

# Czech challenge to solar award fails in Switzerland

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The Swiss Federal Supreme Court has rejected the Czech Republic's interim challenge to an investment treaty award that held the state liable for reforms to its solar power sector, clearing the way for the arbitration to proceed to the damages phase.

In a decision notified on 2 February, the court in Lausanne upheld a partial award on jurisdiction and liability in favour of Dutch-registered Natland Investment Group and three other European investors. The court is not expected to publish its reasoning for several weeks.

While the precise grounds of the set-aside application have not been disclosed, it was limited to the tribunal's findings on jurisdiction. Under Swiss law, the tribunal's findings on liability cannot be challenged until damages are decided.

The court also ordered the state to pay 250,000 Swiss francs in costs.

The investors were represented in the Swiss courts by Kellerhals Carrard in Lugano and ArbLit in Milan, the latter firm also advising them in the arbitration.

The Czech Republic used Froriep in Geneva for the set-aside action and is relying on Arnold & Porter and Czech firm Skills in the arbitration.

A Geneva-seated UNCITRAL tribunal administered by the Permanent Court of Arbitration issued the award in late 2017. It upheld jurisdiction over part of the investors' claims and concluded that one of the disputed solar measures violated the fair and equitable treatment standard in the Energy Charter Treaty and various intra-EU BITs.

The Czech Republic did not raise the issue of the compatibility of the treaties' investor-state arbitration provisions with EU law among its jurisdictional objections and this question was also not pursued in the set-aside proceedings. The award pre-dated the Court of Justice of the European Union's March 2018 ruling on intra-EU BITs in *Achmea*.

The tribunal that issued the award consisted of Lalive partner **Veijo Heiskanen** as chair, **Gary Born** of WilmerHale and Canada's **J Christopher Thomas QC**.

Born resigned from the panel in 2018 and was replaced by former ICC Court president **John Beechey**. Heiskanen resigned as chair in the same year because of a potential issue conflict and has yet to be replaced. The arbitration has been suspended while the state's set-aside application was pending.

A spokesman for the Czech Ministry of Finance said in a statement to local media that it had not received the court's reasoning and therefore could not comment on the decision in detail, but emphasised that it only concerned jurisdiction and that the tribunal has yet to determine the amount the state will be obliged to pay.

European investors launched seven treaty claims against the Czech Republic in 2013 in response to reforms in the solar power sector. The reforms included a three-year levy of 26% on electricity generated by solar plants commissioned in 2009 and 2010, and the abolition of an income tax exemption.

The *Natland* case was by far the largest of the seven cases. The other six cases ended between 2017 and 2019 with victory for the state, with Beechey joining in the awards in four of the cases. ArbLit represented the claimants in all but one of the seven cases, while Arnold & Porter has defended the state in all seven.

Last September, the General Court of the European Union (GCEU) [rejected a challenge](#) to a European Commission decision from 2016 which had concluded that the Czech solar reforms (including those at issue in the treaty cases) constituted state aid compatible with EU law. The challenge was brought by a group of renewable energy producers including some involved in the arbitrations.

Among other findings, the GCEU rejected the producers' arguments that the Commission had gone beyond its competence in asserting that the arbitrations were contrary to EU law, that the investors were not entitled to rely on the ECT or BITs, that the Czech Republic had not infringed the principle of legitimate expectations under national or EU law, and that any compensation awarded by an arbitral tribunal would be unenforceable.

The decision is being appealed to the CJEU.

*Natland Investment Group NV (The Netherlands), Natland Group Limited (Cyprus), GIHG Limited (Cyprus) and Radiance Energy Holding Sàrl (Luxembourg) v Czech Republic*

*Before the Swiss Federal Supreme Court*

#### Counsel to the Czech Republic

- Froriep

Partner **Jean-Marie Vuillemin** in Geneva

#### Counsel to the investors

- Kellerhals Carrard

Partner **Henry Peter** in Lugano

- ArbLit

Partners **Luca Radicati di Brozolo** and **Michele Sabatini** and associates **Emilio Bettoni** and **Flavio Ponzano** in Milan

*In the UNCITRAL arbitration*

#### Tribunal

- No chair in place\*
- **John Beechey\*\*** (UK) (appointed by Natland)
- **J Christopher Thomas QC** (Canada) (appointed by Czech Republic)

\* Finnish arbitrator **Veijo Heiskanen** resigned in 2018

\*\*replaced **Gary Born** (US) in 2018 who replaced **Doak Bishop** (US) in 2014

#### Counsel to the claimants

- ArbLit

Partners **Luca Radicati di Brozolo** and **Michele Sabatini** in Milan

#### Counsel to Czech Republic

- Ministry of Finance

**Ondřej Landa**, **Marie Talašová** (no longer in government) and **Anna Bilanová** in Prague

- Arnold & Porter Kaye Scholer (from 2015)

Partners **Paolo Di Rosa** and **Mallory Silberman** in Washington, DC; partner **Dmitri Evseev** and associates **Peter Nikitin** and **Bart Wasiak** in London; and associate **John Muse-Fisher** in San Francisco

- Skils

Partners **Karolína Horáková** and **Libor Morávek** and associate **Pavel Kinnert** in Prague\*

\* Brought the case with them from *Weil Gotshal & Manges* in 2018

- Squire Patton Boggs (until 2015)

Partners **David Alexander** in Columbus and **Stephen Anway** in New York, with partner **Rostislav Pekar** and **Mária Lokajová** in Prague

- **Zachary Douglas QC** of Matrix Chambers (until 2015)

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