

# TRACTATENBLAD

VAN HET

KONINKRIJK DER NEDERLANDEN

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JAARGANG 2007 Nr. 67

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A. TITEL

*Overeenkomst inzake de bevordering en wederzijdse bescherming van investeringen tussen het Koninkrijk der Nederlanden en de Tsjechische en Slowaakse Federatieve Republiek;  
Praag, 29 april 1991*

B. TEKST

De Engelse en de Nederlandse tekst van de Overeenkomst zijn geplaatst in *Trb.* 1991, 94.

In overeenstemming met artikel 9 van de Overeenkomst is op 1 juli 2002 te Praag het verslag vastgesteld van een overleg betreffende de uitlegging en toepassing van de Overeenkomst. De tekst van het vastgestelde verslag luidt als volgt:

*Consultations on the interpretation and application of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech Republic*

## AGREED MINUTES

By written consultation made on 30 October 2001, the Czech Republic requested the Kingdom of the Netherlands to start consultations under Article 9 of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech Republic, signed on 29 April 1991. Two questions were formulated:

- \* whether the Agreement extends to Czech investments of another investor prior to the acquisition, and
- \* whether law of the host state not inconsistent with the terms of the Investment Promotion and Protection Agreement (IPPA) can be ignored by the Tribunal contrary to Article 8 (6) of the Agreement.

Consultations took place between delegations of the two countries by written exchange of views and by meetings of the delegations. The consultations were conducted in an open and constructive atmosphere. The aim of the consultations was to have an exchange of views in order to investigate the possibility of reaching a common understanding on the interpretation and application of the IPPA between both countries. During the consultations, the delegations took note of the mutual explanations, which included the principles underlying the IPPA. It was agreed upon that the consultations were held on the interpretation and application of the IPPA. The merits of the outstanding disputes in which the Czech Republic is involved were not subject of the consultations.

A first meeting took place on 19 December 2001 in The Hague, where mainly procedures were discussed. Since in the letter of 30 October 2001 no background information was given with respect to the circumstances that led to the questions referred to, it was agreed upon that the Czech delegation would produce a background paper elucidating the two questions. That Czech background paper was sent to the Netherlands on 2 January 2002. The Netherlands delegation drafted a position paper, which was sent to the Czech Republic on 5 February 2002, in which it addressed the issues forwarded by the Czech delegation and in which its views were given on the interpretation and application of the IPPA between the two countries. On 22 February 2002, a further exchange of views took place during a meeting in Prague, of which the results were written down in agreed minutes, which were signed on 4 April 2002 by the heads of the two delegations.

On 4 and 5 April 2002, a final meeting between experts of both countries was held in The Hague. It was agreed upon that the result of the whole consultation process would be reflected in the present agreed minutes and that it will be proposed to the responsible ministers in both countries to confirm the result of the consultations by an exchange of letters between them. By that exchange of letters the consultation process will be concluded.

The names of the members of both delegations that took part in the consultations are stated in the Annex.

As a result of the consultation process, a common position was reached on the following issues:

- purpose and context of the Agreement
- investments disputes and interpretation of Article 8.6 of the Agreement
- assignment of claims arising under the Agreement
- application of the Agreement where another IPPA is invoked.

At the same time different views on the interpretation and explanation of the IPPA remained with respect to some issues.

The following positions have been expressed.

*1. On the issue of the purpose and context of the Agreement*

Both delegations agree that the purpose of the Agreement is to protect investments of investors of one Contracting Party in the territory of the other Contracting Party. The Agreement creates rights and obligations for the Contracting Parties and gives rights to investors in respect of their investments. They agree that the IPPA is applicable to investments of investors made after 1 January 1950 from the moment an investor of one Contracting Party acquires an investment in the territory of the other Contracting Party. The IPPA protects investments of investors who are either natural persons, having the nationality of one of the Contracting Parties in accordance with its law, or legal persons constituted under the law of one of the Contracting Parties. The investments covered by the IPPA are invested either directly or through an investor of a third State. Investors and investments not falling within these categories are not protected by the IPPA. Investments can be new investments (greenfield investments) or existing investments acquired by an investor.

*2. On the issue of investment disputes and interpretation of Article 8.6 of the Agreement*

The delegations agree that the arbitral tribunal shall decide on the basis of the law. When making its decision, the arbitral shall take into account, in particular, though not exclusively, the four sources of law set out in Article 8.6. The arbitral tribunal must therefore take into account as far as they are relevant to the dispute the law in force of the Contracting Party concerned and the other sources of law set out in Article 8.6. To the extent that there is a conflict between national law and international law, the arbitral tribunal shall apply international law.

*3. On the issue of the assignment of claims arising under the Agreement*

The delegations agree that each investor that qualifies under the IPPA is entitled to the protection of the IPPA from the time the investment is acquired by that investor. Investors are free to assign their investments protected by the IPPA. A claim which the first investor has under the IPPA may pass to a second qualifying investor if that claim has been transferred to the second investor either expressly or impliedly by operation of the law applicable to the transfer and the claim so transferred will be available to the second investor on the same basis as it was available to the first investor. If the first investor's claim does not so pass to the second investor, the first investor may still be able to make the claim.

*4. On the issue of the application of the Agreement where another IPPA is invoked*

The two delegations agree that, although it might be undesirable that investors submit the same subject matter to different arbitral tribunals under different Investment Protection Agreements, the Czech – Dutch investment Agreement does not deal with this situation. If the Contracting Parties wish to address this issue further, it could be dealt with either by future amendment of the IPPA or within the framework of a multilateral investment protection agreement, taking into account the complexity of the matter and the various situations which may occur.

The delegation of the Netherlands believes that neither written, nor unwritten international law at present deals with this question. The Czech delegation indicated that there are rules available in international law, based on fundamental principles, which deal with the question referred to. The delegations, however, agreed that the consultations do not provide the context to resolve the issue.

On the issue of different tribunals dealing with supposedly identical cases, the Netherlands delegation believes that it cannot be maintained that there are always identical cases when a legal dispute is submitted to international arbitration under different Investment Protection Treaties and/or by different investors. The provisions of Investment Protection Treaties may differ and/or the claimant(s) may differ. Claims of different legal entities, even though they may be controlled by the same economic entity, are not necessarily the same claims and difference in legal personality has been recognised by tribunals (see, e.g., the ICJ Barcelona traction case). For instance, subsidiaries can operate rather independently from the parent company. The Netherlands delegation points out that an arbitral tribunal decides on its own jurisdiction. The Netherlands added that within the framework of the World Trade Organisation (WTO) new negotiations on a multilateral investment agreement are foreseen and may deal with this matter, but it may take some time before a result may be accomplished.

The Hague, 17 June, 2002

*For the delegation of the Kingdom of the Netherlands:*

PETER D.U. DEN BOER  
Ministry of Economic Affairs

Prague, 1 July 2002

*For the delegation of the Czech Republic:*

VACLAV ROMBALD  
Ministry of Finance

D. PARLEMENT

Zie *Trb.* 1992, 146.

G. INWERKINGTREDING

Zie *Trb.* 1992, 146 en *Trb.* 1995, 37.

J. VERWIJZINGEN

Zie voor verwijzingen en andere verdragsgegevens *Trb.* 1991, 94 en *Trb.* 1995, 37.

Uitgegeven de *zevenentwintigste* maart 2007.

*De Minister van Buitenlandse Zaken,*

M. J. M. Verhagen