DUTCH DOUBLE TAXATION TREATIES AND DUTCH BILATERAL INVESTMENT PROTECTION TREATIES: A LUCKY COMBINATION INDEED

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Contents

I Introduction

Companies - whether privately or publicly or state owned - and individuals, whether “HNW” (high net worth) or not, are investing all over the world. They have done so already for a very long time but a deliberate globalization policy accelerated this in the last two decades. In doing so, the main aim normally is to increase profits and net worth, or to at least maintain them at the present level and not make losses.

Why should these investors consider Holland in this context, either for direct or for indirect investment, i.e. investing through a Dutch vehicle in other countries, even in their home country? The reasons for direct investment in a country such as Holland or any other country, are manifold. So are the reasons for investing indirectly through a country such as Holland or through any other country. Which is the right choice?

Apart from other, economic and commercial factors, five factors are of prime importance when considering an investment or establishing a new business in Holland, i.e. an attractive tax climate, a strategic location with good connections, a highly trained multi-lingual and flexible work force, an international business climate and a just and predictable legislation.

As far as indirect investment, i.e. investing through a Dutch vehicle in other countries is concerned, the above also applies but then there are also two main other considerations involved, which are mainly tax and legal, i.e. the existing Dutch double taxation treaties and the existing Dutch bilateral investment treaties.

II The Dutch Double Taxation Treaties (“DDT’s”)

Presently, there are 141 DDT's in force. [2] These DDT's have to be seen in relation to the following attractive features of the past and the present Dutch tax system. The - now elsewhere much copied - [3] participation exemption regime: this regime allows tax exempted receipt of dividends and capital gains from *qualifying* subsidiaries. The fiscal unity system, allowing to set-off profits and losses between Dutch members of the fiscal unity. [4] The effective corporate tax rate of 5 % for research and development. [5] The 30% Ruling: a favourable tax treatment for foreign employees, seconded to Holland. [6] The reasonable corporate income tax rate for taxable profits of 20 % on the first EUR 200 k and of 25 % on amounts exceeding EUR 200 k. Finally, Holland does not know a withholding tax on interest or licence (royalty) payments.

Under most DDT's, the Dutch dividend withholding tax rate of normally 25 %, on dividends paid by a Dutch entity, is reduced to 0 %, or 5 %, or 15 %. Under the EU Parent-Subsidiary Directive, [7] in case of dividend payments to shareholder entities in other EU countries, normally 0 % would apply. DDT's also usually reduce or eliminate foreign withholding tax on interest or royalties paid to a Dutch entity, while a moderate spread will be taxed with the above mentioned corporate income tax rates.

Couple the above to the various arrangements which can be made in advance with the Dutch tax authorities, the advanced pricing agreements ("APA's"), the present reasonable substance requirements, the Flex BV [8] and the Dutch Stak foundation, [9] and the presence of highly trained multi-lingual and sophisticated legal and tax advisers, accountants and trust offices, it will be clear that *Holland is the European country for an intermediate holding or a financing or royalty arrangement, or for setting up and running a more substantial business in Holland itself, as a bridgehead into Europe.*

Naturally, the whole system, well geared to induce foreign investors to invest either indirectly or directly into Holland, is also under attack from other states, from anti globalists or from organisations for what they see as "tax justice", from the EU, the United States and from you name it. The fact remains that Holland still has a very good position compared to other states active on this global market to attract foreign investment. The present very weak status of the Dutch economy, a consequence of the excessive budget and state debt reduction program of the EU which is slavishly followed and other fatal mistakes, is one of the reasons for the sitting conservative / socialist Dutch government to not allow attacks on this system.

III The Dutch Bilateral Investment Treaties ("DBIT's")

To be seen in conjunction with the above explained favourably structured Dutch tax situation and the DTT's, are the presently 95 DBIT's in force, [10] (all based on a Dutch Model BIT), of the total of about 2.100 Bilateral Investment Protection Treaties, or "Bits", presently in force in the whole world. [11]

Why should we see these DBIT's in conjunction with the above explained favourably structured Dutch tax situation and the many favourable DDT's? The reasons are the following. Most DBIT's in force have a validity of 15 years with extension for the same period. Most DBIT's in force have retroactive effect, so that investments made before the effective date of the DBIT involved, are also protected. For investments made before expiration of the DBIT involved, the DBIT remains valid during 15 years

thereafter.

But the main point of attraction seems the broad definition of “investment” and of “investor”. Article 1 of the Dutch standard DBIT says (bold by the author):

QUOTE

For the purposes of this Agreement:
***1. the term “investments” means every kind of asset** and more particularly, though not exclusively:*
a. movable and immovable property as well as any other rights in rem in respect of every kind of asset;
b. rights derived from shares, bonds and other kinds of interests in companies and joint ventures;
c. claims to money, to other assets or to any performance having an economic value;
d. rights in the field of intellectual property, technical processes, goodwill and know-how;
e. rights granted under public law or under contract, including rights to prospect, explore, extract and win natural resources.
2. the term “nationals” shall comprise with regard to either Contracting Party:
a. natural persons having the nationality of that Contracting Party;
b. legal persons constituted under the law of that Contracting Party;
c. legal persons not constituted under the law of that Contracting Party but controlled, directly or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii).

UNQUOTE

This speaks for itself. The term “investments” means every kind of asset. The term “nationals” shall comprise with regard to either Contracting Party also legal persons constituted under the law of that Contracting Party. Therefore also a Dutch BV, NV, Foundation or Association.

IV EU Influence

It will come as no surprise that this advantage of having these favourable DBIT’s has come under attack from the great leveller the EU, by the mere fact that the Treaty of Lisbon, effective 1 December 2009, awards the EU exclusive competence to negotiate bilateral investment protection treaties. EU member states could be obliged to adapt their bilateral investment protection treaties to EU law which might be a catastrophe. When will the EU realise that reasonable competition is not only good between businesses but especially also between EU member states, because it leads to increased efficiencies of government and taxation.

V Bilateral investment treaties somewhat clarified

The funny thing though is that in spite of all of the above, not many foreign investors seem to be aware of the existence of these Bits, which exist next to the possibilities of (costly) insurance or (time consuming) international law or under other treaties such as the Energy Charter Treaty [12], the North American Free Trade Association, [13] or the EU internally. The advantage of the bilateral investment treaty is that where there is no contractual basis present, it provides a company or an individual

with a direct right of action against a host state to resolve disputes by concilation or arbitration, [14] on the basis of international law.
It may however be that nevertheless a dispute must first be submitted to the courts of the host state.

To clarify the always reciprocal bilateral investment treaty concept a little, the following may serve. First, trading is not the same as investment which implies a long term relationship. Investment protection treaties offer protection of *investments* against riots, armed assaults,
revocation of licences, changing legislation and disguised and outright expropriation or allowed expropriation without proper compensation. These treaties differ in scope, criteria and way of enforcement. They prescribe the application of a number of principles.

The most applied is the principle of *Fair and equitable treatment of the investor* by the courts of the host state and by its administrative organs, against violation of legitimate expectations, or of express representations made, unexpected changes of the law, discrimination, lack of transparency, inconsistency, détournement de pouvoir and abus de pouvoir, coercion and harassment. Other important principles are the principle of *Full protection and security*, physical and non physical, the principle or *Right not to be treated arbitrarily or discriminatorily*, violated where the rules of law are violated or the foreign investor has no access to due process or is discriminated on the basis of nationality and the *Most favoured nations treatment principle* involving a comparison with the treatment of local companies and with other bilateral investment treaties of the host country. Usually there is also a *Final standard clause obliging the host state to always fully comply with its obligations regarding the investments* of companies and individuals from the other state.

The enforcement of awards under the bilateral investment treaty is dependent on the arbitral tribunal prescribed and adhered. The recognition and enforcement of Icsid awards is not based on the New York Convention. [15] A national court does not have jurisdiction to review or test an award rendered in Icsid arbitration. Article 54 of the Icsid Convention ensures enforcement of the award against the host state which has to respect it as a final judgement of its own judiciary. Icsid awards can only be annulled by an ad hoc committee, appointed by Icsid and only on certain limited grounds. It will be no surprise that in spite of all the well arranged possibilies, the process will be long and costly, not in the least due to the complexities of the cases involved.

VI DDT and DBIT Situation with regard to East-European States

The following East-European states have concluded a DDT as well as a DBIT:

- Albania
- Belarus
- Bulgaria
- Croatia
- Czech Republic

- Estonia
- Georgia
- Hungary
- Kazakhstan
- Kyrgyzstan: DDT only
- Latvia
- Lithuania
- Macedonia
- Moldavia
- Montenegro: DBIT only
- Poland
- Rumania
- Russia
- Serbia
- Slovakia
- Slovenia
- Ukraine
- Uzbekistan

VII Conclusions

As it stands now, clients would be well advised to seriously consider combining the advantages of a DDT with the protection of a DBIT through the use of a Dutch entity for their foreign investments, always with an appropriate foreign holding on top, i.e. in combination with an appropriate EU country or with an appropriate double taxation treaty country. What is appropriate is dependent on each individual situation and the specific requirements of the clients. A smooth exit should always be available.

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In case you or your clients are interested, please mail to trust@arcanum.amsterdam

With kind regards,

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Members of the Legal & Tax Alliance

[2] See http://www.rijksoverheid.nl/onderwerpen/belastingen-internationaal .
[3] For example, the UK Holding company, the Spanish Holding Company.
[4] Article 13 Dutch Corporate Income Tax Act (*Dutch: Wet op de Vennootschapsbelasting 1969*).
[5] Article 15 Dutch Corporate Income Tax Act (*Dutch: Wet op de Vennootschapsbelasting 1969*).
[6] Article 12b Dutch Corporate Income Tax Act (*Dutch: Wet op de Vennootschapsbelasting 1969*).
[7] Directive 2011/96/EC.
[8] http://www.kvk.nl/ondernemen/rechtsvormen .
[9] http://nl.wikipedia.org/wiki/Certificaat_van_aandeel .
[10] See http://www.rijksoverheid.nl/onderwerpen/internationaal-ondernemen/documenten-en-publicaties/rapporten/2010/02/22/ibo-landenlijst.html . Presently Albania, Algeria, Argentina, Armenia, Bahrain, Bangladesh, Belarus, Belize, Benin, Bolivia, Bosnia-Herzegovina, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Cape Verde, Chile, China, Costa Rica, Croatia, Cuba, Czech Republic, Dominican Republic, Ecuador, Egypt, El Salvador, Eritrea, Estonia, Ethiopia, Gambia, Georgia, Ghana, Guatemala, Honduras, Hong Kong, Hungary, India, Indonesia, Ivory Coast, Jamaica, Jordan, Kazakhstan, Kenya, Kuwait, Laos, Latvia, Lebanon, Lithuania, Macau, Macedonia, Malawi, Malaysia, Mali, Malta, Mexico, Moldavia, Mongolia, Montenegro, Morocco, Mozambique, Namibia, Nicaragua, Nigeria, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Romania, Russia, Senegal, Serbia, Singapore, Slovakia, Slovenia, South Africa, South Korea, Sri Lanka, Sudan, Suriname, Tajikistan, Tanzania, Thailand, Tunisia, Turkey, Uganda, Ukraine, Uruguay, Uzbekistan, Venezuela, Vietnam, Yemen, Zambia, Zimbabwe.
[11] http://icsid.worldbank.org/ICSID .
[12] http://www.encharter.org .
[13] http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta .
[14] International Centre for Settlement of Investment Disputes (Icsid), NY, based on the 1965 Icsid Convention; Uncitral; ICC; Rules of the Stockholm Chamber of Commerce (SCC). A standard clause would be “Each Contracting Party hereby consents to submit any legal dispute arising between that Contracting Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Contracting Party to the International Centre for Settlement of Investment Disputes for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965.”

[15] http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html .