

Comments of the Kingdom of the Netherlands to the proposals for amendment of the ICSID Rules (21 December 2018)

The Kingdom of the Netherlands is in favor of modernizing the ISDS regime. The Kingdom of the Netherlands has recently adopted a new model International Investment Agreement which contains a reformed dispute settlement mechanism. In addition, the Kingdom of the Netherlands is also actively engaged in the on-going work of the UNCITRAL Working Group III on the multilateral reform of ISDS. In this regard, the Kingdom of the Netherlands takes particular interest in the ongoing amendment of the ICSID Rules process and welcomes the opportunity to provide comments for consideration to the ICSID Secretariat.

The Kingdom of the Netherlands fully aligns itself with the comments submitted by the EU and its Member States that have been sent to the ICSID Secretariat. In addition, the Netherlands would like to make the following observations and comments.

- The Kingdom of the Netherlands stresses the importance of efficient and transparent procedures, wherein decisions are made by independent and impartial adjudicators. The Kingdom of the Netherlands supports the proposed amendments to the ICSID Rules that contribute to these objectives.
- The transparency of procedures is crucial for the legitimacy of the system. As a minimum, the rules on transparency as laid down in the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, which came into effect on 1 April 2014 should be implemented in the ICSID Rules. The possibility given to disputing parties in Rule 47 to object to the public access of hearings or to object to the publication of awards are not defensible in procedures between investors and States, as public interests are at stake in such procedures.
- The Kingdom of the Netherlands welcomes the codification in Rule 48 of the possibility for relevant stakeholders affected by the dispute to participate as a non-disputing party in proceedings between investors and states under International Investment Agreements. It should be added that the Tribunal and disputing parties should give positive consideration to a request from such a stakeholder to file a submission. In addition, the Tribunal should be required to give the reasons for a decision to deny such a request. Furthermore, stakeholders participating as a non-disputing party should only bear their own costs.
- The Kingdom of the Netherlands welcomes the efforts to limit the costs and duration of proceedings. These costs could especially be an obstacle for individuals and small or medium sized enterprises. The interests of individuals and small or medium sized enterprises should specifically be taken into account in the provisions on e.g. expedited procedures, consolidation, decisions on allocation of costs and security for costs.
- The Kingdom of the Netherlands welcomes the inclusion of a clear checklist in Institutional Rules 2 and 3 on what must be included in a request to initiate proceedings. Given the importance of such information for the respondent, it is proposed that the claimant should be required (Rule 2) to include an estimate amount of pecuniary compensation instead of the current listing in Rule 3(a). In addition, the request should include evidence establishing that the claimant is an investor of the other Contracting Party and that it owns or controls the

investment and, where its acts on behalf of a locally established company, that it owns or controls the locally established company.

- The Kingdom of the Netherlands welcomes Rule 11(1), in which it is stipulated that parties to the dispute shall be treated equally. Diverging requirements for claimants and respondents should be prevented in e.g. the rules on consolidation and third party funding.

The Kingdom of the Netherlands reserves the right to make additional comments