

Antaris v. Czech Republic

Energy Community
First Dispute Resolution Forum

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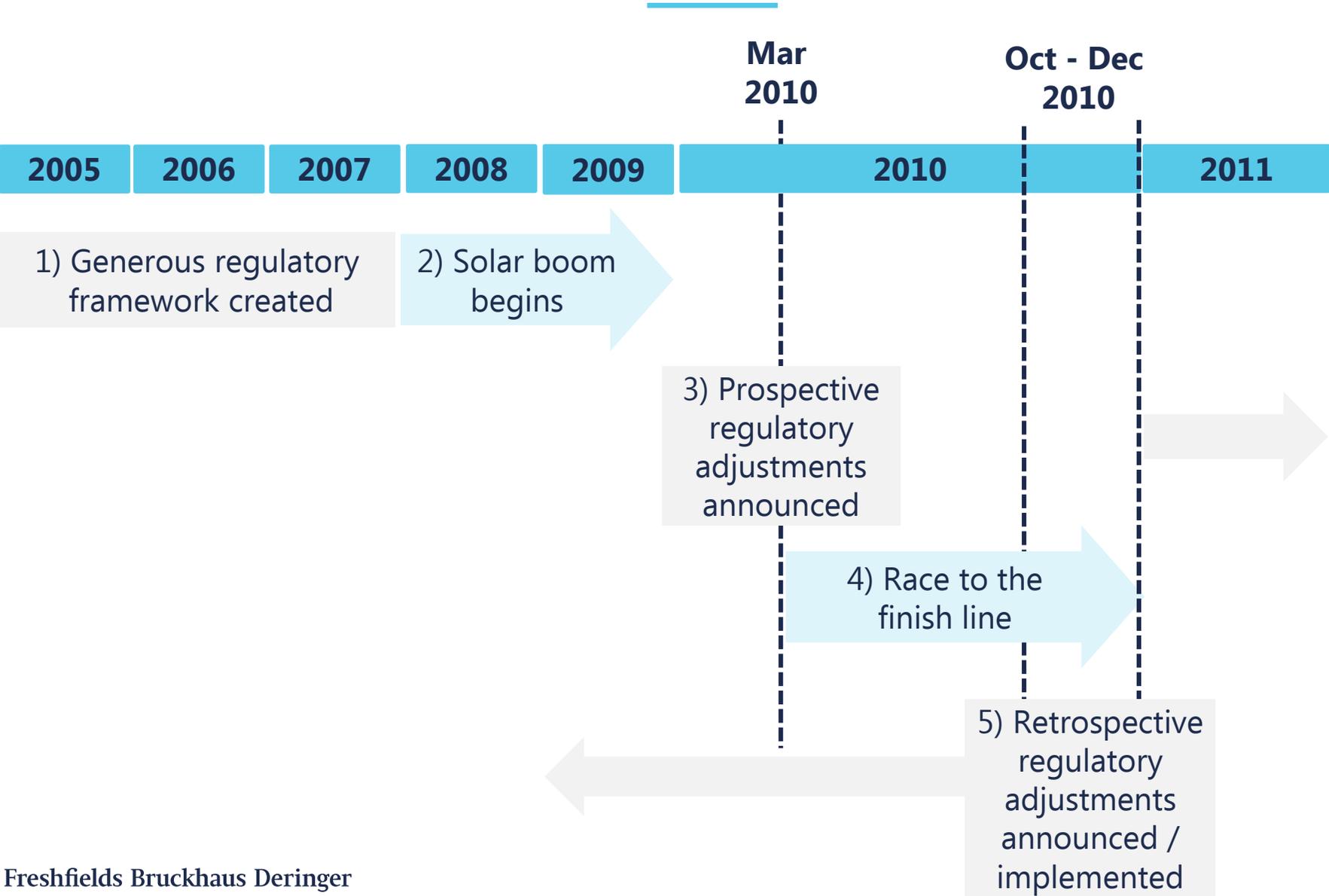


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Agenda

1. Facts of the case: a play in five acts
2. Jurisdictional issue: is the Solar Levy a “tax”?
3. Merits issues:
 - a. What is the scope of legitimate expectations arising from generally applicable legislation?
 - b. What are “opportunistic investors” and what are their rights?
 - c. What is the relevance of an investor’s due diligence (or lack thereof)?
4. Takeaways

Facts of the Case: A Play in Five Acts



Is the Solar Levy a “tax”?

- ECT Article 21(1): “*nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties.*”
- Tribunal carried out a “substantive” – not “formalistic” – analysis
- Two-steps:
 - Czech Law
 - Majority: Persuaded by Supreme Administrative Court holding that the Solar Levy was not a tax for the purposes of the prohibition against double taxation
 - Judge Tomka Declaration: Majority’s extensive reliance on the Supreme Administrative Court’s decision not warranted
 - Article 21’s “inherent limits”
 - Unanimous tribunal: Solar Levy did not constitute a “taxation measure” under the ECT carve-out
 - “*the Solar Levy’s principal objective was a reduction in the level of the FiTs payable to certain solar investors, and not the raising of revenue; they also show that the Solar Levy was structured, in many respects, as a tax in order to reduce the risk of claims against the Czech Republic under international law*” (para 252)

Scope of legitimate expectations?

- Unanimous tribunal: Legitimate expectations of stability can be inferred from generally applicable legislation and official (non-binding) statements – no express stabilization clause required
- Majority:
 - “An expectation may be engendered by changes to general legislation, but, at least in the absence of a stabilization clause, they are not prevented by the fair and equitable treatment standard if they do not exceed the exercise of the host State’s normal regulatory power in the pursuance of a public interest and do not modify the regulatory framework relied upon by the investor at the time of its investment outside the acceptable margin of change.” (para 360(7))
 - “the determination of a breach of the FET standard must be made in the light of the high measure of deference which international law generally extends to the right of national authorities to regulate matters within their own borders” (para 360(9))
- Born Dissent:
 - “I disagree fundamentally with the Tribunal’s analysis. The fact that a state makes an undertaking to investors in general legislation does not “limit” the legitimate expectations of investors nor afford the state with a margin of appreciation to refuse to honor the commitments it has made (whether by statute, treaty, contract or otherwise).” (para 42)
 - “The Tribunal’s suggestion that, absent specific commitments, general legislation is only capable of giving rise to “limited” legitimate expectations of stabilization (here, of tariff levels) is, in my view, contrary to the basic character of a state’s obligation to accord investments fair and equitable treatment. This obligation ensures fairness, equity, basic justice and rule of law; it is not directed towards formalities or technicalities.” (para 43)

“Opportunistic” investors?

- Unanimous tribunal: At the time it was initially put in place, the regulatory framework constituted a “guarantee” that there would be no reductions in minimum FiTs during the prescribed period
- Majority:
 - *“It was clear from mid-2010 that the Government might resort to taxation measures to deal with the solar boom, and statements to that effect by the Prime Minister, Minister of Industry and Trade, and the Minister of Environment were widely reported.”* (para 425)
 - *“The Tribunal considers that Dr Göde’s actions were essentially opportunistic, and that the investment protection regime was never intended to promote and safeguard those who, in the words of the Respondent, “pile in” to take advantage of laws which they must know may be in a state of flux caused essentially by investors of that type. In the words of the Respondent, the Claimants had “a speculative hope – as opposed to an internationally-protected expectation.”* (para 435)
- Born Dissent:
 - *“That record instead shows that the Czech government was aware of the expected imbalances in the renewable energy sector, but repeatedly reiterated from mid- 2009 until October 2010 that the FiTs for sources, which had already been commissioned, would not be changed and that changes to address the regulatory imbalances would be directed prospectively only to renewable energy sources that were commissioned in the future.”* (para 70)
 - *“In these circumstances, it is in my view impossible to see why the Claimants were not entitled, prior to late 2010, to rely on the Czech Republic’s legislative, regulatory and other assurances guaranteeing the levels of FiTs for their investments.”* (para 66)

Due diligence?

- Majority:
 - “*The Tribunal accepts the Respondent’s case that there is no evidence of any real due diligence by Dr Göde.*” (para 432)
- Born Dissent:
 - “*Due diligence is not a condition to protection of an investment under international law, whether under the fair and equitable treatment standards prescribed by the Treaties or more generally.*” (para 74)
 - “*further due diligence on the part of Dr. Göde would have revealed nothing different from what Section 6(1)(b)(2) of the Act on Promotion, and the Czech Republic’s representations, made clear: solar plants commissioned in 2010 would receive the FiTs prescribed for plants commissioned in 2010 by the ERO*” (para 76)

Thank you for your attention!

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