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# IV.

# INVESTMENT ARBITRATION

Assumption (Uspenskyi) Cathedral of Bila Krynytsia Old Believer, Ukraine. | Irynal

# RES INVESTORS AGAINST UKRAINE: UNPRECEDENTED AGREEMENT TO AVOID FUTURE CLAIMS?

By Krystyna Khripkova and Mykola Krys

**Introduction**

In 2008, Ukraine introduced a renewables support scheme with the purpose of reducing gas dependence from the Russian Federation and to favour renewable resources over fossil fuels. The Ukrainian Government offered relatively generous green tariffs to foreign and local investors to encourage a rapid growth of production of renewable energy electricity. In the recent several years, this was accompanied by a great success, as foreign investors and many Ukrainian entrepreneurs have since invested USD 4.5 billion in the construction of wind and solar power plants throughout the country. The renewable energy production in Ukraine got a boom, and generous incentive schemes for renewable energy prompted investors to take advantage. Ukraine's installed production capacity grew from 981 MW in 2016 to 6328 MW at the end of 2019.[1]

However, as explained further, economic difficulties, and the inability to comply with specific obligations regarding full offtake and compensation arose in Ukraine.[2] Ukraine could have become another State along with Spain, Italy and the Czech Republic facing a wave of investor's treaty claims, but in late 2019 the Ukrainian Government initiated public discussions with its local and foreign investors aiming to reach a compromise as regards reduction of the green tariff (and various other aspects of the support scheme).

On 10 June 2020, the Ukrainian Government[3] and the associations amalgamating the interests of investors/producers of electric power from renewable energy sources ("**RES**") reached a compromise and signed a "Memorandum of Understanding for the Resolution of Problematic Issues in the Renewable Energy Industry of Ukraine" ("**Memorandum**") to bring stability to the renewable energy market in Ukraine.[4] This step was a result of tough negotiations between the participants who experienced the complicated state of affairs. In a few weeks after that, the Ukrainian Legislative Power passed a new law reducing renewables sector incentives.[5] Nonetheless, could this be the end of the story?

This article aims at describing the introduction of the renewable support scheme and the crisis that hit the energy market of Ukraine. The authors consider the Memorandum and the new legislative changes passed after its signing as a way to solve the entanglement in this regard. Last section addresses Ukraine's promises of legislative stability and predicts possible changes in the Ukrainian tax regime affecting RES investors. It further analyses prospects of bringing treaty claims against Ukraine if an excise tax is imposed on RES producers.

**1. Background**

**a. History of establishing the FiT in Ukraine**

In order to support the development of renewable energy, in 2008, Ukraine introduced the feed-in tariff ("**FiT**") along with other incentives by amending the 1997 Law of Ukraine "On the Electric Power Industry".[6] The amendments envisaged the mandatory purchase of green energy by the State Enterprise "Energorynok" (which was later replaced by the State Company "Guaranteed Buyer" (the "**GB**")) at the highest price in Europe using the FiT[7]. The FiT was available for producers of green energy for 10 years from the moment of power plants installation.[8]

In September 2010, Ukraine signed the Protocol concerning the Accession of Ukraine to the Treaty Establishing the Energy Community[9]. Shortly after that, Ukraine acceded to the specified Treaty as a Contracting Party. This specifically meant that Ukraine could participate in the integration into the energy sector of the EU. It also entailed setting binding goals at the state level, notably to guarantee investment protection and to encourage the development of modern technologies and innovation.[10]

Ukraine also became a party to the Paris Climate Agreement and set a goal to reach 11% of energy consumption from renewable energy sources by 2020.[11]

**b. Other amendments prior to crisis**

As a part of the renewables support scheme, RES producers were exempt from income tax for the period of 10 years, starting from 1 January 2011.[12] The income tax exemption was later abolished in 2014 by the Law of Ukraine No. 1621-VII.[13] Developing legislation in this area, in 2015, the Parliament adopted the Law of Ukraine No. 514-VIII[14] that established that RES producers could receive a premium for use of materials and equipment produced in Ukraine.

On 1 July 2019, a new electricity market in Ukraine with a new procedure for purchasing electricity at the FiT started working.[15] The Ukrainian regulator approved a new scheme for budgeting the GB and adopted the procedure to enter into power purchase agreements ("**PPAs**") at the FiT between the GB and RES producers.[16] The Government also implemented the new system of state support of RES producers allowing them to participate in support quota distribution auctions. These auctions were developed to replace the FiT, but both procedures will co-exist until 2030.

**c. Crisis in RES sector**

After the new electricity market started to operate, it turned out that the system did not work the way it should. Amongst the main reasons that became a threat to the further stable development of RES sector were:

• significant excess of the green tariff over market prices and lack of funds for its compensation;

• a large number of previously signed pre-PPAs that could be implemented at still high FiT;

• lack of liability of RES producers for imbalances;

• ineffective implementation of the new energy market (auctions);[17] and

• reduced consumption of electricity due to the warm winter and Covid-19 pandemic.

This problem became acute in November 2019, when the energy transmission system operator NPC "Ukrenergo" for the first-time limited RES generation due to the surplus of electricity in the Unified Energy System of Ukraine. The GB's budget deficit led to suspension of the FiT payments. This put both the State and RES producers in a precarious position that triggered lengthy negotiations through mediation aiming to reach a mutually beneficial agreement.

**2. Memorandum with the Government**

**a. Start of negotiations**

Under these circumstances, the Government proposed a retroactive cut of FiT for RES producers, while the GB had already been in deficit for hundreds of millions of debts.[18] In December 2019, two renewables associations – the European-Ukrainian Energy Agency ("**EUEA**") and the Ukrainian Wind Energy Association ("**UWEA**") – started to negotiate with the Government over the proposed reform. However, the negotiations were not successful and came to a standstill. If negotiations had failed, RES producers could have commenced commercial arbitrations against the GB under the ICC arbitration clause contained in their PPAs. But it was unclear whether it would be possible to enforce such awards and collect the debts from the GB, because the GB itself was essentially a clearing house and had no significant assets.[19] As alternative, RES investors started looking *"at instigating arbitration proceedings against the government"* under applicable BITs and the ECT.[20] As investment arbitration is a costly and time-consuming process,[21] RES investors continued expressing their willingness to find an amicable solution with the Government.

After the President of Ukraine formed the new Government, the negotiations between the participants resumed.[22] Three leading

Railway bridge on the Dnieper River in Kiev Ukraine | Yurii Malashchenko

RES industry associations addressed a letter to the President of Ukraine expressing their readiness in voluntary restructuring of the size of FiT and in voluntary refusal to put into operation new RES facilities (which would reduce the financial burden on the GB by more than 80 billion UAH) in return for a promise for a greater stability from the State.[23]

**b. Memorandum**

In the wake of the success of the talks on 10 June 2020, the Ukrainian Government[24] signed the Memorandum with the key associations amalgamating the interests of investors/producers of electric power from renewable energy sources (EUEA and UWEA), however, not all of the RES producers (including members of the aforementioned associations) accepted the terms of the Memorandum.[25] The primary task of the Memorandum was to make the position of the GB solid and cut the FiT for RES producers.

The Memorandum sets forth, *inter alia*, the following amendments to the renewable energy regulatory framework[26]:

• for facilities put into operation before 1 July 2015 the FiT is reduced by 15%;

• for facilities put into operation from 1 July 2015 until 31 December 2019: for ***solar*** facilities with installed capacity above 1MW the FiT is reduced by 15%; for ***solar*** facilities with installed capacity equal to or less than 1MW the FiT is reduced by 10%; for ***wind*** facilities with wind turbine capacity equal to or exceeding 2MW the FiT is reduced by 7,5%;

• for ***wind*** and ***solar*** facilities put into operation after 1 January 2020 the FiT is reduced by 2,5%.

The Memorandum also envisages the accelerated responsibility for imbalances (i.e. errors in forecasting the electricity production at RES facilities). RES producers shall bear financial liability for imbalances at the rate of 50% starting from 1 January 2021 and at the rate of 100% after 1 January 2022. Until 31 December 2029, the tolerance margin for imbalances is 5% for ***solar*** projects and 10% for ***wind*** projects.[27]

In turn, the Government undertakes to ensure timely payment by GB for green electricity, and repayment of existing debt to RES producers that has accrued since 1 January 2020. In particular, GB will repay 40% of the debt in the fourth quarter of 2020, then 15% of the debt – each quarter in 2021.[28]

Furthermore, the Government undertakes to determine and approve the annual quotas in support of green energy and to ensure the holding of auctions for the allocation of such quotas.[29]

Finally, by signing the Memorandum, RES producers do not waive their right to resort to arbitration in order to protect their rights.

**c. The New Law reducing the FiT**

In as little as 10 days after the Memorandum was signed, the President of Ukraine s igned the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Improving Terms for Supporting Electricity Production from Alternative Energy Sources" No. 810-IX, dated 21 July 2020, that entered into force on 1 August 2020 (the "**New Law**").[30] The New Law reflects the key arrangements contained in the Memorandum, albeit with a number of changes and additions.

As regards the cut of the FiT, the arrangements set out in the Memorandum have been partially amended, including: for ***solar*** facilities with installed capacity equal to or less than 1MW put into operation from 1 July 2015 until 31 December 2019 the FiT is now reduced by **7.5%** (it is 10% in the Memorandum).

The New Law additionally envisages that the FiT for ***solar*** plants commissioned after 31 October 2020[31] will be reduced by 60% (for solar plants with installed capacity exceeding 75 MW), and by 30% (for solar plants with installed capacity less than 75 MW)[32].

The New Law introduces several changes into the regulation on support quota distribution auctions and curtailment, as well as sets out the sources to finance the GB.[33] The Memorandum contains express undertakings to repay the indebtedness of the GB, whereas the New Law does not specifically address this point. Instead, the New Law says that a specific law dealing with the repayment of debts must be drafted by the Government within three months.[34]

Last but not least, several state guarantees are included in the New Law as explained in more detail in the next section.

### 3. Potential investment claims

Admittedly, the 2020 legislative changes leading to the reduction of the FiT and shift of the cut-off dates for the commissioning of new facilities entitled to benefit from the FiT could lead to deterioration of RES investors' financial position and significant losses. The renewables reform itself, as well as failure of the GB to fulfil its obligation to offtake green electricity may be seen as the State's measures in breach of the legitimate expectations of investors. In turn, foreign investors may bring treaty claims against Ukraine under applicable BIT and / or the ECT contending, *inter alia*, the latter's failure to accord fair and equitable treatment (FET) to their investments and to protect investments from expropriation without compensation.

This article does not address potential claims that may arise out of the current legislation. Instead, the authors are interested in exploring a hypothetical scenario if, to the extent possible, Ukraine goes further and imposes new taxes on RES producers. This section discusses the likelihood of tax changes in the foreseeable future and evaluates prospects of bringing treaty claims against Ukraine if the legislator decides to lift RES producers' exemption from the excise tax that is now in place.

#### a. Stabilization clause and taxes

Previously, Ukraine guaranteed the stability of the FiT for the period from 2009 to 2030.[35] Namely, under the 1997 Law of Ukraine "On the Electric Power Industry" (as amended in 2009) RES producers were promised that the same incentives for the production of renewable electricity that were in place on the date of commissioning of their facilities would apply. Importantly, in case of change of the incentives, RES producers were free to choose the new incentive package set out in a new law.[36]

In 2015, the legislator introduced the excise tax on electricity that was relatively modest and constituted 3.5%. Yet, RES producers have always been exempted from this tax for obvious reasons. Imposing excise tax on RES producers, who sell electric energy for the regulated price (the FiT) and cannot 'transfer' the excise tax to the consumer by increasing the selling price accordingly, would effectively mean reduction of the FiT by the rate of the excise tax. In other words, imposition of the excise tax would reduce the financial burden on the State related to the renewables support scheme.

Not surprisingly, when the crisis hit the electricity market in fall 2019, there had been discussions that the excise tax might be imposed on RES producers at the rate that is applicable to other producers. Nevertheless, in late November 2019, a draft law leaked to the public that provided for excise taxes for RES producers at the rate of 30-40%. Although the said draft law has never been formally submitted to the Parliament, it has raised concerns that excise tax is already on the table as one of the possible solutions to the budget deficit. Considering these developments, during negotiations between renewable energy producers and the State in relation to potential changes in the renewables regime it was agreed to include the following stabilization clauses in the Memorandum:

*"2. The State Authorities of Ukraine guarantee that the laws of Ukraine effective on the date of entry into force of the Law on the Agreements (as amended to give effect to this Memorandum) will apply to the rights and obligations of the Parties under the PPAs […]*

*22. After the Parties fulfil all obligations provided for in this Memorandum, the State Authorities of Ukraine undertake within their competence to take all necessary measures to prevent the adoption by the relevant state bodies of Ukraine of laws and other statutory instruments worsening conditions of economic activities of RES Producers, in particular, through introduction of additional taxes, fees, fines, FiT reduction, etc."*

Put differently, the Government guarantees the stability of the new regulation and promises to abstain from introducing new legislative changes, including imposition of new taxes, that might negatively affect RES producers.

By virtue of the New Law that came into force on 1 August 2020 the legislator amended the existing stabilization clause by adopting changes in two laws. The first one is the 1996 Law of Ukraine "On the Regime of Foreign Investments" (the "**RFI Law**") that now envisages that the rights and obligations under the power purchase agreements at the FiT will be regulated by the legislation in force at the moment of adoption of the New Law, though with the exceptions that the guarantees "*do not apply to changes in defense, national security, **tax legislation**, public order, and environmental protection*".[37] It is fairly obvious that this clause may be used by the legislator as a back door for imposing the excise tax.

The second law is the 2013 Law of Ukraine "On Alternative Energy Sources" (the "**AES Law**") that now states the following in Article 9-4:

*"The state guarantees that for business entities for which the "green" tariff is set or will be set in accordance with part three of this article, the legislation of Ukraine will be applied during the whole term of the "green" tariff, which is valid on the day of entry into force of the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Improving Terms for Supporting Electricity Production from Alternative Energy Sources". This law does not cover the legislation which reduces the amount of taxes or fees or abolishes them, weakens the regulation of economic activity … which shall apply from the date of entry into force of such legislation."*

Moreover, the next paragraph of Articles 9-4 is spelled out as follows:

*"Guarantees of the stability of legislation do not apply to changes in legislation relating to defense, national security, public order and environmental protection."*

In plain words, the legislator guarantees that the FiT will not be changed or cancelled and RES producers can continue enjoying their exemption from any new taxes and, if existing income tax is reduced, RES producers would be entitled to pay such tax at the lower rate.

The discrepancy between the RFI Law and the AES Law makes the authors wonder on how, in practice, these two colliding stabilization clauses will correlate. In our view, the AES Law is *lex specialis* for RES sector as compared to the RFI Law. Thus, the stabilization clause in the former would likely prevail over the one in the latter when the question of interpretation of the two laws arises. Therefore, at least for now, we may conclude that there is a statutory commitment from the State to keep the RES producers exempt from new taxes, including the excise tax, during the lifetime of the FiT.

Yet, it is hard to rule out the possibility that the AES Law will be amended to include a taxation carve-out. We are indeed living in the era of uncertainty and downturn in economic activity due to the COVID-19 pandemic. That said and in view of the previous excise tax discussions last year, we cannot exclude that the excise tax for RES producers would be levied.

**b. Tax measures breaching treaty standards of protection**

Hypothetically, if the legislator levies an excise tax over RES producers, it would likely mean further reduction of the FiT by the rate of the excise tax or even lead (if the excise tax is 30-40%) to deprivation of the investor in significant part of the use of its investment or reasonably expected revenues. It is common practice that the power of taxation is an inherent attribute of sovereignty. Thus, some, but not all, investment treaties exclude tax matters from the scope of their protection subject to certain exceptions. In practice, tribunals often examine whether taxation measures by a host State are confiscatory, discriminatory, and/or tantamount to expropriation in the light of standards of protection under applicable investment treaties.

As a general observation it must be stressed that each investor's case would be assessed individually against the factual background. In this hypothetical scenario, it seems sensible to assume that such taxation measures could lead to claims from RES producers on the ground of violation of the legitimate expectations. The investor would need to show that at the time of investments the host State by means of the stabilization clauses in the Law of Ukraine "On Electric Power Industry" and the AES Law made a *specific* commitment that the renewables incentives would not be changed or cancelled, thus, imposition of any additional financial burden, like the excise tax, would be a breach of FET.

An interesting question remains unanswered: how to interpret the Government's commitments under the Memorandum that were effectively given only to those RES investors who signed it? Could such commitments be extended to other investors who refused to sign the Memorandum? Given a number of reservations in the Memorandum that most of the rights and obligations of the parties thereto only come into force when the New Law comes into force, it could be argued that such commitments were given in the course of mediation and could not create legitimate expectations. In response, those investors who signed the Memorandum may contend that the arrangements therein indicate *specific* intentions of the parties at a certain point in time that became binding upon them.

Moreover, if as a result of a series of state's measures (for instance, the cut of FiT, the shift of deadlines for commissioning renewables facilities, liabilities for imbalances and the imposition of the excise tax), which do not individually amount to an expropriation, a RES investor was radically deprived of the economic use and enjoyment of its investments, this could be an example of creeping expropriation. If introduction of the excise tax lead to a sufficiently severe economic impact on investment,[38] a tribunal may consider such measure to be expropriatory if it was in conflict with prior representations or commitments of the host State on which the investor relied on when making its investment.[39]

**c. Jurisdictional hurdles: lesson learnt**

The ECT drafters decided to preserve the sovereign and legitimate taxation powers of a host State and included the taxation carve-out in Article 21. However, in exceptional circumstances a taxation measure could not benefit from the taxation exclusion if a claimant is able to demonstrate a lack of good faith on the part of the host State. A great illustration of application of a complex mechanism contained in Article 21 of the ECT may be seen in the Spanish international investment arbitration case law.

Spain enacted the renewable energy scheme to boost production of renewable energy at the expense of long-term investments. As part of the scheme, Spain offered, *inter alia*, a FiT which permitted RES producers to sell electricity at a higher rate for the first 25 years, and granted tax incentives.[40] However, due to financial difficulties the government largely eliminated the incentives[41] and imposed a 7% tax on the value of the production of electric energy, that was introduced by Law 15/2012.[42] In response, Spain faced dozens of investment arbitration claims under the ECT.

In *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*[43], the claimant argued that Law 15/2012, which introduced a 7% tax, constituted a breach of Spain's obligations under the ECT[44]. In response, Spain raised jurisdictional objections contending that Article 21(1) of the ECT was a "carve-out" provision, which exempted tax measures from the scope of the ECT. Therefore, in Spain's view, the Tribunal lacked jurisdiction to hear any claims based on alleged breaches of Article 10(1) of the ECT by virtue of implementation of Law 15/2012[45].

Claimant argued that Spain's argument should fail because Article 21 of the ECT only applied to taxes adopted *bona fide*, whereas this was not the case. Although it was evident for the Tribunal that Law 15/2012 was indeed a taxation measure that was subject to the carve-out from the protection of the ECT,[46] the question remained whether Law 15/2012 was a taxation measure enacted *bona fide*.[47] The starting point of the analysis should always be that the taxation measure was in fact adopted in good faith. This means that the claimant bore the burden of proving that "Law 15/2012 was not enacted for the purpose of raising general revenue for the state, but for a different purpose, i.e. that the measure therefore was enacted *mala fide*."[48] In the Claimant's view "a tax is adopted *bona fide* only if the state's intention was to raise revenues in accordance with the stated purpose of that tax. According to the Claimant, the stated purpose of Law 15/2012 had nothing to do with its real objective, which was to function as a backdoor tariff aimed at further reducing the income the Respondent had guaranteed to PV investors. The Tax was, therefore, adopted *mala fide*."[49]

However, the Tribunal was not convinced and held that it was not easy to overthrow the presumption that a tax measure introduced by a state was enacted *bona fide*. The Tribunal went on explaining that "the actions relied upon by the Claimant in this respect fall short of the extreme actions that according to other arbitral tribunals constitute viable *mala fide* grounds."[50]

Similarly in *Antin Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. v. Kingdom of Spain*[51], the Tribunal held that the adopted tax "is not merely a measure labelled as a taxation measure, but rather plainly it is a tax of general application to all companies in the RE and conventional energy sector, in the pursuit of a public purpose identified and pursued by the Respondent."[52] In both cases, the tribunals accepted Spain's jurisdictional objection based on the taxation carve-out[53].

The *Novenergia II* and *Antin* lesson allow us to understand how the "carve-out" provision under the ECT operates, emphasising the importance of proving that a tax measure was not *bona fide.*

That said, it is important for investors in renewables sector in Ukraine to check whether they have access to other BITs or MITs in addition to the ECT. Investment restructuring to achieve investment treaty protection before a dispute arose may be an effective invocation of available legal rights. The carefully thought-through restructuring allows coupling the protections under the ECT with those of the applicable BITs or MITs. Thus, even the measures that are excluded from the ECT can be covered.

**4. Conclusion**

The prolonged negotiations between the Government and many RES producers bore fruit: a mutually agreeable path was found and further partially embodied in the New Law. Engagement of Ukraine in the productive dialogue with investors may be seen as the State's attempt to balance between its commitments to keep the FiT stable and sovereign power to regulate.

Despite that, it appears that the Government is struggling to meet its financial commitments (i.e. timely payment by GB for green electricity) envisaged in the Memorandum. Notwithstanding that the New Law identified the sources to fund the GB, the established scheme has not been fully implemented yet. As a result, in August 2020, the GB was able to pay for only 65% of green energy produced. If, due to new economic reality in the Covid-19 era, Ukraine decides to change the tax regime for RES investors despite the stabilization clauses in the Memorandum and the legislation, it could face investment arbitration claims. It remains to be seen how tribunals would construe the Government's promises of legislative stability in the context of possible alleged breaches of treaty standards of protection. In any case, it is important for foreign investors to be aware of jurisdictional hurdles under the ECT that may be overcome due to timely investment restructuring.

Krystyna Khripkova and Mykola Krys

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3 The Cabinet of Ministers of Ukraine, the Ministry of Energy and Environmental Protection of Ukraine (or its legal successor), the Energy and Utilities Regulatory Commission (the "NEURC"), and other state authorities of Ukraine.

4 Communications Department of the Secretariat of the CMU, "Government signs Memorandum with green energy producers" (*Governmental portal*, 10 June 2020) <https://www.kmu.gov.ua/en/news/uryad-pidpisav-memorandum-z-virobnikami-zelenoyi-elektroenergiyi>

5 Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Improving Terms for Supporting Electricity Production from Alternative Energy Sources" No. 810-IX dated 21 July 2020 <https://zakon.rada.gov.ua/laws/show/810-20#Text>

6 Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine in the Field of Establishment of G*green*" Tariff" No. 601-VI dated 28 September 2008 <https://zakon.rada.gov.ua/laws/show/601-17#Text>

7 The initial FiT was fixed at the rate of EURO 0.46 per kilowatt and was set to drop every five years.

8 These amendments were further reflected in the Law of Ukraine "On Amendments to the Law of Ukraine 'On the Electric Power Industry' Regarding the Incentives for Using Alternative Sources of Energy" No. 1220-VI dated 1 April 2009 <https://zakon.rada.gov.ua/laws/show/1220-17/ed20090401?lang=en#Text>.

9 Protocol concerning the Accession of Ukraine to the Treaty establishing the Energy Community (*signature date*) <https://www.energy-community.org/dam/jcr:ebe2ae22-efff-47c6-bb71-eb6221af23aa/MC2010_Protocol_Ukraine_Treaty.PDFeb6221af23aa/MC2010_Protocol_Ukraine_Treaty.PDF>

10 Protocol concerning the Accession of Ukraine to the Treaty establishing the Energy Community (*date of entry into force for Ukraine:* 1 February 2011) <https://zakon.rada.gov.ua/laws/show/994_a27#Text>

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12 Tax Code of Ukraine, Subsection 4. paragraph 17 (c), 2 December 2010 (Amended on 1 January 2011) <https://zakon.rada.gov.ua/laws/show/2755-17/ed20110101?lang=en#Text>

13 Law of Ukraine "On amendments to the Tax Code of Ukraine and some other legislative acts of Ukraine" No. 1621-VII dated 31 July 2014 <https://zakon.rada.gov.ua/laws/show/en/1621-18/ed20140803#n149>

14 Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Ensuring Competitive Conditions for Production of Electricity from Alternative Energy Sources" No. 514-VIII dated 4 June 2015 <https://zakon.rada.gov.ua/laws/show/514-19/ed20150604#Text>
15 "New electricity market started working in Ukraine" (*Ukrayinska Pravda*, 1 July 2019) <https://www.epravda.com.ua/news/2019/07/1/649204/>
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34 Ibid.
35 Later, the end year has been changed to 2029.
36 Law of Ukraine "On Electric Power Industry" No.575/97-BP, Article 17-1, dated 16 October 1997 (Amended on 22 April 2009) and Article 9-1 of the 2003 Law of Ukraine "On Alternative Energy Sources" ("The State shall guarantee that for economic entities producing electricity from alternative energy sources at commissioned electricity facilities, the procedure for stimulating the production of electricity from alternative energy sources established in accordance with the provisions of this Article on the date of commissioning of the facilities, including commissioning of the construction queues of power plants (start-up complexes), shall apply. In the event of legislation changes related to the procedure for stimulating the production of electricity from alternative energy sources, businesses may choose a new procedure for stimulation.").
37 Law of Ukraine "On the Regime of Foreign Investments" No. 93/96-BP, Article 8, paragraph 2 dated 19 March 1996 <https://zakon.rada.gov.ua/laws/show/93/96-%D0%B2%D1%80?lang=en#Text>
38 *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC and David Fischer v. Arab Republic of Egypt* (ICSID Case No. ARB/12/11), Decision on Liability and Heads of Loss dated 21 February 2017, paras. 178-183 <https://www.italaw.com/sites/default/files/case-documents/italaw8487.pdf>.
39 *Methanex Corp. v. United States of America* (NAFTA/UNCITRAL), Final Award of the Tribunal on Jurisdiction and Merits dated 3 August 2005, at Chapter IV, Part D para. 7 <https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf>
40 Charles A Patrizia, Joseph R Profaizer, Samuel W Cooper and Igor V Timofeyev, "Investment Disputes Involving the Renewable Energy Industry under the Energy Charter Treaty" (*Global Arbitration Review*) <https://globalarbitrationreview.com/chapter/1178836/investment-disputes-involving-the-renewable-energy-industry-under-the-energy-charter-treaty#footnote-083>
41 Pablo del Rio & Pere Mir-Artigues, 'A Cautionary Tale: Spain's Solar PV Investment Bubble', International Institute for Sustainable Development (IISD) (February 2014)
42 Toby Couture, "Pain in Spain: New Retroactive Changes Hinder Renewable Energy" (*Renewable Energy World*, 19 April 2013) <https://www.renewableenergyworld.com/2013/04/19/pain-in-spain-new-retroactive-changes-hinders-renewable-energy/#gref>
43 *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, (SCC case 2015/063), Award dated 15 February 2018 (**Novenergia II v. Spain**) <https://www.italaw.com/sites/default/files/case-documents/italaw9715.pdf>
44 Novenergia II v. Spain, para. 516.
45 Ibid., para. 517.
46 Ibid., para. 519.
47 Ibid., para. 520.
48 Ibid., para. 521.
49 Ibid., para. 523.
50 Ibid., para. 524
51 *Antin Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. v. Kingdom of Spain* (ICSID Case No. ARB/13/31), Award dated 15 June 2018 (**Antin v. Spain**) <https://www.italaw.com/sites/default/files/case-documents/italaw9875.pdf>
52 Antin v. Spain, para. 320.
53 Novenergia II v. Spain, para. 525, Antin v. Spain, para. 323.