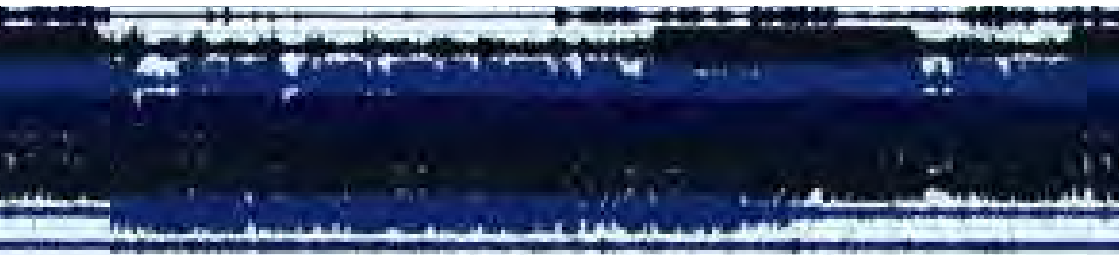
HOUTHOFF BURUMA

保护中国在非洲和世界其他地区的投资

战略性使用荷兰双边投资条约，以保护中国在非洲和世界其他地区的海外投资免受政权无序变动或地方政府的不利干预

PROTECTING CHINESE INVESTMENTS IN AFRICA AND ELSEWHERE IN THE WORLD

STRATEGIC USE OF NETHERLANDS BILATERAL INVESTMENT TREATIES IN PROTECTING CHINESE OVERSEAS INVESTMENTS IN AFRICA AND ELSEWHERE IN THE WORLD AGAINST THE EFFECTS OF DISORDERLY CHANGES IN THE REGIME OR UNFAVOURABLE LOCAL GOVERNMENT INTERFERENCE



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简介

2007 年：中国工商银行以55亿美元价格购买了南非标准银行20%的股份。

2010 年：中国第二大水泥生产商冀东发展集团和中国非洲发展基金，帮助南非在约翰内斯堡附近的豪登省建造了一家至少价值人民币15亿元（约合2.2亿美元、1.74亿欧元、1.48亿英镑）的新水泥厂。

2011 年：四川宏达股份有限公司与坦桑尼亚国营的国家发展公司（NDC）签署了一份价值30亿美元的煤炭和铁矿石采矿协议。四川宏达和NDC组建了一家合资公司——坦中国际矿业资源（TCMR）公司，联合开发煤矿和铁矿。

2012 年：金牛矿业有限公司（中国广东核电集团公司和中国非洲发展基金的子公司）收购了一家澳大利亚铀矿业上市公司—埃克斯特拉科特资源公司（Extract Resources Limited）。埃克斯特拉科特资源公司拥有纳米比亚胡萨卜（Husab）铀矿项目，预期该项目开始运营后将成为世界最大的铀矿。埃克斯特拉科特资源公司的股份是分阶段收购所得（交易价值隐含的股权价值为21.7亿澳元（约合23.4亿美元））。

这仅仅只是过去10年间中国投资者为非洲带来巨大利益的冰山一角而已。已有超过2000家中国公司在非洲投资，投资领域主要集中在能源、矿产、建筑和制造行业。中国国有石油公司在整个非洲大陆都非常活跃。例如，中国石油天然气集团公司在苏丹石油领域投资了超过60亿美元。中国电力投资集团计划在几内亚的铝土矿和氧化铝项目上投资60亿美元。私营的华为集团和公开上市的中兴通讯已经成为多个非洲国家的主要电信提供商。越来越多的中国公司正在进入非洲国家的金融、航空、农业乃至旅游等行业。

中国投资的主要部分过去一直集中在相对较少的几个国家。在2003到2007年间，对尼日利亚、南非、苏丹、阿尔及利亚和赞比亚五个国家的投资占中国投资总量的70%。尽管这些国家仍然是重要的投资目标，但其他国家，如几内亚、加纳、刚果民主共和国以及埃塞俄比亚最近也进入了中国的投资名单。例如，在2010年，埃塞俄比亚共有580家注册的中国公司，估算投资金额为22亿美元。[1]

任何在非洲有商业经验的人都会知道，无论投资的形式如何，都会存在风险。其中的风险之一，是东道国有可能会尝试以多种方式影响投资，或因其他原因而无法保护海外投资者的利益。例如，某些东道国曾经驱逐个人出境，或强制关闭或转让项目和公司的所有权。同样的，某些司法管辖区可能易于受到社会动荡或政权突变的影响。在此情况下，投资者可能会面对不确定性，因为他无法确定东道国是否会部署军警资源来保护一个外国实体经营的矿场等。和以往一样，在非洲较不稳定地区的政府，一方面鼓励外来投资，而另一方面又要照顾其本国国民的利益。

[1] 同上。

昊博实用指南系列中的本书，其目标是为了向在非洲的中国投资者解释如何利用双边投资条约来保护其投资利益，以及如何就当地政府不恰当干预所造成的损失进行索赔。其重点在于双边投资条约(BIT)。根据对我们客户进行的调查，仅有极少数的投资者意识到投资条约的存在。而了解这些投资条约的人也往往低估了它们在投资出现问题时所能发挥的作用。我们希望本书能够帮助在非洲或世界其他地区寻找机会的中国投资者理解这些条约在他们需要的时候，如何能够为他们提供帮助。

德克•诺腾贝尔特
昊博律师事务所仲裁团队主管
2013年3月

第一章 —— 介绍双边投资条约

当投资者选择国际投资目标，以及设立国际投资架构的场所时，投资者的注意力通常不会集中在国际法对投资保护的问题之上。因此，如果当地政府不适当地对投资进行干预，并因而导致损失，是否可以应用投资条约并获得赔偿在很大程度上都是偶然的。但是，审慎的投资者及其顾问在考虑投资目标地区以及设立海外投资架构场所时，同时也会考虑投资是否可以获得国际投资条约的保护，以及获得保护的要求等等。

在世界范围内，约有2,100份投资条约存在。其中有95份是由荷兰缔结的，而其中的28份是与非洲国家间缔结的。

荷兰是一个复杂的国际投资条约网络的中心。这并不是幸运的巧合：荷兰经济非常依赖于海外贸易。荷兰本身是一个资本出口型国家。荷兰企业一向以来都是积极的海外投资者。由于荷兰拥有良好的财政政策，以及作为欧洲主要贸易枢纽的身份，这为荷兰经济带来了良好的开放性、稳定性和低通胀，同样也为海外贸易提供了帮助。

本书的目的是为投资者和投资顾问提供关于两方面问题的概述：其一，如何规划国际投资，其二，如何追回因外国当地政府不恰当干预投资而造成的损失和损害。

1. 海外投资的风险

海外投资的性质与一般贸易不同。在典型情况下，贸易主要是货物和货币的一次性交换，而在外国进行投资则基于投资者和接受投资的国家（“东道国”）之间的长期关系。在规划海外投资时，需要注意的关键问题之一，就是从商业角度和法律角度，预先识别和评估这种长期关系中固有的风险。在其他国家的投资也有一定的风险，这些风险往往和投资者本国（“母国”）所存在的风险不同。

这些风险并不一定是投资中所固有的，而是投资者在其他国家因当地政府干预、进出口管制、政治动荡、乃至战争等原因所造成的风险。

尽管毫无疑问的，在过去几年间，很多非洲国家的投资风险都有所下降，但当这样的风险具象化时，其影响会得到广泛报道，并进而影响投资决策。

由于这些原因，尽管海外投资者对非洲的兴趣不断提高，但他们在决定任何投资时，往往仍然存在疑虑。其原因有二：一方面，对不可再生资源项目的投资需要在相当长的时间内投入大量的资本开支，同时资金缺乏流动性。另一方面，海外投资者在发展中国家进行的长期投资存在诸多政治风险，例如征收项目资产和歧视性待遇等等。

1991年，一家在扎伊尔投资的美国公司工业园，遭到了扎伊尔武装力量的洗劫。工业园在

1992年重新开业。1993年，工业园被扎伊尔武装力量摧毁，并因此被永久关闭。这家美国公司要求扎伊尔共和国根据美国和扎伊尔共和国之间签署的双边投资条约承担责任。[2]

一家澳大利亚公司和毛里塔尼亚政府签订的产品分成合同，在政府因不流血政变失去权力后被撕毁。新政府拒绝承认协议的合法性，并声称合同中存在争端的修订条款损害了国家经济利益。如果澳大利亚和毛里塔尼亚在该争端发生时存在有效的、规管海外投资待遇的国际条约，则该澳大利亚公司的谈判立场可能会得到显著增强。

津巴布韦的土地征用法剥夺了许多农村土地所有者的土地，而没有给予任何补偿。诸多新设法律和对宪法的修订，使得政府可以实质上征收土地所有者们的土地。

苏丹南部和北部地区存在的争端导致南部地区关闭了油井，而不顾及海外投资者的利益。

最近，赞比亚在煤矿工人的骚乱和示威活动后，撤消了该国南部一家中国人拥有的煤矿的许可证。赞比亚政府从中国矿主手中接管了煤矿。

当东道国的新法律使得投资一文不值时、或者东道国政府征收投资者企业时、或者由于政治骚乱导致财产受到损害或被摧毁（例如在埃及、利比亚和叙利亚发生的阿拉伯之春事件）时、或者如果东道国出人意料的取消了许可证，使得投资者无法继续开展业务时，在这些情况下，投资者能寻求何种救济呢？

通常来说，在投资者和当地政府间不存在合同关系。这就使得个人或公司很难，或者无法在当地法院要求合同索赔。对于面临这种风险的谨慎企业来说，保险是一个选项。在一些情况下，确实有可能为这类风险投保。但是保险费用往往十分高昂，同时最大覆盖范围也往往受到限制。这一点对确实存在上述风险的国家，即“资本进口型国家”，或者说大多数非洲国家而言，是非常准确的事实。

国际法有可能适用，但是国际法非常难于执行。在历史上，因东道国违反国际法而希望从东道国获得赔偿的个人或公司不能直接要求索赔。海外投资者往往需要依赖其母国政府的保护，以对其在外国进行的投资提供保障。在某些情况下，这可能会带来军事行动威胁，或者说“炮艇外交”。例如，非洲基础设施集团记录美国曾34次向拉丁美洲派出军队以解决商业争端。[3]

现在，各国更倾向于签署双边投资条约，以确立决定政府如何对待海外投资者的协议。

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[2] 美国制造及贸易有限公司诉扎伊尔共和国，ISCID案件号RB/93/1

[3] <http://www.icafrica.org>

2. （双边投资条约（BIT）

自1959年德国和巴基斯坦签订第一份双边投资条约，以及自1965年ICSID公约签订以来（详见下文），个人或公司有权根据双边投资条约对某一东道国采取直接法律行动。双边投资条约的目的是保护两国间的相互投资。这种条约并不意味着提供保险保护，而是使得双方有可能根据国际法，以高效的方式解决任何争端问题。对于没有合同关系的情况，例如在政治暴动中征收或破坏财产的情况而言，这是一个特别具有吸引力的选择。

尽管双边投资条约因在国际法庭而非国内法庭解决争端而对国家主权造成了侵犯，但很多发展中国家仍然将其视为展现自身对海外投资吸引力的一种方法。

双边投资条约的数量，自问世以来一直在以指数形式增长，目前已经有接近2,500份条约存在。索赔案例的数量也在不断增长。菲利普•莫里斯、道达尔、美孚、壳牌、西门子和嘉吉等公司都曾经将国家政府送上仲裁庭，1990年，斯里兰卡成为第一个受到裁决的发展中国家。在2010年的新索赔案件中，有26%的案件涉及某一非洲或中东国家。津巴布韦、坦桑尼亚、纳米比亚、利比里亚、阿尔及利亚以及塞内加尔都曾经被起诉过。在采矿、水资源和农业方面，看起来还将出现更多争端。而像阿拉伯之春这样的事件很可能会带来大批量的索赔。

迄今为止（2013年3月），荷兰已经缔结了接近100份双边投资条约。[4]只有极少数的其他国家曾经签署过这么多的条约。对于荷兰海外投资者而言，双边投资条约非常重要，特别是因为存在风险的金融利益往往十分可观。荷兰双边投资条约系统是如此的重大，甚至海外投资者也通过荷兰控股公司组建其海外投资，从而充分利用这一协议网络。

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[4] 与荷兰缔结投资条约的国家列表，请参见荷兰海外事务部网站。本文写作之日（2013年3月）时的列表如下：阿尔巴尼亚，阿尔及利亚，阿根廷，亚美尼亚，巴林，孟加拉国，白俄罗斯，伯利兹，贝宁，玻利维亚，波斯尼亚和黑塞哥维那，巴西，保加利亚，布基纳法索，布隆迪，柬埔寨，喀麦隆，佛得角，智利，中国，哥斯达黎加，克罗地亚，古巴，捷克共和国，多米尼加共和国，厄瓜多尔，埃及，萨尔瓦多，厄立特里亚，爱沙尼亚，埃塞俄比亚，冈比亚，格鲁吉亚，加纳，危地马拉，洪都拉斯，香港，匈牙利，印度，印度尼西亚，科特迪瓦，牙买加，约旦，哈萨克斯坦，肯尼亚，科威特，老挝，拉脱维亚，黎巴嫩，立陶宛，澳门，马其顿共和国，马拉维，马来西亚，马里，马耳他，墨西哥，摩尔多瓦，蒙古，黑山，摩洛哥，莫桑比克，纳米比亚，尼加拉瓜，尼日利亚，阿曼，巴基斯坦，巴拿马，巴拉圭，秘鲁，菲律宾，波兰，罗马尼亚，俄罗斯，塞内加尔，塞尔维亚，新加坡，斯洛伐克，斯洛文尼亚，南非，韩国，斯里兰卡，苏丹，苏里南，塔吉克斯坦，坦桑尼亚，泰国，突尼斯，土耳其，乌干达，乌克兰，乌拉圭，乌兹别克斯坦，委内瑞拉，越南，也门，赞比亚，津巴布韦。
来源： http://www.rijksoverheid.nl/onderwerpen/internationaal-ondernemen/documenten-en-publicaties/rapporten/2010/02/22/ibo-landenlijst.html （访问时间：2013年3月）。

在判断对投资的“保护”时，拥有双边投资条约并非唯一要素。最后，至关重要的仍然是双边投资条约的内容。荷兰双边投资条约以其对“投资”的广泛定义而闻名：涵盖所有资产。相应的，对于有权利使用荷兰双边投资条约的“投资者”的定义也非常广泛。和其他国家的双边投资条约不同，荷兰双边投资条约不要求投资者为荷兰人或荷兰公司，也不必将其总部设于荷兰。通过使用荷兰控股或子控股公司，从而通过荷兰建立投资即为充分条件。

荷兰条约网还有其他的组成部分（在本概述中将不会进一步讨论）。例如，荷兰是能源宪章条约的一方，该条约是由超过50个国家签署的多边条约，旨在提供实质性的投资保护。根据本条约为投资提供的保护可以与双边投资条约所给予的保护相提并论。其他提供类似双边投资条约的保护的众所周知的条约包括北美自由贸易组织（NAFTA）和东南亚国家组织（ASEAN）。

在本书第一章中，有多个中国公司在非洲投资的例子。这些投资的东道国，有很大可能已与荷兰签署了双边投资条约。如果上述例子中的任何中国公司通过荷兰建立其投资，他们将可以确保其自身得到了更好的投资保护。

荷兰双边投资条约的目的和范围，以及投资者如何依靠该类条约寻求当地政府不恰当干预所带来损失的索赔，均将在下文进一步详述。首先，我们将介绍双边投资条约的目的和范围。之后，将对双边投资条约提供的保护进行检验。然后，将通过解释如何强制执行本保护，来说明获取这种保护的最重要的条件。最后，我们将讨论在制定如何开展海外投资的决策时，可能非常重要的荷兰双边投资条约中的特定具体方面。

第二章 —— 双边投资条约的目的和范围

3. 双边投资条约的目的）

双边投资条约，作为两国间签署的条约，其目的在于促进两国间相互的海外投资，并为一个国家向另一个国家投资的投资者们提供保护。为此目的，双边投资条约包含处理来源于一国，并在另一国开展投资的约束性规则。这类条约总是相互的。

双边条约的长度通常相当有限，在大多数情况下包含不超过15个条款。绝大多数国家都已制订了双边投资条约范本，并在此基础上就最终文本进行谈判。[5]由于双边投资条约是在两国间进行谈判的基础上缔结的，因此不同的双边投资条约的文本可能存在很大差异。但是一般来说，绝大多数双边投资条约都共用一定数量的标准的、经常性的规定。

在典型情况下，双边投资条约的目的会在其序言或导言部分予以申明，一方面申明缔约国间增强经济合作的愿望，另一方面则承认鼓励并保护投资将促进本项经济保护政策的事实。以下例子为荷兰和津巴布韦签署的双边投资条约的序言节选：

> 荷兰双边投资条约范本参见附录1。
> “荷兰王国
> 及
> 津巴布韦共和国
> 以下称为缔约双方，
> 希望加强两国间的传统友谊纽带，并强化两国间的经济联系，特别是关于缔约国一方在缔约国另一方国土上进行的投资，
> 鉴于两国认识到这种投资待遇将促进资本和技术流动，以及缔约双方的经济发展，并且双方希望其投资得到公平公正的对待，
> 双方现商定如下：…”[6]

序言并非毫不重要。例如，在萨鲁卡（Saluka）诉捷克共和国一案[7]中，根据荷兰和捷克共和国签订的双边投资条约，仲裁庭引用了序言，并称：

> “相比其他情况，这是一个对条约目的的更含蓄和平衡的声明。对海外投资的保护并非投资的唯一目的，而是在鼓励海外投资并扩大强化两国经济联系的整体目的中的一个必不可少的要素。”

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[5] 荷兰双边投资条约范本参见附录1。

[6] 荷兰和津巴布韦间的双边投资条约

[7] 萨鲁卡投资公司诉捷克共和国，UNCITRAL，部分裁决，2006年3月17日，
可在以下地址获取：〈http://italaw.com/documents/Saluka-PartialawardFinal.pdf〉

4. 双边投资条约的范围

双边投资条约的范围取决于有关（i）双边投资条约所提供保护，（ii）为获取保护所应满足的条件，以及（iii）该保护的执行方法的实质性条款。

第三章 —— 双边投资条约提供的保护

一般说来，双边投资条约为符合资格的投资者们在东道国的投资提供了特定的最低程度保护。如果东道国以对投资者不利的方式违反了双边投资条约中的实质性保护相关条款，则后者可以（在特定条件下，具体条件将在下文详述）直接针对该国提起诉讼。因此，很多双边投资条约都将投资争端解决国际中心（ICSID）作为投资者和东道国间发生争端时的仲裁机构。ICSID提供了一种通过调解或仲裁解决投资者和国家间争端的方法。

尽管不同的双边投资条约的文本和条款各不相同，但这些条约通常都包括关于在国际法原则下的标准实质性保护条款。这些条款定义了双边投资条约提供的保护范围。

双边投资条约中还包含其他标准规范条款，其中包括对符合资格的投资者和符合资格的投资的标准定义。这些规范条款处理需要达到何种条件才能有资格接受双边投资条约保护的问题，并将在下一章内详细讨论。

5. 公平和公正的待遇

几乎所有双边投资条约都要求东道国为其他国家的投资者给予“公平和公正的待遇”。例如，荷兰和阿尔及利亚之间的双边投资条约，其第3（1）条规定如下：“各缔约方应确保另一缔约方国民的投资得到公平和公正的待遇”。[8]

对这一相当抽象的原则的解释，取决于案件的实际情况，但在任何情况下，东道国都有义务保持投资环境稳定且可以预测，并与合理的投资者期望相一致。 最近几年的仲裁案例显示，尽管或者可能说因为这一条款有一些含糊和笼统，但该条款仍然是条约索赔中被使用最多的原则和最成功的索赔基础。

关于公平公正待遇的案例可以分为两大类。第一类与东道国法院对投资者的待遇有关，在NAFTA处理的埃兹尼亚诉墨西哥一案中，仲裁庭认为，原则上说，东道国应为其法院的决定承担责任，特别是（i）如果法院拒绝受理诉讼，（ii）不必要的拖延该案件，（iii）不恰当的执行判决，或（iv）存在明显和恶意的误用法律行为。[9]

第二类，也是更重要的一类案例，则与对行政决策的审查有关。大多数该类案件均与授予或扣留投资许可证，或影响投资气候的根本性法律变化有关。

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[8] 荷兰和阿尔及利亚人民民主共和国间的双边投资条约

[9] 埃兹尼亚，达福提亚和巴卡诉墨西哥，ICSID案件号ARB (AF)/97/2 (NAFTA)，1999年11月1日判决，可在以下地址获取： <http://italaw.com/documents/Azinian-English.pdf>.

仲裁案例显示，引起关于违反“公平和公正的待遇”这一标准原则的索赔的因素包括，（i）在投资时的合理期望和法律现状，（ii）具体声明对投资者造成的影响，（iii）歧视，（iv）透明度，（v）不一致性，（vi）为不正当目的使用权利以及（vii）国家机关的胁迫和骚扰。

在根据英国和坦桑尼亚间双边投资条约提起仲裁诉讼的百沃特诉坦桑尼亚一案中， 仲裁庭发现政府发布了一系列公告，贬低投资者绩效不佳，并宣布将由新的公共实体接管服务，这违反了公平公正待遇标准条款。仲裁庭注意到，尽管其业绩不佳，但投资者“仍然有权利正确的、不受阻碍的履行合同终止程序，[同时]共和国在此时做出的公告构成了对上述程序的无理干预”。[10]

在根据美国和厄瓜多尔间双边投资条约提起仲裁诉讼的杜克能源诉厄瓜多尔一案中，仲裁庭考虑到，如投资者需要得到保护，则投资者在进行投资时的期望应当合理合法，并认定厄瓜多尔由于未能实施其在投资合同中明确承诺的具体付款保证，因而未能给予投资者公平公正的待遇。[11]

6. 全面的保护和安全

公平和公正待遇的原则通常与全面的保护和安全有关。例如，荷兰和埃塞俄比亚之间的双边投资条约的文本如下：

> “各缔约方应确保另一缔约方国民的投资得到公平和公正的待遇…各缔约方应给予该类投资全面的安全和保护。”[12]

传统上说，全面的保护和安全标准，是为了保护投资者免于各种形式的实际暴力，包括对其处所的入侵。根据仲裁案例，如果东道国未能采取合理预期的保护性措施，特别是正常行使政府功能范围内的措施，以防止投资者财产遭到实际毁坏，则违反了全面保护和安全的原则。

在AAPL诉斯里兰卡（基于英国-斯里兰卡双边投资条约）一案中，斯里兰卡安全部队在遏制泰米尔叛乱分子的过程中，摧毁了投资者的养虾场，并杀死了超过20名员工。根据双边投资条约的全面保护和赔偿条款规定，仲裁庭认为斯里兰卡政府由于未能采取避免杀人和毁坏投资者财产的全部措施，因而违反了其全面保护和赔偿的义务。[13]

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[10] 百沃特高复（坦桑尼亚）有限公司诉坦桑尼亚联合共和国，ICSID案件编号ARB/05/22，2008年7月24日判决，可在以下地址获取 <http://italaw.com/documents/Biwateraward.pdf>.

[11] 杜克能源电力合作及能源公司诉厄瓜多尔共和国，ICSID案件编号ARB/04/19 (US/Ecuador BIT)，2008年8月18日宣判，可在以下地址获取：<http://italaw.com/documents/DukeEcuadorAward_003.pdf>.

[12] 荷兰和埃塞俄比亚联邦民主共和国间的双边投资条约

[13] 亚洲农业产品有限公司诉斯里兰卡， ICSID案件编号ARB/87/3，1990年6月27日最终裁决，可在以下地址获取： < http://italaw.com/documents/AsianAgriculture-Award.pdf>.

在更近期的仲裁案例，例如基于德国-阿根廷双边投资条约的西门子诉阿根廷一案中，仲裁庭确认，公平和公正待遇的标准并不仅限于实物保护，也包括对东道国运用法律法规侵犯投资者权利的保护。[14]

7. 不会因随意或歧视性的措施影响投资

与公平和公正待遇有密切联系的另一项原则是权利不被任意或歧视性对待。如投资者在相同或可比条件下，得到了与其他投资者不同的待遇，则适用本原则。荷兰和加纳的双边投资条约文本如下：

> “各缔约方应确保另一缔约方国民的投资得到公平和公正的待遇，并不应以不合理或歧视性的措施阻碍该国国民经营、管理、维护、使用、享受或处置的权利。”[15]

一般来说，如果东道国法律法规事实上侵犯了上述权利，或投资者无法利用正当程序，则东道国的行为可以视为不合理或歧视性的。

在海外投资待遇背景下所做的大多数索赔要求主要与国籍方面的歧视有关。在SD迈尔斯诉加拿大一案中——NAFTA索赔，一家美国公司声称，当加拿大对有害废料的跨境运输施加出口禁令时，遭到了歧视性和不公平的对待。该美国公司在很大程度上依赖其美国工厂处理来自加拿大的上述肥料。根据案件事实，仲裁庭认为出口禁令非国民过于随意并具有歧视性。[16]

8. 国民待遇和最惠国待遇

“国民待遇”意味着东道国必须给予海外投资不低于其自身国民和公司投资的优惠政策。本标准的目的是为了为海外投资者创造一个公平竞争的舞台。“最惠国待遇”意味着东道国必须给予海外投资不低于任何其他外国投资者的待遇。例如，荷兰和埃及间的双边贸易条约中就这样阐述了这两条准则：

> “更具体的说，各缔约方应为该投资提供不低于本国国民或任何第三国国民投资待遇中最优惠待遇的优惠。”[17]

在绝大多数关于国民待遇的双边投资条约仲裁案例中，相对比较简单的测试是比较海外投资者的处境和同一商业领域内绝大多数可直接比较的本地投资者的处境。如果在该程序中发现存在待遇差异，则仲裁庭将调查该差异是否会和政府政策存在合理联系，并且这种差异是否对海外投资者造成了歧视性影响。

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[14] 西门子诉阿根廷，ICSID案件编号ARB/02/8，管辖权决定，2004年8月3日，
可在以下地址获取：〈http://italaw.com/documents/SiemensJurisdiction-English-3August2004.pdf〉.

[15] 荷兰和加纳共和国间的双边投资条约

[16] S.D. 迈尔斯公司诉加拿大， UNCITRAL (NAFTA)，第一次部分判决，2000年11月13日，
可在以下地址获取：〈http://italaw.com/documents/SDMeyers-1stPartialAward.pdf〉.

[17] 荷兰和埃及之间的双边投资条约

最惠国待遇原则也可能带来程序性的后果，根据某一双边投资条约提出索赔的投资者，可以引用该双边投资条约中的最惠国待遇待遇，从而享受另一双边投资条约中更加优惠的条款。例如，在基于阿根廷-西班牙双边投资条约的玛菲奇尼诉西班牙一案中，阿根廷投资者在仲裁程序中提交了针对西班牙的索赔要求，尽管他在此前并未根据双边投资条约要求，将争端提交西班牙法院解决。但是，阿根廷投资者成功的辩称，他可以通过引用最惠国待遇条款，越过阿根廷-西班牙双边投资条约中的限制，并要求获得智利-西班牙双边投资条约中可以选择的利益，该条约并不要求投资者首先在东道国国内法院提出索赔。[18]

9. 自由转移投资相关的资金

很多双边投资协议都对东道国施加了允许投资相关资金自由进出东道国的义务。投资者通常需要将资金输入东道国，以开始建设生产设施或扩张业务。同时，将包括利润在内的资本转回母国或其他国家，往往也是投资的主要商业目的之一。但是，东道国可能会认为这并不符合东道国利益。具体来说，东道国可能采取立场，决定进出东道国的大规模资金都需要得到监控和控制，以保护国家政策。东道国可能会将突发的短期资金流入或资金外流视为国内金融市场中的不稳定性。因此，双边投资条约不可避免的包含了涵盖自由转移投资相关资金的条款，例如，荷兰和尼日利亚的双边投资条约这样写道：

> “缔约双方应保证可以转移与投资相关的款项。该转移应以可自由兑换货币方式进行，并无限制或延迟。该转移具体包括，但不限于：
> a) 利润、利息、分红和其他现金收入；
> b) 下列目的的必要资金
> (i) 为采购原材料或辅助材料、半成品或成品目的；或
> (ii) 为更换资本资产，以保证投资连续性目的。
> (iii) 为扩张及/或改进投资；
> c) 偿还贷款资金；
> d) 特许经营费或使用费；
> e) 自然人收入；
> f) 出售或清算投资所得款项 [19]”

如果海外投资者受到了东道国货币管控政策或有效冻结了投资者在东道国资金的其他行为影响，则该投资者有权取得赔偿。当阿根廷在2001年金融危机后采取了多项严重限制向他国转移资金的措施后，这一原则被经常性的引用。

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[18] 玛菲奇尼诉西班牙，ICSID 案件编号ARB/97/7，管辖权裁决，2000年1月25日，可在以下地址获取：〈http://italaw.com/documents/Maffezini-Jurisdiction-English_001.pdf〉.

[19] 荷兰和尼日利亚联邦共和国之间的双边投资条约。

10. 不无偿征用

本条款是双边投资条约中最重要的保护性条款之一。本条款（以及公平和公正待遇条款）是最经常被引用的两个条款之一。

征用并不仅限于直接和蓄意的正式剥夺所有权的行为，例如国有化，同时也包括有效并实质性的剥夺投资者使用、管理和享受其投资的间接行为（包括法律、税务或行政措施）。在征用时，很难判断不适当征用和合法征用措施之间的界线。毕竟，并非所有的征用措施都被禁止。

一般说来如果为公共目的，在不歧视外国人的前提下，通过严谨程序，并向被剥夺投资的投资者支付了适当的补偿，那么可以允许征用。例如，荷兰和赞比亚之间的双边投资条约规定：

> “除非满足下列条件，否则缔约任何一方均不得采取任何措施直接或间接地剥夺另一缔约国国民的任何投资：
>
> 为公众利益，经过严谨法律程序采取的措施；
>
> 不含歧视性或违背采取措施的缔约方可能做出的承诺的措施；
>
> 行使该措施时做出补偿。该补偿应代表受影响投资的真实价值，应包含自支付之日为止的标准商业利率利息，并为使其对索赔人有效，应毫不延迟地向索赔人支
>
> 不延迟地向索赔人支付并使其可向索赔人指定的国家转移，该补偿应为索赔人所属国家货币或索赔人接受的任何自由兑换货币。”[20]

在双边投资条约中没有对征用进行精确定义时，仲裁庭通常的做法是根据国际法律案例中对的征用的条约和司法解释，包括伊朗-美国索赔诉讼庭所做的决定，该诉讼庭为征用方面提供了丰富的仲裁判例法资源。最后，是否存在不当征用的情况需要逐案确定。目前没有关于评估某一行为是否构成不当征用的一致规则集合。仲裁庭评估不当征用索赔时所用的各种测试包括：

- 根据合理预期和经济效益，投资者是否被剥夺了使用或享受其投资，或至少在相当长时间内被剥夺了其主要部分的权利？
- 这种剥夺是否与国家行为有关？
- 国家干预的具体性质、方面和目的有哪些？

但是，存在一个基本的共识，就是如果投资者被剥夺了使用或享受其投资的权利，同时这一情况与国家行为有关，那么就可以进行征用索赔。

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[20] 荷兰和赞比亚共和国间的双边投资条约

在基于荷兰和捷克间双边投资条约的CME（捷克）有限公司诉捷克共和国一案中，捷克一家合资公司的投资者辩称，在捷克官方广播机构强制合资公司放弃其专属授权，并更改了合资协议其他关键条款后，合资公司最终崩溃。仲裁庭认为捷克官方机构的行为影响了投资的经济和法律基础，损害了投资的商业价值，因此属于不当征用的范畴。[21]

在一家国际仲裁庭于2008年做出的七项关于不当征用的索赔案件裁决中，仲裁庭仅在两个案件中认为对申索人有利，并且只有在一个案件中做出了损害赔偿的判决。但是，如果仲裁庭认为投资者的财产受到了不当征用，并且东道国必须赔偿投资者，那么赔偿金额可能会很大，因为赔偿金额需要计算市场价值损失和截至仲裁判决日为止的利息。

11. 遵守具体投资承诺

双边投资条约中经常出现的最后一条标准条款是一条“保护伞条款”，要求东道国始终完全遵守其对另一国家个人和公司投资的义务。各种保护伞条款中常见的共性因素之一是使用强制性语言。在荷兰和阿尔及利亚之间的双边投资条约中，可以看到这类条款常用的典型语言：“各缔约方必须始终遵守其可能签署的关于另一缔约方投资者投资的义务。”[22]

据估计，在目前存在的2,500或更多份双边投资条约中，约有40%包含保护伞条款。对不同国家做法的审查发现，各国对这些条款并没有采取统一的方法。瑞士、荷兰、英国和德国往往在其双边投资条约中包含保护伞条款。但是法国、澳大利亚和日本则只在少数双边投资条约中包含保护伞条款。

保护伞条款引起的争端之一，是在双边投资条约中包含这类条款，会将任何合同索赔上升至国际法级别，并因此根据双边投资条约接受国际仲裁管辖，而非国内法院管辖。在基于瑞士-菲律宾双边投资条约的SGS诉菲律宾一案中，SGS因菲律宾违反海关相关装运前检验服务规定而提出索赔。对于菲律宾方面提出该索赔为合同索赔的论点，SGS引用了“保护伞条款”，称本条款对菲律宾政府施加了遵守具体投资承诺的义务。尽管仲裁庭认为“保护伞条款”可以在双边投资条约的框架内向东道国施加与投资者对等的具体义务，但仲裁庭同时认为“保护伞条款”不具有推翻SGS和菲律宾政府合同内专属管辖权条款的效果。[23]

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[21] CME捷克有限公司诉捷克共和国， UNCITRAL，部分裁决，2001年9月13日
可在以下地址获取： <http://italaw.com/documents/CME-2001PartialAward.pdf>.

[22] 荷兰和阿尔及利亚之间的双边投资条约

[23] SGS法国兴业银行监察公司诉菲律宾共和国，ICSID案件编号ARB/02/6，管辖权裁决，2004年1月29日，可在以下地址获取： <http://italaw.com/documents/SGSvPhil-final_001.pdf>.

第四章——双边投资条约的保护条件

需要解决的初步问题是，是否已与东道国建立了双边投资条约。之后，在双边投资条约中的两个最重要问题是关于“投资者”和“投资”的定义问题。这些定义将双边投资条约的应用范围限制在合格投资者的合格投资之内。

12. 是否适用双边投资条约?

对于寻求保护的个人或公司而言，最初始、初步的问题是，是否与东道国建立了双边投资条约关系。通过咨询多个来源来了解是否存在双边投资条约，包括搜索外交部网站和世界银行网站。[24]

绝大多数双边投资条约明确申明了条约生效和到期的时间。这一点非常重要，因为在很多情况下，在双边投资条约生效前进行的投资将不会得到保护。但是，在更近期的双边投资条约，以及绝大多数荷兰签订的双边投资条约中，包含了为条约生效前进行的投资提供保护的条款，在此情况下，双边投资条约具有追溯力。

[24] 与荷兰签订双边投资条约的国家参见脚注1和附录2，该信息可以在下列网站找到：

- http://www.rijksoverheid.nl/onderwerpen/internationaal-ondernemen/documenten-en-publicaties/rapporten/2010/02/22/ibo-landenlijst.html （访问日期：2013年3月）
- 荷兰外交部网站拥有一个在线条约搜索引擎，其地址为： http://www.minbuza.nl/producten-en-diensten/verdragen/zoek-in-de-verdragenbank （访问日期：2013年3月）
- ICSID拥有一个双边投资条约在线搜索引擎，其地址为： http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewBilateral&reqFrom=Main （访问日期：2013年3月）

13. 谁有权接受双边投资条约的保护?

“投资者”的定义。当确定已与东道国签订了双边投资条约后,下一个问题是,投资者是否有权接受该双边投资条约的保护。如欲受到保护,则投资者必须符合双边投资条约中对“投资者”的定义。一般说来,双边投资条约会对个人和公司加以区别对待。例如,荷兰和坦桑尼亚之间的双边投资条约将“投资者”定义为:

> “‘投资者’一词应包括各缔约方的以下成员:
>
> 具有该缔约方国籍的自然人;
>
> 在该缔约方法律下组建的法人;
>
> 未在缔约方法律下组建,但由第(i)款内所述自然人或第(ii)款内所述法人直接或间接控制的法人。” [25]

很多双边投资条约不要求个人或公司具有缔约方国籍。但ICSID公约第25条第2款给出了这方面的规定,详见下文。

个人的国籍。个人必须拥有各缔约国之一的国籍。由缔约国法律决定个人是否为缔约国国民。在基于意大利和阿联酋双边投资条约的索发吉诉阿联酋一案中,索赔人出示了多份意大利国际证书。但最终,仲裁庭认定索赔人由于成为了加拿大公民而丧失了国籍。作为加拿大公民,索赔人无权依靠意大利和阿联酋间的双边投资条约。此外,加拿大也并非ICSID缔约方之一。[26]

公司的国籍。公司的国籍根据三个条件决定,即组建公司的国家,公司控制者所在的国家,以及公司管理者所在的国家。在一般来说,非法人实体和集团无权接受法律保护,但这可能取决于双边投资条约的用语。例如,在阿根廷-德国的双边投资条约中,“国民”的定义是任何法人及任何其他具有或没有法人地位的商业组织或其他公司或组织。

一般来说,为了获得保护,公司必须在缔约国之一,根据该国法律注册。在基于乌克兰-立陶宛双边贸易条约的托基伍斯•托克勒斯诉乌克兰一案中,索赔人是一家根据立陶宛法律注册成立的公司,但乌克兰公民拥有该公司99%的股份。尽管如此,仲裁庭最终还是接受索赔人作为立陶宛国民。[27]

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[25] 荷兰和坦桑尼亚联合共和国间的双边投资条约

[26] 索发吉诉阿拉伯联合酋长国, ICSID案件编号 ARB/02/7,管辖权裁决,2004年7月7日可在以下地址获取:< http://italaw.com/documents/Soufraki_000.pdf>.

[27] 基伍斯•托克勒斯诉乌克兰, ICSI案件编号ARB/02/18,管辖权裁决, 2004年4月29日,可在以下地址获取: <http://italaw.com/documents/Tokios-Jurisdiction_000.pdf>.

在大多数荷兰签订的双边投资条约中，受缔约国公司或国民控制的公司同样符合“投资者”定义。其他国家则使用不同的判定标准，例如德国将公司管理部门所在国视为该公司是否享受德国作为缔约国签订的双边投资条约之保护的决定因素。而另一方面，美国则仅认为公司登记地点是重要的。公司经营业务的国家或管理层所述的国家在决定公司是否有权接受美国双边投资协议保护时并没有关系。

投资者在进行国际投资以及构建投资结构时，往往只考虑各个国家的税务相关可能性。但是，这些投资者还应考虑适用的投资条约可能提供的保护，为了建立这种保护，应当审查并评估东道国为签字方的不同双边投资条约的条件。在此基础上，投资者可以考虑在与东道国缔结最优惠条件的双边投资条约的国家建立特设的投资机构，从而在东道国进行投资。

14. 哪些投资符合双边投资条约的保护条件?

为满足双边投资条约的保护条件，投资必须符合投资条约中对“投资”的定义。投资条约中的确切用语非常重要。

定义广泛的“投资”。但是，“投资”一词的定义往往非常广泛，使得应用时存在很大的灵活性。经常使用诸如“每一种资产”或“领土内的每一种投资”等用语。很多双边投资条约具体指明五种不同类型的投资（但通常增加用语，以确定该清单为非详尽的清单）：

- 房地产
- 股票；
- 合同；
- 知识产权；以及
- 法律授予的权利。

例如，荷兰-马拉维双边投资条约的定义如下：

> “投资”一词系指所有类型的资产，具体来说包括但不限于：
>
> (i) 动产和不动产物权，以及在任何类型的资产中的任何其他权利；
> (ii) 通过股票、债券和其他在公司和合资公司内的权益获得的权利；
> (iii) 对金钱、其他资产或具有任何经济价值的行为的主张权；
> (iv) 在知识产权、技术流程、商誉和技术诀窍领域内的权利；
> (v) 根据公共法律或合同获得的权利，包括勘探、开采、提炼和开发自然资源的权利。[28]

[28] 荷兰和马拉维共和国之间的双边投资条约

而在荷兰和俄罗斯之间签订的双边投资条约中，其定义如下：

> ‘投资’一词应包括缔约国一方的投资者在另一缔约国领土上，根据后一缔约国法律间接或通过第三国投资者投资的每一种类的资产，其中包括，但不限于：
>
> i. 不动产，例如建筑和设备以及其中的任何物权；
> ii. 货币资金，以及来自股票、债券和其他参与形式的权利；
> iii. 对金钱或具有经济价值的其他履约资产的所有权；
> iv. 在知识产权、技术流程、商誉和技术诀窍领域内的权利；
> v. 根据缔约方法律或合同获得的权利，开展商业活动的权利，包括勘探、开采、提炼和开发自然资源的权利。”[29]

在仲裁案例法中，确认了多种双边投资条约对投资的广泛定义的有效性。在基于荷兰-委内瑞拉双边投资条约进行仲裁的菲达克斯诉委内瑞拉一案中，仲裁庭认定委内瑞拉发行，并由索赔人在次级市场中从原始持有者处购进的承兑票据，在经过背书后，构成双边投资条约中的投资。[30]

时间限制。在合格投资的定义中，可能会包含时间限制条件。例如，阿根廷-西班牙双边投资条约，就表明双边投资条约不适用于在其生效之前产生的任何争端或索赔。同时也可能在投资结束后产生索赔问题，在基于比利时/卢森堡-埃及双边投资条件的让•德•努尔诉埃及一案中，埃及辩称，当争端产生时，投资已不再存在。仲裁庭驳回了这一论点，认为接受这一论点将损害投资保护条约的完整逻辑。[31]

不包含签约前成本。尽管“投资”定义宽泛，但通常不将签约前成本作为受保护的投资。在基于美国-斯里兰卡双边投资条约的米哈里国际集团诉斯里兰卡共和国一案中，索赔人要求赔偿其在争取斯里兰卡拟建电力项目（该项目从未实施）中产生的开支。仲裁庭认为没有产生任何投资并驳回了索赔。[32]

地域限制。投资同时也可能限于具体地域之内。在考虑投资是否处于东道国领土之内时，仲裁庭认为最重要的方面是经济活动的“完整流程”，尽管可能某些具体方面并不一定在本地执行。

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[29] 荷兰和俄罗斯间的双边投资条约

[30] 菲达克斯公司诉委内瑞拉， ICSID案件编号ARB/96/3，管辖权判决，1997年7月11日，可在以下地址获取：〈http://italaw.com/documents/Fedax-1997-Last.pdf〉.

[31] 让德努尔公司和疏浚国际公司诉埃及阿拉伯共和国， ICSID 案件编号ARB/04/13，管辖权判决，2006年6月16日，可在以下地址获取：〈http://italaw.com/documents/JandeNuljurisdiction061606.pdf〉.

[32] 米哈里国际集团诉斯里兰卡，ICSID案件编号ARB/00/2，最终裁决，2002年3月15日，可在以下地址获取：〈http://italaw.com/documents/mihaly-award.pdf〉.

间接投资。间接投资（即由间接子公司、少数持股人、控股公司或最终受益者持有的投资）也可能得到保护。在每一个案件中，仲裁庭都将仔细考虑条约的措辞，以确定间接投资是否属于相关双边投资条约的保护范围之内。例如，在基于荷兰-玻利维亚双边投资条约的阿瓜•德•图纳里公司诉玻利维亚共和国一案的仲裁程序中，玻利维亚辩称已与当时接受开曼群岛的一家公司控制的阿瓜•德•图纳里公司达成特许权协议，以排除ICSID仲裁管辖。但在争端发生时，控制结构已经发生了变化，一家荷兰控股公司进入了公司组织链中。仲裁庭认为，根据荷兰-玻利维亚双边投资条约，仲裁庭具有管辖权。[33]

[33] 阿瓜德图纳里公司诉玻利维亚共和国，ICSID案件编号ARB/02/3，对应诉方反对司法管辖权的决定，2005年10月25日， 可在以下地址获取： <http://italaw.com/documents/AguasdelTunari-jurisdiction-eng_000.pdf>.

第五章——强制执行双边投资条约

冷静期。绝大多数双边投资条约都规定了，在开始诉讼程序前，必须经过一定时间的冷静期。这一冷静期的目的是给予双方探讨和解机会的可能。例如，荷兰和纳米比亚之间的双边投资条约规定：

> “缔约双方关于本协议解释或适用方面的问题，如不能在合理时间内通过外交协商解决，除非双方另有约定，否则应根据任何一方要求，提交由三名仲裁员组成的仲裁庭解决。” [34]

一般说来，这一冷静期从投资者向东道国最高政府机构，例如国家元首或主管投资的部长发送“触发函”时开始。该信函简要说明了争端的事实和性质，并请求东道国协商解决。如果协商未能成功，通常因为东道国未做出回应，则可以针对东道国采取措施。

ICSID仲裁。双边投资条约进一步规定了可以采取哪些措施。最常见的争端解决措施，是根据ICSID公约、规定和规则，将争端提交仲裁解决。[35]例如，荷兰双边投资条约范本规定，投资者和东道国间发生的争端，必须根据ICSID公约、规定和规则提交仲裁解决：

> “各缔约方在此同意，将缔约方和另一缔约方国民间产生的任何关于该国民在前一缔约方领土内投资的法律争端，提交投资争端解决国际中心，根据1965年3月18日在华盛顿签署的美国和其他国家国民之间投资争端的解决公约进行和解或仲裁。”[36]

[34] 荷兰和纳米比亚共和国间的双边投资条约

[35] ICSID公约、规定和规则参见：http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp

[36] 荷兰双边投资条约范本（见附录1）

其他仲裁选择。其他常见选择还包括在联合国国际贸易法委员会(UNCITRAL) [37]规则下进行的临时仲裁，以及根据国际商会(ICC) [38]或斯德哥尔摩商会规则 [39]进行的仲裁。详细探讨所有这些仲裁庭的仲裁规则已经超过了本书范围。鉴于ICSID的特殊性质、其具体规则和规定，以及绝大多数投资者-国家争端都根据其规则解决的事实，我们接下来将继续重点讨论根据ICSID公约、规定和规则进行的仲裁。

作为最终手段的仲裁。最后，某些双边投资条约要求必须先将争端提交东道国国内法院。例如，荷兰和阿根廷的双边投资条约规定：

> 1) 缔约一方和缔约另一方投资者之间关于本协议涵盖问题的争端，如有可能，应友好解决。
> 2) 如未能根据本条第1款，在争端任何一方请求友好和解之日起三个月内解决上述争端，则任何一方可将争端提交投资所在缔约方的行政或司法机构。
> 3) 如在向第2款中所述的管理机构提交争端后十八个月内，上述机构未能作出最终决定，或在上述机构作出决定后双方仍存在争端，则相关投资者可寻求国际仲裁或调解。各缔约方在此同意将本条第1款中所述的争端提交国际仲裁。”[40]

但是，如上文所述，玛菲奇尼诉西班牙一案显示，可以依靠双边投资条约(即阿根廷-西班牙双边投资条约)中的最惠国待遇条款来越过必须首先将争端提交东道国国内法院的规定。[41]

15. 投资争端解决国际中心(ICSID)

位于华盛顿特区的ICSID是根据1965年ICSID公约建立的机构，属于世界银行的官方实体。公约的目标是通过为投资者和东道国提供解决争端的中立平台来促进海外投资。

ICSID自身并不执行仲裁程序，但负责管理仲裁程序的启动和运作。根据ICSID公约，ICSID的裁决具有特殊性质，可以获得比一般裁决更好的承认和执行裁决的保障。

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[37] 见本系列卷1，第26页以下。UNCITRAL仲裁规则(1976年)参见： http://www.uncitral.orgluncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html. 该仲裁规则在2010年进行了修订： http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-e.pdf.

[38] 关于ICC仲裁规则的文本和更多信息，参见： http://www.iccwbo.org/policy/arbitrationlid2882/index.html.

[39] 关于SCC仲裁规则的文本和更多信息，参见： http://www.sccinstitute.com/skiljeforfarande-2.aspx.

[40] 荷兰和阿根廷之间的双边投资条约

[41] 玛菲奇尼诉西班牙， ICSID案件号ARB/97/7，管辖权判决，2000年1月25日
可在以下地址获取： <http://italaw.com/documents/Maffezini-Jurisdiction-English_001.pdf>.

15. 投资争端解决国际中心（ICSID）

位于华盛顿特区的ICSID是根据1965年ICSID公约建立的机构，属于世界银行的官方实体。公约的目标是通过为投资者和东道国提供解决争端的中立平台来促进海外投资。

ICSID自身并不执行仲裁程序，但负责管理仲裁程序的启动和运作。根据ICSID公约，ICSID的裁决具有特殊性质，可以获得比一般裁决更好的承认和执行裁决的保障。

16. ICSID 管辖权

在以下条件成立的情况下：

a. 适用双边投资条约；
b. 投资者有权接受双边投资条约保护；
c. 投资者的投资符合双边投资条约中的“投资”定义；并且
d. 双边投资条约规定按照ICSID公约、规定和规则进行争端解决，

投资者还必须遵守ICSID公约的条件，才能使ICSID获得管辖权。ICSID公约第25条第1款规定了ICSID公约的管辖范围：

> “中心的管辖适用于缔约国（或缔约国指派到中心的该国的任何组成部分或机构）和另一缔约国国民之间直接因投资而产生的任何法律争端，而该项争端经双方书面同意提交给中心。当双方表示同意后，不得单方面撤销其同意。”[42]

第25条第1款通常被解释为需要满足以下强制性条件：

a. 直接因投资产生法律争端
b. 该争端属于缔约国和另一缔约国国民间的争端；并且
c. 争端双方以书面形式同意将争端提交ICSID解决。

如果未达到上述管辖权要求，则ICSID必须并将会拒绝考虑争端问题，即使双方在合同同意将争端提交ICSID仲裁时也是如此。

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[42] ICSID公约第25条第1款（全文见附录3

第一项条件：投资。与绝大多数双边投资条约不同，ICSID公约并不包含投资的定义。但是，除了相关双边投资条约设定的标准外，投资还必须满足ICSID公约的条件。一般情况下，如果投资满足特定条件，则ICSID仲裁庭将认为项目或交易满足ICSID公约中对投资的规定。在基于荷兰-土耳其双边投资条约的萨巴•费克思诉土耳其一案中，仲裁庭认为，尽管ICSID公约的第25条第1款提供了对投资的客观定义，但该定义还包括三项条件，即（i）供款，（ii）一定持续时间，（iii）存在风险因素。[43]

第二项条件：另一缔约国国民。ICSID第25条第2款规定了缔约国国民的具体定义。[44]和很多双边投资条约一样，第25条第2款对自然人（个人）和法人（即公司）做出了区别。

自然人。自然人的国籍取决于该自然人在两个日期时的国籍：即双方同意将其争端提交仲裁时的日期，以及在ICSID登记仲裁请求时的日期。通常情况下，个人必须在受损害之日起，到ICSID登记仲裁请求之日期间，连续保持母国国籍。除此以外，第25条第2款否认对在上述两个日期之一同时具有东道国国籍的自然人的管辖权。

法人。对于法人而言，确定国籍会更加复杂，特别是考虑到目前使用的复杂投资结构。法人是否属于某一缔约国国民，很大程度上取决于缔约双方间的协议（即相关双边投资条约）的措辞。在荷兰双边投资条约范本中，公司国籍并非由公司组建地决定，而是由其是否由具有缔约国国籍的自然人或在缔约国法律下组建的法人所直接或间接控制而决定的。对于公司，ICSID第25条第2款也规定了确定公司国籍的相关时间，即双方同意将争端提交调解或仲裁的日期。同时，在通常情况下，为了确定公司具有某一国籍，该公司必须在受损害之日起，到ICSID登记仲裁请求之日期间，连续保持其国籍。

第三个条件：双方同意。双方的同意在很多情况下并不显而易见，因为在大多数情况下，投资者和东道国间不存在直接合同。但一般接受的原则是，ICSID仲裁程序中的双方分两步表达其同意。第一步，在双边投资条约中，东道国通过为缔约国国民或公司进行投资相关的索赔提出仲裁提议来表示同意。第二部，投资者通过发出仲裁请求接受东道国的提议，从而完成仲裁协议。投资者的主要优势在于他有权直接引用双边投资条约中的保护性条款。这就使得投资者不必依赖其本国政府来代表他进行索赔，从而避免了外交保护中固有的政治考量。

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[43] 萨巴费克思诉土耳其共和国， ICSID案件编号ARB/07/20，裁决，2010年7月14日
可在以下地址获取：<http://italaw.com/documents/Fakes_v_Turkey_Award.pdf>.

[44] ICSID公约第25条全文见附录3

17. ICSID 与国内法院

根据ICSID公约，ICSID仲裁是一个独立程序，不受国内法院的控制或监督。国内法院没有审查或检验ICSID仲裁判决的管辖权。为挑战ICSID裁决，ISCID公约允许一方在ICSID启动撤销判决的程序，在此情况下，ICSID将任命一个临时委员会来考虑这一请求。该委员会不能修订或改变判决，但可以根据以下五点之一，确认或撤销裁决：

a. 仲裁庭成立有缺陷；
b. 仲裁庭明显越权；
c. 仲裁庭成员受贿；
d. 严重违反基本程序规则；
e. 裁决未说明理由。

ICSID裁决的特殊状态（即独立于国内法院的状态）来源于该裁决的承认和执行并非基于纽约公约（1958年），而是基于ICSID公约的事实，详见下文。

18. ICSID 仲裁

如果一份双边投资条约规定投资争端需要根据ICSID仲裁规则解决，则投资者必须通过向华盛顿的ICSID发送一份经过记录和证实的请求来将争端提交ICSID。在此之后，ICSID秘书长将向投资者发出确认函，以及支付行政费用的邀请函。[45]在收到付款后，秘书长将向另一方发送仲裁请求。

之后将给予双方商定仲裁员任命的机会。如双方不能就一名或多名仲裁员的任命达成一致，则ICSID将任命上述一名或多名仲裁员。在仲裁庭任命完成后60天内，必须举行一场听证会以确定仲裁的流程顺序。仲裁通常通过交换书面提交文件进行，之后进行听证。ICSID规则规定了听证会的证人和专家、临时措施以及探索方法等。[46]

ICSID仲裁自仲裁请求登记之日，到做出裁决之时为止，平均需要两到三年时间完成。裁决将由ICSID发表，并包括双方名称，但一方不同意公开的情况除外。

除非双方另行商定，否则仲裁庭将评估双方仲裁开支，并根据仲裁庭认为合适的合理观点，分配支付责任。

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[45] 见附录4 ICSID收费方法.

[46] 见附录5 ICSID仲裁规则

19. 承认与执行

一般来说，缔约双方都自愿接受ICSID裁决。判决后和解的结果通常是支付款项。只有少数案件需要实际执行。

ICSID公约第54条不允许根据国内法律在承认或执行阶段审查ICSID裁决。该条款自动承认ICSID裁决，而不必满足纽约公约（1958年）的条件。但是，第54条并没有规定国家在其国内法院不能强制执行同等最终判决的情况下，有义务强制执行ICSID裁决。ICSID公约第54条如下：

> “每一缔约国应承认依照本公约做出的裁决具有约束力，并在其领土内履行该裁决所加的财政义务，如同该裁决是该国法院的最后判决一样。具有联邦宪法的缔约国可以在联邦法院或通过该法院执行该裁决，并可规定联邦法院应视该裁决如同是其组成的一邦的法院做出的最终判决。”[47]

[47] ICSID公约第54条

第六章——荷兰双边投资条约的优点

对于国际投资者和荷兰投资者来说，以下两种激励因素促使荷兰成为吸引国际投资的大本营。其一，在荷兰纳税体系中有诸多的选择余地，企业可以确立优惠的纳税结构。其二，荷兰已经签订了大量的双边投资条约。

20 “投资”的定义广泛

“投资”在荷兰双边投资条约中的定义非常宽泛，原则上来说，是一种开放式的投资。“投资”覆盖所有的资产，包括如下：

a. 动产和不动资产，包括担保权；
b. 因持有公司股份或者其他权益而享有的权利。
c. 货币主张权；
d. 基于知识产权的主张权；和
e. 政府法律或者合同赋予的权利，包括勘探、开采、提取和开发自然资源的权利。

21. “投资者”的定义广泛

与其他国家相比，荷兰具有有利于投资者的双边协定投资机制。荷兰的双边投资条约不仅为荷兰籍国民和企业提供保护，也可通过荷兰籍国民或者企业控股的方式，直接或间接地使外国企业获得保护。许多其他不涉及荷兰的双边投资条约要求投资者不仅在缔约国成立，而且总部也要求设在缔约国。

目前，中国未与阿尔及利亚、贝宁、喀麦隆、科特迪瓦、肯尼亚、纳米比亚、尼日利亚、突尼斯、乌干达和赞比亚等国签订双边投资条约。在这些国家的中国投资者可利用荷兰与这些国家签订的双边投资条约，通过成立荷兰控股公司或者荷兰控股子公司直接或间接地在这些国家获得双边投资条约的保护。

22. 双边税收条约构成的巨大网络

当选择哪个国家作为获取外国投资的渠道时，人们通常会把大量的精力集中于各国适用税制的比较。与其他国家相比，荷兰由于与众多国家签订了广泛的税收条约而更具优势。为避免对所得和资产进行双重课税，荷兰已经与90多个国家签订了税收条约。[48]

[48] 关于荷兰目前签订的双边税收协定的汇总，参见附录6.

在荷兰作为一个缔约方的税收条约中，可避免或者减征某些国外投资收入的课税金额。通过纳税豁免、税款抵扣或者减征税款的方式可以避免双重课税。以下为两个案例：

- 在大多数与荷兰签订的“双边税收条约”中，一家由国际投资者控股的荷兰公司在支付股息时通常会获准减免荷兰代扣代缴税。
- 荷兰不征收利息或者特许使用费预扣税款。另外，对于支付给荷兰公司的利息或者特许使用费，“双边税收条约”通常会减征或者免除征收外国代扣代缴税。

荷兰税收体制与其他国家的税收规定相比还拥有其他优惠政策。如下：

- 企业所得税率相对较低，应税利润分两部分计算税率。第一部分为起征金额20万欧元，税率为20%；第二部分为超过20万欧元，税率为25%；
- 有利的参与豁免机制，在某些情况下，允许符合资格的子公司提交股息和资本收益免税凭证；
- 一套“财政统一”体系，使荷兰集团成员之间可自由地进行损益相抵；
- 一套有效的企业所得税税率，研发费用的税率仅为百分之五；以及
- 对外籍雇员优惠的所得税待遇（30%的课税规定）。

23. 具有追溯性和终止后存续性的双边投资条约

大多数“荷兰双边投资条约”的有效期为15年，并且附带自动延续15年的选项。与大部分其他国家的“双边投资条约”不同，大部分“荷兰双边投资条约”具有溯及力，这表示在签订双边投资条约之前的投资活动受到保护。另外，对于双边投资条约期满之前的投资活动，“荷兰双边投资条约”在期满之后再延续15年。举例说明，对于2008年11月1日之前在委内瑞拉已经执行的投资活动，当按照委内瑞拉的要求终止协定时，协定中的条款继续保持有效，直到2023年11月1日终止。

第七章 – 《里斯本条约》的潜在影响

《里斯本条约》于2009年12月1日生效，签订《里斯本条约》的宗旨是促使在欧洲联盟（欧盟）内做事更有效，内部更民主，成为世界舞台上更具凝聚力的组织。为了能够使欧盟机构进行现代化改造，以及优化欧盟内部的工作方法，该组织实施了一系列的改革。部分最重大的改革发生对外关系领域，包括欧盟的对外声明。《里斯本条约》采纳的一个重大创新举措是：赋予欧盟外国直接投资专有管辖权。这意味着欧盟将拥有几乎所有行业的双边投资条约磋商专属资格。

一个引申含义是：欧盟成员国将必须使其“双边投资条约”符合欧盟法律的规定，欧盟成员国之间已经签订的“双边投资条约”可能必须终止，取而代之的是欧盟法律。举例，《里斯本条约》生效后，将导致一个荷兰投资者不能再依据荷兰与波兰签订的“双边投资条约”从事投资活动，但必须遵守欧盟法律，并且在波兰法院寻求向波兰公司行使追偿权。

在2009年12月1日《里斯本条约》生效之前，几乎没有完成任何准备工作来填补《里斯本条约》制造出来的撤消欧盟成员国对外国直接投资管辖权的空白。这方面的工作此后也几乎处于停滞状态。截至编写本书时（2011年11月），尚未制定任何成员国的过渡计划，也未颁布任何针对欧盟委员会如何应对外国直接投资的指导性文件。并且，目前对新协定内容的确切含义和影响尚未达成共识。其中一个关键问题与与“外国直接投资”的定义有关，《里斯本条约》并未对该术语予以明确的澄清。

因此，尚不清楚通过《里斯本条约》引进的改革将会产生怎样的影响。此外还存在关于如下两个问题的不同意见：第一，相对于欧盟对外贸易协议来说，《里斯本条约》带来的变革是否会在实际操作中使现状发生重大改变；第二，这些改革是否足以使欧盟的共同商业政策更有效、更民主？

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附录1 —— 荷兰双边投资条约范本

标准文本（2004年3月）

关于[国名]和荷兰王国间鼓励和相互保护投资的协议

[国名]
及
荷兰王国

以下称为缔约双方

希望加强两国间的传统友谊纽带，并强化两国间的经济联系，特别是关于缔约国一方在缔约国另一方国土上进行的投资，

鉴于两国认识到这种投资待遇将促进资本和技术流动，以及缔约双方的经济发展，并且双方希望其投资得到公平公正的对待，

鉴于经济和商业的发展将推动全球普遍接受的劳动标准；
考虑到可以通过不损害健康、安全和环境的一般措施实现上述目标；
双方现商定如下：

第1条

为本协议目的

(a) “投资”一词系指所有类型的资产，具体来说包括但不限于：
  (i) 动产和不动产物权，以及在任何类型的资产中的任何其他权利；
  (ii) 通过股票、债券和其他在公司和合资公司内的权益获得的权利；
  (iii) 对金钱、其他资产或具有任何经济价值的行为的主张权；
  (iv) 在知识产权、技术流程、商誉和技术诀窍领域内的权利；
  (v) 根据公共法律或合同获得的权利，包括勘探、开采、提炼和开发自然资源的权利。

(b) “国民”一词应包括缔约一方符合以下条件的人员：
  (i) 具有该缔约方国籍的自然人；
  (ii) 在该缔约方法律下组建的法人；
  (iii) 未在缔约方法律下组建，但由第(i)款内所述自然人或第(ii)款内所述法人直接或间接控制的法人。

(c) “领土”一词系指：

缔约方领土，以及任何毗邻缔约方领海，并适用该缔约方法律的地区，以及根据国际法，属于该缔约方专属经济区或大陆架，并且缔约方行使主权或管辖权的地区。

第2条

各缔约方应在其法律法规框架内，通过保护另一缔约方国民在其领土内的投资促进经济合作。在各方有权行使其法律法规赋予其权利的前提下，各缔约方应承认上述投资。

第3条

1. 各缔约方应确保另一缔约方国民的投资受到公平和公正的待遇，上述国民经营、管理、维护、使用、享受或处置其投资的权利，不应受到不合理或歧视性措施的影响。各缔约方应为该投资提供全面的实体安全和保护。
2. 更具体的说，各缔约方给予上述投资的待遇不应低于其本国国民的投资待遇或任何第三方国家国民的投资待遇中最优惠的待遇。
3. 如缔约方因缔结关税同盟、经济同盟、货币同盟或类似协议，或根据导致上述同盟或协议的而临时协议，向任何第三方国民给予特殊优惠，则缔约方不应有义务向另一缔约方国民提供上述优惠。
4. 各缔约方应恪守其所可能订立的，关于另一缔约方国民投资的任何义务。
5. 如缔约方一方目前存在法律规定，或缔约双方目前存在或未来将在国际法下订立义务，并且除本协议外，还包括一般性或具体的规定，使得协议另一缔约方国民可获得比当前协议更为优惠的待遇，则该规定在其更加优惠的方面将取代本协议。

第4条

关于缔约一方向在其领土内从事任何经济活动的另一缔约方国民给予的税收、费用、收费和税务减免方面的待遇，其待遇不应低于其自身国民或在相同情况下的任何第三方国民的待遇中最优惠的待遇。但为此目的，该方给予的任何特殊财政优势，不得包括：

a) 根据避免双重征税协议取得的优势；或
b) 因参与关税同盟、经济同盟或类似机构取得的优势；或
c) 与第三方互惠基础上取得的优势。

第5条

缔约双方应保证可以转移与投资相关的款项。该转移应以可自由兑换货币进行，并无限制或延迟。该转移具体包括，但不限于：

a) 利润、利息、分红和其他现金收入；
b) 下列目的的必要资金
   (i) 为采购原材料或辅助材料、半成品或成品目的；或
   (ii) 为更换资本资产，以保证投资连续性目的。
c) 开发投资所需额外资金；
d) 偿还贷款资金；
e) 特许经营费或使用费；
f) 自然人收入；
g) 出售或清算投资所得款项
h) 第7条产生的款项。

第6条

除非满足下列条件，否则缔约任何一方均不得采取任何措施直接或间接的剥夺另一缔约国国民的任何投资：

a) 为公众利益，经过严谨法律程序采取的措施；
b) 不含歧视性或违背采取措施的缔约方可能做出的承诺的措施；
c) 行使该措施时做出补偿。该补偿应代表受影响投资的真实价值，应包含自支付之日为止的标准商业利率利息，并为使其对索赔人有效，应毫不延迟地向索赔人支付并使其可向索赔人指定的国家转移，该补偿应为索赔人所属国家货币或索赔人接受的任何自由兑换货币。

第7条

缔约一方国民在缔约另一方领土内的投资，如因战争或其他武装冲突、革命、国家紧急状态、暴动、叛乱或骚乱蒙受损失，则应有权获得另一缔约方关于恢复原状、赔偿、补偿或其他解决办法的优惠待遇，这些待遇不得低于该缔约方向其国民或任何第三国国民提供的待遇中最优惠的待遇。

第8条

如缔约一方国民的投资进行了任何非商业保险或在法律、法规或政府合同所建立的系统下，以其他方式获得该投资的赔偿款项，则另一缔约方应认可任何保险人或再保险人或机构根据保险或任何赔偿条款代表上述国民获得的权利。

第9条

各缔约方在此同意，将缔约方和另一缔约方国民间产生的任何关于该国民在前一缔约方领土内投资的法律争端，提交投资争端解决国际中心，根据1965年3月18日在华盛顿签署的美国和其他国家国民之间投资争端的解决公约，进行和解或仲裁。根据公约第25条第二款第二项，作为缔约一方国民，在争端开始前由另一缔约方国民控制的法人，为公约目的，应被视为另一缔约方国民。

第10条

本协议的条款自生效之日起同样适用于该日期前进行的投资。

第11条

任一缔约方都可向另一方提出进行磋商，商讨协议解释或适用方面的问题。另一方应善意的考虑该提议，并应提供充分的磋商机会。

第12条

1. 缔约双方关于本协议解释或适用方面的问题，如不能在合理时间内通过外交协商解决，除非双方另有约定，否则应根据任何一方要求，提交由三名仲裁员组成的仲裁庭解决。各方应各自指定一名仲裁员，上述指定的两名仲裁员应共同指定第三名仲裁员作为主席，该仲裁员不得为缔约各方国民。
2. 如果缔约一方未能指定其仲裁员，并在另一方发出进行指定的邀请后两个月内仍未能指定。则后一方可邀请国际法庭庭长进行适当的任命。
3. 如果两名仲裁员在被指定后两个月内，未能就第三名仲裁员的人选达成一致，则任何一方可邀请国际法庭庭长进行适当的任命。
4. 如果，在本条第（2）（3）款的情况下，国际法庭庭长无法履行上述职责或是任一缔约方的国民，则应邀请副庭长进行必要任命，如副庭长无法履行上述职责或是任一缔约方的国民，则应邀请国际法庭中最资深，并且并非任一缔约方国民的成员进行必要任命。
5. 仲裁庭应在尊重法律的基础上做出决定。在仲裁庭做出决定前，双方可在诉讼程序的任何一个阶段提出友好解决争端。上述条款不应妨碍双方同意的情况下通过公平善良原则解决争端。
6. 除非双方另有决定，否则仲裁庭将决定其自身流程。
7. 仲裁庭应通过多数投票来达成判决。该判决应为最终，并对双方具有约束力。

第13条

关于荷兰王国，除非第14条第（1）款中的通知另行规定，否则本协议应适用于王国的欧洲部分以及荷属安的列斯和阿鲁巴。

第14条

1. 本协议应自缔约双方以书面形式通知对方已遵守宪法要求的缔约程序之日起，在第二个月的第一天正式生效，有效期为十五年。
2. 除非任何一个缔约方在条约有效期到期至少六个月前发出终止通知，否则本协议应自动延长十年，同时各缔约方保留在当前有效期到期之日至少六个月前发出通知来终止本协议的权利。
3. 关于在终止之日前进行的投资，上述条款应自当日起继续在十五年内有效。
4. 在本条第（2）款规定的时间基础上，荷兰王国应有权在王国任何部分单独终止当前协议的适用性。

双方正式授权代表签署本协议，以昭信守。

于.....在.....签署两份.....、荷兰语和英语原件，　三种文本均有同等效力。如解释出现差异，则以英语文本为准。

.....代表；荷兰王国代表

附录2 – 与荷兰签订了双边投资条约的国家

国家	双边投资条约签订日期	双边投资条约生效日期
阿尔巴尼亚	15-04-94	01-09-95
阿尔及利亚	20-03-07	01-08-08
阿根廷	20-10-92	01-10-94
亚美尼亚	10-06-05	01-08-06
巴林	05-02-07	
孟加拉	01-11-94	01-06-96
白俄罗斯	11-04-95	01-08-96
伯利兹	20-09-02	01-10-04
贝宁	13-12-01	15-12-07
玻利维亚[12]	10-03-92	01-11-94
波斯尼亚-黑塞戈维亚	13-05-98	01-01-02
巴西[8]	25-11-98	
保加利亚[4]	06-10-99	01-03-01
布基纳法索	10-11-00	01-01-04
布隆迪	24-05-07	
柬埔寨	23-06-03	01-03-06
喀麦隆[7]	06-07-65	07-05-66
佛得角	11-11-91	25-11-92
智利[8]	30-11-98	
中国[3]	26-11-01	01-08-04
哥斯达黎加	21-05-99	01-07-01
克罗地亚	28-04-98	01-06-99
古巴	02-11-99	01-11-01
捷克[2]	29-04-91	01-10-92

多米尼加	30-03-06	01-10-07
厄瓜多尔	27-06-99	01-07-01
埃及[3]	17-01-96	01-03-98
萨尔瓦多	12-10-99	01-03-01
厄立特里亚	02-12-03	
爱沙尼亚	27-10-92	01-09-93
埃塞俄比亚	16-05-03	01-07-05
冈比亚	25-09-02	01-04-07
格鲁吉亚	03-02-98	01-04-99
加纳	31-03-89	01-07-91
危地马拉	18-05-01	01-09-02
洪都拉斯	15-01-01	01-09-02
中国香港	19-11-92	01-09-93
匈牙利[3]	02-09-87	01-06-88
印度[4]	06-11-95	01-12-96
印度尼西亚[3]	06-04-94	01-07-95
科特迪瓦[7]	26-04-65	08-09-66
牙买加	18-04-91	01-08-92
约旦	17-11-97	01-08-98
哈萨克斯坦	27-11-02	01-08-07
肯尼亚[5]	11-09-70	11-06-79
科威特	29-05-01	31-05-02
老挝	16-05-03	01-05-05
拉脱维亚	14-03-94	01-04-95
黎巴嫩	02-05-02	01-03-04
立陶宛	26-01-94	01-04-95
澳门	22-05-08	01-05-09
马其顿	07-07-98	01-06-99
马拉维	11-12-03	01-11-07

马来西亚[5]	15-06-71	13-09-72
马里	13-07-03	01-03-05
马耳他	10-09-84	01-07-85
墨西哥	13-05-98	01-10-99
摩尔多瓦	26-09-95	01-05-97
蒙古	09-03-95	01-06-96
黑山[10]	29-01-02	01-03-04
摩洛哥[5]	23-12-71	27-07-78
莫桑比克	18-12-01	01-09-04
纳米比亚	26-11-02	01-10-04
尼加拉瓜	28-08-00	01-01-03
尼日利亚	02-11-92	01-02-94
安曼[4]	19-09-87	01-02-89
巴基斯坦[6]	04-10-88	01-10-89
巴拿马	28-08-00	01-09-01
巴拉圭	29-10-92	01-08-94
秘鲁	27-12-94	01-02-96
菲律宾	27-02-85	01-10-87
波兰[4]	07-09-92	01-02-94
罗马尼亚[3]	19-04-94	01-02-95
俄罗斯[1]	05-10-89	20-07-91
塞内加尔[4]	03-08-79	05-05-81
塞尔维亚[9]	29-01-02	01-03-04
新加坡[5]	16-05-72	07-09-73
斯洛伐克[2]	29-04-91	01-10-92
斯洛文尼亚	24-09-96	01-08-98
苏丹[7]	22-08-70	27-03-72
南非	09-05-95	01-05-99

韩国	12-07-03	01-03-05
斯里兰卡	26-04-84	01-05-85
苏里南	31-03-05	01-09-06
塔吉克斯塔	24-07-02	01-04-04
坦桑尼亚	31-07-01	01-04-04
泰国[5]	06-06-72	03-03-73
突尼斯	11-05-98	01-08-99
土耳其	27-03-86	01-11-89
乌干达	30-05-00	01-01-03
乌克兰	14-07-94	01-06-97
乌拉圭	22-09-88	01-08-91
乌兹别克斯坦	14-03-96	01-07-97
委内瑞拉[11]	22-10-91	01-11-93
越南	10-03-94	01-02-95
也门	18-03-85	01-09-86
赞比亚	30-04-03	
津巴布韦	11-12-96	01-05-98

上述列表备注：

1 作为前苏联的合法继承者，俄罗斯受该国和荷兰王国签订的双边投资条约的约束。该条约于1989年10月5日签订，并在1991年8月1日生效（条约汇编1991,126）。荷兰王国尚未与俄罗斯签订新的双边投资条约。俄罗斯同时也是与苏联签订的经济、工业和技术合作协议的合法继承者（条约汇编1972,102和条约汇编1975,88）。

荷兰王国尚未与阿塞拜疆、吉尔吉斯斯坦和土库曼斯坦签订新的双边投资条约。但荷兰王国已与组成前苏联的其他主权国家签订了新的双边条约，这些条约现已全部生效。当这些条约生效时，它们取代了荷兰王国和前苏联间签订的双边投资条约。

在未与组成前苏联的国家签订新的双边投资条约前，除非收到不愿继续接受条约约束的通知，否则荷兰将假设荷兰王国和前苏联间的双边投资条约对这些国家仍继续具有约束力。

2 捷克共和国和斯洛伐克已发布联合声明，声明荷兰和前捷克斯洛伐克间的双边投资条约继续有效。

3 同时还和该国签订了关于经济合作的独立协议。

4 同时还和该国签订了关于经济和技术合作的独立协议。

5 和该国签订的协议是包含有关投资的具体条款的经济合作协议。

6 和该国签订的协议是关于经济合作和保护投资的协议。

7 和该国签订的协议是包含有关投资的具体条款的经济和技术合作协议。

8 这些国家现已声明目前将不会批准条约。

9 作为塞尔维亚-黑山的合法继承者，塞尔维亚受该国和荷兰王国签订的双边投资条约的约束。该条约于2002年1月29日签订，并于2004年3月1日生效（条约汇编2002,83）

10 在2006年11月15日和2007年1月18日，荷兰王国和黑山共和国政府交换了关于两国间继续使用荷兰和前塞尔维亚-黑山间签订的条约有效性的备忘录。

11 委内瑞拉终止了与荷兰的双边投资条约，该条约于2008年10月31日终止。关于两国如何对待对方投资者的协议现已不再生效。目前，该终止对2008年11月1日以前进行的投资尚无直接效果。对于上述投资，双边投资条约将继续在15年内有效。

12 由于缺乏关于该双边投资条约终止的澄清，因此尚不清楚该双边投资条约是否仍然有效。

附录3 – ICSID公约第25条

1. 中心的管辖适用于缔约国（或缔约国指派到中心的该国的任何组成部分或机构）和另一缔约国国民之间直接因投资而产生的任何法律争端，而该项争端经双方书面同意提交给中心。当双方表示同意后，不得单方面撤销其同意。

2. “另一缔约国国民”系指：
   (a) 在双方同意将争端交付调停或仲裁之日，以及在根据第二十八条第三款或第三十六条第三款将请求予以登记之日，具有作为争端一方的国家以外的某一缔约国国籍的任何自人，但不包括在上述任一日期也具有作为争端一方的缔约国国籍的任何人；以及
   (b) 在争端双方同意将争端交付调停或仲裁之日，具有作为争端一方的国家以外的某一缔约国国籍的任何法人，以及在上述任一日期也具有作为争端一方的缔约国国籍的任何法人，而该法人因受外国控制，双方同意为了本公约的目的，将其视为另一缔约国国民。

3. 某一缔约国的组成部分或机构表示的同意，须经该缔约国批准，除非该缔约国通知中心不需要予以批准。

4. 任何缔约国可以在批准、接受或认可本公约时，或在此后任何时候，把它将考虑或不考虑提交中心管辖的一类或几类争端通知中心，秘书长应立即将此项通知转送给所有缔约国。此项通知不构成第一款所要求的同意。

附录4 – ICSID收费方法

投资争端解决国际中心

收费方法

（2013年1月1日期生效）

调解请求费用

1. 在以下第二款的基础上，根据管理和财务条例第16条收取的费用为25,000美元。这项不可退还费用应由符合以下条件的各方向中心支付：（a）要求根据公约或附加便利规则进行调解或仲裁程序；（b）申请撤销一项根据公约做出的仲裁判决；或（c）要求根据附加便利规则开展真相调查程序。
2. 符合下列条件的各方应向中心缴纳不可退还的10,000美元费用：（a）请求补充意见、或纠正、解释或修订一项根据公约做出的仲裁判决；（b）请求补充意见、或纠正或解释一项根据附加便利规则做出的仲裁判决；或（c）在撤销根据公约做出的仲裁判决后，请求将争端重新提交新仲裁庭裁决。

调解员、仲裁员、专员和临时委员会成员的费用及开支

3. 除报销合理产生的任何直接开支外，调解员、仲裁员、专员和临时委员会成员还有权为每个会议日或与法律程序相关的其他工作获得每日3,000美元的费用，以及管理和财务条例第14条限额内的生活津贴和差旅费报销。如要求更高金额，则需通过秘书长批准。

在公约或附加便利规则以外的法律程序中任命和挑战仲裁员

4. 在公约或附加便利规则以外的法律程序中，要求秘书长指定仲裁员，或决定挑战仲裁员的一方当事者，需向中心缴纳不可退回的费用10,000美元。

管理费

5. 在组建调解委员会、仲裁庭、真相调查委员会或特设委员会时，中心将收取行政费用32,000美元，并在此后每年收取。该年费同样适用于中心开展的，使用ICSID公约或附加便利规则以外规则的其他法律程序。
6. 与法律程序相关的行政费用和产生的直接开支，以及专员、仲裁庭或委员会的费用和开支，均应根据管理和财务条例第14条，由要求双方向中心不定期缴纳的预付费用支付。

特别服务费

7. 根据管理和财务条例第15条，要求中心提供特殊服务的一方，必须预先缴纳足以支付其所产生费用的押金。上述服务收费根据世界银行在其标准管理流程中确定的费率确定。

附录5 — ICSID仲裁规则

ICSID仲裁规则

第一章 仲裁庭的组成

规则一 – 一般义务

1. 当事者收到申请仲裁予以登记之通知书后，应参照公约第四章第二节的规定，尽快成立仲裁庭。
2. 除非仲裁申请书已经包括了当事者就有关仲裁员人数和他们的任命方式所达成的协议，否则当事者应尽快将此种情况通知秘书长。
3. 除当事者就各名仲裁员之任命达成协议外，只有双方争端当事者所任命之相同人数的仲裁员中争端当事国国民或者其国民是当事者之国家的国民不会形成具有以上国籍之仲裁员的多数，一方当事者才可任命以上国家之国民。
4. 在任何解决争端的先前程序中担任过调解员或仲裁员之人员均不得被任命为仲裁庭成员。

规则二 没有先约时组成仲裁庭的方式

1. 在进行申请仲裁登记时，除当事者另有协议外，如其未就仲裁员人数及其任何方式达成协议，应遵循如下程序：
   a. 申请方在进行申请仲裁登记后的十日内，应向他方当事者建议任命独任仲裁员或特定奇数仲裁员以及确定其任命的方式。
   b. 他方当事者在收到申请方建议后的二十日内，应：
      i. 接受此种建议；或
      ii. 提出有关仲裁员人数和其任命方式的其他建议；
   c. 申请方在收到具有类似建议之答复后的二十日内，应通知他方当事者其是否接受此种建议。

2. 上述第一款规定之通信应以书面形式作成或及时予以书面确认，并且应通过秘书长送达，或当事者间直接送达，将副本送交秘书长。当事者应将达成协议之内容及时通知秘书长。

3. 在予以申请仲裁登记后的六十日内，如还未就其他程序达成协议，任何一方当事者可随时通知秘书长其选择公约第三十七条第二款第二项规定之任命方式。此后秘书长应及时通知他方当事者仲裁庭将依上述公约条款成立。

规则三 – 依公约第三十七条第二款第二项组成仲裁庭之仲裁员之任命

1. 如仲裁庭依公约第三十七条第二款第二项成立：
   a. 任何一方当事者在发往他方当事者之信函中应：
      i. 提名两人，指定其中一名既不具有任何一方当事者之国籍又不是任何一方当事者之国民者为其所任命之仲裁员；指定另一人为其建议的仲裁庭庭长之仲裁员；并
      ii. 邀请他方当事者任命另一名仲裁员并共同任命建议为仲裁庭庭长之仲裁员；

   b. 他方当事者收到以上信函后，在其答复中应及时；
      i. 提名一人作为其所任命的仲裁员，但其既不得具有任何一方当事者之国籍，也不得为任何一方当事者之国民；并且
      ii. 同意任命建议为仲裁庭庭长之仲裁员，或提名另一人为建议为仲裁庭庭长之仲裁员；

   c. 原当事者在收到包含有此种建议之答复后，应及时通知他方当事者其是否同意任命由他方当事者所提议作为仲裁庭庭长之仲裁员。

   d. 在规则规定之信函应以书面形式作成或及时予以书面确认，并且应通过秘书长送达，或双方当事者间送达，将副本送交秘书长。

规则四 – 行政理事会主席任命仲裁员

1. 如仲裁庭未在秘书长送达准予登记通知书后的九十日内或未在当事者另行约定的期间内成立，任何一方当事者可通过秘书长向行政理事会主席提交书面申请，请求任命尚未任命之一名或数名仲裁员，并指定一名仲裁员为仲裁庭庭长。
2. 如双方当事者已经达成协议由仲裁员推选仲裁庭庭长而未选出，则应适当适用上述第一款之规定。
3. 秘书长应立即将申请书副本送达他方当事者。
4. 主席应参照公约第三十八条和第四十条第一款，在尽量与双方当事者磋商后，并且于收到申请书后的三十日内同意此项申请。
5. 秘书长应及时通知双方当事者有关主席作出的任命或指定。

规则五 – 任命之接受

1. 有关一方或双方当事者应将各名仲裁员之任命通知秘书长，并应说明任命之方式。
2. 秘书长一旦收到当事者或行政理事会主席有关任命仲裁员之通知后，即应寻求被任命者之接受。
3. 如仲裁员在十五日内未接受任命，秘书长应及时通知双方当事者，如该仲裁员系主席任命者，还应通知主席，并且邀请他们依先前方式任命另一人为仲裁员。

规则六 – 仲裁庭之成立

1. 秘书长通知双方当事者全体仲裁员均已接受任命之日，应视为仲裁庭已经组成并且仲裁程序已经开始。
2. 仲裁庭开庭前或第一次开庭时，各名仲裁员应以如下方式签署声明：“据本人所知，我没有理由推辞在解决投资争端的国际中心成立的有关……和……之间争端的仲裁庭内任职。”

   “我对由于本人参加本仲裁程序而知之所有信息及仲裁庭作出的任何裁决之内容，将保守秘密。”

   “我将依准据法，在双方当事者间公正裁判，并且除解决投资争端公约和依其制订的条例、规则之规定外，将不接受来自任何方面的有关仲裁的指示或报酬。”

   “在此附上有关本人过去和现在职业以及与当事者双方的其他关系（如系存在）之声明书。”在仲裁庭第一次开庭结束时，任何未签署声明书之仲裁员应被视为已经辞职。

规则七 – 仲裁员之撤换

仲裁庭成立前，各方当事者可随时撤换任何其所指定的仲裁员，并且双方当事者可合意撤换任何仲裁员，以上撤换程序应根据规则一、规则五和规则六执行之。

规则八 – 仲裁员无行为能力或辞职

1. 如仲裁员失去行为能力或不能履行职责，应适用规则九所规定的有关仲裁员资格不合之程序。
2. 仲裁员可通过向其他仲裁庭成员和秘书长提交辞呈方式辞职。如仲裁员系一方当事者任命者，仲裁庭应及时考虑其辞职之理由，并决定是否同意其辞职。仲裁庭应及时将其决定通知秘书长。

规则九 – 仲裁员之资格不合

1. 根据公约第五十七条，提议仲裁员资格不合之当事者应在仲裁宣布终结前的期间向秘书长及时提交建议，说明理由。
2. 秘书长应立即：
   a. 将建议送达仲裁庭成员，并且如建议涉及到独任仲裁员或大多数仲裁庭成员，将此项建议送交行政理事会主席；并且
   b. 通知建议的他方当事者。
3. 一旦发生此种情况，与建议有关之仲裁员可立即向仲裁庭或行政理事会主席作出说明。
4. 除非建议涉及到仲裁庭之大多数成员，其他成员应在有关仲裁员不参加的情况下对建议及时审议和投票。如赞成票与反对票相等，他们应通过秘书长及时将建议、有关仲裁员作出之说明以及他们未作成决定之情况通知行政理事会主席。
5. 主席必须在收到建议后的三十日内就仲裁员资格不合之建议作出决定
6. 对建议之决定作出后，仲裁程序才可继续进行。

规则十 – 仲裁庭空缺之程序

1. 秘书长应将仲裁员资格不合、死亡、无行为能力或辞职以及仲裁庭准予辞职（如其发生），立即通知双方当事者，并如系必要，通知行政理事会主席。
2. 秘书长通知仲裁庭产生空缺后至补缺完成前，仲裁应中止或继续中止。

规则十一 – 仲裁庭之补缺

1. 除第二款另有规定外，由仲裁员资格不合、死亡、行为能力或辞职而产生的空缺应通过其被任命时相同方法及时填补之。
2. 行政理事会主席除了应对其任命之仲裁员补缺外，还应从仲裁员名单中任命一人：
   a. 在仲裁庭未达成一致意见时，填补由于一方当事者任命的仲裁员辞职所产生之空缺；或
   b. 如在秘书长通知空缺后的三十日内，新的任命没有作出并且没有被接受时，根据任何一方当事者之请求，填补任何其他空缺。
3. 补缺之程序应适用规则一、规则四第四款、规则四第五款，并适当适用规则六第二款。

规则十二 – 补缺后仲裁程序之恢复

一旦补缺完毕，仲裁庭应继续进行因空缺而中止之仲裁程序。但如口头辩论已经开始，新任仲裁员可要求其重新进行。

第二章 – 仲裁庭之工作

规则十三 – 仲裁庭之开庭期

1. 仲裁庭应在成立后的六十日内或双方同意之相应期间首次开庭，仲裁庭庭长应在与仲裁庭成员和秘书长磋商后，指定开庭日期。如由于双方当事者达成协议由仲裁庭成员推选产生庭长，而仲裁庭成立后还未选出庭长，秘书长应指定开庭日期。在以上两种情形下，均应尽量与双方当事者磋商。
2. 仲裁庭尽量与秘书长及双方当事者磋商后，应确定后续开庭日期。
3. 仲裁程序应在中心所在地或依照公约第六十三条由双方当事者协议之其他地点进行。双方当事者如果同意仲裁程序在中心或者中心作了必要安排之仲裁机构以外地点进行，应与秘书长协商，并请求仲裁庭批准。如未获批准，仲裁程序应在中心所在地进行。
4. 秘书长应在适当期间内，将仲裁庭开庭的日期和地点通知仲裁庭成员和双方当事者。

规则十四 – 仲裁庭之开庭

1. 庭长应主持仲裁庭之审理和评议。
2. 除双方当事者另有协议外，仲裁庭多数成员出庭应是仲裁庭开庭的必要条件。
3. 仲裁庭庭长应确定开庭日期和开庭时间。

规则十五 – 仲裁庭之评议

1. 仲裁庭之评议应秘密进行并应保守秘密。
2. 只有仲裁庭成员才可参加仲裁庭评议。除仲裁庭作出其他决定外，他人不得参加。

规则十六 – 仲裁庭之决定

1. 仲裁庭之决定由全体成员之多数票决定之。弃权应作为否决票计算之。
2. 除以上规则有其他规定或仲裁庭作出其他决定外，仲裁庭可通过成员间通信方式作出任何决定，但以与全体成员协商为限。这种决定应得到仲裁庭庭长之确认。

规则十七 – 庭长之无行为能力

仲裁庭庭长一旦丧失行为能力，其职责应由仲裁庭其他成员之一履行之，其顺序依秘书长收到仲裁员接受任职通知书之先后确定之。

规则十八 – 当事者之代理

1. 各方当事者可由代理人或律师代理或协助之。该当事者将代理人、律师的姓名及权限通知秘书长。秘书长应及时通知仲裁庭和他方当事者。
2. 规则之条文采用当事者之表述包括：授权代表当事者之代理人、律师。

第三章 – 一般程序条款

规则十九 – 程序性决议

仲裁庭应按进行仲裁程序之要求，作出决议。

规则二十 – 审前程序事务之协商

1. 仲裁庭成立后，庭长应尽快查明双方当事者关于程序问题的意见。为此，他可要求与双方当事者会谈。他应特别征求当事者对下列事项的意见：
   a. 构成仲裁庭开庭之法定人数所必要之仲裁员人数；
   b. 仲裁中使用的一种或数种语言；
   c. 申辩文书的数额及顺序，以及它们提交之期限；
   d. 各方当事者要求他方当事者提交文件之副本数额；
   e. 书面预审或口头辩论之免除；
   f. 仲裁费用之分担方式；以及
   g. 保存审理记录之方式。
2. 仲裁庭在仲裁程序中，应适用双方当事者有关程序问题的任何协议，但公约或行政和财务条例另有规定者除外。

规则二十一 – 预审会议

1. 根据秘书长要求或仲裁庭庭长决定，仲裁庭与双方当事者可举行预审会议，交换文件及确定无争端之事实，以便简化仲裁程序。
2. 根据当事者请求，仲裁庭与当事者或经授权之合法代理人可举行预审会议，审查争端事项，以便达成和解。

规则二十二 – 工作语言

1. 双方当事者可达成协议，在仲裁中使用一种或两种语言，但如达成协议之语言不是中心之正式语言，以仲裁庭在与秘书长协商后予以批准为限。如双方当事者未就任何非正式语言达成协议，当事者为此，可各自选择一种正式语言（如英语、法语和西班牙语）。
2. 如双方当事者选择两种工作语言，任何文件可以其中之一作成。仲裁庭可使用其中任何一

种语言，但仲裁庭有此项要求，则以在提供笔译和口译的条件下为限。仲裁庭应以此两种语言作成决定和裁决以及保存记录，两种文本有相同效力。

规则二十三 – 文件之副本

除仲裁庭与双方当事者及秘书长磋商后另有规定外，申请书、申诉书、请求书、书面意见、证明文件或其他文件（如系存在）应以署名原本附加下列数额副本之方式提交：

a. 仲裁庭人数确定以前：五份；
b. 仲裁庭人数确定以后：多于人数两份。

规则二十四 – 证明文件

证明文件通常应与其有关的文件一同提交，并且必须在规定的期限内提交。

规则二十五 – 错误之改正

经他方当事者之同意或仲裁庭之许可，任何文件或证明文件中的错误可在裁决作出前予以改正。

规则二十六 – 期限

1. 为完成仲裁程序各步骤之需要，仲裁庭应以指定日期之方式确定期限。仲裁庭可将此种权力授予庭长。
2. 仲裁庭可延长其确定的任何期限。如仲裁庭不在开庭期，此种权力应由庭长行使。
3. 有效期限届满后，不得为任何法律行为。除非在特殊情况下并给予他方当事者陈述意见的机会后，仲裁庭才能作出相反的裁定。

规则二十七 – 弃权

一方当事者未遵守其知道或应当知道之行政和财务条例、本规则及任何其他规则之规定、或仲裁所适用之协议、仲裁庭裁定，并且未及时陈述其主张，应视为–依公约第四十五条–放弃了提出异议之权利。

规则二十八 – 仲裁费用

1. 除非双方当事者另有协议，仲裁庭在不影响关于支付仲裁费用之最后裁定的情况下，可决定：
   a. 根据行政和财务条例第十四条，各方当事者在整个仲裁期间应支付仲裁庭之酬金，支出以及使用中心设施之费用的份额；
   b. 应由一方当事者完全承担或按特定比例分担之有关仲裁费用（由秘书长确定之）。
2. 仲裁程序终结后，各方当事者应及时向仲裁庭提交由合理产生或其担负之费用结算表，秘书长应及时向仲裁庭提交各方当事者向中心支付款项之总数以及中心在仲裁中支出之全部费用的帐目。仲裁庭在裁决作出前，可以要求双方当事者和秘书长提供有关仲裁费用之附加资料。

第四章 – 书面审理和口头辩论

规则二十九 – 正常程序

除双方当事者另外达成协议外，仲裁程序应包括二个阶段：书面审理和口头辩论。

规则三十 – 申请书之送达

仲裁庭一旦成立，秘书长即应将提交仲裁之申请书、证明文件、登记通知书以及收到之各方当事者应答信函的副本送达各名仲裁员。

规则三十一 – 书面审理

1. 除仲裁申请书外，书面审理应包括下列在仲裁庭规定之期限内提交的申诉书：
   a. 申请方之记要书；
   b. 他方当事者之记要答辩书；并且，如果双方当事者达成此项协议或者仲裁庭认为必要；
   c. 申请方之答辩书；
   d. 他方当事者之第二答辩书。
2. 如申请由双方共同提出，各方当事者应在仲裁庭规定之相同期间内，提交记要书，并且如双方当事者达成此项协议或者仲裁庭认为必要，还应提交答辩书；但双方当事者为适用上述第一款之规定，可代之而同意其中一方当事者为申请方。
3. 记要书应包括：有关事实之陈述、法律之陈述、意见。记要答辩书、申请方之答辩书或第二答辩书应包括：对前申请书陈述事实之承认或否认、必要附加事实、对前申诉书之法律陈述的意见、其答辩对法律之陈述、意见。

规则三十二 – 口头辩论

1. 口头辩论应由双方当事者、其代理人、律师、证人和专家参加进行。
2. 仲裁庭征得双方当事者之同意，应决定除双方当事者、其代理人、律师、作证人证人和专家以及仲裁庭工作人员以外其他人员可参加听证会。
3. 仲裁庭成员在听证期间，可向双方当事者、其代理人、律师询问，并要求其作出说明。

规则三十三 – 证据之提供

在不影响有关提供书证规则之情况下，各方当事者为达向仲裁庭和他方当事者建议之目的，应在仲裁庭规定的期限内，将准备提供之证据以及准备请求仲裁庭收集之证据，连同与证据有关之某些案情特征的确切情况通知秘书长。

规则三十四 – 证据：一般原则

1. 仲裁庭对于所提供的证据，应就其是否接受及其证明价值作出判断。
2. 仲裁庭在整个仲裁期间如认为必要，可：
   a. 要求双方当事者提供文件、证人和专家；并且
   b. 勘察争端所涉及的现场，或在此现场进行调查。
3. 双方当事者在提供证据和采取第二款规定之措施时，应与仲裁庭合作。仲裁庭应将一方当事者未履行本款规定之义务及未履行之理由作正式记录。
4. 提供证据和依第二款规定采取之其他措施所产生的费用应被认为构成公约第六十一条第二款意义上双方当事者开支的一部分。

规则三十五 – 询问证人及专家

1. 在仲裁庭庭长的领导下，双方当事者可当庭向证人、专家提出询问，仲裁庭成员也可提出询问。
2. 各证人在其作证前应作如下声明：“本人谨以荣誉和良知慎重起誓：我将陈述事实、全部事实、并且仅仅是事实。”
3. 各专家在其作鉴定书前应作如下声明：“本人谨以荣誉和良知慎重起誓：我将一秉信诚提供鉴定结论。”

规则三十六 – 证人及专家：特殊规则

除规则三十五之外，仲裁庭还可：

a. 接受证人或专家在笔录证词中提供之证据；以及
b. 征得双方当事者同意，以非当庭方式对证人和专家进行询问。仲裁庭应限定询问之项目、期限、遵循之程序以及其他细节。双方当事者可参加询问。

规则三十七 – 勘察与调查

如仲裁庭认为必须对有关争端现场进行勘察或调查，则应作成决议。此项决议应限定勘察之范围或调查之项目、期限、遵循之程序及其他细节。双方当事者可参加勘察或调查。

规则三十八 – 仲裁程序之终止

1. 双方当事者当庭申辨结束后，应宣布仲裁程序终止。
2. 在裁决作出前的例外情况下，仲裁庭因发现对裁决有决定性影响的新证据或对澄清某些具体案情必要时，可进行再审程序。

第五章 – 特别程序

规则三十九 – 保全措施

1. 在整个仲裁期间，一方当事者可请求仲裁庭采取维护其权利之保全措施。此种请求应列举被保全之权利、请求采取之措施以及需要采取此种措施之情形。
2. 仲裁庭应优先审议依上述第一款提出之请求。
3. 仲裁庭也可主动采取保全措施或者采取请求书列举之外其他措施。仲裁庭可随时修改和取消此种措施。
4. 仲裁庭仅在给予各方当事者发表意见的机会后，才可采取保全措施或者修改、取消此种措施。
5. 本规则不得禁止双方当事者在开始仲裁程序前或在仲裁期间，请求任何司法机关或其他机关采取保全措施以保全其相应的权益，但其在载有自身承诺之协议中作出此类规定者除外。

规则四十 – 附带请求

1. 除双方当事者另有协议外，一方当事者可直接对争端之标的提出附带请求、附加请求或反请求，但以此种附带请求在双方当事者同意之范围内或在中心管辖范围内为限。
2. 附带请求或附加请求应在提交答辩书前提出，反请求应在提交记要答辩书前提出，除非仲裁庭考虑到提出附带请求之当事者之正当理由及他方当事者之反对理由，准予其在仲裁之较晚阶段上提出此项请求。
3. 仲裁庭应确定附带请求之他方当事者提出意见之期限。

规则四十一 – 管辖权之异议

1. 对于争端或附带请求不属于中心管辖范围或其他认为不属于仲裁庭职权范围之主张，应尽早提出。当事者应在确定提交记要答辩书期限届满前向秘书长提出异议，或者此种异议涉及附带请求，应在提交第二答辩书期限届满前提出，除非异议所基于之事实在此时为当事者所不知。
2. 在整个仲裁期间，仲裁庭可主动审议向其提交之争端或附带请求是否属于中心管辖范围和其本身之职权范围。
3. 有关争端之异议正式提出后，就实质事项之程序即应中止。仲裁庭庭长在与其他仲裁员协商后，应确定当事者对此项异议提出意见之期限。
4. 仲裁庭应决定此项异议之续行程序是否应是口头辩论。它可将此项异议作为一个先决问题加以解决，也可将其并入争端之实质事项一并审理。如仲裁庭对异议作出裁定，或将其并入实质事项一并审理，它应再次确定续行程序之期限。
5. 如仲裁庭裁定争端不属于中心管辖范围或不属于仲裁庭职权范围，它应就此作出裁决。

规则四十二 – 缺席

1. 如一方当事者（本规则称为缺席方）未出庭或在整个仲裁期间未作申辩，他方当事者在仲裁中止前，可随时请求仲裁庭审理提交之问题，并作出裁决。
2. 仲裁庭应及时将此项请求通知缺席方。除非该当事者显然无意出庭或在仲裁期间无意申辩，仲裁庭应同时给予一个宽限期，并且应：
    a. 在该当事者如未于确定的期限内提交答辩状或其他文书的情况下，指定其提交之新期限；或
    b. 在该当事者如未出庭或在仲裁审理中未作申辨的情况下，指定新的审理日期。未经他方当事者之同意，宽限期不得超过六十日。
3. 宽限期届满后或依上述第二款规定无此宽限期时，仲裁庭应对争端进行重新审理。缺席方未出庭或未作申辨不应认为其接受了他方当事者之主张。

4. 仲裁庭应审查尚存异议之中心管辖权和仲裁庭本身之职权，并且如它们有管辖权，应裁定意见书在事实和法律上有无充分根据。为此，仲裁庭在整个仲裁期间可传唤当事者到庭提出意见、提供证据、或作口头说明。

规则四十三 – 和解与中止

1. 如在裁决作出前，当事者就解决争端或就中止仲裁达成协议，仲裁庭或秘书长（如仲裁庭还未成立）应依双方当事者之书面请求，作出中止仲裁之裁定书。
2. 如双方当事者向秘书长提交其和解签字全文，并书面请求裁决中载入此项和解，仲裁庭可在其裁决书中载入之。

规则四十四 – 一方当事者请求之中止

如一方当事者请求中止仲裁，仲裁庭或秘书长（如仲裁庭还未成立）应在裁定书中确定他方当事者可陈述其是否反对此项中止之期限。如在此期限内他方当事者没有提出书面反对意见，应视为其已经默许了此项中止，并且仲裁庭或秘书长（如仲裁庭还未成立）应在裁定书中载入仲裁之中止。但如有异议，仲裁应继续进行。

规则四十五 – 双方当事者不作为之中止

如双方当事者在连续六个月期间或其达成协议并获仲裁庭或秘书长（如仲裁庭还未成立）批准之期限内，未实施任何法律行为，应视为他们已经中止仲裁，并且仲裁庭或秘书长（如仲裁庭还未成立）应在通知双方当事者之后，在裁定书中载入此项中止。

第六章 – 裁决

规则四十六 – 裁决之准备

仲裁裁决（包括任何个人意见或反对意见）应在仲裁终结后的六十日内起草和签署。但如仲裁庭由于其他原因不能起草裁决书，可延长三十日。

规则四十七 – 裁决

1. 裁决应以书面形式作成并且应包括:
   a. 各方当事者确切名称
   b. 仲裁庭依公约成立之陈述，及仲裁庭成立方式之表述;
   c. 仲裁庭各名成员姓名，以及其委任权之证明;
   d. 双方当事者之代理人、律师之姓名;
   e. 仲裁庭开庭日期和地点;
   f. 仲裁之概要;
   g. 仲裁庭查明事实之陈述;
   h. 双方当事者之意见书;
   i. 仲裁庭对向其提交的每一问题之决定，以及决定所依据之理由; 并且
   j. 仲裁庭就仲裁费用作出之全部裁定。
2. 裁决书应由投赞成票之仲裁员署名; 还应标明仲裁庭各名成员签署之日期。
3. 仲裁庭之任何成员不论其是否与多数仲裁员存在分歧，还是陈述其反对意见，均可在裁决书后附其个人意见。

规则四十八 – 裁决书之作出

1. 在全体仲裁员签署后，秘书长应及时:
   a. 查明裁决书原本之真实性并将其连同所有个人意见及反对意见之陈述存入中心档案; 并且
   b. 将核对无误之裁决书（包括个人意见及反对意见之陈述）副本发送各方当事者，标明原文及所有副本之发送日期。
2. 核对无误之裁决书副本发送之日，应视为裁决书已经作出。
3. 秘书长根据请求，应向当事者提供适当数额之附加裁决书副本。
4. 未经双方当事者同意，中心不得公布裁决书。但中心可将仲裁庭适用之法律规则之摘录刊登在其发行刊物上。

规则四十九 – 补充决定与修改

1. 在裁决书作出后的四十五日内，任何一方当事者依公约第四十九条第二款之规定，可请求对裁决作补充决定或进行修改。此项请求应以书面形式提交秘书长。请求书应:
   a. 确定有关之裁决;
   b. 标明请求日期;
   c. 详细陈述:
      i. 请求方认为仲裁庭遗漏了的问题; 以及
      ii. 请求方要求修改的裁决之错误; 并

d. 交付手续费。

2. 秘书长收到请求书和手续费后，应即时：
   a. 准予请求书登记；
   b. 将此项登记通知双方当事者；
   c. 将请求书和有关附件之副本送达他方当事者；并
   d. 将准予登记通知书副本，连同请求书及有关附件之副本送达仲裁庭各成员。
3. 仲裁庭庭长应与其成员协商有无必要开庭审理此项请求。仲裁庭应确定双方当事者就请求书发表意见之期限，并且应确定其审理之程序。
4. 依本规则，仲裁庭之任何决定可适当适用规则四十六至规则四十八之规定。
5. 如秘书长在裁决书作出的四十五日后收到请求书，他应拒绝予以登记，并就此及时通知请求方。

第七章 – 裁决之解释、修改及撤消

规则五十 – 申请

1. 解释、修改及撤消裁决之申请应以书面形式提交秘书长，并且应：
   a. 确定有关之裁决；
   b. 标明申请日期；
   c. 详细陈述；
      i. 申请解释之尚存异议的明确要点；
      ii. 以公约第五十一条第一款为根据之申请修改裁决的要点及理由：请求对裁决之修改、所发现对裁决有决定性影响之事实、此种事实在裁决作出时为仲裁庭和申请人所不知之证据、及申请人不知此种事实亦非其过失所致；
      iii. 以公约第五十二条第一款为根据之申请撤消裁决之理由。以上理由以如下为限：仲裁庭成立有缺陷；仲裁庭明显越权；仲裁庭成员受贿；严重违反基本程序规则；裁决未说明理由；
   d. 交付申请手续费。
2. 在不影响第三款规定的情况下，秘书长收到申请书和手续费后，应立即：
   a. 准予申请书登记；
   b. 将此项登记通知双方当事者；
   c. 将申请书副本及所有附件副本送达他方当事者；
3. 秘书长对以下日期内提交之申请书应拒绝予以登记：
   a. 如其依公约第五十一条第二款，未在新事实发现后的九十日内并且在裁决（或任何后续决定或其修改）作出后的三年内请求修改裁决；
   b. 如其依公约第五十二条第二款，未在以下日期内请求撤消裁决：
      i. 裁决（或任何后续决定或其修改）作出后的一百二十日内，如申请书以如下理由为根据：仲裁庭成立有缺陷；仲裁庭明显越权；严重违反基本程序规则；裁决未说明理由

ii. 有关仲裁庭成员受贿，在其被发现后的一百二十日内并在裁决（或任何后续决定或其修改）作出后的三年内。

4. 如秘书长拒绝登记修改及撤消裁决之申请书，则应立即通知申请方。

规则五十一 – 解释或修改：后续程序

1. 秘书长准予解释或修改裁决之申请书登记后，应立即
   a. 将准予登记通知书副本，连同申请书及所有附件之副本送达原仲裁庭成员；并且
   b. 要求各仲裁庭成员在指定期限内通知其是否愿意参加此项申请之审理。
2. 如全体仲裁庭成员表示愿意参加此项申请之审理，秘书长应将其通知仲裁庭成员及双方当事者。在以上通知发出后，应视为仲裁庭重新成立。
3. 如根据上述第二款仲裁庭未能成立，秘书长应将此种情况通知双方当事者，并请其尽早成立与原仲裁庭相同仲裁员人数、相同任命方式之新仲裁庭。

规则五十二 – 撤消：后续程序

1. 秘书长准予撤消裁决申请书登记后，应立即请求行政理事会主席依公约第五十二条第三款任命一个临时委员会。
2. 秘书长通知双方当事者全体委员会成员均已接受任命之日，应视为委员会已经成立。在委员会第一次会议之前或会上，各成员应按照规则六第二款之规定，签署声明书。

规则五十三 – 程序规则

本规则之条款应适当适用于任何有关裁决解释、修改、撤消之程序及有关仲裁庭或委员会决定之程序。

规则五十四 – 裁决执行之中止

1. 申请解释、修改或撤消裁决之当事者可在其申请书中，并且任何一方当事者可在最后审理此种申请前的任何时候，请求中止执行与申请书有关之部分或全部裁决。仲裁庭或委员会应优先审理此项请求
2. 如修改、撤消裁决申请书包括中止执行裁决之请求，秘书长应通知双方当事者暂时中止执行，并送达准予登记通知书。一旦仲裁庭或委员会成立，如经任何一方当事者之请求，其应在三十日内裁定是否继续此项中止；除非其决定继续此项中止，否则中止应自动结束。
3. 如根据第一款已经准予中止执行，或根据第二款已经准予中止执行，经其一方当事者之请求，仲裁庭或委员会可随时更改或结束此项中止。所有中止应在申请书之最后决定作出之日自动结束。但准予部分撤消裁决之委员会可决定暂时中止执行未撤消之部分除外，以便给予任何一方当事者请求依公约第五十二条第六款成立之新仲裁庭根据规则五十五第三款

之规定准予中止执行之机会。

4. 根据第一款、第二款（第二句）或第三款，请求书应详细列出要求中止、中止之更改或中止之结束的情形。只有仲裁庭或委员会在给予各方当事者提出意见之机会后，才可准予此项请求。
5. 秘书长应将中止执行裁决、其更改及其结束及时通知双方当事者。此项中止、其更改或其结束应在发送此通知之日生效。

规则五十五 – 撤消裁决后争端之复核

1. 如委员会撤消了部分或全部裁决，任何一方当事者可向新仲裁庭请求复核争端。此项请求书应以书面形式提交秘书长，并且应：
   a. 确定有关之裁决；
   b. 标明请求日期；
   c. 详细说明将提交仲裁庭之争端的情况；并
   d. 交付复核手续费。
2. 秘书长在收到请求书和手续费后，应立即：
   a. 将其登记在仲裁登记簿上；
   b. 将此项登记通知双方当事者；
   c. 将请求书及所有附件之副本送达他方当事者；并且
   d. 请双方当事者尽快成立与原仲裁庭相同仲裁员人数、相同任命方式之新仲裁庭。
3. 如仅仅部分撤消原裁决，新仲裁庭应不再审理裁决之未撤消部分。但根据规则五十四规定之程序，新仲裁庭可在其裁决作出前，中止或继续中止执行未撤消之裁决部分。
4. 除第一款至第三款另有规定外，本规则应适用于再次将争端提交仲裁之程序，如同根据组织规则将此项争端第一次提交仲裁之适用情形。

第八章 – 一般性条款

规则五十六 – 最后条款

1. 本规则以中心正式语言作成之文本应具有相同效力。
2. 本规则可作为中心之“仲裁规则”援引。

附录6 – 荷兰缔结的双重税收条约

阿尔巴尼亚
阿根廷
亚美尼亚
澳大利亚
奥地利
阿塞拜疆
巴林
孟加拉
巴巴多斯
白俄罗斯
比利时
百慕大
荷属加勒比
巴西
保加利亚
加拿大
中国
克罗地亚
捷克
丹麦
埃及
爱沙尼亚
芬兰
法国
格鲁吉亚
德国
希腊
中国香港
匈牙利
冰岛
印度
印度尼西亚
爱尔兰
以色列
意大利
日本

约旦
哈萨克斯坦
朝鲜
科威特
拉脱维亚
立陶宛
卢森堡
马其顿
马拉维
马来西亚
马耳他
墨西哥
摩尔多瓦
蒙古
摩洛哥
新西兰
尼日利亚
挪威
安曼
巴基斯坦
波兰
葡萄牙
罗马尼亚
俄罗斯
沙特阿拉伯
新加坡
斯洛伐克
斯洛文尼亚
前苏联
南非
韩国
西班牙
斯里兰卡
苏里南
瑞典
瑞士
台湾
塔吉克斯坦
泰国

荷属安的列斯和阿鲁巴
菲律宾
突尼斯
土耳其
土库曼斯坦
乌干达
乌克兰
阿联酋
英国
美国
乌兹别克斯坦
委内瑞拉
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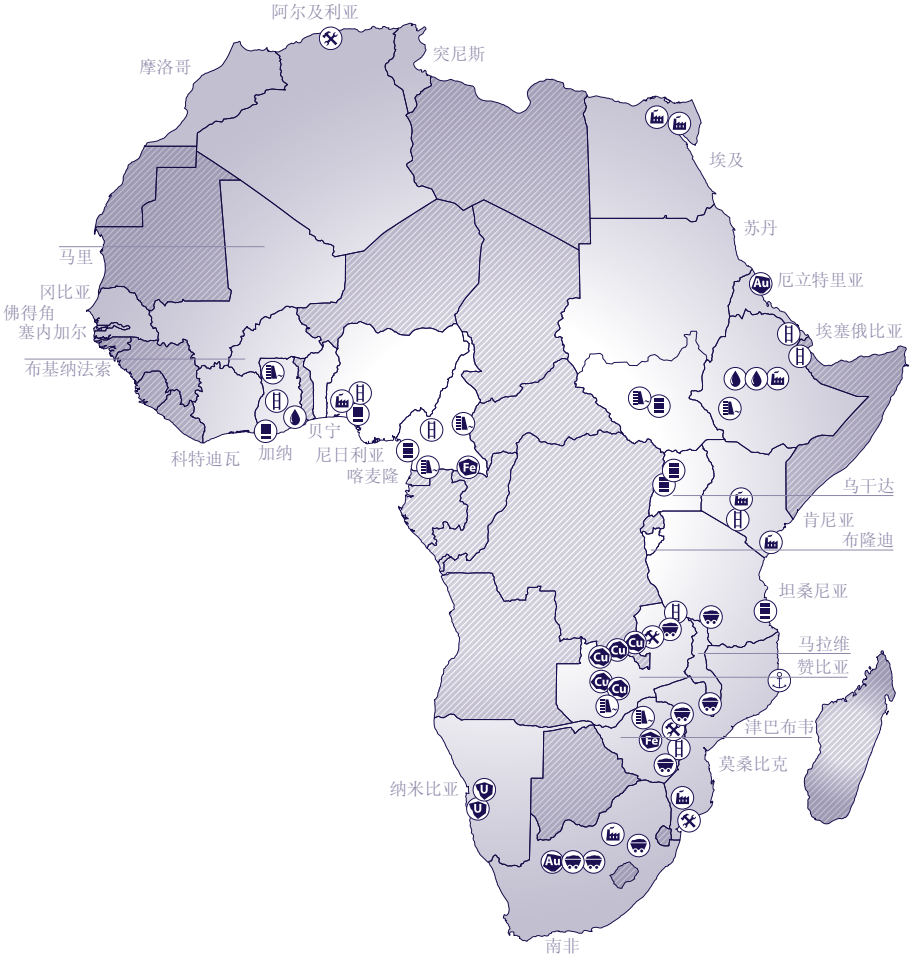
与荷兰有双边投资条约的非洲国家

中国投资行业分布

- 石油和天然气
- 铁路/公路
- 其他采矿
- 水电站大坝
- 铁矿
- 铜矿
- 土木建筑
- 制造业
- 铀矿
- 港口建设
- 金矿
- 水资源


阿尔及利亚
摩洛哥
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埃及
苏丹
马里
厄立特里亚
冈比亚
佛得角
塞内加尔
埃塞俄比亚
布基纳法索
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科特迪瓦
加纳
尼日利亚
喀麦隆
乌干达
肯尼亚
布隆迪
坦桑尼亚
马拉维
赞比亚
津巴布韦
莫桑比克
纳米比亚
南非

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INTRODUCTION

2007: the Industrial and Commercial Bank of China purchased 20 percent of South Africa's Standard Bank for $5.5 billion.

2010: Jidong Development Group, China's second largest cement maker, and the China Africa Development Fund help building a new cement plant worth at least Rmb1.5bn ($220m, €174m, £148m) in Gauteng province, outside Johannesburg, South Africa.

2011: Sichuan Hongda Co. Ltd. signed a $3 billion deal with Tanzania's state-run National Development Corporation (NDC) to mine coal and iron ore. Sichuan Hongda and NDC formed a joint venture company, Tanzania China International Mineral Resources (TCMR), to build the coal and iron ore mines.

2012: Taurus Mineral Limited (a subsidiary of China Guangdong Nuclear Power Corp and China-Africa Development Fund) has acquired all shares in Extract Resources Limited, a listed Australia based uranium mining company. Extract Resources owns Husab, a uranium mining project in Namibia, which is expected to become one of the world's largest uranium mines when it begins operations. The shares of Extract Resources Limited were acquired in stages (deal value implied equity value of the transaction is AUD 2.17bn (USD 2.34bn)

These are just a few examples showing the huge interest which Africa has seen from Chinese investors in the past 10 years. More than 2,000 Chinese companies have invested in Africa, most of which are in energy, mining, construction and manufacturing. China's state-owned oil companies are active throughout the continent. The China National Petroleum Corporation, for example, invested up to $6 billion in Sudan's oil sector. The China Power Investment Corporation plans to invest $6 billion in Guinea's bauxite and alumina projects. Privately-owned Huawei and publicly-traded ZTE have become the principal telecommunications providers in a number of African countries. Increasingly, Chinese companies are moving into finance, aviation, agriculture and even tourism.

The bulk of China's investments have been concentrated in a relatively few countries. Between 2003 and 2007, five countries—Nigeria, South Africa, Sudan, Algeria and Zambia-accounted for more than 70 percent of China's investments. While these countries remain important recipients, others such as Guinea, Ghana, Democratic Republic of the Congo and Ethiopia have joined the list in recent years. In 2010, Ethiopia had, for example, 580 registered Chinese companies operating with estimated investment capital of $2.2 billion.[1]

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[1] Id.

Anyone experienced in doing business in Africa will know that the making of investments, whatever their form, is not risk free. One of the risks is that the host state may try to interfere with the investment in a variety of ways or otherwise fail to safeguard the interests of the foreign investor. For instance, host states have been known to expel individuals, or to force the closure or transfer of ownership in projects and companies. Equally, certain jurisdictions are prone to civil unrest or sudden regime change, in which case investors may face uncertainty as to whether the host state will deploy its police and military resources to protect, for instance, a mine operated by a foreign entity. As ever, governments in less stable parts of Africa have to tread a line between encouraging inward investment on the one hand and looking after the interests of their nationals on the other.

This volume in the series of Houthoff Buruma Practical Guides specifically aims to explain to Chinese investors in Africa how to use bilateral investment treaties to protect their investments, and how to obtain compensation for a loss resulting from improper interference by a 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. We hope that Chinese investors, seeking opportunities in Africa or elsewhere, will find this volume useful to understand how these treaties can assist them if the need should arise.

Dirk Knottenbelt
Head of Houthoff Buruma's arbitration team,
March 2013.

CHAPTER ONE – INTRODUCING BITS

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 not focused on 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, 28 of which with African countries.

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 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.

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.

Although there is no doubt that during the last years the risks of investing in many of the African countries has declined, when such risks materialize, the effects are widely reported and, consequently, influence investment decisions.

For these reasons, and despite the increasing interest, foreign investors often still hesitate when it comes down to committing to any investment in Africa. The reasons are two-fold: on the one hand, investments into non-renewable resources projects require large sums of capital expenditure over substantial periods of time that are for the most part illiquid. Further, a long-term investment by a foreign investor in a developing country poses many political risks such as the risk of expropriation of project assets and discriminatory treatment.

There are many examples of investments go wrong in developing countries. To name a few:

In 1991, an industrial complex of an American company, investing in Zaire, was looted by Zairan armed forces. The complex was reopened in 1992. In 1993, the industrial complex was destroyed by Zairan armed forces and was permanently closed because of this. The American company held the Republic of Zaire accountable under the BIT between the United States and the Republic of Zaire.[2]

The production sharing contracts into which an Australian company had entered into with the Mauritanian Government became dishonoured following the Government's removal from power in a bloodless coup. The new Government refused to recognise the legality of the agreements and argued that disputed amendments to the contracts were damaging to the national economic interest. If Australia and Mauritania had an international treaty in force at the time of this dispute that governed the treatment of foreign investments, the Australian company's negotiating position may have been substantially strengthened.

The Land Acquisition Act in Zimbabwe deprived many owners of rural land without compensation. Various new laws and amendments to the Constitution allowed the government to essentially expropriate the owners of their land.

The differences in Sudan between north and south resulted in the south shutting down oil wells, disregarding the interests of foreign investors.

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[2] *American Manufacturing & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1*

And recently, Zambia revoked the licenses of a Chinese owned coal mine in the south of the countries, after unrest and demonstrations by mine workers. The Zambian government has taken over the mines from the Chinese owners.

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 the Arab Spring 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", such as many of the African 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. Foreign investors often had to rely upon the protection of home governments to safeguard investments in foreign countries. At times this gave rise to threat of military action or so called 'gunboat diplomacy'. For example, the Infrastructure Consortium for Africa notes that the US has sent troops to Latin America 34 times to resolve commercial disputes.[3]

Nowadays, states tend towards entering into BITs to establish protocols for how governments handle foreign investors.

Bilateral investment treaties (BITs)

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.

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[3] <http://www.icafrica.org>

While BITs infringe sovereignty, in that disputes are settled in international tribunals and not domestic courts, many developing countries see them as a way of signalling their attractiveness for foreign investment.

The number of treaties has grown exponentially, to around 2,500 today. The number of claims is growing too. Philip Morris, Total, Mobil, Shell, Siemens and Cargill have all taken states to arbitration, with Sri Lanka suffering the first award against a developing country in 1990. Twenty-six percent of new claims in 2010 had an African or Middle Eastern state party involved. In Africa, Zimbabwe, Tanzania, Namibia, Liberia, Algeria and Senegal have all faced actions. There are likely to be more disputes in areas such as mining, water and agriculture. Events such as the Arab Spring are likley to generate a flood of claims.

To date (March 2013), the Netherlands has concluded close to 100 BITs.[4] There are only a few other countries 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.

Although China has also extended their number of BITs, including with African countries, only a few of China's BITs in Africa are yet in force. By comparison, the Netherlands has 28 BITs in Africa, nearly all of which are in force.

Having a BIT in place is not the only aspect when judging the 'protection' of an investment, it is in the end the content of the BIT that is essential. Dutch BITs are known for their broad definition of the 'investment' they facilitate to recover: It covers all assets. Likewise the definition of an 'investor' who has the right to make use of a Dutch BIT is equally broad. Unlike the BITs of

[4] 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 (March 2013) 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: March 2013).

other countries, a Dutch BIT does not require the investor to be a Dutch company or national, nor to have its have its head office in the Netherlands. It is enough to structure an investment through the Netherlands by using a Dutch holding or sub-holding company.

The Dutch 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).

In this Chapter 1 there are a number of examples of investments that Chinese companies have made in Africa. There is a fair chance that many of these investments have been made in countries that have signed a BIT with the Netherlands. Should any of the Chinese companies in these examples have structured their investments via the Netherlands, they would have ensured themselves a substantially better protection of such investments.

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.

CHAPTER TWO – 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.[5] 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,*

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

Have agreed as follows:..." [6]

The preamble is not without importance. For instance, in *Saluka v. Czech Republic*, [7] 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.

[6] Bilateral Investment Treaty between the Netherlands and Zimbabwe

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

CHAPTER THREE – 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.

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 Algeria, for example, provides the following at Article 3(1): "Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting party...". [8]

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

[8] Bilateral Investment Treaty between the Netherlands and People's Democratic Republic of Algeria.

and malicious misapplication of the law. [9]

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.

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". [10]

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. [11]

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 Ethiopia:

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[9] *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>.

[10] *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>.

[11] *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>.

> *"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."* [12]

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 its 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. [13]

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. [14]

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 Ghana has this wording:

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[12] Bilateral Investment Treaty between the Netherlands and the Federal Democratic Republic of Ethiopia.

[13] *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>.

[14] *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>.

> *"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."* [15]

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. [16]

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."* [17]

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.

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[15] Bilateral Investment Treaty between the Netherlands and the Republic of Ghana.

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

[17] Bilateral Investment Treaty between the Netherlands and Egypt

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. [18]

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 Nigeria states:

> *"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 undue restriction or delay. Such transfers include in particular though not exclusively:*
> *a) profits, interest, dividends and other income;*
> *b) funds necessary*
> *(i) for the acquisition of raw or auxiliary materials, semi-fabricated or finished products; or*
> *(ii) to replace capital assets in order to safeguard the continuity of an investment; or*
> *(iii) for expansion and/or improvement of an investment;*
> *c) funds in repayment of loans;*
> *d) royalties or fees;*
> *e) earnings of natural persons;*
> *f) the proceeds of sale or liquidation of the investment."* [19]

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[18] *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>.

[19] Bilateral Investment Treaty between the Netherlands and the Federal republic of Nigeria.

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 Zambia 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 or contrary to any undertaking which the Contracting Party which takes such measures may have given;*
> >
> > *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."* [20]

[20] Bilateral Investment Treaty between the Netherlands and the Republic of Zambia.

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:

- 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?

- Can the deprivation be linked to state conduct?

- 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. [21]

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.

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

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." [22]

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.[23]

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[22] Bilateral Investment Treaty between the Netherlands and Algeria

[23] *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>.

CHAPTER FOUR – 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.[24]

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 Tanzania defines "investor" as:

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[24] 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: March 2013)
- 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: March 2013)
- ICSID has an online search engine of BITs at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewBilateral&reqFrom=Main (Accessed: March 2013)

"The term 'investors' shall comprise with regard to either Contracting Party:
natural persons having the nationality of that Contracting Party;
legal persons constituted under the law of that Contracting Party;
legal persons not constituted under the law of that Contracting Party but controlled by natural persons as defined in (i) or by legal persons as defined in (ii)." [25]

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. [26]

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. [27]

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[25] Bilateral Investment Treaty between the Netherlands and the United Republic of Tanzania.

[26] *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>.

[27] *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>.

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):

- property,
- shares,
- contracts,
- intellectual property rights and
- rights conferred by law.

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

> *"the term "investments" means 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. claims to money, to other assets or to any performance having an economic value;
iv. rights in the field of intellectual property, technical processes, goodwill and know-how;
v. rights granted under public law or under contract, including rights to prospect, explore, extract and win natural resources." [28]

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." [29]

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. [30]

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

[28] Bilateral Investment Treaty between the Netherlands and the Republic of Malawi.

[29] Bilateral Investment Treaty between the Netherlands and Russia

[30] *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>.

rejected the argument, recognizing that accepting it would defeat the entire logic of investment protection treaties. [31]

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. [32]

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. [33]

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[31] *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>.

[32] *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>.

[33] *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>.

CHAPTER FIVE – 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 Namibia provides:

> *"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."* [34]

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. [35] 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."* [36]

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[34] Bilateral Investment Treaty between the Netherlands and the Republic of Namibia.

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

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

Other arbitration options. Other common options are ad hoc arbitration under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL)[37] and arbitration according to the rules of the International Chamber of Commerce (ICC) [38] or the Stockholm Chamber of Commerce.[39] 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.*
> *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."* [40]

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[37] See Volume 1 in this series, page 26 et seq. The UNCITRAL Arbitration Rules (1976) can be found at: http://www.uncitral.orguncitral/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.

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

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

[40] Bilateral Investment Treaty between the Netherlands and Argentina

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. [41]

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:

a. a BIT applies;
b. the investor is entitled to protection under the BIT;
c. the investor's investment qualifies as an "investment" under the BIT; and
d. 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."* [42]

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

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

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[41] *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>.

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

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. [43]

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. [44] 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 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

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[43] *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>.

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

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.

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:

a. the tribunal was not properly constituted;
b. the tribunal manifestly exceeded its powers;
c. there was corruption on the part of a member of the tribunal;
d. there was a serious departure from a fundamental rule of procedure;
e. 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.[45] Upon receipt of payment, the Secretary-General sends the request for

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

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.[46]

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."* [47]

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

[47] Article 54 of the ICSID Convention

CHAPTER SIX – 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

a. movable and immovable property, including security rights;
b. rights derived from shares and other interests in companies;
c. monetary claims;
d. claims based on intellectual property rights; and
e. 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.

At this time, China has no BITs in force with for instance Algeria, Benin, Cameroon, Côte d'Ivoire, Kenya, Namibia, Nigeria, Tunesia, Uganda and Zambia. Chinese investors may use the protection of the BITs between the Netherlands and those countries 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. [48]

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

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:

- 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.
- 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:

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

CHAPTER SEVEN – 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.

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.

APPENDIX 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:

(a) the term "investments" means 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) claims to money, to other assets or to any performance having an economic value;
(iv) rights in the field of intellectual property, technical processes, goodwill and know-how;
(v) rights granted under public law or under contract, including rights to prospect, explore, extract and win natural resources.

(b) the term "nationals" shall comprise with regard to either Contracting Party:
(i) natural persons having the nationality of that Contracting Party;
(ii) legal persons constituted under the law of that Contracting Party;
(iii) 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).

(c) 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:

a) under an agreement for the avoidance of double taxation; or
b) by virtue of its participation in a customs union, economic union or similar institution; or
c) 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:

a) profits, interests, dividends and other current income;
b) funds necessary
    (i) for the acquisition of raw or auxiliary materials, semi-fabricated or finished products, or
    (ii) to replace capital assets in order to safeguard the continuity of an investment;
c) additional funds necessary for the development of an investment;
d) funds in repayment of loans;
e) royalties or fees;
f) earnings of natural persons;
g) the proceeds of sale or liquidation of the investment;
h) 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:

a) the measures are taken in the public interest and under due process of law;
b) the measures are not discriminatory or contrary to any undertaking which the Contracting Party which takes such measures may have given;
c) 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:

APPENDIX 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
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
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
Russia[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
Sudan[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.

APPENDIX 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).

APPENDIX 4 – ICSID SCHEDULE OF FEES

International Centre for Settlement of Investment Disputes

SCHEDULE OF FEES

(Effective January 1, 2013)

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 a party: (a) requesting the institution of conciliation or arbitration proceedings under the Convention or the Additional Facility Rules; (b) applying for annulment of an arbitral award rendered pursuant to the Convention; or (c) requesting the institution of fact-finding proceedings under the Additional Facility Rules.
2. A non-refundable fee of US$10,000 is payable to the Centre by any party: (a) requesting a supplementary decision to, or the rectification, interpretation or revision of, an arbitral award rendered pursuant to the Convention; (b) requesting a supplementary decision to, or the correction or interpretation of, an arbitral award rendered pursuant to the Additional Facility Rules; or (c) requesting the resubmission of a dispute to a new Tribunal after the annulment of an arbitral award rendered pursuant to the Convention.

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

3. In addition to receiving reimbursement for any direct expenses reasonably incurred, conciliators, arbitrators, commissioners and ad hoc Committee members are entitled to receive 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. Any request for a higher amount shall be made through the Secretary-General.

Appointment and Challenge of Arbitrators in Proceedings Not Conducted under the Convention or Additional Facility Rules

4. A non-refundable fee of US$10,000 is payable to the Centre by a party requesting that the Secretary-General appoint an arbitrator, or decide the challenge to an arbitrator, in proceedings not conducted under the Convention or Additional Facility Rules.

Administrative Charges

5. An administrative charge of US$32,000 is levied by the Centre upon the constitution of the Conciliation Commission, Arbitral Tribunal, Fact-Finding Committee or ad hoc Committee concerned, and on an annual basis thereafter. The same annual charge applies to proceedings administered by the Centre under rules other than the ICSID Convention or Additional Facility Rules.
6. The administrative charge, the direct expenses incurred in connection with the proceedings, 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. Under Administrative and Financial Regulation 15, a party asking the Centre to perform a special service must deposit in advance an amount sufficient to cover the resulting charges. The charges for such services are determined on the basis of rates established by the World Bank under its normal administrative procedures.

APPENDIX 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.
4. 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:

a. before the number of members of the Tribunal has been determined: five;
b. 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;
   . 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.

APPENDIX 6 – DOUBLE-TAXATION TREATIES CONCLUDED BY THE NETHERLANDS

Albania
Argentina
Armenia
Australia
Austria
Azerbaijan
Bahrain
Bangladesh
Barbados
Belarus
Belgium
Bermuda
BES Islands
Brazil
Bulgaria
Canada
China
Croatia
Czech Republic
Denmark
Egypt
Estonia
Finland
France
Georgia
Germany
Greece
Hongkong
Hungary
Iceland
India
Indonesia
Ireland

Israel
Italy
Japan
Jordan
Kazakhstan
Korea
Kuwait
Latvia
Lithuania
Luxembourg
Macedonia
Malawi
Malaysia
Malta
Mexico
Moldova
Mongolia
Morocco
New-Zealand
Nigeria
Norway
Oman
Pakistan
Poland
Portugal
Romania
Russian Federation
Saudi Arabia
Singapore
Slovakia
Slovenia
the (former) Soviet Union
South Africa
South Korea
Spain
Sri Lanka
Surinam
Sweden

Switzerland
Taiwan
Tajikistan
Thailand
The Netherlands Antilles and Aruba
The Philippines
Tunisia
Turkey
Turkmenistan
Uganda
Ukraine
United Arab Emirates
United Kingdom
United States of America
Uzbekistan
Venezuela
Vietnam
the (former) Yugoslavia
Zambia
Zimbabwe

ABOUT HOUTHOFF BURUMA

Houthoff Buruma is a long-established Netherlands-based law firm with well over 250 lawyers worldwide. The firm's lawyers serve a global client portfolio with a strong focus in areas of corporate/M&A, dispute resolution and finance. Houthoff Buruma has since long focused on China and the needs of Chinese businesses. As a result we are the law firm with the broadest Chinese client base in The Netherlands. We have a deep understanding of the Chinese way of doing business and have much experience with focusing on the business goals of our Chinese clients anywhere in the world. Houthoff Buruma has offices in London, Brussels, and New York, which gives us direct access to the world of international finance and all European institutions. We pride ourselves for often being the gateway to Europe for Chinese businesses via our contacts and experience on EU wide regulation, including procurement, distribution and tax structuring via the Netherlands.

HOUTHOFF BURUMA ARBITRATION TEAM

International legal client guides, such as Chambers Europe and Chambers Global, rank Houthoff Buruma as number one in Dispute Resolution. The arbitration team of Houthoff Buruma is one of the few full-time arbitration practices in the Netherlands. A team of 8 lawyers are experienced in Bilateral Investment Treaty (BIT) arbitrations against governments and has been involved in high-profile and high value national and international arbitrations under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, the London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC), the Netherlands Arbitration Institute (NAI), the International Centre for Settlement of Investment Disputes (ICSID) and in ad hoc arbitrations. Additionally, the team members are frequently involved in arbitration-related litigation in the Dutch courts, including cases involving the enforcement and setting aside of national and international arbitral awards. Furthermore, they regularly publish in the area of arbitration and act as arbitrator or as secretary to arbitral tribunals.

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AFRICAN COUNTRIES HAVING A BILATERAL INVESTMENT TREATY WITH THE NETHERLANDS

CHINESE INVESTMENT BY SECTOR

- Oil and natural gas
- Rail/road
- Other mining
- Hydroelectric dams
- Iron ore
- Copper
- Civil construction
- Manufacturing
- Uranium
- Port construction
- Gold
- Water


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SOUTH AFRICA