Her Excellency Ms Sigrid A.M Kaag
Minister for Foreign Trade and Development Cooperation
Ministry of Foreign Affairs of the Netherlands
P.O. Box 20061
2500 EB The Hague
The Netherlands

Date:	19 June 2018
Re:	The automatic renewal of the Bilateral Investment Treaty between the Netherlands and Burkina Faso.
Contact:	Danielle Hirsch, d.hirsch@bothends.org, ☎ +31 20 5306 600

Your Excellency,

We, the undersigned civil society organizations, ask your attention for the possible automatic renewal of the Bilateral Investment Treaty (or BIT) between the Netherlands and Burkina Faso[1].

On 16 February of this year you responded[2] to a series of questions raised by Member of Parliament Mr Alkaya by stating that BITs are very important to Host-countries, especially when they are developing countries. You used a report by the Netherlands Bureau for Economic Policy Analysis[3] to explain that the entry into force of a BIT will – on average – increase direct investment by 35%, with regional differences. While this report indeed found that BITs may have a positive effect on investment in Eastern Europe or Asia, it went on by saying that "this is not the case for low and lower middle income countries located in Latin America and Sub-Saharan Africa[4]," including Burkina Faso.

During recent years, Investor-to-State-Dispute-Settlement, or ISDS, has become highly controversial: the foreign investor is granted more protection than a national investor, only the investor may bring a claim to a tribunal while it frequently can avoid responsibility for human rights violations or environmental damage through opaque business constructions and clever location policy.[5] We want to recall that in 2015, UN experts[6] stated that "ISDS chapters in BITs and FTAs are also increasingly problematic" from a human rights perspective. In addition the European Court of Justice (ECJ) recently ruled[7] that all intra-EU BITs have to be terminated because of their ISDS-clauses. The ECJ currently handles several other cases exploring the legality of ISDS, and there is a very good chance that all BITs containing ISDS and including at least one EU Member State might be declared illegal under EU law.

[1]Project-Accord sur l'encouragement et la protection réciproque des investissements entre le Burkina Faso et le Royaume des Pays-Bas, entry into force on 1January 2004.
[2] https://zoek.officielebekendmakingen.nl/ah-tk-20172018-1303.html
[3] A. Lejour and M. Salfi,"The Regional Impact of Bilateral Investment Treaties on Foreign Direct Investment", CPB Discussion Paper 298,16 January 2015: https://www.cpb.nl/en/publication/the-regional-impact-of-bilateral-investment-treaties-on-foreign-direct-investment
[4] Idem, p. 33.
[5]R. Knottnerus, R. van Os. et al. "50 jaar ISDS. Een mondiaal machtsmiddel voor multinationals gecreëerd en groot gemaakt door Nederland", 13 January 2018, p.33.
[6] UN experts voice concern over adverse impact of free trade and investment agreements on human rights, United Nations Human Rights Office of the High Commissioner 2015, http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031&LangID=E.
[7]ECJ Case C-284/16, 6 March 2018.

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We are glad to hear that the Netherlands views its BITs as outdated, as it is working on a new model BIT. And since your predecessor has stated that ISDS is dead and buried[8], we ask that the Dutch government terminates the current BIT with Burkina Faso, which still includes ISDS.

A unilateral termination of the BIT before 1 July 2018 will mean activation of the sunset-clause from 1 January 2019 until 31 December 2034. Unilateral termination after 1 July 2018 will mean a fifteen year extension of the treaty and a fifteen year sunset-clause up to 31 December 2049. In order to prevent such scenarios, we ask the Dutch government to seek termination by mutual consent of both parties to the treaty, and it is in this context that we want to recall that Burkina Faso as a member of ECOWAS has obligations that might require it not to renew the current BIT: On 19 January 2009, the ECOWAS Supplementary Act on Investment[9] entered into force. It deviates significantly from the current BIT with the Netherlands since it not only includes investor obligations and provisions how to hold investors accountable but it has also been the explicit choice of the ECOWAS members to exclude the highly controversial ISDS mechanism in its dispute settlement system. And following articles 31 and 32 of said Act, ECOWAS Member States must ensure that the provisions of international trade agreements like the one between the Netherlands and Burkina Faso are in line with the Supplementary Act.

We therefore hope that the Netherlands will take the necessary steps to ensure termination of the treaty.

Yours respectfully,

Danielle Hirsch
Director Both ENDS

With support of:

Amis de la Terre (Friends of the Earth France), France
Bank Information Center Europe, Europe
Ecologistas en Acción, Spain
Friends of the Earth Europe, Europe
GRAIN, international
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Ong AFRICANDO, Spain/Senegal
Platform Duurzame en Solidaire Economie, the Netherlands
SEATINI, Uganda
SOMO, the Netherlands
The Corner House, UK
Vrijschrift, the Netherlands

[8]Minister Ploumen in Parliament on 26 September 2017, during a debate on a Free Trade Agreement between the European Commission and Japan.
[9]The text of the treaty is available here: http://investmentpolicyhub.unctad.org/Download/TreatyFile/3266.