JONES DAY

COMMENTARY

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Renegotiation of Existing BITs by the Netherlands May Directly Affect Current Investments

IN SHORT

The Situation: The Netherlands has 79 bilateral investment treaties ("BITs") in place with non-EU countries. On March 22, 2019, the Dutch government published a new model BIT ("2019 Model") as a template for negotiating new non-EU BITs and replacing existing ones. The 2019 Model offers investors less protection than do existing BITs.

The Result: The Netherlands plans to renegotiate existing BITs based on the 2019 Model. Investors that currently rely on a Dutch BIT may be affected, in particular if existing sunset protection no longer applies.

Looking Ahead: In May 2019, the Netherlands obtained authorization from the European Commission to renegotiate its existing BITs with Argentina, Burkina Faso, Ecuador, Nigeria, Tanzania, Turkey, the United Arab Emirates, and Uganda, and to start negotiations for new BITs with Qatar and Iraq.

In response to public criticism of existing BITs and to implement its new sustainable trade and investment policy, the Dutch government sought to replace its 2004 model BIT. In May 2018, it published a draft version of the 2019 Model for public consultation. Subsequently, an amended version was published in October 2018. Following discussions in Dutch Parliament, further amendments were made that resulted in the current 2019 Model. Read the 2019 Dutch Model BIT (source document in Dutch).

> “ Under the 2019 Model, an 'investor' must either have substantial business activities within the Dutch jurisdiction or be owned or controlled by such a person or entity. ”

Pure Holding Companies May No Longer Qualify for Investment Protection

Under the 2019 Model, an "investor" must either have substantial business activities within the Dutch jurisdiction or be owned or controlled by such a person or entity. There are no fixed criteria for what is "substantial." The 2019 Model nonexclusively lists indicators such as location of registered office or headquarters, number of employees, turnover, and the nature and maturity of the activities. These indicators should be assessed in each specific case.

The Scope of Investments Is Narrower

An "investment" is defined as requiring a certain duration, the commitment of capital or other resources, and the assumption of risk. Claims to money arising solely from commercial contracts for the sale of goods or services, the domestic financing of such contracts, or any related order, judgment, or arbitral award are excluded.

The Level of Substantive Protection Is More Limited

The "most-favored-nation" clause no longer allows investors to claim a breach of this provision due to more favorable treatment accorded to investors in other treaties, absent measures adopted or maintained pursuant to those obligations. Under the fair and equitable treatment provision, legitimate expectations cover only investments that were induced by specific representations by the contracting party. Therefore, general changes in regulatory regime may no longer be covered. The concept of "indirect expropriation" is confined to deprivation of "fundamental attributes of property." Whether this is the situation requires a case-by-case, fact-based inquiry, using factors such as economic impact of the measures(s), their duration, character, object, and context.

Investor-State Dispute Settlement

With respect to investor-state dispute settlement ("ISDS"), investors may choose to resolve disputes under the International Centre for Settlement of Investment Disputes ("ICSID") Convention or on the basis of the ICSID Additional Facility Rules and the United Nations Commission on International Trade Law Arbitration Rules. The appointment of arbitrators, however, will be reserved for the Secretary-General of ICSID or for the Secretary-General of the Permanent Court of Arbitration, depending upon which rules apply.

Compensation in the Case of Noncompliance

Arbitrators may limit or deny compensation in the case of an investor's noncompliance with corporate social responsibility policies. In particular, this applies to the Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises and the United Nations Guiding Principles on Business and Human Rights.

Prescription Periods

Investors should be aware of prescription periods for the filing of a request or consultations. Claims must be commenced two years after local remedies were exhausted or ceased, or within five years of the date on which the investor first acquired or should have acquired knowledge of the infringement and resulting loss.

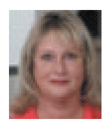
Sunset Clauses in Existing BITs May No Longer Apply

If a BIT is replaced by a new BIT based on the 2019 Model, such clauses may not be applicable. On one occasion, the Dutch government has already stated a preference for using a replacement, since termination of the existing BIT would trigger a sunset clause entitling investors to a 15-year protection extension.

THREE KEY TAKEAWAYS

1. Pure holding companies may no longer qualify for investment protection unless their owners have substantial business activities in the Netherlands.
2. Sunset clauses may no longer apply if existing BITs are replaced by new BITs.
3. Investors should carefully monitor pending negotiations and evaluate whether current investments need restructuring, with a view to maintaining optimal investment protection and access to ISDS.


Charles T. Kotuby Jr.
Washington


Gerjanne te Winkel
Amsterdam


Niels van Loon
Amsterdam


Baiju S. Vasani
London

Kornel Olsthoorn, an associate in the Amsterdam Office, contributed to the preparation of this Commentary.

All Contacts >>>

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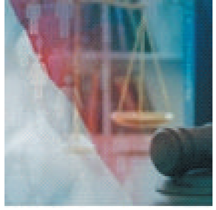

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