Textos legales

Nuevo Borrador de Modelo de APPRI elaborado en los Países Bajos tras el asunto Achmea

Desde 2011, la compatibilidad de los Acuerdos de Promoción y Protección Recíproca de Inversiones (APPRIs) con la legislación de la Unión Europea es objeto de un gran debate en Europa. Este último se ha referido principalmente a APPRIs entre Estados miembros (APPRIs intracomunitarios), pero en los últimos tiempos se ha extendido a la política de la Unión Europea (UE) y de los Estados miembros con respecto a APPRIs celebrados entre Estados miembros de la UE y terceros países (TBI extracomunitarios), sobre todo tras la Sentencia del Tribunal de Justicia de 6 marzo 2018 (*Achmea*), donde se consideró que la cláusula de solución de controversias incorporada en el APPRI entre Países Bajos y Eslovaquia, que otorgaba al inversor el derecho a entablar acciones contra el Estado receptor de la inversión ante un tribunal arbitral, era incompatible con la legislación de la UE. Desde esta decisión, en mayo de 2018, los Países Bajos hicieron público un nuevo Proyecto Modelo de BIT en sustitución al anterior texto de 2004 Dentro de un marco de denuncia de los APPRIs *ad intra*, tras la el asunto Achmea, la nueva la posición de los Países Bajos en relación a la protección de la inversión en sus APPRIs extracomunitarios es particularmente relevante en función de la gran cantidad de acuerdos de este tipo que tienen suscritos y la frecuencia con la que son invocados por los inversionistas. La adopción del texto incorporado en el Borrador de APPR holandés podría tener implicaciones importantes en los desarrollos futuros del arbitraje de inversiones. Dicho texto, elaborado por el árbitro holandés Albert Jan van den Berg, ofrece una visión de cómo la protección de la inversión podría ser reformada en Europa. Su objetivo es "crear más equilibrio entre los derechos y obligaciones de los Estados anfitriones y los inversores" y tener en cuenta varios factores: i) las opiniones procedentes desde las ONG y de la opinión pública según las cuales los estándares abiertos en los APPRIs suscritos por los Países Bajos han sido interpretados por los árbitros, favoreciendo a los inversores en detrimento de los Estados de acogida; ii) las opiniones de la UE con respecto a la protección de la inversión toda que la aprobación de un instrumento de este tipo depende de la autorización de la Comisión Europea; iii) el contexto económico global que impone la necesidad de que los Países Bajos tengan también en cuenta sus intereses como Estado de acogida; y, por último, iv) el reconocimiento de los Principios rectores de las Naciones Unidas sobre las

empresas y los derechos humanos, las Reglas de la UNCITRAL sobre transparencia y las Directrices de la OCDE para las Empresas Multinacionales.

Modelo de APPRI

Agreement on reciprocal promotion and protection of investments between ———————————————————————————————————— and the Kingdom of the Netherlands. The———————————————————————————— and the Kingdom of the Netherlands, hereinafter referred to as the Contracting Parties,

Desiring to strengthen their traditional ties of friendship and to extend and intensify economic relations between them by creating conditions with a view to attract and promote responsible foreign investment of the Contracting Parties in their respective territories that contribute to sustainable economic development;

Recognizing that fostering an open and transparent policy environment and protecting investments of investors of one Contracting Party in the territory of the other Contracting Party are conducive to the stimulation of mutually beneficial economic activity and intensification of economic cooperation;

Reaffirming their commitment to sustainable development and to enhancing the contribution of international trade and investment to sustainable development;

Considering that these objectives can be achieved without compromising the right of the Contracting Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment, public morals, labor rights, animal welfare, social or consumer protection or for prudential financial reasons;

Have agreed as follows:

Section 1: definitions and scope

Art. 1. *Definitions.* For the purposes of this Agreement:

(a) "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:

(i) movable and immovable property as well as any other property rights in rem in respect of every kind of asset, such as mortgages, liens and pledges;

(ii) rights derived from shares, bonds and other kinds of interests in companies and joint ventures;

(iii) claims to money, to other assets or to any contractual performance having an economic value;

(iv) rights in the field of intellectual property, technical processes, goodwill and knowhow;

(v) rights granted under public law or under contract, including rights to prospect, explore, extract and exploit natural resources.

"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.

Returns that are invested shall be treated as investments and any alteration of the form in which assets are invested or reinvested shall not affect their qualification as investments.

(b) "investor" means with regard to either Contracting Party:

(i) any natural person having the nationality of that Contracting Party under its applicable law;

(ii) any legal person constituted under the law of that Contracting Party and having substantial business activities in the territory of that Contracting Party; or

(iii) any legal person that is constituted under the law of that Contracting Party and is directly or indirectly owned or controlled by a natural

person as defined in (i) or by a legal person as defined in (ii).

A natural person who has the nationality of the Kingdom of the Netherlands and the other Contracting Party is deemed to be exclusively a natural person of the Contracting Party of his or her dominant and effective nationality.

(c) "freely convertible currency" means a currency which is widely traded in international foreign exchange markets and widely used in international transactions.

(d) "territory" means the territory of the Contracting Party concerned, including [if applicable] its territorial sea and any area beyond and adjacent to its territorial sea within which it exercises jurisdiction or sovereign rights in accordance with international law.

Art. 2. *Scope and application*. 1. This Agreement shall apply to an investment, made in accordance with the applicable law of the host Contracting Party at the time the investment is made, that is directly or indirectly owned or controlled by an investor of the other Contracting Party and existing on the date of entry into force of this Agreement or made thereafter.

2. The provisions of this Agreement shall not affect the right of the Contracting Parties to regulate within their territories necessary to achieve legitimate policy objectives such as the protection of public health, safety, environment, public morals, labor rights, animal welfare, social or consumer protection or for prudential financial reasons. The mere fact that a Contracting Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectation of profits, is not a breach of an obligation under this Agreement.

3. The Contracting Parties reserve the right to introduce or maintain nondiscriminatory, appropriate and necessary measures for the purpose of preventing investors who, alone or together, have the ability to affect materially the terms of participation in the relevant market as a result of their position in the market, from engaging in or continuing anti–competitive practices.

4. Nothing in this Agreement shall be construed as preventing a Contracting Party from discontinuing the granting of a subsidy and/or requesting its reimbursement, where such measure is necessary in order to comply with international obligations between the Contracting Parties or where it has been ordered by a competent court, administrative tribunal or other competent authority, or requiring that Contracting Party to compensate the investor therefor.

5. If a Contracting Party has accorded special advantages to nationals of any third State by virtue of agreements establishing customs unions, economic unions, monetary unions or similar institutions, such as the European Union, or on the basis of interim agreements leading to such unions or institutions, that Contracting Party shall not be obliged to accord such advantages to investors of the other Contracting Party.

Section 2: Investment promotion and facilitation

Art. 3. *Favorable conditions for investment.* 1. Each Contracting Party shall, within the framework of its laws and regulations and in accordance with international obligations, promote economic cooperation and encourage the creation of favorable conditions for investment in its territory. Subject to its right to exercise powers conferred by its laws and regulations, each Contracting Party shall admit such investments.

2. The Contracting Parties affirm the G20 Guiding Principles for Global Investment Policymaking.

3. The Contracting Parties strive to strengthen the promotion and facilitation of investments that contribute to sustainable development, including but not limited through regular consultations between investment promotion and facilitation agencies and the exchange of information regarding investment opportunities.

Art. 4. *Transparency*. Each Contracting Party shall ensure that its laws, regulations, judicial decisions, procedures and administrative rulings of general application with respect to any matter covered by this Agreement are promptly published or made available in such a manner as to enable interested persons and the other Contracting Party to become acquainted

with them. Whenever possible, such instruments will be made available through the internet in English.

Art. 5. *Rule of law*. 1. The Contracting Parties shall guarantee the principles of good administrative behavior, such as consistency, impartiality, independence, openness and transparency, in all issues that relate to the scope and aim of this Agreement.

2. Each Contracting Party shall ensure that investors have access to effective mechanisms of dispute resolution and enforcement, such as judicial, quasi–judicial or administrative tribunals or procedures for the purpose of prompt review, which mechanisms should be fair, impartial, independent, transparent and based on the rule of law.

Section 3: Sustainable development

Art. 6. *Sustainable development.* 1. The Contracting Parties are committed to promote the development of international investment in such a way as to contribute to the objective of sustainable development.

2. Each Contracting Party shall ensure that its investment laws and policies provide for and encourage high levels of environmental and labor protection and shall strive to continue to improve those laws and policies and their underlying levels of protection.

3. The Contracting Parties recognize that it is inappropriate to lower the levels of protection afforded by domestic environmental or labor laws in order to encourage investment.

4. A Contracting Party shall not adopt and apply domestic laws contributing to the objective of sustainable development in a manner that would constitute unjustifiable discrimination or a disguised restriction on trade.

5. Within the scope and application of this Agreement, the Contracting Parties reaffirm their obligations under the multilateral agreements in the field of environmental protection, labor standards and the protection of human rights to which they are party, such as the Paris Agreement, the fundamental ILO Conventions and the Universal Declaration of Human Rights. Furthermore, each Contracting Party shall continue to make sustained efforts towards ratifying the fundamental ILO Conventions that it has not yet ratified.

6. The Contracting Parties are committed to cooperate as appropriate on investmentrelated sustainable development matters of mutual interest in multilateral fora.

Art. 7. *Corporate Social Responsibility.* The Contracting Parties reaffirm the importance of each Contracting Party to encourage investors operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party, such as the OECD Guidelines for Multinational Enterprises, the United Nations Guiding Principles on Business and Human Rights, and the Recommendation CM/REC(2016) of the Committee of Ministers to Member States on human rights and business.

Section 4 – investment protection

Art. 8. *Non–discriminatory treatment*. 1. Each Contracting Party shall accord to an investor of the other Contracting Party and to an investment of an investor of the other Contracting Party, treatment no less favorable than the treatment it accords, in like situations, to its own investors and to their investments with respect to conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.

2. Each Contracting Party shall accord to an investor of the other Contracting Party and/or to an investment of an investor of the other Contracting Party, treatment no less favorable than the treatment it accords in like situations, to investors of a third country and to their investments with respect to the conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.

3. 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” re-

ferred 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.

Art. 9. *Treatment of investors and of covered investments*. 1. Each Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party. In addition, each Contracting Party shall accord to such investments full physical security and protection.

2. A Contracting Party breaches the aforementioned obligation of fair and equitable treatment where a measure or series of measures constitutes:

a) Denial of justice in criminal, civil or administrative proceedings;

b) Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;

c) Manifest arbitrariness;

d) Direct or targeted indirect discrimination on wrongful grounds, such as gender, race, nationality, sexual orientation or religious belief;

e) Abusive treatment of investors such as harassment, coercion, abuse of power, corrupt practices or similar bad faith conduct; or

f) A breach of any further elements of the fair and equitable treatment obligation adopted by the Contracting Parties in accordance with paragraph 3 of this Article.

3. The Contracting Parties shall, upon request of a Contracting Party, review the content of the obligation to provide fair and equitable treatment and may complement this list through a joint interpretative declaration within the meaning of Art. 31, paragraph 3, sub a, of the Vienna Convention on the Law of Treaties.

4. When applying paragraph 2 of this Article, a Tribunal may take into account whether a Contracting Party made a specific representation to an investor to induce an investment that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain that investment, but that the Contracting Party subsequently frustrated.

5. When a Contracting Party has entered into a written commitment with investors of the other Contracting Party regarding a specific investment, that Contracting Party shall not, either itself or through an entity exercising governmental authority, breach the said commitment through the exercise of governmental authority in a way that causes loss or damage to the investor or its investment.

6. For greater certainty, a breach of another provision of this Agreement or of any other international agreement 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.

Art. 10. *Fiscal Treatment*. With respect to taxes, fees, charges and to fiscal deductions and exemptions, each Contracting Party shall, regarding the operation, management, maintenance, use, enjoyment and disposal of the investment, accord to investors of the other Contracting Party who are engaged in any economic activity in its territory, treatment not less favorable than that accorded to its own investors or to those of any third State who are in like situations, whichever is more favorable to the investors concerned. For this purpose, however, any special fiscal advantages accorded by that Contracting Party, shall not be taken into account:

a) under an agreement for the avoidance of double taxation; or

b) by virtue of its participation in a customs union, economic union, monetary union or similar institution, such as the European Union, or on the basis of interim agreements leading to such unions or institutions; or

c) on the basis of reciprocity with a third State.

Art. 11. *Treatment related to free transfer.* 1. The Contracting Parties shall guarantee that payments relating to an investment may be transferred. The transfers shall be made in a freely convertible currency, without restriction or delay, and at the market rate of exchange applicable on the date of transfer. Such transfers include in particular though not exclusively:

a) profits, interests, dividends and other current income;

b) funds necessary;

i. for the acquisition of raw or auxiliary materials, semi–fabricated or finished products, or

ii. to replace capital assets in order to safeguard the continuity of an investment;

c) additional funds necessary for the development of an investment;

d) funds in repayment of loans;

e) royalties or fees;

f) earnings of natural persons;

g) the proceeds of sale or liquidation of the investment;

h) payments arising under Articles 12 and 13 of this Agreement.

2. This Agreement shall not be construed so as to prevent the Contracting Parties from fulfilling, in good faith, its international obligations for the purpose of maintaining international peace and security.

3. Notwithstanding paragraph 1, nothing in this Article shall be construed to prevent a Contracting Party from applying in an equitable and non–discriminatory manner and not in a way that would constitute a disguised restriction on transfers, its laws relating to:

a) bankruptcy, insolvency, bank recovery and resolution, or the protection of the rights of creditors, and the prudential supervision of financial institutions;

b) issuing, trading, or dealing in financial instruments;

c) financial reporting or record keeping of transfers where necessary to assist law enforcement or financial regulatory authorities;

d) criminal or penal offenses, deceptive or fraudulent practices;

e) the satisfaction of judgments in adjudicatory proceedings;

f) social security, public retirement or compulsory savings schemes.

Art. 12. *Expropriation.* 1. Neither Contracting Party shall nationalize or take any other measures depriving, directly or indirectly, the investors of the other Contracting Party of their investments, unless the following conditions are complied with:

a) the measure is taken in the public interest;

b) the measure is taken under due process of law;

c) the measure is taken in a non–discriminatory manner; and

d) the measure is taken against prompt, adequate and effective compensation.

2. Direct expropriation occurs when an investment is nationalised or otherwise directly taken through formal transfer of title or outright seizure.

3. Indirect expropriation occurs if a measure or a series of measures of a Contracting Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.

4. The determination of whether a measure or a series of measures by a Contracting Party, in a specific factual situation, constitutes an indirect expropriation requires a case–by–case, fact–based inquiry that considers, amongst other factors:

a) the economic impact of the measure or series of measures, although the sole fact that a measure or a series of measures of a Contracting Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;

b) the duration of the measure or series of measures by a Contracting Party; and

c) the character of the measure or series of measures, notably their object and context.

5. The compensation referred to in paragraph 1 of this Article shall amount to the fair market value of the investment at the time immediately before the expropriation or the impending expropriation became known, whichever is earlier. For greater certainty, this Agreement creates no other method for evaluation of the compensation. Valuation criteria shall include going concern value, asset value including the declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

6. In addition to paragraph 5 of this Article, the compensation shall include interest at a normal commercial rate from the date of expropriation until the date of payment and shall, in order to be effective for the investor, be paid and made transferable, without delay, to the State designated by the investor and in the currency of the State of which the investor is a national or in

any freely convertible currency accepted by the investor.

7. The affected investor shall have the right, under the law of the expropriating Contracting Party, to a prompt review of its claim and of the valuation of its investment, by a judicial or other independent authority of that Contracting Party, in accordance with the principles set out in this Article.

8. Except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non– discriminatory measures of a Contracting Party that are designed and applied in good faith to protect legitimate public interests, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity, do not constitute indirect expropriations.

9. This Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights, to the extent that such issuance is consistent with the Agreement on Trade–Related Aspects of Intellectual Property Rights in Annex 1C to the WTO Agreements.

Art. 13. *Compensation for losses*. 1. Investors of a Contracting Party who suffer losses in respect of their investments owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the other Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favorable than that accorded by that Contracting Party to its own investors or to investors of any third State, whichever is more favorable to the investor concerned.

2. Without prejudice to paragraph 1 of this Article, investors of a Contracting Party who, in any of the situations referred to in that paragraph, suffer losses in the territory of the other Contracting Party resulting from:

(a) requisitioning of their investment or a part thereof by the latter's armed forces or authorities; or

(b) destruction of their investment or a part thereof by the latter's armed forces or authorities, which was not required by the necessity of the situation;

shall be accorded prompt, adequate and effective restitution or compensation by the other Party. The amount of such compensation shall be determined in accordance with the provisions of Art. 12.

Art. 14. *Subrogation.* If the investment of an investor of a Contracting Party is insured against noncommercial risks or otherwise give rise to payment of indemnification in respect of such investment under a system established by law, regulation or government contract, any subrogation of the insurer or re–insurer or agency designated by that Contracting Party to the rights of the said investor pursuant to the terms of such insurance or under any other indemnity given shall be recognized by the other Contracting Party.

Section 5: Settlement of Disputes between an investor of a Contracting Party and the other Contracting Party

Art. 15. *Multilateral investment court*. 1. Upon the entry into force between the Contracting Parties of an international agreement providing for a multilateral investment court applicable to disputes under this Agreement, the relevant provisions set out in this Section shall cease to apply.

2. The Contracting Parties shall, if necessary, adopt transitional arrangements taking into account the legitimate expectations of investors in ongoing disputes under the procedures set out under this Section.

Art. 16. *Scope of application.* 1. This Section shall apply to a dispute between, on the one hand, an investor of one Contracting Party and, on the other hand, the other Contracting Party concerning treatment alleged to be a breach of a provision in Section 4 of this Agreement, which breach allegedly causes loss or damage to the investor or its investment(s).

2. An investor may not submit a claim under this Section if the investment has been made through fraudulent misrepresentation, concealment, corruption, or similar bad faith conduct amounting to an abuse of process.

3. The responding Contracting Party may deny the benefits of this Section to an investor within the meaning of Art. 1(b) of this Agreement, which has changed its corporate structure with a main purpose to gain the protection of this Agreement at a point in time where a dispute had arisen or was foreseeable. This particularly includes situations where an investor has changed its corporate structure with a main purpose to submit a claim to its original home state.

Art. 17. *Alternative dispute resolution*. Any dispute should, as far as possible, be settled amicably through negotiations, conciliation or mediation. Such settlement may be agreed at any time, including after proceedings under this Section have been commenced. A disputing party shall give favorable consideration to a request for negotiations, conciliation or mediation by the other disputing party.

Art. 18. *Consultations.* 1. Where a dispute has not been resolved in a manner as provided for under Art. 17, an investor of a Contracting Party alleging a breach of a provision in Section 4 of this Agreement, may submit a written request for consultations to the other Contracting Party. During these consultations, the disputing parties may use non–binding third party procedures, such as good offices, conciliation or mediation.

2. A request for consultations within the meaning of this Article shall contain the following information:

(a) the name and address of the investor and, where such request is submitted on behalf of a locally established company, the name, address and place of incorporation of the locally established company;

(b) the provision(s) in Section 4 of this Agreement, alleged to have been breached;

(c) the legal and factual basis for the claim, including the treatment alleged to be inconsistent with the provision(s) in Section 4 of this Agreement;

(d) the relief sought and the estimated amount of damages claimed; and

(e) evidence establishing that the claimant is an investor of the other Party and that it owns or controls the investment and, where it acts on behalf of a locally established company, that it owns or controls the locally established company.

Where a request for consultations is submitted by more than one investor or on behalf of more than one locally established company, the information in (a) and (e) shall be submitted for each investor or each locally established company, as the case may be.

3. Unless the disputing parties agree to a longer period, consultations shall be held within 60 days of the submission of the request for consultations under paragraph 2.

4. The request for consultations must be submitted within:

(a) five years of the date on which the investor first acquired, or should have first acquired, knowledge of the treatment alleged to be inconsistent with a provision in Section 4 of this Agreement, and of the loss or damage alleged to have been incurred thereby; or

(b) two years of the date on which the investor or, as applicable, the locally established company, exhausts or ceases to pursue claims or proceedings before a tribunal or court under the domestic law of a Contracting Party; and, in any event, no later than ten years after the date on which the investor first acquired, or should have first acquired knowledge, of the treatment alleged to be inconsistent with a provision in Section 4 of this Agreement, and of the loss or damage alleged to have been incurred thereby.

5. In the event that the claimant has not submitted a claim pursuant to Art. 19 of this Agreement within eighteen months of submitting the request for consultations, the investor shall be deemed to have withdrawn its request for consultations. This period may be extended by agreement between the parties involved in the consultations.

6. The time periods in paragraphs 4 and 5 shall not render a claim inadmissible where the investor can demonstrate that the failure to request consultations or submit a claim is due to the investor's inability to act as a result of actions taken by the other disputing party, provided that the investor acts as soon as reasonably possible after it is able to act.

Art. 19. *Submission of a claim*. 1. If a request for consultations has been submitted according to the procedures laid down in Art. 18

and where such consultations do not result in a resolution of the claim within six months from the date of the written request for consultations, the investor may submit a claim under one of the following sets of rules on dispute settlement:

a. the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID Convention) or in accordance with the Rules on the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (ICSID Additional Facility), where the conditions for proceedings pursuant to the ICSID Convention do not apply;

b. the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL Arbitration Rules), with the understanding that the Permanent Court of Arbitration (PCA) shall administer the proceedings;

The rules on dispute settlement according to which a claim has been submitted, shall apply subject to the rules in this Section and the other relevant procedures laid down in this Agreement.

2. All the claims identified by the investor in the submission of its claim pursuant to this Article must be related to treatment identified in its request for consultations pursuant to Art. 18, paragraph 2 of this Agreement, or to treatment that occurred after the request for consultations was submitted.

3. The responding Contracting Party hereby unconditionally consents to the submission of a claim as provided under this Section.

4. The consent under paragraph 3 of this Article and the submission of a claim under paragraph 1 of this Article shall be deemed to satisfy the requirements of:

a) Art. 25 of the ICSID Convention or the ICSID Additional Facility Rules for written consent of the parties to the dispute; and

b) Article I of the New York Convention for "arising out of a commercial relationship".

c) Article II of the New York Convention for an "agreement in writing".

5. A claim may only be referred to a Tribunal pursuant to paragraph 1 of this Article if the investor withdraws or discontinues any existing proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim and waives its right to initiate any claim or proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim.

6. A claim with respect to restructuring of debt issued by a Contracting Party may only be submitted under this Section in accordance with the Protocol on public debt.

7. If two or more claims have been submitted separately to arbitration under this Article and the claims have a question of law or fact in common and arise out of the same events or circumstances, the claimants may seek a consolidation order at a Tribunal. After giving all disputing parties the opportunity to be heard, the Tribunal shall in principle accept such request for consolidation, especially where the claimants are small and medium sized enterprises.

8. The claimant shall disclose to the other disputing party and to the Tribunal the name and address of a third party funder. 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.

Art. 20. *Constitution and functioning of the Tribunal.* 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 Art. 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 Art. 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 appointing authority 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.

6. Arbitrators and their staff shall be independent of, and not be affiliated with or take instructions from, either disputing party or Contracting Party with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. Arbitrators shall comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration and any supplemental rules agreed upon by the Contracting Parties.

7. The fees and expenses of Members of the Tribunal as well as of witnesses and experts involved in the procedure shall be governed by ICSID Administrative and Financial Regulation 14.

8. The Tribunal shall determine whether the treatment subject to the claim is inconsistent with the provisions in Section 4 of this Agreement. In making its determination, the Tribunal shall apply the provisions of this Agreement and other rules of international law applicable between the Contracting Parties. It shall interpret this Agreement in accordance with customary rules of interpretation of public international law, as codified in the Vienna Convention on the Law of Treaties.

9. Without prejudice to preliminary objections raised in accordance with Art. 21 of this Agreement and absent a different agreement between the disputing parties, the arbitral proceedings shall, in the interest of an expeditious resolution of the dispute and in order to prevent unnecessary bifurcation of the proceedings, in general consider issues of jurisdiction and merits together.

10. The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the disputing Contracting Party. In determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of the disputing Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the court or authorities of that Contracting Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Contracting Party.

11. The "UNCITRAL Transparency Rules" shall apply to disputes under this Section. The Tribunal and the disputing parties shall give positive consideration to a request from a third party to submit as an amicus curiae oral or written submissions in accordance with Art. 4 of these Rules.

Art. 21. *Preliminary objections*. 1. Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Tribunal shall be made as early as possible. The respondent shall file the objection no later than the expiration of the time limit fixed for the filing of the countermemorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder – unless the facts on which the objection is based are unknown to the respondent at that time.

2. The respondent may, no later than 30 days after the constitution of the division of the Tribunal, and in any event before its first session, file an objection that a claim is manifestly without legal merit. The respondent shall specify as precisely as possible the basis for the objection. On receipt of such an objection the Tribunal shall suspend the proceedings on the merits and

establish a schedule for considering such an objection consistent with its schedule for considering any other preliminary question. The Tribunal, after giving the disputing parties an opportunity to present their observations, shall at its first session of promptly thereafter, issue a decision or award stating the grounds therefor. In doing so, the Tribunal shall assume the alleged facts to be true. This paragraph is without prejudice to the Tribunal's authority to address other objections as a preliminary question or to the right of the respondent to object, in the course of the proceeding, that a claim lacks legal merit.

Art. 22. *Final award*. 1. The Tribunal and the disputing parties shall make every effort to ensure that the dispute settlement process is carried out in a timely manner. The Tribunal shall endeavor to issue its final award within 24 months of the date the claim is submitted pursuant to Art. 19 of this Agreement. If the Tribunal requires additional time to issue its final award, it shall provide the disputing parties the reasons for the delay.

2. An award issued by a Tribunal pursuant to this Agreement shall be final and binding between the disputing parties and in respect of that particular case. The respondent shall comply with the award with undue delay.

3. An award can only result in compensation, unless the disputing parties agree on restitution. Monetary compensation shall include the applicable interest, determined in a manner consistent with Art. 12, paragraph 6, of this Agreement.

4. The Tribunal shall not award punitive damages. Monetary damages shall not be greater than the loss suffered by the investor, reduced by any prior damages or compensation already provided. For the calculation of monetary damages, the Tribunal shall also reduce the damages to take into account any restitution of property or repeal or modification of the measure.

5. The Tribunal shall order that reasonable costs incurred by the successful disputing party shall be borne by the unsuccessful disputing party, unless the Tribunal determines that such allocation is unreasonable in the circumstances of the case. Such a determination may take into account whether the successful disputing party has acted improperly, for example by raising manifestly frivolous objections or improperly invoking preliminary objections, and whether the unsuccessful disputing party is a small or medium sized enterprise. If only some parts of the claims have been successful the costs shall be adjusted, proportionately, to the number or extent of the successful parts of the claims.

Art. 23. *Behavior of the investor*. Without prejudice to national administrative or criminal law procedures, 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.

Section 6: Consultations and Dispute Settlement between the Contracting Parties

Art. 24. *Consultations of Contracting Parties*. 1. Either Contracting Party may propose to the other Contracting Party that consultations be held on any matter concerning the interpretation or application of this Agreement. The other Contracting Party shall accord sympathetic consideration to the proposal and shall afford adequate opportunity for such consultations. Such consultations shall be held at a place and at a time agreed upon through diplomatic channels by the Contracting Parties.

2. A joint interpretative declaration adopted as result of consultations by the Contracting Parties shall be binding on a Tribunal established under Section 5 of this Agreement. Such joint interpretative declaration is not applicable in cases where a Tribunal was already established.

Art. 25. *Settlement of Disputes between the Contracting Parties*. 1. Any dispute between the Contracting Parties concerning the interpretation or application of this Agreement, which cannot be settled within a reasonable amount of time by means of diplomatic negotiations, shall, unless the Contracting Parties have otherwise agreed, be submitted, at the request of either Contracting Party, to an arbitral tribunal, composed of three members. Each Contracting Party shall appoint one arbitrator and the two arbitrators thus appointed shall together appoint a

third arbitrator as their chairman who is not a national of either Contracting Party and who is a national of a third State that has diplomatic relations with both Contracting Parties.

2. If one of the Contracting Parties fails to appoint an arbitrator and has not proceeded to do so within two months after an invitation from the other Contracting Party to make such appointment, the latter Contracting Party may invite the President of the International Court of Justice to make the necessary appointment. The President shall consult both Parties which consultations shall not take no longer than one month.

3. If the two core arbitrators are unable to agree on the chair person in the two months following their appointment, either Contracting Party may invite the President of the International Court of Justice to make the necessary appointment.

4. If, in the cases provided for in the paragraphs 2 and 3 of this Article, the President of the International Court of Justice is prevented from discharging the said function or is a national of either Contracting Party, the Vice–President shall be invited to make the necessary appointments. If the Vice–President is prevented from discharging the said function or is a national of either Contracting Party, the most senior member of the Court available who is not a national of either Contracting Party shall be invited to make the necessary appointments.

5. In making its determination the Tribunal shall decide the dispute in accordance with customary rules of interpretation of public international law, as codified in the Vienna Convention on the Law of Treaties. Before the Tribunal decides, it may at any stage of the proceedings propose to the Contracting Parties to settle the dispute amicably. The foregoing provisions shall not prejudice settlement of the dispute *ex aequo et bono* if the Contracting Parties so agree.

6. Unless the Contracting Parties decide otherwise, the Tribunal shall determine its own procedure.

7. The Tribunal shall reach its decision by a majority of votes. Such decision shall be final and binding on the Contracting Parties.

8. Each Contracting Party shall bear the costs of its appointed member of the Tribunal and of its representation in the arbitration proceedings and half of the costs of the chairman and the remaining costs. The Tribunal may, however, in its decision direct that a higher proportion of the costs shall be borne by one of the two Contracting Parties. Such decision shall be binding on both Contracting Parties.

Section 7: Final provisions

Art. 26. *Entry into Force, Duration and Termination*. 1. The present Agreement shall enter into force on the first day of the second month following the date on which the Contracting Parties have notified each other in writing that their constitutionally required procedures have been complied with, and shall remain in force for a period of fifteen years.

2. Unless notice of termination has been given by either Contracting Party at least six months before the date of its expiry, the present Agreement shall be extended tacitly for periods of five years, whereby each Contracting Party reserves the right to terminate the Agreement upon notice of at least six months before the date of expiry of the current period of validity.

3. In respect of investments made before the date of the termination of the present Agreement, this Agreement shall continue to be in effect for a further period of fifteen years from that date.

4. Subject to the period mentioned in paragraph 2 of this Article, the Kingdom of the Netherlands shall be entitled to terminate the application of the present Agreement separately in respect of any of the parts of the Kingdom of the Netherlands.

Art. 27. *Territorial Application*. As regards the Kingdom of the Netherlands, the present Agreement shall apply to the European part of the Netherlands, to Aruba, Curaçao, Sint Maarten and the Caribbean part of the Netherlands (the islands of Bonaire, Sint Eustatius and Saba), unless the notification provided for in Art. 26, paragraph 1 provides otherwise.

IN WITNESS WHEREOF, the undersigned representatives, duly authorized thereto, have signed the present Agreement.

DONE in two originals at , on , in the ..., Netherlands and English languages, the [...] texts being authentic.

In case of difference of interpretation, the English text shall prevail.

For ....

For the Kingdom of the Netherlands:

Protocol on public debt

On the signing of the Agreement on reciprocal encouragement and protection of investments between [...] and the Kingdom of the Netherlands, the undersigned representatives have agreed on the following provisions, which constitute an integral part of the Agreement:

1. No claim that a restructuring of public debt of a Contracting Party breaches an obligation of this Agreement may be submitted to, or if already submitted, be pursued under Art. 19 of this Agreement if the restructuring is a negotiated restructuring at the time of submission, or becomes a negotiated restructuring after such submission.

2. Subject to paragraph 1 of this Protocol, an investor may not submit a claim under Art. 19 of this Agreement that a restructuring of debt of a Contracting Party breaches the provisions of this Agreement, unless 270 days have elapsed from the date of submission by the claimant of the written request for consultations pursuant to Art. 18 of this Agreement.

3. A breach of Article 8, paragraph 1, does not occur merely by virtue of a different treatment provided by a Contracting Party to certain categories of investors or investments on grounds of a different macroeconomic impact, for instance to avoid systemic risks or spillover effects, or on grounds of eligibility for debt restructuring.