LEIDEN UNIVERSITY

FACULTY OF HUMANITIES

THE POLITICS OF DUTCH BILATERAL INVESTMENT TREATIES

By

EARVIN MITCHELL VAN GINKEL

A thesis submitted to the Department

of International Relations

Supervised by Dr. Jonathan London

July 2018

Wordcount: 14,298 (excl. footnotes & bibliography)

ACKNOWLEDGEMENTS

In the writing of this thesis, I accumulated debts to several people who helped me along the way. I would like to extend my sincerest gratitude to Nikos Lavranos, Thomas Nauta and Bart-Jaap Verbeek, who generously contributed their time and expertise and sat down with me to discuss the Dutch BIT program in June 2018. From Leiden University, I would also to thank my supervisor Jonathan London and Mohammadbagher Forough for the time they devoted and the direction they provided me. On a more personal note, I would like to thank my parents, Michiel and Carla for their unwavering support and patience in listening to my monologues on the intricacies of the Dutch BIT program. Last but certainly not least, I'd like to thank my sister Chloé who kindly let me work in silence, by allowing me to stay at her place during the final weeks of writing this thesis. I am forever grateful.

ABBREVIATIONS

BIT	Bilateral Investment Treaty
DTT	Double-Taxation Treaty
DG-BEB	Directoraat-Generaal Buitenlandse Economische Betrekkingen
FET	Fair and Equitable Treatment
FDI	Foreign Direct Investment
ICSID	International Centre for Settlement of Investment Disputes
ISDS	Investor-State Dispute Settlement
ITO	International Trade Organisation
MAI	Multilateral Agreement on Investment
MFN	Most-Favoured Nation
NGO	Non-Governmental Organisation
NIEO	New International Economic Order
NT	National Treatment
OECD	Organisation for Economic Cooperation and Development
PTA	Preferential Trade Agreement
SME	Small and Medium-sized Enterprise
SOMO	Centre for Research on Transnational Corporations
TTIP	Transatlantic Trade and Investment Partnership
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organisation

TABLE OF CONTENTS

ACKNOWLEDGEMENTS 2

ABBREVIATIONS 3

TABLE OF CONTENTS 4

1. INTRODUCTION 7

2. THE INTERNATIONAL INVESTMENT REGIME 9

THE POST-WAR ERA 10

THE ABS-SHAWCROSS CONVENTION 10

THE ICSID CONVENTION 11

THE CALVO DOCTRINE 12

EARLY EUROPEAN BITS 13

THE PROLIFERATION OF BITS 13

3. LITERATURE REVIEW 14

PROMOTION OF BUSINESS INTERESTS 15

DE-POLITISATION OF INVESTMENT DISPUTES 16

BUILDING INTERNATIONAL CUSTOMARY LAW 17

INVESTMENT TREATIES AND DIPLOMACY 17

SUMMARY 18

4. ASSESSING THE INFLUENCE OF BUSINESS LOBBYING 18

5. THE BITS AND BOBS OF DUTCH BITS 20

THE RATIFICATION PROCESS 21

THE DUTCH MODEL BIT 22

PREAMBLE 22

BROAD BASED DEFINITIONS 22

STANDARDS OF TREATMENT 23

RELATIVE STANDARDS 23

National Treatment (NT) 24

ABSOLUTE STANDARDS 24
Fair and Equitable Treatment (FET) 25
Free Transfer of Funds 25
Expropriation 26
Umbrella Clauses 26
Investor-State Dispute Settlement (ISDS) 27
SUMMARY 27
7. EARLY DUTCH BITS 30
THE FIRST BITS 30
ORIGINS OF THE BIT PROGRAM 31
A DECADE OF DICHOTAMY 32
SUMMARY 33
8. THE ERA OF PROLIFARATION 34
INTERDEPARTMENTAL COMPETITION 35
MULTILATERALISM AT THE TURN OF THE CENTURY 37
DUTCH FOREIGN INVESTMENT POLICY 38
SUMMARY 39
9. CONCLUSION 48
10. BIBLIOGRAPHY 50

PART I

1. INTRODUCTION

Until very recently, investment treaties and investment treaty arbitration were examples of ‘supranational governance activities that [went] virtually unnoticed’ (Esty quoted in Montt 2009, 143). Parliaments and the media paid hardly any attention to these investment treaties (de Mestral 2015; Poulson 2015). Singh and Ilge (Eds.) (2016, 1) define an international investment treaty (IIA) as a ‘treaty between countries to deal with issues concerning the protection, promotion and liberalization of cross-border investments’. Thus, a preferential trade agreement (PTA) containing an investment chapter is considered an IIAs, whereas double-taxation treaties (DTT) are no longer counted as such (Single and Ilge Eds. 2016, 2). Most investment treaties however, are bilateral and solely with investment protection (2.946 out of 3.322 as of year-end 2017) (UNCTAD 2018). (Singh & Ilge eds., 2016). The United Nations Conference on Trade and Development (UNCTAD) defines a bilateral investment treaty (BIT) as a legally binding agreement between two countries that establishes reciprocal protection and promotion of investments in both countries. Countries who sign BITs commit themselves to grant certain minimum standards of treatment of foreign investors within their territory. The most substantive, and controversial, provision included in almost all Dutch BITs is *Investor-State Dispute Settlement* (ISDS), a system that allows corporations to bring arbitration against governments in (private) ad hoc international tribunals outside their domestic legal jurisdiction.

The Netherlands takes a central position in the whole debate around BITs. It maintains one of the most extensive networks of BITs in the world with some more than 100 BITs signed to date. According to UNCTAD (2018), after the United States (US) (156), in 2017 the Netherlands (102) ranks as the second most frequent home state of international investment claimant –or around 12% of the total number of known ISDS cases (855 by year-end). Interestingly, while the US has been subject to claims itself too (16), the Netherlands has never been a respondent to international investment claims (yet). Presumably, because Dutch BITs have been concluded chiefly with developing countries, these capital-importing states have also been the primary target of Dutch investment claims. For instance, Dutch BITs have been used to sue Bolivia after its re-municipalisation of water resources[1] and Zimbabwe over its agrarian reforms.[2] In spite of the merits of these particular cases, it has fuelled the mounting critique that Dutch BITs are excessively investor-friendly at the expense of developing countries. As a result, Dutch international investment policy has become synonymous with

[1] *Aguas del Tunari SA* v *Republic of Bolivia*, ICSID Case No. ARB/02/3.
[2] *Bernardus Henricus Funnekotter and Others* v *Republic of Zimbabwe*, ICSID Case No. ARB/05/6.

undue business influence. A Brussels-based non-governmental organisation (NGO), for example (2014), suggests that policymakers are heavily pressured into signing BITs, making it no more than 'business propaganda'.

This begs the question, is this really the case? Although lawyers and legal scholars have appreciated the international investment regime for some time now,[3] the political economy of investment treaties in developed countries is 'a surprisingly understudied area of the investment treaty regime' (Bonnitcha, Poulson & Waibel 2017, 181). Bar a few recent exceptions (e.g. Chilton 2016; Basedow 2017) empirical research on the role of business preferences in international investment policy making in specific cases remains rare. Considering the economic importance of foreign investment (it is much less volatile than trade, for example, because foreign investment usually covers an extended period), and in light of the political salience of the topic, the lack of research is remarkable and puzzling. Consequently, this master thesis aims to contribute to closing this gap, offering a detailed, historical case study of the Dutch BIT program. It raises the following research question:

RQ *to what extent has business lobbying influenced the conclusion of Dutch BITs?*

This thesis advances the argument that the role of business preferences and lobbying is generally overstated in the context of the Dutch BIT program. While businesses take interest in Dutch international investment policy, accounts stipulating how business preferences and lobbying (independent variable) accounts for the conclusion of (Dutch) BITs (dependent variable) are only partially correct at best. Instead, this thesis offers a more nuanced story, showing how a variety of stakeholders (policymakers, businesses, and NGOs) drove investment treaty policymaking in The Netherlands during the last half-decade. As such, three additional research questions are constructed:

SQ₁ *to what extent did policymakers influence the conclusion of Dutch BITs?*
SQ₂ *to what extent did parliament influence the conclusion of Dutch BITs?*
SQ₃ *to what extent did NGOs influence the conclusion of Dutch BITs?*

This thesis adopts an assumption that has been gaining traction in the legal domain concerning international treaties. BITs, by their very 'nature' (purpose and objective), are static, non-

[3] See e.g. Dolzer & Scheuer 2012 for an extensive review of the law of investment treaty arbitration

evolutive meaning that they are best understood as products of their time (Merkouris 2014, 14). Therefore, this study takes careful notice of the underlying socio-economic forces that marked the evolution of the international investment regime. It looks at three distinct 'waves' of BITs in the Netherlands: 1) 1963-1989; 2) 1990-2007; and 3) 2008-today.

Before continuing, it is worth pointing out how this thesis fits within the existing body of research concerning the politics of investment treaties in developed countries. First, other scholars have noticed and pointed out the political motives behind the BIT programs of other post-industrialised countries –indeed these works continue to inspired this thesis (e.g. Poulson 2015, Poulson & Aisbett 2016; Chilton 2016; Bonnitcha 2017; Bonnitcha, Poulson & Waibel 2017, Basedow 2017). This project may be best understood as part of this growing literature. Second, this thesis does not examine The Netherlands' motivations behind other forms of (bilateral) economic agreements, such as PTAs or DTTs. Although these other types of economic treaties are closely linked to the workings of the Dutch BIT program, it is conceivable that different motivations compelled the Dutch government to sign them than BITs. Third, the investment-centric explanation, perhaps because of the propounded economic goals of BITs, has generally been used to explain the motives of developed countries to sign BITs (e.g. Tobin & Busch 2010; Hamilton & Rochwerger 2005; Salacuse 1990). Yet, the literature on varieties of capitalism suggests that policy may differ significantly across countries and regions (Crouch 2005).

The study aims to fill the gap in our knowledge about the role businesses in Dutch international investment policymaking by employing qualitative methods to empirically verify its claims. This is complemented with some quantitively-natured work, i.e. codifying more than 100 BITs in order to construct the tables and figures presented in this thesis. Foremost, it draws on field research in the form of interviews with different stakeholders (one current policymaker, one former chief negotiator, and a civil society), archival material of the 1960s and 1970s, extensive press and literature research in addition to a thorough review of public records.

2. THE INTERNATIONAL INVESTMENT REGIME

This thesis aims to identify the main factors driving (bilateral) investment treaty policymaking in The Netherlands. This can only be done based on an understanding of the changing socio-economic environment for foreign investment. In other words, this chapter examines the historical context of the investment treaty regime. It starts just after the Second World War, when the United States and Europe together established the institutional framework that

governs trade and investment to this day. Moreover, this section elucidates how bilateralism came to be the preferred vehicle of international investment policymaking.

THE POST-WAR ERA

As investors –most notably multinationals from developed countries– expanded their international activities in the wake of the Second World War, European investors could no longer rely on imperial regimes to back them during investments disputes. In addition, 'gunboat diplomacy' was considered inconsistent with the prevailing liberal ideas at the time. A as political and economic theories of dependency took hold in much of the developing, however, the attitude towards foreign investors was less than welcoming in newly-independent states (Bonnitcha, Poulson and Waibel 2017, 8). Large multinational firms were regarded as a legacy of colonialism, extracting resources and economic surpluses from the post-colonial periphery to the Western 'core' through 'resource transfers'. Dissatisfied with the willingness and ability of Western multinationals to contribute to national economic development, foreign investments often became subject to strict regulations (Ibid, 185). While not aiming to keep out foreign investors altogether, import-substitution strategies sought to carefully manage and control foreign investments, in particular, in strategic industries in order to promote domestic industrialization (Thurbon and Weiss 2016). With growing amounts of capital ready to invest outside of Europe and an increasingly hostile attitude towards foreign investors, this posed a challenge. Particularly after the economic recovery had begun and European firms were once again looking to invest their capital abroad in the 1950s, protections against expropriation of their investments stood high on their agenda.

THE ABS-SHAWCROSS CONVENTION

The US proposal for an International Trade Organisation (ITO) would have laid the foundations for a multilateral agreement on global investment. But strong resistance from Latin America and India meant that instead, the less ambitious General Agreement on Tariffs and Trade (GATT), which lacked rules on foreign investment, would serve as the primary instrument for governing global trade in the post-war era. The ITO was one of many attempts during the post-war era to reach a multilateral agreement on investment protection (Van Harten 2007, 18)

According to Bonnitcha, Poulson and Waibel (2017, 184-85), two senior officials of the biggest European corporations at the time, the chairman of Deutsche Bank Hermann Abs

and the director of Shell Lord Hartley Shawcross, had been working on separate plans to codify certain minimum standards of treatment for European investors. The German banker, Hermann Abs, wanted to codify an international minimum standard of treatment for foreign investors which would be backed by investor-state arbitration without the need to exhaust local (legal) remedies first (the precursor to modern ISDS). Although Abs' British counterpart had more conservative thoughts on foreign investment protection (for this reason, investment arbitration became optional in their joint-draft), upon learning about each other's proposals the two men decided to merge their respective plans and published the Abs-Shawcross Convention in 1958. While the proposal never left the drafting stage, their convention is considered as one of the founding documents of the modern investment treaty regime –and it shows the indirect involvement of European corporations in the early days of the regime.

THE ICSID CONVENTION

After a series of unsuccessful non-governmental attempts during the 1950s, capital exporting states pursued another avenue for ensuring minimal protections for foreign investors: The Organization for Economic Cooperation and Development (OECD). In 1962, the OECD proposed a watered-down version of the Abs-Shawcross Convention to its members. After the proposal failed to gather the desired support, the OECD members tried to persuade the World Bank to pursue a multilateral agreement on investment protection. Taking note of the North-South divide, the World Bank declined (Parra 2012). Instead, the Bank proposed a convention dealing solely with investment dispute resolution: The International Centre for Settlement of Investment Disputes (ICSID). The Netherlands strongly supported the creation of the ICSID and was among the first to ratify the ICSID Convention in 1966 (Schrijver and Prislan 2013, 3). In fact, it was the insistence of The Netherlands that resulted in an explicit reference to the Permanent Court of Arbitration as a possible forum for settling disputes.[4] Moreover, Dutchman Aaron Broches was actively involved in the creation of the ICSID and would later become the first Secretary-General of the ICSID. Unlike the Abs-Shawcross Convention, however, the ICSID did not contain any substantive rules on investment protection, which arguably explains why investors at the time regarded the ICSID as unimportant (St John 2017). Given the crucial role of the ICSID Convention today (practically all modern Dutch BITs refer to the 1965 ICSID Convention for dispute resolution), this (apparent) lack of attention from business is surprising.

[4] Explanatory Memorandum accompanying the ratification of the ICSID Convention in the Dutch Parliament (Tweede Kamer der Staten-Generaal, Parliamentary Year 1965–1966, 8610, nr 3), p3.

THE CALVO DOCTRINE

The multilateral negotiations in the OECD continued during the 1960s. Capital exporting states argued that international customary law imposed minimum standards of treatment for foreign investors and required that states who expropriated property must pay fair compensation and would be settled outside of domestic courts. By contrast, many developing countries rejected these international norms, understanding them as instruments of the West to maintain their underdevelopment (Salacuse and Sullivan 2005, 69). The nineteenth-century Latin American legal scholar, Carlos Calvo, provided a different set of norms for foreign investment protection for developing countries: foreign investors should not expect special treatment simply because they were foreign; denial of justice would still breach international law, but investment disputes were to be settled in domestic courts (Bonnitcha, Poulson and Waibel 2017, 12). Although Calvo's ideas strongly resonated in Latin American and other developing countries, Calvo's doctrine was still a liberal investment policy as it enshrined national treatment in line with the non-discrimination principles at the heart of the modern trade regime.[5]

During the 1970s, the increasingly restrictive attitude towards foreign investments culminated in a number of high-profile expropriations of foreign investments with little or no compensation in return (Ibid.).[6] Protests against multinationals reached their peak in the 1970s,[7] which was justified in the United Nations (UN) General Assembly, when developing countries took advantage of their majority in the early 1970s to promote a New International Economic Order (NIEO). The cornerstone 1974 UN Charter of Economic Rights and Duties of States, 'called into question the concept of international minimum standards of treatment for foreign investment' (Bonnitcha, Poulson and Waibel 2017, 12-13) and allowed developing countries sovereignty over their natural resources. So, while Latin American countries continued to insist on adopting the Calvo doctrine, European countries remained staunch supporters of adopting investment protection norms envisioned in the Abs-Shawcross Convention. Thus, as the international investment regime became entrenched by the North-South divide, Western countries opted for the 'second-best' option available to them, opting for bilateralism in an effort to secure minimum standards of protection for their investors.

[5] Note however, that WTO disputes are also settled outside of domestic courts.

[6] For instance, The United Nations identified 875 distinct acts of government expropriations of foreign-owned assets in 62 countries between 1960-1974 (Salacuse and Sullivan 2005, 75 ft. 54).

[7] In 1972, the president of Chile, Salvador Allende, urged other countries to reject 'the economic power, political influence and corrupting action of foreign investors' (Allende (1972) quoted in Bonnitcha, Poulson and Waibel 2017, 14).

EARLY EUROPEAN BITS

Since multilateral proposals regulating foreign capital flows proved unfeasible, capital exporting states instead tried to gain the desired minimum standards of protection through bilateral negotiations. Although the Abs-Shawcross-inspired OECD draft convention ultimately failed, it became the main inspiration for the first European BIT programs (Bonnitcha, Poulson and Waibel 2017). Having lost almost all of its foreign investments after its defeat in the Second World War, West-Germany concluded the first BIT with Pakistan in November 1959. Although in the early days of the investment regime Germany, Switzerland and to some extent The Netherlands, dominated the BIT landscape, this all changed with the collective action of developing countries with the NIEO. Eager to obtain similar favourable protections for their investors, which it had become clear at this point could not be achieved at the multilateral level, other European countries such as France, The United Kingdom, Belgium and Italy soon launched their own BIT in the late 1960s and 1970s. Considering the insurmountable differences on foreign investment norms, however, BITs largely remained a phenomenon between Northern European states and Africa.[8] This explains how early BITs were typically signed between countries with stark differences in developmental levels and political traditions (Elkins, Guzman and Simmons 2006, 817).

THE PROLIFERATION OF BITS

Despite the strong resistance by some developing countries against the relevant international customary law, the 1980s witnessed a shift in the socio-economic context in which international investment agreements were being negotiated (UNCTAD 2008). The debt crisis of the 1980s reduced the availability of private lending, making foreign investment an attractive alternative source of capital (Vandevelde 2009). Furthermore, the economic successes of a number of outward-oriented Asian economies (notably Japan, Taiwan and South-Korea) that encouraged foreign investment and export promotion, demonstrated the positive role that FDI could have on national development (Jandhyala, Henisz and Mansfield 2010, 10). Finally, the emergence of the 'Washington Consensus'[9] contributed to the increased political will of both developed and developing nations to economic liberalism and the liberalisation of (foreign)

---

[8] The United States on the other hand, initially used post-war Friendship, Commerce and Navigation (FCN) treaties to protect foreign investments abroad, only starting to shape its BIT program during the 1980s.

[9] Note that, liberalization commitments often conditioned in structural adjustment programs were enforced by international organizations such as the International Monetary Fund (IMF) and World Bank (WB).

capital flows. All these factors contributed to the evolving economic and political landscape for foreign investment –and in turn for BITs (Bonnitcha, Poulson and Waibel 2017).

As a result, many developing countries changed their tone towards multinationals and actually began to encourage flows of foreign capital into their countries. Indeed, attracting FDI became a key component of promoting economic growth and development (Encarnation and Wells 1985). As the Washington Consensus emerged as the dominant strategy for national development, restricting foreign investment was considered 'foolish' (Williamson 1990, ch. 2). In fact, international organizations initially sceptical of foreign investment' contribution to national development, like UNCTAD and the World Bank, began to view multinationals –and their promised capital– as crucial components of promoting economic growth and development (UNCTAD 1992, iii). It was in this environment that BITs flourished: As part of the reforms advocated by the Washington Consensus, countries were expected to enter international agreements that were considered to 'lock in' market-oriented reforms –BITs served this purpose as a 'credible commitment' to these reforms (Elkins, Guzman and Simmons 2006, 823).

Thus, not just developed countries, a great many of new developing states (like China) also started to initiate or expand their BIT programs. Importantly, BITs diffused across similar or peer countries, thereby truly making BITs a global phenomenon. Particularly after the collapse of the Soviet Union in the early 1990s, the number of BITs exploded: former communist, Latin American, Asian and African countries all hopped on the BIT 'bandwagon' (Bonnitcha, Poulson and Waibel 2017). The pursuit of BITs reached its zenith during the 1990s and 2000s, thereafter the number of BITs signed annually dropped considerably for mainly three reasons (Bonnitcha, Poulson & Waibel 2017, 21-22): (1) treaty saturation; (2) the rise of investment treaty arbitration; and (3) a partial shift from concluding investment protections bilaterally, towards preferential economic agreements containing investment chapters.[10]

3. LITERATURE REVIEW

The role of business preferences and lobbying in international investment policymaking in developed countries is under-researched in general, in contrast to the trade regime for example.[11] Further, with a few exceptions, little historical work has been done on developed

[10] For example, the Transpacific Partnership (TPP) and the Transatlantic Trade and Investment Program (TTIP) contained investment protection chapters (although TTIP has become highly controversial as a result).

[11] Looking at trade, the literature provides ample examples of how corporations influence the global trade regime. For instance, Woll (2008, 50) interviewed a former director of the WTO Service Division, who said that

country investment treaty programs (Bonnitcha, Poulson and Waibel 2017).[12] Nevertheless, this section addresses the why of international investment treaties in developed countries.

PROMOTION OF BUSINESS INTERESTS

The conventional, most intuitively plausible explanation for the widespread adoption of investment treaties in developed countries is protecting the interests of private corporations abroad. Many scholars (e.g. Swenson 2005; Neumayer 2006; Van Harten 2007; Allee and Peinhardt 2010) have examined how foreign investors (typically well organized and funded) have exerted political pressure on their home states to sign investment treaties protecting the investor's assets abroad. For instance, private corporations have often managed to induce a strong response from their home state governments in the case their foreign assets are expropriated or mistreated (Krasner 1978; Maurer 2013). More generally, studies concerning the behaviour of Western states have examined the role of business-interests in shaping state behaviour. Additionally, some comparative political economy studies have incorporated business interests in their theories to understand the behaviour of Western states (e.g. Rodrik 1995; Hiscox 2001).

So, what do we know about business lobbying for IIAs? Yackee (2009, 2010) conducted a survey of US companies with investments abroad and found that they rarely took the existence of investment treaties into account when making foreign investment decisions. This implies that US business did not lobby the US government. Chilton (2016) assesses the underlying motivations in the policymaking process of IIAs in the US and found that non-economic, political motivations drive the US approach to negotiating IIAs. In a similar vein, Basedow (2017) assesses the extent to which European business lobbies for IIAs and concludes that business preferences and lobbying had little effect on the outcomes in international investment policy. Instead, Basedow found that bureaucratic politics shape international investment policymaking in Europe.

The scarce literature on business preferences and lobbying is illuminating insofar it suggests that the influence of private commercial interests is generally overstated in the context of IIAs in developed countries. In addition, the literature on business preference and lobbying for BITs in developed countries suffers from at least two significant limitations. First, it merely

'without the enormous pressure generated by the US financial services sector, companies like American Express and CitiCorp, there would have been no services agreement' (quoted in Bonnitcha, Poulsen & Waibel 2017, 192-93).

[12] Unless noted otherwise, this chapter is based on Bonnitcha, Poulson and Waibel (2017).

shows that non-economic, political motivations often motivate international investment policymaking, but it does not explain the reported marginal role of businesses. Second, the literature does not offer insights into the role of business preferences in IIAs in the context of the Netherlands. The studies only discuss investment treaty policymaking in the context of the US and the European Union. As the literature on varieties of capitalism suggest, the influence of private corporate interests on the process and outcomes of international investment policymaking may differ significantly across countries and regions (Crouch 2005). Thus, the Dutch context merits attention.

DE-POLITISATION OF INVESTMENT DISPUTES

The second motive behind developed countries' decision to sign investment treaties relates specifically to how investor-state disputes are resolved. In theory, investment treaties that contain ISDS mechanism should insulate controversies between foreign investors and host states from the political and diplomatic relations between two states. Abbott & Snidal (2000) note that international dispute settlement allows states to minimize political conflicts because foreign investors are given direct access to an international ad hoc tribunal, thus investment disputes would no longer evolve into disputes between the host state and the home state of foreign investors. Accordingly, the de-politization of investment disputes was listed as one of the main justifications for the founders of ICSID convention and is still listed as one of the key arguments for the U.S. to sign investment treaties (Office of the United States Trade Representative 2015).

Yet, Vandevelde (2009, 2012) shows how the objective of de-politicizing investment disputes played only a marginal role during investment treaty negotiations in the US –citing that other factors were equally, if not more, important. Similarly, Bonnitcha, Poulson and Waibel (2017) show that the de-politization of investment disputes played next to no role in the motivation of European BIT programmes. For example, BIT negotiators in The United Kingdom never mentioned de-politization as a benefit accruing from BITs (Bonnitcha, Poulson and Waibel 2017, 197). While de-politicization was clearly a priority to the architects of ICSID, there is little empirical evidence to suggest that de-politicizing of investment disputes was the main driver for Western countries' investment treaty adoption.

BUILDING INTERNATIONAL CUSTOMARY LAW

Bonnitcha, Poulson & Waibel (2017, 198-201) point to the perceived need to respond to the NIEO that emerged in the 1960s through investment treaties as a more important driver of Western investment treaty programmes. International customary law is established by the existence of state practice. Thus, the combination of developing countries' statements in the NIEO, coupled with the wave of expropriations of foreign-owned assets (without full compensation) in the developing countries, enforced the belief in the West that those practices would become legally embedded internationally.

In this context, IIAs were potentially useful to developed countries in two ways. First, following the assumption that developing countries were competing for capital from Western countries to some extent, North-South investment treaties could exploit a 'prisoners dilemma' faced by developing countries. Western countries could secure protections on their foreign investments on a bilateral basis that were rejected in multilateral forums like the UN General Assembly. Second, developed countries could use BITs to reinforce Western investment protection norms in international customary law, because even states who reject Western principles could still become subject to them. Literature in the international relations discipline supports this view: states could be forced to observe the customs of international law through rational cost-benefit analysis (Keohane 1984; Guzman 2008).

So, in addition to protecting their investors abroad, Western investment treaties would also develop international customary law on foreign investment, which is binding on all countries –including those without investment treaties (Bonnitcha, Poulson and Waibel 2017, 200). Whether or not developed states were successful in bolstering customary international law through preferential investment agreements is a legal question. What remains clear, however, is that developed countries tried to achieve the desired investment protections standards bilaterally, if only as a means of circumventing the multilateral forums entrenched by the North-South divide.

INVESTMENT TREATIES AND DIPLOMACY

Similar to arguments extended to preferential trade agreement negotiations, investment treaties can also be initiated as part of a broader set of foreign policy objectives. For instance, Vandevelde (2012) shows how the Truman Administration (1945-1953) used post-war FCN[13] treaties to promote (liberal) economic policies abroad as part of the larger 'containment' of

[13] *Friendship, Commerce and Navigation* (FCN) treaties were the precursor to the modern US BIT program

communism. Additionally, US BITs served as symbolic diplomatic tools for the US government to signify developing countries acceptance of Western principles of liberalism (such as to open markets and protection of private property rights), so-called ‘commitment’ signals (Bonnitcha, Poulson & Waibel 2017, 201).

More recently, Adam Chilton (2016) examined the political motivations behind The United States’ bilateral investment treaty program. Using qualitative and quantitative methods, Chilton (2016) finds strong evidence that the countries the US signed BITs with, were shaped mostly by their strategic importance, and not for investment protection or shaping international customary law per se. In important limitation to this type of argument is that BITs have largely been conducted ‘under the radar’ and received little to no press coverage. This makes them seemingly ineffective symbolic policies at best.

SUMMARY

Taken as a whole, the literature on international investment treaty policymaking in developed countries is in its ‘infancy’ (Bonnitcha, Poulson and Waibel 2017, 205). Bar a few exceptions, there are hardly any detailed case studies on European BIT programs. Little is known about the role of non-traditional actors like NGOs and it remains unclear how much investors and policymakers influenced developed countries’ BIT programs. Yet, the existing evidence does not suggest that the Dutch BIT program was developed in response to lobbying by their own outward investors, mostly multinationals. Rather, it suggests that the Netherlands largely promoted investment treaties for political and bureaucratic reasons. This thesis aims to contribute to closing this gap and shed light on the motives and catalysts behind the BIT program of a prominent case.

4. ASSESSING THE INFLUENCE OF BUSINESS LOBBYING

What follows is a detailed case study of the Dutch BIT program, split in three chronological ‘waves’ of bilateral investment treaty policymaking between 1) 1963-1989; 2) 1989-2007; and 3) 2008-today. The choice of The Netherlands reflects a ‘most likely’ case study design. The Netherlands stills ranks as one of the largest recipient and emitter of foreign investment in terms of foreign direct investment (FDI) flows (Lejour and Van ‘t Riet, 2013). According to the latest edition of UNCTAD’s *World Investment Report* (2018), the Netherlands remains the largest recipient of inward FDI in the European Union, exceeding that of considerably larger economies like Germany, the UK and France. Data from the Dutch Central Bank reveals that

in terms the stock of foreign capital currently invested in the Netherlands, or total *inward* FDI, was reportedly €3,700 billion in 2016 (De Nederlandsche Bank, 2017). In the same year, the total outward FDI stock of private Dutch companies added up to roughly €4,300 billion (De Nederlandsche Bank, 2017). Note however, that according to the Centre for Research on Multinational Corporations (SOMO) (2013), approximately 80% of the inward FDI and as much as 85% of the outward position is the result of almost 20,000 mailbox companies having incorporated within Dutch borders.[14] This is also the foundation for one of the strongest criticisms against the Dutch BIT program, i.e. facilitating ‘treaty shopping’ (discussed in later chapters).

Apart from the staggering capital stocks, the Netherlands takes a central *legal* position in the international investment regime as well. Recall from the introduction that around 12% of all known investment treaty claims make use of Dutch BITs (UNCTAD 2018), making it the second most frequent home state in international investment arbitrations. Furthermore, it maintains one of the largest networks of Europe, surpassed in number only by Germany, the United Kingdom (UK) and France. Moreover, Dutch BITs particularly have been criticised as being excessively ‘investor-friendly’ (Van Roos 2015, 172). Thus, if we expect business preferences and lobbying to play a decisive role in international investment policymaking, it should be observable in particular in this ‘extreme’ case.

This master thesis assesses the plausibility of the argument with a diverse body of proof. It collects and codifies *all* 100 Dutch bilateral investment treaties in complementing the descriptive. Foremost, however, it provides qualitative evidence taken from 1) interviews and conversations with important stakeholders; 2) a review of parliamentary records, hearings and considerations of BITs; 3) analysing documents obtained in the Dutch national archive; and 4) canvassing academic and other accounts that discussed The Netherlands’ BIT program.

Throughout the subsequent chapters, these different research methods will be applied in order to overcome difficulties with obtaining the data proper in the particular period. Government archival material of the 1980s onwards remains classified to the general public for the reason that it contains classified diplomatic correspondences. Hence only chapter 6 can draw on archival material. In contrast to the later chapters 7 and 8, which are broadly supported by reviews of parliamentary records, hearings and considerations, extensive literature research of academic and other accounts discussing the Dutch BIT program (including international law

[14] A ‘mailbox’ company (or ‘shell’; ‘shelf’ etc.) has no office and no employees or other corporate activity in the country, it has only a bank account and a registered address or PO box –it exists only on paper.

reviews) and most importantly, three incredibly insightful (and helpful) interviews that took place in June 2018. The interviews I had present a reasonable cross-section of the playing field in regards to the Dutch BIT program, as it features a former chief negotiator, a government policymaker and a researcher working at an involved NGO. In that same order, I spoke with Prof. Dr. Nikos Lavranos, former senior advisor & chief negotiator at the Ministry of Foreign Affairs who was responsible for all Dutch BITs between 2010 and 2014. He is also currently the Secretary-General of the European Federation for Investment Law and Arbitration (EFILA). Second, Mr. Thomas Nauta, (LL.M) a senior policymaker and lawyer at the specialised division of the Ministry of Foreign Affairs responsible for Dutch investment treaty policymaking, the Directorate-General Foreign Economic Policy (DG-BEB).[15] Third, Bart-Jaap Verbeek, foremost a researcher at the Centre for Research on Multinational Corporations, a critical independent think-tank and established name in the Dutch investment post-2012 policymaking scene. He is also a PhD Candidate at the Radboud University Nijmegen, specialising in Trade and Investment Policy.

There are limitations, however. In addition to the aforementioned fact that most of the archival material remains classified, numerous mailbox companies comprise a large portion of the Dutch inward and outward capital positions, this unique feature may place limits on the potential generalizability of the study. Another methodological limitation is presented by the scope of this master thesis and the fact that, with over 100 BITs signed over half a century, it is impossible to assess what drove each and every agreement. In fact, no single –or monocausal– explanation is possible. But even so, this study is bound to have overlooked or otherwise missed certain things due to the sheer length of the period investigated (more than 60 years). Rather, it focuses on the main factors driving the Dutch investment policymaking process in three distinct waves of BITs

5. THE BITS AND BOBS OF DUTCH BITS

BITs are usually concluded on behalf of the Kingdom of the Netherlands as a whole (i.e. the metropolitan Netherlands, Aruba and the Netherlands Antilles), although only the Kingdom forms the subject to international law and can therefore enter into international agreements. Traditionally, it is the Ministry of Economic Affairs who initiates and conducts negotiations and is supported by the Ministry of Foreign Affairs.[16] Once the treaty is initialled the Ministry

[15] In Dutch, the *Directoraat-Generaal Buitenlandse Economische Betrekkingen* (DG-BEB).
[16] Interview with Dr Nikos Lavranos, June 2018.

of Foreign Affairs takes over, making sure the treaty is concluded in accordance with the constitutional requirements (Schrijver and Prislan 2013) –returning to the negotiation process in subsequent chapters.

THE RATIFICATION PROCESS

After the (draft) treaty signed, it is sent back home where it must be approved and ratified. In the Netherlands, the process is governed by Article 91 of the Dutch Constitution (1983). Since 1994, the approval and ratification procedures are governed by the State Law on the Approval and Promulgation of Treaties (Schrijver and Prislan 2013, 546 fn. 43). This law stipulates that international agreements, like BITs can be either approved expressly (i.e. by law) or impliedly (i.e. tacitly). This law also provides that parliament must be given notice when negotiations commence and be regularly informed of the progress of said negotiations. Once a draft is negotiated, the Minister of Foreign Affairs formally submits a letter requesting the *Staten-Generaal* (First and Second Chambers of the Dutch Parliament) for approval. A copy of the treaty is also sent to the *Raad van State* (the Dutch Council of State), which provides both chambers of parliament with an advisory report on the bilateral investment agreement, and, if applicable, also to the estates of the respective Governors of Aruba, Curacao and Sint-Maarten.

Furthermore, the Minister's letter is accompanied by *Toelichtende Nota* or *Memorie van Toelichting* (explanatory memorandum). The difference, as explained to me by an official from the Ministry of Foreign Affairs, is that a *Toelichtende Nota* is included when the Minister expects the agreement to be approved tacitly and does not foresee parliamentary inquiries. When parliament is more involved, and it expressly approves the international agreement, the Minister includes a *Memorie van Toelichting* which is used to answer or address any parliamentary questions concerning the agreement. Nevertheless, it is important to note that the explanatory memorandum is usually prepared by the Ministry of Economic Affairs, as it serves to explain the scope, the background, the content and specific provisions of the agreement. Particularly considering that the large majority of BITs have been approved tacitly by parliament (Schrijver and Prislan 2013, 547). In some cases, these explanatory memorandums have been used in the course of ISDS arbitration to interpret specific provisions of a particular bilateral investment treaty. After both Chambers of Dutch parliament have approved the international agreement, it enters into force. It usually takes around two years between the treaty being signed and entering into force (Schrijver and Prislan 2013). Since

1814, the Ministry of Foreign Affairs has published all agreements in an official treaty publication series, the *Tractatenblad*.

THE DUTCH MODEL BIT

Although in the process of writing this thesis, a new Model Text (2018) was released for online consultation,[17] the 2004 model on the 'agreement on the encouragement and reciprocal protection of investment' (hereafter, the model text) serves as the primary template of the Dutch bilateral investment treaty program. Although usually BITs can be treated as a homogenous group, important distinctions can be discerned.[18] For instance, the BITs the Netherlands concluded with former-Yugoslavian countries differ substantially in content and wording as well as important generational differences between agreements.[19] Unless otherwise noted, however, this thesis assumes that all BITs, by and large, are the same.

PREAMBLE

A BIT is founded on a 'grand bargain': a promise of investment protection in return for the prospect for more capital in the future (Salacuse and Sullivan 2005, 77). This grand bargain is almost always explicitly articulated in the preamble of the bilateral investment agreement. Every Dutch BIT has a version of the following preamble (Dutch Model BIT 2004, i):

> […] Intending to create favourable conditions for investments by nationals of one Contracting Party on the basis of sovereign equality and mutual benefit; and
> Recognizing that the Agreement on the promotion and protection of such investments will be conducive to the stimulation of investment activities in both countries;

BROAD BASED DEFINITIONS

There is no standard definition of investment in international law. The interpretation of the term *investments* depends almost entirely on the way it has been defined in the individual treaty. Generally, BITs have favoured a short and broad definition that is asset-based (UNCTAD 2011, 24). The inclusion of such broad definitions extends the scope of Dutch BITs significantly insofar that it covers more types of investment in the agreement. Dutch BITs

[17] The new model (2018) is available (in English) at https://www.internetconsultatie.nl/investeringsakkoorden
[18] Interview with Dr. Nikos Lavranos and Thomas Nauta, June 2018.
[19] Ibid.

typically refer to investments as 'every kind of asset' invested by Dutch nationals. This is followed by a non-exhaustive list of the forms such assets may take.

A second important determinant for assessing the scope of application of Dutch BITs has to do with which *investors* can appeal to the protections laid out in the agreement. This is obviously important, because only those investors covered by the agreement can make an appeal to its protective clauses. Dutch BITs employ the term 'nationals', this includes natural and legal persons: 'natural persons having the nationality of that contracting party' and 'legal persons constituted under the law of that contracting party'. However, the strength of Dutch BITs originates from the coverage of 'legal persons not constituted under the law of that contracting party but controlled, directly or indirectly by natural or legal persons as defined in the agreement'. The latter is as tricky as it is crucial. Foreign legal persons (e.g. corporations) who are either directly or indirectly controlled by Dutch investors, are ascribed the same protections as Dutch investors/nationals. As such, the scope of the Dutch BIT is substantial. In fact, no other European BITs offer such a broad scope of investors, making it easy to imagine that Dutch BITs are particularly appealing to treaty shoppers (SOMO 2011, 22).

STANDARDS OF TREATMENT

Bilateral investment treaties contain obligations specifying the treatment of investments and investors. One can distinguish between 'relative' and 'absolute' standards of treatment (Bonnitcha, Poulson and Waibel 2017). Relative standards of treatment define the required treatment to be granted by referencing treatment granted to other investors and investments. In contrast, absolute standards of treatment are non-contingent, meaning that they establish guaranteed standards of treatment regardless of how the contractual state treats other (foreign) investors (UNCTAD 2007, 28).

RELATIVE STANDARDS

This section introduces two relative standards of treatment that aim at investment neutrality: the Most-Favoured-Nation principle and the National Treatment principle. These twin non-discrimination standards are relative insofar that their application requires comparison with the treatment of other foreign or domestic investments. Aimed at investment neutrality, these provisions ensure that host states shall not discriminate against foreign investments on political or nationality grounds, usually once the investment is established ('post-establishment') but in some cases this includes to cover pre-existing investments ('pre-establishment') –especially

after treaties have been renegotiated. These two relative standards are grouped together in the Dutch Investment Treaty Model (2004), article 3, paragraph 2:

> […] each Contracting Party shall accord to such investments treatment which in any case shall not be less favourable than that accorded either to investments of its own nationals or to investments of nationals of any third State, whichever is more favourable to the national concerned.

The Most-Favoured-Nation treatment standard has been included in virtually all Dutch BITs since the 1960s. MFN treatment standards mean that investments or investors of one contracting party are entitled to treatment no less favourable than the treatment the other contracting party grants to investments or investors from other third countries (UNCTAD 2007, 38). In other words, MFN clauses prevent host-states from treating foreign investors from one state better, or worse, than investors from another state.[20] Thus, MFN clauses establish, at least in principle, a level playing field for all foreign investors and investments.

National Treatment (NT)

In the context of a BIT, National Treatment standards obligate both contractual parties to grant investors of the other contracting party no less favourable treatment than it extends to its own investors (UNCTAD 2006, 34). Similar to MFN, this is to ensure a level playing field although here it explicitly aims to establish equal treatment between foreign and domestic investors.

ABSOLUTE STANDARDS

I now turn to four absolute standards of investment treatment which establish guaranteed standards of treatment regardless of how it treats other (foreign) investors (UNCTAD 2006, 28). Four absolute investment protections ensure that Dutch investments in the post-establishment phase: fair and equitable treatment, free transfer of funds, expropriation and umbrella clauses (Bonnitcha, Poulson and Waibel 2017, 104-17; also, Vandevelde 1998, 631-32).

[20] However, an important exception to MFN, not mentioned in Bonnitcha, Poulson and Waibel (2017), stems from obligations arising from existing economic integration agreements.

Fair and Equitable Treatment (FET)

FET is considered the most important substantive investment protection in a BIT (Bonnitcha, Poulson and Waibel 2017, 108). Foreign investors have invoked FET clauses to challenge a whole host of state conduct outside the direct expropriation of foreign-owned assets. According to Bonnitcha, Poulson and Waibel (2017, 109) 'no two academic commentators propose the same taxonomy of [FET] elements'. This study adopts the conceptualisation offered by the aforementioned authors. As such, three factors illustrate the rights granted by FET clauses to protect foreign investors: (1) denial of justice and due process; (2) arbitrary or unreasonable conduct; and (3) legitimate expectations. Taken together, FET is intended to provide overall criteria by which to judge 'whether the treatment given to an investor is satisfactory, and to help interpret and clarify how more specific provisions should be applied to specific situations' (UNCTAD 2007, 28). Subsequently, it allows for compensation even in disputes where no expropriation or discrimination has taken place. The Dutch Model Investment Treaty 2004, article 3, paragraph 1 articulates this provision:

> Each Contracting Party shall ensure fair and equitable treatment of the investments of the nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof of those nationals. Each Contracting Party shall accord such investments full physical security and protection.

Free Transfer of Funds

Ensuring a free transfer of funds has been at the heart of BITs since capital exporting states originally started concluding BITs. Free transfer clauses guarantee investors the right to transfer the investment, and the returns generated by their capital, freely and without delay. The free transfer of funds clauses, according to Bonnitcha, Poulson and Waibel (2017, 115) are unique among the core substantive investment protections because they aim to liberalize inward and outward transfers. Transfer provisions in BITs, therefore, reflect a tension between two different objectives: on the one hand, granting foreign investors the freedom of investment-related monetary transfers, and, on the other hand, providing the host-state with enough regulatory flexibility to properly administers its financial and monetary policies (UNCTAD 2007, 56). Even so, Dutch BITs include provisions that grant investors the right to make capital

transfers in relation to their investment without undue delay, in a freely convertible currency (Ibid., article 5):

> The Contracting Parties shall guarantee that payments relating to an investment may be transferred. The transfers shall be made in a freely convertible currency, without restriction or delay. […]

Expropriation

The concern to protect investments abroad against unlawful expropriation has historically been one of the main drivers of BITs (UNCTAD 2007, 44). Most commonly in the form of nationalization, expropriation refers to state actions that deprive foreign investors of their property, or otherwise substantially deprive investors of their investments (directly or indirectly). These conditions are laid out in paragraph 1, 2 and 3 of article 6 of the Dutch Model Investment Treaty 2004. Dutch BITs do allow host-states to lawfully expropriate foreign-owned property, if it satisfies (all) three conditions: the measures are taken in the public interest and under due process of law; the measures are not discriminatory and said measures are taken against just compensation. Article 6 of the Model specifies this provision:

> Neither Contracting Party shall take any measures depriving, directly or indirectly, nationals of the other Contracting Party of their investments unless the following conditions are complied with […]

Umbrella Clauses

The precise effects of umbrella clauses, as is the case with FET, is subject to broad academic (and tribunal) contestation. Bonnitcha, Poulson and Waibel (2017, 114) consider that umbrella clauses 'span a protective 'umbrella' over the 'commitments' or 'obligations' that host states have assumed with regard to foreign investments', functioning as a type of 'catch-all' provision which may include, in particular, investment agreements host states sign with individual investors (usually involving tax incentives or regulatory exemptions). Dutch BITs have strong umbrella clauses –a point of pride for the Dutch Ministry of Economic affairs (Trade Politics

> Nationals of the one Contracting Party who suffer losses in respect of their investments in the territory of the other Contracting Party owing to war or other armed conflict, revolution, a state of national emergency, revolution, insurrection or riot shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement […]

policy review 2007). Article 7 of the Model outlines the broad but non-exhaustive umbrella clause:

Investor-State Dispute Settlement (ISDS)

Finally, practically all modern Dutch BITs include binding consent to investment treaty arbitration. ISDS, a method of resolving investment disputes between a foreign investor and the home state, is a private dispute resolution mechanism that operates outside the host state's own legal system, backed by international enforcement (Bonnitcha, Poulson and Waibel 2017, 61; 91). It allows foreign investors to obtain binding awards against host states in the form of monetary compensation. The majority of Dutch BITs only outline of the main aspects of Investor-State dispute settlement. Instead, Dutch BITs usually refer to the ICSID convention of 1966 for arbitration disputes. Article 9 of the Model Investment Treaty 2004 (below) obligates the contractual parties to investment arbitration, whereas article 12, paragraphs 1 to 7, outlines procedural steps by which investment disputes are resolved.

> Each Contracting Party hereby consents to submit any legal dispute arising between that Contracting Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Contracting Party to the International Centre for Settlement of Investment Disputes […] (Dutch Model Investment Treaty 2004, Article 9)

ISDS can be assessed from different perspectives. From the perspective of the investor, apart from the evident role of ensuring that obligations of the host country can effectively enforced, ISDS clauses offer predictability and certainty for investors (UNCTAD 2009; 2007, 99-100). The country risk is reduced significantly which in turn encourages foreign investors of one contracting party to invest in the territory of the other. Alternatively, from the perspective of the host state, BITs limit the regulatory flexibility within which countries can pursue their national economic development (UNCTAD 2009, xi).

SUMMARY

The typical Dutch BIT means *inter alia* 1) a short and simple treaty; 2) broad-based definitions; 3) unqualified MFN, NT and FET; 4) broad umbrella clause; 5) full compensation for direct and indirect expropriations and 6) a broad choice of ISDS mechanisms (Lavranos 2013). The uniformity of the various BITs that are currently in force (and since terminated), can be

assessed quantitatively (see figure 1 below). By and large, the interviews confirm this[21]. Nonetheless, Dutch BITs sometimes have important differences, particularly determined by type of partner country. For example, the larger the partner country, the more variations the Dutch negotiators were willing to accept to the model text serving as the basis for the treaty.

Figure 1. Occurrence of important provision in Dutch BITs (n = 100)

MFN	NT	FET	Transfers	Compensation	Umbrella	ISDS
97%	96%	99%	100%	95%	74%	95%

Source: based on data by UNCTAD (2018) IIA Mapping Project.

*This list also includes BITs that have never been ratified, or been terminated at the time of writing.

[21] Where Thomas Nauta and Bart-Jaap Verbeek also noted this, Dr. Lavranos cautioned all-encompassing claims about the legal content of Dutch investment treaties.

PART II

7. EARLY DUTCH BITS

The substantial activities of Dutch companies abroad meant that the Netherlands has traditionally attached great importance to strong international rules protecting foreign investment (Schrijver and Prislan 2013). Recall from chapter 2 that the Netherlands actively supported the ICSID convention and other multilateral efforts. Although the convention failed, the later Abs-Shawcross-inspired ICSID Convention in the OECD became the foundation for the Dutch BIT program. In light of NIEO, the Netherlands took the first bilateral steps in the 1960s in the less developed parts of the world, mostly Africa. Partly motivated by the nationalization of Dutch properties in Indonesia in 1958-1959, the Dutch investment protection programme began in 1963 (Schrijver and Prislan 2013, 541). Whereas businesses for the most part did not wait for BITs to arrive prior to investing, businesses definitely influenced the early Dutch program. Yet, for the greater part, the Netherlands simply emulated its early European counterparts Germany and Switzerland, who had initiated their programs in the 1950s. In fact, archives show how the first Dutch BIT with Tunisia was largely inspired by the 1961 BIT it had already concluded with Switzerland.[22]

THE FIRST BITS

The first treaty to be devoted solely to investment protections, the Convention on Capital Investment and the Protection of Property signed with Tunisia in 1963, marked the beginning of Dutch 'BIT'-making. Archival material shows how it took a while for the agreement to be concluded. International correspondence reveals how the Ministry of Foreign Affairs, specifically discussed the recent investments in Tunisia as a motivation for conducting negotiations. Nevertheless, it took some perseverance of then Ambassador to Tunisia, Dr Bergsma, who stressed the Ministry of Foreign Affairs back home that an investment treaty was urgently needed in light of the increasing industrial presence of Dutch companies in the country.[23] Yet, apart from strong lobbying efforts by a contracting firm eager to obtain an investment guarantee, not all interested companies saw investment treaties as an essential prerequisite for investing in developing countries designated as risky jurisdictions (Poulson 2015, 68). Whereas KLM, Philips and Unilever joined by a number of other companies

[22] National archive 2.05.313-7602.
[23] Ibid.

expressed their interest in an investment treaty with Tunisia, the lack-thereof did not deter Philips or Unilever to start making investments.[24]

A particularly active company at the time was Shell. Regularly affected by the wave of expropriations as part of the post-colonial resentment towards multinationals, one of the directors at the time was Lord Shawcross, the intellectual co-author of the early European BIT programs (together with the German Banker Hermann Abs). Shell provided detailed comments on drafts of early agreements, such as with Tunisia (Bonnitcha, Poulson and Waibel 2017, 188).[25] Shell, Philips and Unilever among other firms were also members of the lobbying foundation representing the interests of industrial enterprises operating at an international level.

Signed on May 23 1963 (entered into force on 19 December 1964) (UNCTAD 2018), the 1963 Tunisia BIT was a concise agreement with many of the provisions we can observe today. It encompassed (a precursor to) fair and equitable treatment, national treatment, transfer of funds, compensation for expropriation in addition to access to international ad hoc arbitration (Schrijver and Prislan 2013, 542). The Netherlands would go on to conclude another three BITs during this decade: Cameroon (1965) and Cote d'Ivoire (1965) and Indonesia (1968). Nonetheless, these early agreements were not proper bilateral investment treaties because they also regulated domains beyond investment (Poulson 2015, 64, fn.71). Some were tied to financial aid incentives. The 1963 Tunisia negotiations were carried out alongside financial assistance program backed up by the Dutch Central Bank.[26] Similarly, the 1965 Cameroon BIT was linked to the provision of a f4 million[27] and likewise did the 1965 Cote d'Ivoire BIT depend on a substantial financial aid package (Ibid.).[28] Thus, it appears commercial and diplomatic incentives were aligned in this process.

ORIGINS OF THE BIT PROGRAM

The origins of the Dutch BIT program can be more properly traced to the late 1960s and early 1970s. Two important developments in the evolution of the BIT program at the time stand out: 1) the importance of *subrogation* and 2) BITs became more standardised. First, subrogation, which meant that the Dutch government initiated the 1970 Investment Re-Insurance Act, basically providing insurance to the Dutch insurance companies. More importantly, this new state-backed investment insurance program tied federal guarantees to investment treaties

[24] Dutch national archives 2.05.313-7602; 2.05.118-10510; 2.08.53-603.
[25] Dutch national archives 2.05.118-10510; 2.05.118-10864.
[26] Dutch national archive 2.05.313-7602
[27] Dutch national archive 2.03.01-3514
[28] Dutch national archive 2.03.01-3537

(Bonnitcha, Poulson and Waibel 2017, 187-88). By linking the insurance program to BITs, Dutch companies now had a direct stake in the conclusion of bilateral investment treaties because BITs had implications for insurance pricing and coverage. In other words, it started to affect companies' bottom-lines'.

From the perspective of the Ministries, the introduction of subrogation put policymakers in a strong position to exert influence on the policy process and outcomes. Whereas one might suspect the Ministry of Foreign Affairs to be the sole responsible department for foreign investment policymaking, after the Second World War the Ministry of Economic Affairs reinforced their position as the principle government agency tasked with coordinating Dutch foreign economic policy, when it established the Directorate-General Foreign Economic Policy (Melissen 1999, 27). The DG-BEB would later present stiff competition for the Ministry of Foreign Affairs' economic diplomacy in the second half of the twentieth century. Nevertheless, policymakers from both departments were strongly incentivised to conclude BITs now that these instruments directly increased national welfare by helping investors qualify for federal insurance. In fact, according to a former Dutch negotiator interviewed by Bonnitcha Poulson and Waibel (2017, 187), subrogation became the most important motivation for the Netherlands to enter into BITs at the time.[29]

This observation reveals another important development in the evolution of the program, although the 1968 Indonesia BIT already provided consent to ICSID arbitration, the first BITs were aimed more subrogation so Dutch investors could insure their investments, than providing consent to investor-state arbitration per se. Thus, not all Dutch BITs included investor-state arbitration in the early days. In retrospect, the first agreement that can be characterized as a modern BIT was the agreement on encouragement and reciprocal protection of investments with South Korea, signed in 1974 (Schrijver and Prislan 2013, 542). The 1974 South Korea BIT, followed by the conclusion of very similar agreements with Egypt (1976), Yugoslavia (1976) and Senegal (1979), marked the beginning of a more coherent, standardised investment treaty program reliably including consent to investment treaty arbitration.

A DECADE OF DICHOTAMY

Whereas the first BITs were primarily aimed at lesser developed countries in Africa, the Netherlands shifted its attention to Asian and communist countries during the 1980s. In addition, the pace at which the Dutch BITs were concluded increased. In the 1980s, an

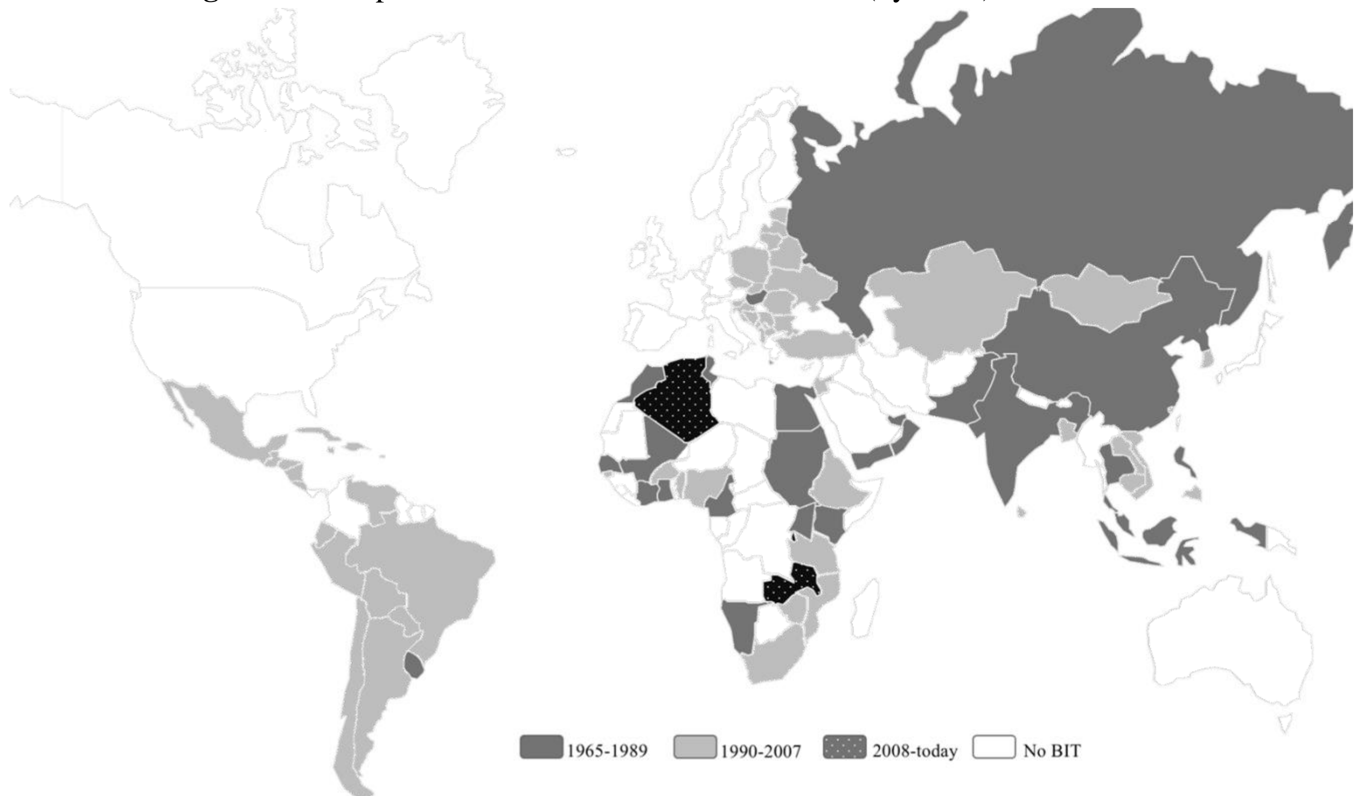
[29] Dutch national archive 2.05.313-7602

additional 14 BITs were signed, the large majority of these agreements containing consent to ICSID arbitration. Government archival material from this period remains classified in the Netherlands, but there is little evidence to suggest that companies became more (or less) involved with the program. For example, Elkins, Guzman and Simmons (2006, 817) note that by the late 1980s governments in countries home to large multinational corporations largely converged on a single treaty model. The Netherlands appears to follow this pattern of capital-exporting states, publishing its second Model BIT in 1987, which by and large closely resembles the 2004 Model Text (Schrijver and Prislan 2013, 545). Furthermore, BITs were sometimes used as foreign policy tools, when for example economic and diplomatic incentives were aligned in former Yugoslavian countries who wanted to signal a commitment to liberalisation (Bonnitcha, Poulson and Waibel 2017, 202).

SUMMARY

Overall, it seems clear that businesses at least sometimes lobbied and promoted the Dutch investment treaty program. Particularly during the early years of the program, it appears that business preferences and lobbying was an important driver of Dutch investment treaty policymaking, evidenced by such efforts of Shell and other firms. The interest in Dutch BITs sparked again the Dutch government linked investment treaties to investment insurance, thereby strongly incentivising Dutch investors to pressure the government for investment treaties and propel bureaucrats at the same time. But other important drivers of the early BIT program were also identified, like the link to larger diplomatic objectives and developmental aid. Thus, the role of businesses cannot be seen in isolation from other stakeholders, chiefly the policymakers at the Ministry of Economic Affairs. Whereas the first Dutch BITs did not provide for consent to ICSID arbitration (except the 1968 Indonesia BIT), by the 1980s pretty much all Dutch BITs did provide consent to ISDS.

Figure 2. The spread of Dutch BITs across the world (by wave)



Source: UNCTAD (2018)

*this figure serves as an illustration and is not entirely complete

8. THE ERA OF PROLIFARATION

During the last decade of the twentieth century, the second wave of BIT policymaking began. The Netherlands signed a spectacular number of BITs in rapid succession: 44 BITs in the 1990s and the Netherlands would go on to sign another 32 by 2007. Recall from chapter 2 on the international investment regime, during the 1980s globalization started shaping a new global political and economic order. Particularly after the dissolution of the Soviet Union in 1991, the world embraced the neoliberal model of economic (and political) openness advocated by Reagan and Thatcher –leaving the Keynesian 'embedded' liberalism development model of the post-WWII era in its wake.[30] The socio-economic climate in which investment treaties were being negotiated dramatically changed. Although the Netherlands continued to sign BITs with traditional partners in Africa and Asia, the global reach of the Dutch program expanded to include so-called transition economies, Eastern European partners and important Latin American countries (up to this point staunch supporters of the Calvo Doctrine). Presumably

[30] 'Neoliberalism', *laisez-faire* or free-market economics, dates back to the Friedrich Hayek's *The Road to Serfdom* (1947) and Paul Samuelsson's *Economics*: *An Introductory Analysis* (1948).

because of the openness of the economy and presence of both domestic and foreign multinationals, the pattern rapid proliferation and diversification of the Dutch program closely resembles the global pattern of BIT policy diffusion established by sociologists (e.g. Elkins, Guzman and Simmons 2006).

There are solid (public) sources describing the main objectives and motivations of the Dutch government during this period, particularly from the mid 1990s onwards, but the chapter also builds on interviews with stakeholders and other accounts discussing the Dutch BIT program in this period, like press newspaper articles from the 1990s. While Dutch companies at least occasionally still got involved in particular agreements,[31] it seems that the relationship between Dutch corporations and policymakers had changed. Although in the early days of the BIT program (1960s and 1970s) Dutch companies appeared to regularly promote particular agreements, during the mid-1980s and 1990s they became less involved with individual BITs and instead were closely consulted during updates and revisions to the Dutch Model texts in 1993, 1995 and 2004 (Trade Policy Report 2007, 32).

INTERDEPARTMENTAL COMPETITION

There is a strong notion that during the 1990s –if they hadn't done so already in the 1980s– policymakers present the strongest and most potent driver of Dutch BITs. Perhaps more importantly to our case, inter-departmental competition intensified during the 1990s. In the wake of the fall of the Soviet Union, the security politics that defined the foreign policy agenda, were put on hold in favour of the increasing importance trade politics. Trade politics, however, was a firmly established practice of the Ministry of Economic affairs, specifically the Directorate-General Foreign Economic Policy who housed all knowledge and expertise in this domain. Yet, in 1995 then Minister of Foreign Affairs van Mierlo (D66) echoed the Dutch Cabinet's (government) ambition to recalibrate foreign policy to this purpose. Rather sneakily, the Minister of Foreign Affairs had already initiated the inter-departmental negotiations for this recalibration of foreign (economic) policy, without the knowledge of Ministry of Economic Affairs, in effect an attempt of the Minister of Foreign Affairs Van Mierlo to poach the prestigious DG-BEB from the Ministry of Economic Affairs (where it had been founded in 1934) (De Volkskrant March 18, 1995, accessed July 28, 2018.)

[31] Although he could not lawfully provide me with specific negotiations, Prof. Dr. Nikos Lavranos did indicate that it would occasionally still happen that a corporation pressured the government to sign BITs with a specific country.

In late 1995, the then Minister of Economic Affairs Wijers was notified of the interdepartmental talks by a representative of the employer's organisation (Rinnooy Kan). Distraught and furious, Minister Wijers immediately claimed his seat at the official consultations and would ultimately succeed in retaining the prestigious Directorate-General Foreign Economic charged with trade politics (ibid.). The position of the Ministry of Economic Affairs was clear: Dutch foreign policy needed to be tailored much more towards trade politics and the Ministry of Economic Affairs constituted an essential pillar of Dutch foreign policy (the two other pillars consisting of security politics and development aid). Nevertheless, despite the Minister's (of Economic Affairs) success in fending of the attack of his counterpart of Foreign Affairs, the fear that certain other parts of the foreign policy would be delegated to the Ministry of Foreign Affairs or Development Co-operation respectively still lingered in the minds of the policymakers housed at Economic Affairs (ibid.).

The insights of the newspaper articles were corroborated by the interview with the former Dutch chief negotiator, who noted that in the 1990s and 2000s, policymakers from the Ministry of Foreign and Economic Affairs started working more closely during the negotiations. In stark contrast to the early days of the BIT program, where the Ministry of Economic Affairs dominated this aspect of the foreign (economic) policy agenda –including negotiating BITs– during the 1950s and 1960s.[32]

Thus, based on interviews with stakeholders, parliamentary records and other sources relating to the Dutch BIT program during this wave, it becomes clear that negotiators consisted of mid-level bureaucrats from the Ministry of Economic Affairs, often assisted by subordinates from the Ministry of Foreign Affairs.[33] The Dutch government considered it to be her 'duty' to conclude BITs, suggesting that businesses at this time no longer lobbied for specific investment agreements (Evaluation report of the Ministry of Foreign Affairs on trade politics, *Ministerie van Economische Zaken* (2007), Beleidsdoorlichting handelspolitiek: Eindrapport, Tweede Kamer, session 2007-2008, 30 991, nr. 3, The Hague. Accessed June 5, 2018.). Negotiations concerning the flow of trade and investment are carried out by governments, making it self-evident that the government should take responsibility of the government to be proactive in concluding investment treaties that support Dutch business.

Apart from a few people who were directly involved with BITs, during this period very few people were aware that these negotiations were taking place. Furthermore, canvassing

[32] Interview with Prof. Dr. Nikos Lavranos
[33] This was confirmed to me by officials from the both ministries after email correspondence, June 5 2018.

parliamentary records suggests BITs were not politically relevant at the time (they were rarely mentioned by politicians for example, who focus on issues that are more important to the electorate), giving bureaucrats considerable leeway in shaping the Dutch BIT program. However, the interview with a former chief negotiator for Dutch BITs reveals that they were mostly signed as part of outgoing (and incoming) trade 'missions'. BIT negotiators from EZ were in the large majority of cases preceded by one or more visits from Ministers and CEOs.[34] This process could easily take years (sometimes as much as 7) from start to finish, often tied to the fluctuations of interdepartmental politics.

MULTILATERALISM AT THE TURN OF THE CENTURY

During the late 1990s and early 2000s, the conclusion of BITs was regularly put on the back burner when the Ministry of Economic Affairs focussed all their efforts on negotiating multilateral agreements (Trade Policy Report 2007, 31).[35] In fact, BITs have always been considered the *second-best* option for the Ministry of Economic Affairs, who repeatedly prioritised efforts in multilateral forums as the preferred instrument for regulating foreign investment (Trade Politics Review 2007, 33). Recall also from chapter 2 and 7, that the Netherlands was closely involved with the earliest of multilateral negotiations, like the ICSID convention in the 1960s.

For instance, during the late 1990s the Ministry of Economic Affairs temporarily refrained from BIT negotiations in favour of the Multilateral Agreement on Investment (MAI) in the late 1990s. After the MAI negotiations failed in 1998, however, the Ministry of Economic Affairs 'actively' approached countries in Latin America, Asia and the former USSR to conclude a BITs (ibid., 31). Likewise, an additional number of African countries that were also approached saw their negotiations being put on hold when multilateral negotiations on investment under the auspice of the WTO began in 2002. After that attempt at also failed, new BIT-talks were initiated in 2003, this time however, the BIT negotiations focused on 'priority' countries (Russia, Iran and Turkey) and other large, energy-producing countries. Importantly, during this period the Netherlands did not negotiate with other countries deemed less strategically important by the Ministry of Economic Affairs. These countries could only enter into a BIT with the Netherlands if they were prepared to accept the Model BIT without, or few alterations.

[34] Interview with Prof. Dr. Nikos Lavranos
[35] For brevity's sake, hereafter: Trade Policy Review.

DUTCH FOREIGN INVESTMENT POLICY

The Dutch policy on investment treaties is intricately linked to the broader Dutch foreign economic strategy with a strong interest in creating a competitive and business-friendly climate in The Netherlands, both for attracting new and keeping to established multinationals. In fact, then State Secretary for Trade Heemskerk noted in 2008 that the amount of energy and effort invested in signing business-friendly BITs is partly based on the government policy to create favourable conditions for attracting multinationals to incorporate within its borders (Letter of the State Secretary of Economic Affairs Mr. Frank Heemskerk to the House of Representatives, February 2008. Accessed June 7, 2018). As such, the Dutch investor-friendly BITs were also linked to a broader strategy of attracting multinationals to incorporate within its borders.

However, as touched upon in the preceding chapter, during the second wave BITs became a well-established part of the broader Dutch foreign policy on trade. Between 2000-2005, this broader foreign policy of the Ministry of Economic Affairs consisted of four policy domains 1) trade, 2) export control, 3) *investment* and 4) social responsibility. The broader foreign policy was aimed at creating a ‘transparent, stable and free international investment climate’ (Trade Policy Review 2007, 8). The underlying motivation for this quintessentially liberal position is that trade and investment barriers resulting from protectionist policies countries present lost opportunities for one of the biggest foreign investors in the world (Ibid.). The conclusion of BITs is thus based on the premise of a positive correlation between BITs and increased investment and trade flows. The most important stated goal was to reduce international trade and investment barriers, which should lead to a more efficient international allocation of labour and in turn result in more prosperity for the strongly outward-oriented economy of the Netherlands.

Thus, keeping investment barriers to a minimum by liberalising the flows of international trade and investment was a key foreign economic objective of the Ministry of Economic Affairs (Ibid., 6). Linked to the broader foreign strategy on trade, during this period the international investment policy served to ‘promote a transparent, stable and free international investment regime by creating favourable conditions for international economic activity of Dutch businesses’, by means of ‘concluding high-quality treaties that strengthen the international economic legal order’ (Trade Politics Report 2007, 31-33). According to the same report (2007, 30), BITs serve the latter purpose rather well because countries that sign BITs with the Netherlands ‘implicitly accept principles that are broadly established through international customary law’. In addition, ‘strengthening the international economic legal

order' should create and maintain a stable legal framework for trade and investment outside the EU, so that Dutch businesses can operate in a stable and predictable international environment' (Ibid. 8).

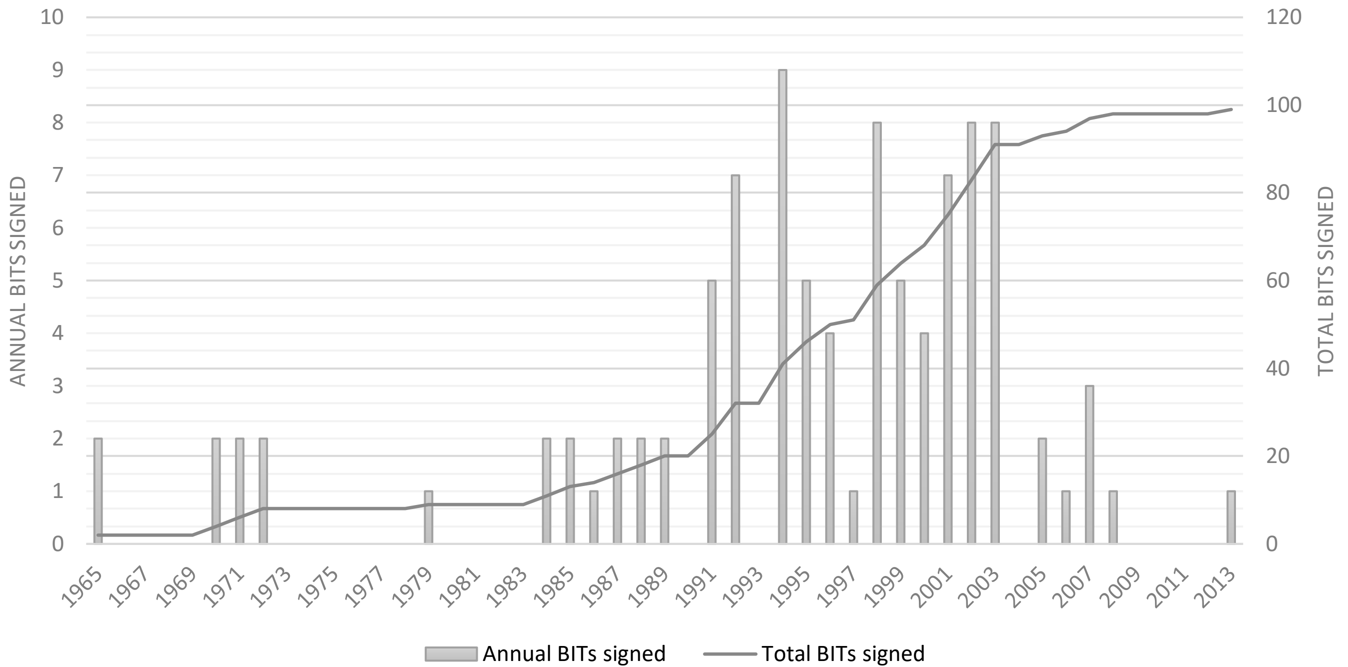
This chapter shows how investment promotion and building international customary law formally motivated the Ministry of Economic Affairs to conclude BITs around the turn of the twentieth century. This was achieved through, and simultaneously reinforced by, building international customary law. This confirms two important motivations that have surfaced in the literature review, building international customary law. Yet there is an important issue that still garners attention, how did business preferences shape Dutch BIT policy? As mentioned in the introductory paragraph of this chapter, it appears that by and large, business had already stopped promoting individual BITs by the 1980s and this pattern solidified in the following decades. This is not to say that businesses were not involved in the program anymore. Aforementioned in the preceding section, the Netherlands started converging towards a model treaty, which would become the basis for future negotiations. Well, since these model texts were 'developed in close consultation with businesses', they were still at the forefront of investment policymaking (Trade Politics Review 2007, 32). Instead of influencing specific agreements however, Dutch industry was periodically consulted and provided the Ministry with feedback on the negotiating template.

SUMMARY

In summary, the Dutch BIT program reached its zenith during the 1990s and early 2000s. Sometimes the conclusion of BITs was temporarily put on hold in favour of negotiating multilateral agreements regulating foreign investment, showing how the Dutch policy on investment was partly determined by external developments. Furthermore, although the program became strongly institutionalized, the bureaucratic competition for the prestigious foreign economic policy domain intensified after the collapse of the Cold War security nexus. Although the Ministry of Economic Affairs managed to hold on to its Directorate-General Foreign Economic Policy, the Ministry of Foreign Affairs became more involved with the BIT program. Against the backdrop of the Dutch government considering it its 'duty' to conclude BITs during this period, businesses appear less involved with promoting individual BITs;

rather their preferences were consulted during regular updates or other amendments to the Dutch model texts, which formed the basis of all BIT negotiations during this time.

Figure 3. The spread of Bilateral Investment Treaties in the Netherlands



8. THE MODERN DUTCH BIT PROGRAM

After the Dutch BITs program reached its peak in the 1990s and early 2000s, the number of BITs dropped considerably again following what sociologists call a classic diffusion '*S*' curve (see figure 2). The point of departure for the third, and current wave of Dutch BIT policymaking started in 2008, the same year the world would witness the largest financial crash in eighty years. Major (national and global) development in the second half of the 2000s resulted in a new era of investment treaty policymaking, which can be characterised as a period of reorientation (UNCTAD 2014). The interviews with stakeholders were hugely insightful regarding the role of businesses on the modern policymaking process and strongly contributed to a more general understanding of the important developments in the past decade. This chapter also relies on parliamentary records and hearings, press accounts and academic and other literature discussing Dutch BITs. What follows focusses on describing how the institutional, political and public contexts evolved over the past decade, in the process arriving at the 'unprecedented' status quo that as a result of a massive turnaround of once pro-ISDS countries

like the Netherlands and Germany (interview with former chief negotiator on behalf of the Netherlands).[36]

There are a mainly four reasons why the Dutch BIT program suddenly slowed down just prior to third wave. First and intuitively plausible, treaty saturation –there are only so many countries the Netherlands could sign a BIT with. This is what the Ministry of Economic Affairs concluded in 2008, stating that 'the Netherlands had entered into a BIT with all the relevant countries at this point' (Trade Politics Review 2007, 31). Second, the Lisbon Treaty (2009) basically took away the Dutch mandate to enter into BITs, although not immediately, foreign investment (protection) policy became an area of exclusive EU competence. Thirdly, the drastic shift in the politics of investment treaties in developed countries as a result of the rise of investment treaty arbitration, Germany for instance was taken aback in 2012, when the Swedish multinational Vattenfall used the ECT to challenge Germany's environmental policies (Bonnitcha, Poulson and Waibel 2017, preface). While the early investment treaties were largely viewed as a 'one-way-street', today's BITs are negotiated in the knowledge that investor may also bring arbitration cases against European states. Fourth and finally, a partial shift away from concluding BITs in bilateral settings, towards (mega-)regional trade agreements that include more parties and issues (Bonnitcha, Poulson and Waibel 2017, 21; 202).

Interviews with former and current government officials closely involved with the Dutch BIT program reveal that the role of businesses in the investment treaty policymaking process is generally overstated.[37] According to a chief negotiator of Dutch BITs between 2010-2014, businesses were not the most important driver in the conclusion of BITs. Although it would occasionally happen that industry would approach the Foreign Economic Policy office and point to a particular country, and then the Ministry would oblige and dutifully negotiate a BIT with said country, business was not the main driver of investment policymaking during this period. In fact, it unfeasible to expect a monocausal explanation for BITs. Rather, signing BITs was mostly part of much larger incoming and outgoing trade missions. Simply put, BITs were just part of the deal.

The type of partner country could also constitute an important for the motivation for a particular BIT. Leading up to 2008, the focus of the Ministry of Economic Affairs was to sign BITs with a few countries of real economic and/or political importance, particularly oil and

[36] Interview with former negotiator Prof. Dr. Nikos Lavranos, June 2018.
[37] Interviews with former negotiator Prof. Dr. Nikos Lavranos and current BEB lawyer Thomas Nauta, L. LM, June 2018.

gas-producing countries in regards to national energy security (Trade Politics Review 2007, 34).[38] Alternatively, sometimes all the parties were interested in was creating a 'photo moment'.[39] For instance, according to a former Dutch negotiator, after the political turmoil in Eastern Europe BITs were sometimes used as political endorsements, reaffirming that BITs were sometimes used as symbolic gestures or foreign policy tools. Although during the 1990s the ministry of Foreign Affairs had still been involved with the program, international investment policymaking had become well-established practice at the Ministry of Economic Affairs, who by 2008 in turn had largely fulfilled its purpose of creating a large network of BITs.

SHIFTING INSTITUTIONAL LANDSCAPE

In 2013, a massive shift in the context of Dutch international investment policymaking landscape took place. Recall from the preceding chapter during the mid-1990s the Directorate-General Foreign Economic Policy fended off an attempted coup of the Ministry of Foreign Affairs. The notion of then Minister of Foreign Affairs Mierlo for a more cohesive Dutch foreign policy however had never really been put to rest. In 2012, the creation of an advisory committee with the purpose of modernising Dutch diplomacy, the fragmented foreign economic policy was again brought to the forefront. The so-called 'wise' group chaired by Arthur Docters van Leeuwen (ed.) questioned what exactly 'economy diplomacy' in the twenty-first century meant, and how the Ministry of Foreign Affairs fit into this picture. The 'wise' group suggested that, in order to finetune its new national role in a new international context, the Ministry of Foreign Affairs should focus their attention away from the ministries in The Hague, and instead professionalise diplomacy and let diplomats stationed abroad suggest the policy, preferably with regional approaches. This included consolidating foreign economic policy under the wings of foreign affairs (Docters van Leeuwen et. al., 2013). Historically, this policy domain had belonged to the Ministry of Economic Affairs, where among other things the DG Foreign Economy Policy coordinated and negotiated the Dutch BIT program. Additionally, the Ministry of Development Co-operation also operated in what were considered economic policy domains, adding to the fragmented departmental landscape. The advisory committee's interim report *Modernising Diplomacy* (2013), would later note how recent Coalition Agreement Rutte-Asscher II (2012-2017) acknowledged this new role for the

[38] This hints at the involved of Royal Dutch Shell was in involved, but without any primary evidence it impossible to empirically verify.
[39] Interview with former negotiator Prof. Dr. Nikos Lavranos, June 2018.

Ministry of Foreign Affairs by relocating the DG Foreign Economic Policy to the Ministry of Foreign Affairs as part of larger harmonisation of Dutch economic diplomacy.

Understanding how the relocation of the DG Foreign Economic Policy affected the institutional landscape of BIT policymaking, consider how each ministry has its own specific set of relationships with in place with various stakeholders.[40] For instance, if the Ministry of Economic Affairs to intends to increase public welfare with its policies, it will do so in consultation with Dutch industry (including the SMEs) by implication. Alternatively, the Ministry of Foreign Affairs maintains close relations primarily with NGOs and other civil society groups, who are to an extent dependent on the Ministry of Foreign Affairs for subsidies.[41] In addition, these civil society groups would be blasted to the forefront by the rise of investment treaty arbitration. All in all, it would be logical to expect that these civil society groups would become more active in the BIT program. The subsequent chapters will show, however, how NGOs took control of the public narrative around the same time the institutional conditions shifted.

MOUNTING CRITICISM

Yet, whereas until this point BITs had been largely negotiated under the radar from much of the public and parliament, this would dramatically change however. The global financial crisis of 2008-09 restated the importance of strong national economic regulatory frameworks, and the rise of investment treaty arbitration started to affect developed countries as well, including investment. The paradigm shift that occurred in Europe, the so-called neoliberal counterrevolution towards more 'sustainable' development marks the beginnings of a concerted move towards BIT reform. Although most scholars would point to the illustrious TTIP negotiations as the moment civil society groups got involved with the Dutch BIT program, this is not entirely accurate. But an interview with a researcher from SOMO –a particularly active non-governmental stakeholder in the Dutch BIT landscape– notes how civil society groups started criticising ISDS and BITs as far back as the 1980s, and during the 1990s a number of small 'research clubs' were founded who started focusing some of their attention on the perceived negative implications of BITs with ISDS.[42] Recall from chapter 2, during the MAI negations in the OECD civil society groups had already started becoming more involved with the international investment regime.

[40] This paragraph is based on the interview with Prof. Dr. Nikos Lavaros.
[41] Interview with Thomas Nauta (LLM) at DG-BEB of the Ministry of Foreign Affairs, June 2018
[42] Interview with Bart-Jaap Verbeek, researcher at SOMO and current PhD Candidate, June 2018.

From the 2010s onward, the criticism against European BITs started mounting. Developing countries like Venezuela, Bolivia, Indonesia and South Africa terminated BITs with the Netherlands. In Europe, often subsidised by the European Commission or national governments (the Netherlands and Germany), civil society groups implemented a campaign to reform BITs around the time of when the Lisbon Treaty entered into force in 2009, when the EU had secured legal competence to enter into EU-wide investment agreements. A collective of NGOs[43] addressed the Dutch government in a 2011 letter, stating that the Lisbon Treaty presented a 'unique window of opportunity' to reform Dutch (and European) investment treaties the NGO's argued were 'a threat to the public interest, social policy and environmental politics' (Knottnerus 2011, 1). The message against ISDS and BITs resonated strongly with a few (leftist) politicians, but the real turning point would be the politization of the TTIP negotiations in the European context. In 2014, civil society groups organised successful campaigns against TTIP in Europe, mobilizing large numbers of citizens and newspaper editorials to rally against strong investment arbitration in the treaty (Bonnitcha, Poulson and Waibel 2017, 203).

THE PUBLIC DEBATE

Between 2014-2016, civil society groups oversaw a tremendously successful campaign against BITs, which has managed to 'misinform' the general public, media and politicians (Lavranos, 2016). As the public got more involved, so did parliament. In the eyes of the critics, Dutch BITs and ISDS in general provide multinationals with a powerful tool to challenge a whole plethora of public interest policies that bypassing domestic legal jurisdictions. This gives foreign companies more rights than domestic investors, undermining their economic competitiveness through a system that not only lacks independence and transparency, but also makes little sense in economic terms (Knottnerus et. al 2011, 7). In other words, the Dutch BIT program is criticised not for being particularly neoliberal, but also 'statist' in nature.[44] Incredibly, their campaign did not only bring the TTIP negotiations to a halt, in a few short years the NGOs successfully managed to pressure strong traditional supporters of ISDS like the Netherlands and Germany, and perhaps more importantly the European Commission, to completely turn their back against it –which had been the backbone of European BITs for 50 years. This is supported by the fact that the Comprehensive Economic and Trade Agreement

[43] i.e. SOMO, Both Ends, Seattle to Brussels Network, Corporate Observatory Europe (CEO), TNI and 7 other NGOs.

[44] Interview with Bart-Jaap Verbeek (researcher at SOMO), June 2018.

(CETA), which was already negotiated in 2014, would take until 2016 before the EC and the Canadian government would ratify the treaty, following heated negotiations that focused on a replacement for ISDS.[45]

Alternatively, supporters of BITs and ISDS point to the proven benefits of the system. For example, Lavranos (2017) reports that without the Netherlands-Zimbabwe BIT and its consent to ICSID arbitration, Dutch farmers who were illegally evicted from their farms by the Zimbabwean government would have been left completely empty-handed. The eventual compensation to the farmers granted by the ICSID award (€8,2 million), shows how ISDS is not only useful for large corporations claiming billions, but helps small and medium enterprises. Additionally, without ISDS, foreign investors would have no forum whatsoever to settle legal disputes, as many states (not the Netherlands) have sovereign immunity laws protecting them against lawsuits from domestic investors. For example, whereas it is fine for the Netherlands to say it has independent and open courts, most countries in the world are not democracies that provide the judicial independence. As such, proponents of BITs and ISDS argue that critics of the Dutch BIT program should think twice about wanting to terminate the complete program, as this would also take away an effective and necessary tool for the global enforcement of the rule of law (Lavranos 2017).[46]

Nevertheless, together with numerous newspaper editorials, the NGOs managed to successfully cement the narrative that (Dutch) investment policymaking is a policy domain synonymous with undue business influence –and a seat during future consultations. As a result of the media interest, parliament starting getting more involved as more politicians took notice of the Dutch BIT program. For example, after several news outlets picked up a story about the Netherlands' position of a 'claim Walhalla' for foreign corporation interested in protecting their foreign investments, MP van Dijk (SP) formally questioned then Minister of Foreign Trade and Development Cooperation Ploumen (PvdA) on this in 2015. Parliamentary records show how the Minister agreed that mailbox companies with no corporate presence in the Netherlands should not be able to invoke Dutch BITs. Nevertheless, the Minister strongly refuted the claim that the Netherlands was a 'Walhalla' for foreign corporations, while stressing the importance for the Netherlands to maintain its attractive business climate for domestic and foreign businesses, the extensive network of BITs being an essential part of this climate (Answer to questions of MP Jasper van Dijk, Ministry of Foreign Affairs, *Ministerie van*

---

[45] Negotiators ultimately opted for the Investment Court System (ICS) in CETA.
[46] Interviews with Prof. Dr. Nikos Lavranos and Thomas Nauta, June 2018.

Buitenlandse Zaken (2015), Tweede Kamer, session 2014-2015, 2015.378192, The Hague. Accessed Jul 20, 2018). But the public debate appears far from over. At the time of writing, a new critical report *50 Years of ISDS* (SOMO, 2018) prompted MP Alkaya (SP) to essentially submit the same questions posed by her colleague to the successor of Minister Ploumen, Minister of Foreign Trade and Development Cooperation Kaag (D66) (Ministry of Foreign Affairs, *Ministerie van Buitenlandse Zaken* (2018), Tweede Kamer, session 2017-2018, 1303 Aanhangsel van de Handelingen, The Hague. Accessed July 21, 2018).

SUMMARY

The international investment policymaking landscape has dramatically changed. According to interviews with current and former government policymakers, in the wake of the TTIP debacle NGOs have moved to the very forefront of Dutch BIT policymaking.[47] For example, the current policymaker closely involved the latest revision of the Dutch Model BIT, indicates that SOMO and Both Ends have become have become influential stakeholders, more so than business preferences and lobbying. In addition to the shifting socio-economic environment and the effective public campaigns against investment treaties, this chapter shows how more structural, institutional factors also contributed to this development. With the relocation of the DG-BEB to the Ministry of Foreign Affairs, the international investment treaty policymaking framework changed. In other words, the institutional dynamics changed after less traditional, non-state actors managed to get a seat at the table.

The current bilateral investment treaty policymaking process in the Netherlands is characterised by a wider array of stakeholders.[48] Consultations nowadays still include businesses, but NGOs, labour unions and parliament have a much more outspoken role. According to a current policymaker at the DG-BEB, as a result of all these changes the Netherlands has started to clarify and narrow it's the broad-based definitions in an effort to improve ISDS procedures. Furthermore, BITs have been reoriented to provide a better balance between the rights of foreign investors and home states and provide better and more easily accessible treaties for small and medium sized enterprises in the Netherlands. But, the complete termination of the BIT program, as some NGOs insist, is not only practically unfeasible, it would undermine the attractive investment climate the Netherlands has so successfully created in the last half decade.

---

[47] Interviews with former chief negotiator Prof. Dr. Nikos Lavranos and current DG-BEB policymaker Thomas Nauta, L. LM, June 2018.
[48]

PART III

9. CONCLUSION

With over 100 BITs in existence, it is impossible to document every single treaty. But author is confident that even if one was to closely examine each and every single Dutch BIT, one would –roughly– come to the same conclusion. Motivated by a wave of expropriations spreading across the world and clear North-South distinctions in the UN, the Netherlands started out emulating earlier European countries and decided the *second best* would serve the purpose of creating same favourable conditions for foreign investment. The bilateral investment policymaking process that followed can best be described as a dynamic, organic process where different actors step up in different contexts, which itself is the result of various internal and external developments. This thesis has examined the *why* and *how* of Dutch bilateral investment treaties throughout a period of over fifty years (1963-today) in order to really assess the extent business preferences and lobbying influenced the Dutch BIT program. It shows how, the influence of business preferences and lobbying in the conclusion of BITs in the Netherlands, is generally overstated. However, the Dutch investment policy cannot be seen in isolation from the rapid international expansion of Dutch industrial enterprises like Dutch Shell, Unilever, Philips and AkzoNobel.

The strongest evidence in support of business influence and lobbying can be found in the early stages of the BIT program. Archival material reveals that during this period Dutch industry –and particularly Shell– at least on a number of occasions promoted specific BITs with specific states to secure protections for its investments abroad. Yet, this role has been subject to change. Scholars have noted elsewhere that countries that house large multinationals corporations within its borders, started converging towards preferred, treaty models. The Netherlands is no exception to this rule: parliamentary records show how the model texts were written in close consultation with industry during the proliferation of the Dutch BIT program during the 1990s and early 2000s. Finally, prominent interviews indicate that in the contemporary bilateral policymaking landscape, the role of business is generally quite modest save the occasional pressures in specific circumstances.

At the same time, this thesis has gone beyond reporting the role of business influence and lobbying for BITs in the Netherlands. It describes how, in addition to economic drivers, bureaucratic and political motivations were also important forces behind the Dutch BIT program. Given the fact that Dutch negotiators were usually mid-level bureaucrats from the ministries of Economic and Foreign Affairs, it logically follows that bureaucrats from the two ministries have been the most important driver of investment treat policymaking. Almost all

BITs were negotiated under the auspice of the Ministry of Economic Affairs, but 50 years after the DG-BEB had concluded the first agreement with Tunisia, in 2013 the division was transferred to the Ministry of Economic Affairs as part of a larger push to modernise economic diplomacy. Whereas the bureaucrats from Economic Affairs had strongly aligned interests with Dutch industry, the Ministry of Foreign Affairs maintained their own close relationships in The Hague which concentrated more on the civil society groups. In addition to this shift in departmental context around BITs, at the same time ISDS and BITs had become so controversial that it had halted the TTIP negotiations dead in its tracks. The NGOs in Europe were instrumental in mobilising the public and news media against investment arbitration; NGOs in the Netherlands cemented their foothold at the negotiating table recently presented by the change of structural conditions.

As we have seen, this thesis does not offer a one grand explanation that fits the entire story of bilateral investment treaty policymaking in the Netherlands over the past fifty years, Instead, the bilateral investment policymaking process in the Netherlands may be described as a dynamic process with interactions between bureaucrats, businesses, parliament and NGOs who have had varying degrees of influence on the Dutch BIT program. Finally, the importance of international political, economic and social developments, have also been important drivers. Thus, in light of the vulnerable and volatile times we live in, I do not expect BITs to disappear any time soon. Instead, I expect the motivations and drivers of Dutch BIT policymaking to disperse even more in the coming years.

10. BIBLIOGRAPHY

In Dutch

Ackermans, Mike. And Nysingh, Ewoud. (March 18, 1995). 'Ministerie verlangt meer aandacht voor buitenlandse economische politiek, Economische Zaken vreest gevolgen herijking.' De Volkskrant. Accessed at https://www.volkskrant.nl/nieuws-achtergrond/ministerie-verlangt-meer-aandacht-voor-buitenlandse-economische-politiek-economische-zaken-vreest-gevolgen-herijking~b2bcf3ab/

Docters van Leeuwen, Arthur (ed.), Colijn, Ko., Lodders-Elfferich, Tineke., Marres, Pieter. and Schoenmaker, Victor. 2013. *Modernisering van de Diplomatie*, tussenrapport. Available at: https://zoek.officielebekendmakingen.nl/kst-32734-14.html

Melissen, Jan (ed.) 1999. *Diplomatie: radarwerk van de internationale politiek*. Assen: Uitgeverij van Gorcum

Ministerie van Economische Zaken (EZ). 2007, *Beleidsdoorlichting handelspolitiek: Eindrapport*, Tweede Kamer, session 2007-2008, 30 991, nr. 3, The Hague.

Ministerie van Buitenlandse Zaken (BZ). 2013, *Modernisering Nederlandse Diplomatie*, Tweede Kamer, session 2013-2014, 32 734, The Hague.

Stichting Onderzoek Multinationale Ondernemingen (SOMO). 2018. *50 Jaar ISDS*, *een Mondiaal Machtsmiddel voor Multinationals*. Amsterdam.

Dutch national archives:

NA, BZ National Archief, Buitenlandse Zaken (National Archive, Ministry of Foreign Affairs).

NA, MF Nationaal Archief, Ministerie van Financiën, Directie Bewindsvoering (National Archive, Ministry of Finance).

In English

Allee, Todd. and Peinhardt, Clint. 2010. 'Delegating differences: bilateral investment treaties and bargaining over dispute resolution provisions', *International Studies Quarterly 54*, 1-26.

Basedow, Robert. 2017. 'Business Preferences in international investment policymaking. Does European business lobby for international investment agreements?' *EUI Working Paper MWP*, 2017/06.

Bonnitcha, Jonathan., Poulson, Lauge. and Waibel, Michael. 2017. *The Political Economy of the Investment Treaty Regime.* Oxford University Press.

Bonnitcha, Jonathan. 2017. *Assessing the Impacts of Investment Treaties: Overview of the evidence*. Winnipeg, Manitoba: IISD Publications.

Chilton, Adam. 2016. 'The political motivations of the United States' bilateral investment treaty program', *Review of International Political Economy, 23*(4), 614-642.

de Mestral, Armand. (eds.). 2017. *Second Thoughts: Investor State Arbitration Between Developed Democracies*. McGill-Queen's Press-MQUP.

Elkins, Zachary., Guzman, Andrew. And Simmons, Beth. 2006. 'Competing for Capital: The Diffusion of Bilateral Investment Treaties', *International Organization*, 60, 811-846.

Guzman, Andrew. 1998. 'Why LDCs sign treaties that hurt them: explaining the popularity of bilateral investment treaties', *Virginia Journal of International Law 38*, 639-88.

Guzman, Andrew. 2008. *How International Law Works: A Rational Choice Theory.* Oxford University Press.

Hamilton, Calvin., and Rochwerger, Paula. 2005. 'Trade and investment: foreign direct investment through bilateral and multilateral treaties', *New York International Law Review 18*(1), 1-59.

Hiscox, Micheal. 2001. 'Class versus industry cleavages: inter-industry factor mobility and the politics of trade', *International Organization 55*, 1-46.

Jandhyala, Srividya., Henisz, Witold. and Mansfield, Edward. 2011. 'Three waves of BITs: The global diffusion of foreign investment policy'. *Journal of Conflict Resolution*, 55(6), 1047-1073.

Keohane, Robert. 1984. *After Hegemony: Cooperation and Discord in the World Political Economy.* Princeton University Press.

Krasner, Stephen. 1987. *Defending the National Interest: Raw Materials Investments and US Foreign Policy.* Princeton University Press.

Lavranos, Nikos. 2013. 'The New EU Investment Treaties: Convergence towards the NAFTA Model as the Plurilateral Model BIT Text?' (March 29 2013). Available at SSRN: https://dx.doi.org/10.2139/ssrn.2241455

Lavranos, Nikos. 2016. 'Profiting from anti-ISDS propaganda', Kluwer Arbitration Blog, October 11 2016, http://arbitrationblog.kluwerarbitration.com/2016/10/11/profiting-anti-isds-propaganda/

Lavranos, Nikos. 2017. 'The Proven Benefits of ISDS and BITs –Even for SMEs and Small Claims', Kluwer Arbitration Blog, October 12 2017,

http://arbitrationblog.kluwerarbitration.com/2017/10/24/proven-benefits-isds-bits-even-smes-small-claims/

Merkouris, Panos. 2014. 'The Political Economy of International Treaties'. In *University of Groningen Faculty of Law Research Paper Series*, No.18/2015. Available at SSR: http://ssrn.com/ abstract=2559183

Montt, Santiago. 2009. *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT generation.* Oxford, Portland: Hart.

Neumayer, Eric. 2006. 'Self-interest, foreign need and good governance: are bilateral investment treaty programs similar to aid allocation?', *Foreign Policy Analysis 2*, 245-68.

Poulson, Lauge. 2015. *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developed Countries*. Cambridge University Press.

Poulson, Lauge and Aisbett, Emma. 2016. 'Diplomats want treaties: diplomatic agendas and perks in the investment regime', *Journal of International Dispute Settlement 7*, 72-91.

Rodrik, Dani. 1995. 'Political economy of trade policy' in Gene Grossman & Kenneth Rogoff (eds.), *Handbook of International Economics*, Volume 3. Amsterdam, New York: Elsevier.

Salacuse, Jeswald. 1990. 'BIT by BIT: the growth of bilateral investment treaties and their impact on foreign investment in developing countries', *The International Lawyer 24*(3), 655-75.

Singh, Kavaljit and Ilge, Burghard (eds.). 2016. *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices.* Amsterdam Both Ends, Madhyam & SOMO co-publication.

Schrijver, Nico and Prislan, Vid. 2013. 'The Netherlands' In *Commentaries on Selected Model Investment Treaties* by Brown, Chester. (ed.). Oxford University Press.

Swenson, Deborah. 2005. 'Why do developing countries sign BITs?', *University of California Davis Journal of International Law and Policy 12*, 131-56.

Tobin, Jennifer., and Busch, Marc. 2010. 'A Bit is better than a lot: bilateral investment treaties and preferential trade agreements', *World Politics 62*(1), 1-42.

United Nations Conference on Trade and Development (UNCTAD). 1992 *World Investment Report 1992.* Geneva: United Nations Publications.

UNCTAD. 2007. *Bilateral Investment Treaties 1996-2006: Trends investment treaty rulemaking*. Geneva: United Nations Publications.

UNCTAD. 2017. *World Investment Report 2017.* Geneva: United Nations Publications.

UNCTAD. 2018. *World Investment Report 2018.* Geneva: United Nations Publications.

Van Harten, Gus. 2007. *Investment Treaty Arbitration and Public Law*. Oxford University Press.

Vandevelde, Kenneth. 2012. 'The First Bilateral Investment Treaties: U.S. Friendship, Commerce and Navigation Treaties in the Truman Administration', PhD Thesis, University of California San Diego. Htttp://gradworks.umi.com/35/47/3547346.html.

Vervest, Pietje., van der Pas, Hilde., van Os, Roos., and Knottnerus, Roeline. 2015. *Socialising Losses, Privatising Gains How Dutch investment treaties harm the public interest*. TNI Policy briefing January 2014.