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The 2019 Dutch Model BIT: Its Remarkable Traits and the Impact on FDI

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On 22 March 2019, the Dutch Government released the text of the new model Netherlands BIT. Its idealism has been applauded: the new model prioritizes gender and regional diversity as well as the United Nations sustainability goals. Yet, what would the effect be of some of the model's provisions on Foreign Direct Investment ('FDI')? For decades, States, not investors, drafted and concluded treaties to protect and attract foreign investors. Some of the new elements of the Dutch Model BIT raise concerns as to how they would impact FDI. How would investors be likely to respond if the Netherlands were to replace existing BITs with this new text?

The Model's Innovative Elements: Sustainability and Social Responsibility

Heeding criticism of ISDS, the former Minister of Trade and Development decided that the text for Dutch model BITs should be modernized: with a reset that would contribute to sustainable development and a fair distribution of wealth in the world.

On 26 October 2018, the Foreign Minister submitted a letter to the Dutch House of Representatives to confirm the objectives of the proposed model BIT: enhancing sustainability and inclusivity with an eye towards the role investors could play in promoting the UN's Sustainability Goals.

The drafters of the text also focused on corporate social responsibility and regional and gender diversity:[1)]

> The Contracting Parties reaffirm the importance of each Contracting Party to encourage investors operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party, such as the OECD Guidelines for Multinationals Enterprises, the United Nations Guiding Principles on Business and Human Rights, and the Recommendations CM/REC(2016) of the Committee of Ministers to Member States on human rights and business. (Article 7(2) of the Dutch Model BIT) [emphasis added]

> The Contracting Parties are committed to promote the development of international investment in such a way as to contribute to the objective of sustainable development. …. Each Contracting Party shall ensure that its investment laws and policies provide for and encourage high levels of environmental and labor protection and shall strive to continue to improve those laws and policies and their underlying levels of protection. (Article 6 (1) and (2) of the Dutch Model BIT)

Going forward, investors can be held accountable and responsible for not complying with the principles of the UN Guiding Principles on Business and Human Rights and the OECD guidelines for multinationals, one of the focal points of the Foreign Minister:

> Without prejudice to national administrative or criminal law procedures, a Tribunal, in deciding on the amount of compensation, is expected to take into account non-compliance by the investor with its commitments under the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises. (Article 23 of the Dutch Model BIT)

The Position on Foreign Investment

The drafters seem animated by a perception that the balance between investors and States has been tilted in favor of investors. The investor-State relationship will no longer be a binary one: other interests must be considered.[2)] The Dutch Foreign Minister raised the concern about damages awarded in international arbitration being too high. It was felt that those amounts could exceed compensation allowed under Dutch law:

> The Tribunal shall not award punitive damages. Monetary damages shall not be greater than the loss suffered by the investor, reduced by any prior damages or compensation already provided in relation to the same factual dispute. (Article 22 (4))

The Minister also wrote to the House of Representatives to indicate the view that, before the current system is replaced by the Multilateral Investment Court, the procedure as envisaged by the model text would improve duration and cost, an important benefit for SMEs.

But it is not clear how the new BIT would reduce duration and cost. It seems that a new appointment mechanism and the departure from party autonomy – discussed below – will likely lead to uncertainty. If parties can no longer appoint arbitrators who are best qualified to adjudicate the dispute at hand, it is more likely that annulment proceedings will follow. Also, given that the Dutch Government apparently welcomes the prospect of a Multilateral Investment Court, it is important to consider the investors' position and the MIC's potential impact on investment.

Equally, the Minister does acknowledge that investment could lead to more employment opportunities and increase know-how and innovation.

Appointment of Arbitrators

The new model text replaces the current processes that exist in ISDS for appointing arbitrators. The text no longer allows for parties to appoint the arbitrators who are to adjudicate the disputes:

> All Members of the Tribunal under this Agreement shall be appointed by an appointing authority. (Article 20 of the Dutch Model BIT)

The treaty thus provides guidelines for the institutional appointment of arbitrators. Those changes were emphasized as an important improvement by the Foreign Minister: the changes to the appointment processes are supposed to boost the impartiality and independence of arbitrators. This change was also arguably made to increase gender and regional diversity. The Minister furthermore emphasized how transparency will be increased and how a role is carved out for third parties.

Proposals to eliminate party autonomy, even if only partially by depriving parties the right to appoint an arbitrator, seem contrary to the interests of States as well as investors. A key element of party autonomy is for both parties to the dispute to have equal participation in the constitution of the tribunal.[3)] Not allowing disputants to appoint the arbitrators takes away the pillar of party autonomy – a key characteristic of international arbitration and the New York Convention. When it comes to enforcement of awards, for any arbitration not administered by ICSID, one must resort to the New York Convention. This treaty only applies to decisions that qualify as arbitral awards. Article I of the New York Convention provides a uniform rule for the scope of the treaty. Awards must be based on party autonomy. States and investors will quickly lose confidence in a dispute settlement system that results in the likelihood of unenforceable awards. This uncertainty leads to risk-averse behavior. Without party autonomy, investors will lose trust in investing in many of the places that need them the most and there will be a significant impact on FDI.

Finally, the Model includes a prohibition on double hatting.

> Members of the Tribunal shall not act as legal counsel or shall not have acted as legal counsel for the last five years in investment disputes under this or any other international agreement. (Article 20 (5))

The double hatting prohibition reduces the pool of arbitrators significantly. It is hard to see how this prohibition would contribute to gender and geographical diversity if only those who give up their counsel practice can sit as arbitrators. The double-hatting prohibition would no longer allow many experienced arbitrators active in the current ISDS system to act as arbitrator if they were truly excluded from their core practice. The diversity in terms of gender and regional diversity of arbitrators owes its recent advances to the fact that new entrants do not have to abandon their main professional activity.

Final Remarks

Although it is time for certain ISDS treaties to be modernized and to revisit some of the elements of international arbitration in order to boost its legitimacy, one must consider the origins of investment treaties: if host countries see benefit in foreign investment, investment treaties should create trust. International arbitration has changed tremendously over the last two decades: it is more diverse than ever with all members of the community pledging to gender diversity, mentoring across borders enabling a new generation of arbitrators to rise. That progress would come to an abrupt halt whether that is by permanent appointments for the MIC or abolishing double-hatting or taking away the ability of parties to appoint arbitrators. However it may be, investment treaties are supposed to attract investors, not deter them.

References

?1 Article 6(3) of the Dutch Model BIT.

?2 *See* Article 24 on the consultations of Contracting Parties: “A joint interpretative declaration adopted as result of consultations by the Contracting Parties shall be binding on a Tribunal …”.

?3 The paper of the Corporate Council International Arbitration Group focuses on the WG-III reforms where party autonomy is under attack as well leading to the same uncertainties and critical questions raised.

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