

# Evaluation international trade and investment policy of the Netherlands

Terms of Reference

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## 1 Introduction

The Dutch trade and investment policy falls under article 1.1 of the budget on sustainable development, trade, and investment of the Minister for Foreign Trade and Development Cooperation (in Dutch: BHOS). The policy has of course developed over time, but is currently characterised by two overarching goals: (1) participating in and promoting a multilateral rule-based trade- and investment system that focuses on sustainability, inclusivity of developing countries, and a level playing field<sup>1</sup>, and (2) promoting sustainable and inclusive bilateral trade agreements between the European Union (EU) and third countries, and effectively implementing these agreements.<sup>2</sup>

As broad as these goals are, so diverse are the topics covered by Dutch trade and investment policy. Dutch trade policy mainly focuses on creating favourable conditions to trade. However, given that the Netherlands is an EU member state and that trade policy is a full and exclusive EU competence, the Netherlands can only strive for such favourable conditions together with the European Commission (EC) and other member states. Dutch trade policy is therefore concerned with trying to influence policy that is made within the three political institutions of the EU: the EC, the Council, and the European Parliament (EP). Moreover, the Netherlands has to implement the directives and regulations that are agreed upon in the EU and the WTO. The EU and WTO institutions thus play a pivotal role in trade and investment policymaking. Given this, another important focus of Dutch trade and investment policy is trying to shape the context under which the relevant EU and WTO institutions function.

The European Commission has the right of initiative and is thus responsible for planning, preparing and proposing new European legislative and budgetary initiatives concerning trade policy.<sup>3</sup> In 2015, the EC presented its 'Trade for all'-strategy as a response to the rise of global value chains, rising societal concerns and shifting power balances. To deal with these changes, the EU trade policy focuses on, amongst others, promoting trade in services, facilitating digital trade, ensuring the effective management of the movement of goods and protecting innovation. In addition, the strategy not only pays attention to creating new policy and negotiations with third countries, but also to the implementation and enforcement of (existing) policy and international agreements.<sup>4</sup> Together with the EC and other EU member states, the Netherlands is involved in developing EU positions for multilateral negotiations that take place in the World Trade Organization (WTO). In addition, the Netherlands is involved in negotiating and effectively implementing (new) trade agreements of the EU with third countries and developing the preferential EU trade policy towards developing countries in the Generalised Scheme of Preferences (GSP).<sup>5</sup>

Although Dutch trade and investment policy have the same two overarching goals, the policy areas differ slightly. Both trade and investment policy focus on creating favourable conditions for Dutch firms abroad, but investment policy also creates rights for existing investors to international arbitration. For example, through Bilateral Investment Treaties (BITs) of the Netherlands with third

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<sup>1</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) <https://www.oecd.org/trade/topics/levelling-the-playing-field/>, accessed on 21 August 2019).

<sup>2</sup> Memorie van Toelichting (2019) [http://www.rijksbegroting.nl/2019/voorbereiding/begroting,kst248597\\_6.html](http://www.rijksbegroting.nl/2019/voorbereiding/begroting,kst248597_6.html).

<sup>3</sup> EUR Lex (2019) [https://eur-lex.europa.eu/summary/glossary/initiative\\_right.html](https://eur-lex.europa.eu/summary/glossary/initiative_right.html), accessed on 20 August 2019.

<sup>4</sup> EC (2015) Trade for all: Towards a more responsible trade and investment policy, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1381>.

<sup>5</sup> GSP removes or lowers import duties for products that vulnerable developing countries put on the EU market (EC (2019) <http://ec.europa.eu/trade/policy/countries-and-regions/development/generalised-scheme-of-preferences/>, accessed on 20 August 2019).

countries, covered investors have the right to binding international arbitration (so-called Investor-State Dispute Settlement) if 'national treatment' (that is 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.<sup>6</sup>

Moreover, as the existence of Dutch BITs shows, investment policy is not (yet) a fully exclusive EU competence. Since 2009, the competence for negotiating new investment agreements has moved to the EU level. Investment protection of Foreign Direct Investment (FDI) and possibly market opening for new FDI could since then be negotiated in the context of deep and comprehensive Free Trade Agreements (FTAs) with third countries.<sup>7</sup> An opinion of the European Court of Justice (ECJ) on the allocation of competences between the EU and the EU member states for concluding the EU-Singapore FTA changed this. The ruling made clear that the following areas are still a 'shared competence': (1) portfolio foreign investment, (2) Investor-State Dispute Settlement (ISDS), and (3) state-to-state dispute settlement relating to portfolio investment.<sup>8</sup> On those issues, the ECJ concluded that provisions "cannot be approved by the European Union alone".<sup>9,10</sup> Investment agreements are again split from FTAs and will from now on be stand-alone agreements. However, EU member states may, with explicit permission of the EC, still renew existing bilateral investment treaties, except for those with other EU member states.

Dutch 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. In addition, the Netherlands is involved in developing broader European investment agreements, efforts to establish a multilateral investment court, and multilateral negotiations on investment in the Organisation of Economic Cooperation and Development (OECD) and the WTO, including an effort to establish a plurilateral investment facilitation agreement in the WTO that would deal with investment promotion policies.<sup>11</sup>

### Aim of this evaluation

This evaluation has two aims. First, to assess the motivation behind the Dutch trade and investment policy. Why the Netherlands has decided to focus on certain policy issues and not on others? And how was the Dutch policy position established? Second, the evaluation aims to assess the extent to which the Netherlands successfully steered the agenda, decision-making, and implementation concerning

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<sup>6</sup> Rijksoverheid (2019) <https://www.rijksoverheid.nl/onderwerpen/internationaal-ondernemen/investeringsbeschermingsovereenkomsten>, accessed on 20 August 2019.

<sup>7</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>8</sup> European Court of Justice (2015), Opinion 2/15.

<sup>9</sup> Ibid, para. 244.

<sup>10</sup> In Opinion 2/15, a different understanding of 'shared competence' as defined in Art. 2 TFEU seems to be used (see Thym, D. (2017) 'Mixity after Opinion 2/15: judicial confusion over shared competences', *Verfassungsblog*, <https://verfassungsblog.de/mixity-after-opinion-215-judicial-confusion-over-shared-competences/>, accessed on 21 August 2018).

<sup>11</sup> Plurilateral trade agreements are made among 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) <http://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/package-multilateral-and-plurilateral-trade-agreements>, accessed on 20 August 2019).

trade and investment policy at the EU and WTO level. However, as previously described, both Dutch trade and investment policy are characterised by layered, multi-level policy-making. There is interdepartmental coordination within the Netherlands, coordination at the EU level (within the EC, the Council, and the EP), and negotiations at the international level, for example collectively with members of the WTO or with a third country in bilateral free trade agreements. This makes it challenging for Dutch policymakers to successfully influence policy outcomes in terms of international trade and investment policy and thus (indirectly) have an impact on, amongst others, economic growth, sustainable development, employment, and distribution of benefits. Moreover, the multilayeredness holds limitations to this evaluation (see section 3.3 for a detailed discussion of the limitations).

The outcome of this evaluation will, together with other IOB studies that cover elements of Article 1 of the BHOS-budget, serve as input for the policy review of the entire Article 1.<sup>12</sup> The policy review is scheduled for 2020.

## 2 Background

### 2.1 Institutional setting

#### National level

Dutch trade and investment policies are part of Article 1 of the budget on sustainable economic development, trade and investment of the Minister for Foreign Trade and Development Cooperation (in Dutch: BHOS). Under Article 1, the Minister has the following general responsibilities: to *finance*, *stimulate*, *direct*, and *execute*.<sup>13</sup> Here, *finance* refers to tailor-made and interdependent financial instruments to promote export and investment, to facilitate trade, and to acquire market access. *Stimulate* covers the promotion of compliance of Dutch multinational companies with the OECD Guidelines on Responsible Business Conduct (RBC)<sup>14</sup>, stimulating good governance, and foster sustainable value chains in low and middle income countries. *Direct* refers to the promotion of sustainable, inclusive bilateral trade agreements of the EU with third countries, stimulating public-private cooperation, and economic diplomacy to promote Dutch economic interests. Finally, *execute* covers dealing with complaints of Dutch companies abroad, the execution of export control on strategic goods, and the implementation and execution of international sanctions related to export. In this evaluation, the focus will be on trade and investment policy that falls under the responsibilities to direct and execute (although sanction policy is not part of the study).

In 2013, Dutch policies dealing with development cooperation and trade were brought together under one minister, the minister for BHOS. In the policy document ‘*A world to gain: A New Agenda for Aid, Trade and Investment*’, Dutch minister Lilianne Ploumen presented a broad policy agenda to ban extreme poverty worldwide, stimulate sustainable and inclusive growth, and create more opportunities for Dutch businesses. This clear link between development policy on the one hand and trade and investment policy on the other hand can also be seen in the previously mentioned ‘Trade for all’ strategy of the EC that was endorsed by the Council and EP. This strategy aims to make trade

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<sup>12</sup> Examples of other studies that cover elements of Article 1 are the evaluation of the Dutch policy on RBC, the aid for trade evaluation, the evaluation of economic diplomacy, and the evaluation of Economic Partnership Agreements (EPAs) of the EU with former African, Caribbean and Pacific (ACP) regions and countries.

<sup>13</sup> Memorie van Toelichting (2019).

<sup>14</sup> OECD (2019) <https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm>, accessed on 6 August 2019.

and investment policy more effective and transparent (by opening up negotiations to more public scrutiny). Moreover, with this strategy the EU aims to address not just (economic) interests, but also the promotion of European values through its foreign economic policy. In 2018, Dutch BHOS-minister Sigrid Kaag presented the government's policy document '*Investing in global prospects*' in which this policy is being continued and even intensified.

The Minister for BHOS<sup>15</sup> is supported by the Directorate for International Economic Governance and Trade Policy Department (IMH) within the DG Foreign Economic Relations (BEB) of the Dutch Ministry of Foreign Affairs (MFA). This DG is tasked with strengthening the Dutch competitive position and promoting an open world economy and sustainable globalisation.<sup>16</sup>

The MFA is not the only Ministry involved in the Dutch trade and investment policy. Other ministries, such as the Ministries of Finance, of Economic Affairs and Climate, of Social Affairs and Employment, of Agriculture, Nature and Food Quality, and of Infrastructure and Water Management, are also closely involved in the formulation and execution of these policies. Through cooperation of all the Ministries, the Dutch government hopes to achieve coherent trade and investment policy, for example concerning the promotion of trade and the reduction of poverty in developing countries.

This cooperation requires coordination between the MFA and the other involved Ministries, for example through the Interdepartmental Council for Trade Policy (IRHP) and the Coordination Committee European Integration- and Association problems (CoCo). Within IRHP, it is discussed what positions the Netherlands will take in negotiations and official meetings (bilaterally, within the EU or multilaterally, for example within the OECD or the WTO). The CoCo is used to determine the Dutch position in relevant specialist councils and the European Council in Brussels. Dutch policymakers then represent this coordinated position in the EU and the WTO.

## EU level

At the EU level, the main driver is of course the European Commission.<sup>17</sup> The EC recommends that trade negotiations should be opened, accompanied by the necessary negotiation directives. The Council, if necessary, modifies this recommendation and may change the negotiation directives by simple majority. The Commission retains a certain leeway for negotiation, negotiates the agreement with one or more third States or a competent international organisation (e.g. Mercosur or ASEAN). The end result of the negotiations is then presented to the Council and to the European Parliament. The latter needs to give its consent by simple majority, before the Council can approve the agreement in question by qualified majority. The draft agreement is also presented for approval and ratification to the member states as such and to their national parliaments in case of so-called 'mixed agreements'.<sup>18</sup> As has already been mentioned before, therefore, the Council, the EP, and the EC

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<sup>15</sup> Sigrid Kaag is the Dutch Minister of BHOS. Dutch Minister of Foreign Affairs, Stef Blok, heads the MFA together with Kaag. Blok is responsible for Dutch foreign policy as well as policy regarding the EU.

<sup>16</sup> Rijksoverheid (2019), <https://www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/organisatie/organogram/directeur-generaal-buitenlandse-economische-betrekkingen>, accessed on 11 September 2019.

<sup>17</sup> TFEU, Article 207.

<sup>18</sup> While in EU-only FTAs all policy areas covered fall under the sole responsibility of the EU institutions, in mixed agreements that responsibility is shared by the EU institutions and individual EU Member states. As previously mentioned, Opinion 2/15 stated on which policy issues member states and the EU still share competences, thus requiring the involvement of member states (and their parliaments) in the ratification process. But provided that portfolio investment and ISDS are not included or are covered in a separate 'mixed' agreement, Opinion 2/15 paved the way for broad and ambitious EU-only FTAs (Van der Loo, G. (2017) 'The Court's Opinion on the EU-Singapore FTA: throwing off the shackles of

together decide on trade policy.<sup>19</sup> This means that the Netherlands thus has to promote its position vis-à-vis negotiation proposals in the Council, in the EP and in the ongoing consultation processes with the EC during negotiations in the Trade Policy Committee (TPC) and the Foreign Affairs Council – Trade (FAC Trade).

### International level

Following coordination of the position at the EU level, trade and investment policy is then negotiated at international level. Particularly at the multilateral level within the World Trade Organization (WTO) but also bilaterally with third countries or regions in bilateral FTAs of the EU, such as the EU-Canada Comprehensive Economic and Trade Agreement (CETA), ASEAN<sup>20</sup>, Mercosur<sup>21</sup>, or regional EPAs. The WTO aims to promote trade and is the only intergovernmental organisation where its members negotiate multilateral rules and agreements concerning trade in a broad sense. Moreover, the WTO monitors implementation of the agreements, and offers members binding dispute settlement to enforce compliance. The EC also acts as party in trade dispute settlement.<sup>22</sup> In the WTO, the EU acts as one with the EC as negotiator and spokesperson. However, before and during negotiations, member states are consulted, for example in the TPC in Brussels or in coordination meetings held in Geneva (where the WTO headquarters are located).<sup>23</sup>

## 2.2. Developments in trade and investment policy

Trade and investment policy-making has been under pressure. Recent years have been characterised by, amongst others, an impasse in the Doha round negotiations in the WTO, a trend towards bilateral FTAs, increasing trade tensions, a backlash against trade liberalisation, failed TTIP-negotiations, or concerns about impacts of dispute settlement of investors on national policy space. This has resulted in a politicisation of trade and investment policy.<sup>24</sup> Examples are increasing tensions between the US, China, and the EU about unilateral trade measures and countermeasures<sup>25</sup>, the difficult Brexit-

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mixture?', CEPS Policy Insights, no. 2017/17, pp. 1-12; Van der Loo, G. (2018) 'Less is more? The role of national parliaments in the conclusion of mixed (trade) agreements', CLEER Papers, no. 2018/1, pp. 1-38). Moreover, ideally the approval of national parliaments and ratification by member states should be restricted to those parts of the agreement that do not fall under the exclusive competence of the EU. However, this precaution that is not always taken.

<sup>19</sup> After the Treaty of Lisbon, agreement by the EP is obligatory when an international trade agreement is presented. And when broad trade agreements are being negotiated by the EC, national parliaments have (to a certain extent) veto power. This veto power only applies on mixed agreements, where Member states still have decision-making power when agreement deals with matters belonging to national competencies, such as (judicial) enforcement of regulation.

<sup>20</sup> The Association of Southeast Asian Nations (ASEAN) is a regional intergovernmental organisation of ten countries (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam) that promotes integration.

<sup>21</sup> Mercosur is a South American trade bloc with Argentina, Brazil, Paraguay and Uruguay as full members. Venezuela is a full member as well, but has been suspended since December 2016.

<sup>22</sup> This is the case for trade issues. When it comes to investment issues, it should be noted that with BITs between the Netherlands and a third country, investors have direct access to binding international arbitration. In ISDS no intervention is needed from the Dutch government nor the EC.

<sup>23</sup> Carta, C. (2013) 'The EU in Geneva: the diplomatic representation of a system of governance', Journal of Contemporary European Research, 9:3, pp. 406-423.

<sup>24</sup> De Bièvre, D., S. Gstöhl and E. Van Ommeren (2018) 'Overcoming 'Frankenfoods' and 'secret courts': the resilience of EU trade policy', CEPON, no. 9, pp. 1-6; Forbes (2018) 'Trump effect of long-term trend: a more politicized trade and investment climate is here to stay', <https://www.forbes.com/sites/riskmap/2018/05/10/trump-effect-or-long-term-trend-a-more-politicized-trade-and-investment-climate-is-here-to-stay/#993b45475945>, accessed on 21 August 2019.

<sup>25</sup> Spiegel (2019) <https://www.spiegel.de/international/world/europe-caught-in-tensions-between-china-and-u-s-a-1273640.html>, accessed on 26 June 2019; The New York Times (2019)

negotiations including uncertainty about the future of UK-EU trade relations<sup>26</sup>, and sensitive trade and investment negotiations between the EU and third countries around ISDS<sup>27</sup>. At the same time, upcoming themes and non-trade concerns<sup>28</sup>, such as transparency, gender, climate change, and sustainable development have been dominating the trade and investment debate.<sup>29</sup> All these factors influence the Dutch policy making regarding trade and investment at national, EU, and WTO level.

## 3 Scope and research questions

### 3.1. Scope of this evaluation

The current evaluation covers the time period from 2013 to 2019. Since 2013, the directorate-general dealing with foreign economic affairs (DGBEB) no longer falls under the Ministry of Economic Affairs, but has become part of the Ministry of Foreign Affairs. At the same time, the link between trade and development cooperation was officially established with the BHOS-minister covering both policy areas in one portfolio. The last policy review of Dutch trade and investment policy has been conducted in 2007.<sup>30</sup> By taking the time period 2013-2019, the current evaluation is able to determine how successful the Netherlands under the auspices of the MFA has been at the EU and international level, but also whether the interests of developing countries have been taken into account in Dutch trade and investment policy. This coherence question will be addressed in greater detail during the 2020 policy review of article 1 BHOS.

Concerning the scope of the study, the type of trade and investment policies covered in this evaluation concern foreign policies aimed at improving trade and investment conditions for Dutch firms and efforts to create a level playing field.<sup>31</sup> This means, for example, that this evaluation does analyse Dutch policies and positions regarding the content of bilateral investment agreements, but that Dutch policies intended to attract foreign direct investments to the Netherlands are not taken into account. And this evaluation does look at the favourable conditions the 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 of Dutch firms.<sup>32</sup>

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<https://www.nytimes.com/2019/05/30/business/dealbook/us-europe-trade.html>, accessed on 26 June 2019; Forbes (2019) <https://www.forbes.com/sites/kenrapoza/2019/06/25/next-up-in-china-trade-war-sanctions/>, accessed on 26 June 2019; NRC (2019) <https://www.nrc.nl/nieuws/2019/05/24/handelsconflict-grootmachten-zet-eu-klem-a3961504>, accessed on 26 June 2019.

<sup>26</sup> Business Insider (2019) <https://www.businessinsider.nl/no-deal-brexit-gevolgen/>, accessed on 26 June 2019; Financial Times (2019) <https://www.ft.com/content/e257fcd6-b4d6-11e7-a398-73d59db9e399>, accessed on 26 June 2019;

<sup>27</sup> Politico (2016) <https://www.politico.eu/article/walloon-parliament-rejects-ceta-deal/>, accessed on 26 June 2019; JD Supra (2019) <https://www.jdsupra.com/legalnews/ceta-s-dispute-settlement-mechanism-63456/>, accessed on 26 June 2019; Financial Times (2019) <https://www.ft.com/content/e6797004-6cd8-11e9-80c7-60ee53e6681d>, accessed on 26 June 2019.

<sup>28</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>29</sup> The World Bank (2019) <https://www.worldbank.org/en/topic/trade/brief/trade-and-gender>, accessed on 6 August 2019; Ministerie van Buitenlandse Zaken (2019) 'Verslag consultaties gender en handel', <https://www.rijksoverheid.nl/documenten/vergaderstukken/2019/06/05/verslag-consultaties-gender-en-handel>; WTO (2019) [https://www.wto.org/english/res\\_e/publications\\_e/trade\\_climate\\_change\\_e.htm](https://www.wto.org/english/res_e/publications_e/trade_climate_change_e.htm), accessed on 6 August 2019; SDIP (2019) <http://sdiponline.org/>, accessed on 6 August 2019.

<sup>30</sup> Ministerie van Economische Zaken (2007) 'Beleidsdoorlichting Handelspolitiek'.

<sup>31</sup> Memorie van Toelichting (2019).

<sup>32</sup> An IOB-evaluation on RBC is forthcoming in 2019.

## 3.2 Research questions

The main research questions of the study are:

1. On which policy issues has the Netherlands focused in the period 2013-2019 and why did the Netherlands focus on these policy issues and not on others?
2. To what extent were the policy goals on these issues realised during the period of 2013-2019?

In order to answer these research questions, the following sub-questions are formulated:

1. How has Dutch trade and investment policy developed over time?
2. Which actors are 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 does Dutch trade and investment policy take the interests of developing countries into account?
4. To what extent did the Netherlands have policy success?
5. To what extent have external trends and factors influenced trade and investment policy?

Each of these sub-questions will be answered in a chapter of this evaluation. First of all, the evaluation starts with a policy reconstruction of the Dutch trade and investment policy. Here attention will be paid to how the policy was developed, how its institutional set-up, both at the national and European level, has changed over time (including how the Netherlands has tried to shape this set-up), how the discussion in the parliament has evolved, what positions stakeholders have taken and how all this has influenced the Dutch trade and investment policy.

Second, the evaluation continues with an analysis of the actors involved, the decision making procedures, and consultation processes within the Netherlands. Here the evaluation specifically looks at who is involved and how the procedure is organised to develop and promote the Dutch position on trade and investment in the EU and the WTO. The actors involved are very diverse: ranging from Ministers, Members of Parliament and policy officers at the different ministries and government institutions, to stakeholders in the private sector and civil society. Such a stakeholder analysis may explain why Dutch policymakers have focused on certain policy issues the past years.

Third, an overview will be presented of specific policy issues on which the Dutch government has focused. For each of these issues, the evaluation will pay attention to the Dutch position and to the motivation behind these issues. Why did policymakers and representatives of the Dutch government decide to pay a lot of attention to certain issues, while others were paid lesser attention to or even neglected? And how did policymakers and representatives of the Dutch government come to agreement on the policy goals?

In this section, the evaluation will also pay attention to the coherence between the Dutch trade and investment policy that was pursued at the European and international level, and the interests of developing countries. In this evaluation, it will be analysed whether the trade and investment policy issues that the Dutch policymakers put emphasis on, are also in line with the interests of developing countries. And whether the merger of development cooperation and trade and ministries also had an impact on the position determination in the area of trade and investment.

Fourth, the aim is to assess the Dutch efforts within the EU and the WTO and whether or not these efforts were successful. Since it is too time consuming to assess this for all policy issues the Dutch government has paid attention to, the evaluation will analyse four specific policy issues in detail in the form of case studies. These issues are: sustainable development, investment protection and investor

duties, Trade in Services Agreement (TiSA), and trade defense instruments (see section 4.1 for an explanation and justification of the case selection). For each of these cases, the complete influence process will be traced, thus allowing to trace mechanisms and identify power constellations that explain why policy success was achieved or not.<sup>33</sup>

Finally, given that policy-making does not happen in a vacuum, the evaluation will look at the international political and economic context in which trade and investment policy is made. External trends and factors that might have influenced it, either positively or negatively, will be identified or analysed. These outcomes could provide some insights in why certain efforts by Dutch policymakers were successful while others were not.

### 3.3 Limitations

Trade and investment policy is characterised by layered, multi-level policy-making. There is interdepartmental coordination within the Netherlands, coordination at the EU level and negotiations at the international level, for example collectively with members of the WTO or with a third country in bilateral free trade agreements. Given this multi-level governance<sup>34</sup>, it is not straightforward to attribute a certain policy outcome to the efforts made by Dutch policymakers. Therefore, this evaluation will also provide for four case studies. By focusing on a limited number of policy issues and tracing the complete influence process, it is possible to trace mechanisms and make statements about why Dutch efforts have been successful on certain policy issues, but not on others.<sup>35</sup> However, given that only four policy issues are analysed in detail, drawing conclusions about the Dutch impact on trade and investment policy in general is difficult and thus requires caution.

Moreover, 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, thus showing a certain selection bias. At the same time, as previously mentioned, this increases the likeliness of observing effects of Dutch efforts if any. If this evaluation does not observe an effect of policy influencing on policy issues that policymakers have been actively working, this might provide insights in how actions of the Netherlands could be altered.

## 4 Approach and methodology

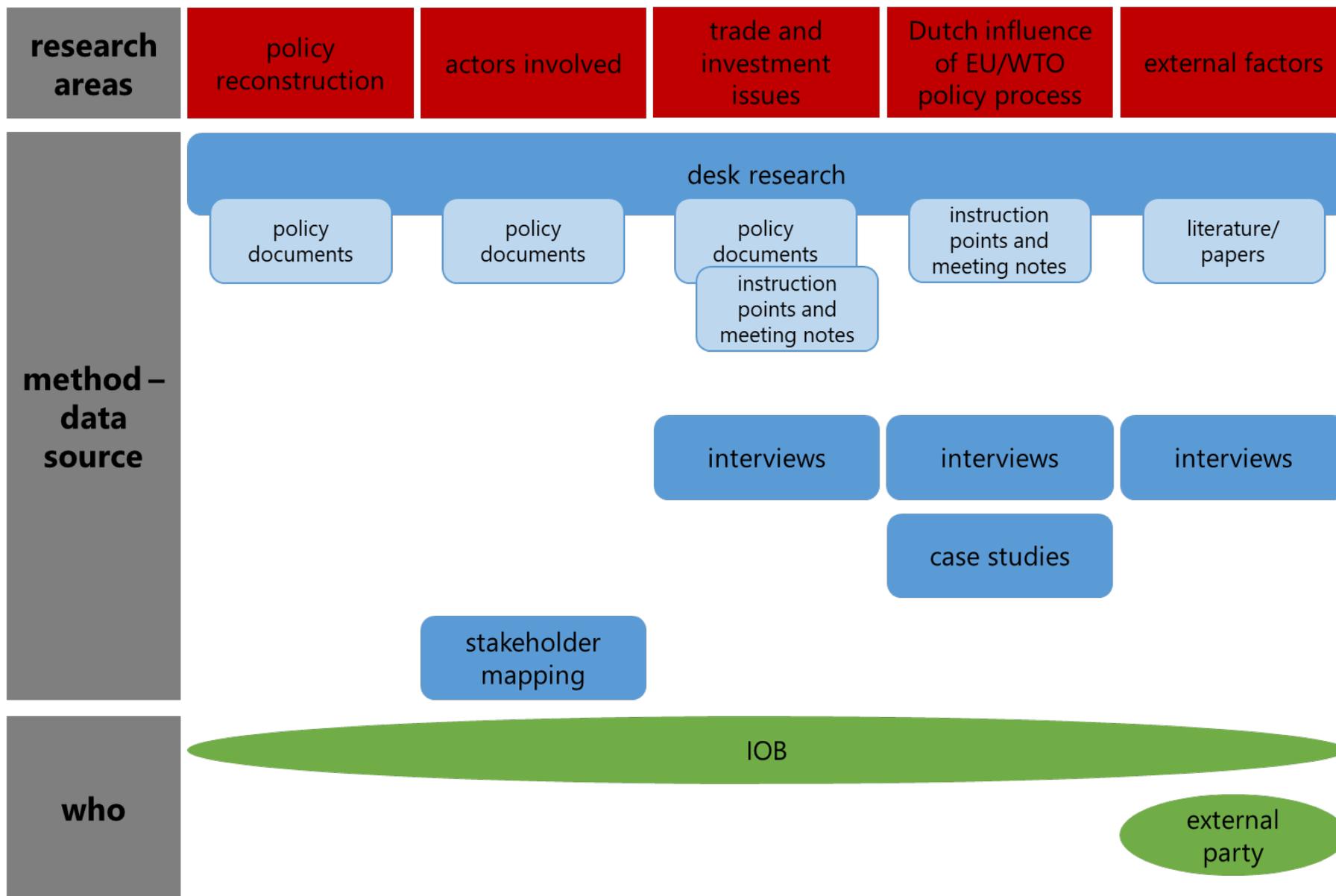
A summary of the different methods used and how they relate to the six research areas is presented in the figure below. A detailed explanation of each of the methods, as well the limitations of this evaluation follow thereafter.

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<sup>33</sup> Dür, A. (2008); Beach, D. (2017) *'Process-tracing methods in social science'*, Qualitative Political Methodology, pp. 1-28; Collier, D. (2011) *'Understanding Process Tracing'*, PS: Political Science and Politics, 44:4, pp. 823-830.

<sup>34</sup> Hooghe, L. and G. Marks (2001) *Multilevel governance and European integration*, Lanham: Rowman & Littlefield.

<sup>35</sup> Dür, A. (2008); Beach, D. (2017) *'Process-tracing methods in social science'*, Qualitative Political Methodology, pp. 1-28; Collier, D. (2011) *'Understanding Process Tracing'*, PS: Political Science and Politics, 44:4, pp. 823-830.



## 4.1 Approach

According to research conducted by political scientists, the policy process consists of five stages. In the first phase, the 'agenda-setting phase', a policy issue is brought to the agenda. This can be done by state, but also by non-state actors who actively lobby to get their issue on the policy agenda (be it a formal agenda, or simply 'on the radar' of policymakers).<sup>36</sup> A well-known example is the international ban on landmines, where NGOs in the end managed to convince governments to negotiate and ratify an agreement that contains such a ban.<sup>37</sup> At the WTO, there might be less room for formal agenda setting, but (Dutch) policymakers or representatives of civil society or the private sector can try to bring certain issues to the attention of WTO members (both through and outside EU channels). In the second phase, the 'policy formulation stage', policy is being formulated. When it comes to trade policy in the EU, this means that the EC presents a policy proposal. After the formulation, the 'policy decision phase' is when policy proposals are adopted. After these stages, there is the fourth phase of 'policy implementation' and the fifth phase of 'policy evaluation'. However, not all issues that are put on the political agenda (or brought to the attention) in the first phase of the policy cycle are in the end translated into policy, let alone result in negotiated outcomes in the WTO or elsewhere. Not only the efforts of the Dutch government matter here, also third countries with whom an agreement is struck have a say in the final outcome. And at the WTO, for instance, negotiations often cover a broad range of topics to cater to the interests of all members, while at the same time closing the negotiations requires a single undertaking. This means that "nothing is agreed until everything is agreed" and is one of the reasons for the impasse in the Doha round.<sup>38,39</sup> In addition, outcomes of trade and investment dispute settlement rulings could also influence the circumstances under which an item is brought forward or a policy proposal is voted on. Furthermore, whether or not decisions are being made also depends on the institutional context, which in itself could also be shaped by actors such as the Netherlands. Moreover, it is important to note that there often is a strong lobby (of both state and non-state actors) to keep issues off the agenda.<sup>40</sup> For example, within the WTO there is a strong lobby of mainly developing countries to make sure that no 'new issues' come to the agenda that could distract WTO Members from full implementation of the current Doha Development Agenda.<sup>41</sup>

In this evaluation, four stages of the policy cycle into account: the setting of the agenda, the formulation of policy proposals, the adoption of policy proposals, and the implementation of policy proposals. For each of these stages, research is conducted to assess to what extent Dutch policymakers were successful. If the study shows that the Netherlands is successful in putting issues

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<sup>36</sup> Bunea, A. (2013) Issues, preferences and ties: determinants of interest groups' preference attainment in the EU environmental policy. *Journal of European Public Policy*, 20(4): 552-570; Carpenter, R. (2007) Setting the advocacy agenda: theorizing issue emergence and non-emergence in transnational advocacy networks. *International Studies Quarterly*, 51(1): 99-120; Pralle, S. (2006) Timing and sequence in agenda-setting and policy change: a comparative study of lawn care pesticide politics in Canada and the US. *Journal of European Public Policy*, 13(7): 987-1005.

<sup>37</sup> Carpenter, R. (2011) Vetting the advocacy agenda: network centrality and the paradox of weapon norms. *International Organization*, 65(1): 69-102;

<sup>38</sup> The Doha round, also known as the Doha Development Agenda (DDA) aims to achieve major reform of the international trading system through the introduction of lower trade barriers and revised trade rules. The fundamental objective is to improve the trading prospects of developing countries.

<sup>39</sup> WTO (2019) [https://www.wto.org/english/tratop\\_e/dda\\_e/work\\_organ\\_e.htm](https://www.wto.org/english/tratop_e/dda_e/work_organ_e.htm), accessed 23 August 2019.

<sup>40</sup> Dür, A., P. Bernhagen and D. Marshall (2015) Interest group success in the European Union: when (and why) does business lose? *Comparative Political Studies*, 48(8): 951-983; Murdie, A. and S. Webeck (2015) Responding to the call: human security INGOs and countries with a history of civil war. *International Political Science Review*, 36(1): 3-19; Baumgartner, F.R., J.M. Berry, M. Hojnacki, D.C. Kimball and B.L. Leech (2009) *Lobbying and policy change: who wins, who loses, and why*. Chicago: The University of Chicago Press.

<sup>41</sup> Khor, M. (2001) 'The proposed new issues in the WTO and the interests of developing countries', Third World Network, 14, pp. 1-34; South Centre (2015) 'WTO's MC10: the call for 'new issues' at the WTO and implications for developing countries', December 2015, pp. 1-27.

on the policy agenda or bring to the attention, yet these issues are rarely translated into actual policy decisions, this could indicate that more effort should be put, for example, in influencing the voting behaviour of other EU (member) states. At the same time, one should also 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.

### Outsourced research

As previously mentioned, policy-making and policy influencing does not happen in a vacuum. The part of the analysis that pays attention to external factors that might have affected the Dutch efforts in the field of trade and investment policy will be outsourced to external consultants. In this chapter of the evaluation, the trends and changes in politics that led to the Dutch focus on certain policy issues will be analysed. For example, a rising demand from parliament and civil society to use trade deals as a lever to also protect the environment, could explain a focus on such policy issues.<sup>42</sup> Moreover, this part of the analysis will also discuss external factors that explain the context in which trade and investment policy is being made. Examples are the impasse in the Doha round negotiations, the trend towards bilateral FTAs, increasing trade tensions, creeping protectionism, the undermining of the functioning of WTO as international organisation, the development of complex international value chains, the merging of goods and services and intellectual property, regionalisation, and a backlash against trade liberalisation.

A separate Terms of Reference is prepared for this part of the evaluation. The invitation for tendering will be sent to all consultants that are part of the framework contract on effect evaluations.

## 4.2 Methodology

This evaluation relies on desk research and qualitative interviews with stakeholders. In the next sections, the specific research methods will be discussed.

### Desk research

The desk research concerns an analysis of different kinds of policy documents and will feed into all five sub-questions. A review of policy documents, such as budgets, answers to questions by parliament, policy letters and memoranda, will be used for the policy reconstruction (Chapter 1), the overview of the actors involved (Chapter 2), the overview of specific trade and investment issues (Chapter 3) and the four case studies (Chapter 4). These documents are all publicly available. Instructions and speaking points (to the extent available) for the Dutch delegation in EC meetings and the minutes from these meetings will be compared and analysed for the overview of and motivation behind specific trade and investment issues the Dutch government has focussed on and for the four case studies (Chapters 3 and 4). These documents will be collected from the MFA archives. A review of the trade and investment literature<sup>43</sup> will feed into the analysis of trade and investment policy

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<sup>42</sup> NRC (2019) 'Deal EU-Mercosur wacht moeilijk pad', 2 juli 2019, <https://www.nrc.nl/nieuws/2019/07/02/deal-eu-mercotur-wacht-moeilijk-pad-a3965757>, accessed on 22 August 2019; FD (2019) 'Brussel bindt de strijd aan met ontbossing', 23 juli 2019, <https://fd.nl/economie-politiek/1309674/brussel-bindt-de-strijd-aan-met-ontbossing>, accessed on 22 August 2019.

<sup>43</sup> Regarding the specific policy issues the Dutch government focusses on.

issues, the coherence with the interests of developing countries and external developments (Chapters 3-5).

### Stakeholder mapping

A stakeholder mapping will be used to identify all relevant actors involved in the policy process in the Netherlands and in the EU, but also to gain insight in their policy goals and mutual relationships. The stakeholder mappings consists of two aspects, stakeholders within the governmental sphere and stakeholders in the private sector and civil society. Stakeholders within the governmental sphere concern amongst others policymakers at the relevant departments within MFA (IMH and DDE) and other Ministries, members of the different councils involved in policy making at national (Interdepartmental Council for Trade Policy and the EU Coordination Committee), at EU level (the European Commission, TPC, FAC-Trade, other member states, the European Parliament) and at 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 the Dutch policy making. Examples are the Dutch Trade and Investment Board, the Dutch employers' federation VNO-NCW, the Brussels-based business association BUSINESSEUROPE, the Dutch employees' federation FNV, or think tanks such as the Geneva-based International Centre for Trade and Sustainable Development (ICTSD).<sup>44</sup>

### An exploratory overview of policy issues

As preparation for this ToR, exploratory talks have been held with policymakers who currently work or have previously worked at the International Economic Governance and Trade Policy Department (IMH) of the DG Foreign Economic Relations (BEB). The aim of these talks was to create an overview of trade and investment policy issues that Dutch policymakers have focussed on in the research period. Based on these talks the following issues have been identified:

- sustainable development<sup>45</sup>
- trade defense instruments<sup>46</sup>
- investor protection and duties<sup>47</sup>
- transparency and accountability
- public support for trade and investment agreements
- Trade-Related Aspects of Intellectual Property Rights (TRIPS) plus
- coherence between trade and investment policy and other policy areas
- gender
- trade facilitation
- trade in services
- implementation of trade agreements
- Generalised Scheme of Preferences (GSP)
- quality of Foreign Direct Investment (FDI)
- e-commerce

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<sup>44</sup> In November 2018, ICTSD shut its doors. However, the former employees could still provide us with valuable insights on the Dutch and European role a WTO negotiations.

<sup>45</sup> This includes amongst others the sustainable development chapters in FTAs (dealt with at EU level) and the enforcement of specific provisions, subsidies for fisheries (dealt with at WTO level), or production methods requirements concerning animal welfare for example.

<sup>46</sup> This concerns trade defense measures such as anti-dumping, fight against protectionism from other countries (e.g. US), and screening of foreign investments.

<sup>47</sup> This concerns 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), investment facilitation, and the potential for a Multilateral Investment Court (MIC).

These policy issues will be further discussed in a separate chapter of the report when the Dutch policy goals are identified and the motivation behind these goals is analysed. In addition, this chapter will pay attention to the coherence between trade and investment policy on the one hand and the interests of developing countries on the other hand.

### Case studies

Out of all the trade and investment policy issues that were identified by involved policymakers, four issues were selected for in-depth analysis. This analysis takes the form of case studies. For the selection of these case studies the following aspects were taken into account: (1) whether or not policymakers have actively been working on these issues during the time period, (2) coverage of both trade and investment issues, (3) coverage of issues focused on at both EU and WTO level, and 4) coverage of issues where the final outcome appears to be in line with the Dutch position and issues where this appears not to be the case (be it at the agenda setting, policy formulation, policy outcome or implementation level).<sup>48</sup>

Of course, a possible bias in the case selection could occur, given that the selection is based on a mapping of issues provided by policymakers. At the same time, it could be argued that if this evaluation does not observe effects of Dutch efforts on issues that policymakers have been actively working on, it is highly unlikely that such effects would be observed on issues they have not been very active on.

For each of the four case studies, a detailed overview of the policy issue and of the Dutch position will be provided. In addition, an analysis will be provided of how the Dutch government has tried to influence the agenda setting, policy proposal stage, policy making stage, or implementation stage at the national, the EU, or WTO level. Which strategies were used? Second, we will analyse the extent to which the Dutch government succeeded in influencing the respective stages. Which strategies proved to be successful? Or why were some policy outcomes not in line with the initial Dutch position?

The selected issues are:

1. sustainable development;
2. investment protection and investor duties;
3. Trade in Services Agreement (TiSA)
4. trade defense instruments

Given that some of these policy issues are very broad, we have further narrowed down the case studies. The first case study, on sustainable development, will only focus on the rise of sustainable development chapters in FTAs between the EU and third countries, and to a small extent to some environmental issues that are usually not part of FTAs but relegated to the WTO level such as fisheries subsidies in view of the global nature of the problems. The second case study, on investment protection, will focus 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 potential investment facilitation agreement in the WTO will only briefly be discussed. The third case study, on the Trade in Services Agreement (TiSA), will focus on the talks held by WTO members on this topic. The fourth case study, on trade defense instruments, will focus on

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<sup>48</sup> This assessment is based on the exploratory talks with policymakers. In the actual research, this assessment will be thoroughly checked through interviews and desk research.

two specific examples of trade defense instruments used by the EU (and promoted by the Dutch government), namely concerning bicycles and biodiesel.

### Interviews

Next to desk research, this study also strongly relies on face-to-face interviews. These interviews will mainly provide input for the case studies (Chapter 4). Besides, they are important for the overview of trade and investment issues and the coherence between trade and investment policy and the interests over developing countries (Chapter 3). Moreover, interviews will be used to identify external factors that could have affected the Dutch efforts (Chapter 5).

IOB will conduct interviews with policy officers such as involved actors within the MFA, policymakers at other ministries, EC officials, and the Dutch permanent representations in Brussels (EU) and Geneva (WTO), as well as with non-state actors (such as business associations, companies and non-governmental organisations (NGOs)) who in turn try to influence the policymakers. While these interviews will touch upon the external factors and global trends that have positively or negatively influenced the effort of policymakers in promoting the Dutch position on trade and investment policy issues, several interviews will also be held with trade and investment experts to discuss these external factors and global trends.

The interviews will take place in October and the beginning of November. The interviewees will receive an invitation end of September or early October. One week before the interview takes place we will share the interview questions in order for the interviewee to better prepare. At the latest one week after the interview we will share the interview notes for fact checking. In case quotations will be used in the report, permission will be asked from the interviewee.

## 5 Meet the team

The project team consists of three teams: (1) the research team, consisting of IOB researchers and external consultants, (2) the advisory group, consisting of IOB staff, and (3) the reference group, consisting of policymakers, stakeholders' representatives, and independent trade and investment experts. Members of each group and their tasks are presented below.

### Research team

The research is conducted by a team of IOB-staff members. This team consists of:

- Kirsten Lucas
- Stephanie Bouman

The external consultants will be selected by means of tendering. The tendering will be done via the framework contract that is in place with 15 consortia.

### Advisory group

A group of IOB staff will be updated every six weeks on the progress of the research and will provide feedback on the final report. This advisory group consists of:

- Joep Schenk
- Pim de Beer
- Josine Polak

### Reference group

Like the advisory group, the reference group will provide feedback on the ToR and the draft final report, and advice the evaluation team on other relevant matters. This reference group consists of:

- Otto Genee – IOB (chair of reference group)
- Tjalling Dijkstra – Policy officer IMH (trade)
- Ralf van de Beek – Policy officer IMH (investment)
- Winand Quaadvlieg – VNO NCW
- Myriam Vander Stichele – SOMO
- Pieter Jan Kuijper – Expert UvA

## 6 Deliverables and planning

The final report of this study will contain a policy reconstruction, a description of the actors involved, an overview of the policy issues the Dutch government has paid attention to and an analysis of the extent to which the interests of developing countries were taken into account when selecting these issues, four case studies, an analysis of the external developments that have affected the Dutch trade and investment policy, conclusions and policy recommendations, and an executive summary. The report will be written in English, and include a Dutch translation of the executive summary. The part of the study that is conducted by consultants may also result in a separate publication, again written in English.

The evaluation will start in September 2019 and will run till May 2020. The detailed planning for the evaluation is presented in the table below.

### Provisional planning

Activity	Deadline
Reference Group meeting	09-Sep 2019
Tender sent out via framework contract	17-Sep 2019
Contract signed with the consultants to start the work on external developments	19-Nov 2019
1 - Policy reconstruction	4-Oct 2019
2 - Actors involved	30-Oct 2019
Final interviews	30-Nov 2019
3 - Overview focus H&I issues	13-Dec 2019
<i>First concept external developments</i>	13-Dec 2019
Feedback external developments	23-Dec 2019
4 - Case studies Kirsten	24-Jan 2020
4 - Case studies Stephanie	24-Jan 2020
Concept report ready for internal feedback	28-Jan 2020
Internal feedback	04-Feb 2020
<i>Draft final report external developments</i>	10-Feb 2020
5 - External developments	17-Feb 2020
Conclusions and policy recommendations	02-Mrt 2020
Executive summary English	04-Mrt 2020

Executive summary Dutch	06-Mrt 2020
<u>Concept report ready for internal feedback</u>	09-Mrt 2020
Internal feedback	11-Mrt 2020
<u>Concept report send to the advisory group</u>	Week 12 2020
Feedback from the advisory group	Week 14 2020
Advisory meeting	Week 14 2020
<u>Concept report send to Reference Group</u>	Week 15/16 2020
Feedback from Reference Group	Week 18 2020
Reference Group meeting	Week 18 2020
<u>Final report external developments</u>	15-May 2020
Final report	29-May 2020