

Czech Republic topples forestry claim

SEBASTIAN PERRY
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An UNCITRAL tribunal chaired by **L Yves Fortier CC QC** has dismissed a German forestry investor's claim against the Czech Republic – but the state may face more treaty claims after its Constitutional Court upheld legislation imposing a special tax on solar power plants.



Intertrade Holding GmbH, an investor in Czech logging firm CE Wood, brought its claim in 2008. It alleged that the conduct of a 2005 tender for the privatisation of the state's forests breached the Germany-Czechoslovakia bilateral investment treaty. The company sought around €150 million in damages, representing the devaluation of its shares in CE Wood after the tender failed to go the company's way.

In an award dispatched on 7 June, Fortier and co-arbitrator **Brigitte Stern** of France held that the actions of Lesy Ceske Republiky, the enterprise that handled the tender, were not attributable to the Czech state under international law.

Intertrade's appointed arbitrator, **Henri Alvarez QC** of Canada, dissented on the issue, though it remains unclear whether he also issued a separate opinion. The award has yet to be published.



Arbitrators Fortier, Alvarez and Stern

The majority is thought to have relied on the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts in holding that Lesy was acting in an entirely commercial capacity rather than exercising sovereign authority.

The Czech Republic retained Czech lawyer **Philip Smitka** of German firm Noerr for the case, along with **David Alexander** and **Stephen Anway** of Squire Sanders & Dempsey in New York.

Anway says, "The award is confidential and therefore I can't divulge specific details about its content. Our client is pleased with the result. We believe it represents a significant development in international law on the issue of state attribution."

It is not the first time Squire Sanders has helped the Czech Republic prevail in an investment treaty claim. Anway and Prague-based partner **Rostislav Pekař** defended the state against an ICSID claim by Israeli company Phoenix Action. That case ended with a 2009 jurisdictional decision in the state's favour that has been frequently cited for its determination that investors cannot change the structure of their investments after a dispute arises in order to bring a treaty claim.

Anway and Pekař are also acting for the state in an UNCITRAL claim by another German investor, ECE Management, over a failed shopping mall. That case is also being heard under the Germany-Czechoslovakia BIT, with an award expected later this year.

Last year the Czech Republic named Alexander and Anway as part of a "dream team" of arbitration specialists it had retained to help fend off dozens of potential Energy Charter Treaty claims by solar power investors. An association of companies including Germany's Voltaic Network and Luxembourg's Radiance Energy Holding filed a notice of dispute last year under the ECT, in response to legislation imposing a retroactive 26 per cent levy on profits generated by solar plants that have benefited from government incentives.

That dispute has apparently been on hold while the Constitutional Court considered senators' objections to the legislation. On 16 May, the court held that the tax is lawful – meaning the state could see arbitration claims filed soon.

Tribunal

L Yves Fortier CC QC (Canada) (president)
Henri Alvarez QC (Canada) (appointed by Intertrade)
Brigitte Stern (France) (appointed by Czech Republic)

Counsel to Intertrade Holding GmbH

Python & Peter
Partners **Wolfgang Peter** and **Anne K Hoffmann** in Geneva

Counsel to Czech Republic

Noerr
Philip Smitka in Prague and Munich
Squire Sanders & Dempsey
Partners **David Alexander** in Columbus and **Stephen Anway** in New York