IIED submission to the online consultation on the Netherlands Draft Model BIT

Lorenzo Cotula and Thierry Berger

Introduction

This document constitutes a submission by International Institute for Environment and Development (IIED) to the online public consultation on the Draft Model Bilateral Investment Treaty (BIT) developed by the Government of the Kingdom of the Netherlands (the "Model"). IIED is a UK-based policy and action research organisation promoting sustainable development and linking local priorities to global challenges (www.iied.org).

The submission is centred on a set of short key points. These do not discuss whether BITs or investor-state dispute settlement (ISDS) are desirable in the first place, and they focus instead on the text of the Model. Also, the submission focuses on selected themes; a more in-depth review would be needed to do justice to the full suite of issues raised by the Model.

A "recalibrated" text – with limitations

The Model integrates several features found in many "recalibrated" investment treaties, and as such it represents a welcome departure from the BITs that the Netherlands has negotiated in the past. Examples include: i) references to sustainable development and the "right to regulate" (preamble and arts 2 and 6); ii) a CSR clause (art 7) ii) a CETA-style, tied-down fair and equitable treatment provision (art 9); and vi) criteria for determining whether an indirect expropriation has occurred (art 15).

The effectiveness of these provisions (e.g. tied-down fair and equitable treatment and expropriation clauses) will ultimately depend on how they are interpreted and applied. Some formulations (e.g. "manifest arbitrariness", as an element of fair and equitable treatment) still involve fairly open language; while they appear to indicate a high threshold, it is hard to foresee how tribunals will interpret them and apply them to specific factual configurations.

Drafters may consider further increasing specificity whenever possible, e.g. by adding illustrative examples of what would constitute "manifest arbitrariness" (as was done for "abusive treatment", art 9(2)(e)). Unlike earlier Netherlands BITs, the Model codifies the notion of "legitimate expectations" (art 9(4)). Over the years, the application of this concept has

raised significant regulatory space concerns, and this provision could undermine the specificity achieved through the first part of article 9.

Several clauses are formulated in ways that reduce their effectiveness. For example, the CSR clause creates no obligations for states or investors, and it falls short of the investor obligations provisions seen in some recent treaty practice (see http://pubs.iied.org/pdfs/17454IIED.pdf). Incidentally, the Guiding Principles on Business and Human Rights are voluntary but they are not optional, i.e. all businesses do have a responsibility to respect human rights; the CSR clause does not fully reflect this.

The sustainable development clause is another provision that could be formulated more effectively: while it reaffirms the parties' international obligations concerning labour and the environment, it does not clarify what is meant by the "high levels of environmental and labour protection" which the parties are required to provide for, resulting in an unspecific and thus ultimately difficult-to-enforce norm.

The most-favoured-nation (MFN) clause excludes substantial obligations from other trade and investment treaties (substantive exclusion), as well as ISDS (procedural exclusion), from MFN treatment (art 8). Given the large number of "first generation" BITs concluded by the Netherlands, this provision is to be welcomed to ensure investors cannot cherry pick standards from older treaties.

Depending on its interpretation and application, however, the "absent measures adopted or maintained by a Contracting Party pursuant to [substantive obligations in other trade and investment treaties]" proviso could undermine the effectiveness of the substantive exclusion.

ISDS

The Model's ISDS provisions will cease to apply upon entry into force of a treaty providing for a multilateral investment court (MIC, art 15). The MIC proposal has formed the object of considerable debate and its contours are still to be clarified. But discussions are yet to fully consider the wide range of challenges that affect the settlement of investment-related disputes (see e.g. http://pubs.iied.org/pdfs/12603IIED.pdf).

The Model departs from prevailing ISDS approaches in that it provides for all members of an arbitral tribunal to be appointed by an appointing authority – the ICSID Secretary-General for ICSID and ICSID/AF arbitration, and the PCA Secretary-General for UNCITRAL arbitrations (art 20). This approach subtracts membership of the tribunal from the disputing parties' control, thereby addressing some public concerns about incentive structures in ISDS.

However, a recent OECD Consultation Paper (https://www.oecd.org/investment/investment-policy/ISDs-Appointing-Authorities-Arbitration-March-2018.pdf) raised several issues about appointing authorities, including: the lack of standardised disclosure of information about appointment processes; complex systems that are difficult for the public to understand; and limited mechanisms for public or internal accountability of appointing authorities. The Model could address some of these issues, for example by mandating minimum standards of transparency and disclosure in appointment processes.

Welcome developments in relation to ISDS include application of the UNCITRAL Transparency Rules (art 20(11)); a clarification that, unless the disputing parties agree on restitution, awards can only order compensation; the exclusion of punitive damages; and a

requirement that members of an arbitral tribunal shall not act as legal counsel or shall not have acted as legal counsel for the last five years in ISDS.

However, the Model does not provide for counterclaims – which in the light of recent developments in the arbitral jurisprudence seems a major gap.

The Model does empower tribunals to consider, when determining compensation, any investor non-compliance with the Guiding Principles on Business and Human Rights and the OECD Guidelines. But a potential reduction in damages seems an inadequate mechanism for dealing with human rights violations, and the current formulation would not capture a wider range of investor non-compliance issues including breaches of national law in areas such as land, labour and the environment.

Mailbox companies and the definition of “investor”

Over the years, the Netherlands has developed an extensive network of international investment treaties, and businesses have used Netherlands BITs to bring numerous arbitration claims – including many businesses that established companies with no or limited real economic links to the Netherlands in order to maximise legal protection for their assets.

The Model’s definition of “investors” seeks to address this issue by requiring legal persons to have substantial business activities in the home state’s territory (art 1(b)). This is an increasingly standard provision in recent investment treaties, but its formulation is unspecific – especially for a country with a particularly developed corporate structuring industry: while the wording would probably exclude pure mailbox companies, the clause does not set a clear threshold and in many cases much will depend on interpretation.

Alternative options could be explored that more directly tie corporate nationality to the location of the corporate headquarters. At the very least, the clause could identify non-exhaustive, illustrative parameters to assess “substantial business activities” (e.g. employment, tax certificates, minimum levels of working capital), and place on the investor the burden of proof as to whether the requirement is met.

Relatedly, the Model enables (“may”) states to deny benefits to an investor that has changed its corporate structure with the main purpose to submit a claim (abuse of rights; art 16(3)). However, denial-of-benefits clauses formulated in such permissive terms (“may”) have proved to be of limited effectiveness in an arbitration context, and “abuse of rights” questions would be more effectively dealt with as a jurisdictional issue.

About the authors

Dr Lorenzo Cotula is a principal researcher in law and sustainable development at the International Institute for Environment and Development (IIED), where he leads the Legal Tools for Citizen Empowerment programme (www.iied.org/legal-tools).

Thierry Berger is a qualified solicitor and IIED Associate focusing on law and sustainable development. Prior to his collaboration with IIED, Thierry worked for global law firms for 10 years specialising in international arbitration.