

Postbus 1110
3000 BC Rotterdam
The Netherlands
Weena 750
3014 DA Rotterdam
The Netherlands
T +31 10 22 40 000
F +31 10 41 48 444

Prof. Dr. G.J. Meijer
M. van de Hel-Koedoot, LL.M.
T +31 20 71 71 623
F +31 10 22 40 006
M +31 6 29 00 76 16
gerard.meijer@nautadutilh.com
mirjam.vandehel-koedoot@nautadutilh.com

Rotterdam, 5 November 2015.

BY E-MAIL AND COURIER

Mr. Miloš Zeman
President of the Czech Republic
Prague Castle
119 08 Prague 1
Czech Republic

Mr. Jan Mládek
Minister of Industry and Trade
Na Františku 32
110 15 Prague 1
Czech Republic
E: posta@mpo.cz

Mr. Andrej Babiš
Minister of Finance
Letenská 15
118 10 Prague
Czech Republic
E: podatelna@mfcf.cz

Mr. Libor Kazda
Director
Financial Analytical Unit
Ministry of Finance
Letenská 15
118 10 Prague
Czech Republic
E: podatelna@mfcf.cz

Dear Sirs,

Formal request for amicable settlement of a dispute under the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic

On behalf of our client Fynerdale Holdings B.V. ("Fynerdale"), a company incorporated under the laws of the Kingdom of the Netherlands, we hereby request that the Czech Republic engage in discussions with Fynerdale to reach an amicable settlement of a dispute with the Czech Republic, pursuant to Articles 8(1) and 8(2) of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (the "BIT").

The BIT was agreed between the former Czech and Slovak Federal Republic and the Kingdom of the Netherlands ("the Netherlands") and entered into force on 1 October 1992. By exchange of diplomatic notes, dated 8 December 1994, be-

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tween the Ministers of Foreign Affairs of the Czech Republic and of the Netherlands, it was confirmed that the BIT remains in force between the Czech Republic and the Netherlands. In accepting the BIT, the Czech Republic took upon itself specific obligations for the encouragement and reciprocal protection of investments made by investors from the Netherlands in the territory of the Czech Republic.

Summary of events

Below follows a summary of the relevant events, for the purpose of reaching an amicable settlement. However, it must be noted that this summary is not a complete discussion of all of the relevant facts, and Fynerdale reserves all rights to further expand hereupon should any formal claims under the BIT be instituted.

Fynerdale is an investor as defined in the BIT and as such has standing to bring a claim thereunder. According to Article 1(b)(ii) of the BIT, the definition of an investor comprises legal persons constituted under the law of one of the Contracting Parties. As Fynerdale was constituted under the laws of the Netherlands, it fulfils this definition.

Additionally, an investment in the sense of Article 1 of the BIT exists. Article 1 of the BIT provides a non-exclusive definition of investments that are protected under the BIT. Fynerdale has, since 2007, invested CZK 3,016,000,000 in the form of assets (loans) into the Czech Republic, both directly to YTRIX a.s., a Czech company ("YTRIX"), and indirectly through Poppyseed Limited, a Maltese company ("Poppyseed"). These assets were intended to be used for trade in poppy seeds produced in the Czech Republic, and were provided after Fynerdale was approached with a "business opportunity" by Mr. Libor Laichman, the Vice-Chair of the Board of Directors of Newton Management a.s., who in turn had been approached with said "business opportunity" by Ms. Marcela Stavjaiková, Chairman of the Board of Directors of YTRIX (who is, as explained below, one of a group of cohorts accused of perpetrating fraudulent activity against Fynerdale; this same group has also already been accused of and convicted for perpetrating similar frauds against other victims). Fynerdale was promised, under the terms of various credit agreements concluded with YTRIX and Poppyseed, that the loans would be repaid within short turnaround periods of between 3 and 6 months, at interest rates of between "3M PRIBOR¹ + 12%" and 30%. Thus, Fynerdale's expected return on its investment can be estimated to be at least CZK 512,767,271.

¹ 3M PRIBOR stands for the 3-Month Prague Interbank Offered Rate.

The investment of the funds provided by Fynerdale was meant to work as follows. Fynerdale would directly provide said credit to YTRIX, as well as provide credit to Poppyseed Limited, a Maltese company, which would in turn provide part of that credit, combined with financial assets of its own, to YTRIX as advance payment on the purchase price of poppy seeds. YTRIX would then purchase poppy seeds from the Czech companies Agrobyskovice, Bohemia Profitinvest and Aida. These companies were to obtain the poppy seeds from local Czech growers. The poppy seeds purchased would then be stored, cleaned, mixed and packed in the warehouses of the just-mentioned Agrobyskovice.

After the investments were made, it came to light, in 2011, that poppy seeds had not actually been purchased as intended, or at least not the amount which should have been purchased, and that, instead, the money invested by Fynerdale was being used in a fraudulent pyramid scheme set in motion by a group of four persons, described below, who were associates of one another and worked in concert to perpetrate the fraud. This group consisted of the aforementioned Ms. Marcela Stavjaiková, along with Mr. Jan Vrbenský, Mr. Josef Stavjanik and Mr. Josef Pospíšil. In the end, the economic activities which were intended to be performed with the assets provided by Fynerdale were in fact not performed, and furthermore, could not have been performed as was promised to Fynerdale. Instead of actual trade in poppy seeds, false invoices, acceptance-delivery certificates and other fictitious accounting documents were issued and used in an attempt to conceal the fraud. Along with this, a circular chain of payments was created between the Czech entities involved so as to give the impression of a successful trading business. All of these fraudulent behaviours had one aim: embezzling assets (money) from Fynerdale. Unfortunately, Fynerdale was not the first victim of the above-mentioned four perpetrators, who had committed similar frauds before and are currently in detention in the Czech Republic in connection therewith.

The above constitutes only a brief general sketch of the activities and fraud in question. A more complete description of the events in question is contained in a document from the Prague Police Department dated 13 December 2013 (attached to this letter in both the original Czech and translated into English; see especially pages 2-4 thereof).

Violations of BIT obligations

As described above, the assets provided by Fynerdale were in fact not used for the intended economic activities, but rather used in part of a fraudulent pyramid scheme. As such, criminal complaints against the perpetrators of the fraud were filed in 2012. However, to date no definitive action has been taken in this matter by the Czech authorities. Also, the Czech authorities have not made any effort to

trace the money invested by Fynerdale, although they have various means to do so and were frequently urged to apply these means by Fynerdale. For example, both the Czech police and the Financial Analytical Unit of the Ministry of Finance ("FAÚ") had the authority to properly investigate the fraud perpetrated against Fynerdale. After all, the police have a duty to investigate criminal activities, including stolen assets, and all requested parties are required by law to cooperate with their investigation and to provide them with all requested information. In this regard, the police can trace assets by asking banks to provide information about all relevant transfers. Further, the FAÚ has the right to directly check and observe all transactions in the Czech Republic and cooperates with similar agencies abroad. It can trace assets very easily and frequently does so in providing support to the police, who subsequently request, on the basis of these results, that banks provide relevant underlying documents, which are later used as evidence within criminal proceedings.

The Czech Republic's behaviour in this matter is especially troublesome when seen in light of the fact that the Czech authorities have acted against similar crimes of fraud by the same persons which were committed against Czech legal persons between now and the time the first criminal complaint regarding the present matter was filed in 2012, but did not do so when foreign legal persons fell victim. The Czech Republic has, therefore, allowed an unreasonable and unacceptable delay in the prosecution of the fraud to come about, has failed to take necessary steps to assure that the perpetrators are brought to justice so that Fynerdale's losses might be recovered and has failed to take the necessary and available steps in order to recover the assets. Therefore, the Czech Republic failed to take the steps necessary to create a safe investment climate for Netherlands investors. These acts and omissions of the Czech Republic are in breach of its obligations under the BIT, as will be further set out below.

Under international law, as a result of these breaches, Fynerdale must be returned to the position in which it would have been in were it not for the violation of the BIT by the Czech Republic,² and, thus, Fynerdale has a right to claim damages from the Czech Republic in the amount of CZK 2,376,267,271.

Below follows a description of ways in which the Czech Republic has failed to meet its obligations under the BIT. However, Fynerdale reserves all rights to further set out its position should any formal claims under the BIT be instituted.

² PCIJ 26 July 1927, Publications of the Permanent Court of International Justice Series A, No. 9 (Case Concerning the Factory in Chorzów).

No fair and equitable treatment

Among other standards, the Czech Republic is in breach of its obligation to ensure fair and equitable treatment to the investments of investors of the other Contracting Party and not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors (Article 3(1) of the BIT). This provision, which is similar to that found in other bilateral investment treaties, guards against a broad range of behaviours by the host State. It covers discriminatory measures, which includes applying domestic law differently in similar situations.³ It also encompasses a prohibition regarding the so-called denial of justice,⁴ which is related to the "*minimum standards (...) in the state's judicial or administrative system with respect to the judicial protection of foreigners and their rights.*"⁵ This standard is therefore especially relevant in cases involving fraud committed by nationals of the host State against foreign investors.

Here, the Czech Republic has, through its inaction, or in any event through the delays in pursuing further action, violated these standards by unreasonably impairing Fynerdale's operation, management, maintenance, use, enjoyment and disposal of its investment in the Czech Republic in a discriminatory manner. As alluded to above, a similar fraudulent scheme was previously perpetrated by the suspects in the fraud involving Fynerdale's assets. This fraud was committed against a Czech company, and in that case the Czech authorities did take prompt and effective action. The perpetrators were brought up on charges and sentenced to considerable jail time. However, in Fynerdale's case, which is very similar except for that the company which was victim to the fraud is a Netherlands entity instead of a Czech entity, the Czech authorities have failed to take any effective measures. This behaviour discriminates between Czech and Netherlands investors, and is thus clearly in breach of the BIT.

Full security and protection

Additionally, the Czech Republic is in violation of its obligation to accord full security and protection to the investments of investors of the Netherlands, which in any case shall not be less than that accorded to investments of its own investors (Article 3(2) of the BIT). Arbitral tribunals have found that such standard can extend "*beyond physical protection of an investment's officials, employees or*

³ A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, Alphen aan den Rijn: Kluwer Law International 2009, p. 289.

⁴ M. van de Hel-Knedoot & B.R.D. Hoebeke, 'De bescherming voor grensoverschrijdende investeerders op grond van bilaterale investeringsverdragen', *Onderneming en Financiering* 2013, no. 4, p. 38-47.

⁵ A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, Alphen aan den Rijn: Kluwer Law International 2009, p. 239.

*facilities, and extends more generally to protections afforded by the legal system.*⁶⁶ This standard is then also especially relevant in cases involving fraud committed against foreign investors. In the present situation, as mentioned above, the Czech authorities have treated the criminal fraud committed against Fynerdale in a completely different manner than that in which it treated a very similar fraud perpetrated by the same suspects against a Czech victim, while under the BIT it should have approached the protection against, or at least prosecution of, such criminal acts in the same way in Fynerdale's case as it did in the case of the Czech company. Furthermore, the Czech authorities' inaction regarding this criminal matter deprives Fynerdale's investment of the full security and protection it deserves under the BIT. Had the Czech authorities acted promptly and effectively in protecting Fynerdale's investment, the chance that Fynerdale could have recovered at least some of its losses would have been increased. Furthermore, through letting such crimes go unpunished and/or un-investigated, the Czech authorities create a climate ripe for such fraudulent activity in the Czech Republic. Beyond this, the Czech authorities have also not taken any steps in order to investigate the current whereabouts of the assets fraudulently obtained from Fynerdale. Also in this way, the Czech Republic has violated its obligations under the BIT.

Expropriation (de facto) of the investment

Finally, under Article 5 of the BIT the Czech Republic is prevented from taking any measures depriving Fynerdale, directly or indirectly, of its investment without a public interest being served, due process being observed, the measures not being implemented discriminatorily and just compensation being provided. The Czech Republic can thus be in violation of the BIT without having committed a direct expropriation of Fynerdale's investment. This is also in line with international investment treaty practice:⁶⁷ "[i]t is recognized in international law that measures taken by a state can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the state does not purport to have expropriated them and the legal title to the property formally remains with the original owner."⁶⁸ As already mentioned above, in the case at hand, the Czech Republic has discriminatorily not taken action in order to protect Fynerdale's investment, while it did take such action in cases involving Czech investors. This behaviour by the Czech Republic has interfered with Fynerdale's property rights in such a way that the investment has been rendered useless and can be deemed to have been (indirectly) expropriated, without the Czech Republic having observed the conditions laid

⁶⁶ A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, Alphen aan den Rijn: Kluwer Law International 2009, p. 311.

⁶⁷ See, e.g., A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, Alphen aan den Rijn: Kluwer Law International 2009, p. 325-328.

⁶⁸ *Starrett Housing Corporation v. Islamic Republic of Iran* (1983) 4 Iran-US CTR 122, 154.

down in Article 5 of the BIT.

Dispute Resolution under the BIT

Article 8 of the BIT, which deals with the resolution of disputes concerning investments under the BIT, refers to disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter. The abovementioned breaches by the Czech Republic of its obligations under the BIT have caused direct and ongoing losses for Fynerdale, which losses it intends to claim from the Czech Republic in an arbitration pursuant to Article 8 of the BIT, if an amicable settlement cannot be reached. Should it come to pass that such a settlement cannot be reached, the claim will be further particularised in a Notice of Arbitration and a Statement of Claim.

Formal request for amicable settlement

This letter is a formal request by Fynerdale for the Czech Republic to engage in discussions with Fynerdale to reach an amicable settlement of this dispute, which amicable settlement is referred to in Articles 8(1) and 8(2) of the BIT. We hereby notify you that should this dispute not be amicably settled, Fynerdale will submit the dispute to arbitration in accordance with Article 8 of the BIT.⁹ That being said, we are open to constructive negotiations with the Czech Republic in order to reach an amicable settlement, and look forward to your expeditious response so that negotiations regarding such an amicable settlement can be commenced as soon as possible.

Yours faithfully,



NautaDutilh N.V.

Gerard J. Meijer

Mirjam van de Hel-Koedoot

⁹ It is of note that although Article 8(2) of the BIT provides that each Contracting Party consents to submit investment disputes under the BIT to an arbitral tribunal if the dispute has not been settled amicably within a period of six months from the date either party to the dispute requested amicable settlement, such period does not apply in the case at hand due to article 3(5) of the BIT's provision that more favourable treatment under other international obligations of the Czech Republic supersedes less favourable treatment under the BIT. The Czech Republic is party to a number of other BITs (e.g. with Australia, Moldova and Panama) which do not contain such a time period before a dispute can be submitted to arbitration, and therefore this more favourable treatment applies in the present case. See also in this regard *Enlita Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000.