> MVO, <<http://www.rijksoverheid.nl/onderwerpen/maatschappelijk-verantwoord-ondernemen/watis-mvo>>

letterbox companies in particular – and added that the European Union will be creating a strong framework expressly for this purpose.<sup>72</sup> Current Dutch BITs, however, do not comprise any investor obligations, whether for letterbox companies or not, and within the European Union the Dutch government can hardly be called a progressive player on this issue (see next paragraph). While the importance of an in-depth debate on investment policy appears self-evident, the topic has thus far been raised only twice in parliament, where it was discussed in a rather minimal manner.<sup>73</sup>

## 3.2 European Integration

The Lisbon Treaty, which came into effect on 1 December 2009 with a view to enhance the efficiency and democratic legitimacy of the Union and to improve the coherence of its actions,<sup>74</sup> reorganizes the external trade policy of the European Union (EU) in a profound manner, by introducing several important institutional and substantive modifications to the EU's Common Commercial Policy (CCP), one of the key pillars in the Union's relations with the outside world. An important novelty is the inclusion of foreign direct investment (FDI) in the exclusive competence of the EU.<sup>75</sup> This has far-reaching consequences for the BITs policies of all Member States (MS). "Lisbon" has set in motion a policy process to draw up the framework for the EU's new common investment policy. This process will necessarily determine the precise nature of the applicability of existing Member State BITs, the competence of Member States to conclude BITs, and the outlines of the EU's future investment agreements.

The creation of a legal framework for the negotiation of future investment agreements (including investment chapters in trade agreements) by the EU, and the necessary transitional process to bring the Member States' BITs in line with the EU's new common investment policy,<sup>76</sup> has sparked a fierce power struggle between the institutions of the EU. The European Commission is eager to flesh out its new competences, while the Member States are reluctant to relinquish theirs. The Council, representing Member States' interests, has from the outset been actively involved in this policy process.<sup>77</sup> The Netherlands is particularly active, and adopts a self-proclaimed leadership role,<sup>78</sup> together with some other countries with huge vested interests. These countries, organised as the

<sup>72</sup> Verslag van een algemeen overleg. Vastgesteld 24 mei 201: <<https://zoek.officielebekendmakingen.nl/kst-2150102062.html?zoekcriteria=%3Fzkt%3DEenvoudig%26vrt%3D171&resultIndex=10&sorttype=1&sortorder=4>> Accessed 24 June 2011

<sup>73</sup> De staatssecretaris van Economische Zaken, Landbouw & Innovatie, Brief Nr. 1063 brief van de staatssecretaris van economische zaken, landbouw & innovatie, 24 mei 2011, Verslag van de Raad Buitenlandse Zaken d.d. 13 mei 2011

<sup>74</sup> Lisbon Treaty, Preamble. At: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0001:0010:EN:PDF>

<sup>75</sup> Treaty of the functioning of the European Union (TFEU), Article 206 and 207

<sup>76</sup> In July 2010, the EC published a draft Regulation "establishing transitional arrangements for bilateral investment agreements between Member States and third countries" and a Communication "Towards a comprehensive European international investment policy." European Commission, Proposal for a regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries Reference to documents COM(2010)0344Brussels, 7.7.2010, COM(2010)344 final, 2010/0197, [www.europarl.europa.eu/meetdocs/2009\\_2014/documents/com/com\\_com\(2010\)0344\\_/com\\_com\(2010\)0344\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2010)0344_/com_com(2010)0344_en.pdf), visited on 29 April 2011. Furthermore, reference is made to European Parliament Resolution of 6 April 2011 on the future European international investment policy (2010/2203(INI)), [www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0141+0+DOC+XML+V0//EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0141+0+DOC+XML+V0//EN), visited on 29 April 2011. Reference is furthermore made to the EU Council's Conclusions on a comprehensive European international investment policy, 3041st Foreign Affairs Council meeting Luxembourg, 25 October 2010, <[www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/117328.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf)>, visited on 29 April 2011. European Commission Communication, Towards a comprehensive European international investment policy, 8 July 2010, COM(2010)343 final

<sup>77</sup> European Council, Conclusions on a comprehensive European international investment policy, 25 October 2010, <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/117328.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf)> accessed 24 June 2011

<sup>78</sup> De staatssecretaris van Economische Zaken, Landbouw & Innovatie, Brief Nr. 1063 brief van de staatssecretaris van economische zaken, landbouw & innovatie, 24 mei 2011, Verslag van de Raad Buitenlandse Zaken d.d. 13 mei 2011

Friends of Investment,<sup>79</sup> fiercely resist phasing out existing BITs, and insist that future EU investment agreements offer “at least the same level of protection as the one provided” in the BITS instead of “high level of protection”, as proposed in a recent European Parliament Resolution.<sup>80</sup> The European Parliament calls on all parties involved to use the window of opportunity offered by “Lisbon” to rebalance the rights and obligations of investors. The position advocated by key member states like the Netherlands wilfully disregards this call for more balanced investment treaties.

With the emergence of EU investment agreements the Netherlands will, in the long run, lose its current competitive edge as a treaty haven for investors, based on attractive BITs, as the incentive to incorporate in the Netherlands to take advantage of the country’s extra-advantageous BIT network will cease to exist. In order to stay ahead, the Dutch are bent on ensuring that future EU investment agreements will offer at least the same level of protection the Dutch BITs currently offer.<sup>81</sup>

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<sup>79</sup> The most important members of the Friends of Investment are the UK, NL, FR, DE, SE, FI, ES

<sup>80</sup> Verwijzing nodig naar Arif rapport en resulterende EP resolutie.: European Parliament, Resolution on the on the future European international investment policy (2010/2203(INI)),

<sup>81</sup> T. Henquet, Dutch bilateral investment treaties and investment protection in the European union: some observations on non-discrimination and investment restructuring; Paper prepared for presentation at a conference on “Contemporary Topics in Investment Arbitration: Most Favored Nation Treatment of Substantive Rights and Investment Arbitration in China”, organised by the Association for International Arbitration, 22 October 2010, Vrije Universiteit Brussel, Belgium



## 4. Scope of the Dutch Model BIT

### 4.1 Introduction

What are the investment protections that the Dutch are so eager to maintain in the context of the EU's future common investment framework? This chapter considers the different elements that make IIAs more or less attractive to investors, by discussing several variables in IIAs relevant to treaty shopping.<sup>82</sup> To narrow down the focus of this paper, while not ignoring the vital importance of substantive investor obligations (e.g. non-discrimination standards or fair and equitable treatment), they are not included in this paper. While, for example, the investors will value the strong national treatment clause in the BIT between China and the Netherlands, it is assumed that such standards are not of decisive importance for the discerning treaty shopper.

Instead the focus is put on the definition of the terms "investor" and "investment", both of which can contain restrictive elements with the aim of excluding some – certain mailbox companies in particular – from BIT protection. In addition, some elements of the dispute settlement clauses and provisions are discussed which are highly relevant to potential treaty shoppers as these determine the conditions attached to bringing claims before international tribunals, and stipulate the tribunals to which the investor has access. Lastly, some elements related to sustainable development are included. This section discusses these provisions in IIAs and how they are included both in the Dutch Model BIT and in the actual BITs signed by the Netherlands and other states. The text also addresses some of the main problems associated with these clauses.

### 4.2 Definition of Investment

In international law, there is no standard definition of investment, and the interpretation of the term in the context of an IIA depends to a large extent on the way it has been included. Generally, IIAs have tended to favour a definition that is broad and asset-based.<sup>83</sup> The relevant clauses in IIAs usually refer to "any kind of asset", often followed by a non-exhaustive list of the forms such assets may take, which include elements such as movable and immovable property; rights derived from shares, bonds and other kinds of interests in companies and joint ventures; and claims to money from intellectual property rights. This wide definition is prevalent in the second-generation BITs concluded in the 1990s and still in force today. In recognition of the problems posed by such broad legal phrasing in a globalising world, characterised by rapidly increasing transnational investment flows, recent treaty practice is witnessing new approaches that aim to narrow the definition of investment.<sup>84</sup> These include excluding specific types of assets such as portfolio investments, certain commercial contracts, certain loans and debt securities, and so on; using a "closed list" definition with a wide asset-based list of examples which are exhaustive rather than illustrative; limiting investments to those made "in accordance with host country law"; and supplementing definitions of "investment" by express references to investment risks and other factors commonly associated with investment, thereby introducing objective criteria for specification of the scope of the definition. Important BIT countries

<sup>82</sup> M. Skinner, C.A. Miles and S. Luttrell, "Access and advantage in investor-state arbitration: The law and practice of treaty shopping" (2010) 3 JWELB 260

<sup>83</sup> UNCTAD, "Scope and Definition", (2011) UNCTAD Series on Issues in International Investment Agreements II, p.24<  
[http://www.unctad.org/en/docs/diaeia20102\\_en.pdf](http://www.unctad.org/en/docs/diaeia20102_en.pdf)> accessed 25 June 2011

<sup>84</sup> *Ibid* p. 19

such as the US (describing characteristics of an investment),<sup>85</sup> Canada (closed list)<sup>86</sup> and China (also describing characteristics of an investment)<sup>87</sup> have begun to pose some limits to the standard definition of investment.

Although the Netherlands adopted a new Model BIT in 2004, its template does not include any attempts at narrowing down the definition of investment used. Rather, it continues to rely on a broad and asset-based clause.<sup>88</sup> The Dutch Model BIT thus protects investments irrespective of whether they are significant, lasting, contribute to the host country's economic development, or are made in accordance with the host country's laws. With only a handful of exceptions, virtually all BITs concluded by the Netherlands follow this broad asset-based definition.<sup>89</sup> Some Dutch BITs do limit the scope of the definition by, *inter alia*: (1) adding that the investment has to be made in accordance with the laws and regulations of the host country;<sup>90</sup> (2) adding a paragraph stating that "investment" also covers reinvestment;<sup>91</sup> (3) adding a requirement of government approval.<sup>92</sup>

Article 10 of the Dutch Model BIT provides that the provisions of the Agreement shall, from the date of entry into force thereof, also apply to investments which have been made prior to that date. The Dutch Model follows the approach taken by most IIAs. The objective of this provision is to ensure that an investment tribunal will have jurisdiction to hear any claim even when it relates to an investment made before the agreement entered into force.<sup>93</sup> However, the Dutch BITs as concluded show considerable variations with regard to the scope of application of this clause.<sup>94</sup>

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<sup>85</sup> United States Model BIT Article 1.1 "Investment" means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk and a non-exhaustive list of forms an investment may take.

<sup>86</sup> Canada 2004 Model BIT Article 1.1

<sup>87</sup> China 2003 Model BIT Article 1.3 "Investment" means any assets owned or controlled, directly or indirectly, by investors of a Contracting Party in accordance with the laws and regulations of the other Contracting Party, including a non-exhaustive list. However, in order to qualify as an investment under this Agreement, an asset must have the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.

<sup>88</sup> "Article 1. For the purposes of this Agreement: (a) the term "investments" means every kind of asset and more particularly, though not exclusively: movable and immovable property as well as any other rights in rem in respect of every kind of asset; rights derived from shares, bonds and other kinds of interests in companies and joint ventures; claims to money, to other assets or to any performance having an economic value; rights in the field of intellectual property, technical processes, goodwill and know-how; rights granted under public law or under contract, including rights to prospect, explore, extract and win natural resources."

<sup>89</sup> Departures from the Model BIT text seem in most cases initiated by the other party to the agreement. First generation BITs concluded by the Netherlands, predominantly in the 1970s, only provide for State to State dispute settlement. Kenya (1970), Malaysia (1971), Malta (1984), Morocco (1971), Pakistan (1988), Senegal (1979), Singapore (1972), Sudan (1970) and Thailand (1972) and are excluded from this analysis

<sup>90</sup> Argentina (1992) and Turkey (1986); The BITs concluded with. Limiting the applicability of an investment agreement in this way is intended to induce foreign investors to ensure that all local laws and regulations are satisfied in the course of establishing an investment in UNCTAD

<sup>91</sup> Kuwait (2001)

<sup>92</sup> Sri Lanka (1984)

<sup>93</sup> UNCTAD, "Scope and Definition", (2011) UNCTAD Series on Issues in International Investment Agreements II, p.46<  
[http://www.unctad.org/en/docs/diaeia20102\\_en.pdf](http://www.unctad.org/en/docs/diaeia20102_en.pdf)> accessed 25 June 2011

<sup>94</sup> These can be classified into several broad categories: Agreements that follow the Dutch Model BIT and apply to investments which have been made before the agreement entered into force (around 50%); Agreements that apply to all investments, whether made before or after its entry into force, but do not apply to any dispute concerning an investment which arose, or/and any claim concerning an investment which was settled, before their entry into force (around 25%); Agreements that only apply to investments made after entry into force or include a specific limitation such as a date or application requirement. The Nicaragua BIT for example excludes legal governmental action which took place before the date of entry into force of the agreement Agreements that add whether before or after its entry into force, made in accordance with the laws and regulations of the contracting party in force at the time the investments were made; R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford Univ. Press, Oxford 2008) p.21 and p. 55.

### 4.3 The Definition of Investor

A second important element determining the scope of application of investor rights in IIAs is the definition of what constitutes an investor, as the benefits of the agreement apply only to those who qualify under the definitions provided. Most BITs include a definition of natural and legal persons as investors. There are three main tests that can be used, often in combination, to determine the nationality of the investor: the incorporation or organization test,<sup>95</sup> seat test (*siège social*),<sup>96</sup> or ownership or control test.<sup>97</sup> The Dutch Model BIT includes a definition of natural and legal persons as investors.<sup>98</sup>

In concurrence with customary international law, the commonest definitions of natural persons are persons that are considered a national or citizen in the contracting states' national legislation.<sup>99</sup> This is also the case in virtually all BITs signed by the Netherlands that generally follow the Model BIT, which provides that *the term National shall comprise: "natural persons having the nationality of that Contracting Party"*.<sup>100</sup> There is much case law on the legal definition of what constitutes a natural person. Even when alternative criteria are introduced, as some IIAs do, such as provisions relating to dual nationality, the term "natural person" remains a fairly uncontroversial legal principle.

With respect to legal persons, the Dutch Model BIT uses the place of incorporation as well as the nationality or the ownership or control test. The control test is used to broaden the scope of investors that can benefit from the BIT, as it is only for investors such as "*shareholders not constituted under the law of the contracting party but in third states.*" The requirement of foreign legal persons controlled by Dutch investors to be investors/nationals under the Dutch investment treaty is essential, as it provides the opportunity for the indirect protection of investments and brings claims under the BIT even by investors of the host state. To include indirectly controlled investors in the scope of a Dutch BIT is its hallmark for treaty shoppers: no other European BITs offer such broad scope.

Even though the BITs concluded by the Netherlands show some variation with regard to the specific wording of the relevant provisions, they generally tend to follow the broad definition used in the Dutch model BIT. Some BITs depart from the Model by using comparable extensive phrases such as "wherever located" for "not constituted under the law of Contracting Party."<sup>101</sup> Also, some BITs skip the phrase "directly or indirectly",<sup>102</sup> while others have added more specific wording with regard to the expression "legal persons" by adopting such terms as "corporations", "firms" or "associations", or even "government-controlled entities".<sup>103</sup> However, the legal implications of these adaptations are not

<sup>95</sup> The incorporation or organization test is most commonly used and provides that a legal entity acquires nationality by way of incorporation. It covers investors without any other connection with the state.

<sup>96</sup> The seat or *siège social* test provides that a legal person holds the nationality of the primary place of incorporation or where the effective management takes place. This test is most often used to prevent treaty shopping or to avoid granting protection to "mail-box" companies

<sup>97</sup> UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* UNCTAD, (2007) UNCTAD/ITE/IIT/2006/5, < [http://www.unctad.org/en/docs/iteiia20065\\_en.pdf](http://www.unctad.org/en/docs/iteiia20065_en.pdf) > accessed 24 June 2011

<sup>98</sup> It provides in Article 1.b: the term "nationals" shall comprise with regard to either Contracting Party:  
natural persons having the nationality of that Contracting Party;  
legal persons constituted under the law of that Contracting Party;  
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)."

<sup>99</sup> In IIAs sometimes the term natural persons, nationals, physical persons or citizens is used.

<sup>100</sup> Model BIT article 1.b

<sup>101</sup> Peru (1994), Zimbabwe (1996) and Uruguay (1988)

<sup>102</sup> Ukraine (1994)

<sup>103</sup> Mainly BITs concluded with Asian countries

directly clear. On the whole, Dutch BITs (more than three quarters of all BITs in force) do not substantially differ from the Model.<sup>104</sup>

#### 4.4 Dispute Settlement

Investor–state dispute settlement is the mainstay of the current investment regime. It is also its most contentious and problematic element. Investment dispute settlement is a relatively recent and rather radical new approach that, in 1995, even before the recent explosion of investor-state cases, was described as “dramatically different from anything previously known in the international sphere”.<sup>105</sup> The dispute settlement regime in its current form allows investors to circumvent domestic courts and bring claims against host governments directly before an international tribunal, as it does not require the prior exhaustion of local remedies. This is in contrast to, for example, international human rights treaties, which do require victims of human rights violations to exhaust local remedies. Dispute settlement clauses provide the rationale behind treaty shopping, with investors not only seeking to secure access to international arbitration but also to optimise their chances of a favourable ruling from the international tribunal that is to judge their grievances. Many states have limiting conditions in their BITs that must be fulfilled before an investor can file a claim for international arbitration. These include efforts to settle the dispute amicably within a certain period, consent from both parties before submitting a dispute for arbitration, or clarification of the interaction through local remedies. Lately, there have been attempts to tighten conditions further, with countries introducing more detailed procedural requirements, such as written notification and rules on transparency.<sup>106</sup>

The provision on investor–state dispute settlement in the Dutch Model BIT is rather short compared to many other BITs.<sup>107</sup> Central elements are: direct access to ICSID; no exhaustion of local remedies; no requirements related to amicable settlements of disputes; and explicit reference to nationals of the host party being treated as nationals of the other Contracting Party, in case they are controlled by nationals of the home state. Whereas the first generation of BITs concluded by the Netherlands, predominantly in the 1970s, only provided for state-to-state dispute settlement, there are now a further 28 Dutch BITs that follow the Model to the letter.<sup>108</sup> The remaining BITs show considerable variation in the wording of their dispute settlement clauses. All, however, allow for investors to sue host states before international tribunals when they feel that host state regulations are impinging on their investment and expected profits. There is a rather broad category that includes reference to additional international arbitration rules, in case the other Party is not a member of the ICSID. These clauses generally stipulate that disputes must be referred to ICSID, ICSID’s Additional Facility, or otherwise to an ad hoc tribunal established in accordance with the UNCITRAL rules. In some cases, the Stockholm Chamber of Commerce, the rules of the London Court of International Arbitration or the ICC rules are

<sup>104</sup> The 2001 China-Dutch BIT combines a incorporation with a seat test.

<sup>105</sup> See, e.g.: J. Paulsson, “Arbitration Without Privity” (1995) 10 ICSID Rev – Foreign Investment LJ 232, 256 (“[T]his is not a sub-genre of an existing discipline. It is dramatically different from anything previously known in the international sphere”).

<sup>106</sup> UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, 2007, p. 105.

<sup>107</sup> “Article 9: Each Contracting Party hereby consents to submit any legal dispute arising between that Contracting Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Contracting Party to the International Centre for Settlement of Investment Disputes for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965. A legal person which is a national of one Contracting Party and which before such a dispute arises is controlled by nationals of the other Contracting Party shall, in accordance with Article 25 (2) (b) of the Convention, for the purpose of the Convention be treated as a national of the other Contracting Party.”

<sup>108</sup> Bangladesh(1994), Belarus(1995), Belize (2002), Benin (2001), Bosnia-Herzegovina (1998), Gambia (2002), Georgia(1998), Jordan (1997), Kazakhstan (2002), Latvia (1994), Lithuania (1994), Macedonia (1998), Malawi (2003), Mali (2003), Moldova (1995), Mongolia (1995), Mozambique (2001), Nicaragua (2000), Nigeria (1992), Paraguay (1992), Peru (1994), Slovenia (1996), Tajikistan (2002), Tanzania (2001), Tunisia (1998), Uganda (2000), Uzbekistan (1996), Yemen (1985)

specifically mentioned. Several BITs, such as the Lebanon BIT, refer to “the competent court of the Contracting Party in the territory of which the investment has been made” as one of the possibilities for submitting disputes. Only the BITs with Chile and Sri Lanka require the exhaustion of local remedies, and the BIT with China states that a dispute may be submitted to international dispute settlement only if the investor concerned has withdrawn its case from the domestic court. Many BITs further contain a clause on striving for amicable settlement of a dispute within a set time frame, mostly within either three months (19 BITs) or six months (22 BITs), before an investor is allowed to put his claim before an international arbitration tribunal. Most BITs which provide for additional avenues besides ICSID state that the award shall be final and binding.

Dutch BITs increase their attractiveness to foreign investors by either containing or disregarding certain elements related to investment arbitration. Most Dutch BITs contain a so-called umbrella clause, by which the host state is bound to observe all commitments or obligations it has entered into with a foreign investor; they are gathered under the umbrella of the BIT. The Dutch model BIT,<sup>109</sup> like many others, phrases its umbrella clause (referring to “any obligations”) to give the widest scope.<sup>110</sup> And it is this that makes them highly contentious. Around three quarters of the BITs concluded by the Netherlands employ such language. Most of the remaining Dutch BITs, by contrast, contain no umbrella clause. A small third category deviates from these norms.<sup>111</sup> Neither the Dutch Model nor any of the concluded BITs contain a so-called “denial of benefits” clause. Recently, they have tended to be included in IIAs with the express aim of preventing treaty shopping. Denial of benefit clauses have the same aim as restrictive definitions of “investor” within BITs (i.e deny the benefits of the treaty to a company that does not have an economic connection to the state on whose nationality it relies), and are a mark of third generation BITs.<sup>112</sup>

In its use of what may be called an investor-friendly dispute-settlement clause, the Dutch model BIT, like most BITs in force, fails to address a number of other problems inherent in investor–state dispute settlement, such as issues relating to arbitrators’ conflicts of interests and the absence of any process fostering sound decision-making and predictability, such as an appeals mechanism. In terms of process, despite a growing international concern in relation to such issues, the Dutch model BIT is silent on requirements regarding transparency of procedures. As dispute settlement in international investment law is derived from international commercial arbitration, investor–state disputes can, owing to considerations of confidentiality, be sealed off from public scrutiny. Investor-state arbitration, however, often concerns issues that have an important public aspect. The arbitration cases – more than 300 – launched since the first cases in the 1990s, mostly against developing countries, have centred on issues of public interest, such as social policy and natural resources. In addition, awards can potentially have a chilling effect on proposed legislation, when governments fear that measures under consideration may invoke huge claims under international investment treaties, with damages

<sup>109</sup> Article 3.4 of the Dutch model BIT states: “Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals of the other Contracting Party.”

<sup>110</sup> *Eureko B.V. v. Poland*, Partial Award 19 August 2005 at para. 246. In OECD, *Interpretation of the Umbrella Clause in Investment Agreements 3* (Working Paper on Int’l Inv. No. 2006/3, 2006)

<sup>111</sup> The Dutch-India BIT for example includes an exhaustion of local remedies clause specifically for investor-state contracts, while the Dutch BIT with Mexico stipulates that disputes arising out of investor-state contracts will be settled under the terms of the contracts underlying the obligations. Depending on the nature of the conflict and the presence of an investor state conflict, an umbrella clause can be an invaluable asset for investors.

<sup>112</sup> The effect of a denial of benefits clause can be explained in the following manner: “Under such a clause, the states reserve the right to deny the benefits of the treaty to a company that does not have an economic connection to the state on whose nationality it relies. The economic connection would consist in control by nationals of the state of nationality or in substantial business activities in that state.” In R Dolzer and C Schreuer, *Principles of International Investment Law* (OUP, New York 2008) p. 55 and LA Mistelis and CM Baltag, “Denial of Benefits and art 17 of the Energy Charter Treaty” (2009) 113 Penn St L R 1301, §1.

potentially draining their budgets for social spending, health and education. A measure of accountability therefore becomes vital, which can be ensured only through enhanced transparency. States such as the US and Canada have begun to include provisions to ensure openness of procedures in their IIAs. Not so the Dutch.

## 4.5 Environmental, Social and Related Issues in IIAs

To ensure that IIAs prevent conflicts between investment promotion and other policy goals, a trend has emerged in investment agreements in the last decade to include provisions on environmental and labour standards and other issues related to sustainable development. Where some states – including the parties to NAFTA, Canada and India – have steered a progressive course, European states have only recently begun to refer to the environment, labour and anti-corruption.<sup>113</sup> Text on these issues has taken several forms, including in (non-binding) preambles specifying the goal of a treaty in terms of, inter alia, sustainable development, non-lowering of standards, the right to regulate, and cooperation commitments regarding social and environmental issues.<sup>114</sup> To date, however, no clear-cut, binding investor obligations have been included in any agreement.

The Dutch model BIT includes some wording on sustainable development in its preamble.<sup>115</sup> Placing it there constitutes a weak form of integrating environmental, labour, and sustainable development goals in IIAs, as opposed to measures integrated within the main body of a treaty, as occurs in, for example, the Belgium model BIT and the US and Canadian models.<sup>116</sup>

This language is weak in a number of respects. The commitment itself uses phrases such as “recognising” or “considering” rather than the more explicit “shall” or “will”, and so remains rather vague and unspecific. It fails to specify any of the labour rights referred to, and carries no reference to any other human right. The Dutch practice with regard to social and environmental clauses in investment treaties is surprising, given the fact that time and again the Dutch government has stated that it is a fierce proponent of CSR norms and social and environmental chapters in European trade and investment agreements.<sup>117</sup> A neighbouring country, Belgium, seems to be far more progressive in this respect, integrating at least labour and environmental clauses in the main part of text.<sup>118</sup>

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<sup>113</sup> N.Bernasconi-Osterwalder and L.Johnson, “Belgium’s Model Bilateral Investment Treaty: A Commentary”. (2010) Brussels-Geneva, IISD-Oxfam Solidarity, <http://www.s2bnetwork.org/s2bnetwork/download/Belgian%20Model%20BIT%20Commentary%208%20March%202010%20FINAL.pdf?id=372> accessed 24 June 2011

<sup>114</sup> S. Spears, “The Quest for Policy Space in a New generation of International Investment Agreements, (2010) *Journal of International Economic Law*, 13(4) p. 1037--1075

<sup>115</sup> The relevant text states Recognising that the development of economic and business ties will promote internationally accepted labour standards; Considering that these objectives can be achieved without compromising health, safety and environmental measures of general application;

<sup>116</sup> The Vienna Convention on the Law of Treaties prioritizes the ordinary meaning of specific substantive text over general purpose statements, the Preamble is so often ignored in favour of a broad definition provision. In UNCTAD p.120

<sup>117</sup> See for example the recent letter of the Secretary of economic affairs to the Dutch parliament: Nr. 105 Brief van de staatssecretaris van Economische Zaken, Landbouw en Innovatie, Aan de Voorzitter van de Tweede Kamer der Staten-Generaal Den Haag, 23 maart 2011; and EZ, and Evaluation report of the Ministry of Economic Affairs on trade politics, Ministerie van Economische Zaken (2007), Beleidsdoorlichting handelspolitiek: Eindrapport, Tweede Kamer, vergaderjaar 2007-2008, 30 991, nr. 3, Den Haag.

<sup>118</sup> N.Bernasconi-Osterwalder and L.Johnson, “Belgium’s Model Bilateral Investment Treaty: A Commentary”. (2010) Brussels-Geneva, IISD-Oxfam Solidarity, <http://www.s2bnetwork.org/s2bnetwork/download/Belgian%20Model%20BIT%20Commentary%208%20March%202010%20FINAL.pdf?id=372> accessed 24 June 2011

As case law on this type of provision in international arbitration is also still minimal, it can be assumed that treaty shoppers will not (yet) base their decision to incorporate in a specific jurisdiction on the presence or absence of such clauses. The particularly weak terminology used in Dutch BITs is unlikely to cause transnational corporations to shun the Netherlands as a treaty haven in the near future.



## 5. Awards

### 5.1 Introduction

The broad definitions of “investment” and “investor” used in Dutch BITs, allowing for a wide interpretation of the protections offered by their provisions, have resulted in dozens of companies that have shopped their way into investment arbitration by incorporating in the Netherlands. This is borne out by the analysis presented here of the 40-odd arbitration cases launched under Dutch BITs, which shows that the majority (29) of the investors that have sought arbitration through a Dutch investment treaty are foreign (i.e. the ultimate or controlling parent is not based in the Netherlands), while 25 of these claimants are so-called letterbox companies, with no employees or any substantial activities in the Netherlands.

Arbitration awards involving Dutch investors have been discussed in many articles and commentaries. To date, however, an inclusive overview of all known cases involving Dutch investors is lacking. This chapter seeks to offer some qualitative and quantitative insights into investment agreement claims under BITs signed by the Netherlands and third countries, drawing on a variety of sources, primarily official awards, the UNCTAD Database of Treaty-Based Investor–State Dispute Settlement Cases, and the Investment Treaty Arbitration website.

Before going into detail, however, a disclaimer is required. Although a marked trend has emerged of late towards increased transparency in relation to international investment arbitration, neither the arbitration framework as such nor the majority of IIAs, including the Dutch model BIT, contain many specific rules and regulations with regard to the level of transparency or access to case-related documents. Rather, what rules there are focus on guaranteeing the confidentiality of awards. As a result, an unknown number of cases remain undisclosed and unreported, with settlements reached behind closed doors and/or related documents remaining hidden. As there is no single up-to-date database on arbitration cases to draw on, and the Dutch government does not publish an inclusive list of arbitrations in which Dutch investors are claimants, the analysis presented here is based on information gathered by combining multiple sources, and it must be assumed that the data presented is incomplete.

## 5.2 Quantification of Cases

The analysis presented here includes 41 arbitration cases. Based on the premise that the total of known investment treaty claims is roughly 400,<sup>119</sup> the Netherlands accounts for about 10% of all cases. So far, the Netherlands has never been the respondent in an investment arbitration; in all cases the Dutch investor is the claimant. To compare this figure, there are less than 10 known claims in which Belgium investors are involved, less than 20 with French investors, less than 30 with German investors, but over 70 in which a US investor is a claimant. In two of the cases discussed, the claim relies not on the Dutch BIT with a third country, but on the Energy Charter Treaty (ECT), to which the Netherlands is a party. These cases have been included in the analysis, however, as they both relate to a foreign investor incorporated in the Netherlands, using the Dutch route, as their countries of origin (the US and Canada) are not party to the ECT itself.

When looking at the host countries that have been subjected to claims by Dutch investors, it appears that the countries listed most frequently are the countries with most claims globally. It must be mentioned, however, that Venezuela is over-represented, with eight cases from Dutch investors out of around 15 globally, while Argentina is under-represented, with two Dutch claimants and 51 claims worldwide. Interestingly, where the dispute settlement clause in the Venezuela–Netherlands BIT permits international arbitration, the Argentina–Netherlands BIT obliges the use of local remedies before international dispute settlement is accessible.

**Table 1 Host countries subjected to claims by Dutch investors**

Host country	Number of claims	Total
Venezuela	8	8
Czech Republic	6	6
Kazakhstan	3	3
Azerbaijan/Bolivia/India/Turkey	2	8
Slovak Republic	2	3
Argentina/Estonia/Georgia/Mongolia/Nicaragua/Nigeria/Paraguay/Romania/Senegal/Slovenia/Tunisia/Vietnam/Zimbabwe	1	13
Total		41

Crucially, the data clearly indicate that the majority (29) of the investors seeking arbitration through a Dutch investment treaty are foreign (the ultimate or controlling parent is not based in the Netherlands), while 25 of all legal persons acting as claimants have no employees at all on the payroll: these companies are no more than shell companies, with hardly any substantial activities in the Netherlands. There are six Dutch investors, and the origin in three cases is unknown.

As to the current status (June 2011) of the cases, 13 were pending and 13 had been settled. Awards favouring the investor (six) outweighed rulings in favour of host states (four). In three cases, the status of the awards remains unknown. In one instance an award was rendered but not made public, while in another the proceedings were discontinued.

<sup>119</sup> UNCTAD, "Scope and Definition", (2011) UNCTAD Series on Issues in International Investment Agreements II, <[http://www.unctad.org/en/docs/diaeia20102\\_en.pdf](http://www.unctad.org/en/docs/diaeia20102_en.pdf)> accessed 25 June 2011

The damages sought by the investor vary extremely, and can be very substantial. In 9 cases, the exact amount could not be identified. In 12 cases it was more than US\$1bn, in 15 cases between US\$25m and US\$1bn, and in 5 cases less than US\$25m.

Amounts sought by the investor	Number of cases
>US\$10bn	4
US\$1.1bn–10bn	8
US\$251m–1bn	7
US\$26m–250m	8
<US\$25m	5
N/A	9
Total	41
Total amount	c. US\$100bn

The amounts add up to US\$100bn. In the cases that have an outcome that (most probably) compensates an investor (natural persons excluded), in only one case, of the 13 that are settled, is the amount disclosed (US\$650, *Holcim v. Venezuela*). In four of the six cases settled in favour of the investor the amounts of money are known: they vary between less than US\$1m and US\$4.3bn.<sup>120</sup>

### 5.3 Treaty shopping perceived through arbitral awards

In general, the arbitration tribunals that were asked to rule under the provisions of Dutch BITs upheld the broad, asset-based definition of investment used therein, as well as the limited requirements for “national” or “investor”.<sup>121</sup> In doing so, these tribunals have effectively given their seal of approval to the practice where investors have restructured their investment through the Netherlands in order to benefit from the extensive protection offered by Dutch BITs. An in-depth discussion of all tribunal awards involving matters related to treaty shopping falls outside the scope of this paper; instead, a non-exhaustive series of examples that illustrate how arbitration tribunals have dealt with treaty shopping practices are described below. These are presented chronologically and have been limited to those cases on which official documentation has been disclosed.

#### CME Czech Republic BV v. Czech Republic

Company	CME Czech Republic BV, liquidated in 2006. Daughter of CME Media Enterprises BV Dam 5 -B, 1012JS Amsterdam. Financial holding, 2 employees.
Forum	UNCITRAL (2001)
Host country	Czech Republic
Initial Claim	US\$560m
Status	Awarded in favour of the investor
Award	US\$270m
Mother company	Central European Media Enterprises, Czech Republic

<sup>120</sup> *Eureko v. Poland* (US\$4.3bn); *CME Check Republic v. Czech* (US\$560); *Eastern Sugar v. Poland* (US\$26m); *Fedax v. Venezuela* (Less than US\$1m)

<sup>121</sup> T. Henquet, Dutch bilateral investment treaties and investment protection in the European union: some observations on non-discrimination and investment restructuring; Paper prepared for presentation at a conference on “Contemporary Topics in Investment Arbitration: Most Favored Nation Treatment of Substantive Rights and Investment Arbitration in China”, organised by the Association for International Arbitration, 22 October 2010, Vrije Universiteit Brussel, Belgium

A controversial and widely discussed case regarding treaty and forum shopping, *CME Czech Republic BV v. Czech Republic* illustrates how one investor can tactically initiate parallel proceedings against the same state, under two different BITs, with regard to the same dispute.<sup>122</sup> Two claims brought at approximately the same time by the ultimate controlling shareholder, Lauder, a US investor, under the BIT between the United States and the Czech Republic, and by CME Czech Republic, a Dutch company that holds shares in the local company under the Netherlands–Czech Republic BIT. CME Czech Republic BV was also owned by Lauder. The Czech Republic prevailed against Lauder, but was ordered to pay US\$270 million in damages to CME.

The CME Tribunal rejected the Czech Republic’s argument that Mr Lauder had been engaged in impermissible treaty shopping:

*“The argument of abusive treaty shopping is not convincing. A party may seek its legal protection under any scheme provided by the laws of the host country. The Treaty, as well as the US Treaty, is part of the laws of the Czech Republic and neither of the treaties supersedes the other. Any overlapping of the results of parallel process must be dealt with on the level of loss and quantum but not on the level of breach of treaty.”*<sup>123</sup>

This ruling has also been caused by the over-wide definition of “investment” and “investor” in the BITs. Different entities (owner, shareholder, investor) along the ownership chain of the multinational company are regarded as distinct nationals, each having its potential claim under the BITs available to it.<sup>124</sup> This outcome would have been avoided if a control test had been included in the BIT. Then the corporate veil could have been lifted, revealing the true nationality of the owner.

#### **Aguas del Tunari, SA v. Republic of Bolivia**

<b>Company</b>	<b>International Water Holdings BV Teleportboulevard 140, 1043EJ Amsterdam. Liquidated in 2010. Direct parent: 50% Baywater Holdings BV Prins Bernhardplein 200, 1097JB Amsterdam. Financial holding of Bechtel, US 50% Edison, Italy 50%</b>
Forum	ICSID (2003)
Host country	Bolivia
Initial Claim	US\$25million
Status	Settled
Award	N/A
Mother company	Bechtel, US 50% Edison, Italy 50%

*Aguas del Tunari, SA v. Republic of Bolivia*, known in connection with the *Cochabamba* water wars,<sup>125</sup> clearly demonstrates the ambiguous nature of definitions in investment treaties. The broad definitions of “investor” and “investment” enable investment tribunals to interpret of these concepts very widely, sometimes leading to unintended outcomes for the host country. In this case, awarded under the Netherlands–Bolivia BIT, the Tribunal rejected Bolivia’s complaint that Aguas was not an entity “controlled directly or indirectly” by a national of the Netherlands, as is set out in the BIT. Bolivia held the opinion that (effective) control referred to the ultimate owner, the US company Bechtel. This argument caused the Tribunal to analyse thoroughly the meaning and application of the term

<sup>122</sup> *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award of September 13, 2001

<sup>123</sup> Paragraph 419 of the Award. *CME Czech Republic B.V. v. Czech Republic*, Partial Award (September 13, 2001)

<sup>124</sup> R. F. Hansen, *Investment treaty arbitration and International Political Economy: The systemic challenge of investor nationality in an era of multinational enterprises*, no date, < <http://www.asil.org/files/ielconferencepapers/hansen.pdf>> accessed 24 June 2011

<sup>125</sup> *Aguas del Tunari, S.A. v. Republic of Bolivia*, Decision on Respondent’s Objections to Jurisdiction, 21 October 2005, ICSID Case No. ARB/02/3,

“controlled directly or indirectly” in the Bolivia–Netherlands BIT. In the end, the majority of the Tribunal concluded that the BIT does not require actual day-to-day or ultimate control as part of the “controlled directly or indirectly requirement contained in Article 1(b)(iii).”<sup>126</sup> The Tribunal also concluded that it does not view this treaty shopping conduct as problematic:

*“This decision reflects the growing web of treaty based referrals to arbitration of certain investment disputes. Although titled ‘bilateral’ investment treaties, this case makes clear that which has been clear to negotiating states for some time, namely that through the definition of ‘national’ or ‘investor’, such treaties serve in many cases more broadly as portals through which investments are structured, organized, and, most importantly, encouraged through the availability of a neutral forum. The language of the definition of ‘national’ in many BITS evidences that such national routing of investments is entirely in keeping with the purpose of the instruments and the motivations of the state parties.”*<sup>127</sup>

In *Aguas v. Bolivia*, the Tribunal accepted that it was possible to restructure an investment in order to access the BIT in case the original home state did not sign a BIT with the Host state.

### Saluka Investment BV v. Czech Republic

Company	Saluka Investments BV, subsidiary of Netherlands Nomura Nederland
Forum	UNCITRAL (2004)
Host country	Czech Republic
Initial Claim	US\$1.25bn
Status	Awarded in favour of the investor
Award	N/A
Mother company	Nomura Europe in London, subsidiary of Investment Group, Japan

In *Saluka v. Czech Republic*, the Japanese bank Nomura, via its London subsidiary, created a “special purpose vehicle” incorporated in the Netherlands.<sup>128</sup> This Dutch subsidiary brought a claim under a BIT between the Netherlands and the Czech Republic. The Czech Republic contended that the claim should be dismissed as Nomura did not have any bona fide factual links to the Netherlands, stating that Saluka was a mere shell company. As such, according to the Czech Republic, it did not satisfy the requirements necessary to qualify as an “investor” able to benefit from the provisions of the Treaty.<sup>129</sup> The Tribunal, however, ruled that the BIT contained no language which would exclude holding companies such as Saluka from benefiting from investment protection. Particularly, the Tribunal has

*“some sympathy for the argument that a company which has no real connection with a State party to a BIT, and which is in reality a mere shell company controlled by another company which is not constituted under the laws of that State, should not be entitled to invoke the provisions of that treaty. Such a possibility lends itself to abuses of the arbitral procedure, and to practices of ‘treaty shopping’ which can share many of the disadvantages of the widely criticized practice of ‘forum shopping’.”*<sup>130</sup>

<sup>126</sup> Para 264. The Declaration of José Luis Alberro–Semerena dissents to the Tribunal’s decision as to the interpretation given to the phrase “controlled directly or indirectly.” The difference between the majority and the dissent as to Respondent’s request for production for documents follows directly from their difference in the interpretation of that phrase. Para 265

<sup>127</sup> Para. 332

<sup>128</sup> *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL Partial Award, 17 March 2006

<sup>129</sup> Para239-240

<sup>130</sup> paras. 240-241.

Despite this statement, the Tribunal remained of the opinion that the provisions of the treaty should guide its decision, and that it could not impose a narrower definition of “investor” than that to which the State Parties to the agreement had concluded.<sup>131</sup> The Tribunal felt that its hands were tied by the loose definition of “investor” in the treaty.

### TSA Spectrum de Argentina SA v. Argentina

<b>Company</b>	<b>TSA Spectrum de Argentina SA, fully owned by TSI Spectrum International NV Financial holding, no employees.</b>
Forum	ICSID (2005)
Host country	Argentina
Initial Claim	US\$509m
Status	Awarded in favour of the state
Award	N/A
Mother company	TSA Spectrum based in Argentina

This is an exceptional case, as the Tribunal has looked beyond the formal place of incorporation in order to determine the “true” nationality of the investor, who was a national of the host state. In TSA Spectrum v. Argentina, one of the objections of Argentina to the jurisdiction of the Tribunal was that TSA did not constitute a legal person enjoying protection as an investor under the BIT.<sup>132</sup> The Tribunal stated that “*only a genuinely foreign investment should be protected by the ICSID mechanism.*”<sup>133</sup> It denied jurisdiction under Article 25(2)(b) of the ICSID Convention on the basis that the Argentinian claimant TSA, while 100% owned by a Dutch company, was ultimately owned by an Argentinian citizen:

*“The only conclusion that can be drawn from the information and evidence available to the Tribunal is thus that the ultimate owner of TSA on and around the date of consent was the Argentinian citizen Mr. Jorge Justo Neuss. It therefore follows that, whatever interpretation is given to the BIT between Argentina and the Netherlands, including the Protocol to the BIT, TSA cannot be treated, for the purposes of Article 25(2)(b) of the ICSID Convention, as a national of the Netherlands because of absence of “foreign control” and that the Arbitral Tribunal therefore lacks jurisdiction to examine TSA’s claims.”<sup>134</sup>*

### Rompetrol v. Romania

<b>Company</b>	<b>The Rompetrol Group NV, Strawinskyiaan 807 Tower A-8 Amsterdam. Financial holding, no employees. Since 2009 subsidiary of Kaz MunaiGax PKOP</b>
Forum	ICSID (2006)
Host country	Romania
Initial Claim	US\$150m
Status	Pending
Award	N/A
Mother company	Luxembourg company called ROGI, owned at time by Romanian nationals Mr Marin and Mr Patriciu

<sup>131</sup> Ibid

<sup>132</sup> See TSA Spectrum de Argentina S.A. v. Argentine Republic, Award, 19 December 2008, ICSID Case No. ARB/05/5, Para 39

<sup>133</sup> Para 118

<sup>134</sup> Para 162

The 2008 dispute in *Rompetrol v. Romania*, in the Romanian oil sector,<sup>135</sup> arose between a Dutch-incorporated energy company and the Government of Romania. However, Romania has asked the tribunal to decline jurisdiction because the Dutch company is a shell company.<sup>136</sup> The country argued that the company's “*real and effective nationality*’ – *determined on the basis of its ownership and control, the source of its capital, and the nature of its commercial operations* – *is that of the Respondent.*”<sup>137</sup>

The Tribunal declined this argument and noted that the provisions of the BIT between the Netherlands and Romania are clear with regard to relying solely on a incorporation test: “*the Tribunal is in no doubt, in the face of the clear provisions of Article 1(b) of the BIT, that Romania did specifically consent to ICSID jurisdiction over claims brought by Dutch companies, without regard to the incidents of control or source of capital.*”<sup>138</sup> The arbitrators also stated that it is not controversial for states to negotiate international treaties *that apply to their own citizens*:

*“The classic instance is that characteristic feature of our period, human rights, but there is no reason why identical policy considerations should not animate States in trade, environmental or other fields; and indeed, as one knows from practical experience, important elements connected with property, assets and economic activity enter into the heart of human rights regimes.”*<sup>139</sup>

According to the tribunal, Romania might have willingly negotiated an international treaty which protected its own citizens provided that they incorporated in another territory and then invoked the treaty in the guise of foreign investors.<sup>140</sup> Nevertheless, with regard to treaty interpretation, the Tribunal noted that, in the end, it does not matter what the Parties to a BIT might (or might not) conceivably have intended by signing the BIT, but what they actually did, and the evidence for that is the terms of the treaty they concluded.

### Mobil v. Venezuela

<b>Company</b>	<b>Mobil Corporation, Mobil Cerro Negro Holding Ltd, Mobil Venezolana de Petróleos Holdings, Inc. Mobil Cerro Negro Ltd, Mobil Venezolana de Petróleos, Inc., Venezuela Holdings BV, Venezuela Holding BV, Graaf Engelbertlaan 75, 4837DS Breda. Financial holding company, subsidiary of Exxon Mobil, no employees</b>
Forum	ICSID (2007)
Host country	Venezuela
Initial Claim	US\$6bn
Status	Pending
Award	N/A
Mother company	Exxon Mobil USA

*Mobil v. Venezuela* concerns a dispute around the nationalization of oil and gas projects, brought against Venezuela by the Dutch holding company *Venezuela Holdings BV*, two Delaware (US) holding

<sup>135</sup> The Rompetrol Group N.V. v. Romania, Decision on Respondent’s Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, ICSID Case No. ARB/06/3

<sup>136</sup> Id., para. 100.

<sup>137</sup> Para 100

<sup>138</sup> Id. para. 101.

<sup>139</sup> Para 109

<sup>140</sup> See also L. Peterson, Human Rights and Bilateral Investment Treaties, Mapping the role of human rights law within investor-state arbitration , Rights and Democracy, 2009, <[http://www.dd-rd.ca/site/\\_PDF/publications/globalization/HIRA-volume3-ENG.pdf](http://www.dd-rd.ca/site/_PDF/publications/globalization/HIRA-volume3-ENG.pdf) >, accessed July 2011



companies, and two Bahamian companies.<sup>141</sup> The company responded to this by instituting investment arbitration pursuant to the 1993 BIT between the Netherlands and Venezuela.<sup>142</sup>

Venezuela challenged the jurisdiction of the Tribunal and contended that the BIT does not provide a basis for ICSID jurisdiction over the dispute. It submits that the Dutch holding Venezuela Holdings is a “corporation of convenience” created in anticipation of litigation against the Republic of Venezuela for the sole purpose of gaining access to ICSID jurisdiction, and concludes that *“this abuse of the corporate form and blatant treaty-shopping should not be condoned.”*<sup>143</sup>

With regard to the provisions of the BIT, Venezuela contends that they “establish that the obligations of a Contracting Party run only to nationals of the other Contracting Party with respect to their own investments and only to the extent that those investments are located in the territory of the first Contracting Party.”<sup>144</sup> Mobil did not deny the allegation put forward, and admitted that in 2004, after the first unilateral tax imposition, it “undertook a review of the extent of the legal protection for its investments in Venezuela”. Upon doing so, it concluded in early 2005 that it should restructure its Venezuelan investments through a holding company incorporated in the Netherlands, which had a bilateral investment treaty with Venezuela.<sup>145</sup>

The Tribunal noted that the main if not the sole purpose of the restructuring was to protect Mobil investments from adverse Venezuelan measures in getting access to ICSID arbitration through the Netherlands–Venezuela BIT.<sup>146</sup> It also concluded that the restructuring of the investments to protect investments against breaches of their rights by the Venezuelan authorities by gaining access to ICSID arbitration through the BIT was *“a perfectly legitimate goal as far as it concerned future disputes.”*<sup>147</sup> In addition, according to the Tribunal, the situation is different with regard to pre-existing disputes. It considers that *“to restructure investments only in order to gain jurisdiction under a BIT for such disputes would constitute [...] an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs.”*<sup>148</sup>

For the Tribunal, treaty shopping or corporate planning in order to gain treaty protection is allowed. This planning was, according to the Tribunal, legitimate regarding claims that arose after the Claimants’ corporate restructuring, but not those that arose before the restructuring.

#### **CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v. Venezuela**

<b>Company</b>	<b>CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV. CEMEX Caracas Investments BV, subsidiary of CEMEX Spain, subsidiary of CEMEX Mexico. Financial holding, Amsteldijk 166, 1079LH Amsterdam, 4 employees</b>
Forum	ICSID (2009)
Host country	Venezuela
Initial Claim	Over US\$1bn
Status	Pending
Award	N/A

<sup>141</sup> Mobil Corporation, Venezuela Holdings B.V.; Mobil Cerro Negro Holdings, Ltd.; Mobil Venezolana de Petróleos Holdings, Inc.; Mobil Cerro Negro, Ltd.; and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela, Decision on Jurisdiction, 10 June 2010, ICSID Case No. ARB/07/27

<sup>142</sup> M. Skinner, C.A. Miles and S. Luttrell, “Access and advantage in investor-state arbitration: The law and practice of treaty shopping” (2010) 3 JWELB 260

<sup>143</sup> Para 27

<sup>144</sup> Id., para. 162.

<sup>145</sup> Para 189

<sup>146</sup> Para 190

<sup>147</sup> Para 204

<sup>148</sup> Para 205

Mother company	CEMEX, Mexico
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In 2008, Cemex Caracas Investments BV and Cemex Caracas II Investments BV,<sup>149</sup> companies incorporated in the Netherlands, filed a Request for Arbitration against Venezuela with the ICSID. Venezuela's prime objection to the ICSID Tribunal's jurisdiction under the treaty stemmed from its contention that both Cemex Caracas Investments BV and Cemex Caracas II Investments BV are indirect investors in Cemex Venezuela, since they control it through their ownership of a Cayman entity known as Vencement Investments, which owns 75.7% of Cemex Venezuela's shares.

The Tribunal observed that a number of ICSID tribunals had considered the question of indirect investment. It also noted that there is no explicit reference to direct or indirect investments in the BIT, and in particular in Article 1(a). It stated that the definition of investment given in that article is very broad. The definition includes "*every kind of assets*" and enumerates specific categories of investments as examples, and indirect investment is an investment made by an indirect investor. As the BIT covers indirect investments, it necessarily entitles indirect investors to assert claims for alleged violations of the Treaty concerning the investments that they indirectly own.

The Tribunal further noted that, when the BIT mentions investments "of" nationals of the other contracting party, it means that those investments must belong to such nationals in order to be covered by the treaty. But this does not imply that they must be "directly" owned by those nationals. Similarly, when the BIT mentions investments made "in" the territory of a contracting party, all it requires is that the investment itself be situated in that territory. It does not imply that those investments must be "directly" made in such territory.<sup>150</sup> Thus, unsurprisingly, the Tribunal dismissed Venezuela's jurisdictional objections.

### Final remarks

The Netherlands is particularly popular because of its broad scope of application, which is due to the extensive definitions of "investment" and "investor/national" in these treaties.<sup>151</sup> Dutch BITs seem to provide an ideal breeding ground for treaty shopping for investment protection. Foreign companies that aim to take advantage of the broad scope of application of Dutch BITs, and their strong substantive investor protection, should bring the investment under the relevant Dutch BIT by bringing a (new or existing) Dutch (intermediate) company in the corporate investment chain. The above examples illustrate how loose definitions can facilitate expansive interpretations regarding who is qualified to initiate proceedings in international tribunals. They also illustrate the danger of treaty shopping when an unpredictable number of shareholders (direct, indirect, minority shareholders) qualify to start arbitration, and how unanticipated risks can be generated for the host country.

An analysis of case law shows that the Dutch policy to attract investors has resulted in dozens (41) of known investment cases (10% of known investment cases worldwide!) started by companies that have shopped their way into investment arbitration by incorporating in the Netherlands. Most of these companies are foreign, and the majority can be considered shell companies. The damages sought by

<sup>149</sup> CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela, March 3, 2010, ICSID Case No. ARB/08/15

<sup>150</sup> Para 157-158

<sup>151</sup> T. Henquet, Dutch bilateral investment treaties and investment protection in the European union: some observations on non-discrimination and investment restructuring; Paper prepared for presentation at a conference on "Contemporary Topics in Investment Arbitration: Most Favored Nation Treatment of Substantive Rights and Investment Arbitration in China", organised by the Association for International Arbitration, 22 October 2010, Vrije Universiteit Brussel, Belgium

the investor are in many cases substantial, in 12 cases more than US\$1bn. In general, the arbitration tribunals that were asked to rule under the provisions of Dutch BITs upheld the broad definition of investment and investor. The overview allows some preliminary conclusions. With regard to the conduct of treaty shopping, most tribunals have expressed some unease. Tribunals are to a large extent bound by the scope of application and the provisions in the treaties signed by the contracting states (Rompetro, Saluka, Cemex, Aguas). Intention is not decisive, but content is (Rompetro). But the same tribunal seems to know that the current patchwork of bilateral treaties is actually meant to function as a multilateral system. Property rights are compared to human rights, and are in principle inalienable, regardless of nationality. The extensive uses of wide definitions in IIAs are evidence of the intent that treaty shopping is perceived by states as unproblematic (Aguas). ICSID provides for some restrictions (TSA spectrum), including additional criteria to lift the corporate veil. However, the discretionary space for tribunals to apply additional criteria is almost boundless. In addition, companies are in some cases allowed to get away with treaty shopping practices to (indirectly) sue their home governments. Some tribunals problematize treaty shopping, but feel restricted in addressing these considerations in their rulings (Saluka).

## 6. Conclusions and recommendations

Recently, there has been renewed attention for the at times problematic relation between the international investment regime and issues relating to the global governance of MNCs and sustainable development, including human rights and environmental concerns. On the other hand, and somewhat conflicting, investment is increasingly seen as a development tool. The growing recognition of the impacts that business activities, in particular those of powerful transnational investors, can have on human rights and sustainable development, coupled with the exponential growth of transnational economic activity since the 1990s, call for an urgent reassessment of the frameworks currently guiding the protection of international investment.

For Europe, the coming into effect of the Lisbon Treaty in 2009 offers a unique opportunity to make such a reassessment. “Lisbon” transfers the competence to negotiate investment treaties from the EU’s member states to the EU level. This demands that the EU and its member states now begin to outline the framework for a future common investment policy, as well as transitional arrangements to bring member states’ existing BITs into line with the broader principles of human rights and sustainable development underpinning all EU policy. If, however, such policy coherence is to precede objectives of simply ensuring maximum protection for home country investors in host states, a switch in mind-set is required in the EU member states – the Dutch not least – as key participants in this debate. The Netherlands, as a major foreign investor, is one of the pivotal member states in the debate about the future EU investment treaty framework. Not only does the Netherlands maintain an extensive network of bilateral investment treaties (95), the Dutch government also notes that in the EU there are only four countries that invest more than the Netherlands, and only six that host more investments.<sup>152</sup>

The Dutch position in the European investment debate is that any future EU policy must offer at least the same level of protection that Dutch investors currently enjoy. The Dutch seem reluctant to begin viewing their investment policy, with its generous protection of investor rights, in a broader policy context which would require a policy rebalancing to include specific investor obligations in relation to human rights and sustainable development. However, the Netherlands is a preferred investment jurisdiction mainly because of its generous fiscal regime. Should the transfer of competences from the member states to the EU result in a common policy that will cost the Dutch their competitive edge related to investment treaties, they will not have existing investors driven away by an enforced lowering of the investment protections they currently enjoy. The Dutch seem relatively unconcerned by any undesirable side-effects of the extensive investment protections safeguarded by their BITs. Letterbox companies making use of investor-friendly Dutch BITs to challenge the regulatory frameworks of host states is not seen as problematic.

Rather, the Netherlands prides itself on the scope of application of its BITs, which expressly aims to include indirectly controlled investors and allows entities with no substantial ties to a contracting state to avail themselves, through these BITs, of the treaty protections that their own state may not be willing to extend to investors vis-à-vis the state hosting their investments. By making clever use of third-country BITs, including those of the Netherlands, treaty shopping can even enable corporations to bring suits against their own countries of origin. In terms of sustainability, the Dutch ought to recognise that extensive investor protections enable easy circumvention of economic, social or

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<sup>152</sup> Fiche 10: Verordening overgangsregeling bilaterale investeringsovereenkomsten

environmental conditions related to the admission of investments put up by host country authorities and that treaty shopping can thus expose. In relation to the wider policy context, there is scant recognition, not only in the Netherlands, but among all EU member states that investor–state dispute settlement based on broad-based BIT definitions can pose a danger to policy space and the safeguarding of public goods and interests, and that this constitutes a risk no longer limited to developing countries, but, in the wake of globalisation, has become an increasingly realistic scenario for the developed world.<sup>153</sup>

As such, Dutch investment policy is at odds with the Dutch government’s own development objectives and CSR policies. The new Dutch model BIT treaty, adopted in 2004, shows by omission that calls to take such wider ramifications of investment protection into consideration continue to fall on deaf ears. But even the Dutch government cannot ignore that, in the aftermath of the current financial crisis, foreign investors, especially from emerging economies, are increasingly making their presence felt in Europe, taking over strategic industries and private public-service providers, thus highlighting the increasing friction between investor “rights” and public policy objectives.

This paper shows that treaty shopping is not a marginal side-effect of Dutch BITs, but poses a real problem. Our analysis of the 41 known Dutch BIT arbitration cases – roughly 10% of the global total – clearly indicates the wide range of treaty shopping practices: a substantial majority (29) of the investors that have sought arbitration through a Dutch investment treaty is foreign (i.e. the country in which the ultimate or controlling parent is based is not the Netherlands), while 25 of these claimants are so-called letterbox companies, with no employees or substantial activities in the Netherlands. What kind of benefits does this policy bring? Could it endanger diplomatic ties with host countries that are getting sued under Dutch BITs? This has already happened with Bolivia.

These findings call for a renewed focus – and not just in the Netherlands – on policy coherence in order to bring investment policy in line with broader (foreign) policy objectives relating to development, human rights and inclusive growth. Much recent attention among of governments, civil society organizations, practitioners and academics has focused on the imbalances in the international investment regime, specifically the imbalance between investor rights on the one hand and public interest and investor obligations on the other. Rather than resist change, the Netherlands ought to follow the example of various other countries such as Canada, South Africa and Belgium that have woken up to the new realities of globalisation and have begun to develop so-called third generation BITs that seek to achieve a better balance between investor interests, on the one hand, and, on the other, the regulatory powers of host states and non-economic factors such as the protection of health, safety, the environment and recognised social and human rights. The Netherlands ought to show the vision and leadership to take advantage of the opportunity offered by “Lisbon” to re-evaluate the basic principles underpinning its investment policy. They should be guided in this by rational assumptions arising from recent analytical insights and an adequate cost–benefit analysis based on international

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<sup>153</sup> Ruggie on policy space: “States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts. Commentary: Economic agreements concluded by States, either with other States or with business enterprises – such as bilateral investment treaties, free-trade agreements or contracts for investment projects – create economic opportunities for States. But they can also affect the domestic policy space of governments. For example, the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so. Therefore, States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection.” John Ruggie, “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework”, 2011 <<http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf>> accessed 24 September 2011

standards that should include, among others, the International Bill of Human Rights, the UN Business and Human Rights Framework, the OECD Guidelines for Multinational Enterprises, the ILO Conventions and the UN Global Compact.

In 2005, the UN appointed John Ruggie as its Secretary General's Special Representative on Business and Human Rights to call attention to businesses' impact on human rights following the exponential growth of transnational economic activity since the 1990s<sup>154</sup> and to investigate and issue recommendations on the corporate responsibility to respect and uphold human rights. The work of Ruggie and his team resulted in the presentation in March 2011 of a framework of UN Guiding Principles on Business and Human Rights, to help to operationalize and promote his earlier business and human rights framework, presented in 2008. The aim of the Special Representative on Business and Human Rights was to establish "a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity".<sup>155</sup> While the Dutch government fiercely supports the UN Business and Human Rights Agenda, policy-makers fail to understand that the State duty to respect as outlined by these Guiding Principles requires them to deepen their understanding of the relation between investment law and policy and the impact of "Dutch" companies abroad. As an influential 2011 study on CSR and European corporations notes: "This can lead to substantial legal and policy incoherence and gaps in protecting human rights and the environment, which often entails significant negative consequences for victims, corporations and States themselves."<sup>156</sup>

The Netherlands should live up to its duty to devise policy frameworks that are in line with the human rights and sustainable development responsibilities of states and the corresponding duty of corporate enterprise to respect these rights. In anticipation of a wider common European framework, the Dutch ought to begin to advocate a standard that firmly embeds investment policy in this wider framework of responsibilities and ought to adapt its investment treaties accordingly when they come up for extension or renegotiation. Following UN Guiding Principles on Business and Human Rights and taking advantage of the window of opportunity in European policy development, the task now facing the Dutch government, Dutch M(E)Ps and CSOs working on Dutch trade and investment policies is to devise a model for socially responsible investing which fully takes into account the human rights, social and environmental impacts of (foreign) investments. This would require the Netherlands to do the following:

- ❑ **Narrow the overly broad definitions of "investor" and "investment" used in the text.** Legal wording that extends protections to indirectly controlled investors and speculative forms of investment should be avoided. In recognition of the problems associated with treaty shopping, Dutch BITs would benefit from the incorporation of a denial of benefits clause, which allows contracting parties to deny treaty protection to those companies that are controlled by investors of an entity that is not party to the treaty, and that have no substantial business activity in the territory of the party under whose laws they are constituted.<sup>157</sup> For instance the Cariforum- EU Economic Partnership Agreement defines that a juridical person "shall not be considered as a juridical

<sup>154</sup> John Ruggie, "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework", 2011 <<http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf>> accessed 24 September 2011

<sup>155</sup> UN, Business and Human Rights Guiding Principles, endorsed by the HRC in June 2011, See: <<http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-endorsed-16-jun-2011.pdf>> 24 September 2011

<sup>156</sup> In 2011, the United Nations Trade and Development Conference (UNCTAD), in accordance with its mission to "help developing countries to participate as effectively as possible in international rule-setting for investment", has dedicated publications to several contentious issues surrounding IIAs, including on the scope and definitions used in these treaties; on the impact of IIAs on sovereign debt restructuring; and on IIAs and alternatives to arbitration in investor-state disputes.

<sup>157</sup> UNCTAD, Bilateral Investment Treaties 1995–2006: Trends In Investment Rulemaking, 2006, [http://www.unctad.org/en/docs/iteiia20065\\_en.pdf](http://www.unctad.org/en/docs/iteiia20065_en.pdf) Accessed 24 September 2011

person of the EC Party or of a Signatory CARIFORUM State respectively, unless it engages in substantive business operations (1) in the territory to which the Treaty establishing the European Community applies or of a Signatory CARIFORUM State.”<sup>158</sup>

- ❑ **Incorporate clauses explicitly safeguarding host states’ policy space to regulate (and offer scope for expansion if and when needed) in the interest of protecting public goods and interests.** While the problem is most acute in less advanced capital-importing countries, where flanking regulation is often insufficient to prevent, address or mitigate harmful side-effects of (far-reaching) investment protections, it is also an issue in the capital-exporting countries, where regulatory frameworks tend to be more advanced. In relation to developing countries, a recent European Parliament resolution calls for space to allow developing countries to pursue their own industrial and development policies as well as for “fairness in investment agreements [...] allowing developing countries to discriminate between different investments on the basis of their contribution to development objectives” and the inclusion of more narrowly defined non-discrimination clauses (national treatment and most favoured nation), “with a more precise wording in the definition mentioning that foreign and national investors must operate ‘in like circumstances’ and allowing some flexibility in the MFN clause in order not to obstruct regional integration processes in developing countries”.<sup>159</sup>
- ❑ **Develop policies that enable regulatory oversight of Dutch and European companies abroad.** Current government policy is completely geared to enhancing the attractiveness of the Netherlands as a business hub. However, there seems to be no real interest in the levels of sustainability of the companies these policies attract or their operations outside the Netherlands. By stimulating the establishment of thousands of mailbox companies, over which regulatory oversight is virtually impossible, the Netherlands will perforce attract dodgy business. Dutch companies’ investments can potentially have adverse effects on rights to food, water, education, health, decent living standards, work and development. Such impacts should be extensively assessed prior to the negotiation of investment agreements by the Netherlands and the EU.
- ❑ **Increase transparency regarding treaty making and fix the democratic deficit surrounding BITs.** International investment agreements by nature severely limit governments’ scope for national policy-making. However, parliamentary involvement in the Netherlands has, so far, been very limited and restricted to specific disputes. Fixing this democratic deficit is crucial as inward investment into Europe increases, raising the chances of claims against European countries, including the Netherlands, while controversies in the EU run high about who is to foot the bill for compensations granted in such cases: the European Union or the member state concerned.
- ❑ **Include enforceable sustainability clauses in the body of BIT texts.** These should refer to the body of internationally recognised standards, including, among others, the International Bill of Human Rights, the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises, the ILO Conventions and the UN Global Compact. In the Dutch model BIT, as in most EU member state BITs, social and environmental objectives are referred to only in the preamble, in a non-binding and non-committal manner. Policy coherence to monitor

<sup>158</sup> Art. 61 of the Cariforum- EU Economic Partnership Agreement : Footnote (1) defines: “In line with its notification of the EC Treaty to the WTO (WT/REG39/1), the EC Party understands that the concept of ‘effective and continuous link’ with the economy of a Member State enshrined in Article 48 of the EC Treaty is equivalent to the concept of ‘substantive business operations’ provided in Article V, paragraph 6, of the GATS, and in this Agreement.”

<sup>159</sup> European Parliament, Report on the future international investment policy, (2010/2203(INI))

<<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A7-2011-0070&language=EN>>



and address transnational corporations CSR records in third countries effectively should begin with the establishment of appropriate policy frameworks at home. The Netherlands is an outspoken proponent of both the recent update of the OECD Guidelines and the UN Guiding Principles. It likes to put itself forward as a champion of the incorporation of CSR norms and social and environmental chapters in EU trade and investment agreements. To give teeth to these important initiatives and intentions, the Netherlands would need to critically assess and adapt the trade and investment promotion policies that support Dutch business abroad, including BITs. Human rights impact assessments and the inclusion of effectively functioning sustainability clauses can be a first positive step. The integration of CSR in BITs would promote investment for development by decreasing the possible negative effects of the activities of multinationals, particularly in countries without effectively functioning governments.

- **Measure the impact of BITs and other treaties on developing countries.** In terms of development policy coherence, the Netherlands should take a critical look at the premise underlying its current trade and investment policy – that opening markets to attract foreign capital is a panacea for the sustainable reduction of poverty. It is a truth almost universally acknowledged that maintaining a tax regime like that of the Netherlands, which serves to facilitate the transfer-pricing and tax-dodging practices that multinational companies are notorious for, deprives host country governments of the public funds needed to devise the policies to lift their people out of poverty. It is equally clear that investment protections that hamper targeted industrial and labour market policies in developing countries and leave host countries wide open to litigation from MNCs, whose claims for damages can seriously drain public coffers, are less than conducive to poverty eradication.
- **Incorporate a much more balanced dispute-settlement arrangement.** This should at the very least include greater transparency in terms of proceedings and the disclosure of information, a roster of permanent arbitrators, and rules to avoid conflicts of interest, as well as an appeals mechanism. An obligation to exhaust local legal remedies before reverting to international arbitration should also be included. This would force countries to observe local laws and regulations, and would have the additional benefit of helping to reinforce the rule of law, in particular in developing countries. In addition, dispute settlement arrangements should allow balancing the investment treaty obligations with other international human rights and environmental treaty obligations.

If, as expected in our globalising world, former outward investors increasingly become the recipients of foreign investment, leaving them open to seeing their own regulatory frameworks challenged before international tribunals, the risks associated with the investment protections that make this possible may well be painfully brought home. The above recommendations should underpin Dutch negotiating perspectives in the (re-)negotiations of the country's BITs, with the aim of achieving a better balance between investors' rights and obligations. They should also guide the positions the Netherlands takes at the European level in relation to the drawing up of a future EU-wide investment policy framework. The possible adverse effects on sustainable development of extensive investment protections outlined in this paper make a strong case for both ex-ante and ex-post assessments of the impacts of investments covered by home states' BITs. As a tax haven and a preferred jurisdiction for treaty shoppers, the Netherlands carries an extra responsibility

## Annex 1 Overview of claims invoked by Dutch investors

Company	Tribunal	Host Country	Case initiated in	Amount sought by the investor	Status	Awarded settled	Ultimate parent	Incorporated in the Netherlands	Number of employees in NLD
The Williams Companies, International Holdings BV, WilPro Energy Services (El Furrial) Limited and WilPro Energy Services (Pigap II) Limited	ICSID	Venezuela	2011	US\$ 7.5bn	Pending		Austria	Administered by a trust office	0
Khan Resources BV	UNCITRAL (ECT)	Mongolia	2011	US\$200m	Pending		Canada	Subsidiary of Khan Resources	0
AES Corporation and Tau Power BV	ICSID (ECT)	Kazakhstan	2010	N/A	Pending		USA	Tau Powers BV financial holding	0
KT Asia Investment Group BV	ICSID	Kazakhstan	2009	US\$1,5bn	Pending		Unknown	Administered by trust office	0
Holcim Limited, Holderfin BV and Caricement BV	ICSID	Venezuela	2009	N/A	Settled	US\$650	Swiss	Subsidiary of Holcim Swiss	5

Itera International Energy LLC and Itera Group NV	ICSID	Georgia	2008	N/A	Settled	N/A	Swiss	Subsidiary of Gasitera Suisse AG	0
Alapli Elektrik BV	ICSID (ECT)	Turkey	2008	Over US\$ 100m	Pending		Luxembourg	subsidiary of TMF Group HoldCo BV (over 1200 subsidiaries) subsidiary of T Beta Sarl in Luxembourg	0
CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV	ICSID	Venezuela	2009	Over US\$1bn	Pending		Mexico	CEMEX Caracas Investments BV subsidiary of CEMEX Spain, subsidiary of CEMEX mexico	4
Millicom International Operations BV <i>et al.</i>	ICSID	Senegal	2008	US\$600m	Pending		Luxembourg	Millicom International Celular, Luxembourg	0
Eureko	UNCITRAL	Slovak Republic	2008	Over US\$144	Pending		Netherlands	Achmea, Rabobank, Netherlands	23000
HICEE	UNCITRAL	Slovak Republic	2008	Over US\$1bn	Awarded in favour of the state		Cyprus	Subsidiary of Penta Cyprus	2
Saba Fakes	ICSID	Turkey	2007	US\$19bn	Awarded in favour of the state		Natural person	Natural person	0

Mobil Corporation, Mobil Cerro Negro Holding, Ltd, Mobil Venezolana de Petróleos Holdings, Inc. Mobil Cerro Negro, Ltd, Mobil Venezolana de Petróleos, Inc., Venezuela Holdings BV	ICSID	Venezuela	2007	US\$6bn	Pending		USA	Exxon Mobil USA	0
Shell Nigeria Ultra Deep Limited	ICSID	Nigeria	2007	Over US\$500m	Pending		Netherlands	SHELL Gas Nigeria BV	0
Liman Caspian Oil BV and NCL Dutch Investment BV	UNCITRAL (ECT)	Kazakhstan	2007	Over US\$200m	Award rendered but not public	N/A	Luxembourg	Citco C&T Holdings (Luxembourg) 1678 subsidiaries	0
ConocoPhillips Company (US), Petrozuata BV (Netherlands) and ConocoPhillips Gulf of Paria BV (Netherlands)	ICSID	Venezuela	2007	US\$30bn	Pending		USA	Subsidiary of Conoco Orinoco INC	0

Eni Dación BV	ICSID	Venezuela	2007	US\$1.1bn	Settled	N/A	Italy	subsidiary of ENI OIL Holdings BV, Subsidiary of Enl Spa in Italy	0
Fondel Metal	ICSID	Azerbaijan	2007	N/A	Settled	N/A	Netherlands	subsidiary of Fondel Netherlands BV	5
Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV	ICSID	Paraguay	2007	US\$22m	Pending		France	Bureau Veritas Group, France	48
E.T.I. Euro Telecom International NV	ICSID	Bolivia	2007	US\$60m	Unknown	N/A	Italia	Telecom Italia	0
Invesmart BV	UNCITRAL	Czech Republic	2007	US\$158m	Unknown	N/A	Italy	Investar SGR SpA	0
The Rompetrol Group NV	ICSID	Romania	2006	US\$150m	Pending		Romania/Kazakhstan	Kaz MunaiGaz	0
Azpetrol International Holdings BV, Azpetrol Group BV and Azpetrol Oil Services Group BV	ICSID (ECT)	Azerbaijan	2006	US\$350m	awarded in favor of the state		Azerbaijan	Azpetrol, Azerbaijan	0
Rail World LLC and others	ICSID	Estonia	2006	N/A	Settled	N/A	USA	USA	0

Shell Brands International AG and Shell Nicaragua SA	ICSID	Nicaragua	2006	N/A	Settled	N/A	Netherlands	Shell Netherlands	N/A
Bernardus Henricus Funnekotter and others	ICSID	Zimbabwe	2005	US\$15	awarded in favor of the investor	US\$12	Natural person	Natural person	N/A
TSA Spectrum de Argentina SA	ICSID	Argentina	2005	US\$509m	awarded in favour of the state		Argentina	Argentinian company	0
K+Venture Partners	UNCITRAL	Czech Republic	2005	US\$5.1m	Settled	N/A	Unknown	N/A	0
I&I Beheer B.V.	ICSID	Venezuela	2005	US\$300 million	Proceeding discontinued		Unknown	N/A	1
Mittal Steel Company NV	ICSID	Czech Republic	2005	US\$1.4bn	Settled	N/A	Luxembourg	ArcelorMittal, UK/Luxembourg	0
	UNCITRAL	Vietnam	2004	US\$140million	Settled	N/A	Natural person	Natural person	
ABCI Investments	ICSID	Tunisia	2004	N/A	N/A	N/A	Bahrein	ABC Bank – Jordan	N/A

Interbrew	ICSID	Slovenia	2004	N/A	Settled	N/A	Belgium	Inbev (previously Interbrew),	0
ABN Amro NV	UNCITRAL	India	2004	N/A	Settled	N/A	Netherlands	ABNAMRO	N/A
Offshore Power Production CV, Travamark Two BV, EFS India-Energy BV, Enron BV, and Indian Power Investments BV (Netherlands)	UNCITRAL	India	2004	over US\$4 billion	Settled	N/A	USA	General Electric, USA	0
Eastern Sugar	UNCITRAL	Czech Republic	2004	US\$143million	awarded in favour of the investor	US\$26	UK	Man Group PLC, UK	0
Saluka Investments BV	UNCITRAL	Czech Republic	2004	US\$1.25bn	awarded in favour of the investor	N/A	Japan	Netherlands Nomura Nederland NV	24
Aguas del Tunari S.A.	ICSID	Bolivia	2003	US\$25 million	Settled	N/A	USA/Italy	Bechtel, US 50% Edison, Italy 50%	0



Eureko	UNCITRAL	Poland	2003	US\$14bn	awarded in favour of the investor	US\$4.3 bn	Netherlands	Netherlands	22,000 (worldwide)
CME Czech Republic BV	UNCITRAL	Czech Republic	2001	US\$ 560 million	awarded in favour of the investor	US\$ 269,814,000	Czech republic	2	2
Fedax NV	ICSID	Venezuela	1998	less than 1 million	awarded in favour of the investor	US\$598,950	Netherlands Antilles	Curacao	0