Case Summary: International Investment Law

The following summary provides a brief factual background and describes the key findings of a recent case settling a dispute about international investment.

Jürgen Wirtgen & others v. The Czech Republic, PCA Case No.2014-03

Date of Award 11 October 2017
Claimants Mr Jürgen Wirtgen, Mr. Stefan Wirtgen, Mrs Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG (JSW Solar) (Germany)
Respondent The Czech Republic
Treaty Treaty between the Federal Republic of Germany and the Czech and Slovak Federal Republic on Encouragement and Reciprocal Protection of Investments of 2 October 1990 (the Treaty)

Introduction

On 11 October 2017, an ad hoc tribunal seated in Geneva and chaired by Professor Gabrielle Kaufmann-Kohler, with co-arbitrators Gary Born (Claimants’ appointee, dissenting) and Judge Peter Tomka (Respondent’s appointee), issued its award in Jürgen Wirtgen & others v. The Czech Republic (the Award). The Tribunal dismissed the Claimants’ claims in full and ordered the Parties to bear their own legal costs and expenses.

In March 2005, the Czech Republic (the Republic) implemented a ‘support scheme’ for producers of renewable energy (RES producers), consisting of tax incentives and feed-in tariffs (FITs). During the ‘solar boom’ of 2009–2010, the Claimants collectively invested in three solar photovoltaic (PV) projects in the Republic. Around this time, the cost of solar panels fell sharply, resulting in an alleged windfall for solar RES producers. In late 2010, the Republic withdrew the tax incentives and capped the sums paid by consumers to finance the FITs. The resulting shortfall was covered by the introduction of a solar levy on certain RES producers (such as the Claimants) that had commissioned plants during 2009 and 2010.

The Claimants commenced proceedings against the Republic in 2013 under Article 10 of the Treaty, seeking damages for breach of Article 2(1) (fair and equitable
treatment). The Claimants also brought ancillary claims for breaches of Article 4(1) (full protection and security) and Article 7(2) (umbrella clause) of the Treaty, which were summarily dismissed by a majority of the Tribunal in light of its conclusions regarding the Treaty’s FET protections.

Why Is This Case Relevant?

The Award is one of the first awards in a series of high-profile investment claims brought against the Czech Republic, Italy, and Spain, arising from each country’s decision to roll back favourable treatment accorded to solar-generated energy suppliers.

Main Findings of the Arbitral Tribunal

Preliminary Matters

Applicability of EU Law

Recognizing its ‘sui generis’ nature, the Tribunal determined that EU law constitutes both an international legal regime and part of the national legal order of Member States. Persuaded by the reasoning in Electrabel v. Hungary, the Tribunal held that the ‘fact that EU law is also applied within the national legal order of an EU Member State does not deprive it of its international legal nature’. However, the Tribunal refrained from answering the further question posed by the Republic, namely whether EU law took primacy over the terms of the Treaty, deeming it to be irrelevant in the absence of any conflict.

Jurisdiction

‘Juridical Person’ Given an Autonomous Meaning

The Republic challenged the Tribunal’s jurisdiction on the ground that the fourth Claimant lacked legal personality as a matter of German law. In the Republic’s view, JSW Solar was not a ‘juridical person’ and accordingly did not constitute an ‘investor’ within the meaning of Article 1(3) of the Treaty.

Applying the rules of interpretation of treaties in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT), the Tribunal found that the term ‘juridical person’ was an ‘autonomous or treaty-specific concept’. Giving the term its ordinary meaning, in its context, in light of the object and purpose of the Treaty, the Tribunal determined that a ‘juridical person’ for the purposes of Article 1(3) was ‘an entity with the legal capacity to invest, conclude contracts, acquire property and sue and be

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2 Award, para.175.
3 Award, para.178.
4 Award, para.187.
5 Award, para. 209.
The Tribunal held that, as a ‘KG’ or limited partnership, JSW Solar possessed the necessary attributes and constituted a juridical person within the definition in Article 1(3).

**Intra-EU BIT Remains Valid after the Date of Accession**

The European Commission (the Commission) (without the support of the Parties) challenged the Tribunal’s jurisdiction on the basis that the Republic’s offer to arbitrate contained in Article 10 of the Treaty was invalid as a matter of public international law. More particularly, the Commission argued that the Treaty must be regarded as terminated pursuant to Article 59 VCLT by virtue of the Treaty on Accession of the Czech Republic to the EU.

The Tribunal, seeing no reason to depart from a long line of cases on this point, rejected the Commission’s arguments. It found that as EU law contains neither FET protections nor a provision allowing investors to bring a claim against a host state directly, the two treaties did not relate to the same subject matter and Article 59 VCLT did not come into play.

**Fair and Equitable Treatment**

**Claimants Failed to Demonstrate a Legitimate Expectation Concerning the Level of Revenue Generated by FITs**

The Claimants alleged that the Republic had breached Article 2(1) of the Treaty by abrogating existing tax incentives and introducing the solar levy. In introducing these changes, the Republic deliberately caused damage to foreign investors and failed to protect the Claimants’ legitimate expectations. Central to the Claimants’ case was their claim that they had a legitimate expectation of benefiting from the tax incentives and guaranteed minimum levels of FITs for the duration of their investments.

The Republic countered that the FITs were solely designed to allow qualifying RES producers to achieve the simple payback of capital expenses within 15 years, together with an annual rate of return or profit of 7%. The Republic also claimed that the standard for founding a legitimate expectation under the Treaty must be interpreted in line with EU law. Under EU State aid law, the Republic was prohibited from paying subsidies to solar investors in excess of their cost of capital. Accordingly, beneficiaries of State aid (such as the Claimants) could not ‘invoke any “legitimate expectations” to claim entitlement to more aid than currently granted’.

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6 Award, para. 229.
7 Award, para. 239.
8 Award, para. 241.
9 Award, para. 253.
10 Award, para. 274.
11 Award, paras. 276–278.
12 Award, paras. 323–326.
13 Award, para. 309.
14 Award, para. 339.
15 Award, para. 350.
As noted by Gary Born (the Claimants’ nominee) in his scathing dissent, ‘the only question in this arbitration, and the only question that divide[d] the Tribunal, [was] what these statutory guarantees provided’. In the majority’s view, the relevant Czech legislation did not support an alleged legitimate expectation that the Claimants would receive a certain level of FITs for the duration of their investment: ‘there [was] no abstract promise of “revenues” to investors. The revenues are tied to the buy-out prices [i.e. FITs], and the buy-out prices are, in turn, tied to the guarantees of a 15 year payback of capital expenses and a return on investment or profit of at least 7% per year over 15 years’. Both of these guarantees remained intact following the imposition of the contested measures for plants meeting the required parameters. Accordingly, there was no breach of the Treaty’s FET protections.

By contrast, Mr. Born concluded that two separate, but related, guarantees had been given to investors, namely that: (i) FITs would be set at a level that provided a return of investment within 15 years; and (ii) revenues per unit of electricity produced would be maintained for 15 years. By imposing the solar levy in disregard of this second guarantee the Republic had committed an ‘obvious violation of the Treaty’.

No Stabilization Clause for Preferential Tax Regime
The Claimants alleged that the Republic had made a commitment that the tax incentives would remain unchanged for the lifetime of their investments, amounting to an express stabilization assurance. Dismissing this claim, the Tribunal noted that the Claimants had failed to cite any rule of Czech law excluding or limiting the legislators’ powers to amend a tax exemption. In reality, the Czech tax legislation had frequently been amended. In the absence of a commitment by the Republic not to alter the tax incentives, the majority held that the Claimants should have anticipated that the laws in force at the time of their investment could change. Accordingly, any expectation of the Claimants was not legitimate and did not benefit from the protection of the Treaty.

Claimants Failed to Demonstrate Deliberate Harm by the Republic
Separately, the Claimants alleged that the Republic deliberately caused them harm in violation of the Treaty’s FET standard by purposefully attracting foreign investment in the solar PV sector on the basis of the support scheme and then subsequently abrogating it. The majority of the Tribunal disagreed, holding that there was no evidence

16 Dissent, para. 17.
17 Award, para. 367.
18 Award, para. 406.
19 In a footnote to his dissenting opinion (Dissent, footnote 32), Mr Born notes that the majority’s assertion that the Republic had guaranteed investors an annual profit of at least 7% had ‘no basis in the text of the Act or its statutory guarantees’, but derived exclusively from the administrative rulings of the Czech Energy Regulatory Office.
20 Dissent, para. 31.
21 Dissent, para. 3.
22 Award, paras. 427–428.
23 Award, para. 433.
24 Award, para. 437.
25 Award, paras. 275–438.
that the relevant legislation was designed to promote foreign investment or that the Republic had sought to attract the Claimants in particular.\textsuperscript{26} The Claimants had failed to make out a case that they were specifically discriminated against.\textsuperscript{27}

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Case Summaries: WTO Disputes

The following summaries provide a brief factual background and describe the key findings of recent WTO panel and Appellate Body reports.

\textit{doi:10.1017/S1474745619000302}

\textbf{China – Domestic Support for Agricultural Producers (China–Agricultural Producers), DS511}

\begin{itemize}
  \item \textbf{Adopted} 26 April 2019
  \item \textbf{Complainant} United States
  \item \textbf{Respondent} China
  \item \textbf{Third Parties} Australia, Brazil, Canada, Colombia, Chinese Taipei, Ecuador, Egypt, El Salvador, European Union, Guatemala, India, Indonesia, Israel, Japan, Kazakhstan, Korea, Pakistan, Paraguay, Philippines, Russia, Saudi Arabia, Singapore, Thailand, Turkey, Ukraine, Viet Nam
\end{itemize}

\textbf{Measure at Issue}

The dispute concerns certain market price support measures by China to domestic agricultural producers of wheat, Indica rice, Japonica rice, and corn, which the United States (US) claimed were inconsistent with China’s obligations under the WTO Agreement on Agriculture. Specifically, the US considered that China utilized

\textsuperscript{26} Award, para. 440.
\textsuperscript{27} Award, para. 441.