ESPI report

Company: Photon Energy N.V.
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Title: Photon Energy N.V. Files a Notice of Dispute With the Czech State

Detailed data:

The management board of Photon Energy N.V. informs that, as a part of a group of investors, on 6 November 2024 it has filed a notice of dispute (the “Notice”) that arises from the Czech Republic's breaches of its obligations under (1) the Energy Charter Treaty ("ECT") and (2) the "Agreement between the Czech and Slovak Federal Republic and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments" ("BIT") resulting from the proposed severe changes and reductions of the State support for photovoltaic power projects in the Czech Republic ("PV Projects").

Among the investors who signed this Notice, each investor qualifies as an "investor" under the ECT.1, meaning they invested in PV Projects in the Czech Republic and their direct and indirect interest and shareholding constitute an "investment" within the meaning of the ECT.2

The ECT is a multilateral instrument that the Czech Republic concluded, among others, to promote the long-term cooperation in the energy field, based on complementarities and mutual benefits. The actions and omissions of the Czech Republic or attributable to the Czech Republic, described below, violate the investment protection provisions of the ECT, specifically, and amongst others, the ECT's fair and equitable treatment clause and the prohibition of illegal expropriations:
- Fair and equitable treatment: Investments shall enjoy fair and equitable treatment in accordance with international law. This imposes duties on the Czech Republic: (i) to accord due process; (ii) to refrain from arbitrary and/or discriminatory measures; (iii) to respect reasonable expectations formed by an investor at the time of its investment (the so-called "legitimate expectations" of the investor); and (iv) to ensure a stable and equitable investment environment.
- No Expropriation: No investment shall be subject to expropriation measures. This rule also applies to a measure or measures having effect equivalent to nationalisation or expropriation (so-called indirect expropriation). Therefore, even in the absence of a loss of property rights stricto sensu, the substantial deprivation of the value of an investment is a ground for an expropriation claim under the ECT.

The Czech Republic had adopted a scheme attracting investments in its renewable energy sector. Having made investments in the PV Projects in reliance on that scheme, the Investors stand to suffer from a significant reduction in revenues and, thus, a significant reduction in the value of their investments.

Between 2005 and 2013, the Czech Republic adopted a system of State support to new photovoltaic power plants which was supposed to provide a stable and reliable return on investments based on predictable feed-in-tariff prices of the electricity and/or a subsidised green bonus paid in addition to a market-based electricity price. This scheme was originally based on Act. 180/2005 of the Coll. Act on the support of electricity generation from renewable resources. This act was amended and replaced by Act No. 165/2012 of the Coll. Act on Supported Sources of Energy. While this act, too, was changed over time, the Czech Republic assured that the photovoltaic power plants put in the operation in years 2009- 2010 would be eligible for support for a period of 20 years from the start of their operation. In September 2021, the Czech Republic set the IRR threshold for overcompensation checks for all renewable energy technologies to a uniform range between 8.4% and 10.6%. While there was no specific IRR for solar PV Projects, the Government then decided that the IRR range for solar PV should be set at 8.4%. The amendment included an increase of a solar levy for photovoltaic power plants put in operation in 2009 and 2010, a levy increasing over time. The State assured that this would be the final adjustment to the support system.

After only two and a half years of operation, contrary to its assurances, the Czech Republic is set to reduce and remove the support for particular projects. The measures, specifically those presently debated in Parliament (sněmovní tisk no. 656 amending inter alia Act No. 165/2012 of the Coll. Act on Supported Sources of Energy), materially alter the previously established conditions for State support for PV Projects. These measures involve:

(i) Removal of State support for renewable electricity production plants in times of negative electricity prices.

(ii) Reduction of the overcompensation IRR range (6.3%-8.4%) and an introduction of individual controls on the IRR. PV Projects which were connected to the grid in 2009 and 2010, and have a capacity of more than 30kW will be due to submit information to the market operator on an annual basis.

(iii) Recalculation of the IRR based on an expected lifespan approximately 10 to 20 years longer than the previously applied 20-year life span.

In brief, the regime will materially reduce the overcompensation IRR range and allow for individual controls. In parallel to the removal of negative pricing support, the Investors will suffer massive reduction in support (and in the value of their investments) and will continue doing so in the years to come. The Investors legitimately expected that the Czech Republic would maintain the support under which it had induced the Investors to invest. The measures stand to deprive the Investors of the benefits they had legitimately expected to receive and will drastically reduce the profitability and even the viability of the PV Projects.

The measures described above constitute severe breaches of the Czech Republic's duties under the ECT including, without limitation, its duty to provide fair and equitable treatment and its duty not to expropriate. As direct consequence of the Czech Republic's breaches, the Investors will suffer losses and other economic disadvantages. They will request the Czech Republic to compensate them for all loss and economic disadvantage they will incur.

The Czech Republic is requested to notify the Investors by return letter whether it wishes to engage in discussions to settle the dispute amicably.

Legal basis: Art. 17.1 MAR.