Towards a more inclusive and sustainable model for Dutch bilateral investment treaties.

SOMO's contribution to the public consultation – 18 June 2018

1. Introduction

On 16 May 2018, the Dutch Ministry of Foreign Affairs published its new draft model for bilateral investment treaties (BIT).[1] The draft model, which will replace the 2004 model BIT, is meant as a basis for the renegotiation of the remaining 79 BITs of the Netherlands with countries outside of the European Union (EU) and for the negotiation of new treaties in the future. The idea of revising the model BIT dates back to early 2015[2], and forms part of a wider rethinking on trade and investment agreements set in motion under the previous Dutch government.[3] SOMO welcomes the long-awaited revision of the Dutch model BIT and acknowledges the efforts to tackle at least some of the controversies that have crystallized over the past years. However, in our view, the draft model text continues to fall short of the promised policy 'reset' that would put sustainable and inclusive development first. In no way does it constitute the break-away from the current system for treaty-based investment protection that is required to address the fundamental systemic imbalances inherent therein.

2. Reassessing the purported benefits of BITs

As a vantage point, the Dutch government should give greater consideration to the purported objectives of BITs and engage more critically with the question whether BITs are the most adequate instruments to advance sustainable economic development. More and more countries are currently reassessing their policies and practices with regard to their investment treaties. Many governments are keen to attract investment to boost sustainable economic development, and, in that light, they are reviewing the effectiveness of existing policies and instruments designed to advance that aim. While the costs of BITs become increasingly apparent and widely acknowledged, the benefits remain largely unclear.[4] This

[1] https://www.internetconsultatie.nl/investeringsakkoorden

[2] Letter from the minister of Foreign Trade and Development to the chair of the House of Representatives, Kamerstuk 21 501-02, nr. 1481, Den Haag, 9 April 2015. https://zoek.officielebekendmakingen.nl/kst-21501-02-1481.html

[3] Non-paper The Netherlands, 'Reforming EU trade policy: protection, not protectionism', September 2016. https://www.rijksoverheid.nl/onderwerpen/handelsverdragen-europese-unie/documenten/vergaderstukken/2016/09/01/reforming-eu-trade-policy-protection-not-protectionism.

[4] SOMO et al., "50 jaar ISDS. Een mondiaal machtsmiddel voor multinationals gecreëerd en groot gemaakt door Nederland." Amsterdam, January 2018. https://www.somo.nl/nl/50-jaar-isds-een-mondiaal-machtmiddel-voor-multinationals/. Lise Johnson, Lisa Sachs, Brooke

section briefly highlights some of the recent evidence that should be taken into consideration when reassessing the key purported benefits of BITs.

➔ **BITs do not necessarily attract FDI**

One of the most common rationales for BITs is that they can encourage foreign direct investment (FDI). However, evidence that BITs can increase FDI flows remains inconclusive. A recent OECD study that comprehensively reviews the existing evidence states the following:

> [T]he several dozen econometric studies that have tested whether there is a correlation between the existence of [BITs] and FDI inflows to developing countries show diverse and at time contradicting results. Some studies found positive correlation, at least in certain configurations, some found a very weak, no, or even negative correlation with [BITs] and some studies found correlation between [BITs] and greater inflows, but not necessarily from the States with which a treaty has been concluded.[5]

Numerous studies indicate that BITs are hardly the determining factor for investors when making the decision to invest; other factors such as market size and growth potential, a skilled workforce, availability of natural resources and adequate infrastructure appear to be more important determinants of FDI.[6] In fact, a recent study shows no decrease and in some cases even an increase in FDI after countries terminated their BITs.[7]

➔ **FDI does not necessarily contribute to sustainable development**

A second consideration is that not all FDI is the same. FDI can produce wide-ranging benefits in host economies by generating employment, transferring skills and disseminating technology, generating fiscal revenues, supporting industrial diversification and productive capacities as well as contributing to local enterprise development through linkages with suppliers. But these benefits do not always materialize automatically. Research indicates that FDI can also have negative spill-over effects and crowd out domestic companies, create

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Guven and Jesse Coleman (2018), "Costs and Benefits of Investment Treaties: Practical Considerations for States", CCSI Policy Paper, March 2018. http://ccsi.columbia.edu/files/2018/04/07-Columbia-IIA-investor-policy-briefing-ENG-mr.pdf.

[5] Pohl, J. (2018), "Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence", OECD Working Papers on International Investment, 2018/01, OECD Publishing, Paris. http://dx.doi.org/10.1787/e5f85c3d-en. Pp. 28-9. See also Jonathan Bonnitcha (2017), "Assessing the Impacts of Investment Treaties: Overview of the evidence", IISD Report, September 2017. https://iisd.org/sites/default/files/publications/assessing-impacts-investment-treaties.pdf; UNCTAD (2014), "The impact of international investment agreements on foreign direct investment: an overview of empirical studies 1998-2014', IIA Issues Note, September 2014. http://investmentpolicyhub.unctad.org/Upload/Documents/unctad-web-diae-pcb-2014-Sep%2016.pdf.

[6] Liesbeth Colen, Miet Maertens and Johan Swinnen (2014), "Determinants of foreign direct investment flows to developing countries: The role of international investment agreements", in O. De Schutter, J. Swinnen and J. Wouters (Eds.), *Foreign Direct Investment and Human Development. The Law and Economics of International Investment Agreements.* Routledge; Lisa E. Sachs and Karl P. Sauvant (2009), "BITs, DTTs, and FDI flows: An overview", in Sauvant and Sachs (Eds.), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*. Oxford University Press.

[7] Public Citizen (2018), "Termination of Bilateral Investment Treaties has not Negatively Affected Countries' Foreign Direct Investment Flows", Public Citizen Research Brief, April 2018. https://www.citizen.org/sites/default/files/pcgtw_fdi-inflows-from-bit-termination_0.pdf.

precarious jobs or reduce employment, increase income inequality, facilitate tax evasion and avoidance, and contribute to environmental degradation and pollution.[8] This shows that it is crucial to provide for the adequate mechanisms and regulations to harness FDI for sustainable development.

BITs, however, tend to protect all kinds of FDI irrespective of the nature of the investment, the behaviour of the investor or the social, economic or environmental impact of the investment. Moreover, BITs generally go beyond the traditional notion of FDI and typically include also portfolio investment and other financial and short-term speculative capital flows that are less likely to produce tangible benefits for the host economy.

➔ **BITs and ISDS do not necessarily contribute to the 'de-politicization' of investment disputes**

Another main argument used to justify BITs and ISDS is that, by enabling foreign investors to bring claims directly against host states before international arbitration, investment disputes are 'de-politicized'. The purported benefit is that the investor no longer needs to rely on its home state in investment-related disputes, either through so-called 'gunboat diplomacy', diplomatic protection, espousal or the imposition of political or economic sanctions that may harm diplomatic relations.[9] Claims about de-politicization, however, not only largely obfuscate the distributional effects – and thus the inherent political nature – of the investment treaty regime, recent research also shows that investors still frequently seek assistance from their home governments in informally resolving incipient investment disputes. One particular study concludes: "[d]espite the rise of investment treaties and investor-state arbitration, access to commercial diplomacy remains a valuable asset for firms seeking to manage political risks abroad".[10] This suggests that commercial diplomacy has been *complemented* rather than replaced by the modern investment arbitration regime as a mechanism for protecting foreign investment.

[8] For an overview of the different positive and negative effects of FDI, see: Liesbeth Colen, Miet Maertens and Johan Swinnen (2014), "Foreign direct investment as an engine for economic growth and human development: a review of the arguments and empirical evidence", in O. De Schutter, J. Swinnen and J. Wouters (Eds.), *Foreign Direct Investment and Human Development. The Law and Economics of International Investment Agreements.* Routledge; UNCTAD (2015), "Investment Policy Framework for Sustainable Development". http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf.

[9] Kenneth J. Vandevelde (2005), "A brief history of international investment agreements", *U.C.-Davis Journal of International Law & Policy* 12(1): 157. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1478757.

[10] Geoffrey Gertz (2018), "Commercial Diplomacy and Political Risk", *International Studies Quarterly* 62(1): 94-107. See also: Gertz, G., Jandhyala, S., Poulsen, L. (2018), "Legalization, diplomacy, and development: do investment treaties de-politicize investment disputes?", *World Development* 107: 239-252.

3. Commentary to the draft model BIT

Scope and application

In terms of covered investments, the draft model continues to rely on the widest possible definition that covers 'every-kind-of-asset' (article 1(a)). Such a wide definition is problematic as it can end up covering economic transactions not contemplated by the Parties or investments/assets with questionable contribution to countries' development objectives. It may also expose states to unexpected liabilities.[11]

➔ The definition of investment must be narrowed down substantially.[12]

Investments are required to have a certain duration, the commitment of capital or other resources, the expectation of gain or profit, and the assumption or risk. Three of these characteristics follow the so-called *Salini*-criteria, but unfortunately no reference is made to the important characteristic of contributing to the economic development of the host country.

➔ More ambitious characteristics should be developed to ensure that the covered investments bring concrete benefits to the sustainable economic development of the host country.

Article 1(b)(iii) requires legal persons to have 'substantial business activities' in the territory of the home state. However, it remains unclear what kind of business activities are considered to be 'substantial', as the draft model fails to provide for any further definitions or criteria. Dutch law gives some limited guidance in the form of the substance requirements that foreign companies must comply with in order to enjoy the benefits of the Dutch tax regime.[13] It is however widely acknowledged that many of these requirements are weak in

[11] UNCTAD (2015), "Investment Policy Framework for Sustainable Development". http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf.

[12] An increasing number of countries exclude portfolio investment from the scope of their BITs. E.g. article 1(3) of the 2016 Nigeria-Morocco BIT, http://investmentpolicyhub.unctad.org/Download/TreatyFile/5409; article 2(1) of the 2015 Brazil-Malawi Investment Cooperation and Facilitation Agreement, http://investmentpolicyhub.unctad.org/Download/TreatyFile/4715.

[13] The substance requirements are the following:

- The entity should have sufficient equity, where what constitutes 'sufficient' is decided on a case-by-case basis
- The entity should be subject to 'genuine risks' of its activities and transactions. According to Dutch authorities, there is a real risk when the entity's equity if at least 1 per cent of the entity's loan or an amount of at least 2 million euro.
- At least half of the directors should have permanent residency in the Netherlands.
- The directors should have adequate professional knowledge in order to carry out their tasks and manage the entity's transactions.
- The directors' decisions are made in the Netherlands.
- The bank accounts are held and bookkeeping is performed in the Netherlands.
- The entity should comply with its (tax) reporting obligations.
- The entity's address is in the Netherlands and the entity is not a tax resident elsewhere.

Ministry of Finance, 2014, 'Vragen en antwoorden met betrekking tot het besluit Dienstverleningslichamen en zekerheid vooraf (DGB 2014/3101), en het besluit Behandeling van verzoeken om zekerheid vooraf in de vorm van een Advance Tax Ruling (ATR) (DGB

the sense that they are easily met without having, for example, a real office, staff, production or sales in the Netherlands. The Netherlands boasts a thriving trust firm sector that assists foreign shell companies in complying with these substance requirements.[14]

- ➔ To give some more body to the notion of 'substance' the new Dutch model BIT might look at linking corporate nationality to the location of the corporate headquarters, supported by an illustrative and non-exhaustive list of criteria (e.g. number of permanent employees, turnover, tax certificates), and placing the burden of proof on the investor. Alternatively, options to directly exclude certain types of activities from the scope of the treaty could be explored.[15]

Article 2(2) merely reaffirms the right to regulate, but continues to leave it to arbitrators to determine whether a contested measure taken by a Contracting Party falls within the definition of an action necessary to achieve legitimate policy objectives. It falls short of civil society's demand to affirm a State's duty to regulate in the public interest.

- ➔ A public interest carve-out modelled after the 'tobacco carve-out' in the Trans-Pacific Partnership agreement would form a much stronger mechanism to safeguard public interest legislation from ISDS claims.[16]

Investment promotion and facilitation

Article 3(1) uses very strong language on investment promotion ("shall admit"), and weaker language on the commitment to promote sustainable investment ("strive to strengthen") (article 3(3)).

- ➔ Article 3(1) should aim to create favourable conditions for sustainable and responsible investment that contribute to sustainable development.
- ➔ The draft model should include a requirement for foreign investors to conduct a human rights and environmental impact assessment prior to their establishment.[17]

2014/3099)". https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/besluiten/2014/06/13/besluit-dgb-2014-3102/besluit-dgb-2014-3102def.pdf

[14] Parliamentary Enquiry on Fiscal Structures, June 2017. https://www.tweedekamer.nl/kamerstukken/detail?id=2017D20244.

[15] For example, Article 1(2(2)) of the 2015 Indian model BIT states:
"Real and substantial business operations do not include:

- Objectives/strategies/arrangements, the main purpose or one of the main purposes of which is to avoid tax liabilities;
- The passive holding of stock, securities, land, or property; or
- The ownership or leasing of real or personal property used in a trade or business".

[16] Article 29.5 of the Trans-Pacific Partnership (TPP) agreement.

[17] See for example article 13 of the SADC Model Bilateral Investment Treaty, http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf; article 14 of the 2016 Nigeria-Morocco BIT, http://investmentpolicyhub.unctad.org/Download/TreatyFile/5409.

Article 5 refers to enhancing the rule of law in the Contracting Parties. SOMO welcomes the effort of strengthening domestic institutions and judiciaries to provide all stakeholders with better access to justice, which might make the ISDS mechanism eventually obsolete.

➔ Article 5(2) remains overly focused on the access to justice for investors. More ambitious language should be developed in order to ensure the necessary commitment by both home and host country to facilitate, assist, and collaborate with regard to the strengthening of domestic judiciaries, not only for investors but to all stakeholders.

Sustainable development

Article 6 on sustainable development is unjustifiably weak and lacking in real ambition. It does mention the fundamental ILO Conventions, the Universal Declaration of Human Rights and the Paris Climate Agreement, but only states that Parties reaffirm their commitments under these agreements in so far as they are party to them (article 6(5)). The ratification and implementation of such core international agreements has not been included as a prerequisite. The only 'hard' language in relation to sustainable development is found in article 6(4), which reads: "A Contracting Party shall not adopt and apply domestic laws contributing to the objective of sustainable development in a manner that would constitute unjustifiable discrimination or a disguised restriction on trade". Such phrasing is wide open to the broadest interpretation.

As to Corporate Social Responsibility, in the new Dutch model the Parties merely reaffirm the importance to 'encourage' investors operating in their territory or subject to their jurisdiction 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 (article 7). Again, a blatant lack of ambition, not only in the lack of any binding obligations, but also in failing to at least raise the bar by holding investors to the most stringent levels of CSR applied in either Party.

➔ Investors should be required to comply with domestic and international obligations. [18]

[18] Precedents for more ambitious CSR commitments can be found in, for example, articles 18 and 19 of the 2016 BIT between Nigeria and Morocco, http://investmentpolicyhub.unctad.org/Download/TreatyFile/5409; articles 13 to 16 of the ECOWAS Supplementary Act of 2008 Adopting Community Rules on Investment and the Modalities for their Implementation, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3266; articles 10 to 16 of the SADC Model Bilateral Investment Treaty, http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf.

- ➔ A supremacy clause should be included to clarify that the states' obligations under international human rights, labour or environmental agreements override the obligations under international investment agreements.[19]
- ➔ The commitment to sustainable development should ultimately inform the principles and objectives governing the treaty. Sustainable development objectives should for example also be translated into the definition of investment.

Investment protection

The provisions on national and most-favoured nation treatment (article 8), fair and equitable treatment (article 9) and indirect expropriation (article 12) largely follow the text of the EU-Canada CETA agreement. Particularly, article 9(4) codifies the obligation not to breach the 'legitimate expectations' of an investor. Article 9(5) stipulates that "[w]hen a Contracting Party has entered into a written commitment with investors of the other Contracting Party regarding a specific investment, that Contracting Party shall not […] breach the said commitment through the exercise of governmental authority in a way that causes loss or damage to the investor or its investment". This as such constitutes a broadening of what is understood as 'fair and equitable treatment' in customary international law.

- ➔ Articles 9(4) and 9(5) should be omitted.

SOMO welcomes the effort to further clarify what constitutes as indirect expropriation (article 12). However, it remains up to for-profit arbitrators to decide what counts as a measure "designed and applied in good faith to protect legitimate public interests" (article 12(8)). Moreover, the calculation of the compensation on the basis of 'fair market value' remains highly problematic. Such a formulation facilitates the 'explosion' of claims to enormous amounts for lost profits.[20]

- ➔ Investors should be compensated only for direct forms of expropriation and the amount of compensation should reflect more realistically the actual losses suffered by the investor (i.e. not expected profits).

[19] See for example Markus Krajewski (2017), "Ensuring the Primacy of Human Rights in Trade and Investment Policies: Model clauses for a UN Treaty on transnational corporations, other businesses and human rights", https://www.cidse.org/publications/business-and-human-rights/business-and-human-rights-frameworks/ensuring-the-primacy-of-human-rights-in-trade-and-investment-policies.html.

[20] For an insider's view on the controversial methods for calculating the amount of compensation, see George Kahale III, "ISDS: The Wild, Wild West of International Law and Arbitration", The Brooklyn Lecture on International Business Law, 3 April 2018, https://www.bilaterals.org/IMG/pdf/isds-the_wild,_wild_west_of_international_law_and_arbitration.pdf.

Dispute settlement

The draft model provides investors with the possibility to bring ISDS claims for breach of the BIT's core protection standards. The model text does include some procedural improvements. Article 20(5) seeks to address the problem of 'double hatting' by arbitrators and the associated conflict of interest, by laying down that it is no longer permissible for arbitrators to have acted as legal counsel in the previous five years. Article 20(11) incorporates the UNCITRAL Transparency Rules. But the draft model fails to address many of the fundamental problems of the ISDS mechanism. SOMO principally rejects, also in the context of part 2 of the briefing, the inclusion of the ISDS mechanism in the Dutch model BIT.

- ➔ SOMO proposes to **phase-out the ISDS mechanisms** from Dutch BITs and invites the Dutch government to explore alternative avenues for the resolution of investment-related disputes. These could include:
  - Strengthening the domestic legal systems;
  - Private investment risk insurance;
  - Dispute prevention;[21]
  - Mediation and other forms of alternative dispute resolution;
  - State-to-state dispute settlement.

Should the Dutch government still decide to retain the ISDS mechanism, then the following comments and recommendations should be taken into account.

Article 15 considers the future establishment of a multilateral investment court (MIC), by stating that "the ISDS provisions will cease to apply upon the entry into force of an international agreement providing for a multilateral investment court". In our view, current proposals for a MIC seem to only further institutionalise and entrench a fundamentally flawed and one-sided system and will therefore not be able to address the core injustices of the investment protection regime and ISDS.[22]

Article 16(3) lays down that States may deny benefits to an investor that has changed its corporate structure with a main purpose to submit a claim "at a point in time where a

[21] See for example the approach taken by Brazil in its recent Cooperation and Facilitation Investment Agreements. These agreements do not contain ISDS, but include a novel and innovative form of institutional governance through the constitution of an Ombudsman or Focal Point and a Joint Committee for state-state cooperation and dispute prevention. Jose Henrique Vieira Martins, "Brazil's Cooperation and Facilitation Investment Agreements (CFIA) and Recent Developments", IISD Investment Treaty News, 12 June 2017, https://www.iisd.org/itn/2017/06/12/brazils-cooperation-facilitation-investment-agreements-cfia-recent-developments-jose-henrique-vieira-martins/.

[22] SOMO, "Same old, same old: the EU pushes ISDS 2.0", 28 March 2018. https://www.somo.nl/old-old-eu-pushes-isds-2-0/. See also CIEL, S2B and Rosa Luxembourg Foundation, "A World Court for Corporations: How the EU Plans to Entrench and Institutionalize Investor-State Dispute Settlement". December 2017. http://www.ciel.org/wp-content/uploads/2017/12/AWorldCourtForCorporations.pdf.

dispute had arisen or was foreseeable". This leaves out the many legal entities that are already incorporated in the Netherlands to benefit from the Dutch tax regime. Moreover, the rather permissive wording ("may") reduces its effectiveness in ISDS proceedings and places the burden of proof on the responding State.

➔ The denial-of-benefit clause should contain stronger language (e.g. "States **deny** benefits") and should cover all investors that lack substantial business activities. The burden of proof should be placed on the investor.[23]

ISDS claims may be submitted only under the ICSID Convention (or the ICSID Additional Facility) or under the UNCITRAL arbitration rules with the understanding that the Permanent Court of Arbitration (PCA) shall administer the proceedings (article 19(1)). Most notably, the draft model departs from established ISDS approaches in that it provides for the three members of an arbitral tribunal to be appointed by an appointing authority – the ICSID Secretary-General for ICSID arbitrations, and the PCA Secretary-General for UNCITRAL arbitrations (article 20). The selection of these two institutions – or better, these two individuals – as appointing authorities will however not necessarily translate into a more diverse pool of arbitrators.[24] Moreover, the motivation behind removing the appointing authority from the signatory states remains unclear and seems out of sync with the European Union's approach of a fixed roster of arbitrators appointed by states under its *Investment Court System*.[25]

Particularly worrying is article 22(4), which stipulates that for the calculation of monetary damages, "the Tribunal shall also reduce the damages to take into account any restitution of property or repeal or modification of the measure". This could be read as an encouragement for governments to adjust their regulatory measures in avoidance of huge claims for compensation.

➔ Article 22(4) should be omitted.

According to article 23, a tribunal may, when determining compensation, take into account any investor non-compliance with the UNGPs and the OECD Guidelines, but a potential reduction in compensation seems an inadequate mechanism to address human rights violations or other non-compliance by investors.

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[23] For an overview of existing treaty practice, see Suzy H. Nikiema, "Best Practices: Definition of Investor", IISD Best Practices Series, March 2012. http://www.iisd.org/pdf/2012/best_practices_definition_of_investor.pdf.

[24] For a comprehensive overview of the characteristics of these institutions, see David Gaukrodger, "Appointing Authorities and the Selection of Arbitrators in Investor-State Dispute Settlement: An Overview", OECD consultation paper, March 2018. https://www.oecd.org/investment/investment-policy/ISDs-Appointing-Authorities-Arbitration-March-2018.pdf.

[25] See for example article 8.27 of the EU-Canada CETA agreement. Furthermore, the Dutch model BIT makes no reference to an appellate mechanism, whereas this has become standard practice in recent EU treaties.

SOMO would furthermore propose including the following elements in the model BIT:

- ➔ Require investors to **exhaust local remedies** before challenging a state directly in an ISDS tribunal.[26] Some Dutch BITs already contain some language on the exhaustion of local remedies; this should become a standard practice.[27]
- ➔ Allow states to bring **counter-claims** on the basis of international human rights obligations and environmental duties for foreign investors.[28]
- ➔ Allow **affected third parties to join a case** with full rights, on equal grounds with the main parties to the dispute. This would bring more procedural fairness and inclusiveness to a system that is highly asymmetrical.
- ➔ **Deny access to ISDS** for investors that violate domestic or international obligations.[29]
- ➔ Facilitate the selection of **arbitrators from a more diverse background** (i.e. gender and geographical representation) and to have expertise in other relevant areas of law, such as human rights, labour law, and environmental law.

Final provisions

Article 26(1) provides that the treaty shall remain in force for a period of fifteen years. And even after the treaty has been terminated, foreign investors are still entitled to the rights enshrined in the treaty, including ISDS, for another period of fifteen years (article 26(3)). This further enhances the disciplining power of BITs and significantly limits democratic and parliamentary control over the political economy.

- ➔ Article 26 should be limited to shorter time periods.[30]

[26] Both under customary international law and international human rights law individuals are required to seek redress before domestic courts before pursuing international proceedings against the state. This practice aims at empowering domestic legal systems and safeguarding state sovereignty by avoiding their bypassing. In recent years, several states and regional communities have reintroduced a mandatory requirement to exhaust local remedies. Martin Dietrich Brauch, "Exhaustion of Local Remedies in International Investment Law", IISD Best Practice Series, January 2017. https://www.iisd.org/sites/default/files/publications/best-practices-exhaustion-local-remedies-law-investment-en.pdf.

[27] E.g. Articles 10(2) and 10(3) of the Netherlands-Argentina BIT (1994) require the investor to exhaust domestic remedies, but already allows the investor to initiate international proceedings if the domestic administrative or judicial organs have not given a final decision within a period of eighteen months from submissions of the dispute. http://investmentpolicyhub.unctad.org/Download/TreatyFile/107.
Article 9(3) of the Netherlands-United Arab Emirates BIT (2013) contains a mandatory requirement to exhaust local remedies, but only in case of a legal dispute concerning an investment in the territory of the United Arab Emirates. http://investmentpolicyhub.unctad.org/Download/TreatyFile/4774.

[28] Counter-claims are permitted in principle under Article 46 of the ICSID Convention and Articles 21-23 of the UNCITRAL Arbitration Rules.

[29] Article 16(2) of the draft model BIT provides: "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". This provision should be expanded to include human rights and environmental obligations.

[30] E.g. article 24(2) of the 2015 Indian model BIT: "[T]he provisions of this Treaty shall remain in force for a period of five years".

➔ Contracting Parties should commit themselves to a periodic review to assess the operation and effectiveness of the treaty. Parties could adopt joint measures in order to improve the respective treaty.[31]

Conclusion

Where a growing number of countries is focusing on more binding obligations for incoming investors, in the interest of more inclusive and sustainable development, the revised Dutch model BIT seems a missed opportunity to substantially narrow down treaty-based investment protection and better balance the rights and responsibilities of foreign investors. The draft model remains asymmetrical whereby foreign investors are granted rights without accompanying enforceable obligations. The Dutch model BIT disappoints, as the trade policy 'reset' announced by the Ministry of Foreign Affairs had raised hopes for a much more innovative approach to expedite genuine, fair, equitable and sustainable development.

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[31] E.g. article 33 of the 2016 Nigeria-Morocco BIT: "The State Parties shall meet every five years after the entry into force of this Agreement to review its operation and effectiveness, including the levels of investment between the Parties."