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Memorandum

To: Ministry of Foreign Affairs
For the attention of: Directorate-general International Cooperation
Concerning: Response internet consultation new model text investment agreements

1 INTRODUCTION

1. On 16 May 2018 the Ministry of Foreign Affairs, Directorate-general International Cooperation, published an internet consultation regarding a new model text for Dutch investment agreements.[1] A response to said internet consultation is hereby submitted on behalf of NautaDutilh N.V.'s[2] international arbitration department. We hereby give explicit permission to make this response public as referred to under "publication responses" on the internet consultation website.

2 TEXTUAL SUGGESTIONS AND BACKGROUND

2. In line with the question posed to those sending in responses to the internet consultation,[3] below we will provide suggested textual amendments to the proposed new model text for investment agreements (hereinafter: the draft text), along with explanatory background information regarding those suggestions. We will focus our suggestions around four themes:

- stricter definitions of "investor" and "investment";
- stricter definitions of substantive protection standards;
- new dispute settlement provisions; and
- new obligations imposed on investors.

[1] See <https://www.internetconsultatie.nl/investeringsakkoorden>.
[2] NautaDutilh is an international law firm with offices in Amsterdam, Brussels, London, Luxembourg, New York and Rotterdam. With more than 400 lawyers, notaries and tax advisers, it is one of the largest in the Benelux region. See <www.nautadutilh.com>.
[3] *"Do you have concrete suggestions, preferably in the form of textual suggestions, to amend the model text?"*.

2.1 Stricter definitions of investment and investor

2.1.1 Article 1(a)

3. We would suggest altering the proposed text of Article 1(a) as follows:

> *"'investment' means every kind of asset ~~that has the characteristics of an investment, which includes a certain duration, the commitment of capital or other resources, the expectation of gain or profit, and the assumption of risk~~. Forms that an investment may take include, but are not limited to:*
>
> (…)
>
> *~~'Claims to money' within the meaning of sub (iii) does not include claims to money that arise solely from commercial contracts for the sale of goods or services by a natural or legal in the territory of a Contracting Party to a natural or legal person in the territory of the other Contracting Party, the domestic financing of such contracts, or any related order, judgment, or arbitral award.~~"*

4. The draft text imposes stricter requirements for an "investment" to exist, incorporating the *Salini* criteria: *"contributions, a certain duration of performance of the contract, and a participation in the risks of the transaction."*[4] In addition to the *Salini* criteria, investments must also meet the condition of entailing the expectation of gain or profit. Next to this, claims to money arising solely from commercial contracts for the sale of goods or services between natural/legal persons of the Contracting Parties are explicitly excluded.

5. In our practice and experience, we have not come across situations in which the Netherlands has suffered from the current broad definition, but rather only situations in which the Dutch economy has greatly benefited from the positive investment climate that is created by offering broad protection to those who choose to bring about foreign investments via the Netherlands. It would be unfortunate if the new model text would take away this strong benefit for the Netherlands' economy that exists under the current model text.

2.1.2 Article 1(b)(ii)

6. We would suggest altering the proposed text of Article 1(b)(ii) as follows:

[4] *Salini Costruttori SpA and Italstrade SpA v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, paragraph 52.

> *"any legal person constituted under the law of that Contracting Party ~~and having substantial business activities[1] in the territory of that Contracting Party~~; or"*

7. In contrast to the current broad definition of an "investor" in Dutch investment agreements (hereinafter: "BITs"), the draft text imposes additional requirements on the definition of investors, which essentially aim to exclude shell ("mailbox") companies from the scope of protection of the BIT. Thus, a legal entity must not only be constituted under the law of one of the Contracting Parties, but must also have "substantial business activities" in that State. If a legal entity constituted under the law of either Contracting Party does not have substantial business activities in that Contracting Party, it is necessary – as a result of the proposed Article 1(b)(iii) – that it is directly or indirectly controlled by a legal entity that is constituted in that Contracting Party and has substantial business activities there. In a footnote several, seemingly vague, criteria are mentioned that may be taken into account for the determination of what constitutes "substantial business activities".

8. Similar to that mentioned above regarding the definition of "investment", in our practice and experience, we have not come across situations in which the Netherlands has suffered from the current broad definition of "investor". It would be unfortunate if the new model text would take away the strong benefit for the Netherlands' economy that exists under the current broad model text.

2.2 Stricter definitions of substantive protection standards

2.2.1 Article 8(3)

9. We would suggest altering the proposed text of Article 8(3) as follows:

> *"Substantive obligations in other international investment and trade agreements do not in themselves constitute 'treatment', and thus cannot give rise to a breach of paragraph 2 of this Article, absent measures adopted or maintained by a Contracting Party pursuant to those obligations. ~~Furthermore, the 'treatment' referred to in paragraph 2 of this Article does not include procedures for the resolution of investment disputes between investors and States provided for in other international investment and trade agreements.~~"*

10. The express restriction of the most favoured nation clause to not covering dispute resolution mechanisms makes it so that bringing about foreign in-

vestments via the Netherlands is less favourable than making those same investments via another land that has a BIT with the potential host State with a more favourable dispute resolution mechanism. After all, broad possibilities for investor-State arbitration under BITs is a fundamental aspect of an effectively functioning BIT regime. In our experience, the Netherlands has not suffered from broad dispute resolution mechanisms, but in fact economically profited therefrom. It seems imprudent to actively remove this important impetus for the Netherlands' economy.

2.2.2 Article 9(6)

11. We would delete this paragraph in its entirety. Article 9 is entitled *"Treatment of investors and of covered investments"*. It seems unreasonable and not in line with the object and purpose of BITs to declare outright that a breach of the BIT or any other international agreement does not constitute a breach of the treatment of investors and of covered investments in the sense of Article 9. Indeed, one would expect that following the BIT and other international agreements would be a very basic, minimum standard of treatment, not categorically excluded from creating responsibility under the BIT.

12. Alternatively, we would suggest altering the proposed text of Article 9(6) as follows:

> *"For greater certainty, a breach of another provision of this Agreement, ~~or~~ of any other international agreement, or of ~~does not constitute a breach of this Article. In addition, the fact that a measure breaches~~ domestic law does not, in and of itself, establish a breach of this Article."*

2.3 New dispute settlement provisions

2.3.1 Article 19(8)

13. We would suggest deleting this paragraph in its entirety. Third party funders in practice allow small and medium sized enterprises, and of course natural persons, to bring claims under BITs. Indeed, many of those in the just-mentioned categories would be prevented from bringing claims under BITs if it were not for third party funders. This would make the protections offered under such BITs and intended to be safeguarded through investor-State dispute settlement illusory.

14. Alternatively, we would suggest altering the proposed text of Article 19(8) as follows:

"The claimant shall disclose to the other disputing party and to the Tribunal the ~~name and address of~~ fact that a third party funder is involved, if any. The disclosure shall be made at the time of the submission of a claim, or as soon as possible if the funding has been granted after the submission of a claim."

2.3.2 Article 20

15. We would suggest altering the proposed text of Articles 20(1) through (5) as follows:

"1. ~~*All Members of the Tribunal under this Agreement shall be appointed by an appointing authority.*~~ *In the event that the claimant chooses arbitration pursuant to the ICSID Convention or the Additional Facility in accordance with Article 19, paragraph 1, subparagraph a, the Secretary-General of ICSID shall serve as appointing authority for arbitration under this Agreement. In the event that the claimant chooses arbitration pursuant to the UNCITRAL Arbitration Rules in accordance with Article 19, paragraph 1, subparagraph b, the Secretary-General of the Permanent Court of Arbitration shall serve as appointing authority for arbitration under this Agreement.*

2. ~~*The appointing authority shall appoint Members of the Tribunal that fulfill the conditions set out in paragraphs 5 and 6 of this Article, after thoroughly consulting the disputing parties.*~~ *For greater certainty, in making appointments the Secretary General of ICSID is not limited to the Panel of Arbitrators.*

3. *The Tribunal shall be composed of three Members.* ~~*After consulting the disputing parties, the appointing authority may decide that the Tribunal consists of one Member taking into account the complexity of the case, the amount of damages claimed and the desirability of keeping the costs of the procedure as low as possible, especially for small and medium sized enterprises.*~~

4. *The appointing institution shall publish the composition of each Tribunal on its website together with the date of the constitution of the Tribunal, the name of the disputing parties, the legal basis for the claim, and the relief sought.*

5. *The Members of the Tribunal shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognized competence. The parties to the dispute or the appointing authority, as the case may be, shall make every effort to ensure that the members of the Tribunal, either individually or together, possess the necessary expertise in public international law, international investment and international trade law as well as in the resolution of disputes arising under international agreements.* ~~*In addition,*~~

~~*Members of the Tribunal shall not act as legal counsel or shall not have acted as legal counsel for the last five years in investment disputes under this or any other international agreement.*~~"

16. Firstly, the draft text takes away party autonomy as regards the selection of arbitrators. Instead, an appointing authority (the Secretary General of the ICSID or of the PCA) would appoint all three arbitrators. Thus, neither the investor nor the host State would be allowed to appoint an arbitrator. This proposed change greatly reduces party autonomy in arbitrations constituted under the draft text. However, as party autonomy is one of the most important aspects of arbitral proceedings in general, both in the investment arbitration system and under the Dutch Arbitration Act, it seems imprudent to remove this aspect of the system. Next to this, it must be noted that whether arbitrators are appointed by the parties (and these two arbitrators appoint a chair) or by an appointing authority, all arbitrators are in any event required to be impartial and independent.

17. Secondly, arbitrators are excluded from appointment if they have acted as legal counsel for the past five years in investment disputes under the draft text or any other international agreement. This excludes a large number of highly experienced practitioners from being selected to serve as arbitrators in disputes under the draft text. Investment (arbitration) law is a highly technical and specific area of law, something that seems to be recognized in the draft text in the sentence of Article 20(5) immediately preceding the five-year requirement. Shutting out every practitioner from this already-limited pool for five years after they have acted in *any* investment dispute would be detrimental to the availability of high-quality arbitrators for disputes under the draft text.

2.4 New obligations imposed on investors

18. We would suggest altering the proposed text of Article 23 as follows:

> *"Without prejudice to national administrative or criminal law procedures, if the investor has voluntarily incorporated them into their internal policies as referred to in Article 7, a Tribunal may, in deciding on the amount of compensation, take into account non-compliance by the investor with its commitments under the UN Guiding Principles on Businesses and Human Rights, and the OECD Guidelines for Multinational Enterprises."*

19. The draft text contains a specific provision on corporate social responsibility in Article 7, which calls upon the Contracting Parties to encourage

investors to "voluntarily incorporate" in their internal policies those internationally recognized corporate social responsibility standards that have been endorsed or supported by a Contracting Party. However, Article 23 seems to state that no matter what, arbitral tribunals can take compliance with the relevant standards into account in determining compensation. This seems contrary to the voluntary nature of the incorporation of the standards as referred to in Article 7. Next to this, Article 23 already foresees national administrative or criminal law proceedings where an investor does not meet its obligations. It does not seem appropriate to penalise an investor twice – *i.e.* domestically and internationally – for the same conduct.

3 CONCLUSION

20. We hope that the above textual recommendations and background thereto may assist the Ministry of Foreign Affairs in coming to the best possible new model text for Dutch investment agreements. After all, by retaining the right balance between the rights of States and investors, the Netherlands can remain an important centre for international investment. Should the Ministry have any questions or requests for clarification regarding the above, we of course remain at your disposal and can be reached via the above-mentioned contact details.