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Recent Developments

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The changing ecosystem of Dutch BITs

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ABSTRACT

This article reviews the recent changes of the Dutch model BIT text. It provides a background of the political changes at the domestic as well as the European Union (EU) level, which have been driving these changes. The consequences of the *Achmea* judgment are of particular importance for the intra-EU BITs and potentially for the Energy Charter Treaty. Subsequently, the article highlights the most dramatic changes compared to the previous Dutch model BIT text and Dutch BIT practice. The author concludes that these changes will ultimately result in a lowering of the level of investor and investment protection.

1. INTRODUCTION

A few years ago, leading arbitrator Gary Born warned that like the Seven Kingdoms in the Game of Thrones, international arbitration has enjoyed 'a long golden summer when everything went right' but that 'winter is coming' and called upon the arbitration community to defend the arbitration system more vigorously.[1]

As far as Dutch Bilateral Investment Treaties (BITs) are concerned, winter has certainly arrived and the chilly wind has relentlessly been blowing throughout Europe, thereby changing the ecosystem of investment treaty arbitration and Dutch BITs permanently.

The purpose of this contribution is to provide a *tour d'horizon* covering the impact of the Court of Justice of the European Union (CJEU)'s *Achmea* judgment on intra-European Union (EU) BITs and potentially on the Energy Charter Treaty (ECT) (Section 2), followed by a discussion of the new Dutch Model BIT text, which was adopted and published by the Dutch Government in October 2018 (Section 3), a review of the recent developments at the European and international level (Section 4), concluded by a short outlook (Section 5).

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1 A Ross, '"Game of Tribunals" – Winter Is Coming, Warns Born' (*Global Arbitration Review*, 15 July 2016) <https://globalarbitrationreview.com/article/1067197/-game-of-tribunals-–-winter-is-coming-warns-born> accessed 14 March 2020 ; A Ross, 'Born Takes "Game of Thrones" Message to Freshfields' (*Global Arbitration Review*, 16 November 2018) <https://globalarbitrationreview.com/article/1177000/born-takes-"game-of-thrones"-message-to-freshfields > accessed 14 March 2020.

However, before doing so, it is important to highlight the change of attitude towards BITs and the investor–state dispute settlement (ISDS) system by the Dutch Government and the EU institutions, which have been the main driving forces for this change and hence the arrival of the winter.

From the outset, it should be recalled that Dutch BITs are one of the most often used BITs for ISDS disputes.[2] The reason for that is that Dutch BITs provide for maximum coverage of investors (including letterbox companies) and investments, broadly formulated protection standards and a menu of arbitration rules. It is for these reasons that Dutch BITs have long been considered by investors and legal advisors as the 'gold standard' of BITs worldwide.[3] In addition, Dutch BITs are also very attractive in conjunction with the almost 100 Dutch Double Taxation Agreements and, thus, are used for optimal tax and company structuring as well.[4]

In short, over the past decades, the Dutch Government actively pursued a policy of attracting foreign investors and investments by providing an attractive investment climate, which in turn has resulted in thriving legal, tax, and trust company sectors in the Netherlands.[5]

As such, Dutch BITs were enjoying a long summer where everything went right, until the anti-Transatlantic Trade and Investment Partnership Agreement (TTIP)/ ISDS campaign initiated by many non-governmental organization (NGOs) across Europe, in particular, Dutch NGOs such as Transnational Institute (TNI) and Centre for Research on Multinational Corporations (SOMO), got a wider traction in the political circles and the media.[6] This was also aided by the fact that the department of foreign trade relations, which was situated within the Dutch Ministry of Economic Affairs for 65 years, was transferred to the Ministry of Foreign Affairs at the end of 2012 with the start of the Rutte II cabinet. That resulted in a decisive shift of the attitude and perspective of the relevant policymakers and civil servants from serving the Dutch economy and business interests into serving Dutch NGOs. This shift has been further reinforced by the fact that the Ministers responsible for trade

2 UNCTAD, *IIA Issues Note 2 Fact Sheet on Investor-State Dispute Settlement Cases in 2018*, May 2019, 3.

3 See, eg A Ramanna, 'Bilateral Investment Treaties – The Dutch Gold Standard' (*Lexology*, 29 August 2013) <https://www.lexology.com/library/detail.aspx?g=c2eef6ae-213a-41ab-accb-0e7ea01df719> accessed 14 March 2020; H Sprenger and B Boersma, 'The Importance of Bilateral Investment Treaties (BITs) When Investing in Emerging Markets' (*Houthoff Business Law Today*, March 2014) <https://www.houthoff.com/-/media/Houthoff/Publications/bboersma/Investment_treaties.pdf?la=en&hash=B11E7EDD9B31F1817303 7B5CB38FE6F2AB8BC5C1 > accessed 14 March 2020.

4 See, eg Interview with Maarten van der Weijden, managing partner, Loyens & Loeff, 19 September 2012, *Leaders League*, 19 September 2012 <https://www.leadersleague.com/en/news/interview-with-maarten-van-der-wijden-managing-partner-loyens-loeff> accessed 14 March 2020; RL Winston, 'Tax structuring with BITs' (*KLGates*, 15 November 2013) <https://uba.ua/documents/doc/richard_winston.pdf> accessed 14 March 2020.

5 The Netherlands Foreign Investment Agency continues to promote the 'Attractive features of the current Dutch tax regime' on its website: <https://investinholland.com/wp-content/uploads/2019/06/Incentives-Taxes_2019.pdf> accessed 14 March 2020.

6 See, eg the publications on the SOMO website: <https://www.somo.nl/nl/onderwerp/handel-en-investeringen/?fwp_paged=8&fwp_per_page=18> accessed 14 March 2020.

and investments are having a more left-wing party affiliation with close ties to the NGOs.[7]

This shift can be illustrated by the following example. The negotiating mandate of the EU Foreign Affairs Council for the European Commission regarding TTIP of 17 June 2013 contained *inter alia* the following sections:

> 22. The aim of negotiations on investment will be to negotiate investment liberalisation and protection provisions including areas of mixed competence, such as portfolio investment, property and expropriation aspects, *on the basis of the highest levels of liberalisation and highest standards of protection that both Parties have negotiated to date*. . . .
>
> 23. As regards investment protection, the objective of the respective provisions of the Agreement should:
>
> - *provide for the highest possible level of legal protection and certainty* for European investors in the US,
> - provide for the *promotion of the European standards of protection* which should increase Europe's attractiveness as a destination for foreign investment,
>
> . . .
>
> - build upon the Member States' experience and best practice regarding their bilateral investment agreements with third countries, ...[8]

Accordingly, until mid-2013, all EU Member States, in particular the Netherlands, but also Germany and France, still fully supported the Dutch 'gold standard' and obligated the European Commission to achieve the same result with the USA.

However, only two years later, after the fear of 'chloride chickens' arose and a plastic 'Trojan horse' was marched by the anti-TTIP NGOs through many European capitals, former EU Trade Commissioner Malmström initiated an online public consultation regarding TTIP and ISDS. The outcome was overwhelmingly against ISDS—albeit that 97 per cent of the answers were prefabricated by the anti-TTIP NGOs.[9] Nonetheless, in September 2015, former Trade Commissioner Malmström declared that 'ISDS is now the most toxic acronym in Europe' and that it must be replaced by a kind of permanent court.[10] A month later, former Dutch Trade Minister Ploumen went even as far as stating that 'ISDS is dead'.[11]

7 Former Dutch Trade Minister Ploumen (acting from November 2012 until October 2017) was director of Cordaid and is party member of the Labour Party (PvDA). The current Trade Minister Kaag is from the centre-left D66 party and was former United Nations (UN) diplomat.

8 Council of the EU, 'Directives for the Negotiation on the Transatlantic Trade and Investment Partnership Between the European Union and the United States of America' (ST 11103/13) 17 June 2013 (emphasis added).

9 European Commission Staff Working Document, 'Report on the Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)' (SWD (2015) 3 final) 15 January 2015.

10 P Adams, 'ISDS: The Most Toxic Acronym in Europe' (*Politico*, 19 September 2015) <https://www.politico.eu/article/isds-the-most-toxic-acronym-in-europe/> accessed 14 March 2020.

11 H de Zeeuw, 'Ploumen: grootste bezwaar TTIP is al "dood en begraven"' (*NRC*, 7 Oktober 2015) <https://www.nrc.nl/nieuws/2015/10/07/ploumen-neemt-110-000-handtekeningen-in-ontvangst-tegen-ttip-a1412547> accessed 14 March 2020.

Whereas the TTIP debate, which subsequently also spilled over to the Comprehensive Economic Trade Agreement (CETA) between the EU and Canada,[12] *prima facie* concerned only new EU investment agreements, it has also put pressure on the existing Dutch BITs.

In the first place, Dutch NGOs obtained a seat at the table with the Ministry of Foreign Affairs by participating in the so-called 'breed handelsberaad', which created an informal group that regularly discusses the agenda of the EU Foreign Affairs Council and, thus, also all BITs, ISDS, and Free Trade Agreements (FTAs) issues.[13]

Secondly, after the TTIP negotiations were suspended and the European Commission had indeed presented a proposal for replacing ISDS with the so-called investment court system (ICS), the focus of the NGOs turned to the Dutch BITs. Eventually, they extracted the commitment from the Dutch Trade Minister that a new Dutch Model BIT text would be developed in close cooperation with all stakeholders and that existing Dutch BITs would be renegotiated.[14]

Thirdly, at the same time, several Dutch BITs were terminated, for example, by South Africa (as of 1 May 2014), Indonesia (as of 1 July 2015), India (as of 1 December 2016), and Tanzania (as of 1 April 2019), which provided further fuel to the critique against Dutch BITs.

Fourthly, the pressure on the Netherlands to do something against letterbox companies was also increasing in the context of the tax rulings, the Base Erosion and Profit Shifting (BEPS) debate in the Organization for Economic Co-operation and Development (OECD) and some high-profile examples, which created a public outcry.[15] Although, it must be noted in this context that recently the General Court of the CJEU decided regarding Starbucks that the Dutch tax ruling system is consistent with EU law.[16]

12 In October 2019, the PvDA, which is the party of former Trade Minister Ploumen who negotiated and agreed on the CETA text, withdrew its support to ratify CETA. See, M Bouman, 'Nog onredelijker dan de Walen: PvdA wil handelsverdrag met Canada torpederen' (*FD*, 18 October 2019) <https://fd.nl/opinie/1320789/nog-onredelijker-dan-de-walen-pvda-wil-handelsverdrag-met-canada-torpederen> accessed 14 March 2020. Meanwhile in February 2020, the lower Chamber of the Dutch Parliament approved CETA with a very narrow majority. Since the coalition Government does not have a majority in the upper Chamber of the Dutch Parliament, it remains very uncertain whether CETA will indeed be ratified by the Netherlands. See, N Lavranos, Comment: What is the CETA drama in the Netherlands all about? (*Borderlex*, 13 February 2020) <https://www.borderlex.eu/2020/02/13/comment-what-is-the-ceta-drama-in-the-netherlands-all-about/> accessed 14 March 2020.

13 See regarding the 'breed handelsberaad': <https://www.rijksoverheid.nl/onderwerpen/handelsverdragen-europese-unie/breed-handelsberaad> accessed 14 March 2020.

14 See the answers of Trade Minister Kaag regarding the efforts of the Dutch Government to develop a new model BIT text, Tweede Kamer, vergaderjaar 2017–18, Aanhangsel, 1303 <https://zoek.officielebekendmakingen.nl/ah-tk-20172018-1303.pdf> accessed 14 March 2020; see the letter of former Trade Minister Ploumen of 19 May 2015 stating that the Dutch BITs would be re-negotiated <https://www.rijksoverheid.nl/documenten/kamerstukken/2015/05/19/beantwoording-kamervragen-over-gevolgen-isds-clausules-voor-ontwikkelingslanden> accessed 14 March 2020.

15 See, eg M Steinglass, 'Great Tax Race: Dutch Focus Reforms on Letterbox Companies' (*FT*, 28 April 2013); IJM Valderrama, 'The Adoption of the BEPS in the Netherlands' in K Sadiq, A Sawyer and B McCredie (eds), *Tax Design and Administration in a Post-BEPS Era: A Study of Key Reform Measures in 18 Countries* (Fiscal Publication 2019).

16 CJEU, Judgment in Joined Cases T-760/15 *Netherlands v Commission and T-636/16 Starbucks and Starbucks Manufacturing Emea v Commission* (24 September 2019) ECLI:EU:T:2019:669.

Finally, in October 2018, following an online public consultation, the Dutch Government adopted and published a new Model BIT text, which significantly departs from the 2004 Model BIT text.[17]

In short, within a time span of only a few years, the attitude towards Dutch BITs and ISDS has dramatically changed and become increasingly hostile. One interesting aspect in this context is the fact that neither the arbitration community nor the business community made any visible attempts to reverse or at least slow down this trend, which has been fuelled to a large extent by misconceptions and misrepresentations.[18]

It is against this backdrop that the following topics will be analysed.

2. THE IMPACT OF *ACHMEA* ON INTRA-EU BITs AND THE ECT

Before the accession of the Central and Eastern European countries to the EU in 2004 and 2007, most Western EU Member States had concluded BITs with these countries in the late 1980s and early 1990s. Also, the Netherlands had concluded 12 BITs with those countries,[19] which after their accession to the EU transformed from being extra-EU BITs, that is BITs with non-EU third states, into intra-EU BITs.

The purpose for concluding these BITs was obvious: after the fall of Communism, the Eastern and Central European countries were in dire need of foreign investments to help revamp their run-down economies, whereas their political, judicial, and administrative systems were largely dysfunctional and plagued by corruption and incapacity. In those circumstances, foreign investors could only be lured to invest in those countries if some form of minimum investment protection and effective dispute resolution mechanism was available, which is exactly what these BITs provide for.

Indeed, in the context of the Europe Agreements, which the EU signed with the accession countries in order to prepare them for the EU, the EU was encouraging the Eastern and Central European countries to conclude BITs.[20]

17 Dutch model BIT text 2018 (which was slightly updated in March 2019): <https://www.rijksoverheid.nl/documenten/publicaties/2019/03/22/nieuwe-modeltekst-investeringsakkoorden> accessed 14 March 2020. See for a detailed analysis: AM Paschalidis and N Lavranos, 'Comparative Analysis Between the 2018 and 2004 Dutch Model Bilateral Investment Treaty Texts' (2019) 4 European Investment Law and Arbitration Review 89ff.

18 A notable exception is European Federation for Investment Law and Arbitration, see eg *EFILA Paper: A Response to the Criticism Against ISDS*, 17 May 2015 <https://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the-criticism_of_ISDS_final_draft.pdf> accessed 14 March 2020.

19 Bulgaria, Czech Republic, Slovak Republic, Estonia, Latvia, Lithuania, Hungary, Malta, Romania, Slovenia, Poland (already terminated in February 2019), and Croatia.

20 For example, in the *Micula v Romania* (ICSID Case No ARB/05/20), Final Award, 11 December 2013, para 182, the Arbitral Tribunal noted that Article 74(2) of the Europe Agreement explicitly states that the aims of the cooperation between the EU and Romania in particular shall be:

> . . . - for Romania to establish and improve a legal framework which favours and protects investment;
> - the conclusion by the Member States and Romania of Agreements for the promotion and protection of investment . . .

<https://www.italaw.com/sites/default/files/case-documents/italaw3036.pdf> accessed 14 March 2020.

There was, thus, seemingly no problem with the compatibility of BITs with EU law, after all, they both aim to provide for a stable legal environment in order to stimulate the economy and create jobs, with an additional side effect of supporting the Rule of law. Indeed, a recent study confirms that intra-EU BITs provided for additional Foreign Direct Investment (FDI) to Central and Eastern European countries.[21]

2.1 The increasing tension between intra-EU BITs and EU law

However, in the *Eastern Sugar v Czech Republic*[22] case, which involved a Dutch company against the Czech Republic, the Notice of Arbitration was filed in June 2004 based on the Netherlands–Czech Republic BIT, only one month after the Czech Republic acceded to the EU, the issue of potential incompatibility of the BIT with EU law came up for the first time.

In that case, the Czech Republic relied on a letter of the European Commission, which claimed that after the Czech Republic's accession to the EU, EU law enjoys supremacy over the BIT, which in turn precludes the jurisdiction of the Arbitral Tribunal. The Arbitral Tribunal rejected this position and found that the Czech Republic had breached the BIT and awarded Eastern Sugar damages of EUR 25.4 million plus interest.[23]

In 2010, the alleged incompatibility of intra-EU BITs with EU law came up again in the now seminal *Achmea (formerly Eureko) v Slovak Republic*[24] case. Also, in that case, the Arbitral Tribunal rejected the arguments of the Slovak Republic and the European Commission that since the accession to the EU, EU law supersedes the BIT and that in any event only the domestic courts of the Member States and ultimately the CJEU are competent to decide disputes between EU investors against EU Member States. In this context, it is noteworthy that the Netherlands also intervened in this case and strongly defended the validity of the intra-EU BITs when it stated:

> 161. The Netherlands Government concluded that:
> The Netherlands affirms again that the BIT in question in this dispute continues to be fully in force. Consequently, there is also no reason to doubt the jurisdiction of the Arbitral Tribunal in this dispute. Accordingly, Article 8 of the BIT, which prescribes international arbitration as a dispute settlement tool for disputes between an investor and a Contracting Party, is fully applicable. *In the view of The Netherlands, European Union law aspects cannot and do not affect in a way the existing jurisdiction of this Arbitral Tribunal. Thus, this Arbitral Tribunal should fully exercise its jurisdiction and adjudicate this dispute.*

21 See, eg Z Zimny, 'FDI Has Benefitted the EU Members from Central and Eastern Europe and Can Continue to Do So' (23 September 2019) Columbia FDI Perspectives No 261 <http://ccsi.columbia.edu/files/2018/10/No-261-Zimny-FINAL.pdf> accessed 14 March 2020.

22 SCC No 088/2004, Partial Award, 27 March 2007.

23 ibid.

24 PCA Case No 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010.

> 162. . . . Considering this ongoing process between the Member States and the European Commission, The Netherlands deems it inappropriate to anticipate or even predetermine the question of the status of intra-EU BITs in the present dispute before an international ad hoc Arbitral Tribunal. *Legal certainty for all Contracting Parties to BITs and for investors and their investments is of the utmost importance to the Netherlands. Therefore, casting any doubt on the legal validity of existing intra-EU BITs would be unnecessarily harmful and undermine the rights and legitimate expectations of investors relying on existing BITs.*[25]

In the end, the Arbitral Tribunal found that the Slovak Republic breached the BIT and awarded *Achmea* EUR 22.1 million plus interest as compensation.[26]

Subsequently, the Slovak Republic unsuccessfully tried to set aside the award before the Oberlandesgericht Frankfurt—Frankfurt being the seat of arbitration in this dispute.[27] In appeal before the Bundesgerichtshof, it eventually succeeded to convince that court to request a preliminary ruling from the CJEU, despite the fact that the Bundesgerichtshof was not very convinced by Slovakia's arguments.[28]

On 6 March 2018, the Grand Chamber of the CJEU issued its now seminal *Achmea*[29] judgment, which was the first time the CJEU was asked to decide on the alleged incompatibility of the ISDS provision in intra-EU BITs.

As is well known, the CJEU decided that Article 8 of the Netherlands–Slovakia BIT is incompatible with EU law. In short, the CJEU argued that Arbitral Tribunals cannot be qualified as domestic courts of the Member States and, therefore, cannot request preliminary rulings from the CJEU. Consequently, there is a risk that such Arbitral Tribunals could interpret or apply EU law without being controlled by the CJEU. According to the CJEU, this, in turn, affects the consistency and uniformity of EU law and, thus, the autonomy of the EU legal order, which cannot be accepted.[30]

2.2 The impact of the *Achmea* judgment

The exact impact of the *Achmea* judgment is still a matter of debate and has raised many questions, for example: does it declare only the specific ISDS provision incompatible or the whole BIT? Does it automatically apply to all intra-EU BITs even if their ISDS provisions differ? Does it apply retroactively to all disputes since 1 May 2004 when the first Eastern and Central European countries joined the EU? Does it even affect intra-EU disputes initiated under the ECT?

25 ibid (emphasis added).

26 *Achmea BV v Slovak Republic* (PCA Case No 2008-13), Final Award, 7 December 2012.

27 Oberlandesgericht Frankfurt am Main, Beschluss vom 18 December 2014 (Az: 26 Sch 3/13) (in German).

28 Bundesgerichtshof, Beschluss vom 3 March 2016 (I ZB 2/15) (in German).

29 CJEU Case C-284/16 *Slovak Republic v Achmea BV* (2018) ECLI:EU:C:2018:158.

30 ibid. See, eg AS Hartkamp, 'Gevolgen van het Achmea arrest voor de praktijk van de investeringsarbitrage binnen de EU' (*Ars Aequi*, September 2018) 732ff; BJ Drijber, 'Nous d'abord: investeringsarbitrage na "Achmea"' (*Nederlands juristenblad*, 2019) 588ff; N Lavranos, 'After Achmea: The Need for an EU Investment Protection Regulation' (*Kluwer Arbitration Blog*, 17 March 2018) <http://arbitrationblog.kluwerarbitration.com/2018/03/17/achmea-need-eu-investment-protection-regulation/> accessed 14 March 2020.

Whichever view one takes, only a few weeks after the *Achmea* judgment was published, the Dutch Trade Minister Kaag publicly stated that the only possible consequence of the *Achmea* judgment is to terminate all Dutch intra-EU BITs.[31] In addition, the statement also declares that *Achmea* is relevant for intra-EU ECT arbitrations and, thus, must be addressed by the European Commission and the Member States, despite the fact that *Achmea* does not mention the ECT with a single word.[32]

Subsequently, on 15 January 2019, all Member States also reacted to the *Achmea* judgment by adopting three political Declarations in which they explain their conclusions of the *Achmea* judgment and the necessary consequences that follow from it.[33]

The first Declaration, signed by 22 Member States, including the Netherlands, states that all intra-EU BITs are incompatible with EU law and that they intend to terminate them by 6 December 2019. In addition, these Member States commit themselves to intervene before all Arbitral Tribunals and domestic courts to inform them about the consequences of the *Achmea* judgment and to prevent the issuing of future intra-EU BITs awards and their recognition and enforcement in the EU. The same applies also to all intra-EU ECT disputes and awards.[34]

In the second Declaration, 5 Member States (Finland, Luxembourg, Malta, Slovenia, and Sweden) disagree on the ECT issue by arguing that it is inappropriate for the Member States to decide this matter before the CJEU has ruled on it. This is in particular so since Swedish courts have requested preliminary rulings from the CJEU on exactly this point and the answer of the CJEU is pending.[35]

In the third Declaration, Hungary argues that it does not consider that the *Achmea* judgment is applicable to the ECT at all.[36]

2.3 The termination agreement for all intra-EU BITs

However, on 24 October 2019, the European Commission announced that the EU Member States have reached agreement on a plurilateral treaty for the termination of all ca. 190 intra-EU BITs.[37] Essentially, the termination agreement regulates two

31 Letter by the Dutch Government in reaction to the *Achmea* judgment [Kamerbrief over investeringsakkoorden met andere EU-lidstaten, Minister Kaag (Buitenlandse Handel en Ontwikkelingssamenwerking) informeert de Tweede Kamer over investeringsakkoorden met andere EU-lidstaten] <https://www.rijksoverheid.nl/documenten/kamerstukken/2018/04/26/kamerbrief-over-investeringsakkoorden-met-andere-eu-lidstaten> accessed 14 March 2020.

32 ibid.

33 Declaration of the Member States of 15 January 2019 on the Legal Consequences of the *Achmea* Judgment and on Investment Protection <https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en> accessed 14 March 2020.

34 ibid.

35 Declaration of the Representatives of the Governments of the Member States of 16 January 2019 on the Enforcement of the Judgment of the Court of Justice in *Achmea* and on investment protection in the EU <https://www.regeringen.se/48ee19/contentassets/d759689c0c804a9ea7af6b2de7320128/achmea-declaration.pdf> accessed 14 March 2020.

36 Declaration of the Representative of the Government of Hungary of 16 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the EU <https://www.kormany.hu/download/5/1b/81000/Hungarys%20Declaration%20on%20Achmea.pdf> accessed 14 March 2020.

37 The text of the termination agreement has not yet been officially published but a draft version has been leaked by IA Reporter <https://www.iareporter.com/articles/revealed-previously-unseen-draft-text-of-eu-termination-treaty-reveals-how-intra-eu-bits-and-sunset-clauses-are-to-be-terminated-treaty-also-creates-eu-law-focused-facilitation-p/> accessed 14 March 2020.

issues: (1) how the existing intra-EU BITs are to be terminated, including their sunset clauses and (2) how to deal with new, pending, and concluded arbitration proceedings.[38]

In the first place, the termination agreement states that all intra-EU BIT arbitrations, which were concluded before the *Achmea* judgment, ie before 6 March 2018, will remain untouched. In other words, the termination agreement does not foresee in a retroactive effect for arbitration proceedings that have definitely been concluded with a final award or settlement agreement prior to *Achmea*.

Secondly, the situation is significantly different for pending disputes, meaning arbitration proceedings that were initiated prior to the *Achmea* judgment (6 March 2018) and which have not yet been concluded. For these pending disputes, the termination agreement provides for a so-called 'structured dialogue'. This 'structured dialogue' allows the investor to initiate a settlement procedure with the Member State concerned, but only within six months from the termination of the respective BIT. The settlement procedure is to be overseen by an 'impartial facilitator' 'with a view of finding between the parties an amicable, lawful and fair out-of-court and out-of-arbitration settlement'. The facilitator shall be selected by common agreement between the investor and the Member State concerned. Interestingly, besides being independent and impartial, the facilitator must explicitly possess in-depth knowledge of Union law, but not in-depth knowledge of investment law. If the disputing parties fail to agree on a facilitator, an appointing authority, which in the draft text has been left open in brackets, shall appoint the facilitator. The facilitator shall reach a settlement agreement within six months, but parties can agree to a longer period. It is noteworthy that any settlement agreement must take into account the rulings of the CJEU as well as definite decisions of the European Commission. The latter apparently aims to ensure that State aid Decisions of the European Commission as in the famous *Micula* case are not ignored by the facilitator. Also, the termination agreement provides that the settlement procedure shall be impartial and confidential. Interestingly, the termination agreement does not explain what happens with the dispute if no settlement agreement has been reached. Is the investor allowed to continue the arbitration proceedings or is the dispute suddenly moot?

Thirdly, regarding 'new' arbitration proceedings, that is, proceedings initiated on or after 6 March 2018, ie post-*Achmea* judgment, the termination agreement simply states that 'arbitration clauses [in intra-EU BITs] shall not serve as legal basis for new arbitration proceedings'. This apparently means that dozens of intra-EU BIT proceedings that were initiated post-*Achmea* are qualified as null and void by this termination agreement, despite the fact that most intra-EU BITs were still in force and legally binding on the Member States when the proceedings were initiated. In other words, the termination agreement imposes a retroactive effect on arbitration proceedings that have been initiated more than two years ago.

Fourthly, the termination agreement simply states that the sunset clauses contained in the intra-EU BITs 'shall not produce legal effects'. Sunset clauses are

38 See for a detailed analysis: N Lavranos, 'Comment: How Intra EU Investor-State Dispute Settlement Will Be Phased Out (*Borderlex*, 12 November 2019) <https://www.borderlex.eu/2019/11/12/comment-how-intra-eu-investor-state-dispute-settlement-will-be-phased-out/> accessed 14 March 2020.

provisions which protect investments made prior to the termination of the BIT in question for a certain period, usually for an additional 10–20 years after the termination. The purpose of the sunset clauses is to protect the legal expectations of investors who made their investments based on the existence of the respective BITs.

Whereas a detailed analysis goes beyond the scope of this article, it suffices here to note that one can seriously question whether such a retroactive effect is compatible with the Rule of Law and the jurisprudence of the European Court of Human Rights.

Finally, it should be noted that the termination agreement does not apply to intra-EU ECT disputes. Instead, it is stated that this issue will be dealt with later by the Member States and the EU. It is also interesting to note that the termination agreement only requires two ratifications in order to enter into force. Also, a provisional application of the termination agreement is envisaged.

In short, it seems that the end of intra-EU BITs and arbitration proceedings based on them is coming very soon. However, it remains questionable whether all problems, in particular regarding pending cases and those initiated post-*Achmea*, are satisfactorily resolved by this termination agreement.

3. THE NEW DUTCH MODEL BIT TEXT 2018

As mentioned in the introduction, the Dutch Government responded to the pressure to align its BITs programme with the new EU investment treaties such as CETA by publishing in October 2018 a new Dutch model BIT[39] text, which replaces the 2004 model BIT text.[40] After a public consultation and discussion with various stakeholders, the new model BIT text has been adopted for the purposes of negotiating any future Dutch BITs—to the extent that is still relevant—as well as providing a basis for the re-negotiation of the existing 70 plus Dutch BITs with third states (the so-called extra-EU BITs).

A detailed analysis comparing the 2018 with the 2004 texts has been published elsewhere.[41] In the following sections, the most significant changes will be highlighted.

Essentially, the 2018 model BIT text departs significantly from the 2004 text and the existing Dutch BITs by introducing (from the perspective of investors) several new restrictive elements.[42] These additional restrictions effectively raise the threshold of successfully qualifying for investment protection under the 2018 model BIT text.

3.1 Only investors with substantial business activities are protected

The most dramatic modification in the 2018 model BIT text as compared to the 2004 text concerns the definition of 'investor', which now requires investors

39 2018 Dutch model BIT text as revised in March 2019: <https://www.rijksoverheid.nl/documenten/publicaties/2019/03/22/nieuwe-modeltekst-investeringsakkoorden> accessed 14 March 2020.

40 2014 Dutch model BIT text: <https://investmentpolicyhub.unctad.org/Download/TreatyFile/2859> accessed 14 March 2020.

41 Paschalidis and Lavranos (n 17).

42 N Lavranos, 'The CETArisation of Future Dutch BITs' (*Practical Law Arbitration Blog*, 8 June 2018) <http://arbitrationblog.practicallaw.com/the-cetarisation-of-future-dutch-bits/> accessed 14 March 2020.

of 'having substantial business activities', which essentially excludes 'empty' letterbox companies from the scope of the BIT. More specifically, the 2018 text includes the following indications for defining 'substantial business activities':

i. the undertaking's registered office and/or administration is established in that Contracting Party;
ii. the undertaking's headquarters and/or management is established in that Contracting Party;
iii. the number of employees and their qualifications based in that Contracting Party;
iv. the turnover generated in that Contracting Party; and
v. an office, production facility, and/or research laboratory are established in that Contracting Party;

This effectively puts an end to the widespread use of Dutch BITs by non-Dutch investors, which simply establish a letterbox company in the Netherlands in order to benefit from Dutch BITs. Consequently, when the 2018 text is indeed implemented, Dutch BITs will not be part any more of any 'BIT optimization' or 'BIT structuring', which has been one of the main reasons why Dutch BITs have been used in so many ISDS disputes by *de facto* non-Dutch investors.[43]

3.2 New commitments regarding sustainable development and CSR

The 2018 text contains a whole range of new explicit commitments to take into consideration the objectives of sustainable development, set out in multiple agreements (eg Paris Agreement, ILO Conventions, etc), before they admit an investment and to promote that investors voluntarily abide by the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises. Although, *prima facie*, the Corporate Social Responsibility (CSR) obligations are voluntarily, Article 7 must be read together with Article 23 of the 2018 Model BIT text, which states that:

> a Tribunal may, in deciding on the amount of compensation, take into account non-compliance by the investor with its commitments under the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises.

This effectively turns the soft law CSR obligations into hard law obligations because failure to observe them could reduce the amount of compensation, which is due to the investor/claimant. In other words, if an investor/claimant wants to be sure to receive 100 per cent of his claim, he must prove that he observed the all applicable CSR obligations.

43 UNCTAD, *Treaty-based ISDS Cases Brought under Dutch IIAs: An Overview* (2015).

3.3 Closed list of fair and equitable treatment breaches

Another significant change concerns the replacement of the open-ended wording of the fair and equitable treatment (FET) standard, which is relied upon by claimants in virtually every ISDS case. The standard provision in Dutch BITs simply states that Contracting Parties must guarantee FET at all times to foreign investors. This open-ended wording has enabled arbitral tribunals to develop and expand the FET standard to an extent that many states consider far too broad. Consequently, and as is the case in CETA, the 2018 model BIT text introduces a closed list of FET breaches.[44] This means that only measures that fall within this list can be qualified as FET breaches. Obviously, this severely restricts the room for interpretation of the arbitral tribunals and will inevitably lead to a more restrictive interpretation of the FET standard as compared to the 2004 text.

3.4 No compensation in case of 'indirect' expropriation for public policy reasons

Following the CETA (and indeed the North American Free Trade Agreement (NAFTA) and Comprehensive and Progressive Trans-Pacific Partnership Agreement (CPTPP) texts), the 2018 model BIT text now explicitly states that measures—which result in indirect expropriation but have been allegedly taken for the protection of public interests do not—in principle—constitute indirect expropriation and thus cannot lead to the payment of compensation to the affected investor/claimant.

In addition, the 2018 text enumerates the following specific indicators, which describe in detail the conditions which must be met before a measure can be qualified by arbitral tribunals as indirect expropriation:

1. effect must be equivalent to direct expropriation;
2. depriving an investor of the right to use, enjoy, and dispose of its investment, and
3. indicative factors regarding the disputed measures or series of measures are:
4. (a) the economic impact, although the sole fact that a measure or a series of measures has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;

44 Article 9 of the 2018 model text reads as follows:

> 2. A Contracting Party breaches the aforementioned obligation of fair and equitable treatment where a measure or series of measures constitutes:
>
> a) Denial of justice in criminal, civil or administrative proceedings;
>
> b) Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
>
> c) Manifest arbitrariness;
>
> d) Direct or targeted indirect discrimination on wrongful grounds, such as gender, race, nationality, sexual orientation or religious belief;
>
> e) Abusive treatment of investors such as harassment, coercion, abuse of power, corrupt practices or similar bad faith conduct; or
>
> f) A breach of any further elements of the fair and equitable treatment obligation adopted by the Contracting Parties in accordance with paragraph 3 of this Article.

(b) the duration, and
(c) their character, notably the object and context.

This kind of provision is now rather common in many newer investment treaties, however, is lacking in the 2004 text and all currently existing Dutch BITs. This is particularly relevant considering the fact that by far the majority of ISDS cases concern measures that were adopted for allegedly public policy reasons but have resulted in an indirect expropriation of the investor/claimant. Obviously, the 2018 text significantly increases the threshold for investor–claimants to successfully prove an indirect expropriation by the state.

3.5 Reformed ISDS provisions

The ISDS provisions of the 2018 text have been completely revised and too a large extent aligned with the EU's new investment treaties such as CETA.

First, it should be noted that the 2018 text already contains a provision which automatically accepts the jurisdiction of the currently negotiated multilateral investment court (MIC), once it becomes operational.[45]

Secondly, none of the disputing parties is involved in the selection of the arbitrators. Instead, the Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID) shall serve as appointing authority for the appointment of all three arbitrators, if the claimant selects the ICSID Convention as arbitration rules. In the event that the claimant chooses arbitration pursuant to the UNCITRAL Arbitration Rules, the Secretary-General of the Permanent Court of Arbitration (PCA) shall serve as appointing authority for selecting all three arbitrators.

Accordingly, there will be no party autonomy—neither for the investor nor for the state—to select an arbitrator of their choice. This removes one of the fundamental pillars of arbitration.

At the same time, this is an interesting deviation from the ICS that is contained in CETA and the other EU investment treaties. In these treaties, it is only the Contracting Parties that select the ICS members to the exclusion of the investor–claimant. This obviously carries the risk of selecting pro-state biased ICS members, which may be tempted to judge cases in favour of states, in particular, in order to secure their re-appointment. In contrast, the system as proposed in the 2018 text, which puts the selection of all three arbitrators in the hands of an independent arbitration institution, seems to provide a better guarantee for a balanced, independent, and impartial selection of arbitrators.

45 UNCITRAL Working Group III on ISDS reforms has been discussing various options, including the proposal of the EU to create a new permanent two-tier MIC. See on the proposed design of the MIC, Submission from the EU and its Member States, *Possible Reform of Investor-State Dispute Settlement (ISDS)* (A/CN.9/WG.III/WP.159/Add.1) 24 January 2019 <https://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1> accessed 14 March 2020.

3.6 An unenforceable Rule of Law provision

There is an interesting innovative aspect in the 2018 text since it contains a specific Rule of Law provision.[46] To the knowledge of the author, this is a unique provision in a model BIT text. However, the practical relevance of that provision appears limited since Article 16 of the 2018 model text restricts the scope of the arbitration provisions to 'treatment alleged to be a breach of a provision in Section 4 of this Agreement, which breach allegedly causes loss or damage to the investor or its investment(s)'. However, the Rule of Law provision is part of Section 3, which *prima facie* excludes the possibility for investor–claimants to enforce that provision.

In my view, it would be important to modify the model text on this point so as to make it possible for investor–claimants to bring claims against states, which violate the Rule of Law provision. This would significantly strengthen the level of protection of the BITs.

In short, the 2018 model BIT text represents a significant departure from the current Dutch 'gold standard' BIT practice. It remains to be seen to what extent other states will agree to this text when the Netherlands starts re-negotiating its 70 plus extra-EU BITs and possibly concludes new BITs.

In any event, due to Regulation 1219/2012,[47] the European Commission has the right to supervise any new BITs and must ultimately authorize them. In this way, the European Commission will be able to align also the ca. 1500 existing extra-EU BITs of all Member States with its new FTAs, such as CETA.

3.7 Other Member States also revise their model BIT texts

Around the same time as the Netherlands, also Belgium and Luxembourg have also adopted a new model BIT text.[48] While many aspects are very similar to the new Dutch model BIT text, there are also some interesting differences.

46 Article 5 obliges the Contracting parties to:

> 1. . . . guarantee the principles of good administrative behavior, such as consistency, impartiality, independence, openness and transparency, in all issues that relate to the scope and aim of this Agreement.
> 2. Each Contracting Party shall ensure that investors have access to effective mechanisms of dispute resolution and enforcement, such as judicial, quasi-judicial or administrative tribunals or procedures for the purpose of prompt review, which mechanisms should be fair, impartial, independent, transparent and based on the rule of law.
> 3. As part of their duty to protect against business-related human rights abuse, the Contracting Parties must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy. These mechanisms should be fair, impartial, independent, transparent and based on the rule of law.

47 *Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries* (2012) OJ L351, 40–46.

48 *Voortgangsrapport 2019 inzake handelsverdragen van de vice-eersteminister en minister van Buitenlandse Zaken en Europese Zaken, belast met beliris en de Federale Culturele Instellingen, Belgische Kamer van Volksvertegenwoordigers* (DOC 54 1806/007) 28 Maart 2019.

For example, Article G of the BEL/LUX model BIT text continues to stick with the traditional ISDS mechanism, which means that both investor–claimant and the host state can appoint an arbitrator. This is rather surprising in light of the ferocious resistance of Wallonia against including even the reformed ICS in CETA, which almost brought CETA down and led to Belgium's request of an Opinion from the CJEU as to the compatibility of the ICS with EU law. Eventually, the CJEU gave its blessing to the ICS in its Opinion 1/17.[49] Thus, also Belgium and Luxembourg started the process of aligning their BITs with the EU investment policy.

Moreover, even in the UK, which is about to free itself from the shackles of EU law, the House of Commons' Select Committee on International Trade released a 70-page report urging the UK Government to reform the UK BITs.[50] Among other things, it calls for clarifying the UK Government's stance on investment protection standards and dispute resolution mechanisms for investors. Indeed, the report states that the UK Government must 'carefully consider and fully evaluate' alternatives to ISDS in the agreements it negotiates moving forward—such as the EU ICS and the proposal for an MIC.

The Committee also urged the UK Government to consider including provisions in any international investment agreements to counterbalance investor rights, such as enshrining investor obligations, allowing for state counterclaims or 'carve-outs' from investment protection. The report also asks the UK Government to consider the compatibility of any future investment agreements with 'UK policies in the areas of development, climate and human rights'.

In sum, there seems to be a trend in several jurisdictions to review and revise the currently existing BIT practice by aligning it with the EU approach in CETA.

4. GLOBAL DEVELOPMENTS

At the regional and global level, the developments in international investment law also continue to take place at a high pace.

At the regional level, the process of modernizing the ECT is under way, which will cover both substantive protection standards as well as procedural aspects.[51] Obviously, the EU and the Member States are aiming to also align the ECT towards CETA.[52] However, it remains to be seen whether, and if so, to what extent the other ECT parties will go along with these proposals.

At the global level, reference can be made to the process of revisions of the ICSID Arbitration Rules.[53] Since ICSID Arbitration Rules are by far the most often

49 See for a detailed analysis: N Lavranos, 'CJEU Opinion 1/17: Keeping International Investment Law and EU Law Strictly Apart' (2019) 4 European Investment Law and Arbitration Review 240ff.

50 House of Commons International Trade Committee UK Investment Policy, *Seventh Report of Session 2017–19* (30 July 2019).

51 The relevant documents regarding the ECT modernization process can be found on the dedicated website of the ECT: <https://www.energychartertreaty.org/modernisation-of-the-treaty/> accessed 14 March 2020.

52 See the EU Negotiating Directives for the Modernisation of the Energy Charter Treaty (10745/19 ADD 1) 2 July 2019 <https://data.consilium.europa.eu/doc/document/ST-10745-2019-ADD-1/en/pdf> accessed 14 March 2020.

53 The relevant documents are available at the dedicated website of ICSID: <https://icsid.worldbank.org/en/amendments> accessed 14 March 2020.

used rules, their modifications will have a significant impact on investment treaty arbitration disputes.

At the same time, attention is increasingly turning to alternative dispute settlement options, such as mediation. However, until recently settlement agreements following successful mediation could not be enforced in courts, which is clearly a huge drawback. This could change now with the new UN Convention on International Settlement Agreements Resulting from Mediation (the 'Singapore Convention on Mediation'),[54] which was adopted on 20 December 2018 and has been opened for signature on 7 August 2019 in Singapore. This Convention mirrors the New York Convention 1958 on the recognition and enforcement of foreign arbitral awards in that it provides for recognition and enforcement of settlement agreements in the signatory states. At the time of writing (March 2020), more than 50 states have signed the Convention and three countries (Fiji, Qatar and Singapore) have ratified it. Indeed, if a significant number of states would ratify this Convention, it could make mediation an interesting alternative to ISDS procedures, especially for straightforward cases with a relatively low amount of damages involved.

Finally, the negotiations within UNCITRAL Working Group III on ISDS reforms are in their final phase. The Working Group has been looking at incremental as well as systemic reform proposals for the current ISDS system. Agreement on incremental changes has been agreed upon at the last meeting in October 2019.[55] For example, the creation of an Advisory Centre for Investment Disputes that would provide legal assistance to developing countries which are involved in investment arbitration disputes. Also, a binding Code of Conduct for arbitrators and more stringent regulations for third-party funders will be developed.

The focus in 2020 will be on the systemic reforms by creating some sort of permanent body, either in the form of the MIC or some other kind of appeal mechanism that would allow for the review of arbitral awards. It remains to be seen whether major economies such as the USA, Japan, and China will actually support the creation of a permanent body.

5. OUTLOOK

Since the EU entered the investment arbitration arena 10 years ago, it has had a powerful impact that continues to spill over to the global level. Pushed by the European Parliament, NGOs, academics, and the media and assisted by the CJEU, the European Commission has put in motion significant changes regarding ISDS and substantive protection standards.

This has also forced the Netherlands and other EU Member States to align their model BIT texts. While it will take probably 5–10 years to see the real impact of this policy change, it is obvious that the Dutch 'gold standard' for BITs will be something of the past. Similarly, the pressure on the ECT is mounting and will inevitably lead to its modification towards the CETA model.

54 United Nations Convention on International Settlement Agreements Resulting from Mediation, 2018 (the 'Singapore Convention on Mediation').

55 See N Lavranos, 'UNCITRAL Members Harvest Low Hanging Fruit in ISDS Reform' (*Borderlex*, 18 October 2019) <https://www.borderlex.eu/2019/10/18/uncitral-members-harvest-low-hanging-fruit-in-isds-reform/> accessed 14 March 2020.

At the same time, investors will continue to seek the best investment protection which they can get. Consequently, other jurisdictions outside the EU could become particularly interesting. This in turn will lead to a 'waterbed effect', meaning that other jurisdictions will benefit from this policy change.

As regards the MIC, it remains to be seen whether it will indeed be the panacea for all the perceived shortcomings of the current ISDS system. Indeed, even if the MIC would become operational, the substantive differences between the more than 3000 BITs will continue to exist and cannot be swept under the carpet through teleological and dynamic jurisprudence of the MIC.

In any event, the conclusion must be that the ecosystem of Dutch BITs has—presumably permanently—changed and will continue to evolve in the coming years. However, the fundamental question remains unanswered, namely, for whose benefit are these changes implemented? Surely not for maintaining a high level of investor and investment protection and neither for maintaining the Netherlands as an attractive destination for FDI.