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Legal Update

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The Kingdom of the Netherlands has concluded investor friendly investment treaties with close to 100 countries

How the use of Netherlands or Curaçao entities can protect foreign investments

Introduction

It is well-known that structuring investments through the Netherlands and Curaçao can significantly reduce corporate tax liabilities. Less well-known, but potentially even more important in cases where investments are made in politically unstable countries, is that the Kingdom of the Netherlands has established an extensive network of bilateral investment treaties (**BITs**). The Kingdom of the Netherlands has entered into BITs with close to 100 countries. These treaties apply to all parts of the Kingdom, which apart from the Netherlands consists of Curaçao, St. Maarten and Aruba (together: the **Dutch Kingdom**). Conversely, the United States has only about 40 BITs in place, while most off shore jurisdictions such as the Cayman Islands, Bermuda and the British Virgin Islands have no or only a handful of BITs in place. The practical importance of BITs of the Dutch Kingdom can be illustrated by considering that 13 cases of investor/state arbitration that are currently pending before the International Centre for Settlement of Investment Disputes involve BITs of the Dutch Kingdom (out of a total of 126 pending cases), including the $7 billion case between *Mobil Corporation, Venezuela Holdings B.V. and others v Venezuela* and the over $10 billion case between *ConocoPhillips Petrozuata B.V. and others v Venezuela*.

BITs in a nutshell

BITs are agreements between two countries protecting investments made by investors from one contracting state in the territory of the other contracting state. The BITs of the Dutch Kingdom typically include the following substantive obligations that each country undertakes towards investors from the other country, with only narrow exceptions:

- treating foreign investors' investments *fair and equitable*, i.e. not taking unreasonable or discriminatory measures and treating investments of foreign investors at least as favorable as investments from its own nationals and nationals of third states;
- not *nationalizing or expropriating* investments from foreign investors, unless the measures taken are non-discriminatory, taken in the public interest and while observing due process, and against payment of prompt, adequate and fair compensation; and
- allowing funds relating to investments to be *freely transferred* by foreign investors without delay.

THE 97 BITS OF THE NETHERLANDS, CURACAO, ST. MAARTEN AND ARUBA:
Albania, Algeria, Argentina, Armenia, Bahrain (pending), Bangladesh, Belarus, Belize, Benin, Bolivia (contested), Bosnia and Herzegovina, Brazil (pending), Bulgaria, Burkina Faso, Burundi (pending), Cambodia, Cameroon, Cape Verde, Czech Republic, Chile (pending), China, Costa Rica, Croatia, Dominican Republic, Ecuador, Egypt, El Salvador, Eritrea (pending), Estonia, Ethiopia, Gambia, Georgia, Ghana, Guatemala, Honduras, Hong Kong, Hungary, India, Indonesia, Ivory Coast, Jamaica, Jordan, Kazakhstan, Kenya, Kuwait, Laos, Latvia, Lebanon, Lithuania, Macao, 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, Slovenia, Slovakia, Sri Lanka, South Africa, South Korea, Sudan, Suriname, Tajikistan, Tanzania, Thailand, Tunisia, Turkey, Uganda, Ukraine, Uruguay, Uzbekistan, Venezuela (terminated), Vietnam, Zambia (pending), Zimbabwe

Each of the 157 contracting states to the Washington Convention shall recognize and enforce an award rendered pursuant to the Washington Convention as if it were a final judgment of a court of that state

Covered investments

The definition of "investments" in BITs of the Dutch Kingdom is worded broadly and is open ended. The definition covers any kind of asset, including but not limited to: (i) movable and immovable property and security rights in relation thereto; (ii) rights derived from shares, bonds and other interests in corporations and joint ventures; (iii) monetary claims; (iv) intellectual property rights; and (v) rights to explore, extract and win natural resources and other rights granted under public law.

BITs of the Dutch Kingdom are more investor friendly

The Dutch Kingdom's BITs can be regarded as more investor friendly as compared to certain BITs of other jurisdictions. To give a few examples:

- The Dutch Kingdom's BITs typically not only apply to citizens and corporations of the Dutch Kingdom but also to foreign corporations that are directly or indirectly controlled by such investors. A significant number of BITs of other countries require qualifying investors to be both established in the contracting country and to have their head office there. The Dutch Kingdom's approach gives a lot of flexibility to structure investments in a tax efficient manner, while at the same time benefiting from the rights granted to investors in BITs. To illustrate this, U.S. investors could benefit from the Dutch Kingdom's BITs with China and India by directly or indirectly (depending on applicable tax considerations) investing in China or India through a Netherlands or Curaçao (sub)holding company. The U.S. currently does not have BITs in place with these countries.
- The provisions of BITs of the Dutch Kingdom are in most cases valid for an initial period of fifteen years. The BITs of the Dutch Kingdom usually apply to investments that have been made before the date of entry into force, while BITs of other countries in general do not have retrospective effect. Unless a six months advance termination notice has been given by one of the contracting states before its expiry date, the BIT will automatically be extended for 10 years. Importantly, the provisions of the BIT survive for a further period of fifteen years for investments that were made before termination. Consequently, the Dutch Kingdom-Venezuela BIT that has been terminated upon Venezuela's request as of November 1, 2008, will remain in force until November 1, 2023 for investments made before November 1, 2008.

Direct access to arbitration

BITs of the Dutch Kingdom are given teeth because the foreign government consents in advance to the submission of legal disputes concerning investments from a Dutch Kingdom investor to a neutral tribunal, usually the International Centre for Settlement of Investment Disputes (**ICSID**). The consent to litigate the dispute before the ICSID from the foreign government is part of the BIT itself and thus applies even if the investor has not entered into any contract with the foreign government itself.

BIT awards are final and enforceable

Awards rendered by the ICSID are binding on parties and not subject to any court or other appeal, provided that an award can be annulled by a second ICSID panel on grounds that are significantly narrower than the grounds that can be found in the New York Arbitration Convention, i.e. lack of arbitrability and violation of public policy are not reasons to annul an award. The ICSID was established under the Convention on the Settlement of Investment Disputes between States and Nationals of other States on 18 March 1965 (the **Washington Convention**).

Each of the 157 contracting states to the Convention must recognize an award rendered pursuant to the Washington Convention as binding and enforce the monetary obligations imposed by that award, as if it were a final judgment of a court of that state. It is therefore hardly surprising that there have been no successful challenges to the enforcement of ICSID awards. However, it should be noted that local law of the country in which enforcement is sought will ultimately determine whether particular sovereign assets can be seized.

Conclusion

When structuring foreign investments, the use of entities incorporated under Netherlands or Curaçao law as (sub)holding companies may not only make sense because of the extensive Dutch tax treaty network (about 100 bilateral tax treaties), but also, and maybe more importantly, because of the extensive BIT network of the Netherlands and Curaçao.

Extensive tax treaty and BIT networks point to the use of Netherlands and Curaçao entities when structuring foreign investments

Who we are

Sprenger & Associates is a Netherlands and Dutch Caribbean boutique law firm based in New York and founded by Helena Sprenger. Helena was a partner at the international law firm Allen & Overy LLP and headed its Dutch and Netherlands Antilles law practice in New York for over 10 years.

We advise our clients, including large international corporations and financial institutions, including UBS, Morgan Stanley, Credit Suisse, Goldman Sachs, Bank of America, Banco Santander and Rabobank, on matters of Dutch Caribbean, Dutch and Suriname law in the context of international capital markets, corporate and cross-border finance transactions.

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