Reaction by Both ENDS

on

Internetconsultatie “Nieuwe modeltekst investeringsakkoorden”

16.05.2018

For the purposes of this internet consultation we will focus on a few of our main concerns regarding the currently proposed text for a new model BIT. Both ENDS is more than willing to discuss the draft model BIT in greater detail with the Ministry of Foreign Affairs.

The stated objective of the current reform proposal

It is admirable that the aim for the new model BIT is to bring more balance to the rights and duties of states and investors. Unfortunately the current draft does not meet that aim: investors are still granted rights while at the same time no obligations are imposed on them.

In that regard we would like to refer to article 20 of the Morocco – Nigeria BIT (2016)[1] or chapter three of the ECOWAS Supplementary Act A/SA.3/12/08.

Both treaties contain several articles than at least also impose some obligations on the foreign investor and deal with the liability of foreign investors.

Furthermore, in the current model BIT it is still only the investor who can bring a claim against a host-state before a tribunal. There are no similar mechanisms included to address investment related disputes that are caused by the conduct of the investor, neither for the host state nor for other affect stakeholder, such as local communities.

There is also no minimum cooperation requirement included for home and host state to assist one another in efforts to hold an investor accountable. This again falls short of best practices in IIA treaty making. For example article 26 of the ECOWAS Supplementary Act gives Host States the right to seek information from a potential investor or its home State about its corporate governance history and its practices as an investor, including in its home State. And article 30 puts at

1 Investors shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state.

least some minimum obligations and cooperation requirements on the Home state to address investment related corruption in the Host state.

For the rest of our input document for this consultation we try to follow the structure of the currently prosed text

There are also major questions regarding definitions, scope and application of the model BIT.

Art.1

In article 1(a) the definition of 'investment' includes any kind of asset that has the characteristics of an investment with the only exception of claims to money that arise solely from commercial contracts for the sale of goods and services.

There are no conditions relating to the nature of the investment or in how far the investment has to contribute to the objective of the treaty. It should be clarified that every provision in this treaty that gives rights to the foreign investor will only be applicable when the investment indeed contributes to the stated aim of sustainable development.

A few forms of investment mentioned in the illustrative list are problematic, such as "rights granted under contract" or "rights in the field of intellectual property": we believe that rights in the field of intellectual property, goodwill, brand value, markets sharer, or similar intangible property should be excluded from coverage because these assets as such might not sufficiently contribute to the aim of sustainable development.

Article 1(b)(ii) mentions "substantial business activities", but it does not mention what constitutes a "substantial business activity". With no clearcut definition of substantial business activities it is left to the arbitrators to formulate criteria and thresholds. And as we have seen in the current context, arbitrators tend to stretch already wide definitions even further. In the Netherlands, in order to obtain an Advance Tax Ruling and/or Advance Pricing Agreement, legal entities have to meet "substance requirements" that in our view would be totally insufficient to prevent "letter box companies" from benefiting from the BIT.

It is also problematic that article 1(b)(iii) explicitly covers legal entities that have no substantive business activities in the Netherlands at all, as long as they are (in)directly owned or controlled by Dutch investors defined in article 1(b)(ii).

Art. 2

The phrase "indirectly owned or controlled investment" in article 2(1) is problematic since this could potentially open the door to treaty shopping.

Although article 2(4) already reduces the right to subsidies of foreign investors, any type of subsidies or grant provided by the host-state should not fall within the treaty, especially when such a treaty involves a developing country.

But the main flaw in this article is that it reduces the treaty to focus on foreign investors' rights only, whereas we were made to believe that the aim of this new text was to strike a fair balance between the rights and obligations of both states and investors. Not only are there no obligations for investors, no commitments by parties to the treaty are made to address misconduct of investors.

In comparison we here would like to recall article 20 of the Morocco – Nigeria BIT or Chapter three of the ECOWAS Supplementary Act. Furthermore, article 18(6) of this Act states that "(…) a host state or private person or organization, may initiate actions for damages under the domestic law of the host Member State, or the domestic law of the home Member State where such an action relates to the specific conduct of the investor, for damages arising from an alleged breach of the obligations set out in this Supplementary Act (…)."

Art. 3

Although parties affirm the G20 guiding principles for global investment policy not all of the principles seem to be implemented in the model BIT. Principle eight for instance states that "investment policies should promote and facilitate the observance by investors of international best practices and applicable instruments of responsible business conduct and corporate governance".

In our view that would mean that any foreign investor that persistently ignores "applicable instruments of responsible business conduct" should not be able to benefit from the rights granted under this treaty. Furthermore, any investment that is inconsistent with the multilateral agreements in the field of environmental protection, labor standards and the protection of human rights to which the contracting parties are party should also be excluded from protection under this treaty.

Art.6

While we appreciate that the agreements mentioned in article 6(5) do not constitute an exhaustive list, we believe that at least the GSP+ Conventions (included in Annex VIII of Regulation (EU) No 978/2012 of 31 October 2012)

should be added to article 6(5). The parties should also agree to - upon request of one of the parties, or periodically - review the content of the treaty list and include appropriate additions.

Art 7

Article 7 reads more like something that should be in a preamble rather than the operational part of a treaty: it seems there is no obligation to "encourage" investors to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that party. It is also unclear what constitutes as encouragement.

Art 8

We want to highlight that Art. 8.1 as it is formulated now would not grant "Non-discriminatory treatment" to foreign investors. The currently chosen formulation is

" Each Contracting Party shall accord to an investor of the other Contracting Party […] treatment no less favorable than the treatment it accords, in like situations, to its own investors[...]".

While this does clarify that national investors can not be treated better than the foreign one, foreign investors instead still could be treated better than national ones. If the objective would indeed be no discriminatory treatment of national and foreign investors, the words " *treatment no less favorable than*" should be taken out.

Art. 8.1 would than read as follows:

"Each Contracting Party shall accord to an investor of the other Contracting Party and to an investment of an investor of the other Contracting Party, the treatment it accords, in like situations, to its own investors and to their investments with respect to conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory."

Art 9

In our view Articles 9(4) and 9(5) are very problematic and should be deleted.

Article 9(4) gives a mandate to arbitrators to also consider "legitimate expectation" of investors. The expectations of the investor do not even have to be based on a commitment given in writing. The only requirement is that the Contracting Party made a "specific representation" to an investor to induce an

investment upon which the investor relied in deciding to make or maintain that investment.

Article 9(5) lifts any right or promise that might have been given to an investor in writing related to a specific investment to a legally binding and internationally enforceable right under international law. The "written commitments" might have been made in a secret document such as a contract.

But in fact even loose promises that may have been made in an informal email might already fulfil the criterion of a "written commitment" as long as it was a commitment regarding a specific investment.

The current draft text for a new model BITs also provides for no limitation or restriction of the rights that might be granted or promised to be made to investor, even so they subsequently would be protected under Art. 9.4 and Art 9.5

Articles 9(4) and (5) provide huge legal loopholes: even if a court of last instance should come to the conclusion that the promises made to the investor were illegal under national law, it is not ensured that the related investor's right under Art 9.5 or Art 9.4 would be automatically waived by the arbitrators.

In addition, there will be insufficient transparency to hold those who made a promise to account or to prevent that far reaching decisions are made, and there will be insufficient scrutiny by other relevant government departments, parliament or the general public.

In article 6(3) for instance "the Contracting Parties recognize that it is inappropriate to lower the levels of protection afforded by domestic environmental or labor laws in order to encourage investment". But something that is inappropriate is not necessarily forbidden. And because of the prevailing practice not to publicly disclose investment contracts such a breach might never become public, preventing any accountability of those responsible.

Equally disturbing are "stabilization clauses" in private contracts between investors and host states that address changes in law in the host state and are meant to "stabilize" the legal environment applicable to the investment during the lifetime of the project. They are frequently designed to insulate investors from progressive new environmental and social legislation, a matter not only of growing concern but also of growing economic significance to investors.

A study conducted for the International Finance Corporation of the World Bank and UN Special Representative of the Secretary-General on Business and Human Rights John Ruggie[2] found that that nearly 60%of the stabilization clauses with

2 A. Shemberg. "Stabilization Clauses and Human Rights" research conducted for IFC and the United Nations Special Representative of the Secretary-General on Business and Human Rights, IFC and UNITED NATIONS May 27, 2009

non OECD countries as host state cover stabilization against social and environmental law. Publicly known and documented cases of contracts with stabilization clauses with adverse impacts on the protection and promotion of Human rights in the host state are the BTC pipeline project of BP (the Baku-Tbilisi-Ceyhan pipeline crossing Azerbaijan, Georgia, and Turkey), BPs contracts underpinning the South Caucuses Pipeline (SCP), the Chad-Cameroon pipeline of Exxon and the 2005 Mittal steel investment in Liberia.

Besides articles 9(4) and (5), the definition of investments in article 1(a)(iv) [that unconditionally covers any "rights granted under contract"] would also make such stabilization clauses directly enforceable by an investor.

As stated in the study "human rights law requires states to protect human rights from interference by private parties (including companies). The passing and implementing of laws regulating the behavior of private parties (including companies) is one of the primary methods by which states fulfill their international human rights obligations. UN human rights law and policy support the idea that failures by a state to regulate and enforce its regulations against companies can amount to a violation of the state's international treaty obligations. Additionally, within the regional human rights systems, states have been found in violation of their human rights obligations for failing to properly regulate or prevent company actions or omissions that resulted in violations of human rights, including the right to life, privacy, and others."

To negotiate treaties that not only do not ban stabilization against social and environmental law in contracts but to even make them binding under international law and to provide the means to investors to make them enforceable is in our view totally unacceptable.

Section 5

Section 5 contains the controversial Investor-to-State Dispute Settlement mechanism (ISDS). While it contains some procedural changes, the proposed reforms do not hit at the hart of the problem of the ISDS mechanism.

We recognize that some of the proposed reforms in the new text, like inclusion of the "UNCITRAL Transparency Rules" are improvements to the current model text for Dutch BITs. However looking in comparison at the investment chapter of CETA ,and even though we think that the reform effort reflected in the CETA text are still totally in adequate, we still have to conclude that the text in Section 5 of the proposed new model text is even worse than the CETA-text.

The way how the procedural rights granted to foreign investors under Section 5 go far beyond those of nationals, might be best illustrated by Art 18.4.b.

Art 18.4.b explicitly grants the right to a foreign investor that might have lost a case in the national courts of last instance to still start procedures under the new ISDS mechanism up to two years after the final ruling of that court, but also at any earlier moment of convenience to the foreign investor.

The Netherlands currently has at least five BITs in force that do not include any form of ISDS. We had hoped that the new model BIT would now mainstream this approach and exclude ISDS from all future treaties. (examples are the current Dutch BIT with Malta and the one with Thailand)

Art. 26

After entry into force the treaty would make it impossible for parliaments to change any of the applicable rights granted to investors for 30 years (Art 26.1 in combination with Art 26.3). Signing the treaty would mean that parliament would agree that it would be forbidden for the Netherlands and its counterpart country to terminate the treaty for 15 years, and even if the treaty should than be terminated, nothing could prevent that present foreign investors still make use of the rights and mechanism of the BIT for another 15 years.

Article 26 as it currently has been drafted has the clear intention to put the rights granted to foreign investors -not only above those of national investors- but also out of any democratic control for more than a generation.

The Netherlands has currently several treaties that do not contain a so called "survival clause" (in the proposed new mode text this is Art. 26.3)

While we did not manage to make a comprehensive analysis of all Dutch BITs we found that besides the example of the current Dutch BIT with Bangladesh at least four other Dutch BITs that are currently in force do not contain a survival clause.

We also found that several of the currently applicable Dutch BITs can after an initial term be terminated at any time (examples are the currently in force Dutch BITs with Malaysia or Nigeria). Art. 26.2 of the proposed new model text would not allow this.

So also here we have to conclude that the new text falls far short of the best practice that currently can be found in currently applicable Dutch BITs.