

The Netherlands wants ISDS under U.S. and Dutch influence

Vrijschrift

This paper is the [Vrijschrift Foundation](#) submission to the Dutch [consultation](#) on its [new model bilateral investment treaty](#) (BIT). The proposed BIT would give multinationals far reaching rights to challenge government decisions and it would place its supranational enforcement mechanism (investor-to-state dispute settlement or ISDS) under U.S. and Dutch influence.

Enforcement mechanism

The most remarkable change is that all members of ISDS tribunals would be appointed by an appointing authority, the secretary-general of ICSID or the secretary-general of the Permanent Court of Arbitration (article 20). Both are not judges.

The International Centre for Settlement of Investment Disputes (ICSID) is part of the World Bank. It is the most used ISDS forum; investors can choose this forum. The Bank's president [has always been a United States national](#) since the founding of the Bank in 1944. This president

- is ex officio chairman of the ICSID Administrative Council ([article 5 ICSID](#)),
- nominates the ICSID secretary-general ([article 10 ICSID](#)),
- appoints all three the arbitrators in annulment cases under ICSID rules (the only possible appeal, [article 52.3 ICSID](#)).

A [study](#) found that claimants from the U.S. were 91% more likely to benefit from an expansive resolution than claimants from all other states combined. In addition, the U.S. never lost an ISDS case. In the one case against the U.S., a case it could have lost, the U.S. [exerted pressure](#).

The Dutch proposal would further strengthen the role of officials with a link to the U.S. The ICSID secretary-general would appoint all three arbitrators in ICSID ISDS cases. It would create an investor-to-state dispute settlement mechanism under U.S. influence.

Permanent Court of Arbitration

The Netherlands plays a major role in the Permanent Court of Arbitration (PCA), which is not a court. Under the rules, the Netherlands minister for foreign affairs is the president of the PCA council. In addition, a senior Dutch diplomat [has always occupied the position of PCA secretary-general](#) – he or she would become the other appointing authority under the Dutch proposal.

The president gives instructions to the PCA secretary-general on behalf of the Administrative Council. An [OECD paper](#) notes: “Information about the exercise of this power in practice has not been located”. The paper also notes: “There does not appear to be any committee dedicated to oversight of dispute resolution matters or ISDS”.

Officials with a link to the Netherlands play a major role in the PCA. There are no known ISDS cases against the Netherlands.

Substantive protections

Investor-to-state dispute settlement tribunals have expansively interpreted “[nearly every provision found in investment treaties](#)”. ISDS tribunals even went [beyond levels of protection](#) offered by domestic courts. The Dutch proposal’s substantive provisions are modeled after the EU-Canada trade agreement CETA; both [codify the expansive interpretations](#).

Right to regulate

The model BIT’s right to regulate clause in article 2.2 is based on the European Commission’s proposal for the EU-US trade agreement TTIP. The formulation [is full of holes](#).

To protect the fundamental right to the protection of personal data, the European Commission has (later) proposed to fully exclude data protection from ISDS/ICS (article [B.4](#)). The Dutch model BIT does not contain such a safeguard.

Interpreting TRIPS

Article 12.9 (inadvertently) invites ISDS tribunals to interpret the WTO TRIPS agreement. This [should be avoided](#).

Multilateral investment court

Under the BIT's article 15 the parties would agree to use a multilateral investment court if one is created. Such a court would [strengthen investments vis-à-vis democracy and fundamental rights](#). This undermines our values, ability to reform, and ability to respond to crises, including to climate change.

Conclusion

The Dutch proposal combines invasive, far reaching rights with a biased enforcement system. The reform failed.

The Netherlands wants to attract multinationals. It facilitates tax evasion and gives multinationals great supranational power to challenge government decisions. The proposal would continue this practice.

The Dutch approach is penny wise, pound foolish. We need to strengthen our democracies and our ability to respond to crises, including to climate change. The Dutch proposal is irresponsible.