



# *IOB evaluation*

## **Trading interests and values**

*Evaluation of the international trade and investment policy of the Netherlands*

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## List of abbreviations

AB	Appellate Body
ACIIL	Advisory Centre on International Investment Law
ACP	African, Caribbean and Pacific (countries)
ACWL	Advisory Centre on WTO Law
AD	Anti-dumping
AfCFTA	African Continental Free Trade Area
AFL-CIO	American Federation of Labor and Congress of Industrial Organizations
AS	Anti-subsidy
ASEAN	Association of Southeast Asian Nations
BHB	Broad Trade Council ( <i>Breed Handelsberaad</i> )
BIT	Bilateral Investment Treaty
BHOS	Foreign Trade and Development Cooperation ( <i>Buitenlandse Handel en Ontwikkelingssamenwerking</i> )
BRI	Belt and Road Initiative
BRICS	Brazil, Russia, India, China and South-Africa
CAI	Comprehensive Agreement on Investment (EU–China)
CARIFORUM	Caribbean Forum
CCP	Common Commercial Policy
CEPS	Centre for European Policy Studies
CETA	Comprehensive Economic and Trade Agreement (EU–Canada)
CoCo	Coordination Committee European Integration- and Association problems ( <i>Coördinatie Commissie voor Europese Integratie- en Associatieproblemen</i> )
COVID-19	Coronavirus 2019
CSO	Civil Society Organisations
CSR	Corporate Social Responsibility, also known as Responsible Business Conduct (RBC)
CTEO	Chief Trade Enforcement Officer
DDA	Doha Development Agenda
DDE	Sustainable Economic Development Department ( <i>Directie Duurzame Economische Ontwikkeling</i> )
DG	Directorate General
DGBEB	Directorate General for Foreign Economic Relations ( <i>Buitenlandse Economische Betrekkingen</i> )
DIE	Directorate European Integration ( <i>Directie Integratie Europa</i> )
DOL	Department of Labour
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DSU	Dispute Settlement Understanding
DTIB	Dutch Trade and Investment Board
EAC	East African Community
EBA	Everything But Arms (scheme of the EU)

EBMA	European Bicycle Manufacturers Association
EC	European Commission
ECA	European Court of Auditors
ECDPM	European Centre for Development Policy Management
ECIPE	European Centre for International Political Economy
ECOFIN	Economic and Financial Affairs Council
ECOWAS	Economic Community of West African States
ECJ	European Court of Justice
EEC	European Economic Community
ENDA-CADID	African centre for trade, integration and development ( <i>Centre Africain pour le Commerce l'intégration et le Développement</i> )
EP	European Parliament
EPA	Economic Partnership Agreement
ESA	Eastern and Southern Africa
ETUC	European Trade Union Confederation
ETUI	European Trade Union Institute
EU	European Union
FA (minister)	Foreign Affairs (minister of)
FAC	Foreign Affairs Council
FDI	Foreign Direct Investment
FNV	The Netherlands Trade Union Confederation
FTA	Free Trade Agreement
FTDC	Foreign Trade and Development Cooperation
G20	Group of twenty (countries)
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GDPR	General Data Protection Regulation
GSP	Generalised System of Preferences (of the EU)
HACEU	High Level Administrative Committee on the EU
HIAM	Trade and investment agreements, and market access ( <i>Handels- en Investeringsakkoorden en Marktoegang</i> )
IA	Investment Agreement
IBO	Investment protection agreements ( <i>investeringsbeschermingovereenkomst</i> )
ICS	Investment Court System
ICT	Information and communications technology
ICSID	International Centre for Settlement of Investment Disputes
ICTSD	International Centre on Trade and Sustainable Development
IFA	Investment Facilitation Agreement
ILO	International Labour Organization
IMH	International Trade Policy and Economic Governance Department ( <i>Internationale Marktordering en Handelspolitiek</i> )
IO	International organisation
IOB	Policy and Operations Evaluation Department ( <i>Internationaal Onderzoek en Beleidsevaluaties</i> )

IRBC	International responsible business conduct
IRHP	Interdepartmental Council for Trade Policy ( <i>Interdepartementale Raad voor de Handelspolitiek</i> )
ISDS	Investor State Dispute Settlement
ISO NL	International Strategic Consultation
ITC	International Trade Centre
I&W	Ministry of Infrastructure and Water Management
KORUS	South Korea-United States Free Trade Agreement
KST	Parliamentary document, <i>Kamerstuk</i>
LDC	Least Developed Country
LDR	Lesser Duty Rule
LNV	Ministry of Agriculture, Nature and Food Quality
MAR	Market Access Regulation (of the EU)
MC	Ministerial Conference
MCEU	Ministerial Committee on the EU
MDTF	Multi-Donor Trust Fund (World Bank)
MEA	Ministry of Economic Affairs
MEP	Member of European Parliament
MES	Market Economy Status
MFA	Ministry of Foreign Affairs
Mercosur	Southern Common Market (South America)
mHREDD	mandatory human rights and environmental due diligence
MIC	Multilateral Investment Court
MNE	Multi-National Enterprises
MoF	Ministry of Finance
MP	Member of Parliament
MS	Member state(s)
MPIA	Multi-party interim appeal arbitration arrangement
NAFTA	North-American Free Trade Agreement (Canada, US, Mexico)
NGO	Non-Governmental Organisation
NL	The Netherlands
OECD	Organisation of Economic Cooperation and Development
PREU	Permanent Representative EU
PRUN	Permanent Representative UN
PSD	Private sector development
PvdD	Dutch Animal Party ( <i>Partij voor de Dieren</i> )
QMV	Qualified Majority Voting
RBC	Responsible Business Conduct
REC	Regional Economic Communities
SADC	Southern African Development Community
SAIIA	South African Institute of International Affairs
SDG	Sustainable Development Goals
SER	Dutch Social and Economic Council
SME	Small and medium-sized enterprises
STDF	Standards and Trade Development Facility

SZW	Ministry of Social Affairs and Employment
TA	Technical assistance
TDC	Trade Defence Instruments Committee
TDI	Trade Defence Instrument
TFA	Trade Facilitation Agreement
TFEU	Treaty on the Functioning of the European Union
TFAF	Trade Facilitation Agreement Facility
TiSA	Trade in Services Agreement
TMEA	TradeMark East Africa
ToR	Terms of Reference
TPC	Trade Policy Committee
TPCSI	Trade Policy Committee on Services and Investment
TPP	Trans-Pacific Partnership
TSD	Trade and Sustainable Development
TTIP	Transatlantic Trade and Investment Partnership (EU–US)
TRALAC	Trade Law Centre for Southern Africa
TRAPCA	Trade Policy Training Centre in Africa
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNFCCC	United Nations Framework convention on climate change
US, USA	United States of America
USMCA	US-Mexico-Canada Agreement
USTR	United States Trade Representative
VNO-NCW	The Confederation of Netherlands Industry and Employers ( <i>Verbond van Nederlandse Ondernemingen – Nederlands Christelijk Werkgeversverbond</i> )
WCO	World Customs Organization
WPTQ	Working Party on Trade Questions
WTO	World Trade Organization

# Preface

Trade and investment account for a large share of the Dutch economy, the Netherlands being an open economy and an important transit hub with a large service sector. Exports constitute approximately one third of the Dutch economy (2017) and for almost a third of all jobs (2015–2017). Globally, the Netherlands is one of the five largest countries regarding outgoing and incoming foreign direct investment and hosts a large number of multinational enterprises. Promoting trade and investment have long been continuous priorities for Dutch cabinets.

In 2012, the post of Minister for Foreign Trade and Development Cooperation was created, aid and trade being joined under one minister for the first time. Consequently, the Directorate-General for Foreign Economic Relations moved from the Ministry of Economic Affairs to the Ministry of Foreign Affairs. Thus, Dutch trade and investment policy became the responsibility of the Minister for Foreign Trade and Development Cooperation at the time. She introduced a focus on sustainability and the inclusion of developing countries in the international trading system, while at the same time promoting Dutch business interests as well as investments abroad.

This study evaluates Dutch trade and investment policy in the period 2013–2019, in particular concerning article 1.1: the promotion of a sustainable trade and investment system, including responsible business conduct. It is the first time since 2007 that IOB has evaluated trade and investment policy. This evaluation sets out to identify the policy issues that the Netherlands prioritised and whether policy goals on these issues were achieved.

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As part of the research, five case studies were selected: trade defence instruments; trade and sustainable development chapters in bilateral free trade agreements; the trade in services agreement; investor protection; and economic partnership agreements with African regions. The report includes overarching observations, general conclusions and recommendations, and touches on overarching issues such as policy coherence for development, staff capacity and the future of trade agreements. Balancing national economic interests and the pursuit of non-trade concerns in trade policy was a recurring challenge.

Because the Netherlands largely operates in the context of the European Union, and trade policy is an exclusive EU competence, trade and investment policy is the outcome of a multilayered, multi-stakeholder process. This complicates not only determining the policy success of Dutch interventions, but also success in itself. The Dutch position was often aligned from an early stage with that of the Commission and like-minded member states. Nevertheless, this study is able to show that where the Netherlands clearly pushed for certain priorities, such as linking sustainability and trade, it did have policy success, contributing to the EU position and putting its priority topics on the international agenda.

The report was written by an evaluation team consisting of Stephanie Bouman, Otto Genee, Martine de Groot, Kirsten Lucas, and Marit van Zomeren. Internal quality support was provided by Anne Bakker, Pim de Beer, and Joep Schenk. An external reference group advised on the report: Pieter Jan Kuijper of the University of Amsterdam, Winand Quaedvlieg of

VNO-NCW and Myriam Vander Stichele of SOMO, who provided expert comments. Furthermore, we thank the colleagues from the Directorate-General for Foreign Economic Relations who were members of the reference group: Ralf van de Beek, Monique Bouman and Tjalling Dijkstra.

Colleagues from the Ministry of Foreign Affairs, the Permanent Representation to the EU (PR EU) in Brussels and WTO (PR WTO) in Geneva as well as other trade professionals of the European Commission, stakeholders and experts provided valuable input as well.

This evaluation is part of a series that will inform the policy review of budget article 1 for foreign trade and development cooperation, expected later in 2021. Final responsibility for this report rests solely with IOB.

Peter van der Knaap  
*Director Policy and Operations Evaluation Department (IOB)*  
*Ministry of Foreign Affairs, the Netherlands*



# Executive summary

## Introduction

For centuries, international trade and foreign direct investment have shaped the Dutch economy. In 2018, a third of Dutch wealth was created through exports; domestic added value of exports accounted for EUR 262 billion.<sup>1</sup> In the same year, imports amounted to EUR 391 billion; and in 2019, the Netherlands was the world's second largest outward investor.<sup>2</sup>

Government policy and international and European (i.e. EU) rules have influenced private trade and investment flows. These policies and rules have evolved over time, adjusting to political, economic and societal developments. While IOB evaluated EU trade policy several times in the last 15 years, a review of the Dutch trade and investment policy has not been carried out since 2007.<sup>3</sup>

The current study reviews Dutch trade and investment policy for the period 2013 up and until 2019, complemented with important developments since 2019. The study identifies which trade and investment policy issues the Netherlands prioritised. In addition, it assesses if and how the Netherlands contributed to the international agenda, decision-making and implementation of agreements on these issues, in the context of the European Union (EU) and the World Trade Organization (WTO). The report provides a building block for the upcoming policy review on article 1 of the budget for Foreign Trade and Development Cooperation (BHOS).

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This summary describes the Dutch trade and investment policy and its multilayered governance. Subsequently, it presents five case studies of specific fields of trade and investment policy and concludes with some general observations and recommendations.

## Dutch trade and investment policy and multilayered, multi-stakeholder governance

This evaluation of the Dutch trade and investment policy finds that Dutch policy goals should be more elaborated and should be more systematically operationalised into concrete policy positions and instructions. Additionally, an up-to-date assessment framework to weigh trade interests against other policy priorities has been missing, which has complicated taking a coherent approach.

### *The new agenda for aid, trade and investment policy*

In 2012, development cooperation and trade and investment policies were combined into one policy agenda, and a Minister for Foreign Trade and Development Cooperation (BHOS) was appointed. As a result, the directorate-general responsible for foreign economic

<sup>1</sup> CBS (2020).

<sup>2</sup> Ibid.

<sup>3</sup> MEA (2007).

relations, the DGBEB, which used to be part of the Ministry of Economic Affairs, was integrated into the Ministry of Foreign Affairs.

Trade and investment policies help to create the basic conditions and rules for countries within which private business can trade and invest abroad. In 2013, a new Dutch policy for aid, trade and investment was introduced, with three central aims: (1) the eradication of extreme poverty in a single generation; (2) sustainable, inclusive growth all over the world; and (3) success for Dutch companies abroad.<sup>4</sup> In addition, in 2013, responsible business conduct (RBC) became an explicit objective of the aid and trade agenda, and in 2018, gender equality became a cross-cutting priority.<sup>5</sup>

Four objectives were formulated for international trade and investment policy specifically: (1) concluding bilateral free trade agreements (FTAs) at EU the level; (2) internationalising the Dutch private sector; (3) attracting foreign direct investment to the Netherlands; and (4) protecting Dutch investments abroad.<sup>6</sup> Whereas the nuances and focus areas in Dutch policy have evolved over the reporting period, the objectives for trade and investment policy remained in line with the objectives identified in 2013.

Beyond the policy papers of the Rutte II and III cabinets,<sup>7</sup> these three overarching policy goals (as well as the four specific objectives for international trade and investment policy) were not much elaborated in underlying policy documents and were not systematically operationalised, especially when it comes to investment policy.

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#### *Multilayered and multi-stakeholder governance*

Because trade policy – and investment policy to a large extent – is an exclusive EU competence, the European Commission (EC) prepares proposals and negotiating positions and speaks on behalf of the EU and its member states, including the Netherlands, in the WTO and in negotiations on free trade and investment agreements with third countries.

Dutch interventions are therefore primarily aimed at influencing international trade and investment policy through the EU, including in the WTO: governance is thus multilayered.

In the EC, the Directorate-General for Trade (DG Trade) is the most important actor in this context. It proposes policies, which are then further developed through formal and informal meetings. Dutch officials mainly operate in the EU's Trade Policy Committee (TPC, a working party), and the Minister for BHOS represents the Netherlands at the political level in the EU's

<sup>4</sup> MFA (2013), p. 6.

<sup>5</sup> MFA (2013) and MFA(2018). One can argue that these topics are in fact trade related, too. In this report we define the term trade interests as national economic (and corporate) interests, while the term non-trade concerns is mostly used to describe other public, social and environmental interests, such as sustainability, RBC, gender and labour rights. Balancing conflicting interests was a recurring challenge throughout the issues studied.

<sup>6</sup> MFA (2013), pp. 41-43.

<sup>7</sup> These policy notes are *A world to gain* (2013) and *Investing in global prospects* (2018).

Foreign Affairs Council when that formation meets with the ministers responsible for development cooperation and/or foreign trade.

Whereas the Minister for BHOS is responsible for the policy coherence between development cooperation and foreign trade and investment policy,<sup>8</sup> there is no up-to-date assessment framework to weigh diverging or conflicting interests among Dutch trade and investment policy, development cooperation policy and/or foreign policy, which makes it difficult to ensure policy coherence.<sup>9</sup> A range of non-state actors are consulted on a regular basis and invited to comment on policy proposals. This allows for some non-trade interests to be taken into account, although not completely overcoming the lack of an up-to-date assessment framework.

## The five case studies

Five case studies were conducted to identify if and how Dutch interventions contributed to achieving Dutch policy goals in five specific areas, with a focus on policy success in the EU. The cases were selected on the basis of interviews and because of the relevance of their topics. While these case studies do not cover the whole field of trade and investment policy and concerns files where the Netherlands was most active, they are representative of the most important trade and investment dossiers in 2013–2019 that the Netherlands invested in with political capital and diplomatic activity. Moreover, the case studies contain a variety of trade and investment issues as well as different stages of policymaking, and EU and WTO-related files. Several higher-level observations were identified from the case studies, which were subsequently translated into recommendations. These will be presented at the end of this executive summary.

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Whereas some conclusions were unique to a specific case study, several overarching conclusions emerged from these cases. The Netherlands has been actively holding the EC to account on its policymaking, procedures and implementation. This occurred by demanding more transparency, nudging (to different extents) the EU towards a more liberal position and demanding proper policy implementation. The case studies illustrate areas in which the Netherlands, individually or in joint efforts with like-minded countries, contributed to the EU agenda and position on topics of Dutch priority. For instance, the Netherlands contributed to the agenda and policymaking in the areas of trade and sustainable development (TSD) chapters in free trade agreements, responsible business conduct, the ‘lesser duty rule’ (LDR) in trade defence policy and enhanced transparency in FTA negotiations. Additionally, the Netherlands demanded more transparency and advocated for the effective implementation of policy, for instance on calculations to justify the implementation of trade defence measures and for the effective implementation of commitments made in TSD chapters.

<sup>8</sup> MFA (2013).

<sup>9</sup> There is, however, an assessment framework on non-trade concerns that dates from 2009, (MFA, 2009). Kamerstuk 2008–2009, 26 485, nr. 68.

On other topics, results were more limited or less evident. The Netherlands could improve its general performance by acting in a more strategic manner and operationalising objectives into concrete positions.

The most important findings on each case study are presented below. Overarching conclusions for the individual case studies are briefly reflected at the beginning of each case (in italics).

### Trade defence instruments

*The Netherlands – together with some liberal partners – managed to maintain the liberal spirit of the ‘lesser duty rule’ and was able to hold the EC accountable and demand evidence to justify adjustments. This is considered a policy success.*

Trade defence instruments (TDIs) such as anti-dumping or anti-subsidy measures can be used in response to unfair trade practices. An important development in trade defence policy during the period of evaluation was the reform of the EU’s trade defence mechanism, along with a new anti-dumping methodology. Several global developments contributed to the momentum for modernisation, including the need for more transparency and predictability of investigations in the EU’s TDI mechanism. Some components of the EC’s proposal created substantial disagreement among member states, putting negotiations in gridlock for several years. In particular, the proposal for non-application of the ‘lesser duty rule’ (LDR) to address dumping practices caused disagreement.

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In general, the Netherlands favoured the EC’s initiative to reform the EU’s trade defence policy. It believed several components of the proposed reforms would enhance the efficiency and effectiveness of the system and promote a level playing field.<sup>10</sup> However, with a liberal cabinet and an open economy, the Netherlands strongly opposed some of the aspects of the proposed reform. It was particularly critical about the suggested non-application of the LDR. Together with other supporters of the LDR, the Netherlands believed that giving up this rule might facilitate the abuse of anti-dumping measures beyond what was needed to restore damage to import-competing industries, and would disregard the interests of other EU stakeholders, processing industries and consumers.

Therefore, at the start of negotiations in 2013, the Netherlands took a firm stance, opposing the proposal of non-application of the LDR. However, in late 2016, its position changed, and the Netherlands became more willing to compromise. While the firm initial stance and the witnessed change in 2016 is partly explained as a negotiation tactic, several external developments also contributed to this. The accumulation of overcapacities in raw material industries (such as steel), more protectionist trade policies of large players in world trade

<sup>10</sup> This refers to competition in the global economy being ‘fair’, without distortion by market barriers and government actions. A level playing field allows all countries and firms to compete on an equal footing (OECD (2019)).

(e.g. China and the United States), the debate about maintaining the Chinese non-market economy status (2016), and political pressure contributed to the shift to a more flexible approach. The change in position was furthermore the result of the input of the Permanent Representation to the EU (PR EU), which signalled that the Netherlands was running a step behind in negotiations. With negotiations quickly progressing in late 2016, the PR EU considered that holding on to the firm Dutch position would not be fruitful and risked placing the Netherlands on the sidelines in the TDI negotiations.

As for results, the Netherlands – together with liberal partners, yet in the minority – did manage to maintain the liberal spirit of the LDR and was able to hold the EC accountable and demand evidence to justify adjustments. This has been a policy success. Additionally, recognising that it was only one of 28 member states (and that agreement and compromise were needed), the Netherlands duly invested in coalition-building.

This case study is elaborated by describing Dutch positions and efforts on specific anti-dumping measures against imported biodiesel and e-bikes, with an initially liberal stance on both issues. In line with the findings in the context of the TDI modernisation, the biodiesel and e-bike cases illustrate the success of the Netherlands in holding the EC to account, demanding transparency and calculations to justify measures.

Finally, the examples of biodiesel and e-bikes in this case illustrate the difficulty of achieving policy coherence. For instance, developments in trade defence policy may conflict with Dutch objectives in development policy and may affect bilateral relations with partner countries, also on other topics.

## Trade and sustainable development chapters

*The Netherlands (and the United Kingdom) had mixed success in influencing the negotiating agenda of the EC in this area. In the EU FTA with Japan, the Netherlands succeeded in getting animal welfare included, but not whaling in particular. On gender, success was modest until 2019.*

Since 2011, trade and sustainable development (TSD) chapters have become an integral part of EU FTAs with third countries. By including social and environmental provisions, the EC tried to (re)commit its trading partners to implement their existing obligations in relevant labour and environmental agreements and conventions, and aimed to create a level playing field. The Netherlands has been a front runner in this context: from the start, it was a big proponent of TSD chapters in all agreements, also stressing the importance of their enforcement. Because the Dutch and the EC position were aligned from the beginning, it is impossible to attribute the inclusion of TSD chapters exclusively to Dutch efforts. However, distinct results can be identified in various trade agreements.

For instance, in the case of the EU FTA with South Korea, the Netherlands advocated a bigger role for the International Labour Organization (ILO) in dispute settlement. The Netherlands preferred to put more pressure on South Korea, including the possibility of trade sanctions by

withdrawing preferential benefits. In the end, it agreed to drop such sanctions, as the EU decided to take more assertive action towards South Korea on outstanding violations of ILO conventions.

In the case of the Transatlantic Trade and Investment Partnership (TTIP) negotiations, the Netherlands and the United Kingdom (UK) had mixed success in influencing the negotiating agenda of the EC. In the EU FTA with Japan, the Netherlands was successful in getting animal welfare included in the FTA: it managed to put the issue on the agenda and the issue was translated into policy. However, while animal welfare was included in the FTA with Japan and the possibility to explore further cooperation was discussed, the TSD chapter talks about 'a focus on farmed animals',<sup>11</sup> thus avoiding the issue of whaling, which was particularly relevant in this case.

Success has thus far been more limited on the topic of gender. While gender equality was a priority in Dutch trade and development policy, this position was not operationalised into concrete objectives – and currently none of the finalised TSD chapters in FTAs concluded in the reporting period contains provisions on gender.<sup>12</sup>

## The Trade in Services Agreement

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*The Netherlands was active on this file and cooperated with a group of like-minded member states, nudging the EU a bit towards more liberal positions.*

From 2013 onwards, after GATS<sup>13</sup> negotiations in the Doha Round had reached an impasse, a select group of WTO members negotiated a draft agreement on trade in services (TiSA). However, TiSA negotiations also stalled in late 2016, due to fundamental differences among participants – including the United States (US) and the European Union. Negotiation partners had conflicting views on how to liberalise trade in services, how to deal with issues such as privacy and what exceptions to allow.

The Netherlands attached great importance to the TiSA because of the Dutch comparative advantage in services, including digital services. It favoured an ambitious liberalisation agreement, without excluding any sector in advance, which at the same time would safeguard the interests of developing countries if multilateralised at a later stage. Whereas the EU (EC and other member states) proposed far-reaching exceptions for public service sectors, the Netherlands was not concerned that policy space would be limited and it claimed that the TiSA would duly protect national interests in that context. As a liberal country with offensive interests in other markets,<sup>14</sup> the Netherlands did not want to shield any specific service sectors in addition to the exceptions listed by the EU.

<sup>11</sup> EU/JP/en, p. 482.

<sup>12</sup> However, BEB colleagues have pointed out that in negotiations on the draft EU–Chile free trade agreement there was agreement on most of the paragraphs on gender (EC (2020)).

<sup>13</sup> General Agreement on Trade in Services.

<sup>14</sup> 'Offensive interest' here means the interest in gaining access to the market of your negotiating partner.

The Netherlands was active on this file and cooperated with a group of like-minded member states, nudging the EU a bit towards more liberal positions. However, since the positions of the EC and the Netherlands were mostly aligned and TiSA negotiations are now stalled, we cannot identify any particular policy success and attribute that to the Netherlands.

On data flows and privacy protection, the Netherlands favoured an ambitious EU mandate because of its own offensive interests. It took the EC some time to formulate a proposal that was agreeable to all member states, which was facilitated by the adoption of the General Data Protection Regulation (GDPR) in 2016. Another topic that the Netherlands was interested in was the entry of temporary professional workers, influencing the EU position with a concrete proposal. While the interests of least-developed countries were another Dutch priority, it was impossible to get any relevant provisions into the text. Similarly, the desire to include references to ILO conventions was dropped rather quickly, because of opposition by the US and the few developing countries that participated.

A more general lesson learned is that reviving the route of an economic integration agreement for a TiSA is a dead-end street (because of opposition from other WTO members). The alternative of a plurilateral agreement in the context of the WTO that deals with market access can probably only be achieved if the group is open-ended, with a critical mass of countries at the table and application of the most-favoured nation concept, accepting some 'free riding' by smaller (developing) economies.

## Investment protection, investor duties and dispute settlement

*The Dutch effort on the reform of the investment protection system was visible, and the proposal of the EC on the topic was in line with the proposals that the Netherlands and some other members had put forward. The Dutch Model Bilateral Investment Agreement reflects progressive thinking, providing a theoretical example.*

Investment agreements, which promote investment protection, need to balance the rights and duties of investors. As developing countries grew stronger, which led inter alia to more disputes between investing companies and states, and investment treaties were also negotiated between OECD countries, investor-state dispute settlement (ISDS) became more important and at the same time more controversial.

By 2015, the Netherlands – having a large network of bilateral investment treaties – was one of the most active member states promoting the establishment of an investment court system (ICS) as an alternative to ISDS. The ultimate aim was to establish a permanent multilateral investment court. Such a reformed system would offer the possibility of appeal, independent judges and a modernised arbitral procedure, with rights for affected third parties, thus promoting a more level playing field. The proposal of the EC to reform the system was very much in line with the proposals that the Netherlands had put forward together with some other members. The Dutch effort was highly visible, but since the EC had similar views to the Netherlands from the start of the discussions, this result cannot be attributed to the Dutch alone.

Furthermore, while the investment court system was introduced in some EU FTAs, in particular the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, it is yet to be established. Some negotiating partners refused to include an ICS into agreements. The EC and member states – including the Netherlands – usually considered the rule of law to be sufficiently established in the countries concerned and did not hold on to their desire in principle to have an investment protection chapter including an ICS, and/or they left the question of dispute settlement mechanisms to future negotiations. In the end, the EU and member states acted pragmatically on these issues. And a multilateral investment court is likely to remain an aspirational goal only for the foreseeable future, given the state of play in the deliberations.

On another, but related topic, the Netherlands set up a new Model Bilateral Investment Treaty in 2018. This text was finalised after an inclusive and extensive consultation process. The model text aims to make direct investments more sustainable, and it introduces comprehensive provisions on the fair treatment of foreign investors and a modernised investor-state dispute settlement mechanism. While the text is considered a significant move forward, critics stress that it still offers very broad protection to investors – and direct access to international dispute settlement. The Netherlands is renegotiating its bilateral investment treaties with 10 countries, but due to the COVID-19 pandemic and other obstacles (from the side of negotiating partners), the model text has not yet been truly put to the test, nor has it been integrated into new agreements.

## Economic partnership agreements with Africa

*This case study shows moderately positive, but limited results. The Netherlands actively brought up the topic of EPAs at the EU and WTO and promoted dialogue. The Netherlands played the part of 'honest broker' in EPA negotiations and achieved some intermediate results, notably awareness raising and cooperation. However, it is plausible that other countries also contributed to the end results and that some negative side effects occurred. As to the EU's success as a whole, while some negotiations with African regions have moved forward, other negotiations largely failed or only led to partial results.*

In 2001, the EU started negotiations with groupings of African countries as well as Caribbean and Pacific states (the ACP countries) on WTO-compatible economic partnership agreements (EPAs). This evaluation focuses on negotiations with African countries in the research period. In EPAs, policy goals on development, trade and investment come together: Dutch policy objectives in this context were, first, to promote the development of ACP countries as well as their regional integration, advocating for adequate policy space and flexibility in covered products, safeguards and transition periods for ACP countries. Second, other Dutch objectives were to continue and strengthen trade and investment relations with these countries. The Netherlands was among the most vocal member states on the development friendliness of the EPAs, while largely supporting the EC's actions.

In 2013, the Dutch Minister for Foreign Trade and Development Cooperation offered to facilitate negotiations with the Southern African Development Community (SADC),

West Africa and the East African Community (EAC). Taking on a role as honest broker, she aimed to help speed up the negotiations and give substance to the new Dutch aid, trade and investment agenda. Interestingly, this offer came as a surprise to the EC. To effectuate her role, the minister commissioned a think tank to organise stakeholder meetings in the three regions and in the Netherlands. The meetings were appreciated by the stakeholders involved. She also raised the EPA negotiations with other ministers to promote progress. In addition, the Netherlands took part in several initiatives, including sending a letter by European 'Friends of EPA' to the EC in late 2013, which was said to have had a positive effect. On the other hand, the letter also caused some friction with the EC, which thought its negotiating stance was being undermined.

The Netherlands achieved a moderately positive, albeit limited result in its role as honest broker: especially intermediate results such as awareness raising and cooperation. While the Netherlands stated that it played a key role in the progress of negotiations, the actual impact is more nuanced when considering the counter-effects created and the likely impact of other member states and think tanks. In addition, the role that the Netherlands plays as a member of the EU and its role as an honest broker are difficult to combine, making impartiality a challenging task.

Furthermore, while some negotiations with the African regions have moved forward,<sup>15</sup> other EPA negotiations in the African regions largely failed or only achieved limited results, such as interim EPA agreements with individual countries or continued access under the market access regulation. Additionally, adverse effects have also occurred: the EPAs created issues for regional integration, and to some extent led to antagonised political relations between the EU and Africa. Lessons learned include that the negotiations of the EU as a whole with African regions as a whole should not be too ambitious. Where EPAs can add value, will differ per country – and alternative ways of expanding market access need to be explored.

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Overall, the lessons learned are, first, that the role of honest broker is difficult to play as a member of the EU (being a party to the negotiations). A second lesson learned is that stakeholders must be involved and informed to be able to address potential negative effects.

## Overarching observations, general conclusions and recommendations

From the case studies, three specific, overarching observations are evident. These are discussed below and complemented with practical recommendations. The overarching observations relate to policy coherence, Dutch policy success in the EU and capacity. These issues are highlighted to provide suggestions for improved performance in trade and investment policy. The discussion includes some conclusions, but does not serve to define

<sup>15</sup> See Ecorys (2021), p. 158 for an overview of EPAs.

overall findings on the Netherlands' success in influencing EU positions and international negotiations (or the failure thereof).<sup>16</sup>

Overall, we found that Dutch contributions to the EU's position would benefit from ensuring a more strategic approach and a more focused effort, with more operational policies and more dedicated capacity.

#### *Policy priorities and policy coherence*

Policy goals at the level of the five topics studied tended to be rather broadly formulated. They did not have a strategy outlining how to achieve the goals or operationalise priorities (per file), nor did they identify clear performance indicators to measure success. In addition, there is no up-to-date assessment framework to weigh (economic) trade concerns against (other) non-trade-related priorities and to promote coherence among Dutch trade and investment policy, development policy and foreign policy. Furthermore, formal positions were not adjusted to changing circumstances consistently, on a regular basis or in a strategic manner, nor were they translated into intermediate objectives or operational policy objectives per negotiating issue.

**We recommend** that the Ministry of Foreign Affairs (MFA), in particular the DGBEB, select and operationalise major policy priorities in a systematic manner, integrating them into all instructions and documents. We also suggest reconsidering and updating the 2009 assessment framework on trade and non-trade concerns, to help come to a balanced position in a transparent manner when there are conflicting interests, or concerns about the WTO compatibility of intended measures. Finally, we recommend drafting framework instructions, to delineate the bottom line, but moreover so that there be some flexibility to adjust positions to changing circumstances on a regular basis.

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#### *Policy success in the EU*

Dutch efforts have focused on translating policy views into the EC's mandate for negotiations with third countries and in the WTO. The five case studies had been selected in part because they were said to be files where the Netherlands had made proactive and visible efforts. Although on some specific files, the Netherlands indeed took an active approach and had a vocal stance, the Netherlands generally took a rather reactive approach to Commission proposals on trade and investment files. And in those cases, it seemed to lack tailor-made efforts and a clear vision and strategy on the desired direction and policy of the EU. Where the Netherlands took a more proactive stance, its contribution to the EU agenda and position was notable, mostly in agenda-setting and formulating EU positions: it advocated effective trade and sustainable development chapters in FTAs, and helped put gender and RBC on the international agenda. However, success beyond agenda-setting has often been limited (thus far). The Netherlands did successfully advocate transparency in the EC's way of working and consultation of stakeholders.

<sup>16</sup> These are reflected in the case studies above and will not be repeated here.

We recommend that for priority processes, Dutch policymakers customise their efforts and conduct stakeholder analyses in a systematic manner, identify what coalitions to build, and draft a strategy to promote major interests, while adjusting the strategy to current circumstances on a regular basis. We also recommend continuing to engage closely with the EC to enhance Dutch policy success, while at the same time holding the EC to account.

### *Capacity*

The number of dedicated staff at the MFA and the permanent missions to the EU (PR EU) and WTO (PR WTO) for trade and investment policy is limited. Maintaining a critical mass of experienced staff is required to have policy success and to build coalitions, preferably at an early stage of decision-making. This is particularly important if the Netherlands wants to continue to push for priorities such as responsible business conduct and if, for instance, it has the ambition to lead the liberal block of member states after Brexit. To be able to respond to the evolving reality in the EU and EC in Brussels and in the WTO in Geneva – which is different from the political reality in The Hague – continued close and strategic cooperation with the permanent representations and other actors there (colleagues from the EC and other member states, WTO and other experts) is important, including through informal contact.

We recommend that the MFA enhances the available capacity on important files, that policymakers share and exchange information systematically, and continue to invest in informal contact with other member states and the European Commission. Additionally, we advise DGBEB to make smart use of the expertise and knowledge available elsewhere, for instance through the strategic use of seconded national experts and other Dutch diplomats abroad, including through informal contact.

### *Geopolitics, multilateralism and open plurilateral agreements: reflections*

Considering the importance of the geopolitical context for Dutch trade and investment policy, we close with some reflections for the future of this policy.

Major economies, notably the US, EU and China, are increasingly operating in competing regional blocks, extending their geopolitical and economic spheres of influence. The EU's first priority therefore lies in reviving multilateralism, and more precisely, in revitalising and modernising the WTO. Since reaching broad consensus in the WTO will remain difficult, a multi-speed approach of varying coalitions of the willing will have to be explored. Some members, including the EU, have already started plurilateral negotiations, as was the case with TiSA. Such working groups need to be open-ended to ensure support among WTO members, while accepting some free-riding by smaller economies, including developing countries.

Joint Statement Initiatives may offer a better option to collaborate on new regulatory issues at the multilateral level. These initiatives could ultimately result in covered plurilateral WTO agreements, if adequate guarantees on no exclusion are given. The new leadership at the WTO, a recommitment by the current US administration and the proposed strategy by the European Commission – defined in its most recent Trade Review (2021) – are reason for

cautious optimism. They provide opportunities for the Netherlands to continue to play its role in strengthening global economic governance.



# Introduction

This report presents the evaluation of Dutch trade and investment policy, covering the period from 2013 to 2019, complemented with important developments since 2019. It serves as a building block for the policy review of the sustainable trade and investment policy – article 1 of the budget for Foreign Trade and Development Cooperation (BHOS<sup>17</sup>). It deals in particular with the topics of sub-article 1.1: the promotion of a sustainable trade and investment system, including responsible business conduct.

This evaluation has two objectives. First, it reviews which policy issues were prioritised and why, and how Dutch policy positions were established. Second, it reviews if and how the Netherlands achieved policy success, contributing to the agenda, decision-making and implementation of trade and investment policy.

## 1.1 Background to the evaluation

International trade and investment are the cornerstone of the Dutch economy. This is evident, for instance, in its export figures. In 2018, a third of Dutch wealth was created through exports; domestic added value of exports<sup>18</sup> accounted for EUR 262 billion, or 34% of total Dutch GDP.<sup>19</sup> The Netherlands also imports heavily. In 2018, imports amounted to EUR 391 billion.<sup>20</sup> An important share of these imports consisted of raw materials and intermediary goods, to be used in the production of Dutch exports.<sup>21</sup> Also, foreign direct investment (FDI) is an important element of the Dutch economy. In 2019, the Netherlands was the world's second largest outward investor, surpassed only by the United States (US).<sup>22</sup>

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In 2013, the Rutte II cabinet (2012–2017) introduced a new policy for aid, trade and investment, with three central aims: (1) the eradication of extreme poverty ('getting to zero') in a single generation; (2) sustainable, inclusive growth all over the world; and (3) success for Dutch companies abroad.<sup>23</sup> Additionally, non-trade<sup>24</sup> concerns such as gender equality and responsible business conduct (RBC) were identified, providing cross-cutting priorities.

For international trade and investment policy specifically, the policy brief identified the following four objectives: (1) concluding bilateral free trade agreements (FTAs) at EU the level;

<sup>17</sup> *Buitenlandse Handel en Ontwikkelingssamenwerking* (BHOS) – Foreign Trade and Development Cooperation.

<sup>18</sup> Defined as the value added by the Dutch economy to the products exported, calculated as the gross export value minus required imported finished products (for re-export), semi-finished goods and raw materials. Source: CBS (2019), p. 20. The policy review of BHOS budget article 2 is scheduled to be completed later this year (2021).

<sup>19</sup> CBS (2020).

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> *A world to gain*, MFA (2013), p. 6.

<sup>24</sup> One could argue that these topics are trade related, too. In this report we use the term trade interests to mean national economic (and corporate) interests, while non-trade concerns is mostly used to describe other public, social and environmental interests, such as sustainability, RBC, gender and labour rights. Balancing conflicting interests was a recurring challenge throughout the issues studied.

(2) internationalising the Dutch private sector; (3) attracting foreign direct investment to the Netherlands; and (4) protecting Dutch investments abroad.<sup>25</sup> Whereas nuances and focus areas have evolved over time, the objectives for trade and investment policy have largely remained in line with the ones identified in 2013.<sup>26</sup> A more elaborate description of Dutch policy will be presented in Chapter 2.

Evaluating Dutch trade and investment policy will aim to identify if and how Dutch interventions have contributed to achieving Dutch policy goals. However, it is important to acknowledge the context in which the Netherlands operates, as this has affected the Dutch interventions as well as our evaluation of the interventions.

First, Dutch trade and investment policy is characterised by layered, multilevel policymaking. An important aspect is the fact that trade policy (and investment policy to a large extent)<sup>27</sup> is a full and exclusive EU competence. As a member state of the EU, Dutch trade policy is by and large shaped at the EU level. Furthermore, as a member of the World Trade Organization (WTO), Dutch policy is also influenced by WTO law. Consequently, an important part of Dutch interventions takes place at the international level, and particularly at the EU level,<sup>28</sup> consisting mainly of advocacy efforts to convey the Dutch position (established at the national level) and contribute to policymaking in the political institutions, as well as the overall performance of these organisations.

Second, evaluation of Dutch trade and investment policy must take note of the turbulent times in which Dutch policy was designed and implemented. Trade and investment policy has been under pressure in recent times, with, among others, an impasse in the WTO's Doha Round, increasing trade tensions, a backlash against trade liberalisation, failed Transatlantic Trade and Investment Partnership (TTIP) negotiations, Brexit and concerns about the impact of dispute settlement of investors on national policy space. Consequently, trade and investment policy have become increasingly politicised.<sup>29</sup> At the same time, the policy field of trade and investment has widened and deepened, with increased demand for the integration and prioritisation of upcoming themes and non-trade concerns,<sup>30</sup> such as transparency, gender, climate change and sustainable development, into trade and investment policy.<sup>31</sup>

<sup>25</sup> Ibid, pp. 48-50.

<sup>26</sup> For example, in 2019, the objectives formulated for the BHOS policy included: (1) participating in and promoting a multilateral rules-based trade and investment system that focuses on sustainability, inclusivity of developing countries and a level playing field, among others in the WTO, OECD and G20, and (2) promoting sustainable and inclusive bilateral trade agreements between the European Union and third countries, and effectively implementing these agreements. *Memorie van Toelichting*, 2019, p. 32.

<sup>27</sup> Unlike trade policy, investment policy is not a fully exclusive EU competence. EU member states may, with explicit permission from the EC, still renew existing bilateral investment treaties (BITs), except for those with other EU member states. See Chapter 2 (box 2.1) and more detailed information.

<sup>28</sup> Given that the EC negotiates and speaks on behalf of the EU in negotiations of the WTO, influence must be exerted mainly via the EC.

<sup>29</sup> De Bièvre, et al. (2018); Forbes (2018).

<sup>30</sup> Non-trade concerns refer to a broad range of concerns about the environment (i.e. climate change, the protection of biodiversity), respect for working conditions, but also animal welfare.

<sup>31</sup> WB (2019); MFA (2019); WTO (2019b); SDIP (2019).

All of these factors affect Dutch policymaking on trade and investment at the national, EU and WTO levels.<sup>32</sup>

## 1.2 Evaluation rationale and delineation

### 1.2.1 Time frame and rationale

The current evaluation covers the period from 2013 to 2019. However, it is complemented with relevant events that took place before 2013 but affected the evaluation period, and with important developments since 2019, thus covering trade and investment policy developed and implemented under the Rutte II and Rutte III cabinets.

Fundamental changes in trade and investment policy have occurred during the time under evaluation. By the end of 2012, a new ministerial post was created: the Minister for Foreign Trade and Development Cooperation. The new ministerial post merged policies on trade and investment that were previously the responsibility of the Ministry of Economic Affairs (MEA), with the policies on development cooperation and private sector development (PSD) in developing countries, the responsibility of the Ministry of Foreign Affairs (MFA). These policies became part of a joint policy agenda: the new agenda for aid, trade and investment. Consequently, the Directorate-General for Foreign Economic Relations (DGBEB), which previously fell under the Ministry of Economic Affairs, became part of the Ministry of Foreign Affairs.

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This fundamental change in trade and investment policy under the aid, trade and investment agenda, as well as the fact that the most recent IOB review of Dutch trade and investment policy dates back to 2007,<sup>33</sup> underscore the relevance of the current evaluation.

### 1.2.2 Research scope

The type of trade and investment policies covered in this evaluation are foreign policies aimed at improving trade and investment conditions for Dutch firms and efforts to create a level playing field.<sup>34</sup> This means, for instance, that the evaluation analyses Dutch policies and positions on the content of bilateral investment agreements, but not Dutch policies intended to attract foreign direct investment. Additionally, this evaluation includes reviewing the favourable conditions that Dutch trade policy aims to set for companies to trade with third countries, but does not analyse the specific policy to promote responsible business conduct by Dutch firms.<sup>35</sup>

<sup>32</sup> See also Chapter 3 for a further review of key external trends and factors that have influenced trade and investment politics.

<sup>33</sup> MEA (2007).

<sup>34</sup> Memorie van Toelichting (2019).

<sup>35</sup> This has been analysed in a separate evaluation, see <https://www.iob-evaluatie.nl/resultaten/evaluatie-imvo-beleid>.

Furthermore, the evaluation reviews the integration of aid, trade and investment policy in terms of identifying if and how trade and investment policy integrated sustainability and more inclusive trade, taking account of the interests of developing countries.

Finally, whereas the current evaluation reviews the coherence within Dutch trade and investment policy, a more comprehensive review of the overall coherence of Dutch aid, trade and investment policy is scheduled to be part of the policy review of article 1 of BHOS later this year.

### 1.2.3 Case study selection

The evaluation largely builds on the review of five specific case studies:<sup>36</sup>

1. Trade defence instruments;
2. Trade and sustainable development chapters in free trade agreements;
3. Investor protection and investor duties;
4. The Trade in Services Agreement; and
5. Economic partnership agreements with Africa.

The evaluation of these five specific areas in trade and investment policy (selected on the basis of their importance to the Netherlands<sup>37</sup>) provided the basis for an in-depth analysis.

## 1.3 Research questions

The objectives of this evaluation have been translated into the following two main research questions:

1. Which policy issues did the Netherlands prioritise and why, and how were policy positions established?
2. Have policy goals on these issues been achieved, and if so, how?

To answer these research questions, the following sub-questions were formulated:

1. How did Dutch trade and investment policy develop over time?
2. Which actors were involved in formulating trade and investment policy?
3. Which policy goals did the Netherlands want to achieve in the field of trade and investment policy and why? And to what extent did Dutch trade and investment policy take the interests of developing countries into account?
4. To what extent was the Netherlands' policy successful?
5. To what extent did external trends and factors influence trade and investment policy?

<sup>36</sup> See Annex 1 for more information about the case selection. Moreover, this annex presents the extra research questions for the EPA case study.

<sup>37</sup> Exploratory talks with policymakers were held to identify the most important files and topics, which were further narrowed down to the five selected case studies. See Annex 1 for more information about the case selection. The topics that were not covered as a case study are briefly discussed in Annex 2.

## 1.4 Evaluation approach and definition of ‘success’

According to research by political scientists, the policy process consists of five stages. First, in the ‘agenda-setting phase’, a policy issue is put on the agenda. This can be done by states, but also by non-state actors that actively lobby to get their issue on the policy agenda (be it a formal agenda, or simply ‘on the radar’ of policymakers).<sup>38</sup> At the WTO, there might be less room for formal agenda-setting, but (Dutch) policymakers or representatives from civil society or the private sector can try to bring certain issues to the attention of WTO members (both through and outside of EU channels). Next is the ‘policy formulation stage’. For EU trade policy, this means that the EC presents a policy proposal. Third, policy proposals are discussed and adopted in the ‘policy decision stage’. Adopted policies are implemented in the ‘policy implementation phase’ and reviewed in the ‘policy evaluation stage’.

Not all issues that are put on the political agenda (or ‘put on the radar’) in the first phase of the policy cycle are eventually translated into policy, let alone result in negotiated outcomes at the EU or WTO level. Various aspects are of influence here. First, interventions by member states other than the Netherlands, as well as third countries (with whom an agreement is negotiated), affect the final outcome of the process. Second, the outcomes of trade and investment dispute settlement rulings can influence the circumstances under which an item is brought forward or a policy proposal is voted on. Third, the institutional context, which in itself could also be shaped by actors such as the Netherlands, influences decision-making on policies as well. Fourth, strong lobby practices (of both state and non-state actors) also affect the process. Stakeholders can apply pressure and affect the process in order to serve their interests and keep issues off the agenda.<sup>39</sup> The multitude of forces and stakeholders involved affects the ability of the Netherlands to affect the final outcome of policy development and implementation. These forces need to be considered when evaluating the success of Dutch interventions.

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The current evaluation focuses on the following stages of the policy cycle: the stages of agenda-setting, formulation of policy proposals, and adoption of policy proposals, and where possible and/or applicable, the actual implementation of policy proposals. For each of these stages, research was conducted to assess whether an effect had occurred that can be contributed to Dutch interventions. An intervention is identified as successful when enough evidence is found to substantiate that a Dutch intervention contributed to the observed result. Success will further be reviewed to the extent that interventions have led to success at higher levels of the policy cycle, e.g. translated into policy. Identifying why intermediate successes did not lead to success regarding the final outcome of policy formulation or implementation (e.g. because of strong counter forces, such as lobbying forces) will still provide insight into the quality of interventions and the context of the playing field, and thus provide input for the formulation of recommendations.

<sup>38</sup> Bunea (2013); Carpenter (2007); Pralle (2006).

<sup>39</sup> Dür et al. (2015); Murdie and Webeck (2015); Baumgartner et al. (2009).

This will also shed light on if and where (additional) Dutch interventions may be preferred. For example, if the study shows that the Netherlands has been able to put issues on the policy agenda or put them on the radar, yet these issues are rarely translated into actual policy decisions, this could indicate that more effort should be put into influencing the behaviour of other EU (member) states, for example.

Furthermore, in evaluating Dutch success, one should keep in mind that external factors could have complicated the policy influencing process for Dutch policymakers, or that the position of the EC or the majority of EU member states was simply too far removed from the Dutch position. The difficulty of evaluating the success of policy interventions is further discussed in Section 1.6, which describes the limitations encountered in evaluating Dutch trade and investment policy.

## 1.5 Methodology

This evaluation relies on desk research and semi-structured qualitative interviews with stakeholders to trace the process of Dutch policy success. Desk research involved an analysis of various different types of policy documents, a literature review and stakeholder mapping.

The evaluation further relied strongly on semi-structured interviews. IOB conducted interviews with policymakers at the MFA department, EC officials and the Dutch permanent representations in Brussels (PR EU) and Geneva (PR WTO). Additionally, interviews were conducted with non-state actors, who in turn tried to influence policymakers, such as business associations, companies and non-governmental organisations (NGOs). Finally, interviews were conducted with trade and investment experts, to discuss external factors and global trends that influenced policymakers' efforts to promote the Dutch position on trade and investment policy issues.

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The interviews provided input for the policy reconstruction and the discussion of the involved actors and the case studies.

Part of the research, namely the case study on the EPAs and the analysis of the political and economic context in which trade and investment takes place nowadays, was conducted by the consultancy firm Ecorys. Annex 1 discusses the research methods in more detail.

## 1.6 Limitations

As part of this evaluation, IOB encountered a number of limitations, two of which must be discussed in more detail. First, as already introduced in Section 1.4 on defining what constitutes success, one must recognise the difficulty of reviewing the attribution or contributing effect of Dutch interventions in the multilayered context of policymaking, the various different stakeholders and their impact as well as the EU's exclusive competence on trade policy. Because the EU has exclusive competence in the field of trade and (to a large

extent) investment policy, and there is therefore multilevel governance,<sup>40</sup> one cannot attribute a specific policy outcome to the efforts by Dutch policymakers in a straightforward manner. To deal with and minimise this limitation, this evaluation focused on a limited number of policy issues – the case studies – and reviewed Dutch interventions by tracing the intervention logic of the process. This made it possible to trace mechanisms and make statements about why Dutch efforts have been successful on certain policy issues, but not on others.<sup>41</sup> However, identifying the exact degree of attribution (and even contribution) of Dutch interventions has been impossible. Furthermore, given that only five policy issues are analysed in detail, drawing conclusions about the Dutch impact on trade and investment policy in general is difficult and should thus be done with caution.

Second, a certain selection bias may be present in the case studies. The selection of case studies is based on exploratory talks with policymakers working at the MFA. Only policy issues on which the policymakers have actively worked during the period of evaluation are taken into account. At the same time, this method also increases the likelihood of observing effects of Dutch efforts if there are any. If this evaluation does not observe an effect of Dutch interventions on policy issues that policymakers were said to have worked on actively and visibly, it might still shed light on how to enhance Dutch efforts.

## 1.7 Structure of this report

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The remainder of the report is structured as follows. Chapter 2 presents a reconstruction of the Dutch international trade and investment policy and the actors involved, including at the national, EU and international levels. Chapter 3 contains an overview of developments, issues and factors that influenced trade and investment policy.

Chapters 4 to 8 review Dutch trade and investment policy in the context of the five case studies: Trade defence instruments (Chapter 4), Trade and sustainable development chapters in free trade agreements (Chapter 5), The Trade in Services Agreement (Chapter 6), Investment protection and investor duties (Chapter 7), and Economic partnership agreements with Africa (Chapter 8).

Finally, Chapter 9 presents conclusions and recommendations.

<sup>40</sup> Hooghe and Marks (2001).

<sup>41</sup> Dür (2008); Beach (2017); Collier (2011).



## Dutch international trade and investment policy and multilevel governance

## 2.1 Main observations

Based on the overview of the development of Dutch trade and investment policy during the evaluation period (2013–2019) that is presented below, the following observations can be made. First, the international trade and investment policy of the Netherlands is characterised by a limited number of policy goals, allowing for a focused approach. When compared to ‘A world to gain: a new agenda for aid, trade and investment’<sup>42</sup> of 2013, the policy goals presented in ‘Investing in global prospects: for the world, for the Netherlands’<sup>43</sup> (2018) are fairly similar. Both policy documents stress the importance of coherence between trade and investment policy and development policy. And both documents acknowledge that tensions can arise when trying to combine these different policy areas. However, the weighing of conflicting interests was made more explicit in ‘Investing in global prospects’. But what also becomes clear is that none of the policy documents introduces an up-to-date assessment framework to weigh possible conflicting interests of the Netherlands against the interests of developing countries.

This links to our second observation, namely that the overarching policy goals of the Netherlands,<sup>44</sup> and the more specific policy objectives for trade and investment policy,<sup>45</sup> are barely operationalised, and it remains unclear how exactly the Netherlands plans to achieve policy goals. For example, the policy documents do not depict a roadmap to a multilateral rules-based trade and investment system. And even if more concrete goals are formulated, the policy documents do not specify how the Dutch diplomatic efforts to achieve these will be assessed. In the Trade Agenda, for example, the only measurable indicator under article 1.1 of the BHOS-budget relates to RBC, while the four priorities (such as market access or providing services to SMEs) are not translated into indicators.<sup>46</sup> This makes it challenging for policymakers to identify specific policy goals that the Netherlands wants to achieve. Moreover, it is no easy task for policymakers (nor for citizens, non-state actors and politicians) to assess whether or not Dutch advocacy efforts on these policy goals were successful. A possible explanation for this might be that trade and investment policy covers such a wide range of topics that it is difficult to introduce more concrete actions in the policy documents such as ‘A world to gain’ or ‘Investing in global prospects’. One could argue that the aim of these documents is to provide ultimate goals, not to provide explicit plans on how to get there. If that is indeed the case, one would expect underlying policy documents that elaborate on the broad plans. This is why in Chapters 4 to 8, we analyse the policy goals and strategies used by Dutch policymakers on five specific case studies.

<sup>42</sup> From now on referred to as ‘A world to gain’.

<sup>43</sup> From now on referred to as ‘Investing in global prospects’.

<sup>44</sup> See Chapter 1. Central policy goals of the aid, trade and investment policy are: (1) eradicate extreme poverty (‘getting to zero’) in a single generation; (2) sustainable, inclusive growth all over the world; and (3) success for Dutch companies abroad (MFA, 2013, p. 6).

<sup>45</sup> See Chapter 1. For Dutch trade and investment policy specifically, the policy document identified four goals: (1) concluding bilateral free trade agreements at the EU level, (2) internationalising the Dutch private sector, (3) attracting foreign direct investment to the Netherlands, and (4) protecting Dutch investments abroad (MFA, 2013, p. 48-50).

<sup>46</sup> Ministerie van Buitenlandse Zaken (2019), p. 8.

Third, the Netherlands' trade and investment policy focuses more on trade than on investment issues. As mentioned earlier, not all dimensions of the overarching Dutch objectives are translated into more concrete goals. But this is even more limited when it comes to investment policy. In the Trade Agenda of 2018, for instance, the Dutch cabinet only mentioned the negotiations on the reform of Dutch investment agreements as an important policy goal.<sup>47</sup> Note that Chapter 7 discusses Dutch policies concerning investment policy.

Fourth, Dutch trade and investment policy is not only a complicated policy area because it covers such a broad range of topics but also due to the fact that trade policy (and investment policy to a large extent)<sup>48</sup> is a full and exclusive EU competence. The EC has the right of initiative and is thus responsible for planning, preparing and proposing new European legislative and budgetary initiatives concerning trade policy. In addition, the EC, among other things, negotiates and speaks on behalf of the EU in negotiations that take place at the international level (in the WTO) and negotiates FTAs with third countries. Against this background, an important part of Dutch advocacy efforts are aimed at conveying the Dutch position on trade and investment policy to the European level (with a strong focus on the EC). Policymakers in The Hague are supported in these efforts by the Permanent Representation of the Netherlands in Brussels (PR EU) and the Permanent Representation of the Netherlands in Geneva (PR UN). Of course, effectively conveying the Dutch policy positions requires good communication and coordination between Brussels, Geneva and The Hague. It also requires sufficient capacity – which is currently not there – to attend meetings in both Brussels and Geneva on a regular basis and to participate in informal meetings with other member states in between meetings. In Chapters 4 to 8, more attention will be paid to this coordination, to the specific advocacy efforts used for the different policy issues and to what extent these have led to Dutch policy success.

## 2.2 Introduction

Dutch international trade and investment policy covers a very broad range of topics, including trade defence instruments, sustainable development, e-commerce, and trade and investment agreements. Who exactly develops this trade and investment policy? And what is the common thread in the policy of the Netherlands? This chapter discusses the main developments of Dutch international trade and investment policy during the research period of 2013–2019<sup>49</sup> and the actors involved.

<sup>47</sup> Ibid, p. 2. See Chapter 7 for more information.

<sup>48</sup> Further explained in Section 2.3.2.

<sup>49</sup> Although the focus of this evaluation is the period 2013–2019, developments in the years before are taken into account when they have shaped the policymaking structures and the actual policy.

## 2.3 Multilevel governance

It is impossible to study trade policy purely at the Dutch level, given that the development of trade policy at the national level is intertwined with policymaking at the European (EU) level and international level (e.g. WTO). Trade and investment policy is thus the result of what political scientists have called ‘multilevel governance’.<sup>50</sup> The next sections will focus specifically on policies developed at these multiple levels, the actors that are involved and the way this shapes the actions of the Netherlands.

### 2.3.1 The national level

Since 2012, the Netherlands has had one Minister for Foreign Trade and Development Cooperation (BHOS), thus placing trade affairs and development cooperation under the responsibility of a single minister at the cabinet level.<sup>51</sup> With this change, the directorate-general responsible for trade within the Ministry of Economic Affairs, the Directorate-General for Foreign Economic Relations (DGBEB), moved in its entirety to the Ministry of Foreign Affairs.<sup>52</sup> It became the responsibility of the Minister of BHOS, who together with the Minister of Foreign Affairs (FA) heads the Dutch MFA.<sup>53</sup> The DGBEB is tasked with strengthening the Dutch competitive position, and promoting an open world economy and sustainable globalisation. Within this DG, when it comes to trade and investment policy, the BHOS Minister is specifically supported by the International Trade Policy and Economic Governance Department (IMH).<sup>54</sup>

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Shortly after the DGBEB was moved in April 2013, Minister Ploumen issued the policy document ‘A world to gain’. It explained the rationale behind the merge between trade policy and development cooperation.<sup>55</sup> According to the Dutch cabinet at the time, developments at the global level, such as rapidly emerging economies, increased global interconnectedness and interdependence, changing patterns of poverty, and economic problems within the EU were causing a shift in power relations. This shift also has an impact on the role of the Netherlands in the world. The policy document states that ‘[t]he influence of the Netherlands as a country is decreasing due to the emergence of new actors on the world stage’.<sup>56</sup>

<sup>50</sup> Hooghe, L. and G. Marks (2001), p. 4.

<sup>51</sup> This was a major shift in responsibilities. Until 2012, a state secretary at the Ministry of Economic Affairs was responsible for trade. The responsibility for development cooperation changed between the level of minister and state secretary, but was placed under the umbrella of the Ministry of Foreign Affairs. In November 2012, with the Rutte II cabinet (2012–2017), both policy areas were brought together under one newly created minister for BHOS, placed at the MFA.

<sup>52</sup> The tasks between the two ministers are divided as follows: the Minister for BHOS is responsible for policies regarding trade and investment policy and development cooperation, while the Minister of FA is responsible for Dutch foreign policy as well as policy regarding the EU.

<sup>53</sup> Although trade affairs have now been placed under the MFA, the MEA is still involved in formulating trade policy on certain aspects as it represents the economic and business point of view.

<sup>54</sup> In addition to IMH, the DGBEB consists of two other departments; the Economic Diplomacy and Transition Department and the International Enterprise Department (Ministry of Foreign Affairs (2020b)).

<sup>55</sup> Ministry of Foreign Affairs (2013).

<sup>56</sup> Ibid, p. 16.

In addition, '[i]t is becoming increasingly difficult to use aid to exert influence on poverty and equity issues', given that the relations with low- and middle-income countries are now on a more equal footing because these countries not only receive aid but are also trading partners.<sup>57</sup> These developments required a new agenda for aid, trade and investment. The BHOS Minister is responsible for making sure that the consequences of Dutch policy for low- and middle-income countries are taken into account in decision-making.<sup>58, 59</sup> Moreover, the policy document pushed for a change of focus in trade partners. While good relations existed with (some of) the emerging economies as a result of Dutch development cooperation, 'A world to gain' claims that Dutch trade policy remained focused on the more 'traditional' and neighbouring trade partners and that the Netherlands did not fully seize the opportunities related to the economic growth in emerging countries.<sup>60</sup>

'A world to gain' presented a broad agenda with three goals at the international level: (1) to ban extreme poverty worldwide in a single generation, (2) stimulate sustainable and inclusive growth all over the world, and (3) create success for Dutch businesses abroad.<sup>61</sup> The role of the private sector was emphasised more than under previous cabinets, as well as the importance of FDI for inclusive, sustainable growth and poverty reduction, alongside promoting and supporting Dutch exports and investments. The cabinet recognised that merging aid, trade and investment policy would lead to actions motivated by 'both solidarity and enlightened self-interest',<sup>62</sup> and that conflicts of interest might arise between the different objectives. After all, success for Dutch businesses abroad (goal number 3) does not automatically go hand in hand with the banning of extreme poverty (goal number 1). If such a conflicts of interest were to arise, sustainable and inclusive growth (goal number 2) was taken 'as our guiding principle'.<sup>63</sup> However, an operational assessment framework on how to weigh the different interests was not introduced.<sup>64</sup>

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'A world to gain' identified four objectives for Dutch trade and investment policy: (1) concluding bilateral free trade agreements (FTAs) at EU the level; (2) internationalising the Dutch private sector; (3) attracting foreign direct investment to the Netherlands; and (4)

<sup>57</sup> Ibid, p. 16.

<sup>58</sup> Ibid, p. 21.

<sup>59</sup> The amount of coherence or synergy between development cooperation and trade in general will not be discussed in this evaluation, but will be part of the review of the overall policy under article 1 BHOS (also conducted by IOB in 2021). However, this evaluation includes the question of whether the trade and investment policy issues that the Dutch policymakers emphasised are also in line with the development cooperation agenda. And whether merging development cooperation and trade and ministries also had an impact on determining the Dutch position.

<sup>60</sup> Ibid, p. 10.

<sup>61</sup> Ibid, p. 11.

<sup>62</sup> Ibid, p. 7.

<sup>63</sup> Ibid, p. 7.

<sup>64</sup> A cabinet vision on non-trade concerns and trade policy was presented in 2009, with a view to making production more sustainable. It describes when to act in a multilateral context, in the context of the EU or unilaterally, with an assessment framework for unilateral action, taking into account sustainability (Tweede Kamer, vergaderjaar 2008-2009, 26 485, nr. 68).

protecting Dutch investments abroad.<sup>65</sup> In addition, creating a level playing field<sup>66</sup> was identified as an important related objective, as a way to facilitate these objectives.

These objectives cannot be achieved by the MFA alone. When it comes to support to Dutch business abroad or poverty reduction in developing countries, for example, other ministries are closely involved in defining cabinet positions. Of all the Dutch ministries, the MFA works especially close with the Ministries of Finance (MinFin), of Economic Affairs and Climate Policy (MEA), of Social Affairs and Employment (SZW), of Agriculture, Nature and Food Quality (LNV), and of Infrastructure and Water Management (I&W).<sup>67</sup> This cooperation obviously requires coordination. To this end, two coordination bodies were used. First, the Interdepartmental Council for Trade Policy (IRHP) was re-established in 2014, under the authority of the BHOS Minister.<sup>68</sup> The IRHP, chaired by the DGBEB, meets every week and prepares and coordinates the Dutch position on trade and investment policy, to be translated into instructions for delegations that represent the Netherlands in international meetings (e.g. at the OECD or the WTO), the EU, and in bilateral meetings.<sup>69</sup> IRHP meetings, where representatives from the different departments and the PR EU in Brussels and PR WTO discuss relevant topics, are said to be constructive.<sup>70</sup> Second, the weekly Coordination Committee for European Integration and Association problems (CoCo) is mandated to determine the Dutch position in relevant specialist councils and the Council of the European Union in Brussels.<sup>71</sup> The CoCo is the gateway to the Dutch Council of Ministers; CoCo-conclusions are discussed and adopted in the weekly Council of Ministers. Equipped with a coordinated position, Dutch representatives then participate in meetings and negotiations in the EU and other international organisations (IOs), such as the WTO.

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The coordinated Dutch positions on the different trade and investment topics are often reactive, in response to EC proposals, rather than designed proactively. A reason for this could be the limited capacity at IMH at the DGBEB. As indicated earlier, many topics are covered

<sup>65</sup> Ibid, p. 48-50.

<sup>66</sup> This refers to competition in the global economy being 'fair', without distortion by market barriers and government actions. A level playing field allows all countries and firms to compete on an equal footing (OECD (2019)).

<sup>67</sup> Interview with Dutch policymaker working at the MFA, held on 21 October 2019.

<sup>68</sup> Before 2014, IRHP was placed under the authority of the Minister of Economic Affairs; Source: Ministry of Foreign Affairs (2014).

<sup>69</sup> Including specialised councils and committees such as the European Council Working Party on GSP or the Working Party on Trade Questions, the EU Trade Defence Committee or the Committee on rules of origin of the WTO.

<sup>70</sup> Source: interviews with Dutch policymakers from MEA and LNV, held on 20 April and 11 May 2021. Both respondents identified IRHP meetings as 'constructive' and 'substantive' and with room for input from the department-specific perspective.

<sup>71</sup> The CoCo is chaired by the Director of the Directorate for European Integration (DIE), on behalf of the Minister of Foreign Affairs. DIE also runs the secretariat. More politicised dossiers are being discussed in the High Level Administrative Committee on the EU (HACEU), which consists of high-level officials from several departments. HACEU is the door to the Ministerial Committee on the EU (MCEU), which is chaired by the Prime Minister's Office. MCEU deals with the strategic European agenda, preparations for the European Council and the Economic and Financial Affairs Council (ECOFIN), focused on international financial institutions and the G20.

under trade and investment policy, and the actual topics are very broad. Moreover, there are several bilateral (EU) agreements on a number of different topics that require attention. There are only so many policy officers at IMH.<sup>72</sup> Furthermore, the turnover rate for policy officers is usually every four years, which sometimes leads to a loss in institutional capacity and knowledge of certain trade and investment topics.

Many non-state actors based in the Netherlands criticised the merging of foreign trade and development cooperation. They feared that the policy note 'A world to gain' did not provide an effective approach to dealing with possible trade-offs and clashing interests between trade and development cooperation.<sup>73</sup> In the 2016 action plan on 'Policy coherence for development', the cabinet elaborated on how it planned to tackle these possible tensions. The action plan, written at the request of the Dutch Parliament, aimed to create greater coherence between different policy areas that affect development.<sup>74</sup> The action plan covered eight themes: trade agreements, investment protection, access to medicines, tax avoidance and evasion, sustainable value chains, the cost of monetary transactions, climate change and food security. According to the plan, achieving policy coherence begins by explicitly recognising the importance of development at the outset of policy formulation. A clear link is made to the Sustainable Development Goals (SDGs) that were adopted in 2015 by all United Nations (UN) member states, including the Netherlands,<sup>75</sup> because the eight themes covered in the action plan correspond to one or multiple SDGs.

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In the 2016 action plan 'Policy coherence for development', the cabinet acknowledges that achieving policy coherence between trade and investment policy, on the one hand, and development policy on the other hand, is not an easy task. The interests of the poorest people sometimes clash with other Dutch interests, for example economic ones. The cabinet therefore stresses that policy coherence is a matter of balancing those interests. What this policy document fails to do, though, is introduce an up-to-date assessment framework on how exactly to balance those interests. It is left up to policymakers to weigh possible conflicting interests of the Netherlands against the interests of development countries. However, according to the action plan, achieving positive results for the poorest is a leading concern for the Netherlands, and Dutch representatives are instructed to express this position

<sup>72</sup> IMH counts 52 FTEs, which is about 57 employees. The trade and investment agreements and market access cluster (HIAM) – which covers the topics of this evaluation – counts less than 20 employees.

<sup>73</sup> ActionAid (2013); OxfamNovib (2016); FGG Alliance (2013).

<sup>74</sup> Tweede Kamer, vergaderjaar 2015–2016, 33 625, nr. 219.

<sup>75</sup> The '2030 Agenda for Sustainable Development' contains 17 SDGs, which are an urgent call to developed and developing countries to work together to end poverty and other deprivations, improve health and education, reduce inequality and spur economic growth. In addition, the SDGs also focus on tackling climate change and preserving the oceans and forests, and they stress the importance of sustainable development (UN (2015)).

in the EU and other IOs.<sup>76, 77</sup> To strengthen Dutch advocacy efforts and to mobilise support, the cabinet builds on academic research and cooperates with other countries and non-state actors.<sup>78</sup>

Two institutions were of particular importance for exchanging views and cooperating with non-state actors during the evaluation period. First, the Dutch Trade and Investment Board (DTIB), which brings together policymakers and representatives from the private sector three to four times a year.<sup>79</sup> In this board, they discuss how the government could support and stimulate ‘internationally active entrepreneurs’. State Secretaries, the Ministers of Foreign Affairs and Economic Affairs, civil servants, and, from a later date, the representatives of the five largest municipalities are all present in the DTIB. Participants from the private sector include the chairpersons of employers’ organisation VNO–NCW, the alliance of small and medium-sized enterprises (SMEs) MKB–Nederland as well as representatives of Randstad, Royal HaskoningDHV, Shell and other companies.<sup>80</sup> Second, the *Breed Handelsberaad* (broad trade council, BHB), established in 2017, is an important forum in which policymakers and non-state actors meet at least five times a year. The BHB was established to enhance transparency and increase the involvement of non-state actors in the policymaking process, while at the same time making sure that there was a balance between represented parties (i.e. both business organisations and NGOs).<sup>81</sup> The BHB consists of more than 17 representatives of trade unions (such as FNV), business associations (e.g. EVO–Fenedex or MKB–Nederland), companies (such as Unilever, Shell), civil society organisations (e.g. Both ENDS, Milieudefensie, SOMO) and the Association of Dutch Municipalities. Regular BHB meetings take place four times a year before the Foreign Affairs Council (FAC) on Trade (see the section on the European level below). The discussion in the regular BHB meeting follows the agenda of the FAC.<sup>82</sup> About twice a year, a thematic meeting takes place, which focuses on one specific topic. Examples include sustainability chapters in the FTAs (Chapter 5) and the new model text for investment agreements (Chapter 7). The representatives can express their concerns, put forward new ideas or put questions to the MFA. All the (confidential) information exchanged in the BHB serves as input for the MFA to determine the Dutch position concerning trade and investment policy. In addition to the four regular

<sup>76</sup> Tweede Kamer, vergaderjaar 2015–2016, 33 625, nr. 219.

<sup>77</sup> It is interesting to note that this Dutch position goes further than Article 208 (TFEU) in which EU MS have agreed to ‘take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries’ (EUR-LEX (2016). The Netherlands expresses in the action plan that the effects on developing countries are not only taken into account, but are actually ‘leading’ (Tweede Kamer, vergaderjaar 2015–2016, 33 625, nr. 219, p. 2).

<sup>78</sup> Ibid.

<sup>79</sup> This board was established as the Dutch Trade Board in 2004 and became the DTIB 10 years later. In 2018, the board was merged with the International Strategic Board, now called the International Strategic Consultation (ISO NL).

<sup>80</sup> FTM (2018); TNI (2019); minutes of the DTIB and ISB NL/ISO NL.

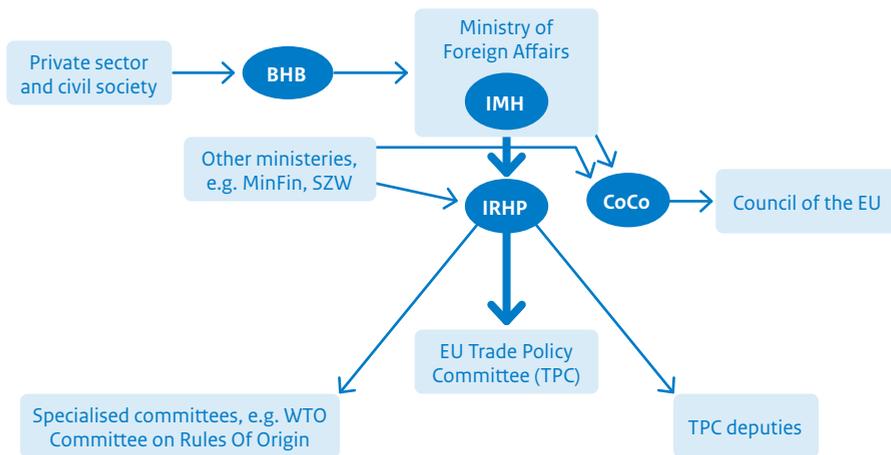
<sup>81</sup> Interview with Dutch policymaker working at the MFA, held on 21 October 2019.

<sup>82</sup> In the Dutch Parliament, the parliamentary committee on BHOS also (partly) follows the agenda of the FAC. In this committee, members of parliament (MP) meet to discuss the agenda of the FAC (and are joined by the BHOS minister), but these MPs also organise roundtables on FTAs, technical briefings etc.

meetings and the two thematic meetings, the BHB also meets at least once a year to discuss the more strategic long-term vision on Dutch trade policy.

Besides these two institutions, the Netherlands also organises (online) consultations on a regular basis in which non-state actors (such as trade unions, business associations, companies, NGOs, universities and research institutes), citizens, IOs and municipalities provide their views on policy proposals. For example, the 2018 coalition agreement presented a renewed BHOS policy, with a focus on, among other things, tackling the underlying causes of poverty, migration, climate change, sustainable production chains and inclusive economic development.<sup>83</sup> While developing this policy document, the MFA invited non-state actors, citizens and other interested parties to share their views based on nine questions (e.g. on which priority areas the government should focus and how the government can contribute to the achievement of the SDGs).<sup>84</sup> The MFA received 230 responses<sup>85</sup> that were (to some extent) used to help shape the new policy.<sup>86</sup>

Figure 2.1 Trade and investment policy at the national level



Only a few months later, in May 2018, the new BHOS Minister presented the policy document ‘Investing in global prospects’, fleshing out various policies announced in the coalition agreement under the third cabinet of Prime Minister Rutte.<sup>87</sup> This document builds on ‘A world to gain’ of 2013 and ‘Policy coherence for development’ of 2016, by continuing the

<sup>83</sup> Ministry of Foreign Affairs (2018e).

<sup>84</sup> Ministry of Foreign Affairs (2018f).

<sup>85</sup> See, for example, VNO–NCW and MKB–Nederland (2018); ONL voor Ondernemers (2018).

<sup>86</sup> In the report of the consultation, the MFA emphasises that the consultation largely supported the intended structure and content of the policy document. Not all input was incorporated, for example because of the detailed level or the focus on specific countries. However, all responses received were shared with the responsible policy directorates to serve as input for policy on FTDC, outside of the policy document (Ministry of Foreign Affairs (2018c)).

<sup>87</sup> Ministry of Foreign Affairs (2018a).

focus on coherence between trade and investment policy and development policy. ‘Investing in global prospects’ present four overarching BHOS goals: (1) preventing conflict and instability, (2) reducing poverty and social inequality, (3) promoting sustainable inclusive growth and climate action worldwide, and (4) enhancing the Netherlands’ international earning capacity. Throughout these four goals, gender equality and empowerment of women and girls is a cross-cutting theme.<sup>88</sup> One year later, in 2019, the ‘Trade agenda to the policy document investing in global perspectives’ was presented to Parliament.<sup>89</sup> With this agenda, the cabinet aimed to show how it implements the ambition to enhance the international earning capacity of the Netherlands (overarching goal 4).<sup>90</sup> The ‘Trade agenda’ is based on four priorities: (1) market access and Brexit, (2) providing an excellent service to small and medium-sized enterprises (SMEs) and start-ups, (3) customised economic diplomacy, and (4) redesign of the public and private trade promotion, innovation and investment network.<sup>91</sup> Both ‘Investing in global prospects’ and the ‘Trade agenda’ emphasise the importance of sustainable trade and investment agreements (for example, through sustainability chapters in FTAs), investment facilitation in developing countries, the multilateral trade system (with a crucial role for a modernised WTO), and the rise of digitalisation and services trade.<sup>92</sup>

Both documents encountered criticism by non-state actors. The criticism of ‘Investing in global prospects’ concerned the ‘rather superficial analysis’ on which the policy documents were based, where earlier Dutch policies on trade and development cooperation and the reasons for success and failure were not taken into account,<sup>93</sup> as well as criticism for not paying enough attention to climate action<sup>94</sup> and criticism of the strong focus on Dutch self-interests.<sup>95</sup> Additionally, there were complaints that the ‘Trade agenda’ did not devote attention to the central themes of ‘Investing in global prospects’, such as gender equality, the SDGs and sustainable inclusive growth,<sup>96</sup> while others argued that it focused excessively on the SDGs and did not provide enough action aimed at trade.<sup>97</sup> In 2019, the BHOS Minister provided an update on the ‘Trade agenda’, describing the progress on each of the four focus points.<sup>98</sup> However, since the above-mentioned actions with regard to international trade and investment mostly focused on the long term, the reported progress was relatively limited.

In ‘Investing in global prospects’, the cabinet also announced reforms to the 2016 action plan on ‘Policy coherence for development’. In this reformed plan, presented to Parliament in July 2018, the previous eight areas were merged to create five: development-friendly trade agreements, a development-friendly investment regime, tax avoidance and evasion,

<sup>88</sup> Ibid.

<sup>89</sup> Ministry of Foreign Affairs (2018b).

<sup>90</sup> Ibid, p. 1.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid, Ministry of Foreign Affairs (2018a).

<sup>93</sup> Hoebink, P. (2018), pp. 1-14.

<sup>94</sup> Hirsch, D. (2018).

<sup>95</sup> Paassen, Barbara van (2018).

<sup>96</sup> SOMO, TNI, Women, Both ENDS and ActionAid (2018).

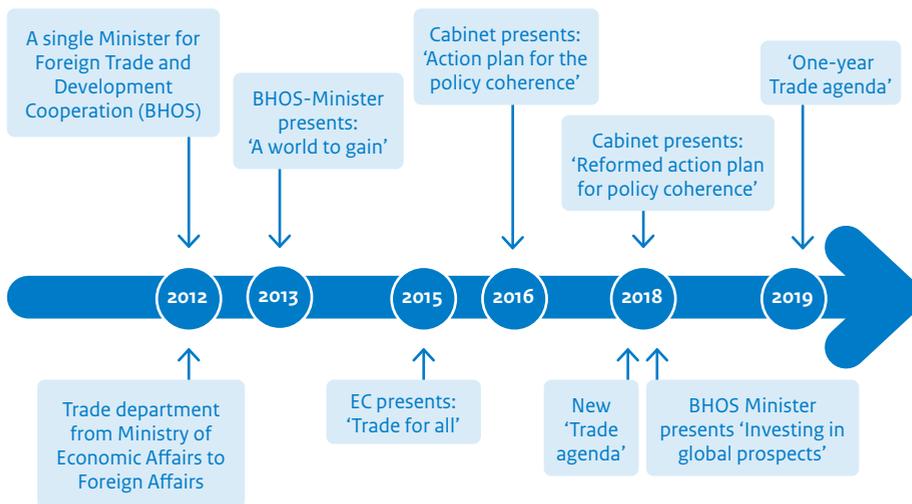
<sup>97</sup> Evofenedex (2018); Evofenedex (2019).

<sup>98</sup> Ministry of Foreign Affairs (2019).

combating climate change, and sustainable production and trade (SDG 17).<sup>99</sup> According to cabinet, the reformed plan emphasises policy areas that help developing countries to achieve the SDGs and ‘where the Netherlands can make a difference’.<sup>100</sup> At the same time, it should be noted that this policy document still does not provide a clear framework on how to balance the interests of the Netherlands against the interests of developing countries.

In July 2019, the BHOS Minister presented a progress report on the plan to Parliament, for example on tax agreements, modernising investment protection agreements (IBOs), implementing economic partnership agreements (EPAs), improving the social and environmental circumstances in supply chains and climate diplomacy.<sup>101</sup> Moreover, in May 2020, (limited) progress was reported on tax avoidance and evasion, mandates for the European Commission (EC) to convert the EPAs into full-fledged trade agreements, the reform of investor-state dispute settlement, improving working conditions in supply chains and intensifying Dutch climate diplomacy.<sup>102</sup>

**Figure 2.2** Timeline of policy developments and implementation (in the evaluation period)



<sup>99</sup> The goals of providing access to medicines, the cost of monetary transactions and food security were no longer mentioned as separate goals. These have been integrated into the five themes where incoherence can occur. Food security, for instance, remains a focal point when discussing trade and climate action. And access to medicines is an important part of negotiations on trade agreements (Ministry of Foreign Affairs (2018d), p. 3).

<sup>100</sup> Ibid, p. 1.

<sup>101</sup> Tweede Kamer, vergader jaar 2018–2019, 33 625, nr. 285.

<sup>102</sup> Ministry of Foreign Affairs (2020a).

### 2.3.2 The European level

The Netherlands is an EU member state, and trade policy (and investment policy, to a large extent – see Box 2.1) is a full and exclusive EU competence. This means that the Netherlands, together with the other member states (MS), has transferred its policymaking power on these issues to the European level. Therefore, member states do not ‘provide the sole interface between supranational and subnational arenas, and they share, rather than monopolise, control over many activities that take place in their respective territories’.<sup>103</sup>

An important part of Dutch trade and investment policy is therefore to influence policy that is made within the three political institutions of the EU: the EC, the Council of the European Union (Council), and (to a lesser extent) the European Parliament (EP).<sup>104</sup> The EC is a crucial player, because it has the right of initiative and is thus responsible for planning, preparing and proposing new European legislative and budgetary initiatives concerning trade policy.<sup>105</sup> In addition, the EC negotiates and speaks on behalf of the EU in (multilateral) negotiations that take place in the WTO, for example on a plurilateral investment facilitation agreement that would deal with policies that promote investment.<sup>106</sup> Moreover, the EC negotiates Free Trade Agreements (FTAs) with third countries on behalf of the EU and develops and implements the preferential EU trade policy towards developing countries in the Generalised Scheme of Preferences (GSP).<sup>107</sup> Moreover, since the Lisbon Treaty in 2009, the EU has the competence to negotiate new investment agreements dealing with foreign direct investment (FDI), as discussed in Box 2.1. The EU and WTO institutions thus play a pivotal role in trade and investment policymaking.

<sup>103</sup> Hooghe, L. and G. Marks (2001), p. 4.

<sup>104</sup> Contact between Dutch policymakers/diplomats and members of the EP (MEPs) is fairly limited (interviews with Dutch policymakers working at the MFA, held on 9 April 2020, 16 April 2020 and 31 August 2020, Interview with Dutch diplomat, held on 18 February 2020).

<sup>105</sup> EUR-LEX (2019).

<sup>106</sup> Plurilateral trade agreements are made between countries with similar interests. With those agreements, it is not mandatory that all WTO countries are involved or that the agreements are negotiated within the WTO framework (European Parliament (2019)).

<sup>107</sup> GSP removes or lowers import duties for products that vulnerable developing countries put on the EU market (EC (2019b)).

**Box 2.1** *Competence to negotiate investment agreements*<sup>108, 109, 110, 111, 112, 113</sup>

Since 2009, as part of the negotiated Lisbon Treaty (2007), the competence for negotiating new investment agreements moved to the EU level. Investment protection of foreign direct investment and possibly opening markets for new FDI could be negotiated in the context of comprehensive EU FTAs with third countries.<sup>108</sup> An opinion of the European Court of Justice in 2015, on the allocation of competences between the EU and EU member states for concluding the EU–Singapore FTA somewhat changed this. The ruling made clear that the following areas are still a ‘shared competence’:<sup>109</sup> (1) portfolio investment; (2) investor-state dispute settlement (ISDS); and (3) state-to-state dispute settlement relating to portfolio investment.<sup>110</sup> On those issues, the ECJ concluded that provisions ‘cannot be approved by the European Union alone’. Consequently, investment agreements must be stand-alone agreements and cannot be incorporated in ‘deep’ and comprehensive FTAs.<sup>111</sup>

Member States may, with the explicit permission of the EC, still renew existing bilateral investment treaties (BITs), except for those with other member states.<sup>112, 113</sup> Besides requiring permission to renew existing BITs, member states must implement any newly negotiated EU agreements, directives and regulations on investment.

<sup>108</sup> With the Lisbon Treaty, the Common Commercial Policy (CCP) has been expanded to include FDI. This has thus given the EU exclusive competence in this area (Consolidated Version of the Treaty on the Functioning of the European Union art. 3(1), 2009 O.J. C 326/49, [hereinafter TFEU]).

<sup>109</sup> ‘Shared competence’ allows both the EU and its member states to adopt legally binding acts for the policy area in question.

<sup>110</sup> European Court of Justice (2015), Opinion 2/15, para 244.

<sup>111</sup> Here it is important to note that Opinion 2/15 seems to use a different understanding of ‘shared competence’ as defined in Art. 2 TFEU (see Thym, D. (2017)).

<sup>112</sup> Bilateral investment agreements deal with the protection of FDI against risks such as expropriation without prompt, adequate and effective compensation, and provide for dispute settlement outside the national court system in case of investor-state disputes. Through BITs, covered investors have the right to binding international arbitration (so-called investor-state dispute settlement) if ‘national treatment’ (i.e. to be treated the same way as an investor from that country), ‘most-favoured nation’ (conditions can be in place, as long as they are not discriminatory) and the right to transfer capital freely (from and to the country of choice) are violated (Source: Rijksoverheid (2019)).

<sup>113</sup> Besides its own BITs, the Netherlands is involved in negotiating broader European investment agreements, efforts to establish a multilateral investment court, and multilateral negotiations on investment in the OECD and the WTO, including an effort to establish a plurilateral investment facilitation agreement in the WTO.

Given the EU's exclusive competence on trade policy (and investment policy to a certain extent), an important aspect of Dutch interventions consists of conveying the Dutch position on trade and investment policy to the European level. This was already mentioned in 'A world to gain': '[i]ncreasingly, we are exerting our influence through the European Union'.<sup>114</sup> According to this policy document, '[w]e can exercise more influence as a member of the EU than we can alone. That is why for us the EU is the most relevant framework within which to conduct a coherent policy'.<sup>115</sup> The PR EU plays an important role. It interacts with the EC, Council and the EP, with other permanent representations and the large community of non-state actors.<sup>116</sup> Examples of non-state actors active at the European level are think tanks (e.g. the European Centre for International Political Economy, ECIPE; Bruegel; the Centre for European Policy Studies, CEPS), companies (including multinationals such as Google), business associations (individual associations for each single sector and overarching associations such as BusinessEurope, which represents 40 national business associations including VNO–NCW,<sup>117</sup> and EUROCHAMBRES, the Association of European Chambers of Commerce and Industry), trade unions (e.g. European Trade Union Confederation, ETUC; European Trade Union Institute, ETUI) and non-governmental organisations (e.g. Oxfam International) that are involved in trade and investment policy. All of these organisations try to impact policymaking, among others, through (online) consultations and by organising events, generating media attention and directly contacting policymakers.<sup>118</sup>

Moreover, the PR EU works in close collaboration with policymakers at the department in The Hague, specifically with the DGBEB. The DGBEB determines the Dutch trade and investment policy, based on input from, among others, the PR EU in Brussels and the Dutch permanent representation to the WTO and/or to the UN in Geneva.<sup>119</sup> The PR EU, for example, provides the DGBEB with an analysis of the arena, i.e. the various positions (revealing which member states are in favour or against a certain proposal), estimates the feasibility of Dutch initiatives and advises when to bring new proposals to the table.<sup>120</sup> Policymakers of the DGBEB travel to Brussels regularly to attend meetings, but are themselves, as experts on certain policy issues, also in close contact with policymakers at the EU institutions, representatives of other EU MS and the EP.<sup>121</sup>

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The extent to which policymakers can bring forward the Dutch position in official meetings or promote the Dutch views during informal talks with other member states in between meetings is finite. For example, at the Dutch PR EU there is only one employee responsible for trade, compared to two employees at the Maltese PR EU (which is a much smaller trade

<sup>114</sup> Ministry of Foreign Affairs (2013), p. 16.

<sup>115</sup> *Ibid.*, p. 56

<sup>116</sup> Interview with Dutch diplomat, held on 18 February 2020.

<sup>117</sup> <https://www.businesseurope.eu/>

<sup>118</sup> Beyers, J. (2002), pp. 585–612; Beyers, J. (2004), pp. 211–40; De Bruycker, I. and J. Beyers (2019), pp. 57–74; De Bruycker (2015), pp. 599–616; De Bruycker, I. and J. Beyers (2015), pp. 453–474; Dür, A. and D. de Bièvre (2007), pp. 79–101; Quittkat, C. (2011), pp. 653–674.

<sup>119</sup> Interviews with Dutch diplomats, held on 21 October 2019, 31 October 2019 and 18 February 2020.

<sup>120</sup> Interview with a Dutch diplomat, held on 18 February 2020.

<sup>121</sup> Interviews with Dutch policymakers working at the MFA, held on 9 April 2020, 16 April 2020 and 31 August 2020; interview with EC trade officer, held on 6 March 2020.

nation) or four at the Italian PR EU. The high-speed train connection between The Hague and Brussels is an advantage for the Dutch officials when attending official meetings in Brussels: meetings almost always fit in the schedule, and when necessary the Netherlands can visit with a larger delegation more easily. At the same time, it also has a disadvantage. Because of the fast connection, many Dutch officials travel back on the same day, unlike officials from other countries who travel by plane and often leave the next day. This provides fewer opportunities for Dutch government officials to hold informal meetings, compared to other countries.<sup>122</sup>

At the European Commission, DG Trade has the lead on trade policy. This DG, led by a trade commissioner, coordinates, among others, the trade relations between the EU and third countries. The DG is divided into policy directorates that deal, for example, with services and investment (directorate B), trade defence (directorate H) and regional directorates (such as directorate C, which deals with Asia and Latin America).

In 2015, the EC presented its ‘Trade for All’ strategy, which made a clear link between development policy, on the one hand, and trade and investment policy, on the other hand.<sup>123</sup>,<sup>124</sup> This link between these policy areas is, of course, in line with the policies and the institutional set-up (with one minister for BHOS) of the Netherlands, and is also something that has been frequently advocated by Dutch representatives.<sup>125</sup> The ‘Trade for All’ strategy stresses how ‘trade policy, combined with development cooperation, is a powerful engine of growth in developing countries’ and how the ‘Trade for All’ strategy should be combined with the commitments to the SDGs.<sup>126</sup> Moreover, the strategy reflects on the changing world economy and how EU trade and investment policy can help to boost employment and growth. For example, the EC states that trade in services, which accounts for 70% of EU GDP and employment, will be prioritised in trade negotiations (e.g. through a plurilateral Trade in Services Agreement (TiSA)). In addition, the EC agrees to strive for better implementation of FTAs, a stronger enforcement of the EU’s rights, and to make trade and investment policy more transparent (by opening up negotiations to more public scrutiny). Moreover, the strategy talks about reinvigorating the multilateral trading system, for instance by making progress at the WTO and by actively pushing for the conclusion of the Doha Round (see 2.3.3 and Annex 3 for more information).<sup>127</sup>

<sup>122</sup> Interview with a Dutch diplomat, held on 18 February 2020.

<sup>123</sup> European Commission (2015).

<sup>124</sup> The combination of EU trade and development policy has a long tradition; already with the Lomé Convention of 1975 the European Economic Community (EEC) combined trade and aid to 71 African, Caribbean and Pacific (ACP) countries.

<sup>125</sup> For example, concerning negotiations taking place in the context of the WTO (see Tweede Kamer, vergaderjaar 2013–2014, 25 074, nr. 186; IRHP 2016–28b TPC Handleiding Plv 22-07-2016; IRHP 2017–18b Handleiding Plv 9 June 2017), or discussions within the EU itself (see IRHP 2016–10b TPC Handleiding Plv 11-03-2016). Although a policymaker also pointed out that this link was stressed by multiple member states and that the Commission was already working on it (interview with Dutch policymaker working at the MFA, held on 14 October 2019).

<sup>126</sup> Ibid, p. 7.

<sup>127</sup> Ibid.

Two years later, in 2017, the EC presented a report on the implementation of Trade for All.<sup>128</sup> In this progress report, the EC mentioned ‘considerable concrete progress towards an effective, transparent and responsible trade policy that responds to economic challenges and seizes opportunities’.<sup>129</sup> It cited the examples of the FTAs with Canada and Japan. At the same time, the EC also pointed out that carefully implementing achieved agreements requires attention (for example on sustainable development<sup>130</sup>), as do, among other issues, investment liberalisation,<sup>131</sup> the reform of the WTO<sup>132</sup> and gender equality.<sup>133</sup>

While the EC talked about ‘considerable concrete progress’, it should be noted that, at that time, large parts of CETA were only applied provisionally, awaiting its ratification by the EU MS, the EU and Canada. And even today, CETA has still not been ratified.<sup>134</sup> Moreover, several non-state actors were critical about the level of transparency, especially regarding the TTIP negotiations.<sup>135</sup> For example, the European Trade Union Confederation (ETUC) stated, ‘the transparency we have called for has not been achieved’<sup>136</sup> and Corporate Europe Observatory argued that ‘despite the public relations [TTIP] is still under a cloak of secrecy’.<sup>137</sup> Greenpeace leaked some of the negotiating documents, in order ‘to bring some much-needed transparency to the debate on TTIP’.<sup>138</sup> At the same time, it should be noted that business organisations were more satisfied with the transparency initiatives of the European Commission. The Confederation of Swedish Enterprise even warned that more transparency ‘risk[s] compromising the negotiations’.<sup>139</sup>

In June 2020, the EC launched a major review of the EU’s trade policy. The aim was to define a new medium-term direction, responding to global challenges (such as the Brexit trade talks, the future of the WTO, shifting power balances and the economic effects of COVID-19).<sup>140</sup> The review, which included a large public consultation,<sup>141</sup> was led by the Trade

<sup>128</sup> European Commission (2017), pp. 1–16.

<sup>129</sup> *Ibid.*, p. 16.

<sup>130</sup> European Commission (2017), p. 9. See Chapter 5 for more information.

<sup>131</sup> *Ibid.*, p. 8. See Chapter 7 for more information.

<sup>132</sup> *Ibid.*, p. 14.

<sup>133</sup> *Ibid.*, p. 10.

<sup>134</sup> In the Netherlands, the House of Representatives has approved the treaty, but the Senate has yet to vote.

<sup>135</sup> For a detailed analysis of the different positions of non-state actors, see Gheyle, N. and F. De Ville (2017), pp. 16–28.

<sup>136</sup> ETUC (2016).

<sup>137</sup> Corporate Europe Observatory (2015).

<sup>138</sup> Greenpeace (2016).

<sup>139</sup> In the context of the TTIP negotiations, several business associations, including the American Chamber of Commerce, BusinessEurope and Copa–Cogeca (representing the agricultural industry), commended the Commission on its level of transparency. Exceptions are agricultural business groups, such as the European Milk Board and the Irish Creamery Milk Suppliers Association, who sided with NGOs and trade unions (Gheyle and De Ville (2017), p. 19). All responses to the public consultation can be found here: European Ombudsman (2014). <https://www.ombudsman.europa.eu/en/correspondence/en/58643>

<sup>140</sup> European Commission (2020b).

<sup>141</sup> More than 400 submissions from a wide range of stakeholders were received (European Commission (2021)).

Commissioner<sup>142</sup> and resulted in a revised strategy that was adopted in February 2021. The strategy has three core objectives: strengthen the capacity of trade to support the digital and climate transitions; shape global rules for a more sustainable and fairer globalisation; and increase the EU's capacity to pursue its interests and enforce its rights.<sup>143</sup> The EU's strategy is fully supported by the Netherlands. The Dutch representative in the Trade Policy Committee (TPC) welcomed the focus on the major reform of the WTO (e.g. because the Netherlands is pushing for a solution to the fishery subsidies within the WTO framework), sustainability and the objective to enforce the EU's rights (e.g. the enforcement of trade agreements that include a sustainability chapter – see Chapter 5), as well as the use of trade defence instruments (see Chapter 4).<sup>144</sup>

The Trade Policy Committee (TPC) is a forum in which trade and investment policy is discussed. The TPC is also known as Committee 133, after article 133 in the 1992 Maastricht Treaty, which states that the EC has competence over trade policy. In the TPC, the EC informs MS about trade negotiations with third countries and/or in international organisations, and MS provide advice and assistance. The TPC deals with three important policy areas: (1) the World Trade Organization, (2) bilateral trade agreements, and (3) new EU regulations on trade. Moreover, this committee prepares the decision-making process of the European Council concerning EU trade policy. The TPC also has a Services and Investments sub-group that meets to discuss agreements on trade in services, investment and investment protection, services and investment-related matters in FTAs, and separate investment protection agreements between the EU and third countries. The PR EU represents the Netherlands (although the capacity is limited to one person only), based on instructions it receives from The Hague, in the meeting of the deputy members, which takes place once a week. When the full members<sup>145</sup> of the TPC meet, once a month, Dutch interests are represented by DGBEB. In addition, once every six months, the full members gather in an informal meeting in the country that holds the rotating presidency of the Council of the EU. In those meetings, the Netherlands is again represented by DGBEB.

Trade ministers from all EU member states meet in the Foreign Affairs Council on Trade (FAC Trade). Meetings of the FAC on common commercial policy issues are presided by the representative of the EU member state holding the rotating presidency of the Council. The FAC Trade takes place four times a year, with two formal meetings and two informal meetings.

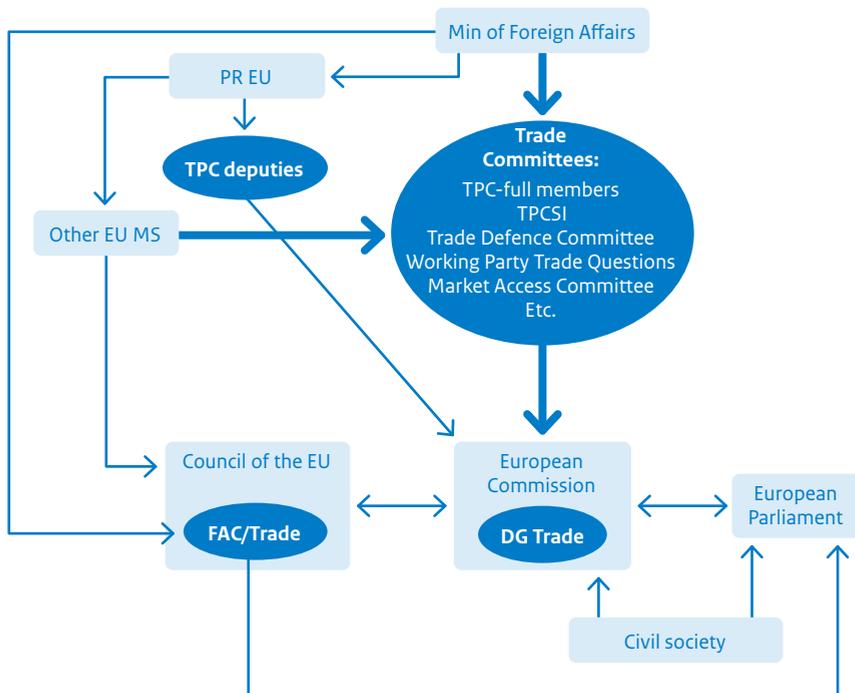
<sup>142</sup> Only two months after the launch, Trade Commissioner Hogan had to resign after a political scandal (European Commission (2020c)). Hogan has been succeeded by Valdis Dombrovskis (Politico (2020)).

<sup>143</sup> European Commission (2021).

<sup>144</sup> Ministry of Foreign Affairs (2021).

<sup>145</sup> Usually General Directors/Head of Trade divisions in the relevant ministries of EU member states.

**Figure 2.3** Trade and investment policy at the European level



### 2.3.3 The international level

The most important institution at the international level dealing with trade and investment policy is the WTO (see Annex 3 for background on how the WTO has developed over time), which is based in Geneva. This intergovernmental organisation, established in 1995 and succeeding the General Agreement on Tariffs and Trade (GATT), is concerned with the regulation of international trade and currently has 164 members. The Netherlands has been a member since the beginning.

In Geneva, the Dutch Permanent Representation (PRUN), and more specifically the Deputy Permanent Representative to the WTO, deals with all matters related to trade policy (and investment policy to the extent that it is discussed within the WTO framework). The task of this Permanent Representative to the UN and his limited team is to represent Dutch interests and provide input for policymakers in The Hague. The team is relatively small: including the Deputy Permanent Representative there are only five employees working on trade, one of which focuses solely on investment and on labour, and they often work at the PR UN on

economic affairs as well.<sup>146</sup> At the same time, according to diplomats working at the PR UN, policymakers from The Hague should be more visible in Geneva. These diplomats feel that having contacts in Geneva with other WTO members and knowing the debates that are taking place there is essential for developing effective trade (and investment) policy.<sup>147</sup> Currently, though, policymakers in The Hague only occasionally travel from The Hague to Geneva to participate in (expert) councils and committees. In addition, every two years, Dutch policymakers attend the WTO Ministerial Conferences (MCs).<sup>148</sup> However, policymakers in The Hague mostly rely on the information they receive from the PR UN after the meeting of EU ambassadors to the WTO (taking place on Wednesdays) to serve as input for the TPC (taking place on Fridays in Brussels).<sup>149</sup>

Given that trade policy is an exclusive EU competence (as was discussed in Section 2.3.2), it is the EC that negotiates on behalf of the European Union within the framework of the WTO.<sup>150</sup> In Geneva, the EU has two-fold representation.<sup>151</sup> First, there is the Delegation of the EU to the UN and other international organisations. This Delegation is part of the network of 140 EU delegations worldwide, carrying out the EU's foreign policy and supporting the High Representative of the EU for Foreign Affairs and Security Policy. Second, there is the Permanent Mission of the European Union to the WTO, supporting the EU Trade Commissioner.

At the WTO, the EU is a member in its own right as a customs union, as are each of its member states. However, while the member states coordinate their position in Brussels and Geneva, the EC represents the EU and its 28 member states in the councils and committees of the WTO and in the MCs.<sup>152, 153</sup> In addition, the EC is involved in negotiations of the Doha Development Agenda (DDA), but also in plurilateral initiatives such as the Information Technology Agreement (initiated by the EU and signed by 82 members of the WTO), the Environmental Goods Agreement (negotiated by the EU and 16 other WTO members) and the Trade in Services Agreement (negotiated by 23 members of the WTO, including the EU, though currently on hold). Moreover, the EC makes active use of the dispute settlement mechanism of the WTO. This mechanism provides a legal framework to WTO members for resolving disputes when negotiations fail to resolve them.<sup>154</sup> While the EU is thus speaking on behalf of

<sup>146</sup> The Permanent Representative and his team not only work on the WTO but also deal with the United Nations Conference on Trade and Development (UNCTAD) and the International Labour Organization (ILO) (interview with Dutch diplomat, held on 31 October 2019).

<sup>147</sup> Interviews with Dutch diplomats, held on 31 October 2019 and 1 November 2019.

<sup>148</sup> The MCs are the highest decision-making body of the WTO and are attended by trade ministers and other senior officials from the WTO members. The MC can take decisions on all matters under any of the multilateral trade agreements. At the MCs, the EC regularly updates MS on the progress of the negotiations.

<sup>149</sup> Interviews with diplomats, held on 16 October 2019 and 21 October 2019.

<sup>150</sup> European Commission (2019c).

<sup>151</sup> Established following the Lisbon Treaty of 2007.

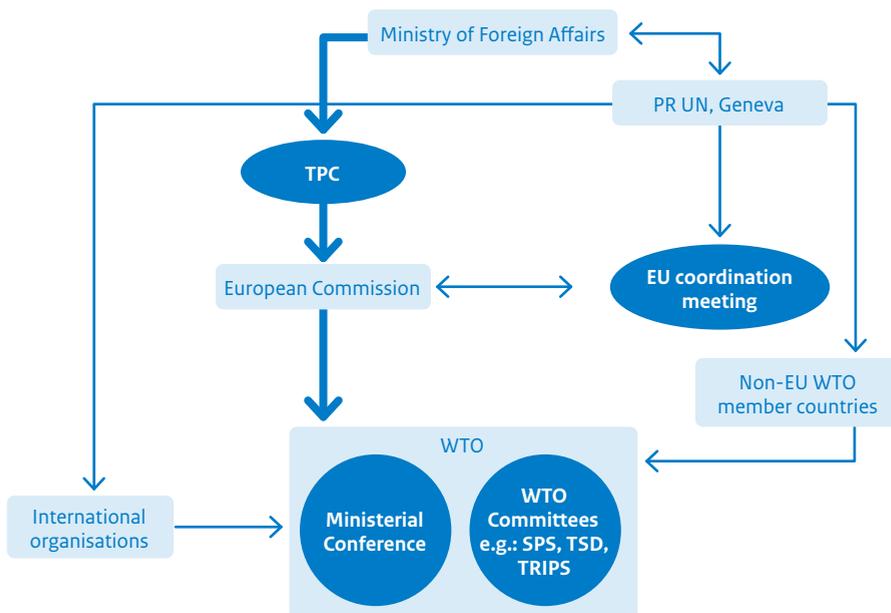
<sup>152</sup> Ibid; interview with a Dutch diplomat held on 21 October 2019.

<sup>153</sup> There are two exceptions: MS speak on their own behalf in the WTO Budget Committee and representatives of MS can also perform duties as chairpersons of WTO councils and committees.

<sup>154</sup> While the EC is the EU's executive arm and thus conducts negotiations, for example, WTO materials tend to refer to the 'EU' instead of the 'EC' (WTO (2019)).

all the member states, a Dutch diplomat pointed out that every country still has its own representation in Geneva. According to this diplomat, this shows that none of the EU member states feel comfortable with ‘the EU doing its thing’.<sup>155</sup>

**Figure 2.4** Trade and investment policy at the international level



Every week, the EU organises coordination meetings, attended by all MS. The coordination meetings are used by the EC to communicate the EU position and to update the MS on the progress of negotiations. Moreover, member states are invited to express their opinion on proposals by the EC or on the way the EU is conducting negotiations in the context of the WTO.<sup>156</sup> These meetings thus provide the most important opportunity to represent the interests of the Netherlands on trade and investment policy. At the same time, though, the EC gives MS very little to no room to lobby on their own, eager to protect the EC exclusive competence.<sup>157</sup> For example, MS are informed only in broad terms about statements that the EU makes during WTO negotiations. This means that EU MS are unable to effectively use the breaks during meetings; it is difficult to talk to third countries about how the position of those countries only slightly differs from the EU position, given that the member states are not familiar with the specifics of the EU position themselves.<sup>158</sup> According to Dutch diplomats, this works against the effectiveness of the EU at the international level. The EC should use the permanent representations of member states as important vehicles to

<sup>155</sup> Interview with Dutch diplomat, held on 31 October 2019.

<sup>156</sup> Interview with EU diplomat, held on 30 October 2019.

<sup>157</sup> Interviews with Dutch diplomats, held on 21 October 2019 and 31 October 2019.

<sup>158</sup> Interview with Dutch diplomat, held on 1 November 2019.

enhance the visibility of EU initiatives and enhance and explain the EU position, for example by capitalising on the bilateral contacts that member states have.<sup>159</sup>

In addition to the EU and international levels, the Netherlands also operates at the bilateral level, advocating its positions in informal and formal meetings with one or more counterparts. When the minister attended ministerial level meetings, her files often contained speaking notes on priority policy topics including trade and investment issues. For instance, in the period 2015–2018, at the OECD ministerial councils, bilateral meetings on trade and investment (including EU free trade agreements) included notes on trade and gender, responsible business conduct, an improved investment dispute settlement system and the Dutch Model Bilateral Investment Treaty.

<sup>159</sup> Interviews with Dutch diplomats, held on 21 October, 31 October 2019 and 1 November 2019.



3

## Key external trends and factors in trade and investment politics

### 3.1 Introduction

Although the Netherlands has its own objectives for trade and investment policy, Dutch policy formulation and implementation does not happen in a vacuum. In fact, trade and investment policy is shaped and influenced by various national and international developments, issues and factors, which are interlinked and complex.

This chapter presents a review of the most important developments, issues and factors that shaped and affected Dutch trade and investment policy during the period under evaluation. The chapter is based on the study by Ecorys (2021) as commissioned by IOB.<sup>160</sup>

### 3.2 Developments, issues and factors and their effect on trade and investment policy

The different trends and developments that influenced trade and investment policy can be categorised as follows: (1) geopolitical developments; (2) socio-economic factors; (3) public opinion and politics; (4) business and technological developments; and (5) environmental issues.

It is important to note the interconnectedness of these developments. Key developments in one category have the potential to enhance or counter the effect of developments in other categories. The (perceived) negative effects of globalisation, socio-economic trends and business and technological developments influenced public opinion and politics, and subsequently influenced trends and events: for instance, the election of Donald Trump in the US in 2016 and, second, the mobilisation of public opinion on the Transatlantic Trade and Investment Partnership (TTIP) and the Trade in Services Agreement (TiSA), and the subsequent opposition to trade and investment negotiations.<sup>161</sup> The interplay of these developments, factors and trends – and their effect on trade and investment policy – is very complex.

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What follows is a discussion of the key developments, trends and factors. Key developments discussed include: the rise of China over time and the election of President Trump in 2016 (geopolitical developments); income and welfare inequality and gender inequality (socio-economic factors); internationalisation and integration of business and technology (business and technology development); and climate change (environmental issue). These thematic issues were selected partly because they have been priorities of the ministers for Foreign Trade and Development Cooperation (BHOS, in Dutch).

Note that this evaluation covers the period 2013–2019. Where relevant, longer-term developments, issues and factors are included. Moreover, the review takes account of some

<sup>160</sup> See Chapter 1 (pp. 13–24) and Annex B (pp. 165–171) in Ecorys (2021) for a more detailed overview of the developments, issues and factors.

<sup>161</sup> Ibid.

important developments since 2019, but only where these are explicitly related to the selected developments, issues and trends highlighted in this report. A key development that is therefore not discussed is the COVID-19 pandemic, even though it has had an impact on trade and investment policy. The pandemic will be briefly discussed in Chapter 9, however.<sup>162</sup>

### 3.2.1 Geopolitical developments: the rise of China and the election of Donald Trump

#### *The continued rise of China and the EU's response*

A geopolitical development that particularly stands out is the continued rise of China. Since the economic reform and trade liberalisation over 40 years ago, China has been among the world's fastest-growing economies.<sup>163</sup> By 2013, China had overtaken the US as the world's largest economy on a purchasing power parity basis, and in 2019, it accounted for 19% of the global economy.<sup>164</sup> China further increased its economic position in global trade with initiatives such as the Belt and Road Initiative (BRI, which started in 2013),<sup>165</sup> to facilitate the integration of the Chinese economy in the global market. Besides accelerating Chinese growth through increased connections, its infrastructure projects also facilitated work for Chinese construction firms across the globe on an unparalleled scale.<sup>166</sup> Additionally, China enhanced its economic position through its many regional and bilateral trade agreements with third countries, especially in the framework of the BRI.<sup>167</sup>

China also established its geopolitical power through its influence in international organisations. It became a WTO member in 2001, created the Asian Infrastructure Investment Bank, and joined in the establishment of other new organisations.<sup>168</sup> China further increased its political influence by taking on more international responsibility in terms of foreign aid, peacekeeping, nuclear non-proliferation and regional security mechanisms, as well as – among other things – by opening of a military base in Djibouti.<sup>169</sup>

Given China's rising economic size and political influence, its development has had a profound effect on European and Dutch trade and investment. Positive effects include the enhanced market for European exporters and increased Chinese investments in the European Union (EU). Between 2013 and 2019, EU exports to China increased by 46%, from EUR 148 billion in 2013 to EUR 217 billion in 2019.<sup>170</sup> In the same period, Chinese (state-owned and private) foreign direct investment (FDI) in the EU increased by 73%, from EUR 6.7 billion in

<sup>162</sup> In its concluding chapter, the Ecorys report (2021, pp. 134-135) also touches on COVID-19.

<sup>163</sup> Purdie (2019).

<sup>164</sup> Ibid.

<sup>165</sup> This multibillion-dollar investment plan consists of infrastructure projects in 71 countries across Asia, Africa and Europe.

<sup>166</sup> Kuom and Kommenda (2018).

<sup>167</sup> Ecorys (2021).

<sup>168</sup> Such as the BRICS development bank. BRICS is the acronym for the group of Brazil, Russia, India, China and South Africa.

<sup>169</sup> Ecorys (2021); Chen (2014).

<sup>170</sup> ITC Trade Map, undated. *European Union (EU 28)'s exports to China*.

2013 to EUR 11.6 billion in 2019, with much higher increases in some of the years<sup>171</sup> in-between.<sup>172</sup> Private foreign direct investment, in particular, increased significantly over time.<sup>173</sup>

However, there are equally evident negative effects related to China's rise, such as increased strategic competition among global powers combined with protectionist foreign economic policies, notably between China and the US, but also between China and the EU. In addition, problems with Chinese dumping practices (such as overcapacity in steel production) and its powerful state-owned enterprises continued to grow. International media, parliaments and activists have also asked for attention to labour, human rights and environmental issues in China, including in the context of trade negotiations.<sup>174</sup>

The expiration of China's non-market economy status in the WTO<sup>175</sup> in 2016 had a significant influence on WTO and EU trade and investment policy. In the years prior to 2016, in anticipation of China's market economy status, the debate at the national and international levels sped up. This change of status required a careful redesign of policy – especially of trade defence policy – to avoid Chinese exports becoming 'too competitive', but also to avoid a deterioration of political relations with China (see also Chapter 4 on trade defence policy).

The sum of these combined effects is defined in the European Commission's EU China strategic outlook of 2019, which states: 'China is, simultaneously, in different policy areas, a cooperation partner with whom the EU has closely aligned objectives, a negotiating partner with whom the EU needs to find a balance of interests, an economic competitor in the pursuit of technological leadership, and a systemic rival promoting alternative models of governance'.<sup>176</sup>

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EU Communications since 2019 reveal the impact of the rise of China on trade and investment policy as well. The European Commission (EC)'s 2021 Trade Policy Review,<sup>177</sup> for example, underscores the impact expected from the continued rise of China on the global economic and political order: 'The continued rise of China will impact heavily on global economic developments over the next ten years'<sup>178</sup>. The EU's trade and investment policy will aim to protect the EU's essential interests, while simultaneously building a fairer and rules-based

<sup>171</sup> E.g. in 2016, 2017 and 2018, Chinese FDI into the EU totalled EUR 21 billion, EUR 37 billion and EUR 29 billion respectively (Statista.com (2021)).

<sup>172</sup> Statista.com (2021).

<sup>173</sup> Ibid.

<sup>174</sup> Ecorys (2021).

<sup>175</sup> Under the WTO's Accession Protocol, China was treated as non-market economy for 15 years (since 2001). This allowed other countries to use a special methodology for calculating the dumping margin in anti-dumping measures for Chinese goods. Thus, easier and higher anti-dumping duties could be imposed on Chinese exports. See Ecorys (2021, p. 121) for more details. More generally, on China Ecorys adds that 'Import-competing industrial stakeholders see China as a highly problematic trade partner and market participant and are largely supportive of the EU's trade defence policy towards China' (p. 122).

<sup>176</sup> EC (2019), p. 1.

<sup>177</sup> EC (2021).

<sup>178</sup> Ibid, p. 3.

economic relationship with China, with greater obligations for that country in international trade.<sup>179</sup>

Surprisingly, the Dutch BNC fiche<sup>180</sup> (March 2021), which discusses the new EC Trade Policy Review and the Dutch position towards it, does not explicitly address the developments of the continued rise of China or its implications (for instance, on the competitiveness of Dutch trade), nor does it address the Dutch stance on trade and investment policy on this matter.<sup>181</sup>

### *US policy and the response of the EU*

A second key development influencing trade and investment policy and global geopolitics was the election of Donald Trump in 2016. His 'America First' attitude increased protectionist US foreign economies policies. The US withdrew from the Transpacific Partnership<sup>182</sup> and renegotiated 'outdated and imbalanced' agreements with Mexico (NAFTA), Canada (USMCA) and South Korea (KORUS).<sup>183</sup> The US also increased its trade defence measures, initially to affect Chinese products. In early 2018, the US levied steel and aluminium tariffs on China, setting in motion an upward spiral of tariffs.<sup>184</sup> In June 2018, the EU was also confronted with import tariffs by the US on steel and aluminium, affecting EUR 6.4 billion worth of EU goods.<sup>185</sup> The EU retaliated with measures, affecting EUR 2.8 billion worth of US imports.<sup>186</sup>

In addition, the international leadership of the US in the multilateral trading system dissolved, with increased criticism on and actions in the WTO.<sup>187</sup> Already under the Obama administration, the US blocked the appointment of new members of the WTO's Appellate Body and refused to engage in serious discussions on reform, a position that has (so far) been continued by the Trump and Biden administrations. To ensure the continuation of international dispute settlement in the midst of this paralysis, in April 2020 the EU and other WTO members<sup>188</sup> formally introduced an interim appeal arrangement for WTO disputes.<sup>189</sup>

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With the Biden administration, the EU sees opportunities for improving the Transatlantic relationship. The EC's new Trade Policy Review also addresses the EU's geopolitical ambitions in this context, and identifies opportunities for cooperation on trade and investment. It states that the current US administration 'provides an opportunity to work together to

<sup>179</sup> Ibid.

<sup>180</sup> A BNC fiche is a note by an interdepartmental working group describing and assessing new proposals by the European Commission. IOB obtained a draft fiche on the Trade Policy Review in late March 2021.

<sup>181</sup> In line with the pursued position in previous years, the BNC fiche does address the importance for the Netherlands to pursue a policy that facilitates an open, fair and rule-based system.

<sup>182</sup> The Trans-Pacific Partnership was, effectively, the largest investment agreement ever negotiated and involved negotiating partners Australia, Canada, Chile, Mexico, Peru, Singapore and Vietnam (Mandel (2020)).

<sup>183</sup> BDI (2020).

<sup>184</sup> Ibid; Press release 31 May 2018. <https://ec.europa.eu/>.

<sup>185</sup> EC (2018a).

<sup>186</sup> EC (2018b).

<sup>187</sup> BDI (2020).

<sup>188</sup> Including, among others, Australia, Brazil, Canada, China, Colombia, Mexico, New Zealand and Switzerland.

<sup>189</sup> EC (2020).

reform the WTO, including by reinforcing its capacity to tackle competitive distortions and to contribute to sustainable development’.<sup>190</sup>

The EC also aims to modernise the global rule book to achieve more sustainable and fairer globalisation – partly in response to protectionist and unilateral policies. The 2020 communication of the EU High Representative<sup>191</sup> on ‘a new EU–US agenda for global change’, speaks more explicitly about protectionist measures in EU–US bilateral trade. The EU aims to renew EU and US commitments to more open and fairer trade, to improve the level playing field and address the challenges of protectionism and unilateralism.<sup>192</sup>

The Dutch Ministry of Foreign Affairs embraces the EC’s strategy, as explained in the BNC fiche, particularly its focus on modernising the WTO, including reforms of the Appellate Body, and its ambition to guarantee open and fair trade.

### 3.2.2 Socio-economic factors: income and welfare inequality and trade inequality

Several socio-economic factors have substantially influenced the development of trade and investment policy. Whereas EU citizens continue to largely support enhanced liberalisation of trade and investment in the institutional context of the WTO and the EU, including within the Netherlands,<sup>193</sup> there is widespread recognition that trade and investment liberalisation in itself do not automatically benefit all citizens, nor to the same extent. Consequently, mitigating the negative social effects of globalisation have influenced and become part of trade and investment policy.

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For example, increasing inequality worldwide has had a strong socio-economic influence on trade and investment policy.<sup>194</sup> Although the extent to which trade and investment liberalisation has affected inequality is a matter of debate, there is a widespread perception that the benefits of globalisation have not been shared equally.<sup>196</sup> This increasing inequality has fed into the debate to address the disruptive effects of globalisation and has led to concerns about growing inequalities from uneven income distribution, poor working

<sup>190</sup> EC (2021), pp. 8–9.

<sup>191</sup> The High Representative of the Union for Foreign Affairs and Security Policy.

<sup>192</sup> EC & HRVP (2020).

<sup>193</sup> For example, results from the Eurobarometer survey on international trade of 2019 identified that the majority of EU citizens (60%) believe they benefit from international trade. This was even higher for Dutch citizens, at almost 80%. Additionally, over 70% of EU citizens, and almost 90% of Dutch citizens believed that the EU was better able to defend their interests than member states could independently (Eurobarometer, 2019).

<sup>194</sup> Ecorys (2021).

<sup>195</sup> There is broad consensus that inequality in many developed countries has increased in recent years, but there is less consensus as far as inequality between countries is concerned. A perception that the benefits of globalisation are not equally shared has fed into broader discontent with globalisation and the fairness of the rules. This discontent goes beyond inequality, including concerns about tax avoidance by multinationals and a perceived lack of a level playing field under current rules for trade and investment, fearing social or environmental dumping, for example (Ecorys (2021)).

<sup>196</sup> Ecorys (2021).

conditions, tax avoidance and an unequal playing field, as well as a fear of social and environmental dumping.<sup>197</sup> These issues made their way into trade and investment policies, including the negotiation of new trade and investment agreements (for instance, into the Trade and Sustainable Development (TSD) chapters in free trade agreements (FTAs). Additionally, specific stakeholders have gained a stronger voice, such as civil society and consumer groups. Indeed, civil society has become a more prominent actor in the negotiation and implementation of the TSD chapters of the EU's FTAs.

Another topic that influenced trade and investment policy in the period under review is gender inequality and the role of women in trade. Whereas gender equality was initially addressed as a fundamental principle, it has now become a policy goal. For example, gender was not part of the EU's Trade for All Strategy in 2015, and trade was not included in the 2010–2015 Strategy for Equality between Women and Men.<sup>198</sup> However, the updated Gender Equality Strategy 2020–2025 does explicitly include gender equality as an objective of EU trade policy.<sup>199</sup> At the same time, simply mentioning gender equality is not enough to have an impact on trade and investment policy. In this context, Chapter 5 will discuss the extent to which gender equality is translated into policy when the EU is negotiating FTAs with third countries.

Both inequality and gender were priority topics for the ministers for Foreign Trade and Development Cooperation in the period under review, as spelled out by the policy notes of Minister Ploumen and Minister Kaag: *A world to gain* (2013) and *Investing in global prospects* (2018), respectively. Dutch trade and development policy has since focused on poverty reduction and reaching poor and vulnerable countries and groups, including women and girls.

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### 3.2.3 Business and technological developments

Another important development was the continued internationalisation and integration of business and technology. In the past decade, we have seen the start of the transition to a digital economy. Developments such as lower transport costs and innovations in ICT, e-commerce and logistics have advanced cross-border production, increased efficiency and fragmented global value chains even further. These developments directly affected trade and investment policy. Sometimes policymakers had to deal with highly specific and technical issues. Examples include digital trade and related privacy law issues or the protection of personal data, competition issues and tax implications. These developments also required new regulations to deal with the trade in goods and services that were previously non-existent or were not traded; to deal with increased risks of fragmented production;<sup>200</sup> and to deal with

<sup>197</sup> Ecorys (2021); EC (2021).

<sup>198</sup> Viilup (2015), as cited in Ecorys (2021).

<sup>199</sup> EUR-Lex (2020) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0152>, as cited in Ecorys (2021).

<sup>200</sup> For example, via production and processing standards.

investment arbitration. They also increased the importance of trade defence measures, the regulation of standards and the regulation of intellectual property rights.<sup>201</sup>

These developments affected trade and investment policy indirectly as well. For instance, the combination of increased fragmentation of value chains and enhanced insight on production and investment practices revealed unethical and unsustainable practices in supply chains.<sup>202</sup> Increased global social interconnectedness increased access to such information and hence increased public awareness. Opposition to agreements such as TTIP, CETA and TiSA was led by civil society and interests groups that were connected globally. This public awareness, in turn, increased the demand for the integration of responsible business conduct into trade and investment policy and beyond. In addition, digitalisation has required an effort to increase consumer protection. All of these developments call for a cross-border, multilateral approach, and an increasing role for organisations such as the EU and WTO.

EC communications after 2019 reflect the importance of these developments and the need for new regulations. They affirm that Europe's digital transformation requires policies on digital goods, the increased trade of (new) services, the protection of intellectual property and innovation.<sup>203</sup> Trade and investment policy related to digital developments should be shaped at the global level, according to the EC. It therefore aims for a rapid conclusion of an ambitious and comprehensive WTO agreement on digital trade.<sup>204</sup> The Dutch cabinet also identifies the need to take account of business and technological developments, stating in the BNC fiche: 'A point for consideration is the reform of trade policy to support the digital transition of trade and (digital) services'. The Netherlands supports the policy proposals of the EC, and stresses the need to take account of the interests of consumers and developing countries, as well as national security, privacy and fundamental rights.<sup>205</sup>

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The past two Dutch cabinets prioritised digital trade, because of its importance for the Dutch economy. Minister Kaag issued a policy paper on the topic in June 2019: the Digital Agenda.<sup>206</sup> In Chapter 7 on trade in services, we will come back to some of the challenges around the digitalisation of trade.

### 3.2.4 Environmental issues: climate change

Climate change and environmental degradation have increasingly affected trade and investment, and subsequently affected trade and investment policy. Public awareness of the environmental impact of trade and investment has grown over the reporting period, and the sustainability of free trade – leading to greenhouse gas emissions, pollution and the

<sup>201</sup> For more details, see Ecorys (2021).

<sup>202</sup> Note, however, that these developments may also positively influence trade and investment policy, for instance by reducing the need for standards and regulations in light of the enhanced use of block chain methods.

<sup>203</sup> EC (2021).

<sup>204</sup> EC (2021).

<sup>205</sup> BNC Working Party (2021). Internal document.

<sup>206</sup> MFA (2019). This was an extension of the Dutch digitisation strategy from 2018.

depletion of natural resources – has been questioned. Governments started promoting climate-resilient investments and procurement, especially in the areas of infrastructure, energy and transport. They started to introduce carbon pricing systems, and recently the EU even designed a carbon border adjustment mechanism, trying to prevent ‘carbon leakage’. Companies, meanwhile, are reassessing their assets (mitigating the risk of stranded assets). Some companies started reporting on their global footprints, the ‘true price’ of products and the ‘true costs of trade’, as well as on their adherence to international standards on responsible business conduct. Many companies now participate in international initiatives to fight climate change. Investors have started to work on ‘social and environmental impact investments’, and government and private sector investors have started greening their financial instruments.

Given the global nature of climate change, policy responses are often developed at the international and global levels. The Sustainable Development Goals (2015) and the Paris Agreement (2015) helped shape the international policy debate. Indeed, strict climate policies in one country have little effect if insufficient international measures are taken to reduce carbon emissions. Environmental dumping has also been a concern in trade discussions. Trade agreements could provide a platform for addressing such environmental issues.<sup>207</sup>

These issues have clearly had an effect on trade and investment policy, as demonstrated by mitigating policies, trade and investment standards and trade defence measures (e.g. related to environmental dumping and carbon tariffs). EU free trade agreements have started to include chapters on TSD, including clauses on responsible business conduct and environmental sustainability. Some trade agreements specifically refer to climate change and parties’ commitments in the context of the UNFCCC.<sup>208</sup> The EU Trade Policy Review (2021) highlights climate change and a green transition of the economy as one of the priorities of our time.<sup>209</sup>

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Climate change, sustainable development and responsible business conduct have been among the top priorities for the Dutch cabinet since 2013, and for the ministers for Foreign Trade and Development Cooperation in particular. The Netherlands presents itself as a leader in these fields, with high ambitions nationally and internationally. The ministry has also strongly promoted the inclusion of sustainable development chapters in free trade agreements. Chapter 5 will elaborate on this topic.

<sup>207</sup> Ecorys (2021). After the period under review, the EU developed a legislative proposal on a carbon border adjustment mechanism. Environmental dumping is the practice of transporting waste to another country.

<sup>208</sup> Ecorys (2021). UNFCCC is the United Nations Framework Convention on Climate Change. Other relevant international frameworks impacting trade and investment policies include the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (2011) and the UN Sustainable Development Goals (which are part of the 2030 Agenda for Sustainable Development, 2015).

<sup>209</sup> EC (2021). ‘The acceleration of climate change, together with biodiversity loss and environmental degradation, paired with tangible examples of their devastating effects have led to the recognition of the green transition as the defining objective of our time’, it states.

### 3.3 Conclusion

The developments, issues and factors addressed in this chapter and the different effects and ways in which they influence trade and investment policy are rich and diverse. 'An observer of trade and investment policy could hardly have felt bored in recent times', as Ecorys concluded in their report for this study.<sup>210</sup>

This chapter has shown the complexity that policymakers face in the design, implementation and enforcement of trade and investment policy. These developments and their effects need to be taken into account on a continuous basis. They need to address the ways in which they affect trade and investment, and identify how they affect the national and international context and different stakeholders. Policymakers need to adjust policies to changing circumstances, balancing the interests of different stakeholders and serving their own strategic goals.

<sup>210</sup> Ecorys (2021).



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## Trade defence instruments

## 4.1 Introduction

Trade defence instruments (TDIs) can be used by importing countries to respond directly to alleged *unfair* trade practices of individual third-party exporters (the distortion of competition by the third party caused by dumping or actionable subsidies), via anti-dumping (AD) or anti-subsidy (AS) measures. Additionally, TDIs can be used against *fair* trade, via so-called safeguard measures, to provide the domestic industry temporary relief in case of an unforeseen, sharp and sudden influx of competing foreign goods. Most TDI measures come in the form of higher tariffs on the offending exporter or product in order to ‘restore’ the competitive status quo, or as price undertakings in the case of anti-dumping.

As a member of the EU and the WTO, Dutch trade defence policy is by and large formed and constrained by the institutional setting, rules and jurisprudence of the EU and the WTO agreements and relevant dispute settlement rulings.<sup>211</sup>

Trade defence policy and multilateral rules in this area provide a valuable instrument to achieve the overarching Dutch policy goals of trade and investment policy. This instrument is particularly relevant to the Dutch objective of participating in and promoting a multilateral rules-based trade and investment system, with a level playing field. Establishing a level playing field implies applying TDIs when necessary, while combatting the abuse of TDIs. It is important to note the double-edged sword of these instruments. The use of TDIs comes at the expense of other EU stakeholders, such as consumers, importers and processors. Therefore, applying trade measures requires their optimal use, taking into account all EU interests.

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This chapter reviews Dutch trade defence policy, building on the background study conducted by Ecorys,<sup>212</sup> and includes an analysis of the Dutch positions and objectives, interventions undertaken and the extent to which Dutch interventions contributed to achieving Dutch trade defence policy goals.<sup>213</sup> Central to the review are the interventions undertaken in the context of the reform of the EU’s trade defence mechanism, especially in response to the anticipated altering position of China to the status of a market economy, as committed to in the 2001 WTO Accession Protocol.<sup>214</sup> To provide further depth to the review, Dutch interventions are assessed for two goods considered of special interest to the Netherlands: electric bicycles and biodiesel. Annex 4 provides additional information and explanation.<sup>215</sup>

<sup>211</sup> See Annex 4 for a more elaborate description of trade defence measures and the institutional setting in which they are applied.

<sup>212</sup> Ecorys (2021), chapter 6, pp. 114–133.

<sup>213</sup> See chapter 1 for an explanation of the approach used in this evaluation to analyse policy success.

<sup>214</sup> China acceded the WTO on 10 November 2001 based on the Accession Protocol. Under Article 15 (d) of the Accession Protocol, China agreed to be treated as non-market economy for the period of 15 years. This would expire in 2016, after which China would be treated as a market economy, which had consequences for the calculation of AD measures. The matter will be discussed in more detail in Section 4.2.1. Also see Ecorys (2021), chapter 6, p. 122 for more details on China and the WTO.

<sup>215</sup> Annex 4, as mentioned earlier, provides an elaborate overview of the WTO and EU legal contexts; of regulations and procedural practices of implementation in the EU system; and key developments of trade defence policy.

## 4.2 The Dutch position on trade defence policy

The Netherlands has always taken a liberal approach to trade and has been reluctant to use TDIs.<sup>216</sup> In fact, within the EU, the Netherlands has often taken the most liberal position of all member states because of the risk of potential abuse of AD measures and the negative effect on user industries and consumers.<sup>217</sup> A number of factors further motivate this stance.

First, the Dutch position is heavily influenced by the context of its economy and the type of trade. As an open economy, geographically conveniently located with the infrastructural capacity to serve as a European logistical hub, international trade is the cornerstone of the Dutch economy.<sup>218</sup> Dutch exports are characterised by re-exports and the export of processed goods with complex value chains that use imported intermediate inputs. The Netherlands has fewer import-competing manufacturing industries than most larger or more protectionist EU member states. The goods produced in the Netherlands generally have less value added,<sup>219</sup> and benefit from open trade and cheaper sourced inputs. TDIs generally do not protect an import-competing Dutch industry and therefore harm the Dutch economy and consumers.

Second, the Netherlands believes that trade defensive measures, when invoked, must serve the interests of various stakeholders, including producers, industrial users (importers, processors and re-exporters), employers, workers and consumers in a balanced<sup>220</sup> manner.<sup>221</sup> To do so, the Netherlands has always taken a reluctant stance; TDIs must be used only to restore a distorted playing field and should not become unnecessarily protectionist and permanently shield non-competitive industries.<sup>222</sup>

Third, the Dutch position stipulates the Netherlands' objective of maintaining good relations with non-EU WTO members and other trade partners. Abusive protectionist trade defence measures by the EU risk retaliatory measures against our exporters that may escalate in a tit-for-tat trade war and sour mutually beneficial trade relations with trade partners affected by the EU measures.<sup>223</sup>

To contribute to Dutch trade, while protecting the interests of Dutch stakeholders and maintaining good relations with trade partners, Dutch interventions have specifically aimed to contribute to the EU's TDI policymaking and the implementation of this policy: restrain

<sup>216</sup> Interview with EC Deputy Director, held on 25 March 2020; Interviews with MFA policy officers, held on 16 and 17 April 2020.

<sup>217</sup> Interview with policy officer at MFA, held on 16 April 2020.

<sup>218</sup> See Chapter 1 of this report.

<sup>219</sup> For example, in 2018, the added value of Dutch exports amounted to 40 cents per euro (CBS (2019).

<sup>220</sup> The so-called Union interest test: the analysis to determine the appreciation of all the interests taken as a whole, including the interests of the domestic industry and users and consumers, systematically applied in TDI investigations. Article 21 of the Basic Anti-Dumping Regulation; Article 31 of the Basic Anti-Subsidy Regulation. For more details, see Annex 4 and the TDI case study of Ecorys (2021).

<sup>221</sup> Permanent Representation to the EU (2020).

<sup>222</sup> Tweede Kamer, vergaderjaar 2015–2016, 21 501-02, nr. 1615.

<sup>223</sup> E.g. in IRHP 2016-34b TPC Handleiding Ldn 28-10-2016.

(overly) protectionist measures; address imbalances and market imperfections; and hold the European Commission accountable for the design and implementation of TDI policy.<sup>224</sup>

#### 4.2.1 EU reform of trade defence instruments

An important development in trade defence policy has been the reform of the EU trade defence instruments, known as the ‘TDI modernisation’.<sup>225</sup> Attempts to modernise the EU trade defence system date back to 2008, but it would take another 10 years for the reforms to be finally adopted by the EU Council and the EP. The TDI modernisation entered into force in June 2018.<sup>226</sup> Negotiations on adjusting calculations of the anti-dumping margins, for which the new regulation entered into force December 2017, took place in parallel with the TDI modernisation.<sup>227</sup> In this chapter, the two reforms will be discussed together.

In April 2013, the EC put forward a proposal to reform the EU’s TDIs, to enhance the transparency and predictability of investigations, to increase the effectiveness and enforcement of anti-dumping and anti-subsidy measures, and to deal more efficiently with the threat of retaliation.<sup>228, 229</sup>

Several components of the April 2013 proposal, however, created substantial disagreement between member states, causing the negotiations to last for several years. It was the reform of the ‘lesser duty rule’ (LDR) in particular that caused disagreement. The LDR is used when calculating the anti-dumping margin on imported goods in case the EC establishes that a dumping practice has occurred for a specific imported good.<sup>230</sup> Box 4.1 below provides an example of the application of the LDR.

<sup>224</sup> Observation obtained from interviews with various MFA policy officers (e.g. interviews held on 8 July 2019, and 16 and 17 April 2020) and various documents, including letters to parliament and reports from EU meetings (see e.g. KST 21501-02, 2016; MFA (2016); and IRHP 2016-34b TPC Handleiding Ldn 28-10-2016).

<sup>225</sup> See Annex 4 for an elaborate discussion on this reform.

<sup>226</sup> Regulation (EU) 2018/825 of the European Parliament and of the Council of 30 May 2018 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union, OJ L 143, 7 June 2018, p. 1.

<sup>227</sup> Regulation (EU) No 2017/2321 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union [2017] OJ L 338 of 19.12.2017.

<sup>228</sup> EPRS (2018). See Annex 4 for a comprehensive overview of the substance and process of the TDI modernisation.

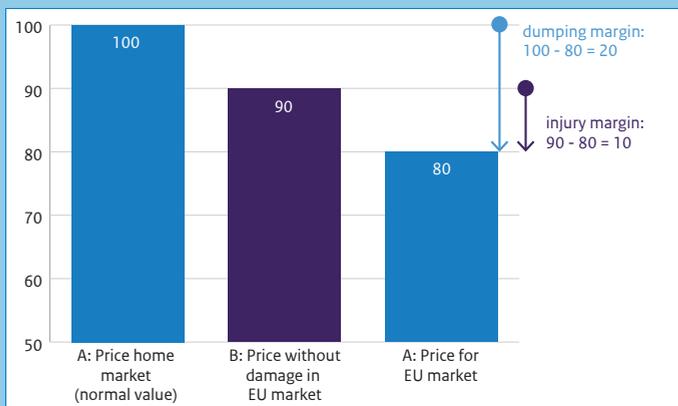
<sup>229</sup> The reform was intended to enhance the transparency and predictability of investigations and increase the effectiveness and enforcement of AD/AS measures.

<sup>230</sup> Establishing that a dumping practice has occurred is established through an investigation carried out by the EC, after a complaint is filed by the affected EU industry, or (in less than 1 percent of the cases) after the EC initiates a procedure ex officio. See Annex 4 for an overview of the steps in this process.

**Box 4.1** Calculating anti-dumping duties under the LDR<sup>231</sup>

A third-country producer sells its product in its home market at a price of EUR 100 (price A in the figure below). This price is known as the *normal value*, commonly based on the cost of production plus a reasonable profit. The third-country producer also exports its product to the EU but sells it at a lower price, at EUR 80 (price C). When this occurs, the EU industry may file a complaint (because it cannot compete with the low price of the exporter). After investigation, the EC may indeed find that a dumping practice occurred.

Under WTO law, when determining the size of the duty, the duty may at most be equal to the ‘dumping margin’: the normal value (price A) minus the selling price in the EU market (price C), or EUR 20 in our example.



The lesser duty rule, however, implies that the AD duty must be based on the dumping margin, *unless* a lower duty would suffice to remove the injury to the EU industry. This rate is known as the ‘injury margin’ and calculated as the difference between the exporter’s price in the EU market (price C), and the price of EU producers (to be calculated). The actual injury incurred by EU producers is based on an estimated selling price, one where there is no damage for the EU industry. In our example, the injury margin is calculated at EUR 10: EU producers would already avoid injury if the third-country exporter sells its product for EUR 90 (price B). Therefore, under the LDR, setting a duty that suffices for EU producers to be injury free, would require a duty of EUR 10.

The purpose of the LDR is clearly illustrated in the above example: duties are set at the lowest necessary level to restore the level playing field while minimising the hindrance to trade.

<sup>231</sup> Based on information provided in: Tweede Kamer, vergaderjaar 2015–2016, 21 501-02, nr. 1615.

Under the pre-2017 regulation, with China being a non-MES in China's WTO Accession Protocol, Chinese exports were subject to the non-market economy (NME) methodology for calculating AD duties. Chinese home market prices were not considered to be representative, market-driven prices, so calculations of the normal value were based on the costs of other 'appropriate' third-country exporters (e.g. the US, Australia or Canada). These calculations often generated a relatively high price for Chinese production costs.

The 2013 EC proposal included non-application of the LDR. Non-application of the LDR was particularly important when it came to Chinese products. This was connected to China's high level of steel production (causing global overcapacities) and was in anticipation of the changes resulting from China's WTO Accession Protocol and the expiry of the alternative methodologies contained in the protocol by December 2016,<sup>232</sup> which would no longer allow the EU to use alternative LDR calculations. The decision on what to do with China's market economy status and how to integrate this into the reforms is discussed in Box 4.2 below.

**Box 4.2** *The lesser duty rule and new AD calculations*<sup>233, 234</sup>

In anticipation of China obtaining market economy status (MES) in December 2016, four options were put on the table in the modernisation negotiations:<sup>233</sup>

1. Unconditionally grant China MES;
2. Decide on MES on a case-by-case basis;
3. Change the EU's methodology to allow the EU to treat China differently in AD cases; or
4. Grant China MES and continue to apply the existing methodology.

In May 2016, France and Germany proposed to solve the issue of China's MES by a reform of the TDI legislation in a WTO compatible manner (option 3).<sup>234</sup> The new methodology allowed alternative calculations of anti-dumping margins on imports from third countries where significant market distortions have been found.

In late 2016, member states finally agreed on the reform of TDIs, including amendments to the LDR. The EC will no longer apply the LDR in two situations: (1) in case of systemic raw materials distortions<sup>235</sup> in the exporting country (see also Box 4.2) and (2) in case the countervailing subsidies granted by third countries are distortive to trade.<sup>236</sup>

<sup>232</sup> Van Bael and Bellis (2017), pp. 1-2.

<sup>233</sup> De Ville (2019).

<sup>234</sup> Ibid.

<sup>235</sup> 'Structural distortions' related to state-induced raw material distortions (e.g. dual pricing or export taxes), which create an unwarranted competitive advantage to the exporting company in the EU market, Van Bael & Bellis (2017). Van Bael & Bellis (2017), pp. 1-2.

<sup>236</sup> Ecorys (2021), chapter 6, p. 120.

The EC may decide not to apply the LDR if this is in ‘the Union’s interest’ and if it can waive it for companies considered non-cooperating.<sup>237</sup>

In general, the Netherlands favoured the EC’s initiative to reform the EU TDI mechanism. It believed several components of the proposed reforms would enhance the efficiency and effectiveness of the system and would promote a more level playing field. Nevertheless, on some proposed reforms the Dutch position deviated from or opposed the EC’s proposal.

On the most specific feature of the reforms, the LDR, the Netherlands was highly critical. The Netherlands has continuously voiced its position in favour of the use of the LDR in EU meetings. Fully retaining the LDR in its initial form was essential for the Netherlands.<sup>238</sup> On this matter, the Netherlands took a firm stance against alteration of the use of the LDR. Dutch policy documents in the early years since 2013 even identify this element of the EC’s proposal as a ‘breaking point’ in the reform process,<sup>239</sup> because even ‘partial abolition of the LDR does not lead to modernisation of the TDIs, but to reinforced protectionism’.<sup>240</sup> The Netherlands demanded more transparency and an explanation on the extent of use of non-application of the LDR (and under which circumstances), and the execution of impact assessments to substantiate the reform. For example, TPC talking points of April 2016 state: ‘If we were ever to change the LDR, we would need more information regarding why we need to change it and what the effects and costs would be... We have been asking for this information since 2013 and have yet to receive it. Without this information, we cannot have a proper discussion with our stakeholders, [who] have to deal with the consequences of this change in practice’.<sup>241</sup>

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Among the other most prominent elements negotiated under the TDI reform, the Dutch position focused on: (1) support to the EC’s proposal to maintain the investigation period of AD procedures to protect the quality of investigation;<sup>242</sup> (2) a more lengthy/full-fledged ‘shipping clause’;<sup>243</sup> (3) enhanced (timely) information provided to affected parties; and (4) increased transparency in TDI procedures for stakeholders, including businesses and member states.<sup>244, 245</sup>

<sup>237</sup> Ibid.

<sup>238</sup> IRHP 2014-035b TPC Handleiding Plv. 04-07-2014.

<sup>239</sup> E.g. IRHP 2014-046b TPC Handleiding LDN 3 October 2014.

<sup>240</sup> IRHP 2014-035b TPC Handleiding Plv. 04-07-2014.

<sup>241</sup> IRHP 2016-34b TPC Handleiding Leden 28 October 2016, Pos. 237.

<sup>242</sup> The Netherlands supported the EC to maintain the existing investigation period of maximum nine months (instead of seven as proposed by other member states) to the provisional measure and respectively a maximum of 13 and 15 months to the definitive measure.

<sup>243</sup> The ‘shipping clause’, and complementary pre-disclosure clause, aimed to provide more predictability, especially for importers. The clause covers the effective shipment time from the countries of origin, providing and exclusion of products from a preliminary defence measure if goods are already ‘on the water’. The Netherlands advocated for a full-fledged shipping clause with a time period of at least four weeks (see, for instance, IRHP 2014-035b TPC Hand Plv 04-07-2014).

<sup>244</sup> Tweede Kamer, vergaderjaar 2015-2016, 21 501-02, nr. 1615.

<sup>245</sup> See Annex 4 for a more comprehensive discussion of the TDI reform.

In addition to expressing the need to avoid overly protective measures in the interest of Dutch industry in the TPC, this position was also expressed in the Working Party on Trade Questions (WPTQ), the Trade Defence Instruments Committee (TDC), and in high-level meetings. For example, the Minister of BHOS frequently represented the interests of Dutch steel importers in the FAC on Trade, addressing the imbalance of protecting EU steel producers but thereby neglecting the interests of EU steel importers and users.<sup>246</sup>

Dutch interventions show a slow change in terms of the Netherlands' negotiation position over time, from efforts that express a firm negotiation position, particularly an unwillingness to compromise on the use of the LDR in its existing form, towards eventually willing to compromise. This is illustrated by TPC reports, for example.<sup>247</sup> In TPC meetings, the Netherlands expressed the same, firm position for three and a half years: 'The Netherlands is in favour of fully [retaining] the LDR in its initial form'. A somewhat altered position was eventually taken by October 2016. TPC reports since late 2016 identify a more flexible approach, stating that the Netherlands was willing to help reach a compromise on the LDR (under certain conditions).<sup>248</sup> While the altering position can be explained as part of negotiation tactics, several external developments also contributed to this.

Important external developments included global overcapacity in several raw material industries (including steel), especially accumulating in China (2015), developments towards protectionist trade policies of large players in world trade (e.g. China and the US),<sup>249</sup> and the debate about maintaining the Chinese non-market economy status (2016) notwithstanding the commitments in the 2001 WTO Accession Protocol of China.<sup>250</sup> Interviewees further identified the pressure exerted by Dutch Parliament, demanding an altered position due to the above-mentioned developments, particularly those in China (specifically the state-interfering trade distortions) and the repercussions of the aggressive US trade policy under the Trump administration on third countries, including the EU. Interviewees stated that when there is no longer confidence that the largest players on the world stage will uphold international rules or act in the spirit of the game, the Dutch objective to continuously hold on to the spirit of free trade would become unsustainable.<sup>251</sup>

The change in the Dutch stance followed furthermore with input from the PR EU. In late 2016, when negotiations gained momentum and quickly progressed, the PR signalled that continuing to hold on to the firm Dutch position would not be fruitful and would place the Netherlands on the sidelines in the TDI negotiations.<sup>252</sup> It was deemed to be more effective to

<sup>246</sup> Interview with MFA policy officer, held on 16 April 2020.

<sup>247</sup> IRHP 2014-027c TPC Verslag Ldn 23-05-2014 to IRHP 2017-34c TPC Verslag Leden 24-11-2017.

<sup>248</sup> The conditions mentioned, for example in TPC Guidelines, included the willingness to accept adjustments to the LDR: only in AD cases, with raw materials composing at least 40% of the production costs, provided that a shipping clause of at least four weeks is included and following intense discussions of the adjustment (source: IRHP 2017-32b Handleiding TPC Ldn 27-10-2017, Pos. 512-531; IRHP 2017-14b Handleiding Ldn 28-04-2017, Pos. 178-179).

<sup>249</sup> See also Chapter 3.

<sup>250</sup> See Annex 4 for more details.

<sup>251</sup> Interviews with MFA policy officers, held on 8 July 2019 and 16 April 2020.

<sup>252</sup> Interview with MFA policy officer, held on 18 February 2020.

engage and adopt a more pragmatic approach (see also Section 4.3). Although this pragmatic approach was eventually taken to regain a position in negotiations, the firm stance lasted a long time. Even if the initial firm stance was part of the negotiation tactic, taking a firm stance for a long time may signal that you are not willing to engage in discussions – and may create the risk of being placed on the sidelines. Given that negotiations suddenly developed quickly, the PR EU advised to signal to other member states that the Netherlands was indeed open to negotiate. The Dutch approach would have benefitted from showing openness to compromise in TPC meetings and from considering trade-offs sooner.

The Netherlands found support for its position on the LDR primarily from countries that are traditionally more liberal when it comes to trade (such as the UK and Nordic countries).<sup>253</sup> In addition to fearing over-protective measures, these countries saw the LDR as something the EU could take pride in, since it had the effect of de-escalating trade disputes by obliging the EU to restrain itself when imposing duties.<sup>254</sup> Dutch representatives collaborated with various like-minded member states – in formal and informal (bilateral) contacts – to find common ground, and speak with one voice in the TDI reform process in the relevant working groups and committees. Forming a blocking minority in the Council, the Netherlands and like-minded member states argued against amendments to the LDR and in favour of a full-fledged shipping clause and a shorter investigation time in AD and AS procedures as proposed by the Commission.<sup>255</sup> Moreover, in 2017, Dutch representatives cooperated with other like-minded member states, which resulted in a non-paper, to press the EC to provide more information on the impact of the TDI reform.<sup>256</sup> The Netherlands was mentioned as the most vocal of the liberal group (together with Sweden) in this process.<sup>257</sup> In contrast, southern member states, particularly Mediterranean countries such as France, Italy, and Spain, pushed the Commission to further strengthen the EU trade defence tools, to have ‘greater firepower’ in its AD arsenal.<sup>258</sup> While the Netherlands mainly interacted with like-minded member states, it was invited to an informal meeting with several member states, chaired by Germany and France, to find ‘common ground’ on TDI reform.

In addition to coalition-building, Dutch policymakers and diplomats also had frequent (often informal) contact with the EC and Dutch EC diplomats. Influencing policy formulation through direct contact with the EC (including the European Commissioner for Trade) became more important in this area since the Lisbon Treaty of 2007 went into force.<sup>259</sup> Informal contact with EC diplomats with a Dutch nationality were also used to lobby for

<sup>253</sup> In policy documents from 2014, like-minded countries identified in the context of the LDR included Austria, Belgium (although it would leave the group later on), Cyprus, Czech Republic, Denmark, Estonia, Finland, Ireland, Latvia, Malta, Slovenia, Sweden and the UK. The group decreased somewhat in size over time.

<sup>254</sup> Koeth (2018).

<sup>255</sup> IRHP 2014-035b TPC Handleiding Plv. 4-07-2014.

<sup>256</sup> IRHP 2016-34b TPC Handleiding Leden 28 October 2016.

<sup>257</sup> Interviews with MFA policy officers, held on 8 July 2019.

<sup>258</sup> Ibid.

<sup>259</sup> The Lisbon Treaty enhanced the role of the EC by applying comitology procedures in the implementation of specific and temporary AD and AS measures, reversing the original requirement of having qualified majority voting (QMV) to adopt a measure proposed by the Commission to having QMV to block a proposal. See also Ecorys (2021) for more information on the Lisbon Treaty.

Dutch priorities in TDI policymaking. However, policy officers at IMH and the PR EU experienced difficulties in influencing these EC diplomats, because their first loyalty was to the EC position. Furthermore, unlike Italy or France, for instance, the Netherlands hardly seconds national experts to the trade defence unit to promote Dutch policy objectives and contribute to EC policy.

Finally, there were other, less frequent or one-off interventions. An example is the use of the Dutch EU presidency in 2016 as a tool to push for further agreement on TDI reform, focusing on finding a compromise in the Council on the length of the investigation period in an AD procedure. Whereas it had initially argued in favour of the EC's proposal to maintain the investigation period of AD procedures, during the EC presidency the Netherlands accepted the compromise to shorten the period, on condition that the quality of the investigation would be maintained and sufficient proof would be provided to substantiate the measure.<sup>260</sup>

#### 4.2.2 Biodiesel

In addition to modernising the TDI, the Netherlands also actively advocated its policy position in several specific cases for products deemed of special interest to the Netherlands. The first one concerns TDI measures for biodiesel imports.

In early 2010, Argentina and Indonesia emerged as the first and second largest foreign biodiesel suppliers to the EU.<sup>261</sup> In 2012, the European Biodiesel Board filed a complaint on behalf of EU biodiesel producers, accusing Argentinian and Indonesian biodiesel exporters of dumping. Following investigations and provisional AD duties, the European Commission imposed definitive AD duties by November 2013. However, the measures were challenged by the affected Indonesian companies in the EU courts and by the Indonesian and Argentinian governments in the WTO Dispute Settlement Body (DSB). The rulings from the General Court of the EU,<sup>262</sup> two panel reports of the WTO DSB<sup>263</sup> and an Appellate Body report<sup>264</sup> found fault with the EC's calculations – specifically that there were flaws regarding the calculations of the cost of production in constructing the normal value, as well as the underlying evidence on price cutting and the alleged causal link to substantiate the AD measures.<sup>265</sup> Following the court rulings, reinvestigations by the EC concluded that no genuine and substantial causal relationship between the dumped imports and the material injury to the Union industry

<sup>260</sup> MFA (2016).

<sup>261</sup> USDA Foreign Agricultural Service, 2019: 33, as cited in Ecorys (2021), Chapter 6, p. 126.

<sup>262</sup> General Court of the EU (2016). 'Case T-80/14 ECLI:EU:T:2016:504', 'Case T-111/14 ECLI:EU:T:2016:505', 'Case T-120/14 ECLI:EU:T:2016:501', 'Case T-121/14 ECLI:EU:T:2016:500' and 'Case 139/14 ECLI:EU:T:2016:499'.

<sup>263</sup> WTO (2016a). 'European Union – Anti-Dumping Measures on Biodiesel from Argentina'. Panel Report WT/DS473/R and Add.1, as modified by Appellate Body Report WT/DS473/AB/R; WTO (2018). 'European Union – Anti-Dumping Measures on Biodiesel from Indonesia'. Panel Report WT/DS480/R and Add.1.

<sup>264</sup> WTO (2016b). European Union – Anti-Dumping Measures on Biodiesel from Argentina, Appellate Body Report WT/DS473/AB/R and Add.1.

<sup>265</sup> Ecorys (2021), Chapter 6, pp. 114-133.

could be established.<sup>266</sup> The AD duties were lifted and proceedings were terminated in the autumn of 2018.

However, a new round of accusations from the EU industry emerged in October 2018, this time regarding alleged trade-distorting subsidies. Furthermore, this time the investigation period covered the period from 1 October 2017 to 30 September 2018 for Indonesia and the year 2017 for Argentina.<sup>267</sup> The EU imposed definitive countervailing duties on biodiesel imports from Argentina in February 2019 and on Indonesian biodiesel in November 2019. Additionally, for Argentinian biodiesel, the EC also decided to establish a minimum import price and impose a limit on volume. Affected Indonesian companies filed complaints against the EC decision at the EU General Court in 2020. Proceedings are still ongoing.

In the biodiesel case, the Netherlands took a liberal stance and voted against the adoption of the anti-dumping measures in 2013. This was motivated by the general liberal stance of the Netherlands and its reluctance to use TDIs driven by protectionist intent. In this case, it involves, in particular, the need for the EC to present adequate calculations of the AD margin.<sup>268</sup> The negative stance also aimed to protect the balance of interest of different (Dutch) stakeholders. The Netherlands argued that it considered the interests of consumers (who would be disadvantaged by rising prices), importers and processors as well as the interests of related businesses, such as the Port of Rotterdam (which serves as a transshipment port for much of the biodiesel to the hinterland).<sup>269</sup> Moreover, the Netherlands argued that the measures would negatively affect trade relations, including retaliations (including import restrictions on other Dutch products on the Indonesian market) and the bilateral Dutch-Indonesian cooperation on palm oil, where, together with civil society, it was working to enhance the sustainability of palm oil-based value chains.<sup>270</sup> The anticipated negative effect in terms of losses in the EU market as a result of trade defence measures on the sustainability efforts in the Indonesian palm oil industry further highlights the incoherence of the TDIs in the context of Dutch international responsible business conduct policy. Also, following the court rulings and DSB reports, the Netherlands still did not favour the use of AD measures and abstained from voting.<sup>271</sup>

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The Dutch position was somewhat different regarding anti-subsidiary measures in 2018. The Netherlands was willing to accept the AS measure but was highly critical about the procedures that were followed and the calculations underlying the measure. It demanded that the EC's calculations would be clear and transparent.<sup>272</sup>

<sup>266</sup> Ibid.

<sup>267</sup> Ibid.

<sup>268</sup> The EC calculations of the AD measures were based on a comparison of the cost price (rather than the market price on the Indonesian and Argentinian market, which would have been higher) versus the export price on the EU market.

<sup>269</sup> MFA (2013); MFA (2019).

<sup>270</sup> MFA (2019).

<sup>271</sup> Verslag TDC 24-04-2018.

<sup>272</sup> MFA (2013); MFA (2019); interviews with MFA policy officers held on 16 and 17 April 2020.

The desk study and interviews reveal the vocal and critical stance taken by the Netherlands in different EU meetings (e.g. the TDC and the WPTQ). For example, during TDC meetings, the Netherlands questioned various aspects of the EC's investigations and calculations, including the EC's decision in 2013 to use AD duties rather than AS duties, whether calculations regarding dumping margins conformed to WTO regulations, and research on the sales prices of EU producers.<sup>273</sup> The Netherlands, as well as several other member states, also voiced their criticism of the Commission's lack of transparency in communications.<sup>274</sup>

Dutch efforts further consisted of bilateral interventions with Argentina and Indonesia. At various levels, Dutch policy officers and diplomats aimed to maintain bilateral relations with these countries against the background of the biodiesel case. Documents identify the strategic diplomatic approach taken, where at times the Netherlands continued to maintain contact with ambassadors of the respective countries, but also decided specifically not to discuss the issue to avoid negatively affecting the Netherlands' bilateral relation or the ongoing EU process.<sup>275</sup>

Active collaboration was also observed in internal communication; there was frequent contact between policy officers at IMH, the Sustainable Economic Development Department (DDE) and PR EU to keep each other up to date (e.g. on the meetings, the votes and the status quo at the EU and WTO levels). In addition, these actors interacted to obtain (technical) knowledge, to fine-tune the Dutch position, to enhance the negotiation capacity and to represent the different interests of Dutch stakeholders. For example, in TDC meetings, policy officers engaged with different Dutch stakeholders, including Dutch biodiesel producers and the knowledge platform 'CSR Netherlands'.<sup>276</sup>

### 4.2.3 E-bikes

Another example in which the Netherlands tried to pursue its policy position in a particularly active manner is the antidumping measures against electric bicycles ('e-bikes'). Whereas in the case of biodiesel, on balance, Dutch interests were clearly against the use of TDIs (and thus easily aligned with the general Dutch position on TDIs), the e-bikes issue was characterised by conflicting interests of certain domestic bicycles producers and consumers.

Bicycle imports originating from China have significantly increased over time, and e-bikes are an increasingly large share of these imports. At its height in 2016, Chinese imports reached almost one million e-bikes, representing 78% of all e-bikes imported into the EU.<sup>277</sup> These trends have caused repeated political battles at the EU level, when defending the interests of

<sup>273</sup> Ibid.

<sup>274</sup> IRHP 2018-06c TPC Verslag Plv 16-02-2018, Pos. 31-32

<sup>275</sup> For example, internal correspondence in September 2017 addressed the advice to the Minister of BHOS to not (yet) contact the Indonesian ambassador, as voting on the biodiesel case for Indonesia had not yet occurred at the EU level.

<sup>276</sup> Various documents of internal correspondence.

<sup>277</sup> Eurostat, undated, as cited by Bike-eu.com (2017). See also Ecorys, 2021, Chapter 6, p. 132, Figure 11 for an overview of prominent exporters of e-bikes into the EU.

the different EU stakeholders. On the one hand, there are EU stakeholders that benefit from Chinese e-bikes (e.g. importers and consumers, who benefit from the competitive price) and, on the other hand, EU stakeholders harmed by the low-priced Chinese e-bikes, particularly EU producers of e-bikes.

In 2017, the European Bicycle Manufacturers Association – a representative body of the European bike industry – filed two complaints, calling for investigation of Chinese imports of e-bikes.<sup>278</sup> The EC conducted an anti-dumping and, subsequently, an anti-subsidy investigation for the period from 1 October 2016 to 30 September 2017 and concluded that Chinese e-bike exporters had benefited from Chinese state subsidies. Following temporary measures, in 2019, the EC imposed both definitive anti-dumping and anti-subsidy duties on e-bikes imported from China.<sup>279</sup>

The Netherlands is one of the EU member states with the largest number of e-bike producers (finished and component producers), but also depends heavily on Asian, and particularly Chinese imports (full bikes and components for assembly). In line with its general position on TDIs, the Netherlands advocated against the use of TDIs on imported e-bikes. For example, on several occasions, the Netherlands addressed the EC's lack of evidence to substantiate the claims of unfair dumping practices by Chinese exporters.<sup>280</sup> However, acknowledging the difficult situation (recognising the evidence of overcapacity as a result of state influence in the Chinese economy that allowed it to sell e-bikes in the EU below cost price, yet also calling the proposed measures too extensive), in 2018 the Netherlands decided to abstain from voting on the preliminary measures in the e-bike case.

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### 4.3 Extent of policy success

Overall, this policy domain at the EU level has seen a shift towards more protectionism and forceful application of trade defence measures. There are several reasons for this trend in the EU:<sup>281</sup> (1) the change in decision-making procedures giving more power to the EC and offering more openings for complaints by import-competing industries; (2) the growing impact of Chinese competition and continuing state influence in the Chinese economy, especially in raw material industries characterised by oversupply; (3) the catching-up response to more aggressive use of TDIs by trading partners, in particular the US; (4) a revival of industrial strategies supporting national champions and the reshoring of certain industries. Over the last decade, the Netherlands as a trading nation has been leaning into a stronger protectionist headwind within EU policymaking, while the balance between liberal and more protectionist member states is shifting, especially after Brexit. Nevertheless, we can state that Dutch policy efforts have contributed to several policy results at the EU level under the existing rules of the game in this domain.

<sup>278</sup> Ecorys (2021), Chapter 6, pp. 114-133.

<sup>279</sup> Bike-eu.com (2019).

<sup>280</sup> Interview with policy officer at MFA, held on 17 April 2020.

<sup>281</sup> Aspects also discussed in Chapter 3 of this report, as well as in the report of Ecorys (2021).

First, an important policy achievement – preserving the spirit of the LDR, albeit with some adjustments – was the result of the joint efforts of liberal-minded member states with an active role for the Netherlands. Interviews confirmed that continued Dutch participation in various EU bodies (individually and as part of the like-minded group) to challenge the proposed reform of the LDR, and particularly to demand more fact-based evidence, played an important role in countering the demands of member states in favour of (or even going beyond) the initial proposal. In the adopted reforms of the EU's trade defence rules, the essence of the LDR was maintained and the initially proposed change eventually only endorsed in certain, limited circumstances.

Also, EC representatives underscore the active and critical approach of the Netherlands in negotiations, identifying also the general constructive and informed tenor of the Netherlands in meetings, stating that the interventions of the Netherlands (and other member states as well) have resulted in fruitful discussions and benefited the outcome of the reform process.<sup>282</sup>

However, the evidence from interviews and desk research also shows that the path to these results has not been a straight line. An important lesson here is that taking a firm stance for a long period of time may not always be fruitful, especially when sudden, unexpected progress is made.<sup>283</sup> Whereas taking a firm initial stance can be used as a negotiation technique, the firm stance in this case lasted long,<sup>284</sup> and carried the risk that the Netherlands would place itself on the sidelines, because other member states may have taken this stance as a sign that negotiating was not possible. One interviewee expressed the sentiment that the Netherlands was always one step behind, unable to respond quickly to the evolving situation within the EU decision-making process.<sup>285</sup> Eventually, the effective communication between The Hague and the PR EU proved essential, because the PR was able to signal the need for adjustment when negotiations suddenly gained momentum. Strategically developing and adjusting a negotiation position, and having effective communication between The Hague and the permanent representation is key to be able to act in a timely manner. As one policymaker stated, the strategy behind taking a position should no longer only be defined by the question 'what do we want to achieve?', but also by 'how do we achieve it?'<sup>286</sup>

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As a second policy achievement, policy officers identified the contribution of Dutch interventions in the implementation of actual trade defence measures to hold the EC accountable, thereby serving the different (Dutch) interests. The Netherlands demanded transparency on calculations and requested the EC to present fact-based evidence regarding its measures. In this respect, Dutch policymakers and diplomats tried to represent the interests of (Dutch and EU) stakeholders other than only import-competing producers, and counter over-protectionist demands from the member states in favour of the TDIs. In doing so, the Netherlands made strategic use of like-minded member states and its network, and used its internal expertise to counter and uncover unsubstantiated measures. Although

<sup>282</sup> Interview with EC Deputy Director, held on 25 March 2020.

<sup>283</sup> As evident in TPC reports from 2013 to 2016 (see section 4.2.1).

<sup>284</sup> Interview held with MFA policy officer on 18 February 2020.

<sup>285</sup> Interview held with MFA policy officer on 18 February 2020.

<sup>286</sup> Interview with MFA policy officer, held on 8 July 2019.

sometimes more successful than at other times in terms of getting the requested transparency and evidence, policymakers stated that their interventions generally benefited the process, holding the European Commission to account for decisions and actions.<sup>287</sup>

At the same time, while the Netherlands and other member states advocated for more transparency on the EC's calculations to substantiate the use of TDIs (thereby holding the EC to account), results at a higher level, such as stopping the use of trade defence measures, have been limited.<sup>288</sup>

Desk research and interviews present sufficient evidence to suggest that in the biodiesel and e-bike cases, the Netherlands and its like-minded countries have only had limited success in countering the strong lobbying forces of the EU biodiesel industry (joined in the European Biodiesel Board), for example, and other, more defensive member states. Despite the fact that some of the measures were (already) successfully challenged in the EU Court and in WTO dispute settlements, trade distortions have existed for many years in the form of various applied provisional and definitive measures, and they even re-emerged in another guise in the case of biodiesel, thereby worsening overall EU trade relations with third countries, especially China. However, without a counterfactual, it is impossible to determine the exact extent of success, and TDIs might have been even more severe, less substantiated by evidence and might have resulted in a less level playing field without the efforts of the Netherlands and like-minded countries.

## 4.4 Conclusion

The review of the Dutch interventions on TDI policy reveal the active participation of the Netherlands in various working groups and committees, as well as in bilateral and multilateral (often like-minded) meetings, especially at the EU level. The Netherlands and like-minded member states often represented a minority group on a tilted playing field, often unable to substantially change the direction of trade defence policymaking once the basic rules of the game had changed. However, the evidence does provide results in line with the objectives defined in Section 4.2. Desk study and interviews provided evidence of Dutch efforts, including actions to include the interests of EU stakeholders other than the aggrieved import-competing producers in decision-making and actions to hold the EC to account and provide transparency in the measures that it designed and implemented. The Netherlands used its internal and external network strategically to form coalitions and leverage Dutch interventions. Consequently, several successes were partly due to Dutch interventions. The results attained included more transparency on calculations in the case studies discussed and maintaining the essence of the LDR in the case of the reforms of the EU trade defence system.

<sup>287</sup> Interviews with policy officers at MFA, held on 16 and 17 April 2020.

<sup>288</sup> Moreover, attributing the effect that was achieved to the interventions of the Netherlands and other MS alone is not realistic.

The evidence also provides a lesson about, first, taking a firm and principled position and, second, the value of effective communication with the permanent representation, using them as your 'eyes and ears' on the ground, to anticipate to sudden and unexpected progress and changes. Recent developments, including the enhanced importance of geopolitics in trade policy and the loss of the UK as a partner in the liberal block, will increase the importance of defining a strategic position early on and effective communication with the PRs in Brussels and Geneva – to be able to identify not only what the Netherlands wants to achieve, but also how it aims to achieve this.

## 4.5 Recommendations

- Identify a negotiation strategy prior to taking a position. Defining such a strategy should occur in close collaboration with the permanent representations in Brussels and Geneva and requires input from other departments as well. The IRHP<sup>289</sup> or other, similar collaborations at the national level can provide valuable platforms to obtain input from stakeholders and discuss the strategies that need to be developed.
- Frequently evaluate current external developments and negotiation dynamics to identify whether it is necessary to reposition or introduce different types of interventions and to avoid being placed on the sidelines in negotiations. Closely collaborate with the permanent representations in Brussels and Geneva, as they are the eyes and ears on the ground.
- Define the geopolitical context and stakeholders involved to decide which strategy and tactics and which coalitions will be most successful to achieve Dutch policy goals. This may require some additional capacity at the MFA in The Hague, but more than that, it may require making good use of the network and expertise at the permanent representations in Brussels and Geneva.
- Express a willingness to be open for debate to avoid being placed on the sidelines of negotiations.

<sup>289</sup> See Chapter 2, p. 30.



# 5

## Trade and sustainable development chapters

## 5.1 Introduction

In recent years, sustainable development has become an integrated part of bilateral free trade agreements between the EU and third countries, in the form of so-called trade and sustainable development (TSD) chapters.<sup>290</sup> These chapters include both social and environmental protection provisions and aim to *protect*, as well as *promote*, EU standards and values. TSD chapters are meant to ensure that economic growth goes hand in hand with higher labour and environmental standards, and as such to make trade policy ‘not just about interests but also about values’.<sup>291</sup> At the same time, TSD chapters are used to create a level playing field and prevent a race to the bottom through a deliberate weakening of domestic labour and environmental protection.

The first TSD chapter dealing with labour and environmental provisions was included in the EU–South Korea FTA of 2011.<sup>292</sup> TSD chapters have been included in all subsequent EU bilateral trade negotiations and agreements.<sup>293</sup>

In keeping with the focus of Dutch trade and investment policy beyond economic growth, the Netherlands strongly supports the inclusion of TSD chapters in FTAs. Over the years, internal instructions show that Dutch representatives have stressed the importance of ‘ambitious’ and ‘robust’ TSD chapters on numerous occasions in the Trade Policy Committee.<sup>294</sup> Dutch policy aims to enhance broader development, for example by stimulating responsible business conduct (RBC) and sustainability. Over the years, TSD chapters have received more and more political attention from the European Parliament, Dutch parliament and non-state actors (both at the domestic and European levels), for instance triggered by the Paris Agreement and the momentum concerning climate policy.<sup>295</sup> In this respect, the provisions on sustainable development play a key role in the political viability of EU FTAs and their ratification.

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This chapter focuses on the development of Dutch policy goals on different aspects of the TSD chapters and the extent to which these policy goals were achieved.

<sup>290</sup> When the EU negotiates a new free trade agreement, it also negotiates rules on trade and sustainable development. These rules are written down in a special TSD chapter. With such a chapter, the EU and its trade partners must, among others, follow international labour and environmental standards and agreements, enforce environmental and labour laws, encourage trade that supports tackling climate change and promote practices such as corporate social responsibility. For more information on the development of TSD chapters, see Ecorys (2021), Chapter 4, pp. 51–92.

<sup>291</sup> EC (2015a), p.5.

<sup>292</sup> Sustainability issues are tackled in other parts of EU trade agreements as well, for example in the procurement chapters (promoting sustainable public procurement) or in relation to the energy trade (remove barriers to trade and investment in renewable energy). However, this case study specifically focuses on the TSD chapters.

<sup>293</sup> Currently, 12 trade agreements have been concluded containing a TSD chapter (EC (2020b)).

<sup>294</sup> Coding all TPC instructions and meeting reports in our research period shows that the need for an ‘ambitious’ and ‘robust’ TSD chapter was mentioned at least 30 times.

<sup>295</sup> More external factors that explain the increased importance of TSD chapters can be found in Chapter 4 of Ecorys (2021).

## 5.2 The Dutch position on TSD chapters

### 5.2.1 Inclusion of TSD chapters in FTAs

When the first TSD chapter was included in the EU–South Korea FTA of 2011 (which came into force in 2013), the Dutch MFA already had a contact point dealing with TSD chapters in FTAs (located in The Hague, at IMH).<sup>296</sup> The fact that the Netherlands had a policymaker dedicated to the issue of sustainability in FTAs, who was given the time and space to specialise on this topic, showed the importance that the Netherlands attached to this issue from the very start. It made the Netherlands a front runner in this respect, given that in many other EU member states, TSD chapters were the responsibility of a diplomat dealing with EU trade affairs or the Ministry of Agriculture, for instance. The main responsibility of the Dutch TSD contact point has been to facilitate, organise and coordinate the Dutch approach. This has been operationalised by bringing together different actors, such as policymakers within the MFA, embassies, other ministries and the permanent representation to the EU in Brussels. This proved to be quite difficult and time-consuming, also given the fact that the Netherlands was running various sustainable development projects on the ground, steered by different actors such as departments of the MFA (e.g. DDE, IGG, DSO) and/or directly from embassies.<sup>297</sup>

The Dutch approach to TSD chapters focuses on the link between sustainability and trade, and its practical translation into projects and Dutch sector agreements.<sup>298</sup> This approach has been promoted by policymakers and diplomats in the TPC and EC expert meetings.<sup>299</sup> Until 2016, the Netherlands, together with the EC under the leadership of then EU Commissioner for Trade Cecilia Malmström, was very much setting the agenda in this respect. Both the EC and the Netherlands were pushing for the inclusion of TSD chapters in FTAs, while there was relatively little interest from other member states (excluding Sweden, France and the UK) on the issue.<sup>300</sup> Dutch policymakers had three priorities in their interaction with the Commission and other member states: (1) generate attention for the environment, labour rights and climate (especially after the Paris Agreement of 2015), (2) compliance with the OECD Guidelines for Multinational Enterprises,<sup>301</sup> and (3) the involvement of non-state actors

<sup>296</sup> The Dutch position on TSD chapters is developed and expressed by policymakers working in The Hague (who regularly travel to Brussels for meetings), and by diplomats working at the Dutch permanent representation in Brussels. The department in The Hague is in the lead, however (interview with a Dutch diplomat, held on 18 February 2020; interviews with policymakers at the MFA, held on 7 and 14 October 2019).

<sup>297</sup> Interview with policymaker at the MFA, held on 31 August 2020.

<sup>298</sup> The Dutch MFA, together with a wide group of different stakeholders, has thus far concluded 11 different sector agreements, so called Responsible Business Conduct agreements, in sectors such as gold, garments and textiles and coal. RBC agreements aim to promote international responsible business conduct throughout the value chain and improve environmental conditions. See, for example, IOB (2019) for more information on the RBC agreements.

<sup>299</sup> Interview with policymaker at the MFA, held on 31 August 2020.

<sup>300</sup> Ibid.; Talking points for the TPC, such as IHRP 2015-49b TPC Handleiding Plv 9-10-2015; IRHP 2015-52b TPC Handleiding Leden 14-10-2015.

<sup>301</sup> The OECD Guidelines for Multinational Enterprises are recommendations made by governments to multinationals operating in or from adhering countries. The Guidelines provide non-binding principles and standards for RBC (OECD (2020)).

when implementing the arrangements made in the TSD chapters in FTAs.<sup>302</sup> These three priorities were constantly stressed, which led to some kind of ‘issue ownership’.<sup>303, 304</sup> It took some time before other member states, such as Finland, Denmark and Italy, jumped on the bandwagon of the EC and TSD-promoting member states.<sup>305</sup> But eventually this process – further spurred by external events such as the Rana Plaza disaster, malpractices that were unveiled and the political pressure this created led to – increased EU attention for sustainability and trade, including in fora such as the TPC.<sup>306</sup>

## 5.2.2 Implementation and enforcement of TSD chapters in FTAs

In recent years, political parties in the Dutch parliament and non-state actors have been pressing the Dutch government and the Minister for BHOS, not on the need of TSD chapters but on their legal enforcement. This enforceability has also been at the centre of much academic debate on their use and effectiveness.<sup>307</sup> In 2016, during the discussion of the CETA agreement in the Dutch Parliament, then Minister Ploumen was urged to ‘guarantee’ that the legal enforcement of the arrangements dealing with sustainability, labour standards and the environment would have an ‘at least equally binding force’ as the agreements related to trade, would ‘provide equal sanctions’ and would provide ‘access for third parties, such as labour unions and NGOs to a dispute mechanism that can also impose effective sanctions’.<sup>308</sup> The minister agreed to look into the issue of legal enforcement and the MFA outsourced a study into this matter to the University of Leuven. In this study, researchers identified and analysed existing dispute settlement mechanisms that could be applied to TSD chapters in trade agreements, ranging from an expression of concern when agreements are not upheld by sanctions, be it with or without the involvement of a third-party complaint mechanism. The researchers showed that there is no golden standard for the legal enforcement of international agreements and that it is up to policymakers to weigh the pros and cons of different models.<sup>309</sup>

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At IMH, the department dealing with trade and investment policy, this led to discussions about what to advise the Minister for BHOS on this issue. In an appreciation of the study

<sup>302</sup> Interviews with policymakers at the MFA, held on 9 April 2020 and 31 August 2020; talking points for the TPC, such as IRHP 2017-18b Handleiding Plv 9 June 2017.

<sup>303</sup> In political science, (associative) issue ownership refers to the spontaneous association between an issue and a political party in the minds of voters (Walgrave et al. (2012), pp. 771-782). Here, issue ownership might be used to refer to the issues the Netherlands is recognised by and known for by other member states and the EC, for example, such as the involvement of non-state actors.

<sup>304</sup> Interview with policymaker at the MFA, held on 9 April 2020.

<sup>305</sup> As can be read in internal reports of the TPC meetings in Brussels, for example.

<sup>306</sup> The wider support and use of TSD chapters also prompted criticism and debate. It was argued that TSD chapters do not aim to promote sustainable development through trade, but are mainly used to legitimise trade liberalisation and promote and protect EU businesses. And the Dutch emphasis on the involvement of civil society was criticised for being ‘window dressing’ (read, for instance, Orbie et al. (2016), pp. 526-546). More information on these debates can be found in Chapter 4 of Ecorys (2021).

<sup>307</sup> E.g. George, C. and S. Yamaguchi (2018), pp. 1-41; Melo-Araujo, B. (2018), pp. 233-253; Orbie, et al. (2016). See also Chapter 4 of Ecorys (2021).

<sup>308</sup> Motie Vos van 13 October 2016 (Kamerstukken 21 501-02, nr. 1677).

<sup>309</sup> Marx, A., F. Ebert, N. Hachez and J. Wouters (2017).

written to the Dutch Parliament in March 2017, the cabinet stressed the importance of enforceable sustainability provisions and a bigger role for the International Labour Organization (ILO) in dispute settlement.<sup>310</sup> Moreover, the cabinet promised to consult interested parties in the BHB and talk to the EC and other member states, to prepare a final position concerning the dispute settlement of sustainability chapters.<sup>311</sup>

Non-state actors were consulted, but they did not speak with one voice. On the one hand, some NGOs, such as a coalition between the Transnational Institute, SOMO, Milieudefensie and Greenpeace, called for strong sanctions. In their position paper, published as a response to the civil society consultation initiated by MFA, they argued for an independent panel of experts to investigate a complaint. They argued that when a party is found to be in breach of the agreement ‘this should ultimately lead to trade sanctions’.<sup>312</sup> On the other hand, the business community feared that strong enforcement of TSD chapters would limit the possibilities of concluding an FTA in the first place. For example, the Brussels-based business association BusinessEurope published a position paper in which it ‘supports the EU’s approach to use soft pressure, consultation and transparency, as well as publicity’ on TTIP.<sup>313</sup> It promoted consultations ‘and the possibility to set up an independent panel of experts and seek the opinion of international organisations, including ILO’.<sup>314</sup> Furthermore, business organisations feared that dispute settlement would be very difficult, time-consuming and would only lead to subjectivity and discussions.<sup>315, 316</sup>

However, the divisions on dispute settlement did not only run between actor types (i.e. business versus NGOs) but also within the same type of organisations. Some NGOs supported business organisations in their critique on strict legal enforcement. They argued that strong sanctions would be perceived as ‘green imperialism’, thus creating an unlevelled playing field, while ignoring the underlying problems that explain non-conformity (such as a

<sup>310</sup> Tweede Kamer, vergaderjaar 2016–2017, 31 985, nr. 49.

<sup>311</sup> Ibid, p. 5.

<sup>312</sup> Transnational Institute, SOMO, Milieudefensie and Greenpeace (2017), p. 6.

<sup>313</sup> BusinessEurope (2015), p.5.

<sup>314</sup> Ibid.

<sup>315</sup> Interview with (former) representative of amfori, held on 9 April 2020.

<sup>316</sup> An example of such a lengthy procedure, mentioned by several respondents, was the first-ever FTA labour dispute settlement case of the US versus Guatemala (interview with EC trade policy officer, held on 6 March 2020; interview with policymaker at the MFA, held on 31 August 2020; interview with (former) representative of amfori, held on 9 April 2020). In 2008, the American federation of labour unions (AFL-CIO) and six Guatemalan labour unions filed a complaint under the FTA alleging that Guatemala failed to effectively enforce its labour laws with respect to acceptable working conditions, freedom of association and the right to organise and bargain collectively. The US Trade Representative (USTR) and U.S. Department of Labor (DOL) joined the complaint in 2010 when they asked for consultations in order to ‘see the Government of Guatemala take specific and effective action – including, if appropriate, legislative reforms – to improve the systemic failures in enforcement of Guatemalan labor law’ (USTR (2010)). In 2011, USTR and DOL requested the establishment of an arbitral panel, and it took this panel until June 2017 to issue a decision. The panel found that, while Guatemala failed to enforce certain laws, there was no proof that this failure was ‘sustained and recurring’ and that it was affecting trade. (Banks, K., T. Posner and R. Hernández (2017)). Therefore, the US lost this case.

lack of administrative capacity to ensure compliance).<sup>317</sup> Labour unions did not see eye to eye on the issue of legal enforcement either. Dutch labour union FNV is in favour of sanctions, calling the agreements in the sustainability chapter of CETA ‘hollow phrases without legal weight’.<sup>318</sup> Dutch labour union CNV, on the other hand, sees a central role for ILO, which should get the mandate to sanction. Nevertheless, CNV also warns that such sanctions do not encourage partners to ‘make changes to the regulations following a breach of the agreement’.<sup>319</sup> Therefore, CNV promotes a combination of sanctioning and ‘positive stimulation’,<sup>320</sup> for example by the use of domestic advisory groups to help the countries conform.<sup>321, 322</sup>

In the end, Dutch policymakers decided that there was no political will or capacity to promote stronger legal enforcement. Instead, the Netherlands relies on ‘pressure’ to ensure compliance<sup>323</sup> and has (successfully) pushed, together with member states such as Finland, Sweden, Belgium and Luxembourg<sup>324</sup> for early evaluation of the TSD chapters. According to the Dutch cabinet, this makes it possible to monitor initial effects and, if necessary, encourage the EC to take additional action.<sup>325</sup> The Netherlands was also supported by (some) non-state actors on this issue, for example, Brussels-based foreign trade association amfori, which pushed for annual monitoring reports along with ex-post impact assessments. According to amfori, this would ‘incentivise underperforming partners to do more or seek support, while at the same time provide positive branding for the well-performing partners’.<sup>326</sup>

In February 2018, the EC presented a non-paper on the implementation and enforcement of TSD chapters in EU FTAs. The EC addressed feedback that was received by MEPs, businesses, international organisations and member states, for example.<sup>327</sup> More importantly, the paper presented ‘15 concrete and practicable actions to be taken to revamp the TSD chapters’.<sup>328</sup> The EC proposed strengthening actions on three specific issues: (1) climate change, (2) the role of civil society including the social partners<sup>329</sup> and (3) the implementation of TSD chapters. Clearly, these three issues are in line with the policy priorities of the Netherlands, in particular generating attention for climate change and the involvement of non-state actors when implementing the arrangements. As to the involvement of non-state actors, the action

<sup>317</sup> Interview with policymaker at the MFA, held on 31 August 2020.

<sup>318</sup> FNV (2018), p. 35.

<sup>319</sup> CNV (2020).

<sup>320</sup> *Ibid.*, p. 4.

<sup>321</sup> Interview with policymaker at the MFA, held on 31 August 2020.

<sup>322</sup> For example, CNV was involved in the setup of a domestic advisory group in Indonesia (CNV (2020), p. 4).

<sup>323</sup> MFA (2016); see also IRHP 2017-13b Handleiding Plv 21 April 2017; IRHP 2017-22b Handleiding Leden 5 July 2017.

<sup>324</sup> IHRP 2017-16b Handleiding Plv 19 May 2017.

<sup>325</sup> MFA (2016); IRHP 2017-03b TPC Handleiding Leden 27 January 2017.

<sup>326</sup> Amfori (2020), p. 3.

<sup>327</sup> EC (2018), pp. 1-12.

<sup>328</sup> *Ibid.*, p. 5.

<sup>329</sup> The social partners are the bodies representing the two sides of industry: the employers (represented through employer organisations) and the employees (trade unions).

plan identified the future inclusion of civil society (in the form of domestic advisory groups) to be extended to the whole FTA (action point 4). The Netherlands welcomed this decision, as it aligned with Dutch priorities on the involvement of non-state actors. In addition, the Dutch priority of compliance with the OECD Guidelines and the importance given to RBC was also addressed (in the EC's action point 5). The EC proposed to commit parties to promoting RBC, using the OECD and ILO as the main implementers of dedicated capacity building and outreach activities in this field.<sup>330</sup> The Netherlands therefore supported the 15 points of improvement of the EC.<sup>331</sup>

On the issue of dispute settlement and the application of trade sanctions, consultations held by the EC showed divergent points of view. According to the EC, a majority supported the current model of enforcing TSD chapters, however.<sup>332, 333</sup> The Netherlands also expressed its support for the current system of dispute settlement. The Dutch representative in the TPC called it 'too early' to link trade sanctions to this system and called on the EC to intensify the current approach, be more assertive where necessary and improve the cooperation between the EC and member states on the issue of dispute settlement.<sup>334</sup> In November 2018, the EC showed assertiveness when it proposed to use the current dispute settlement system in the FTA with South Korea.<sup>335</sup> South Korea had failed to implement four out of the eight fundamental conventions of the ILO (on freedom of association, the right to collective bargaining and two conventions against forced labour), despite seven years of pressure from the EU. The EC proposed to start intergovernmental consultations,<sup>336</sup> because it feared that the credibility of the EU and the approach of sustainability in FTAs was at stake.<sup>337</sup> The proposal of the EC was supported by most member states. The Netherlands and Denmark were initially more cautious. For the Netherlands, this was because it wanted to coordinate its position first, through internal consultations with, among others, the Dutch Ministry of Social Affairs and Employment and the Dutch embassy in Seoul. Because dispute settlement under an FTA had not been initiated before, the Netherlands requested more time to determine its position and a second discussion in TPC.<sup>338</sup> Moreover, the Netherlands asked for close involvement of the ILO in the procedure. On this point, the EC confirmed it was in close contact with the ILO and pointed out that the FTA allows for the involvement of the labour

<sup>330</sup> EC (2018), Article 5, p. 6.

<sup>331</sup> IRHP 2018-08b Instructie TPC leden 9-03-2018

<sup>332</sup> EC (2018), p. 2.

<sup>333</sup> The EC believed sanctions would be counterproductive and 'based on the false assumption that trade can fix it all' (interview with EC trade policy officer, held on 6 March 2020). Moreover, the EC warned that having the possibility of sanctions in an FTA could also lead to cases against EU countries, for example on human rights or labour issues (ibid.). This reasoning was in line with the Dutch position and was also used by Dutch policymakers to explain their position on sanctioning (interviews with policymakers at the MFA, held on 9 April and 31 August 2020).

<sup>334</sup> IRHP 2018-08c TPC Verslag Leden 09-03-2018.

<sup>335</sup> EU-Korea FTA (2011).

<sup>336</sup> Ibid, Article 13.14.

<sup>337</sup> For example, the European Parliament could obstruct ratification of the trade agreements with Vietnam and Japan, on the basis of fear of lack of implementation of the TSD chapters (IRHP 2018-36b TPC Instructie Plv 30-11-2018).

<sup>338</sup> IRHP 2018-34c TPC Verslag Plv 16-11-2018.

organisation in the consultation procedure if both parties agree.<sup>339</sup> After a second discussion in the TPC, both the Netherlands and Denmark supported the proposal of the EC to start consultations.<sup>340</sup> Unfortunately, these failed to provide a satisfactory solution. In July 2019, the EC therefore requested a panel of experts to examine the matters that have not been satisfactorily addressed through the consultations.<sup>341</sup> This led to the South Korean government submitting a proposal in its National Assembly for the ratification of three out of the four outstanding ILO conventions and of the bills for necessary labour reforms in October 2019.<sup>342</sup> The government aimed to have the bill passed by the end of 2020, but the National Assembly did not take any formal steps to discuss or vote on these bills.<sup>343</sup> In January 2021, a panel of experts confirmed that South Korea was indeed in breach of the labour commitments under the FTA.<sup>344</sup>

Meanwhile, the Commission has continued its assertive approach regarding the implementation, compliance and enforcement of FTAs. In July 2020, the EC appointed its first Chief Trade Enforcement Officer (CTEO), under direct guidance of the Commissioner for Trade, 'to monitor and improve the compliance of our trade agreements'.<sup>345</sup> It reflects the importance placed by the current (Von der Leyen) Commission on implementation and compliance, also concerning sustainable development commitments.<sup>346</sup> The establishment of a CTEO is supported by the Netherlands, as evident from a joint non-paper by the Netherlands and France published in May 2020.<sup>347</sup> In this non-paper, the Dutch and French trade ministers even propose to go a step further by introducing staged implementation of tariff reductions linked to the effective implementation of TSD provisions.<sup>348</sup> This would allow partner countries that live up to TSD commitments to be rewarded, while enforcement would be strengthened.<sup>349</sup> Additionally, the non-paper proposed 'a more streamlined EU notification mechanism to respond to possible breaches of TSD-commitments',<sup>350</sup> facilitating the CTEO's work on TSD. In line with the proposal, in November 2020, the EC launched a

<sup>339</sup> EU–Korea FTA (2011), Article 13.14; IRHP 2018-34c TPC Verslag Plv 16-11-2018; interview with EC labour policy officer, held on 6 March 2020.

<sup>340</sup> IRHP 2018-36c TPC Verslag Plv 30-11-2018.

<sup>341</sup> EC (2019).

<sup>342</sup> BusinessKorea (2020).

<sup>343</sup> Ibid.

<sup>344</sup> EC (2021).

<sup>345</sup> Von der Leyen, U. (2019), p. 5.

<sup>346</sup> EC (2020c).

<sup>347</sup> Kaag, S. and J.-B. Lemoyne (2020), pp. 1-3.

<sup>348</sup> Ibid, p. 1.

<sup>349</sup> This proposal is criticised by Bronckers and Gruni, who argue that the option to make tariff reductions dependent on compliance with FTA's sustainability standards would only exist for a limited period of time. If a country decides to no longer comply after most tariffs have been eliminated, it would be 'back to square one: ordinary trade sanctions'. In addition, these scholars argue that the Dutch-French proposal is unclear about whether the suspension would be proportional to the seriousness of the infringement and/or limited to certain tariff lines. Moreover, there is the fear that using one tool (trade measures) to achieve to different objectives (creating economic growth and encouraging the implementation of sustainability standards) leads to a loss of focus (Bronckers and Gruni (2021), pp. 1-27, p. 25).

<sup>350</sup> Kaag, S. and J.-B. Lemoyne (2020), p. 1.

mechanism enabling non-state actors to report non-compliance of sustainable development commitments.<sup>351</sup>

As becomes clear from the discussion of Dutch policy positions on TSD chapters, the focus of the Netherlands has slightly shifted from putting these chapters on the political agenda to implementing and enforcing the commitments under these chapters. This is in line with the shifting focus of the EC: from getting TSD chapters into FTAs, to ensuring that such chapters are implemented.

## 5.3 Extent of policy success

### 5.3.1 Inclusion of TSD chapters in FTAs

The Netherlands has been a strong advocate of putting TSD chapters in bilateral trade agreements and this has been common practice in the EU since 2011. The Netherlands has consistently promoted the inclusion of sustainability in trade agreements, in formal meetings and in informal, bilateral contacts. However, several interviewees pointed out that since the Dutch and EC position were aligned from the beginning, it is impossible to attribute the inclusion of TSD chapters to the Dutch effort.<sup>352</sup>

For example, in September 2017, the Netherlands expressed the wish to include a (robust) TSD chapter in an FTA with India. At the time, formal negotiations had not begun yet, but India and the EC were exploring the possibility of coming to an agreement. On the TSD chapter, the Netherlands was only openly supported by Austria. According to a Dutch policy officer, ‘[t]he other member states put the importance of a thorough and quickly concluded free trade agreement above a TSD chapter’.<sup>353</sup> However, the EC did bring up a possible TSD chapter in every talk with Indian representatives, even though these talks were difficult, especially concerning the role of civil society (which is of course a priority of the Netherlands).<sup>354</sup> In the end, the talks of the EC did not lead to a formal opening of FTA negotiations with India.<sup>355</sup> The Netherlands supported the EC in this decision, arguing that the EC should only invest in talks with India if there is a prospect of constructive negotiations leading to an ambitious FTA.<sup>356</sup>

What becomes clear from policy documents and interviews is that the Netherlands and the EC had a similar policy position on the inclusion of TSD chapters. Of course, the Netherlands and the EC did not have the same policy position on all issues around TSD chapters. Where they disagreed, the Netherlands tried to influence the EC, other member states and relevant actors,

<sup>351</sup> EC (2020d).

<sup>352</sup> Interviews with policymakers at the MFA, held on 14 October 2019, 9 April 2020 and 31 August 2020; interview with EC trade policy officer, held on 6 March 2020.

<sup>353</sup> IRHP 2017-28b Handleiding Plaatsvervangers 29 September 2017.

<sup>354</sup> IRHP 2018-21b Instructie TPC Leden 21-06-2018.

<sup>355</sup> EC (2020e).

<sup>356</sup> IHRP 2018-36c TPC Verslag Plv 30-11-2018.

and did so with mixed success. Below, we will describe some instances of policy success concerning the TSD chapters that can be attributed to the Netherlands, sometimes together with another member state.

In 2015, the Netherlands and the UK started to push the EC to expand the TSD chapter of TTIP with an article in which both parties (EU and US) would commit to (1) prevent or limit the negative impact of TTIP on developing countries, (2) cooperate to maximise positive spill-over effects, and (3) cooperate on harmonising preferential tariff systems for low-income countries.<sup>357</sup> In the initial EU position paper (tabled for discussion with the US in the negotiating round of 19–23 May 2014), these issues were not mentioned.<sup>358</sup> However, in the textual proposal tabled for discussion with the US in the negotiating round of 19–23 October 2015, some of these issues were included.<sup>359</sup> For example, article 19 of the textual proposal deals with the review of sustainability impacts and states that ‘the Parties commit to, jointly or independently, reviewing, monitoring and assessing the impact of the implementation of this Agreement on sustainable development in their territories and globally (...) In this context, they will pay specific attention to developing countries and in particular LDCs with a view to maximising the positive spill-over effects of this Agreement’.<sup>360</sup> At the same time, the call for harmonisation of preferential tariff systems for low-income countries was not included in the EU’s textual proposal. This shows that the Netherlands and the UK had mixed policy success in setting the negotiating agenda of the EC on TTIP. Besides, given the fact that TTIP negotiations ended without conclusions in late 2016, it is impossible to determine whether the policy success of the Netherlands (and the UK) would have moved beyond the agenda-setting phase, into the policy formulation and policy decision phase. In April 2019, the Council adopted a decision stating that ‘[t]he negotiating directives for the Transatlantic Trade and Investment Partnership have become obsolete’.<sup>361</sup> If the negotiations are resumed, it is therefore important for the Netherlands to make sure that new negotiating directives again deal with the impact of TTIP on developing countries. Given the fact that, with Brexit, the Netherlands has lost its ally on this issue, Dutch policymakers and diplomats will need to look for new coalition partners.

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### 5.3.2 Animal welfare in TSD chapters

An example of a TSD chapter in which the Netherlands managed not only to put a new issue on the agenda but also have it translated into a policy outcome, is the FTA with Japan. In 2016, the Netherlands asked for animal welfare to be included in the negotiating mandate of the EC.<sup>362</sup> This can be explained by the fact that while most Dutch political parties rarely spoke on the EU–Japan FTA, the Dutch Animal Party (PvdD) had called on the government to

<sup>357</sup> IHRP 2015-49b TPC Handleiding Plv 9-10-2015, IRHP 2015-52b TPC Handleiding Leden 14-10-2015.

<sup>358</sup> This position paper was made public on 7 January 2015; EC (2015b).

<sup>359</sup> Made public on 6 November 2015; EC (2015c).

<sup>360</sup> EC (2015c), Article 19.2, p. 15.

<sup>361</sup> Council Decision 2019/6052/EU of 15 April 2019, p.3.

<sup>362</sup> IRHP 2016-21b TPC Handleiding Plv 03-06-2016. The Dutch request to include animal welfare in the discussions with Japan was repeated on numerous occasions (at least 30 times in TPC instructions and meeting reports).

stop negotiations if Japan did not end the slaughter of whales and dolphins.<sup>363</sup> Dutch policymakers argued that an ambitious TSD chapter and agreements about animal welfare would be a starting point to discuss whaling.<sup>364</sup> After advocacy by Dutch policymakers and diplomats, animal welfare was indeed included in the EC negotiating mandate, meaning that the Netherlands was successful in putting this issue on the negotiating agenda. And this policy success went beyond the agenda-setting phase. While Japan was initially very hesitant to discuss animal welfare, in the end it agreed to include it in the agreement.<sup>365</sup> In Article 18.17 on Animal welfare, the EU and Japan agree to ‘cooperate for their mutual benefit on matters of animal welfare with a focus on farmed animals’ and to ‘establish an Animal Welfare Technical Working Group to exchange information, expertise and experiences in the field of animal welfare and to explore the possibility of promoting further cooperation’.<sup>366</sup> One could argue that the Netherlands was successful to some extent in getting its priorities translated into policy (which is called the policy decision phase). Animal welfare was mentioned and the possibility to explore further cooperation was also discussed. At the same time, the TSD chapter talks about ‘a focus on farmed animals’,<sup>367</sup> thus avoiding the issue of whaling. It therefore remains to be seen whether the agreements about animal welfare in this TSD chapter will indeed open the discussion on whaling with the Japanese government.

### 5.3.3 Involvement of non-state actors

As mentioned, also in Chapter 2, the involvement of non-state actors has been another priority for the Netherlands, especially in TSD chapters. This is in line with the Dutch call for transparency, and helps to enhance knowledge, identify the interests of all stakeholders and create support for policy decisions. On this issue, the Netherlands again had some policy success in the agenda-setting, policy formulation and policy decision-making phases of the FTA with Japan. Japan agreed on stakeholder participation through consultations, even though it was ‘not used to a structural dialogue with stakeholders via such a platform’.<sup>368</sup> In the FTA, both the EU and Japan agreed to ‘convene the Joint Dialogue with civil society organisations situated in their territories (...) to conduct a dialogue’ on the TSD chapter.<sup>369</sup> Given the fact that the EU–Japan FTA only entered into force in the beginning of 2019, it is too early to examine whether the inclusion of such a dialogue in the TSD chapter has also led to the closer participation of stakeholders through consultations. And observing positive effects is made even more complicated by the fact that the involvement of non-state actors through civil society mechanisms is left up to the discretion of governments (in this case the Japanese government, without much experience) and that a balanced, representative membership of

<sup>363</sup> IRHP 2016-34b TPC Handleiding Leden 28 October 2016.

<sup>364</sup> Ibid.

<sup>365</sup> Ibid; IRHP 2016-21b TPC Handleiding Plv 03-06-2016.

<sup>366</sup> EU/JP/en, pp. 482-483.

<sup>367</sup> EU/JP/en, p. 482.

<sup>368</sup> IRHP 2017-13b Handleiding Plv 21 April 2017.

<sup>369</sup> EU/JP/en, Article 16.16, p. 448

such mechanisms (not only business and labour organisations) requires active promotion by the governments.<sup>370</sup>

At the European level, the launch of a ‘Single Entry Point’ in 2020 should lead to closer involvement of non-state actors. The objective of this single entry point is to streamline internal processes to tackle non-compliance and better prioritise enforcement action. All EU-based stakeholders who want to lodge a complaint on non-compliance with TSD commitments can use this contact point.<sup>371</sup> In the BNC fiche of March 2021,<sup>372</sup> the Netherlands welcomed this contact point, which was in line with the Dutch priority of enhancing involvement of non-state actors. Moreover, the BHOS Minister Kaag promised to organise round tables (together with the Dutch Social and Economic Council, SER) with representatives of trade unions, businesses and NGOs, to provide additional input to the EC.<sup>373</sup> Whether the Single Entry Point will truly lead to closer involvement of non-state actors and more streamlined enforcement actions, remains to be seen.

### 5.3.4 Inclusion of gender in FTAs

Not surprisingly, not all issues that Dutch representatives have pushed for in TSD chapters resulted in policy success. Examples of more mixed results are found for the gender-related interventions. In ‘A world to gain’, the Dutch government already made it clear that it ‘considers gender equality to be a priority in foreign policy’.<sup>374</sup> Subsequently, in ‘Investing in global prospects’, gender equality was presented as a cross-cutting goal of the BHOS agenda.<sup>375</sup> Moreover, the Netherlands addressed the importance of gender equality at the international level as well, for example by supporting a WTO declaration on women and trade.<sup>376</sup> Given the importance of the issue for Dutch foreign policy, the Netherlands has supported the EC<sup>377</sup> or advocated for gender equality to be included in TSD chapters in trade agreements.<sup>378</sup>

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However, the TPC members have often been divided on this issue. Sweden was the most vocal supporter of the Dutch emphasis on gender equality,<sup>379</sup> but some Eastern and Southern European countries were opposed.<sup>380</sup> According to a Dutch diplomat, it is important to bear

<sup>370</sup> Ashraf, N. and J. van Seters (2020), pp. 1-26; Harrison, J., M. Barbu, L. Campling, B. Richardson and A. Smith (2019), pp. 260-277; Orbie et al. (2016); Westlake, M. (2017), pp. 1-31. For more information on how non-state actors are involved in the TSD chapters, see chapter 4 of Ecorys (2021).

<sup>371</sup> EC (2020a).

<sup>372</sup> MFA (2021).

<sup>373</sup> MFA (2020).

<sup>374</sup> MFA (2013), p. 64.

<sup>375</sup> MFA (2018), p. 8.

<sup>376</sup> WTO (2017).

<sup>377</sup> For example, the Netherlands has supported the EC in its plan to include provisions on gender in the EU–Chile FTA (see e.g. IHRP 2018-16b Instructie TPC Plv 08-05-2018).

<sup>378</sup> Interviews with policymakers at the MFA, held on 9 April and 31 August 2020; see, for example, IHRP 2018-16b Instructie TPC Plv 08-05-2018; IHRP 2018-17b Instructie TPC Plv 18-05-2018.

<sup>379</sup> See, for example, IRHP 2017-08c TPC Verslag Plv 08-03-2017; IHRP 2018-02c TPC Verslag Plv 19-01-2018.

<sup>380</sup> Ibid; interview with (former) representative of amfori, held on 9 April 2020; interview with a Dutch diplomat, held on 18 February 2020.

in mind that the political reality in The Hague, namely consensus on the importance of gender equality, is sometimes very different from the reality in the ‘Euro bubble’.<sup>381</sup> Close contact between the department in The Hague, which is in charge of making the policy and defining Dutch priorities, and the permanent representation in Brussels, often sent to EU meetings to advocate these priorities, is therefore essential.

In the end, none of the currently concluded TSD chapters contain specific provisions on gender equality.<sup>382, 383</sup> One could argue that the Netherlands succeeded in setting the gender agenda, given that the topic was discussed multiple times in fora such as the TPC. However, this policy success did not spill over to the next stages of the policy cycle, namely policy formulation, policy decision and policy implementation.<sup>384</sup> Besides the fact that the Netherlands lacked support from other member states, another explanation for this mixed policy success could be the rather unclear Dutch position on gender equality in TSD chapters. As a policymaker described it, gender is seen as important, and the reasoning seems to be ‘the more, the better’, but it is unclear what the Netherlands wants to achieve exactly on this topic, aside from it being mentioned in TSD chapters.<sup>385</sup> Of course, this lack of a clear position makes it almost impossible to gain enough support from member states and the EC for it to be translated into policy. At the same time, this policymaker also acknowledged that there are some issues one simply cannot say ‘no’ to, that one cannot ignore, given the pressure from, for example, the Dutch Parliament.<sup>386</sup> Our interviews and an analysis of the policy documents indicate that the symbolic value (both to the domestic audience, e.g. Dutch Parliament, and to the European audience, e.g. other member states) of putting and keeping the issue of gender equality on the policy agenda is considered to be of such high importance, that whether or not actual policy outcomes are achieved on this issue is of lesser significance.

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Nevertheless, some positive results were achieved, albeit mostly after the evaluation period. For example, in December 2019, in the context of CETA, the EU and Canada issued a statement on gender and trade. Since then, they have been working on an action plan.<sup>387</sup> In addition, in 2020 the Netherlands, together with nine<sup>388</sup> other member states, sent a joint non-paper to the EU Commissioner for Trade to address gender equality.<sup>389</sup>

<sup>381</sup> Interview with a Dutch diplomat, held on 18 February 2020.

<sup>382</sup> Note that although all EU trade agreements concluded since the 1990s contain a general human rights clause, this clause is the basis of the agreement. Moreover, in the TSD chapters, a link is made to standards on labour rights, some of which are relevant for women, such as the ILO fundamental conventions on equal remuneration and discrimination (European Parliamentary Research Service (2019), pp. 1-2).

<sup>383</sup> However, DGBEB pointed out that in negotiations on the draft EU–Chile FTA, there was agreement on most of the paragraphs on gender (EC site consulted, update of May 2020, [https://trade.ec.europa.eu/doclib/docs/2021/may/tradoc\\_159588.pdf](https://trade.ec.europa.eu/doclib/docs/2021/may/tradoc_159588.pdf)).

<sup>384</sup> See Chapter 1 and annex 1 for an explanation of the analytical framework used in this study. Only in some cases did we find and study policy implementation, notably in the case of TDI.

<sup>385</sup> Interview with policymaker at the MFA, held on 31 August 2020.

<sup>386</sup> Ibid.

<sup>387</sup> See: [https://trade.ec.europa.eu/doclib/docs/2019/december/tradoc\\_158536.pdf](https://trade.ec.europa.eu/doclib/docs/2019/december/tradoc_158536.pdf).

<sup>388</sup> Luxembourg, Denmark, Sweden, Italy, Spain, France, Ireland, Finland and Belgium.

<sup>389</sup> Asselborn et al. (2020).

## 5.4 Conclusion

Already in 2011, when the EC concluded the first TSD chapter in the FTA with South Korea, sustainability was an important policy issue for the Netherlands. As a front runner in this respect, the Dutch MFA and its embassies were running projects around sustainable development and the MFA had a dedicated contact point dealing with TSD chapters in FTAs. Over the years, TSD chapters have received more and more political attention, for example from other EU member states, from civil society and the Dutch and European Parliament. In this chapter, IOB studied to what extent the Netherlands managed to achieve policy success concerning the TSD chapters in FTAs.

What became clear is that the policy position of the Commission was (often) in line with the Netherlands. For both the EC and the Netherlands, it was important to include TSD chapters in FTAs, thus generating attention for the environment, labour rights and climate change (especially after the Paris Agreement of 2015). It is therefore impossible to attribute the inclusion of TSD chapters to the efforts of the Netherlands. However, this study by IOB has also shown that the Netherlands has successfully put several issues on the agenda of the European Commission and other member states (such as the involvement of non-state actors) and that sometimes these issues were also translated into policy outcomes (for example concerning animal welfare in the FTA with Japan).

The actions undertaken to influence EU policymaking, and the implementation and enforcement of TSD chapters, also contributed to achieving Dutch policy goals, especially in terms of promoting sustainable, inclusive economic growth. The Netherlands constantly tries to find the right balance between promoting sustainability, on the one hand, and making sure that developing countries and the weakest groups in society are not negatively impacted by the FTAs and their implementation, on the other hand.<sup>390</sup> This focus on inclusive growth in developing countries and a level playing field also explains the Dutch focus on including non-state actors in the implementation of TSD chapters.<sup>391</sup>

Furthermore, Dutch efforts helped to achieve the specific trade and investment policy goals of the Netherlands, particularly the conclusion of bilateral FTAs at the EU level. Dutch interventions also contributed to serving the Netherlands' cross-cutting priorities, such as gender and RBC. Finally, the commitment of the EU and its trade partners to social and environmental standards provided the basic mandate for TSD chapters, implying that Dutch contributions that influenced policymaking in standard setting have also contributed to creating a more level playing field.

At the same time, the main focus of Dutch policymakers and diplomats has been at the European level. While the TSD chapters established a link with multilateral agreements (such as the ILO core conventions), this did not cause the Netherlands to push for more

<sup>390</sup> Interview with policymakers at the MFA, held on 7 October 2019 and 9 April 2020; interview with a Dutch diplomat, held on 18 February 2020.

<sup>391</sup> Interview with policymaker at the MFA, held on 9 April 2020.

multilateralism. According to policymakers, this is explained by a lack of support for enhanced multilateralism.<sup>392</sup>

Whereas the implementation and legal enforcement of the TSD chapters has also been a Dutch priority, given the relatively recent date of the measures to ensure implementation of these chapters, it remains to be seen to what extent the EU can truly be effective here.

## 5.5 Recommendations

- Having a clear policy position is a precondition for achieving policy success. The example of gender equality shows that simply arguing that an issue is important does not necessarily mean it will be translated into policy.
- One should limit the number of policy priorities. The fact that the Netherlands only had three priorities concerning the TSD chapters contributed to its policy success and to Dutch 'issue ownership'.
- The reality in The Hague is different from the reality in Brussels. It is important to recognise this and maintain close contact between the department, the permanent representation in Brussels and contact points at embassies in The Hague, including through informal meetings.
- It is important to continuously seek new coalition partners, e.g. in light of Brexit and other international developments. France might prove a valuable new coalition partner, as an important advocate and front runner in themes such as RBC and climate change.

<sup>392</sup> Ibid; interview with policymaker at the MFA, held on 14 October 2019.



6

## Trade in Services Agreement

## 6.1 Introduction

The Trade in Services Agreement (TiSA) is a proposed international agreement that was under negotiation between 2013 and 2016 among a select group of WTO Members. The agreement promoted the further liberalisation in service provision. Negotiations for a TiSA were launched after the negotiations for services among all WTO members (as part of the Doha Round) stalled. The draft TiSA was negotiated among 23 WTO members,<sup>393</sup> who considered themselves the ‘Really Good Friends of Services’ and cover about 70% of the global services economy, with the EU and its member states counting as one. The aim was that this ‘economic integration agreement’ could eventually be brought back into the WTO (multilateralisation) and would allow other WTO members to join at a later stage.<sup>394</sup> However, these TiSA negotiations came to a halt as well, in late 2016, largely due to differences among participants on both the liberalisation approach to be taken and substantial issues (coverage of sensitive sectors and related issues, such as privacy and data protection). Positions taken by the US under the Trump administration and public opposition to the negotiations had exacerbated these difficulties.

This chapter addresses important aspects of TiSA, the positions and the extent of success of the policies and efforts of the Netherlands.<sup>395</sup> It focuses on issues where the Netherlands tried to influence EU positions and includes considerations on the international context.

The Netherlands tried to influence EU and WTO agenda-setting as well as the formulation of positions in TiSA negotiations. Since policy objectives were often not formally identified, we have been unable to assess the precise results of Dutch interventions against such objectives. In this chapter, we will focus on Dutch positions on a number of important TiSA topics and compare them to the respective EU positions.

Because agreement was never reached on the draft TiSA, the extent of policy success was particularly difficult to determine in this case, and the question of the results of Dutch interventions beyond agenda-setting and the formulation of EU positions is virtually impossible to answer. Actually, the EU and the group of countries negotiating TiSA as a whole have not achieved their ultimate objectives – further liberalisation of trade in services – because TiSA negotiations stalled.

<sup>393</sup> US and Australia started the initiative to these plurilateral negotiations. The original participants were Australia, Canada, Colombia, Chinese Taipei, Costa Rica, the EU, Hong Kong, Israel, Japan, Mexico, New Zealand, Norway, Pakistan, Peru, the Republic of Korea, Switzerland, Turkey and the US. Later, other countries also joined: Chile, Iceland, Liechtenstein, Mauritius and Panama. While Paraguay and Uruguay also joined the group, they decided to step out of the negotiations in 2015 (Ecorys (2021), pp. 38–50).

<sup>394</sup> When a WTO member enters into a regional integration arrangement through which it grants more favourable conditions to its trade with other parties to that arrangement than to other WTO members’ trade, it departs from the guiding principle of non-discrimination. WTO members, however, are permitted to enter into such arrangements under specific conditions. Members need to seek a waiver from WTO rules. Such waivers require the approval of three quarters of WTO Members. Source: WTO (2021d).

<sup>395</sup> We refer to Chapter 3 on TiSA in Ecorys (2021) for further explanation. Where we say the Netherlands in this chapter, we usually mean the Dutch cabinet.

### 6.1.1 Why is TiSA important for the Netherlands?

Dutch policy goals in the context of TiSA were not specified in detail, but broadly speaking they aimed to further open up the service sector markets in third countries for Dutch service providers (called an offensive interest), while protecting some domestic interests such as public services sectors and public and social goods.

The Netherlands derives almost 70% of its GDP and more than 80% of its employment from the service sector.<sup>396</sup> When TiSA negotiations started, the Netherlands expected to profit greatly from a services agreement, due to its highly developed service sectors and advanced digital infrastructure. Whereas trade in services in a broad sense is already covered and guaranteed in the EU internal market, the cabinet felt that the Dutch economy would benefit from more liberalisation and larger coverage of service sector markets in regions where the EU does not have free (services) trade agreements yet: South America, Asia and the Middle East.<sup>397</sup> At the same time, the Netherlands expected to be able to protect or exclude certain public service sectors, such as education, health, social security and culture.

### 6.1.2 Stakeholders in TiSA

The liberalisation of services (such as railway services, education, health and energy) to foreign service providers is a complicated and highly political topic, because most service sectors are strictly regulated via standard requirements<sup>398</sup> of service providers and supervisory authorities, and because domestic service sectors often have well-organised and politically connected lobbies. Some service sectors are either partially or fully public sectors.

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To create public support for TiSA and to be able to take the concerns of non-state actors into account, the Netherlands consulted with a wide variety of stakeholders on a regular basis. In this case, it used the inclusive group of the Breed Handelsberaad (i.e. broad trade council, BHB, see Chapter 2). In addition, an academic expert was consulted, parliament was informed several times and parliamentarians were invited to view negotiating texts.<sup>399</sup> Furthermore, the Netherlands often urged the Commission to be transparent and engage civil society on a regular basis. Consultations with civil society at the EU level were indeed held on a regular basis, albeit seemingly mostly after the negotiating mandate had been made public in March

<sup>396</sup> Around 70% of the value added of Dutch export came from services in 2016, according to the World Bank's World Development Indicators, and trade in services accounted for 39% of Dutch GDP that year. Services made up around 19% of Dutch exports in 2016, of which 12% in telecom and computer services, 6% in maritime services and 1% in construction services according to the Statistics Netherlands. Ecorys, using World Bank data, note in their background report to this study that 'in the EU, the services sector accounted for 65.6% of GDP and 71% of total employment in 2019; in the Netherlands these shares are 69.8% and 82% respectively'. Retrieved by Ecorys from <https://data.worldbank.org/indicator/NV.SRV.TOTL.ZS?locations=NL> and <https://data.worldbank.org/indicator/SL.SRV.EMPL.ZS>.

<sup>397</sup> Interview with former MFA policymaker, held on 22 March 2021.

<sup>398</sup> For instance, by quality standards of services, caps on the number and origins of providers and professional requirements of service providers.

<sup>399</sup> Interview with former MFA BEB official.

2015. Some sources seem to suggest that better engagement of civil society from the start could have allayed unfounded fears about TiSA.<sup>400</sup>

However, the consultations and engagement could not prevent that opposition to the TiSA negotiations – by civil society organisations (CSOs), trade unions, opinion makers and parliaments – grew around the same time the Transatlantic Trade and Investment Partnership (TTIP) negotiations with the US were highly criticised.<sup>401</sup> Around 2016, opponents started various petitions and distributed information and concerns to mobilise public opinion.

The concerns expressed about TiSA were partly similar to the ones regarding TTIP, CETA and other trade and investment agreements. Critics of TiSA, such as the Dutch trade union FNV, were afraid that public sectors and national standards would be eroded and that more competition could depress fees and wages of certain service providers and workers. Civil society's greatest concerns were that more competition could lead to full privatisation of public sectors and that TiSA obligations would prevent the introduction (or reintroduction) of more protective regulation for domestic service providers. Furthermore, opponents were worried that states' right to regulate and to protect people, workers and the environment would be undermined if direct investments of multinational enterprises (MNEs) would also benefit from having direct access to international dispute settlement (ISDS) under parallel investment protection agreements, to the detriment of domestic and public interests of the host state. A lack of transparency in the negotiations may have fed the concerns of these CSOs.

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The Dutch minister and other European policymakers rejected all of these claims and underlined that public and social interests would be duly protected. The EU and the Dutch government claimed that public sector services in the EU and member states would remain adequately protected under TiSA. These sectors were excepted from the EU market access offer, in order to keep serving the public interest and secure universal access (in certain sectors). However, both the EU and the Netherlands did not fully succeed in refuting the claims of critics – and the opposition continued, until negotiations seemed to be definitely put on hold around 2017.

### 6.1.3 Draft substance and structure of TiSA and relations to GATS

The EU intended TiSA to be an ambitious precursor of a multilateral agreement on services that could be incorporated into the WTO, once a critical mass of WTO members representing global trade would be reached. Negotiations of a plurilateral agreement in the WTO ran into several legal complications. Adding TiSA as a plurilateral agreement covered under the WTO and its dispute settlement system would, for instance, require consensus at a Ministerial Conference, effectively giving non-parties a veto right.<sup>402</sup> Moreover, there were complications

<sup>400</sup> Interview with former MFA policymaker, held on 22 March; Ecorys (2021); and Delimatsis (2016).

<sup>401</sup> The Ecorys report describes stakeholders and opposition to TiSA in more detail. Additional sources used for this chapter include FNV (2016); Greenpeace (2016a); Greenpeace (2016b); international CSOs, including EPSU (EPSU (2016) and EPSU (2021)); and some media articles. See also WikiLeaks (2016b).

<sup>402</sup> In accordance with Article X:9 of the WTO Agreement.

on how to negotiate new market access, how to deal with concerns about free-riding non-participants in TiSA and whether to use a positive or negative list to sector coverage.<sup>403</sup>

Under normal circumstances, WTO members that did not participate in the TiSA negotiations would have the right to most-favoured nation (MFN) treatment.<sup>404</sup> However, concerned about ‘undeserved’ MFN benefits for such ‘free riders’,<sup>405</sup> the EU and other TiSA participants opted for the form of an economic integration agreement under GATS Article V, as a legitimate exception to MFN. This implies that the preferential treatment and new market access under TiSA do not automatically need to be extended to non-parties to the agreement. Conditions in GATS Article V are such that an agreement cannot raise the overall level of barriers to trade in services in the covered sectors for non-parties, compared to the level prior to such an agreement, and that it has to cover substantially all service sectors and modes of delivery.

The draft TiSA document<sup>406</sup> consisted of three parts<sup>407</sup> when negotiations stalled in 2016. The first part outlined the general rules, building on GATS, including the core provisions of the GATS and TiSA-specific scheduling requirements. The second part included market access and national treatment commitments by each TiSA party in national schedules: this part also includes exceptions (e.g. public services) and reservations on full national treatment. The third part contained common rules and standards that apply horizontally<sup>408</sup> as well as rules for specific sectors in 17 annexes. These 17 negotiating texts contained regulatory disciplines<sup>409</sup> and were considered an integral part of the agreement. Some annexes applied horizontally to trade in all services (such as transparency, domestic regulation and e-commerce), while others addressed rules in specific sectors (such as financial services and maritime transport). Some of the topics covered by annexes are discussed below, because they were important to the Netherlands.

<sup>403</sup> Concerning the latter, countries can decide which national sectors and modes of supply are covered in their national GATS schedule – by compiling a *positive list*. The modes of supply are: (1) cross-border supply of services, (2) consumption abroad, (3) commercial presence, and (4) presence of natural person (see Chapter 3 of Ecorys (2021) for more information). Countries can also decide which of the six (carefully defined) restrictions or reservations on the national treatment of foreign service providers listed in GATS Article XVI, in the four modes of supply, are to be maintained (in a *negative list*). A negative list approach implies that unless exceptions are listed, full national treatment applies.

<sup>404</sup> Most favoured-nation treatment under GATS Article II: ‘With respect to any measure covered by this Agreement, each member shall accord immediately and unconditionally to services and service suppliers of any other member treatment no less favourable than that it accords to like services and service suppliers of any other country’. Source: WTO (2021b).

<sup>405</sup> Scholars have argued that freeriding was not a real problem: ‘TiSA is being pursued as a non-MFN FTA, although services disciplines are in most cases applied on an MFN basis within each jurisdiction. The issue of free riders is in many cases nothing more than a mere conceptual concern’. Nakatomi and Michitaka (2015).

<sup>406</sup> WikiLeaks (2016b).

<sup>407</sup> EC (2016). Since negotiations were not finalised, it is unsure which of the annexes would have been part of the final text.

<sup>408</sup> Horizontal clauses – also called disciplines – apply all trade in services, e.g. rules on transparency and domestic regulation.

<sup>409</sup> ‘Disciplines’ in the context of WTO refers to rules for the trading system, in particular rules that prohibit governments to take measures that prevent, hinder and prohibit free trade and investment.

## 6.2 The Dutch position on TiSA

In letters to parliament and instructions for TPC meetings in Brussels, the Netherlands advocated progress in the TiSA negotiations to open up the service sector markets in third countries and give an impetus to global trade in services. It also professed it wanted to promote the interests of the least-developed countries.<sup>410</sup> In an instruction in 2013, the following additional objectives for TiSA were listed, albeit at a rather abstract level:

- No sector should be excluded from the negotiations in advance (a priori);
- The agreement should include provisions on dispute settlement; and
- Development considerations should be taken into account (with a focus on least-developed countries).

In a letter to parliament from January 2016 on TiSA,<sup>411</sup> the only specific Dutch efforts mentioned were the promotion of making TiSA a covered WTO agreement and the promotion of granting unilateral offers to the least-developed countries, in addition to a desire for transparency ‘at the European level’. In TPC meetings, the Netherlands does not seem to have intervened much on TiSA. Note that during its presidency in the first half of 2016 the Netherlands did not normally have an active representative in the national seat.<sup>412</sup> During its presidency, it did organise an informal EU meeting on TiSA. In 2015–2016, the main Dutch positions were still: ‘TiSA should make provisions for multilateralisation; the agreement is of great importance to the Netherlands; and we want to extend the advantages to least-developed countries’.

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Note that during the reporting period, normally only one policy officer was working on trade in services in The Hague, except for during the presidency, when one extra person was appointed.<sup>413</sup>

<sup>410</sup> Development interests were to be integrated into TiSA, in the Dutch view. While this notion was not well explained in the 2013 instruction, in the WTO and FTA context it is usually understood to mean taking the interests of developing countries into account and granting them market access unilaterally, in particular least-developed countries. One interviewee affirmed this was a genuine desire of several actors in the EU, including the Netherlands and the EC (interview held with former MFA policymaker, 22 March 2021). See also Tweede Kamer, vergaderjaar 2015–2016, 25 074, nr. 189. One could also think of capacity building and technical assistance for developing economies as well as exceptions on disputes (Nakatomi and Michitaka (2015)). Later sources make it clear that the Netherlands wanted to extend an Everything But Arms-type preferential treatment to service providers from least-developed countries in the covered sectors. However, market opening under mode 4 for temporary guest workers, an issue of major interest for most developing countries, was never really part of the TiSA negotiations because it was considered to be too sensitive politically and conflated with fears over permanent migration. The EU limited this mode in its offer to intra-corporate transferees and highly skilled professionals, who did not compete with local labour.

<sup>411</sup> Tweede Kamer, vergaderjaar 2015–2016, 25 074, nr. 189

<sup>412</sup> Interview with former MFA policymaker, held on 22 March 2021

<sup>413</sup> Interview with former MFA policymaker, held on 22 March 2021. During the presidency, one extra person was available for services (as well as one for investments), the TPC SI team consisting of four people for that period only.

This chapter analyses nine priorities in the Dutch position on TiSA. The Dutch objectives around these topics were not always explicit in public communications, so our findings on the Dutch policy objectives have been partly deduced from TPC instructions and reports.

### 6.2.1 Liberalisation approach

The Netherlands favoured an ambitious liberalisation of certain sectors in a plurilateral setting, with like-minded states, such as TiSA would promote. The Dutch cabinet explained that trade agreements can lock in regulatory reforms, making the playing field more predictable for business. The Netherlands and the EU aimed for an ambitious agreement – increasing market access for European service providers as much as possible – that could be multilateralised at a later stage.<sup>414</sup> This meant that a plurilateral agreement also had to include a simple mechanism for accession.<sup>415</sup>

The Dutch wish for an ambitious agreement also became clear in the discussions of so-called standstill and ratchet clauses in the context of ‘national treatment’ (i.e. non-discrimination of foreign companies). The *standstill clause* means that once a country has unilaterally removed discriminatory measures to national treatment above and beyond to what it had agreed to in the GATS schedule, it cannot reintroduce such measures for negotiating leverage at the moment new legal commitments in a request-and-offer approach are made. The *ratchet clause* refers to a state not being allowed to reintroduce a discriminatory measure once it is removed and once the agreement has entered into force.<sup>416</sup>

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The Netherlands was in favour of both clauses, to lock in already existing unilateral liberalisation and promote further liberalisation in mutually beneficial negotiations among TiSA participants. It also took this position when the EU negotiating mandate was drafted in 2016. At that time, the EU mandate did not contain such a standstill clause, while this was already included in many EU free trade agreements and would benefit further liberalisation.

A third expression of the Dutch ambition was the desire to have comprehensive sector coverage and fewer restrictions on national treatment. Dutch instructions for TPC suggest that market access on the basis of a negative list, which the US preferred (just like in NAFTA), would discourage other WTO members from joining a plurilateral agreement. It could also become an obstacle to aligning TiSA with the GATS (while at the start of TiSA negotiations the

<sup>414</sup> Note that negotiating partners including the EU did not put forward their most ambitious offers. Benefits – market openings – would automatically apply to all TiSA participants, without the possibility of exchanging favourable offers from the non-party (as is the case in bilateral negotiations).

<sup>415</sup> Several sources, among others Rijksoverheid (2021) as well as an internal MFA dossier published by bigwobber.nl, issued in late 2017 but possibly dating from 2016 <https://bigwobber.nl/wp-content/uploads/osd/20171221/2399.pdf>. See also chapter 3 of Ecorys (2021) for more information on multilateralisation and the EU position on that matter.

<sup>416</sup> A simple explanations of the standstill and ratchet clauses can also be found in the EC fact sheet on TiSA (2016): [https://trade.ec.europa.eu/doclib/docs/2016/september/tradoc\\_154971.doc.pdf](https://trade.ec.europa.eu/doclib/docs/2016/september/tradoc_154971.doc.pdf)

Netherlands did not have a position concerning negative listing yet).<sup>417</sup> Developing countries, in particular, would not be able to accept a negative list – or for some, even to come up with such a list for their own economies. To avoid this issue, the EU and other TiSA participants eventually opted for the route of an economic integration agreement, leaving the accession mechanism ambiguous, since there is no obligation on parties to allow the entry of other WTO members into such an agreement.

Services that were of particular importance to the Netherlands, due to its offensive economic interests,<sup>418</sup> were financial services, the maritime sector, as well as telecommunications and delivery services. To promote these interests, the Netherlands cooperated with like-minded countries. With regard to the maritime sector, the Netherlands had a special interest in dredging. In late 2015, the Netherlands sent a letter to the EC with Belgium and Luxembourg with a view to their offensive interests in the TiSA negotiations, advocating the opening up of the dredging sector.<sup>419</sup> The Netherlands also set up a like-minded group called the ‘Friends of Maritime’ after its presidency in 2016 that advocated for an ambitious TiSA with regard to the maritime sector. Other coalitions the Netherlands participated in included a group of around 14 like-minded, liberal member states who consulted on a regular basis on the eve of TPC meetings where services were discussed (TPC SI). It was one of the leaders of that group with Denmark, Poland and Sweden. A similar group of like-minded EU members, including the Netherlands, was set up a bit later to promote offensive interests in digital trade and data flows.

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As a liberal-minded country, the Netherlands had fewer defensive interests to shield. As a result, in terms of national interests the Netherlands had few reservations about full market access in addition to the general EU reservations. Examples of such Dutch reservations were related to maintaining qualification and licensing requirements for lawyers, vital gas and electricity networks, and foreign ownership restrictions of maritime vessels flying the Dutch flag. Other exceptions listed by the Netherlands concerned reservations in the ‘professional services’ category (mostly in health-related professions), and transport (maritime) and related logistics. The Netherlands advocated fewer specific restrictions than almost any other EU member state.<sup>420, 421</sup>

<sup>417</sup> While the internal document published by bigwobber.nl (Bigwobber (2017) mentioned the US preference for a negative list unfavourably, as a risk for multilateralisation, another internal document with general instructions – which was also published through the Dutch Public Access to Government Information Act (WOB), probably dating from 2013 – noted that the Netherlands had not yet expressed its own preference.

<sup>418</sup> ‘Offensive interest’ is understood to mean the interest you may have in gaining access to the market of your negotiating partner. Offensive in this case means for the purpose of offense rather than defence.

<sup>419</sup> Former FMA policymaker interviewed. The letter was at the level of Director-General.

<sup>420</sup> One interviewee suggested that the Netherlands, together with UK and Denmark, was very liberal minded, having many offensive interests in TiSA, while Southern European countries were less so.

<sup>421</sup> It is important to acknowledge that one country’s offensive interest in a sector, e.g. the Dutch interest in dredging services, could be another country’s defensive interest which wants the sector to remain closed to foreign competition. For instance, the US has kept the dredging sector closed for decades on the basis of the Jones Act. An extensive exclusion of sectors by defining them as a public service and sectors of general interest would severely restrict the number of sectors where market openings could be negotiated.

Overall, the Netherlands was a proactive advocate of ambitious liberalisation in TiSA. According to an official interviewed, once the EU mandate had been negotiated, the difficulty lay mostly in getting the EC to share information on its exchanges and ideas around negotiation positions with member states in a timely manner. The offers for market access that the EC made in specific sectors were said to be shared only very late by the EC.<sup>422</sup>

### 6.2.2 Public sector services

Like all TiSA parties, the EU excluded all ‘services provided in the exercise of governmental authority’, which are services exclusively provided by governments on a non-commercial basis, such as justice, police and the military.<sup>423</sup> In addition, the EU offer excluded public and strategic sectors from sector coverage in TiSA: film, television and other audio-visual services, most air transport services, publicly funded health and social services, publicly funded education, water collection, purification, distribution and management. The EU also emphasised the right to regulate services. Moreover, it made the general reservation that TiSA signatories (including EU member states) can keep public monopolies and decide how they want to regulate public services.

The Netherlands did not except public sub-sectors in addition to the ones already excepted for the EU as a whole. Actually, the Netherlands expressed concerns, in 2016, that the EU offer contained too many exceptions, which could negatively affect the requests for market opening that the EU could put to other TiSA participants.<sup>424</sup>

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When civil society and parliamentarians claimed that public sectors would be insufficiently protected from foreign competition by the draft TiSA, also around 2016, Minister Ploumen argued that these sectors would be adequately protected from enforced privatisation, since EU Free Trade Agreements in general ‘do not impose privatisation’.<sup>425</sup> The government web page on TiSA notes that the protection of public services is a precondition for Dutch support to TiSA and that the Netherlands itself determines which sectors it considers public sectors.<sup>426</sup> Critics from civil society claimed that these exceptions were not enough to fully protect public and social interests. They called for a full exclusion of services of general interest from the TiSA agreement, without defining what that actually means.

<sup>422</sup> Interview held with a policy officer formerly working at the MFA, held on 22 March 2021.

<sup>423</sup> Note that the definition of public sectors differs between the TiSA and GATS, on the one hand – which is more limited – and the EU, on the other hand. Public sectors can mean government sectors such as justice, which the EU refrains from opening up. It can also mean services such as education services that receive public funding and state support, which can be subject to protection. Public sector services can also denote services that are in the public interest but which can be privatised, e.g. in the Netherlands some medical services and educational services. The Netherlands is more liberal than some other member states in the latter category.

<sup>424</sup> IRHP 2016-34b TPC Handleiding Leden 28 October 2016 (the same source was used for the rest of this section).

<sup>425</sup> MFA (2016).

<sup>426</sup> Rijksoverheid (2021).

### 6.2.3 Temporary labour movement, temporary entry of highly skilled professionals

This topic concerns services under GATS ‘mode 4’, the temporary entry of persons who provide services. In practice, the scope of negotiations under this mode was quite limited. Mode 4 covers natural persons who are either service suppliers (such as independent professionals) or workers under contract of a national company who are temporarily present in another country to supply a service.<sup>427</sup>

Market opening under mode 4 for temporary guest workers is an issue of major interest for most developing countries, but it was never really part of the TiSA negotiations because it was politically too sensitive and conflated with fears about migration.

The EU and the Netherlands have an offensive interest in attracting highly skilled professionals in certain sectors and also in getting access to third countries for their own professionals and intra-corporate transferees in their MNEs. Companies want to attract highly skilled foreign workers and also move intra-corporate transferees with third-country nationalities from one country to another. The EU’s conditions for entry are that people should stay only for a specified period and under precise conditions stipulated by a contract. In this context, the Netherlands prioritises getting highly skilled niche workers for certain service and academic sectors: temporary workers for skilled work, research and study.<sup>428</sup>

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On the other hand, the EU and the Netherlands have defensive (economic and political) interests in limiting free competition from foreign workers in most segments of the local labour markets. They therefore restrict most other types of temporary workers, especially low- to medium-skilled workers. Following the public and political debates on immigration since the early 2000s and the increase in asylum seekers around 2015, there has been a strong sense of self-interest to prevent the influx of migrants to Europe. Dutch cabinets have been hesitant to allow the entry of low- and medium-skilled workers from outside the EU, even on a temporary basis.

Some TiSA parties objected to the idea of accepting temporary workers on a reciprocal basis. The EU’s position was complicated by the fact that its trade and migration policies are quite distinct: a GATS opening in a certain sector does not guarantee actual physical entry if there are visa requirements for certain nationalities. Basically, the EU did not want to make any promises about extending GATS visas to temporary guest workers.

The Netherlands was not always among the most vocal members about limiting demand-driven temporary labour movement, but the documentation available does suggest a concern about visa requirements, which could undermine commitments to market entry. In the context of TiSA, the Netherlands proposed for the EU to integrate a ‘protocol’ on the

<sup>427</sup> Mode 4 does not concern migration on a permanent basis, nor does it assume free entry into the EU labour market to compete for EU jobs and still requires a visa for entry if there are visa requirements.

<sup>428</sup> A law on modern migration was adopted on 1 June 2013 – see Lodder (2019).

movement of natural persons into its negotiating offer, so that countries benefiting from TiSA would be required to facilitate the return and readmission of temporary workers:<sup>429</sup> the ‘complementary protocol on movement of natural persons for business purposes’. This was taken up by the EU, to the satisfaction of the Netherlands.

#### 6.2.4 New (future) services and digital services

New services, e-services and environmental services were to a large extent excluded from TiSA negotiations. There is a gap in international regulation for new services, in particular outside of the EU. Regulatory issues around digital services were meant to be dealt with in a dedicated annex to the TiSA. Discussions focused on e-commerce: issues such as spam, data flows, localisation of computing facilities, source code, access and use of the internet, consumer protection and international cooperation. Negotiations on data flows and localisation of computing facilities remained unsolved by the end of 2016.

The Netherlands agreed to exclude ‘new’ services – i.e. services that are yet unknown, yet to be created – from the TiSA agreement, like the rest of the EU, but unlike the US. Critics of the TiSA negotiations supported such an exclusion, afraid that future sectors would automatically be subject to mechanisms to open up the market. New services remained controversial until the negotiations were put on hold.

#### 6.2.5 Cross-border data flows and privacy protection

Within the EU, the Netherlands initially promoted the free flow of data, including personal data of services consumers, from a liberal point of view. Some other actors, notably the EC and France, were more protective of data, especially personal data, with a view to protecting citizens’ and consumers’ privacy. In 2016, the EU adopted its General Data Protection Regulation (2016), determining the balance between the different interests in the EU. Subsequently, in its negotiating offer in 2016, the EU required substantial provisions for the general protection of data (to be incorporated into the annex to the TiSA on e-commerce), including but not specifying the protection of personal data. The EU made use of provisions in the existing GATS annex on financial services and proposed that restrictions on the free flow of data could be based on grounds of protecting data security and privacy, while protectionist grounds for restrictions would be rejected.<sup>430</sup> The EU position was said to be too restrictive for some of the more liberal negotiating partners in TiSA, such as the US, who considered this issue a major obstacle. The final draft TiSA text also contains a general exception to protect the privacy of personal data.

<sup>429</sup> EC (2015). The Netherlands proposed and the EU included in its offer the condition that this protocol would apply to TiSA, with countries hosting temporary workers committing to procedures and countries sending workers agreeing to cooperate on the return and readmission of such migrants. Further sources *inter alia* interview with former MFA official and dossier issued by bigwobber.nl.

<sup>430</sup> The clause proposed by the EU on data protection was based on an earlier agreement on such a provision in the GATS Understanding on Financial Services. Source: report on technical EU meeting, February 2017.

A group of like-minded EU members including the Netherlands (a spin-off of the group of 14 liberal members) focused on data flows: they sent a letter in May 2017 urging the EC to present an EU text proposal for trade agreements on the free flow of data, because of their offensive interests in this area. They advocated an ambitious EU proposal on data flows and data localisation<sup>431</sup> and regretted that there had not been an EU offer on the matter yet, forcing the EU in a defensive position.<sup>432, 433</sup>

In 2016, the treatment of cross-border flow of data and transparency were indeed two of the major unsolved issues in the TiSA negotiations. The EU position in TiSA negotiations was held up by internal processes. The EU had to resolve differences among the Commission and member states. It managed to do so with the conclusion of the General Data Protection Regulation of 2016, introducing high privacy standards, albeit only for the EU market. By the time the EU managed to conclude these, TiSA negotiations had already reached an impasse.

### 6.2.6 Least-developed countries

The Netherlands wanted TiSA to include development considerations, with a view to assisting developing countries' economies. It wanted in particular to offer the advantages of the draft TiSA agreement to all least-developed countries (LDCs) (offering market access to service sectors, without asking reciprocal access commitments),<sup>434</sup> extending the treatment of the GATS waiver for commitments under the current GATS schedules to TiSA schedules. The EU offer, however, does not contain provisions on this topic, which may be understandable given its limited nature and purpose – and no LDCs participated in TiSA negotiations. The draft TiSA text itself did not contain provisions on special treatment of developing countries either. Minister Ploumen explained to Parliament<sup>435</sup> that the Netherlands was planning to take an initiative in the WTO to grant preferential treatment to the LDCs after TiSA would have been concluded and ratified. This seems rather an empty gesture, because there were very few market openings for temporary workers offered under mode 4, LDCs have few highly skilled professionals (and may even risk a brain drain in critical sectors if they

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<sup>431</sup> One important policy issue is the localisation of data in the country where the consumer resides. If privacy protection and consumer rights cannot be guaranteed in the country where the supplier of e-services resides, forced data localisation can become a trade problem, to be addressed in agreements such as TiSA.

<sup>432</sup> Source for this paragraph: interview with former MFA policymaker, held March 2021, and Government of the Netherlands (2017).

<sup>433</sup> The letter advocates ambitious rules to allow for the participation of businesses and citizens in global value chains as well as a level playing field. Signed by Bulgaria, Croatia, Czech Republic, Denmark, Finland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Romania, the Slovak Republic, Spain and Sweden. Government of the Netherlands (2017).

<sup>434</sup> IRHP 2013-28b TPC Handleiding Plv 21 June 2013. The WTO has allowed preferential treatment for service providers from least-developed countries. At the WTO's 2011 Ministerial Conference, members adopted the waiver which allows WTO members to deviate from their most-favoured nation obligation in order to provide preferential treatment to services and service suppliers from LDCs. The waiver was extended until 2030 by the Tenth Ministerial Conference in Nairobi in 2015. Sources: WTO (2021c); WTO (2021e); WTO (2011). Offering LDCs MFN status and extra market access would be superfluous in light of existing EU commitments in WTO context and in EPAs.

<sup>435</sup> Tweede Kamer, vergaderjaar 2016–2017, nr. 1075. Liliane Ploumen was Minister for Foreign Trade and Development Cooperation in the previous cabinet, until 2018, when Sigrid Kaag took over.

leave) and, finally, few of their service companies are able to compete in the EU market. At the same time, according to one official involved as well as internal documents, the Netherlands and the EU were committed to extending TiSA market access to least-developed countries once the agreement would have been concluded, and their desire for multilateralisation is related to that.<sup>436</sup>

### 6.2.7 ILO conventions and labour standards

The EU, including the Netherlands, initially wanted parties to TiSA to respect the ILO core conventions on labour standards. However, the EC immediately warned members – and Dutch TPC instructions in late October 2016 mentioned this – that setting a precondition for parties to ratify and implement ILO core conventions would prevent the TiSA agreement from becoming a covered agreement under WTO at a later stage, given the general resistance by developing countries to make ratification of these conventions a condition to WTO membership. It would also have been a problem for the US, which still has not ratified all ILO conventions. Interestingly, the Dutch BHOS Minister noted in a letter to parliament in November 2016 (in answer to the question why she accepted human rights and labour standards being left out of the TiSA) that she was disappointed that there were no concrete references to the ILO conventions in the draft TiSA text yet and that the Netherlands would continue to ask for attention for the topic.<sup>437</sup> The minister stated, in the same letter, that TiSA would contain provisions on the protection of labour rights. In late 2016, the draft text on TiSA did not contain references to labour standards, except very general exceptions to protect health and safety, similar to the general exceptions under GATS Article XIV and GATT Article XX.

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### 6.2.8 Dispute settlement

On the issue of dispute settlement in TiSA, only the outlines of its envisaged dispute settlement mechanism had emerged in the negotiations by the time they had stalled: TiSA was likely to include only quite traditional state-to-state dispute settlement procedures.

While at the outset the Netherlands stated that it wanted to include a special inter-state dispute settlement mechanism in TiSA, in 2017<sup>438</sup> it preferred using the WTO (state-to-state) dispute settlement mechanism. However, at a TPC meeting in mid-2016, the EC clarified that the WTO could not take on this task, since TiSA would not, at least initially, be a covered agreement under the WTO and TiSA would thus not yet be subject to the jurisdiction of the Appellate Body. The Commission did not want to delay the overall negotiations on TiSA for this issue. While the EU had initially wanted to set up an appellate body for disputes in addition to arbitration panels, it dropped this position with a view to completing negotiations by the end of 2016.

<sup>436</sup> In official communications such as EC (2021); indeed facilitating participation of developing countries to plurilateral agreements is highlighted in instructions as well.

<sup>437</sup> Tweede Kamer, vergaderjaar 2016–2017, nr. 1075

<sup>438</sup> Bigwobber (2017).

In the end, TiSA was likely to include only state-to-state dispute settlement with provisions largely mirroring those of the WTO Dispute Settlement Understanding (in light of the desire to make it a covered agreement under WTO). It would not include ISDS-type provisions giving foreign investors direct access to international arbitration panels.

Critics from Dutch civil society (including trade union FNV<sup>439</sup> in 2016) feared that multinational enterprises could still make use of bilateral investment treaties containing provisions on investor-to-state dispute settlement to bring claims to host countries about TiSA provisions, especially under mode 3 obligations, limiting states' right to regulate. This fear was similar to concerns expressed around other mega-regional FTA negotiations, but in the case of TiSA it seems far-fetched because the draft TiSA texts do not confer direct rights to multinational investors that could be enforced in ISDS panels.

### 6.2.9 Transparency and consultations

The draft TiSA text contains an annex dealing with participation by stakeholders and transparency in laws and regulations.<sup>440</sup> In addition, the EU and the Netherlands expressed a commitment to be transparent about the negotiations and to organise public consultations on goals for and progress made during negotiations, meeting with business, civil society organisations, trade unions and consumer organisations on a regular basis. The EC also published the EU offer on market access commitments in 2014 and the revised offer in 2016. Critics from civil society pointed out, however, that the EC published the offer only in July 2014, while TiSA discussions started in 2012–2013 and WikiLeaks had already made some documents public. In early 2016, Minister Ploumen informed Dutch Parliament<sup>441</sup> that negotiating mandates would henceforth be published at an early stage, adding, however, that the Netherlands favoured a case-by-case approach to publish negotiating documents to balance the need for transparency and the need to protect the EU's negotiation position vis-à-vis negotiating partners.

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While the Netherlands and the EC pointed out that the draft TiSA text included consultations as a bonus, critics such as Dutch labour union FNV<sup>442</sup> and Greenpeace<sup>443</sup> stressed that such consultations would mostly benefit the interests of businesses, which would be consulted first and foremost. Indeed, some internal documents show the ministry attached great importance to consulting with the Dutch business sector and suggest that Dutch companies

<sup>439</sup> FNV is the largest Dutch trade union, with more than a million members, and a social democratic background. They published a folder on TiSA in September 2016 advocating against the proposed TiSA. See FNV (2016).

<sup>440</sup> The draft TiSA text also covers transparency, stating that states shall publish measures of application after it enters into force.

<sup>441</sup> MFA (2016).

<sup>442</sup> FNV issued a folder on TiSA in 2016. See FNV (2016).

<sup>443</sup> In November 2016, Greenpeace deplored that 'influential lobby groups such as the European Services Forum are officially consulted before and during rounds of negotiation'. Greenpeace (2016c).

have substantial influence in identifying negotiating positions.<sup>444</sup> At the same time, the BHB consultations with civil society and regular contacts that policy officers are said to have had, show that the MFA took civil society engagement seriously.

## 6.3 Extent of policy success

### 6.3.1 Dutch positions compared to the positions of the EU

The Netherlands does not seem to have taken an extreme position on any of the issues described above, but it started from a neoliberal desire to open up foreign services markets in an ambitious manner (in line with the already built-in GATS liberalisation agenda) by securing non-discrimination or national treatment of its service providers in third markets as much as possible. This is not surprising: first of all, Dutch government coalitions were predominantly neoliberal, and the Netherlands as a services-oriented trading nation has traditionally adopted liberal trade policies. Second, it is not surprising since these positions are in line with the general Dutch desire to complete the internal market by fully integrating the EU services market.

At the same time, in TiSA the EC and Dutch positions took into account special sensitivities in the EU, such as enshrining the right of states to regulate, and protecting public services, social security and the audio-visual sectors. Whereas the Netherlands sometimes started by voicing liberal positions in EU deliberations – often keeping instructions the same for months or even years – in the end it usually acted pragmatically, adjusting its positions (seemingly quite suddenly)<sup>445</sup> and aligning with the European Commission's positions.

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Annex 5 compares the Dutch positions on selected themes, which were introduced above, to the EU positions, insofar as information was available. The Dutch positions and efforts on some main topics can be summed up as follows.

- The Netherlands consulted with a group of around 14 like-minded, liberal member states on a regular basis and was among the leaders of that group.
- This group had mixed success in achieving a liberal position on the TiSA negotiations, though. On opening up European public service sectors, the Netherlands would have preferred a more liberal position that better defined public services and opened them up somewhat further than the one in the EC proposal.
- On professional services workers under mode 4, the EC integrated a Dutch idea to include an EU protocol to ensure cooperation on the return of temporary workers to their home states after completion of their contracts.

<sup>444</sup> A general note on free trade agreements from 2013 (made public under the WOB law) explicitly noted that the Ministry of Foreign Affairs wanted to represent the interests of Dutch businesses as well as possible and that it asked for their input.

<sup>445</sup> This statement is based on the written instructions and reports of the TPC and TPCSI meetings, as well as interviews with policymakers and diplomats. IMH indicates that when necessary (because of developments) positions are adjusted and updated for informal talks with other members.

- On data flows, the Netherlands advocated for an ambitious EU common position to promote its offensive interests. In the TiSA negotiations, the EU indeed promoted general protection of data, including personal data, using arguments of preventing protectionism and promoting data security rather than privacy arguments. In April 2016, the EU agreed internally on the above-mentioned regulation for the flow of data in the EU (in GDPR). For TiSA, the EC proposed existing texts from the GATS Understanding on Financial Services.
- While the Netherlands unilaterally advocated for preferential market access of least-developed countries, this was never achieved, because TiSA negotiations stalled.
- As to a reference to the ILO conventions on labour rights, the Netherlands – following the EC – dropped its desire for a reference, because it would hinder multilateralisation of TiSA, although this change was not made public.

### 6.3.2 Overall results

If success is defined as concluding a TiSA agreement, the EU and the Netherlands obviously did not achieve that goal, but that was in great part due to the difficult atmosphere in international trade relations, in particular with the US. In fact, even negotiating TiSA as an economic integration agreement among a selective ‘Group of Real Friends’ did not result in their ultimate objective of opening up global trade in services.

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In interviews at the start of this study, representatives of the Dutch Ministry of Foreign Affairs suggested that much effort had been put into TiSA negotiations. From our sources, it is not very clear that this was a priority topic and/or that specific initiatives or campaigns were undertaken to promote Dutch positions or TiSA as such in bilateral contacts, beyond the normal expression of Dutch positions in the EU Trade Policy Committee on services.

Although TPCSI reports did not always highlight Dutch interventions, the Netherlands did play a visible part in the context of the EU, during its presidency and beyond, helping to support the ambitious position of the European Commission in the TiSA negotiations. Because the Netherlands held the presidency at an important time during TiSA negotiations, it was not in a position at the time to push its own agenda, according to a Dutch official interviewed. At the same time, it did engage actively in groups of like-minded member states. The Netherlands did not have a dedicated representative for the TPC working group on Services and Investment, but it was active in several groups of member states, including like-minded liberal countries and thematic groups on data flows.

Actually, it is difficult to say to what extent the Dutch efforts to influence the EU offer and positions in TiSA have been effective, partly because most Dutch positions were aligned with EC positions and those of other delegations, in particular liberal countries such as Denmark and the UK. It is clear that the Netherlands took an active interest and let itself be heard. According to an interview with an EC representative, the Netherlands was often able to nudge internal EU negotiations in a certain direction, challenging the Commission if needed, thanks to its skilled representatives at the technical level. At least two non-Dutch experts,

who were positive about the quality of Dutch interventions at the technical level on trade and investment in general when asked, did not mention specific TiSA-related Dutch inputs. The Netherlands is best known for its generally liberal stance on trade policy and, to a lesser extent, its consideration of the interests of developing countries.

Dutch minister Ploumen's promotion of goals such as sustainable trade, responsible business conduct, gender and special treatment of developing countries, which were raised in some communications with Parliament, does not seem to have resulted in concrete text proposals in the EU positions on TiSA. For the most part, these Dutch priorities did not materialise in instructions, reports and other documents on EU discussions on TiSA that IOB found.<sup>446</sup> On the issue of developing countries this may not be surprising, given the limited participation of developing countries and the fact that issues of interest to developing countries were virtually absent in the TiSA negotiations, as well as the limited influence of civil society.

## 6.4 Conclusion

### 6.4.1 International context and the way forward

The legal issues around the form best suited for TiSA – a plurilateral agreement with an accession mechanism or an economic integration agreement – created problems from the start. Besides, China – the world's second-largest economy – was excluded by some TiSA participants for geopolitical reasons. Moreover, developed countries had fundamental economic disagreements regarding to what extent they would exclude public services; about how they would take on legally binding obligations; and how they could open up their markets to foreign service providers in a mutually beneficial manner – especially in new sensitive areas such as data flows, privacy protection, e-commerce and dispute settlement. These problems proved insurmountable, and discussions around TiSA have gotten nowhere since 2016.

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When TiSA negotiations came to a halt, official communications did not immediately recognise that the pause would be semi-permanent. At the moment of writing, in early 2021, the Trump administration has been replaced by Biden's, but economic policymakers in the Netherlands and the EU do not expect TiSA negotiations to resume where participants left them in 2016, because geopolitics and international relations have not fundamentally changed.

Meanwhile, at the WTO, discussions on the service sector have lacked any real progress since 2015, or even since 2005 for that matter.<sup>447</sup> Public protests against FTAs seem to have calmed down somewhat. But the public distrust in Europe of big, mostly American, tech companies

<sup>446</sup> Priorities as evidenced by Minister Ploumen's policy notes and letters to parliament as well as statements and articles on a 'reset of trade policies'. See also IOB's upcoming policy assessment of BHOS budget article 1 on trade and development cooperation and the final chapter of this report on such topics.

<sup>447</sup> WTO (2021a).

seems to have exacerbated over the past few years, and that is likely to make future negotiations on trade in services even more difficult. The absence of an agreement on liberalisation of the service sector has not hindered the trends of globalisation, digitalisation and the proliferation of new services, although regulatory conflicts are looming on the horizon. Meanwhile, separately from TiSA, a group of WTO members is negotiating on domestic service regulation,<sup>448</sup> following a joint declaration at the WTO Ministerial Conference in 2017.

The EC in its Trade Policy Review (February 2021) indicates that digital trade is a top priority and that trade in services is becoming increasingly important.<sup>449</sup> In this communication, the Commission prioritises the WTO negotiations on domestic service regulation. They only want to advance the liberalisation of services, such as in the context of TiSA, afterwards. Furthermore, the Commission acknowledges that plurilateral agreements in the context of WTO are the only way forward for further liberalisation (rather than self-standing economic integration agreements): covered agreements under Annex IV of the WTO agreement. Since multilateralisation requires consensus from the entire WTO membership, any such plurilateral agreement will need to address the interests of a wide range of members in a balanced manner.

A lesson for WTO members wishing to go further in trade liberalisation and negotiate a plurilateral agreement in a certain area is to ensure that a critical mass of WTO members is involved and allow some degree of free-riding to ensure multilateralisation.<sup>450</sup> The Information Technology Agreement<sup>451</sup> on full liberalisation of the trade in IT products could offer a good template to build on.

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Negotiations on horizontal disciplines for standards, regulations and subsidies in services that affect all WTO members should preferably take place in open-ended working groups at the WTO, not in closed meetings among a selective group of countries.<sup>452</sup> Whether it will even be wise – or practicable – to advocate a resumption of the plurilateral TiSA negotiations is, in sum, questionable.

<sup>448</sup> See [wto.org on the discussions on domestic service regulations: https://www.wto.org/english/tratop\\_e/serv\\_e/dom\\_reg\\_negs\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/dom_reg_negs_e.htm)

<sup>449</sup> EC (2021).

<sup>450</sup> If the critical mass of countries making up the majority of the relevant sector participate in the negotiations and if a high number of countries have to ratify an agreement before it can enter into force, the minority group (of free riders) will not really affect the balance in reciprocal market openings and global trade much – and in the case of poorer developing countries their profiting could even be welcomed.

<sup>451</sup> See [https://www.wto.org/english/res\\_e/publications\\_e/ita20years2017\\_e.htm](https://www.wto.org/english/res_e/publications_e/ita20years2017_e.htm).

<sup>452</sup> 'Since FTAs are fundamentally structured around discrimination between participants and non-participants, they are not conducive to being integral to global rulemaking. [...] The fact that TiSA is an FTA makes its path towards global rules a non-transparent process', as stated in Natakomi and Michitaka (2015).

### 6.4.2 Dutch positions and influence

Although there is not much robust information on the formal Dutch position expressed in the EU on TiSA and on the Dutch influence on the EU offer of 2016, this study has shown that the Netherlands was engaged in the topic and took an active interest in promoting market access for its service providers in third markets. In line with the comparative advantages of the Netherlands in services and the general desire to achieve an ambitious outcome, it prioritised the promotion of market openings for Dutch companies abroad, including for its digital service providers. The protection of its own public sector and safeguarding the right to regulate domestically (which were arguably not at risk under TiSA anyway) were not priorities in TiSA – and understandably so.

Overall, the Netherlands seems to have aligned itself with EU positions, even though it sometimes started from a more ambitious or more liberal position. Dutch interventions do not seem to have resulted in outstanding achievements, except perhaps when it comes to including an EU protocol on the return of temporary workers into the EU offer. This is significant because as negotiations on TiSA were stalled, we are unable to tell whether Dutch priority positions would have achieved success beyond the phase of agenda-setting, influencing the EU position and being integrated into the EC's negotiation mandate.

However, it is safe to say that the Dutch position probably allowed the Commission to arrive at a more balanced position where offensive interests outweigh defensive interests, which fits with the desire of the Netherlands and the EU to have an ambitious TiSA negotiated between like-minded WTO members.

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## 6.5 Recommendations

- Often, Dutch policy objectives and positions were not spelled out in instructions or other communications. For reasons of clarity, consistency and policy coherence it would be preferable to formulate Dutch positions on (a future) TiSA more explicitly and update them when circumstances change. For future negotiations on trade and investment agreements, it would be good to draft clear policy objectives and/or systematically record the Dutch position.
- Make the Dutch position public wherever strategic interests allow it, in order to live up to the political commitment of transparency. Consult all stakeholders, including civil society, on a regular basis – not just the business sector.
- For the sake of policy coherence, integrate relevant priority policy goals and commitments more systematically into Dutch positions, including in negotiations on the services sector. For instance, if the interests of least-developed countries, gender and labour rights are top priorities for trade agreements, come up with proposals for texts or other ways to promote these issues. In the same vein, ensure (or continue to ensure) that cabinet positions on trade and development are aligned and harmonised. It would help to establish an up-to-date assessment framework to identify and manage trade-offs and to foster synergies.



7

# Investment protection and investor duties

## 7.1 Introduction

Almost every country welcomes foreign direct investment (FDI) and deploys financial and tax incentives to attract it. Few governments, however, accept legal commitments to open their market and few offer legal protection to foreign investors beyond their treatment of domestic investors. Most capital exporting (home) countries therefore seek additional legal protection for their own direct investors in third countries through investment agreements, especially if the rule of law in the host country is considered deficient and is not compensated by market advantages.

In the past, investment protection was dealt with primarily in bilateral investment agreements or treaties (BITs), mostly between Northern (OECD) and Southern countries. OECD countries usually did not conclude BITs among themselves, because they trusted each other's rule of law and followed OECD guidance.<sup>453, 454</sup> In bilateral investment agreements, governments agreed on rules on how to treat direct investors and created direct access for those investors to international arbitration in case of disputes.

However, from 1996 onwards, OECD countries attempted to negotiate multilateral investment disciplines – on both protection and new market access – in the WTO. Until now, these multilateral negotiations have not been successful, primarily due to a resistance of developing countries to negotiate and accept binding disciplines in this area.<sup>455</sup> This lack of success is due to several issues, such as the lack of balance between foreign investors' rights and duties, the 'intrusive' nature of FDI and tensions regarding the right to regulate by governments, as well as the opaque nature of investor-state dispute settlement (ISDS) arbitration panels. Some countries, led by the EU, have sought to improve ISDS by setting up a more permanent and transparent international investment court system (ICS), as part of comprehensive free trade agreements (FTAs) and investment agreements. In the longer term, the EU aims to set up a multilateral investment court (MIC), which would replace all Investment Court Systems.

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<sup>453</sup> An effort in the Organisation for Economic Co-operation and Development (OECD) in the 1990s to negotiate a comprehensive multilateral agreement on investment (MAI) foundered primarily on disagreements about enlarging market access in sensitive sectors.

<sup>454</sup> The OECD used to have around 30 mostly Western members, nowadays there are 38. There is no uniform mechanism for investor to state dispute settlement (ISDS); there are over 3,000 bilateral investment agreements and they each have their own provisions. These usually guarantee that a foreign investor can start international arbitral proceedings (ISDS) against the host state's legislative, executive or judicial measures if the investor considers they are incompatible with the agreement. An ad hoc tribunal, usually under the [ICSID Convention](#), can then be requested by the complaining investor. Now that Southern economies have grown and become more assertive, and now that investment treaties have been negotiated between OECD countries, either as part of comprehensive FTAs or the Energy Charter Treaty, ISDS has become more important and more controversial.

<sup>455</sup> OECD countries are also getting cold feet because of societal pressure and security concerns, while some are now also facing legal challenges from foreign investors in sensitive policy domains.

**Box 7.1** *Main aspects ICS and MIC*<sup>456</sup>

What is an **investment court system**, such as the EU envisages<sup>456</sup> (and how does it differ from traditional ISDS)?

It is a permanent court (instead of the temporary, ad hoc tribunals that are used under ISDS), established under the jurisdiction of the covered BITs that provide the ICS with this legal authority.

It is accessible to foreign investors. An ICS is made up of a Tribunal of First Instance and an Appeal Tribunal (in contrast to ISDS where there is no possibility for appeal).

The ICS Tribunal of First Instance is endowed with professional and independent adjudicators.

It will work transparently by opening up hearings, publishing documents and allowing interested third parties to intervene.

A **multilateral investment court** would be a permanent body, established by a multilateral treaty with a dedicated secretariat, open to foreign investors of participating countries where interested countries can join at a later stage.

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Throughout the reporting period, the Netherlands tried to influence EU positions on investment in negotiations on comprehensive EU FTAs and free-standing investment agreements as well as in UNCITRAL<sup>457</sup> discussions on ISDS reform. Broadly speaking, the overall policy objectives in the field of investment protection were, first, to set up an investment court system that is fair, transparent, independent and offers the possibility of appeal. Second, to provide a modernised blueprint for bilateral investment agreements – the Model BIT – that also refers to the set-up of such a modern ICS system and contains provisions on the promotion of responsible business conduct, human rights and sustainable development.

This chapter deals with the Dutch position on the treatment of FDI in intergovernmental negotiations and its influence on the EU position on these matters, given that almost all

<sup>456</sup> Source inter alia: EC (2019); EC (2021b).

<sup>457</sup> United Nations Commission on International Trade Law. The Netherlands actively supported the EC in the multilateral negotiations in the UNCITRAL working group III on Investor State Dispute Settlement Reform, which exists since around 2017. The EU is not a formal member of UNCITRAL (a UN body), but does negotiate in this setting on behalf of the EU and the member states. For more information see: [https://uncitral.un.org/en/working\\_groups/3/investor-state](https://uncitral.un.org/en/working_groups/3/investor-state); Source: European Parliamentary Research Service (2020b).

aspects of investment protection were conferred to the EU under the Lisbon Treaty.<sup>458, 459</sup> This chapter and its annex will also discuss how some agreements attempt to enhance the contribution of FDI to sustainable development in host countries, which the Dutch cabinet aimed to promote, as part of a coherent trade and investment policy.

In this chapter, we will sketch the economic and legal context of investment agreements and explain why this topic is relevant to the overall Dutch strategy on trade and investment. Second, we will address the priorities of the Netherlands in the research period, including the promotion of responsible business conduct. More specifically, we will focus on the Dutch position on (1) the change towards a reformed international system for dispute settlement and the plan to set up a multilateral investment court, and (2) the new Dutch Model Bilateral Investment Treaty (BIT), introduced in 2018, which can be seen as the clearest expression of changed Dutch priorities. Third, we will try and analyse the extent to which the Netherlands was successful in putting those issues on the policy agenda and in achieving its preferred policy outcomes.

#### *Legal treatment of investment in international agreements*

Investment protection agreements, such as the bilateral investment treaties, intend to protect international investors against the risk of expropriation or nationalisation by the host country, as well as guarantee free transfer of capital and a ‘fair and equitable treatment’ of investors. Nowadays, investment agreements are not only negotiated between developed and developing countries, but also among developed regions and OECD countries.

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Investor State Dispute Settlement panels have, over time, come up with extensive interpretations of the concept of ‘fair and equitable treatment’ in BITs. These interpretations went beyond the national treatment of domestic investors and resulted in some controversial rulings and huge financial settlements in favour of investors. OECD countries tried to negotiate investment protection and market access in the WTO as one of the so-called Singapore issues.<sup>460</sup> While this attempt was initially successful, these issues were later

<sup>458</sup> This chapter builds on the investment case study in the background report by Ecorys (2021).

<sup>459</sup> The Court of Justice of the EU ruled in Opinion 2/15 that almost all aspects of investment protection except for non-direct investment and investor-state dispute settlement are conferred to the EU under the Treaty of Lisbon. EU member states are allowed to continue negotiating and concluding new BITs, or renegotiating and amending existing ones, only with explicit consent of the Commission under Regulation 1219/2012, i.e. the EC consents if there are no agreements or negotiations ongoing by the EU itself.

<sup>460</sup> The ‘Singapore issues’ refers to the WTO Singapore Ministerial Conference in 1996 that set up three new working groups, on trade and investment, on competition policy and on transparency in government procurement. The fourth issue concerns ways of simplifying trade procedures, or ‘trade facilitation’. The issues were initially part of the negotiations on the Doha Development Agenda of 2001.

dropped at the insistence of developing countries.<sup>461</sup> In this context, it is good to note that developing countries prefer traditional state-to-state dispute settlement: they seem to accept ISDS and ICS only when they do not have enough political clout and economic leverage (resulting in negotiating power) to stick to intergovernmental settlement of disputes.

The stalemate in the WTO led to investment issues being increasingly covered in negotiations on comprehensive free trade agreements, including in those by the EU. Main motives in the EU to improve the existing system, both in substance and in arbitration procedures, included the desire to enhance its legitimacy and stability and to safeguard the right of states to regulate – and thus perhaps improve the chance of approval of investment agreements by critical national parliaments. However, several infamous arbitration rulings under existing BITs and NAFTA,<sup>462</sup> as well as public pressure (especially against ISDS in the context of the failed TTIP<sup>463</sup> negotiations) led an increasing number of OECD countries to consider ways of recalibrating the international investment regime.<sup>464</sup>

#### *Relevance of ISDS and ICS to the overall Dutch strategy on trade and investment*

The topic of investment protection is of particular interest to the Netherlands, first because of its role as home state of many MNEs and its responsibility for its extensive network of BITs. The Netherlands has around 90<sup>465</sup> bilateral investment protection agreements. As a result, a considerable part of all arbitral procedures were litigated under Dutch BITs.<sup>466, 467</sup> Possible reasons are the important position of the Netherlands as a provider and recipient of FDI and the fact that the Netherlands is the seat of a disproportionate number of MNEs and special interest vehicles (so-called letterbox companies or special purpose entities). Dutch BITs used

<sup>461</sup> Treatment of FDI and market access is partly covered for service sectors under mode 3 of the GATS agreement for services, but few countries have made significant market opening commitments. Dispute settlement under GATS is only intergovernmental and not accessible for investors. Though negotiations on investment were originally part of the 2001 Doha agenda, this 'Singapore' issue was later removed from the negotiating agenda at the 2003 WTO Ministerial Conference in Cancun. Negotiations on a Multilateral Investment Agreement seem to have failed around 1997-1999 due to lack of political leadership, lack of support from the business community and opposition by NGOs (source: Institute for International Economics (2000)).

<sup>462</sup> North American Free Trade Agreement (1994) between Canada, Mexico and the United States.

<sup>463</sup> The proposed Transatlantic Trade and Investment Partnership between the US and the EU.

<sup>464</sup> Concerns by parties in the UNCITRAL Working Group III on ISDS reform were: a) consistency, coherence, predictability and correctness of arbitral decisions; b) integrity of arbitrators and decision-makers; and c) cost and duration of ISDS disputes.

<sup>465</sup> The UNCTAD international investment agreements navigator mentions, in January 2021, 107 bilateral agreements, of which 15 were terminated and 5 signed but not enforced – so 87 are active (UNCTAD (2021a)); various sources including MFA letters to parliament mention that the Netherlands has around 90 bilateral agreements. The government's website mentions 95 current agreements, but it includes 9 which are no longer in force and one which is not yet in force; their list is dated 15 October 2020. (Rijksoverheid (2020)).

<sup>466</sup> A study by UNCTAD in 2015 found that the Netherlands was involved in 11% of all ISDS procedures. The study was not really made public (although Parliament was free to read it) but the report was briefly summarised in letter to parliament nr. 2313 of 20 May 2015. It found that 61 of a total of 552 cases until 2013 stated the Netherlands as home state of the investor/company concerned. In mid-December 2020, the UNCTAD website listed 114 cases since 1996 (again, almost 11% of 1061 cases) (UNCTAD (2021b)).

<sup>467</sup> Adviesraad Internationale Vraagstukken (2015).

to be known for their investor friendliness. At the same time, the Netherlands was also attractive as a conduit country for fiscal planning reasons.<sup>468</sup> In addition, Dutch BITs (like other countries' BITs, for that matter) are not required to exhaust domestic legal remedies before submitting an ISDS claim, and still have easy substance requirements for establishment in the Netherlands, thus providing legal protection under the BIT.<sup>469</sup>

This situation raises questions around policy coherence and the balance between rights and duties of investors (which we will revert to in an annex to this chapter). BITs typically do not set out the duties of international investors beyond the requirement that they shall comply with domestic laws and regulations of the host state, including laws and regulations on human rights, environmental protection and labour laws. As enforcing such laws domestically is often a problem in developing countries, OECD countries started spelling out expectations of behaviour for their investors, based on international guidelines, standards and principles of duty of care and due diligence<sup>470</sup> around responsible business conduct, sustainable development and human rights. With some notable exceptions,<sup>471</sup> such expectations of behaviour have not yet been integrated into regulations for the MNEs by the home state of the direct investors.<sup>472</sup>

<sup>468</sup> Arcuri and Verbeek (2019) pointed out that the Netherlands was the top investor in 2018 and the second largest recipient of FDI in 2018, and that it is also 'the world's biggest conduit country, used for channelling funds to... tax havens', citing research by the University of Amsterdam. 'The country offers an attractive fiscal climate by offering low withholding taxes on dividends, royalties, interest and capital gains income. The relatively weak substance requirements under Dutch law enable multinational corporations to set up holding companies, including letterbox companies and Special Purpose Entities'. Other sources including the Dutch government, OECD and media confirm the investor friendliness of Dutch BITs. They confirm that fiscal policies were designed to attract foreign companies, in particular MNEs and that the Netherlands is more accommodating than other (European/Western) host states. 'Their [i.e. Dutch BITs] investor-friendly nature stems from their typically broad scope of application, general lack of balance and unrestricted access to ISDS', according to Arcuri and Verbeek (2019).

<sup>469</sup> More than three quarters of claims submitted under Dutch BITs were actually brought by non-Dutch firms with little or no substantial economic activities in the Netherlands, so-called 'letterbox companies'. Dutch BITs may have enabled some foreign investors to circumvent their own national legal systems by allowing them to submit investment disputes with their own government directly to international arbitral tribunals. For an overview of cases brought under Dutch BITs, see <https://investmentpolicy.unctad.org/publications/135/treaty-based-isds-cases-brought-under-dutch-iias-an-overview>. Arcuri and Verbeek (2019) state that of the investors submitting claims, only 13% are in fact Dutch. They give several examples of claims where Dutch BITs have been used to promote a company's narrow self-interest to challenge host states' policies and legislation.

<sup>470</sup> In the context of responsible business conduct, due diligence is 'the process enterprises should carry out to identify, prevent, mitigate and account for how they address ... adverse impacts in their own operations, their supply chain and other business relationships. The purpose of due diligence is first and foremost to avoid causing or contributing to adverse impacts on people, the environment and society, and to seek to prevent adverse impacts directly linked to operations, products or services through business relationships'. Source: OECD (undated). <https://www.oecdguidelines.nl/oecd-guidelines/due-diligence-guidance>

<sup>471</sup> Nowadays, there exists EU regulations on conflict minerals, non-financial reporting, corruption and fraud.

<sup>472</sup> This chapter will not be dealing with the negotiations on the UN Binding Treaty on Transnational Corporations with respect to Human Rights. For more information see <https://bindingtreaty.org/>.

Starting around 2013, the Netherlands raised its profile as an advocate for such standards and principles in the enhanced OECD Guidelines on RBC for MNEs,<sup>473</sup> motivated by a desire to promote global public goods, but also to create a global level playing field among multilateral companies. In 2018, the Netherlands adopted a Model BIT, meant to serve as the basis for updating Dutch bilateral investment agreements, but also as an example for other countries. This Dutch Model, which is described below in some detail, went beyond the positions and ambitions of the EU on modernising the ISDS and advancing the promotion of RBC, human rights and sustainable development by foreign investors.

## 7.2 The Dutch position on investor-state dispute settlement

### 7.2.1 Investment court system

The Netherlands, the EC and other member states such as France and Germany tried to improve the ISDS both in substantial provisions and process, by defining more clearly (1) when a host state acts illegally or discriminates against foreign investors by not extending ‘fair and equitable treatment’ to them; (2) defining more clearly when a host country government exercises its right to regulate in its own jurisdiction legitimately, for instance when protecting the public interest, public health or the environment; and (3) limiting the eligibility of foreign investors and investment categories to protection to prevent treaty abuse.

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In terms of process, the Netherlands and the EU also tried to improve the procedures of the current arbitration system based on ad hoc panels established under the ICSID<sup>474</sup> Convention: by improving the quality and independence of arbiters, improving consistency in the interpretation of provisions in investment agreements, increasing the transparency around settlements and procedures, and promoting the establishment of a standing investment court system. Finally, the Netherlands also attempted to promote a more level playing field for developing countries by, first, funding technical assistance by UNCTAD for governments negotiating contracts with MNEs and, second, by taking the lead in initiatives to establish a legal support facility for developing countries challenged by investors under the international system.<sup>475</sup>

#### *Moving from ISDS to ICS*

Following public and political criticism around the TTIP negotiations, in 2014 Minister Ploumen commissioned research to assess ‘the impact of investor-state-dispute settlement in

<sup>473</sup> For more information see <https://www.oecd.org/corporate/mne/responsible-business-conduct-matters.htm>

<sup>474</sup> The ICSID Convention deals with the settlement of investment disputes between states and nationals of other states.

<sup>475</sup> For instance, the Netherlands supported the establishment of an advisory centre on international investment law (ACIIL), inspired by the Advisory Centre on WTO Law (ACWL), which has been operating since 2001 in WTO dispute settlement.

the TTIP'.<sup>476</sup> She noted the following priority areas for improving the system, which were similar to the priorities for change that the European Commission had identified:

- Adding filters to limit the accessibility of ISDS and avoid frivolous claims by foreign investors (in response to the fear that such investors unduly get direct access to international arbitration, while domestic actors do not);
- Guaranteeing policy and regulatory space for the government parties involved (in response to the fear that states would be limited to draft new policies and legislation);
- Limiting and clarifying the scope of covered investments to avoid abuse, excluding letterbox companies lacking an economic relationship with the Netherlands (setting substantive requirements), formulating clear standards and inserting a 'limited umbrella' clause<sup>477</sup> to ensure that not all policies and legislation could be contested;
- Improving the procedures for arbitration: increased transparency and avoiding conflicts of interest of appointed arbiters (in response to the criticism that information about claims and settlements was not complete, and that arbiters could be double-hatted, were not diverse enough and had too much power to interpret investment agreements);
- The possibility to appeal panel rulings, to receive proper legal protection for both states and investors and to have more consistency in rulings.

From 2015, the Netherlands promoted the change from ISDS to ICS, including the possibility of appeal and independent, well-qualified arbiters.<sup>478</sup> Minister Ploumen stated that legal security for international investors was an essential precondition for a reliable international trade and investment regime. The motivation for the establishment of an ICS was the desire to modernise the current system and make it more transparent, as well as to improve the consistency, legitimacy and independence of arbitration.

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The minister, together with the ministers for Trade of Germany, France and some other EU member states played an active part on this issue. They tabled a paper in May 2015 on references to ISDS in the CETA negotiations with Canada, which informed the position EU Commission and other member states.<sup>479</sup> In addition to the points above, the paper highlighted the need to maintain states' rights to protect core European values, 'such as respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights, protection of health, safety and the environment, as well as cultural and linguistic

<sup>476</sup> Letter of 25 June 2014 by Minister Ploumen explaining the study and Dutch positions (Tweede Kamer, vergaderjaar 2013–2014, 21501 02 nr. 1397). The researchers were from Halle and Leiden universities as well as Ecorys.

<sup>477</sup> The 'limited umbrella clause' means that not all provisions of a bilateral investment treaty should automatically apply to all policies and commitments by the state party. An umbrella clause is a provision in a BIT by which a state agrees to comply with all of its obligations owed to foreign investors. An umbrella clause can be highly advantageous as it may allow the investor to argue that issues ordinarily governed by local law and jurisdiction can also be characterised as a breach of an investment treaty obligation. Therefore, the investor may be able to elevate all of its disputes with the state to the international forum under the protective umbrella of the BIT. Source: LexisNexis (2020). Substantive requirements were promised after international discussions on investment protection, alongside responsible business conduct requirements for investors.

<sup>478</sup> The introduction of an ICS still allows investors to have direct access to the international judicial system, albeit a better system with more guarantees for quality, independence and transparency.

<sup>479</sup> EU Member States' non-paper (2015).

diversity, media freedom and media pluralism'.<sup>480</sup> The Netherlands and the EC also promoted improvements to ISDS and references to an ICS in cooperation with like-minded stakeholders outside of the EU, including with Canada around the time of the CETA negotiations, and including during the Dutch presidency.<sup>481</sup> In sum, the Netherlands showed a serious effort to reform the investment dispute settlement system.

#### *Dutch input and consistency in technical EU meetings; a case-by-case approach*

The EU positions on trade and investment matters are prepared at a technical level, in the Trade Policy Committee. In those meetings, the Netherlands often retained the same position over long periods of time, without adjusting it to changing circumstances in FTA negotiations. The position most commonly expressed in instructions – 46 times over less than two years in 2015–2017 – was that the Netherlands insisted on texts on a modernised system (ICS). The Netherlands was also part of a group of around 14 like-minded, liberal member states who consulted on a regular basis on the eve of TPC meetings that dealt with services and investment. Note, however, that capacity for this issue was limited, with basically only one person in The Hague dealing with investments, apart from the period during which the Netherlands held the presidency.<sup>482</sup>

The Netherlands only considers it necessary to move towards ICS, as an improved dispute settlement system for foreign investors, when justice is less secure than in the Netherlands or the EU, basically in countries outside the group of traditional OECD members. Meeting reports and interviews indicated that this position was shared by the rest of the EU. This position was expressed in the case of Australia and New Zealand, for example.<sup>483</sup> Access to the national courts is seen to offer adequate legal protection for the direct investors of the partner country. This Dutch position was explained in a TPC meeting group in 2018,<sup>484</sup> for example, and it was also confirmed in an interview by IOB in 2021.<sup>485</sup> The Netherlands – like Germany – effectively had a pragmatic approach to investment protection, deciding whether to insist on ICS on a case-by-case basis. However, in some cases a reference to ICS was part of the EC's negotiation mandate and in the case of CETA, while the rule of law in Canada was adequate, a reference to ICS was still included. In any case, the Netherlands made it clear that it could not accept references to the outdated ISDS – only to ICS.

<sup>480</sup> Ibid.

<sup>481</sup> Berichtenverkeer (2016a); Berichtenverkeer (2016b); Berichtenverkeer (2016c); Europa - EU - Raadswerkgroep - Handel - Verslag TPC SI 25 January 2017.

<sup>482</sup> Interview with policymaker at the MFA and e-mail message (2021). During the presidency, one extra person was available for investments (as well as one for services); the TPC SI team only consisted of four people in that period.

<sup>483</sup> Several instructions for the TPC contain such texts; more specifically: IRHP 2017-36b Handleiding TPC plaatsvervangers 7-12-2017; IRHP 2018-02b Instructie TPC plaatsvervangers 19-01-2018; IRHP 2018-06b Instructie TPC plaatsvervangers 16-02-2018; Handleiding voor TPC leden Plv, Australië en Nw-Zeeland 7-12-2020.

<sup>484</sup> Germany explained in April 2018 in an internal EU meeting that the EU needs to consider whether addressing investment protection is necessary, and if so, whether it should be in a separate agreement or not. The Netherlands supported Germany. (IRHP 2018-11c TPC Verslag Attachés 4 April 2018).

<sup>485</sup> Interview with policymakers at the MFA, held on 6 January 2021 and 22 March 2021.

In 2017 and 2018, the Netherlands stated<sup>486</sup> about EU Free Trade Agreements with third countries in general that it would be unable to accept the old system for investment protection (i.e. ISDS) in the context of the FTAs that the EU negotiated at the time (i.e. with Mexico and Vietnam).<sup>487</sup> Throughout 2017, Dutch instructions at the working level confirmed that a compromise on ISDS – i.e. mentioning ISDS instead of ICS – would not be acceptable:<sup>488</sup> no mention of ICS in an agreement was better than a mention of the outdated ISDS.<sup>489</sup>

In 2015, an earlier Dutch instruction to the TPC working group stated that CETA and TTIP negotiations were too important to be held up by disagreement on improving the ISDS system. In the same vein, in 2017 the Minister for Economic Affairs told Parliament that he would rather have an agreement on a comprehensive FTA with Japan without reference to ICS than not have an agreement at all.<sup>490</sup> Instructions to TPC give the impression that the minister's statements necessitated a change of the formal Dutch position in TPC.<sup>491</sup>

The fact that the Netherlands and the EU did not insist on introducing investment protection chapters and in particular the investment court system in comprehensive free trade agreements, raises the question whether the desire to reform the investment protection system is essential or not. One can also ask to what extent economic self-interest is a reason to drop references to ICS, when ICS is part of the EC's negotiating mandate but negotiating partners reject it.<sup>492</sup> Perhaps the emphasis on the inclusion of an investment protection chapter including ICS depends not only on the quality of the rule of law in the countries concerned (as was said to be the case with Australia and New Zealand), but also on whether economic interests outweigh the desire to include ICS.<sup>493</sup>

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Two negotiating processes which were concluded after the reporting period also lack a substantial reference to an ICS (reaffirming IOB's doubts about how essential the issue is): the draft EU–China Comprehensive Agreement on Investment (CAI), agreed in principle on

<sup>486</sup> Based on analyses of the TPC meetings of 2017 and the annexes to Tweede Kamer, vergaderjaar 2017–2018, 33 625, nr. 265.

<sup>487</sup> See BDI (2020) and its map with EU FTAs.

<sup>488</sup> TPC instructions for 2017 in general, and more specifically: IRHP 2017-04b Handleiding Plv 3 February 2017; IRHP 2017-13c TPC Verslag Plv 21-04-2017; IRHP 2017-32b Handleiding TPC Leden 27 October 2017; IRHP 2017-35b Handleiding TPC plaatsvervangers 1-12-2017.

<sup>489</sup> Source: interview and reference group, BEB.

<sup>490</sup> This was one of the instances where political statements suggested more ambition than was expressed at the technical level – here, the political level (the Minister of Economic Affairs) indicated a willingness to drop ICS before instructions reflected that.

<sup>491</sup> Tweede Kamer (2017); various instructions for the TPC in 2017, i.e. IRHP 2017-22b Handleiding Leden 5 July 2017.

<sup>492</sup> Such an approach can be seen as pragmatic. Evidence for a pragmatic EU position was also found in the context of a TISA, in technical meeting reports of 2016, when it was suggested that the EU was hesitant to push for a modern investment dispute settlement mechanism and an appellate body because it might delay or stall negotiations.

<sup>493</sup> Although it happened beyond the reporting period, we note that also in the draft EU FTA with the UK, in December 2020, no specific provision was made for the resolution of disputes between investors and a party by an international arbitral tribunal. (Source: Fietalaw (2020)).

30 December 2020, as well as the EU free trade agreement with Japan and discussions on an investment protection agreement with Japan. In the case of China, a placeholder, or rendezvous clause, on addressing ISDS was inserted for negotiations in two years' time.<sup>494, 495</sup>

### *Support to developing countries and SMEs*

The Netherlands – the relevant minister as well as Parliament – attached importance to extending support to developing countries to be able to participate in ISDS and in a future dispute settlement regime. In addition, it wanted to assist small and medium-sized enterprises (SMEs) to access the court, by reducing costs and providing information. To this end, the MFA initiated and funded a scoping study in 2019 on securing adequate legal defence for developing countries in proceedings under international investment agreements as well as on an Advisory Centre on Investment.<sup>496</sup>

## **7.2.2 A multilateral investment court**

### *From an ICS to a MIC*

A disadvantage of establishing an investment court system under the joint umbrella of different comprehensive FTAs or bilateral investment agreements is that a whole set of different investment courts will have to be established (one for each EU FTA, as long as there is no multilateral court) and judges will have to be retained (paid, while there often is little actual work). With different substantial provisions on investment protection in the underlying bilateral agreements, having a set of unconnected ICS courts retains the risk of inconsistent rulings and no finality on similar disputed matters, in the absence of an overall appellate body.<sup>497</sup> It can also be quite expensive for governments to retain and pay judges on a full-time basis in order to safeguard their independence. Setting up a permanent *multilateral* court in the context of a multilateral investment treaty could solve these problems. A permanent court accessible to private investors could apply to multiple investment agreements and between different investment partners, if parties chose to do so.

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<sup>494</sup> On 30 December 2020, the EU and China concluded in principle a Comprehensive Agreement on Investment (CAI). The text includes a 'commitment by both sides to try to complete negotiations on investment protection and investment dispute settlement within two years of the signature of the CAI. The common objective is to work towards modernised protection standards and a dispute settlement that takes into account the work [...] in the context of UNCITRAL on a Multilateral Investment Court, according to the Commission. The EU's objective remains to modernise and replace the existing member states' Bilateral Investment Treaties with China'. Source: EC (2020a).

China has emphasised the right of the parties to appoint arbitrators, while the EU favours full-time appointed arbiters. Source: European Parliamentary Research Service (2020a).

<sup>495</sup> 'The EU–Japan EPA was implemented on 1 February 2019. Negotiations continue separately for an IPA with Japan. While the substantive provisions have been agreed, the procedural ones (ICS) are still not accepted by Japan. The last discussions on the IPA took place on 20–22 March 2019 [...]. For the time being, no further discussions are foreseen'. Source: EC (2020b). In July 2018, Minister Ploumen in a letter on policy coherence wrote to parliament that 'The Netherlands cannot assent to any agreement that includes the old system of investment protection' and that no agreement was reached with Japan due to the differences on ICS (Government of the Netherlands (2018)).

<sup>496</sup> Columbia Centre for Sustainable Investment (2019).

<sup>497</sup> Because of a lack of clear jurisprudence, a lack of quality assurance in particular regarding consistency and the absence of the possibility of redress. A multilateral court with an appellate body could prevent that.

The Netherlands officially sees the investment court system as a transition phase in the process of eventually setting up a MIC. The same position is held by the EU as a whole. The EC declared that a permanent international investment court would lead to a ‘modern, efficient, transparent and impartial system for international investment dispute resolution’. A MIC could be set up either (1) as a self-standing international body in the context of a multilateral investment treaty that also covers substantial provisions on investment protection, or (2) by embedding it into an existing multilateral institution. Inserting it into the WTO is not likely, though, given the resistance of developing countries to cover investment in a WTO agreement, as well as the reluctance of almost all WTO members to adapt the current intergovernmental character of dispute settlement in the WTO and allow access to private investors.

*Dutch input in meetings: political support and pragmatism*

On the proposal to set up a multilateral investment court, the official position was that the Netherlands strongly supported it. This was in line with the EU’s position and remained the same over several years. At the same time, the Netherlands did, again, show pragmatism in its position.<sup>498</sup>

The Netherlands participated in discussions in the context of G20 and OECD on a MIC. In 2017, Minister Ploumen reaffirmed the need for consistency, independence and legitimacy of a MIC, the importance of access for non-state actors other than investors, as well as the need for a pool of diverse, highly qualified judges. By 2018, the Commission had been given a mandate for the negotiations on a MIC.<sup>499</sup> In 2019,<sup>500</sup> Minister Kaag, Ploumen’s successor, reiterated that the Netherlands is very much in favour of a MIC, as part of a functioning multilateral trade and investment system.

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On the other hand, interestingly, IOB learned that policymakers are expressing doubt about the feasibility of a MIC and favour pragmatic solutions. First and foremost, because it seems unlikely that the UNCITRAL negotiations will produce a text for a multilateral treaty in the near future that could be ratified by a substantial number of countries, including the major home and host countries of FDI. In addition, a permanent multilateral court would be very expensive to set up and maintain. The current effort to promote a MIC will probably remain an aspirational objective only.<sup>501</sup> Perhaps it could, in the medium term, trigger a push towards a reformed and modernised ISDS system under the ICSID convention, as a second-best option. Although this might not be the ideal outcome for the Netherlands, it could be an acceptable solution, given that the ultimate objective of the European (and Dutch) position

<sup>498</sup> In late 2017, Dutch instructions were to ‘remain flexible’ in the mandate to be given to the Commission on this topic, but this allegedly meant to give the EC room for manoeuvre. Source: 20171122 Verslag TPC SI 22 November 2017 and comment by BEB/reference group.

<sup>499</sup> Negotiating directives for a convention establishing a multilateral court for the settlement of investment disputes. Source: Council of the European Union (2018).

<sup>500</sup> In a debate in Parliament of 19 March 2019. Tweede Kamer, vergaderjaar 2018–2019, 34 952, n. 58.

<sup>501</sup> Interview with policymaker from the MFA.

to change the form and procedures of the system was, of course, to improve the substance and quality of ISDS.<sup>502</sup>

### 7.2.3 Bilateral investment treaties

As mentioned in the introduction, the Netherlands has an extensive network of BITs, which foreign investors established in the Netherlands have gladly made use of to access the international system for dispute settlement.

With the adoption of the Lisbon Treaty, negotiations with third countries on substantive standards of investment protection became the exclusive competence of the EU with the Commission as its negotiator; however, ISDS procedures and the treatment of non-direct (portfolio) investments remain a shared competence, as determined by the European Court of Justice, requiring ratification of investment agreements that contain such aspects by member states' parliaments.<sup>503</sup> If member states want to update or modernise their own bilateral investment protection agreements with third countries, they need to obtain permission from the EC to start negotiations and to conclude an agreement. Such permission is granted only if the EU is not negotiating its own agreement with the countries concerned and is not planning to do so.

#### *Updating agreements in line with the Dutch Model BIT*

In practice, member states align the text of any new draft agreements with the text of EU-led investment agreements, although they can be more progressive in areas such as sustainable development or due diligence obligations of investors, as the Netherlands has shown.

Based on the EU position on an ICS in 2015, the Netherlands decided to renegotiate some of its 90 BITs.<sup>504, 505</sup> In 2017, bilateral discussions started with Ecuador, Argentina and Burkina Faso.

In May 2019, the Netherlands was authorised by the EC to negotiate updated agreements with

<sup>502</sup> This was confirmed by an interview with a policymaker. Whether the European Parliament and national parliaments will accept any 'second-best' improvements in ISDS or accept maintaining the current ISDS in new EU investment agreements, remains to be seen, however.

<sup>503</sup> The Netherlands was initially among the member states that argued that bilateral trade agreements should remain a national competence, even after the Lisbon Treaty. However, the ECJ ruled differently. Opinion 2/15 of the ECJ concludes that in addition to the European Parliament, each member state (27 parliaments in total) needs to ratify every FTA that involves portfolio investment and ISDS procedures. In practice, the requirement for national parliaments to co-ratify investment agreements has caused much delay and even seems an obstruction; for instance, the Dutch Senate still has not ratified the CETA agreement with Canada. See also European Commission (2017b).

<sup>504</sup> Some, though not all, because member states are only allowed to renegotiate with countries that the EU does not have an agreement with. Also, for practical reasons and capacity constraints, the Netherlands had to limit its efforts to important partners. The number of Dutch BITs differs a bit depending on the source you consult: AIV (2015) mentioned 'around 90' and the [government's website](#) in 2021 mentions 95 bilateral agreements (of which 10 are not in force). The [UNCTAD website](#) gives an overview of current and expired BITs of the Netherlands, listing 107 BITs in 2020, of which 15 had terminated and 5 were signed though not yet in force.

<sup>505</sup> AIV (2015).

10 countries. The list includes Iraq, Nigeria, Qatar, Tanzania, Turkey, Uganda and the United Arab Emirates.

The Dutch Model Bilateral Investment Treaty (2018) serves as a basis for the negotiations with these countries. This model text was drafted in line with the ambition of Minister Ploumen to play a leadership role in the field of sustainable investment policy and to achieve a better balance between the rights and duties of investors and states.<sup>506</sup> The text was the result of intensive public consultations, with civil society organisations, business and arbiters, as well as other ministries. Comments from the wider public were also encouraged in a comprehensive and transparent process. This included an internet consultation, where 1,657 reactions were received.<sup>507</sup> Parliament was engaged as well. In October 2018, the Netherlands adopted the new model text.<sup>508</sup>

The text aims to make direct investments more sustainable and to depoliticise potential conflicts.<sup>509</sup> Moreover, it introduces new definitions of investor and covered investments, more comprehensive provisions on fair and equitable treatment of foreign investors as well as changes to the traditional ISDS system. It introduces principles of investor behaviour and expectations regarding sustainable development<sup>510</sup> and responsible business conduct,<sup>511</sup> aligned with the OECD Guidelines for MNEs on responsible business conduct.<sup>512</sup> According to UNCTAD, innovative elements in the model text are flexibility for policy to prevent anti-competitive practice, a provision to promote the rule of law, including the protection of human rights, as well as clauses establishing investor liability in the home state.<sup>513</sup>

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More critical voices point to several flaws in the Dutch Model BIT. Scholars Arcuri and Verbeek, for instance, point out that there are no rules 'to grant investment-affected communities the right to initiate a dispute to hold the investor or the contracting party accountable to their obligations'.<sup>514</sup> While this is valid, one should note that citizens normally never have access to international tribunals for appeal. Critics also state that the new model

<sup>506</sup> Tweede Kamer, vergaderjaar 2018–2019, 34 952, nr. 32. The previous Model BIT was considered outdated and did not incorporate any provisions on corporate social responsibility.

<sup>507</sup> Overheid.nl (2018).

<sup>508</sup> UNCTAD (2019a).

<sup>509</sup> Tweede Kamer, vergaderjaar 2017–2018, 33 625, nr. 265

<sup>510</sup> The model text strengthens the focus on sustainable development, inter alia in a separate section. It refers to obligations under the multilateral agreements in the areas of environmental protection, climate, labour standards and the protection of human rights. These obligations relate to multilateral agreements to which the contracting parties are party, such as the Paris Agreement, the fundamental ILO Conventions and the Universal Declaration of Human Rights.

<sup>511</sup> Article 7 on Corporate Social Responsibility establishes obligations for direct investors to 'comply with domestic laws and regulations of the host state, including laws and regulations on human rights, environmental protection and labour laws'. It affirms the importance of states to encourage investors operating within their territory or subject to its jurisdiction to incorporate the OECD Guidelines into their internal policies.

<sup>512</sup> MFA (2018).

<sup>513</sup> UNCTAD (2019b).

<sup>514</sup> Arcuri and Verbeek (2019).

‘reproduces some of the most criticised substantive provisions in Investment Agreements, such as umbrella clauses’.<sup>515</sup>

The box below includes the most important provisions that the Dutch government has highlighted in its communication about the model text,<sup>516</sup> including some of the critique.

**Box 7.2** Priority elements of the Model BIT, including critique<sup>517, 518</sup>

The Model BIT is fully in line with Dutch policy priorities and reflects these priorities.

- 1) The new model text prevents frivolous claims and excludes letterbox companies from protection.

**Critics point out that the text fails to clarify requirements of substantial economic activities. They note that speculative flows (vulture investors profiting from debts) are not excluded from protection in this model BIT text.**

- 2) The model encourages due diligence to consider environmental and social impacts. The text preserves the right of governments to regulate for the public good, for the protection of health, security, the environment, labour rights, animal welfare and consumer protection.

**Critics point out that communities affected by investments (‘victims’) are excluded from access to international justice, while investors get direct access. (It should be noted, however, that citizens normally do have access to national courts, and do not have access to international appeal systems in other areas either.)**

- 3) Agreements around sustainability and responsible business conduct are made explicit. Reference is made to human rights, labour rights and ILO conventions.

- 4) When deciding on compensation, the tribunal can consider non-adherence by the investor to agreements on the UN Guiding Principles on Business and Human Rights and to the OECD guidelines for Multi-National Enterprises on RBC. The arbitral tribunal in determining compensation may take into account the non-compliance of the investor with these principles and guidelines.

**Critics point out that this provision is not enough of a deterrent for bad corporate behaviour and that umbrella clauses protect investor rights against host state policies, to the detriment of human rights. Affected communities and states cannot effectively hold investors to account for human rights abuses and non-compliance with international and domestic law. Civil society cannot start a procedure either (as with bilateral investment**

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<sup>515</sup> Ibid.

<sup>516</sup> Sources are inter alia Tweede Kamer, vergaderjaar 2018–2019, 34 952, nr. 32; Rijksoverheid (2018). In this trade agenda, the MFA highlighted three of these issues: excluding letterbox companies, the right to regulate and responsible business conduct (numbers 1, 2 and 3–4 in the box here).

<sup>517</sup> Main source for these points of criticism: Arcuri and Verbeek (2019).

<sup>518</sup> Several parties in Dutch Parliament had advocated for a stronger role for civil society, for instance during a parliamentary debate in March 2019, see Tweede Kamer, vergaderjaar 2018–2019, 34 952, nr. 58.

***treaties). Stakeholders can only try and influence proceedings as an amicus curiae – friend of the court.***<sup>518</sup>

5) Investment protection is clarified, including agreements on the principle of non-discrimination and rules for expropriation.

***Critics point out that the mention of ‘legitimate expectation’ of protection leaves room for undue claims which go against the interests of public health, socio-economic rights and environmental sustainability.***

6) The model text modernises the investment protection system, guaranteeing independent tribunals appointed by the Permanent Court of Arbitration or the International Centre for Settlement of Investment Disputes. The model text also sets ethical and quality standards for arbiters. It introduces the multilateral investment court and states that the existing ISDS arrangement shall cease to apply to new cases once a multilateral investment court has been officially set up.

7) Procedures for dispute settlement are more efficient (shorter) and take into account the needs of small and medium-sized enterprises, keeping costs down.

Obstacles in the negotiations to update the ten BITs<sup>519</sup> are as follows, according to a policymaker involved. First, partners were reluctant to include provisions on sustainability, the SDGs and gender. This is a serious obstacle given the importance that the Dutch minister and the Model BIT attach to these topics. Second, it is difficult to define the right to regulate. In addition, partners are reluctant to improve texts on dispute settlement procedures for investors, and notably they object to the Dutch proposals for dispute settlement to be fully transparent. A related obstacle was the difficulty to agree on the appointment of arbiters, where some partners have a problem with accepting fully independent arbiters. Finally, defining how to exclude ‘vulture investors’ from claiming full legal protection under the BIT – in case of a multilateral public debt restructuring – has also been difficult.<sup>520</sup> These issues are key elements of the Dutch position and of the Model BIT.

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#### *Issues around enforcement, policy coherence and COVID-19*

The model BIT does not contain or ensure enforcement of clauses on sustainability and human rights (the investors’ duties), nor does it provide recourse or standing for affected communities and local authorities in case of disputes with a foreign investor: they can only go through the national system (and eventually state-to-state dispute settlement). This means that the success of the model in promoting sustainable FDI and enforcing RBC will probably be limited. The text does not delineate the limits of investor protection (investors’ rights)

<sup>519</sup> The ten BITs are mentioned above, in the first paragraph of this section. Source on the obstacles: interviewee at MFA, January 2021.

<sup>520</sup> A vulture investor seeks to extract value from companies in decline. The goal is to swoop in when sentiment is low – at a rock bottom price – and take whatever action is necessary to revive the company and boost profits, usually via hefty cost-cutting exercises such as job layoffs, to sell it for a profit.

clearly enough either, because the investors' 'legitimate expectations' can still be interpreted quite broadly by arbitration tribunals and possibly infringe on domains of public interest.

In the end, policy coherence still risks being an issue. On the one hand, the Netherlands promotes sustainable development and investors' due diligence to prevent human rights violations and abuse through its policies on responsible business conduct. On the other hand, large MNEs with headquarters in the Netherlands keep enjoying substantial benefits through the extensive network of Dutch bilateral tax treaties. As an additional benefit, these companies get direct access to international arbitration when they invest in another country, if there is a BIT with that country.<sup>521</sup> This means that MNEs enjoy benefits in the form of international legal protection while not contributing much through public tax revenues. Competing domestic companies, affected communities and NGOs in the host state do not get such privileges, as explained above. On the other hand, foreign investors cannot be forced to invest in third countries with an unreliable investment climate. They may require additional protection, such as offered by BITs, to be persuaded to do so. Host countries that welcome FDI will have to consider the trade-offs, because attracting no FDI at all is not an option. We will revisit issues around policy coherence in Annex 6.

In 2020–2021, bilateral negotiations on Dutch BITs came to a halt due to the COVID-19 pandemic. Negotiating partners, especially from developing countries, seemed unwilling or unable to continue these confidential talks without the possibility of meeting face-to-face. In light of the issues listed above, the opportunities for actually using the Model BIT as a blueprint seem rather limited anyway at the moment.

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## 7.3 Extent of policy success

### 7.3.1 Investment court system and multilateral investment court

The EU has bilateral free trade agreements in various forms with 37 countries, some of which contain investment protection chapters or provisions. In September 2015, the European Commission released a proposal<sup>522</sup> to reform the dispute settlement system on investment issues in those agreements. The priorities of the EC in this proposal were very much in line with the ones of the Netherlands and its like-minded partners as expressed in, among other things, their joint letter:<sup>523</sup> the right to regulate, the possibility of appeal, independent judges and a modern arbitral procedure. Also, the EC paper clarified the relationship between national legal procedures and ISDS to prevent investors from going forum shopping and starting domestic and international procedures at the same time, looking for the most favourable legal system. Similarly, the negotiating mandate of the EU for a multilateral investment court – which built on earlier positions regarding an ICS – was also fully in line with the Dutch position.

<sup>521</sup> The Dutch Model BIT text contains substantive requirements so that not just any company (letterbox company) gets access to international arbitration, but updated BITs have not yet been concluded.

<sup>522</sup> European Commission (2015).

<sup>523</sup> EU member states non-paper (2015).

The Netherlands and France were the countries that put forward their ideas on the reform of the dispute settlement system most proactively, before the Commission formalised its own position. Given that these ideas were in line with the policy position of the Commission, it is not surprising that the EC integrated all of them into the formal EU positions and negotiating mandates. These mandates were used in the comprehensive FTA negotiations with Canada, Singapore and Vietnam. By early 2018, Mexico had also agreed to include the ICS in their updated trade agreement with the EU. The proposal of the EU on ICS was fully included in the final texts of these FTAs.

In FTAs with other countries, ICS was not included. TTIP negotiations with the US came to a halt in 2016, in part due to disagreement on the chapter on investment protection, where the US objected to the ICS. Around the same time, Japan refused to accept a draft text on the new ICS as well. In 2020, the FTA with Japan had been limited to trade, while the topic of investment protection had been deleted except for a rendezvous clause. The draft agreement with Mercosur was concluded in principle in 2019 (although the final text has not been finished): the original mandate of the EC, dating from 20 years ago, did not include ISDS. While several member states asked the EC to broaden the mandate by including ICS, the EC indicated that Mercosur does not apply ISDS, and so it would only complicate the negotiations to include ICS.<sup>524</sup> No agreements with Australia or New Zealand have been concluded yet: both are still being negotiated in 2021, but the EU, including the Netherlands, is not insisting on ICS and so far it has not been included in draft negotiating texts.

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The Netherlands was an influential actor during its EU presidency in the first half of 2016 and promoted the reform of ISDS to ICS. However, its achievements on this file are difficult to single out, because the EU – the Commission and member states – seems to have been unified, or almost completely so, throughout the EU's internal talks and negotiations with trade and investment partners. The EU, including the Netherlands, generally felt that ICS was not necessary in agreements with states where the rule of law was secure. And when the negotiation position on ICS was adapted (or abolished because the negotiating partner rejected it) for the higher objective of achieving an agreement or enhanced market access for EU investors, the Netherlands fully supported such pragmatic decisions. However, even where it was agreed, establishing and staffing an ICS has not been easy and it will take time. It was only in January 2021 that the Commission launched a public call<sup>525</sup> to recruit suitable candidates to become permanent adjudicators for EU trade and investment agreements.

The establishment of a multilateral investment court is likely to remain merely a political aspiration for the near and medium-term future. Success for the Netherlands and the EU will possibly only be achieved in the sense that discussions around the MIC may inspire reform of the current ISDS system.

<sup>524</sup> Source: TPC instructions, IRHP 2017-08b Handleiding, Plv 8 March 2017.

<sup>525</sup> European Commission (2021a).

## 7.4 Conclusions

### *Shift towards attention to investor duties*

Minister Ploumen advocated a ‘reset of trade and investment policies’ already in 2015, supporting fair trade and investment policies, which are transparent and rules-based, while addressing inequalities, as well as taking into account the effects of trade on the environment and climate.<sup>526</sup>

Indeed, over the years, the debate around investment agreements seems to have shifted somewhat from the protection and promotion of foreign investment by host states towards better regulation of such foreign investment, with attention to environmental sustainability and the private sector contribution to the Sustainable Development Goals in general. Also, the relationships between investors, often large companies from the Global North, and the host states, often in the Global South, are moving slowly in the direction of becoming a bit more balanced, in part because middle- and high-income countries now receive considerable amounts of FDI. Host states expect foreign investors to abide by national legislation and respect and promote the public interest. At the same time, those foreign investors require their investments to be protected in host countries by good governance, an effective rule of law, as well as principles of non-discrimination.

As a study of Columbia University stated in December 2020, ‘[c]ountries appear to begin to focus not only on providing investment protection standards and measures to stimulate investment flows, but increasingly on addressing the conditions for the entry of investment into their territories, the obligations of investors and their investments once established, as well as the regulatory powers of governments over such investments. The new generation of treaties with investment protection (...) are beginning timidly to address environmental protection, corporate social responsibility and accountability for foreign investors’, showing encouraging signs of coherence across policy domains.<sup>527, 528</sup> The shift of focus from investment protection towards investment regulation for sustainable development is also visible in Dutch policy during the review period, including draft legislation on due diligence (see Annex 6).

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On a sobering note, the desire to move to an investment court system and a multilateral investment court (ICS) is still driven by Northern countries only. In investment treaties

<sup>526</sup> MFA (2013).

<sup>527</sup> Columbia Centre for Sustainable Investment (2020).

<sup>528</sup> For instance, France adopted legislation on due diligence in March 2017. Germany (2016) and the UK also introduced legislation on due diligence (UK Modern Slavery Act in 2015). In May 2020, the Commission announced it would also introduce legislation in 2021 to enforce due diligence in the field of human rights for EU companies. And the Netherlands continues to be a thought leader when it comes to promoting responsible business conduct, at least when it comes to standard-setting. In 2019, on an initiative by Parliament, the government adopted legislation to ensure companies conduct due diligence to prevent child labour and other harmful practices in their value chains, beyond its national borders. It now has the difficult task of drafting regulations and ensuring implementation and enforcement of the legislation. In 2019, the Dutch government also presented a new policy framework on responsible business conduct, including an intention to regulate broader due diligence obligations for Dutch MNEs. MFA (2020).

between and among OECD countries, there seems to be little appetite to replace ISDS systematically by a reformed system, because negotiating partners have enough faith in the rule of law in these countries. Second, establishing an ICS and ultimately a multilateral court would require a lot of time, capacity and funding. In addition, developing countries seem to prefer traditional state-to-state dispute settlement.

#### *Findings and conclusions on the Dutch positions*

1. The Netherlands has been committed to improving the international system for investor-state dispute settlement towards setting up a more permanent investment settlement court, or a Multilateral Investment Court, at least since 2015. However, in the end, the EU and the Netherlands have remained pragmatic: in countries where the rule of law is adequate, they do not require (an investment protection chapter including) references to an investment court system; and where partners refuse to mention ICS, references to (traditional) ISDS are omitted.
2. The Netherlands helped in the preparation of EU positions in negotiations for a trade and investment agreement and its positions on certain issues around dispute settlement were taken up by the Commission. The Netherlands took part in like-minded meetings and on some occasions partnered with like-minded countries to influence the EC and EU positions. While it is highly likely that the Netherlands had an influence, others, notably France, Germany and the Commission itself, held similar positions and all of them cooperated, so that achievements cannot be attributed to one actor in particular.
3. The Netherlands was consistent in promoting sustainability and responsible business conduct in its own bilateral investment agreements. In that context, the government drafted a Model Bilateral Investment Treaty, through a thorough multi-stakeholder consultation process. The text shows how bilateral agreements could promote international standards. It includes references to human rights and ILO conventions on labour rights. However, its ultimate success is not guaranteed: the Model BIT does not guarantee improvements in business practice and it has not resulted in updated bilateral agreements yet. So far, negotiating partners have been reluctant to accept provisions on sustainability and RBC. In any case, negotiations on bilateral investment agreements have come to a halt due to the COVID-19 pandemic.  
The Model BIT is still an interesting initiative, reflecting best practice at this moment in time. The challenge remains to put it to the test: will elements of this text be accepted in BITs with partner countries; will these BITs be ratified as is by both parties, applied in practice and result in changes in behaviour by MNEs?
4. Over the past decade, the Netherlands shifted its overall policy priorities somewhat. Before, it focused on attracting as much foreign investment as possible. Over the last few years, the Netherlands started to focus on the quality of investments. Under the last two ministers for Foreign Trade and Development Cooperation, Dutch representatives have prioritised promoting responsible business conduct and sustainable investments in the EU, OECD and WTO. However, policy coherence in these areas is not a given.

## 7.5 Recommendations

- Publicly explain the reasoning behind the EU's decisions to sometimes include (investment protection chapters including) ICS in the negotiating mandate for comprehensive trade and investment agreements and sometimes not. Become more consistent in promoting a modernised and fairer international investment dispute settlement system and court; and/or be more transparent when you accept the absence of references to ICS in agreements.
- Second, continue to align positions at the national, political level and the EU technical working level. Adapt instructions to changed circumstances in EU negotiations with third parties more often. Acknowledging the limits of high-level policy intentions, be open about changing the national position when negotiating realities require this.
- Continue to work with the Commission and like-minded countries inside and outside of the EU (e.g. Canada) to form coalitions to promote the establishment of a permanent investment court system, while working in parallel on modernising the current system as a policy of no regret.
- Given the many obstacles, focus on a thorough reform of the current ISDS system in the short and medium term instead of the establishment of a multilateral investment court.
- Promote stronger links between international standards for responsible business conduct to provisions in investment agreements or investment chapters in comprehensive FTAs, paying attention to implementation and enforcement. Try and strengthen provisions on sustainability and human rights, if these continue to be policy priorities.



8

# Economic partnership agreements with Africa

## 8.1 Introduction

The EU has always kept a special relationship with EU member states' former colonies, which are referred to as African, Caribbean and Pacific (ACP) countries. Concerning trade relations, the EU granted non-reciprocal market access to the ACP countries under the 1975 Lomé Convention. However, as this preferential access was not compatible with WTO rules, the EU started negotiations on WTO-compatible economic partnership agreements (EPAs) in the early 2000s. The negotiations took place at the regional level, i.e. between the EU and groupings of African countries as well as Caribbean and Pacific states,<sup>529</sup> and were meant to build on and foster regional integration processes in the ACP.<sup>530</sup> The negotiations had mixed success. The EPA between the EU and the Caribbean Forum (CARIFORUM) was negotiated reasonably in time, within the original deadline of end of 2007, and resulted in the entering into force of the EPA in 2008. However, several other EPA negotiations were only partially successful,<sup>531</sup> or have thus far failed to result in the signing of the EPA.<sup>532, 533</sup>

This case study explores the reasons for the mixed success of the EPA negotiations between 2013 and 2019.<sup>534</sup> It reviews the obstacles and differences in the regional groups, and among the countries in the regions. In addition, the case study reviews Dutch interventions and the extent of policy success.

The case study focuses on the regional groupings in Africa. This provides the opportunity to review particularly the Dutch role of 'honest broker'. In 2013, the Netherlands assigned itself the role as honest broker to help progress the stalled EPA negotiations with the Southern African Development Community (SADC), West Africa and the East African Community (EAC). Taking on this role was identified as a means to give substance to the newly introduced Dutch policy, to combine aid and trade.<sup>535</sup>

<sup>529</sup> Negotiations have taken place with seven regional groups of countries: 1. the Southern African Development Community (SADC); 2. Eastern and Southern Africa (ESA); 3. The East African Community (EAC); 4. West Africa; 5. Central Africa; 6. The Caribbean; and 7. The Pacific. After EPAs are negotiated and signed at the regional level, they need to be ratified and implemented at country level.

<sup>530</sup> ECDPM (undated). <https://ecdpm.org/dossiers/dossier-economic-partnership-agreements/>.

<sup>531</sup> For example, the EPA with ESA has thus far resulted in an interim EPA, which is provisionally applied. In October 2019, the EU started negotiations with the five ESA countries to deepen the existing interim EPA. EPA deepening negotiations are ongoing.

<sup>532</sup> For example, in 2014, the EU and the Economic Community of West African States (ECOWAS) agreed on an interim EPA after 13 years of negotiations. However, the interim EPA is currently 'on hold', given that 15 of the 16 West African countries have signed the agreement, while Nigeria is refusing to sign it (see CADTM (2018)).

<sup>533</sup> Table A7.1 in Annex 7 presents an overview of the countries involved and the current status of the EPAs per region. A more detailed overview can be found in Chapter 2 of the study about external developments in trade and investment policy, conducted on behalf of IOB by Ecorys (Ecorys (2021), pp. 25-37.).

<sup>534</sup> It should be noted that key developments in the negotiations took place before 2015. This posed a challenge for the interviews, as stakeholders were retired, had changed positions or had only a limited recollection of events.

<sup>535</sup> In 2013, Minister Ploumen stated that '[b]ecause aid and trade are combined in my portfolio, the Netherlands is able to take on the role of honest broker' (Government of the Netherlands (2013)).

In studying Dutch interventions, the review will answer questions such as: ‘What were the policy positions of the Netherlands on the EPAs?’ ‘Which actions did Dutch policymakers and diplomats undertake to achieve EPAs in line with these positions?’ And ‘what has been achieved in the EPA negotiations that can be attributed to Dutch interventions?’

The case study provides lessons learned that are relevant input for the EU–Africa development strategy, a follow-up Agreement to Cotonou, further development of the EPAs, and possible bilateral FTAs between the EU and Africa at the continent-wide level.<sup>536</sup>

## 8.2 Obstacles in the EPA negotiations with Africa

From the outset in 2001, EPA negotiations between the EU and ACP countries were characterised by asymmetry; in terms of liberalisation, coverage of goods, delays, available resources and (often temporary) solutions that aimed for interim EPAs focusing on liberalisation of trade in goods only.<sup>537, 538</sup> Many of the EPAs have stranded at certain points in the negotiation cycle, either because parties were unwilling to conclude the negotiations for an EPA or even an interim EPA within the foreseen deadlines, or because parties were unwilling or unable to sign, ratify or implement an EPA at the regional level once negotiated. For the EPA negotiations with Africa specifically, there were various obstacles.<sup>539</sup> These obstacles are primarily related to the trade schemes already in place and the differences that exist across and within the countries of the respective African regions.<sup>540</sup>

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First and foremost, the added value of the EPAs for most African countries is limited as far as new market access to goods is concerned. Consequently, in African countries where the added value of an EPA would be limited, the priority to negotiate one was low. The lack of added value for most African countries can be explained by the benefits from the (different types) of existing trade schemes in place.<sup>541</sup> Most African countries are least-developed countries (LDCs). These countries benefit from preferential market access under the EU’s Everything but Arms (EBA) scheme, which provides quota and duty-free access to all imports of goods (except arms and ammunition) coming from LDCs. Furthermore, most of the other, non-LDC African countries have market access under the Market Access Regulation (MAR), which provides

<sup>536</sup> EPA negotiations cover negotiations on the tariff liberalisation of goods, whereas the continent-wide FTA negotiations put more focus on services and investments. However, as will become evident from this evaluation, key lessons learned, such as setting realistic goals and acknowledging the (effect of) different interests of different parties in negotiations, will be valuable for future negotiations, other than negotiations on the tariff liberalisation of goods, as well.

<sup>537</sup> See, for example, Heron (2011), pp. 328–357; Ilorah and Ngwakwe (2015), pp. 322–338; and Kohnert (2015), pp. 141–147.

<sup>538</sup> See also Ecorys (2021), Chapter 2 for other asymmetries in negotiations.

<sup>539</sup> For a more elaborate overview of the obstacles in the EPA negotiations with Africa, see Ecorys (2021), Chapter 2.

<sup>540</sup> Interview with EC trade policy officer, held on 4 March 2020.

<sup>541</sup> For an overview of the different types of market access schemes in place for non-LDC African countries (those not enjoying market access under the EBA scheme), see Ecorys (2021), Chapter 2, p. 31, Table 1 *Market access of African countries*.

temporary unilateral free access to the EU market for non-LDCs that have made meaningful progress in the negotiations,<sup>542</sup> under an (interim) EPA, or have an export basket that faces no significant tariff barriers in the EU.

Second, and this point was specifically identified by critics, the EPAs were perceived as a possible threat to development in African countries. Critics have pointed to the reduced tariff revenues that result from the implementation of an EPA, whereas this has been an important source of tax income in most African countries. With ACP countries ‘depending on tariff revenues to fund social programmes [...], the sudden loss of this revenue is likely to create much hardship and possibly lead to social dislocation as the burden will fall disproportionately on the poor’.<sup>543</sup> Moreover, critics have argued that opening up markets to EU imports threatens domestic industries, especially those industries that are still in their infancy. The fear of negative and especially disproportionate effects has led to active campaigns against the EPAs, both by NGOs and domestic industries in Africa.<sup>544</sup> At the same time, there was limited counterweight in the form of support for the EPAs by other stakeholders, as the agreements were considered to provide opportunities only for a small part of the business community.<sup>545</sup> However, the criticism has also been disputed. For instance, to account for the negative effects of the EPAs, the EU provides budget support, if needed, to absorb a drop in tax revenues. Moreover, countries can design their tariff liberalisation schemes to protect the interests of their own industry and take measures against market disruptions.

Third, the content of the EPAs complicated the negotiations. To comply with WTO requirements, agreements would need to cover market access issues such as tariffs and quotas. However, the EU’s initial ambition was to conclude modern comprehensive agreements, agreements with deeper integration, which would also cover trade in services and trade-related issues, such as intellectual property rights and competition.<sup>546</sup> This has proven to be difficult, as there was limited interest and capacity<sup>547</sup> from the African counterparts.<sup>548</sup>

<sup>542</sup> Market access regulation 1528/2007 provided preferential market access to those countries that had made meaningful progress and had signed the EPA but had no other preferential market access, for example through the EBA scheme. Regulation (EU) No 527/2013 withdrew the Market Access Regulation’s benefits to those countries that had not taken the necessary steps towards ratifying the EPAs concluded with the EU.

<sup>543</sup> [https://www.europarl.europa.eu/intcoop/acp/60\\_11/pdf/speeches/miller.pdf](https://www.europarl.europa.eu/intcoop/acp/60_11/pdf/speeches/miller.pdf); as cited in Ecorys (2021), Chapter 2, p. 30.

<sup>544</sup> See, for example, Ecorys (2021), p. 34; Moerland and Weinhardt (2020), pp. 266-276; Africa Renewal (2007).

<sup>545</sup> Ecorys (2021).

<sup>546</sup> Zamfir (2018), pp. 1-11.

<sup>547</sup> With most African trade existing of goods, including trade in services and IPRs, EPAs did not provide a favourable road to development for African countries. Inclusion of these topics requires careful management and sufficient infrastructure (regional institutions) and capacity to negotiate on these topics, which did not exist.

<sup>548</sup> Ecorys (2021), p. 34.

Fourth, negotiations were complicated by regional integration in Africa. Each of the existing main ACP regional groupings entered into bilateral negotiations with the EU. Therefore, negotiations in Africa were conducted with the five African regional groupings.

However, the regional negotiation groups do not always coincide with the groups of the regional economic communities (RECs) that the African countries belong to.<sup>549</sup> For example, member states of the SADC region were split into four different EPA groups.<sup>550</sup> But even when the EPA groups are congruent with the membership of the respective REC, as is the case for the EAC and the ECOWAS-EPA groups, individual countries within these groups have different national interests,<sup>551</sup> which were sometimes placed above the interests of the REC as a group, thereby creating fractions within the REC, rather than fostering regional integration within the REC. Besides weakening regional ties, these actions have also weakened the group's negotiation power to act as one block in EPA negotiations.<sup>552, 553</sup>

These fractions also stem from the fact that regional integration is not yet fully advanced. For example, an inclusive customs union is lacking, so that member states can still uphold different external trade regimes, weakening their desire to take a unified stance in EPA negotiations.<sup>554</sup> Finally, the capacity of regional organisations is limited too (limited availability of technical expertise and resources),<sup>555</sup> reducing the ability to unify interests and take a strong negotiation position. It should be noted that capacity constraints have not only been an issue for regional organisations, but also for other stakeholders in Africa, including national governments. This has made it difficult for African counterparts to fully assess and go along with the deep integration aspects of the EPAs.<sup>556</sup>

## 8.3 The Dutch position on the EPAs with Africa

### 8.3.1 Overview of Dutch standpoints regarding the EPA negotiations

Since the Cotonou Agreement was signed in June 2000, the Netherlands has always taken a critical but constructive position regarding the EPA negotiations with ACP countries.<sup>557</sup> During the negotiations, the Netherlands was concerned about the feasibility of the EPAs with the poorest regions of Africa within the foreseen time frame. These included concerns about the impact of the EPAs on the development of individual African countries and on African regional integration.<sup>558</sup> Economic development and negotiation capacity were

<sup>549</sup> See Ecorys (2021), p. 30 for an overview of the African country groups that negotiated with the EU.

<sup>550</sup> Krapohl and van Huut (2020), pp. 565-582.

<sup>551</sup> For example, in the ECOWAS REC, Nigeria is the dominant regional power. Other ECOWAS countries, many of which are LDCs, have different interests in trade liberalisation.

<sup>552</sup> Ecorys (2021), p. 32; see also Krapohl and van Huut (2020), pp. 565-582.

<sup>553</sup> This was also acknowledged in the TPC; see, for example, IRHP 2014-07b TPC Handleiding 05-02-2014.

<sup>554</sup> Krapohl and van Huut (2020), pp. 565-582.

<sup>555</sup> UNECA (2020), p. 11.

<sup>556</sup> Ecorys (2021), pp. 34-35.

<sup>557</sup> Tweede Kamer, vergaderjaar 2010-2011, 32 883-3

<sup>558</sup> Ibid.

limited, and regional cooperation was often still in its infancy.<sup>559</sup> Furthermore, the Netherlands continuously pushed to prioritise the development relevance of the agreements, within the boundaries of the WTO legal framework for economic integration agreements.<sup>560</sup> The main Dutch standpoints regarding the EPA negotiations were as follows:

- Full market access to the EU for all ACP products;<sup>561</sup>
- Sufficient room for ACP regions to exempt certain products from liberalisation (i.e. the issue of liberalisation coverage) or to apply longer transition periods for these products. In particular, this would apply to products that are important for food security, rural development or the subsistence of large groups of people within the ACP regions;<sup>562</sup>
- The ability of ACP regions to protect themselves against subsidised or abundant imports from the EU.<sup>563</sup> Building on the safeguard clauses included in the ‘stepping stone EPA’ between the EU and Ghana that was agreed in 2007, the Netherlands advocated similar safeguard clauses for the final EPAs for goods. With these clauses, EPA countries could temporarily protect their local economies from imports from EU countries in case these would disturb local production and threaten food security, for instance with temporary import tariffs or tariff quotas;<sup>564</sup>
- Restrictive rules of origin, especially on cumulation of origin for raw materials and intermediate products which under the Cotonou regime were experienced as a barrier to trade for some products (including textiles and clothing, and fishery products); and
- Only including services and so-called Singapore issues (public procurement, trade facilitation, investment and competition) in the EPA negotiations if respective ACP countries are open to that. According to the Netherlands, balanced provisions on services and the Singapore issues could contribute positively to the development of ACP countries, but ACP countries should not be forced to include these themes in the negotiations.<sup>565</sup>

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### 8.3.2 Dutch positioning in practice

The EC, and DG Trade specifically, conducts the EPA negotiations with ACP countries on behalf of the EU member states. This does not mean, though, that member states were inactive on the issue of the EPAs and did not take a public stance. France, the UK, Germany and the Netherlands were particularly vocal in the debates, both within and outside the TPC.<sup>566</sup>

The Netherlands often expressed support for the actions taken by the European Commission and acknowledgement of the results achieved so far.<sup>567</sup> Dutch representatives reminded other

<sup>559</sup> Ibid.

<sup>560</sup> Based on instructions for the TPC meetings and subsequent TPC meeting reports; Tweede Kamer, vergaderjaar 2010–2011, 32 883-3

<sup>561</sup> Tweede Kamer, vergaderjaar 2010–2011, 32 883-3.

<sup>562</sup> Ibid.

<sup>563</sup> Ibid.

<sup>564</sup> MFA (2012).

<sup>565</sup> Tweede Kamer, vergaderjaar 2010–2011, 32 883-3.

<sup>566</sup> For instance, noted in an interview with an expert, held on 16 June 2020, and in an interview with a Dutch diplomat, held on 14 October 2020.

<sup>567</sup> Evident, for example, from TPC instructions from 2013 and subsequent TPC meeting reports.

member states of the development aspects of the EPAs (e.g. asymmetry of obligations by the EU and ACP regions) on several occasions, and supported the Commission at times when other member states protected their own (often agricultural) interests.<sup>568</sup> In addition, the Netherlands continuously sought to garner attention for the impact on individual African countries, regarding their risk of losing preferential access to the EU due to delays in the negotiation process (caused by internal discrepancies of the countries in the EPA group).<sup>569</sup> However, with negotiations advancing slowly, the Netherlands pressed for further progress and, later on, requested the European Commission and member states to swiftly sign, ratify and implement all EPAs as soon as negotiations were finalised.<sup>570</sup>

Furthermore, as discussed in Section 8.1, in 2013, Minister Ploumen offered to take on a role as honest broker in the EPA negotiations with the SADC, West Africa and ESA group. As part of the honest broker initiative, the Netherlands commissioned the international think tank ICTSD<sup>571</sup> to execute regional analyses and to organise three regional dialogues to bring together a variety of stakeholders in different EPA regions.<sup>572</sup> The efforts aimed to identify the effects of the EPAs and settle final outstanding issues in the different regions.<sup>573</sup> The role as honest broker also increased Dutch visibility on the issue of the EPAs. For example, on 10 June 2016, the Netherlands, as President of the European Council (2016), spoke at the signing ceremony of the EU–SADC EPA in Kasane (Botswana), which highlighted the personal engagement of Minister Ploumen, in her effort to advance negotiations in the years before the conclusion of the EPA.

## 8.4 The Netherlands in its role as honest broker and the extent of policy success

### 8.4.1 Reasons behind this role and choice of countries

As previously described, negotiations with the ACP countries had in most cases not progressed in line with the expectations after the Cotonou Agreement was signed.

<sup>568</sup> Interview with policymaker at the MFA, held on 7 October 2020.

<sup>569</sup> *Ibid.*

<sup>570</sup> MFA (2014c); IRHP 2014-049b TPC Handleiding PLV 30-10-2014. This was done by ICTSD, which was perceived by all parties as an independent organisation.

<sup>571</sup> The International Centre for Trade and Sustainable Development (ICTSD) was established in 1996. The Geneva-based organisation assisted NGOs, governments and other stakeholders to acquire the necessary knowledge for trade policymaking and effective participation in negotiations and to create dialogue and connections between stakeholders, and within and across ministries (IOB (2017), Annex 1). After 22 years, ICTSD ceased its operations in 2018.

<sup>572</sup> Whereas the Netherlands was visible as a funder and supporter of the organised interventions, it did not lead to action. This was done by ICTSD, which was perceived by the EU and African countries as being neutral and independent (MFA (undated). Beoordelingsmemorandum DDE–ICTSD sustainable development in trade).

<sup>573</sup> MFA (2016); MFA (undated). Beoordelingsmemorandum DDE–ICTSD sustainable development in trade (internal document).

Nevertheless, from 2008 onwards, ACP countries could still benefit from the Market Access Regulation regime that was introduced, which temporarily continued duty-free and quota-free access to the EU market. Due to the lack of progress and results, in 2011 the European Commission announced that countries not having ratified at least interim EPAs for goods were to be removed from the MAR regime starting 1 October 2014. While LDCs in the ACP regions could continue to benefit from the EBA regime in such a situation, other non-LDCs such as Namibia, Kenya and Botswana would lose significant market access to the EU.<sup>574</sup> Their existing tariff-free access would be replaced by less preferential access under the EU's Generalised System of Preferences (GSP). This implied higher tariffs and tariff rate quota for certain agricultural and manufacturing products. Furthermore, if products or the countries graduated from the GSP, they would fall under the MFN regime.<sup>575</sup>

As this self-imposed deadline of 1 October 2014 for the ratification of EPAs was rapidly approaching, the Dutch Minister of BHOS decided to put herself forward as an honest broker and attempt to break the deadlock with some of the regions in 2013. The aim was to bring the EU and ACP countries closer together by entering into dialogue and explore the extent to which WTO rules provided room for manoeuvre, to be able to address the concerns of the ACP countries without putting other countries at a disadvantage.<sup>576, 577</sup> The honest broker role was an independent initiative; other member states and the EC were not consulted on this.<sup>578</sup>

The motivation of the Dutch minister to take up the role as honest broker was that her combined responsibility for both the Dutch international trade and development cooperation portfolios put her in a good position. According to the minister, economic development, which was expected to be promoted by the EPAs, increases the possibility of phasing out development cooperation with these countries and establishing mutually beneficial trade relations.<sup>579</sup> Furthermore, the expectation was that it could help eradicate extreme poverty, stimulate sustainable and inclusive growth, as well as regional integration.<sup>580</sup>

The Netherlands selected SADC, West Africa and EAC as focus regions in which to play a role as honest broker. These regions were selected based on the following criteria and circumstances:

- Feasibility to close a full EPA for goods;
- Development perspective (regions with the largest potential losers as well as the number of LDCs in the regions);

<sup>574</sup> MFA (2015e).

<sup>575</sup> MFA (2018).

<sup>576</sup> MFA (2013a).

<sup>577</sup> MFA (2018).

<sup>578</sup> Interview with an expert, held on 16 June 2020.

<sup>579</sup> Tweede Kamer, vergaderjaar 2010–2011, 32 883-3

<sup>580</sup> MFA (2015e).

- Possibilities within the regions to create a good interplay between the Dutch minister's trade and development cooperation portfolios. The presence of Dutch businesses could positively contribute to the economic development of the countries.<sup>581</sup>

The reasons for choosing each of these specific regions, as indicated in a letter to parliament, are presented in the table below. These reasons also reflect the assumptions underlying Dutch policy on aid, trade and investment, i.e. the assumed positive effects of trade liberalisation and promoting direct investment in the development of and regional integration among ACP regions.

Region	Arguments for honest broker role
EAC	It seemed realistic that an EPA with this region could be concluded. Furthermore, a number of (locally based) Dutch companies could benefit from an EPA. The conclusion of this EPA could lead to a good interplay between development cooperation and trade, while the presence of the Dutch private sector could help to further develop the region.
SADC	It seemed realistic that a full EPA could be concluded with this region. The Dutch Minister of BHOS particularly valued the completion of this EPA, because this region includes two of the largest potential losers – namely, Namibia and Botswana. These are upper middle-income countries, which would graduate from the EU's GSP and would therefore fall back on MFN tariffs by 1 October 2014.
West Africa	The negotiations with this region were very difficult. However, the region consists of many LDCs, with limited intra-regional trade. The potential gains of this EPA could be the largest because of the development perspective and potential for further regional integration.

Source: MFA (2013b).

It should be noted that the unsolicited decision of the Dutch minister to take up a more constructive role, as an honest broker, raised some eyebrows in several quarters. It was seen as 'remarkable', according to one interviewee, and 'suspicious' by some EU stakeholders and several African delegations, especially because her predecessors were more critical of the EPAs.<sup>582, 583</sup>

It is also clear that there is some inherent tension regarding the role of the Netherlands as an honest broker, given that indirectly, as one of the EU member states, it is also one of the negotiating partners. The Dutch minister was aware of this tension. Therefore, it was decided to commission an independent organisation for the implementation of most of the activities (see below). This organisation was the think tank ICTSD, which worked on the EPAs in terms of research and dialogue. ICTSD had a network and expertise, and it was known for its impartiality and good reputation on both sides.<sup>584</sup> Moreover, the Dutch minister tried to

<sup>581</sup> MFA (2013b).

<sup>582</sup> Interview with EC trade policy officer, held on 6 March 2020.

<sup>583</sup> For example, it was mentioned that Minister Koenders had generally taken a more critical approach.

<sup>584</sup> MFA (2014d).

remove the possible tension between trade and development cooperation by explicitly indicating that flanking support to the ACP countries would not be a condition for signing the EPA.<sup>585</sup>

#### 8.4.2 Actions undertaken in the capacity of honest broker

The following concrete actions were planned to be undertaken as honest broker and presented to Dutch Parliament in 2013:<sup>586</sup>

- Organisation of stakeholder meetings in the three proposed EPA regions, to better understand the positions of different stakeholders and to get insight in opportunities for a way forward;
- Organisation of a stakeholder meeting in the Netherlands with both NGOs and companies with stakes in the region;
- Region-specific analyses (among others, based on the above-mentioned stakeholder meetings), as a result of which the minister could enter into discussions with the European Commission, on the one hand, and the main stakeholders in the regions, on the other; and
- Examine options for flanking policies.

Concerning the second point of action, a meeting in the Netherlands with non-state actors did not take place.<sup>587</sup> In addition, the stakeholder meeting in West Africa (which was supposed to be combined with a Dutch trade mission to Senegal<sup>588</sup>) was cancelled. By the time the event was supposed to be organised, negotiations between the EU and West Africa had significantly progressed and were successfully concluded at the technical level.<sup>589</sup> Therefore, a stakeholder event was not deemed useful anymore.<sup>590</sup> The cancellation also seems to be related to delays on the part of ICTSD in organising the seminar in Dakar in February 2014; Senegalese counterparts of ICTSD doubted the feasibility of the event on the set date.<sup>591</sup> Furthermore, something that did take place, although initially unplanned, was a final stakeholder dialogue, organised by ICTSD in Brussels.<sup>592</sup>

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Three regional stakeholder meetings, in the context of the EU–EAC and EU–SADC EPA negotiations, were organised with representatives from governments, the private sector and civil society. These meetings took place in Kenya (Nairobi) in October 2013, South Africa (Cape Town) in January 2014 and Tanzania (Dar es Salaam) in February 2014.<sup>593</sup> The meetings

<sup>585</sup> MFA (2013b).

<sup>586</sup> MFA (2013b).

<sup>587</sup> Why the meeting in the Netherlands did not take place remains unclear from policy documents and interviews. A potential explanation may be the general lack of awareness and interest of Dutch stakeholders, as mentioned in an interview (interview with former IMH policy officer at the MFA, held on 26 October 2020).

<sup>588</sup> MFA (2013c).

<sup>589</sup> MFA (2014d).

<sup>590</sup> Ibid.

<sup>591</sup> MFA (2014b).

<sup>592</sup> IOB (2016).

<sup>593</sup> MFA (2015e).

were organised and moderated by the ICTSD<sup>594</sup> and organised with the help of local organisations (TMEA,<sup>595</sup> Tralac,<sup>596</sup> TRAPCA<sup>597</sup> and SAIIA<sup>598</sup>).<sup>599</sup>

Participants in the meetings identified the most important stumbling blocks, concerns and policy options.<sup>600</sup> On the basis of the findings of the stakeholder meetings, ICTSD wrote a report with outstanding issues in the negotiations, the concerns of the partners and the potential way forward. Moreover, the report provided an overview of the possibilities to address the concerns of the ACP countries, within WTO rules, taking into account sensitive issues of the stakeholders.<sup>601</sup> The results of the meetings were shared with the EU Commissioner for Trade, the African negotiation teams as well as other EU member states. These findings were also presented during the meeting with the EU negotiators in March 2014.<sup>602</sup>

Although the organisation and facilitation of the stakeholder events were outsourced to ICTSD, the Dutch minister played a small role herself during the meeting in Nairobi by providing the opening speech and closing remarks. During the other two events, Dutch representatives were present. While some opening remarks were made, the delegation of the Netherlands had an observing role, and limited its participation to asking questions for clarification if needed. The EC was never invited to these events. However, in all of the meetings, the Dutch delegation emphasised that the key messages would be conveyed to the minister and the Commission.<sup>603</sup>

In addition to the organisation of these meetings, the Netherlands participated and initiated several initiatives around the EPAs with Africa. First, together with France, the UK, Ireland and Denmark, the Netherlands sent a letter to the High Representative of the Union for Foreign Affairs and Security Policy/Vice President of the European Commission and the European Commissioners for Development and Trade in December 2013. In this letter, the 'Friends of the EPA' requested extra flexibility in the negotiations on several points, including the

<sup>594</sup> ICTSD received a budget of EUR 271,384 for its role as 'unbiased facilitator'. Source: IOB (2017).

<sup>595</sup> TradeMark East Africa (TMEA) was established in 2010 and funded by, among others, the UK, Sweden, the Netherlands, Canada and the US. TMEA supports the growth of trade – both regional and international – in East Africa, by unlocking economic potential through reducing barriers to trade and increased business competitiveness (TradeMark East Africa (2021)).

<sup>596</sup> The Trade Law Centre for Southern Africa (Tralac) was founded in 2002 to build technical expertise and capacity in trade governance across Africa (Tralac, 2021).

<sup>597</sup> The Trade Policy Training Centre in Africa (TRAPCA) was established in 2006 to provide training and technical expertise on trade issues to professionals in LDCs and low-income sub-Saharan African countries (trapca.org (2017)).

<sup>598</sup> The South African Institute of International Affairs (SAIIA) is a think tank, established in 1934, facilitating dialogue and executing research, to enhance awareness on the importance of international affairs (Africaportal.org (undated). <https://www.africaportal.org/content-partners/south-african-institute-of-international-affairs-saiia/>).

<sup>599</sup> MFA (2014d).

<sup>600</sup> MFA (2018).

<sup>601</sup> ICTSD (2014).

<sup>602</sup> MFA (2014d).

<sup>603</sup> ICTSD (2014).

coverage of products for which trade in ACP regions needs to be liberalised, the length of the transition periods, the elimination of export subsidies by the EU and the deployment of measures in support of the EPA.<sup>604</sup> It should be noted that while the Netherlands signed this letter, it is not considered the main initiator of the letter.<sup>605</sup> It was particularly the UK that led the initiative.<sup>606</sup>

Second, the Netherlands had conversations with regional organisations, including ECOWAS, Hub Rural<sup>607</sup> and the Central African organisation Enda CACID,<sup>608</sup> to discuss support to programmes focused on regional integration in West Africa, in line with the intended EPA.<sup>609</sup>

Third, on several occasions, both in the European context as well as during the ninth WTO Ministerial Conference in 2013, Minister Ploumen raised the EPA negotiations to stimulate political dialogue.<sup>610</sup> For instance, during the meeting of the Foreign Affairs Council on Trade on 28 May 2013, Ploumen held a discussion with EU Commissioner of Trade Karel de Gucht on the issues of the EPA negotiations.<sup>611</sup> Moreover, in the margins of the informal FAC meeting of EU trade ministers that took place on 27 January 2014 in Athens, Minister Ploumen organised an informal ministerial gathering on the status of the EPA negotiations with trade ministers from Germany, Denmark, France and the UK. Together, the assembled ministers concluded that the European Commission has shown the required flexibility to achieve a breakthrough in the negotiations with West Africa, which created hope that this momentum would also lead to positive results in the other regions.<sup>612</sup>

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The Dutch minister not only raised the issue of the EPAs within the EU but also in contacts with African counterparts. The EPAs and their finalisation were put on the agenda of meetings of the minister with her counterparts during several trade missions, for instance in the case of Ghana.<sup>613</sup> The EPAs were also raised during the EU–Africa Summit and the African Union Summit in 2014.<sup>614</sup> In this period, the pressure of the imposed deadline of 1 October 2014 caused frustrations on both the EU and African side.<sup>615</sup>

Finally, (internal) documents of the Dutch MFA refer to the execution of a light assessment of the lessons learned of the EPA negotiations (in terms of process and content).<sup>616</sup> Whereas it

<sup>604</sup> MFA (2015e); Denmark, France, Ireland, the Netherlands and the UK (2013).

<sup>605</sup> Interview with former IMH policy officer at the MFA, held on 26 October 2020.

<sup>606</sup> Ibid.

<sup>607</sup> A West and Central Africa-oriented organisation focused on rural development.

<sup>608</sup> *Centre Africain pour le Commerce, l'Intégration et le Développement* – African centre for trade, integration and development – is a platform of civil society organisations.

<sup>609</sup> MFA (2014a).

<sup>610</sup> MFA (2015e).

<sup>611</sup> MFA (2013b).

<sup>612</sup> MFA (2014d).

<sup>613</sup> MFA (2014a).

<sup>614</sup> MFA (2014e).

<sup>615</sup> E.g. IRHP 2014-016b TPC Handleiding Plv 19-03-2014q; IRHP 2014-021b TPC Handleiding Leden 25-04-2014; and IRHP 2014-042b TPC Handleiding Plv. 5-09-2014 (internal document).

<sup>616</sup> MFA (2015b).

seems likely that this assessment was completed and results shared with parliament (because commitments were made by the minister of BHOS to research lessons learned<sup>617</sup> and the executed research is referred to in internal documents<sup>618</sup>), the actual assessment could not be found, neither in public nor internal documentation, making analysis of the lessons learned impossible.

## 8.5 Extent of policy success

Various positive effects have been reported regarding the honest broker role of the Netherlands. They were often reported by the Netherlands itself, for example in letters to parliament but also independent reviews, and other stakeholders have also noted the positive effects of Dutch interventions.

The three stakeholder meetings in Cape Town, Nairobi and Dar es Salaam were appreciated by the different parties. In an independent evaluation of ICTSD, conducted by Saana Consulting, the joint meetings were mentioned as a positive experience to the stakeholders that rendered some valuable policy options to move the EPA process forward.<sup>619</sup> It is important to note that in several African countries, civil society and the private sector were only consulted by their respective governments to a limited extent. Because of that, many relevant actors had insufficient information about the exact scope of the EPA, the timeline of the negotiations, the way concerns could be dealt with and the potential consequences for the populations of the various African countries. Therefore, the stakeholder meetings had an important bridging function by providing information and raising awareness – namely, actors could be informed, misperceptions and prejudices could be addressed, and the knowledge and expertise of different stakeholders could be exchanged. At the same time, the meetings provided more insight into the concerns and interests of the stakeholders.

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As previously mentioned, the results of the stakeholder meetings were shared with the EU Commissioner for Trade, the African negotiation teams as well as other EU member states. The EC confirmed receipt and took notice of the report, though this may be a diplomatic response as it is unclear to what extent the findings were taken into account.<sup>620</sup> According to the Dutch minister, however, the stakeholder meetings played an important role in the final phase of the negotiations to achieve a more positive view on the outstanding issues and to address these issues with new insights.<sup>621</sup> In addition, the minister considered that discussion among African countries had been promoted, and the positive results of these discussions on the anti-EPA lobby, for example, were relevant for future negotiations.<sup>622</sup>

<sup>617</sup> Tweede Kamer, vergaderjaar 2014–2015, 21 501-04, nr. 167.

<sup>618</sup> MFA (2018).

<sup>619</sup> Sanaa Consulting (2014).

<sup>620</sup> Interview with former IMH policy officer at the MFA, held on 26 October 2020.

<sup>621</sup> MFA (2015e).

<sup>622</sup> Ibid.

In addition to the results of the three stakeholder meetings, Dutch participation and the organisation of several initiatives around the EPAs with Africa resulted in the following reported results.

First, as part of the reporting on the progress on the EPAs, in a letter to the Dutch parliament in 2013, Minister Ploumen outlined the success achieved by the joint letter sent to the High Representative of the Union for Foreign Affairs and Security Policy/Vice President of the European Commission and the European Commissioners for Development and Trade. It was argued that the joint letter had generated positive results on both the European and the African sides.<sup>623</sup> She stated that the letter was seen by the African negotiating parties as an important political signal that the EU was actually prepared to come to a solution that was in the interest of both negotiating parties.<sup>624</sup> Some third parties underscored the minister's conclusion. For example, several Senegalese media actually referred to this letter as a positive signal from the EU.<sup>625</sup>

In the case of West Africa, Minister Ploumen also argued that the letter had in all likelihood helped to break the deadlock and reach a final agreement. The most important elements of the compromise were the liberalisation percentage of 75% of covered tariff lines over a transition period of 20 years, with exceptions for some (sensitive) products and sectors.<sup>626, 627</sup> The positive effect of the letter was underscored by the report of Coherentiemonitor (2015): almost all of the recommendations from the letter appear to be included in the final agreement.<sup>628</sup>

Despite these stated positive outcomes from the letter, an unintended negative effect also occurred, creating some internal friction as the letter was less appreciated by the EC. The EC regretted the fact that some of the member states (including the Netherlands) seemed to question the efforts of EU Trade Commissioner de Gucht<sup>629</sup> and thus undermined the Commission's negotiation stance. In a TPC meeting shortly after the publication, the EC argued that member states needed to support the Commission unconditionally in the last phase of these negotiations, because agreements on (some of) the EPAs were within reach, but only if member states and EC held the same position. Moreover, the European Commission mentioned that the letter was factually incorrect: the call for more flexibility was inappropriate and not based on the state of play of the negotiations at the time, given that the Commission had already proposed transition periods of 25 years on several policy dossiers.<sup>630</sup>

<sup>623</sup> MFA (2015e).

<sup>624</sup> Ibid.

<sup>625</sup> MFA (2014b).

<sup>626</sup> MFA (2015d).

<sup>627</sup> MFA (2014d).

<sup>628</sup> Coherentiemonitor (2015).

<sup>629</sup> Karel de Gucht served as the European Commissioner for Trade from February 2010 to November 2014.

<sup>630</sup> IRHP 2014-02c TPC Verslag Plv 17-01-2014.

Second, as regards the conversations with regional organisations to discuss Dutch support to programmes focused on regional integration in West Africa, no evidence was found in policy documents or from interviews that actual support initiatives have been implemented based on those conversations. Policy documents and interviews with policy officers of the MFA did not identify who took the initiative to organise the meetings either.

Third, the various dialogues conducted by the Dutch minister at the multilateral level (in EU and WTO context) as well as in (bilateral) contacts with African counterparts reinforced the importance of reaching a compromise on the EPAs and was likely to have contributed to the progress made in EPA negotiations. During EU meetings, the Netherlands, together with France, the UK, Germany and Denmark, went a little further, claiming to have played a key role in breaking the deadlock of the negotiations. For example, according to the minister, Dutch efforts contributed to a development whereby key players from the African countries, NGOs, companies and think tanks (such as Tralac, TRAPCA and SAIIA) started to share new insights, knowledge and expertise and were better informed about each respective position. This was assumed to have helped break through old ways of thinking and pave the way for new paths.<sup>631</sup> The independent evaluation by Saana Consulting underscored the positive findings, stating, ‘the meetings produced fruitful dialogue, encouraged participation from a wide-range of stakeholders and rendered some valuable policy options to move the EPA process forward’.<sup>632</sup> However, Saana Consulting also noted that claims that the dialogues had a positive impact on loosening the deadlock should be taken with caution. The evaluation stated that quantifying the magnitude of the dialogues’ contribution was difficult given the highly political and sensitive nature of EPA negotiations.<sup>633</sup>

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While the above findings indicate a generally positive effect of the Netherlands in the role as honest broker, particularly at the intermediate outcome level (enhanced awareness and renewed collaboration and policy options),<sup>634</sup> there are also more critical voices. For example, an interviewee representing the EC noted that the Netherlands claimed the success of the honest broker role, also in the press, but that the actual impact of this role was more limited.<sup>635</sup> For example, the Netherlands had indeed organised stakeholder events, but these events in the African regions were only a fraction of the activities that took place. ICTSD organised many other stakeholder consultations on the EPAs on its own, and other organisations were active as well (e.g. ECDPM).<sup>636</sup> Moreover, other member states played a (more prominent) role in initiatives undertaken by the ‘Friends of EPA’ as well. As mentioned, in the letter sent to the High Representative of the Union for Foreign Affairs and Security

<sup>631</sup> MFA (2015e).

<sup>632</sup> Saana Consulting (2014), p. 9.

<sup>633</sup> Saana Consulting (2014), p. 39

<sup>634</sup> E.g. MFA (2015e). The document identifies which results have been booked as result of the Dutch interventions.

<sup>635</sup> Interview with EC trade policy officer, held on 6 March 2020.

<sup>636</sup> Although it should be noted that some of the organisations/activities have also been (partially) funded by the Netherlands, but not as part of the honest broker role.

Policy/Vice President of the European Commission and the European Commissioners for Development and Trade, it was the UK that took the lead role.<sup>637</sup>

Another interviewee mentioned that while the honest broker role of the Netherlands was well intended, it was not strategically targeted to get the negotiations back on track.<sup>638</sup> The Netherlands engaged in awareness-raising workshops and events at the African level, but failed to involve stakeholders at higher political levels and encourage discussion at this level. It did not involve the European Commission, nor did it invite ACP ministers to its events.<sup>639</sup>

Moreover, while EPA negotiations were ultimately concluded in all three regions and more flexibility was granted in the period from concluding the EPAs and their ratification, it is difficult to attribute these results to the Dutch efforts. From the documentation and interviews, it is unclear how, and to what extent, the specific interventions affected the evolving negotiating position of the EC and the African parties. The high turnover of staff responsible for the EPA dossier, as revealed in interviews with the MFA, made it even more difficult to identify whether and how Dutch interventions affected the negotiations.

Overall, the effect seems to be limited. This can be partly explained by the fact that, from the outset, it was difficult for the Netherlands to take on a full-fledged role as honest broker while being involved in the negotiations as an EU member state (with the Commission negotiating on behalf of the member states). Considering the efforts of other relevant stakeholders (e.g. other EU member states and think tanks), Dutch activities were only part of a larger sum of interventions, and should be reviewed in this context. In addition, the fact that the Netherlands took up this role without prior consultation seems to have an unintended effect in the sense of causing friction between the Netherlands and the EC. According to a representative of DG Trade, the European Commission was sometimes more busy negotiating with member states than with the African countries.<sup>640</sup> At the same time, this friction seems to be only temporary, without any clear lasting effects. A representative of DG Trade even pointed out that the EC could make clever use of the member states, for instance by using the ties that the member states already have in countries that the Commission is negotiating the EPA with (e.g. through development programmes) to increase awareness.<sup>641</sup>

After some of the EPAs were concluded, the Dutch BHOS Minister indicated she was committed to supporting their swift finalisation and implementation. Minister Ploumen also wanted to stay informed about the sentiments around the EPAs in the relevant countries, and where necessary, take action and communicate their sentiments to the EC. The Dutch MFA and embassies have, at least once, conducted a stocktaking of sentiments and opinions,<sup>642</sup>

<sup>637</sup> Interview with former policy officer at the MFA, held on 26 October 2020.

<sup>638</sup> Interview with an expert, held on 16 June 2020.

<sup>639</sup> Ibid.

<sup>640</sup> Interview with EC trade policy officer, held on 6 March 2020.

<sup>641</sup> Interview with EC trade policy officer, held on 4 March 2020.

<sup>642</sup> MFA (2015a).

though the results of the stocktaking and what kind of follow-up was provided remain unclear. Moreover, according to one interviewee, currently most EU member states, including the Netherlands, no longer play a proactive role in the EPA negotiations – and they are for the most part still at an impasse.<sup>643, 644</sup> Nevertheless, the Netherlands has funded general technical assistance to the countries to enhance their negotiation capacity and trade competitiveness in the areas of trade policy and negotiation capacity, trade facilitation and standards.<sup>645</sup> These long-running initiatives are relevant for African countries to be able to benefit from trade liberalisation and integration in global supply chains, though not directly linked to the EPAs.

## 8.6 Conclusion

While some negotiations with the African regions have ultimately resulted in an EPA, such as the EU–SADC or EU–ESA EPA, other EPA negotiations in the African region have largely failed or only led to interim EPA agreements with individual countries or continued access under the market access regulation.<sup>646</sup> They also created issues for regional integration, and to some extent antagonistic political relations between the EU and Africa.

In terms of Dutch interventions leading to the final outcomes of the negotiations with African regions, the effect seems to be limited. Nevertheless, several conclusions can be drawn on the effect of Dutch interventions, particularly in its role as honest broker.

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Positive effects include the effects from the stakeholder meetings, which were appreciated by the beneficiaries and found to be of added value in terms of bringing a wide range of stakeholders together, creating fruitful dialogue and enhancing awareness; a better understanding of the sensitivities in the countries; and new insights on how to move forward. At the same time, the fact that the Dutch minister herself took on the role as honest broker without consultation caused a negative effect as well, leading to friction with the European Commission, as the Commission felt undermined by this action.

What is evident from this case study and the EPA negotiations in general is how difficult it is to conclude negotiations between the EC, representing all EU member states on one side, and African groups, representing various diverse African countries on the other side. Furthermore, these difficulties do not disappear once negotiations have been concluded but continue in the ratification and implementation phases.

<sup>643</sup> For a more elaborate overview of the current state of EPA negotiations with Africa, see the EPA case study in Ecorys (2021), Chapter 2.

<sup>644</sup> In terms of the implementation of the EPAs that have been ratified, Germany is the only country mentioned as an active player in this area, in terms of monitoring and support (interview with an expert, held on 16 June 2020).

<sup>645</sup> This has happened through several multilateral initiatives, for instance through support to ACWL, Codex Alimentarius Trust Fund, the WTO Standards and Trade Development Facility and TradeMark East Africa, and similar trade facilitation efforts in West Africa in cooperation with ECDPM and the World Bank (MFA (2015c)).

<sup>646</sup> See Ecorys (2021), Chapter 2.

## 8.7 Recommendations

Building on the review and above conclusions, the following lessons learned have been formulated, with respect to the EPA negotiations in general (lessons 1 to 5) and the Dutch role as honest broker (lesson 6). The overarching lesson learned with respect to the EPA negotiations in general (lessons 1-5), which should be taken into account in future negotiations, is to be realistic about what the agreements can achieve given (i) the diversity in interests among negotiation parties, as well as individual countries and different stakeholders; (ii) the current level of development of certain economies and specific industries; and (iii) the negotiation capacity available on the African side.

- In future negotiations, be realistic about the different (sometimes conflicting) interests, both within the African groups and between the EU and the African partners.

A key lesson expressed by a representative of DG Trade, is ‘not to fall in the CARIFORUM trap’ and thus not to be overly ambitious in future agreements.<sup>647</sup> This is something the EU and its member states, including the Netherlands, should remember when talking about further developing the EPAs and a follow-up agreement of Cotonou and a possible bilateral FTA between the EU and Africa at the continental level. Be willing to innovate to ensure that the agreements have added value and serve the interests of the parties involved.

- Be realistic about the limited interest shown on the side of African counterparts due to negotiation capacity constraints.

Ensuring that there is interest on the African side regarding the inclusion of topics beyond the trade in goods (in light of future agreements on trade in services, for example) will require careful management, sufficient institutional infrastructure and negotiation capacity among the African countries. The EU and individual member states could play an important role, providing (and continuing to provide) technical assistance. Yet the challenge is to maintain a balance between being a (negotiation) party with its own interests and objectives, and an uninvolved and dispassionate provider of technical assistance.<sup>648</sup> The Aid for Trade initiatives, such as trade facilitation initiatives, legal shops and advisory centres to enhance negotiation and implementation capacity, could serve as models.<sup>649</sup>

- Provide support and scope in the design of EPAs to facilitate exports, but be realistic about the effects that EPAs can have on exports.

Even the most far-reaching and innovative trade agreement can only do so much to promote exports. This also depends on the ability to carry EPA’s forward into national industrial policies. National policies pursued by different African governments have shown varying

<sup>647</sup> Here, the EC has negotiated an ambitious and comprehensive agreement with Caribbean countries, but this agreement has hardly been implemented, due to insufficient capacity and interest on the side of the ACP countries (interview with EC trade policy officer, held on 4 March 2020).

<sup>648</sup> Ecorys (2021), Chapter 2, p. 35.

<sup>649</sup> Ecorys (2021), Chapter 2.

degrees of success. For EPA negotiations to facilitate national industrial development, it is important for governments to develop and implement well-designed national industrial policies, within the space created in the EPAs. To do so may require additional institutional capacity building to design and implement targeted support and policies.

- Explore alternatives to (the current form of) the EPA and EPA negotiations.

A possible consideration is also to eschew EPAs with those regions and countries unwilling to ratify and apply an EPA. Instead, the EU could expand market access under GSP, available to all developing countries. Although this would not offer the same level of market access as an EPA for African countries, it would not require them to open their markets to EU imports, thus taking away some of their current concerns around EPAs.

- Ensure continuous and inclusive dialogue between the EU and African countries, where interests of different stakeholders are well presented.

Results from the dialogues organised by ICTSD have been valuable, providing scope for different groups of stakeholders, including civil society and the business community, to share their views and express their interests. Inclusive and frequent dialogue between the EU and African countries similar to dialogues organised by ICTSD allow for enhanced awareness and continued collaboration. The African countries may not always prefer the inclusion of a wide base of stakeholders, but this varies per country. It is important for the EU to be aware of these country-specific preferences and to structure the dialogue accordingly. Furthermore, support to regional organisations and think tanks that provide useful input (e.g. expertise, research and their local networks) can enhance the quality of these dialogues.

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- Identify and recognise the challenges that come with taking on a dual role as an honest broker and an EU member, and learn from the unintended effects.

It is difficult to play the honest broker in the context of the negotiations, given that the Netherlands is also involved as a member of the EU. It is important not only to think carefully about what can be done (can the obstacles be addressed, and if so, how?), but also consider what parties and stakeholders must be involved or informed – as well as what potential counter effects or unintended effects may occur, and how these can be mitigated.

For instance, consult relevant stakeholders and enhance communication with the EC. Involve the EC to reduce friction and better integrate the Dutch position at the stage of EC policymaking.



9

**Overarching observations,  
general conclusions and  
recommendations**

This evaluation has presented a review of Dutch trade and investment policy, covering the period 2013 to 2019, complemented with some important, more recent developments. It identified which trade and investment policy issues were prioritised by the Netherlands, and why, and how the Netherlands subsequently established its position. Moreover, we examined to what extent the policy goals on these issues were achieved and whether there was policy success, notably in influencing EU positions, but also in terms of setting the agenda and achieving results in trade negotiations more widely.

The purpose of this chapter is to provide observations, general conclusions (leaving the specific conclusions of the case studies to the previous chapters), and recommendations around three topics: policy priorities and coherence, Dutch policy success in the EU and capacity. These observations are shown in boxes with examples from Dutch practice. The three topics recurred throughout the policy reconstruction, the case studies and during interviews, and are highlighted in this final chapter to suggest how to enhance the policymaking process.

Grounded in evidence from the five specific case studies, the observations, general conclusions and recommendations are valid at a higher level and go beyond the case studies. They provide guidance and food for thought and will hopefully inspire policymakers, in particular at the DGBEB, to advocate Dutch priorities more effectively, to enhance policy coherence, acknowledge trade-offs, and reduce gaps between the policy goals and results.

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#### *Case studies as a basis*

In the case studies, we examined Dutch policy success at different stages of policymaking, from agenda-setting, to adoption of policy proposals, and in some cases policy implementation.<sup>650</sup> Determining whether efforts to influence policy were successful was often challenging, so that these cases mainly identified the most conspicuous Dutch efforts and signs of policy success or lack thereof. In particular, we could not identify with certainty whether Dutch interventions at the level of the EU were decisive and to what extent results in Dutch priority issues could be attributed to the Netherlands, because, on most topics, similar positions were taken by the European Commission and other member states from an early stage.

Overall conclusions from the five case studies regarding the success of Dutch interventions in contributing to the EU agenda, EU positions and international negotiations are reflected in the executive summary and will not be reiterated here. The complete findings on these case studies are presented in Chapters 4-8.

The five case studies were: trade and sustainable development chapters in free trade agreements, trade defence instruments, investor protection and investment dispute settlement, the trade in services agreement and the economic partnership agreements with African regions.

<sup>650</sup> For a detailed description of the methodology, see annex 1 to this report. The stage of policy implementation was found to be of limited relevance only in some of the five case studies, notably TDI.

### *Policy priorities and coherence, Dutch policy success in the EU and capacity*

The observations, conclusions and recommendations in this chapter reflect recurring and/or overarching issues. The first set of recommendations concerns policy priorities and policy coherence. Policy coherence was a recurring theme throughout the case studies, because non-trade priority concerns,<sup>651</sup> such as sustainability and the interests of developing countries, may conflict with – and have to be weighed against – (national economic) trade interests. Moreover, policy coherence is at the heart of the combined policy agenda for aid, trade and investment of the Netherlands. It is also at the heart of the IOB policy review of the BHOS budget article 1, which this study feeds into. This confirms its relevance. In fact, the issues of policy coherence and conflicting interests were already noted in Chapter 2.

The second set of topics concerns Dutch policy success in EU trade and investment policies, which was the starting point and main initial question of this evaluation. The third topic concerns capacity. Staff capacity appears to be crucial, and a lack thereof is an obstacle for effective interventions. We will finish this chapter by looking ahead, presenting overall considerations on the future of trade negotiations against the background of current geopolitical developments.

## 9.1 Policy priorities and policy coherence

### 9.1.1 Operationalising the trade and investment policy

The three overarching aims of the Dutch BHOS policy were: (1) eradication of extreme poverty in a single generation; (2) sustainable, inclusive growth all over the world; and (3) success for Dutch companies abroad. More specifically on trade and investment, the Netherlands wanted to play its part in concluding bilateral (EU) free trade agreements, internationalising the Dutch private sector, attracting foreign direct investment and protecting Dutch investments abroad.<sup>652</sup>

Policy goals at a lower level, as relevant to the five specific case studies, tended to be formulated rather broadly and without a strategy or intervention logic on how to achieve these goals. There was little indication as to how the Netherlands planned to achieve the policy goals, underlying objectives and targets. Nor was it specified what the desired results and common threads and bottom line were for current priority issues in these five specific policy areas. Consequently, overarching policy goals and priorities have not been systematically translated into actual policy positions. For instance, while the Netherlands promoted gender equality and the interests of developing countries in general, IOB did not find evidence of Dutch interventions at the working level reflecting specific proposals on these two topics.

<sup>651</sup> 'Non-trade concerns' here means that these issues are not classic economic, national interests or classic business interests in trading.

<sup>652</sup> See Chapter 2 for a more detailed review of Dutch international trade and investment policy.

### Recommendations

1. Operationalise the policy priorities in a consistent manner: trade and investment policy can be elaborated in a more systematic manner. This is especially relevant for priority themes and important negotiation processes, and can be executed by formulating overarching goals, objectives and concrete targets, strategies to achieve these, and timelines. Drafting framework instructions will support this approach.
2. Maintain a limited number of policy priorities, to make it possible to formulate clear messages, and promote issue ownership and a visible profile within the EU (as is already the case with sustainability chapters). A limited number of priorities, and the operationalisation of these priorities into objectives and positions for specific files, could also enable a focused implementation of policy.

#### Box 9.1 Good practices and lessons learned

##### Good practices

- Sustainability is a clear policy priority and has been well integrated into trade policy, specifically in EU FTAs, by introducing trade and sustainable development (TSD) chapters. The Netherlands started its agenda-setting by supporting the EC on the inclusion of TSD chapters into bilateral FTAs (see Chapter 5). TSD chapters are now proposed in all FTAs that the EU negotiates. It is likely that Dutch emphasis on such chapters, from an early stage, contributed to this success. Over the years, Dutch efforts have shifted from inclusion in treaties to implementation and enforcement. Whether the Netherlands and the EU will be as successful in implementing these chapters remains to be seen. Recent Commission efforts to strengthen the enforceability of TSD chapters are a positive development in that respect.
- The Netherlands integrated comprehensive sustainability and RBC provisions in its Model Bilateral Investment Treaty, developed in 2017–2018. These texts are innovative and ambitious – although they lack real possibilities for enforcement (see Chapter 7).

##### Lesson learned

In the TSD chapters, the Netherlands pushed hard for the inclusion of gender equality, but it remained unclear what exactly it wanted to achieve in trade disciplines for governments – other than raising awareness (one policymaker stated: ‘the more [references], the better’) and giving priority to women’s empowerment. In the end, none of the TSD chapters in the EU FTAs concluded up and until 2019 contain any specific provisions on gender equality (see Chapter 5). In its BNC fiche on the EU Trade Policy Review of February 2021, the Dutch cabinet mentions that the mainstreaming of gender into EU trade policy is an important objective.\* This mainstreaming has not fully been operationalised yet, although after the reporting period, the Netherlands did issue a non-paper, promoting gender equality through trade policy (2020), and the EU set up an Action Plan on empowering women and girls (2020).

\* MFA (2021).

### 9.1.2 Balancing conflicting interests

Policy coherence has been a long-standing objective of the Netherlands. Making policy priorities operational requires elaborating a strategy on how to deal with potentially arising conflicting interests or trade-offs between policy goals. National economic interests can clash, for instance, with the interests of developing countries (as explained in the text box on advocating their interests below), and the interests of companies can clash with some public interests that are defended by civil society. Our findings show that trade-offs or synergies in decision-making do not appear to have been made explicit or calibrated in a systematic manner.

The Dutch Trade and Investment Board (DTIB) and the Broad Trade Council (BHB) do offer non-state actors, including civil society, a chance to meet with policymakers on a regular basis, to discuss trade policy or raise issues such as non-trade concerns (see Chapter 2). However, there is no up-to-date assessment framework to weigh trade and investment priorities against development and foreign policy, or to promote the overall coherence of Dutch trade and investment policy with development policy and foreign policy. Using such a framework would help decision-making.

For instance, when non-trade concerns, such as sustainable and inclusive development, gender and RBC, conflict with trade concerns, an up-to-date assessment framework could help to enhance coherence between policy priorities. In interviews for this evaluation, no evidence was found that the assessment framework on trade and non-trade concerns from 2009 is currently actively used.<sup>653</sup> This is remarkable given the fact that these issues are cross-cutting priorities for the Netherlands, which would benefit from the active use of such a framework. In 2018, development-friendly trade agreements, including non-trade concerns, were identified as one of the priorities for policy coherence.<sup>654</sup> However, when negotiating partners refused to integrate specific, concrete sustainability commitments, the EC and member states failed to insist on their inclusion and instead prioritised the need to reach an agreement.

<sup>653</sup> In 2009, the Dutch cabinet presented a policy position regarding non-trade concerns (NTCs) and trade (Tweede Kamer, vergaderjaar 2008–2009, 26 485, nr. 68), arguing that these concerns deserved attention because of their intrinsic value and because too little attention for NTCs could eventually undermine the societal support for the multilateral trading system. For unilateral trade measures, an actual assessment framework was presented. However, since the introduction in 2009, no updated assessment framework has been introduced and some interviews with policymakers working at the MFA have confirmed that the framework is no longer being used (interviews with Dutch policymakers working at the MFA, held 7 and 14 October 2019. One employee at DGBEB did say that the framework was still valid (June 2021).

<sup>654</sup> Government of the Netherlands (2018). The 2016 Action Plan on policy coherence already identified areas where conflicts might arise.

Trade-offs and clashing interests may also occur (see Chapter 2)<sup>655</sup> in terms of policy coherence between the three policy fields of aid, trade and investment policy. However, an up-to-date assessment framework (or Theory of Change) to identify, reduce and weigh possible trade-offs and incoherencies between Dutch development policy and trade and investment policy does not exist, even though defending the interests of developing countries in international trade is an explicit policy priority (see also the text box below).<sup>656</sup>

**Box 9.2** *Advocating the interests of developing countries*

**Advocating the interests of developing countries**

Because ‘the Netherlands will continue to stand by the poorest people’ and fight for an equitable world, with sustainable and inclusive growth,\* it has often advocated the interests of developing countries, as evident in the five case studies. For example, the Netherlands tried to prevent negative impacts of FTAs for developing countries – in particular, least-developed countries – and marginalised groups in society.\*\* In this vein, the Netherlands supported developing countries’ negotiation capacity in the WTO and their ability to play their role in international discussions on investment dispute settlement. The Netherlands financed Aid for Trade interventions on technical assistance for negotiation capacity, to strengthen the capacity of developing countries in negotiations on trade and investment, for instance through the Advisory Centre on WTO Law (ACWL). It took the lead in proposing a similar centre in the area of investment dispute settlement (ACIIL). And in the case of EPAs, for instance, Minister Ploumen offered to be an honest broker in the negotiations (see Chapter 8).

\*MFA, 2013, p. 6.

\*\**In addition to considerations of solidarity and strengthening a multilateral, rules-based and equitable trade system, the MFA feels that the EU also has a strategic interest in supporting the integration of vulnerable countries into the global economy. Source: MFA (2021).*

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Potentially conflicting interests were a recurring issue in the five case studies. Inconsistencies among the different areas were not clearly solved in operational policy guidance, as just explained in 9.1.1. For instance, in the case study on investment protection and investor duties (Chapter 7), it was evident that steps have been taken in the right direction, but policy coherence remains a challenge. When trying to update bilateral investment treaties, Dutch representatives have to weigh the aspiration to insert non-trade concerns against the risk of not getting any agreement, because such proposals have often encountered opposition from negotiating partners. Another challenge in coherence is illustrated by the EPAs.

<sup>655</sup> This was also concluded in the IOB study: ‘Coherence or co-existence? A study on the implementation of the aid, trade and investment agenda in three transition partner countries: Bangladesh, Ethiopia and Kenya’, which identified the difficulties experienced to serve aid objectives and trade and investment objectives concomitantly (see: IOB, 2021). [https://www.tweedekamer.nl/kamerstukken/briefven\\_regering/detail?id=2021Z06438&did=2021D14248](https://www.tweedekamer.nl/kamerstukken/briefven_regering/detail?id=2021Z06438&did=2021D14248)

<sup>656</sup> MFA (2018).

Minister Ploumen offered to act as an honest broker, to advance the interests of developing countries, while those interests may clash with the EU's economic interests – and the Netherlands itself was, of course, also part of the EU party in the negotiations.

Because there is currently no up-to-date assessment framework to help prioritise objectives in the face of trade-offs, not all non-trade concerns can be effectively integrated into trade and investment agreements in practice, let alone translated into trade disciplines that are implemented and enforced. This is especially problematic when the obligations and rights of the countries concerned are at odds according to different agreements, and when negotiating partners strongly object.

Close collaboration between the Directorate-General for International Cooperation (DGIS) and the Directorate-General for Foreign Economic Relations (DGBEB) is recommended to identify potential trade-offs and address policy incoherence. When the BEB moved to the Ministry of Foreign Affairs (MFA) in 2012, the main responsibility for raising specific interests of developing countries was given to BEB/IMH, which also has the responsibility for policies promoting commercial interests. This puts the responsibility for the assessment of diverging policy objectives mainly in one hand: which has the potential to enhance coordination and coherence and create synergy, but also comes with the risk that development cooperation objectives are not represented to the extent they were before, even though policy notes on trade and development highlight these topics. Policymakers need to be acutely aware of the possibility of conflicts and trade-offs between policy goals when policy positions are formulated and expressed at negotiating tables. They must take into account issues related to sustainable development and the interests of developing countries. This requires identifying, and avoiding as much as possible, any potential conflicts and trade-offs, for instance in an up-to-date assessment framework. Similarly, given the importance of geopolitical developments on trade and investment policy (see Chapter 3), these developments must be taken into account as well.

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### *Recommendations*

3. Integrate goals and commitments, such as those expressed in policy notes, more systematically into trade and investment policy, including sustainability, climate change, gender, labour rights, human rights, responsible business conduct and due diligence.
  - Identify potential synergies and trade-offs between Dutch policy goals in a systematic manner. When and where trade-offs exist, they should be identified early on and weighed in a transparent and systematic manner. Deal more explicitly with trade-offs and synergies among the interests of business, citizens, consumers, government authorities and the environment. Address possible inconsistencies between obligations in various international agreements and ambitions on non-trade concerns, on the one hand, and measures to support Dutch companies and to attract foreign investors, on the other hand.
  - Update or redesign the existing assessment framework (2009) on how to deal with trade-offs between trade and non-trade concerns and/or between the different policy objectives of Dutch aid, trade and investment policy and among trade policy, development policy and foreign policy.

- Acknowledge the limits of the influence of trade agreements – and trade policy in general – on other policy areas. Non-trade concerns cannot always be translated into disciplines in trade agreements or in unilateral trade sanctions.
4. Ensure that development issues are taken into account for a balanced and coherent position on trade files in the EU, as well as foreign policy (Directorate-General for Political Affairs, DGPZ) issues. Close collaboration and consultation on a regular basis between DGBEB and DGIS and DGPZ is key to promoting the integration and coherence of all MFA policies.

**Box 9.3** *Weighing various and conflicting interests*

**Weighing various and conflicting interests**

The MFA advocated for stakeholder involvement in discussions at the national (Parliament) and the EU level. The MFA also invited various stakeholders to advocate non-trade concerns and public interests on a regular basis: for instance, concerns related to labour rights and environmental sustainability. A positive example of transparent, multi-stakeholder consultations were the extensive discussions that the Netherlands organised concerning the Model Bilateral Investment Treaty (Chapter 7).\*

In the case of TiSA (Chapter 6), there were tensions between trade policy and development policy. However, it did not have an up-to-date framework to weigh different policy objectives nor did it systematically take into account the interests of developing countries in instructions – and they were not even participating in these negotiations. Finally, Dutch business seems to have had a major effect on negotiating positions, profiting from close ties with policymakers and politicians.

\*The Netherlands also organised other consultations with non-state actors on a regular basis, including a recent series on TSD commitments (for more information see: <https://www.rijksoverheid.nl/documenten/kamerstukken/2020/11/16/kamerbrief-aan-de-eerste-kamer-inzake-klachtenmechanisme-over-duurzaamheidsbepalingen-in-handelsakkoorden>).

### 9.1.3 Adjusting formal positions to changing circumstances

This evaluation has shown that Dutch positions, once formulated in instructions for the Trade Policy Committee and/or so-called BNC fiches, were often maintained for months, or even years. This led to a repetition of the same positions, with the same phrasing, dozens of times in EU meetings such as the TPC. Whereas taking a firm stance early on in negotiations can be a good tactic, continuing to hold on to this firm stance, also in the later stages of negotiations, not taking changing contexts and proposals into account, can create undesired effects – such as being much less involved in ongoing negotiations. Most conspicuously, this was discussed in the case of trade defence policy negotiations in Chapter 4 (particularly in the proposed non-application of the lesser duty rule), and in Chapter 7, related to the investment court system. At the same time, in several case studies we noted that instructions changed

overnight, often at the later stages of negotiations. In those instances (notably ICS and TISA), the Netherlands went along with compromise proposals and/or EC proposals, seemingly in silent agreement. In response to IOB's findings, BEB suggests that in the run-up to such compromises there usually was a period of informal contact where solutions were drafted without formally changing instructions.<sup>657</sup>

Negotiations require some room for manoeuvre, adjustments to changing contexts and possible trade-offs between policy issues. Multilateral trade and investment negotiations are complex and can last many years. Changes in circumstances require careful alterations in standpoints and they may require adjusting ambitions and directions, for instance setting intermediate objectives along the way towards the ultimate goal. This was illustrated by the case of investment dispute settlement and the proposal for a multilateral investment court (Chapter 7).

#### Recommendations

5. Draft general guidance and framework instructions for a number of priority issues and negotiations, delineating the bottom line, thus allowing Dutch representatives in EU negotiations to compromise on those issues without having to consult senior management. Consider setting less ambitious, interim objectives towards achieving ultimate goals.
6. Review policy positions regularly and tailor them to circumstances when and where needed. When taking a pragmatic approach in the end, leaving references to non-trade concerns out or having a change of heart due to changed circumstances, be transparent about your decisions and underlying motives.

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#### Box 9.4 Pragmatic practice and lessons learned

##### Pragmatic practice

- Often, negotiating partners of comprehensive free trade agreements objected to sustainability and human rights commitments that the EU proposed (e.g. related to the FTA with Japan) as well as proposals to include references to an investment court system. Sometimes, the EU introduced sustainability and human rights commitments in other international agreements, for example by including references to the ILO core conventions. Occasionally, the EU considered the possibility of trade measures (sanctions) to enforce such commitments. When negotiating partners rejected such texts and the EU's proposals would have prevented the conclusion of any agreement, pragmatism ultimately prevailed: the EU's proposals were dropped. In the case of investment dispute settlement, references were left out of the agreement with Japan only when it could accept the old system (ISDS).
- The Netherlands adopted a case-by-case approach to references to investor-state

<sup>657</sup> According to a comment by BEB, formally changing instructions is too burdensome an administrative process. IOB could not verify to what extent informal contacts and undocumented changes in position took place.

dispute settlement in EU trade and investment agreements, similar to the rest of the EU (Chapter 7). The EU dropped its desire for introducing an investment court system whenever the rule of law was deemed adequate in the negotiating partner's country (for example, Australia and New Zealand, but not Canada). More generally, when negotiating partners objected to a mention of ICS, investment (investor-state) dispute settlement was left out of the draft agreements. The Dutch cabinet explained its pragmatic stance to the Dutch Parliament, but could perhaps have done so sooner and better in the case of the EPA with Japan (2019).

### Lessons learned

- The Netherlands did not always respond quickly in negotiations, to adjust to sudden, unexpected progress in negotiations. For example, in the case of the reform of the EU trade defence system (Chapter 4), as regards the non-application of the LDR, the Netherlands held on to its initial stance for a long time, while some other member states were already (more) flexible earlier on. While taking a firm initial stance can prove to be a valuable negotiation tactic, in this case it seems to have created a risk of being placed on the sidelines in discussions. The Netherlands was eventually able to adjust its position, showing a willingness to compromise. However being more open to exploring compromises and considering trade-offs sooner can be beneficial to influencing negotiations.
- Policies and strategies need to be adapted when circumstances change. One major change is the rapid rise of China and the associated opportunities and challenges (see Ecorys (2021)). For a long time, the Netherlands, as an open economy, kept defending the spirit of free trade. This was also evident in the case of trade defence instruments (TDIs), where the Netherlands took a liberal approach and objected to using TDIs. Over the past few years, several developments added to the impression that the spirit of free trade had become unsustainable. It was only relatively recently that the Netherlands started to act on the fact that large players, such as the US and China, do not always adhere to international rules and instead adopt power-based policies. The Netherlands has now acknowledged that expectations in the WTO 2001 Accession Protocol about a decreasing role of the state in the Chinese economy have not been met. The cabinet also changed its position on TDI reform and Chinese FDI, and drafted a more assertive China Strategy (2019). Furthermore, the rise of China led to a sense that Europe should become 'strategically autonomous', in the context of a tougher, more assertive discourse by EU policymakers in general. This more assertive EU stance was reflected in, for instance, the draft EU China Agreement on Investment of December 2020, and the proposed EU Trade Policy Review of February 2021.

## 9.2 Dutch policy success in the EU

### 9.2.1 Promoting priority interests

As explained in Chapter 2, the European Commission speaks and acts on behalf of the EU and its member states on trade and investment matters, especially in the WTO, including on bilateral free trade agreements. The Netherlands mainly operates in the context of the Council of the European Union and its policymaking bodies.<sup>658</sup> Dutch efforts therefore focus on promoting the Netherlands' policy views in the mandate of the EC for negotiations with third countries. Coalition-building with other member states is important in this context, since the EU Council has the ultimate decision-making power to approve the agreements once they are negotiated (alongside the European Parliament).<sup>659</sup> Member states have the greatest influence when they start advocacy at an early stage in the policy cycle. Once there is a proposal by the Commission, it is difficult to completely change it.<sup>660, 661</sup>

A vocal stance on some priority topics gave the Netherlands visibility and influence on the EU's agenda. However, a considerable part of the Dutch instructions and reports that IOB studied showed a rather reactive approach of the Netherlands to EC proposals, rather than it proactively setting the agenda and advocating from the start. Even when clear priority topics were identified (sustainable development, gender, modernising ISDS), there did not seem to be a clearly articulated Dutch vision on the desired direction and strategy of the EU on these priority topics. Although there might be strategic thinking at a higher, managerial and political level, such thinking was not explicit in the documents analysed for this study.<sup>662</sup> This could be partly attributable to the high turnover of some policy officers, as for instance identified in the EPA case study, which consequently resulted in a lack of institutional memory.

The observation that a strategy was largely lacking is relevant, since strategic thinking is a precondition for anticipating developments and formulating Dutch positions in a timely manner. An important issue requiring such strategic thinking is how to deal with Brexit.<sup>663</sup> the Netherlands has lost an important liberal ally in the EU, but at the same time, Brexit can provide an opportunity for the Netherlands to become a more prominent player, for instance if it wants to be a leader of the liberal contingent in the EU.<sup>664</sup>

<sup>658</sup> MFA (2013), p. 16.

<sup>659</sup> The Council applies qualified majority voting in most areas to mandate the Commission to start negotiations and adopt negotiating results, in conjunction with the EP, and national parliaments in case of ratification of mixed competence agreements – which in essence introduces a veto possibility. Note that the Council has to approve negotiating mandates and that the European Parliament (and in some cases national parliaments) only has (have) to approve agreements after their conclusion.

<sup>660</sup> See, for example, Baumgartner and Jones (1993); Baumgartner and Jones (2002); Baumgartner et al. (2009); and Kingdon (1995).

<sup>661</sup> König et al. (2006), p. 553-574.

<sup>662</sup> Including all TPC instructions and meeting reports since 2013.

<sup>663</sup> A Brexit task force and network of focal points was set up in the MFA, but institutionally it did not fall under DGBEB.

<sup>664</sup> Europa Nu (2020); Clingendael Spectator (2021).

In the case studies, we did not come across systematic strategic reflection on lessons learned, which could help to increase Dutch influence and impact. This could be partly attributable to the fact that there is a high turnover rate among policy officers, whereas networks and coalition-building (including at the political level) are key to success,<sup>665</sup> and they require time.<sup>666</sup> Formulating a clear strategy on how to engage with like-minded and non-like-minded countries could help increase Dutch influence.<sup>667</sup>

#### *A more proactive stance*

On some priority topics, the Netherlands did take a more proactive stance, for example by writing letters to the European Commission and writing position papers (sometimes together with other member states), or by responding more extensively to policies and initiatives in support of the proposal by the EC (trying to convince other member states, for example).

In specific instances where an extra effort was made, the Dutch influence was notable. On those occasions, the Netherlands did set the agenda and helped prepare EU positions on its topics of interest or managed to move the EC position closer to the Dutch position. For instance, the Netherlands helped kick-start the debate on moving towards an ICS system within the EU around 2015 (Chapter 7) and was a leading member of the group of like-minded countries that pushed for the liberalisation of services around the time of the TiSA negotiations (2016) (Chapter 6). Furthermore, Dutch efforts to improve sustainability provisions and include effective TSD chapters in comprehensive bilateral trade agreements are well known and were quite successful (Chapter 5). Also, the Netherlands contributed to putting gender and responsible business conduct on the international trade agenda.

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Moreover, the five case studies have shown that the Netherlands advocated enhancing transparency, and quite successfully so, not only in the implementation of disciplines, but also during the phases of internal EU policy development (the negotiating mandate), the actual negotiations (e.g. negotiations on EPAs, TiSA and trade defence instruments) and sometimes the implementation of policy (e.g. trade defence).

While the EU highlights the importance of transparency, the EC tends to keep draft policies, positions and conditional offers close to its chest, especially when trade-offs have to be made between divergent offensive and defensive interests. This creates issues with transparency and accountability to the public. And it makes it difficult for member states, civil society and parliaments to hold the EC to account. In several case studies, the Netherlands insisted on more transparency in the Commission's way of working: publishing the negotiating mandate and sharing draft proposals or treaty texts in a timely manner. This concurred with the EC's own desire to become more transparent, but Dutch influence probably helped them do so.

<sup>665</sup> Jenkins-Smith et al. (1991), p. 851-880; Junk (2019), pp. 660-764; Sabatier (1988), p. 129-168.

<sup>666</sup> Weible et al. (2012).

<sup>667</sup> See also: Häge (2013), pp. 481-504.

### Recommendations

7. The following matters could be taken into account better and more systematically, when drafting policies and strategies to enhance the MFA's strategy and influence, especially on priority topics in trade and investment.
  - Carry out a stakeholder and context analysis at the outset of each process, before negotiations start, and update it on a regular basis (for instance, taking into account the changed positions of major economies such as the US and China).
  - Set up a strategy and a tactical plan for priority negotiations, within the limits of your staff capacity. Align the timing of your interventions in the EU and WTO with key events or opportunities, such as ministerial meetings. Adjust the strategy to changing circumstances.
  - Build relations, embrace cooperation and set up coalitions, within and outside of the EU. Draft a strategy on how to engage with like-minded and less compatible countries.
    - Consider setting up a group of member states to get a blocking minority in the EU, if you are willing to accept the consequences and if no outcome would be preferable to a bad outcome.
    - Inside the EU, also work with less compatible countries to get information on their positions and build a relationship, explore deals in other dossiers and perhaps increase your leverage.
    - Decide which issues, and how and when, you will engage on issues politically, at the ministerial level, which is often the appropriate place to make deals.
  - Start lobbying efforts from the beginning for optimum effect and dedicate sufficient staff resources to priority topics and campaigns.
  - Be strategic in all of your efforts, making smart choices and selecting which events are important to attend, given that staff capacity on trade issues is limited.
    - Distinguish between formal and informal discussions, important and non-important meetings. Carefully select which policy meetings to attend from The Hague and at a higher level, instead of only the Permanent Representation to the EU and to the WTO, and engage Dutch embassies in EU capitals more.
8. Engage actively with the Commission on priority topics to have an influence on trade and investment policy.
  - Hold the EC to account: demand transparency and the sharing of draft proposals and information on progress on a continuous basis, in particular on priority topics. More detailed and more frequent updates to the public on Dutch and EU negotiating positions would increase transparency.
  - Engage systematically in discussions with various parts of the Commission on priority issues, providing feedback on substance.

### Box 9.5 Good practice

The case studies contained some examples of working together well at the ministerial level with France and Germany, e.g. on the investment court system in 2015 (Chapter 7), and on trade, social-economic effects and sustainable development in 2020 (but that was after the reporting period; Chapter 5).

The TDI case study identified the Netherlands' value in being critical and holding the EC to account, for instance by demanding the EC to ensure the proper use of and provide sufficient evidence for the application of TDIs. For instance, the Netherlands asked the EC to provide more information on the extent of the use of non-application of the 'lesser duty rule' (as part of the TDI reforms), and provide a cost-benefit assessment of the effects. Furthermore, the Netherlands was critical and demanded more transparency during the implementation phase of TDI policy. It requested more evidence to substantiate the claims for trade defence measures in response to Chinese dumping practices for e-bikes.

## 9.3 Capacity

### 9.3.1 Capacity and staff turnover

The issue of capacity directly affects the quality and effectiveness of Dutch policies and interventions. The number of dedicated staff for trade and investment policy in the MFA and the permanent representation to the EU is relatively small and turnover in The Hague is high. For the period under evaluation, BEB/IMH has had an increasingly diminishing number of dedicated staff for trade and investment files such as the ones related to the WTO, and the PR EU only has one full-time staff member working on trade, while other member states usually have significantly more.<sup>668</sup> Limited staff capacity may be one of the reasons that instructions on the topics of the case studies were not always up to date.<sup>669</sup>

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One of the advantages of the close proximity of The Hague to Brussels is that IMH policy officers can often directly participate in deliberations, for example in the TPC or in working groups. Of course, this helps them a great deal to build experience and to network and allows IMH officers to support their colleagues at the PR EU. At the same time, several interviewees mentioned that many of the important discussions take place outside of the formal meetings. To truly stay on top of things, policy officers should continue to invest in informal contact with other member states, the European Commission, and with their colleagues at the PR EU, when travelling to Brussels. It is worthwhile to devote considerable time to informal meetings – time which representatives from The Hague (according to interviews) may not have.

In addition, we note that the DGBEB's move to the MFA in late 2012 may have increased the turnover rate of trade and investment experts.<sup>670</sup> Policy offers at the MFA do not usually get

<sup>668</sup> DGBEB staff comments that WTO capacity decreased because little happened in the WTO over the past few years, while they say that the overall number of staff at the relevant unit has probably slightly increased, and that Dutch representatives often travel to Brussels, thus compensating for the difference in capacity with other member states.

<sup>669</sup> Another reason that BEB brought up (in response to a draft version of this report) is that it is their conscious choice not to update formal positions while informal negotiations are ongoing.

<sup>670</sup> MFA staff turnover is usually every three to five years (seven at most).

much training in trade and investment policy, nor are they able to build up much experience in these complicated dossiers over the different postings during their career. By contrast, the Commission's Directorate-General for Trade often has career staff with a much longer tenure, who have particular areas of expertise, and decades of experience in different trade negotiations and policy areas.

Some external interviewees mentioned that Dutch representatives were generally very capable and skilled and were able to provide valuable input for Commission proposals and provide counterweight to more defensive member states. This is an achievement, given the limited capacity and staff turnover. The Netherlands needs to invest in its institutional memory and maintain a critical mass of qualified, experienced staff, if it wants to maintain substantial influence in the EU, among like-minded and in the liberal block of member states, if it wants to help keep the EU on track and in line with Dutch priorities, and if it wants to balance different interests carefully and promote a sustainable global trading regime.

### 9.3.2 Policy reality versus actual reality

In trade matters, the political reality in The Hague is often quite different from the complex and changing reality in Brussels and Geneva, where compromises are needed to make any progress. It is therefore wise for the DGBEB to maintain close contacts with the Dutch permanent representations – as they say they do – and (Dutch) staff at the EU and the WTO and other international organisations, as well as delegates from third countries. Geneva offers good opportunities for direct contact with non-EU delegations, meaning that Dutch representatives working there can help gather information. Close cooperation and a solid exchange of information with the permanent representations is of the utmost importance, as is frequent informal contact with other delegates and experts, especially to help draft compromises. While BEB officers do their best, the capacity to do so is limited.

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#### *Recommendations*

If the Netherlands wants to achieve its ambition and take up the role of the leader of the liberal contingent in the EU, for example, then it needs to increase its capacity for policymaking, position-taking and representation. The MFA needs to ensure that sufficient staff and expertise are available to formulate and adapt policies and instructions, especially by increasing the number and continuity of staff at DGBEB/IMH for trade and investment policy and WTO files.

- Ensure institutional memory, consistency and continuation of Dutch position-taking. Ensure systematic information-sharing and a thorough handing over of files.
- Promote specialised knowledge and career paths, letting officers build a relevant network. Offer specific training on trade and investment dossiers.
- Work with Dutch staff at the EU and international organisations, especially the WTO, to gather information, get their expert insight and promote Dutch interests.
- Support strategic secondments of national experts at DG Trade to build up experience and networks, with a view to promoting Dutch interests.

- Make optimal use of staff and expertise at the PRs to the EU and WTO. Remain in close contact, (continue to) consult them frequently and provide them with clear and up-to-date guidelines.

## 9.4 Geopolitics, multilateralism and open plurilateral agreements

Given the importance of the geopolitical context, this final section offers some reflections by the evaluation team on the changing circumstances in the international trading system, agreements and relations, with an eye to the future of trade negotiations.

In a changing world, with major economies that do not always play by the rules, such as the US and China, and cross-cutting, existential issues such as digitalisation and climate change that must be taken into account, a renewed effort is needed to update the multilateral rulebook on trade policies and level the playing field for trade measures. The most important organisation in that respect remains the World Trade Organization, keeping in mind that preferential trade agreements (outside of the WTO) cannot fully address the negative effects of international policies – and that they could even reinforce the formation of regional blocks.

Now that the US (Biden) administration has started to embrace multilateralism again and a new Director-General of the WTO has been appointed, the first priority for the European Commission is to revitalise and modernise the WTO. This is especially important since there is currently no functioning Appellate Body, making it difficult to resolve bilateral trade disputes. Another priority of the EC is to stimulate multilateral rule-making and governance on services, digital trade and investment facilitation.<sup>671</sup>

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In this context, the EU Trade Policy Review of 2021,<sup>672</sup> with an annex on reforming the WTO,<sup>673</sup> provides a clear roadmap for the years ahead. The Commission feels that negotiations in the WTO should first modernise the rules on e-commerce, investment facilitation, services domestic regulation, as well as rules on the role of the state in the economy (i.e. subsidies). After that, the focus could shift to advancing liberalisation on goods and services.<sup>674</sup> The Commission believes that ‘progress can be best achieved through different processes, in particular open, plurilateral agreements’.<sup>675</sup> Note that the EC continues to emphasise plurilateral agreements within the context of the modernised WTO (both in rules and measures of enforcement), signifying that multilateralism will remain key.<sup>676</sup> As observed in the BNC fiche, this EC roadmap is in line with Dutch policy priorities and is fully supported by the Netherlands.<sup>677</sup>

<sup>671</sup> EC (2021b).

<sup>672</sup> Ibid.

<sup>673</sup> EC (2021a)

<sup>674</sup> This approach thus breaks with the idea of a ‘single undertaking’, which according to the EC ‘has failed to deliver’.

<sup>675</sup> EC (2021a), p. 8

<sup>676</sup> EC (2021a); EUI Global Governance Programme (2021).

<sup>677</sup> MFA (2021).

However, progress in WTO negotiations – with consensus based decision-making – has proven to be extremely difficult. Coalitions of the willing have therefore started to debate issues in smaller groups and in plurilateral negotiations on a sector- or issue-specific basis. As EC DG Trade Acting Director Ignacio Garcia Bercero mentioned during a webinar on the Trade Policy Review, ‘flexible multilateralism’, led by like-minded front runners, offers many advantages, and progress in small groups of countries is bound to be much quicker than in the WTO membership as a whole; but it also raises concerns about non-participants being negatively affected.<sup>678</sup> The concept that ‘nothing is agreed, until everything is agreed’, which is the leading principle in the WTO Doha Development Agenda, does offer some protection for developing countries’ interests.<sup>679</sup> However, it comes at the price of a very slow pace: the convoy moves at the speed of the slowest ship, or does not move at all.

The case study on TiSA (Chapter 6) has shown that negotiations on horizontal disciplines affecting all WTO members should best take place in open-ended working groups at the WTO – and not in closed meetings among a selective group of countries – to allow for widespread support and truly global agreements. In addition, when plurilateral agreements are negotiated, participants need not be overly concerned about ‘free riders’ – countries that may profit even if they do not offer market openings themselves, as long as a substantial part of the global market in a sector is covered. If free-riding countries cover only a small share of the market concerned and if they are poorer developing countries, they should arguably be allowed to benefit from the application of MFN and national treatment. The Netherlands, with trade and development policy combined under one minister, could play an important part in reminding the European Commission, other member states and third countries of the interests of developing countries.

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#### *New coalitions and new ways of working*

While multilateralism remains an important policy priority of the Netherlands and the EC, and there is an increased focus on plurilateral agreements, economies today seem to be operating more and more in competing regional blocks, with the US, EU and China operating as the dominant centres of these blocks (see Chapter 3). Increasingly, the markets of these regional blocks are being integrated, while regions have started to regard other regions with suspicion.

A shift towards plurilateral discussions and negotiations on the governance of specific sectors or issues could offer a more attractive alternative to comprehensive FTAs. The practice of so-called Joint Statement Initiatives (JSIs)<sup>680</sup> could ultimately provide a basis for formal open plurilateral agreements (OPAs) in the WTO. Open plurilateral agreements could provide an institutional framework for collaboration among national authorities, for transparency, mutual review and learning – while not subject to dispute settlement. In parallel,

<sup>678</sup> EUI Global Governance Programme (2021).

<sup>679</sup> One example concerns proposals by developing countries to negotiate disciplines on the protection of traditional knowledge and biodiversity in intellectual property rules: they were never taken up.

<sup>680</sup> Different groups of WTO members launched joint initiatives on three issues – electronic commerce, investment facilitation and MSMEs as well as services domestic regulation – kick-started by the 2017 Ministerial Conference, adding to an earlier JSI on gender (WTO (2017)).

WTO members could agree on enforceable multilateral principles to ensure that OPAs are compatible with an open global trade regime. Such an OPA mechanism could also be a constructive way forward to defuse the controversial use of trade policy instruments for climate change initiatives (such as carbon taxing).<sup>681</sup>

However, if geopolitical trust among economic regions does not increase, global agreement, increased multilateralism and even OPAs are unlikely to emerge.<sup>682</sup> The EU and the Netherlands will have to identify how they can best advance their policy priorities in trade and investment governance, including the pursuit of non-trade concerns such as sustainability, responsible business conduct and gender, against this background of various and overlapping free trade zones, overlapping and potentially conflicting international obligations, shifting alliances and geopolitical tensions.

In conclusion, the new leadership at the WTO, the recommitment by the Biden administration and the EC's recent Trade Review are reason for cautious optimism. They provide opportunities for the Netherlands to continue to play its role in strengthening global economic governance.

<sup>681</sup> Alliances of countries that jointly pursue their nationally determined contributions in the Paris Agreement could make explicit in an OPA how trade sanctions will be applied among the members of the OPA to reach the agreed decarbonisation targets. See for more information: Hoekman and Sabel (2021).

<sup>682</sup> Remarks by Martin Sundbu, of the *Financial Times*, at the EU Trade policy day (EC (2021c)).



**Annex 1**

**Applied methodology**

### *Desk research*

Desk research was conducted by reviewing different kinds of policy documents to contribute to the findings for all sub-questions. A broad range of policy documents was studied, from letters to parliament, answers to questions by parliament, policy notes, speaking points and minutes of different committees (at the national, EU and WTO levels), and internal communications. To analyse these documents in a structured way, IOB used the coding software MaxQDA. The output of these analyses were used for the policy reconstruction and the overview of the actors involved (Chapter 2) as well as the five case studies (Chapters 4–9). Except for the speaking points and minutes of committees at the EU and WTO levels and the internal communications, these documents were publicly available. Instructions and speaking points (to the extent available) for the Dutch delegation in EU meetings and the minutes from these meetings were compared and analysed for the overview of and motivation behind specific policy issues and for the case studies. These documents were mainly collected from the MFA archives. Additionally, a review of trade and investment literature<sup>683</sup> was fed into the analysis of the policy issues, as well as into the analysis of policy coherence and external developments (Chapters 2 and 3).

The consultancy firm Ecorys was commissioned to conduct a background study<sup>684</sup> informing IOB about external developments influencing Dutch policymaking on trade and investment.

### *Stakeholder mapping*

A stakeholder analysis was used to identify all relevant actors involved in the policy process in the Netherlands and in the EU, but also to gain insight into their policy goals and mutual relationships. The stakeholder mapping consisted of two categories: stakeholders within the governmental sphere and stakeholders in the private sector and civil society. Stakeholders within the governmental sphere include policymakers at the relevant departments within MFA and other ministries, members of the different councils involved in policymaking at the national level (i.e. the Interdepartmental Council for Trade Policy and the EU Coordination Committee), at the EU level (such as the European Commission, TPC (SI), FAC Trade, other member states, the European Parliament) and at the WTO level (e.g. the WTO Secretariat). Stakeholders in the private sector and civil society are actors who, by means of lobbying, try to influence Dutch policymaking. Examples are the Dutch employers' federation VNO-NCW, the Brussels-based business association BusinessEUROPE, NGOs such as Greenpeace, the Dutch employees' federation FNV, and think tanks such as the Geneva-based International Centre for Trade and Sustainable Development (ICTSD).<sup>685</sup>

### *An exploratory overview of policy issues*

As preparation for the Terms of Reference, IOB held exploratory talks with policymakers who work at or used to work at the Department of International Trade Policy and Economic Governance (IMH) of the DG for Foreign Economic Relations (BEB). The purpose was to create an overview of trade and investment policy issues that Dutch policymakers focused on in the

<sup>683</sup> Regarding the specific policy issues the Dutch government focuses on.

<sup>684</sup> Ecorys (2021).

<sup>685</sup> In November 2018, ICTSD shut its doors. However, its former employees could still provide us with valuable insights on the Dutch and European role a WTO negotiations.

research period. On the basis of these talks, several issues were identified, including sustainable development,<sup>686</sup> gender, investor protection and duties,<sup>687</sup> trade in services, public support for trade and investment agreements, the implementation of trade agreements, transparency and accountability, Trade-Related Aspects of Intellectual Property Rights (TRIPS), economic partnership agreements (EPAs), e-commerce, trade facilitation and the coherence between trade and investment policy and the interests of developing countries.

### *Case studies*

Out of all the trade and investment policy issues identified by the policymakers in question, five issues were selected for in-depth analysis. The analysis was done in the form of case studies. For the selection of these cases, the following aspects were taken into account: (1) extent of active work by policymakers on these issues in the period 2013up and until 2019; (2) coverage of both trade and investment issues; (3) coverage of issues at both the EU and WTO levels; and (4) coverage of issues where the final outcome appears to be in line with the Dutch position and issues where this does not appear to be the case (whether at the agenda-setting, policy formulation, policy outcome or implementation level). Where relevant, we looked beyond 2019 to take other important developments into account.

Of course, as discussed under the limitations in Section 1.5, possible bias in the selection of cases could occur, given that the selection was based on the identification of issues by policymakers. At the same time, if this evaluation did not observe effects of Dutch efforts on issues that policymakers have been actively working on, it is highly unlikely that such effects would have been observed on issues they have not been actively working on.

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For each of the case studies, a detailed overview of the policy issue and of the Dutch position is provided in the respective chapters. In addition, an analysis is provided of how the Dutch government tried to influence the agenda-setting, policy proposal stage, policymaking stage, or implementation stage at the national, the EU or WTO level. Which strategies were used? Second, we analysed the extent to which the Dutch government succeeded in influencing these stages. Which strategies proved to be successful? What was achieved in the negotiations that can be attributed to Dutch interventions? Why were some policy outcomes not in line with the initial Dutch position?

Since some of these policy issues were very broad, we have further narrowed down the case studies. The first case study, on sustainable development, focused on the introduction of sustainable development chapters in FTAs between the EU and third countries, and to a small extent on some environmental issues that are usually not part of FTAs but relegated to the WTO – such as fisheries subsidies – in view of the global nature of the problems. The second

<sup>686</sup> This includes, among others, the sustainable development chapters in FTAs (dealt with at the EU level) and the enforcement of specific provisions, subsidies for fisheries (dealt with at the WTO level), or production method requirements concerning animal welfare.

<sup>687</sup> This concerns the change from investor-to-state dispute settlement to the investment court system in new FTAs, the new template for Bilateral Investment Treaties (BITs), investment facilitation, and the potential for a multilateral investment court (MIC).

case study, on investment protection, focused on the change from investor-to-state dispute settlement (ISDS) to the investment court system (ICS) in new FTAs, the new template for Bilateral Investment Treaties (BITs) and investor duties. The third case study, on the Trade in Services Agreement (TiSA), focused on the plurilateral talks by a group of WTO members on this topic. The fourth case study, on trade defence instruments, includes two specific instances where such instruments have been used by the EU (and promoted by the Dutch government), namely e-bicycles and biodiesel. The fifth case study focused on the EPAs with Africa. It explores the reasons for the mixed success of the EPA negotiations with various regional groups between 2013 and 2019 and, more specifically, it sheds light on the role of honest broker that the Dutch Minister for Foreign Trade and Development played.

#### *Research questions for the EPA case study*

The EPA case study was added to this evaluation of Dutch trade and investment policy at a later stage. An evaluation of the effects of the EPAs had been on IOB's evaluation agenda since 2017. Due to personnel changes, among other things, in 2020 this evaluation was yet to be conducted. However, given that the EPAs had not been high on the trade policy agenda during the last years, IOB decided not to conduct a separate evaluation of this policy issue. Instead, the issue was included as a case study in the current evaluation. In consultation with the responsible policymaking department of the Ministry of Foreign Affairs (IMH), IOB has identified four additional research questions (in addition to the research questions that were already presented in Section 1.4):

1. What were the obstacles in the EPA negotiations with Africa, especially during the period 2013–2019 and what explains the differences in progress between regions and countries?
2. How did the Netherlands position itself in the EPA negotiations with all (seven) African regions and how successful was it in influencing the EU position?
3. Why did the Netherlands decide to play a role as honest broker in three African EPAs (SADC, West Africa and EAC), which actions were undertaken in this capacity and to what extent were these actions successful in influencing the EPA negotiations?
4. Which broader lessons on EU–Africa trade relations can the Netherlands and the EU learn from trying to conclude and implement EPAs during the period 2013–2019 that are relevant for the EU–Africa development strategy, for a follow-up Agreement of Cotonou, for further development of the EPAs and also for a possible bilateral FTA between the EU and Africa at the continental level?

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#### *Interviews*

In addition to desk research, this study also relied heavily on semi-structured interviews. IOB conducted interviews with policymakers at the MFA, EC officials, and the Dutch permanent representations in Brussels (EU) and Geneva (WTO), as well as with non-state actors, who in turn tried to influence policymakers. Moreover, interviews with trade and investment experts were held to discuss the external factors and global trends that influenced policymakers' efforts to promote the Dutch position on trade and investment policy issues.



## Annex 2

# Dutch position on other trade issues

While international trade and investment policy is only one of the many areas the MFA covers, this policy area is very extensive. In addition, other policy fields and issues that used to be perceived as irrelevant for trade or national matters (such as labour rights, environmental issues and animal welfare) have now been integrated into trade and investment policy – albeit not always operationalised into concrete positions, as our study has shown.

As with every policy area, not all aspects are equally important. At the start of this study, IOB asked Dutch policymakers to identify the topics within trade and investment policy that were (most) important for the Netherlands between 2013 and 2019, to obtain the overarching Dutch policy aims as discussed in Chapter 2. This resulted in a list of ten topics. Five of these topics were identified as the most important and were reviewed in detail in the case studies of Chapters 4 to 8. The five remaining topics are discussed in this annex. They are (1) gender; (2) trade facilitation; (3) implementation and use of trade agreements; (4) transparency, accountability and public support for trade and investment agreements; and (5) TRIPS and medicines.<sup>688</sup> These topics are presented with a brief discussion on the Dutch positions, interventions and signs of policy success.<sup>689</sup>

## 1 – Gender

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Recognising that trade has an impact on gender equality, policymakers have increasingly focused on the role of women in trade and the impact of trade liberalisation on women.<sup>690</sup> Consequently, various attempts have been made to mainstream gender equality into trade policy or include it in trade agreements.<sup>691</sup> Previously, gender equality was included mostly as a fundamental principle, but over time, more emphasis was given to the integration of gender equality as an objective of trade policy.<sup>692</sup>

### *The Dutch position*

Women's rights have had a prominent place on the Dutch international agenda for decades.<sup>693</sup> In 'A world to gain', the Dutch government stated that it 'considers gender equality to be a priority in foreign policy'.<sup>694</sup> It was recognised that women in developing countries have profited little from macroeconomic growth, and remained vulnerable because of their often informal employment and the dismal labour conditions that come with it.<sup>695</sup>

<sup>688</sup> TRIPS refers to (the agreement on) Trade-Related Aspects of Intellectual Property Rights.

<sup>689</sup> In the five case studies of this report, IOB has studied the extent of policy success by desk research and multiple interviews with actors involved. However, in this chapter, the five remaining topics are discussed mainly based on limited desk research. Therefore, IOB talks about signs of policy success here.

<sup>690</sup> UNCTAD, 2009 as cited in Ecorys (2021); OECD (undated). 'Trade and Gender'.

<sup>691</sup> Ecorys (2021).

<sup>692</sup> Ibid.

<sup>693</sup> IOB (2015).

<sup>694</sup> MFA (2013), p. 64.

<sup>695</sup> IOB (2015), p. 48.

In 2018, in ‘Investing in global prospects’, gender equality was presented as a cross-cutting goal of the BHOS agenda.<sup>696</sup>

The Netherlands has aimed to strengthen the role of Dutch women in international trade as well, acknowledging that ‘female entrepreneurs represent the untapped earning potential for the Netherlands, but doing business abroad is not yet a matter of course’.<sup>697</sup>

In line with the general position of the Netherlands in trade and investment policy, it has taken a more liberal position on gender equality than many other EU and WTO member states, the EC (also at the WTO level) and the WTO itself.<sup>698</sup> Important like-minded countries include Sweden and Canada, which often take the lead on the topic in international meetings and conferences. By contrast, various eastern and southern EU member states, such as Poland, have been more reluctant to include gender equality in trade policy.<sup>699</sup>

Whereas the EC addresses gender equality in its new Trade Policy Review<sup>700</sup> (February 2021), for example, the Netherlands believes there needs to be a more ambitious attempt to take action to improve gender awareness in trade policy. In the BNC fiche of March 2021, the Netherlands states that the Trade Policy Review could have shown more ambition and that the Dutch government will continue to ensure that gender equality and the economic empowerment of women are an integral part of EU trade policy.<sup>701</sup>

#### *Interventions and signs of policy success*

Various trade instruments and tools have been used to strengthen the role of women in Dutch trade, including trade missions, which now target a minimum of 25% of female participants and address female needs better (e.g. shorter missions to enhance female participation).<sup>702</sup>

Furthermore, at the EU level, the topic of gender was addressed as well, for example in the context of TSD chapters (see Section 5.3.4). The Netherlands expressed its support for EC proposals and actions of other (like-minded) member states. TPC reports identify, for instance, Dutch support for the EC’s ambition to include a strong position on gender and trade in discussions on the modernised EU–Chile Association Agreement.<sup>703</sup>

<sup>696</sup> MFA (2018a), p. 8.

<sup>697</sup> MFA (2019), pp. 1-2.

<sup>698</sup> As revealed in interviews and policy documents (e.g. TPC reports). For instance, one interviewee stated that in EU meetings, the Netherlands used stronger language than the EU on the gender issue in trade (interview held on 4 September 2020).

<sup>699</sup> Evident in TPC reports, for example, as well as discussions on the inclusion of gender in the modernisation of the association agreement with Chile, where Sweden and Poland took strongly opposing stances on the inclusion of gender in the mandate. See, for example: IRHP 2017-18c TPC Verslag Plv 09-06-2017.

<sup>700</sup> EC (2021c).

<sup>701</sup> MFA (2021).

<sup>702</sup> MFA (2018a); EC (2021b). Currently, in the draft EU agreement with Chile, there is consensus on most of the paragraphs on gender.

<sup>703</sup> For example: IRHP 2018-17b Instructie TPC Plv 18-05-2018

Dutch support for the inclusion of gender in trade also occurred in cooperation with like-minded member states, as illustrated in TPC meetings by the support for the Canadian proposal on gender equality within domestic regulation on services, together with Sweden.<sup>704</sup> The Netherlands and Sweden addressed the need for full EU support to this proposal at the WTO level.

Joint efforts are also illustrated by a non-paper on gender, although it was finalised after the evaluation period. In 2020, the Netherlands, together with nine<sup>705</sup> other member states, sent this joint non-paper to the Commissioner for Trade, to address gender equality.<sup>706</sup>

The Netherlands promoted its position on gender equality also at the WTO level, primarily supporting the interventions of other like-minded countries. For instance, in 2017, prior to the 11th Ministerial Conference of the WTO in Buenos Aires, several WTO members including Canada, Sweden and Finland expressed their intention to address the role of women in trade policy through a joint declaration. Dutch policy documents confirm that the Netherlands supported the initiative, whether it would be a multilateral or plurilateral statement, as it underscored the economic and moral value of women in trade.<sup>707</sup> The initiative eventually led to 119 WTO members backing the joint declaration<sup>708</sup> on trade and women's economic empowerment and agreeing to work together to enhance the position of women in trade. Dutch TPC reports noted that the joint declaration has served as a first step towards the wider recognition of gender in the domain of trade policy.<sup>709</sup>

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As for policy success, our review identified the Dutch influence in maintaining attention for the topic in high-level meetings (as well as in other meetings, including informal bilateral meetings). However, the evidence also shows that during the evaluation period, despite the importance of gender in Dutch policy, the Netherlands more often supported interventions by more proactive member states than taking the lead itself.

In terms of policy success in the context of the TSD chapters,<sup>710</sup> none of the currently concluded TSD chapters contain specific provisions on gender equality.<sup>711</sup> One could argue that while the Netherlands succeeded in influencing the agenda and leveraging its efforts by supporting efforts of other like-minded members, for the period under evaluation, policy success had not (yet) spilled over to the next stages of the policy cycle, namely policy formulation, policy decision and policy implementation.<sup>712</sup>

<sup>704</sup> For example: IRHP 2017-18b Handleiding Plv 9 June 2017. The joint call for support was reported in 15 different TPC reports. The Canadian proposal related to the negotiation agenda of the WTO MC11.

<sup>705</sup> Luxembourg, Denmark, Sweden, Italy, Spain, France, Ireland, Finland and Belgium.

<sup>706</sup> Asselborn et al. (2020).

<sup>707</sup> Instructie WTO conferentie Buenos Aires December 2017.

<sup>708</sup> See: [https://www.wto.org/english/thewto\\_e/minist\\_e/mc11\\_e/genderdeclarationmc11\\_e.pdf](https://www.wto.org/english/thewto_e/minist_e/mc11_e/genderdeclarationmc11_e.pdf) for the joint declaration.

<sup>709</sup> For instance, stated in IRHP 2018-09b Instructie TPC Plv 16-03-2018.

<sup>710</sup> As discussed in more detail in Chapter 5.

<sup>711</sup> Although in negotiations on the draft EU-Chile FTA there was agreement on most of the paragraphs on gender, this could change in the future.

<sup>712</sup> See Chapter 1 and Annex 1 for an explanation of the analytical framework used in this study.

## 2 – Trade facilitation

Trade facilitation concerns ‘the simplification, modernisation, and harmonisation of export and import processes’ by means of reducing red tape and bureaucratic delays.<sup>713</sup> Making trade more predictable, easier and cheaper is important for reaping the benefits of trade agreements.<sup>714</sup> An important development in trade policy at the international level has been the WTO Trade Facilitation Agreement<sup>715</sup> (TFA), which is a binding initiative with enhanced global coverage. TFA negotiations started in 2004 and were concluded in 2013. On 22 February 2017, a sufficient number of WTO members (two-thirds) had signed and ratified the agreement for it to enter into force.<sup>716</sup> Implementation of the TFA was anticipated to lower the transaction costs of trade substantially, particularly benefitting developing countries and SMEs,<sup>717</sup> which are subject to inefficiencies and other trade barriers.<sup>718</sup>

The TFA and its negotiation processes represent a terrain where the Netherlands could bring together aid policy with trade and investment policy, and therefore, where the MFA departments could work together, and where the Netherlands could present itself as one coherent actor within the EU, as indicated by an interviewee.

### *Dutch position*

In line with its general liberal position on trade and investment, the Netherlands supported trade facilitation policy, given its contribution to Dutch policy goals, such as facilitating a more level playing field, success for Dutch businesses abroad and the enhanced competitiveness of developing countries, stimulating inclusive growth all over the world. For example, in ‘A world to gain’, Minister Ploumen identified the Dutch commitment to concluding the Doha Round’s partial agreement on trade facilitation,<sup>719</sup> with expected benefits for Dutch businesses. Furthermore, recognising the limited implementation capacity and limited competitiveness of developing countries, the Netherlands advocated a flexible approach towards LDCs,<sup>720</sup> with comprehensive provisions on special and differential treatment and technical assistance to support LDCs in the implementation process. ‘Investing in global prospects’ also addressed Dutch priorities of trade facilitation, identifying as Dutch

<sup>713</sup> See: [https://www.wto.org/english/tratop\\_e/tradfa\\_e/tradfa\\_e.htm](https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm)

<sup>714</sup> IOB (2017).

<sup>715</sup> The TFA contains provisions to reduce transaction costs of trade and sets measures for cooperation between customs and other authorities. Furthermore, agreements have been made on the provision of technical assistance and capacity building to developing countries. Although the negotiation process for the TFA took place mainly in the period prior to this evaluation, an analysis of the related interventions is included here as it provides insight on the success of interventions after 2013, mostly related to the implementation process.

See <https://www.tfafacility.org/trade-facilitation-agreement-facility> for more information on the TFA.

<sup>716</sup> To date, 153 WTO members have ratified the TFA.

<sup>717</sup> KST 25074-186, 2013. *Ministeriële Conferentie van de Wereldhandelsorganisatie (WTO)*. 18 December 2013.

<sup>718</sup> Benefits of the TFA were estimated at EUR 50-400 billion per year by the OECD (OECD, 2003).

<sup>719</sup> MFA (2013).

<sup>720</sup> Ibid.

aims '[investing] in infrastructure, building institutional capacity and trade facilitation in developing countries' to stimulate a favourable business climate.<sup>721</sup>

More recently, after the evaluation period, trade facilitation was identified as a Dutch priority. The BNC fiche (March 2021), assessing the new EC's Trade Policy Review (February 2021), referred to Dutch trade facilitation objectives, in line with the EC's objectives for more effective implementation and enforcement of trade agreements, to reduce trade barriers. It welcomed the input of the EC in this respect.<sup>722</sup>

### *Interventions and signs of policy success*

The Netherlands has been an important bilateral donor of funding and technical assistance to various multi-donor trade facilitation programmes, including TradeMark East Africa, the World Customs Organization, World Bank programmes such as the Trade Facilitation Agreement Facility (TFAF) and the Multi-Donor Trust Fund for Trade and Development II, as well as the Advisory Centre on WTO Law. The contribution of these organisations to trade facilitation is illustrated, for example, by Dutch funding to ACWL, which provided legal support to LDCs during the TFA negotiations.

Furthermore, to support the interests of developing countries in the TFA, the Netherlands argued, in TPC meetings, that technical assistance and capacity building should be an integral part of the mandate of the TFA negotiations.<sup>723</sup> It also recommended a more active role of the EU in technical assistance in trade facilitation for developing countries.<sup>724</sup> However, it also urged the EC to provide assistance (only) on the basis of needs assessments (demand-driven), and to ensure that it was only related to 'soft infrastructure'.<sup>725, 726</sup>

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In terms of success, while it is difficult to identify whether it can be attributed to Dutch interventions, several results indicate that these interventions are likely to have contributed to results and thus to policy success. First, the conclusion and ratification of the TFA contributed to the credibility of the Doha Round and the WTO system as a whole. While acknowledging the limited role of the Netherlands as one member among the many WTO members that signed the TFA, Dutch efforts and actions seem to have contributed to the EU's position and conclusion of the TFA.

Second, the value added of the Netherlands mostly lay in serving developing countries' interests. Policy documents frequently identified an active role for the Netherlands in promoting developing countries' (and specifically LDCs') interests, and the need for technical assistance as an integral part of an agreement. At the level of results, with the inclusion of special and differential treatment for developing countries and LDCs in the TFA, inequalities

<sup>721</sup> MFA (2018b), p. 57.

<sup>722</sup> MFA (2021).

<sup>723</sup> For example, IRHP 2013-07b Handleiding Plv 15-02-2013.

<sup>724</sup> IRHP 2013-06b Handleiding Plv 1-02-2013.

<sup>725</sup> 'Soft infrastructure' capacity encompasses service infrastructure, such as IT, finance and customs systems.

By contrast, 'hard infrastructure' capacity encompasses physical networks, such as roads and ports.

<sup>726</sup> For example IRHP 2013-06b Handleiding Plv 1-02-2013.

in capacity are taken into account: more flexible periods of implementation and provisions for technical assistance for capacity building to implement it. This serves the Dutch objective of a more equal trade system – and thus points to Dutch policy success.

### 3 – Implementation and use of trade agreements

The current bilateral and multilateral trade agreements in place cover the majority of countries with whom Dutch businesses trade. Together, these trade agreements have reduced over 90% of tariffs as well as a large share of non-tariff barriers, thus significantly reducing trade costs and increasing trade volumes.<sup>727</sup> Despite these positive developments, studies have also shown that, with some variance by trading partner, product and member state, Dutch and other EU exporters have made sub-optimal use of these tariff reductions.<sup>728</sup> A study by the EC conducted in 2018 found that in 2016, EUR 3.5 billion could have been saved by EU exporters if the EU's FTAs had been fully used that year.<sup>729</sup> There are different reasons for the sub-optimal use<sup>730</sup> of tariff provisions. They include (1) the lack of familiarity with the FTAs and their preferential provisions; (2) the existence of marginal differences between MFN tariffs and the preferential tariff of the FTAs; (3) the complexity of the provisions and rules of the FTAs (e.g. rules of origin); and (4) limited implementation of the agreement and its provision in the FTA partner countries.<sup>731</sup>

In the EC Trade Policy Review 'Trade for All' of 2015, the EC emphasised the importance of implementing and enforcing FTAs effectively, and committed itself to implementing and enforcing FTAs more effectively.<sup>732</sup> At the end of 2016, the EC announced that it would take action to improve the communication on these agreements to European businesses and to link technical assistance better to developing countries party to the FTAs.<sup>733, 734</sup>

#### *Dutch position*

The Netherlands was aligned with the EC's ambitions, and welcomed collaboration with the EC on the matter of implementation. In addition, the Netherlands additionally emphasised the inclusion of the Dutch private sector in addressing trade obstacles under FTAs. It was committed to gaining a better understanding of why the FTAs were under-used and what

<sup>727</sup> Nilsson, L., Preillon, N. (2018), p. 14; Ecorys (2018).

<sup>728</sup> Ibid.

<sup>729</sup> Nilsson, L., Preillon, N. (2018), p. 14.

<sup>730</sup> Utilisation is measured by so-called utilisation rates: the percentage of export value that has occurred under the trade agreement's lower import provisions (Tweede Kamer, vergaderjaar 2017-2018, 31 985, nr. 54).

<sup>731</sup> Tweede Kamer, vergaderjaar 2017-2018, 31 985, nr. 54; Ecorys (2018); IRHP 2017-03c TPC Verslag Leden 27-01-2017.

<sup>732</sup> EC (2015).

<sup>733</sup> For example, by providing TA for building the partner country's implementation capacity. The EC started to put more emphasis on capacity building for implementation of FTAs in its Aid for Trade programme (Tweede Kamer, vergaderjaar 2017-2018, 31 985, nr. 54).

<sup>734</sup> Tweede Kamer, vergaderjaar 2017-2018, 31 985, nr. 54.

bottlenecks were faced by Dutch companies.<sup>735</sup> This was meant to benefit the Netherlands in EU meetings and to ensure that future FTAs would better meet Dutch needs, especially of SMEs.<sup>736</sup> Additionally, the Netherlands aimed to enhance communication to Dutch businesses on the benefits of EU FTAs and the use of the benefits at the business level. It also aimed to use relevant network partners, such as embassies, the Dutch Chamber of Commerce, VNO–NCW and Dutch customs.<sup>737</sup> In addition, the Netherlands would continue its technical assistance for capacity building for the implementation of FTAs,<sup>738</sup> with the objective of a more open trade system and a more level playing field.

In the EC's new Trade Policy Review (February 2021), strengthening the EU's focus on implementation and enforcement of trade agreements is one of the six core areas for achieving EU objectives.<sup>739</sup> The Netherlands agrees with the importance attached to implementation and enforcement, as was underscored in the BNC fiche (March 2021), which in this context refers specifically to ambitious sustainability commitments, for instance in TSD chapters, and guidance for the new Chief Trade Enforcement Officer.

#### *Interventions and signs of policy success*

Various interventions tried to enhance the awareness and knowledge of the Dutch business sector. After research concluded that seminars on specific trade agreements would enhance the quality and use of information on specific trade agreements,<sup>740</sup> such seminars were organised in 2019. For instance, a seminar on the EU–Japan trade agreement<sup>741</sup> took place, together with business association VNO–NCW and the EC, to inform the business community, involved parties and civil society on the implementation of FTAs.<sup>742</sup> The Netherlands also enhanced online communications on FTAs on the website of the Netherlands Enterprise Agency (RVO), and drafted a brochure on rules of origin.<sup>743</sup> The Dutch business community responded positively to these interventions.<sup>744</sup>

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Second, efforts were also made to obtain data for insight into the existing bottlenecks among Dutch businesses. RVO opened a contact point to administer business complaints on market

<sup>735</sup> See for instance: Tweede Kamer, vergaderjaar 2017–2018, 31 985, nr. 54.

<sup>736</sup> Ibid.

<sup>737</sup> IRHP 2017–14b Handleiding Ldn 28 April 2017

<sup>738</sup> For example, the Dutch aid for trade policy covered aid for trade policy and regulations for many years, including support to build capacity for trade policy and regulations and trade facilitation (including improving 'soft' infrastructure and enhanced implementation of FTAs), such as support to ACWL, ICTSD, TMEA and the WCO.

<sup>739</sup> EC (2021a). P. 11.

<sup>740</sup> Tweede Kamer, vergaderjaar 2019–2020, 34 952, nr. 86.

<sup>741</sup> Tweede Kamer, vergaderjaar 2019–2020, 34 952, nr. 86.

<sup>742</sup> Tweede Kamer, vergaderjaar 2017–2018, 31 985, nr. 54.

<sup>743</sup> IRHP 2017–14b Handleiding Ldn 28 April 2017.

<sup>744</sup> Tweede Kamer, vergaderjaar 2017–2018, 31 985, nr. 54.

access issues and remaining trade obstacles. It is unclear if and how this registration system complemented already existing databases, such as RVO's Achilles registration system.<sup>745</sup>

The interventions seem, in general, to be relevant to the ambitions of the Netherlands, in terms of including the private sector, giving them access to knowledge and insight on the issues at hand, and helping to serve their needs at the EU level. The interventions were welcomed by the Dutch private sector.

At the higher results level (serving policy goals), however, it is unknown whether Dutch interventions have had an effect, for instance whether enhanced awareness and knowledge among Dutch businesses was achieved, or enhanced utilisation of FTA provisions or more effective implementation in partner countries. Because these interventions took place in recent years, the effects, especially at the higher (final outcome or impact) level, are likely to require more time. Monitoring and evaluating results is essential to determine whether results at the higher level have been (or will be) achieved. Quantitative data, such as RVO's Achilles registration system can provide valuable input.

## 4 – Transparency, accountability and public support for trade and investment agreements

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Trade and investment agreements are negotiated behind closed doors. During negotiations, only the European Parliament (EP) and EU member states receive updates on progress. Informing other stakeholders and the general public during ongoing negotiations occurs less often and less comprehensively, via a few short news items, e.g. on the EC website. Other EU processes occur behind closed doors, too, such as the design of new regulations or investigations on trade defence measures. Because trade and investment agreements and trade and investment policies<sup>746</sup> affect member states, including their producers and consumers, there is a strong demand for transparency in and access to information on negotiations, decisions and processes to enhance the legitimacy and accountability.<sup>747, 748</sup> Not only will this bring citizens closer to the EU, it also enhances the legitimacy, accountability and effectiveness of EU institutions.<sup>749</sup> Furthermore, transparency can raise awareness of the existence of new regulations or agreements, thus contributing to the effectiveness of implementation.<sup>750</sup>

<sup>745</sup> The Achilles registration system was launched in 2019. The system documents economic diplomacy activities, including answering trade questions on doing business abroad and dealing with trade barriers. It is used by the Dutch global economic network, which includes embassies, other commercial offices abroad and various departments of RVO.

<sup>746</sup> This also involved EU actions and decisions in the implementation of EU policy, e.g. in the context of trade defence, ISDS, e-commerce, etc.

<sup>747</sup> Marx, A and Van der Loo, G (2021).

<sup>748</sup> For example, in TiSA negotiations, lack of transparency caused widespread discontent (see Chapter 6).

<sup>749</sup> As stated, for example, in: IRHP 2018-11b Instructie TPC attaches 4 April; Belgium et al. (2020).

<sup>750</sup> See also section 3 of this Annex.

Requests for more transparency in ongoing EU negotiations and processes have increased over time. For instance, different parties (the EP, member states, non-state actors and the public) started to demand more insight into interim results in the ongoing negotiations on TTIP<sup>751</sup> (2013–2016<sup>752</sup>), CETA<sup>753</sup> (2009–2017) and TiSA (2013–2016). Particularly the TTIP negotiations between the EU and the US led to an unprecedented level of dispute across different sections of society (from CSOs to the EP), in terms of the negative impact<sup>754</sup> of the agreement. Concerns were also raised in the Netherlands. The demand for more openness on these negotiations can be seen as a tipping point triggering more transparency.<sup>755</sup> By the end of 2016, because national governments were asking for more transparency on the TTIP, the EC introduced ‘reading rooms’ in individual member states. The reading rooms were open to the general public and national parliaments to access some documents on the TTIP negotiations.<sup>756</sup> Reading rooms were also opened at US embassies in European capitals. These rooms demonstrate the EC’s willingness to enhance transparency. Also under the Von der Leyen Commission, the EC aims to enhance transparency in the EU’s trade policy. In her mission letter<sup>757</sup> to the Trade Commissioner, she addressed the need to ‘ensure the highest level of transparency and communication with the [EP], the Council and civil society’.<sup>758</sup>

### *Dutch position*

The Netherlands has recognised that negotiation processes and policy development require some confidentiality to preserve the effectiveness of negotiations and leave space to reflect.<sup>759</sup> The Netherlands has, however, also advocated for more transparency and communication at the international level, for instance in position papers and consolidated negotiation texts. Transparency allows for informing parliament, ministries, businesses and other stakeholders already from the start of a process and for constructive discussions on the Dutch position.<sup>760</sup>

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In the early years, the Netherlands was somewhat more reluctant to allow more openness regarding negotiation mandates, because of the risks involved. TPC reports in the earlier years of evaluation, for example, identify Dutch concerns for setting undesired precedents or compromising the EU’s negotiation position.<sup>761</sup> The Netherlands argued for transparency on mandates on a case-by-case basis, and only after negotiations had concluded. For each negotiating document, a separate assessment would be needed so as not to damage the EU’s

<sup>751</sup> Transatlantic Trade and Investment Agreement.

<sup>752</sup> The Transatlantic Trade and Investment Partnership (TTIP) negotiations ended in 2016, without reaching a successful conclusion to the agreement.

<sup>753</sup> Comprehensive Economic and Trade Agreement.

<sup>754</sup> Impact concerns related primarily to the government’s right to regulate and the environmental, consumer and food safety standards.

<sup>755</sup> Interview with MFA policy officer, held on 8 July 2019.

<sup>756</sup> EP (2016).

<sup>757</sup> In publicly available EC mission letters, sent to all Commissioners, EC President Ursula von der Leyen set out the mission of the EC for the years to come.

<sup>758</sup> Von der Leyen (2019).

<sup>759</sup> IRHP 2015-44b TPC Handleiding Plv 04-09-2015; Belgium et al. (2020).

<sup>760</sup> Belgium et al. (2020).

<sup>761</sup> IRHP 2015-09b TPC Handleiding Leden 20-02-2015.

negotiating position.<sup>762</sup> Since 2016, however, the Netherlands has been more in favour of openness regarding negotiation mandates.

The Netherlands has aimed to improve transparency at the national level as well, to promote wider support for new policies and regulations, and to use the input from stakeholders in drafting its positions at the EU level.

#### *Interventions and signs of policy success*

In EU meetings, the Netherlands voiced appreciation for the EC's activities to enhance transparency, including, for instance, in the TTIP negotiations. The Netherlands stated that it welcomed the general trend of increasing transparency, such as the brochure developed with several chapters of TTIP, and the transparency-related initiatives<sup>763</sup> to enhance public awareness of the benefits of TTIP.<sup>764</sup>

Although the progress that was achieved was welcome, Dutch interventions also pressed for more transparency and held the EC accountable for its commitments to providing information and openness. For example, in the context of TTIP, the Netherlands pleaded for access to consolidated negotiation texts in reading rooms. And it asked for an update on the status of the confidential annex the EC promised to make available to member states.<sup>765</sup> Transparency on TTIP documents was also addressed in bilateral informal meetings at the DG level of the EC.<sup>766</sup> In addition, the Netherlands demanded transparency in other EU procedures, such as on TDI calculations to motivate trade defence measures.<sup>767</sup>

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The Netherlands also promoted transparency in the investment dispute settlement system. It actively supported the possibility for third parties, including civil society and academia, to influence proceedings. On various occasions when informing Parliament in 2015 and 2016, the ministry stressed that – according to the EU position on ICS – third parties would be granted access to all relevant documents, could send an *amicus curiae* letter to support one of the parties, and would get standing and be able to intervene if they had a substantial interest. Furthermore, the Netherlands pleaded for an enhanced focus on transparency more generally, as a part of trade and investment agreements, for instance, for the legitimacy of ISDS procedures,<sup>768</sup> for transparency on regulations, procedures and authorities in investment agreements<sup>769</sup> and to involve stakeholders in the TSD chapters of FTAs.<sup>770</sup>

<sup>762</sup> IRHP 2015-64b TPC Handleiding Leden 04-12-2015.

<sup>763</sup> E.g. the publication of 'ten myths of TTIP'.

<sup>764</sup> E.g. documented in IRHP 2015-41b TPC Handleiding Plv 24-07-2015; IRHP 2015-48b TPC Handleiding Plv 2-10-2015.

<sup>765</sup> Annotated agenda FAC on Trade, February 2016; IRHP 2015-49b TPC Handleiding Plv 9-10-2015; IRHP 2015-56b TPC Handleiding Plv 30-10-2015.

<sup>766</sup> IRHP 2015-44b TPC Handleiding Plv 04-09-2015.

<sup>767</sup> See Chapter 4 of this report.

<sup>768</sup> E.g. in 20190327 concept-instructie TPCSI 27 March 2019.

<sup>769</sup> 20181207 Conceptinstructie TPCSI 07 12 2018.

<sup>770</sup> IRHP 2015-05b TPC Handleiding Plv 30-01-2015

Demands for more transparency also occurred in joint efforts. For example, in a non-paper released in early January 2020, the Netherlands and various northern EU member states, including Belgium, Denmark and Sweden addressed the need for more openness and information-sharing to ‘bring citizens close to the EU and enable the [EU] institutions to enjoy greater legitimacy, accountability and effectiveness’.<sup>771</sup>

As for results, transparency at the EU level increased over time. In particular, the opening of reading rooms was a step forward. Other steps, such as engaging civil society on TSD chapters, for instance, were also positive. It is difficult to determine to what extent this success can be contributed to Dutch interventions, yet given its active role it is likely that the Netherlands contributed to these changes, individually and jointly with other member states.

As for results at the national level, an important step was the establishment of the *Breed Handelsberaad* (broad trade council – BHB), in 2017. The BHB is a multi-stakeholder national forum in which policymakers and non-state actors meet four times a year (prior to Foreign Affairs Council on Trade meetings).<sup>772</sup> Additionally, twice a year, special thematic meetings are organised, for instance on the TSD chapters in the FTAs and the new model text for investment agreements.<sup>773</sup> In addition to providing transparency, allowing concerns to be raised and enhancing support, BHB meetings also generate valuable input to determine the Dutch position. The Netherlands organises other meetings and online consultations as well: at least once a year, the MFA organises a dialogue with Dutch civil society and companies, addressing the Dutch position and (EU) negotiation texts. In addition, information was frequently shared with the Dutch Parliament and published on a public website.<sup>774</sup> Finally, the Dutch government intensified its communication and information on the agreements already in place, including on how to make use of them, and how they can be of benefit.<sup>775</sup>

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Results at the national level can be attributed to Dutch interventions more easily. The introduction of the BHB, in particular, enhanced transparency. Participants acknowledge this, experiencing a feeling of inclusion on EU matters, having input about the formulation of the Dutch position and enhancing stakeholders’ awareness and knowledge of EU trade and investment agreements (including businesses).<sup>776</sup> Over time, stakeholders have become more active and the level of discussion has improved.<sup>777</sup> The European Council on Foreign Relations acknowledged the many Dutch efforts: in 2016, the Netherlands ranked amongst a group of six ‘leader’ countries on the 2016 European Foreign Policy Scorecard, in the context of TTIP negotiations.<sup>778</sup>

<sup>771</sup> Belgium et al. (2020), p. 1.

<sup>772</sup> See Section 2.3.1 for more information.

<sup>773</sup> See Chapter 2 of this report for more information on the BHB.

<sup>774</sup> MFA (2016).

<sup>775</sup> Tweede Kamer, vergaderjaar 2017–2018, 31 985, nr. 54

<sup>776</sup> Interview with an MFA policy officer, held on 21 October 2019.

<sup>777</sup> Ibid.

<sup>778</sup> Other winners were Austria, France, Germany, Spain and the UK. These six countries were said to have worked especially hard to communicate the advantages of TTIP to a sceptical public. ECFR (2016).

## 5 –TRIPS and medicines

The Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement has been in place since 1995 and is a multilateral (WTO) agreement on intellectual property. It is an attempt to reduce the differences in national protection and enforcement, and to create international laws. The agreement covers intellectual property in the form of copyrights, trademarks, geographical indications, designs, patents, and undisclosed information. It sets minimum standards of protection, rules of enforcement and rules for dispute settlement. At the same time, there is still a degree of flexibility, since countries can tailor their approach to the protection and enforcement of intellectual property rights. In addition, developing countries are granted transitional periods to phase in new legislation.<sup>779, 780</sup> Least-developed countries receive a temporarily exemption for pharmaceutical obligations under the TRIPS agreement.

### *Dutch position*

In 2016, TRIPS and access to medicine was among five priority topics that the Minister for Foreign Trade and Development identified around policy coherence for development. This topic was reiterated in July 2018, albeit as a sub-target of five other policy objectives.<sup>781</sup> The Dutch policy objective was to guarantee affordable medicine for developing countries, especially for the least-developed countries, and for the Netherlands itself. This objective is in line with the more general policy priorities as expressed in 'A world to gain' (2013) and explained in Chapters 2 and 5, such as poverty reduction and prioritising the needs of the most vulnerable countries and people.

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### *Interventions and extent of policy success*

At the international level, Dutch interventions consisted of advocating Dutch priorities, particularly addressing developing countries' interests and development needs. Within the EU, and together with the EC in the WTO, the Netherlands lobbied for an indefinite exemption for LDCs in the area of TRIPs. The Netherlands also advocated against the inclusion of TRIPS+ provisions in any negotiations of new trade agreements between the EU and developing countries, because such provisions could lead to an extension of patent rights, for example, which in turn could delay the date when generic medicine enters the market and maintain the high prices of medicines, making it more difficult for developing countries to access such medicines.<sup>782</sup>

In 2016, the Netherlands actively embarked on an international discussion on the high prices of medicine and the lack of innovation in that area. It contributed to the UN Secretary-General's High-Level Panel on Access to Medicines, calling for a broad range of solutions. At the 69th World Health Assembly in May 2016, the Netherlands advocated a globally coordinated approach for research and affordable medicine.<sup>783</sup>

<sup>779</sup> WTO (undated-a). 'Overview: the TRIPS agreement'.

<sup>780</sup> WTO (undated-b). 'Intellectual property: protection and enforcement'.

<sup>781</sup> Tweede Kamer, vergaderjaar 2015–2016, 33 625, nr. 219

<sup>782</sup> Tweede Kamer, vergaderjaar 2015–2016, 33 625, nr. 219; Tweede Kamer, vergaderjaar 2017–2018, 33 625, nr. 250; Tweede Kamer, vergaderjaar 2017–2018, 33 625, nr.265.

<sup>783</sup> Tweede Kamer vergaderjaar 2015–2016, 33 625, nr. 219 as well as the updated action plan of July 2018.

As for results, no member states objected to including TRIPS+ provisions in any negotiations on trade agreements, and thus TRIPS+ provisions have been included or are likely to be included in many comprehensive free trade agreements with developing countries (e.g. with Vietnam, Indonesia, the Philippines, Mexico and Mercosur).

Because of resistance from, among others, Japan and the USA, an indefinite exemption for LDCs is currently not possible. However, in the WTO TRIPS council in 2015, the exemption for LDCs was extended until 2033, providing them with access to generic medicine.<sup>784</sup> It is plausible that the Netherlands managed to draw attention to this issue for developing countries, which may have helped to extend the exemption to the TRIPS rules for LDCs.

<sup>784</sup> Tweede Kamer, vergaderjaar 2015–2016, 33 625, nr. 219; Tweede Kamer, vergaderjaar 2017–2018, 33 625, nr. 250; Tweede Kamer, vergaderjaar 2017–2018, 33 625, nr. 265; MFA (2016).



# Annex 3

## Developments in the WTO

In 1947, 23 countries agreed to establish the General Agreement on Tariffs and Trade (GATT) in order to reduce trade barriers as an alternative to the intended International Trade Organisation (ITO). It marked the “completion of the most comprehensive, the most significant and the most far reaching negotiations ever undertaken in the history of world trade”.<sup>785</sup> The GATT came into force in 1948 and provided the rules for much of world trade until 1994. All those years, it seemed well established, but remained a provisional agreement without a firm legal foundation.

In 1994, 123 nations agreed on the creation of the WTO as an international organisation under the Marrakesh Agreement and binding dispute settlement. Among members, there was a big push for launching a new round of negotiations. In 1996, developed countries such as the EU, US and Japan pushed for negotiations on what became known as the ‘Singapore-issues’. These issues are investment, competition policy, transparency in government procurement and trade facilitation. After five years of discussions, there was still no consensus reached on these issues, when in 2001 the Doha Round started. At the same conference, China was admitted as member.

The Doha Round aimed to achieve a major reform of the international trading system by introducing lower trade barriers and revised trade rules and thus improving the trade prospects of developing countries. The Round, known as the Doha Development Agenda (DDA), covers a very broad range of policy issues such as agriculture, services, trade facilitation and dispute settlement. The DDA was supposed to be concluded by the end of 2002, beginning of 2003. However, negotiations proved to be very difficult, particularly on the Singapore issues. At the MC in Cancun in 2003, countries agreed that a decision on the ‘modalities of negotiations’ on the Singapore issues had to be taken “by explicit consensus”. Whilst the WTO normally takes decisions by consensus (but where consensus is reached when no WTO member explicitly opposes a decision), this meant that any of the WTO members could veto the inclusion of Singapore issues in the DDA. Together with the unwillingness of the US to address farm subsidies, the differences over inclusion led to the collapse of the MC in Cancun.<sup>786</sup>

The aftermath of Cancun was one of standstill, until the negotiations were resumed in March 2004 due to a concerted effort of the EU and the US.<sup>787</sup> WTO members agreed to abandon all the Singapore issues but trade facilitation from the Doha round. Only then, negotiations could move forward in the face of resistance by developing countries. These countries, especially India and Brazil, were also actively involved in the negotiations with developed countries. With the so-called ‘July package’, WTO members reached a Framework Agreement that provided guidelines for completing the Doha negotiations. The agreement covered agriculture, non-agricultural market access, services, and trade facilitation. Moreover, the agreement set December 2005, the Hong Kong MC, as a new deadline for negotiations on these issues.

<sup>785</sup> European Office of the United Nations (1947).

<sup>786</sup> Woolcock, S. (2003). pp. 249-255, p. 249.

<sup>787</sup> Fergusson et.al. (2005). pp. 1-27, pp. 2-3.

This meeting could have been an important step within the Doha round, but did not resolve many issues, with the exception of a commitment to phase out export support in agriculture and an Aid-for-Trade package. In the Hong Kong Ministerial Declaration, the WTO members did reaffirm their full commitment to the Doha round and set 2006 as the new deadline for resolving the complete Doha Work Programme.<sup>788</sup>

After the MC, talks in Geneva failed to reach an agreement on the reduction of domestic farm subsidies and lowering import duties on agriculture and manufactures. Moreover, in June 2007, a major impasse occurred between the US, EU, India and Brazil on the opening up of agricultural and industrial markets and the reduction of domestic subsidies.<sup>789</sup> In addition, negotiations over a special safeguard mechanism<sup>790</sup> for developing countries broke down in July 2008.<sup>791</sup> After several countries urged to renew the negotiations and a mini-ministerial conference was held in India in September 2008, countries pledged to complete the Doha round by the end of 2010. At the G20 summit in London in 2009, countries again pledged to complete the round. However, the deadline of 2010 was not met.

In 2013, the Bali Package was produced at the 9th MC. In the Ministerial Declaration, WTO members reaffirmed their “full commitment” to give effect to the Declarations and Decisions adopted at Doha, and the subsequent MCs.<sup>792</sup> The Bali Package included provisions for lowering import tariff and agricultural subsidies. Moreover, the Trade Facilitation Agreement (TFA), that aims to reduce red tape and streamline customs, was adopted.

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At the MC in Nairobi in December 2015, developed countries again agreed to end all export subsidies on agricultural products immediately, while developing countries agreed to phase out their own use of export subsidies by the end of 2018.<sup>793</sup> However, in the Nairobi Ministerial Declaration WTO members also agreed on an ambiguous statement regarding the Doha Round: “[w]e recognise that many members affirm the Doha Development Agenda, and the Declarations and Decisions adopted at Doha and at the Ministerial Conference held since then, and reaffirm their full commitment to conclude the DDA on that basis. Other members do not reaffirm the Doha mandates, as they believe new approaches are necessary to achieve meaningful outcomes in multilateral negotiations. Members have different views on how to address the negotiations”.<sup>794</sup> At the same time, all members confirmed their strong commitment on advancing the negotiations on the remaining issues, be it within or outside of the Doha Round.

<sup>788</sup> WTO (2005).

<sup>789</sup> Reuters (2007).

<sup>790</sup> This mechanism is developed to protect poor farmers by allowing countries to impose special tariffs on certain agricultural goods in the event of an import surge or price fall (WTO (2020a)).

<sup>791</sup> Financial Times (2008).

<sup>792</sup> WTO (2013).

<sup>793</sup> Several exceptions were made. Developed countries have until 2020 to allow export subsidies for dairy products, swine meat, and processed products. Developing countries have five years extra for certain export subsidies covering transport and marketing costs (<https://www.ictsd.org/bridges-news/bridges-africa/news/evaluating-agriculture-in-the-nairobi-package>, last visited 6 December 2019).

<sup>794</sup> WTO (2015).

After Nairobi, negotiations continued to be very difficult, especially on whether ‘new issues’, such as e-commerce, trade facilitation in services and investment facilitation, should be included in the ongoing Doha negotiations. In the lead-up to the 11th MC, though, countries were positive that an agreement on the elimination of ‘harmful’ fisheries subsidies was within reach.<sup>795, 796</sup> However, no agreement was reached at the MC in Buenos Aires in 2018 and members agreed, “to continue to engage constructively in the fisheries subsidies negotiations, with a view to adopting, by the Ministerial Conference in 2019”.<sup>797</sup> In the end, no MC was scheduled for 2019 and the MC in Kazakhstan scheduled for June 2020 was postponed due to COVID-19. In November 2019, DG WTO Azevêdo warned the WTO members that failing to successfully conclude the fisheries subsidies negotiations “will not just be bad for marine fish stocks: it will damage the credibility of the WTO and discredit the feasibility of multilateral rule-making”.<sup>798</sup>

The stagnation of the Doha Round is not the only problem the WTO is dealing with. The recent trade war(s) between the US, China and the EU put the multilateral trade system and the WTO under further pressure. Moreover, the dispute settlement mechanism of the WTO is in crisis.<sup>799</sup> Within the WTO, ad hoc panels issue rulings on disputes between litigant members over compliance with WTO rights and obligations, subject to review by a standing Appellate Body (AB) composed of seven ‘judges’. Those ‘judges’ are appointed by consensus of all WTO members for four-year terms (renewable once). Decisions by the AB are final and binding. However, given that WTO members have failed to negotiate updates to the rulebook, including rules on dispute settlement, the AB has increasingly reviewed decisions made on ambiguous or incomplete WTO rules with ample room for interpretation.<sup>800</sup> Those have led to charges of bias by the United States.

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Consequently, since the summer of 2017, US officials have blocked appointments of AB-members to force WTO members to negotiate new rules that address the US concerns and limit – in their view – the scope of judicial overreach. According to the US Senate’s Committee on Finance, the AB “has long strayed off course from its original form and function”. These concerns have been addressed under President Trump, but also already under President Obama. According to the US Senate’s Committee on Finance “US presidents on both sides of the aisle have taken issue with Appellate Body members addressing issues that were not raised by the parties involved in the dispute, taking longer than 90 days to decide appeals, and creating new rights and obligations for WTO members”.<sup>801</sup> Due to the US blocking new

<sup>795</sup> The issue of fisheries subsidies was particularly pushed by African, Pacific and Caribbean (ACP) countries. Since the launch of the talks, negotiations have been characterised by the need to balance sustainability and development considerations (WTO (2020b)). In 2016, EC Commissioner for Trade Cecilia Malmström gave a speech on ‘The WTO after Nairobi’ called the fisheries subsidies an important outstanding Doha issue, although “smaller in terms of impact” and “commercial profile” than issues such as domestic support for agriculture, digital trade and investment (EC (2016)).

<sup>796</sup> The Hindu (2017).

<sup>797</sup> WTO (2017).

<sup>798</sup> WTO (2019).

<sup>799</sup> Giuliani, C. (2019). pp. 1-4.

<sup>800</sup> Payosova, T., G. Hufbauer and J. Schott (2018). pp. 1-14.

<sup>801</sup> US Mission to Geneva (2019).

appointments of AB-judges, as of 11 December 2020, the AB was effectively shut down.<sup>802</sup> Consequently, WTO members will be able to avoid binding rulings and thus escape their international obligations by appealing panel reports.<sup>803</sup> The EC responded with a proposal to put an interim arrangement in place through arbitration under the WTO Dispute Settlement Understanding.<sup>804</sup> In March 2020, the EU and 15 other WTO members agreed to establish such a contingency appeal arrangement.<sup>805</sup>

While some had hoped for the AB to move forward after Biden's inauguration as US president, this is not the case. Following the line of his predecessors, Biden continues to block the appointment of new AB-judges. The Biden administration made a statement saying that it could not agree to the appointment of new members, given that the US "continues to have systemic concerns" with the functioning of the AB.<sup>806</sup> However, Biden did lift Trump's block on the appointment of Ngozi Okonjo-Iweala as new Director-General of the WTO.<sup>807</sup> Okonjo-Iweala is the first woman and the first African to serve in this position. Her term of office will expire in August 2025.

<sup>802</sup> Payosova, T., G. Hufbauer and J. Schott (2018), p. 2.

<sup>803</sup> EC 2019/0273 (COD), p. 1.

<sup>804</sup> *Ibid.*, p. 2.

<sup>805</sup> EC (2020).

<sup>806</sup> Bloomberg (2021).

<sup>807</sup> BBC (2021).



# Annex 4

## Annex to Trade Defence Instruments case study

## Institutional setting

The WTO framework permits its members to apply trade defence instruments (TDIs) to protect domestic industries from trade distorting effects. The key rules in question on the use of TDIs are: Articles VI and XIX of the GATT; the Agreement on Implementation of Article VI of the GATT; the Agreement on Subsidies and Countervailing Measures; and the Agreement on Safeguards.

Several measures can be taken to protect domestic industries from different types of events or practices. Anti-dumping measures, the most frequently used TDIs, are applied to individual exporters to correct for dumping practices; the selling of a product below sales price in the domestic market or at a price below cost price. Measures typically exist of duties on imports. Anti-subsidy or countervailing measures aim to counter the unfair subsidisation of third countries to their companies to produce or export goods.

Unlike anti-dumping and anti-subsidy measures, safeguards do not address unfair trade practices. Instead, these measures aim to (temporarily) regulate imports from third countries, giving the domestic industry relief and time to adapt to the surge of imports. Safeguards typically exist of quantitative import restrictions or duty increases on all imports. The invocation of an anti-dumping or anti-subsidiary measure as safeguard measure is allowed, if the WTO-rules on substance and procedure in the respective agreements are followed correctly.

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The absolute majority of measures adopted are to counter dumping practices or unfair subsidies; safeguard measures are comparatively rare.<sup>808</sup> Complaints against application are subject to scrutiny of the EU Court of First Instance for affected exporters and for governments in WTO dispute settlement. The use of a safeguard measure for a maximum of four years requires, in addition, a non-discriminatory approach (to all foreign products), a restructuring of the affected industry sector, trade compensation to affected WTO members elsewhere and may trigger retaliatory measures.

EU trade defence policy is based on the WTO framework of related articles and agreements, as discussed above. The EU's legal framework consists of four Regulations<sup>809</sup> that codify

<sup>808</sup> This can be explained by the fact that the conditions to impose safeguards are more stringent and the WTO member generally must pay a compensation to the affected WTO members (Ecorys (2021), Ch. 6, p. 116).

<sup>809</sup> Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (Basic Anti-Dumping Regulation), OJ L 176 of 30.6.2016; Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union (Basic Anti-Subsidy Regulation), OJ L 176 of 30.6.2016; Regulation (EU) 2015/478 of the European Parliament and of the Council of 11 March 2015 on common rules for imports, OJ L 83 of 27.3.2015; and Regulation (EU) 2015/755 of the European Parliament and of the Council of 29 April 2015 on common rules for imports from certain third countries, OJ L 123 of 19.5.2015.

general rules on the different types of measures. The EU Enforcement Regulation<sup>810</sup> ensures that the EU is able to exercise and enforce its rights under international trade agreements by adopting various trade policy measures. Furthermore, EU trade defence policy is applied through the Implementing Regulations. Implementing Regulations contain decisions on the initiation of investigations, introduction, modification and termination of specific TDI in relation to individual trade defence cases. Below we provide an overview of the principles, procedures and actors involved in the implementation of EU trade defence policy.

## Implementation of EU trade defence policy

In line with the EU's exclusive competence of trade policy, trade defence measures are developed and implemented at EU level. TDI is an EC policy area, applied specifically by DG TRADE.

To understand the dynamics of trade defence policy, and how and where Dutch interventions can affect EU policy, this annex presents a descriptive overview of the principles, process and key actors involved. Given the more dominant use of measures adopted to counter dumping practices or unfair subsidies, this annex will focus exclusively on anti-dumping (AD) and anti-subsidy (AS) measures.

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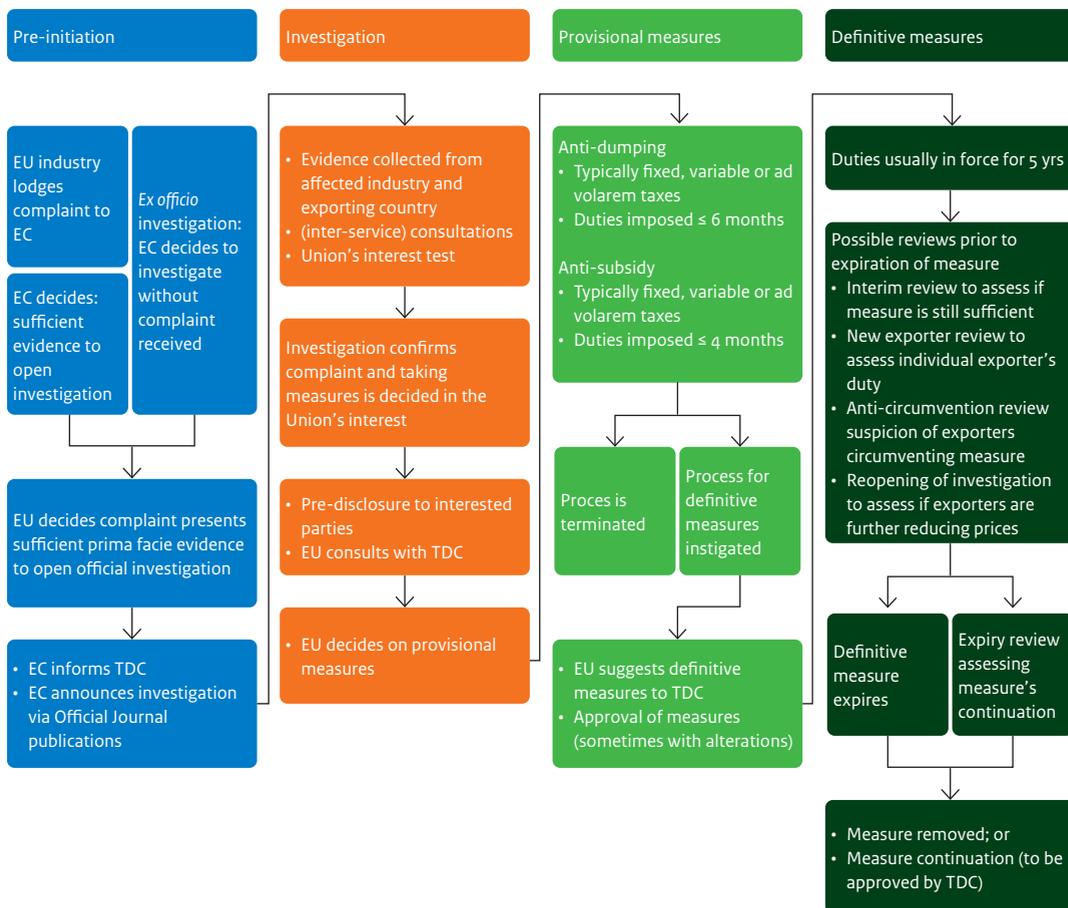
### Important steps in the process

The process of dumping or subsidisation has the potential to cause declined production and sales, reduced market shares and profits, decreased productivity and/or capacity (utilisation). The (claimed) existence of these effects provide reason to investigate the use of trade defence measures. Typical anti-dumping and anti-subsidy procedures follow a very similar path.<sup>811</sup> Figure A4.1 below presents the main steps of the process.

<sup>810</sup> Regulation (EU) No 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules and amending Council Regulation (EC) No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, OJ L 189 of 27.6.2014.

<sup>811</sup> Ecorys (2021). Chapter 6, pp. 114-133.

Figure A4.1 The EU trade defence process



Procedures commonly start with a demand-driven complaint, whereby the affected EU industry lodges the complaint to the Office of Complaints at DG TRADE.<sup>812</sup> Alternatively, in less than one percent of the cases, the EC initiates a procedure *ex officio*.<sup>813</sup> When the EC decided there is sufficient *prima facie* to support the complaint, the process enters the phase of investigation.

During investigation, the EC collects data and information from various sources to identify the injury and causality of effects. Information is obtained directly, from the affected industry

<sup>812</sup> The complaint must be supported by a major proportion of the EU industry (the requirement of “standing”).

<sup>813</sup> *Ex officio* means that the EC can start a trade defence investigation on its own initiative without an official complaint by the EU industry.

and the third country's respective exporters (e.g. through questionnaires and on-site visits<sup>814</sup>), and consultations with EC directorates and specialised authorities. Additionally, the EC determines whether trade defence measures are at the interest of the Union as a whole. By means of a Union's interest test the total European Union's interest is calculated. The total appreciation includes different and (sometimes countering) interests, considering social, environmental and economic interests and different EU stakeholders (EU industry, users and consumer interests). Following pre-disclosure of provisional findings and consultations with the Trade Defence Instruments Committee (TDC), provisional measures are decided upon.

Provisional measures remain in force up to 6 months in anti-dumping cases and up to 4 months in anti-subsidy cases. Upon expiration, the trade defence procedure may be terminated or followed by definitive measures. In the latter case, the EC proposes definite measures for approval to the TDC.

Definitive measures are usually put in place for a period of five years, unless they are subject to change or removal, following from the different pre-expiration reviews discussed in the figure. Without the change or removal of the measures, measures can be prolonged following an expiry review.

Transparency is an important principle of the functioning of the EU. The EC is required to disclose to the parties the essential elements on which it bases its decisions, so that affected parties (those that have a specific stake in the affected interest and can prove it) are presented the evidence, and provided the opportunity at various moments to respond. Additionally, since 2007, a 'Hearing Officer' has been put in place as independent mediator, to facilitate communication between the relevant parties and the EC.<sup>815</sup>

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All EU trade defence measures are up to verification and validation; for instance being placed under scrutiny of the CJEU (for EU law compliance), and open to be challenged in domestic courts (for incorrect implementation). Additionally, EU measures must be notified to the WTO and measures can be challenged in WTO dispute settlement (for WTO law compliance).

### **Key players: the role of DG Trade and cooperation with other stakeholders**

Concerning development and enforcement of trade defence, DG TRADE takes the main role. Furthermore, throughout the process, from investigation, to consultations for technical knowledge, to the collection of TDI duties, DG TRADE cooperates closely with several other

<sup>814</sup> The EC sends out questionnaires to the EU industry (i.e. producers, importers and the users of the products concerned). Should the number of producers/importers for the product in question be too high, the EC will analyse the data provided by a sample of such companies. To supplement and verify the data provided by the industry, the EC may carry out on-site visits. Additionally, the EC approaches the government of the third country, from where the allegedly dumped/ subsidised imports originated, to send questionnaires to the respective exporters.

<sup>815</sup> European Court of Auditors (2019).

stakeholders. Important partners in this process include other DGs and services, such as DG ENER<sup>816</sup>, DG TAXUD<sup>817</sup>, DG BUDG<sup>818</sup>, and OLAF<sup>819</sup>.

Member states are involved at several phases of the process. Additional to the cooperation with member states via the TDC, including to inform, consult and obtain approval of member states, authorities of the member states are involved in the enforcement of measures, holding responsibility for collecting TDI duties.

## Reform of the EU trade defence mechanism

Several changes have occurred in EU trade policy during the time under study, with some of these changes being the outcome of long-lasting processes. Important developments in EU trade defence policy, regarding anti-dumping and anti-subsidy regulations, have occurred under the so-called modernisation of TDIs, along with a new anti-dumping methodology. The EU trade defence system had not been updated since 1995, and required modernisation to deal with the challenges of the modern global economy.<sup>820</sup> Modernisation aimed specifically to enhance the transparency and predictability of investigations, increase the effectiveness and enforcement of AD/AS measures and tackle the risk of retaliation.<sup>821</sup>

In April 2013, the EC adopted a proposal to modernise the EU's AD and AS Regulation. An important element to the proposal was the reform of the LDR,<sup>822</sup> which would allow higher tariffs to be imposed on dumped products.

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The EC proposal only slowly progressed through the legislative process. Following the EC's proposal, the EP adopted its position in April 2014, but the Council was divided on key aspects of the reforms, especially on the LDR reform.<sup>823</sup> Member states fearing possible retaliation and more free trade-oriented member states, including the Netherlands preferred keeping the LDR in its current form.

<sup>816</sup> Directorate-General for Energy, consulted for example in the biodiesel case.

<sup>817</sup> Directorate-General for Taxation and Customs Union, tasked with, e.g. administering that member states apply the Common Customs Tariff (European Court of Auditors (2019), p.11, Table 2.).

<sup>818</sup> Directorate-General for Budget, tasked with, e.g. calculation of TDI-related inspections and the verification of collections of import duties by national customs (European Court of Auditors (2019), p.11, Table 2).

<sup>819</sup> European Anti-Fraud Office, tasked with, e.g. coordinating the investigation of circumvention of AD or AS duties (European Court of Auditors (2019), p. 11, Table 2).

<sup>820</sup> EC (2018).

<sup>821</sup> EPRS (2018).

<sup>822</sup> WTO law states that anti-dumping measures may at most be equal to the dumping margin (price in country of origin compared to (lower) export price), but may also be restricted to the *actual* damage caused (to local producers). The LDR thereby describes to compare the dumping and injury margin, using the lower of the two to define the AD tax. Whereas the LDR is not an obligatory WTO rule, the EU applied it systematically.

<sup>823</sup> Ecorys (2021). Chapter 6: Trade Defence Instruments, pp. 114-133.

The question of reform became more pressing in 2015, especially due to global overcapacities in several raw material industries (e.g. aluminium, cement and steel), which accumulated particularly in China. Additionally, in 2016, the question of how to deal with the Chinese market economy status (expiring December 2016) and (potentially) unfair competition of state companies propelled the trade defence reform to the top of the political agenda.<sup>824</sup> Consequently, adjustments to the calculations of the anti-dumping margins entered into force in December 2017,<sup>825</sup> and the TDI modernisation regulation entered into force June 2018.<sup>826</sup>

The reforms of the EU trade defence mechanism included various changes. Important modifications are discussed in the study of Ecorys<sup>827</sup> and included:

- Elimination of the distinction between market economies and non-market economies
- No application of the LDR in case of: systemic raw materials distortions in the exporting country and/or distorted trade due to countervailing subsidies granted by third countries.
- Shortened time frames for the introduction of EC provisional trade defence measures
- Increased transparency and predictability of procedures by means of a pre-warning system for all interested parties and publication by the EC of its own assessments
- Measures to facilitate SMEs' access to TDI
- Environmental and social interests anchored into trade defence procedures.

Furthermore, to ensure EU interests are protected even if the WTO system and the DSM in particular are paralysed, three distinct actions were taken:<sup>828</sup>

- The EC has proposed amendments to the EC Enforcement Regulations, to extend the scope to allow for action if dispute settlement procedures are blocked
- The effectuation of a temporary trade dispute appeal system, together with several WTO members, in 2020.
- The EC appointed a Chief Trade Enforcement Officer (CTEO), tasked to ensure better monitoring and enforcement of the implementation of EU trade agreements focusing on the trade partners' commitments to climate, environmental and labour standards.

<sup>824</sup> China joined the WTO in 2001, under a 15-year transition period, to obtain a market economy status (MES). For the time not yet having transitioned to a MES, other WTO members were allowed to impose AD tariffs (to compensate for state capital subsidised Chinese exports (priced unfairly low). On 11 December 2016, the deadline expired and the EU could no longer apply AD measures under the non-MES method.

<sup>825</sup> Regulation (EU) 2018/825 of the European Parliament and of the Council of 30 May 2018 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union, OJ L 143, 7 June 2018, p. 1

<sup>826</sup> Regulation (EU) No 2017/2321 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union [2017] OJ L 338 of 19.12.2017.

<sup>827</sup> Ibid.

<sup>828</sup> Ibid.



# Annex 5

## Annex to TiSA case study

## Dutch positions compared to the EU position

### *Liberalisation*

- The Netherlands thought that no sector should be excluded a priori and advocated opening markets as much as possible.
- The Dutch position evolved somewhat. While in 2013, the Netherlands did not have a position on using a negative list yet, in 2016 it felt that a negative list was undesirable because it would prevent multilateralisation of TiSA.
- The EU position was that a hybrid approach to listing sectors and market access would be best (see Section 6.1.) – like most negotiating Parties.
- The Netherlands hardly added any national topics, professions or sectors to the list of exceptions to MFN status that the EU offer contained, less so than other member states.

### *Public sectors*

- The Dutch position seems to have been nuanced. While the minister(s) informed parliament more than once that the public sector would be fully protected, an internal document from fall 2016 shows the Netherlands thought the EU offer contained too general an exception for the public sector.
- Indeed, the EU claimed general exceptions for public sectors and public utilities. Its 2016 offer excluded services ‘supplied in the exercise of government authority’, as well as publicly funded education, health and social services and water distribution.

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### *Temporary labour migration and entry of highly skilled professionals*

- The Netherlands did not always intervene along with other members that spoke out against provisions on visa for temporary migrants, even though in the domestic political debate some political parties rallied against immigration in general.
- The Netherlands proposed to apply ‘the Complementary protocol on movement of natural persons for business purposes’ to promote the return of temporary migrants. The EU integrated this in their offer.

### *New services and digital services*

- This sector was important to the Netherlands. It wanted to get an ambitious agreement with wide definitions on telephone and roaming services.
- In 2016, the Netherlands did not yet seem to have a clear position on the exclusion of new services; at the same time, the Commission proposed such an exclusion in their offer, limiting new market access.

### *Cross-border data flows*

- The Netherlands stressed the importance of agreement on data flows. It favoured the free flow of data including personal data, because it did not want to water down provisions on this ‘offensive’ area for the EU. As a member of a likeminded group, it co-signed a letter to the EC advocating an ambitious EU offer on data flows. At the same time, the Netherlands wanted TiSA to meet EU standards for protection of data.
- In TiSA, the EU promoted general protection of data, including personal data, using arguments of preventing protectionism and promoting data security rather than

arguments of privacy. In April 2016, the EU agreed internally on the regulation for the flow of data in the EU (in GDPR). For TiSA, the EU proposed existing texts from the GATS Understanding on Financial Services.

#### *Least Developed Countries*

- The Netherlands was in favour of mainstreaming development concerns; and in favour of extending possible advantages of TiSA to LDCs unilaterally. The minister explained to parliament<sup>829</sup> that this could be initiated (in the WTO) after the agreement had been agreed and ratified.
- A Sustainability Impact Assessment on TiSA for the EU (July 2017) concluded that no significant impact was expected on developing countries and LDCs. IOB found no other references to LDCs: they were not mentioned in the EU offer nor in the draft TiSA text.

#### *ILO conventions and labour standards*

- The Dutch position was not fully coherent. In 2016, the Dutch cabinet informed parliament it was disappointed that no concrete texts on ILO conventions had been inserted, but an internal instruction said that obliging partners to ratify and implement these conventions would undesirably prevent multilateralisation – and this stance was confirmed in an interview.
- The Netherlands did not want to delay negotiations and aligned with the EU position. The EU offer did not contain specific texts on ILO conventions and labour standards.

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#### *Maritime sector*

- The Netherlands had an offensive interest in the maritime sector – especially dredging – and was a founding member of a group of Friends of Maritime. In late 2015, it sent a letter to the EC, together with the Benelux, about its importance, and was disappointed in many negotiating partners' offers in the maritime sector.
- The EU acknowledged this sector's importance and said in a DG Trade factsheet<sup>830</sup> that it was ambitious in opening up maritime sector services (along with air and road transport) given its competitive domestic industry there.

<sup>829</sup> Tweede Kamer, vergaderjaar 2016–2017, 1075.

<sup>830</sup> EC (2016).



# Annex 6

## Annex to Investment case study

## Dilemma's in investment protection: balancing rights and duties of investors

### *The right to regulate*

This topic is of interest because of a concern that the State's right to regulate could be harmed by the protection of foreign investors, who could contest the State's policies and regulations through international arbitration panels. Around the time of the TTIP negotiations, civil society and politicians started to feel that there was a lack of balance between rights and obligations of multinational companies in trade and investment agreements. This concern was heightened by fears that the international tax regime (and gaps within that system) facilitated aggressive tax planning, benefitting only multinational companies and tilting the tax burden towards citizens and domestic companies. Stakeholders feared that potential and huge financial claims by foreign investors (facilitated by ISDS) could affect the host states' right to regulate. And that these potential claims could have a negative effect on their policy space and future policy making in sensitive areas such as sustainable development, environment and human rights. This fear was fed by the concern that non-transparent and unaccountable ISDS panels of arbiters, without an appeal option, could further expand on earlier interpretations of investors' 'legitimate expectations' of protection of their investments, especially if this would cover future profits allegedly affected by new legislation.

### *Policy coherence: balancing interests*

In investment protection, the challenge is to balance the rights of foreign investors with the rights of the host states to regulate all companies in their jurisdiction in a non-discriminatory manner. OECD countries, as host states of FDI and MNEs, feel the need to promote public goods such as public health, climate and the environment in the interest of their population, while they also need to provide security of justice, the rule of law and good governance. International investors established in OECD countries are also understood to have duties or responsibilities, in terms of responsible business conduct and due diligence of their international supply chains in other jurisdictions. These duties are slowly being aligned with or referenced in some investment agreements, although many provisions are not mandatory and enforceable.

Appropriate foreign direct investment can greatly contribute to sustainable social and economic development and FDI is mostly welcomed by all countries, including developing countries. Until a dozen years ago, developing countries simply agreed to the standard Bilateral Investment Agreements that the Netherlands proposed, but this situation is changing. One reason this changed is that several developing countries – such as China, Brazil, India – have become emerging economies with a market size attractive enough for FDI, so that they can pose limits on the legal protection offered, but also have their own international investors (MNEs) seeking protection elsewhere. Another reason is that some developed countries, EU countries in particular, have now experienced the bilateral nature of BITs for the first time and have received claims against them under the ISDS system. The Netherlands itself is now confronted by a possible ISDS challenge by the energy company RDW under the same treaty. RDW considers the proposed Dutch ban on using coal in power

plants by 2030 to affect its future profits negatively and feels it is insufficiently compensated by damage payments.

### *Regulating due diligence*

The Netherlands continues to be a thought leader when it comes to promoting responsible business conduct, at least as regards standard setting. In 2019, upon an initiative by parliament, the government adopted legislation to ensure companies conduct due diligence to prevent child labour and other harmful practices in their value chains, beyond its national borders. It now has the difficult task of drafting regulations and ensuring implementation and enforcement of the legislation. In 2019, the Dutch government also presented a new policy framework on responsible business conduct, including an intention to regulate broader due diligence obligations for Dutch MNEs.

The EU Commission, in the meantime, aims to table a draft Directive on mandatory human rights and environmental due diligence (mHREDD) requirements for businesses in 2021. The Commission started preparing a public consultation about such legislation in 2020. In addition, the European Parliament's Committee on Legal Affairs published a draft report<sup>831</sup> with recommendations to the Commission for new EU-wide legislation mandating such mHREDD requirements.

### *Business and human rights*

Another relevant process in this context is the negotiations around a UN Human Rights and Business Treaty. An open-ended intergovernmental working group on transnational corporations and other business enterprises concerning human rights (under UNHCR), established in 2014, is negotiating an international legally binding instrument to regulate the activities of transnational corporations and other business enterprises. However, the negotiations do not progress well. The EC has no mandate from the Council to conduct negotiations on behalf of the EU. Other UN member states are even absent from negotiations, effectively boycotting them, including the US.<sup>832</sup>

Finally, the 50 OECD National Contact Points provide a non-judicial grievance mechanism for MNE behaviour, allowing NGO's and citizens to bring complaints if companies do not observe the OECD Guidelines for MNEs on responsible business conduct. The contact points can mediate and contribute to the resolution of issues, including human rights issues.<sup>833</sup> The Dutch National Contact Point is among the most active ones in the OECD.

<sup>831</sup> European Parliament (2020).

<sup>832</sup> Source i.a. EESC: <https://www.eesc.europa.eu/en/agenda/our-events/events/binding-un-treaty-business-and-human-rights> and Just Security: <https://www.justsecurity.org/61936/self-defeating-absence-u-s-u-n-business-human-rights-forum/>

<sup>833</sup> Source i.a. <https://mneguidelines.oecd.org/ncps/>



# Annex 7

A brief historical perspective  
on the EPAs

### *From Lomé and Cotonou to a new WTO-compatible trade regime*

With the signing of the Cotonou Partnership Agreement in June 2000 as the successor to the Lomé-IV Agreement, the EU and 67 ACP countries also agreed to redefine their existing bilateral trade regime. The Cotonou trade regime consisted of unilateral, preferential access for ACP exporters to the EU and Most Favoured Nation (MFN) treatment for EU products. ACP exporters enjoyed zero duties for all manufactured goods and tariff rate quota for many agricultural goods at zero or reduced duties for specified volumes. Moreover, ACP suppliers of sugar, beef, bananas and rum (though not from all ACP countries) received limited access to the EU market at high, internal EU prices.<sup>834</sup>

After several negative WTO rulings that determined that the Lomé trade regime discriminated other developing countries, the Cotonou Agreement defined the following basic goals: developing a new WTO-compatible trade regime, promoting growth, sustainable development, poverty alleviation and enhancing the integration of ACP economies into the world economy. However, the Agreement only contained basic principles and objectives for this new economic and trade cooperation. What the future EU–ACP relations and the EPAs should look like required further negotiations.

### *Everything but Arms, the Generalized System of Preferences, and challenging negotiations*

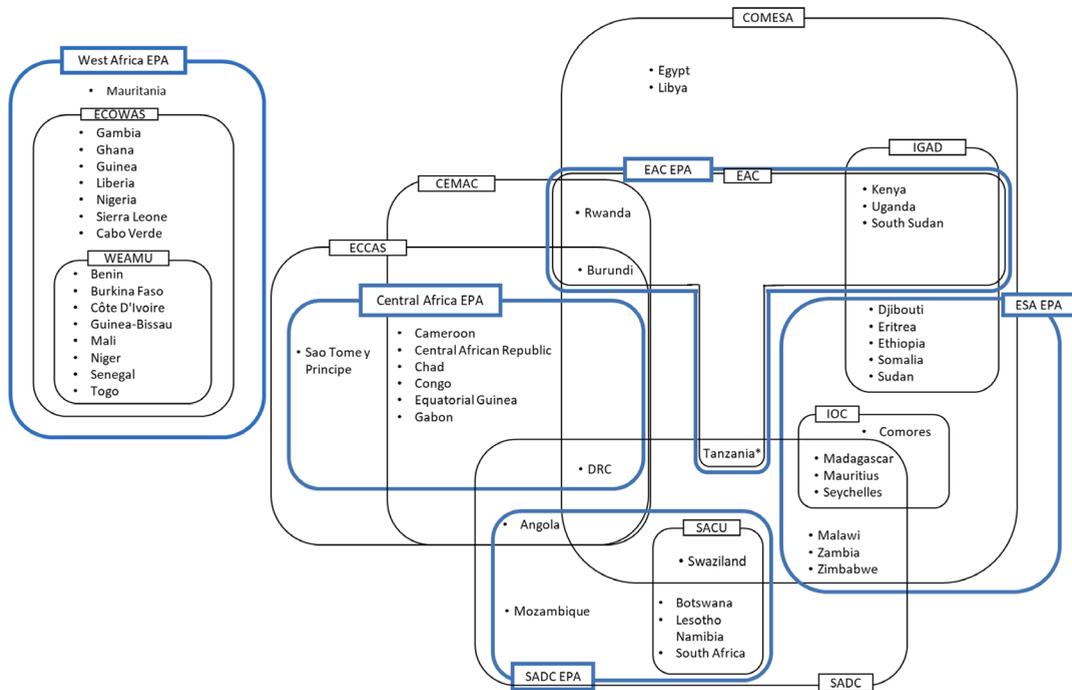
In 2001, the EU granted duty-free and quota-free access for Least Developed Countries (LDCs) on all products (except arms and armaments) through the Everything but Arms (EBA) initiative, which is part of the Generalized System of Preferences (GSP) for all developing countries.<sup>835</sup> There were transitional regimes for bananas (until January 2006), sugar (July 2009) and rice (September 2009) due to the sensitivity of those primary commodities. The EBA-initiative was legally covered in the WTO by the waiver that the EU obtained in the 2001 WTO Ministerial Conference, as part of the multilateral, political deal to launch the Doha development round.

Only a year after the EBA-initiative, the EU and ACP countries started negotiating a WTO-compatible trade regime. The intention was to conclude the EPAs in 2007. After a first ACP-wide phase to address issues of interest to all ACP-countries, the negotiations were taken to the regional level (in six regional configurations). In the figure below, the EPA configurations and associated regional organisations are presented.

<sup>834</sup> Euractive (2018).

<sup>835</sup> EC (undated). 'Tradehelp Everything but Arms'. <https://trade.ec.europa.eu/access-to-markets/en/content/everything-arms-eba>.

Figure A7.1 Economic Partnership Agreements configurations<sup>836, 837</sup>



\*Tanzania no longer belongs to the COMESA region.

Source: Figure constructed on various sources, including ECDPM (2010) and Parliament UK (2005), updated with recent developments.

From the outset, negotiations proved to be difficult, both in terms of process and substance. Negotiations became even more challenging when, after 2005, the Commission considerably narrowed the substance options for the future EU–ACP trade regime. ACP countries were more or less forced by the EU to negotiate enhanced regional EPAs, despite the fact that their regional integration was often at an infancy stage. Moreover, the EU Commission pushed for deeper and broader EPAs that were also supposed to cover trade in services, intellectual property and so-called Singapore issues such as investment, competition and government procurement that had been dropped from the Doha round in the WTO in 2003.

<sup>836</sup> EPA negotiations with individual ACP countries that are not covered by a regional EPA, such as with the Pacific small islands, are still ongoing. As regards the least developed countries from Central and East Africa, which enjoy duty and quota free access to EU markets under EBA, negotiations are not advanced.

<sup>837</sup> ECOWAS: Economic Community of West African States; WEAMU: West African Economic and Monetary Union; CEMAC: Central African Economic and Monetary Community; ECCAS: Economic Community of Central African States; COMESA: Common Market for Eastern and Southern Africa; EAC: East African Community; IGAD: Intergovernmental Authority on Development; IOC: Intergovernmental Oceanographic Commission; SACU: Southern African Customs Union; SADC: Southern African Development Community.

By October–November 2007, none of the African or Pacific regions were in a position to conclude a full EPA. However, the EU insisted on abiding by the WTO rules and in the absence of any alternative trade regime, those ACP countries not signing an EPA would have had the GSP or EBA for LDCs to fall back on.<sup>838</sup> The EU refused to provide an alternative to EPAs to safeguard the ACP's market access after 2007, but it did agree to limit the scope of 'interim agreements', that provided a legal basis for continuing (and improving) ACP preferences into 2008. The December 2007 ACP Council of Ministers "deplore[d] the enormous pressure that has been brought to bear on the ACP States by the European Commission to initial the interim trade arrangements, contrary to the spirit of the ACP-EU partnership".<sup>839</sup> Even Trade Commissioner Mandelson acknowledged that "the last months of 2007 were difficult" and that "some good relationships (...) have been strained".<sup>840</sup>

At the end of 2007, 15 countries in the Caribbean region, 2 Pacific countries and 18 African countries concluded an (interim) EPA. And at the same time, the second WTO waiver expired, ending the unilateral preferences for ACP countries of the Cotonou Agreement.

#### *Developments after 2007*

In 2008, countries that had concluded an (interim) EPA were entitled to make use of the trade benefits under Market Access Regulation No. 1528/2007. This regulation was a transitory arrangement that offered continued market access preferences to ACP partners in anticipation of their EPA ratification.<sup>841</sup> The seventeen ACP countries that had failed to take steps towards ratification of the full or interim EPAs, initialled in 2007, were bound to lose free access to EU markets and had to fall back on either GSP or EBA.

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While the Market Access Regulation was intended as an incentive to sign an EPA, it delayed the signing and ratification of these initialled agreements. There was no incentive for ACP-countries to ratify an EPA while the Market Access Regulation provided them with duty and quota free access to the EU for an open-ended interim period between the initialling of the agreements (and expiry of the WTO waiver) and their signature and ratification.

The years after 2008 are characterised by many countries signing an EPA, but with only one ratification (of the CARIFORUM EPA). This meant that all these countries did enjoy the unilateral benefits of the Market Access Regulation, not leading to the reciprocity the EU had aimed for through the EPAs. In 2013, the European Commission therefore announced that

<sup>838</sup> Overseas Development Institute (2007).

<sup>839</sup> Peter Mandelson speaking to the European Parliament Development Committee, 28 January 2008, as cited in: ECDPM and ODI (2009). Ch. 3, p.48.

<sup>840</sup> Ibid.

<sup>841</sup> The Council allowed the EC to propose ACP countries – as a delegated act – to be included in the Annex to the Regulation and thus let them benefit from continued preferential market access. Following the amendment of the MAR No. 1528/2007 in 2014, ACP countries were conditionally included into the Annex to the Regulation. The explanatory memorandum to the delegated act of the EC clarified that, as from 1 October 2016, ACP states which do not have an EPA in place will be removed from the Annex and thus will not anymore benefit from the preferential market access.

countries not having ratified at least interim EPAs for goods were to be removed from the Market Access Regulation regime as from the 1st of October 2014.<sup>842</sup>

These developments were followed by a number of EPAs being concluded and being ratified (by some countries). For example, regional EPAs with ECOWAS and SADC were concluded, and Cameroon and Fiji ratified the regional EPAs they were part of. Countries that had concluded regional EPAs or started the ratification of interim EPAs were reintegrated in the Market Access Regulation. This meant that these countries were allowed the benefits again.

**Box A7.1** *Regional EPA with East Africa (EAC)*<sup>843</sup>

The negotiations for the regional EPA with East Africa illustrate the challenging nature of the wider EPA negotiations. EAC is a customs union in Eastern Africa between Kenya, Tanzania, Uganda, Rwanda, Burundi and South Sudan with one external tariff regime.

Already in October 2014, an (interim) EPA on goods was concluded between the EU and EAC, but the ratification proved to be difficult. However, after several non-LDC ACP countries faced a possible loss of market access in the EU if they did not ratify by 1 October 2016, the EPAs were back on the agenda. To complicate matters, Brexit introduced an element of uncertainty in 2016. Some ACP countries such as Tanzania used the possible future lack of coverage of the UK as an argument to reconsider their decision to ratify their EPA with the EU.

After preparing and agreeing on the legal text, signing by the EU and all six EAC members was finally foreseen on 19 July 2016 in Nairobi. Due to last-minute objections expressed by Tanzania and Uganda, though, signing was postponed. On 1 September 2016, with the deadline of 1 October looming only two of the five countries (Kenya and Rwanda) went ahead and signed the EPA with the EU. Kenya also ratified the agreement.

However, this meant that not all EAC members signed and ratified the EPA. As a result, Kenya, being the bloc's only non-LDC, was to lose its free market access to the EU and fall back to the GSP treatment. This would have affected, amongst others, its cut flower exports to the EU. The rest of the EAC members, however, continued to have free access to EU under EBA. To reward Kenya for signing and ratifying the EPA, the EU has allowed the country temporary access to the European market under a special arrangement.

Since 2016, little progress has been made. Currently, Kenya is asking the other EAC partner states to adopt the Principle of Variable Geometry, allowing member

<sup>842</sup> Regulation (EU) No. 527/2013. See: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L\\_.2013.165.01.0059.01.ENG](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2013.165.01.0059.01.ENG).

<sup>843</sup> The East African (2019).

countries to enforce trade agreements with the EU individually rather than en bloc. This would allow Kenya to start accessing the EU market under an EPA. No agreement has been reached yet with EAC, though.

Currently, only one full regional EPA with CARIFORUM and three interim EPAs (Central Africa, West Africa – only Ivory Coast/Ghana – and Eastern and Southern Africa) have been implemented. However, legally all four EPAs are still provisionally applied. For all the other EPAs, the negotiations are in progress (for the Pacific) or on hold (West Africa and the East African Community).

In the table below, the current state of play of the EPAs, as presented by the European Commission, is shown.<sup>844</sup> It is important to note, though, that what the European Commission refers to as 'EPA implemented', actually refers to provisionally application and only with a limited number of countries of that region. For example, the EPA with Central Africa is marked as implemented, but Cameroon is the only country in that region that has actually concluded the negotiations and has signed, ratified and provisionally implemented the EPA.<sup>845</sup>

<sup>844</sup> EC (2020a).

<sup>845</sup> EC (2020b).

**Table A7.1** *State of play of the EPAs*

<b>EPA implemented</b>	Africa	West Africa	Cote d'Ivoire
			Ghana
		Central Africa	Cameroon
		East and Southern Africa (ESA)	Mauritius
			Madagascar
			Seychelles
			Zimbabwe
		Southern African Development Community (SADC) EPA group	Botswana
			Lesotho
			Namibia
	South Africa		
	Swaziland		
	Caribbean	Antigua and Barbuda	Jamaica
		Bahamas	St Lucia
		Barbados	St Vincent
		Belize	St Kitts and Nevis
		Dominica	Suriname
		Dominican Republic	Trinidad and Tobago
		Grenada	
Guyana			
Pacific		Fiji	
		Papua New Guinea	
<b>EPA concluded, adoption ongoing</b>	Africa	West Africa	16 countries
		East African Community (EAC)	5 countries
		Southern African Development Community (SADC) EPA group	Mozambique
	Caribbean		Haiti

Source: EC (2020a).

While the EPA negotiations have been difficult, both in terms of process and content, two recent developments require increased focus on these agreements. The Cotonou Agreement is due to expire in December 2020, which means that the EU is now negotiating the future of the ACP-EU partnership. Moreover, the European Commission launched a new development strategy for Africa by the end of 2018. In this strategy, the EPAs were presented as building blocks towards the African Continental Free Trade Area (AfCFTA).



## Annex 8

# List of interviewees

## Policy officers of the Dutch government

	Name	Function (at the time of the interview)	Department	Interview related to
Ms	Cécile Kleve	Advisor Europe	MGA	EPA case study
Mr	Dirk Klaassen	Deputy head of the Section	PR EU, Brussels	Trade and investment policy
Ms	Elke Koning	Coordinating policy officer	PR EU, Brussels	EPA case study
Ms	Elsbeth Akkerman	Former Deputy PR NL to the WTO, currently Ambassador in Vietnam	Embassy Hanoi, Vietnam	Trade and investment policy
Mr	Gé Kuijpers	Policy officer	IMH, MFA	Trade and investment policy
Mr	Henk Eggink	Senior policy officer	PR UN, Geneva	Trade and investment policy
Mr	Jochem Sprenger	Former policy officer	I&W	Investment case study, TiSA case study
Ms	Manon Post	Senior policy officer	PR UN, Geneva	Trade and investment policy
Mr	Marcel Vernooij	Deputy PR NL to WTO	PR UN, Geneva	Trade and investment policy
Ms	Margreet Groenenboom	Policy officer	LNV	Trade and investment policy
Ms	Marijn Noordam	Policy coordinating officer	IMH, MFA	Trade defence case study
Ms	Marjolein Sliep	Policy officer	Formerly IMH	EPA case study
Mr	Matthijs van Eeuwen	Policy officer	Formerly IMH	EPA case study
Ms	Maya Taselaar	Policy officer	IMH, MFA	TSD case study
Mr	Olaf Terlouw	Senior policy officer	EZK	Trade and investment policy
Mr	Ralf van de Beek	Senior policy officer	IMH, MFA	Trade and investment policy, investment case study
Ms	Rozemarijn Vermeulen	Senior policy officer	IMH, MFA	TSD case study
Ms	Tess van der Zee	Policy officer	PR UN, Geneva	Trade and investment policy
Mr	Thomas Nauta	Senior policy officer	PR UN, Geneva	Trade and investment policy
Mr	Tjalling Dijkstra	Strategic policy officer	IMH, MFA	Trade and investment policy, trade defence case study

## Other stakeholders

	Name	Function (at the time of the interview)	Department	Interview related to
Ms	Alette van Leur	Director of Sectoral Policies	ILO	Trade and investment policy
Mr	Anders Aeroe	Director	International Trade Centre	Trade and investment policy
Mr	Bernard Kuiten	Head of External Relations	WTO	Trade and investment policy
Ms	Cecile Billaux	Head of ACP Unit	DG TRADE, EC	EPA case study
Ms	Elisabeth Tuerk	Director	UNCTAD	Trade and investment policy
Mr	Hiddo Houben	Deputy PR of the EU to the WTO	EU permanent mission the WTO, Geneva	Trade and investment policy
Mr	Leo Palma	Deputy director	ACWL	Trade and investment policy
Mr	Leopoldo Rubinacci	Deputy director, DGA2H	DG TRADE, EC	Trade defence case study
Mr	Louis Prats	Head of unit	DG EMPL, EC	TSD case study
Ms	Madelaine Tuininga	Head of unit	DG TRADE, EC	TSD case study
Mr	Manfred Elsig	Professor International Relations	World Trade Institute	Trade and investment policy
Mr	Mark Koulen	Counsellor	WTO	Trade and investment policy
Mr	Milan Pajić	Trade Policy Advisor	(formerly) amfori	TSD case study
Mr	Nicolas Imboden	President	IDEAS centre	Trade and investment policy
Mr	Paolo Garzotti	Deputy PR of the EU to the WTO	EU permanent mission the WTO, Geneva	Trade and investment policy
Mr	Ravi Kanth	Journalist	The Wire; The Hindu	Trade and investment policy
Mr	Remco Vahl	Senior policy officer	DG TRADE, EC	EPA case study
Mr	Ricardo Melendez-Ortiz	Former director	ICTSD	Trade and investment policy
Mr	Richard Bolwijn	Head of investment research	UNCTAD	Trade and investment policy
Mr	San Bilal	Head of the Economic Transformation and Trade Programme	ECDPM	EPA case study



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