**Position paper for the Roundtable on the Dutch Model BIT**

**Parliamentary Commission for Foreign Trade and Development Cooperation**

The Hague, 28 January 2019

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With the invitation to participate in the Round table came the request to produce a ‘position paper.’ I gladly oblige. I will limit myself to three issues which have been, as far as I can see, neglected in the discussion up to this point.

1. *The Compatibility of Bilateral Investment Treaties with EU Law*

The Minister rightly notes that the text will have to be notified to the Commission with a view to obtaining authorisation. The Commission will have to refuse such authorisation if it finds that the text is ‘in conflict with Union law’ (Art 9(1) a, Regulation 1219/2012).

The Model text seeks to address potential problems in several instances. Most generally, Article 2 (5), states that ‘no provision of this agreement shall be construed as to prevent a Contracting Party from fulfilling its obligations as a member of…the European Union’. Articles 2(3) (competition law) and Article 2(4) (state aids) are written with a view of avoiding claims in areas where Dutch obligations under EU Law are most vulnerable to accusations of breach of Fair & Equitable Treatment obligations. Article 20 (12), finally, prohibits the Tribunal from applying domestic law- and hence, in the case of the Netherlands, EU law- other than ‘as a matter of fact’, and from pronouncing itself on the legality of any measure under domestic law.

In my view, the model text potentially forces the Netherlands to be in breach of the general prohibition of discrimination on grounds of nationality under EU law. The reason for this is fairly straightforward, and the debates currently raging about the difference between intra-EU BITs, extra-EU BITs and EU Investment agreements in this regard are but noise. The key lies in the uncontroversial observation that the criteria for nationality under the model text and fundamentally different from the criteria or nationality under EU law, with the consequence that an entity which qualifies as a foreign ‘investor’ under international law qualifies *at the same time* as a ‘Dutch company’ under EU Law.

Perhaps an example may be useful. Mrs Alpha, a national of country B, owns 100% of shares of Alpha BV, a company incorporated in the Netherlands. Under the model text, Mrs Alpha is an ‘investor’ with the nationality of country B who has the right to bring a claim to protect her ‘investment’, Alpha BV, from mistreatment by the Dutch authorities. Clearly, there is nothing in EU law to prevent the Netherlands to accord rights and privileges and pay compensation for breach of international law obligations to a third-country national. But the Netherlands is not allowed under EU law to afford rights and privileges and pay compensation to a Dutch company which it doesn’t afford and pay to other EU companies operating in the same market and suffering the same treatment in the same circumstances. And under EU Law, Alpha BV, *regardless of the nationality of its shareholders*, is a Dutch company.

Where the point is recognised in debates about investment protection, it is often buried under the slogan of ‘no greater rights’ or some other variation of the idea that there is nothing in investment agreements giving greater protection to foreign investors than is available under domestic law to domestic – and EU- investors. While I have great respect for the effort and learning that has gone into filling entire libraries comparing EU law and international investment law protections, this is, in my view, a largely irrelevant discussion. The substantive standards of protection against, for example, expropriation and unfair and inequitable treatment in the model text are both *absolute*- in that they apply to foreign investors regardless of how domestic investors are treated- and *autonomous*- in that their content is derived from the development of international law without any necessary regard for or reference to the development of similar doctrines in national or EU law. ‘No greater rights’ is hence both static and entirely empirical, and offers no principled legal solution to the problem. In my view, the only way to make Dutch BITs compatible with EU law is to limit substantive standards of protection to the relative standard of non-discrimination. I add that even in the unlikely case that the Court of Justice were to decide, in its Opinion on the compatibility of the CETA investment chapter with EU law, that similar fears of discrimination are unfounded, the problem for the Netherlands will not necessarily go away. EU Agreements, unlike Dutch bilateral treaties, are an integral part of the EU legal order. *Quod licet* the EU *non licet* the Netherlands.

1. *Investor liability for damage caused in the host state*

The Minister writes:

“Met de nieuwe modeltekst speelt Nederland een voortrekkersrol op het terrein van duurzaam investeringsbeleid. De nieuwe modeltekst brengt meer evenwicht in de rechten en plichten van investeerders en staten.”

As an example of this newly enlightened policy, she goes on to explain:

‘In het geval dat het land van vestiging niet optreedt tegen misdragingen van de buitenlandse investeerder, bevestigt de modeltekst dat een procedure kan worden gestart tegen die investeerder, conform het recht van de thuisstaat van de investeerder.’

What she refers to is Article 6 (4), which reads:

Investors shall be liable in accordance with the rules concerning jurisdiction of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state.

This is, frankly, meaningless window-dressing devoid of all intellectual honesty. There is very little in the ‘rules concerning jurisdiction’ of the Netherlands to make such an action likely to succeed. Nothing in the model text would stop a Dutch court from wondering why it should hear a case brought by foreigners against a foreign company for damage caused in a foreign country. If the company law doctrine of separate legal personality is suspended in investment treaties in favour of a foreign investor seeking to bring a claim on behalf of its subsidiary, the doctrine is very much alive in Dutch tort law which would limit any liability for an investor for actions undertaken by its subsidiary - let alone actions undertaken by its foreign subsidiary in a foreign land- to the rare circumstances where the mother company exercised effective control over the actions of the daughter company, or fell short of its – narrowly circumscribed- due diligence obligations. If the Netherlands is serious about investor liability, it should incorporate the whole of the International Institute for Sustainable Development’s Model clause, and not just an emasculated version of the first paragraph:

Investor Liability   
1.      Investors and their investments shall be subject to civil actions for liability in the judicial process of their home state for the acts, decisions or omissions made in relation to the investment where such acts, decisions or omissions led to damage, personal injuries or loss of life in the host state.  
2.      Parties shall ensure that their legal systems and rules allow for, or do not prevent or unduly restrict, the bringing of court actions on their merits before domestic courts relating to the civil liability of the Investor for damages resulting from alleged acts, decisions or omissions of the Investor and/or its investment in the territory of other Parties.   
3.      In particular,  
i. each Party shall ensure that its domestic courts shall not decline to hear such actions based on forum non conveniens or any similar judicial rule in the Party.  
ii. each Party shall allow its courts to look at the structure of the Investor and its investments to impose liability on the parent corporation and/or a sister subsidiary if the acts, decisions or omissions of the Investor or its investment led to damage, personal injuries or loss of life in the host state.

1. *The protocol on public debt*

The protocol – taken from CETA which, in turn, takes it from US BITs with South American countries- is written as offering protection against ‘vulture funds’, or, generally, against hold-out litigation by bondholders seeking to recover the full nominal value of their debt securities and refusing to take a ‘haircut’ together with the majority of bondholders who are willing to engage in debt-restructuring. There is, of course, as such, nothing wrong with legislating against vulture funds. The protocol, however, is an exception legitimising a rule which the Netherlands should never endorse in any circumstance. Public debt, purchased on secondary markets and *priced according to the risk of default*, should not be regarded as an ‘investment’ and considered a property right to be protected under international investment law. Of all the aberrant awards by Tribunals that have led to the current legitimacy crisis in investment arbitration, *Abaclat* (upholding jurisdiction for a class action of hold-outs of Argentinian debt on a spurious theory why junk bonds should count as ‘investments’) is surely among the worst.

As a matter of international legal policy, the protocol is a terrible idea, for reasons too many and compelling to enumerate. A short selection:

1. Of all international institutions that could potentially deal with issues of sovereign debt restructuring, investment arbitration tribunals are surely the least suitable. They deal with the specific obligations that a State has of protecting the property rights of a specific investor, an angle from which it is impossible in the best of circumstances to take proper account of the interests of the many stakeholders involved (international institutions, citizens of the state concerned, taxpayers from bailout countries) in a process that should be guided by the principle of equitable burden-sharing.
2. The protocol is written to address a collective action problem *among* creditors: by legislating against ‘free riders’, the theory is that it increases the confidence and willingness of the majority of creditors to engage in meaningful negotiations. But the principle of public debt as an enforceable property right under Investment Treaties strengthens the hand of creditors *collectively* in any negotiation with the debtor state: to put it bluntly, it gives an incentive to *every* creditor to behave like a vulture.
3. The lack of international regulation of sovereign debt and bankruptcy is a deplorable shortcoming of the international legal system. There have been efforts by the IMF in 2003 to come to a multilateral Sovereign Debt Restructuring Mechanism, but these were abandoned under pressure of creditors. Recently, UNCTAD developed its Principles of Promoting Responsible Sovereign Lending and Borrowing. The General Assembly of the United Nations breathed new life into the issue by its Resolution of 9 September 2014, calling for negotiations to come to a legal framework for a global bankruptcy process. The global politics in the area of public debt is clear from the voting record on the GA Resolution: a vast majority, including the entire global south, voted in favor; 41 states, including the great majority of EU Member States including the Netherlands, abstained; 11 States, including the US, Canada, Germany and the United Kingdom voted against. By privileging market-based, contractual solutions, the protocol is a slap in the face of the G77 and of all efforts to come to a sensible multilateral treaty-based process of debt restructuring.

The protocol should be scrapped altogether, and the definition of ‘investment’ should contain the following clause, taken from the 2004 Model BIT of Canada:

“for greater certainty: a loan to, or debt security issued by, a Party or a state enterprise thereof is not an investment.”