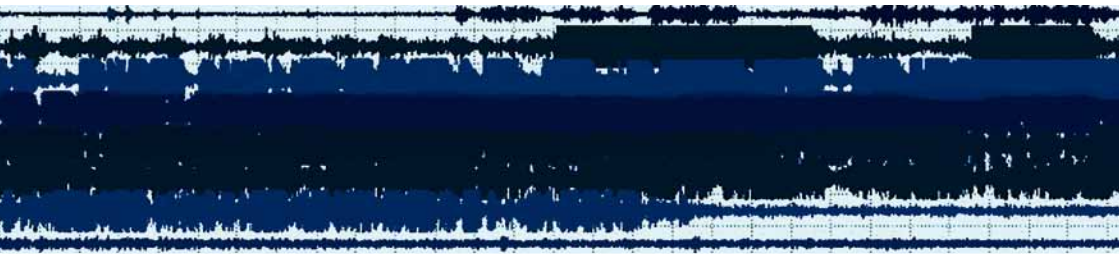
HOUTHOFF BURUMA

INVESTMENT ARBITRATION

THE ROLE OF BILATERAL INVESTMENT TREATIES

INTERNATIONAL ARBITRATION - VOLUME 2



IN-HOUSE COUNSEL PRACTICAL GUIDE

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INTRODUCTION

"A leading Dutch real estate developer has filed a claim at the ICSID against the Republic of Turkey for breach of Turkey's obligations to treat foreign investors fairly and equitably and for expropriation of a successful real estate project in Istanbul. The Dutch real estate developer argues it was encouraged to come to Istanbul and, through a Turkish subsidiary, invest substantial amounts of money to construct a state-of-the-art housing project. But after it became a success and construction was well under way, the Turkish government unlawfully terminated the contract and seized the property involved. The loss and damage is estimated at over $400 million (US)."

Het Financieele Dagblad, 24 October 2011

This is the second volume of a series called Houthoff Buruma Practical Guides on International Arbitration. The first volume was a general introduction to international arbitration. The aim of this second volume is to explain to those investing in a foreign country how to obtain compensation for a loss resulting from improper interference by the local government. The focus is on bilateral investment treaties (BITs). According to a survey of our clients, a limited number of investors are even aware of the existence of investment treaties. And those who are aware of these treaties generally tend to underestimate the role they can play if an investment goes wrong. Both international investors and their advisers will find it most useful to understand how these treaties can assist them if the need should arise.

By no means does this volume pretend to take a complete and exhaustive look at the issue of bilateral investment treaties and investment arbitration. These are two subjects of magnitude and complexity. Voluminous books and articles have been published, and arbitration awards rendered, on various aspects of investment treaties. The aim of this volume is to provide investors and investment advisers with an overview of the issues relating to two aspects: first, the planning of international investments and, second, how to recover loss and damage resulting from a foreign local government's improper interference with an investment.

Dirk Knottenbelt
Head of Houthoff Buruma's arbitration team,
January 2012

KEY POINTS

THIS GUIDE ON INVESTMENT ARBITRATION WILL HELP YOU:

1. understand what a BIT (bilateral investment treaty) is;
2. understand how a BIT can help protect your investment;
3. avoid pitfalls and common misinterpretations;
4. identify necessary criteria for eligibility; and
5. what to consider when structuring an investment.

INTRODUCING THE BIT

When an investor decides on where to invest internationally, and where to set up the structure for the foreign investment, the investor's attention is usually focused on a comparison of the tax rules of the various countries under consideration. Often little or no attention is paid to the issue of investment protection under international law. Because of this, if a local government improperly interferes with the investment, and a loss results, whether an investment treaty is applicable and provides for recovery is largely a matter of chance. However, it would be prudent for an investor and its adviser, when considering where to place the investment and where to set up the structure for the foreign investment, to also consider whether the investment would be protected by an international investment treaty and what the requirements for this would be.

Worldwide, there are about 2,100 investment treaties. Approximately 95 of them have been concluded by the Netherlands. The Netherlands is the centre of an extensive network of international investment treaties. This is not a happy coincidence: the economy of the Netherlands is heavily dependent on foreign trade. It is a capital-exporting country. Dutch businesses have always been active investors abroad. It also helps that the Dutch economy is open and stable and enjoys moderate inflation, the rewards of a sound financial policy and the benefits of being a major European transport hub.

The risks of foreign investment

A foreign investment differs in nature from ordinary trading. Whereas trading typically consists of the one-off exchange of goods and money, investing in a foreign country is based on a long-term relationship between the investor and the country where the investment is made (the "host state"). A key feature in planning foreign investment is identifying and assessing in advance the risks inherent in the long-term relationship involved, both from a commercial perspective and a legal one. Investing in other countries carries certain risks, risks that are often quite different from those in one's own country (the "home state").

These risks are not necessarily those inherent in the investment, but rather the risks an investor runs in other countries as a result of interference by local governments, import and export restrictions, political unrest—and even war. What are an investor's remedies if new legislation in the host state renders an investment worthless? Or if a host state government expropriates the investor's business? Or if property is damaged or even destroyed because of political riots, such as what has taken place in Egypt, Libya and Syria? Or if a host state, quite out of the blue, revokes a licence, thus preventing the investor from doing business any further?

Ordinarily, there is no contractual relationship between an investor and the local government. This makes it difficult, if not impossible, for an individual or company to pursue a contractual claim in

the local courts. Insurance is one option for a careful company facing such risks. In some cases, it was and is possible to obtain insurance coverage for such risks. The costs are high, however, and the maximum coverage available limited. This is especially true for investments in countries where the risks described above are a real possibility, the "capital importing countries".

International law might apply, but this is difficult to enforce. Historically, an individual or company seeking compensation from a host state because of a breach of international law could not do so directly. Instead, the individual or company had to rely on its government to take up the claim on its behalf, sometimes by gunboat diplomacy. For instance, when Venezuela defaulted on its foreign debt in 1902, the governments of Germany, Great Britain and Italy sent warships to the Venezuelan coast, demanding compensation for the losses incurred by their nationals.

Bilateral investment treaties (BITs)

Another option is the bilateral investment treaty. Since 1959, when the first BIT was concluded between Germany and Pakistan, and since the conclusion of the 1965 ICSID Convention (described further below), an individual or company may have a right of action directly against a host state under a BIT. A BIT serves to protect investments in both countries. This kind of treaty is not meant to provide insurance coverage, but to make it possible to resolve any disputes in an efficient way on the basis of international law. This is an especially attractive option if there is no contractual relationship, e.g. expropriation or the destruction of property in a political riot.

To date (November 2011), the Netherlands has concluded close to 100 BITs.[1] There are only a few other countries, such as Germany, that have entered into as many such treaties. BITs have acquired great significance for Dutch investors abroad, especially since the financial interests at stake are often considerable. The Dutch BIT system is so significant that even foreign investors are making use of this treaty network by structuring their foreign investments through Dutch holding companies.

The Dutch BIT system is so significant that foreign investors structure their investments through Dutch holding companies.

This treaty network has other components (which will not be dealt with further in this overview). For instance, the Netherlands is a party to the Energy Charter Treaty, a multilateral treaty signed by over 50 countries to provide for substantive investment protection. The protection offered under this treaty is comparable to that provided by BITs. Other well know treaties that offer protection comparable to BITs are the North American Free Trade Association (NAFTA) and the Association of South East Asian Nations (ASEAN).

The operation and scope of Dutch BITs, and how investors may rely on such treaties if seeking compensation for losses caused by improper interference by local governments, are explained in further detail below. First, we look at the purpose and scope of BITs. This will be followed by an examination of the protection offered by BITs. Next, the most important criteria for obtaining this protection will be set out, followed by an explanation of how to enforce this protection. Finally, we deal with certain specific aspects of Dutch BITs that may be of importance when making the decision how to structure an investment abroad.

PURPOSE AND SCOPE OF A BILATERAL INVESTMENT TREATY

The purpose of BITs

The purpose of a BIT, which is a treaty between two countries, is to promote foreign investments between the two countries and to offer protection to investors from one country investing in the other. For that purpose, a BIT contains binding rules on the treatment of investments originating from one country and made in the other. The treaties are always reciprocal.

A BIT is normally limited in length, in most cases encompassing not more than 15 articles. Most countries have developed a model BIT on the basis of which they negotiate the final text.[2] Because a BIT is concluded on the basis of negotiations conducted by the two countries, the texts of the various BITs can differ considerably. In general, however, most BITs share a certain number of standard, recurring provisions.

Typically, the purpose of a BIT is stated in the preamble or introductory wording, which refers to both the desire to intensify economic cooperation between the contracting states and to recognition of the fact that encouraging and protecting investments will stimulate this economic protection. Here is an example drawn from the preamble of the BIT between the Netherlands and Zimbabwe:

> *"The Kingdom of the Netherlands*
>
> *and*
>
> *the Republic of Zimbabwe,*
>
> *hereinafter referred to as the Contracting Parties,*
>
> *Desiring to strengthen their traditional ties of friendship and to extend and intensify the economic relations between them, particularly with respect to investments by the nationals of one Contracting Party in the territory of the other Contracting Party,*
>
> *Recognizing that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment of investment is desirable,*
>
> *Have agreed as follows:...."*[3]

The preamble is not without importance. For instance, in *Saluka v. Czech Republic*,[4] an arbitration based on the BIT between the Netherlands and the Czech Republic, the tribunal referred to the preamble and stated:

> *"This is a more subtle and balanced statement of the Treaty's aims than is sometimes appreciated. The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations."*

The scope of BITs

The scope of a BIT depends on the substantive provisions regarding (i) the protection offered by the BIT, (ii) the criteria to be met to be eligible for protection and (iii) the enforcement of such protection.

THE PROTECTION PROVIDED BY A BIT

In general, a BIT affords eligible investors certain minimum protection of their investments in a host state. If a host state breaches the substantive protection-related provisions in the BIT in a manner adversely affecting the investor, the latter may (subject to certain conditions, as discussed further below) commence proceedings directly against the state. As a result, many BITs provide for arbitration by the International Centre for Settlement of Investment Disputes (ICSID) if a dispute arises between the investor and the host state. ICSID offers a method of resolving investor-state disputes through conciliation or arbitration.

Although the wording and provisions in the various BITs differ, the treaties generally include standard clauses relating to substantive protection under international legal principles. These clauses define the scope of the protection provided by a BIT.

A BIT allows an investor to commence proceedings directly against the state.

BITs contain other standard formal provisions, including standard definitions of a qualifying investor and a qualifying investment. These formal provisions will be discussed in the next chapter, which deals with the issue of the criteria to be met to qualify for protection under a BIT.

Fair and equitable treatment

Almost all BITs require host states to accord "fair and equitable treatment" to investors from the other state. The BIT between the Netherlands and Ukraine, for example, provides the following at Article 3(2): "Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting party...".[5]

The interpretation of this rather abstract principle depends on the facts of the case, but it is always based on the obligation of the host state to maintain a stable and predictable investment environment consistent with reasonable investor expectations. The arbitration case law in recent years shows that despite—or possibly because of—the somewhat vague and general nature of this principle, it is the most relied on the principle and the most successful basis for a treaty claim.

The cases on fair and equitable treatment fall into two broad categories. The first category concerns the treatment of investors by the courts of the host state. In *Azinian v. Mexico*, a claim brought under NAFTA, the tribunal accepted that in principle the host state could be liable for the decisions of its courts, especially (i) if the courts refused to entertain the suit, (ii) subjected the suit to undue delay, (iii) administered justice in an inadequate way, or (iv) if there was a clear and malicious misapplication of the law.[6] The second, more important category deals with the

review of administrative decisions. The majority of such cases have been concerned with the granting or withholding of investment licences or a fundamental change in the law affecting the investment climate.

A BIT may hold a state liable for the unfair decisions by its courts.

The arbitration case law shows that factors giving rise to a claim for breach of the standard principle of "fair and equitable treatment" are (i) the legitimate expectations and the state of law at the time of the investment, (ii) the effect of specific representations made to the investor, (iii) discrimination, (iv) transparency, (v) inconsistency, (vi) the use of powers for improper purposes and (vii) coercion and harassment by state authorities.

In *Biwater v. Tanzania*, an arbitration proceeding brought under the BIT between the United Kingdom and Tanzania, the tribunal found that a series of public announcements denigrating the investor's poor performance and announcing that a new public entity would be taking over the service were in violation of the fair and equitable treatment standard. The tribunal noted that, despite its poor record, the investor "still had a right to the proper and unhindered performance of the contractual termination process [and] the Republic's public statements at this time constituted an unwarranted interference in this".[7]

In *Duke Energy et al. v. Ecuador,* an arbitration based on the BIT between the United States and Ecuador, the Tribunal considered that, for an investor to be protected, the investor's expectations must be legitimate and reasonable at the time the investor makes the investment and found that, in that case, Ecuador had failed to accord fair and equitable treatment to the investor by not implementing the specific payment guarantee expressly promised in one of the investment contracts.[8]

Full protection and security

The principle of fair and equitable treatment is often connected to that of full protection and security. See, for example, the wording in the BIT between the Netherlands and Honduras:

> *"Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party...Each Contracting Party shall accord to such investments full security and protection."*[9]

Traditionally, the primary reason for the full protection and security standard was the need to protect the investor from various types of physical violence, including the invasion of the premises. According to the arbitration case law, the principle of full protection and security is breached if the host state fails to take reasonably expected protective measures to prevent

physical destruction of the investor's property, in particular measures that fell within the normal exercise of governmental functions.

In *AAPL v. Sri Lanka* (concerning the United Kingdom-Sri Lanka BIT), Sri Lankan security forces had destroyed the investor's shrimp farm and killed more than 20 of its employees in efforts to try to curb Tamil insurgents. On the basis of the full protection and indemnity clause in the BIT, the tribunal found that the Sri Lankan government had violated its obligation of full protection and indemnity by not taking all measures to prevent the killing and the destruction of the investor's property.[10]

In more recent arbitration cases, such as the *Siemens v. Argentina* arbitration based on the Germany-Argentina BIT, the tribunal confirmed that the standard of fair and equitable treatment extends beyond physical protection to the protection against infringements of the investor's rights by operation of laws and regulations of the host state.[11]

No arbitrary or discriminatory measures impairing the investment

Another principle closely linked to fair and equitable treatment is the right not to be treated in an arbitrary or discriminatory way. This principle applies if an investor is treated differently from other investors in similar or comparable circumstances. The BIT between the Netherlands and Estonia has this wording:

> *"Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals."*[12]

In general, host states act unreasonably or discriminatorily if rules of law are de facto violated or if an investor has no access to due process.

Most claims made in the context of treatment of foreign investments deal with discrimination on the basis of nationality. In *S.D. Myers Inc v. Canada*, a NAFTA claim, an American company claimed it had been treated discriminatorily and unfairly when Canada announced an export ban on the trans-boundary movement of hazardous waste. The American company was for a large part dependent on the processing of such waste from Canada at its American plant. Based on the facts of the case, the tribunal found that the export ban was arbitrary and discriminatory against non-nationals.[13]

National treatment and most favoured nation treatment

"National treatment" means the host state must treat foreign investments no less favourably that the investments of its own nationals and companies. The purpose of this standard is to create a level playing field for foreign investors. The "most favoured nation treatment" means the host state must treat one foreigner's investment no less favourably than that of an investor from another foreign country. For an example of a clause stating these two principles, this is the wording used in the BIT between the Netherlands and Egypt:

> *"More particularly, each Contracting Party shall accord to such investments treatment which in any case shall not be less favourable than that accorded either to investments of its own nationals or to investments of nationals of any third State, whichever is more favourable to the national concerned."*[14]

In the majority of the arbitration cases dealing with national treatment in BITs, the relatively simple test conducted has been to compare the foreign investor's situation with that of the most directly comparable local investor(s) in the same business sector. If a difference in treatment is detected by such a process, the tribunal will investigate whether the difference has a reasonable connection to government policies and whether it is discriminatory in its effect on foreign investors.

The most favoured nation treatment principle may also have procedural consequences, i.e. an investor filing a claim under one BIT can, by invoking the most favoured nation treatment clause in that BIT, benefit from a more favourable clause in under another BIT. For example, in *Maffezini v. Spain*, which was based on the Argentina-Spain BIT, the Argentinean investor had filed a claim in the arbitration proceedings against Spain, even though he had not previously submitted the dispute to the Spanish courts as required by the BIT. The Argentinean investor successfully argued, however, that he could, by invoking the most favoured nation treatment clause, bypass this condition in the Argentine-Spain BIT and claim a benefit available under the Spain-Chile BIT, which did not require investors to first file a claim in the national court of the host state.[15]

Free transfer of funds relating to investments

Many BITs impose an obligation on the host state to freely permit the transfer of funds relating to investments into and out of the host state. An investor will typically need to import funds into the host state to start a production facility or to expand its business. Repatriation of capital, including profits, into the home state or other country will often be the major business purpose of the investment. However, a host state may find that this is not in the host state's interests. In particular, the host state may take the position that large currency transfers into and out of the host state require monitoring and control in order to protect national policies. A host state may see sudden short-term capital inflows or capital flight as leading to instability in the domestic financial

markets. For this reason, BITs invariably include clauses covering the free transfer of funds related to investments. For example, the BIT between the Netherlands and India states:

BITs often include clauses covering the free transfer of funds related to investments.

1. *"Each Contracting Party shall assure to investors of the other Contracting Party, without delay and on a non-discriminatory basis, the unrestricted transfer inter alia of:*

   Capital and additional capital amounts used to maintain or increase investments;

   Net operating profits including dividends and interest;

   Repayments of any loan, including interest thereon, relating to the investment

   Payment of royalties and service fees as far as it is related to the investment

   Proceeds of sale or liquidation of the investment

   The earnings of nationals of one Contracting Party or of any third State who work in connection with investments in the territory of the other Contracting Party.

2. *Currency transfer under paragraph 1 shall be in a freely convertible currency. Such transfer shall be made at the prevailing market rate of exchange on the date of transfer."*[16]

Foreign investors are entitled to compensation if they are affected by currency control regulations or other acts of the host state that effectively freeze investor funds in the host state. This principle was frequently invoked when Argentine, after the financial crisis in 2001, took several measures that drastically limited the possibility of transferring funds to other countries.

No expropriation without compensation

This clause is one of the most important protection clauses in a BIT. This (together with the fair and equitable treatment clause) is one of the two clauses most frequently invoked.

Expropriation is not only the direct and deliberate formal act of taking ownership, such as naturalisation, but also indirect acts (including legal, tax or administrative measures) that effectively and substantially deprive an investor of the use, value and enjoyment of its investment. In the case of expropriation, the difficulty is drawing the line between improper expropriation and legitimate regulatory measures. After all, not all expropriations are prohibited.

Generally, expropriations may be allowed if the measures are taken for a public purpose, without discriminating against foreigners, in compliance with due process and by paying the deprived investor adequate compensation. For example, the BIT between the Netherlands and Turkey provides:

> *"Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with:*
>
> > *the measures are taken in the public interest and under due process of law;*
> >
> > *the measures are not discriminatory;*
> >
> > *the measures are accompanied by provision for the payment of just compensation. Such compensation shall amount to the fair market value of the investment or in the absence of a fair market value the genuine value of the investments affected and shall, in order to be effective for the investors, be paid and made freely transferable, without unreasonable delay, to the country of which the investors concerned are nationals or to any other country accepted by the Contracting Party concerned and in the currency in which the investment was originally made or in any freely convertible currency, mutually agreed to by the investor and the Contracting Party."*[17]

In the absence of a precise definition of expropriation in the BITs, the usual practice of arbitration tribunals is to construe expropriation in the light of treaties and judicial interpretation in international legal cases, including the decisions of the Iran-US Claims Tribunal, a tribunal that has proven to be a rich source of arbitration case law on expropriation. Ultimately, whether improper expropriation has occurred is a matter to be determined on a case-by-case basis. There is no consistently applied set of rules for assessing whether an act constitutes improper expropriation. Among the various tests applied by tribunals to assess improper expropriation claims are the following:

1. Has the investor been deprived of the use or enjoyment of its investment, at least in significant part and over a significant period, based on reasonable expectation and economic benefit?

2. Can the deprivation be linked to state conduct?

3. What are the specific nature, aspects and purpose of the state interference?

There is a fundamental consensus, however, that if an investor suffers a deprivation of the use or enjoyment of its investment that can in some manner be linked to conduct of the state, an expropriation claim may be viable.

In *CME Czech Republic B.V. v. Czech Republic*, which was based on the BIT between the Netherlands and the Czech Republic, an investor in a joint venture in the Czech Republic argued that the joint venture had collapsed after the official Czech broadcasting authority had forced the joint venture to give up its exclusive licensing rights and changed other key terms of the joint venture agreement. The tribunal held that the acts of the Czech authority had interfered with the economic and legal basis of the investment, ruining the commercial value of the investment and, thus, amounted to improper expropriation.[18]

In the seven decisions in 2008 in which a claim based on improper expropriation was addressed by an international arbitration tribunal, only in two instances did the tribunal find in favour of the claimant and only in one case did the tribunal actually award damages. However, if a tribunal finds that an investor's property was improperly expropriated and that the host state must compensate the investor, the compensation may be substantial because the compensation is to be based on loss of market value and interest calculated up to the date of the arbitration decision.

Compliance with specific investment undertakings

The final standard clause recurring in BITs is a general "umbrella clause" that obligates a host state to always fully comply with its obligations regarding the investments of individuals and companies from the other country. A common factor in the various umbrella clauses is the use of mandatory language. Wording typically used in this clause can, for instance, be found in the BIT between the Netherlands and Algeria: "Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party."[19]

It is estimated that, out of the 2,500 or more BITs currently in existence, approximately 40% include an umbrella clause. A review of the practices of the various states does not indicate a uniform approach to the treatment of these clauses. Switzerland, Netherlands, United Kingdom and Germany often include umbrella clauses in their BITs; however, France, Australia and Japan include umbrella clauses in only a minority of their BITs.

The umbrella clause has given rise to the argument that inclusion of such clause in a BIT elevates any contractual claim to the level of international law and, thus, subject to international arbitration under the BIT rather than submission to the national courts. In *SGS v. Philippines*, which was based on the Switzerland-Philippines BIT, SGS brought a claim against the Philippines for breach of custom-related pre-shipment inspection services. In response to the Philippines' argument that

the claim was contractual, SGS invoked the "umbrella clause", arguing that this clause imposed an obligation on the Philippines to comply with specific investment undertakings. Although the tribunal held that an "umbrella clause" could impose specific obligations on a host state vis-à-vis an investor within the framework of the BIT, the tribunal also held that the "umbrella clause" did not have the effect of overriding the exclusive jurisdiction clause in the contract between SGS and the Philippines.[20]

THE CRITERIA FOR PROTECTION UNDER A BIT

The preliminary issue to be resolved is whether a BIT has been concluded with a host state. Subsequently, the two most important definitions in a BIT are those for "investor" and "investment". These definitions restrict the application of a BIT to the qualifying investments of a qualifying investor.

Does a BIT apply?

For an individual or company seeking protection, the initial, preliminary matter to be determined is whether a BIT has been concluded with the host state. Whether a BIT is in place can be verified by consulting various sources, including the websites of the Ministry of Foreign Affairs and the World Bank.[21]

Consult online search engine of the World Bank to find out if a BIT is in place.

Most BITs state expressly when the treaty enters into force and when it expires. This is important, because in many cases investments made before a BIT entered into force will not be protected. In more recent BITs, and in most BITs to which the Netherlands is a contracting state, however, clauses have been included to provide for the protection of investments made in the period before the treaty entered into force, in which case the BIT has retroactive effect.

Who is entitled to protection under the BIT?

Definition of "investor". Once it has been established that a BIT has been concluded with the host state, the next question is whether an investor is entitled to protection under that BIT. To be protected, an investor must be an "investor" within the meaning of the BIT. Generally, a BIT differentiates between individuals and companies. For instance, the BIT between the Netherlands and Poland defines "investor" as:

> *"The term 'investors' shall comprise with regard to either Contracting Party:*
>
> *natural persons having the nationality of that Contracting Party in accordance with its law;*
>
> *without prejudice to the provisions of (iii) hereafter, legal persons constituted under the law of that Contracting Party;*
>
> *legal persons, wherever located, controlled, directly or indirectly, by investors of that Contracting Party."*[22]

Many BITs do not identify when an individual or company is required to have the nationality of a contracting state. As described further below, such rules are, however, given at Article 25(2) of the ICSID Convention.

Nationality of an individual. Individuals must have the nationality of one of the contracting states. Whether an individual is a national of a contracting state is determined according to the national law of that state. In *Soufraki v. UAE*, which was under the BIT between Italy and the United Arab Emirates, the claimant produced several Italian certificates of nationality. Nevertheless, the tribunal found that the claimant had lost its nationality as a consequence of having become a Canadian national. As a Canadian national, the claimant was unable to rely on the BIT between Italy and the UAE. Moreover, Canada is not a party to ICSID.[23]

Nationality of a company. A determination of the nationality of a company is based on three criteria, i.e. the nation of incorporation of the company, the nation where the company is controlled, and the nation where the company is managed. In general, unincorporated entities and groupings are not entitled to legal protection, but this may depend on the wording in the BIT. For instance, in the Argentina-Germany BIT, the definition of "national" is "any legal person and any commercial or other company or association with or without legal personality".

Generally speaking, to be eligible for protection, a company must have been incorporated in one of the contracting states in accordance with the laws of that state. In *Tokios Tokelès v. Ukraine*, which was under the Lithuania-Ukraine BIT, the claimant was a business enterprise established under the laws of Lithuania but nationals of the Ukraine owned 99% of its shares. The tribunal, nevertheless accepted the claimant as a national of Lithuania.[24]

International investors should consider structures that would provide the protection of a BIT.

In most of the BITs to which the Netherland is a party, companies controlled by a company or national of a contracting state also qualify as "investor". Other countries use different criteria. Germany, for example, considers the country from which a company is managed as determinative of whether a company enjoys the protection of a BIT to which Germany is a party. The United States, on the other hand, consider only the place of establishment important. The place where the company conducts its activities or where the management is seated is not relevant to determining whether a company is entitled to protection under a U.S. BIT.

Investors planning international investments, and setting up investment structures, are often only led by the tax-related possibilities in the various countries. Such investors should, however, also consider

the possible protection of applicable investment treaties. To create such protection, the criteria of the different BITs to which the envisaged host state is a party, should be reviewed and assessed. On that basis, the investor may consider making an investment in a host country through a specially created investment vehicle that is established in a state which is party to a favourable BIT with the host state.

What investments qualify for protection under a BIT?

To be entitled to protection under a bilateral investment treaty, the investment must come within the definition of "investment" under the BIT. The exact wording used in the BIT is important.

Broad interpretation of "investment". However, the term "investment" is often broadly defined, ensuring a high degree of flexibility in application. Wording like "every kind of asset" or "every kind of investment in the territory" is used. Many BITs specifically refer to five different kinds of investments (but usually wording is added to ensure this is a non-exhaustive list):

1. property,
2. shares,
3. contracts,
4. intellectual property rights and
5. rights conferred by law.

The term "investment" is often broadly defined.

For example, the Netherlands-Nigeria BIT defines "investment" as follows:

> *"the term 'investments' shall comprise every kind of asset and more particularly,*
>
> *though not exclusively:*
>
> *i. movable and immovable property as well as any other rights in rem in respect of every kind of asset;*
>
> *ii. rights derived from shares, bonds and other kinds of interests in companies and joint ventures;*
>
> *iii. title to money, other assets or any performance having an economic value;*
>
> *iv. rights in the field of intellectual property (such as patents, copyrights, licenses, trademarks and trade names), technical processes, goodwill and know-how;*
>
> *v. rights granted under public law, including rights to prospect, explore and extract natural resources."*[25]

And in the BIT between the Netherlands and Russia, this is the definition:

> *"the term 'investment' shall comprise every kind of assets to be invested either directly or through an investor of a third State, by investors of the one Contracting Party on the territory of the other Contracting Party in accordance with the laws of the last Contracting Party including in particular, though not exclusively:*
>
> *i. property such as buildings and equipment and any property rights thereto;*
>
> *ii. monetary funds, as well as rights derived from shares, bonds and other forms of participation;*
>
> *iii. title to money or to any other asset of performance having an economic value;*
>
> *iv. rights in the field of intellectual property, technical processes and know-how;*
>
> *v. rights to conduct commercial activity, including rights to prospect, explore, extract and exploit natural resources, granted under contract or under the legislation of the Contracting Party in the territory of which such activity is undertaken."*[26]

The validity of defining investment broadly in the various BITs has been confirmed in the arbitration case law. In *Fedax v. Venezuela*, an arbitration conducted under the Netherlands-Venezuela BIT, the tribunal held that promissory notes issued by Venezuela and acquired by the claimant from the original holder in the secondary market, through endorsement, constituted an investment under the BIT.[27]

Time restrictions. A time restriction may be included in the definition of a qualifying investment. The Argentina-Spain BIT, for instance, provides that the BIT does not apply to disputes or claims arising before its entry into force. A claim may arise after the investment has come to end. In *Jan de Nul v. Egypt*, which was based on the Belgium/Luxembourg–Egypt BIT, Egypt argued that at the time the dispute arose the investment no longer existed. The tribunal rejected the argument, recognizing that accepting it would defeat the entire logic of investment protection treaties.[28]

Time frame is important: a BIT usually does not apply to claims arising before it enters into force.

Pre-contractual costs not included. Notwithstanding the wide definition of "investment", pre-contract costs are consistently rejected as a protected investment. In *Mihaly International Corp v. Republic of Sri Lanka*, under the U.S.-Sri Lanka BIT, the claimant sought reimbursement of expenses incurred to pursue a proposed power project in Sri Lanka (a project which was never carried out). The tribunal found that no investment had taken place and rejected the claim.[29]

Territorial restrictions. Investments are also limited to a specific territory. When dealing with the issue of whether an investment falls within the territory of a host state, tribunals consider the important aspect to be the "entire process" of economic activity, even though particular aspects may not have been locally performed.

Indirect investments. Indirect investments (e.g. investments held by indirect subsidiaries, by minority shareholders, by holding companies or ultimate beneficiaries) may also be protected. In each and every case, a tribunal will carefully consider the wording of the treaty when deciding whether an indirect investment qualifies as a protectable investment under the relevant BIT. For instance, in *Agua del Tunari SA v. Republic of Bolivia*, arbitration proceedings conducted under the Netherlands-Bolivia BIT, Bolivia argued that it had carefully structured the concession agreement with Agua del Tunari SA, at the time controlled by a company on the Cayman Islands, to preclude ICSID arbitration. By the time the dispute arose, the control structure had been changed and a Dutch holding company had been inserted in the corporate chain. The tribunal held that it had jurisdiction under the Netherlands-Bolivia BIT.[30]

ENFORCING A BILATERAL INVESTMENT TREATY

Cooling-off period. Most BITs provide for a cooling-off period that must lapse before proceedings can be initiated. The cooling-off period serves to allow the parties the opportunity to explore a settlement. For example, the BIT between the Netherlands and Peru provides:

> *"Any dispute between one Contracting Party and a national of the other Contracting Party, concerning an investment of the latter in the territory of the former, shall, if possible, be settled amicably. If such a dispute cannot be settled within a period of 3 months from the date either party requested amicable settlement, each Contracting Party hereby consents to submit any legal dispute arising [to arbitration]."*[31]

Generally, this cooling-off period starts on the investor sending a "trigger letter" to the highest authorities of the host state, such as the head of state or the minister of the ministry dealing with the investment. The letter briefly sets out the facts and the nature of the dispute and requests the host state to enter into negotiations. If the negotiations do not succeed—often because of a lack of response by the host state—an action can be commenced against the host state.

ICSID arbitration. The BIT, furthermore, directs which action can be taken. The most common dispute resolution option is the submission of the dispute to arbitration according to the ICSID Convention, Regulation and Rules. For example, the Dutch model BIT provides that a dispute between an investor and a host state must be submitted to arbitration according to the ICSID Convention, Regulation and Rules:

> *"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."*[33]

Other arbitration options. Other common options are ad hoc arbitration under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL)[34] and arbitration according to the rules of the International Chamber of Commerce (ICC)[35] or the Stockholm Chamber of Commerce[36]. It is beyond the scope of this booklet to look at the arbitration rules of all these arbitration tribunals. Because of ICSID's special nature, its specific rules and regulations,

and the fact that most investor-state disputes are settled under its rules, we will focus below on arbitration conducted according to the ICSID Convention, Regulation and Rules.

Arbitration as a last resort. Finally, certain BITs require that a dispute must first be submitted to the national courts of the host state. For example, the BIT between the Netherlands and Argentina states as follows:

1. *Disputes between one Contracting Party and an investor of the other Contracting Party regarding issues covered by this agreement shall, if possible, be settled amicably.*

2. *If such disputes cannot be settled according to the provisions of paragraph (1) of this article within a period of three months from the date on which either party to the dispute requested amicable settlement, either party may submit the dispute to the administrative or judicial organs of the Contracting Party in the territory of which the investment has been made.*

It may be a requirement that a dispute must be submitted to national courts first.

3. *If within a period of eighteen months from submissions of the dispute to the competent organs mentioned in paragraph (2) above, these organs have not given a final decision or if the decision of the aforementioned organs has been given but the parties are still in dispute, then the investor concerned may resort to international arbitration or conciliation. Each Contracting Party hereby consents to the submission of a dispute as referred to in paragraph (1) of this Article to international arbitration."*[37]

As explained above, however, the *Maffezini v. Spain* case shows that a clause in a BIT (in that case, the Argentina-Spain BIT) requiring that a dispute must first be submitted to the national courts of the host state can be bypassed by relying on the most favoured nation clause in the BIT.[38]

International Centre for Settlement of Investment Disputes (ICSID)

Based in Washington D.C., ICSID was established under the 1965 ICSID Convention and is an official body of the World Bank. The Convention's goal was to stimulate foreign investment by offering a neutral forum for the resolution of disputes between investors and host states.

ICSID does not conduct arbitration proceedings itself, but administers their initiation and functioning. Pursuant to the ICISD Convention, ICSID awards have a special status that safeguards the recognition and enforcement of awards better than is the case for normal awards.

ICSID jurisdiction

Once the following has been established:

1. a BIT applies;
2. the investor is entitled to protection under the BIT;
3. the investor's investment qualifies as an "investment" under the BIT; and
4. the BIT provides for dispute resolution according to the ICSID Convention, Regulation and Rules,

the investor must also comply with the criteria of the ICSID Convention for ICSID to have jurisdiction. Article 25(1) of the ICSID Convention defines the scope of ICSID's jurisdiction:

> *"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."*[39]

Article 25(1) is commonly interpreted as requiring the fulfilment of the following mandatory criteria:

1. a legal dispute arises directly out of an investment;
2. the dispute is between a contracting state and the national of another contracting state; and
3. the parties to the dispute consent in writing to submit the dispute to ICSID.

If the jurisdictional requirements are not met, ICSID must and will refuse to consider a dispute, even if the parties have contractually agreed to submit a dispute to ICSID arbitration.

The first criterion: investment. Contrary to most BITs, the ICSID Convention does not include a definition of investment. In addition to the criteria set by the relevant BIT, the investment must, however, also meet the criteria of the ICSID Convention. In general, ICSID tribunals have found a project or transaction to qualify as an investment within the meaning of the ICSID Convention if it meets certain criteria. In *Saba Fakes v. Turkey*, based on the Netherlands-Turkey BIT, the tribunal considered that while Article 25(1) of the ICSID Convention provides for an objective definition of

an investment, this definition is comprised of three criteria, namely (i) a contribution, (ii) a certain duration, and (iii) an element of risk.[40]

The second criterion: a national of another contracting state. Article 25(2) of the ICSID Convention provides a specific definition of a national of a Contracting state.[41] Like many BITS, Article 25(2) distinguishes between natural persons (i.e. individuals) and juridical persons (e.g. companies).

Natural persons. The nationality of a natural person is determined according to that person's nationality on two dates: the date on which the parties consented to submit their dispute to arbitration and the date on which the request for arbitration was registered at ICSID. It is usually the case that the individual must possess home-state nationality continuously from the date of the injury to the date of the registration of the request for arbitration at ICSID. Furthermore, Article 25(2) denies jurisdiction to a natural person who on either date also had the nationality of the host state.

Juridical persons. For judicial persons, determining nationality is more complicated, especially in view of the complex investment structures currently being used. Whether a judicial person is a national of a contracting state depends very much on the wording in the agreement between the parties (i.e. the relevant BIT). Under the Dutch model BIT, the nationality of a company is determined not by where the company was constituted, but by whether it is controlled, directly or indirectly, by natural persons having the nationality of the contracting state or legal persons constituted under the law of that contracting state. For example, if a Dutch company acquires shares in a Polish company working on the construction of a new football stadium for the 2012 European Championships, the Polish subsidiary could be treated as a Dutch company and be granted ICISD jurisdiction for a claim against Poland. For companies, Article 24(2) of the ICSID Convention also provides that the relevant time for determining the nationality of the company is the date on which the parties consented to submit the dispute to conciliation or arbitration. And, again, it is usually the case that, for a company to be considered as having a given nationality, it must have this nationality continuously from the date of the injury to the date of the registration of the request for arbitration at ICSID.

Determining 'nationality' of companies is complicated due to complex investment structures.

Third criterion: consent of the parties. The consent of the parties is often not immediately apparent, since in most cases a direct contract between the investor and a host states does not exist. It has generally been accepted, however, that the parties in ICSID arbitrations express their consent in two steps. First, in a BIT, the host state consents by including a standing offer to arbitrate with respect to claims based don investments by nationals or companies of the

contracting state. Second, the investor consents by accepting the offer by filing a request for arbitration, thus perfecting the agreement to arbitrate. The main advantage for the investor is its entitlement to directly invoke the protection clauses in the BITs. This makes an investor independent from having to rely upon its government taking up the claim on its behalf and, thus, from political considerations inherent in diplomatic protection.

ICSID v. national courts

Pursuant to the ICSID Convention, an ICSID arbitration is an independent procedure not subject to control or supervision by a national court. A national court does not have jurisdiction to review or test an award rendered in an ICSID arbitration. To challenge an ICSID award, the ICSID Convention allows a party to commence annulment proceeding in the ICSID, in which event the ICSID will appoint an ad hoc committee to consider the request. This committee cannot amend or change the award, but may confirm or reverse the award on the basis of one of only these five grounds:

1. the tribunal was not properly constituted;
2. the tribunal manifestly exceeded its powers;
3. there was corruption on the part of a member of the tribunal;
4. there was a serious departure from a fundamental rule of procedure;
5. the award failed to state the reason on which it is based.

The special status of ICSID awards (i.e. independence of national courts) also results from the fact that the recognition and enforcement of such awards is not based on the New York Convention (1958), but on the ICSID Convention, as explained further below.

ICSID arbitration

If a BIT provides that an investment dispute is to be settled in accordance with the ICSID arbitration rules, the investor must submit the dispute to ICSID by sending a documented and substantiated request for arbitration to ICSID in Washington. The Secretary-General of ICSID subsequently sends a confirmation to the investor, together with an invitation to pay the administrative charges.[42] Upon receipt of payment, the Secretary-General sends the request for arbitration to the other party.

The parties are then given an opportunity to agree on the appointment of the arbitrators. If the parties do not reach agreement on the appointment of one or more of the arbitrators, ICSID will appoint the arbitrator(s). Within 60 days after the appointment of the arbitration tribunal, a hearing must be held to set the procedural order of the arbitration. The arbitration is normally

conducted by the exchange of written submissions, followed by a hearing. The ICSID Rules provide for the hearing of witnesses and experts, provisional measures and discovery.[43]

ICSID arbitrations take an average of about two to three years to complete, from the registration of the request for arbitration to the rendering of the award. The award is published by ICSID, and includes the names of the parties, unless a party does not consent to publication.

Unless the parties have agreed otherwise, A tribunal assess the parties' arbitration expenses and awards expenses as the tribunal deems fit on the basis of the tribunal's perception of would be reasonable.

Recognition and enforcement

Generally, parties comply voluntarily with ICSID awards. Payment is often the result of a post-award settlement. Only a small number of cases require actual enforcement.

Article 54 of the ICSID Convention does not allow ICSID awards to be reviewed under national laws at the recognition or enforcement stage. It grants an ICISD award automatic recognition, without going through the criteria of the New York Convention (1958). However, Article 54 does not obligate a state to enforce an ICSID award in cases where an equivalent final judgment of its own national court cannot be enforced. Article 54 of the ICSID Convention provides as follows:

> *"Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state."*[44]

ADVANTAGES OF DUTCH BILATERAL INVESTMENT TREATIES

For both international and Dutch investors, two factors make the Netherlands a particularly attractive base for international investments. First, there are many options in the Dutch tax system for setting up favourable tax structures. Second, the Netherlands has concluded a large number of bilateral investment treaties.

Broad definition of "investment"

The definition of "investment" in Dutch BITs is very broad and in principle open-ended. The definition covers all assets, including

1. movable and immovable property, including security rights;
2. rights derived from shares and other interests in companies;
3. monetary claims;
4. claims based on intellectual property rights; and
5. the rights granted under public law or under contract, including rights to prospect, explore, extract and win natural resources.

Broad definition of "investor"

Compared to other countries, the Netherlands has an investor-friendly system of bilateral treaties. Dutch BITs offer protection not only to Dutch nationals and companies, but also to foreign companies directly or indirectly controlled by Dutch nationals or companies. Many other BITs not involving the Netherlands require the investor not just to be established in the contracting state but also to have its head office in the contracting state.

Dutch BITs do not require the investor to have its head office in the Netherlands.

At this time, the United States is not a party to a BIT with China or India. American investors may use the protection of the BIT between the Netherlands and China, or the BIT between the Netherlands and India, to invest directly or indirectly in those countries through a Dutch holding company or sub-holding company.

Large network of double-taxation treaties

When choosing a country through which to route foreign investments, much attention is usually focused on a comparison of the tax rules of the various countries. The Netherlands compares very

favourably to other countries because of its extensive tax treaty network. The Netherlands has concluded treaties for the avoidance of double taxation on income and capital with more than 90 countries.[45]

The tax treaties to which the Netherlands is a party prevent or reduce the payment of tax on certain types of foreign-source income. Double taxation is usually avoided by means of tax exemptions, tax credits or deduction of taxation either based on the tax treaties or by unilateral measures. Two examples:

1. The Dutch withholding tax rate to which the Dutch entity of a foreign shareholder is generally subject in the case of a dividend payment is reduced under most double-taxation treaties.

2. The Netherlands does not levy any withholding tax on interest or royalty payments. Additionally, double-taxation treaties usually reduce or eliminate the foreign withholding tax on interest or royalties paid to a Dutch entity.

There are other features of the Dutch tax system that compare favourably to the tax rules of other countries. They include the following:

1. a relatively low corporate income tax rate for taxable profits of 20% on the first € 200,000 and 25% on amounts exceeding € 200,000;
2. a favourable participation exemption regime which, in certain circumstances, allows tax-exempted receipt of dividends and capital gains from qualifying subsidiaries;
3. a "fiscal unity" system for freely setting off profits and losses among Dutch group members;
4. an effective corporate tax rate of only 5 per cent for research & development; and
5. a favourable tax treatment for foreign employees (30% tax ruling).

BITs with retroactive effect and post-termination survival

Most Dutch BITs are valid for 15 years, with the option of automatic extension for another 15 years. Contrary to many other BITs, most Dutch BITs have retroactive effect, meaning that investments made before the BIT came into effect are also protected. Furthermore, for investments made before the BIT expired, Dutch BITs remain valid for 15 years after the expiry of the BIT. For example, investments made in Venezuela before 1 November 2008, when the treaty was terminated at the request of Venezuela, remain protected by the provisions of the BIT until 1 November 2023.

Most Dutch BITs have retroactive effect and remain valid for 15 years after the expiry.

POSSIBLE CONSEQUENCES OF THE LISBON TREATY

On 1 December 2009, the Treaty of Lisbon entered into force. The aim of the Lisbon Treaty was to make the European Union (EU) more efficient, more internally democratic and a more coherent body on the world stage. It introduced a number of changes intended to modernise EU institutions and optimise working methods in the EU. Some of the most significant changes were in the area of external relations, including the external representation of the EU. A major innovation introduced by the Lisbon Treaty was to give the EU exclusive jurisdiction over foreign direct investment. This meant that the EU would have exclusive competence to negotiate BITs in almost all sectors.

A further implication was that EU member states would be obliged to adapt their BITs to EU law, meaning that existing BITs concluded between member states might have to be terminated and replaced by EU law. For example, this would result in a Dutch investor no longer being able to rely on the BIT between the Netherlands and Poland, but having to rely on EU law and seeking recourse against Poland in the Polish courts.

Before the Lisbon Treaty came into force on 1 December 2009, very little preparation work had been done to fill the vacuum that the Lisbon Treaty would create by removing competence over foreign direct investment from EU member states. Very little has been done since then either. As of the time of writing (November 2011), no transition has yet been worked out for the member states and no guidelines on how the Commission would deal with foreign direct investment have been issued. Also, there is not yet a common interpretation of the exact meaning and implications of this part of the new treaty's text. A key question relates to the definition of foreign direct investment—a term the Lisbon Treaty failed to clarify.

Therefore, it is not yet clear what impact the reforms introduced by the Lisbon Treaty will have. There are differences of opinion, first, on whether the changes to the Lisbon Treaty in relation to the EU's external trade agreements will significantly alter the status quo in practice and, second, on whether these changes are sufficient to make the common commercial policy of the EU more efficient and more democratic.

[1] A list of countries that have concluded investment treaties with the Netherlands is found at the website of the Dutch Ministry of Foreign Affairs. The list as of the date of writing (November 2011) is as follows:
Albania, Algeria, Argentina, Armenia, Bahrain, Bangladesh, Belarus, Belize, Benin, Bolivia, Bosnia-Herzegovina, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Cape Verde, Chile, China, Costa Rica, Croatia, Cuba, Czech Republic, Dominican Republic, Ecuador, Egypt, El Salvador, Eritrea, Estonia, Ethiopia, Gambia, Georgia, Ghana, Guatemala, Honduras, Hong Kong, Hungary, India, Indonesia, Ivory Coast, Jamaica, Jordan, Kazakhstan, Kenya, Kuwait, Laos, Latvia, Lebanon, Lithuania, Macau, Macedonia, Malawi, Malaysia, Mali, Malta, Mexico, Moldavia, Mongolia, Montenegro, Morocco, Mozambique, Namibia, Nicaragua, Nigeria, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Romania, Russia, Senegal, Serbia, Singapore, Slovakia, Slovenia, South Africa, South Korea, Sri Lanka, Sudan, Suriname, Tajikistan, Tanzania, Thailand, Tunisia, Turkey, Uganda, Ukraine, Uruguay, Uzbekistan, Venezuela, Vietnam, Yemen, Zambia, Zimbabwe.
Source: http://www.rijksoverheid.nl/onderwerpen/internationaal-ondernemen/documenten-en-publicaties/rapporten/2010/02/22/ibo-landenlijst.html (Accessed: 7 November 2011).

[2] See Appendix 1 for the Dutch Model BIT.

[3] Bilateral Investment Treaty Between the Netherlands and Zimbabwe

[4] *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, available at: <http://italaw.com/documents/Saluka-PartialawardFinal.pdf>

[5] Bilateral Investment Treaty between the Netherlands and Ukraine.

[6] *Azinian, Davitian, & Baca v. Mexico*, ICSID Case No. ARB (AF)/97/2 (NAFTA), Award 1 November 1999, available at: <http://italaw.com/documents/Azinian-English.pdf>.

[7] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award 24 July 2008, available at: <http://italaw.com/documents/Biwateraward.pdf>.

[8] *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19 (US/Ecuador BIT), Award 18 August 2008, available at: <http://italaw.com/documents/DukeEcuadorAward_003.pdf>.

[9] Bilateral Investment Treaty between the Netherlands and Honduras

[10] *Asian Agricultural Products Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award 27 June 1990, available at: < http://italaw.com/documents/AsianAgriculture-Award.pdf>.

[11] *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, available at: < http://italaw.com/documents/SiemensJurisdiction-English-3August2004.pdf>.

[12] Bilateral Investment Treaty between the Netherlands and Estonia

[13] *S.D. Myers, Inc. v. Canada*, UNCITRAL (NAFTA), First Partial Award, 13 November 2000, available at: < http://italaw.com/documents/SDMeyers-1stPartialAward.pdf>.

[14] Bilateral Investment Treaty between the Netherlands and Egypt

[15] *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Award on Jurisdiction, 25 January 2000, available at: <http://italaw.com/documents/Maffezini-Jurisdiction-English_001.pdf>.

[16] Bilateral Investment Treaty between the Netherlands and India

[17] Bilateral Investment Treaty between the Netherlands and Turkey

[18] *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, available at: <http://italaw.com/documents/CME-2001PartialAward.pdf>.

[19] Bilateral Investment Treaty between the Netherlands and Algeria

[20] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, available at: <http://italaw.com/documents/SGSvPhil-final_001.pdf>.

[21] See footnote 1 and also Appendix 2 for a list of countries with which the Netherlands has entered into a BIT. This information is found at:

- http://www.rijksoverheid.nl/onderwerpen/internationaal-ondernemen/documenten-en-publicaties/rapporten/2010/02/22/ibo-landenlijst.html (Accessed: 7 November 2011)

- The Dutch Ministry of Foreign Affairs has an online treaty search engine at http://www.minbuza.nl/producten-en-diensten/verdragen/zoek-in-de-verdragenbank (Accessed: 7 November 2011)
- ICSID has an online search engine of BITs at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewBilateral&reqFrom=Main (Accessed: 7 November 2011)

[22] Bilateral Investment Treaty between the Netherlands and Poland

[23] *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Jurisdiction, 7July 2004, available at:< http://italaw.com/documents/Soufraki_000.pdf>.

[24] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, available at: <http://italaw.com/documents/Tokios-Jurisdiction_000.pdf>.

[25] Bilateral Investment Treaty between the Netherlands and Nigeria

[26] Bilateral Investment Treaty between the Netherlands and Russia

[27] *Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3, Award on Jurisdiction, 11 July 1997, available at: <http://italaw.com/documents/Fedax-1997-Last.pdf>.

[28] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, available at: <http://italaw.com/documents/JandeNuljurisdiction061606.pdf>.

[29] *Mihaly International Corporation v. Sri Lanka*, ICSID Case No. ARB/00/2, Final Award, 15 March 2002, available at: <http://italaw.com/documents/mihaly-award.pdf>.

[30] *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, available at: <http://italaw.com/documents/AguasdelTunari-jurisdiction-eng_000.pdf>.

[31] Bilateral Investment Treaty between the Netherlands and Peru

[32] The ICSID Convention, Regulation and Rules can be found at: http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp

[33] Dutch Model Bilateral Investment Treaty (See Appendix 1.)

[34] See Volume 1 in this series, page 26 *et seq*. The UNCITRAL Arbitration Rules (1976) can be found at: http://www.uncitral.orgluncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html. The Arbitration Rules were revised in 2010: http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-e.pdf.

[35] For more information and for the text of the ICC Arbitration Rules, see: http://www.iccwbo.org/policy/arbitrationlid2882/index.html.

[36] For more information and for the text of the SCC Arbitration Rules, see: http://www.sccinstitute.com/skiljeforfarande-2.aspx.

[37] Bilateral Investment Treaty between the Netherlands and Argentina

[38] *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Award on Jurisdiction, 25 January 2000, available at: <http://italaw.com/documents/Maffezini-Jurisdiction-English_001.pdf>.

[39] Article 25(1) of the ICSID Convention (For the full text, see Appendix 3.)

[40] *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, available at: <http://italaw.com/documents/Fakes_v_Turkey_Award.pdf>.

[41] See Appendix 3 for the full text of Article 25 of the ICSID Convention.

[42] See Appendix 4 for the ICSID Schedule of Fees.

[43] See Appendix 5 for the ICSID Arbitration Rules.

[44] Article 54 of the ICSID Convention

[45] See Appendix 6 for an overview of the current double-taxation treaties concluded by the Netherlands.

FURTHER READING

Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (New York, 2008)

Redfern and Hunter on International Arbitration, Fifth Edition (New York, 2009)

Campbell McLauchlan, Laurence Shore, Matthew Weiniger, *International Investment Arbitration* (New York, 2007)

Lucy Reed, Jan Paulsson, Nigel Blackaby, *Guide to ICSID Arbitration*, Second Edition.

Christoph Schreuer, *The ICSID Convention*, Second Edition.

ANNEX 1 — DUTCH MODEL BILATERAL INVESTMENT TREATY

Standard text (March 2004)

Agreement on encouragement and reciprocal protection of investments between [country name] and the Kingdom of the Netherlands

[country name]
and the Kingdom of the Netherlands,

hereinafter referred to as the Contracting Parties,

Desiring to strengthen their traditional ties of friendship and to extend and intensify the economic relations between them, particularly with respect to investments by the nationals of one Contracting Party in the territory of the other Contracting Party,

Recognising that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment of investments is desirable,

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;

Have agreed as follows:

Article 1

For the purposes of this Agreement:

1. the term "investments" means every kind of asset and more particularly, though not exclusively:
   a. movable and immovable property as well as any other rights in rem in respect of every kind of asset;
   b. rights derived from shares, bonds and other kinds of interests in companies and joint ventures;

c. claims to money, to other assets or to any performance having an economic value;
d. rights in the field of intellectual property, technical processes, goodwill and know-how;
e. rights granted under public law or under contract, including rights to prospect, explore, extract and win natural resources.

2. the term "nationals" shall comprise with regard to either Contracting Party:
   a. natural persons having the nationality of that Contracting Party;
   b. legal persons constituted under the law of that Contracting Party;
   c. 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).

3. the term "territory" means:
   the territory of the Contracting Party concerned and any area adjacent to the territorial sea which, under the laws applicable in the Contracting Party concerned, and in accordance with international law, is the exclusive economic zone or continental shelf of the Contracting Party concerned, in which that Contracting Party exercises jurisdiction or sovereign rights.

Article 2

Either Contracting Party shall, within the framework of its laws and regulations, promote economic cooperation through the protection in its territory of investments of nationals of the other Contracting Party. Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments.

Article 3

1. Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals. Each Contracting Party shall accord to such investments full physical security and protection.
2. More particularly, each Contracting Party shall accord to such investments treatment which in any case shall not be less favourable than that accorded either to investments of its own nationals or to investments of nationals of any third State, whichever is more favourable to the national concerned.
3. If a Contracting Party has accorded special advantages to nationals of any third State by virtue of agreements establishing customs unions, economic unions, monetary unions or similar institutions, or on the basis of interim agreements leading to such unions or institutions, that Contracting Party shall not be obliged to accord such advantages to

nationals of the other Contracting Party.

4. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals of the other Contracting Party.
5. If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain a regulation, whether general or specific, entitling investments by nationals of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such regulation shall, to the extent that it is more favourable, prevail over the present Agreement.

Article 4

With respect to taxes, fees, charges and to fiscal deductions and exemptions, each Contracting Party shall accord to nationals of the other Contracting Party who are engaged in any economic activity in its territory, treatment not less favourable than that accorded to its own nationals or to those of any third State who are in the same circumstances, whichever is more favourable to the nationals concerned. For this purpose, however, any special fiscal advantages accorded by that Party, shall not be taken into account:

1. under an agreement for the avoidance of double taxation; or
2. by virtue of its participation in a customs union, economic union or similar institution; or
3. on the basis of reciprocity with a third State.

Article 5

The Contracting Parties shall guarantee that payments relating to an investment may be transferred. The transfers shall be made in a freely convertible currency, without restriction or delay. Such transfers include in particular though not exclusively:

1. profits, interests, dividends and other current income;
2. funds necessary
   a. for the acquisition of raw or auxiliary materials, semi-fabricated or finished products, or
   b. to replace capital assets in order to safeguard the continuity of an investment;
3. additional funds necessary for the development of an investment;
4. funds in repayment of loans;
5. royalties or fees;
6. earnings of natural persons;
7. the proceeds of sale or liquidation of the investment;
8. payments arising under Article 7.

Article 6

Neither Contracting Party shall take any measures depriving, directly or indirectly, nationals of the other Contracting Party of their investments unless the following conditions are complied with:

1. the measures are taken in the public interest and under due process of law;
2. the measures are not discriminatory or contrary to any undertaking which the Contracting Party which takes such measures may have given;
3. the measures are taken against just compensation. Such compensation shall represent the genuine value of the investments affected, shall include interest at a normal commercial rate until the date of payment and shall, in order to be effective for the claimants, be paid and made transferable, without delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants.

Article 7

Nationals of the one Contracting Party who suffer losses in respect of their investments in the territory of the other Contracting Party owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which that Contracting Party accords to its own nationals or to nationals of any third State, whichever is more favourable to the nationals concerned.

Article 8

If the investments of a national of the one Contracting Party are insured against non-commercial risks or otherwise give rise to payment of indemnification in respect of such investments under a system established by law, regulation or government contract, any subrogation of the insurer or re-insurer or Agency designated by the one Contracting Party to the rights of the said national pursuant to the terms of such insurance or under any other indemnity given shall be recognised by the other Contracting Party.

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.

Article 10

The provisions of this Agreement shall, from the date of entry into force thereof, also apply to investments, which have been made before that date.

Article 11

Either Contracting Party may propose to the other Party that consultations be held on any matter concerning the interpretation or application of the Agreement. The other Party shall accord sympathetic consideration to the proposal and shall afford adequate opportunity for such consultations.

Article 12

1. Any dispute between the Contracting Parties concerning the interpretation or application of the present Agreement, which cannot be settled within a reasonable lapse of time by means of diplomatic negotiations, shall, unless the Parties have otherwise agreed, be submitted, at the request of either Party, to an arbitral tribunal, composed of three members. Each Party shall appoint one arbitrator and the two arbitrators thus appointed shall together appoint a third arbitrator as their chairman who is not a national of either Party.
2. If one of the Parties fails to appoint its arbitrator and has not proceeded to do so within two months after an invitation from the other Party to make such appointment, the latter Party may invite the President of the International Court of Justice to make the necessary appointment.
3. If the two arbitrators are unable to reach agreement, in the two months following their appointment, on the choice of the third arbitrator, either Party may invite the President of the International Court of Justice to make the necessary appointment.
4. If, in the cases provided for in the paragraphs (2) and (3) of this Article, the President of the International Court of Justice is prevented from discharging the said function or is a national of either Contracting Party, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is prevented from discharging the said function or is a national of either Party the most senior member of the Court available who is not a national of either Party shall be invited to make the necessary appointments.
5. The tribunal shall decide on the basis of respect for the law. Before the tribunal decides, it may at any stage of the proceedings propose to the Parties that the dispute be settled amicably. The foregoing provisions shall not prejudice settlement of the dispute ex aequo et bono if the Parties so agree.

6. Unless the Parties decide otherwise, the tribunal shall determine its own procedure.
7. The tribunal shall reach its decision by a majority of votes. Such decision shall be final and binding on the Parties.

Article 13

As regards the Kingdom of the Netherlands, the present Agreement shall apply to the part of the Kingdom in Europe, to the Netherlands Antilles and to Aruba, unless the notification provided for in Article 14, paragraph (1) provides otherwise.

Article 14

1. The present Agreement shall enter into force on the first day of the second month following the date on which the Contracting Parties have notified each other in writing that their constitutionally required procedures have been complied with, and shall remain in force for a period of fifteen years.
2. Unless notice of termination has been given by either Contracting Party at least six months before the date of the expiry of its validity, the present Agreement shall be extended tacitly 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 date of expiry of the current period of validity.
3. In respect of investments made before the date of the termination of the present Agreement, the foregoing Articles shall continue to be effective for a further period of fifteen years from that date.
4. Subject to the period mentioned in paragraph (2) of this Article, the Kingdom of the Netherlands shall be entitled to terminate the application of the present Agreement separately in respect of any of the parts of the Kingdom.

IN WITNESS WHEREOF, the undersigned representatives, duly authorised thereto, have signed the present Agreement.

DONE in two originals at _____, on _____, in the _____, Netherlands and English languages, the three texts being authentic. In case of difference of interpretation the English text will prevail.

For _____: For the Kingdom of the Netherlands:

ANNEX 2 — COUNTRIES HAVING A BILATERAL INVESTMENT TREATY WITH THE NETHERLANDS

Country	Date of execution of BIT	Date BIT came into force
Albania	15-04-1994	01-09-1995
Algeria	20-03-2007	01-08-2008
Argentinia	20-10-1992	01-10-1994
Armenia	10-06-2005	01-08-2006
Bahrain	05-02-2007	
Bangladesh	01-11-1994	01-06-1996
Belarus	11-04-1995	01-08-1996
Belize	20-09-2002	01-10-2004
Benin	13-12-2001	15-12-2007
Bolivia[12]	10-03-1992	01-11-1994
Bosnia-Herzegovina	13-05-1998	01-01-2002
Brazil[8]	25-11-1998	
Bulgaria[4]	06-10-1999	01-03-2001
Burkina Faso	10-11-2000	01-01-2004
Burundi	24-05-2007	
Cambodia	23-06-2003	01-03-2006
Cameroon[7]	06-07-1965	07-05-1966
Cape Verde	11-11-1991	25-11-1992
Chile[8]	30-11-1998	
China[3]	26-11-2001	01-08-2004
Costa Rica	21-05-1999	01-07-2001
Croatia	28-04-1998	01-06-1999
Cuba	02-11-1999	01-11-2001
Czech Republic[2]	29-04-1991	01-10-1992
Dominican Rep.	30-03-2006	01-10-2007
Ecuador	27-06-1999	01-07-2001
Egypt[3]	17-01-1996	01-03-1998
El Salvador	12-10-1999	01-03-2001

Country	Date of execution of BIT	Date BIT came into force
Eritrea	02-12-2003	
Estonia	27-10-1992	01-09-1993
Ethiopia	16-05-2003	01-07-2005
Gambia	25-09-2002	01-04-2007
Georgia	03-02-1998	01-04-1999
Ghana	31-03-1989	01-07-1991
Guatemala	18-05-2001	01-09-2002
Honduras	15-01-2001	01-09-2002
Hong Kong	19-11-1992	01-09-1993
Hungary[3]	02-09-1987	01-06-1988
India[4]	06-11-1995	01-12-1996
Indonesia[3]	06-04-1994	01-07-1995
Ivory Coast[7]	26-04-1965	08-09-1966
Jamaica	18-04-1991	01-08-1992
Jordan	17-11-1997	01-08-1998
Kazakhstan	27-11-2002	01-08-2007
Kenya[5]	11-09-1970	11-06-1979
Kuwait	29-05-2001	31-05-2002
Laos	16-05-2003	01-05-2005
Latvia	14-03-1994	01-04-1995
Lebanon	02-05-2002	01-03-2004
Lithuania	26-01-1994	01-04-1995
Macau	22-05-2008	01-05-2009
Macedonia	07-07-1998	01-06-1999
Malawi	11-12-2003	01-11-2007
Malaysia[5]	15-06-1971	13-09-1972
Mali	13-07-2003	01-03-2005
Malta	10-09-1984	01-07-1985
Mexico	13-05-1998	01-10-1999
Moldavia	26-09-1995	01-05-1997
Mongolia	09-03-1995	01-06-1996
Montenegro[10]	29-01-2002	01-03-2004
Morocco[5]	23-12-1971	27-07-1978
Mozambique	18-12-2001	01-09-2004
Namibia	26-11-2002	01-10-2004

Country	Date of execution of BIT	Date BIT came into force
Nicaragua	28-08-2000	01-01-2003
Nigeria	02-11-1992	01-02-1994
Oman[4]	19-09-1987	01-02-1989
Pakistan[6]	04-10-1988	01-10-1989
Panama	28-08-2000	01-09-2001
Paraguay	29-10-1992	01-08-1994
Peru	27-12-1994	01-02-1996
Philippines	27-02-1985	01-10-1987
Poland[4]	07-09-1992	01-02-1994
Romania[3]	19-04-1994	01-02-1995
Rusland[1]	05-10-1989	20-07-1991
Senegal[4]	03-08-1979	05-05-1981
Serbia[9]	29-01-2002	01-03-2004
Singapore[5]	16-05-1972	07-09-1973
Slovakia[2]	29-04-1991	01-10-1992
Slovenia	24-09-1996	01-08-1998
Soedan[7]	22-08-1970	27-03-1972
South Africa	09-05-1995	01-05-1999
South Korea	12-07-2003	01-03-2005
Sri Lanka	26-04-1984	01-05-1985
Suriname	31-03-2005	01-09-2006
Tajikistan	24-07-2002	01-04-2004
Tanzania	31-07-2001	01-04-2004
Thailand[5]	06-06-1972	03-03-1973
Tunesia	11-05-1998	01-08-1999
Turkey	27-03-1986	01-11-1989
Uganda	30-05-2000	01-01-2003
Ukraine	14-07-1994	01-06-1997
Uruguay	22-09-1988	01-08-1991
Uzbekistan	14-03-1996	01-07-1997
Venezuela[11]	22-10-1991	01-11-1993
Vietnam	10-03-1994	01-02-1995
Yemen	18-03-1985	01-09-1986
Zambia	30-04-2003	
Zimbabwe	11-12-1996	01-05-1998

Notes for the above list:

[1] As the legal successor of the former USSR, Russia is bound by the BIT that was concluded between that country and the Kingdom of the Netherland. It was executed on 5 October 1989 and went into force on 1 August 1991 (Treaty Series 1991, 126). A new BIT with Russia has not been concluded. Russia is also the legal successor of the agreements on economic, industrial and technical cooperation concluded with the USSR (Treaty Series 1972, 102, and Treaty Series 1975, 88.)

The Kingdom of the Netherlands has still not executed a new bilateral investment treaty with Azerbaijan, Kyrgyzstan and Turkmenistan. With the other sovereign states that were part of the former USSR, the Kingdom of the Netherlands has concluded new BITs, all of which are now in force. At the time these BITs went into force, they replaced the BIT between the Kingdom of the Netherlands and the former USSR.

As long as there are no new bilateral investment treaties with countries that were part of the former USSR, the presumption of the Netherlands is that the BIT between the Kingdom of the Netherlands and the former USSR continue to have binding force on these countries, unless notice is received that there is no longer a desire for the binding force to continue.

[2] Joint declarations have been made with the Czech Republic and Slovakia stating that the BIT between the Netherlands and the former Czechoslovakia continue to have binding force.

[3] A separate agreement regarding economic cooperation has also been concluded with this country.

[4] A separate agreement regarding economic and technical cooperation has also been concluded with this country.

[5] The agreement with this country is an economic cooperation agreement that includes provisions specifically relating to investments.

[6] The agreement with this country is an agreement regarding economic cooperation and investment protection.

[7] The agreement with this country is an economic and technical cooperation agreement that includes provisions specifically relating to investments.

[8] This countries have made it known that for the time being the treaty will not be ratified.

[9] As the legal successor of the country of Serbia and Montenegro, Serbia is subject to the BIT concluded between that country and the Kingdom of the Netherlands. This was executed on 29 January 2002 and went into force on 1 March 2004 (Treaty Series 2002, 83).

[10] On 15 November 2006 and 18 January 2007, the Kingdom of the Netherlands and the government of the Repubic of Montenegro exchanges memoranda regarding the continued application to both countries of the validity of the treaty between the former country of Serbia and Montenegro.

[11] Venezuela terminated the BIT with the Netherlands, so that it ended on 31 October 2008. Agreements on how investors from the two countries are to be dealt with are no longer in effect. For the time being, the termination has no direct effect on investments made before 1 Noveber 2008. For these investments, the BIT remains in force for a period of 15 years.

[12] Because there is lack of clarity about the termination of the BIT, it is unclear whether this BIT is duly valid.

ANNEX 3 —
ARTICLE 25 OF THE ICSID CONVENTION

1. The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

2. "National of another Contracting State" means:

   a. any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

   b. any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

3. Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

4. Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

ANNEX 4 — ICSID SCHEDULE OF FEES

International Centre for Settlement of Investment Disputes

SCHEDULE OF FEES
(January 1, 2008)

Fee for Lodging Requests

1. Subject to paragraph 2 below, the fee prescribed pursuant to Administrative and Financial Regulation 16 is US$25,000. This non-refundable fee is payable to the Centre by the party requesting the institution of conciliation or arbitration proceedings under the Convention.

2. A non-refundable fee of US$10,000 is payable to the Centre by the party requesting a supplementary decision to, or the rectification, interpretation, revision or annulment of an arbitral award rendered pursuant to the Convention. The same fee is payable by the party requesting the resubmission of a dispute to a new Tribunal after the annulment of such an award.

Fees and Expenses of Conciliators, Arbitrators and ad hoc Committee Members

3. In addition to receiving reimbursement for any direct expenses reasonably incurred, conciliators, arbitrators and ad hoc Committee members are entitled to receive, unless otherwise agreed between them and the parties, a fee of US$3,000 per day of meetings or other work performed in connection with the proceedings, as well as subsistence allowances and reimbursement of travel expenses within limits set forth in Administrative and Financial Regulation 14.

Administrative Charges

4. An administrative charge of US$20,000 is made by the Centre following the constitution of the Conciliation Commission, Arbitral Tribunal or ad hoc Committee concerned and on an annual basis thereafter. Administrative charges are also made by the Centre for reimbursement of its out-of-pocket expenses incurred for the particular proceeding concerned. These include expenses for the services of persons (such as interpreters, reporters and secretaries) especially engaged by the Centre for the proceeding.

5. If the proceeding is held away from the seat of the Centre, additional charges include: US$1,500 per day of meetings when the Secretary of the Commission, Tribunal or Committee attends the meetings; reimbursement of the travel and subsistence expenses of the Secretary; and any charges by the host of the meetings.

6. Administrative charges, and the fees and expenses of the Commission, Tribunal or Committee, are met from advance payments that the parties are periodically requested to make to the Centre under Administrative and Financial Regulation 14.

Charges for Special Services

7. A party requesting the Centre to perform a special service (such as the provision of translations or copies) must under Administrative and Financial Regulation 15 deposit in advance an amount sufficient to cover the resulting charges. For such services as the provision of translations or copies, the charges are determined on the basis of rates established by the World Bank under its normal administrative procedures.

Appointment of Arbitrators

8. A fee of US$ 10,000 is payable to the Centre by the party requesting the Secretary-General to appoint, or to decide on the challenge of, an arbitrator for any arbitration not conducted under the Convention or Additional Facility Rules.

ANNEX 5 — ICSID ARBITRATION RULES

ICSID ARBITRATION RULES

CHAPTER I – ESTABLISHMENT OF THE TRIBUNAL

Rule 1 – General Obligations

1. Upon notification of the registration of the request for arbitration, the parties shall, with all possible dispatch, proceed to constitute a Tribunal, with due regard to Section 2 of Chapter IV of the Convention.

2. Unless such information is provided in the request, the parties shall communicate to the Secretary-General as soon as possible any provisions agreed by them regarding the number of arbitrators and the method of their appointment.

3. Except if each member of the Tribunal is appointed by agreement of the parties, nationals of the State party to the dispute or of the State whose national is a party to the dispute may be appointed by a party only if appointment by the other party to the dispute of the same number of arbitrators of either of these nationalities would not result in a majority of arbitrators of these nationalities.

No person who had previously acted as a conciliator or arbitrator in any proceeding for the settlement of the dispute may be appointed as a member of the Tribunal.

Rule 2 – Method of Constituting the Tribunal in the Absence of Previous Agreement

1. If the parties, at the time of the registration of the request for arbitration, have not agreed upon the number of arbitrators and the method of their appointment, they shall, unless they agree otherwise, follow the following procedure:
   a. the requesting party shall, within 10 days after the registration of the request, propose to the other party the appointment of a sole arbitrator or of a specified uneven number of arbitrators and specify the method proposed for their appointment;
   b. within 20 days after receipt of the proposals made by the requesting party, the other party shall:
      i. accept such proposals; or
      ii. make other proposals regarding the number of arbitrators and the method of their appointment;
   c. within 20 days after receipt of the reply containing any such other proposals, the requesting party shall notify the other party whether it accepts or rejects such proposals.

2. The communications provided for in paragraph (1) shall be made or promptly confirmed in writing and shall either be transmitted through the Secretary-General or directly between the parties with a copy to the Secretary-General. The parties shall promptly notify the Secretary-General of the contents of any agreement reached.

3. At any time 60 days after the registration of the request, if no agreement on another procedure is reached, either party may inform the Secretary-General that it chooses the formula provided for in Article 37(2)(b) of the Convention. The Secretary-General shall thereupon promptly inform the other party that the Tribunal is to be constituted in accordance with that Article.

Rule 3 – Appointment of Arbitrators to a Tribunal Constituted in Accordance with Convention Article 37(2)(b)

1. If the Tribunal is to be constituted in accordance with Article 37(2)(b) of the Convention:
   a. either party shall in a communication to the other party:
      i. name two persons, identifying one of them, who shall not have the same nationality as nor be a national of either party, as the arbitrator appointed by it, and the other as the arbitrator proposed to be the President of the Tribunal; and
      ii. invite the other party to concur in the appointment of the arbitrator proposed to be he President of the Tribunal and to appoint another arbitrator;
   b. promptly upon receipt of this communication the other party shall, in its reply:
      i. name a person as the arbitrator appointed by it, who shall not have the same nationality as nor be a national of either party; and
      ii. concur in the appointment of the arbitrator proposed to be the President of the Tribunal or name another person as the arbitrator proposed to be President;
   c. promptly upon receipt of the reply containing such a proposal, the initiating party shall notify the other party whether it concurs in the appointment of the arbitrator proposed by that party to be the President of the Tribunal.

2. The communications provided for in this Rule shall be made or promptly confirmed in writing and shall either be transmitted through the Secretary-General or directly between the parties with a copy to the Secretary-General.

Rule 4 – Appointment of Arbitrators by the Chairman of the Administrative Council

1. If the Tribunal is not constituted within 90 days after the dispatch by the Secretary-General of the notice of registration, or such other period as the parties may agree, either party may, through the Secretary-General, address to the Chairman of the Administrative

Council a request in writing to appoint the arbitrator or arbitrators not yet appointed and to designate an arbitrator to be the President of the Tribunal.

2. The provision of paragraph (1) shall apply mutatis mutandis in the event that the parties have agreed that the arbitrators shall elect the President of the Tribunal and they fail to do so.

3. The Secretary-General shall forthwith send a copy of the request to the other party.

4. The Chairman shall, with due regard to Articles 38 and 40 (1) of the Convention, and after consulting both parties as far as possible, comply with that request within 30 days after its receipt.

5. The Secretary-General shall promptly notify the parties of any appointment or designation made by the Chairman.

Rule 5 – Acceptance of Appointments

1. The party or parties concerned shall notify the Secretary-General of the appointment of each arbitrator and indicate the method of his appointment.

2. As soon as the Secretary-General has been informed by a party or the Chairman of the Administrative Council of the appointment of an arbitrator, he shall seek an acceptance from the appointee.

3. If an arbitrator fails to accept his appointment within 15 days, the Secretary-General shall promptly notify the parties, and if appropriate the Chairman, and invite them to proceed to the appointment of another arbitrator in accordance with the method followed for the previous appointment.

Rule 6 – Constitution of the Tribunal

1. The Tribunal shall be deemed to be constituted and the proceeding to have begun on the date the Secretary-General notifies the parties that all the arbitrators have accepted their appointment.

2. Before or at the first session of the Tribunal, each arbitrator shall sign a declaration in the following form: "To the best of my knowledge there is no reason why I should not serve on the Arbitral Tribunal constituted by the International Centre for Settlement of Investment Disputes with respect to a dispute between _____ and _____.

"I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal.

"I shall judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Convention on the Settlement of Investment Disputes and in the Regulations and Rules made pursuant thereto.

"A statement of my past and present professional, business and other relationships (if any) with the parties is attached hereto." Any arbitrator failing to sign a declaration by the end of the first session of the Tribunal shall be deemed to have resigned.

Rule 7 – Replacement of Arbitrators

At any time before the Tribunal is constituted, each party may replace any arbitrator appointed by it and the parties may by common consent agree to replace any arbitrator. The procedure of such replacement shall be in accordance with Rules 1, 5 and 6.

Rule 8 – Incapacity or Resignation of Arbitrators

1. If an arbitrator becomes incapacitated or unable to perform the duties of his office, the procedure in respect of the disqualification of arbitrators set forth in Rule 9 shall apply.

2. An arbitrator may resign by submitting his resignation to the other members of the Tribunal and the Secretary-General. If the arbitrator was appointed by one of the parties, the Tribunal shall promptly consider the reasons for his resignation and decide whether it consents thereto. The Tribunal shall promptly notify the Secretary-General of its decision.

Rule 9 – Disqualification of Arbitrators

1. A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor.

2. The Secretary-General shall forthwith:
   a. transmit the proposal to the members of the Tribunal and, if it relates to a sole arbitrator or to a majority of the members of the Tribunal, to the Chairman of the Administrative Council; and
   b. notify the other party of the proposal.

3. The arbitrator to whom the proposal relates may, without delay, furnish explanations to the Tribunal or the Chairman, as the case may be.

4. Unless the proposal relates to a majority of the members of the Tribunal, the other members shall promptly consider and vote on the proposal in the absence of the arbitrator concerned. If those members are equally divided, they shall, through the Secretary-General, promptly notify the Chairman of the proposal, of any explanation furnished by the arbitrator concerned and of their failure to reach a decision.

5. Whenever the Chairman has to decide on a proposal to disqualify an arbitrator, he shall take that decision within 30 days after he has received the proposal.

6. The proceeding shall be suspended until a decision has been taken on the proposal.

Rule 10 – Procedure during a Vacancy on the Tribunal

1. The Secretary-General shall forthwith notify the parties and, if necessary, the Chairman of the Administrative Council of the disqualification, death, incapacity or resignation of an arbitrator and of the consent, if any, of the Tribunal to a resignation.

2. Upon the notification by the Secretary-General of a vacancy on the Tribunal, the proceeding shall be or remain suspended until the vacancy has been filled.

Rule 11 – Filling Vacancies on the Tribunal

1. Except as provided in paragraph (2), a vacancy resulting from the disqualification, death, incapacity or resignation of an arbitrator shall be promptly filled by the same method by which his appointment had been made.

2. In addition to filling vacancies relating to arbitrators appointed by him, the Chairman of the Administrative Council shall appoint a person from the Panel of Arbitrators:
   a. to fill a vacancy caused by the resignation, without the consent of the Tribunal, of an arbitrator appointed by a party; or
   b. at the request of either party, to fill any other vacancy, if no new appointment is made and accepted within 30 days of the notification of the vacancy by the Secretary-General.

3. The procedure for filling a vacancy shall be in accordance with Rules 1, 4(4), 4(5), 5 and, mutatis mutandis, 6(2).

Rule 12 - Resumption of Proceeding after Filling a Vacancy

As soon as a vacancy on the Tribunal has been filled, the proceeding shall continue from the point it had reached at the time the vacancy occurred. The newly appointed arbitrator may, however, require that the oral procedure be recommenced, if this had already been started.

CHAPTER II – WORKING OF THE TRIBUNAL

Rule 13 – Sessions of the Tribunal

1. The Tribunal shall hold its first session within 60 days after its constitution or such other period as the parties may agree. The dates of that session shall be fixed by the President of the Tribunal after consultation with its members and the Secretary-General. If upon its constitution the Tribunal has no President because the parties have agreed that the President shall be elected by its members, the Secretary-General shall fix the dates of that session. In both cases, the parties shall be consulted as far as possible.

2. The dates of subsequent sessions shall be determined by the Tribunal, after consultation with the Secretary-General and with the parties as far as possible.

3. The Tribunal shall meet at the seat of the Centre or at such other place as may have been agreed by the parties in accordance with Article 63 of the Convention. If the parties agree that the proceeding shall be held at a place other than the Centre or an institution with which the Centre has made the necessary arrangements, they shall consult with the Secretary-General and request the approval of the Tribunal. Failing such approval, the Tribunal shall meet at the seat of the Centre.

4. The Secretary-General shall notify the members of the Tribunal and the parties of the dates and place of the sessions of the Tribunal in good time.

Rule 14 – Sittings of the Tribunal

1. The President of the Tribunal shall conduct its hearings and preside at its deliberations.

2. Except as the parties otherwise agree, the presence of a majority of the members of the Tribunal shall be required at its sittings.

3. The President of the Tribunal shall fix the date and hour of its sittings.

Rule 15 – Deliberations of the Tribunal

1. The deliberations of the Tribunal shall take place in private and remain secret.

2. Only members of the Tribunal shall take part in its deliberations. No other person shall be admitted unless the Tribunal decides otherwise.

Rule 16 - Decisions of the Tribunal

1. Decisions of the Tribunal shall be taken by a majority of the votes of all its members. Abstention shall count as a negative vote.

2. Except as otherwise provided by these Rules or decided by the Tribunal, it may take any decision by correspondence among its members, provided that all of them are consulted. Decisions so taken shall be certified by the President of the Tribunal.

Rule 17 - Incapacity of the President

If at any time the President of the Tribunal should be unable to act, his functions shall be performed by one of the other members of the Tribunal, acting in the order in which the Secretary-General had received the notice of their acceptance of their appointment to the Tribunal.

Rule 18 - Representation of the Parties

1. Each party may be represented or assisted by agents, counsel or advocates whose names and authority shall be notified by that party to the Secretary-General, who shall promptly inform the Tribunal and the other party.

2. For the purposes of these Rules, the expression "party" includes, where the context so admits, an agent, counsel or advocate authorized to represent that party.

CHAPTER III – GENERAL PROCEDURAL PROVISIONS

Rule 19 – Procedural Orders

The Tribunal shall make the orders required for the conduct of the proceeding.

Rule 20 – Preliminary Procedural Consultation

1. As early as possible after the constitution of a Tribunal, its President shall endeavor to ascertain the views of the parties regarding questions of procedure. For this purpose he may request the parties to meet him. He shall, in particular, seek their views on the following matters:
   a. the number of members of the Tribunal required to constitute a quorum at its sittings;
   b. the language or languages to be used in the proceeding;
   c. the number and sequence of the pleadings and the time limits within which they are to be filed;
   d. the number of copies desired by each party of instruments filed by the other;
   e. dispensing with the written or the oral procedure;
   f. the manner in which the cost of the proceeding is to be apportioned; and
   g. the manner in which the record of the hearings shall be kept.

2. In the conduct of the proceeding the Tribunal shall apply any agreement between the parties on procedural matters, except as otherwise provided in the Convention or the Administrative and Financial Regulations.

Rule 21 – Pre-Hearing Conference

1. At the request of the Secretary-General or at the discretion of the President of the Tribunal, a pre-hearing conference between the Tribunal and the parties may be held to arrange for an exchange of information and the stipulation of uncontested facts in order to expedite the proceeding.

2. At the request of the parties, a pre-hearing conference between the Tribunal and the parties, duly represented by their authorized representatives, may be held to consider the issues in dispute with a view to reaching an amicable settlement.

Rule 22 – Procedural Languages

1. The parties may agree on the use of one or two languages to be used in the proceeding, provided, that, if they agree on any language that is not an official language of the Centre, the Tribunal, after consultation with the Secretary-General, gives its approval. If the parties do not agree on any such procedural language, each of them may select one of the official languages (i.e. English, French and Spanish) for this purpose.

2. If two procedural languages are selected by the parties, any instruments may be filed in either language. Either language may be used at the hearings, subject, if the Tribunal so requires, to translation and interpretation. The orders and the award of the Tribunal shall be rendered and the record kept in both procedural languages, both versions being equally authentic.

Rule 23 – Copies of Instruments

Except as otherwise provided by the Tribunal after consultation with the parties and the Secretary-General, every request, pleading, application, written observation, supporting documentation, if any, or other instrument shall be filed in the form of a signed original accompanied by the following number of additional copies:

1. before the number of members of the Tribunal has been determined: five;
2. after the number of members of the Tribunal has been determined: two more than the number of its members.

Rule 24 – Supporting Documentation

Supporting documentation shall ordinarily be filed together with the instrument to which it relates, and in any case within the time limit fixed for the filing of such instrument.

Rule 25 – Correction of Errors

An accidental error in any instrument or supporting document may, with the consent of the other party or by leave of the Tribunal, be corrected at any time before the award is rendered.

Rule 26 – Time Limits

1. Where required, time limits shall be fixed by the Tribunal by assigning dates for the completion of the various steps in the proceeding. The Tribunal may delegate this power to its President.

2. The Tribunal may extend any time limit that it has fixed. If the Tribunal is not in session, this power shall be exercised by its President.

3. Any step taken after expiration of the applicable time limit shall be disregarded unless the Tribunal, in special circumstances and after giving the other party an opportunity of stating its views, decides otherwise.

Rule 27 – Waiver

A party which knows or should have known that a provision of the Administrative and Financial Regulations, of these Rules, of any other rules or agreement applicable to the proceeding, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed - subject to Article 45 of the Convention - to have waived its right to object.

Rule 28 – Cost of Proceeding

1. Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:
   a. at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;
   b. with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.

2. Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. The Tribunal may, before the award has been rendered, request the parties and the Secretary-General to provide additional information concerning the cost of the proceeding.

CHAPTER IV – WRITTEN AND ORAL PROCEDURES

Rule 29 – Normal Procedures

Except if the parties otherwise agree, the proceeding shall comprise two distinct phases: a written procedure followed by an oral one.

Rule 30 – Transmission of the Request

As soon as the Tribunal is constituted, the Secretary-General shall transmit to each member a copy of the request by which the proceeding was initiated, of the supporting documentation, of the notice of registration and of any communication received from either party in response thereto.

Rule 31 – The Written Procedure

1. In addition to the request for arbitration, the written procedure shall consist of the following pleadings, filed within time limits set by the Tribunal:
   a. a memorial by the requesting party;
   b. a counter-memorial by the other party; and, if the parties so agree or the Tribunal deems it necessary:
   c. a reply by the requesting party; and
   d. a rejoinder by the other party.

2. If the request was made jointly, each party shall, within the same time limit determined by the Tribunal, file its memorial and, if the parties so agree or the Tribunal deems it necessary, its reply; however, the parties may instead agree that one of them shall, for the purposes of paragraph (1), be considered as the requesting party.

3. A memorial shall contain: a statement of the relevant facts; a statement of law; and the submissions. A counter-memorial, reply or rejoinder shall contain an admission or denial of the facts stated in the last previous pleading; any additional facts, if necessary; observations concerning the statement of law in the last previous pleading; a statement of law in answer thereto; and the submissions.

Rule 32 – The Oral Procedure

1. The oral procedure shall consist of the hearing by the Tribunal of the parties, their agents, counsel and advocates, and of witnesses and experts.

2. The Tribunal shall decide, with the consent of the parties, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal may attend the hearings.

3. The members of the Tribunal may, during the hearings, put questions to the parties, their agents, counsel and advocates, and ask them for explanations.

Rule 33 – Marshalling of Evidence

Without prejudice to the rules concerning the production of documents, each party shall, within time limits fixed by the Tribunal, communicate to the Secretary-General, for transmission to the Tribunal and the other party, precise information regarding the evidence which it intends to produce and that which it intends to request the Tribunal to call for, together with an indication of the points to which such evidence will be directed.

Rule 34 – Evidence: General Principles

1. The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.

2. The Tribunal may, if it deems it necessary at any stage of the proceeding:
   a. call upon the parties to produce documents, witnesses and experts; and
   b. visit any place connected with the dispute or conduct inquiries there.

3. The parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure.

4. Expenses incurred in producing evidence and in taking other measures in accordance with paragraph (2) shall be deemed to constitute part of the expenses incurred by the parties within the meaning of Article 61(2) of the Convention.

Rule 35 – Examination of Witnesses and Experts

1. Witnesses and experts shall be examined before the Tribunal by the parties under the control of its President. Questions may also be put to them by any member of the Tribunal.

2. Each witness shall make the following declaration before giving his evidence:
   "I solemnly declare upon my honour and conscience that I shall speak the truth, the whole truth and nothing but the truth."

3. Each expert shall make the following declaration before making his statement:
   "I solemnly declare upon my honour and conscience that my statement will be in accordance with my sincere belief."

Rule 36 – Witnesses and Experts: Special Rules

Notwithstanding Rule 35 the Tribunal may:

a. admit evidence given by a witness or expert in a written deposition; and
b. with the consent of both parties, arrange for the examination of a witness or expert otherwise than before the Tribunal itself. The Tribunal shall define the subject of the examination, the time limit, the procedure to be followed and other particulars. The parties may participate in the examination.

Rule 37 – Visits and Inquiries

If the Tribunal considers it necessary to visit any place connected with the dispute or to conduct an inquiry there, it shall make an order to this effect. The order shall define the scope of the visit or the subject of the inquiry, the time limit, the procedure to be followed and other particulars. The parties may participate in any visit or inquiry.

Rule 38 – Closure of the Proceeding

1. When the presentation of the case by the parties is completed, the proceeding shall be declared closed.

2. Exceptionally, the Tribunal may, before the award has been rendered, reopen the proceeding on the ground that new evidence is forthcoming of such a nature as to constitute a decisive factor, or that there is a vital need for clarification on certain specific points.

CHAPTER V – PARTICULAR PROCEDURES

Rule 39 – Provisional Measures

1. At any time during the proceeding a party may request that provisional measures for the presentation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

2. The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).

3. The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

4. The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

5. Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to the institution of the proceeding, or during the proceeding, for the preservation of their respective rights and interests.

Rule 40 – Ancillary Claims

1. Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.

2. An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the counter- memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.

3. The Tribunal shall fix a time limit within which the party against which an ancillary claim is presented may file its observations thereon.

Rule 41 – Objections to Jurisdiction

1. Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder - unless the facts on which the objection is based are unknown to the party at that time.

2. The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.

3. Upon the formal raising of an objection relating to the dispute, the proceeding on the merits shall be suspended. The President of the Tribunal, after consultation with its other members, shall fix a time limit within which the parties may file observations on the objection.

4. The Tribunal shall decide whether or not the further procedures relating to the objection shall be oral. It may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Tribunal overrules the objection or joins it to the merits, it shall once more fix time limits for the further procedures.

5. If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, it shall render an award to that effect.

Rule 42 – Default

1. If a party (in this Rule called the "defaulting party") fails to appear or to present its case at any stage of the proceeding, the other party may, at any time prior to the discontinuance of the proceeding, request the Tribunal to deal with the questions submitted to it and to render an award.

2. The Tribunal shall promptly notify the defaulting party of such a request. Unless it is satisfied that that party does not intend to appear or to present its case in the proceeding, it shall, at the same time, grant a period of grace and to this end:
   a. if that party had failed to file a pleading or any other instrument within the time limit fixed therefor, fix a new time limit for its filing; or
   b. if that party had failed to appear or present its case at a hearing, fix a new date for the hearing. The period of grace shall not, without the consent of the other party, exceed 60 days.

3. After the expiration of the period of grace or when, in accordance with paragraph (2), no such period is granted, the Tribunal shall resume the consideration of the dispute. Failure of the defaulting party to appear or to present its case shall not be deemed an admission of the assertions made by the other party.

4. The Tribunal shall examine the jurisdiction of the Centre and its own competence in the dispute and, if it is satisfied, decide whether the submissions made are well-founded in fact and in law. To this end, it may, at any stage of the proceeding, call on the party appearing to file observations, produce evidence or submit oral explanations.

Rule 43 – Settlement and Discontinuance

1. If, before the award is rendered, the parties agree on a settlement of the dispute or otherwise to discontinue the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall, at their written request, in an order take note of the discontinuance of the proceeding.

2. If the parties file with the Secretary-General the full and signed text of their settlement and in writing request the Tribunal to embody such settlement in an award, the Tribunal may record the settlement in the form of its award.

Rule 44 – Discontinuance at Request of a Party

If a party requests the discontinuance of the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall in an order fix a time limit within which the other party may state whether it opposes the discontinuance. If no objection is made in writing within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Tribunal, or if appropriate the Secretary-General, shall in an order take note of the discontinuance of the proceeding. If objection is made, the proceeding shall continue.

Rule 45 – Discontinuance for Failure of Parties to Act

If the parties fail to take any steps in the proceeding during six consecutive months or such period as they may agree with the approval of the Tribunal, or of the Secretary-General if the Tribunal has not yet been constituted, they shall be deemed to have discontinued the proceeding and the Tribunal, or if appropriate the Secretary-General, shall, after notice to the parties, in an order take note of the discontinuance.

CHAPTER VI – THE AWARD

Rule 46 – Preparation of the Award

The award (including any individual or dissenting opinion) shall be drawn up and signed within 60 days after the closure of the proceeding. The Tribunal may, however, extend this period by a further 30 days if it would otherwise be unable to draw up the award.

Rule 47 – The Award

1. The award shall be in writing and shall contain:
   a. a precise designation of each party;
   b. a statement that the Tribunal was established under the Convention, and a description of the method of its constitution;
   c. the name of each member of the Tribunal, and an identification of the appointing authority of each;
   d. the names of the agents, counsel and advocates of the parties;
   e. the dates and place of the sittings of the Tribunal;
   f. a summary of the proceeding;
   g. a statement of the facts as found by the Tribunal;
   h. the submissions of the parties;
   i. the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based; and
   j. any decision of the Tribunal regarding the cost of the proceeding.

2. The award shall be signed by the members of the Tribunal who voted for it; the date of each signature shall be indicated.

3. Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.

Rule 48 – Rendering of the Award

1. Upon signature by the last arbitrator to sign, the Secretary-General shall promptly:
   a. authenticate the original text of the award and deposit it in the archives of the Centre, together with any individual opinions and statements of dissent; and
   b. dispatch a certified copy of the award (including individual opinions and statements of dissent) to each party, indicating the date of dispatch on the original text and on all copies.
2. The award shall be deemed to have been rendered on the date on which the certified copies were dispatched.

3. The Secretary-General shall, upon request, make available to a party additional certified copies of the award.

4. The Centre shall not publish the award without consent of the parties. The Centre may, however, include in its publications excerpts of the legal rules applied by the Tribunal.

Rule 49 – Supplementary Decisions and Rectification

1. Within 45 days after the date on which the award was rendered, either party may request, pursuant to Article 49(2) of the Convention, a supplementary decision on, or the rectification of, the award. Such a request shall be addressed in writing to the Secretary-General. The request shall:
   a. identify the award to which it relates;
   b. indicate the date of the request;
   c. state in detail:
      i. any question which, in the opinion of the requesting party, the Tribunal omitted to decide in the award; and
      ii. any error in the award which the requesting party seeks to have rectified; and
   d. be accompanied by a fee for lodging the request.

2. Upon receipt of the request and of the lodging fee, the Secretary-General shall forthwith:
   a. register the request;
   b. notify the parties of the registration;
   c. transmit to the other party a copy of the request and of any accompanying documentation; and
   d. transmit to each member of the Tribunal a copy of the notice of registration, together with a copy of the request and of any accompanying documentation.

3. The President of the Tribunal shall consult the members on whether it is necessary for the Tribunal to meet in order to consider the request. The Tribunal shall fix a time limit for the parties to file their observations on the request and shall determine the procedure for its consideration.

4. Rules 46-48 shall apply, mutatis mutandis, to any decision of the Tribunal pursuant to this Rule.

5. If a request is received by the Secretary-General more than 45 days after the award was rendered, he shall refuse to register the request and so inform forthwith the requesting party.

CHAPTER VII – INTERPRETATION, REVISION AND ANNULMENT OF THE AWARD

Rule 50 – The Application

1. An application for the interpretation, revision or annulment of an award shall be addressed in writing to the Secretary-General and shall:
   a. identify the award to which it relates;
   b. indicate the date of the application;
   c. state in detail:
      i. in an application for interpretation, the precise points in dispute;
      ii. in an application for revision, pursuant to Article 51(1) of the Convention, the change sought in the award, the discovery of some fact of such a nature as decisively to affect the award, and evidence that when the award was rendered that fact was unknown to the Tribunal and to the applicant, and that the applicant's ignorance of that fact was not due to negligence;
      iii. in an application for annulment, pursuant to Article 52(1) of the Convention, the grounds on which it is based. These grounds are limited to the following: that the Tribunal was not properly constituted; that the Tribunal has manifestly exceeded its powers; that there was corruption on the part of a member of the Tribunal; that there has been a serious departure from a fundamental rule of procedure; that the award has failed to state the reasons on which it is based;
   d. be accompanied by the payment of a fee for lodging the application.

2. Without prejudice to the provisions of paragraph (3), upon receiving an application and the lodging fee, the Secretary-General shall forthwith:
   a. register the application;
   b. notify the parties of the registration; and
   c. transmit to the other party a copy of the application and of any accompanying documentation.

3. The Secretary-General shall refuse to register an application for:
   a. revision, if, in accordance with Article 51(2) of the Convention, it is not made within 90 days after the discovery of the new fact and in any event within three years after the date on which the award was rendered (or any subsequent decision or correction);
   b. annulment, if, in accordance with Article 52(2) of the Convention, it is not made:
      i. within 120 days after the date on which the award was rendered (or any subsequent decision or correction) if the application is based on any of the following grounds: the Tribunal was not properly constituted; the Tribunal has manifestly exceeded its powers; there has been a serious departure from a fundamental rule of procedure; the award has failed to state the reasons on which it is based;

ii. in the case of corruption on the part of a member of the Tribunal, within 120 days after discovery thereof, and in any event within three years after the date on which the award was rendered (or any subsequent decision or correction).

4. If the Secretary-General refuses to register an application for revision, or annulment, he shall forthwith notify the requesting party of his refusal.

Rule 51 – Interpretation or Revision: Further Procedures

1. Upon registration of an application for the interpretation or revision of an award, the Secretary-General shall forthwith:
   a. transmit to each member of the original Tribunal a copy of the notice of registration, together with a copy of the application and of any accompanying documentation; and
   b. request each member of the Tribunal to inform him within a specified time limit whether that member is willing to take part in the consideration of the application.

2. If all members of the Tribunal express their willingness to take part in the consideration of the application, the Secretary-General shall so notify the members of the Tribunal and the parties. Upon dispatch of these notices the Tribunal shall be deemed to be reconstituted.

3. If the Tribunal cannot be constituted in accordance with paragraph (2), the Secretary-General shall so notify the parties and invite them to proceed, as soon as possible, to constitute a new Tribunal, including the same number of arbitrators, and appointed by the same method, as the original one.

Rule 52 – Annulment: Further Procedures

1. Upon registration of an application for the annulment of an award, the Secretary-General shall forthwith request the Chairman of the Administrative Council to appoint an ad hoc Committee in accordance with Article 52(3) of the Convention.

2. The Committee shall be deemed to be constituted on the date the Secretary-General notifies the parties that all members have accepted their appointment. Before or at the first session of the Committee, each member shall sign a declaration conforming to that set forth in Rule 6(2).

Rule 53 – Rules of Procedure

The provisions of these Rules shall apply mutatis mutandis to any procedure relating to the interpretation, revision or annulment of an award and to the decision of the Tribunal or Committee.

Rule 54 – Stay of Enforcement of the Award

1. The party applying for the interpretation, revision or annulment of an award may in its application, and either party may at any time before the final disposition of the application, request a stay in the enforcement of part or all of the award to which the application relates. The Tribunal or Committee shall give priority to the consideration of such a request.

2. If an application for the revision or annulment of an award contains a request for a stay of its enforcement, the Secretary-General shall, together with the notice of registration, inform both parties of the provisional stay of the award. As soon as the Tribunal or Committee is constituted it shall, if either party requests, rule within 30 days on whether such stay should be continued; unless it decides to continue the stay, it shall automatically be terminated.

3. If a stay of enforcement has been granted pursuant to paragraph (1) or continued pursuant to paragraph (2), the Tribunal or Committee may at any time modify or terminate the stay at the request of either party. All stays shall automatically terminate on the date on which a final decision is rendered on the application, except that a Committee granting the partial annulment of an award may order the temporary stay of enforcement of the unannulled portion in order to give either party an opportunity to request any new Tribunal constituted pursuant to Article 52(6) of the Convention to grant a stay pursuant to Rule 55(3).

4. A request pursuant to paragraph (1), (2) (second sentence) or (3) shall specify the circumstances that require the stay or its modification or termination. A request shall only be granted after the Tribunal or Committee has given each party an opportunity of presenting its observations.

5. The Secretary-General shall promptly notify both parties of the stay of enforcement of any award and of the modification or termination of such a stay, which shall become effective on the date on which he dispatches such notification.

Rule 55 – Resubmission of Dispute after an Annulment

1. If a Committee annuls part or all of an award, either party may request the resubmission of the dispute to a new Tribunal. Such a request shall be addressed in writing to the Secretary-General and shall:
   a. identify the award to which it relates;
   b. indicate the date of the request;
   c. explain in detail what aspect of the dispute is to be submitted to the Tribunal; and
   d. be accompanied by a fee for lodging the request.

2. Upon receipt of the request and of the lodging fee, the Secretary-General shall forthwith:
   a. register it in the Arbitration Register;
   b. notify both parties of the registration;
   c. transmit to the other party a copy of the request and of any accompanying documentation; and
   d. invite the parties to proceed, as soon as possible, to constitute a new Tribunal, including the same number of arbitrators, and appointed by the same method, as the original one.
3. If the original award had only been annulled in part, the new Tribunal shall not reconsider any portion of the award not so annulled. It may, however, in accordance with the procedures set forth in Rule 54, stay or continue to stay the enforcement of the unannulled portion of the award until the date its own award is rendered.

4. Except as otherwise provided in paragraphs (1) - (3), these Rules shall apply to a proceeding on a resubmitted dispute in the same manner as if such dispute had been submitted pursuant to the Institution Rules.

CHAPTER VIII - GENERAL PROVISIONS

Rule 56 - Final Provisions

1. The texts of these Rules in each official language of the Centre shall be equally authentic.
2. These Rules may be cited as the "Arbitration Rules" of the Centre.

ANNEX 6 — DOUBLE-TAXATION TREATIES CONCLUDED BY THE NETHERLANDS

Country	Status 1 Oct 11
Albania	In force
Argentina	In force
Armenia	In force
Aruba*	In force
Australia	In force
Austria	In force
Azerbaijan	In force
Bahrein	In force
Bangladesh	In force
Barbados	In force
Belarus	In force
Belgium	In force
Brasil	In force
Bulgaria	In force
Canada	In force
China	In force
Croatia	In force
Curacao*	In force
Czech Republic	In force
Denmark	In force
Egypte	In force
Estonia	In force
Finland	In force
France	In force
Georgia	In force
Germany	In force
Ghana	In force
Greece	In force
Hong Kong	Tacit approval
Hungary	In force
Iceland	In force
India	In force
Indonesia	In force
Ireland	In force

Country	Status 1 Oct 11
Israël	In force
Italy	In force
Japan	In force
Jordan	In force
Kazakhstan	In force
Korea	In force
Kuweit	In force
Kyrgyzstan (Soviet treaty)	In force
Latvia	In force
Lithuania	In force
Luxembourg	In force
Macedonia	In force
Malawi	In force
Malaysia	In force
Malta	In force
Mexico	In force
Moldavia	In force
Mongolia	In force
Morocco	In force
New Zealand	In force
Nigeria	In force
Norway	In force
Oman	Signed
Pakistan	In force
Panama	Tacit approval
Philippines	In force
Poland	In force
Portugal	In force
Qatar	In force
Rumania	In force
Russian Federation	In force
Saudi Arabia	In force
Serbia	In force
Singapore	In force

Country	Status 1 Oct 11
Sint Maarten*	In force
Slovakia	In force
Slovenia	In force
South Africa	In force
Spain	In force
Sri Lanka	In force
Suriname	In force
Sweden	In force
Swiss	In force
Taiwan	In force
Thailand	In force
Tunisia	In force
Turkey	In force
Turkmenistan (Soviet treaty)	In force
Uganda	In force
Ukraine	In force
United Arab Emirates (UAE)	In force
United Kingdom	In force
United States of America	In force
Uzbekistan	In force
Venezuela	In force
Vietnam	In force
Zambia	In force
Zimbabwe	In force

* Tax regulation for the Kingdom of the Netherlands (Belastingregeling voor het Koninkrijk)

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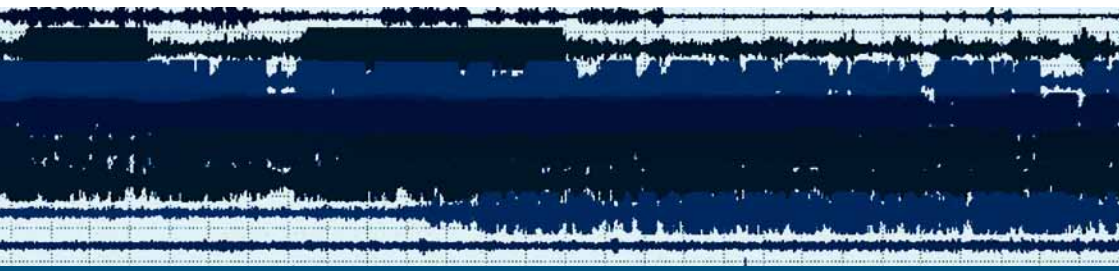

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