

INTERTRADE HOLDING GMBH V. THE CZECH REPUBLIC
SEPARATE OPINION OF HENRI ALVAREZ

1. I have had the opportunity to read in draft the reasons of my esteemed colleagues in this arbitration, which, as a result of the conclusion reached, deal only with jurisdictional issues and the question of attribution. While I agree with most of the reasoning in the Majority Decision and recognize the desirability of unanimity, I am compelled to write this brief separate, dissenting opinion to address the reasoning and conclusions reached on attribution with which I must respectfully disagree. I consider the issue of attribution an important one and one which requires a careful, detailed review of the relevant facts and arguments.

2. My disagreement would likely not lead to a different result in the arbitration. Having reviewed all of the evidence and arguments carefully, I am not persuaded that InterTrade demonstrated sufficient linkage between the acts complained of and the consequences alleged. Therefore, in my view, InterTrade has probably failed to prove causation. However, on the reasoning of the Majority Decision, this issue does not arise for determination. For this reason, my comments in this separate opinion will be brief and focused only on the issue of attribution.

3. In this arbitration, the Claimant alleges that the Czech Republic “held illegal, manipulated tenders in the forest sector in 2004 which ultimately led to CE Wood losing its business and hence forced InterTrade to give up its investment.”¹ The Respondent has raised a number of jurisdictional objections. The objection relevant to this separate opinion is the allegation that the acts complained of are not attributable to it and, therefore, the Tribunal does not have jurisdiction to decide the Claimant’s claims under the BIT. The Claimant submits that the alleged treaty breaches are attributable to the Respondent under one or more of Articles 4, 5, 8 and 11 of the ILC Articles on State Responsibility. I agree with the majority’s reasoning and conclusion in respect of Articles 8 and 11, but respectfully disagree in respect of Articles 4 and 5 for the following reasons.

4. As mentioned, the claim in this arbitration relates to tenders in the forest sector conducted in 2004. The ministry ultimately responsible for forests in the Czech Republic is the Ministry of

¹ Request for Arbitration at para. 1.

Agriculture.² Approximately 60% of the forests in the Czech Republic are State owned.³ In 1992, the Ministry of Agriculture founded a State enterprise, Lesy České Republiky, S.P. ("Lesy CR"), to perform the State's functions with regard to preserving, protecting and regenerating the Czech forests.⁴ The Ministry of Agriculture delegated the day-to-day management of the State-owned forests to Lesy CR, but, in accordance with the *State Enterprise Act*, it maintained control over Lesy CR through the power to appoint and dismiss the Director and two-thirds of the Supervisory Board.⁵ Also in accordance with this Act, the Ministry of Agriculture had both "the right and the obligation to request information on the business activities ... of the Enterprise and to check and verify the information..."⁶ The evidence in the arbitration demonstrated that the Ministry of Agriculture actively controlled the management of Lesy CR at the management level. Between October 2003 and January 2009, the Ministry of Agriculture replaced the Chief Executive Director of Lesy CR six times.⁷ There were also a number of changes to the Supervisory Board.⁸

5. The evidence also demonstrated that the day-to-day management of the forests fell to Lesy CR. After it was founded, Lesy CR entered into contracts with private companies for logging and reforestation services.⁹ According to the Foundation Decree, Lesy CR was responsible for not only ensuring that the forests were managed in a cost effective way, but also that the forest land resources were protected, that regulations were complied with and that systems in the forest, including watercourses, were ameliorated, maintained and managed. CE Wood held a number of these contracts for many years.

6. In late 2004, Lesy CR published on its website a notice of tender for the execution of logging and re-planting activities in 87 territorial units. The tender documents made clear that the tenders were for "a general contract for delivery of complete forestry activities, a contract for

² Czech Forest Act, Article 49; National Forest Programme, Exh. R-17, p.2. Also see Reply at paras. 131, 139 - 140.

³ Request for Arbitration at para. 5. According to the Respondent, the figure may be as high as 77%; see Respondent's Statement of Rejoinder, para. 28.

⁴ See Foundation Decree dated 11 December 1991 (Exh. CLM-78); Request for Arbitration at para. 5; Statement of Defence at para. 135; Reply at para. 112.

⁵ See State Enterprise Act, sections 15, 12(2) and 13(2) and Reply at paras. 123 - 124.

⁶ State Enterprise Act, section 15(g).

⁷ Exh. C-84, "State Forests will be Managed by Sykora", January 1, 2009.

⁸ See Statement of Reply at para. 129.

⁹ See Statement of Defence at para. 142.

performing silviocultural activities and a contract for performing logging activities in [each territorial unit].”¹⁰ CE Wood submitted tenders for all 87 units and was awarded two, although it previously had contracts for 40 of those units.¹¹ InterTrade says that the tenders were illegal and manipulated and that it lost its investment as a result of this tainted process. InterTrade alleges that the Respondent is responsible for the tenders either through the acts or omissions of the Ministry of Agriculture (Article 4) or the acts of Lesy CR directly (Article 5).

Article 4

7. Article 4 provides:

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

8. As stated in the Majority Decision, the Czech Republic is responsible for all of the acts of the Ministry of Agriculture because it is an organ of the State. Thus, the Tribunal has the jurisdiction to determine whether the acts of the Ministry of Agriculture are acts that breached the BIT. The Majority has reviewed the evidence and found that “the Claimant failed to adduce any evidence of specific acts of the Ministry in the conduct of the tender which engaged its responsibility.” The Majority then goes on to say, “the Ministry’s alleged failure to supervise how LCR actually conducted the tender demonstrates precisely that the “founder” of LCR respected the independence of the State enterprise in the management of its regular business activity.” In my view, these conclusions do not fully address all of the submissions made by the Claimant.

9. The Claimant argues “that the actions and omissions complained of in this arbitration, namely the planning and execution of a tender as well as the failure to remedy its harmful effects – are those of the Ministry of Agriculture as much as they are those of Lesy CR.”¹² The purpose

¹⁰ Exh. R-61, Notice of Preparation of a Tender Announcement.

¹¹ Request for Arbitration at para. 12.

¹² Reply at para 134.

of the tender was described as a "change of paradigm"¹³ and stated to be a restructuring of the management of the forests because the then current system "was unsatisfactory both in the light of antimonopoly legislation and economic effectiveness, and in the light of European law."¹⁴ Although it is true that the Claimant did not adduce any evidence of specific acts of the Ministry of Agriculture in the conduct of the tender, it is clear from the evidence that the Ministry was integrally involved in the decision to conduct a tender for the express purpose of changing the way the forests were managed. It was also clear that the Ministry of Agriculture reacted to the industry outcry after the tender was conducted by removing the Chief Executive Director of Lesy CR. The evidence also indicates that the Ministry of Agriculture refused to intervene to assess whether the tenders had been conducted properly after asked to do so by the Claimant. I am troubled that an organ of the State would avoid responsibility for the conduct of an illegal tender (if proved) simply because it macro-managed the tender process rather than micro-managed the tender process. Despite the Respondent's protestations to the contrary, the tender process at issue was not just a commercial exercise in which an entity independent from the State was seeking to maximize its profits. That is clear from the stated purpose in the call for tender, as well as the Ministry's keen interest and involvement in the process at the management level. Unlike the Majority Decision, I would have found that the Ministry was sufficiently involved in the tender process to require a closer examination of its failure to oversee the acts of Lesy CR, as it is obliged to do by statute, to ensure that the change in paradigm it directed for the management of the State forests be conducted in such a way as to not breach any treaty obligations.

10. I note that this case differs from *Jan de Nul v. Egypt* to the extent that it is not disputed that the Ministry of Agriculture is an organ of the State. In this case, the Claimant relies on Article 4 alleging that the Ministry of Agriculture itself, through its acts and omissions, and not Lesy CR alone, breached the Claimant's treaty rights. The same can be said for the *Hamester v. Ghana* case upon which the Respondent also relies. As noted in those cases, under Article 4, States are responsible for all acts of State organs, whether those acts are acts *de jure gestionis* or *de jure imperii*. Thus, the Respondent is responsible for any acts or omissions of the Ministry of

¹³ Statement of Defence at p.41.

¹⁴ Statement of Defence at para. 149.

Agriculture in relation to the tender regardless of whether the tender was for commercial or governmental purposes.

11. In light of the Majority Decision, I make no comment about the merits and whether the tenders were run in a non-transparent or illegal manner, as alleged. However, I am of the view that the Ministry of Agriculture, as the State organ designated by the State to manage the forests is responsible for how that management occurs. The Ministry of Agriculture remained responsible for the administration of the forests under the Forestry Act even though it delegated the overseeing of contracts to Lesy CR. The Respondent is responsible for the acts and omissions of the Ministry of Agriculture. The Claimant alleges that the Ministry of Agriculture failed to properly oversee the tender which was an integral part of its obligation to manage the forests. Further, the Claimant asserts that once the tender was conducted, the Ministry of Agriculture failed to address concerns raised by the unsuccessful bidders.¹⁵ Whether the alleged acts and omissions amounted to internationally wrongful conduct through a breach of the BIT is a matter that required, in my view, further review and analysis.

Article 5

12. Article 5 provides as follows:

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

13. With respect to the question of whether the Respondent is responsible for the acts of Lesy CR, the analysis is somewhat different. As noted in the Majority Decision, under Article 5, a State can be responsible for a non-State entity that has been delegated governmental authority, but it is only responsible for acts *de jure imperii* – exercise of governmental authority in English or *l'exercice de prérogatives de puissance publique* in French. I agree that not all of the acts of Lesy CR can be attributed to the State and that the fact that Lesy CR has as one of its goals benefitting the wider public interest is not, in and of itself, sufficient to attribute responsibility for its acts to the Respondent. The acts complained of must be an exercise of governmental

¹⁵ I note that on 23 March 2007, the Commission of the European Communities issued a reasoned opinion on the basis of Art. 226 of the Treaty establishing the European Community, stating that the procurement proceedings breached several obligations under the Directive 92/50/EEC and Directive 2004/18/EC. See Exh. C-17.

authority. There is no dispute in this case that Lesy CR was empowered to exercise elements of governmental authority. Where I disagree with my learned colleagues is in their assessment of the conduct of the tender process as a purely commercial activity and not an exercise of governmental authority.

14. As discussed above, I consider that the goal of the tender process went beyond generating funds or maximizing profit for Lesy CR. In addition to representing a paradigm shift in how the forests were managed, the criteria for selecting the successful bidder included more than just the best price. The tenders were designed to find bidders that would properly manage the forests, albeit in an economically advantageous manner. In my view, applying the label "tender" to the acts complained of and saying that it is therefore commercial overly simplifies the necessary factual analysis and does not properly perform the functional test required to determine whether Lesy CR was exercising governmental authority through the tender process. Although a tender process may appear to be connected only to commercial activities, it is necessary to analyse the purpose of the tender in question.

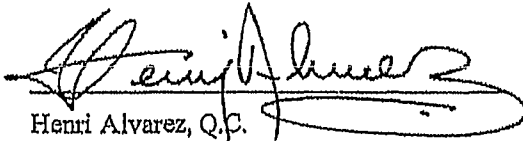
15. I am of the view that there are few functions more intimately related to governmental authority than the management of natural resources, such as State-owned forests. This view appears to have been shared by the Czech Minister of Agriculture at the time of the impugned tenders, Jaroslav Palas, who was quoted in an interview at the time as saying, "[t]he Czech government and I personally consider the forest wealth of the country an integral part of what we sometimes aptly call "the family silver" which shall not be sold out under any circumstances because of a vision of immediate profit."¹⁶ This tender process was not a purely commercial one, as might be a tender conducted to identify a firm that would provide legal services or office supplies to Lesy CR. Through this tender process, the Ministry of Agriculture hoped to change how the State-owned forests were managed by deciding which firms would be awarded the contracts to harvest timber based on criteria that went beyond the best price. The determination of who will be granted the right to perform complete forest services, including not only logging activities, but also silvicultural activities to protect, preserve and ameliorate the forests, is central to the management of the forests. I consider this an exercise of governmental authority.

¹⁶ Exhibit C-83, "Palas Claims: We Shall Not Sell Lesy CR Out", Silvarium, 17 March 2005.

16. The Majority Decision has referred to and adopted the reasoning of the *Jan de Nul* tribunal. I note that, surprisingly, the two paragraphs quoted in the Majority Decision constitute the entire reasoning of that tribunal on the issue of attribution under Article 5. Further, I cannot agree with that tribunal's conclusion that "the fact that the subject matter of the contract related to the core functions of the SCA, ...is irrelevant." In my view, this cannot be correct, as the logical conclusion is that a State cannot be responsible for any dispute arising out of a contract or, in other words, an entity cannot exercise governmental authority through a contractual process. As noted in the commentary to the Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001:

Article 5 does not attempt to identify precisely the scope of "governmental authority" for the purpose of attribution of the conduct of an entity to the State. Beyond a certain limit, what is regarded as "governmental" depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances.¹⁷

17. Article 5 was adopted to take account of para-statal entities.¹⁸ While States should not be held responsible at international law for acts that are purely commercial, they should not be able to avoid responsibility by exercising governmental authority through contractual or commercial means. If, through the tender process, Lesy CR was managing the State-owned forests, then it was exercising governmental authority. The fact that the subject matter of the tender process relates to the core function of Lesy CR is of fundamental importance.


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Co-arbitrator

¹⁷ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001 at p. 43 (6).
http://untreaty.un.org/ilc/texts/instruments/english/commentaries/2_6_2001.pdf

¹⁸ *Ibid* at p. 42.