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National Report of Ukraine

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1. ARBITRATING ENERGY DISPUTES UNDER ISDS

1.1 How many BITs has your country signed and how many of them are in force?

Since it attained independence in 1991, Ukraine has signed 75 BITs. As of the beginning of March 2016, Ukraine has 72 of signed BIT's ratified and in force.

1.2 What mechanisms of dispute resolution method does your country favor in its BITs? Do investors have the choice to sue a host state in the state courts and in arbitration? Do investors have to choose between suing the host state either in the state courts or in arbitration (fork-in-the-road provision)?

Under all BIT's concluded by Ukraine the parties in dispute are obliged to seek amicable solution and most of the Treaties provide for a six (6) months cooling-off period. In the event the dispute is not settled amicably, investor is typically entitled to seek resolution of the dispute by reference to arbitration. Nearly half of BIT's allow investors to file their claims with domestic courts of the place of investment state. At the same time, virtually all BIT's of Ukraine require investors to make choice between proceedings in the state courts and arbitration.

1.2.1 If investors can choose proceedings before state courts in your jurisdiction: Are there any cases in the last five years in which state courts in your jurisdiction had to decide on claims of (foreign) investors against your state?

State courts of Ukraine are not considered to be particularly popular among investors of Ukraine, who prefer arbitration as means of dispute settlement. In terms of investor-state disputes it is more common for Ukraine to refer to its national courts with claims against foreign investors. Those claims usually constitute requests to recognize investment contracts void or to obtain property owned by investor. The above claims are usually based on the reasons of protection of national political and economic interests. Thus, in recent judgment of 17 March 2015 the High Commercial Court of Ukraine upheld the right of the state represented by the State Property Fund to ownership over parts of pipe line previously owned by the subsidiary of a Russian joint stock company operating in Ukraine.

There, however, were several cases initiated by foreign investors in Ukrainian state courts under the BIT's in force. In 2013 a legal company filed its claims against Ukraine in an administrative court in the territory of Crimea with reference to the US-Ukraine BIT. American investor insisted that penalty measures imposed on its subsidiary were in violation of international obligations undertaken by Ukraine. The first instance court ruled that the investor failed to prove that Ukraine violated its international obligations. The investor appealed, however the decision was never rendered since Russia occupied the Crimean peninsula. The subsidiary in question was located in Crimea and after the event the investor was not inclined to continue court proceedings.

Another case was initiated by foreign investor against Ukraine in July 2015. A British legal entity filed claims for recovery of more than £8,5 mln. For alleged expropriation of its investment in the territory of Ukraine – monetary funds and immovable property of Kherson Airport LLC. The first and second instance court ruled in favour of the State noting that the legal entity had purchased its share in Kherson Airport LLC from a person, which had not had rights over the property. The case is submitted to final resolution to the High Commercial Court of Ukraine.

1.2.2 If so, were the decisions in favor of the country/host state or were they in favor of the investor?

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1.2.3 Has your country signed and ratified the Washington Convention on the Settlement of Investment Disputes between States and nationals of other States (1968) (the ICSID Convention)? If not, does your state intend to accede to/ratify the ICSID Convention soon?

Ukraine signed the ICSID Convention on 3 April 1998 and ratified it by Law of Ukraine No.1547-III dated 16 March 2000. The Convention has thus been in force in the territory of Ukraine since 7 July 2000.

1.3 If an investor can choose (only) arbitration as dispute resolution method:

1.3.1 If an investor can choose arbitration as dispute resolution method, are there conditions attached to it, such as a requirement to resort to state courts for a certain period of time or a requirement to attempt to arrive at amicable settlement within a certain period of time?

Under each BIT of Ukraine investor is obliged to engage in amicable settlement procedures before resorting to arbitration. Typically, the cooling-off period is fixed at 6 months. Several BIT's require a 3 months cooling-off period.

Mostly, attempt to settle dispute amicably is the only condition to be complied with before commencing arbitration. However, single BIT's may set forth additional requirements. For instance, the Belorussia-Ukraine BIT stipulates that arbitration shall become available to the disputing parties "only after settlement of internal court proceedings". Under the Canada-Ukraine BIT investor is obliged to waive its right to commence or upheld any alternative procedures of the dispute settlement, in particular within national courts of the place of investment state.

1.3.2 If an investor can choose not only ICSID, but also other institutional rules such as SCC, ICC or ad hoc proceedings, or between various institutions in case the ICSID Convention is not signed/ratified by your country, which advantages or disadvantages do investors take into consideration in choosing between these arbitration rules?

The choice of arbitration rules (institutions) often depends on particularities of a case. Hence, shall be determined on case by case basis. *Ad hoc* arbitration (e.g. under UNCITRAL Rules) provides more flexibility and confidentiality (e.g. to the contrary to ICSID). The ICSID Convention has it's obvious advantages (e.g. related to the enforceability), while often sets additional requirements for investor's case. In some cases administration of them from Paris or Stockholm is preferable for the investor and that is why, usually, the choice in favor of the ICC or SCC respectively is also sometimes made. Possibility of obtaining interim measures, as well as general pro-arbitration framework in relevant jurisdiction, is also often significant factor which influence the choice.

1.4 Is your country a member state of the ECT? If not, has your country signed, but never (or not yet) ratified the ECT? If so, has your country exempted the ECT's provisional application prior to its ratification?

Ukraine signed the ECT on 17 December 1994 and ratified it by Law of Ukraine No.89/98-BP dated 6 February 1998. The ECT has thus been in force in the territory of Ukraine since 27 January 1999.

1.4.1 If your country is not a member state to the ECT or has recently withdrawn from the ECT: What are the reasons?

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1.4.2 According to Article 26 ECT an investor can choose arbitration either under (i) the ICSID Convention, (ii) the ICSID's Additional Facility Rules, (iii) under the arbitration rules of the SCC or (iv) ad hoc arbitration under the UNCITRAL Arbitration Rules. Do investors in your jurisdiction have any preference? If so, for what reasons?

There were four arbitration proceedings launched against Ukraine since ECT entered into force for the latter in 1999. All of the above arbitrations were launched under the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

SCC is known to be one of the largest arbitration institutions in the world. In terms of investment arbitration, SCC is particularly SCC is favorable for investors seeking not to have the details of the dispute disclosed. SCC is renowned for displaying only limited public information on the existence and the outcomes of proceedings, unlike that considered by ICSID or under ECT.

SCC also shows a rather impressive statistics of investor-state dispute settlement: for disputes brought under SCC Rules by the end of 2012, only 25 per cent were in favour of the state.[1] Ultimately, the cost of conducting arbitration is taken into consideration by the investors, which in SCC is relatively lower, e.g. compared to ICSID.

1.4.3 Has your country declared a reservation under Article 26(3)(b(i) ECT? If the answer is in the negative: Are there cases in which an investor has sued your country in parallel before the state courts and in arbitration? Did the parallel proceedings result in conflicting decisions?]

Ukraine has not declared a reservation under Article 26(3)(b(i) ECT.

1.5 What are the key features in relation to the concept of "Investor" and "Investment" in your country's BITs? Is a "denial of benefits" clause usual in your country's BITs?

Under Ukrainian BIT's an "investment" typically comprises any type of assets invested in connection with economic activity of an investor of one contracting state in the territory of another contracting state. The definition covers all tangible and non-tangible property, securities, claims for payment or performance under the contract of economic value, intellectual property rights, rights to procurement of economic or commercial activity. Separate BIT's may contain additional types of investment: for instance, under Canada-Ukraine BIT the definition of investment covers also reputation.

The investment definition lists are usually non-exhaustive and typically do not contain exclusions. However, the Israel-Ukraine BIT does not extend to operations of obtaining or providing by the investors of any loans or reimbursable financial aid.

An "investor" is typically defined as either a national of one contracting state making an investment in another contracting state, or a legal entity registered and located in the territory of one contracting state and making investment in the territory of another contracting state, or a legal entity registered under the laws of a contracting state and being under direct control of the individual or legal entity, referred to above.

1.6 In light of the EU position on this matter: Is your country planning on withdrawing from the BITs signed in the past? If this is the case: What are the motives for doing so?

There has been no indicators of Ukraine intending to withdraw from the BITs signed in the past in recent years.

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[1] Nathalie Bernasconi-Osterwalder and Diana Rosert. Investment Treaty Arbitration: Opportunities to reform arbitral rules and processes January 2014

1.7 In the context of the intra-EU treaties conflict: How is this issue affecting the commercial relationships between your State and others when it comes to choosing an effective dispute resolution mechanism?

Given that Ukraine is not an EU member state and EU-Ukraine Association Agreement is still on the implementation stage, the issue does not seem to be of particular urgency and attention with regard to Ukraine at the time.

1.7.1 What approach would you take when seeking enforcement of a favorable award resulting from an intra-EU dispute? Would you counsel to seek enforcement in the courts of an EU member state or outside the EU? Have your national courts ever ruled on this issue?

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1.8 Does your country have a history of voluntary compliance with adverse investment treaty awards?

Ukraine has complied voluntarily with the award in Joseph C. Lemire v. Ukraine ICSID Case No. ARB/06/18 of 28 March 2011. Other adverse awards were complied with upon final judgments in enforcement proceedings or are still being challenged before relevant state courts.

1.9 To what extent have local courts been supportive of investment treaty arbitration?

There is general tendency of pro-arbitration approach in Ukraine, while the problem is that the courts do not provide any difference in practice between commercial and investment arbitration. E.g. there is, as a rule, the same procedure for recognition and enforcement in Ukraine of either commercial or investment awards, including ICSID awards.

1. ARBITRATING DISPUTES IN CONNECTION WITH RENEWABLE ENERGIES (WIND, SOLAR, WATER)

1.1 Legal Framework

1.1.1 What is the legal framework for renewable energies in your jurisdiction? Can investors take advantage of certain incentives such e.g. premium tariffs, very low taxes on power generators' revenues, subsidies for renewable energy producers etc?

To stimulate the operation and development of renewable energy sources in Ukraine, a "green" tariff, or special feed-in tariff as this may be known in other jurisdictions, was introduced in 2009. The Law of Ukraine "On amendments to certain Laws of Ukraine as to establishment of "green" tariff" No 601-VI dd. 25.09.2008 introduced changes to the Law on Electric Power Industry. Pursuant to the Law "On Electric Power Industry" "green" tariff is a special tariff for purchase of electricity produced at power plants using alternative energy sources (except for blast-furnace and coke gas, and using hydro energy – produced by small hydro power plants). Electricity produced in such way can be sold directly to consumers, and the Wholesale Electricity Market[2] is obliged to pay "green" tariff for electricity produced in such way and not sold at contractual prices directly to consumers or energy supplying companies, which conduct economic activity in the sphere of electricity supply as per regulated tariff.

According to the current legislation the rate of the "green" tariff shall be established for each business entity producing electricity using alternative energy sources as to each type of alternative energy and for each object of the electric power industry. The rate of the "green" tariff is calculated by multiplying retail tariff for consumers of second class voltage as for January 2009 by "green" tariff level factor for each type of alternative energy (see Tables 1,2).

Table 1. SOLAR FEED-IN TARIFF RATES[3] UNDER THE LAW No.514-VIII, FOR 1 KWH, IN EURO CENTS

Category of the renewable energy objects	Objects commissioned:				
	from 01.07.2015 till 31.12.2015	from 01.01.2016 till 31.12.2016	from 01.01.2017 till 31.12.2019	from 01.01.2020 till 31.12.2024	from 01.01.2025 till 31.12.2029
Solar energy, Surface facilities	16,96	15,99	15,02	13,52	12,01

[2] The Wholesale electricity market (hereinafter the WEM) is a market set by business entities for the purchase and sale of electric energy under contract2 (Article 1 of the Law of Ukraine "On Electric Power Industry" dd. 16.10.1997 № 575/97-VR)

The State Enterprise "Energorynok" is a commercial WEM operator, and thus a "single buyer" therein (it exclusively buys electricity from generating companies and sells it to distribution companies).

[3] provided10%, 20% and 30% reduction of tariffs for plants commissioned after 2015, 2020, 2025

Solar energy, on roofs, fixed on facades	18,04	17,23	16,37	14,75	13,09
Solar energy, on roofs/facades of private houses, < 30 kW	20,03	19,01	18,09	16,26	14,49

Table 2. "GREEN" TARIFFS* UNDER THE LAW No.514-VIII , FOR 1 KWH, IN EURO CENTS

Category of the renewable energy objects	**Objects commissioned:**		
	from 01.07.2015 till 31.12.2019	from 01.01.2020 till 31.12.2024	from 01.01.2025 till 31.12.2029
Wind energy, < 600 kW	5,82	5,17	4,52
Wind energy, > 600 kW,< 2000 KW	6,79	6,03	5,28
Wind energy, > 2000 kW	10,18	9,05	7,92
Wind energy, private households, < 30 kW	11,63	10,45	9,32
Biomass energy	12,39	11,15	9,91
Biogas energy	12,39	11,15	9,91
Micro hydro power station, < 200 kW;	17,45	15,72	13,95
Mini hydro power station, > 200 kW, < 1MW;	13,95	12,55	11,15
Small hydro power station, > 1MW, <10MW	10,45	9,42	8,35
Geothermal energy	15,02	13,52	12,01

Under the feed-in tariff, the produced electricity is purchased in the volume minus electricity consumed for own needs of the power facility that produces electricity from RES.

Currently instead of a compulsory local content requirement Ukrainian legislation provides for a special encouraging surcharge to the feed-in tariff.

The surcharge shall be set by the National Commission for State Regulation of Energy and Utilities subject to the following levels of use of the equipment of Ukrainian origin (Table 3):

Table 3. LOCAL CONTENT RULE	
Bonus to the "green" tariff,%	**Level of the use of equipment of Ukrainian origin,%**
5	30
10	50

In addition, the legislation provides for quarterly revision of feed-in tariffs based on the EUR/UAH exchange rate (index-linked to inflation[4]).

1.1.2 Has such legal framework been amended recently? If so, has it been ameliorated for investors or deteriorated?

2. After annexation of the Autonomous Republic of Crimea at the beginning of year 2014 investors operating in Crimea faced with an unpredictable problem in regard to the future operation of energy objects producing electrical power from alternative energy sources (the majority being, of course, solar power plants). These stations enjoyed guaranteed "green tariff" till 2030 and many investors have bought the equipment on credits calculated based on the promised tariff. Already on April 4, 2014, SE "Energorynok" announced that it had officially stopped purchasing all electricity produced in Crimea.

On August 13, 2014, the Cabinet of Ministers of Ukraine passed its Resolution No. 372 of August 13, 2014 "On approval of Procedure for taking temporary emergency measures to overcome the effects of prolonged disruption of the normal operation of the electricity market", which determined the grounds and procedure for decision-making on temporary emergency measures to overcome the effects of prolonged disruption of the normal operation of the electricity market due to emergency situations in the unified energy system of Ukraine.

And referring to this Resolution No. 372, notwithstanding the state guarantee regarding the buy-out of the electricity at the "green" tariff until 2030, on January 31, 2015, the National Commission for State Regulation in Energy and utilities decided to reduce the "green" tariff (i) by 20% for solar power plants, commissioned before March 31, 2013, and (ii) by 10% - for power plants producing electrical energy from all other alternative energy, commissioned before March 31, 2013. After some time the Commission went further and at the end of February introduced (i) 55% tariff cut for solar power plants and (ii) 50% cut for all other renewable power plants.

This means that Ukraine has ignored the "green" tariff guarantee clause and gave the injured party the grounds for lodging the investment protection claim against the State of Ukraine, in particular, under (i) the Energy Charter Treaty, and/or (ii) an applicable Bilateral Investment Treaty.

[4] indexation to the Euro will now be carried out for all objects not monthly but quarterly and will be envisaged only for facilities commissioned before 01.01.2025 (for both legal entities and private households).

In addition, there were a number of other incentives for RES in Ukraine, which included **VAT and customs duty exemptions**. Pursuant to Article 282 of the Customs Code, certain equipment and machinery for alternative energy production were exempt from customs duties. The VAT and customs duty incentives were applied provided that these goods were used by the taxpayer for its own production and no identical goods of equivalent quality were produced in Ukraine. However, the Resolution of the Cabinet of Ministers of Ukraine No. 719 dated 29.12.2014 cancelled the Decree providing list of the respective equipment, therefore, the incentive is no more applied.

Income of electric power enterprises from sales of electric energy generated from renewable energy sources was exempted from corporate income tax (CIT) until 1 January 2021; sales of own-produced goods: (i) equipment that operates on renewable energy sources; (ii) materials, raw materials, equipment and components to be used in power production from renewable energy sources was 80% CIT-exempted for a period of five years, and property taxes were reduced by 75%. On 31 July 2014 Verkhovna Rada approved Law No. 1621-VII "On amendments to Tax Code of Ukraine and other legislative acts (on improvement of certain provisions)". Among other things, the document cancelled provision on CIT-exemption of electric power enterprises from sales of electric energy generated from renewable energy sources until 1 January 2021. At the same time the Law No. 71-VIII dated 28.12.2014 cancelled the 80% CIT-exemption provision, as well as reduced land tax (25% of the standard land tax rate, Art. 276-6 of the Tax Code).

2.1.1 May different legal frameworks applicable to renewable energy facilities coexist within your jurisdiction? What is the criterion to benefit from one or other?

There is only feed-in tariff system available as incentives for renewable energy in Ukraine.

2.1.2 If your jurisdiction grants an incentive scheme for renewable energies: Has your country notified it to the European Commission under Article 108(3) TFEU so that it can be assessed under the State aid legislation?

Ukraine hasn't notified the European Commission on incentive scheme for renewables under Article 108(3) TFEU. The mechanism (institutional framework, infrastructures and capacities) for the implementation and operation of the State Aid system is still under development in Ukraine, and thus, Ukraine needs to adopt secondary legislation to make it effective. The tender on Development of the State Aid Control and Monitoring System in Ukraine has recently been announced. The aim of the tender is to support the establishment of an effective and efficient State Aid system in Ukraine.

2.1.3 If the answer is in the positive: Has the European Commission issued any decision on your current or former national incentive scheme? On what grounds was its ruling based?

2.2 Law-making process

2.2.1 By what means may the renewable sector exert an influence on the law-making process in your country? Does the renewable sector hold a fluent relation with the national energy authorities of your country? What about foreign investors?

It shall be noted that market participants do not have a direct initiative right. However, the renewable energy sector takes an active participation in parliamentary working groups discussing amendments into the current Ukrainian legislation, including different NGO having renewable market players as members are submitting their position papers to the respective state authorities.

2.2.2 Has any renewable subsector recently or in the past reached any sort of agreement(s) with your State on a particular issue concerning the applicable legal framework?

After the introduced (described above) reduction of tariff in the beginning of 2015, the market participants were declaring that they will file the investment protection claim against the State of Ukraine, as it was direct breach of state guarantee. In addition, there were a number of claims before the state courts for changes in the legal framework.

After a number of discussions by its Resolution dated 23 July 2015 "On approval of additional payments to refund shortfalls to producer working under Green Tariffs for July 2015" the National Commission for Energy and Utilities Regulation approved some additional payments for July 2015 amounting to UAH 92.3 m to refund shortfalls to producers of electricity from renewable sources. Thus, this was considered to be a compromise between market players and the state.

2.2.3 If the answer is affirmative: What are the agreed-upon terms of such agreement(s)? How is/are that/those agreement(s) regarded from a legal perspective (an administrative act, a bilateral contract, etc.)?

Please see para 3.2.2.

2.3 Development objectives

2.3.1 What policy instruments has your country implemented to meet the EU's binding 2020 renewable energy targets in the last few years (renewable action plans, incentive programs to increase installed capacity, etc.)? Will your country presumably comply with these objectives going forward?

On 1 October 2014, the Cabinet of Ministers adopted a National Renewable Energy Action Plan (up to 2020) and "Action Plan to Implement the National Renewable Energy Action Plan for the Period up to 2020". In line with EU commitments (Directive 2009/28/EC), the plan sets a target for renewable energy generation equivalent to 11% of gross final energy consumption by 2020 (up from 5.5% in 2009).

2.3.2 What kind of initiatives have been taken by your national energy authorities in order to foster the proliferation of renewable energy within your country? In contrast, what kind of restrictions have been put in place to restrict the installed capacity within your country's borders?

Please see para 3.1.1, 3.1.2.

2.4 Grandfathering policy

2.4.1 Is there any grandfathering regulation or clause included in your jurisdiction's legal framework for renewable energies that prevents existing investors from any retroactive changes in the regulatory paradigm in the future?

Yes, according to the Law "On Electric Power":

"The state guaranties that for economic entities which produce electricity from alternative energy sources at commissioned power plants, the procedure of stimulation of electricity production from alternative energy sources shall be applied as determined pursuant to provisions of this article at the date of commissioning of the power plants which produces electricity from alternative energy sources. In case amendments are being introduced into the legislation which regulates the procedure for stimulation of production of electricity from alternative energy sources, the economic entities are entitled to choose the new stimulation procedure".

2.4.2 If a regulation or clause of this sort exists: How does national case law construe it? Is it applicable to every regulatory aspect or exclusively to particular ones?

Please see the para 3.4.1.

2.4.3 Has your country ever undergone a profound change in the legal framework for renewable energies, recently or in the past?

Please see the para 3.1.2.

2.4.4 If the answer is positive: What were the alleged reasons by the national authorities leading to those changes? Were acquired rights respected by the new regulatory legislation? What kind of transitional rules were enacted?

Mainly the changes were introduced due to military actions in Ukraine and dramatic deficiency of state budget, namely Ukraine doubted the tariffs were economically justified (especially for solar energy) and that the country has the respective bankability to pay the tariff.

In general, amendments regarding the solar tariffs reduction were considered by international financial institutions.

2.5 Dispute resolution

2.5.1 Are there any pending claims before either the state courts or arbitral tribunals for changes in the legal framework regarding investor incentives in the renewable energy sector?

There are no pending claims before state courts.

2.5.2 Are there any final decisions of your state courts approving/disapproving of changes in the legal framework regarding investor incentives in the renewable energy sector?

In view of the green tariffs reduction justified by emergency state in the power sector, owners of renewable energy parks filed three different lawsuits in Kyiv District Administrative Court asking the court to recognize unlawful the Resolution of the National Commission for State Energy and Public Utilities Regulation No. 492 on 50–55% reduction of the green tariffs within the framework of temporary emergency measures in the electricity market. There was a similar joint lawsuit against the Regulator, SE "Energorynok", the Ministry of Energy and Coal Industry and the Ministry of Justice

asking to recognize unlawful the 10–20% reduction of the green tariffs within the framework of the Resolution dated 31 January 2015 No. 105, and compensation of loss. On 23 June 2015 the court recognized the Resolution No. 105 unlawful and bound the Regulator to consider compensation of the difference between the value of the actually sold electricity in February 2015 and the green tariff rate established by law.