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Ministry of Foreign Affairs of the Netherlands
Postbus 20061
2500 EB Den Haag, the Netherlands

Rue du Trône 60
3ème étage
1050 Bruxelles
Belgique

+32 (0)2 808 34 65
info@clientearth.org
www.clientearth.org

RE: Consultation on the new Dutch model bilateral investment agreement – comments by ClientEarth

Dear Sir/Madam,

ClientEarth welcomes the Dutch government's efforts to consult citizens, civil society, and other stakeholders over the new Dutch model Bilateral Investment Treaty (BIT) and is grateful for the opportunity to provide comments. In this letter, ClientEarth sets out its comments and suggestions for improvement for the Dutch model BIT. After providing a general commentary, the letter will provide further detailed commentary and suggestions under six headings.

In ClientEarth's view, a progressive BIT, respectful of the rule of law, ensures that individuals should have equal access to justice within a democratic constitutional framework and not undermine or circumvent it. For this reason, ClientEarth recommends the Dutch government to seek inspiration from the South African and internal EU approach to the protection of investors. In a nutshell, this means that protection of investment is embedded within a general constitutional framework and that domestic courts are primarily tasked with the administration of justice.

The new Dutch model BIT by contrast is currently inspired by the EU's approach taken in its recent trade and investment agreements such as the Comprehensive Economic and Trade Agreement (CETA). This approach seeks to preserve and save the international investment protection system as it has been developed over the past three decades¹, while making several minor amendments to enhance the legitimacy of the system.

In this submission, ClientEarth will highlight several concrete areas where the Dutch model BIT should be improved:

1. As a matter of principle, the **domestic judiciary** should administer disputes between investors and states over the rights and obligations contained in an investment agreement. If a Party fails to incorporate the investment agreement into its domestic legal system, the other Party should have recourse to state-to-state dispute settlement. Only where there is clear and persuasive evidence that a the judiciary of a Party is systematically and structurally failing to provide minimum guarantees of sound administration of justice, should an investor-state dispute settlement mechanism be

¹ The expansion and extensive use of ISDS in BITs began in earnest around 1990.

considered for that country and only insofar as such a system is compatible with EU law.

2. The agreement should include **substantive obligations for investors**. These obligations should be enforceable by third parties and by the same means as investor rights contained in the agreement.
3. The Dutch government should **define substantive rights for investors and key definitions progressively** with greater room for public interest considerations. Currently the Dutch approach codifies and consolidates expansive definitions and interpretations of such rights.
4. If a BIT does include an ISDS-style mechanism, the Dutch government should ensure that **arbitrators are appointed from a diverse background** taking into account gender, geographic representativeness, and expertise in areas of environmental, social, and human rights law. In other words, the Dutch government should discourage the selection of arbitrators that come from the investment arbitration industry.
5. The Dutch model BIT should include **stronger clauses that protect public interests**.
6. If a BIT does include an ISDS-style mechanism, it should allow for **national enforcement of awards only**.

1. Definitions and substantive rights for investors

The Dutch model BIT replicates to a large extent the definitions and substantive rights for investors as contained in the CETA. By analogy the criticism of those provisions are equally valid here.² The main points of criticism are:

- An overly broad 'open-ended asset-based' definition of investment. An enterprise-based definition focussing on the contribution of the investment to the economy of the host state should be preferred.
- The non-discrimination provisions in Article 8 are overly broadly defined and should more precisely indicate what constitutes discrimination. Moreover, the most-favoured nation clause in Article 8 (2) should be removed. Inspiration should be taken from the non-discrimination provisions in the South African Protection of Investment Act 2015.³
- Article 9 (3) of the Dutch model BIT must be carefully examined in order to prevent the circumvention of the powers of Dutch parliament regarding the ratification of international agreements.
- Article 9 (4) results in the codification of one of the most controversial interpretations of the fair and equitable treatment standard by investment tribunals, the obligation not to breach 'legitimate expectations' of the investor. As such, this provision should be removed.
- Article 12 should only entitle investors to compensation for direct expropriation. Moreover, the Dutch model BIT should not employ the *Hull-formula* of 'prompt,

² See for instance commentary by IISD here: <http://www.iisd.org/library/commentary-draft-investment-chapter-canada-eu-comprehensive-economic-and-trade-agreement> EU-based civil society organisations here: <https://www.transportenvironment.org/publications/joint-analysis-ceta%E2%80%99s-investment-court-system-ics> and academic commentary here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2466688 and here: <http://digitalcommons.osgoode.yorku.ca/olsrps/139/>

³ See article 8, available at https://www.thedti.gov.za/business_regulation/acts/Investment_Act_22of2015.pdf

adequate and effective compensation’, but use more public interest friendly standard of ‘appropriate compensation’.

- Article 12 (6) should be reformed to unambiguously ensure that the interest is not calculated as compound interest and that the rate is set by national law of the host country.

In addition, Article 6 (4) should be removed. This article may be used by investors to second-guess environmental and other public interest policies through the vague and open-ended terms ‘unjustifiable discrimination’ and ‘disguised restriction on trade’. This language finds its inspiration from the World Trade Organisation agreements and has given WTO panels the opportunity to question sound environmental policies.

2. Substantive obligations for investors

The Dutch model BIT does not contain any obligations for investors that are enforceable either by states or by affected citizens or public interest groups. Moreover, the Dutch model BIT is a clear step back compared to other BITs in allowing only investors to bring claims and categorically rules out the possibility of counterclaims. As associate professor Alessandra Arcuri from Erasmus University Rotterdam has written such an approach raises serious rule of law issues.⁴

ClientEarth recommends following the approach taken by the Southern Africa Development Community in its model BIT.⁵ This model BIT lists a number of core obligations for investors that counterbalance their investor rights and seek to guarantee that investment is made in a responsible and sustainable way.

3. Resolution of disputes

The Dutch model BIT takes as a presumption that the domestic judiciary is not capable of resolving disputes between investors and states or guaranteeing the rights envisioned in the model BIT.⁶ It provides for an international remedy before international tribunals regardless of whether the host government has had the opportunity to remedy the dispute before its own domestic courts. As such, the current Dutch model BIT is hostile and distrustful of domestic institutions as a matter of principle.

Rather than taking such a disproportionate, prejudicial, and evidence-free approach, ClientEarth recommends the South African and internal EU model of reliance on domestic courts.⁷ It is notable in that sense that the application of non-discrimination provisions in the

⁴ Arcuri, Alessandra, ‘The Great Asymmetry and the Rule of Law in International Investment Arbitration’ Lisa Sachs, Lise Johnson and Jesse Coleman, eds., *Yearbook on International Investment Law and Policy 2017* (OUP, Forthcoming 2018)

⁵ <http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf>

⁶ In dualist systems, it is for the Party in question to properly transpose the obligations contained in an international agreement into national law in order to fulfil any such obligations it has under international law.

⁷ The EU’s judicial system consists out of the courts of the Member States and Court of Justice of the European Union. Together they are the guardians of the EU legal order that ensure that EU law is observed throughout the Union through the preliminary reference procedure, the keystone of the EU’s judicial system.

EU Treaties is ultimately entrusted to domestic courts. This approach has given very little problems in over sixty years of European integration.

Alternatively, if arbitration is considered, the Dutch government should assess with each country individually whether the investment agreement should include arbitration that is open to investors. Only in very weak governance zones where there is clear and persuasive evidence that the judiciary of a Party is systematically and structurally failing to provide minimum guarantees of sound administration of justice should such arbitration be considered. In such a case, arbitration should also be open to other stakeholders as they can equally not rely on the domestic judiciary for claims against investors.

Moreover, it is likely that the Dutch model BIT is contrary to EU law. ClientEarth has published several studies outlining this fundamental legal issue.⁸ It follows that if arbitration is considered at all, the model BIT must respect the EU's autonomous legal order. At the very least, this will require investors to exhaust domestic remedies first and a system of prior involvement of the European Court of Justice for questions of EU law. Such an approach would be entirely in line with the general approach under international law that local remedies must be exhausted first.⁹

4. Appointment of arbitrators

The Dutch model BIT offers to institutional fora where arbitrators are to be selected from: ICSID and the PCA. The Dutch model BIT thus perpetuates the selection of a group of much criticised individuals to positions of significant power and influence over public interest decision-making. As the OECD has recently pointed out the characteristics of the ISDS pool of arbitrators:

*“elite status in the legal profession, very high levels of compensation, a high representation of private lawyers with commercial arbitration experience, less representation of government backgrounds, very few if any serving government officials, a high representation of OECD country nationals and a 95%/5% gender distribution. It appeared that over 50% of ISDS arbitrators had acted as legal counsel for investor claimants in other cases, while approximately 10% had done so for respondent states.”*¹⁰

Furthermore, ISDS tribunals tend to ignore public interest law and principles in their reasoning, focussing solely on the myopic legal world created by investment treaty arbitration.¹¹

The Dutch government should ensure that arbitrators are appointed from a diverse background taking into account gender, geographic representativeness, and expertise in

⁸ See for instance <https://www.documents.clientearth.org/wp-content/uploads/library/2018-04-19-implications-of-achmea-judgment-coll-en.pdf> and <https://www.documents.clientearth.org/wp-content/uploads/library/2015-10-15-legality-of-investor-state-dispute-settlement-under-eu-law-ce-en.pdf>

⁹ <https://www.iisd.org/sites/default/files/publications/best-practices-exhaustion-local-remedies-law-investment-en.pdf>

¹⁰ David Gaukrodger 'Appointing Authorities and the Selection of Arbitrators in Investor-State Dispute Settlement: An Overview' (OECD consultation paper 2018) available at <https://www.oecd.org/investment/investment-policy/ISDs-Appointing-Authorities-Arbitration-March-2018.pdf>

¹¹ Wei Chung Lin, 'Safeguarding the Environment? The Effectiveness of Amicus Curiae Submissions in Investor-State Arbitration' *International Community Law Review* 19 (2017) 270–301

areas of environmental, social, and human rights law. In other words, the Dutch government should discourage the selection of arbitrators that come from the investment arbitration industry.

5. Protection of responsible investment

The Dutch model BIT unfortunately does not rebalance the scale in favour of public interest protection with the inclusion of article 2. This provision merely restates the already existing balance between investor rights and public interest goals of the host state while adding a several clauses to ensure compatibility with the EU Treaties. It does not exclude claims by investors based on such public interest legislation. In other words, under the Dutch model BIT a government may adopt public interest regulations, but will still be required to pay compensation to investors if those regulations infringe on their rights. The Dutch model BIT explicitly acknowledges this by stating in article 22.4 that for the purpose of calculating monetary damages, “the Tribunal shall also reduce the damages to take into account any restitution of property or repeal or modification of the measure”.

A public interest carve-out would solve this problem by ensuring that investors could not challenge legitimate public interest regulations in the first place.

ClientEarth would recommend including the following in the model BIT:

- **a clean hands clause**, allowing only responsible investors to bring claims;
- **a public interest carve out**, protecting legitimate public interest measures from challenge; and
- **a supremacy clause**, clarifying that investment protection should not come at the expense of the EU’s human rights and environmental obligations as contained in international agreements.

Together, these three measures would provide an incentive for investors to act responsibly.

Clean hands clause

This clause would aim to dismiss any claim regarding an investment that violates core EU values, or that has violated host state law. As a result, it ensures that only investors with ‘clean hands’ can bring a claim on the basis of the BIT.

Including a clean hands clause in the Dutch model BIT would be relatively easy. Current article 2.1 already makes clear that covered investment that is inter alia “made in accordance with the applicable law at the time the investment is made”. Moreover, Current article 16.2 already includes a list of reasons for excluding investors from ISDS. This list could simply be expanded to cover situations in which investors have committed fraud, human rights abuses, or otherwise violated national or international environmental, social, consumer, or labour laws.

Example of a clean hands clause based on articles 2.1 and 16.2 of the Dutch model BIT:

“An investor may not submit a claim if the investment has been made through fraudulent misrepresentation, concealment, corruption, conduct amounting to an

abuse of process, fraud, human rights abuses, or not in accordance with the applicable environmental, social, and consumer law, including international law.”

Including a clean hands clause would follow the EU's current approach towards public procurement. Under the EU's public procurement Directive, public authorities can, and are in some instances required to, exclude tenders that violate certain EU values.¹² For example, public authorities must exclude tenderers who have been convicted of child labour or other forms of trafficking in human beings.¹³

Public interest carve-out

ClientEarth suggests that the Dutch model BIT should also include a public interest carve-out that would exclude challenges to public interest legislation. This public interest carve-out would ensure that claims involving tobacco legislation, environmental permits, health care legislation, minimum wage legislation, or other public interest rules cannot be brought before any tribunal competent to hear a claim on the basis of the BIT.

A public interest carve-out is extremely important, because one of the most serious downsides to ISDS as it currently exists is that investors have used it to challenge national environmental, health, and human rights rules, or to pressure states not to adopt such rules under threat of litigation. For example, after Philip Morris used the Australia-Hong Kong BIT to attack Australia's plain packaging laws, Australia insisted that a 'tobacco carve-out' be included in the Transpacific Partnership (TPP) agreement.¹⁴

The public interest carve-out could be inspired by the TPP's 'tobacco carve-out', expanded to include a broader set of public interest laws and policies.

Supremacy clause

ClientEarth also suggests introducing a supremacy clause clarifying that investment protections do not outweigh international social and environmental commitments. Sometimes, investors' rights come into conflict with Parties' obligations under international human rights, labour, or environmental agreements. In such cases, it is necessary to clarify which rules investment arbitrators should prefer. Unfortunately, in a number of ISDS cases, investment arbitrators have found that obligations under international environmental or human rights agreements cannot justify infringing on investors' rights.¹⁵ This is an unacceptable outcome.

¹² Article 57 of the Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (2014) OJ L 94/65

¹³ Article 57 (1) (f) of the Directive

¹⁴ Article 29.5 TPP states 'A Party may elect to deny the benefits of Section B of Chapter 9 (Investment) with respect to claims challenging a tobacco control measure of the Party. Such a claim shall not be submitted to arbitration under Section B of Chapter 9 (Investment) if a Party has made such an election. If a Party has not elected to deny benefits with respect to such claims by the time of the submission of such a claim to arbitration under Section B of Chapter 9 (Investment), a Party may elect to deny benefits during the proceedings. For greater certainty, if a Party elects to deny benefits with respect to such claims, any such claim shall be dismissed.'

¹⁵ See Markus Krajewski, 'Ensuring the Primacy of Human Rights in Trade and Investment Policies: Model clauses for a UN Treaty on transnational corporations, other businesses and human rights' (Study commissioned by CIDSE) available at <http://www.cidse.org/publications/business-and-human-rights/business-and-human-rights-frameworks/ensuring-the-primacy-of-human-rights-in-trade-and-investment-policies.html> (accessed on 14 March 2017), at 13 referring to SAUR International SA v. Republic of Argentina, ICSID Case No. ARB/04/4, para. 331. See also B. Farrugia, 'The human right to water: defences to investment treaty violations', (2015) Arbitration

Countries must have the policy space they require to fulfil their international social and environmental commitments.

Including a supremacy clause in the Dutch model BIT would make clear to investment arbitrators that obligations arising out of international environmental, social and human rights agreements trump obligations arising out of IIAs.¹⁶ In the event of a conflict between these rules, investor protections would give way to public social and environmental obligations.

Inspiration for a supremacy clause can be taken from NAFTA article 104, which provides that in the event of any inconsistency between NAFTA and a list of environmental agreements, the obligations under the environmental agreements shall prevail.¹⁷

Example of a supremacy clause

"In the event of any inconsistency between an international investment agreement and any international environmental, social, or human rights agreement binding on one Parties to a dispute, the obligations under the international environmental, social, or human rights agreement shall prevail."

6. A national enforcement regime

There have been considerable problems with foreign investors seeking to bypass the domestic legal system of countries by seeking to enforce awards of ISDS tribunals in other countries. The *Micula* case, where foreign investors have sought to enforce an award before courts in the United States in order to circumvent Union courts is a prime example of this problematic development. If the Dutch government does choose to have an ISDS-style dispute resolution system in a BIT with a third country, ClientEarth considers it fundamental that awards issued by any tribunal set up under a Dutch BIT can only be enforced in the country against which they are rendered. Such a requirement would be **fully in line with the approach taken under the European Convention of Human Rights** and would also ensure that foreign investors do not have greater procedural rights than citizens in Europe.

Thank you for your time and consideration.

Yours faithfully,

Laurens Ankersmit (ClientEarth, lankersmit@clientearth.org Tel: +32 (0) 2 808 4321)
Rue du Trône 60 (box 11), 1050, Brussels, BELGIUM

International 31 (2), 261 at 265; Andreas Kulick, *Global Public Interest in International Investment Law* (Cambridge: Cambridge University Press, 2012) at 233-245

¹⁶ See Krajewski above

¹⁷ Andreas Kulick, *Global Public Interest in International Investment Law* (Cambridge: Cambridge University Press, 2012) at 232-233