European Federation for Investment Law and Arbitration

EFILA's submission for the public consultation regarding the Dutch draft model BIT text

18 June 2018

1. EFILA is grateful for having the opportunity to submit its views on the Dutch draft model BIT text to the Dutch Government.
2. The European Federation for Investment Law and Arbitration (EFILA) is a Brussels-based think tank and its membership consists of various stakeholders, including investors, law firms, arbitrators and academics.
3. EFILA tracks and analyses the EU investment policy, including in the EU Member States, by offering a platform for fact- and merit-based discussion.
4. EFILA is unique in that it brings together a very high level of practical expertise in investment law and arbitration and in that sense is an organization that can contribute with added value in order to develop a model BIT text that is practical, effective and efficient from the perspective of the users.
5. The purpose of these comments is to highlight several aspects that in our view should be modified in order to improve the current draft model BIT text.
6. From the outset, EFILA wishes to underline that the fact that the Netherlands belongs to the top-5 countries in the world as far as in- and outgoing Foreign Direct Investments (FDI) are concerned. Therefore, Dutch BITs are of utmost importance for foreign investors globally. **Consequently, it is important that the concerns and suggestions from practice are actually taken into account.**
7. It appears that **Article 4 (transparency) and Article 5 (Rule of Law)** appear to create new substantive rights for investors. However, it is unclear how these provisions interact with the protections contained in Article 9 (treatment of investors), in particular Article 9(1)(b) (fundamental breach of due process, including fundamental breach of transparency, in judicial and administrative proceedings) and Article 9(1)(c) (manifest arbitrariness)? This is problematic because Articles 4 and 5 are apparently not themselves directly enforceable by investors. More generally, if it is the intention of Article 4 and Article 5 to create new substantive rights for investors, they should be enforceable in order to have any effect.
   Therefore, it is advisable to clarify the relationship between Articles 4 and 5 on the one hand and, Article 9 on the other hand. Also, it should be clarified whether and how these provisions are enforceable by investors, if that is intended.
8. The FET provision contained in Article 9(2) is apparently modelled according to the one in CETA. However, it remains unclear what the specific FET breaches actually mean and what their threshold is? For example, is it "fair" to be arbitrary, as long as it is not "manifestly" arbitrary? Is a breach of "non-fundamental" due process rules acceptable? There is an inherent tension between the chapeau in Article 9(1) and the specific FET breaches listed in Article 9(2). **Therefore, it is advisable to remove vague qualifiers such as "fundamental" and "manifest" from the FET provision and to ensure no inconsistency between 9(1) and 9(2).**

9. The umbrella clause in Article 9(5) does not deal with the interplay between contractual and treaty dispute resolution provisions. However, this issue has caused difficulties to previous tribunals and **therefore should be clarified.** In addition, Article 9(5) introduces a risk that a State institution may end up unintentionally binding another State institution contrary to the division of power between the two. **It might be advisable to clarify the language of this provision also in this regard.**

10. Article 12(5) provides that "the compensation shall amount to the fair market value of the investment at the time immediately before the expropriation or the impending expropriation became known, whichever is earlier." However, this provision leaves the timing issue with respect to compensation for creeping expropriation unresolved. The wording of Article 12(5) could arguably be interpreted as meaning that it is the value of the investment just before the State conduct ultimately results in an expropriation (a creeping one) that would be relevant. That value may be very low compared to the value of the investment before the initial State measures, and may thus not compensate investor-claimants for the actual losses suffered as a result of a creeping expropriation. **Therefore, it would make sense to clarify the wording in order to avoid such an outcome.**

11. Moreover, Article 12(5) states that "[f]or greater certainty, this Agreement creates no other method for evaluation of the compensation." It is not entirely clear how this should be understood. Does this exclude compensation in the form of lost profits, lost dividends, direct costs etc. as a result of a violation of (for example) the FET standard? If so, what would be the purpose of such a provision? If the purpose is only to clarify that shareholder damages (equating the losses of local companies with those of their shareholders) shall not be awarded, then **this could be clarified separately. More generally, it should be further considered whether it makes sense to exclude other means of estimating losses than the Fair Market Value method.**

12. Article 13 may be redundant because of the Full Protection and Security clause in Article 9(1). Indeed, an investor will claim most likely rely on Article 9(1) rather than on the non-discriminatory compensation under Article 13.

13. The **denial of benefits clause in Article 16(3)** lacks clarity on several points. It does not refer to the exact time at which the denial may be made by the State. For reasons of legal certainty, this should be clarified, in particular by **explicitly stating that a State cannot deny the benefits of the BIT to an investor once the State has learned that the investor invokes the dispute resolution provision in the BIT**. **Accordingly, it would be advisable that (i) more explicit language is used with regard to the issue of retroactive application of the denial of benefits clause, and (ii) the BIT regulates the precise timing requirements for raising the denial of benefits objection**. For example, that the State must raise any denial of benefits objection within the cooling off period. It should also be clarified that any such objections would be decided by the tribunal.

14. Article 16(2) states that "an investor may not submit a claim under this Section if the investment has been made through fraudulent misrepresentation, concealment, corruption, or similar bad faith conduct amounting to an abuse of process". However, it

usually not clear at the moment of submission of a claim whether, and if so, to what extent any of these situations have actually taken place. This is something that usually becomes apparent during the arbitration proceedings and if needed will be dealt with by the tribunal. However, it seems unfair to take an investor-claimant the right to submit a claim without that any wrongdoing by the investor-claimant has been independently verified. The current wording suggests that the mere accusation by the State is sufficient to deny the investor-claimant access to justice. **Therefore, this provision should be dropped or alternatively clarified as an element that has to be ultimately determined by the tribunal.**

15. The requirement for investors to disclose third party funders (Article 19(8)) appears to be not sufficiently developed. It could be helpful to spell out what are the reasons for this requirement in order to help tribunals deal with this issue. In particular, it **should be clarified what are the reasons for this requirement and what are tribunals expected to do**. Must tribunals run conflict checks against third party funders as well? Is the presence of a funder to have an impact on the allocation of costs, or even security for costs? **If this requirement is to be maintained, Claimants, Respondents and tribunals would need more guidance regarding the disclosure of third party funders**. Further, although not the most common practice, it is possible for Respondent States to secure third party funding. Thus, any disclosure requirements should apply to both disputing parties.
16. **EFILA regrets that this draft text removes the party autonomy of selecting the arbitrators, after all, party autonomy is of one the hall marks of arbitration. At the same time, we appreciate that – unlike in CETA – none of the disputing parties is envisaged to select the arbitrators and instead this decision is deferred to an Appointing Authority.** At least, this would ensure a balance between the disputing parties concerning the issue of appointment of arbitrators, which is a very important aspect in arbitration.
17. Regarding the necessary expertise of arbitrators, it is not clear why is there a requirement for expertise in "international trade law" (Article 20(5)) since these would not be trade disputes. Therefore, **this requirement should be dropped**.
18. The requirement of a 5-year "cooling-off" period between acting as counsel and arbitrator (Article 20(5)) is very problematic because it severely restricts the pool of possible arbitrators. In particular, it hampers any efforts by institutions such as ICSID to appoint arbitrators from more diverse backgrounds, and to help foster a new generation of investment arbitrators. This 5-year requirement would effectively restrict the pool of arbitrators to a subset of investment law academics who have not acted as co-counsel or expert in previous years. Also, the 5-years period appears rather randomly selected. Why should 5 years cooling off make any difference compared to 4 years? In general, this will prevent the appointment of arbitrators with sufficient and up-to-date expertise. **Consequently, the this 5-years exclusion for potential arbitrators period should be dropped.**
19. Regarding Article 20(9) on the preference towards NOT bifurcating for the stated aim of "in the interest of an expeditious resolution of the dispute", it should be underlined that bifurcation can be, in certain circumstances, actually the most expeditious way of disposing

cases (when there are clear-cut jurisdictional objections such as no investment, not a qualifying investor, etc) as well as in cases that are complex on the merits. **Since this determination is highly fact-specific, it would be a better solution not to state any preference one way or the other, but to encourage arbitrators to organise the proceedings in a way that is most likely to lead to the expeditious resolution of the dispute.**

20. Regarding Article 20(10) on the interaction between allowing a tribunal to consider domestic law (including EU law) as matter of fact, while at the same time excluding any binding effect of such a determination on domestic courts and authorities of the Contracting Parties, appears to be highly problematic. In particular, it remains unclear what would be the precise consequences for the arbitration proceedings as well as for eventual enforcement or setting aside proceedings before domestic courts. **Therefore, it would advisable to further elaborate and clarify this provision.**

21. While EFILA welcomes the obligation imposed on the Contracting Parties to “encourage investors … to voluntarily incorporate Corporate Social Responsibility (CSR) standards”, the voluntary and soft-law nature of CSR standards creates a tension with Article 23, which allows a tribunal to reduce the amount of compensation in case of non-compliance of the investor with CSR standards. It should be recalled that CSR obligations are specifically owned by States rather than investors. The currently drafted provision would allow tribunals to one-sidedly “punish” investors-claimants. In this way, soft-law CSR standards would be turned into hard-law CSR standards, which is exactly not what they are supposed to be. In case this provision is nonetheless maintained, it would only be fair that States are equally held liable for any such violations. **Therefore, it would be better to remove this provision, or alternatively, balance this provision by explicitly including negative repercussions for States as well.**

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