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How Dutch investment treaties harm the public interest

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Text: Roeline Knottnerus, Roos van Os, Hilde van der Pas, Pietje Vervest
Design: Ricardo Santos
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1. Introduction

1.1. Mounting controversy over current investment protection framework

Over the past two decades a complex web of more than 3,200 investment agreements has developed globally, mostly in the form of Bilateral Investment Treaties (BITs). These treaties grant investors far-reaching rights, limiting state control over transnational capital and constraining governments' policymaking space. A key provision in many of the investment agreements is a controversial mechanism that allows corporations to sue governments in private international arbitration tribunals outside the regular national court system. Investors' claims through 'investor-state dispute settlements' (ISDS) have skyrocketed by more than 400% since the early 1990s.[1]

These ISDS lawsuits increasingly challenge public interest environmental and health policies, and include cases (in the global north and south) where corporations use the ISDS framework to challenge a plethora of public policy measures. ISDS lawsuits are sparking an increasingly heated public debate on the necessity of reform of the current framework, especially in the context of negotiations around the EU–US Transatlantic Trade and Investment Partnership (TTIP) and the Canada–EU Comprehensive Trade and Economic Agreement (CETA). The debate centres not least on two aspects of investment agreements – first, that their contribution to their stated aim of attracting foreign capital is at best inconclusive; and second, that their adverse impact on policy space and public budgets cannot be ignored.

The Netherlands takes a central position in the current debate around BITs and international investment agreements (IIAs). More than 10% of all known investment treaty claims make use of Dutch Bilateral Investment Treaties (BITs).The growing controversy surrounding BITs – and in particular the mounting critique of Dutch BITs as being excessively investor-friendly, to the detriment of the policy space of developing countries– has led the Dutch trade department to announce a review of Dutch bilateral investment treaties with developing countries. This paper gives a critical civil society perspective on the clear tension between BITs protections and the democratic right and duty of the state to regulate in the broader public interest.

As mentioned above, IIAs are a particularly pressing problem for developing countries. Given their limited budgetary resources, high pay-outs to investors hit developing countries disproportionately hard. At the same time, their policy frameworks are often limited and actually require more public policy making, a need which IIAs restrict, leaving these countries wide open to claims. Specifically, this paper shows how (the threat of) lawsuits taken to the International Centre for Settlement of Investment Disputes (ICSID) and other fora, using Dutch BITs, have effectively blocked policymaking in the public interest for development in host countries.

This paper also discusses the risks that the extensive Dutch BIT network poses for the Netherlands itself. So far, the Netherlands has never been on the receiving end of an ISDS claim, but changing global patterns of investment increase the likelihood of developed countries being sued before ISDS tribunals. It examines the flaws in the ISDS system and the adverse impacts of the broad set-up of Dutch BITs. It also looks at the shortcomings of recent proposals for reforming the ISDS system that have emanated from the European Commission and have been embraced by the Dutch foreign trade and development minister. The paper concludes with concrete recommendations for a more sustainable and inclusive investment policy.

Box 1

Losing control

The policy space of states to introduce, expand or amend policies and regulations in the public interest is constrained by trade and investment agreements. These agreements forbid, for example, the use of capital controls to address destabilising capital flows. Equally, they remove the freedom to impose so-called performance requirements, i.e. obligations on foreign investors to reinvest (part of) their profits in the host country, to employ local labour or use local resources in their production process. Such measures traditionally constitute an important part of countries' development toolkit. Investor-state dispute settlement in trade and investment agreements allows corporations to challenge public policy measures (ranging from regulations to provide affordable public services such as water and electricity, protect labour rights, public health or the environment; regulate the extraction and exploitation of natural resources; put in place tax measures and/or government interventions to deal with economic crisis) as indirect expropriations, or infractions of their 'legitimate expectations to a stable investment climate' or their entitlement to 'fair and equitable treatment', for which compensation is required.[2] Claims, which can run into hundreds of millions of dollars, have a severe impact on public budgets and are known to cause governments to reconsider or withdraw proposed legislation.

2. What is wrong with BITs?

2.1. Investment protection – an expanding system

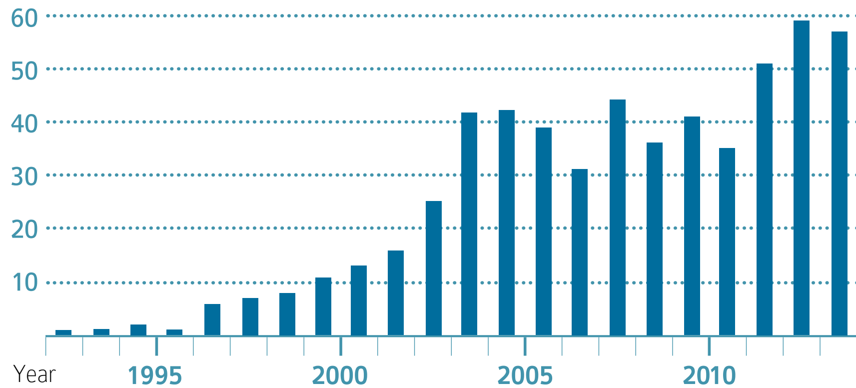
The first bilateral investment treaty (BIT) was signed in 1959 between Germany and Pakistan. The number of investment treaties has since risen to over 3200, of which 2,902 are BITs.[3] And the system continues to expand as investment provisions are increasingly integrated into large (inter-)regional trade deals such as:

- the Trans-Pacific Partnership (TPP), an ambitious, comprehensive trade agreement that the United States is negotiating with 11 other countries throughout the Asia-Pacific region: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam;
- the Regional Comprehensive Economic Partnership (RCEP) between the Association of South-East Asian Nations (ASEAN), Australia, China, India, Japan, New Zealand and South Korea;
- the EU-Singapore Free Trade Agreement (EUSFTA)
- the EU-Canada Comprehensive Trade and Economic Agreement (CETA);
- the US-EU Transatlantic Trade and Investment Partnership (TTIP) between the US and the EU;
- the Trilateral Free Trade Agreement (FTA) between the Southern African Development Community (SADC), the East African Community (EAC) and the Common Market for Eastern and Southern Africa (COMESA).

Together, these negotiations involve 76 countries with a total population of over 4.5 billion people and a combined GDP representing over 90% of world GDP. Because of their magnitude, if concluded, the above (inter-)regional trade deals will be a game-changer in relation to the current framework for investment protection. TTIP would extend ISDS coverage of international foreign direct investment flows by approximately 300 per cent of the current coverage based on existing treaties.[4]

In the early days, BITs were agreed to underline that a country was a safe investment destination. Wider implications of BITs provisions were generally not fully understood, but in recent years BITs and other international investment treaties – including investment chapters in free trade agreements – have emerged as a threat to the national policy space to regulate, and to public budgets. Countries are waking up to the fact that there are high costs associated with the investment regime promoted in bilateral and other international investment treaties. Companies file for and receive compensations that can run into hundreds of millions of dollars. In 2012, for instance, an investment tribunal ordered Ecuador to pay US$1.77 billion in compensation to US company Occidental Petroleum for the revocation of an oil concession. Including interest and legal costs, Ecuador will have to pay out US$2.4 billion.[5] In Europe, Swedish energy giant Vattenfall, the parent company of Dutch energy supplier Nuon, is suing Germany for €4.7 billion for its democratic decision to phase-out nuclear energy. China's second largest insurance company, Ping An, is suing Belgium over losses incurred in the nationalisation of Fortis bank in 2008, amounting to US$2 billion.[6] ISDS cases have been brought over other crisis measures, including against Spain for the discontinuation of its subsidy schemes for solar energy.

Since the early 1990s, the number of investment cases has exploded from just a handful to some 568 known cases by the end of 2013;[7] 2012 and 2013 saw the largest numbers of known investment arbitrations filed in a single year (58 and 56 respectively).[8] Transnational corporations have used ISDS to challenge a wide range of government measures, including green energy and medicine policies, anti-smoking legislation, bans on harmful chemicals, environmental restrictions on mining, health insurance policies, measures to improve the economic situation of minorities and many more.[9]



Box 2

ISDS: big business for the legal industry.

The current boom in arbitration cases is fuelled by international law firms that are handsomely rewarded for their legal services in ISDS disputes. These firms are actively encouraging corporations to pursue arbitration and exploit loopholes in investment protection clauses, advising corporations on how to restructure their investments to make the best use of investment protections and ISDS opportunities in international investment treaties. Investment arbitration has turned into a multi-million dollar industry which is even attracting interest from hedge funds and other third-party funders interested in co-funding cases in return for a share in the award.[10]

The international investment arbitration industry is dominated by a small and tight-knit Northern hemisphere-based community of law firms and elite arbitrators.[11] Three top law firms – Freshfields (UK), White & Case (US) and King & Spalding (US)– claim to have been involved in 130 investment treaty cases in 2011 alone. Only 15 arbitrators, nearly all from Europe, the US or Canada, have decided 55% of all known investment-treaty disputes. This small number of lawyers sits on the same arbitration panels, act as both arbitrators and counsels, and even call on each other as witnesses in arbitration cases. This has led to growing concerns, including within the broader legal community, over conflicts of interest. The boom in arbitration has created bonanza profits for investment lawyers, paid for by taxpayers. Legal and arbitration costs average over US$8 million per investor-state dispute, exceeding US$30 million in some cases. Elite law firms charge as much as US$1,000 per hour, per lawyer – with whole teams handling cases. Arbitrators also earn hefty salaries, amounting to almost US$1 million in one reported case.[12] These costs are borne by taxpayers, including in countries where people do not even have access to basic services.

Arbitrators' staunch defence of a system that is demonstrably biased in favour of corporations is fuelling concerns regarding the neutrality of international investment arbitration. Arbitrators have close links with business and indicate that "they do not normally see themselves as guardians of the public interest".[13] Some sit or have sat on corporate boards, including of companies which have filed investor-state disputes. Some have worked or are working for law firms that encourage investors to claim against states and advise them in picking the most investor-friendly treaties for their claims and structuring their investments accordingly. Others have spoken out against investment treaty revisions which would allow governments greater freedom in policymaking. One arbitrator even has his own lobby firm advising corporations on how to avoid or counteract government regulations.[14] Yet these elite arbitrators have decided the majority of all known investment-treaty disputes, weighing public interest against the interests of profit.

2.2. Investment treaties: their questionable correlation with foreign direct investment

BITs and other investment treaties offer enhanced legal protection to foreign investors, but it is unclear whether they do what they are allegedly designed for: attract foreign capital. Existing literature suggests that the correlation is weak at best. A growing body of research shows that the relationship between trade, investment, economic growth and (sustainable) development is far from clear-cut.[15] In its *Trade and Development Report 2014*, UNCTAD comes to the conclusion that "BITs appear to have no effect on bilateral North-South FDI flows" and warns developing-country policymakers not to assume "that signing up to BITs will boost FDI" and to remain cautious about entering into BITs.[16] BITs and IIAs do seem to add to the attractiveness of countries by providing foreign investors with the transparency, security and predictability provided by the international investment regime, but they do not appear to be decisive in the investment decisions of multinational enterprises (MNEs). Political stability, overall levels of economic development and exchange rates appear to be more important determinants of foreign direct investment (FDI). As are market size and potential, a skilled workforce, availability of natural resources and adequate infrastructure.[17]

2.3. Limiting domestic policy space

Meanwhile, the investment protection framework is increasingly associated with high and unpredictable risks to policy space and public budgets. Awards are payable out of public budgets, with potentially severe impacts on funds available for public policy objectives. Even when private arbitrators rule in favour of governments, their legal costs can be considerable. International investment lawyers are known to charge average of US$1,000 per hour for their services. The OECD has calculated that legal and arbitration costs in ISDS arbitration cases average over US$8 million, exceeding US$30 million in some cases.[18] The amount of US$2.4 billion Ecuador was ordered to pay is roughly equal to Ecuador's annual health care budget for 7 million people.[20] The largest damages award yet known in investment treaty arbitration was decided on 18 July 2014 by an UNCITRAL arbitral tribunal under the auspices of the Permanent Court of Arbitration (PCA). It ordered Russia to pay over US$50 billion in compensation for the indirect expropriation of OAO Yukos Oil Company (Yukos).[21] Governments cannot afford to ignore the threat of such claims. And transnational corporations (TNCs) have demonstrated not to be above wielding the threat of ISDS claim as a political tool in their attempts to have unwelcome regulation shelved.

2.4. Regulatory chill

The limitation of policy space as a result of investment protection provisions is often termed 'regulatory freeze'. Bilateral investment treaties, as well as other trade and investment agreements like CETA and TTIP ensure that any changes in the regulatory framework, whether or not they relate directly to trade and investment, are open to challenges from foreign investors who can argue that policy changes constitute a regulatory taking and therefore equate to an indirect expropriation, or that they violate their right to a 'stable regulatory environment', their entitlement to 'fair and equitable treatment' or their 'legitimate expectations' in relation to their investments.

Across the globe, there is mounting evidence that ISDS dispute settlement provisions in BITs and other international investment treaties and the threat of unaffordable claims are indeed constricting government policy space to regulate. Faced with the threat of ISDS cases from major mining companies, Indonesia was forced to water down regulation to ban open-pit mining in protected forest areas.[22] Likewise, the Philip Morris case against Uruguay and Australia over plain packaging rules and health warnings on cigarette packs has provoked Malaysia to postpone the introduction of similar anti-smoking measures until the outcome of the case is known. A Canadian mining company attempted to put pressure on the Romanian government to grant an exploitation permit for an environmentally highly controversial gold-mining project by threatening to file a US$4 billion ISDS claim[23] – a sum amounting to roughly 2 per cent of Romania's GDP.[24] And US company Lone Pine Resources is suing Canada for compensation following the province of Quebec's moratorium on fracking. This case is a clear indication of how investor-state dispute settlement seeks to undermine public choices and how it could be used to challenge fracking bans and moratoria across Europe under the TTIP. And it is not just weaker developing countries caving in under this kind of pressure. Indeed, a former Canadian government official has stated: "I've seen the letters from the New York and DC law firms coming up to the Canadian government on virtually every new environmental regulation [...].

Virtually all of the new initiatives were targeted and most of them never saw the light of day."[25]

2.5. Undermining development policies

Global corporations are economically powerful. In the case of developing countries, these corporations sometimes have more assets than states and can exert high political pressure on governments. At the same time there is an accountability gap. The frameworks for social corporate responsibility remain non-binding, while the legal separation that exists between different entities within a multinational enterprise can make it extremely difficult for victims of corporate human rights abuses to achieve any remedy from a parent company, especially where the parent company is domiciled in a different country. Meanwhile, TNCs can directly challenge sovereign states through ISDS. This creates an enormous power imbalance not only in financial resources, but also in redress to courts between citizens and large corporations.

Investment protection frameworks as enshrined in BITs and other IIAs further tilt the balance between investor rights and obligations in favour of the investor. Former UN Special Representative on business and human rights, John Ruggie, writes: "Investor protections have expanded with little regard to states' duties to protect, skewing the balance between the two. Consequently, host states can find it difficult to strengthen domestic social and environmental standards, including those related to human rights, without fear of foreign investor challenge, which can take place under binding international arbitration."[26]

Investment protection agreements favour foreign investors by giving them access to a parallel and exclusive legal system that is not open to domestic investors, and allowing them to refer to the broadly phrased protections mentioned above that in many instances would fail if brought under the domestic legal systems of the countries concerned.

Investment treaties can also get in the way of development policies as they can restrict "the ability of developing countries to take certain measures which would benefit domestic firms (such as subsidies for infant industries) or give preferential treatment to disadvantaged persons (such as indigenous persons who might require special or differential treatment)." Many IIAs forbid the use of so-called performance requirements – including local content requirements aimed at enhancing employment and the transfer of training and technology – this can be an important tool to enhance the benefits of or address concerns with regard to incoming foreign investment.

2.6. Eroding democracy

Even insiders agree that ISDS undermines democratic decision making. An international arbitrator has summed it up nicely: *"When I wake up at night and think about arbitration, it never ceases to amaze me that sovereign states have agreed to investment arbitration at all [...] Three private individuals are entrusted with the power to review, without any restriction or appeal procedure, all actions of the government, all decisions of the courts, and all laws and regulations emanating from parliament."*[27] That many "healthy, vibrant democracies have signed on to investor state dispute settlement" does not change the fact that national legal (democratic) systems are by definition bypassed when international investors – mostly transnational corporations – are enabled to challenge democratic policies for interfering with their profits before ad hoc and non-transparent investment tribunals. In addition, international investment agreements generally do not contain any provisions to exhaust local remedies before reverting to international arbitration.

2.7. Conclusion

ISDS enables transnational corporations to bring a case directly against a country. In the eyes of its advocates this adds to the expediency of the system. But critics argue that ISDS gives transnational corporations a powerful tool to challenge a wide range of government regulation and public interest measures. Direct access to investment arbitration allows foreign investors to bypass the domestic legal system and effectively grants them more rights than domestic investors, effectively and unfairly undermining their competitiveness. The ISDS system not only lacks independence, accountability, transparency and coherence in law, it also makes little sense in economic terms as it appears to be inconsistent with the general free marked paradigm. Foreign investors can readily avail themselves of adequate market-based solutions such as commercial investment insurance schemes if they feel the need to insulate themselves from political risk relating to their investments abroad.

3. Calls for system change

3.1. Changing perspectives

The debate around the current investment protection framework, and in particular ISDS, is gearing up. The boom in ISDS claims and growing understanding of their threats to regulatory freedom and public budgets is giving rise to a reappraisal of the international investment regime and its impact on the policy space of the state to pursue sustainable development policies, safeguard human rights and address environmental concerns. Governments across the globe are beginning to question their BITs frameworks and are initiating reviews.[28 29]

Because it is particularly in developing countries that investment protection has been deemed necessary (for lack of a comprehensive investment policy framework or political stability), the bulk of BITs has traditionally been concluded between developing and developed countries. Developing countries have thus traditionally been subject to ISDS claims. Resistance, however, is mounting.

- In Latin America, countries like Bolivia, Venezuela and Ecuador have broken away from ICSID – the World Bank forum for investment arbitration. In 2013 Indonesia announced its intention to terminate all its BITs and has already given notice to several countries, including the Netherlands. An extensive, multi-stakeholder review carried out by South Africa between 2007 and 2010, underlined the limited added value of its BITs: the review found that South Africa does not receive significant inflows of foreign investment from many partners with whom it has BITs, while the country continues to receive significant investments from countries with whom it has no BITs.[30] South Africa is concerned about the impact of BITs on democratic decision-making and wants to retain the option in future investment treaties to impose capital controls should the repatriation of investment-related funds (threaten to) cause serious balance of payments problems. South Africa has also cancelled its BIT with the Netherlands and other EU member states.

- India has recently announced it will be reassessing its 83 (72 in force) trade and investment promotion agreements because they fail to take into account the socio-economic objectives of government policy. A spate of ISDS cases, including with Nokia and Vodafone over tax measures, are cited as an underlying motive for India's move to introduce a new model for investment protection that better balances the rights of investors and the wider public interest.[31]

In Europe and the Netherlands, issues surrounding ISDS have come to the fore with the completion of negotiations for CETA in October 2014, and the launch of TTIP negotiations. Growing public concerns about the problematic investment protections enshrined in BITs– developing as a powerful political tool in the hands of transnational corporations – being written into these new comprehensive and standard-setting agreements are beginning to reach policymakers. Global investment flows are changing, with capital-importing countries increasingly emerging as capital exporters, and capital-exporting countries becoming net recipients of foreign capital. And with investment protection being included in trade agreements between developed countries, traditional capital exporters are now also increasingly waking up to the risks associated with investment protection. However, rather than reject ISDS as systemically flawed, a global player like the EU is embarking on an agenda for reform that is widely criticised by civil society and academia alike for failing to achieve its intended objectives.

3.2. EU proposals for reform fail to address fundamental issues

With the coming into force of the Lisbon Treaty in 2009, competence over investment policy shifted partly from the member states to the European Commission. Recognising the flaws of the current international investment arbitration regime, the Commission has come up with reform proposals for new investment treaties that the EU negotiates. In a public consultation on ISDS in the Transatlantic Trade and Investment Partnership, the EC declared its ambition to make the system 'more transparent and impartial', 'build a legally water-tight system', and 'close the legal loopholes once and for all.' These are laudable objectives. However, there is a growing concern from environmental and farmers' groups, trade unions, consumer organisations[32] and academics[33] that the approach of the European Commission does not adequately recognise or address the fundamental flaws in the system.

The reform proposals fail to protect the 'right to regulate' as a general right and as a component of the fair and equitable treatment (FET) and expropriation standards of protection of investors. In its ISDS consultation text, the European Commission indicates that it will safeguard the right to regulate in relation to investment protection by ensuring 'that all the necessary safeguards and exceptions are in place'.[34] But there is no mention of unequivocally safeguarding the right to regulate as a sovereign right, as, for example in Protocol 1, Article1 of the European Convention on Human Rights, which states:

(1) *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

(2) *The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*[35]

The EU states it will strive to 'ensure that investment protection standards cannot be interpreted by arbitral tribunals in a way that is detrimental to the right to regulate'. Despite the systemic flaws in the arbitration system, the EU still intends to trust commercial arbitrators with the task of weighing sovereign states' right to regulate against the property rights of foreign investors. Arbitrators are left to determine whether state measures are 'necessary' and whether their impacts on foreign investors are 'manifestly excessive' or 'more burdensome than necessary to achieve their aim'. Arbitrators only have to consider the immediate interest of the investor bringing a case and are under no obligation to take into account the wider public interest. There is no possibility of appeal.

They also continue to allow for unwarranted discretion for arbitration tribunals in various 'necessity' tests. The EU's suggested reform fails to regulate conflicts of interest in the arbitration process, continues to allow foreign investors to bypass national courts, and does not put an end to treaty shopping. Academics critical of the EU's approach further fault it, among other things for allowing anyone with a substantial business activity in the home state who holds any 'interest' in an enterprise in the host state to bring a claim, and for failing to spell out legal duties of investors in host states.[36]

The Commission's proposals for a roster and code of conduct for arbitrators insufficiently address inherent problems relating to the independence, competence and impartiality of arbitrators. In this one-sided system, where arbitrators earn commercial fees on a case-by-case basis, there is a suspicion of potential conflicts of interest and bias in favour of the investor as the only party that bring cases. While the EU's ISDS reform agenda seeks to limit arbiters' scope for interpretation by narrowing down clauses and definitions in investment agreements, it leaves the fundamental structure of the system untouched.

4. The Netherlands as a major player in foreign investment protection

4.1. A treaty heaven for foreign investors

The Dutch government actively works to create a competitive and attractive business climate in the Netherlands.[37] Foreign TNCs often set up financing structures that route investment through the Netherlands because the country offers a profitable fiscal climate with a reduction of tax charges on dividends, interest, royalties and capital gains income. The Netherlands also offers political weight, guaranteeing action will be taken when host states attempt to challenge treaty protection. Dutch investor-friendly bilateral investment treaties are an additional trump card used to attract multinationals to incorporate within Dutch borders. Together, the business-friendly Dutch tax system and the Dutch framework for investment protection have attracted an estimated 12,000 letterbox companies.[38]

As a result of these policies, the Netherlands ranks as one of the largest investors worldwide in terms of foreign investment flows. The Netherlands has headed global investment rankings in the last decade as a result of the vast amounts of capital flowing through so-called special purpose entities (SPEs) and mailbox companies. At the end of 2012, the total inward FDI position of the Netherlands totalled almost €3,700 billion, 80% of which was attributable to SPEs. At approximately 85%, the share of SPEs in the Dutch outward FDI position was even larger.

4.2. Pro-business bias in the Dutch position on investment protection

The Netherlands currently maintains an extensive BIT network of over 95 investment protection agreements, 12 of which are so-called intra-EU BITs,[39] that are characterised by broadly phrased and open-ended protections that the Netherlands proudly refers to as the 'gold standard' in investment protection.[40] The Netherlands continued to negotiate its BITs on the basis of a model treaty developed in 2003 in close cooperation with Dutch industry.[41] And recently it concluded a BIT with the United Arab Emirates (UAE). However, in 2014 the Ministry of Foreign Affairs indicated that all other ongoing BIT negotiations have been postponed, pending the outcome of a reappraisal of the Dutch BIT model by trade minister Lilianne Ploumen. Minister Ploumen announced a reassessment of the Dutch framework for investment protection in response to the same growing public concerns over the potential harmful effects of ISDS that galvanised the European Commission into drafting proposals for a reform of the system.

Where the European Commission launched a consultation about its reform agenda in relation to the proposed inclusion of ISDS in TTIP, Minister Ploumen, prompted by a parliamentary motion, initiated her own investigation into ISDS in TTIP. In her appraisal to Parliament, she downplayed the occurrence of regulatory chill. She further dismissed the financial risks from ISDS for the Netherlands as negligible, while embracing proposals for reform of the ISDS mechanism put forward by the European Commission.[42] The Minister also announced a separate review that would look into the development impacts of Dutch BITs for developing countries.

Until now most Dutch BITs published on the government website[43] follow (with variations) the Dutch investor-friendly model treaty. Dutch investment treaties are characterised by their broadly phrased and expansively interpretable definitions of investors, investment and ISDS. The goal of sustainable development is only mentioned in the non-binding preamble of the model BIT.

→ **Definition of investor:** The Dutch model BIT qualifies indirectly controlled foreign investors as 'national' investors, entitled to the full protection of Dutch bilateral investment agreements.[44] The Netherlands facilitate easy establishment of mailbox companies, which allows entities with no substantial ties to the Netherlands to avail themselves of the treaty protections

Box 3

Corporate minions in the ministry

The senior civil servant responsible for the Dutch position on investment protection and all Dutch BITs was Dr Nikos Lavranos. In the summer of 2014 he made a transition to become the Secretary General of the European Federation for Investment Law and Arbitration (EFILA). EFILA was launched in Brussels as a non-profit association to promote the benefits of investor-state arbitration and influence EU policy on investment protection on 1 July 2014. Founding partners include international law firms White & Case, Shearman & Sterling and Linklaters. EFILA's executive board further lists members of Herbert Smith Freehills, Quinn Emanuel Urqhart & Sullivan, Norton Rose Fulbright and NautaDutilh.[45] EFILA's advisory board includes representatives from Shell, French pharmaceuticals company Sanofi and Dutch insurer Achmea.[46]

In its contribution to the ISDS consultation of the European Commission, EFILA argued in favour of further curtailing governments' freedom to regulate, arguing that in some cases financial compensation for damages and loss of future profits is not sufficient and that arbitration tribunals should be given the authority to order governments to repeal or amend contested measures.[47] This completely ignores the state's democratically legitimised sovereign right, responsibility and duty to regulate in the public interest and with due consideration for a much wider range of interests than those of foreign investors alone.

In a response to questions from civil society organisations to the Dutch ministry about if and how the obvious corporate bias of their senior policy officer on investment issues has influenced the Dutch position on investment protection and ISDS, including in current trade negotiations such as with Singapore, Canada and the US, but also with regard to the (re-)negotiation of bilateral investment treaties, the ministry states it can not answer the questions out of privacy concerns of the person concerned.[48]

that their own state of origin may not be willing to extend to investors from the state actually hosting their investments. Some 12,000 foreign investors are known to have restructured their investments both to take advantage of the corporate-friendly Dutch fiscal climate and to avail themselves of the protections offered by the broad scope and definitions of Dutch BITs, including to bring investment claims even against their own countries of origin.[49]

→ **Definition of investment:** The Dutch model BIT of 2004 continues to rely on the widest possible definition of Investment that covers "every kind of asset".[50] It uses an open-o if we can. to ad. have been sued under Dutch BITs and how many of these are developing countries/ other European member statesended non-exclusive list, that not only covers any type of "property" or "claims to money" but also "any performance having an economic value" and unusual asset categories such as "good will" and "knowhow".

In addition, any rights (whatever they might be) granted in a commercial contract are covered as an investment that is protected under the treaty.

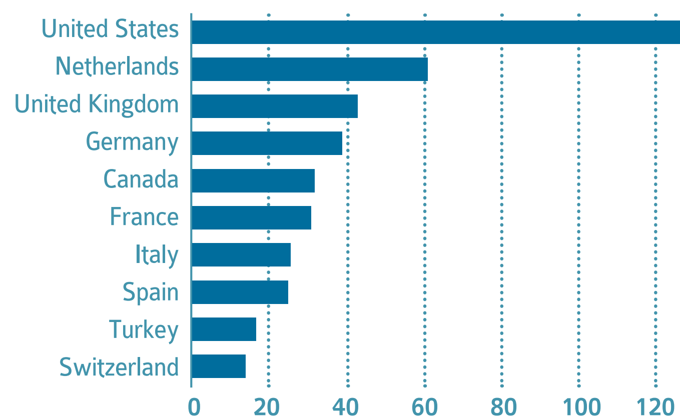
The Dutch model BIT does not attach any conditionality to investments that are protected under the treaty. While some countries include language in their BITs to ensure that the covered investment contributes to the host country's economic development, the Dutch model does not even include the requirement that the investments be made in compliance with the laws and regulations of the host State.[51]

→ **Dispute settlement:** The Dutch Model BIT includes a wide ISDS clause that grants greater private property rights – without corresponding responsibilities – to foreign investors than are enshrined in national constitutions or EU law. Under the current investment framework, national courts are easily sidelined: the Dutch model BIT does not include requirements to exhaust local remedies before reverting to international arbitration, and a ruling by an investment arbitration panel overrides national legal decisions.

BITs are easily entered into, but not so easy to terminate when adverse and unintended impacts emerge. The Dutch model BIT gives a standard duration of 15 years after signing, during which no one-sided change or withdrawal is allowed. Unless notice of termination is given by either contracting party at least six months before the date of the expiry of its validity, the BIT is tacitly extended for periods of 10years, whereby each contracting party reserves the right to terminate the agreement upon notice of at least six months before the subsequent date of expiry. The model treaty further contains a clause whereby, upon termination of the treaty, any investment made prior to termination will continue to be protected by the treaty's provisions for a further 15 years.

4.3. The Netherlands: the most frequent home state in arbitration after the US

As a preferred investment jurisdiction, the Netherlands is a frequent home state for arbitration cases. With 61 known cases till 2013 – over 10% of known investment cases – the Netherlands is the most frequently used jurisdiction for arbitration cases after the US. Treaty shopping – structuring investment to benefit from foreign investment treaties – emerges as a very real problem in relation to Dutch BITs. Research by the Centre for Research on Multinational Corporations (SOMO) analysing the 61 known Dutch BIT arbitration cases clearly shows that a substantial majority of investors that have sought arbitration through a Dutch investment treaty are foreign (i.e. the country in which the ultimate or controlling parent is not based in the Netherlands).[52] Dutch BITs have even been used by foreign investors to bring lawsuits against their own country of origin.[53] By SOMO's assessment of the available data relating to Dutch BIT cases shows that over 75 per cent of Dutch BIT cases were brought by mailbox companies with no real economic substance in the Netherlands. Overall, foreign investors have used Dutch BITs to claim over 100 billion US$ from states (claims are often not disclosed at all)..[55]



Box 4

Dutch BIT cases

Newmont versus Indonesia

The case Newmont versus Indonesia shows how the mere threat of an ISDS claim can affect development policies in recipient countries. Newmont mining, one of the biggest mining companies in the world, sued Indonesia under its BIT with the Netherlands after Indonesia announced mining Law No. 4/2009 on Mineral and Coal, which came into force in 2009. It requires mining companies to, within 5 years time, partially process raw materials in Indonesia before exporting and seeks to limit foreign ownership by requiring mining companies to sell up to 51% of their shares to the Indonesian government or local businesses in 10 years' time. These policies aim to boost domestic employment and the local economy and help Indonesia to get a larger share of its mineral resources. Newmont was able to sue the Indonesian government under the Dutch BIT because its majority shareholder is based in the Netherlands under the name Nusa Tengara Partnership BV –with zero employees and more than a billion euros in assets. Newmont withdrew its case within a month of reaching an agreement with the Indonesian government that gives the company special exemptions from the contested mining law.[56] The Newmont case clearly shows how companies may wield the threat of a billion dollar claim in response to a (proposed) new policy. Dutch BITs have also been used to sue Zimbabwe over its agrarian reforms,[57] Bolivia over its re-municipalisation of water resources[58] and Venezuela over the nationalisation of coffee[59] and oil production.[60]

Achmea and Eastern Sugar, using 'illegal' intra-EU BITs

The Netherlands maintains a number of BITs with Eastern-European countries, signed before they joined the EU. These BITs have been used to bring cases against both the Czech Republic (six times) and Slovakia, among others. Often claims arise when a new member state is adapting its regulatory framework to comply with EU laws. A case in point: Dutch investor Eastern Sugar suing the Czech Republic under the Netherlands-Czech Republic BIT when the Czech government passed regulations to comply with EU's Common Agricultural Policy.

The EC has argued that these intra-EU BITS are in conflict with EU law and incompatible with the EU single market and should therefore be terminated. The Dutch government however, has been one of the most outspoken EU member states against this proposal. In the case of Achmea v. Slovakia, Dutch insurer Achmea is using the Dutch-Slovak BIT to fight government plans to bring the health insurance system back into public hands. In this context, the Slovak government intends to expropriate Achmea's share as foreign investor in a Slovak insurance company. The government has the legal right to do so, provided certain conditions are met. Achmea argues *inter alia* that the precondition that a public interest is served by the measure was not met.[61] The case is highly controversial because it creates several precedents: Achmea is suing over a *proposed* policy and instead of compensation demands withdrawal of the plan. As such, the case is a clear example of how ISDS is used to restrict public policy space. In a prior case, Achmea has already been awarded US$22 million (plus US$3 million for legal fees) in compensation for Slovakia's policy to curb profit repatriation opportunities for health insurers. The tribunal ruled that this was a violation of Achmea's property rights.[62] When during the dispute the issue came up that Slovakia might unilaterally terminate the treaty,Solvakia was "kindly reminded" by the Dutch Ministry of Economic Affairs that any such effort would be futile since the protection for investors as included in the treaty would remain valid for a further 15 years as stipulated in its so-called 'survival clause'.[63]

4.4. Mounting critique triggers a reassessment of Dutch investment policy

Based on their own assessments that investment protection backed by ISDS poses unacceptable risks to policy space and public budgets, both South Africa and Indonesia have notified the Dutch government of their wish to cancel bilateral investment agreements with the Netherlands. The Minister has since– and in response to parliamentary questions– announced a reappraisal of investment protection as laid down in Dutch BITs in relation to policy space and the freedom to regulate in countries hosting Dutch investments.[64] The outcome of this appraisal is pending. The Ministry for Foreign Affairs, Trade and Development Cooperation has indicated that, for the time being, all BIT negotiations have been put on hold.

But with the Minister in her earlier appraisal of ISDS in TTIP positioning herself firmly behind the EU reform proposals, which are under strong criticism for failing to address the systemic flaws in the current investment protection framework, and policymakers failing to recognise the tension between Dutch investment policy and the Dutch government's own development objectives and CSR policies, it is to be feared that proposals to revise the Dutch bilateral investment agreement network will fall short of what is needed to ensure one of the principles underpinning Dutch policy coherence for sustainable development.

5. Policy coherence for development demands investment policy change

5.1. International obligations and FDI for sustainable development

The Netherlands are a signatory to all major human rights conventions and an active proponent of corporate social responsibility, including the UN Business and Human Rights Framework and the 2011 OECD Guidelines. As such, the Dutch government operates under an obligation to ensure that its policies do not undermine the corporate ability to respect human rights.[65] At the international level, the UN Guiding Principles on Business and Human Rights stipulate that states should "[e]nforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically asses the adequacy of such laws and address any gaps".[66] The UN Guiding Principles specifically mention BITs as an area of concern as they can restrict a host state's policy space: *"host States can find it difficult to strengthen domestic social and environmental standards, including those related to human rights, without fear of foreign investor challenge, which can take place under binding international arbitration"*.[67]

There is an added European responsibility: The 2009 Lisbon Treaty requires the EU to take account of the objective of poverty reduction and eradication in all actions likely to affect developing countries,[68] firmly establishing policy coherence for development (PCD) as a shared responsibility of EU institutions and Member States alike.

5.2. The Netherlands must recognise its responsibility

The investments of Dutch companies - or rather, foreign companies investing abroad through Dutch mailbox companies - can have negative impacts on various obligations under the human rights conventions, such as the rights to food, education, water, health care, a reasonable standard of life, work and development. The Netherlands is a pivotal player in hosting foreign companies as well as the international investment framework. The Dutch government notes that in the EU there are only four countries that invest more than the Netherlands, and only six that host more investments.[69] The Dutch government is developing policies to support companies to fulfil their responsibility to respect human rights as laid down in the UN Guiding Principles on Business and Human Rights.[70] At the same time, the extensive investment protections in Dutch BITs contravene these objectives, not least by enabling mailbox companies[71] to use the Netherlands as a jurisdiction to challenge the regulatory frameworks of host states. The Netherlands has a particular responsibility to reassess its investment policy in terms of policy coherence and to ensure that businesses incorporated in the Netherlands respect human rights in their operations abroad.

A narrow understanding of investment as promoted in (Dutch) BITs disregards that investment is about the commitment of multiple resources, including natural, human, social, cultural, physical and financial. Investments which ignore the imperatives for social reproduction and which are subsidised by vast ecological debts cannot be considered sustainable.

The Dutch model BIT and the BITs concluded on the basis of this model treaty continue to fail to adequately recognise the potential negative human rights impacts of investor protection. The Dutch model BIT follows the trend to include provisions on environmental and labour standards and other issues related to sustainable development in international investment agreements in order to address conflicts between investment promotion and other policy goals. However, these continue to be phrased in vague and non-binding language.[72] To date, no clear-cut, binding investor obligations have been included in any agreement. In the Dutch model BIT, sustainable development remains confined to the non-binding preamble, rather than being integrated into the main body of the treaty.[73]

In theory, policy coherence for development as a principle underpins all Dutch government policy.[74] But Dutch policymakers are failing to take on board the fact that investor–state dispute settlement based on broad-based BIT definitions enable easy circumvention of economic, social or environmental conditions related to foreign investments laid down by host country authorities. Equally, there is scant recognition that investment policy is at odds with UN Guiding Principle 9 that calls on states to ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of trade and investment agreements.

5.3. Recommendations for policy change: a new framework for BITs

→ A revised investment policy should not be centred on the protection of investments but on the promotion of sustainable investment and the state's ability to fulfil its human rights obligations. The exclusive right of foreign investors to threaten and initiate claims against legislative, executive or judicial decisions outside of national courts contrast sharply with the lack of mechanisms for communities to address corporate impunity when violations of human and environmental rights occur. TNCs must be held accountable for the social, environmental and human rights impacts of their operations. A modern investment framework should not privilege investors but should prioritise human rights. Effective regulation of foreign investment is required to ensure it contributes to economic development, social progress and environmental sustainability. Investment policy should favour long-term and sustainable investments and investor relationships over short-term financial gain, especially in developing countries. A modern investment policy must be tailored to ensure genuine sustainable development. Such a policy should be in line with principles of human dignity, democracy and respect for human rights as enshrined in the Treaty on the European Union, which stipulates in Article 3.5 that *"In its relations with the wider world, the Union [...] shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights [...]."*

→ With regard to development policy coherence, states should periodically review their business regulation at all levels to assess whether it is coherent with development commitments and protection of human rights, and adapt it where needed. BITs and other international investment agreements should be subject to periodic public and independent sustainability and human rights impact assessments. Countries should retain the option to revisit or terminate trade and investment agreements at any time, if these assessments show negative development impacts.

→ A new framework for international investment should encompass and build on the UN Guiding Principles on Business and Human Rights and other frameworks for corporate social responsibility such as the OECD Guidelines for Multinational Enterprises. In a fundamental recalibration of the system, investor obligations should be made binding and enforceable and the system should prioritise establishing effective avenues at the international level that provide access to justice for victims of investor crimes. The policy space of states must be independently and unequivocally be established, and should take firm precedence over investor rights and privileges to ensure the unfettered ability of the state to regulate in the wider public interest.

→ ISDS must be abandoned as a high-risk and unnecessary parallel legal system which is beyond reform. Transnational corporations are perfectly able to assess the risks associated with their foreign investments and weigh them up against expected financial returns. In case of conflicts they can resort to national courts. In addition, private insurance is available to transnational investors to cover political risks. Instead of maintaining an ISDS system that allows for the transferal of the cost associated with expansively interpreted investment protections onto the tax payer, this should be the preferred option.

In the interest of policy coherence for development, the Dutch government should proactively renegotiate existing BITs along these lines and not postpone their long overdue revision until they expire.

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14 Daniel M. Price serves on the Panel of Arbitrators of the World Bank's International Centre for Settlement of Investment Disputes, the Advisory Board of the Atlantic Council, and the Board of Directors of the American Arbitration Association. He is Managing Director of Rock Creek Global Advisors, an international economic policy advisory firm. According to Rock Creek's website, he focuses on international regulatory and policy matters and 'is currently advising multinational companies, financial institutions, and trade associations on financial regulatory issues, policy matters arising in global forums (G8, G20, and APEC), and ongoing trade negotiations'. Source: http://www.rockcreekadvisors.com/daniel-m-price.html

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The Transnational Institute was founded in 1974. It is an international network of activist-scholars committed to critical analyses of the global problems of today and tomorrow.
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www.bothends.org

Friends of the Earth Netherlands (Milieudefensie) is a national environmental organization that has approximately eighty local groups. Milieudefensie was founded in 1971 and has gathered more than 80.000 members and supporters since then. Jongeren Milieu Aktief (JMA), the independent youth department, has several thousand partners.
milieudefensie.nl