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Dutch Bilateral Investment Treaties: 60 years of protecting multinationals

Algemeen Dagblad

Onafhankelijk

Mexicaans bezoek

Aan beide zijden overwinningen gemeld

OPSTAND IN ARGENTINIË

Doel „invloed Peronisten breken"

Overwerk in bouw taboe

Rijksloodsen gaan betere financiële koers varen

Stabiel

Gewelddaden in Canada

FRANS-CANADEZEN WILLEN AFSCHEIDING VAN QUEBEC

Jammer

INTERPELLATIE VAN PROF. VONDELING

Militair omgekomen bij autobotsing

werd het ontwerp zonder hoofdelijke stemming goedgekeurd.

Bescherming investeringen

Overeenkomst tussen Nederland en Tunesië

TUNIS. — Tussen Nederland en Tunesië is een overeenkomst tot stand gekomen die de bevordering en bescherming van de Nederlandse investeringen regelt. Drs. J. H. W. Hoogwater, de plaatsvervangend directeur-generaal voor de buitenlandse economische betrekkingen, heeft een week onderhandeld in Tunis. Ambtenaren in Tunis hebben verteld dat de overeenkomst volgende week zal worden ondertekend door de Tunesische staatssecretaris Ahmed Ben Salah en door de Nederlandse ambassadeur dr. Th. P. Bergsma.

Content

1
Key takeaways

- **Over the past 60 years, the Netherlands has concluded many Bilateral Investment Treaties (BITs) of which 75 are in force today.** These treaties have been concluded with countries mostly in Asia, Africa and Latin America with the promise of promoting foreign investment and economic growth. However, they have been used mostly by multinational corporations to sue governments for taking action, including policy and legal changes that are in the public interest, when these governmental actions harm their profits.
- **Up to 40 per cent of the total foreign investment that flows from the Netherlands to countries with which the Netherlands has a BIT goes through empty shell companies,** or Special Purpose Entities (SPEs). These SPEs benefit from the corporate-friendly provisions of the Dutch BITs – and this is almost certainly one key reason why they are set up.
- **The Netherlands is the second most popular country (after the United States) for foreign investors to use BITs to sue other countries.** Between 1996 and 2022, companies that are registered in the Netherlands have used Dutch BITs to submit claims amounting to USD 105 billion. Such amounts create a significant financial burden for the targeted host states, and risks undermining their capacities to provide crucial public services to their citizens.
- 71 per cent of the 106 cases known to have been filed under Dutch BITs have been lodged through SPEs. Another 5 per cent involves other foreign-owned entities, meaning that **more than three-quarters of the cases are lodged by non-Dutch investors.**
- Half of the cases involves **companies with more than USD 1 billion in annual revenue and individuals with more than USD 100 million in net wealth.** Companies with more than USD 10 billion in annual revenue make up 26 per cent of the cases.
- BITs and their extensive investor rights **act as a significant obstacle to ambitious climate policy.** Fossil fuel investors are increasingly resorting to ISDS to challenge environmental and climate measures.
- **21 cases (20 per cent of the total known Dutch BIT cases) are related to the fossil fuel industry, involving a total of more than USD 55 billion in claims** of which USD 11.5 billion has already been paid out in compensation. Such claims create risks for energy and climate policies in host states.
- Instead of focusing on lengthy and uncertain renegotiation of 75 BITs, **the Netherlands should pursue the termination of existing treaties in cooperation with its treaty partners** to create the necessary policy space for sustainable development.

Belangrijkste bevindingen

- **In de afgelopen 60 jaar heeft Nederland vele Bilaterale Investeringsverdragen (BIT's) gesloten, waarvan er momenteel 75 van kracht zijn.** Deze verdragen zijn vooral gesloten met landen in Azië, Afrika en Latijns-Amerika om buitenlandse investeringen en economische groei te bevorderen. Ze zijn echter vooral gebruikt door multinationals om overheden aan te klagen voor het nemen van maatregelen, waaronder beleids- en wetswijzigingen die in het algemeen belang zijn, wanneer deze maatregelen hun winsten schaden.
- **Ruim 40 procent van de totale investeringen die vanuit Nederland stromen naar landen waarmee Nederland een BIT heeft, loopt via lege vennootschappen, of Special Purpose Entities (SPE's).** Deze SPE's profiteren van de gunstige bepalingen van de Nederlandse BIT's - en dit is vrijwel zeker een belangrijke reden waarom zij worden opgericht.
- **Nederland is het tweede meest populaire land (na de Verenigde Staten) voor buitenlandse investeerders om BIT's te gebruiken om andere landen aan te klagen.** Tussen 1996 en 2022 hebben in Nederland geregistreerde bedrijven Nederlandse BIT's gebruikt om voor 105 miljard dollar aan claims in te dienen. Dergelijke bedragen leggen een aanzienlijke financiële druk op de overheidsbegroting van de getroffen gastlanden, ten koste van cruciale publieke dienstverlening aan de burgers van deze landen.
- 71 procent van de 106 zaken die op grond van Nederlandse BIT's zijn aangespannen, zijn via SPE's ingediend. Nog eens 5 procent betreft andere entiteiten in buitenlandse handen, wat betekent dat **meer dan driekwart van de zaken wordt ingediend door niet-Nederlandse investeerders.**
- In de helft van de gevallen gaat het om bedrijven met meer dan 1 miljard dollar aan omzet en particulieren met meer dan 100 miljoen dollar aan nettovermogen. Bedrijven met meer dan 10 miljard dollar aan omzet vormen 26 procent van de zaken.
- BIT's en hun uitgebreide investeerdersrechten vormen een **belangrijk obstakel voor een ambitieus klimaatbeleid.** Investeerders in fossiele brandstoffen nemen steeds vaker hun toevlucht tot ISDS om milieu- en klimaatmaatregelen aan te vechten.
- 21 zaken (20 procent van het totaal aantal bekende Nederlandse BIT-zaken) zijn **gerelateerd aan de fossiele industrie, waarmee in totaal meer dan 55 miljard dollar aan claims is gemoeid,** waarvan al 11,5 miljard dollar aan schadevergoeding is uitgekeerd. Dergelijke claims creëren risico's voor energie- en klimaatbeleid in gastlanden.
- In plaats van zich te richten op langdurige en onzekere heronderhandelingen van 75 BIT's, zou **Nederland moeten streven naar beëindiging van bestaande verdragen in samenwerking met zijn verdragspartners** om de noodzakelijke beleidsruimte te creëren voor duurzame ontwikkeling.

2 Introduction

The Netherlands-Tunisia BIT: "This will cost us nothing".

On 23 May 1963, the Netherlands signed its very first bilateral investment treaty (BIT) with Tunisia. The treaty aimed at creating favourable conditions for foreign investment to stimulate private entrepreneurship and increase the prosperity of the two countries. Only three pages long, it included binding commitments to grant foreign investors with fair and non-discriminatory treatment, compensation in case of expropriation, and access to arbitration in case of dispute.[1] The Dutch decision to negotiate a BIT was spurred by political developments in Tunisia in the aftermath of the end of the French protectorate in 1956 and the subsequent "Tunisification" of the economy as part of nation-building efforts of the country's first President Habib Bourguiba. In particular, the Tunisian Decree No. 61-14 of 1961 sought to limit the extent to which foreign companies could operate in Tunisia, requiring that foreign companies had to establish a subsidiary in Tunisia with at least 50 per cent of the shares held by Tunisians. Foreign investors could continue with their activities in Tunisia on the condition that they were

> *"nationals of a State which has concluded with Tunisia a convention on reciprocal guarantees concerning investments and under the conditions provided for by the convention".*

The Dutch government feared that the decree put Dutch commercial interests in Tunisia at risk. Dutch companies with investments in the country, including Shell, KLM, Philips and Unilever, requested the Dutch government to negotiate a BIT with Tunisia. Other European states, such as Germany and Switzerland, had already begun signing BITs with a number of countries to protect their investment interests in the wake of decolonization processes and newly independent states' aspirations to build up their own economies. The Dutch government took the BIT that Switzerland had concluded with Tunisia in 1961 as a template for negotiation, with one Dutch official tellingly noting that "this will cost us nothing"[2] . The BIT was signed after a week of negotiations in Tunis and was accompanied by a letter from the Tunisian State Secretary of Finance, Ahmed Ben Salah, confirming that the treaty met the conditions

of Decree No. 61-14. Representatives of Shell were closely consulted during the negotiations and gave their blessing to the treaty. The head of its legal department in The Hague, Josephus Jitta, stated:

"the agreement to be reached with Tunisia would undoubtedly have precedent-setting effects for what the Netherlands could achieve in negotiations with other developing countries. Shell would welcome similar agreements with more countries in the future".[3]

The costs and benefits of BITs

Sixty years later, the Netherlands maintains a network of 75 BITs with countries mostly in Asia, Africa and Latin America. Worldwide, there are currently 2,583 bilateral and regional trade and investment treaties with investment provisions in force. Most of these treaties are very alike in content and include similar sets of investment protections. At their centre is the investor-to-state dispute settlement (ISDS) mechanism, allowing foreign investors to circumvent national legal systems to sue governments before international arbitration and claim compensation for state action affecting their business activities and expected profitability.[4] Evidence that BITs could help attract foreign investment, let alone sustainable and responsible investment, remains largely inconclusive. A meta-analysis of 74 studies has found that the "effect of international investment agreements is so small as to be considered zero".[5] Similarly, claims that BITs could bring benefits in terms of advancing good governance and the rule of law remain rather unsubstantiated.[6]

At the same time, their adverse impacts have become increasingly visible and widely recognised. Foreign investors – ranging from transnational corporations to shareholders and bondholders, and other wealthy individuals – have filed ISDS cases against a wide range of government measures that have little to do with blatant expropriation. These cases include issues related to transparency, stability, predictability, and consistency in regulatory frameworks. ISDS claims have targeted measures at all levels of government, including executive, legislative and judicial acts. They have regularly involved sensitive areas of public regulation, such as environmental protection, human rights, land reforms, public services and utilities, taxation, financial regulation, and developmental policies.[7] Claims and compensation awards can add up to billions of dollars and can weigh heavily on government budgets, particularly in the Global South. The significant financial burden on governments risks undermining their capacities to provide crucial public services to their citizens, such as education, health care, basic infrastructure, and housing. The exorbitant costs of ISDS could potentially result in a "chilling effect" on governments to bring in new legislative proposals in order to avoid claims.[8]

Whereas ISDS provides foreign investors with a tool to bend policy-making to suit their interests, victims of human rights violations, environmental degradation, and other types of corporate misconduct do not have recourse to similar strong mechanisms to

hold those same foreign investors to account. Contemporary BITs are marked by an inherent asymmetry in the allocation of substantive rights and obligations, and generally fail to include investor responsibilities with proper avenues for affected communities and workers (whose rights and interests can be at stake in investment disputes) to intervene effectively in ISDS proceedings.[9] Arbitral tribunals are not bound by domestic rules and procedures and tend to give priority to the relevant BIT provisions over other relevant areas of domestic or international law and policy, such as environmental or human rights frameworks, when deciding cases. As BITs generally place enforceable obligations only on states, investors could win cases even if they have violated domestic law or other international norms in relation to the investments. Such asymmetry further widens the global governance gap in the regulation of transnational corporations and strengthens their legal and thus political position vis-à-vis governments and societies at large.

Misalignment with climate objectives

The potential for such a legal infrastructure to enable corporate power becomes particularly problematic in the area of climate policy and energy transition.[10] In March 2023, the IPCC delivered a final warning on the climate crisis, as rising greenhouse gas emissions push the world to the brink of irrevocable damage that only swift and drastic action can avert. In the words of UN Secretary-General Antonio Guterres, "our world needs climate action on all fronts: everything, everywhere, all at once".[11] However, BITs and their extensive investor rights act as a significant obstacle to ambitious climate policy. Fossil fuel investors are increasingly resorting to ISDS to challenge environmental and climate measures, accounting for 20 per cent of the total known ISDS cases across all sectors. Lower middle-income and upper middle-income countries have received the highest number of claims related to fossil fuel investments, while 92 per cent of the investors are from high-income countries.[12] At the same time, high-income countries are not immune to ISDS claims themselves. For example, the Netherlands has itself faced claims by German energy companies RWE and Uniper on the basis of the Energy Charter Treaty (ECT), together claiming 2.4 billion euro in compensation for the decision to phase out coal-fired power generation by 2030 to comply with the Paris Climate Agreement.[13] The IPCC has warned that investment treaties could "be used by fossil fuel companies to block national legislation aimed at phasing out the use of their assets".[14] Indeed, climate ministers of Denmark, France and New Zealand have openly admitted to delaying their phase-outs of oil and gas production in fear of arbitration cases.[15]

In an unprecedented move, several EU member states, including the Netherlands, have announced their intentions to withdraw from the ECT, a BIT-like treaty dealing with investments in the energy sector.[16] Notably, the Dutch Minister for Climate and Energy, Rob Jetten, indicated that the proposed modernisation of the treaty still remains insufficiently in line with Dutch and European climate targets as it would continue to protect investment in fossil fuels and other areas inimical to carbon emission reduction.[17] The decision to exit a multilateral treaty on the basis of climate considerations marks an historic step and should ideally initiate a broader process of rethinking Dutch BITs from a climate perspective.

No time for renegotiation

Dutch BITs have frequently been used by foreign investors to obtain compensation for public policy measures, including by some of the largest fossil fuel companies in the world. Dutch BITs are particularly notorious for protecting non-Dutch investors that structure their investments through empty shell companies registered in the Netherlands, rendering the Netherlands a true claim-haven from where ISDS cases are being lodged. This approach has attracted fierce criticism from governments of partner countries facing unanticipated compensation claims, with Bolivia, Burkina Faso, Ecuador, India, Indonesia, South Africa, Tanzania and Venezuela all deciding to terminate their BIT with the Netherlands in recent years.

Due to strong pressure by civil society organisations and the Dutch Parliament, the Netherlands adopted a new model BIT in 2019 for use in (re-)negotiations with partner countries, with the aim of excluding protection for mailbox companies and introducing references to such issues as climate, environment, human rights, and corporate social responsibility. However, the model still provides a broad scope of protection for investments, including in fossil fuels. Continued and long-term protection for both existing and new investments in fossil fuels is clearly out of sync with the recent statements by Minister Jetten. Such continued protection could give rise to situations of large financial pay-outs to fossil fuel investors, thus interfering with the goal of the Paris Climate Agreement to align financial flows with a low-carbon trajectory.

Meanwhile, not a single BIT has yet been renegotiated based on the new model, while fossil fuel investors continue to use the Netherlands to sue governments worldwide on the basis of existing BITs. As the time-window for climate action is rapidly narrowing, governments need all the necessary policy space to make relevant changes as soon as possible. Against this background, efforts to realign Dutch BITs with the Paris Climate Agreement should not only focus on lengthy and uncertain renegotiation processes, but also on more short-term and systemic solutions in coordination and collaboration with partner countries. These should include the option of terminating existing and outdated treaties to open up policy space for governments to pursue sustainable development objectives.

This report examines how Dutch BITs have been used over the past sixty years by showing who has benefitted the most and what costs. Publicly available data from different sources have been used, including from the IMF, Dutch Central Bank, OECD, and UNCTAD, together with relevant arbitral documents and analyses through Investment Arbitration Reporter, as well as other online media reports. Corporate data have been retrieved from the Dutch Chamber of Commerce and corporate database Orbis. Section 3 of the report highlights the role of the Netherlands as a conduit country for global capital flows, and Section 4 gives a brief overview of the Dutch BIT networks and their main issues. Section 5 maps the different ISDS cases arising under Dutch BITs and their outcomes, what countries and sectors have been targeted the most, what amounts are involved, what types of investors are using Dutch BITs, and which arbitrators are handling the cases. Section 6 explores options to terminate the BITs in light of the slow progress in renegotiations, and is followed by the report's conclusion in Section 7.

3 The Netherlands as Conduit Country for Global FDI

According to the International Monetary Fund (IMF), offshore financial centres (OFCs) are countries or jurisdictions that "provide financial services to non-residents on a scale that is incommensurate with the size and the financing of its domestic economy".[18]

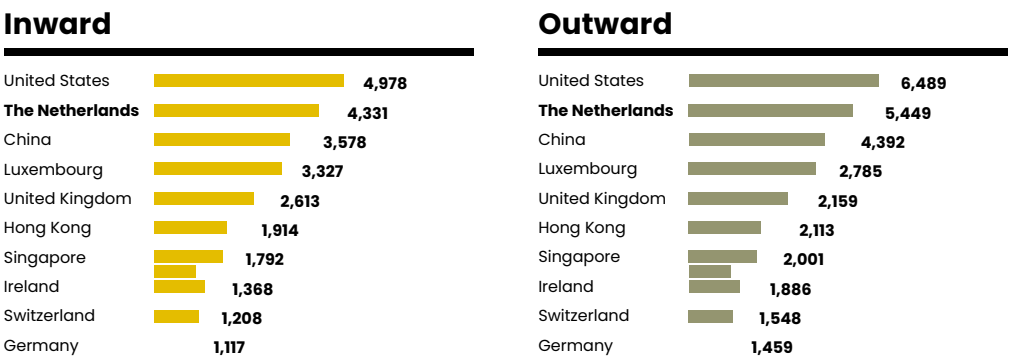
A distinction can be made between "sink" and "conduit" OFCs. Sink OFCs are typical tax havens, like Bermuda and the Cayman Islands, that attract and retain foreign capital and function as the final destination for global FDI flows. Conduit OFCs are jurisdictions that function as intermediate destinations for global FDI and are characterised by regimes of low taxes, strong legal systems and reputations for enabling transfers without taxation. Typical conduit OFCs are the Netherlands, the United Kingdom, Switzerland, Singapore, and Ireland.[19] The sheer magnitude of capital flowing through conduit OFCs has led the IMF to conclude that we are witnessing the rise of so-called "phantom capital". Almost 40 per cent of global FDI consists of such phantom capital, consisting of cross-border financial investments between firms belonging to the same multinational group, rather than stimulating economic growth, job creation, and productive capacities in host economies. Such phantom capital runs through empty shell companies, or Special Purpose Entities (SPEs) that have no real business activities but mainly carry out holding activities, intrafirm activities, or manage intangible assets to minimise the global tax bill.[20]

According to the Dutch Central Bank, there are about 12,000 SPEs in the Netherlands that together hold more than EUR 3,371 billion in assets on their accounts.[21] These SPEs typically manage participations, royalties, or intellectual property rights for the parent companies and/or are important links in the financing activities of the parent company in the context of mergers, acquisitions, and capital increases. They are characterised by carrying out very large income and capital transactions that are disproportionate to their productive activity in the Netherlands. They are usually established in the

Netherlands to obtain tax benefits either in the Netherlands or in the country of the parent company.[22] According to the Dutch Central Bureau for Statistics, about 80 per cent of incoming FDI in the Netherlands is directly reinvested abroad.[23]

The role of the Netherlands as an offshore financial centre and conduit country is reflected in FDI data. The Netherlands ranks second in terms of inward and outward direct investment positions worldwide, ahead of much larger economies such as China, United Kingdom, Germany and Japan (Figure 1). With USD 4,331 billion in total inward FDI, around 11 per cent of total global FDI flows through the Netherlands.

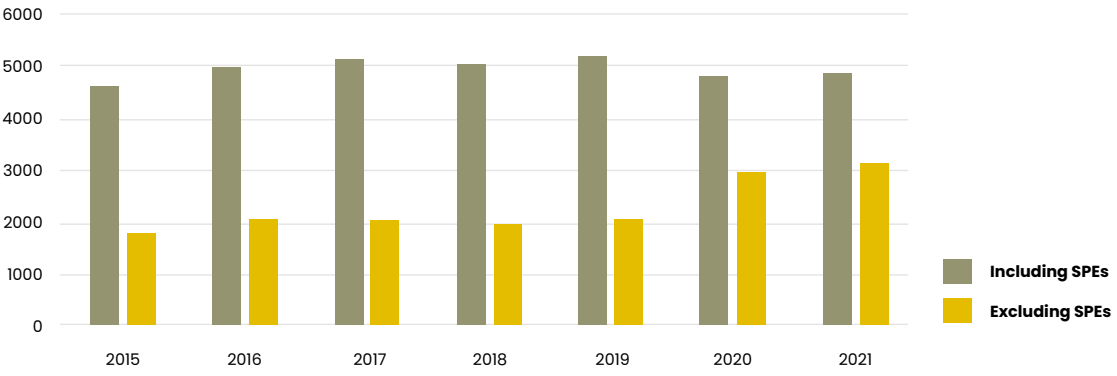
Figure 1.
Netherlands direct investment position, USD billions, 2021



Source: IMF Coordinated Direct Investment Survey

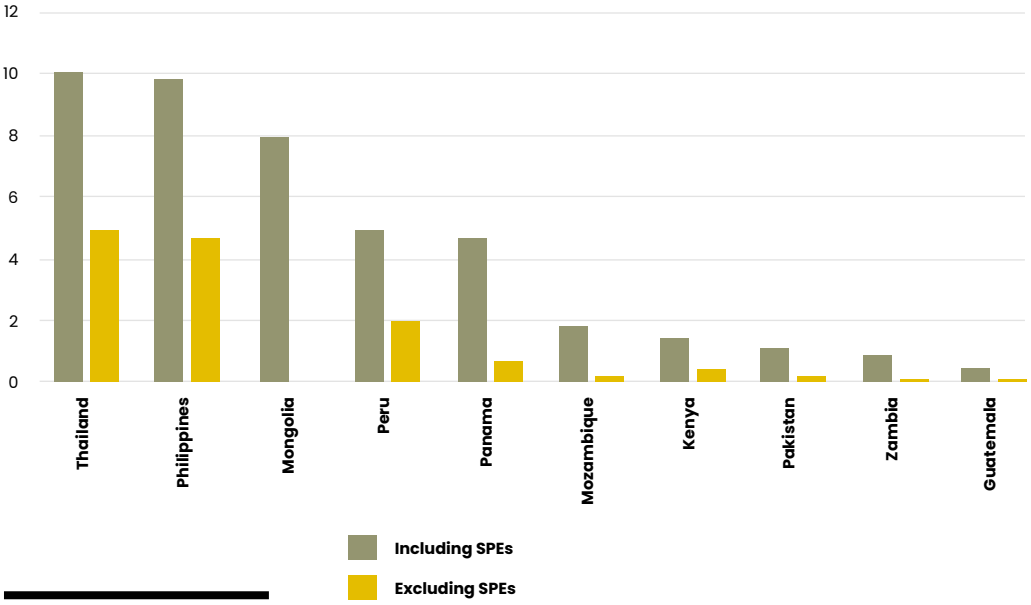
A substantial amount of these FDI volumes runs through Dutch SPEs, although this has been decreasing since 2020 (Figure 2). When looking at selected economies in the Global South, the vast majority and in some cases practically all Dutch FDI is routed through SPEs (Figure 3).

Figure 2.
Netherlands outward direct investment position, EUR billions, 2015-2021



Source: Dutch Central Bank

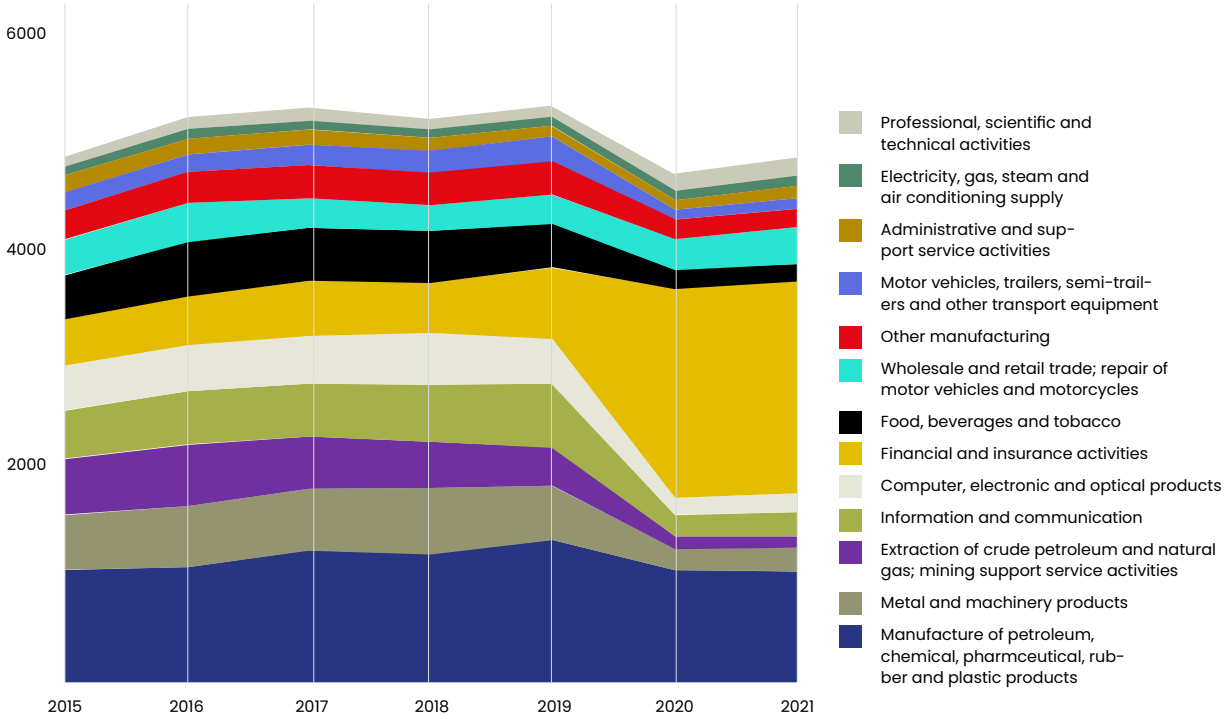
Figure 3.
Netherlands outward direct investment position in selected countries, EUR billions, 2021



Source: OECD/Dutch Central Bank

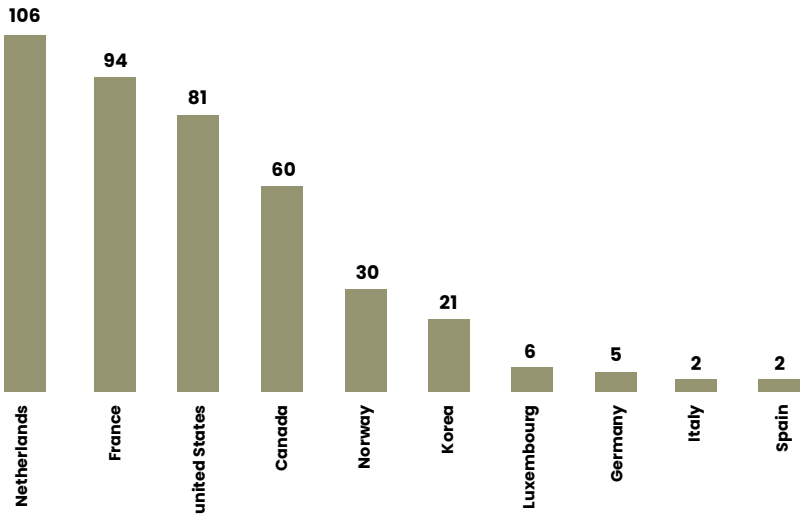
Dutch outward FDI is concentrated mainly in financial and insurance activities, and the manufacture of petroleum, chemical, pharmaceutical, rubber and plastic products (Figure 4). The share of extraction of crude petroleum and natural gas together with support activities for mining decreased between 2015 and 2021. However, the Netherlands still invests relatively substantially in these activities compared with other OECD economies (Figure 5). In 2021, the Netherlands held EUR 110 billion in oil and gas extraction and another EUR 289 billion in the manufacture of coke and refined petroleum products, together representing 8 per cent of total Dutch outward investments.[24] Global efforts to curb the use of fossil fuels to prevent dangerous climate change will undeniably affect the value, and sometimes even the viability, of these investments, thereby running the risk of creating "stranded assets". Large oil and gas projects represent enormous value not only to their investors but also for the economy of their home countries. Dutch investors earned as much as EUR 10 billion from foreign investments in oil and gas extraction in 2021 alone.[25] Fossil fuel companies and their shareholders will therefore be keen to secure the expected income from these projects in the years to come.

Figure 4.
Netherlands FDI position by industry (selection), EUR billions, 2015-2021



Source: OECD/Dutch Central Bank

Figure 5.
FDI position extraction of crude petroleum, natural gas and mining support activities, selection of OECD countries, EUR billions, 2020



Source: OECD

Photo: Chunyip Wong via iStockphoto

Large oil and gas projects represent enormous value not only to their investors but also for the economy of their home countries. Fossil fuel companies and their shareholders will therefore be keen to secure the expected income from these projects in the years to come.

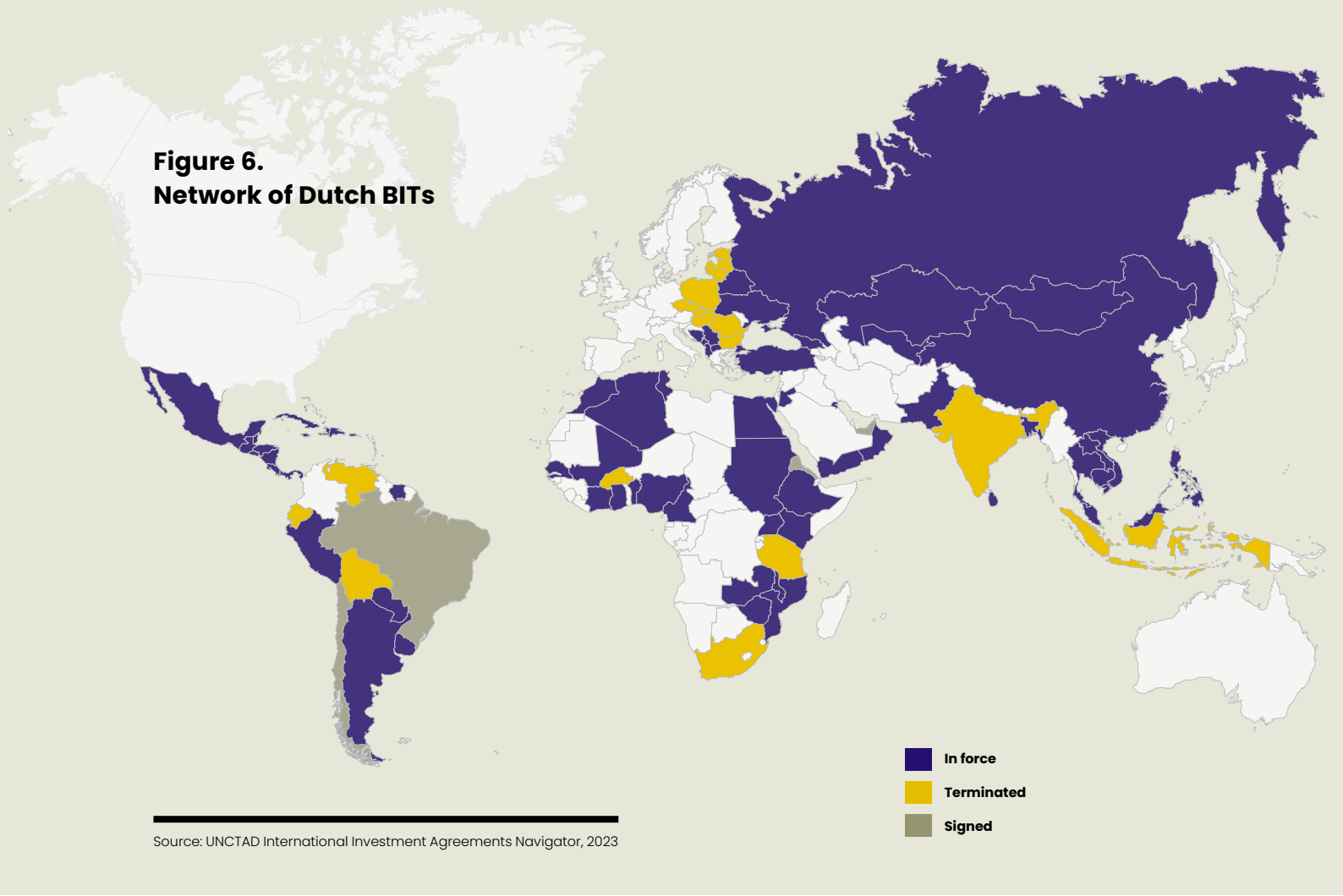
4. Dutch BITs as the "Gold Standard" for Investment Protection

The Netherlands currently has 75 BITs in force, mostly with lower- and middle-income countries in Asia, Africa, and South America. These treaties have been concluded over the course of four decades, with most being signed during the 1990s (Figure 6). The BITs with Brazil, Chile, Eritrea, Oman, and United Arab Emirates were signed but never ratified. With the exclusive competence on FDI resting with the EU since the Treaty of Lisbon of 2009, the Dutch government has become less active in bilateral negotiations, focusing more on EU free trade agreements with investment chapters instead.

In recent years, more BITs were terminated than concluded, reflecting a broader dissatisfaction among governments with the current investment treaty regime. Bolivia, Ecuador, India, Indonesia, and South Africa have terminated their treaties, including with the Netherlands, after concluding that the costs of their BITs outweigh the purported benefits. Burkina Faso, Tanzania and Venezuela have only terminated their BIT with the Netherlands because of its specific content and associated risks. More countries are undertaking similar exercises, potentially leading to more treaty terminations in the nearby future.[26] Moreover, 12 BITs with other EU member states have been terminated by consent following the landmark Achmea-judgment of 2018, in which the European Court of Justice found intra-EU BITs and their ISDS provisions in particular incompatible with EU law.

Dutch BITs are generally characterised by their broad and open-ended provisions, which are often euphemistically referred to by ISDS practitioners as the "gold standard" for investment protection. Their investor-friendly nature stems from their typi-

Figure 6.
Network of Dutch BITs

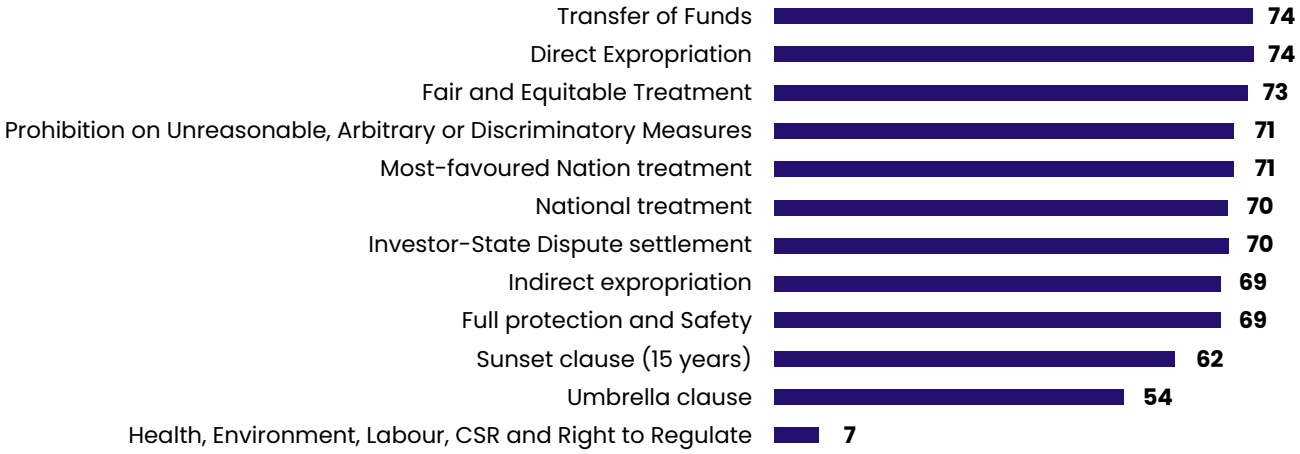


Source: UNCTAD International Investment Agreements Navigator, 2023

cally broad scope of application, general lack of balance, and unrestricted access to ISDS. First, Dutch BITs rely on a very wide definition of investment that covers "any-kind-of-asset", including any type of movable or immovable property; rights derived from shares, bonds and other kinds of interests in companies or joint ventures; claims to money or any contractual performance having an economic value; intellectual property rights; asset categories such as goodwill and know-how, and rights granted under contract. With some exceptions, Dutch BITs thus protect all kinds of investments irrespective of their nature, their social, economic, or environmental impact, or whether they are made in accordance with the host state's laws. In addition, Dutch treaties generally enable indirectly controlled foreign investors to be qualified as "nationals", thereby also extending protection to holding companies and SPEs without substantial business activities in the Netherlands. Such a wide definition has facilitated widespread "treaty-shopping" practices, whereby foreign investors have restructured their investments through the Netherlands to take advantage of the broad network of Dutch BITs.
Second, Dutch BITs are typically characterised by their asymmetric nature in that they offer foreign investors far-reaching rights without corresponding obligations. Practically all treaties include broad and expansively interpretable protection for investors, including unqualified fair and equitable treatment, national and most-favoured nation treatment, protection against direct and indirect expropriation and free transfer of funds related to an investment. Few BITs mention issues such as public health, environment, labour, corporate social responsibility and the right to regulate other than in their preambles, and then only in a legally rather meaningless way (Figure 7).

And third, Dutch BITs enable foreign investors to circumvent national legal systems and to submit investment disputes directly before arbitral tribunals under the ISDS mechanism. There are generally no requirements to exhaust domestic remedies before submitting an ISDS claim, contrary to what is the rule under international customary law and international human rights law. Local communities or other investment-affected third parties whose interests and rights may be at stake have no meaningful legal avenues to participate in ISDS proceedings.

Figure 7.
Investment provisions found in Dutch BITs



Source: UNCTAD International Investment Agreements Navigator, 2023

5. The Netherlands as Gateway for Treaty-Shopping

As a preferred jurisdiction for foreign investors, the Netherlands is frequently acting as a home state for ISDS cases. At present, 1,257 cases are known, with the Netherlands acting as home state of the claimant in 130 of them.

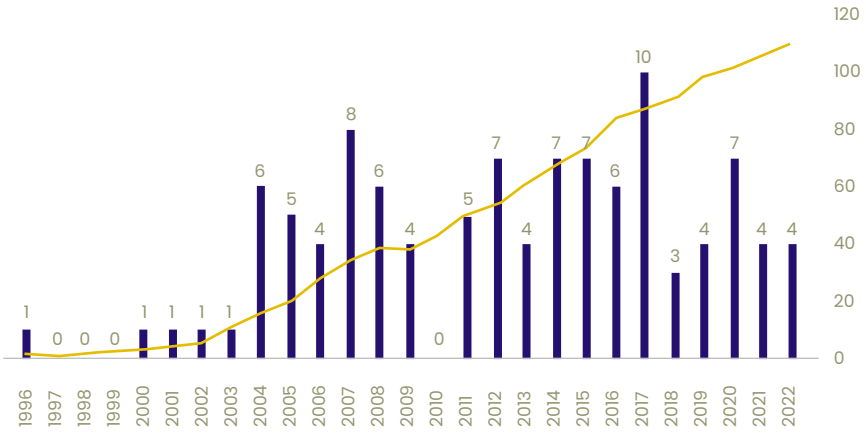
In other words, roughly 10 per cent of all known ISDS cases is filed through the Netherlands, making it the second most popular home state – after the United States – for ISDS claims (Figure 8). When excluding cases filed under the Energy Charter Treaty, a total of 106 cases based on Dutch BITs remains (Figure 9). Of these 106 cases, Venezuela has been a favourite target, followed by Central and Eastern European states, Turkey, Nigeria, and India. In total, 45 different countries worldwide have faced at least one ISDS case under a Dutch BIT (Figure 10). Even though states tend to "win" most cases, 21 per cent of the cases ends up in a settlement with the investor often still gaining at least some benefits. In another 12 per cent, the investor decided to discontinue the case, which could also be the result of an out-of-court settlement (Figure 11).

Figure 8.
Most popular home states from which ISDS cases are filed

United States	214
The Netherlands	**130**
United Kingdom	101
Germany	80
Spain	68
Canada	65
France	64
Italy	48
Turkey	48
Switserland	45

Source: UNCTAD Investment Dispute Settlement Navigator, 2023

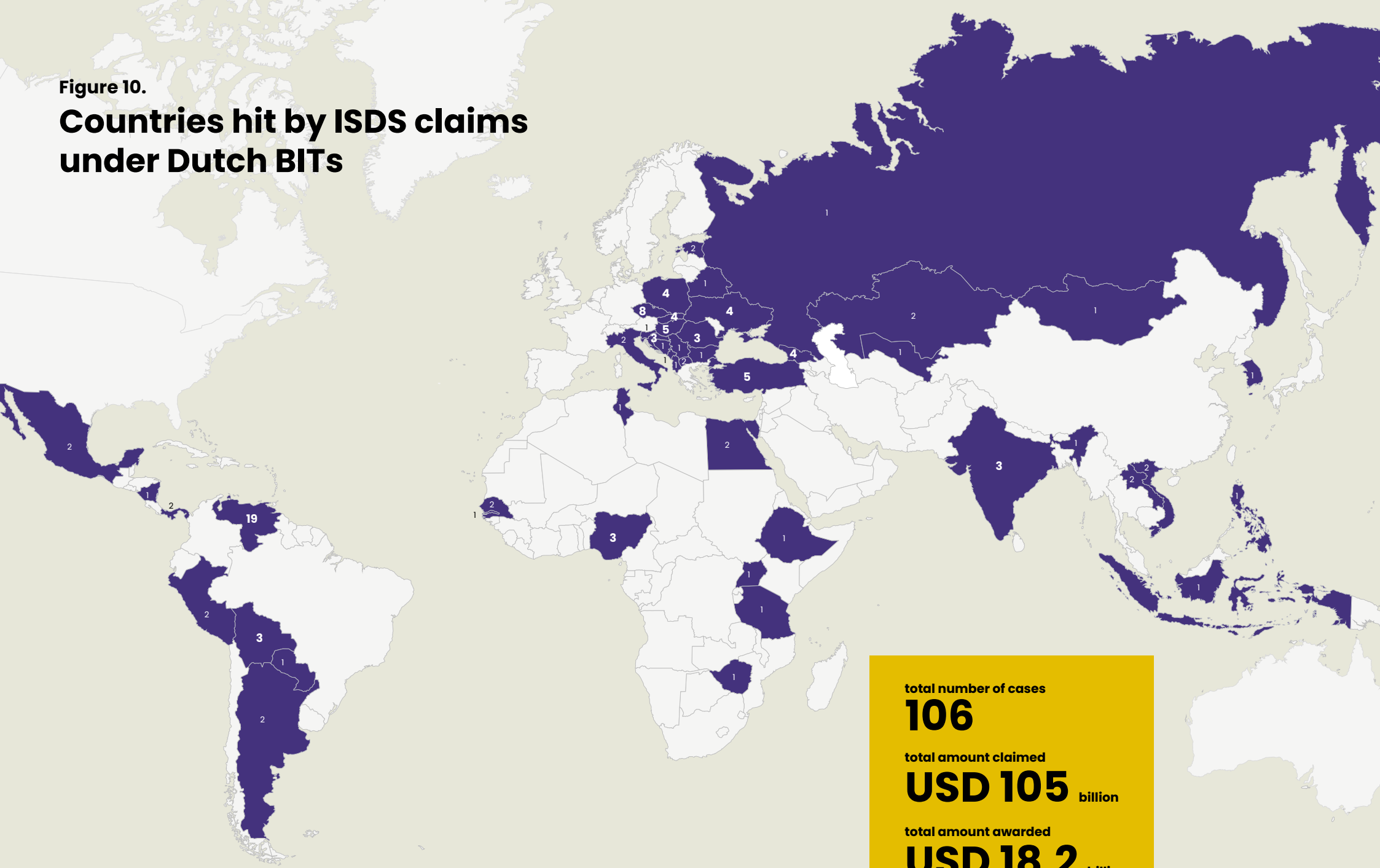
Figure 9.
Number of cases under Dutch BITs, per year and cumulative



Source: UNCTAD Investment Dispute Settlement Navigator, 2023

Figure 10.

Countries hit by ISDS claims under Dutch BITs



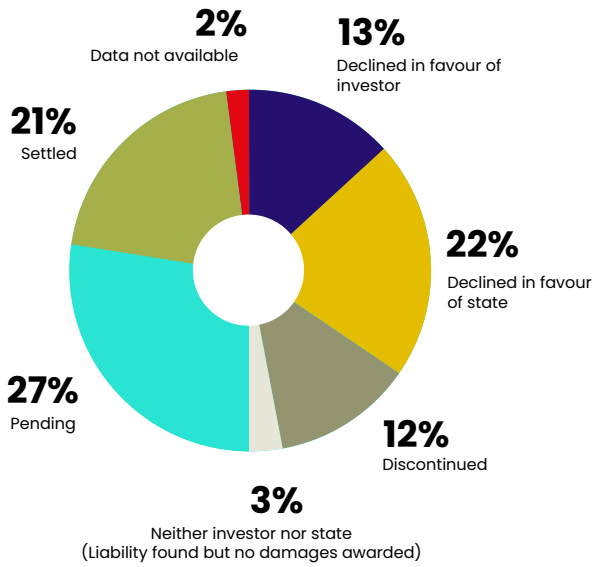
total number of cases
106

total amount claimed
USD 105 billion

total amount awarded
USD 18.2 billion

Source: UNCTAD Investment Dispute Settlement Navigator, 2023

Figure 11.
Outcome of ISDS cases under Dutch BITs



Source: UNCTAD Investment Dispute Settlement Navigator, 2023

Examples of ISDS cases under Dutch BITs

Consolidated Water v. Mexico: In 2022, Cayman Islands-based company Consolidated Water filed an ISDS claim of USD 58 million against Mexico for the termination of a public-private partnership agreement for the construction and operation of a seawater desalination plant in Baja California.[27] The project had become financially unfeasible for the state government because of increased costs and negative changes in exchange rates, as the contract was signed in dollars, resulting in pressure to increase water tariffs.[28] The case is pending.

Alamos Gold v. Turkey: In 2021, Canadian mining company Alamos Gold lodged a claim against Turkey, seeking more than USD 1 billion in damages for alleged expropriation and unfair and inequitable treatment regarding its Kirazli gold project in the country.[29] The project had sparked resistance from locals and activists over its environmental impact, with the Turkish government not renewing the company's expired permits.[30] The case is pending.

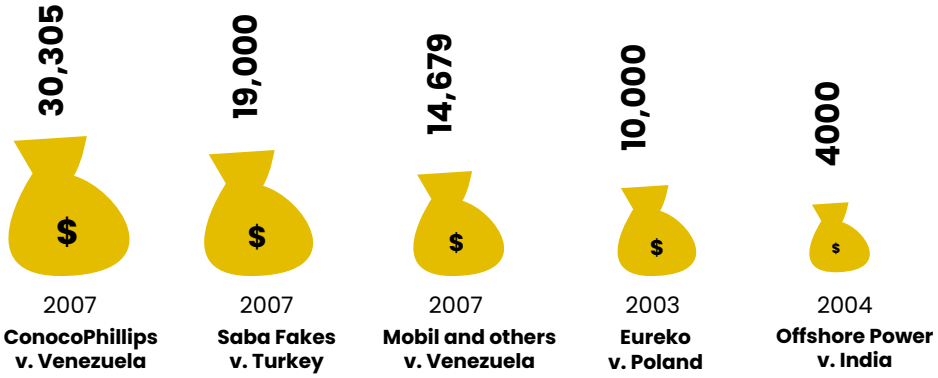
Nationale Nederlanden v. Argentina: In 2019, Dutch financial services company Nationale Nederlanden brought an ISDS case against Argentina in which it is claiming USD 500 million in compensation for reversing the privatization of the pension system in 2008.[31] Civil society groups have criticised the privatised system that existed between 1993 and 2008 for not meeting the minimum conditions for a fair and equitable social security system, with disastrous effects on Argentine citizens.[32] More than a hundred academics, including Nobel Laureate Joseph Stiglitz, have strongly condemned the ISDS claim.[33] The case is pending.

Total v. Uganda: In 2015, French oil and gas company Total lodged a claim against Uganda for imposing a "stamp duty" on its 33 per cent stake in a Tullow Oil project near Lake Albert.[34] Details of the dispute have not been not disclosed. According to the Uganda Revenue Authority, the Product Sharing Agreement included a tax waiver, which would be illegal under Ugandan law. Accordingly, Total owed about USD 30 million in unpaid taxes.[35] The case was settled in 2018, but no further details are known.

Newmont v. Indonesia: In 2014, US mining company Newmont sued Indonesia after the Indonesian government introduced export restrictions on copper in 2009, including an export duty and a ban on the export of copper concentrate.[36] The Mining Law No.4/2009 was aimed at boosting domestic employment and the local economy and to support Indonesia in becoming less dependent on the export of raw materials. Newmont ultimately withdrew its claim after obtaining special exemptions from the mining law.[37]

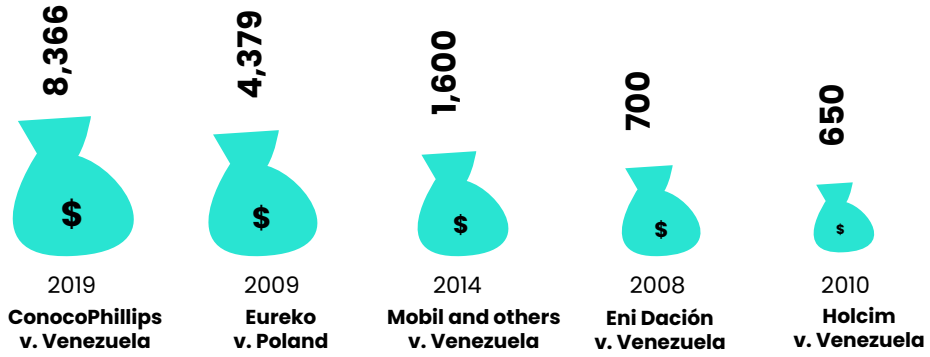
As disclosure is not mandatory under ISDS, the substance of many disputes (and sometimes even their existence) remains confidential. Based on the cases for which information was available, it is calculated that foreign investors using Dutch BITs have submitted ISDS cases amounting to USD 105 billion. This comes down on average to USD 1.6 billion per case. So far, tribunals have awarded USD 18.2 billion in compensation to foreign investors, meaning USD 675 million per case on average. Dutch BITs have produced some of the largest known claims and awards in the entire ISDS regime (Figures 12 and 13).

Figure 12.
Largest claims under Dutch BITs, USD millions



Source: UNCTAD Investment Dispute Settlement Navigator, 2023

Figure 13.
Largest awards or settlements under Dutch BITs, USD millions



Source: UNCTAD Investment Dispute Settlement Navigator, 2023

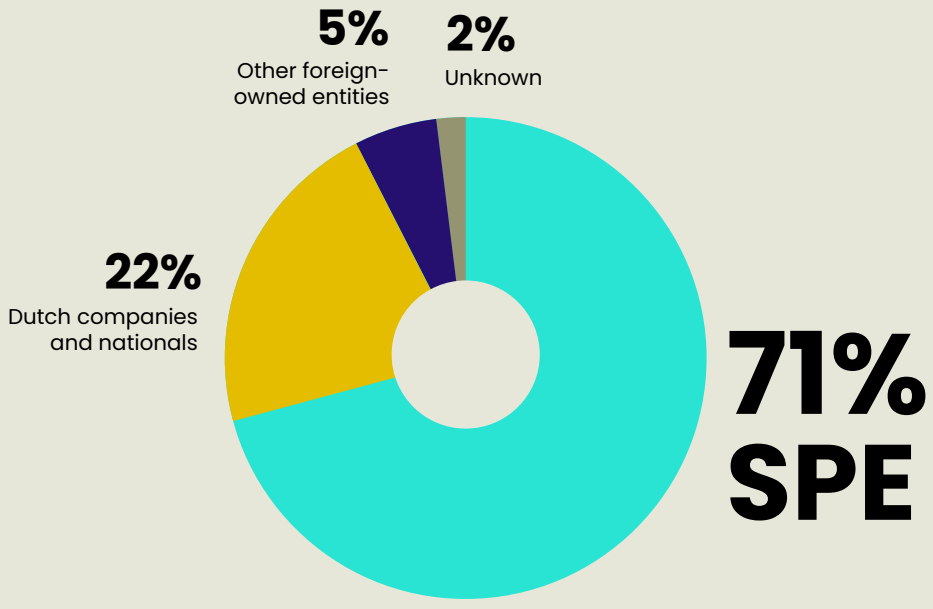
The vast majority (71%) of the 106 cases filed under Dutch BITs are lodged through SPEs (Figure 14). Following IMF guidelines, SPEs are defined here as foreign-owned or controlled entities registered and/or incorporated in the Netherlands with up to five employees, having little or no physical presence or production in the Netherlands and transacting almost entirely abroad.[38] Several of the largest corporations in the world have used Dutch BITs through SPEs, including Kimberly-Clark, Total, Newmont,

Vodafone, United States Steel Company, Holcim, Cemex, ConocoPhillips, Eni, Telecom Italia, ExxonMobil, InBev, General Electric, Bechtel and Nomura Group. Such SPEs typically include empty shell companies registered in the Netherlands (or in Aruba or Curaçao) belonging to corporate groups that have otherwise no links with the Netherlands. Sometimes they also include holding companies for a corporate group's international activities outside the Netherlands, even though that group also has considerable economic presence in the Netherlands. SPEs are typically administered by specialised corporate service providers (trust companies) that help foreign investors to fulfil the necessary substance requirements before the Dutch tax authorities. Foreign investors also regularly use Dutch SPEs to sue their own home state governments, thereby circumventing their national legal systems. The prominence of SPEs in the representation of ISDS cases under Dutch BITs is hardly surprising, given that up to 40 per cent of the total Dutch outward FDI position in BIT partner countries is structured through SPEs.

"The prominence of SPEs in the representation of ISDS cases under Dutch BITs is hardly surprising, given that up to 40% of the total Dutch outward FDI position in BIT partner countries is structured through SPEs."

Another 22 per cent of the cases involves Dutch companies and individuals having a Dutch nationality. The former includes large internationally operating companies like Shell, Rabobank, Nationale Nederlanden, Achmea and ABN Amro. The latter includes

Figure 14.
Main users of Dutch BITs, per type of corporate entity

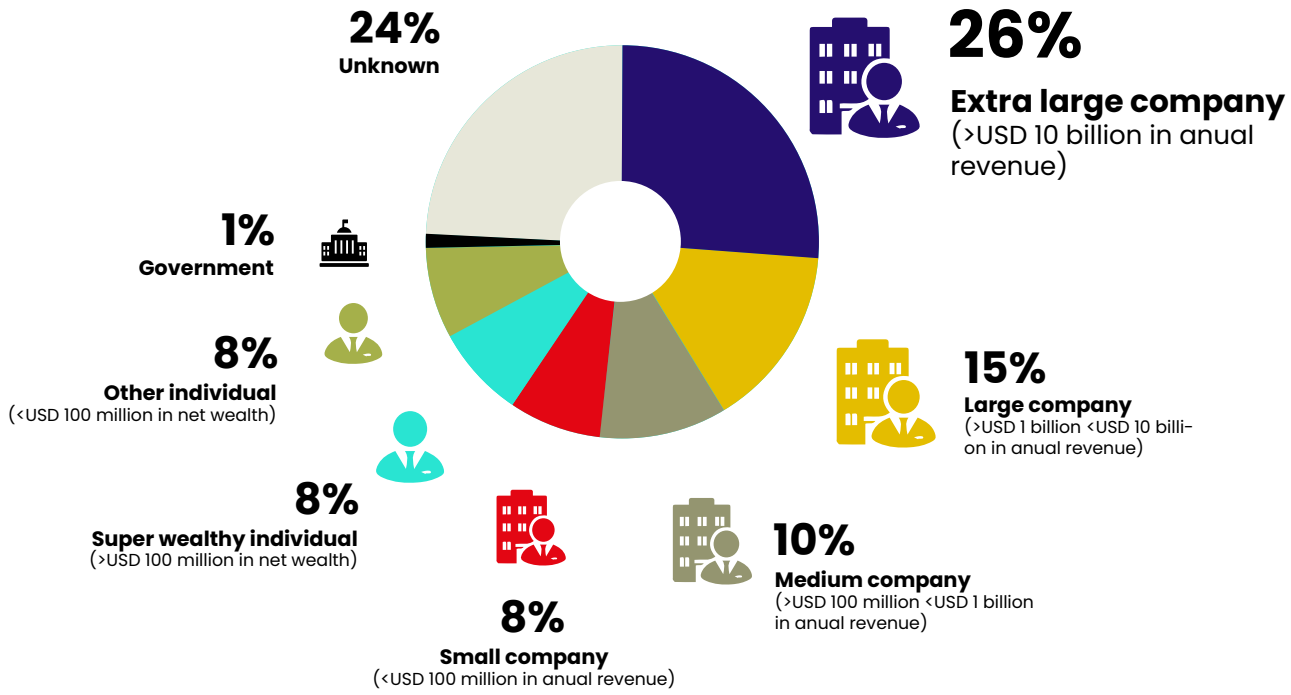


Source: Orbis, Dutch Chamber of Commerce, Investment Arbitration Reporter

wealthy Dutch people investing abroad, but more often they are not of Dutch origin, but hold dual nationality and do not live in the Netherlands or have any effective links with the Netherlands. Only 5 per cent of the cases involves other foreign-owned entities that are not SPEs and deploy substantial business activities and employment in the Netherlands.

When looking at the size and wealth of the foreign investors that have brought cases under Dutch BITs, it is evident that half of all them involves companies with more than USD 1 billion in annual revenue and individuals with more than USD 100 million in net wealth (Figure 15). Extra-large companies with more than USD 10 billion in annual revenue are the largest group of companies using Dutch BITs, accounting for more than a quarter of the cases. At the same time, only 8 per cent of the cases involve companies with less than USD 100 million in annual revenue. Contrary to claims that ISDS can also bring benefits for small and medium enterprises, these statistics show that Dutch BITs and their ISDS mechanisms are indeed primarily used by large multinationals and wealthy investors.[39]

Figure 15.
Main users of Dutch BITs, per economic size and wealth



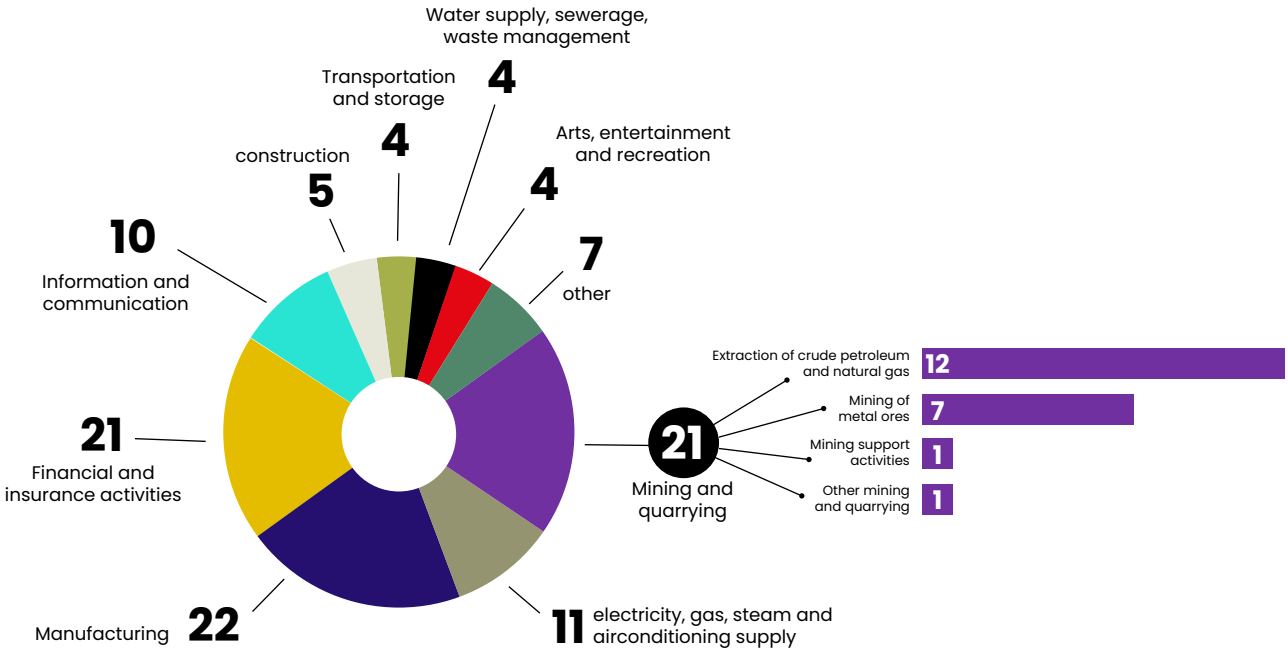
Source: Orbis, Dutch Chamber of Commerce, Investment Arbitration Reporter

Economic sectors affected most by ISDS cases under Dutch BITs are manufacturing (22 cases), financial and insurance activities (21 cases), and mining and quarrying (21 cases). The last group consists primarily of cases in relation to the extraction of crude petroleum and natural gas (12 cases) and mining of metal ores (7 cases) (Figure 16). These extractive sectors are prone to investment disputes, particularly in light of the energy transition, with large fossil fuel and mining companies lodging cases from the Netherlands, often through SPEs. Some of the largest CO2-emitting companies –

ExxonMobil, Shell, Total, ConocoPhillips and Eni – have used Dutch BITs to sue countries like Nigeria, Philippines, Uganda and Venezuela for regulating the oil and gas sector (Table 1). Moreover, two cases involve the manufacture of coke and refined petroleum products, and another seven involve gas-fired power plants and infrastructure. This means that 21 out of 106 cases (20 per cent) under Dutch BITs are related to the fossil fuel industry, involving a total of more than USD 55 billion in claims of which USD 11.5 billion has already been paid out in compensation.

The possibility of challenging state action under investment treaties can influence the ways in which investors disengage from fossil fuels and frustrate access to remedies for communities affected by their investments. In 2021, Shell lodged a claim against Nigeria under the Netherlands-Nigeria BIT in a long-running battle in Nigerian courts in relation to a 1970 oil spill in the Niger Delta.[40] A year earlier, the Nigerian Supreme Court had ordered Shell to pay a fine of USD 467 million to the Ejama-Ebubu community, with Shell complaining that it was not given the opportunity to properly defend itself. The company withdrew its ISDS case in 2022 after successfully lowering the fine to USD 111 million in a final settlement with the community.[41] Moreover, fossil fuel companies can opportunistically structure their investments through the Netherlands and take advantage of the favourable terms of Dutch BITs to advance their corporate interests. In 2020, Italian oil and gas major Eni sued Nigeria for blocking the production of a large offshore oil field OPL 245, with Nigeria claiming the license had been obtained through corruption.[42] Notably, Eni chose not to sue under the Italy-Nigeria BIT but under the more investor-friendly Netherlands-Nigeria BIT through its Dutch subsidiaries Eni International B.V. and Eni Oil Holdings B.V. For example, Italy's treaty with Nigeria requires compliance of the investment with the laws of the host state, whereas the treaty between the Netherlands and Nigeria does not.

Figure 16.
Cases under Dutch BITs per economic sector



Source: UNCTAD Investment Dispute Settlement Navigator, 2023

Table 1. Carbon majors using Dutch BITs

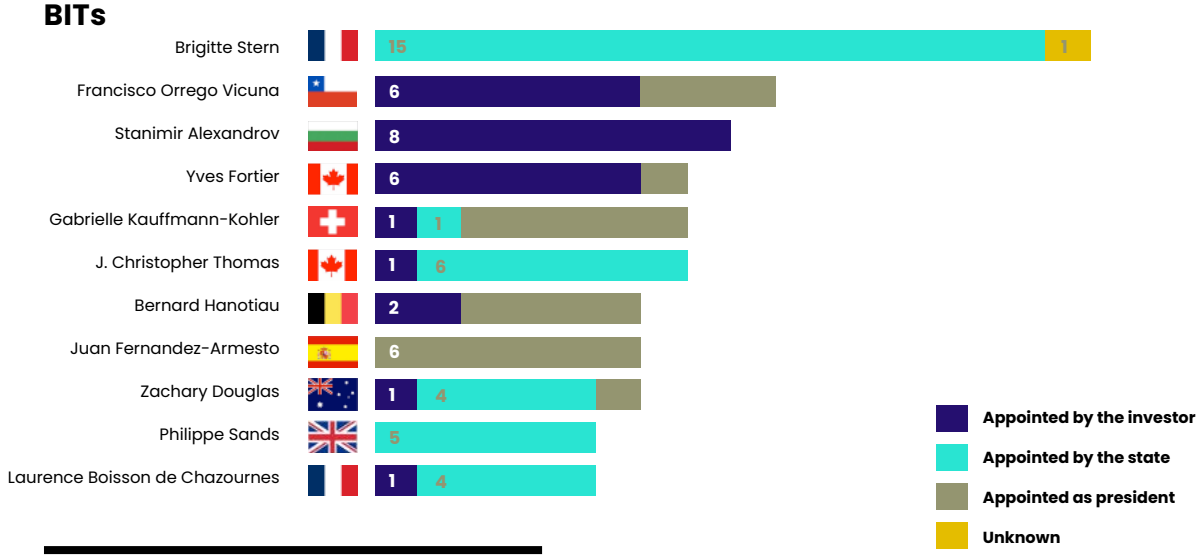
Company	Carbon major rank	Number of cases	Outcome
ExxonMobil	5	1	USD 1.6bn award
Shell	9	4	2 discontinued 1 settled 1 pending
Total	16	1	1 settled (non-pecuniary relief)
ConocoPhillips	18	1	USD 8.4bn award
Eni	27	2	USD 700m settlement 1 pending

Source: UNCTAD Investment Dispute Settlement Navigator, 2023 / Carbon Major Database, 2017

Foreign investors rely the most in their claims on the provisions for fair and equitable treatment and indirect expropriation (46 and 34 times, respectively, in the 58 cases for which information is available). Both are catch-all phrases that can include a wide array of regulatory measures, including those in the public interest. Out of the 27 cases producing a compensation award for the investor and for which information is available, 14 cases involved a violation of the fair and equitable treatment standard, making it the most successfully invoked standard in Dutch BITs.

ISDS cases are typically decided by panels of three arbitrators, one appointed and paid for by the investor and another by the state, with the third selected jointly and acting as the tribunal president. Although a total of 146 different arbitrators have sat on tribunals under Dutch BITs, only 63 have participated in two cases or more, with only 11 participating in five cases or more. The 11 arbitrators most often appointed in the claims are involved in 82 of the 106 cases (72 per cent) (Figure 17). This means that nearly three-quarters of the cases brought under Dutch BITs are decided by the same arbitrators. All but one of these arbitrators are from the Global North (Europe, Canada and Australia) and therefore not all are necessarily familiar with different legal systems and cultures and the specific concerns of governments in the Global South in their policy-making.

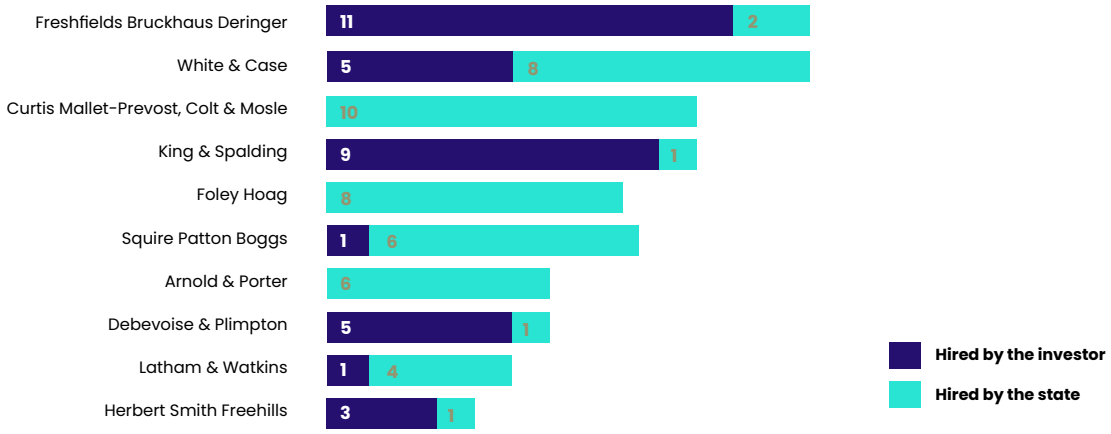
Figure 17. Most frequently appointed arbitrators in ISDS cases under Dutch BITs



Source: UNCTAD Investment Dispute Settlement Navigator, 2023

A small number of Anglo-Saxon law firms have been hired by the disputing parties in the majority of cases under Dutch BITs. Some law firms are hired more by investors, such as Freshfields Bruckhaus Deringer, King & Spalding, Deveboise & Plimpton and Herbert Smith Freehills. Other law firms exclusively help respondent states in defending their cases. These include Curtis, Mallet-Prevost & Mosle, Foley Hoag, Squire Patton Boggs, and Arnold & Porter (Figure 18). With average legal costs per case of USD 6.4 million for investors and USD 4.7 million for states, ISDS is a lucrative business for these firms.[43]

Figure 18.
Law firms most often involved in ISDS cases under Dutch BITs



Source: UNCTAD Investment Dispute Settlement Navigator, 2023

As only foreign investors can initiate ISDS cases, they have the right to choose where to bring the case and under what rules. Most ISDS cases under Dutch BITs are brought to the World Bank's International Centre for Settlement of Investment Disputes (ICSID) in Washington in the United States (79 cases – 74 per cent) The Permanent Court of Arbitration in The Hague in the Netherlands has handled 15 cases (14 per cent), and the Stockholm Chamber of Commerce another two (2 per cent). Moreover, 71 cases have been governed by the ICSID Rules, 26 under the UNCITRAL Rules with another eight by the ICSID Additional Facility. This makes ICSID by far the most popular avenue for the resolution of cases under Dutch BITs.

6. The Need to Terminate Dutch BITs

In response to mounting criticism by Dutch civil society groups and the broader societal backlash against ISDS, the Dutch government presented a new model investment treaty in 2019 to be used as a template for renegotiating existing BITs and negotiating new ones.[44] The new model was developed in dialogue with experts and stakeholders and after a process of public consultation and parliamentary debate. It introduces several noteworthy innovations.

In particular, it requires investors to have substantial business activities in the Netherlands in an attempt to exclude empty shell companies from the scope of treaty protection. Several indications should be assessed in determining the level of substance, including the number of employees and the turnover generated. Moreover, the model introduces several new articles on the right to regulate, on human rights, climate and environment, and corporate social responsibility. At the same time, it still contains the same investment protections such as fair and equitable treatment and indirect expropriation. The proposed clarifications seem too untested and uncertain to preclude compensation claims against regulatory action in the public interest. Importantly, the model continues to protect a wide range of investments and retains the ISDS mechanism, thereby allowing fossil fuel investors to keep suing governments under future treaties.[45]

In May 2019, the Dutch government received formal authorisation from the European Commission to renegotiate the existing BITs with Argentina, Burkina Faso, Ecuador, Nigeria, Tanzania, Turkey, United Arab Emirates and Uganda, as well as to conclude BITs with Iraq and Qatar.[46] First exchanges, in which the Dutch government presented its new model, were held with Argentina, Burkina Faso, Ecuador, Iraq and United Arab Emirates in the course of 2019, but no further steps have been taken since then.[47] According to local media reports, the Netherlands and Ghana seemingly commenced the renegotiation of their 1989 BIT in April 2023.[48] Dutch government officials have

pointed to the travel restrictions during the Covid-19 pandemic as a factor contributing to the slowdown in treaty talks. At the same time, they have also acknowledged that "international treaty negotiations are lengthy processes [...] many technical details have to be carefully negotiated, and treaty partners do not always agree with the Netherlands."[49]

Photo: Gerard Stolk

This lack of progress raises serious questions about whether lengthy and uncertain renegotiation of 75 existing BITs is the most effective strategy to address the most pressing challenges of the outdated model of investment protection, particularly in light of the climate crisis.

This lack of progress raises serious questions about whether lengthy and uncertain renegotiation of 75 existing BITs is the most effective strategy to address the most pressing challenges of the outdated model of investment protection, particularly in light of the climate crisis. Since the publication of the model BIT, foreign investors have already lodged 19 new ISDS cases under existing Dutch BITs, together claiming more than USD 2 billion in damages. The current decade is crucial for climate action, as greenhouse gas emissions need to be reduced by almost half by 2030 on the path to net zero by 2050 to keep global warming below 1.5°C. The latest IPCC report has warned that current climate action still falls short of what is required to tackle climate change, and calls for "deep, rapid and sustained greenhouse gas emissions reductions in all sectors" in the coming years. The Netherlands bears a large responsibility for those emissions as it not only acts as a major conduit for global finance flows, including in fossil fuels, but it also reduces political and transition risks for those finance flows through the insurance effects of its BITs.[50] The Dutch government should therefore not only be concerned with reducing emissions and bringing financial flows in line with the 1.5°C scenario – as required by the Paris Climate Agreement – at home, but also abroad. This would mean that the Dutch government should also be considerate of preserving the necessary policy space of treaty partner countries for their climate action and energy transition policies, as well as for other sustainable development objectives. The decision to withdraw from the Energy Charter Treaty, after careful assessment, shows that the Dutch government has started to take parts of its climate responsibility seriously by putting its money where its mouth is. Not even the promise of reform has tempered the Netherlands' resolve to leave the ECT and prevent the EU from signing up. A logical next step would be to review its 75 BITs in the same light, and work together with partner countries in the Global South towards a substantive overhaul of the existing investment treaties in a time-effective manner.

One option for the Netherlands and its treaty partners is to agree to terminate their existing BITs. Governments worldwide have acknowledged broad concerns with investment treaties, particularly old-generation treaties and their ISDS mechanisms. Treaty terminations have already been outpacing the number of new treaties signed since 2018. The Netherlands itself has agreed to terminate twelve of its BITs with other EU member states (see Chapter 4). Termination is a rational and legitimate strategy for governments seeking to reduce the risks of existing treaties in the short term. This would also provide a more holistic response to many of the fundamental concerns regarding the overall costs and benefits of BITs and ISDS and the extensive legal privileges they offer to the owners of capital to the detriment of development objectives of states and the rights and interests of different stakeholders within those states.[51]

As treaties under public international law, BITs are subject to the rules of the Vienna Convention on the Law of the Treaties (VCLT). Under Article 54 VCLT, termination can take place (1) in conformity with the termination provisions of the treaty, or (2) at any time by mutual consent. Dutch BITs typically provide for a duration period of ten to fifteen years after the treaty entered into force, during which no unilateral change or withdrawal is allowed. Most BITs are tacitly extended for another period (generally ten years) unless prior notice of termination is given by either contracting party at least six months before the expiration date. It is therefore important to keep track of the notifi-

cation deadlines for termination in order to issue timely notice before the BIT is automatically renewed for another decade or longer. Eleven Dutch BITs have their deadlines for notification coming up before the end of 2024.[52]

In case of termination, most Dutch BITs provide for a "sunset clause" of ten to fifteen years during which existing investments will continue to be protected under the treaty. Should a treaty be terminated by mutual consent, both parties should seek to neutralise the sunset clause by explicitly clarifying its non-application prior to termination. If the treaty is terminated unilaterally, the Dutch government could try to persuade its treaty partner to neutralise the sunset clause or at least advocate for reduced periods. In turn, the Dutch government should also accommodate similar requests by treaty partners desiring to terminate their treaties with the Netherlands.

Alternatively, the Dutch government could initiate a process with like-minded states to develop a multilateral instrument allowing those interested to opt-in for the termination of their BITs.[53] Such an instrument could draw inspiration from the agreement for the termination of around 190 BITs between EU member states, and the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, which modifies the application of existing tax treaties to implement certain taxation measures.

The abolition of BITs and ISDS does not mean that foreign investors will be left unprotected. States remain bound by other international treaties and customary international law with relevant dispute settlement mechanisms. Foreign investors still have rights under domestic legal systems and they have options to pursue risk insurance. In some instances, they can also resort to international human rights mechanisms. Terminating existing and outdated BITs would be the quickest and most effective strategy to open up policy space for governments and to clear the way for international instruments that are better suited to promote and govern investment for the energy transition and sustainable development.

7. Conclusion

This report examines the bilateral investment treaty network that the Netherlands has proactively crafted over the past 60 years and how the treaties have contributed to strengthening corporate power around the globe. As a major offshore financial centre, the Netherlands has been a driving force behind the creation of a transnational legal space in which multinational corporations and billionaires move and store their globally extracted wealth. Dutch BITs have enabled foreign investors to claim a total of USD 105 billion in taxpayer money for different types of government regulations worldwide affecting the value of their assets. In particular, the legal form and complex structures that corporations have attained are the main mechanisms through which property claims are made to protect wealth and financial returns. Notably, 71 per cent of the claims under Dutch BITs are filed by Special Purpose Entities that are owned and controlled by some of the largest corporations and the richest people in the world. Corporate directors have often argued it is their fiduciary duty to pursue these claims in the interest of their shareholders. This makes ISDS a powerful tool for corporations in their strategies to maximize shareholder value and to exercise their political influence over government decision-making to ensure a stable accumulation of capital.

Such corporate power has detrimental effects on the world in the form of environmental degradation and pollution, climate change, human rights abuses, exploitation of workers in global value chains and deepened inequality both within and between countries. With access to ISDS, corporations have the ability to make societies pay for the damage the corporations have inflicted through their activities by suing governments in their attempts to mitigate the worst consequences. The fossil fuel industry, in particular, has claimed a staggering USD 55 billion under Dutch BITs in compensation for government regulations in the oil and gas sector, of which USD 11.5 billion has already been paid out. These sums put huge financial pressure on governments across the globe and may divert public money reserved for clean energy transition programmes and alleviating energy poverty, as well as other crucial public services. Moreover, the pay-out of billions of dollars under Dutch BITs has led to the transfer of financial flows from oil and gas producing countries in the Global South to private companies and shareholders primarily in the Global North. This contradicts pledges by the Netherlands to provide climate finance to the Global South.[54]

As the world faces huge and interconnected challenges, the termination of BITs and the abolition of ISDS should be crucial steps in dismantling the structural enablers of corporate power that inhibit the transition to equitable, democratic and environmentally sustainable societies. These structural enablers and legal regimes are not fixed or inevitable. They have been politically constructed and rolled out by governments over the past few decades, meaning they can also be reversed and rebuilt. The Dutch government has already shown its readiness to exit from the Energy Charter Treaty, created after an idea of former Dutch Prime Minister Ruud Lubbers, citing concerns over continued protection for undesirable corporate activities. The next step is to work together with partner countries to disentangle the legal shackles that keep vulnerable societies hostage to corporate interests, and to pursue the termination of the 75 existing Dutch BITs. Reform proposals such as those contemplated in the new model BIT or in the form of a yet to be created Multilateral Investment Court do not offer systemic solutions. Rather, they retain the core characteristics of the investment treaty regime by offering one-sided international legal protections, enforceable through ISDS, to a privileged class of asset owners and investors. The decision to withdraw from the ECT marks an historic turning point for the Netherlands and should lead to a substantive overhaul of its foreign investment policy. Sixty years of Dutch BITs has been long enough.

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Colophon

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