

UNCTAD Expert Meeting on Taking Stock of IIA Reform

Geneva, 16 March 2016

The Netherlands

- Also in The Netherlands we are reviewing the international investment policy regarding investment treaties and the mechanism for investment protection.
- Concerns (in context of negotiations of the EU and US TTP) are raised regarding the current mechanism of investment protection reflected in our model text and BITs.
- Concerns are related for a need of a balance of the State's right to regulate in the public interest and investor protection and the lack of a transparent dispute settlement mechanism.
- To this end we have requested expert studies:
 1. On the impact of bilateral investment treaties on investment flows. Research of the Netherlands Bureau for Economic Policy Analysis confirms that BITs increase on average bilateral FDI stocks by 35% compared to FDI stocks of country pairs not having an investment treaty. The effect differs by income group.
 2. UNCTAD provided an overview of treaty-based ISDS cases brought under Dutch IIA's.
 3. A Study on the impact of ISDS in TTIP, the transatlantic trade and Investment partnership between the EU and the US.
- After a phase of careful revision with involvement stakeholders and parliament, the Dutch government identified four areas for reform; these are in line with UNCTAD's roadmap:
 1. To have a reaffirmation of the right to regulate: States should have the right to regulate for legitimate public policy purposes without the public interest being jeopardized by ISDS claims.
 2. To limit access to the dispute resolution mechanism: with exceptions for prudential measures, no parallel claims, to avoid forum shopping, and prevent frivolous claims.
 3. To improve the dispute resolution mechanism to a transparent system, with a code of conduct for members of the tribunal, a fixed list of judges, an appeals mechanism and the possibility to introduce binding interpretations by the Contracting Parties.
 4. To clarify the scope of investment protection: with a denial of access for mailbox companies and clearer substantive standards providing better guidance on the interpretation.
- This position has been actively conveyed also in the context of negotiations at EU-level with third countries, such as TTIP, and therefore supported the proposals of the European Commission in November 2015 regarding a new reformed mechanism on investment protection and the establishment of a new Investment Court System, in the future to be developed into a multilateral dispute resolution mechanism.
- It has also led to the decision to revise all our (91) BITs and to put ongoing negotiations 'on hold' for the time being.
- On the basis of the new EU investment policy we are now at the starting point of this revision: We will first develop a new model text subject to consultations with concerned stakeholders, and subject to authorization by the European Commission, we can commence the revision process with our BIT-partners and will also continue ongoing negotiations that were put on hold in order to achieve a sustainable development oriented IIA-policy.

- The Dutch Council of Ministers of the Kingdom of the Netherlands will most likely also decide on the 1st of April to sign and conclude the UNCTRAL Transparency Convention, on which basis the UNCITRAL transparency rules will directly apply to all our existing BITs.
- While knowing the areas of reform, we are still at the starting point of the revision process and therefore welcome this expert meeting, learning from experience and best practices of others, which is a welcome inspiration for us. We thank UNCTAD of making this possible and also for its work over the past years.