

DECLARATION OF JUDGE TOMKA

1. I agree with the Tribunal's decision and most of its reasoning. In my view, it is important that the Tribunal considered the Claimants' claims in relation to the Respondent's obligations both under the BIT and the ECT and found no breach.
2. The Tribunal dealt with the Respondent's objection that it does not have jurisdiction over the claims based on the ECT. In the Respondent's view, the Solar Levy is a tax, and therefore, under Article 21 of the ECT it does not come within the Tribunal's jurisdiction. The Tribunal rejected this objection and upheld its jurisdiction over the ECT claims. While I do not disagree with this outcome, I am not convinced that the Decision of 10 July 2014 rendered by the 9th (three-member) Chamber of the Czech Supreme Administrative Court in which it concluded that the Solar Levy is not a tax, is decisive and authoritative. That Decision is the main basis for the Tribunal's conclusion.
3. The nature of the Solar Levy under the Czech law is disputed and the Czech legal doctrine and jurisprudence of Czech courts are far from unanimous. In my understanding, however, the predominant view is that the Solar Levy is a tax. The leading Czech constitutional expert, Professor Dr. Aleš Gerloch, PhD., wrote in his opinion of 3 December 2010 on the amendment, then under consideration, of Act No. 180/2005 on the support of the generation of electricity from renewable sources of electricity:

“[i]t is without a doubt that the instituted concept of a levy [in Czech: odvod] has all the signs of being a tax since it represents a payment levied into the state budget from a certain base. It matters not at all that the instituted concept is called a “levy”; from the point of view of its content it is a payment that must fulfill the criteria of the provisions of Article 11, paragraph 5 of the Charter of Rights and Freedoms according to which taxes and fees may only be imposed on the basis of the law.”¹

In his conclusions, Professor Gerloch is unequivocal:

“in reality, this levy represents a tax and, therefore, it must fulfill the criteria that are set down in the Constitutional Order regarding the imposition of tax liabilities.”²

4. The expert on Czech financial law, and in particular on taxes, levies and fees, Associate Professor Dr. Radim Boháč, PhD, from Charles University Law School, in his monograph *Tax*

¹ C-222, p.2 (Czech original), p. 3 (in the English translation supplied by the Claimants).

² C-222 p. 8 (Czech original), p. 11 (in the English translation supplied by the Claimants). In the English translation the original Czech term “odvod” is imprecisely translated as “deduction”. The correct English term for “odvod” is “levy”.

Revenues of Public Budgets in the Czech Republic,³ analyses “whether individual levies in the contemporary legal system of the Czech Republic have the nature of taxes or fees.”⁴ After a detailed examination of the Solar Levy, he concludes that “the levy on electricity from solar radiation has all the obligatory (basic) theoretical features of a tax”⁵. He further states that “from the theoretical point of view” there are no important enough reasons justifying “the designation of the levy on electricity from solar radiation as ‘levy’ and not as a ‘tax’”⁶. Finally, he adds that “[u]nfortunately, professional views do not always prevail, ceding ground to political views that are capable of present implementation and realization in the short term.”⁷

5. The 9th Chamber of the Supreme Administrative Court, after a brief consideration, concluded that “the levy does not have the nature of a tax.”⁸ It was of the view that the levy does not fulfill “the basic criterion” or “a common essential feature of all taxes”, namely “non-equivalence”.⁹ It understood non-equivalence as subjecting an entity by the State to a tax “without any performance from the State at the time of taxation”.¹⁰ In its view, “the [S]tate uses the levy to lower the support it calculated and provided”.¹¹
6. I am not sure whether the Chamber properly understood the non-equivalence in Czech financial law. As the leading Czech expert in this field of law, Professor Dr. Milan Bakeš, DrSc., writes in his textbook, “taxes are mostly non-equivalent payments for which no direct *quid pro quo* is provided.”¹² Associate Professor Radim Boháč considers the Solar Levy as “non-equivalent, due to the absence of an immediate, direct and concrete consideration in return on the part of public authority.”¹³ He explains that “the State does not provide anything to the payers of the levy on electricity from solar radiation in return for this levy; the fact that these payers benefit from financial support and subsidy on the basis of provisions of

³ R-318, R. Boháč, *Daňové příjmy veřejných rozpočtů v České republice*, Wolters Kluwer, Praha 2013. This monograph was submitted to the Scientific Council of Charles University Law School as his *Habilitationsschrift*. In addition to his academic position, Dr. Boháč has been since 2011 the Deputy Director of the Tax Legislation Department of the Czech Ministry of Finance, having served earlier in 2010 as the Head of its Division for the Coordination of Tax Legislation.

⁴ *Ibid.*, p. 221, Section 9.2.

⁵ *Ibid.*, p. 225.

⁶ *Ibid.*, p. 226

⁷ *Ibid.*, pp. 226-227.

⁸ Judgment of 10 July 2014, para. 19, Annex 11 to First [REDACTED] Report.

⁹ *Ibid.*, para. 19 and 20.

¹⁰ *Ibid.*, para. 19.

¹¹ *Ibid.*

¹² M. Bakeš et al. *Finanční právo*, 6th updated edition, C.H. Beck, Praha 2012, p. 93, Annex 4 to First [REDACTED] Report.

¹³ R. Boháč, *op.cit.* supra fn 3, p. 225.

Sections 28 and 29 of the Act on Promoted Sources of Energy . . . does not have any impact on this.”¹⁴ In my understanding, no direct *quid pro quo* is provided by the State to the solar electricity producers. Their entitlement to the payment of the feed-in-tariffs (FiT) under the Act on Promotion is not subject to the condition of paying the levy.

7. It is to be noted that, despite the view expressed by the 9th Chamber of the Supreme Administrative Court, the Czech courts treated the Solar Levy as a tax in several subsequent judgments.
8. Thus, another Chamber of the same Supreme Administrative Court in its Judgment of 25 March 2015 stated that “should the solar electricity producer become affected by individual liquidating effects associated with the payment of this tax [i.e., the Solar Levy], such producer may apply for deferral of payment of another tax”.¹⁵
9. The Czech Constitutional Court in its Decision of 13 January 2015 expressed the view that “the ‘solar levy’ can surely be considered such a tax”.¹⁶
10. The Solar Levy was a device to reduce *de facto* the State subsidies to the solar plant operators without formally altering the FiT to which they were legally entitled. At the same time, the Solar Levy was one of the three necessary sources of new income for the State Budget in order to provide funding for the support of electricity production from renewable sources.¹⁷
11. Article 21 of the ECT refers the Tribunal to the domestic law of a Contracting Party, when considering a measure which is presented as a taxation measure. However, whether it constitutes a tax for the purposes of the ECT is in the end a matter of treaty interpretation.
12. The Solar Levy was purposefully construed as “a withholding tax”¹⁸ so that “it cannot be legally contested”¹⁹, particularly in international arbitration proceedings.²⁰ In view of this aim, I am convinced that the contested measure (the Solar Levy) should not escape the legal scrutiny

¹⁴ *Ibid.*

¹⁵ Judgment of the Chamber of the Supreme Administrative Court of March 25, 2015, para. 42. Annex 18 to First [REDACTED] Report. It is to be noted that the English translation, supplied by the Claimant, is slightly imprecise when it translates the words in the Czech original “tého daně” as “such tax”. Also the word “payment” in relation to deferral, although appearing in the Czech original [s úhradou], is missing from the translation.

¹⁶ Judgment of the Senate of the Czech Constitutional Court (11.ÚS 2216/14) of 13 January 2015, para. 33. Annex 14 to the First [REDACTED] Report.

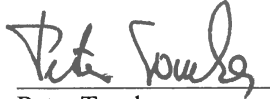
¹⁷ See Award, para. 155.

¹⁸ See C-198, Minutes of the third meeting of the Coordination Committee held on October 15, 2010, para. 3, quoted in the Award, para. 152.

¹⁹ *Ibid.*, quoted in the Award, para. 153.

²⁰ C-208, Minutes of meeting of the Economic Committee of the Chamber of Deputies of November 2, 2010, Statement of the Minister of Industry and Trade, quoted in the Award, para. 160.

of the Tribunal as to its conformity with substantive obligations of the Respondent under the ECT.


Peter Tomka