“International investment agreements: a possible threat to the legitimacy of tax rules”

Research from an international, Dutch and comparative perspective

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Master Thesis International Business Taxation/LLM

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Abstract

In recent years, academics and international organisations (e.g. UNCTAD) focus on the relationship between International Investment Agreements (IIAs) and tax matters has been growing. This thesis aims to examine to what extent these treaties impact the decision-making process concerning tax laws and, consequently, the latter's legitimacy. In particular, it will be observed how the dispute resolution mechanism made available by the IIAs, i.e., the Investor-State Dispute Settlement (ISDS), grants foreign investors the possibility to challenge domestic tax measures, thus forcing states to amend and even repeal them, or compelling them to draft new legislation with the sole purpose of avoiding the payment of large sums of money by way of compensation following arbitral awards. In addition, the practical pitfalls of decision-making processes, which are guilty of not giving adequate attention to IIAs and the threat they pose, will be analysed. This will be done from an international perspective, and then the Dutch situation, in particular, will be examined. Finally, in addition to a comparative analysis involving the countries present at the EUCOTAX Wintercourse, possible solutions and recommendations will be given to remedy the current shortcomings and risks.

Table of Contents

List of abbreviations 8

Introduction 9

Relevance of the research 10

Research question 10

Sub-research questions 10

Methodology 11

Research structure 12

SECTION I 13

Chapter 1. International Investment Agreements from an International Tax Perspective 13

1.1 General features 13

1.1.1 Policy considerations 14

1.1.2 Reasons to conclude IIAs 15

1.2 IIAs and tax matters 15

1.2.1 Tax carves-out 16

1.2.2 IIAs impact on taxation: most relevant provisions 17

1.2.3 Interplay and overlap between IIAs and DTTs 18

1.2.4 Investor-State Dispute Settlement and taxation 19

1.2.5 ISDS v. MAP: what to prefer? 22

1.2.6 Tax-related ISDS disputes: high-profile case law 23

1.3 Interim conclusions 25

SECTION II 27

Chapter 1. Dutch decision-making process 27

1.1 Dutch decision-making process: general features 27

1.1.1 The decision-making process regarding Dutch tax law 27

1.1.2 Ratification and implementation of international treaties: how to give effect to international law? 27

Chapter 2. International Investment Agreements in the Dutch law 29

2.1 General aspects 29

2.3 Dutch BITs 30

2.3.1 New Dutch Model BIT 30

2.3.2 Substance requirements: exclusion of "letterbox companies" 31

2.3.3 Letterbox companies: a gateway to (tax) treaty shopping 33

2.3.4 Fiscal treatment 34

2.3.5 Reformed ISDS provisions 36

2.3.6 Dutch BITs: an issue for the Dutch government? 37

2.4 ISDS awards under Dutch BITs 38

2.5 BITs application by Dutch courts in tax cases 39

2.5.1 AWB 06/2927 39

SECTION III 41

Chapter 1. A legal comparison between EUCOTAX countries 41

1.1 National approaches towards IIAs 41

1.1.1 National BIT Models 42

1.1.2 National laws and parliamentary discussions concerning BITs 43

1.1.3 National trade and investment policies 45

1.2 Inclusion of tax carve-out clauses 46

1.3 Countries' experience with ISDS and BITs' application by national courts 48

1.4 Interim conclusions 49

SECTION IV 51

Chapter 1. IIAs and decision-making process concerning tax laws from an international perspective 51

1.1 Issue n. 1: IIAs have a detrimental impact on the decision-making process 51

1.2 Issue n. 2: Growing percentage of national tax measures challenged through the ISDS 52

1.3 Issue n. 3: IIAs are not integral to the decision-making processes 55

1.4 Issue n. 4: Potential overlap between IIAs and DTTs ... 57

1.5 Interim conclusions ... 58

1.6 Possible solutions and recommendations ... 59

1.6.1 Globally applicable solutions and recommendations ... 59

1.6.2 OECD solutions and recommendations ... 60

Chapter 2. IIAs and the Dutch decision-making process concerning tax laws ... 62

2.1 IIAs and the Dutch decision-making process ... 62

2.1.1 Parliamentary discussions concerning ISDS ... 63

2.1.2 Parliamentary discussions concerning the opportunity to include tax carve-out clauses ... 65

2.1.3 Parliamentary discussions on letterbox companies ... 67

2.1.4 Laws and regulations about IIAs ... 68

2.1.5 The (possible) role of the Dutch Council of State ... 69

2.1.6 IIAs do not impact the application and interpretation of tax laws ... 70

2.2 Interim conclusions ... 70

2.3 Possible solutions and recommendations ... 71

2.4 Further considerations regarding the Wintercourse comparison ... 76

SECTION V ... 78

Conclusions ... 78

Bibliography ... 81

Annex 1: Tax-related ISDS disputes ... 84

Annex 2: ISDS tax-related cases brought under Dutch BITs ... 90

List of abbreviations

BEPS	Base Erosion and Profit Shifting
BIT	Bilateral Investment Treaty
DOB	Denial of Benefits Clause
DTT	Double Tax Treaty
ECT	Energy Charter Treaty
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
ICSID	International Centre for Settlement of Investment Disputes
IMF	International Monetary Fund
IIA	International Investment Agreement
ISDS	Investor-State Dispute Settlement
MAP	Mutual Agreement Procedure
MFN	Most-Favoured Nation
MIC	Multilateral Investment Court
MNC	Multinational Company
MTC	Model Tax Convention
NT	National Treatment
OECD	Organisation for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
PPT	Principle Purpose Test
SOMO	Stichting Onderzoek Multinationale Ondernemingen
SPE	Special Purpose Entity
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
VAT	Value-Added Tax

Introduction

"[…]The claim to legitimacy implies the assertion that state institutions strive to act towards the realisation of the values constituting the identity of the community. The institutions of the rule of law can contribute to the legitimacy of the legal system through their actions. In this sense, legitimacy is a conditio sine qua non for the survival of state power. […]Legitimacy requires that authority be exercised in accordance with the fundamental principles of the legal order."[1]

These words are quoted from Hans Gribnau's work entitled "*Rechtsbetrekkingen en rechtsbeginselen in het belastingrecht*" (Legal relations and legal principles in tax law) and encapsulate in almost philosophical terms the meaning of legitimacy. Of interest to us will be the legitimacy of the tax rules. In particular, we will investigate how international investment agreements (IIAs), whose primary objective is to encourage and foster investment and economic growth, impact the decision-making process concerning tax laws and their legitimacy. As will be seen, the first and fundamental link between IIAs and tax matters is the dispute resolution mechanism these treaties provide, namely the Investor-State Dispute Settlement (ISDS). The latter, by placing excessive leverage in the hands of foreign investors, has granted them the possibility to challenge, in an increasing number of cases, through investment arbitration, domestic tax measures. As a result, some countries, such as Spain and, more recently, India, have been forced to revise their contested tax measures, repeal them and replace them following arbitration awards. The genuine concern is that states, in the future, may feel obliged to draft their tax laws and policies in such a way that they do not harm investors or simply do not have their tax measures challenged and do not expose themselves to the risk of having to pay significant amounts of money in compensation and consequently to considerable financial risks.

Notably, the Netherlands has one of the most extensive bilateral investment agreements (BITs) networks. It is no coincidence that large multinational companies (MNCs) have often structured their investments through the Netherlands to benefit from the highly competitive business climate and the enthralling tax environment. For these reasons, BITs' impact on Dutch decision-making regarding tax laws will be examined. Additionally, we will briefly focus on the other major issue related to IIAs, namely treaty shopping. Notably, until 2019, Dutch BITs also protected those companies without any substantial economic activity, so-called letterbox companies, increasing the risks of treaty shopping and tax treaty shopping.

[1] Hans Gribnau, "Rechtsbetrekkingen en rechtsbeginselen in het belastingrecht" (1998), Kluwer, pag. 85-86.

Relevance of the research

To date, while academics widely discuss the relationship between IIAs-BITs and tax matters, the impact they may have on decision-making processes and the legitimacy of tax rules have not been the subject of particular studies. Only in very recent years has United Nations Conference on Trade and Development (UNCTAD) published initial studies[2], with the primary objective of informing tax policymakers about the main potential problems and providing some possible solutions. From a national point of view, the Dutch parliament and government, although, as will be seen, introducing a new BIT model in 2019, have never openly discussed the possible adverse impact that IIAs and ISDS may have on the decision-making process concerning tax laws, the legitimacy of tax rules and the tax sovereignty of the state itself. For these reasons, this thesis aims to understand how IIAs interact with tax matters and to what extent they ensure the legitimacy of tax rules from an international and specifically Dutch perspective. In addition, taking the global perspective into account, an attempt will be made to provide solutions or simple recommendations to remedy the problems that various states might face during their legislative procedures and then focus on the Dutch situation.

Research question

To examine the influence of IIAs on decision-making processes concerning tax laws and, consequently, on the legitimacy of tax rules, the following research question was developed:

"To what extent do IIAs impact the decision-making process concerning tax laws and consequently their legitimacy from an international, Dutch and comparative perspective?"

Sub-research questions

To delineate the matter more clearly and to come to an answer, the following sub-research questions have been developed:

- What is an international investment agreement, and why should states conclude them?

[2] See, for example, UNCTAD, "International Investment Agreements and their Implication for Tax Measures: what tax policymakers need to know" (2021).

- What is the relationship between IIAs and tax matters?
- Why should states include tax carve-out clauses in their BITs?
- How do IIAs interact with double tax treaties (DTT)?
- Which is the interaction between ISDS and taxation?
- To what extent is ISDS detrimental to states' tax sovereignty and the legitimacy of national tax measures?
- Are IIAs integral to Dutch decision-making when drafting, interpreting and applying tax laws? Do the Parliament and government assess their potential impact?
- Are there similarities between the decision-making processes of other countries and the Dutch one in the way IIAs are involved? Have parliaments discussed the potential impact of IIAs on tax matters and the legitimacy of tax rules? The legal comparison made in the EUCOTAX Wintercourse week in Uppsala will be discussed here.

Methodology

This thesis will analyse to what extent IIAs impact the legitimacy of tax rules from an international and specifically Dutch perspective. To do so, research will be carried out using mainly literature and case law. In addition to literature and case law, several UNCTAD studies will be reviewed, including the annual World Investment Reports and the recent guide for tax policymakers. To assess the impact of ISDS on states' tax sovereignty and the legitimacy of tax rules, several ISDS cases and subsequent arbitral awards concerning tax measures will be considered. Several sources, including relevant parliamentary and governmental documents, will be employed concerning the Dutch situation.
Besides, there will be held a comparative analysis. This analysis will be based on the legal comparison made in the EUCOTAX Wintercourse week in Uppsala, comparing the positions of all participating countries. This comparative analysis will determine whether other countries' decision-making processes concerning tax laws consider IIAs integral to ensure tax rules' legitimacy. Moreover, the different national approaches towards IIAs will be examined. The different attitudes of the other countries under comparison will also help to understand whether there is a specific identity between the perspectives of national parliaments and governments towards the potential impact of IIAs on tax matters and the legitimacy of tax rules. This is done to provide a set of recommendations that can apply across the board and not only to the Netherlands.

Research structure

To answer the research question, the structure of this thesis will be the following. In Section I, IIAs will be analysed from an international perspective. Different topics will be addressed: the relationship between IIAs and tax matters, the nature and role of tax carve-out clauses, the interplay and potential overlap between IIAs and DTTs, the influence of ISDS on taxation and specifically on states' fiscal sovereignty and as a consequence on the legitimacy of tax rules. In Section II, the focus will shift to the national level. Besides briefly analysing, in Chapter 1, how the Dutch decision-making process concerning tax laws takes place, Chapter 2 will examine the new BIT model introduced in 2019 and the role that (Dutch) BITs play in increasing treaty shopping risks. Furthermore, the comparative analysis made in Uppsala will be discussed in Section III. Section IV will deal with the IIAs' impact on the decision-making process. An attempt will be made to assess whether these agreements are integral to the decision-making process using parliamentary documents, government policies and case law. The various issues underlined in the different chapters will be finally addressed. The author will provide possible solutions or simple suggestions to overcome the shortcomings, evaluating their feasibility. Finally, Section V will contain the conclusions.

SECTION I

Chapter 1. International Investment Agreements from an International Tax Perspective

Intro

Foreign investors and host states attach great importance to how tax measures are handled in IIAs. Foreign investors are concerned about fair taxation by the host state, as tax measures can significantly impact the profitability of their investments. Suppose tax measures are too harsh, such as measures taken to recover taxes. In that case, it can lead to foreign investments becoming economically unviable and expose the states to ISDS challenges. However, host states see fiscal policies as fundamental to their sovereignty, and they may want to protect their autonomy over budgetary policies from the demands of treaties and tribunals.

1.1 General features

Starting with a simple definition, IIAs are “legally binding treaties concluded between states to encourage cross-border investment and economic growth”[3]. They establish the terms and conditions for private investments by nationals and companies of one country in another country, conferring them protection in respect of such investments.

IIAs, which traditionally are divided into Bilateral Investment Agreements (BIT) and Preferential Trade Agreements (PTA)[4], tend to follow a standard format, with provisions on prohibiting expropriation or "regulatory taking" without compensation; “national treatment” (NT) or non-discrimination, meaning that foreign investors are treated no less favourably than domestic investors; "most favoured nation treatment” (MFN), requiring the same standard of treatment available to other foreign investors; “fair and equitable treatment” (FET), or “minimum international standards of treatment”, which can be very broad in scope,

[3] United Nation Committee of Experts on International Cooperation in Tax Matters, “Relationship of tax, trade and investment agreements”, 12 March 2023, para. 1.

[4] In addition to BITs and PTAs, there are multilateral agreements with similar features, such as the Energy Charter Treaty (ECT), the North American Free Trade Agreement (NAFTA), the United States-Mexico-Canada Agreement or the Investment Protection Agreement between the EU and Canada (CETA). Likewise, these agreements aim to provide a stable and predictable investment environment to promote economic growth and development.

generally including protection of investors "legitimate expectations"; and complete protection and security for investments.[5]

Arguably, one of the most important provisions of the IIAs, but also the most discussed and controversial, gives foreign investors the ability to challenge the regulatory measures of the host State, such as taxes, through making potential treaty violation claims and seeking compensation if they succeed. This is known as Investor-State Dispute Settlement (ISDS) mechanism. Throughout the years, MNCs and foreign investors have utilised the ISDS mechanism to contest tax measures imposed by host states that have negatively impacted them. Using the ISDS mechanism to challenge taxation measures imposed by sovereign states is considered a more appealing option for foreign investors when compared to other dispute resolution mechanisms found in bilateral tax treaties (see para. 1.2.5).[6]

1.1.1 Policy considerations

IIAs belonging to the so-called "first generation" (those signed between 1960 and 1990) were concluded between countries with different aims. Indeed, the United Nations (UN) Committee of Experts on International Cooperation in Tax Matters underlines how developing countries (host countries) sought to attract inbound investment for economic growth and job creation, creating a friendly environment for foreign investors. On the other hand, developed countries (home countries) aimed to establish a legal framework for their investors to invest in host states, ensuring stability and returns from investments.[7]

In recent years, there has been growing concern about the negative impact of IIAs on the ability of governments to regulate in the public interest. Indeed, IIAs can limit the ability of governments to handle specific matters, such as taxation, by granting foreign investors the right to challenge government actions as a violation of their rights under the agreement. Consequently, they also create fundamental policy questions regarding the balance between preserving the rights of foreign investors and maintaining governments' power to regulate certain areas.

[5] "Report of the Special Rapporteur on the rights of indigenous peoples", Human Rights Council (2016), pag.4, para. 9.
[6] Prabhash Ranjan, "Investor-state dispute settlement and tax matters: limitations on state's sovereignty right to tax", Asia Pacific Law Review (2022), pag. 2.
[7] United Nations Committee of Experts on International Cooperation in Tax Matters, "Relationship of tax, trade and investment agreements", 12 March 2023, para. 8.

Host countries are often asked to sacrifice some of their tax sovereignty to reassure foreign investors. In particular, it is believed that the dispute resolution mechanism guaranteed by BITs (i.e., ISDS) puts too much leverage and authority to determine key policy outcomes back into the hands of private investors, leading to a somewhat dramatic development: national governments are losing the ability to exert sovereign authority over fundamental matters of self-governance, including, taxation.[8] This issue is addressed more extensively in later paragraphs (see para.1.1, Section IV).

1.1.2 Reasons to conclude IIAs

IIAs are a vital instrument in the strategies of most countries, in particular developing countries, to attract foreign direct investment (FDI). Policymakers need to know what role these treaties play and to what extent they can contribute to receiving more investment abroad. Equally important is whether the impact of IIAs on investment inflows also depends on the specific type of investment treaty concluded. A better understanding of the influence of IIAs on foreign investment can help to avoid unrealistic illusions, assess the costs and benefits involved and prepare the ground for more effective systemic host country policies that give IIAs their proper place in an overall strategy of attracting foreign investment and making it work for development.

IIAs add several essential components to the policy and institutional determinants for FDI, enhancing countries' attractiveness. They improve investment protection and add to the investment framework's security, transparency, stability and predictability. By liberalizing market access for non-tradable services and effectively creating a "market" for such services, IIAs also improve an important economic determinant of foreign investments.

1.2 IIAs and tax matters

The impact of IIAs on tax matters is based chiefly on those treaties the UNCTAD refers to as "old-generation IIAs" (from the 1990s or earlier). Indeed, most of them lack exclusions from their scope: none for taxation, grants and subsidies, public procurement, or other topics. Therefore, it is possible for DTT and an IIA between the concerned nations to both apply to a specific tax-related, creating a hazardous overlap

[8] Jennifer Bird-Pollan, "The Sovereign Right To Tax: How Bilateral Investment Treaties Threaten Sovereignty", Notre Dame Journal of Law, Ethics & Public Policy (2018), intro.

(see para. 1.2.3).[9] Furthermore, since tax matters are not in most of the IIAs, there is a risk that these agreements could unintentionally interfere with a state's regulatory actions. Old-generation IIAs and the easy availability of ISDS has resulted in an unbalanced approach that has negatively impacted the host state's ability to regulate and hindered sustainable development goals. Therefore, states need to reform their approach to IIAs, and the policy rationale behind excluding taxes from the coverage of BITs relates to the issues raised by the exercise of essential tax sovereignty[10].

Additionally, it should be noted that since most IIAs do not contain a definition of tax/taxation for treaty purposes, this has allowed its meaning to evolve over time, giving great power to investment tribunals to interpret it.[11] Notably, according to ISDS jurisprudence, we should understand "matters of taxation" as all those in which the investor challenges the validity or enforcement of a tax[12], including how much is payable or refundable[13].

1.2.1 Tax carves-out

Several countries have recently incorporated clauses (i.e., tax carve-outs) that expressly exclude taxation from the agreement's purview in their IIAs[14]. States vary in their approaches to taxation carve-out clauses, with each state opting for different levels and methods of limiting their vulnerability to investment claims based on taxation. For instance, the United States Model BIT contains a tax carve-out clause specifying that the agreement will not apply to tax measures in many of its IIAs. Similar tax carve-out provisions have been incorporated into Canada, Australia, and New Zealand's IIAs. The Germany-Oman BIT (2007)[15] restrict the application of the treaty to issues of taxation on income and capital, which are regulated by a Double Tax Convention (DTC) or domestic law. Notably, in BITs practice, it is common to find tax carves-out applied to the NT and MNF clauses, as well as the expropriation one. Examples include Art. 5 of the United Kingdom-Mexico BIT or Art. II(4)(b) of the Bulgaria-Turkey BIT.

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[9] UNCTAD, "International Investment Agreements and their Implication for Tax Measures: what tax policymakers need to know" (2021).

[10] Michael Lang, Jeffrey Owens, Pasquale Pistone, Alexander Rust, Josef Schuch, Claus Staringer, "The Impact of Bilateral Investment Treaties on Taxation", European and International Tax Law and Policy Series, IBDF (Chapter 1: General Report, para. 1.3.1).

[11] Maíra de Melo Vieira, "The Regulation of Tax Matters in Bilateral Investment Treaties: A Dispute Resolution Perspective", Dispute Resolution International Vol. 8 No. 1 (2014), pag. 68.

[12] Burlington Resources Inc. v. Republic of Ecuador, Decision on Jurisdiction of 2 June 2010, ICSID Case No. ARB/08/5, para. 168; Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, para. 74.

[13] Encana Corporation v. the Republic of Ecuador, LCIA, Award of 03.02.2006, para. 142.

[14] See, for example, the Canada Model BIT 2021, art. 11 par. 1 (Taxation Measures).

[15] Germany-Oman BIT (2007) art. 3.

But what is the rationale behind tax carve-out clauses? Why do states incorporate them in their IIAs? We have to start with an assumption. The international investment law regime is built on the idea that states, through IIAs, have willingly relinquished a portion of their sovereignty to international investment tribunals. In exchange, they anticipate an increase in foreign investment. According to this perspective, investors are inclined to invest in countries that have ratified IIAs because they can be confident that their investments will be shielded from unfair treatment by the host state.[16] This does not stand for tax matters. As pointed out, states are reluctant to relinquish some of their tax sovereignty, so they prefer to include tax carves. According to Stephen Krasner, four attributes of national sovereignty exist: government control over activity within its borders, organization of internal political structures, exclusion of external authority and recognition by other states.[17] None of these can be achieved without taxation.

1.2.2 IIAs impact on taxation: most relevant provisions

IIAs can affect taxation in various ways. Old-generation IIAs often had (and still have) broadly worded provisions, subject to interpretation. For instance, the terms "investor" and "investment" could include tangible and intangible assets, direct and portfolio investments, and direct and indirect forms of ownership. The definitions provided are often not specific and allow for various possibilities. Typically, an investor falls within the scope of application of an IIA by simply incorporating in one of the contracting parties. However, due to the intricate ownership arrangements of multinational corporations, it can be challenging to determine who truly owns an asset, which opens the door to a well-known practice in the international tax community called "treaty shopping" (see para. 2.3.3, Section II). Then, the consequence is that a foreign investor with minimal connection to the host country could use the ISDS to contest a tax measure implemented by that country. That's why some of the most recent IIAs include a so-called denial of benefits (DOB) clause to curtail this practice.

Moreover, one of the most frequently invoked clauses brought before arbitral investment tribunals is the fair and equitable treatment (FET) clause. In theory, this clause is a general provision protecting investors and investments against unjust treatment by the State in which they operate. FET has been interpreted, however, as covering expectations of regulatory stability, among others. One can quickly see how such an interpretation severely limits the legislative "range of motion" states enjoy. A simple change of tax rates

[16] Matthew Davie, "Taxation-Based Investment Treaty Claims", Journal of International Dispute Settlement (2015), pag. 217.
[17] Stephen Krasner, "Globalization and Sovereignty" in D.Smith and others (eds), States and Sovereignty in the Global Economy (1999).

could thus potentially fall under such a breach of FET. For instance, in *Occidental v. Ecuador*[18], the arbitrators found that the denial by the government of Value-Added Tax (VAT) credits and refund to Occidental Corporation had frustrated the company's legitimate expectations regarding the commercial and economic conditions under which the investment was made and, therefore, constituted a breach of the FET obligation of the US-Ecuador IIA.[19]

One of the issues related to IIAs concerning taxation is the potential for them to be used for tax avoidance and tax evasion by multinational corporations. Many old-generation IIAs contain a transfer-of-funds provision without exceptions. In most IIAs, no explicit guidance is provided on the types of restrictive measures that may be permitted or conditions for their application[20]. This can allow multinational companies to move their earnings to nations with lower tax rates to avoid paying taxes in countries where they conduct business. This can lead to a loss of revenue for host nations and unfair competition between domestic and international companies.

On the other hand, some scholars have argued that the free transfer of funds clauses are unique among the core substantive investment protections because they aim to liberalise inward and outward transfers.[21]

It is remarkable how some authors[22] have discussed the possibility of qualifying an exit tax as a transfer of funds. Specifically, the French and Portuguese experiences were used as samples. It has been argued that both French and Portuguese exit taxes do not violate the free transfer provisions of the BITs because these taxes are not covered by these latter. It was further explained that the change in residence, which triggers the exit tax, does not qualify as a transfer since the investment remains in the original country of residence. Even if a transfer of investment were to take place, the free transfer provision does not conflict with tax obligations because the funds owed are to the state and not owned by the investor. As a result, the investor has no entitlement to those funds.

1.2.3 Interplay and overlap between IIAs and DTTs

From a certain perspective, it can be argued that IIAs and DTTs have elements in common. They facilitate FDIs, provide similar legal protection, such as prohibiting discrimination against non-nationals, and aim to

18 Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11.

[19] United Nations Committee of Experts on International Cooperation in Tax Matters, "Relationship of tax, trade and investment agreements", 12 March 2023, para. 63.

[20] Jana Kubicová, "BITs and Taxes", Derivatives & Financial Instruments, Vol. 19, No.5, IBDF, para. 5.3.1 (2017).

[21] Bonnitcha, Jonathan., Poulson, Lauge. and Waibel, Michael "The Political Economy of the Investment Treaty Regime", Oxford University Press.

[22] Nathalie Bravo, Rita Julien, Jasmin Kollmann, Alicja Majdanska, and Laura Turcan, "Bilateral Investment Treaties and Their Effect on Taxation", Tax Notes International (2015), para. VII.

establish a safe and predictable climate for investors. Nevertheless, on the one hand, DTTs do not provide investors with direct access to dispute resolution and only deal with taxing rights allocation. On the other hand, it has already been stated that just some of the more modern IIAs include tax carves-out. Moreover, they are silent on their relationship with DTTs. This implies that if host states adopt tax-related measures that violate the substantive protections of an IIA, investors can be shielded from them. Notably, these measures may fall under both a DTT and an IIA between the countries involved. As explained in later paragraphs (see para. 1.2.5), investors sometimes prefer challenging tax measures through investment arbitration rather than waiting for the long timelines required by Mutual Agreement Procedure (MAP). This has led to a proliferation of tax-related ISDS claims. ISDS precedents have demonstrated that ISDS cases related to domestic tax policies can intersect with the issues addressed in DTTs and MAPs.[23] A striking example of this is the *Cairn v. India*[24] case (see para. 1.2.6). In a nutshell, the case emerged after India retroactively amended its income tax legislation and imposed a $1.6 billion tax liability on Cairn India Ltd. The tax was related to Cairn's failure to deduct withholding tax on capital gains from restructuring activities within the Cairn Group in 2006. Cairn UK initiated arbitration proceedings under the UK-India BIT, arguing that India's actions, which led to the imposition of the retroactive tax, violated its obligation to provide FET to Cairn UK and its investments. Why recall this case, then? According to India, relying on the UK-India DTT, which "does not provide for arbitration but rather for a MAP", challenges to its "[…]tax legislation and policy are excluded from the scope of application of the BIT and are not arbitrable". Since the DTT regulates the measures adopted by India, the BIT should be read to exclude such matters from its scope. Thus, Cairn UK should have used the MAP outlined in the DTT instead of contesting India's tax measures through the ISDS mechanism provided by the BIT.

1.2.4 Investor-State Dispute Settlement and taxation

As already explained, several IIAs feature the ISDS mechanism, whereby investors can bring arbitration cases against a host State for alleged failures to protect their investments following the provisions in the agreements without requiring additional consent from the respondent State and directly challenge State measures in front of an arbitral investment tribunal.

[23] Javier García Olmedo, "The fragmentation of international investment and tax dispute settlement: A good idea?", Leiden Journal of International Law (2023), para. 4.
[24] Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India, PCA Case No. 2016-7, Final award of 21 December 2020.

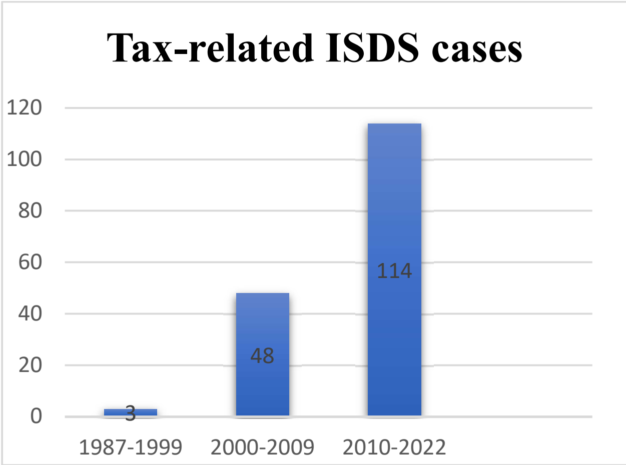
Generally, BIT models do not include tax carves-out regarding the ISDS mechanism (see para. 1.3, Section III)[25]. Consequently, investors can subject tax disputes to the latter. However, not all tax-related claims may be brought before ISDS[26]. A distinction is drawn between tax disputes and tax-related investment disputes. Tax disputes are disagreements about the amount of a foreign investor's tax due or, more broadly, whether and how a specific transaction is taxed under the municipal legislation of one State (or several if the trade is international).
In contrast, tax-related investment disputes focus on claims of investment treaty violations by particular sovereign taxation-related state actions. The tax measure's legality is questioned in a tax-related investment dispute. Only tax-related investment disputes can be submitted to ISDS.[27]

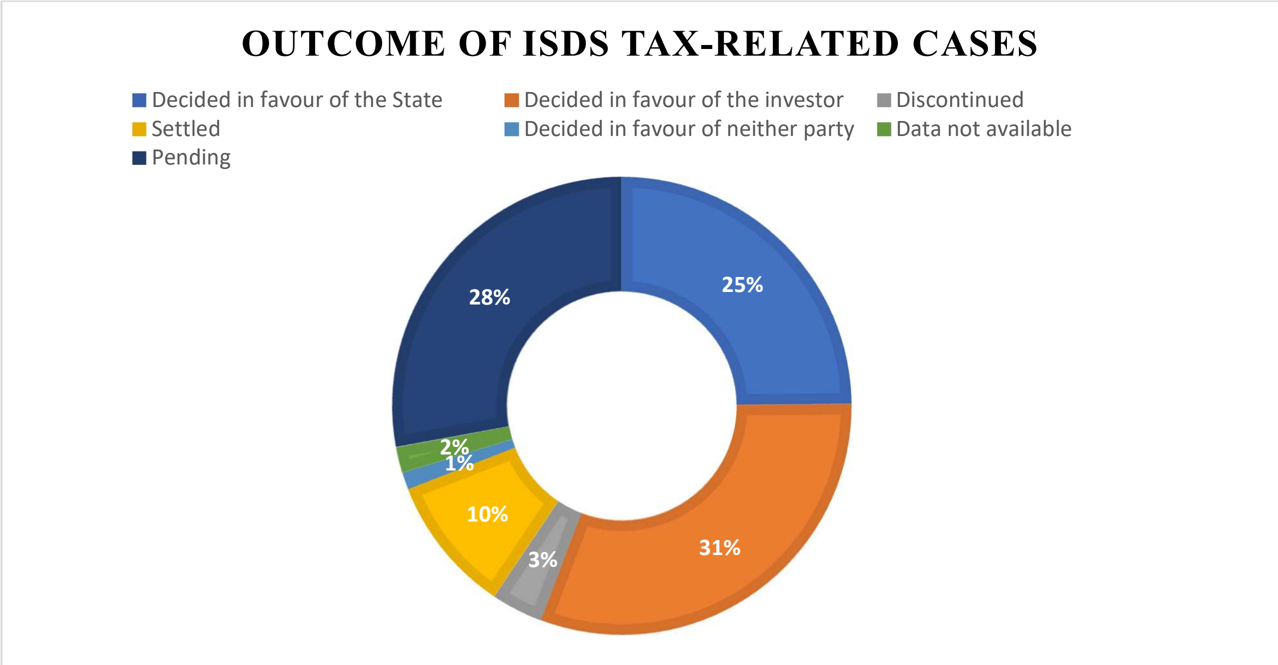
As emphasised by UNCTAD, tax measures challenged through the ISDS have involved, among others, reforms in the feed-in tariffs and incentives to solar energy, withdrawal of VAT subsidies, VAT exceptions or non-payment of VAT refunds, increase in windfall profit taxes and royalties, imposition of capital gain taxes and initiation of tax investigations or audits.[28]

Specifically, the data suggest that investors have challenged tax-related measures in 165 ISDS cases (see Annex 1) based on IIAs[29]. The first charter below shows how the number of tax-related ISDS claims is significantly increased in the last decade. This multiplication of tax disputes before international tribunals represents an alarming change in the landscape of international investments. According to J. Chaisse[30], this process results from "endogenous factors" and one "exogenous factor". The first relies on the previously

[25] However, tax carves-out concerning ISDS can be found for instance in some United States (not in the Model) and Chinese treaties.
[26] Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India, PCA Case No. 2016-7, para. 793: […] *the present dispute is a tax-related investment dispute, not a tax dispute. More precisely, this dispute concerns alleged violations of an investment treaty resulting from certain sovereign measures taken by the Respondent in the field of taxation, also referred to as fiscal measures. This type of dispute must be distinguished from tax disputes proper, which are disputes concerning the taxability (including the tax-amount) of a specific transaction.... In a tax dispute, the question is whether and how a particular transaction is taxable under the applicable (municipal) law or, possibly laws of several countries if the transaction is international. In tax-related investment disputes, on the other hand, the tribunal is tasked with determining whether the respondent State has breached substantive standards of treatment under the investment treaty through the exercise of its authority in the field of taxation, and whether liability arises as a result. The issue at stake is thus not a matter of domestic tax law; it is rather whether the fiscal measures taken by the State, valid or not under its own tax laws, violate international law*[..].
[27] Anna Crevon-Tarassova, Francisco Garcia-Elorrio and Asha Rajan, "Taxation-Related ISDS", Global Arbitration Review (2022).
[28] UNCTAD, "International Investment Agreements and their implication for Tax Measures: what tax policymakers need to know" (2021), pag. 31.
[29] UNCTAD, "Facts On Investor-State Arbitrations In 2021: Whit A Special Focus On Tax-Related ISDS Cases" (July 2022).
[30] Julien Chaisse, "Investor-State Arbitration In International Tax Dispute Resolution. A Cut Above Dedicated Tax Dispute Resolution?", Virginia Tax Review (2016), pag. 166-170.

discussed possibility for foreign investors to challenge the host country's actions before an international arbitral panel. Their capacity to take conflicts to unbiased arbitrators offers an additional assurance that local authorities will adhere to their international commitments, guaranteeing a positive and steady investment environment in the country where they operate. The second factor is closely related to the shortcomings and weaknesses of the dispute resolution mechanism provided by international tax treaties: the MAP. Under BITs, investors have a right to direct access to international arbitration, while under tax treaties, arbitration is only supplementary to the MAP (see next paragraph). Thus, there have been many cases where investors have preferred to challenge a specific tax measure with the ISDS mechanism rather than wait the long time required by the MAP.





1.2.5 ISDS v. MAP: what to prefer?

Unlike ISDS, the MAP is a state-to-state process[31]. Taxpayers have the right to present a claim to the domestic tax authorities. However, this does not guarantee that it will result in MAP with the other country involved in the DTT. Indeed, two factors must be considered: firstly, the tax administration must be convinced that the request is reasonable, and secondly, it may be possible to solve the issue without involving the other country. The ISDS works differently. Once the investor files the claim, there is no discretion: arbitration is mandatory. The period before the arbitration tribunal is established, which allows the investor and host country to discuss the issue, does not often lead to a solution. Investors do not usually consider whether a disputed tax measure is reasonable from a policy standpoint.

Additionally, it is necessary to understand that tax arbitration procedures do not provide taxpayers with comprehensive procedural rights. In contrast, BITs grant investors the ability to initiate arbitration independently of the states' agreement, participate in the selection of the arbitration panel, determine the scope of the arbitration, attend the hearing, express their views and arguments with full access to the relevant information, and receive a well-grounded decision that can be enforced within a reasonable timeframe. Additionally, it must be recalled that, under art. 25 of the OECD 2017 Model Tax Convention[32], tax authorities are not obliged to reach an agreement through the MAP.

Moreover, some authors underlined how the role of an investment tribunal in handling a tax provision would be limited to determining if the dispute breaches the boundaries of the BIT without considering whether the BIT was applied correctly or if it is suitable in general. Consequently, the tax dispute would remain unresolved.[33]

MAP aims to alleviate double taxation or address taxation that might not be in accordance with the DTT. On the other hand, investors oppose a tax measure under IIAs to obtain substantial financial compensation for the damages they claim to have sustained due to the implementation of the contested measure. Whereas the competent authorities under the MAP have a broad knowledge of tax issues and applicable treaties, arbitrators under the ISDS are not tax experts. The consequences are alerting, as arbitrators are called upon to decide on complex and cumbersome tax disputes and are unlikely to be able to provide an effectively reasoned and structured outcome. This could have devastating effects on the states involved in the dispute

[31] Most of IIAs also include a state-to-state dispute settlement (SSDS) mechanism. However, it is barely used.
[32] OECD 2017 Model Tax Convention, art. 25 para. 3.
[33] Nathalie Bravo, Rita Julien, Jasmin Kollmann, Alicja Majdanska, and Laura Turcan, "Bilateral Investment Treaties and Their Effect on Taxation", Tax Notes International (2015), para. VIII.

and sanctioned to pay very high compensation sums. The reference is to their fiscal sovereignty: if foreign investors continue to challenge tax measures through the ISDS mechanism, with the threat of states being obliged to pay copious sums of money, perhaps as a result of unclear arbitral awards, the states themselves may be forced to redesign their tax laws and regulations to avoid precisely that investors challenge them through investment arbitration.

Furthermore, relying on an IIAs to resolve a tax dispute can be seen as an attempt to selectively choose the most favourable forum. This practice is also known as "forum shopping", and it is particularly troublesome if the dispute could have been resolved through domestic courts or by invoking a MAP. While some people might prefer using the ISDS mechanism when the MAP fails to provide a satisfactory settlement, it is important to discourage this option because it could compromise the integrity of DTTs. Such a course of action may lead to situations where tax measures explicitly permitted by a DTT can be disputed under an IIA. Notably, it is not the desire of a country to grant its DTT "partner" the right to tax only to have one of its investors challenge those rights under the ISDS provisions of an IIA.[34]

1.2.6 Tax-related ISDS disputes: high-profile case law

Investors and states often have opposing views on taxes. From the investors' standpoint, new taxes are seen as an obstruction to be bypassed whenever possible. Conversely, states view foreign investment as a beneficial means of generating revenue that can be accessed when needed. As discussed in previous sections, IIAs protect investors from the host state's power to impose taxes. These agreements provide investors with comprehensive entitlements to protect against host state action, such as the right to prevent expropriation, national and most-favoured-nation treatment, etc.[35]

Over time, foreign investors have mainly exploited the FET provisions to challenge national regulatory policies, particularly taxation, that adversely affect their investment. In two recent cases – *Vodafone v. India*[36] and the already mentioned *Cairn Energy v. India*[37] – ISDS tribunals have interpreted these clauses to include protection against discriminatory and arbitrary tax measures. In these two cases, taxation measures adopted by the host State have been considered in breach of the investor's legitimate expectations,

[34] United Nations Committee of Experts on International Cooperation in Tax Matters, "Relationship of tax, trade and investment agreements", 12 March 2023, para. 79.
[35] Matthew Davie, "Taxation-Based Investment treaty Claims", Journal of International Dispute Settlement (2015), pag. 202.
[36] Vodafone International Holdings BV v. Government of India [I], PCA Case No. 2016–35.
[37] Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India, PCA Case No. 2016-7.

which is an essential component of the FET provision[38]. Specifically, the tribunals held that retroactive capital gains taxation violated India's obligation under the FET standard in the India-United Kingdom BIT (1994).[39] This attitude by investment tribunals can make it more difficult for host countries to enforce their tax laws and regulations against foreign investors since they may be subjected to challenges through ISDS if deemed arbitrary or discriminatory. Indeed, following the Cairn case, India took two crucial steps. Firstly, it unilaterally ended the BIT between India and the United Kingdom. Secondly, it intended to repeal retrospective taxation to resolve ongoing disputes earlier in 2021. Not surprisingly, the Indian government continues to vehemently oppose the authority of investment tribunals instituted through BITs to handle taxation issues on the ground that it would infringe on the states' sovereignty to tax.[40]

In specific situations, taxes may constitute indirect expropriation of foreign investment. ISDS tribunals have developed the so-called "substantial deprivation test" to determine whether it is the case. Tribunals focus on the severity of the effect of the measure taken by the States on foreign investment. This test implies that even if a measure does not constitute direct expropriation, it can form an indirect expropriation if the effect of that regulatory measure causes a substantial deprivation of foreign investment. In substance, the home country reduces the worth of an investor's investment through regulatory actions instead of directly seizing it. Therefore, to establish a claim of indirect expropriation, the investor must demonstrate that the state's behaviour significantly diminished the value of their investment. (UNCITRAL, 26 June 2000, *Pope and Talbot v. The Government of Canada*; *Metalclad Corporation v. United Mexican States*, No. ARB(AF)/97/1[41]; *CMS Gas Transmission Company v. The Argentine Republic*, No. ARB/01/8[42]). According to investment tribunals, the deprivation should be « substantial, racial, severe, devastating or fundamental » (*Electrabel SA v. The Republic of Hungary*, 30 November 2012, No. ARB/07/19[43]).

Expropriation represents the most far-reaching violation.[44] It can be argued that expropriation cases are particularly relevant because numerous investment agreements contain provisions that exclude taxation-related claims, except for matters that involve allegations of expropriation. Leaving out the cases mentioned

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[38] Prabhash Ranjan, "Investor-state dispute settlement and tax matters: limitations on state's sovereignty right to tax", Asia Pacific Law Review (2022).
[39] Robert J.Danon and Sebastian Wuschka, "International Investment Agreement and the International Tax System: The Potential of Complementarity and Harmonious Interpretation", Bulletin For International Taxation (2021), para.1.
[40] Napur Jalan and Akshara Rao, "The Cairn Arbitration Award: Retrospective Taxation of Indirect Share Transfers in India Breaches Bilateral Investment Treaty", Bulletin For International Taxation (2021), para. 4.2.
[41] Metalclad Corporation v United Mexican States, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000, para. 103.
[42] CMS Gas Transmission Company v The Argentine Republic, ICSID Case No ARB/01/8, Award, 12 May 2005, paras. 262–63.
[43] Electrabel SA v. The Republic of Hungary, 30 November 2012, No. ARB/07/19.
[44] P.H.M. Simonis, "BITs en belastingen (deel 1)", Maandblad Belasting Beschouwingen 2 (2014), pag. 8.

above, the most relevant ones derive from the "Yukos saga". Yukos was a Russian oil company which adopted tax planning strategies in the early 2000s. Specifically, to minimize tax obligations, Yukos' production companies sold oil to affiliated trading companies located in regions where tax exemptions on profits applied. These trading companies then sold the oil at market prices to foreign buyers. Although the oil was subject to VAT, it was zero-rated. Russian tax authorities (*Federalnaya nalogovaya sluzhba* or FNS) discovered more than $24 billion in unpaid debts. Despite Yukos' attempts to settle the tax debts, neither the Russian tax authority nor the judiciary has shown any interest in resolving the issue. The government seized Yukos' assets and conducted a non-competitive auction in which they were sold to Rosneft, a state-owned oil company, at prices below their market value. The government's actions were too prompt and gave Yukos little time to respond: a demand for payment of $3.5 billion in taxes was filed on 15 April 2005, followed by an asset freeze the next day and a deadline for voluntary payment of taxes the next day. Over the next two months, the state took control of Yukos' three most important subsidiaries.[45]
Yukos' shareholders brought claims against Russia under the United Kingdom–USSR BIT, Spain–USSR BIT and the Energy Charter Treaty (ECT), alleging that Russia had expropriated their investments. In a nutshell, they won. In *Renta 4 SVSA v. Russia*[46], the Stockholm Chamber of Commerce (SCC) ruled that the "[..] Russian federation's real goal was to expropriate Yukos and not to legitimately collect taxes". Subsequently, in *Yukos Universal Ltd v. Russia*[47], the tribunal found that, despite the questionable legality of the tax planning, Russia exceeded the permissible actions by launching an all-out attack on Yukos and its beneficial owners. The only aim was to bankrupt Yukos and seize its assets.[48]

1.3 Interim conclusions

By signing and ratifying IIAs, states expose themselves to various risks and threats from a fiscal (but not only) perspective. On the one hand, these agreements do not always include tax-exclusion clauses, potentially causing a dangerous overlap between IIAs and DTTs, and on the other hand, mainly ensuring that investors can challenge national tax measures before international investment tribunals through the ISDS mechanism. Indeed, for reasons related to the shortcomings of the MAP, a trend is developing on the part of investors to challenge domestic tax laws through ISDS rather than requesting the opening of a MAP. However, as described in this section, the danger is that states start being forced to amend and possibly

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[45] Matthew Davie, "Taxation-Based Investment Treaty Claims", Journal of International Dispute Settlement (2015), pag. 204.
[46] Renta 4 SVSA and others v. The Russian Federation, SCC No 24/2007, Award, 20 July 2012.
[47] Yukos Universal Ltd (Isle of Man) v. The Russian Federation, PCA Case No AA 227, Final Award, 18 July 2014.
[48] Matthew Davie, "Taxation-Based Investment Treaty Claims", Journal of International Dispute Settlement (2015), pag. 205.

repeal their tax laws as a result of certain arbitration awards or that they start drafting them with the sole aim of avoiding an ISDS challenge and consequently the possibility of having to pay large sums of money in compensation. Hence, the decision-making process concerning tax laws risks being highly compromised and unable to preserve the legitimacy of tax rules.

SECTION II

Chapter 1. Dutch decision-making process

Intro

Considering that the purpose of this thesis is to test the impact of IIAs on the legitimacy of tax rules, in this chapter, the author will briefly analyse the main features of the Dutch decision-making process, underlining (if they are) the differences concerning tax law. Moreover, it will shortly be explained how international treaties (including BITs) are ratified and implemented within the Dutch legal order.

1.1 Dutch decision-making process: general features

According to Article 81 of the Dutch Constitution, the power to enact Acts of Parliament (*wetten formele zin*) rests jointly with the government and the *States General* (Der Staten Generaal). Bills are signed by the King and one or more Ministers or State Secretaries (Art. 47 of the Constitution). This general procedure also applies to tax legislation, and legislation can be initiated by both the government and the *States General*.

1.1.1 The decision-making process regarding Dutch tax law

As explained in the previous paragraph, the general procedure is also applied in the case of the drafting of tax legislation. However, for tax legislation, the State Secretary (staatssecretaris) of Finance play a pivotal role. In his capacity as co-legislator, he is responsible for the continuous initiating activity of the government. Moreover, since it's the head of the Netherlands Tax and Customs Administration (NTCA), the perspective of the tax administration often prevails in tax legislation. The content of the tax statutes is often primarily shaped by the interests of the tax administration. The legislator usually adopts the perspective of the tax administration to advance the efficient implementation of tax laws.[49]

1.1.2 Ratification and implementation of international treaties: how to give effect to international law?

[49] Hans Gribnau and Sonja Dusarduijn, "Constitutional Taxation in the Netherlands", Tilburg Law School Research paper, para. 4.

The Constitution of the Netherlands is quite flexible towards international law.[50] Treaties require either explicit or tacit approval from both Houses of Parliament (*Eerste Kamer* and *Tweede Kamer*). Exceptions can be made with parliamentary approval, which may be obtained expressly by a Parliamentary Act or tacitly.

Starting in 1994, the process for approving and ratifying treaties, including BITs, is regulated by the State Law on the Approval and Promulgation of Treaties[51]. The latter specifies that international agreements can be approved either explicitly through legislation or implicitly through other means. It also requires that parliament be notified when negotiations begin and regularly updated on their progress. Once a draft is finalized, the Minister of Foreign Affairs sends a formal letter to the *Staten Generaal* requesting approval. Furthermore, the Minister's letter is accompanied by *Toelichtende Nota* or *Memorie van Toelichting* (explanatory memorandum).

There are no significant differences if the treaty deals with tax-fiscal matters. Once a tax treaty has been approved by the Dutch Parliament and signed into law by the King, it becomes part of Dutch domestic law and is enforceable by the Dutch tax authorities[52].

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[50] Janneke Gerards & Joseph Fleuren, "Implementation of the European Convention of Human Rights and of the judgements of the ECtHR in national law cases. A comparative analysis", Intersentia (2014) Pages 220-221.

[51] Rijkswet goedkeuring en bekendmaking verdragen = Kingdom Act on the approval and application of Treaties (7 July 1994), Staatsblad, 1994, No. 542.

[52] Usually, the Dutch tax authorities issue guidance and instructions to tax officials on applying the tax treaties' provisions.

Chapter 2. International Investment Agreements in the Dutch law

Intro

In this chapter, the author will discuss how international investment agreements signed by the Netherlands interact with Dutch legislation. To introduce the topic, Dutch trade and investment will be briefly explained. Specifically, the analysis will focus on the new Dutch BIT Model introduced in 2019. In addition, the position of the Dutch courts will be considered.

2.1 General aspects

The Dutch government actively works to create a competitive and attractive business climate in the Netherlands. MNCs often structure their investment through the Netherlands because the country offers an engaging fiscal environment by submitting low withholding taxes on dividends, royalties, interests, and capital gains income. Because of the government's relatively loose substance requirements, multinational corporations can form holding companies in the country, including letterbox companies and Special Purpose Entities (SPEs). This allows enterprises, among other things, to use the Netherlands' extensive network of DTTs and make agreements (Advance Tax Rulings) with the Dutch Tax Authority about the breadth of their corporate tax base and effective corporate tax rates. Furthermore, a vast Dutch network of BITs protects investors against impending legal and regulatory changes in the host countries that may affect their capacity to conduct business.[53] As a result of these policies, the Netherlands has become a favourite "conduit country" for multinational corporations. The role of the Netherlands as an offshore financial centre and conduit country is reflected in FDI data. Indeed, the Netherlands ranks second in inward and outward direct investment positions worldwide (only behind the United States), ahead of much larger economies such as China, the United Kingdom, Germany and Japan.[54]

The investment treaty policy of the Netherlands is closely tied to its broader foreign economic strategy, which aims to foster a competitive and welcoming environment for businesses in the country. This is important for both attracting new multinational corporations and retaining established ones. Notably, in

[53] Alessandra Arcuri & Bart-Jaap Verbeek, "The New Dutch Model Investment Agreement. On the road of sustainability or keeping the appearances?" (2019), para. 1.
[54] SOMO, "Dutch Bilateral Investment Treaties: 60 years of protecting multinationals" (2023), pag. 11.

2008, the State Secretary for Trade, Heemskerk[55], acknowledged that the government's focus on negotiating business-friendly BITs is partly driven by its objective of creating favourable conditions for multinationals to establish themselves in the Netherlands.

The Netherlands is particularly interested in investment protection, owing to its role as the home state of several MNCs and its responsibility for its massive network of BITs. As a result, a significant portion of all arbitral proceedings was conducted under Dutch BITs. Possible explanations include the Netherlands' crucial role as a source and recipient of FDI and the fact that the Netherlands hosts a disproportionate number of MNEs and "letterbox companies".

2.3 Dutch BITs

The Netherlands maintains a total number of 80 BITs, of which 75 are currently in force.[56] Five BITs – with Brazil, Chile, Eritrea, Oman and the United Arab Emirates – have been signed but not ratified. The first BIT was signed with Tunisia in 1963, followed by a series of BITs with countries in Africa and Asia.[57] Many of these early BITs already provided for arbitration at the International Centre for the Settlement of Investment Disputes (ICSID) (the one with Indonesia (1968) was the first). Currently, the Netherlands maintains one of the world's largest BIT networks.
The Dutch BITs are generally characterised by their broad and open-ended provisions, often euphemistically referred to by ISDS practitioners as the "gold standard" for investment protection.[58] They have always been considered investor-friendly due to their typical broad scope of application, general lack of balance and unrestricted access to ISDS.

2.3.1 New Dutch Model BIT

In 2019, the Dutch government presented a New Model Investment Agreement to contribute to the sustainability and inclusivity of future Dutch trade and investment policy. The new text has been developed

[55] Letter of the State Secretary of Economic Affairs Mr. Frank Heemskerk to the House of Representatives, February 2008.
[56] Before 2019 there were 92 BITs. 12 of them have been terminated because of the Achmea judgement.
[57] United Nations Conference on Trade and Development (UNCTAD), International Investment Agreements Navigator, International Investment Agreements Navigator | UNCTAD Investment Policy Hub, accessed on 6 February 2023.
[58] SOMO, "Dutch Bilateral Investment Treaties: 60 years of protecting multinationals" (2023), pag. 15.

in dialogue with experts and stakeholders after public consultation and parliamentary debate[59]. The Dutch government has set lofty goals for establishing "policy coherence" in development and sustainability, with the UN Sustainable Development Goals (SDGs) playing a pivotal role. The Netherlands intends to revise its investment protection policy to "provide a fairer and more balanced framework for encouraging and preserving sustainable investments for the benefit of development."[60] The New Model has introduced several noteworthy advancements. The reference to the host state's right to govern, business-related human rights, sustainable development, corporate social responsibility, and the necessity for investors to have considerable commercial activity in the host state are notable improvements.

The model encourages due diligence to consider environmental and social impacts. The text preserves the right of governments to regulate for the public good, for the protection of health, security, the environment, labour rights, animal welfare and consumer protection. The model text modernises the investment protection system, guaranteeing independent tribunals appointed by the Permanent Court of Arbitration (PCA) or the International Centre for Settlement of Investment Disputes (ICSID). The model text also sets ethical and quality standards for arbitrators. It introduces the multilateral investment court and states that the existing ISDS arrangement shall cease to apply to new cases once a multilateral investment court has been officially set up (see para. 2.3.5, Section II).

2.3.2 Substance requirements: exclusion of "letterbox companies"

As already explained, the Netherlands has become a favourite "conduit country" for MNCs because of its tax and investment policies. International Monetary Fund (IMF) numbers[61] also show that the Netherlands, due to letterbox companies[62], is the second country worldwide in terms of investment flowing into the country, ahead of much larger economies like China and Germany, and only behind the United States.

Since it is a favoured jurisdiction for international investors, the Netherlands is regularly used as a home state for ISDS lawsuits.

[59] See the parliamentary debate on the Model BIT: Doc Nr TK 62/62-3-1, Plenary reports | House of Representatives of the States-General (tweedekamer.nl), accessed on 23 January 2023.

[60] IOB Evaluation, "Trading interests and values. Evaluation international trade and investment policy of the Netherlands" (2021).

[61] https://data.imf.org/?sk=40313609-F037-48C1-84B1-E1F1CE54D6D5&sId=1482247616261, accessed on 11/04/2023.

[62] Companies that are incorporated in one Member State but do not perform any activity in that Member State or anywhere else.

There are now 1257 known ISDS lawsuits, with the Netherlands serving as the claimant's home state in 130 cases.[63] This places the Netherlands, behind the United States, as the second most preferred home state in ISDS claims. According to previous research, MNCs and other investors based in the Netherlands have lodged investment claims totalling $100 billion. Only 13% of these investors are Dutch: 84% of the claims are from non-Dutch corporations, and 3% are of unknown provenance. The real issue is that letterbox corporations filed 71% of all Dutch claims.[64]

Moreover, the employment of letterbox companies (commonly referred to as "*Special Purpose Entities (SPEs)"* by the IMF, the UNCTAD and OECD) is considered a gateway to treaty shopping[65] and tax treaty shopping[66]. Taxpayers who engage in treaty shopping and other treaty abuse schemes threaten fiscal sovereignty by claiming treaty benefits that were not meant to be granted, depriving governments of tax revenues.

The Base Erosion Profit Shifting (BEPS) package includes the Action 6 Report, which outlines a minimum standard for addressing treaty shopping in tax treaties. Members of the BEPS Inclusive Framework have agreed to include these provisions in their tax treaties to prevent treaty abuse. They also recognise the need for some flexibility in implementation to account for each jurisdiction's unique circumstances during tax agreement negotiations.

Specifically, the OECD BEPS Action 6 Report contains a principal purpose test rule (PPT rule) to fight the abuse of tax treaties. This PPT rule is also included in the Multilateral Convention to implement tax treaty-related measures to prevent base erosion and profit shifting (MLI)[67] and in art. 9(9) of the OECD MTC.[68] It deals with abuse relating specifically to tax treaties. Notably, there is no similar measure in place to fight BITs shopping. The question might be whether states should include in their BIT templates or, at the time

[63] UNCTAD, https://investmentpolicy.unctad.org/investment-dispute-settlement/country/148/netherlands, accessed on 5 June 2023.

[64] SOMO, "Dutch Bilateral Investment Treaties: 60 years of protecting multinationals" (2023), pag. 21.

[65] "Treaty shopping" refers to the conduct of foreign investors in acquiring the benefits of investment treaties in their actual or planned host state through third countries, through which their investment needs to be routed. To provide an example, Zimbabwe and the United States have not signed a BIT, while the Netherlands and Zimbabwe have signed one. A US investor who wishes to invest in Zimbabwe can acquire BIT protection in that country by structuring its investment through the Netherlands or any other country that has signed a favourable investment treaty with Zimbabwe.

[66] It typically involves the attempt by a person to indirectly access the benefits of a tax treaty between two jurisdictions without being a resident of one of those jurisdictions.

[67] Art. 7(1) MLI.

[68] Dennis Weber, "The Reasonableness Test of the Principal Purpose Test Rule in OECD BEPS Action 6 (Tax Treaty Abuse) versus the EU Principle of Legal Certainty and the EU Abuse of Law Case Law", Erasmus Law Review (2017).

of signature, a DOB clause excluding letterbox companies to at least ban them from the protection granted by the treaty.

The Netherlands has been facing increasing pressure to take action against letterbox companies due to factors such as tax rulings, the debate on BEPS within the OECD, and prominent cases that have sparked public outrage. However, it is worth mentioning that the Court of Justice of the European Union (CJEU) Court recently established that the Dutch tax ruling system complies with EU law.[69]

For all these reasons, as mentioned in the Report on the result of the consultation[70] concerning the New Model, the Dutch government decided to exclude letterbox companies from protection guaranteed by new Dutch BITs.

Indeed, Article 1(b)(iii)[71] requires legal persons to have "substantial business activities" in the territory of the home state. However, what business activities are considered 'substantial' remains unclear, as the draft model fails to provide further definitions or criteria. Dutch law offers limited advice in the form of substance criteria that foreign enterprises must meet to take advantage of the Dutch tax structure[72].

2.3.3 Letterbox companies: a gateway to (tax) treaty shopping

Investors can utilize the ISDS mechanism even if their home state lacks an investment treaty with the host state. This is made possible by investing indirectly through a subsidiary located in a third state. This practice, which expands the reach of the investment treaty system and increases the potential legal obligations of the host states, is believed to be driven by investors strategically seeking to "acquire investment treaties". This phenomenon is an unintended consequence of the international tax treaty framework: companies and individuals are motivated to invest through subsidiaries in third states, allowing them to benefit from the network of BITs and reduce their tax liabilities. Furthermore, it is crucial to consider that once these subsidiaries are established, they can be utilized as claimants in ISDS cases in the event of a dispute. Host states may therefore face legal liabilities from third-party investors under BITs, and evidence suggests that they often do.

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[69] CJEU, Judgment in Joined Cases T-760/15 Netherlands v Commission and T-636/16 Starbucks and Starbucks Manufacturing Emea v Commission (24 September 2019) ECLI:EU:T:2019:669.
[70] https://www.internetconsultatie.nl/investeringsakkoorden, accessed on 27 November 2022.
[71] Dutch Model BIT (2019) Article 1(b)(iii).
[72] Ministry of Finance, 2014, 'Vragen en antwoorden met betrekking tot het besluit Dienstverleningslichamen en zekerheid vooraf (DGB 2014/3101), en het besluit Behandeling van verzoeken om zekerheid vooraf in de vorm van een Advance Tax Ruling (ATR) (DGB 2014/3099).

There are glaring examples of this practice, which happen to involve the Netherlands and the Dutch BITs. The first concerns the already mentioned *Vodafone v. India* case[73]. The British telecom giant Vodafone Plc won a $3B arbitration against India. However, the claim was filed not by Vodafone Plc itself but rather by one of Vodafone's Dutch holding companies under the Netherlands-India BIT. Just two years after the lawsuit was filed, as a consequence, India unilaterally terminated its BIT with the Netherlands.[74] The second regards the other ISDS claim, namely *B3 Croatian Courier v. Croatia*[75]. In this scenario, the American parent company (Bancroft Group) indirectly invested in Croatia through a subsidiary (B3 Croatian Courier) established in the Netherlands. Besides benefiting from different tax advantages, it is essential to highlight that when a dispute arose with the Croatian government, the American parent company initiated an ISDS claim by utilizing its Dutch subsidiary and leveraging the Croatia-Netherlands BIT. By investing indirectly through a Dutch subsidiary, Bancroft aimed to minimize the tax obligations, and later, the same subsidiary was utilized as the claimant in the ISDS process when a dispute emerged with the country where the investment was made.[76]

As pointed out from a different perspective, the tax and investment systems are highly intertwined. For this reason, there is a need for harmonious interaction between the two. If investment treaties do not exclude letterbox companies from their protection, these may be increasingly incentivised to structure their businesses through conduit countries or tax havens, such as the Netherlands. This would increase the risks of treaty shopping and tax treaty shopping. While from the point of view of DTTs, there are mechanisms such as the PPT to counteract this problem. Otherwise, not all BITs include DOB clauses.

2.3.4 Fiscal treatment

Article 10 of the New Model[77], which has been redacted following the public consultation, contains an extensive provision on "Fiscal Treatment", and it mandates that:

> *"With respect to taxes, fees, charges and to fiscal deductions and exemptions, each Contracting Party shall, regarding the operation, management, maintenance, use, enjoyment and disposal of the investment, accord to investors of the other Contracting Party who are engaged in any*

[73] Vodafone International Holdings BV v. Government of India [I], PCA Case No. 2016–35.
[74] Calvin Thrall, "Spillover Effects in International Law: The Case of Tax Planning and Investor-State Dispute Settlement" (2021), pag. 2.
[75] B3 Croatian Courier Coöperatief U.A. v. Republic of Croatia, ICSID Case No. ARB/15/5.
[76] Calvin Thrall, "Spillover Effects in International Law: The Case of Tax Planning and Investor-State Dispute Settlement" (2021), pag. 13.
[77] Dutch Model BIT (2019) art 10(1).

economic activity in its territory, treatment not less favourable than that accorded to its own investors or to those of any third State who are in like situations, whichever is more favourable to the investors concerned."

The provision first contains an NT and MFN clause, which applies to "taxes, fees, charges, and fiscal deductions and exemptions". At the same time, the rule precludes any tax benefits obtained by participation in customs unions, economic unions, and so on, or based on reciprocity with third countries. Following public consultation, two sections were added[78]: a carve-out for measures to prevent tax evasion or avoidance and a provision confirming that double taxation treaties prevail over the investment treaty.[79]

The Dutch Model doesn't clearly define its extent, and unlike the Netherlands' DTT, it doesn't specify the particular taxes that apply to BITs based on it. Nevertheless, this doesn't mean that all the provisions in Dutch BITs automatically grant foreign investors rights in the realm of taxation.[80]

Indeed, although the Dutch New Model BIT doesn't include a broad exclusion clause according to which taxes are wholly excluded from the scope of the investment agreement, the priority of tax treaties over IIAs, which characterises the New Model, must nevertheless be regarded as a tax carve-out characterising the New Model BITs.[81]
Testimony to this, also the previous (2004) Netherlands' model IIA didn't contain a stand-alone carve-out clause. Article 4 provides NT and MFN standards that apply to taxation matters but contain a DTT exception to the MFN standard.[82]
However, some old Dutch BITs could include broader tax carves-out. For instance, according to art. 3(3)(b) of the Netherlands-Turkey BIT[83] (1986), the FET provision "*shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from: […]; b) any international agreement or arrangement relating wholly or mainly to taxation on the basis of reciprocity with a third State*".

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[78] Dutch Model BIT (2019) art 10(2) and (3).
[79] Eric De Brabandere, "The 2019 Dutch Model Bilateral Investment Treaty: Navigating The Turbulent Ocean of Investment Treaty Reform", ICSID Review (2021), para. V.
[80] Michael Lang, "The Impact of Bilateral Investment Treaties on Taxation", European and International Tax Law and Policy Series, IBDF, para. 16.3.
[81] Jana Kubicová, "BITs and Taxes", Derivatives & Financial Instruments, Vol. 19, No.5, IBDF, para. 4.2.2 (2017).
[82] Matthew Davie, "Taxation-Based Investment Treaty Claims", Journal of International Dispute Settlement (2015), pag. 214.
[83] Netherlands-Turkey Bilateral Investment Treaty (1986), International Investment Agreement Navigator.

The NT clause in both the 2004[84] and 2019[85] Dutch Model BITs is specifically designed to prevent discrimination against foreign investments. Still, it does not include the right of establishment or direct tax measures that differentiate between domestic and outbound investments or between residents and non-residents. This is because the NT and MFN requirements are linked to the concept of nationality outlined in Article 1 of the BIT Model, which prohibits discrimination based on nationality.
However, the Dutch Model BIT does cover distinctions based on whether a company is domestically or foreign-owned, which is similar in scope to Article 24(4) and Article 24(5) of the OECD Model Tax Convention. These aim to prevent discrimination against resident companies based on the location of their shareholders or payment recipients. Although the OECD Commentary allows such distinctions under Article 24(5), it is unclear whether the same applies to BITs.

2.3.5 Reformed ISDS provisions

The New Dutch Model BIT has wholly revised the ISDS provision, aligning with the EU's new investment treaties, such as the EU-Canada Comprehensive Economic and Trade Agreement (CETA).[86] Notably, the new Article 15[87] introduces the currently negotiated Multilateral Investment Court (MIC), automatically accepting its jurisdiction once it becomes operational. Moreover, none of the disputing parties is involved in selecting the arbitrators. Indeed, depending on what forum and arbitration rules are chosen, ICSID or UNCITRAL, the Secretary-General of the ICSID or the PCA, will act as appointing authority. These new provisions will guarantee a more balanced, independent, and impartial method of selection of arbitrators.

Moreover, it must be borne in mind that Article 16(3)[88] of the new model states that countries have the option to decline jurisdiction to an investor who has restructured their company primarily to file a claim "*at a point in time where a dispute had arisen or was foreseeable*". This exclusion overlooks numerous legal entities already established in the Netherlands to take advantage of the Dutch tax system. Furthermore, the language used ("may") is lenient, reducing its effectiveness in ISDS proceedings and requiring the responding country to bear the burden of proof.

[84] Dutch Model BIT (2004) Article 4.
[85] Dutch Model BIT (2019) Article 10 (1).
[86] Nikos Lavranos, "The changing ecosystem of Dutch BITs", Arbitration International (2020), para. 3.5.
[87] Dutch Model BIT (2019) Art. 15(1): "*The Parties shall pursue with each other and other interested partners the multilateral reform of ISDS. Upon the entry into force between the Contracting Parties of an international agreement providing for a multilateral investment court applicable to disputes under this Agreement, the relevant provisions set out in this Section shall cease to apply*."
[88] Dutch Model BIT (2019) Article 16(3).

To address these issues, as suggested by SOMO[89], the clause denying benefits should have stronger wording (e.g., "States deny benefits") and apply to all investors with insufficient business activities. Additionally, the burden of proof should be shifted to the investor.

Always according to SOMO, of particular concern is Article 22(4)[90], which states that when calculating financial compensation, "*the Tribunal shall also reduce the damages to take into account any restitution of property or repeal or modification of the measure*". This could be interpreted as an incentive for governments to modify their regulatory measures to avoid substantial claims for compensation. For this reason, the provision should be removed.

2.3.6 Dutch BITs: an issue for the Dutch government?

The Dutch BITs network could have profound implications for the government and its policies to promote sustainable development. Claims and compensation awards can amount to billions of dollars, damaging government finances, especially in developing countries. This may have a "chilling effect" on governments, causing them to introduce new legislative measures to prevent lawsuits. Foreign investors can use the prospect of ISDS claims to force governments to soften or even withdraw opposed legislation. Companies can utilise BITs to influence public policy in the nations where they operate.

Consequently, governments are concerned about the prospect of ISDS. International businesses and their legal counsel are well aware of ISDS's power. They are no longer utilising it as a "last resort" when all other avenues for asserting their rights have been exhausted. Corporations increasingly see ISDS as a "deterrent" to prevent the implementation of unfavourable policies. Different cases demonstrate how international investors have used Dutch BITs to pressure governments. In *Total E&P v. Uganda*[91] and *Shell Philippines v. Philippines*[92], they have been utilised to sue Uganda and the Philippines for taxation measures regarding fossil fuel extraction, in the already mentioned *Vodafone v. India*[93] to sue India for taxation measures applying to telecommunications. Consequently, several countries have voiced dissatisfaction with the Dutch approach in recent years after being subjected to one or more ISDS lawsuits launched under Dutch treaties and have threatened to terminate the BITs still in force with the Netherlands. This was why the Dutch government introduced the New BIT Model to pursue new investment policies.

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[89] Contribution SOMO, "Towards a more inclusive and sustainable model for Dutch bilateral investment treaties" (2018), pag. 8-9.

[90] Dutch Model BIT (2019) Article 22(4).

[91] Total E&P v. Uganda, ICSID Case No. ARB/15/11.

[92] Shell Philippines v. Philippines, ICSID Case No. ARB/16/22.

[93] Vodafone International Holdings BV v. Government of India [I], PCA Case No. 2016–35.

2.4 ISDS awards under Dutch BITs

The 2019 Dutch Model BIT differs significantly from the 2004 Model BIT, especially regarding ISDS. Section 5 of the 2019 Model BIT has nine provisions, whereas the 2004 Model BIT only had one. However, this is not unexpected, as recent events have shown that states[94] are increasingly adding more detail to the dispute settlement clauses in investment treaties. This includes refining and specifying the scope of the clause, defining applicable procedural rules, and reacting to certain legal cases. In addition, the suggestion by the EU to substitute ISDS with an "international investment court" has caused numerous EU Member States to support the idea, as seen in the New Dutch Model BIT [95]. This proposal has also made governments more receptive to addressing issues and suggestions for change raised during discussions surrounding the EU's reform proposals for ISDS.[96]

The Dutch Model BIT does not allow for an exception in dispute resolution if the disputed matter falls under a DTT. This means that tax issues are not automatically excluded from investor-to-state arbitration. Lang[97] notes that there is no discussion in Dutch literature about whether tax issues should be arbitrated under BITs. Nevertheless, academic tax literature has acknowledged that the MAP and arbitration procedures under DTTs have significant shortcomings, including the limited role of taxpayers and the absence of procedural rights. As a result, some suggest that ISDS arbitration should also be an option under DTTs.

As mentioned, so far, the Netherlands has been the respondent state in an investment arbitration just in two very recent cases[98]. Indeed, as already examined, the Netherlands is regularly used as a home state for ISDS lawsuits and the second most preferred home state (128 cases), behind the United States (207 cases).
To compare this figure, there are 20 known claims involving Belgium investors, less than 70 with French investors, and less than 80 with German investors.[99]
When looking at the host countries subjected to claims by Dutch investors, it appears that the countries listed most frequently are the countries with the most claims globally.

[94] See for example, US Model BIT (2012), which contains more than 10 articles relating to ISDS.
[95] Dutch Model BIT (2019) Article 15(1).
[96] Michael Lang, "The Impact of Bilateral Investment Treaties on Taxation", European and International Tax Law and Policy Series, IBDF, para. 16.8.2
[97] Michael Lang, "The Impact of Bilateral Investment Treaties on Taxation", European and International Tax Law and Policy Series, IBDF, para. 16.8.1.
[98] *Uniper v. Netherlands* and *RWE. v. Netherlands.*
[99] United Nations Conference on Trade and Development (UNCTAD), International Investment Agreements Navigator, Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub, access on 11 March 2023.

Most investors seeking arbitration through a Dutch investment treaty are foreign (the ultimate or controlling parent is not based in the Netherlands). Many of all legal persons acting as claimants have no employees at all on the payroll. These companies are no more than shell companies, with hardly any substantial activities in the Netherlands.[100] As explained, the Dutch government has tried to remedy this problem through the New Model BIT.

Historically, the tribunals in charge of resolving disputes based on Dutch BITs have supported the comprehensive definition of investment and the limited criteria for "national" or "investor." In doing so, they have substantially allowed investors to restructure their investments through the Netherlands to take advantage of the extensive protection provided by Dutch BITs.[101]

2.5 BITs application by Dutch courts in tax cases

To determine the impact that BITs have on the decision-making process and, thus, on the legitimacy of tax rules from a Dutch perspective, it is necessary to check whether Dutch courts have invoked or used these treaties in tax cases. This analysis should help us understand these agreements' influence on applying and interpreting tax legislation.

However, based on this research, faced with their application in cases concerning civil rights, civil procedure, public international law or administrative law, only one case, below, purely concerning tax matters, was found.

2.5.1 AWB 06/2927[102]

The case deals with applying the non-discrimination clauses (NT and MFN) under BITs. In its decision made on 20 October 2008, the District Court of Breda ruled that the Netherlands did not violate the requirement of MFN treatment under the 1956 "Treaty of Friendship, Commerce and Navigation"[103] between the Netherlands and the United States when it imposed discriminatory taxation on dividends paid by a Dutch company to its US-based parent company based on section 8.2.6 of the General Administrative

[100] SOMO, “Dutch Bilateral Investment Treaties. A gateway to “treaty-shopping” for investment protection by multinational companies” (2011), para. 5.2.

[101] SOMO, “Dutch Bilateral Investment Treaties. A gateway to “treaty-shopping” for investment protection by multinational companies” (2011), para. 5.3.

[102] District Court of Breda, 20 October 2008, AWB 06/2927.

[103] Verdrag van vriendschap, handel en scheepvaart tussen het Koninkrijk der Nederlanden en de Verenigde Staten van Amerika, 's-Gravenhage, 27-03-1956.

Law Act (Awb)[104]. The US taxpayer had hoped to use a more favourable DTT that the Netherlands had agreed with a third country to lower their tax liability on Dutch dividends or to take advantage of the EU Parent-Subsidiary Directive[105] to reduce their liability. However, the treaty explicitly excludes tax treaty benefits and reciprocal benefits from the MFN requirement. So, the Court of Breda determined that the Netherlands' imposition of dividend tax didn't violate the MFN requirement based on the carve-out clause.[106]

[104] Algemene wet bestuursrecht (AWB) = General Administrative Law Act (GALA).
[105] Council Directive 2011/96/EU.
[106] Michael Lang, "The Impact of Bilateral Investment Treaties on Taxation", European and International Tax Law and Policy Series, IBDF, para. 16.5.

SECTION III

Chapter 1. A legal comparison between EUCOTAX countries

Intro

This Chapter will contain a legal comparison that students made from 9 countries which participated in the EUCOTAX Wintercourse 2023, which took place in April 2023 in Uppsala (Sweden). The general theme of this year's EUCOTAX Wintercourse was "Legitimacy of tax rules". The author of this thesis participated in the legal comparison concerning subtopic 6: "*The influence of Conventions on Human Rights, International Investment Agreements and International Covenant on Economic, Social and Cultural Rights on Designing, Applying and Interpreting Tax Legislation*". The participating countries were Belgium, France, Germany, Hungary, the Netherlands, Poland, Spain, Switzerland, and the US. Austria, Italy, and Sweden were also participating in the EUCOTAX Wintercourse, but there were no participants for this subtopic. Within the latter, human rights conventions, the Covenant on economic, social, and cultural rights, IIAs, and their impact on the legitimacy of tax rules were explored. In light of this thesis, the author only focuses on the comparison concerning IIAs.

1.1 National approaches towards IIAs

As is also clear from the preceding paragraphs, the most direct channel through which IIAs interact with tax law are ISDS clauses and the arbitration procedures arising from them. As previously discussed, states have varying experiences with ISDS claims, some very positive while others are decisively negative from a state-actor perspective. States like the USA or Switzerland have had very few arbitration procedures lodged against them, most unsuccessful. Other states, like Spain, have had arbitration procedures started against them by investors successfully; in some instances, this led state parties to reconsider their stance on IIAs, some going as far as terminating a few.[107]

[107] UNCTAD, "Recent Developments in Investor-State Dispute Settlement" (2013).

Changing attitudes toward IIAs can be seen by the number of them (BITs specifically) which have been terminated in recent years[108]:

STATE	SIGNED & RATIFIED	IN FORCE
Belgium	85	62
France	108	84
Germany	149	114
Hungary	66	39
Netherlands	80	75
Poland	63	36
Spain	81	60
Switzerland	125	110
United States	41	39

These statistics illustrate the different approaches of states to IIAs. States with predominantly positive experiences have not felt the need to terminate IIAs, sometimes merely modifying them according to UNCTAD guidelines. Further, the number of IIAs signed & ratified appears to be indicative of the status of states as capital-importing or exporting states; the United States seems to be an outlier in this respect. The reasons states decide to sign IIAs and potentially terminate them are primarily determined by their experiences with ISDS procedures.

1.1.1 National BIT Models

During the negotiation of BITs, it is usual to use an official model of agreement that the capitalist countries have generally elaborated to approach the same protection standard to their investors abroad. The models employed are not the same in all countries, and it can be said that each state or group of capitalist states have its own model aiming to approach the same protection standard to its investors abroad. Some countries, like Germany or France, have a fixed official model for IIAs, but it is also found the case in which a country has several models for IIAs but not an official one. This is the case in Switzerland and Spain.

	OFFICIAL MODEL?
Belgium	YES
France	YES
Germany	YES
Hungary	NO
Netherlands	YES
Poland	NO

[108] UNCTAD, International Investment Agreements Navigator, https://investmentpolicy.unctad.org/international-investment-agreements, accessed on 24 May 2023.

Spain	NO
Switzerland	NO
United States	YES

One of the most recent models is the Belgian one. It is valuable to note that Belgium co-signs BITs with Luxembourg within the Belgium-Luxembourg Economic Union (BLEU) framework. To this day, Belgium and Luxembourg still cooperate within the framework of the BLEU. The relevant provision for BITs can be found in Chapter 5 of the BLEU convention, signed in 2002. The new model was drafted in 2019, containing more provisions and several differences compared to the previous version (e.g., a list of covered investments, a clear hierarchy between obligations arising from international law and those arising from membership in the European Union and new conditions for lawful expropriation).

1.1.2 National laws and parliamentary discussions concerning BITs

To understand the influence of IIAs on the legitimacy of tax rules, it is essential to note the varying degree to which IIAs are referenced in acts of tax law such as bills and other documents. For instance, references are absent in Belgium, Germany, Poland, Hungary and the United States. In The Netherlands, as we know, references are scarce as well. Still, FDIs legislation exists ("Investments, Mergers and Acquisitions Security Screening Bill"[109]). In Spain, there are the Royal Decree 664/1999, 23 April[110], about abroad investments, and the Foreign Investment Law No.19/2003[111], about the legal regime of capital movements and abroad economic transactions. Overall, express references to investment agreements in acts of law are few and far between (this applies to all researched states)[112]. Therefore, it is difficult to accurately assess these instruments' influence on tax law. It is understood that the impact on tax law is rather implicit than explicit.

That said, it should be taken into account that each country member of the EU has enacted a bill authorising the ratification of the Agreement on the termination of bilateral investment treaties between the Member States of the European Union.

Over the years, parliaments and governments in almost all the states analyzed have discussed the potential impact of IIAs, the benefits of signing up for them, the need for outreach, or perhaps the drawbacks of ISDS, as it happened in the Netherlands, but not concerning taxation.

[109] Wet veiligheidstoets investeringen, fusies en overnames = Investments, Mergers and Acquisitions Security Screening Bill, Staatsblad 2022, No. 2015.
[110] Real Decreto 664/1999, de 23 de abril, sobre inversiones exteriors.
[111] Real Decreto Sobre Inversiones Exteriores.
[112] Based on the relevant passages in the Wintercourse papers.

The legislative branch in Germany has debated the potential impact of IIAs, for example, concerning the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada.[113] Here, the different opinions on the Agreement differed widely, with the promotion of bilateral economic relations on one side and possible legal action against Germany by investors or difficulties for the agricultural field due to higher competition through additional imports from Canada under CETA.

In Poland, there has been a debate on the advantages of signing and ratifying IIAs. This debate focused on the (potential) losses and benefits flowing from IIAs and their provisions. Primarily, this issue stems from the arbitration clause employed in traditional IIAs. As discussed, this provision creates a potential liability for States party to IIAs (BITs, for instance). Opponents of a continuation of the current (at the time) policy concerning these treaties raised that the abuse of treaty provisions in general and arbitration clauses specifically led to a limitation of state discretion in tax matters and created unnecessary financial burdens for the state. Proponents insisted on the positive effect of IIAs with broad investor protection provisions on attracting investment.[114] It is important to note that Poland is moving away from BITs, ceding – in a way – this task to the European Union, and Poland have come to rely on IIAs negotiated by the EU as a whole.

In Belgium, there has not been a public assessment of the benefits of signing and ratifying these treaties or whether it may impact commitments to investors when new legislation is proposed. Thus, the legislative branch has not debated the potential impact of IIAs.

In Switzerland, the legislative branch has debated the impact of IIAs but in the context of their effects on other states. Those discussions are, however, not specifically on tax matters but mainly on environmental and human rights issues. The opinions of the stakeholders involved in the consultation process are heterogeneous. While the cantons[115], the Swiss Business Federation[116] and the Liberal party[117] mainly support the BIT, Caritas Switzerland[118] and the social democratic party are critical of both the supposedly low priority of human rights and potentially restrictive effects of BITs and ISDS on the state's ability to regulate.[119] This position is reflected in the social democratic parties' statement in the National Council, which refused to support BIT due to environmental and human rights concerns.

[113] https://www.bundestag.de/dokumente/textarchiv/2022/kw27-de-ceta-900526.
[114] K. Tetłak – Poland [in:] Michael Lang et al. – The Impact of Bilateral Investment Treaties on Taxation, Amsterdam 2017, pag. 213-214.
[115] Consultation on BIT with Indonesia, 2022, section 1-25.
[116] Consultation on BIT with Indonesia, 2022, section 31.
[117] Consultation on BIT with Indonesia, 2022, section 26.
[118] Consultation on BIT with Indonesia, 2022, section 30.
[119] Consultation on BIT with Indonesia, 2022, section 28.

Moreover, there appears to be no debate on whether IIAs should protect tax matters in France. Tax matters are an essential part of IIAs as investors may choose not to invest in one State if this State has an aggressive tax policy, for instance. However, what can be open to debate is that such treaties, when they include provisions on taxation, limit the fiscal sovereignty of the state.

From this comparison, and taking into account what has already been said for the Netherlands, it can be seen that to date, with the possible exception of Poland, there have been no parliamentary debates in which political representatives have examined the likely impact of IIAs or ISDS on taxation or tax sovereignty.

1.1.3 National trade and investment policies

As previously mentioned, IIAs are crucial tools utilized by most countries, especially developing ones, to attract foreign investment. Indeed, policymakers need to comprehend these treaties' precise role and how much they can facilitate increased foreign investment.

In Switzerland, FDIs are seen as a significant factor in prosperity and economic growth. Direct investments by Swiss investors reached 1400 billion Swiss Francs (CHF) in exported capital[120] , with an estimated number of 2 million employees in companies controlled by Swiss direct investments. Switzerland constantly ranks within the top fifteen countries in direct investments, and the high levels result from a long-term trend of rising direct investments. The Swiss Federal Council views ISDS as a central and indispensable element of IIAs. In addition to the advantages for Swiss investors, the Federal Council points out that from a government perspective, ISDS have the advantage that there is less of a need for diplomatic protection or political interventions in case of disputes. However, Switzerland advocates for a gradual reform of the ISDS procedures and participates in various multilateral processes in pursuing this goal. Switzerland consistently enhances its IIA contract practice to incorporate advancements in international investment protection. Swiss IIAs do not seek to regulate or influence private investments according to governmental expectations regarding their nature or objectives. Instead, they are regarded as agreements to guarantee international legal safeguards for investors.

In Spain, the Government tries to attract foreign investments through IIAs by ensuring a favourable and balanced environment that decreases political and legal uncertainty that sometimes affects investment

[120] Swiss National Bank (SNB), 2022, Direct Investments, p. 5.

projects. Additionally, the internationalization of the Spanish enterprise is supported by this primary instrument of institutional action of the State Secretary of Commerce.[121]

IIAs are a relevant government policy element in Belgium, France and Germany. Notably, in France, the French Treasury is in charge of advising the French Government on matters ranging from domestic to international economic policy. Furthermore, Business France's mission is « to help SMEs and mid-sized companies to project themselves better internationally and to attract more foreign investors to France to create or take over job-creating activities ». The French government has a voluntary and committed approach to promoting France's attractiveness: in 2021, France was the first destination for foreign investment projects in Europe for the third consecutive year. The reasons are various: tax incentives, quality of infrastructures, the existence of organisations such as French Tech and Business France, which work to obtain partnerships and issue specific visas, etc.

Furthermore, as a global economic leader, the US plays a dual role as a significant source and recipient of FDI worldwide. To protect US investors on foreign soil and promote US investment to foreign investors, the US government entered into various IIAs that aim to reduce FDI restrictions, ensure non-discriminatory treatment of investors and investment, and balance investment protections and other policy interests through binding, reciprocal obligations. Specifically, the CIT rate reduction to 21% may have been enacted to induce foreign investors by making the US an attractive place for FDI and encouraging US taxpayers to reinvest in the US.

1.2 Inclusion of tax carve-out clauses

Not all IIAs include taxation carve-outs, but those that do provide them have used different drafting styles. In the case of most European BITs, such carve-out provisions have been drafted in a manner that avoids possible contradictions between DTTs and IIAs. In this respect, tax-related provisions recognise the application of NT and MFN standards to tax matters, excluding only "special fiscal advantages" from the purview of the IIA if such unique advantage is incorporated in DTTs, economic unions or based on reciprocity with a third State.

Generally, countries like France, Poland, Switzerland or Spain do not use tax carve-outs, whereas other countries have great importance in their official model for IIAs. Germany, especially, is one of these

[121] Ministerio de industria, Comercio y turismo. (2022). Acuerdos de Promoción y Protección Recíproca deInversiones.

countries that include tax carve-out clauses in their IIA model as they are a crucial part of this agreement. Indeed, Articles 3 and 7 of the German BIT model of 2008[122] explicitly exempt tax matters from the treaty's scope.

Germany is not the only European country with tax carve-out clauses in its IIAs. Other countries like Belgium, Hungary and the United States also include them. Notably, Belgian BITs have diverse approaches regarding tax carve-outs. Five categories can be distinguished. The first category of BITs eliminates the most favoured nation clause and the national treatment clause if present. The second category of BITs includes a specific carve-out for double tax treaties. This carve-out concerns the most favoured nation clause. Subsequently, the third category deals with BITs that explicitly exclude benefits granted under instruments of regional economic integration. This can be interpreted by the foreign investor not being able to invoke the BIT to gain access to concessions granted by the host State. A fourth category of BITs contains no carveout for internal tax provisions or double tax treaties. However, this category does include a carve-out of the benefits granted under instruments of regional economic integration from the third category. The last category of BITs does not contain any clause on fiscal matters nor an exclusion on mechanisms of regional economic integration. This is primarily the case for older BITs.

In Hungary, the types of taxation coverage can be categorized into three different groups: (i) a provision in regards to exemptions resulting in that one contracting party is not obliged to grant the investors of the other the benefit of any treatment, preference or privilege resulting from any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation[123]; (ii) a provision excluding the application wholly in regards of taxation matter[124]; (iii) in regards of transfers some agreements state that the Contracting Parties shall guarantee the free transfer of payments related to investments and returns, after fulfilment of tax obligations.

It has already been explained that the threat of ISDS cases may cause an undue influence on the policy-making objectives of the host state because the damages awarded can exert significant pressure on the scarce public coffers and create potential disincentives for public-interest regulation. However, no national BIT model includes a tax exclusion clause concerning ISDS.

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[122] German Model Treaty 2008, UNCTAD, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2865/download.
[123] Look, for instance, at Hungary - United Arab Emirates BIT (2021), Hungary - Kyrgyzstan BIT (2020), and Cabo Verde - Hungary BIT (2019).
[124] Look, for instance, at Hungary - Russian Federation BIT (1995) or Hungary - Paraguay BIT (1993).

	TAX CARVE-OUT CLAUSES?	TAX CARVE-OUT FOR ISDS?
Belgium	YES	NO
France	NO	NO
Germany	YES	NO
Hungary	YES	NO
Netherlands	YES	NO
Poland	NO	NO
Spain	NO	NO
Switzerland	NO	NO
United States	YES	NO

1.3 Countries' experience with ISDS and BITs' application by national courts

As previously stated, IIAs primarily affect tax legislation by including ISDS provisions and the subsequent arbitration procedures they entail. States have had diverse encounters with ISDS claims, with some perceiving them favourably while others view them unfavourably from the state's standpoint as a governing entity.

From a more general standpoint, all states examined have acted at least once as the respondent state in ISDS disputes. Spain (56), Poland (36), the USA (23) and Hungary (17) are the states with the highest number of cases dealt with as respondent states. It is no coincidence that they are the only countries with ISDS disputes concerning tax matters against them.

Spain has been sued more than 40 times since 2011 under the ECT, making it the European country with the highest number of ISDS tax-related disputes lodged against it. These actions stem from the government's decision, starting in 2010, to withdraw incentives to promote investment in renewable energy and to impose a 7% tax on the value of energy production. Notably, Spain has overspent about EUR 100 million to participate in 25 ISDS lawsuits.[125]

As was the trend with Dutch BITs, US BITs have also often been exploited in the context of ISDS tax disputes. Notably, several cases rely on applying the Ecuador-US BIT (1993). Exemplary is the aforementioned *Occidental v. Ecuador (I)* case[126]. Briefly, in the 2012 case of Occidental Petroleum Corp.

[125] United Nations Committee of Experts on International Cooperation in Tax Matters, "Relationship of tax, trade and investment agreements", 12 March 2023, para. 87.
[126] Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11.

v. Ecuador, the state of Ecuador was ordered to pay the aggrieved US investor $1,769,625,000 in damages for violating the US – Ecuador BIT. Noteworthily, Ecuador subsequently delivered to the US a notice of termination for the US – Ecuador BIT. As of May 18, 2018, the BIT ceased to have effect, except that it will continue to apply for another ten years to cover investments existing at the time of termination. Henceforth, commentators believe that the substantial award of monetary damages could potentially send a chilling regulatory effect and political influence on the host state's laws or regulations that may violate the BIT provisions. Coupled with the fact that US BITs are entered into with developing countries to increase FDI, the threat of ISDS cases may cause an undue influence on the policy-making objectives of the host state because the damages awarded can exert significant pressure on the scarce public coffers and create potential disincentives for public-interest regulation.

This case shows states' grievances with IIAs and reasons for terminating them. Further, it shows how IIA ISDS procedures can profoundly impact states' realisation of policy goals directly and indirectly by depriving states of much-needed revenue.

From a purely national point of view, the analysis and comparisons led us to emphasise that national courts in different countries tend not to refer to IIAs in their tax cases and rulings. For instance, in Hungary, only a handful of judiciary decisions reference such agreements, although none is genuinely taxation related. There are two Constitutional Court decisions with such references: one with a refusion for the observation of an IIA due to the applicant having no right for the initiation of international treaty interpretation by the Court,[127] and another containing the interpretation of the relationship between the national laws on arbitration and the property of the state and the IIAs concluded with other nations.[128] The other 3-4 cases with IIA references mainly deal with expropriation, with all decisions deeming the expropriations in question justified and thus legal.[129]

As there has been no tax-related investment arbitration decision against most of the analysed countries so far, there has been no change of domestic tax legislation based on pressure by investors via IIAs or an ISDS. Arguably, only Spain was obliged to revise and possibly repeal its often contested tax legislation concerning tax incentives for renewable energy.

1.4 Interim conclusions

[127] HCC decision no. 729/B/2004., https://uj.jogtar.hu/#doc/db/1/id/A08H0201.ABX/ts/10000101/.
[128] HCC decision no. 14/2013. (VI. 17.), https://uj.jogtar.hu/#doc/db/1/id/A13H0014.AB/ts/20130617/.
[129] See for example: Curia decision no. Kfv. 37.097/2021/10. 8 https://jogkodex.hu/doc/9423420.

As we have seen in previous chapters, IIAs may profoundly impact taxation matters directly and indirectly. States have had varying experiences with IIAs, leading some to terminate many. This ties into the reasons states conclude IIAs in the first place: states may want to protect their own investors abroad or attract foreign investment. Conflicts between states and investors may arise, frequently leading to arbitration proceedings (i.e., ISDS). These proceedings influence taxation most directly, as perceived infringements by states in the area of, e.g., tax policy may lead to large sums of money being paid out to investors as reparation (e.g., Spain). As such, states' sovereignty in tax policy may be de facto limited. Other states have had decisively positive experiences with IIAs, successfully defending themselves at the (few) arbitration proceedings lodged against them. The IIA termination statistics reflect this.

States also have different approaches to the conclusion of IIAs: some (i.e., Belgium, France, Germany, Netherlands, USA) have official BIT models, while others do not. Analyses have shown that national parliaments and governments, except for Belgium and France, have extensively discussed the potential impact of IIAs and the benefits of signing them. Despite this, it appears that no country has openly addressed the influence they may have on tax matters, tax sovereignty or the legitimacy of tax rules. No state subject to this legal comparison, except for the Netherlands (it did it, but not concerning taxation), seems to have discussed whether or not to continue to maintain ISDS as the leading dispute resolution mechanism, despite being aware of the threat it poses to decision-making processes and, consequently, to the legitimacy of tax laws. However, it has to be taken into account that many of these states, notably Belgium, France, Germany, the Netherlands and Switzerland, have been involved in ISDS disputes as respondent state very few times and never in the context of ISDS disputes concerning tax matters. Consequently, as there have never been arbitral awards rendered against these states, they have never felt the need to change or repeal their tax regulations or policies because they were pressurised by investors or forced to do so due to the ISDS awards.

The tax-related case law based on IIAs is extensive (see Annex 1), offering an insight into the potential repercussions of ISDS proceedings for tax law. All these things considered, it must be said, however, that the influence of IIAs on domestic tax law of states appears to be rather implicit than explicit. Very few, if any, references to investment agreements are to be found in domestic acts of tax law. In cases about taxes brought before domestic courts, references to these documents are absent. To summarize, the influence of IIAs on taxes is present but perhaps difficult to pinpoint due to a lack of overt references. It could be advised that lawmakers and tax policymakers devote more consideration in the legislative process to these instruments, as this could improve the legitimacy of tax law.

SECTION IV

Chapter 1. IIAs and decision-making process concerning tax laws from an international perspective

Intro

Considering what has been outlined and examined above, the extent to which IIAs impact the decision-making process concerning tax laws from an international perspective, will be clarified in the following paragraphs. The main problems will be identified, and the author will provide possible solutions or simple suggestions.

1.1 Issue n. 1: IIAs have a detrimental impact on the decision-making process

To date, IIAs could represent an indirect but severe jeopardy for the legitimacy of decision-making processes concerning tax laws and, consequently, a looming danger for the legitimacy of tax laws themselves. But what are the reasons for this?
The preceding paragraphs are already evidence of how private investors' reliance on the ISDS mechanism guaranteed by BITs threatens states' fiscal sovereignty and, consequently, indirectly, the legitimacy of tax laws. Indeed, investors' challenges to tax measures under ISDS can result and has already happened, in states drafting and implementing tax laws in such a way that they do not then see themselves involved in investment disputes concerning these same laws. This only puts the legitimacy of tax provisions and related decision-making in a highly critical situation. Recent cases, such as *Vodafone v. India* and *Cairn v. India*, are prime examples. As a result, states have been forced to abandon specific tax regulations, repeal them, and enact new ones to comply with various arbitration awards. If this has not happened yet, it might happen in the future. It is widely argued that this system may make states more reluctant to introduce new regulations and policies for fear of having them contested through ISDS. If this were not the case, they would likely feel obliged to implement tax measures, perhaps not fully intended, but certainly in line with investors' expectations and thus unlikely to be questioned. While this does not guarantee the legitimacy of tax rules, it is highly detrimental to the fiscal sovereignty of states.

What can be the solutions to remedy this system? The most straightforward and effective solution, also to ensure maximum flexibility in tax policymaking, would likely be a clear and comprehensive exclusion of

taxation matters from the scope of IIAs. Suppose this is not possible for various reasons (e.g., it could be that there is no consensus among members of Parliament). At the very least, in that case, a tax exclusion clause concerning ISDS should be introduced, as suggested by the author, or, as suggested by UNCTAD[130], a mechanism that gives the host State discretion to determine whether the carve-out applies in a specific dispute or that gives the competent authorities the power to decide.

In support of these assertions, it is necessary to emphasise how ISDS also leads to various financial risks for national governments. Indeed, as also stressed by UNCTAD[131], two main financial risks are associated with the ISDS process. First, there are the costs incurred to participate in the ISDS as a defendant. Second, there are the fees to compensate a foreign investor if an arbitral tribunal determines that a country has infringed one or more dispositions of an IIA. Occasionally, a country may face numerous ISDS cases due to a single set of policy twists. Spain is an example of this, having been sued more than 40 times since 2011 under the ECT (see Annex 1). These actions stem from the government's decision, starting in 2010, to withdraw incentives to promote investment in renewable energy and to impose a 7% tax on the value of energy production. Notably, Spain has overspent about EUR 100 million to participate in 25 ISDS lawsuits. Furthermore, a primary concern is that granting private investors the authority to enforce BITs' tax-related provisions gives them too much power. This is because investors, both corporations and individual stakeholders, prioritize profit maximization. Consequently, their decision to go to arbitration will depend on the potential profitability of the case.

1.2 Issue n. 2: Growing percentage of national tax measures challenged through the ISDS

In paragraph 1.2.5, Section I, the differences between ISDS and MAP have been examined. In particular, the author highlighted how some of the typical deficiencies in the resolution mechanism provided by DTTs might be one of the driving forces behind the increasing use of ISDS to challenge tax measures. The most consonant and reasonable solution would be to keep separate the two systems. Investors should only use ISDS to challenge non-tax measures that may have harmed them. Avoid a preference for ISDS over a MAP, despite the latter's flaws. But how to do this? Once again, the most prominent and immediate solution for policymakers is to insert a tax carve-out for the disposition that provides for using the ISDS mechanism.

[130] UNCTAD, "International Investment Agreements and their Implication for Tax Measures: what tax policymakers need to know" (2021), pag. 43.
[131] United Nations Committee of Experts on International Cooperation in Tax Matters, "Relationship of tax, trade and investment agreements", 12 March 2023, para. 86.

Nevertheless, history currently teaches us, as pointed out above, that over the years, the number of tax disputes under ISDS has been growing steadily. Most BITs do not include a tax carve-out for ISDS, and for the reasons noted above, investors sometimes prefer to resort to the latter rather than open a MAP.

Moreover, part of the jurisprudence of investment tribunals could be a testimony to how tax carve-out clauses are not always successful in blocking tax-based investment claims. Indeed, arbitral tribunals have often demonstrated a readiness to interpret or disregard tax carves-out in several instances. We have a vivid example of this in *Occidental Exploration and Production Company v. Ecuador*[132], where the tribunal held Ecuador responsible for violating the FET requirement according to the US-Ecuador BIT, even though Article XI of the treaty excluded tax-related claims from this standard. The *Yukos* case gives another essential contribution (see para. 1.2.6, Section I). In detail, in *Renta 4 SVSA*[133] and *Yukos Universal Ltd*[134] (both cases are part of the "Yukos saga"), the investment tribunals held that the tax carve-out clause incorporated in Article 21(1) of the ECT[135] (Russia tried to rely on it) is available only if the host country's regulations are *bona fide* exercise of tax powers. If tax measures are not implemented in good faith, they cannot be exempted from the tribunals' jurisdiction.[136] Evidently, this verdict does not likely reflect the willingness of the states that signed the IIA, which, by including a tax carve-out clause, intended not to see themselves involved in investment arbitration to debate tax issues. While again, the aftermath this may have on states' fiscal sovereignty and decision-making on tax laws is apparent, from a purely jurisdictional perspective, although the arbitration award specifically concerns ECT and its Article 21(1), one cannot help but consider its potential and risky precedential value and the consequent impact on future ISDS tax-related-cases.

Considering all these considerations, what might be different solutions to ensure that states do not see their fiscal sovereignty undermined and simultaneously ensure the legitimacy of tax rules? A first suggestion would be to introduce a dispute resolution mechanism which mirrors the procedure employed in most DTTs. Individuals filing complaints under a BIT must initially seek resolution within the host country's legal system. Only if this process fails to address the complaint can the individual turn to their home country for arbitration between the two governments. This solution would grant a sovereign government the authority to challenge a country's decision to impose a tax. Essentially, it is about fostering state-to-state

[132] Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, para. 186.
[133] Renta 4 SVSA and others v. The Russian Federation, SCC No 24/2007, Award, 20 July 2012.
[134] Yukos Universal Ltd (Isle of Man) v. The Russian Federation, PCA Case No AA 227, Final Award, 18 July 2014.
[135] Energy Charter Treaty (ECT) Art. 21(1).
[136] Prabhash Ranjan, "Investor-state dispute settlement and tax matters: limitations on state's sovereignty right to tax", Asia Pacific Law Review (2022), para. 4.

investment arbitration, which several BIT models already include. In the second place, also suggested by J. Bird-Pollan[137], one could incorporate investment tax provisions in DTTs. In this way, investment tax-related claims would be subject to the dispute resolution mechanism provided by DTTs (i.e., MAP). However, a not-insignificant aspect needs to be emphasized. To date, BITs in force have been concluded between states that have not signed a DTT with each other. As a result of this situation, it is impossible to transfer the tax provisions on foreign investment into a DTT because there is currently no DTT. Why? It would be necessary to draft and agree on an entirely new DTT to remove the tax provisions from the BIT. In addition, countries that do not have an existing DTT are unlikely to be willing to sign it. DTTs are usually entered between countries with similar bargaining power, where both parties can benefit from the treaty. On the other hand, most BITs are signed between parties of unequal status, with one party usually being the host country and the other representing the home country of the protected investors.

Furthermore, it must be considered that BIT complaint arbitration entails an independent arbitrator assessing the regulatory policy choices made by a government entity. Consequently, this unique arrangement allows non-affiliated arbitrators who are not elected and have no connections to the country in question to impact the government's legal system and regulatory policy decisions in the BIT dispute.[138] Allowing an arbitral tribunal to rule on the authority of states to collect and impose taxes would give it the power to settle a fundamental question of public law, which by its nature should be decided by the courts and not through arbitration.[139] Additionally, arbitration under DTTs involves two governmental parties (i.e., state-to-state process), while BIT arbitration enables individual parties to file complaints. Under a DTT, if an individual believes that a country is violating its obligations, he must first convince his home country that his allegation is valid before the dispute proceeds to arbitration. This means both governmental parties must agree on the dispute's merits before submitting it to an arbitration panel. Under a BIT, on the other hand, an individual can independently trigger arbitration against the host country if a dispute arises. Thus, pursuing personal advantage through the arbitration of a BIT may lead to objections to a country's policy choices, which will then be resolved by impartial arbitrators who may have their own reasons in favour of the claimant.[140]

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[137] Jennifer Bird-Pollan, “The Sovereign Right To Tax: How Bilateral Investment Treaties Threaten Sovereignty”, Notre Dame Journal of Law, Ethics & Public Policy (2018), Part IV.B.

[138] Jennifer Bird-Pollan, “The Sovereign Right To Tax: How Bilateral Investment Treaties Threaten Sovereignty”, Notre Dame Journal of Law, Ethics & Public Policy (2018), Part II.D.

[139] Jennifer Bird-Pollan, “The Sovereign Right To Tax: How Bilateral Investment Treaties Threaten Sovereignty”, Notre Dame Journal of Law, Ethics & Public Policy (2018), Part II.D.

[140] Jennifer Bird-Pollan, “The Sovereign Right To Tax: How Bilateral Investment Treaties Threaten Sovereignty”, Notre Dame Journal of Law, Ethics & Public Policy (2018), Part III.B.1.

In the author's opinion, as mentioned above, the most suitable and beneficial solution from every point of view would be simply to include a tax-exclusion clause in the BIT framework concerning the ISDS mechanism. It is true that case law has made some time a mockery of the few exclusion clauses regarding ISDS already in place. In any case, it is a matter of a few isolated cases which cannot disincentive this choice.

1.3 Issue n. 3: IIAs are not integral to the decision-making processes

So far, some fundamental flaws have been highlighted: IIAs and, in particular, the dispute resolution mechanism they guarantee to foreign investors, i.e. the ISDS, constitute a potent potential threat to the fiscal sovereignty of states and consequently to effective and smooth decision-making processes concerning tax rules. Suppose states are obliged to amend or repeal their tax laws due to unfavourable arbitration awards or draft them under pressure to have them subsequently challenged. In that case, it is clear how the legitimacy of the rules themselves is affected.
For these reasons, the logical consequence should be that political representatives assess these potential bottlenecks during the legislative processes leading up to the drafting and subsequent enactment of the various tax laws and policies. The perceived risks of ISDS should be examined by assessing how investors might be affected by the new legislation. This would try to understand in advance the pitfalls of seeing that newly introduced tax measure challenged in the investment courts within a few years.

Unfortunately, none of this happens. As also emphasised in Section 3, countries seem not to take too much into account during the legislative processes of IIAs and the threats they pose to the legitimacy of tax rules and their sovereignty. Based on the research, it appears that the various national parliaments and governments have not even discussed whether or not tax matters should be included in the scope of these treaties. Indeed, several countries are increasingly introducing tax-exclusion clauses in their BIT models. Still, no one is apparently introducing them concerning ISDS, leaving the problems it entails untouched. This is what is needed, though. The author has already pointed out that the most immediate solution would be introducing a tax exclusion clause for ISDS. If, however, the states do not discuss this possibility and the benefits it would bring within their parliaments, we are at a standstill.

Surprisingly, despite this inert attitude of national governments, states are fully aware of the potential dangers associated with ISDS. Indeed, in the Organisation for Economic Co-operation and Development (OECD) Working Paper on International Investment 2017/02 entitled "The balance between investor

protection and the right to regulate in investment treaties: A scoping paper"[141], the issue related to the impact of treaties on the functioning of government, including the power of governments to maintain, change, apply and enforce their policies is examined. While highlighting how these treaties can result in the liability of states to pay large sums of money, increasing those financial risks already mentioned, the ability of treaties to cause a so-called "regulatory chill" is also assessed.

Speaking precisely of the OECD, it must be pointed out that during the decision-making process concerning the adoption of all those tax documents that typify the work of this organisation, no reference is, however, made to investment agreements, ISDS or the serious concerns they entail. It is true that the OECD, among other things, also deals with investment, and from this perspective, the material is remarkable. What the author wants to point out is how when it comes to adopting a new policy or new documentation[142], there is no mention of the IIAs. For example, in the BEPS Action 6 Peer Review[143] concerning treaty shopping, there is no hint of the need to tackle granting IIA benefits to investors in inappropriate circumstances (e.g., letterbox companies). It could be trivially argued that the objective of this is to check the perils of tax treaty shopping alone. The point is that these systems are interlinked. The setting up and use in a given country of a letterbox or conduit company for the purpose of tax planning could a priori be dictated by the desire to benefit from the guarantees and protection provided by the BITs that that country has signed and are currently in force. The central element of numerous tax avoidance schemes is primarily built upon the attractiveness offered by major global investment hubs. These hubs depend not only on their domestic company regulations and tax laws, as well as a wide range of DTTs, but also on comprehensive networks of IIAs.[144] These networks are often substantial and closely aligned with each other. One could, however, think of another reason why the role and the possible impact of IIAs or ISDS are not taken into account during decision-making processes at the OECD regarding tax documentation. First, BITs are international treaties that two states conclude between themselves. Unlike DTTs, which are modelled on OECD or United Nations (UN) models convention, in investment matters, the states usually have their national models to use during negotiations. Secondly, and here the author wishes to draw attention to this, when investors, for reasons already discussed at length, decide to challenge a tax measure before investment tribunals via the ISDS mechanism, the object of the dispute is the national measure, clearly not the OECD tax documentation.

[141] OECD Working Paper on International Investment 2017/02, "The balance between investor protection and the right to regulate in investment treaties: A scoping paper" (2017), Chapter V. Part. C.

[142] Various OECD documents (studies, research, peer reviews, reports), public consultation reports, discussion drafts were reviewed. In none of those analysed were clear references to IIAs or ISDS or the potential risks associated with them found.

[143] OECD - BEPS Action 6 on Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, 2021.

[144] UNCTAD, "World Investment Report 2015. Reforming International Investment Governance" (2015), pag. 209.

Consequently, it may be understandable that at the OECD, not much consideration is given to these treaties and the ISDS when drafting the various tax documents. As mentioned, the national parliaments and governments should deal with this issue during the different plenary sessions or in the various committees responsible for drafting tax regulations. They should be the ones to consider the risks that the new legislation could be targeted through ISDS.

1.4 Issue n. 4: Potential overlap between IIAs and DTTs

Given the lack of a provision regulating the relationship between IIAs and DTTs, potentially, litigation concerning tax measures may fall within the scope of both treaties. Consequently, interested parties could use both the MAP and the ISDS to settle a dispute concerning the same measure. This is no minor problem, not by coincidence, also raised by UNCTAD very recently:

> "*Potentially, a taxpayer could request the relevant competent authority for a mutual agreement procedure (MAP) and, concurrently or afterwards, pursue ISDS claims as an investor under an IIA concerning the same matter. A MAP between the competent authorities of the contracting parties or a State-State tax arbitration could be ongoing when an ISDS proceeding is initiated. The outcome of a MAP, tax arbitration or tax litigation could also give rise to ISDS cases*."[145]

This not only leads to fragmentation and an uncoordinated mechanism to resolve tax disputes but also to the same problem: investors will see increased opportunities to challenge tax measures through ISDS. It is a vicious circle: if investors persist in contesting tax-related measures before investment tribunals, the uncertainties of states in the decision-making process on tax measures and policies will escalate, with a severe knock-on on their legitimacy. There will be a slowdown in the development of national tax systems for fear of having their tax measures continually challenged and thus being forced to repeal them in the interest of investors.[146]

The relationship between international investment and tax policy regimes is highly interconnected. Both systems aim to encourage and enable investment activities across national borders. They interact, and

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[145] UNCTAD, "International Investment Agreements and their Implication for Tax Measures: what tax policymakers need to know" (2021), pag. 16.

[146] However, it must be highlighted that there is no proven conflict between a DTT and an IIA on a specific dispute concerning a tax measure. Therefore, it is preferable to harmonise their individual uses to avoid legal ambiguities, confusion or the possibility of deliberately manipulating investors through the selective choice of legal jurisdictions.

changes in one can have implications for the other. As underlined by the UNCTAD[147], when undertaking reforms, it is crucial to ensure that both policy regimes continue to function to maintain trust and backing for both systems effectively. The main objective is facilitating productive cross-border investment while addressing tax avoidance to generate domestic resources for sustainable development. It may be beneficial to establish greater coherence between the reform processes of the two regimes. This would involve managing their interaction more effectively. This improvement would also include, for example, the introduction of tax exclusion clauses in the BITs. This would not only hinder the potential problems with the relationship between DTTs and IIAs but also prevent tax measures from being challenged through ISDS. Like a domino, tax sovereignty, decision-making, and the legitimacy of tax rules would not be compromised. However, as pointed out, as long as these problems persist, it would be essential to ensure that, at the very least, national governments and parliaments take into view the IIAs, ISDS and the impact they may have during the decision-making process regarding tax laws.

1.5 Interim conclusions

This chapter aimed to ascertain the extent to which IIAs, particularly the dispute resolution mechanism they provide (i.e. ISDS), impact the decision-making process concerning tax laws and, consequently, the legitimacy of the latter from an international perspective.

First, the indirect impact these instruments can determine has been highlighted. Indeed, as we have seen, in the last decade, there has been a considerable increase in investment cases in which foreign investors have challenged various domestic tax measures through the ISDS mechanism. As a result of arbitral awards, some states, such as India and, in the past, Spain, have been forced to amend and even repeal their disputed tax regulations. The danger is that states will begin, if they have not already done so, to design their own tax laws and policies with the sole intention of serving the interests of investors and avoiding new disputes and the payment of large sums of money in compensation (and potential financial risks). It is then evident how the decisional process would be highly jeopardised and, consequently, the tax laws' legitimacy.

Subsequently, taking all these issues into account, an attempt has been made to shed light on some practical aspects, verifying the extent to which IIAs are an integral part of decision-making processes in drafting tax regulations. As some OECD reports have revealed, states are aware of the threat that IIAs and specifically ISDS, pose to their ability to regulate and produce legitimate regulations. For this reason, one would at least expect that during decision-making processes concerning tax laws, political representatives would discuss the impact of tax rules on foreign investors and the possibility that it would be challenged through ISDS,

[147] UNCTAD, "World Investment Report 2015. Reforming International Investment Governance" (2015), pag. 213.

thus generating the series of risks that have been examined. Similarly, the OECD itself should make greater use of IIAs when preparing its tax documentation. However, this does not happen. And while it is pretty incomprehensible for states, as far as the OECD is concerned, some reasons have been suggested as to why there are no references to IIAs.

1.6 Possible solutions and recommendations

For the reasons outlined in the previous paragraphs, the author intends to present a series of simple, straightforward suggestions or recommendations to ameliorate the current system. As will be seen, some of these recommendations concern the decision-making process, while others aim to tackle the problem at the source.

1.6.1 Globally applicable solutions and recommendations

1) Inclusion of tax carve-out clause concerning ISDS: In this way, states would cease having their tax regulations contested by foreign investors before investment tribunals. As repeatedly emphasised throughout this thesis, this represents the most immediate solution to ensure that IIAs and ISDS do not adversely affect the fiscal sovereignty of states and their ability to provide the legitimacy of tax regulations through decision-making processes. In addition, a separate tax and investment system would be maintained. Despite its shortcomings, MAP would continue to be used to settle tax disputes, while ISDS would be limited to investment litigation.
2) Introduction in IIAs of a dispute resolution mechanism which mirrors the MAP: Individuals filing complaints under a BIT must initially seek resolution within the host country's legal system. Only if this process fails to address the complaint can the individual turn to their home country for arbitration between the two governments. This solution would grant a sovereign government the authority to challenge a country's decision to impose a tax. Essentially, it is about fostering state-to-state investment arbitration, which several BIT models already include.
3) Assess the impact on investors and litigation risks through ISDS: The national legislative branches should duly assess and debate if any proposed tax legislation may negatively impact its commitments to foreign investors. When drafting national tax legislation, lawmakers must estimate how likely the bill will be challenged through ISDS. Policymakers cannot merely be aware of the risks without assessing them when a regulation is to be drafted and enacted. It sounds like a highly trivial solution, but it is precisely what is missing and essential to ensure a decision-making process that genuinely considers the role of IIAs and can secure and safeguard the legitimacy of tax rules.

But how to achieve this? It would be sufficient that during the preparation of legislation, members of government and parliament discuss and assess the potential impact of the legislation on investors and the danger of it being challenged through ISDS and then perhaps amended and repealed. These discussions can occur during plenary meetings or in specially appointed technical committees.

1.6.2 OECD solutions and recommendations

4) Making decision-making at the OECD more comprehensive: In para. 1.3 of the present Section, we speculated why there is no reference to IIAs or the impact of ISDS in OECD tax documents and why these treaties are not part of the decision-making process at the OECD. However, the OECD documents are vital to national legislators when drafting tax laws. For this reason, more research is needed on the role of IIAs in OECD tax documentation that may have more points of contact with these agreements. In this way, problems such as the potential overlap between IIAs and DTTs, the fact that investors may favour ISDS over MAP, and the risk of abuse of both types of treaty by letterbox companies, would be assessed more extensively and states would be better informed of the dangers that IIAs may pose.
5) Developing OECD guidelines: the OECD could develop guidelines that national legislators could use in their decision-making processes when drafting tax legislation. These guidelines would act as intentional standards and should guide legislators when drafting tax laws, among other things, by asking them to carefully assess the possible impact of tax laws on investors and the risk of challenge through ISDS. This would help to ensure a decision-making process regarding tax laws that takes the role of IIAs seriously and safeguards the legitimacy of tax rules. It would also alleviate the risks of seeing one's tax sovereignty compromised.

The question now is: are these solutions feasible? In general terms, the author answers in the affirmative. However, some criticisms must be underlined. Below is a brief analysis of each of the solutions presented:

1) It is a solution that would completely eradicate the problem. If investors no longer had the guarantee of being able to challenge national tax laws through the ISDS mechanism, bypassing national court systems, states would no longer be subject to the threat of having to amend and possibly repeal their tax laws as a result of arbitral rulings or having to draft them with the sole intention of not having them challenged, with the risk of having to pay billions in compensation and facing possible financial exposure.

   This is a more than feasible proposal. In relatively recent years, many states have already introduced new national BIT models, accompanied by the incorporation of tax exclusion clauses. However,

apparently, none of the latest models (and, of course, none of the previous ones) contain a tax exclusion concerning ISDS. The problem also lies in the lack of parliamentary or governmental discussion on whether tax exclusion clauses should be included. The starting point is precisely this. Once legislators carefully consider the issue, including a tax exclusion for ISDS is a "piece of cake".

2) As explained, this suggestion is about fostering state-to-state investment arbitration, which several BIT models already include. The result would always be to avoid national tax measures being challenged through ISDS. The solution is highly feasible since this provision is already available in many treaties.
3) This is the most significant recommendation. In a system where it is not yet customary to include a tax exclusion clause concerning ISDS in BITs, the work of national legislators becomes of absolute urgency. For national parliaments and governments, assessing the impact of tax legislation at the drafting stage on investors and the litigation risks must be a priority. The solution is, in the author's opinion, achievable. It is clear that the decision-making process will be prolonged, but this is the necessary consequence of an assessment made with the sole objective of ensuring that it runs smoothly and that it is able to secure and preserve the legitimacy of the tax rules.
4) This solution is perhaps not tricky to implement but will probably never be put into practice. As already pointed out, the investors obviously contest national tax measures and not the OECD tax documentation. Therefore, it is the national legislators who have to assess the role of the IIAs. However, the existence of OECD tax documentation in which the effects of IIAs and ISDS are taken seriously could be of great use to lawmakers during the decision-making processes concerning tax laws.
5) This is a complex solution to implement. It would require the OECD to develop a new set of guidelines explicitly designed to manage decision-making processes to ensure the legitimacy of tax rules. It would perhaps be too burdensome. Furthermore, it would be mere soft law, with the consequence that states would not be legally obliged to use them, with the risk that problems and pitfalls would persist. In any case, according to the author, this is an intriguing solution, which, in a system marked by the absence of tax exclusion clauses for ISDS in the BITs, would be highly beneficial for national tax policymakers.

Chapter 2. IIAs and the Dutch decision-making process concerning tax laws

Intro

The objective of this chapter is to concretely analyse the extent to which IIAs are an integral part of the Dutch decision-making process concerning tax laws. To this end, main reliance will be placed on government and parliamentary documents, such as reports of parliamentary debates, motions submitted by political representatives, explanatory memoranda, etc. In addition, the role of Dutch courts will be discussed.

2.1 IIAs and the Dutch decision-making process

In Section 1, the author tried to shed light on how IIAs (and among them BITs, in particular) can indirectly influence decision-making processes concerning tax measures. In particular, through the dispute resolution mechanism (i.e. ISDS) that these treaties make available to investors, the latter are able to bypass national judicial systems and challenge the national tax measure in question directly before an investment court. According to several scholars, this system would simultaneously cause and feed the so-called "regulatory chill", which consists of the attitude of a State actor failing to enact or enforce bona fide regulatory measures because of a perceived or actual threat of investment arbitration.[148]

On the one hand, this would not guarantee proper decision-making and, above all, it would not ensure the legitimacy of the tax rules. For this reason, until this diatribe between IIAs and their impact on tax matters is brought to an end, perhaps through the inclusion of tax exclusion clauses in BITs, IIAs must be an integral part of the decision-making process. But how? Particularly during the drafting stages of legislation, political representatives, in plenary sessions or the framework of the various committees, should, for instance, assess the impact that tax legislation may have on investors to try to understand in advance what the risks are of seeing that same measure challenged through ISDS. Alternatively, the Parliaments could adopt new acts to manage the potential interplay between its tax measures and ratified BITs.

[148] Christian Tietje and Freya Baetens, "The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership", Study prepared for: Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands (2014).

When designing tax documents, we already know this is not the case in most states and at the OECD level. But what happens in the Netherlands? Are there the same issues? We can already answer affirmatively, but more details will be provided in the following paragraphs.

2.1.1 Parliamentary discussions concerning ISDS

It was made clear how ISDS poses a severe menace to the fiscal sovereignty of states and, as an indirect implication, to the legitimacy of tax rules. Despite this, the New Dutch Model BIT (as well as the previous 2004 Model) does not include any explicit tax carve-out regarding ISDS. This should raise several perplexities, considering that Dutch BITs have been used in several investment cases where tax issues were at stake (see Annex 2). In addition, three of these cases are still pending. Given that ISDS will be the chosen dispute resolution mechanism, the underlying danger cannot be overlooked: should these future arbitral awards force the government of the respondent state (note that the Netherlands has never acted as the respondent state in ISDS tax-related cases) to amend or repeal the disputed tax measures and then introduce and implement new ones, the resulting implications for decision-making and the legitimacy of tax regulations brought about by the BITs and more directly by the ISDS mechanism they introduced is undeniable.

This is even more controversial after the General Committee on Foreign Trade and Development Cooperation consulted with the Minister of Foreign Trade and Development Cooperation Kaag in February 2019 also to discuss ISDS and its potential impact.[149] In addition to raising issues concerning letterbox companies and their access to ISDS, the possibilities of lobbying governments provided by ISDS to investors were debated. Notably, it was highlighted how often the mere threat of an ISDS claim is enough to prevent the implementation of undesirable regulations to investors ("regulatory chill"). The example of the multinational Shell, which lobbied the Nigerian government for tax advantages, was given. The parliamentarians pointed out that one can apparently also use an ISDS complaint to obtain tax benefits. It is believed that ISDS puts a disproportionate amount of power in the hands of private investors and large multinational corporations that scour the world in search of the lowest possible standard or a bloodletting installed by Western institutions. For this reason, members of the PvdD and others (e.g., SP) have proposed removing ISDS from the Dutch BIT model text altogether.[150]
However, as we already know, the new model has no tax exclusion clause for ISDS. And although this is inconsistent with the parliamentary statements above, specific noteworthy considerations have been made.

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[149] Tweede Kamer, Vergaderjaar 2018–2019, 34952, nr. 58.
[150] Tweede Kamer, Vergaderjaar 2018–2019, 34952, nr. 58.

While it is believed that large multinationals, such as Shell, can, through the mechanism of ISDS, pressure governments to bend to their demands (even simply through legal intimidation), it is, therefore, necessary to avoid that the mere fact that a big corporation threatens a claim prevents governments from regulating the public interest (e.g. taxation), on the other hand, as also pointed out in the previous paragraphs (see para. 2.3.1, Section II) the new BIT model is the result of a long process of consultations with different parties, including the Broad Trade Council, civil society organizations and experts. In addition, the UNCTAD reform agenda was used as a basis. Furthermore, Minister Kaag emphasised that investment agreements only protect investors from illegal government actions. If a government respects the general principles of good governance and has a legal framework to do so, there is no risk of being ordered to pay compensation. An investment agreement can cause governments to reconsider unlawful government actions.[151]

Even though there is no discussion in the Dutch tax literature as to whether tax issues should be arbitrated under BITs[152], this parliamentary paper is symptomatic of how opposing views exist on whether or not to use ISDS as a dispute resolution tool. Additionally, during the debate concerning the New Dutch Model BIT, two members of the Parliament submitted a motion to ask the government to eliminate ISDS from the new model because it affects the political freedom of governments, and the threat of claims can put pressure on the creation and enforcement of policies such as national ones.[153]

Moreover, a parliamentary question took place in 2018, through which Minister Kaag was asked to provide clarification on a report stating that the Netherlands is a haven for ISDS claims and at the centre of an increasing number of claims by companies against states. The Minister, in addition to acknowledging the problem and emphasising that it is indeed the letterbox companies that file the vast majority of cases, announced the cabinet's willingness to resolve the issue, in particular by excluding letterbox companies from the protection provided by the BITs (an intention respected in the new model). However, for the purposes of this thesis, the spotlight must be on a specific question and its answer. When the minister was asked whether the government was willing, possibly in a multilateral context, to ask in how many cases (threats of) ISDS claims led to a change of policy by a state, a very clear answer was given: "*A claim under an investment agreement cannot have the effect of forcing a government to change its laws or regulations or to change its policies compulsorily. To the extent that risks would continue to exist, they can be*

[151] Tweede Kamer, Vergaderjaar 2018–2019, 34952, nr. 58.
[152] Michael Lang, "The Impact of Bilateral Investment Treaties on Taxation", European and International Tax Law and Policy Series, IBDF, para. 16.8.1.
[153] Tweede Kamer, Vergaderjaar 2018–2019, 34 952, nr. 49.

eliminated by clarifying investment standards and making explicit the right of governments to regulate. The new model text provides for this (see next para)."

These examples prove that the Dutch parliament and government are aware of the inconveniences that IIAs and ISDS can pose. The threat that ISDS can constitute to the proper functioning of government forces them to adopt a specific piece of legislation rather than another. In addition, it is highly disruptive to the legitimacy of tax regulations. Nevertheless, some problems need to be examined. First of all, these parliamentary debates are an end in themselves. They originate from questions to which government representatives are submitted without these discussions being part of a broader legislative drafting project. Secondly, these debates do not consider fiscal matters at all but analyse problems from a more general perspective. Notably, one of the purposes of this thesis is to verify the impact that IIAs have on the decision-making process, but the one concerning tax laws. And when it comes to the drafting of tax laws or tax plans (*belastingplannen*), based on this research, there is no debate regarding the impact the legislation might have on investors and the potential risk of it being challenged through ISDS, perhaps forcing the government to repeal and replace it as a result.

Considering the potential risks involved in IIAs, such a decision-making process is difficult to grasp. However, there might be a reason that would make it more logical. So far, the Netherlands has only been involved in ISDS disputes as a respondent state in two very recent cases.[154] Two cases that do not concern tax measures but rather laws prohibiting the use of coal for electricity production. But regardless of the subject matter of the dispute, the Netherlands, until two years ago, was never in a position to have specific laws or policies challenged and potentially obliged to amend or even repeal them as a result of the arbitral award. This state of affairs might explain why, during the decision-making process concerning tax regulations, the government and parliament are not inclined to consider the impact that IIAs, particularly ISDS, might have. Often the changes are only there when those risks come true and you experience them first-hand.

2.1.2 Parliamentary discussions concerning the opportunity to include tax carve-out clauses

In the course of this thesis, the author has already expressed how a possible practical solution that states could adopt to handle the source of the problem of investors' challenge of national tax laws through ISDS and consequently prevent the decision-making process from being undermined and the legitimacy of the

[154] *Uniper v. Netherlands* and *RWE. v. Netherlands.*

tax rules compromised, would consist in introducing tax carve-out clauses in their BIT models at least concerning ISDS.

As explained, Dutch BITs are often used by investors as a legal basis to lodge an ISDS claim. Through them, investors have objected to the tax measures of several states (see Annex 2), forcing the latter to unilaterally terminate the treaties signed with the Netherlands (see para. 2.5, Section II). Precisely for this reason, the Dutch government should have discussed whether a tax exclusion clause concerning ISDS should be introduced in the new model BIT or even whether tax matters should be wholly excluded from the scope of the treaties. The problem is that this has not yet occurred. Even the round table discussion report[155] concerning adopting the new model BIT bears witness to the fact that tax matters are never discussed. It is true that the new model includes certain types of tax carve-outs, but that is not what is needed. Preventing investors from exploiting Dutch BITs to challenge national tax laws utilizing ISDS would not only re-credit Dutch investment policy but would also ensure that in the future, it would not be Dutch tax measures that would be the subject of the dispute before investment courts, with the risk that the decision-making process would be altered and the legitimacy of tax rules damaged.

So far, what has been done is to introduce a so-called "power to regulate" into the new model. Indeed, the preamble and Article 2[156]state that "*The provisions of this Agreement shall not affect the right of the Contracting Parties to regulate within their territories necessary to achieve legitimate policy objectives […]. The mere fact that a Contracting Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectation of profits, is not a breach of an obligation under this Agreement.*" The scope of this regulation is remarkable. Ensuring that the government has the right to regulate to achieve legitimate policy and investor expectations can be interpreted as a disguised attempt to ensure that decision-making is not compromised and to prevent investors from continuing to challenge national laws undeterred, to provide the legitimacy, as far as we are concerned, of tax regulations. To be precise, the rule does not even explicitly refer to taxation but exclusively to prudent financial reasons. By analogy, one can probably extend the scope of Article 2 to tax matters as well.

The problem at the decision-making level regarding tax laws is that, apart from not having debated the appropriateness of including a tax exclusion clause, at least for ISDS, political representatives do not tend to assess the potential threat posed by the absence of such a clause when drafting legislation. Granting

[155] Tweede Kamer, Vergaderjaar 2018-2019, 34 952, nr. 43.
[156] Dutch Model BIT (2019) Article 2(2).

investors the right to go directly to an arbitration tribunal to challenge national tax regulations, as we know, would disrupt the decision-making process itself, and the legitimacy of tax regulations would not be ensured, as the government and parliament would be inclined to amend and repeal the laws following the arbitral award and with the sole intention of no longer seeing them as the object of dispute and avoiding multi-billion dollar compensation. Therefore, when tax legislation is being designed, it would be appropriate to evaluate these potential risks. In all likelihood, the reason for this abstentionism is the same as the one highlighted in the previous paragraph: the Netherlands has only twice (in 2021)[157] been involved as a defendant state in ISDS cases, and neither of these two times concerned Dutch tax laws. This is probably why the government and parliament have never needed to assess these issues. Let us remember, however, that "prevention is better than cure".

2.1.3 Parliamentary discussions on letterbox companies

The Dutch government and parliament are keenly conscious of the issue of letterbox companies. Indeed, it is no coincidence that a motion was tabled in the BITs in March 2018 to ask the government to exclude these companies from the scope of ISDS.[158] The Netherlands has implemented measures to reduce its appeal to letterbox companies. In early 2021, the Dutch government established the Committee on Conduit Companies to investigate and provide policy recommendations regarding the phenomenon of conduit companies. The Commission aimed to analyze the scope, reasons, and outcomes of the Netherlands being used as a conduit country and propose solutions to address this issue. Additionally, the implementation of a withholding tax on interest and royalty payments, the enforcement of a stricter tax ruling policy (explained in chapter five), and the inclusion of the PPT in tax treaties all contribute to the objective of making the Netherlands less attractive to such companies.

One of the solutions presented by the committee is precisely to ensure that letterbox companies are excluded from the scope of BITs. However, various criticisms remain. The New Dutch Model BIT refers to the presence of "substantial economic activity"[159], but Dutch law does not define the concept. What are the requirements for the existence of substantial economic activities? As the committee points out, the real issue is choosing between a loose definition that puts a lot in the courts' hands and a more closed enumeration that easily becomes a safe harbour.[160] Evidently, by opting for the first option, the possibility

[157] *Uniper v. Netherlands* and *RWE. v. Netherlands.*
[158] Tweede Kamer, Vergaderjaar 2017–2018, 21 501-02, nr. 1829.
[159] Dutch Model BIT (2019) Article 1(b)(iii).
[160] Committee on Conduit Companies, "The road to acceptable conduit activities" (2021), para. 5.4.

of investment courts interpreting this provision broadly and continuing to protect shell companies may persist. A possibility that the Netherlands must nip in the bud.

To date, no Dutch BIT has been renegotiated using the new model. Consequently, letterbox companies can still benefit from the protection granted to them by the BITs currently in force. Therefore, from a future perspective, this committee should be an active part of the decision-making process regarding tax laws. The idea could involve it directly as a "technical advisor", not only to assess the risks of letterbox companies filing complaints through ISDS against the tax law being drafted but also to examine on a case-by-case basis how likely investors will challenge the legislation. This solution would make the decision-making process more comprehensive and ensure greater legitimacy of the tax rules.

2.1.4 Laws and regulations about IIAs

It should be noted that there is currently no specific Dutch legislation on IIAs. Despite that, on 17 May 2022, Dutch Senate adopted the "Investments, Mergers and Acquisitions Security Screening Bill" (*Wet veiligheidstoets investeringen, fusies en overnames*)[161] (ISSB), which contains FDI-like rules that are not limited to specific sectors. The ISSB is expected to enter into force by the end of 2022 but will also have a retroactive effect as of 8 September 2020. The ISSB applies to undertakings based in the Netherlands that are (a) vital suppliers, (b) an operator of a high-tech campus or (c) undertakings active in the field of sensitive technology (so-called "target undertakings"). It catches all mergers and demergers, acquisitions and other investments that result in (i) a change of control over a relevant company, (ii) the acquisition of a relevant company, or (iii) in a case of highly sensitive technologies, an acquisition or increase of significant influence over a relevant company. Asset purchases are also captured if those assets are essential for the company to function as a vital provider or a sensitive technologies enterprise.[162] It is simply an FDI screening bill with nothing directly to IIAs or ISDS.

As evidence of the fact that there are few Dutch laws concerning IIAs or specifically BITs, it is intriguing to note that the UNCTAD Investment Law Navigator makes no mention of any investment law, FDI screening bill or investment policy enacted and implemented by the Netherlands.[163] Although UNCTAD describes it as the "world's most comprehensive online database of national investment laws and

[161] Wet veiligheidstoets investeringen, fusies en overnames = Investments, Mergers and Acquisitions Security Screening Bill, Staatsblad 2022, No. 2015.
[162] Foreign Direct Investment Regimes Laws and Regulations Report 2023 Netherlands (iclg.com), accessed on 8 March 2023.
[163] UNCTAD, https://investmentpolicy.unctad.org/investment-laws, accessed on 24 May 2023.

regulations", since it seems that anyone can report on the law, some doubts may be raised about its thoroughness.

Notwithstanding this, the author believes the Netherlands does not need legislation specifically dedicated to IIAs. To make the decision-making process more comprehensive and to ensure the legitimacy of the tax regulations, which cannot be achieved at the moment for the reasons analysed above, the political representatives should, when drafting tax laws, simply have documentation made available to them in advance from international organisations such as UNCTAD, the OECD or even from the Dutch tax authorities, which presents the risks associated with the application of the new regulations. In this way, the new legislation could be drafted and possibly amended by having highly qualified documents attesting to the dangers involved in terms of possible challenges through ISDS.

2.1.5 The (possible) role of the Dutch Council of State

The Council of State (*Raad van State*) is an advisory body. One of its main tasks is reviewing legislative proposals and advising on their legality and quality. Indeed, before a legislative proposal is submitted to parliament, it is usually sent to the Council for review. The latter assesses whether the proposal is in accordance with the Constitution, international treaties, and other relevant legislation. Nevertheless, the advice of the Council of State is not binding, but the government and parliament generally give it great weight. This review process aims to ensure that legislative proposals are of high quality and have been thoroughly considered before they are adopted as law.

One might wonder whether the Council of State, before a tax law, is brought to the Chambers, has ever expressed any assessment of the possibility of the legislation being challenged before investment tribunals through ISDS or whether it has ever voiced the accompanying threat that this would imply for the decision-making process and the legitimacy of tax rules. The point is that in a decision-making process where political representatives do not assess the influence of IIAs and, in particular ISDS, the risks of falling into "regulatory chill" and not guarantee the legitimacy of tax legislation, the role of a body such as the Council of State would become vital. Should this inactivity on the part of government and parliament continue, turning to the Council for advice on how to amend tax legislation to avert the risks of having the measure challenged through ISDS and then having to pay substantial compensation is a highly actionable solution.

2.1.6 IIAs do not impact the application and interpretation of tax laws

A clarification must be made. In several cases, Dutch courts have mentioned and used IIAs as a legal basis. For instance, over a dozen lawsuits have explicitly referred to ECT. The point is that these cases have no impact on Dutch tax law but rather on other sectors, such as energy. In certain lawsuits, such as Yukos, Dutch legislation is not even discussed. However, this thesis aims to verify the impact these treaties have on the decision-making process concerning tax laws and the legitimacy of these laws. The decision-making process, by definition, also includes the stages of application and interpretation by the courts, and considering how only one case was found, it can be firmly argued that from this standpoint, the IIAs have no impact whatsoever.

In all likelihood, the reasons can be traced back to what has already been pointed out for the absence of parliamentary debates or specific documentation to be exploited during the decision-making process: until 2021, the Netherlands had never been involved in investment disputes as a respondent state. The government had never seen its laws challenged before arbitration courts through the ISDS mechanism. Consequently, even national courts have never found themselves having to rule on investor challenges based on IIAs. Nevertheless, when the first two cases came up in 2021, the Dutch courts did not hesitate to deliver their verdict and absolve the government of any responsibility. However, these are cases that (i) are still pending before international investment courts and (ii) have nothing to do with Dutch tax law.

Given these considerations, the author does not consider it essential that Dutch courts use IIAs as a legal basis and point of reference to resolve tax cases involving Dutch tax legislation. As soon as during the decision-making process, there will be sufficient parliamentary discussions regarding the possible impact of Dutch tax law on investors, the potential dangers of having it challenged by investors through ISDS, and consequently having to amend or even repeal it just to avoid having to pay billions in compensation, or their absence the involvement of the Dutch Council of State or the Committee on Conduit Companies. Then there will be adequate tools to ensure a decision-making process where IIAs are an integral part and capable of protecting the legitimacy of tax rules. In addition, in the hypothetical situation in which, despite all these debates in government and parliament, the newly enacted tax legislation becomes the subject of the dispute before arbitration courts through the mechanism of ISDS, the Dutch national courts will always be ready to rule on the matter, as witnessed by the two recent 2021 cases.

2.2 Interim conclusions

In Section 1, the interaction between IIAs and taxation was examined in general. In particular, it was shown how these treaties and, specifically, the dispute resolution mechanism they guarantee, i.e. the ISDS, can pose a menace to smooth decision-making processes concerning tax laws and their legitimacy. In addition, it was analysed how precisely the decision-making processes do not adequately take IIAs into account, increasing the risks.

The Netherlands is not immune to this. Although the Dutch government and parliament introduced a new national BIT model in 2019, intending to make investments more sustainable and excluding letterbox companies from the scope of application, ISDS remains the main instrument investors have at their disposal. This means that in the future, although, as explained, the Netherlands pushes for the introduction of a multilateral investment court, national tax measures could be challenged through this mechanism, with all the risks it entails. It is true that so far, the Netherlands has only been involved in ISDS disputes in two cases, not involving domestic tax measures, but there is no telling what might happen in the future. That is why "prevention is better than cure".

However, as demonstrated in para. 2.1.1 of the present Section, to date, during the decision-making process concerning tax laws, the Dutch legislator is not in the habit of assessing the impact the legislation potentially has on investors and the resulting risks of it becoming the subject of the dispute before international arbitration tribunals. Indeed, to be precise, parliamentary debates are conspicuously absent. However, parliament has repeatedly addressed ISDS's impact in limiting the legislature's ability to enact legitimate laws and policies. Additionally, some motions have been tabled to require the government to remove the ISDS mechanism from the BIT at all. In addition, the Policy and Operations Evaluation Department (IOB) in 2021[164] strictly emphasised that the Dutch position is precisely to overcome ISDS in favour of MIC. Precisely for these reasons, it seems almost nonsensical that there is no parliamentary debate on the matter when it comes to drafting tax legislation. Nor has there been any consideration of the benefits of introducing a tax-exclusion clause for ISDS.

2.3 Possible solutions and recommendations

Given these shortcomings, the author again intends to propose some simple solutions or recommendations to ensure a more comprehensive decision-making process that ensures the legitimacy of tax regulations. Since these problems are also present internationally, some answers will be reflected.

[164] IOB Evaluation, "Trading interests and values. Evaluation international trade and investment policy of the Netherlands" (2021), para. 7.2.

1) Assess the impact on investors and litigation risks through ISDS: The Dutch legislative branch should duly assess and debate if any proposed tax legislation may negatively impact its commitments to foreign investors. When drafting national tax laws and policies, lawmakers must estimate how likely the bill will be challenged through ISDS. Dutch tax policymakers cannot merely be aware of the risks without assessing them when a regulation is to be drafted and enacted. As has also been said for the international level, it sounds like a highly trivial solution. Still, it is precisely what is missing and essential to ensure a decision-making process that genuinely considers the role of IIAs and can secure and safeguard the legitimacy of tax rules. But how to achieve this? It would be sufficient that during the preparation and design of legislation, members of government and parliament discuss and assess the potential impact of the legislation on investors and the danger of it being challenged through ISDS and then perhaps amended and repealed. These discussions can occur during plenary meetings or in specially appointed technical committees.
2) Broadening the role of the Committee on Conduit Companies, UNCTAD and the Dutch tax authorities: The suggestion would be to engage some or only some of these bodies during the decision-making process as technical advisors. This would ensure the participation of teams of experts with expertise in investment, international law and tax regulations which can analyse the potential impact of tax regulations on investors and the risks of challenge through ISDS. They would be required to carefully assess critical issues and provide recommendations based on their experience through documentation of other technical value. Documentation that Dutch legislators can and should leverage during the decision-making process to make it more insightful and finally able to ensure the legitimacy of tax regulations.
3) Get the Dutch Council of State more involved: As explained in section 2.1.5, during the decision-making process, before the bill is submitted to Parliament, it is reviewed by the Council of State, which usually renders an opinion on it, but of a non-binding nature. Before the tax legislation reaches Parliament, the author recommends involving this body to obtain an opinion on how to amend the tax legislation to avert the risk of having the measure challenged through ISDS and thus having to pay substantial compensation.
4) Exploiting UNCTAD and possibly OECD documentation: In 2021, UNCTAD released a guide specifically for tax policymakers[165] to provide insights into the functioning of the provisions included in old-generation IIAs, focusing on their interaction with tax measures and possible reform options. It is a highly functional tool that national legislators could henceforth use as one of several reference points when drafting tax legislation. On the other hand, as far as the OECD is concerned,

[165] UNCTAD, "International Investment Agreements and their Implication for Tax Measures: what tax policymakers need to know" (2021).

it was explained that no tax documentation explicitly takes IIAs into account to date. This possible solution currently depends solely on the will of the OECD.

5) Leveraging public consultations: Despite the absence of parliamentary debates, the Dutch legislator can still involve the interested public through public consultations. This is already present in the Dutch system. Indeed, the Dutch government considers (optional) Internet consultation a valuable tool to supplement existing consultation practices in the legislative process and improve the quality and viability of the legislative proposals.[166] In any case, organise meetings, seminars, or conferences where investors, trade organisations, professional associations and industry experts can express their concerns and make suggestions. This can help identify potential critical issues and gather different points of view. In this way, Dutch lawmakers would theoretically be able to avoid the risks of tax regulations being challenged by investors at a later stage through ISDS, and the legitimacy of tax regulations would be safeguarded.
6) Conducting comparative research: The idea would be to conduct a comparative analysis of the tax laws of other countries or similar regions. Study how they deal with similar problems and their approaches to mitigate litigation risks through ISDS and encourage investment. This could provide valuable insights and best practices that can be adapted to the specific situation the Dutch legislator would be facing.
7) Introducing monitoring and evaluation phases: Once tax legislation has been implemented, it would be crucial to closely monitor the effectiveness and impact of the tax measures adopted. Regularly evaluate the results and make necessary changes based on new information and developments in the economic environment. These would be changes or amendments not forced by arbitration awards or the mere need to avoid the payment of large sums of money. But the basis would ideally be a comprehensive decision-making process, where the IIAs are an integral part, accompanied by various parliamentary discussions concerning the possible impact of tax legislation on investors and the risks of challenge through ISDS.
8) Investing in training and awareness: In the aforementioned OECD report on investment protection[167], it is pointed out that the general degree of understanding of treaties and their provisions by the broad public interacting with foreign investors tends to be low. High-profile cases, press coverage, and parliamentary and public debate can significantly increase general awareness. Therefore, investing in the training and awareness-raising of personnel involved in drafting tax regulations would be necessary. It should be ensured that they have a good

[166] For instance, on 24 October 2022, the Netherlands launched a public consultation on the draft bill to implement Pillar Two by 31 December 2023, while in 2017, to implement the Anti-Tax Avoidance Directive (ATAD 1).
[167] OECD Working Paper on International Investment 2017/02, "The balance between investor protection and the right to regulate in investment treaties: A scoping paper" (2017), Chapter V. Part. C.

understanding of international investment principles, the risks associated with ISDS and the implications of tax regulations for investors. This will help to foster informed decision-making on the relevant issues.

Again, one must wonder to what extent these solutions and recommendations are feasible. As before, they will be analysed one by one.

1) This is the key solution. To date, as explained, the Dutch BITs do not include a tax exclusion clause for ISDS. It is true that it is made clear in the model that once an eventual MIC comes into operation, it will take precedence, but ISDS is still the mechanism of choice. For these reasons, it is imperative that the Dutch legislator, during the decision-making process regarding tax laws or tax plans more generally, discusses the potential impact of the legislation on investors and the risks of challenge through ISDS. This would alleviate the danger that tax laws, as a result of arbitral awards, would be amended or repealed, or in any case, prevented from being drafted with the sole purpose of avoiding multibillion-dollar offsets. The solution is, in the author's opinion, achievable. It is clear that the decision-making process will be prolonged, but this is the necessary consequence of an assessment made with the sole objective of ensuring that it runs smoothly and that it is able to secure and preserve the legitimacy of the tax rules.
2) This is a feasible solution in itself. However, it would most likely be difficult to involve UNCTAD directly as a technical advisor, even though it participated, for example, in the public consultations concerning the introduction of the new Dutch BIT model. As far as the Committee on the Conduit Society is concerned, it is a body established for different purposes. However, given that, as explained, no BITs signed by the Netherlands have been renegotiated through the new model and no new ones have been ratified since 2013[168], letterbox companies will still be a scourge for treaty shopping and tax treaty shopping risks for a while, despite the Dutch government's efforts to counteract them. It is therefore not unreasonable to assume that this committee can actively participate during the decision-making process regarding tax laws, with the task of assessing the impact of legislation on investors (including letterbox companies) and the risks of counteracting them. The third possibility would be to involve the Dutch tax authorities. As explained in para. 1.1, the perspective of the tax authorities usually prevails in the context of Dutch tax law. Therefore, requiring them to be more involved in assessing the impact on investors and the risks of using ISDS appears to be the most feasible solution.

[168] UNCTAD, International Investment Agreements Navigator, https://investmentpolicy.unctad.org/international-investment-agreements/countries/148/netherlands, accessed on 10 June 2023.

3) It is a highly feasible solution. The point is that, in a decision-making process, such as the Dutch one, where political representatives do not assess the influence of IIAs and, in particular, ISDS, the risks of falling into "regulatory chill" and not guarantee the legitimacy of tax legislation, the role of a body such as the Council of State would become vital.
4) In this case, it depends on which organisation we refer to. As far as UNCTAD is concerned, between the guide for tax policymakers published in 2021, the World Investment Reports (in particular those of 2015[169], 2016[170], and 2022[171]) and other studies, there is a plethora of material that the Dutch legislator can exploit and use during the decision-making process regarding tax laws. In this case, this is a more than feasible option. On the other hand, as far as the OECD is concerned, we know that, at the moment, no tax documentation explicitly refers to IIAs or ISDS risks. For this reason, it cannot be relied upon.
5) Public consultations are an instrument already in the possession of the Dutch government and parliament. In the author's opinion, it is an appropriate solution. It is simply a matter of focusing these consultations on the impact of tax legislation on investors being able to grasp the potential risks of challenges before arbitration courts. Including them permanently in the decision-making process would be a valuable tool to ensure and safeguard the legitimacy of Dutch tax laws and policies.
6) This is currently an unfeasible solution. As has already been emphasised in Section I and as will be further demonstrated in Section 3 through the legal comparison, to date, it is very rare to find countries that have openly discussed during their decision-making processes concerning their tax laws the impact they may have on investors and the risks associated with ISDS. Similarly, it is difficult to find governments and national parliaments that have debated the appropriateness of introducing tax exclusion clauses for ISDS. For this reason, comparative research is highly problematic. What is certain is that when these parliamentary debates are held in the future, it will be an enforceable solution.
7) Monitoring and evaluation mechanisms would further alleviate the risks of tax law challenges through ISDS. The economic and financial environment is constantly changing. The interests of investors and the impact a tax regulation may have on them may evolve over time. Therefore, even if hypothetically, in the course of the decision-making process, there are parliamentary debates, there is the use of highly technical documents or the involvement of external bodies as technical advisors, monitoring how the legislation evolves is necessary to avoid it being challenged due to

[169] UNCTAD, "World Investment Report 2015. Reforming International Investment Governance" (2015).
[170] UNCTAD, "World Investment Report 2016. Investor Nationality: Policy Challenges" (2016).
[171] UNCTAD, "World Investment Report 2022. International Tax Reforms and Sustainable Investment" (2022).

inactivity on the part of the Dutch government and parliament. The question, however, is how to introduce these mechanisms. Should there be a special body in charge? Should the government and parliament deal with them themselves? Perhaps their introduction would make the decision-making process too costly and burdensome. This isn't easy to predict. In itself, in the author's opinion, it is an effective solution, but it is hard to verify beforehand for a number of reasons.

8) Usually, the Dutch tax authorities issue guidance and instructions to tax officials on applying the tax treaties' provisions. This is a starting point. The personnel involved in drafting and preparing Dutch tax laws and public officials need to be conscious of the relationship between IIAs and tax matters, the potential risks ISDS might pose to the state's tax sovereignty and the Dutch legislator's ability to produce legitimate tax regulations. This awareness, which could also depend on knowledge of some of the most important ISDS disputes, would give more sustainability to the decision-making process and increase the chances of enjoying legitimate tax regulations. And taking into account that the Dutch tax authorities are already in the habit of issuing guidelines and instructions on how to apply the treaties, the author believes that the responsibility of 'coaching' this staff and public officials can be placed on them in case this awareness cannot depend on the existence of parliamentary debates or ISDS cases involving the Netherlands as a respondent state, making the solution feasible.

2.4 Further considerations regarding the Wintercourse comparison

The objective of the legal comparison, in addition to highlighting the similarities and differences between the various participating countries, is to see whether the latter's solutions can be applied in the Netherlands if loopholes or issues need to be overcome. However, the analysis concerning IIAs is unusual because each country faces the same problems. Every single country examined has no parliamentary debates or discussions regarding the appropriateness of introducing tax exclusion clauses within their BITs. With the possible exception of Spain, there is a general scarcity or even absence of national laws concerning BITs. National courts tend not to give too much consideration to IIAs in their tax rulings.

These aspects have been considered when examining the impact of IIAs from an international perspective and stating that they are not an integral component of decision-making processes concerning tax laws.

For all these reasons, it is not possible to provide suggestions or possible recommendations, structured on the experiences of these countries, to improve the Dutch system. Nevertheless, among the various solutions proposed in the previous paragraph is the introduction of comparative research. The latter should precisely be based on and carried out by evaluating those arrangements and mechanisms adopted by other countries. This is an option that is highly dependent on future developments. If the various countries, including the

Netherlands, begin to seriously evaluate the influence of the IIA and ISDS on the decision-making processes regarding tax laws and the legitimacy of the latter by adopting counter mechanisms or some of the solutions proposed by the author, the system will only benefit. Then, it will also be possible to conduct comparative research and assess which measures introduced by certain countries could be implemented in the Netherlands.

SECTION V

Conclusions

It all started with this research question: "To what extent do IIAs impact the decision-making process concerning tax laws and consequently their legitimacy from an international, Dutch and comparative perspective?"

As it turns out, the correlation points between IIAs and tax matters are numerous. From the non-discrimination clauses in these agreements (i.e., the NT and MFN clauses) to the potential overlap between IIAs and DTTs. But above all, the dispute resolution mechanism that these agreements make available to foreign investors, namely the ISDS. Through the latter, investors can rely on a procedure more congenial to them than the MAP. The issue that states are facing, however, is an increasing number of disputes in which foreign investors challenge domestic tax measures through ISDS before international investment tribunals.

Consequently, as has already happened in some cases, national governments may be forced to change or even repeal their tax regulations due to unfavourable arbitration awards. Worse still, governments and parliaments could see themselves implicitly obliged to draft their tax laws for the sole purpose of not having them challenged through ISDS and avoiding the payment of large sums of money in compensation and subsequent financial risks. It is, therefore, clear that the decision-making processes concerning tax laws would be highly compromised, and consequently, the legitimacy of tax laws would not be guaranteed and safeguarded.

For all these reasons, it would be reasonable to assume that states, during their decision-making processes regarding tax laws, would give adequate consideration to IIAs, specifically through parliamentary or governmental debates on the potential impact the legislation might have on foreign investors, the consequent risks of challenge through ISDS, and whether or not tax exclusion clauses should be introduced. However, this does not occur. Both internationally and specifically concerning the Netherlands. What is surprising, as also shown by the analysis of OECD documents and reports of discussions by the Dutch parliament and government, is that states are keenly aware of the threat posed by IIAs and ISDS. Consequently, it seems almost nonsensical that in government or parliament, during the drafting phase of tax laws, there is no in-depth assessment of these instruments' role.

Concerning the international perspective specifically, the role of the OECD has also been questioned. As it turns out, even the OECD tax documentation does not mention IIAs. The same applies to public consultation reports, discussion drafts, and studies related to this documentation. This led us to conclude that IIAs are not essential to the decision-making process, even at the OECD. Nevertheless, one has tried to reason why this is not the case, and the reason would probably be that foreign investors clearly do not challenge OECD tax documentation through ISDS but only domestic tax measures. However, in the author's opinion, given that the OECD documents serve as international standards, it would be more than beneficial to render the decision-making process at the OECD more comprehensive by paying more attention to the role of IIAs and ISDS. Or, as suggested in para. 1.6 Section IV, guidelines could be drawn up for properly handling national decision-making processes concerning tax laws.

The problems that were examined from an international perspective also involved the Netherlands. Several parliamentary debates, reports and motions submitted to the government testify that the Dutch legislator is aware of the risks associated with IIAs and ISDS in particular. However, this is completely unrelated to the drafting of tax regulations. Indeed, during the decision-making process concerning tax laws, briefly described in Chapter 1 Section II, these debates do not seem to be present. When tax legislation is to be drafted, there is no assessment of the possible impact on investors or the likelihood that the newly enacted law will become the subject of dispute before international investment tribunals within a few years.
For this reason, several solutions or recommendations have been put forward, which the Dutch lawmaker could consider to make the decision-making process more exhaustive and ensure the legitimacy of the tax regulations. Among these are the obvious need for parliamentary/governmental discussions, the possibility of involving the Council of State more deeply, leveraging public consultations, investing in training and awareness, etc. In addition, it is worth emphasising that the role of the Dutch courts cannot be relied upon either. These, to date, have never considered IIAs in the context of their tax rulings, and consequently, these agreements do not influence the application and interpretation of tax laws.

Regarding the EUCOTAX Wintercourse, this sub-research question has been raised: "*Are there similarities between the decision-making processes of other countries and the Dutch one in the way IIAs are involved? Have parliaments discussed the potential impact of IIAs on tax matters and the legitimacy of tax rules?*".
As shown and explained, all countries seem to face the same concerns. During the decision-making processes regarding tax laws, there are no parliamentary debates regarding the impact the legislation might have on investors, the possible risks of challenge through ISDS, the benefits of signing these agreements, or the appropriateness of including tax-exclusion clauses. Almost every country does not have national laws specifically dealing with IIAs or ISDS. For this reason, it can be said that there are similarities between the

decision-making processes of the countries present at the Wintercourse. However, this is not the ideal solution, and many of the recommendations tabled from an international perspective may apply to any of these countries.

In conclusion, it can be argued that IIAs indirectly impact decision-making processes concerning tax laws. Due to ISDS challenges by foreign investors, states may have to amend and repeal their tax laws, or they may have to draft them a priori with the sole intention of not having them challenged and not having to pay billions in compensation. It is clear that such a decision-making process would be highly compromised and unable to ensure the legitimacy of tax regulations. This is why we need decision-making processes that actually take IIAs into account when drafting tax legislation. Unfortunately, this thesis demonstrates that such decision-making processes are currently absent. Therefore, the author has presented several possible solutions and suggestions for improving the current system.

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- *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11
- *Renta 4 SVSA and others v. The Russian Federation*, SCC No 24/2007, Award, 20 July 2012
- *Vodafone International Holdings BV v. Government of India [I]*, PCA Case No. 2016–35
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Annex 1: Tax-related ISDS disputes

Source: UNCTAD[172]

No.	Year of initiation	Short case name	Applicable IIA	Outcome
1	1995	Goetz v. Burundi (I)	BLEU (Belgium-Luxembourg Economic Union)– Burundi BIT (1989)	Settled
2	1999	Link Trading v. Moldova	Moldova, Republic of–United States of America BIT (1993)	Decided in favour of State
3	1999	Feldman v. Mexico	NAFTA (1992)	Decided in favour of investor
4	2001	Enron v. Argentina	Argentina–United States of America BIT (1991)	Decided in favour of investor
5	2001	Crespo and others v. Poland	Poland–Spain BIT (1992)	Neither investor nor the State (liability found but no damages awarded)
6	2002	Tokios Tokelés v. Ukraine	Lithuania–Ukraine BIT (1994)	Decided in favour of State
7	2002	Occidental v. Ecuador (I)	Ecuador–United States of America BIT (1993)	Decided in favour of investor
8	2002	Canfor v. USA	NAFTA (1992)	Settled
9	2002	Ahmonseto v. Egypt	Egypt–United States of America BIT (1986)	Decided in favour of State
10	2003	Plama v. Bulgaria	ECT (1994); Bulgaria–Cyprus BIT (1987)	Decided in favour of State
11	2003	Pan America v. Argentina	Argentina–United States of America BIT (1991)	Settled
12	2003	Encana v. Ecuador	Canada–Ecuador BIT (1996)	Decided in favour of State
13	2003	El Paso v. Argentina	Argentina–United States of America BIT (1991)	Decided in favour of investor
14	2004	Terminal Forest v. USA	NAFTA (1992	Settled
15	2004	Tembec v. USA	NAFTA (1992	Settled
16	2004	Telenor v. Hungary	Hungary–Norway BIT (1991)	Decided in favour of State
17	2004	Grand River v. USA	NAFTA (1992	Decided in favour of State
18	2004	Duke Energy v. Ecuador	Ecuador–United States of America BIT (1993)	Decided in favour of investor
19	2004	Corn Products v. Mexico	NAFTA (1992	Decided in favour of investor
20	2004	BP v. Argentina	Argentina–United States of America BIT (1991)	Settled
21	2004	ADM v. Mexico	NAFTA (1992)	Decided in favour of investor
22	2005	Yukos International v. Russia	ECT (1994)	Decided in favour of investor

[172] UNCTAD, "Facts On Investor-State Arbitrations In 2021: Whit A Special Focus On Tax-Related ISDS Cases" (July 2022).

23	2005	Veteran Petroleum v. Russia	ECT (1994)	Decided in favour of investor
24	2005	RosInvest v. Russia	Russian Federation–United Kingdom BIT (1989)	Decided in favour of investor
25	2005	Noble Energy v. Ecuador	Ecuador–United States of America BIT (1993)	Settled
26	2005	Micula v. Romania (I)	Romania–Sweden BIT (2002)	Decided in favour of investor
27	2005	Hulley Enterprises v. Russia	ECT (1994)	Decided in favour of investor
28	2005	EDF v. Romania	Romania–United Kingdom BIT (1995)	Decided in favour of State
29	2005	Cargill v. Mexico	NAFTA (1992)	Decided in favour of investor
30	2005	Bogdanov v. Moldova (II)	Moldova, Republic of–Russian Federation BIT (1998)	Decided in favour of State
31	2005	Binder v. Czechia	Czechia–Germany BIT (1990)	Decided in favour of State
32	2005	Amto v. Ukraine	ECT (1994)	Decided in favour of State
33	2006	Roussalis v. Romania	Greece–Romania BIT (1997)	Decided in favour of State
34	2006	Rompetrol v. Romania	Netherlands–Romania BIT (1994)	Neither investor nor the State (liability found but no damages awarded)
35	2006	Quiborax v. Bolivia	Bolivia, Plurinational State of–Chile BIT (1994)	Decided in favour of investor
36	2006	Phoenix Action v. Czechia	Czechia–Israel BIT (1997)	Decided in favour of State
37	2006	Oostergel v. Slovakia	Netherlands–Slovakia BIT (1991)	Decided in favour of State
38	2006	Nations Energy v. Panama	Panama–United States of America BIT (1982)	Decided in favour of State
39	2007	Tza Yap Shum v. Peru	China–Peru BIT (1994)	Decided in favour of investor
40	2007	TCW v. Dominican Republic	CAFTA–DR (2004)	Settled
41	2007	Renta 4 S.V.S.A and others v. Russia	Russian Federation–Spain BIT (1990)	Decided in favour of investor
42	2007	Paushok v. Mongolia	Mongolia–Russian Federation BIT (1995)	Data not available
43	2007	Mobil and others v. Venezuela	Netherlands–Venezuela, Bolivarian Republic of BIT (1991)	Decided in favour of investor
44	2007	Domtar v. USA	NAFTA (1992)	Discontinued for unknown reasons
45	2007	ConocoPhillips v. Venezuela	Netherlands–Venezuela, Bolivarian Republic of BIT (1991)	Decided in favour of investor
46	2008	Perenco v. Ecuador	Ecuador–France BIT (1994)	Decided in favour of investor
47	2008	Murphy v. Ecuador (I)	Ecuador–United States of America BIT (1993)	Decided in favour of State
48	2008	Burlington v. Ecuador	Ecuador–United States of America BIT (1993)	Decided in favour of investor

49	2009	MTN v. Yemen	United Arab Emirates–Yemen BIT (2001)	Settled
50	2009	Mærsk v. Algeria	Algeria–Denmark BIT (1999)	Settled
51	2009	Bogdanov v. Moldova (III)	Moldova, Republic of–Russian Federation BIT (1998)	Decided in favour of investor
52	2010	Bozbey v. Turkmenistan	Türkiye–Turkmenistan BIT (1992)	Discontinued for unknown reasons
53	2011	The PV Investors v. Spain	ECT (1994)	Decided in favour of investor
54	2011	Ryan and others v. Poland	Poland–United States of America BIT (1990)	Decided in favour of State
55	2011	Murphy v. Ecuador (II)	Ecuador–United States of America BIT (1993)	Decided in favour of investor
56	2011	Bawabet v. Egypt	Egypt–Kuwait BIT (2001)	Settled
57	2012	Sanum Investments v. Laos	China–Lao People's Democratic Republic BIT (1993)	Decided in favour of State
58	2012	Orascom v. Algeria	Algeria–BLEU (Belgium-Luxembourg Economic Union) BIT (1991)	Decided in favour of State
59	2012	LSF-KEB v. Korea	BLEU (Belgium-Luxembourg Economic Union)– Korea, Republic of BIT (1974)	Pending
60	2012	Lao Holding v. Laos (I)	Lao People's Democratic Republic–Netherlands BIT (2003)	Decided in favour of State
61	2012	Charanne and Construction Investments v. Spain	ECT (1994)	Decided in favour of State
62	2012	Bogdanov v. Moldova (IV)	Moldova, Republic of–Russian Federation BIT (1998)	Decided in favour of State
63	2012	Bidzina Ivanishvili v. Georgia	France–Georgia BIT (1997)	Discontinued for unknown reasons
64	2012	Ampal-America and others v. Egypt	Egypt–United States of America BIT (1986); Egypt–Germany BIT (2005)	Settled
65	2013	Voltaic Network v. Czechia	Czechia–Germany BIT (1990); ECT (1994)	Decided in favour of State
66	2013	Spentex v. Uzbekistan	Netherlands–Uzbekistan BIT (1996)	Decided in favour of State
67	2013	RREEF v. Spain	ECT (1994)	Decided in favour of investor
68	2013	Photovoltaik Knopf v. Czechia	Czechia–Germany BIT (1990); ECT (1994)	Decided in favour of State
69	2013	Natland and others v. Czechia	Czechia–Netherlands BIT (1991); Cyprus– Czechia BIT (2001); BLEU (Belgium-Luxembourg Economic Union)–Czechia BIT (1989); ECT (1994)	Pending
70	2013	JSW Solar and Wirtgen v. Czechia	Czechia–Germany BIT (1990)	Decided in favour of State
71	2013	Isolux v. Spain	ECT (1994)	Decided in favour of State
72	2013	Infrastructure Service and Energia Termosolar (formerly Antin) v. Spain	ECT (1994)	Decided in favour of investor
73	2013	I.C.W. v. Czechia	Czechia–United Kingdom BIT (1990); ECT (1994)	Decided in favour of State
74	2013	Güneş Tekstil and others v. Uzbekistan	Türkiye–Uzbekistan BIT (1992)	Decided in favour of investor

75	2013	Federal Elektrik Yatirim and others v. Uzebekistan	Türkiye–Uzbekistan BIT (1992); ECT (1994)	Settled
76	2013	Europa Nova v. Czechia	Cyprus–Czechia BIT (2001); ECT (1994)	Decided in favour of State
77	2013	Eiser and Energía Solar v. Spain	ECT (1994)	Decided in favour of investor
78	2013	CSP Equity Investment v. Spain	ECT (1994)	Pending
79	2013	Antaris and Göde v. Czechia	Germany–Slovakia BIT (1990); ECT (1994)	Decided in favour of State
80	2013	Alghanim v. Jordan	Jordan–Kuwait BIT (2001)	Decided in favour of State
81	2014	Vodafone v. India (I)	India–Netherlands BIT (1995)	Decided in favour of investor
82	2014	Unión Fenosa v. Egypt	Egypt–Spain BIT (1992)	Decided in favour of investor
83	2014	Rwe Innogy v. Spain	ECT (1994)	Decided in favour of investor
84	2014	RENERGY v. Spain	ECT (1994)	Pending
85	2014	NextEra v. Spain	ECT (1994)	Decided in favour of investor
86	2014	Masdar v. Spain	ECT (1994)	Decided in favour of investor
87	2014	Luxtona v. Russia	ECT (1994)	Pending
88	2014	Longyear v. Canada	NAFTA (1992)	Discontinued for unknown reasons
89	2014	InfraRed and others v. Spain	ECT (1994)	Decided in favour of investor
90	2014	Blusun v. Italy	ECT (1994)	Decided in favour of State
91	2015	Watkins and others v. Spain	ECT (1994)	Decided in favour of investor
92	2015	Total E&P v. Uganda	Netherlands–Uganda BIT (2000)	Settled
93	2015	Stadtwerke München and others v. Spain	ECT (1994)	Decided in favour of State
94	2015	SolEs Badajoz v. Spain	ECT (1994)	Decided in favour of investor
95	2015	Solarpark v. Spain	ECT (1994)	Discontinued for unknown reasons
96	2015	Silver Ridge v. Italy	ECT (1994)	Decided in favour of State
97	2015	OperaFund and Schwab v. Spain	ECT (1994)	Decided in favour of investor
98	2015	Novenergia v. Spain	ECT (1994)	Decided in favour of investor
99	2015	Landesbank Baden-Württemberg and others v. Spain	ECT (1994)	Pending
100	2015	KS and TLS Invest v. Spain	ECT (1994)	Pending
101	2015	Kruck and others v. Spain	ECT (1994)	Pending
102	2015	JGC v. Spain	ECT (1994)	Decided in favour of investor
103	2015	Hydro Energy 1 and Hydroxana v. Spain	ECT (1994)	Decided in favour of investor

104	2015	Hydro and others v. Albania	Albania–Italy BIT (1991)	Decided in favour of investor
105	2015	Hanocal and IPIC International v. Korea	Korea, Republic of–Netherlands BIT (2003)	Discontinued for unknown reasons
106	2015	Greentech and NovEnergia v. Italy	ECT (1994)	Decided in favour of investor
107	2015	Foresight and others v. Spain	ECT (1994)	Decided in favour of investor
108	2015	Eskosol v. Italy	ECT (1994)	Decided in favour of State
109	2015	E.ON SE and others v. Spain	ECT (1994)	Pending
110	2015	Cube Infrastructure and others v. Spain	ECT (1994)	Decided in favour of investor
111	2015	CEF Energia v. Italy	ECT (1994)	Decided in favour of investor
112	2015	Cavalum SGPS v. Spain	ECT (1994)	Pending
113	2015	Cairn v. India	India–United Kingdom BIT (1994)	Decided in favour of investor
114	2015	Belenergia v. Italy	ECT (1994)	Decided in favour of State
115	2015	BayWa r.e. v. Spain	ECT (1994)	Decided in favour of investor
116	2015	Alten Renewable v. Spain	ECT (1994)	Pending
117	2015	9REN Holding v. Spain	ECT (1994)	Decided in favour of investor
118	2016	Vedanta v. India	India–United Kingdom BIT (1994)	Pending
119	2016	Sun Reserve v. Italy	ECT (1994)	Decided in favour of State
120	2016	Shell Philippines v. Philippines	Netherlands–Philippines BIT (1985)	Pending
121	2016	Lao Holdings v. Laos (II)	Lao People's Democratic Republic–Netherlands BIT (2003)	Pending
122	2016	Infracapital v. Spain	ECT (1994)	Pending
123	2016	Green Power and SCE v. Spain	ECT (1994)	Pending
124	2016	Glencore International and C.I. Prodeco v. Colombia (I)	Colombia–Switzerland BIT (2006)	Decided in favour of investor
125	2016	Eurus Energy v. Spain	ECT (1994)	Pending
126	2016	ESPF and others v. Italy	ECT (1994)	Decided in favour of investor
127	2016	EDF v. Spain	ECT (1994)	Pending
128	2016	Cordoba Beheer and others v. Spain	ECT (1994)	Pending
129	2016	CIC Renewable and others v. Italy	ECT (1994)	Pending
130	2016	Biram and others v. Spain	ECT (1994)	Decided in favour of investor
131	2016	Alhambra v. Kazakhstan	Kazakhstan–Netherlands BIT (2002)	Data not available
132	2016	Albacora v. Ecuador	Ecuador–Spain BIT (1996)	Decided in favour of State
133	2017	Vodafone v. India (II)	India–United Kingdom BIT (1994)	Pending
134	2017	Triodos SICAV II v. Spain	ECT (1994)	Pending

135	2017	Portigon v. Spain	ECT (1994)	Pending
136	2017	Nissan v. India	India–Japan EPA (2011)	Settled
137	2017	Mera Investment v. Serbia	Cyprus–Serbia BIT (2005)	Data not available
138	2017	ICL Europe v. Ethiopia	Ethiopia–Netherlands BIT (2003)	Decided in favour of State
139	2017	FREIF Eurowind v. Spain	ECT (1994)	Decided in favour of State
140	2017	ConocoPhillips and Perenco v. Viet Nam	United Kingdom–Viet Nam BIT (2002	Pending
141	2017	Bursel Tekstil and others v. Uzbekistan	Türkiye–Uzbekistan BIT (1992)	Pending
142	2018	The Carlyle Group and others v. Morocco	Morocco–United States FTA (2004)	Pending
143	2018	Manolium-Processing v. Belarus	Treaty on Eurasian Economic Union (2014)	Decided in favour of investor
144	2018	LSG Building Solutions and others v. Romania	ECT (1994)	Pending
145	2018	Itochu v. Spain	ECT (1994)	Pending
146	2018	European Solar Farms v. Spain	ECT (1994)	Pending
147	2018	Ersoy v. Azerbaijan	Azerbaijan–Türkiye BIT (1994)	Settled
148	2019	Okuashvili v. Georgia	Georgia–United Kingdom BIT (1995)	Pending
149	2019	Legacy Vulcan v. Mexico	NAFTA (1992)	Pending
150	2019	IC Power v. Guatemala	Guatemala–Israel BIT (2006)	Decided in favour of State
151	2019	Axiata and Ncell v. Nepal	Nepal–United Kingdom BIT (1993)	Pending
152	2019	Aecon v. Ecuador	Canada–Ecuador BIT (1996	Pending
153	2020	Telcell v. Georgia	Georgia–United States of America BIT (1994)	Pending
154	2020	South32 v. Colombia	Colombia–United Kingdom BIT (2010)	Pending
155	2020	SMM Cerro v. Peru	Netherlands–Peru BIT (1994)	Pending
156	2020	Shift Energy v. Japan	Hong Kong, China SAR–Japan BIT (1997)	Pending
157	2020	Freeport-McMoRan v. Peru	Peru–United States FTA (2006)	Pending
158	2020	Fin.Doc and others v. Romania	ECT (1994)	Pending
159	2020	Encavis and others v. Italy	ECT (1994)	Pending
160	2021	Telefónica v. Peru	Peru–Spain BIT (1994	Pending
161	2021	SREW v. Ukraine	BLEU (Belgium-Luxembourg Economic Union)– Ukraine BIT (1996)	Pending
162	2021	Spanish Solar v. Spain	ECT (1994)	Pending
163	2021	Modus Energy v. Ukraine	ECT (1994)	Pending
164	2021	Misen v. Ukraine	Sweden–Ukraine BIT (1995)	Pending
165	2021	First Majestic v. Mexico	NAFTA (1992); USMCA (2018	Pending

Annex 2: ISDS tax-related cases brought under Dutch BITs

Source: UNCTAD[173]

Year of initiation	Case name	Applicable Dutch BIT	Outcome
2006	**The Rompetrol Group N.V. v. Romania**	Netherlands-Romania BIT (1994)	Neither investor nor the State (liability found but no damages awarded)
2006	**Jan Oostergetel and Theodora Laurentius v. The Slovak Republic**	Netherlands-Slovakia BIT (1991)	Decided in favour of the State
2007	**Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v. Bolivarian Republic of Venezuela**	Netherlands-Venezuela, Bolivarian Republic of BIT (1991)	Decided in favour of the investor
2007	**ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela**	Netherlands-Venezuela, Bolivarian Republic of BIT (1991)	Decided in favour of the investor
2012	**Lao Holdings N.V. v. Lao People's Democratic Republic (I)**	Lao People's Democratic Republic-Netherlands BIT (2003)	Decided in favour of the State
2013	**Spentex Netherlands, B.V. v. Republic of Uzbekistan**	Netherlands-Uzbekistan BIT (1996)	Decided in favour of the State
2014	**Vodafone International Holdings BV v. India (I)**	India-Netherlands BIT (1995)	Decided in favour of the investor
2015	**Total E&P Uganda BV v. Republic of Uganda**	Netherlands-Uganda BIT (2000)	Settled
2016	**Shell Philippines Exploration B.V. v. Republic of the Philippines**	Netherlands-Philippines BIT (1985)	Pending
2016	**Lao Holdings N.V. v. Lao People's Democratic Republic (II)**	Lao People's Democratic Republic-Netherlands BIT (2003)	Pending
2016	**Alhambra Resources Ltd. and Alhambra Coöperatief U.A. v. Republic of Kazakhstan**	Kazakhstan-Netherlands BIT (2002)	Data not available
2017	**ICL Europe Coöperatief U.A. v. Ethiopia**	Ethiopia-Netherlands BIT (2003)	Decided in favour of the State
2020	**SMM Cerro Verde Netherlands B.V. v. Republic of Peru**	Netherlands-Peru BIT (1994)	Pending

[173] UNCTAD, "Facts On Investor-State Arbitrations In 2021: Whit A Special Focus On Tax-Related ISDS Cases" (July 2022).