



Sun rises on Czech energy claims

Sebastian Perry and Kyriaki Karadelis • Wednesday, 19 February 2014

Three UNCITRAL panels are in place to hear claims by renewable energy investors against the Czech Republic, with a chair still to be appointed in four other cases also arising from the state's levy on the solar power industry.

Sunrise in Prague

Swiss arbitrator **Gabrielle Kaufmann-Kohler** is chairing the panel in one ad hoc proceeding, lodged in June last year by German brothers Jürgen and Stefan Wirtgen and their company JSW Solar (zwei). The tribunal, formed in November, also includes **Gary Born**, partner at Wilmer Culter Pickering Hale and Dorr in London, who was appointed by the claimants, and Slovakia's **Peter Tomka**, the president of the International Court of Justice, chosen by the Czech Republic. German firm Luther is advising the claimants in that case.

The claimants in the other six cases belong to a group of 10 solar investors who originally filed a [collective claim](#) against the state in May last year under the Energy Charter Treaty and several bilateral investment treaties. However, the state objected to the consolidation of all the claims and responded by appointing arbitrators in what it deemed to be six separate cases, only agreeing to consolidate claims where the claimants either were affiliates or had purportedly invested in the same operation.

The 10 claimants responded by asking the Permanent Court of Arbitration to

designate the Stockholm Chamber of Commerce as an appointing authority, so that they could ask the SCC to nominate an arbitrator on the Czech Republic's behalf for a single tribunal that would hear the collective claim. However, the PCA rejected the request in a decision last August, so the parties proceeded with the selection of six panels.

One of those six cases is being administered by the PCA, which published details of the proceedings on its website last week. The claimants, German company Antaris Solar and its founder Michael Göde, have appointed **Doak Bishop**, a partner at King & Spalding in Houston, as their arbitrator, while the state has again nominated Tomka. **Lord Collins of Mapesbury** has been appointed to chair the panel. The case is being brought under the ECT and the Germany-Czechoslovakia BIT of 1990.

The remaining five cases are ad hoc arbitrations. So far, a tribunal has only been formed in one of them, brought by UK and Dutch subsidiaries of Natland Group, Cypriot company GIHG Limited and Luxembourg's Radiance Energy – all investors in Czech solar power producer Energy 21. Finnish arbitrator **Veijo Heiskanen**, a partner at Lalive in Geneva, is chairing the tribunal in that case. The claimants have once again appointed Bishop, while the Czech Republic has selected Canadian arbitrator **J Christopher Thomas QC** of the National University of Singapore.

The remaining four ad hoc cases are being brought respectively by German company Voltaic Network; Photovoltaik Knopf Betriebs, also of Germany; the UK's ICW Europe Investments; and Cypriot entity WA Investments-Europa Nova. In all those cases, the claimants have appointed Bishop, while the Czech Republic has nominated **Toby Landau QC** of Essex Court Chambers. The role of chair in those four cases has yet to be filled.

In all six cases arising from the collective claim, the claimants are using Milan boutique ArbLit – Radicati di Brozolo Sabatini. Founding partner **Luca**

Radicati di Brozolo was instructed before he left Italian firm Bonelli Errede Pappalardo in June last year.

The same counsel team is defending the Czech Republic in all seven claims concerning its solar power policies. The team comprises Squire Sanders partners **Stephen Anway** in New York, **David Alexander** in Columbus, Ohio, and **Rostislav Pekař** in Prague; **Zachary Douglas** of Matrix Chambers in Geneva; and partner **Karolína Horáková** from Weil Gotshal & Manges in Prague. The line-up closely resembles the original “dream team” of practitioners that the state said it would hire in 2011 to defend the claims. The cases all arise from a levy on electricity generated by solar plants that became operative between 2009 and 2010. Investors complain that the levy, introduced in 2011, amounts to a 26 per cent tax on the subsidies provided by the Czech government to encourage investment in its solar sector. The Czech Constitutional Court declared the tax unlawful a few months after it was implemented.

Meanwhile, Spain is also facing a new claim relating to reforms in its solar power sector. A Dutch subsidiary of Abu Dhabi’s Masdar Clean Energy has brought the claim at ICSID under the Energy Charter Treaty. The centre registered the claim on 11 February – its first new case of 2014.

Masdar has a joint venture with Spanish engineering firm SENER, which operates three thermosolar power projects in the country.

It is the fourth ICSID claim lodged against Spain by investors in its renewable energy sector since October. Like the other cases, it relates to a series of energy measures introduced by the Spanish government over the past couple of years, including a 7 per cent tax on power generators’ revenues and a reduction in subsidies for renewable energy producers.

Masdar has instructed a team from Allen & Overy, the same firm acting for solar investors in the three other ICSID claims against Spain, brought

respectively by the British investment fund [Eiser Infrastructure](#) and its Luxembourgish subsidiary [Energia Solar](#); BNP Paribas subsidiary [Antin](#); and a subsidiary of Deutsche Bank, [Rreef](#).

Allen & Overy is also advising 14 groups of investors (comprising 88 claimants) in an ad hoc UNCITRAL proceeding in Geneva that arises out of Spain's 2010 revocation of subsidies for solar photovoltaic power plants. An arbitral panel, chaired by Kaufmann-Kohler, is still considering Spain's objections on jurisdiction and admissibility in that case.

Spain is also facing at least two further ECT claims at the SCC, brought by the Dutch investor [Charanne](#) and Luxembourg's Construction Investments; and a Luxembourgish subsidiary of Spanish company [Abengoa](#).

Herbert Smith Freehills is known to be advising Spain in the UNCITRAL proceedings in Geneva and in the *Charanne* case at the SCC, but the state has yet to instruct external counsel for the ICSID cases.

Antaris Solar and Dr Michael Göde v the Czech Republic (PCA administered)

Tribunal

- **Lord Collins of Mapesbury** (UK) (presiding)
- **Doak Biship** (US)
- **Judge Peter Tomka** (Slovakia)

Counsel to the claimants

- ArbLit – Radicati di Brozolo Sabatini

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

Counsel to the Czech Republic

- Ministry of Finance

Petr Plášil, Marie Talašová and Markéta Filipová

- Squire Sanders

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

- Weil Gotshall & Manges

Partner **Karolína Horáková** in Prague

- **Zachary Douglas** of Matrix Chambers

Natland Investment Group NV, Natland Group Limited, G.I.H.G. Limited, and Radiance Energy Holding S.A.R.L. v. The Czech Republic (UNCITRAL ad hoc)

Tribunal

- **Veijo Heiskanen** (President)(Finland)
- **Doak Bishop** (US)
- **Christopher Thomas QC** (UK)

Counsel to claimants and respondents as above.

Voltaic Network GmbH v. The Czech Republic (UNCITRAL ad hoc)

Tribunal

- President yet to be appointed
- **Doak Bishop** (US)
- **Toby Landau QC** (UK)

ICW Europe Investments Limited v. The Czech Republic

(UNCITRAL ad hoc)

Tribunal

- President yet to be appointed
- **Doak Bishop** (US)
- **Toby Landau QC** (UK)

Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic

(UNCITRAL ad hoc)

Tribunal

- President yet to be appointed
- **Doak Bishop** (US)
- **Toby Landau QC** (UK)

WA Investments-Europa Nova Limited v. The Czech Republic

(UNCITRAL ad hoc)

Tribunal

- President yet to be appointed
- **Doak Bishop** (US)
- **Toby Landau QC** (UK)

Counsel to claimants and respondents as above

Mr Jürgen Wirtgen, Mr Stefan Wirtgen, and JSW Solar (zwei) v.

Czech Republic (UNCITRAL ad hoc)

Tribunal

- Gabrielle Kaufmann-Kohler (President) (Switzerland)

- Gary Born (US)
- Judge Peter Tomka (Slovakia)

Counsel to Mr Jürgen Wirtgen, Mr Stefan Wirtgen, and JSW Solar (zwei)

- Luther

Partners **Richard Happ** and **Georg Scherpf** in Hamburg

Counsel to respondents as above

Masdar solar & Wind Cooperatief UA v Kingdom of Spain
(ICSID Case No. ARB/14/1)

Counsel to Masdar Wind & Solar

- Allen & Overy

Partners **Simon Roderick** and **Chris Mainwaring-Taylor** with senior associate **Yacine Francis** in Dubai, and partners **Judith Gill QC** and **Jeffrey Sullivan** in London.

Counsel to Spain

- State attorneys