UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

UNCTAD

2018 Dutch Model Investment Agreement:

A Comparison with UNCTAD Policy Tools

January 2019

Prepared by:
International Investment Agreements Section
Division on Investment and Enterprise
UNCTAD

2018 Dutch Model Investment Agreement:

A Comparison with UNCTAD Policy Tools

- The 2018 Dutch Model Investment Agreement aims to provide a balanced starting point for negotiations, in line with the spirit of "new generation" investment treatymaking. It aims to promote sustainable development and to preserve the right to regulate and it refines investor-State dispute settlement (ISDS). At the same time, the model maintains key investment protection clauses (e.g. fair and equitable treatment (FET), indirect expropriation, non-discrimination).

- The model contains many of the policy options set out in UNCTAD's Reform Package for the International Investment Regime (2018 edition) and in UNCTAD's Investment Policy Framework for Sustainable Development (2015 edition).[1] It includes many features of "new-generation" investment agreements, including those now standard in EU IIAs, such as CETA, and clearly departs from the 2004 model and the majority of existing "old-style" Dutch BITs.

- Examples of "new-generation" features included in the model:
    - Definition of investment: requiring certain characteristics (duration, commitment of capital, expectation of gain or profit, assumption of risk);
    - Definition of investor: requiring substantial business activities in the home State (for legal persons);
    - Investment protection: refining protections through, e.g., an exhaustive list of breaches in FET and a clarified scope of indirect expropriation;
    - ISDS provisions: refining the existing mechanism through increased procedural transparency, time limitation periods for the submission of ISDS claims, and/or exclusion of ISDS claims based on corporate restructuring or based on fraudulent investments.

- The model also includes some innovative elements that are neither part of the EU's new approach nor UNCTAD's policy tools, e.g.:
    - A clause providing policy flexibility to prevent anti-competitive practices;
    - A provision to promote the rule of law, including the duty to take appropriate steps to give access to effective remedy in case of business-related human rights abuses;
    - Clauses establishing investor liability in the home State for damages, injuries or loss of life in the host State (if such jurisdictional rules exist in the home State);
    - ISDS-related innovations, e.g., departure from party appointments of tribunal members.

[1] See https://investmentpolicyhub.unctad.org/.

- The model misses certain “new-generation” clauses that have become mainstream treaty practice, and it retains one “old-school” clause that is mostly omitted from modern treaties. However, in each case, efforts have been made to achieve greater balance:
  - The new model does not contain a general exception clause, but it has improved on older generation treaties in that it contains an explicit reaffirmation of the right to regulate in favour of legitimate public policy objectives both in the preamble and in a separate hortatory provision. It also contains clause- and issue-specific exceptions, e.g. for taxation measures;
  - The model does not contain an exception for serious balance-of-payments situations in the transfer of funds provision. However, the transfer of funds provision does contain a set of non-discriminatory exceptions, e.g., for the protection of creditors;
  - The model includes an umbrella clause, which most modern treaties tend to omit. However, the model’s umbrella clause has been refined (it only applies to “written commitments…regarding a specific investment”).

- The model includes several elements aimed at strengthening the sustainable-development orientation of treaties (e.g., strong commitment in the preamble). It also contains a separate section dedicated to sustainable development. This section includes provisions on issues of investor responsibility and is placed before the section on investor protection. Although these provisions are soft law by nature, they are important for treaty interpretation and send a clear message to investors and investment stakeholders.

- The process of developing the model (with a draft version released in May 2018 open for public consultation and comments until 18 June 2018) has been in line with UNCTAD’s own guidelines (e.g., ensuring that reform actions are inclusive and transparent). UNCTAD provided comments to an earlier draft in 2017.

- A modernized treaty model, like the 2018 Dutch text, spurs policy debate among IIA stakeholders. Real change, however, will only occur through the model’s implementation: the negotiation of new IIAs and the modernization of existing “old-generation” treaties. Given the large stock of Dutch “old-generation” treaties (more than 90 BITs concluded between 1963 and 2013) and current reform-oriented treatymaking at the EU level, the replacement of the Netherland’s “old-generation” treaties should be a priority.

- When identifying specific existing treaties for priority action, consideration should be given to:
  1. Treaty content and urgency for change. Note: given that the existing network of Dutch treaties is relatively coherent this criterion might be less pertinent.
  2. Treaty partners’ desire for change. Several countries (e.g. Bolivia, India, Indonesia, South Africa, Venezuela) have effectively terminated their BIT with the Netherlands over the past few years, and others may have sent notices for termination.
  3. Effective bilateral foreign direct investment (FDI) relationships; i.e. the stock of Dutch investment in partner countries, and vice versa.