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**Your reference**

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**Copy to**

the public entity Curacao and  
the Central Bank of Curacao  
and Sint Maarten.

Date 27 February 2023  
Subject Notice of Arbitration by Mr Abdallah Andraous | Various  
procedural issues

Dear Dr Martha and Mr De Vriese,

On behalf of the Kingdom of the Netherlands (the "**Netherlands**"), I write to you in relation to the Notice of Arbitration dated 7 February 2023 ("**NoA**") transmitted by Mr Abdallah Andraous by reference to the Agreement on the Encouragement and Reciprocal Protection of Investments between the Lebanese Republic and the Kingdom of the Netherlands of 2 May 2002 (the "**BIT**"). In view of certain procedural questions and proposals made by Mr Andraous in the NoA, the Netherlands notes the following.

**Applicability of the 1976 UNCITRAL Arbitration Rules**

Mr Andraous has proposed an ad hoc arbitral tribunal constituted under the arbitration rules of the United Nations Commission on International Trade Law ("**UNCITRAL Rules**"), referred to in Article 9(2)(d) of the BIT. Throughout the NoA, Mr Andraous appears to assume that the applicable version of the UNCITRAL Rules is not the original 1976 version, but rather the 2021 version (i.e. the UNCITRAL Rules as revised in 2010, with article 1, paragraph 4, as adopted in 2013 and article 1, paragraph 5, as adopted in 2021). This assumption is incorrect. The Netherlands draws Mr Andraous' attention to Article 1(2) of the 2021 Rules, which stipulates that the 2021 version of the Rules will not be presumed to apply with regard to an arbitration initiated after 2010 under a treaty older than 2010:

*"The parties to an arbitration agreement concluded after 15 August 2010 shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration [...]. That presumption does not apply where the arbitration agreement has been concluded by accepting after 15 August 2010 an offer made before that date."*

The BIT is dated well before 15 August 2010 (2 May 2002). At the time of its conclusion, the BIT's reference to the UNCITRAL Rules was to the version of the UNCITRAL Rules then in force, namely the 1976 Rules. The 1976 Rules are therefore applicable and the provisions of the 2021 Rules do not apply.

In response to para. 92 of the NoA, the Netherlands accepts Mr Andraous' proposal to apply the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

### **Number and method of appointment of arbitrators**

The Netherlands has taken note of Mr Andraous' proposal for the arbitral tribunal to consist of three arbitrators, with each party to appoint one co-arbitrator and the co-arbitrators to *"elect a president from a pre-recorded list of ten arbitrators, of which the respective parties propose five each"* (NoA, para. 87).

The Netherlands counter-proposes the following:

- The tribunal consists of five arbitrators, with each party appointing one co-arbitrator.
- Regardless of the number of arbitrators, the Netherlands proposes that the Parties elect the remaining arbitrator(s) on the basis of a list procedure as proposed by Mr Andraous, except that the names on the list should be provided by the appointing authority rather than the Parties themselves, in order to further preserve objectivity in the appointment process.

The Netherlands trusts that Mr Andraous will appreciate the importance of safeguarding the objectivity of the proceedings in constituting the arbitral tribunal by means of the aforementioned method.

### **Choice of administering, appointing, and designating authority**

The Netherlands has also taken note of Mr Andraous' proposal in para. 91 of the NoA to have the Permanent Court of Arbitration ("**PCA**") administer the arbitral proceedings. However, in view of the separate arbitration proceedings initiated by the PCA against the Netherlands that are presently ongoing, the Netherlands is currently unable to agree to having these proceedings administered by the PCA so as to avoid any potential conflict. The Netherlands notes that the function of an administrator is not prescribed by nor required under the UNCITRAL Rules. The Netherlands proposes to revisit the need for an administrator upon the constitution of the Tribunal and by reference to the Tribunal's requirements.

The Netherlands has likewise taken note of the e-mail of Mr De Vriese dated 22 February 2023 proposing to designate the Secretary-General of the PCA as appointing authority in these proceedings. For the same reasons as set out above, the Netherlands is unable to accept this proposal. It proposes to designate the President of the International Court of Justice ("**ICJ**") as the appointing authority in these proceedings, noting in that regard that the President of the ICJ is also the default appointing authority in cases brought under Article 10 of the BIT. In the event that Parties cannot agree on

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**Date**  
27 February 2023

the appointing authority, the Netherlands would likewise prefer for the President of the ICJ to replace the PCA in its role as designating authority in these proceedings.

The Netherlands also notes that there is no agreement between the Parties as to the seat of arbitration at this stage and reserves its right to revert on this issue in due course.

Yours sincerely,

René Lefeber  
Legal Advisor

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Page 3 of 3