

BITs and FITs: Investment
treaty claims arising
out of Ukraine's recent
amendments to its FIT
scheme



1. INTRODUCTION

On 28 October 2021, the International Centre for Settlement of Investment Disputes (ICSID) registered a new request for arbitration proceedings brought against Ukraine by SREW NV (SREW). SREW, which owns the 110-megawatt Dnepro-Bugsky wind power station in southern Ukraine, is claiming that Ukraine's reforms to its tariff regime are in breach of the BLEU (Belgium-Luxembourg Economic Union) - Ukraine bilateral investment treaty (BIT). This follows the claim earlier in the year by Modus Energy International (Modus Energy), a Lithuanian investor in three solar power plants in Ukraine, which filed SCC arbitration proceedings against Ukraine under the Energy Charter Treaty (ECT). Modus Energy is claiming, by way of its Dutch subsidiary, that Ukraine has breached the ECT through the adoption of Law No. 810-IX, a legislative reform which reduced guaranteed feed-in tariffs (FITs). It is reported that Modus Energy is claiming damages of approximately EUR 11.5 million.

Yet, the claims by SREW and Modus Energy may only be the first set of claims in a potential wave of investment treaty claims, under the ECT or other bilateral investment treaties, that Ukraine may face over recent amendments to its FIT regime. Elementum Energy, a UK investor, has already filed a notice of dispute under both the ECT and the UK-Ukraine BIT and it is reported that investors from Norway, South Korea and Turkey are also considering or have already filed similar trigger letters in response to Ukraine's legislative reforms.

In this Client Alert, we discuss the recent legislative reforms to Ukraine's FIT regime which have already given rise to the disputes referred to above. We also consider the claims which Ukraine could face in the context of similar claims which other States have faced in response to the reduction in FITs.

2. BACKGROUND

In 2009, Ukraine introduced a FIT scheme for electricity produced from solar and wind energy. This was part of a package of incentives designed to encourage investment in the renewable energy sector. In July 2019, the regime was reformed with new legislation enacted to govern the electricity market and the payment of FITs to renewable energy producers.

Yet, when FITs came to exceed market prices, the State-owned entity designated as the offtaker was unable to make FIT payments to electricity producers and, in November 2019, Ukraine's transmission system operator restricted the generation of electricity by renewable energy producers. Ultimately, FIT payments to producers were suspended.

Following various negotiations, this crisis led to a formal mediation between the Government of Ukraine and two energy industry associations (which represented some but not all renewable energy producers) under the Energy Community mediation rules. The mediation resulted in the signing of a Memorandum of Understanding (MoU) between the parties. Pursuant to the MoU, the Government of Ukraine committed, *inter alia*, to settle existing FIT-related debts according to an agreed schedule – 40% in the fourth quarter of 2020 and 15% in each quarter of 2021 and to introduce compensation for curtailments of wind and solar producers. At the same time, the industry associations agreed under the MoU to accept the proposed reduction of the FIT rates. Yet, the MoU makes clear that its provisions are without prejudice to the rights of the signatories, including the right to defend one's interests in courts or through arbitration proceedings.

Law 810-IX "On Amending Certain Laws of Ukraine to Improve Support of the Production of Electric Power from Renewable Energy Sources" entered into force on 1 August 2020. Intended to implement the MoU, the Law introduced important changes including a reduction of the FIT rate and an introduction of a local content premium.

3. KEY AMENDMENTS OF THE FIT SCHEME

3.1 Reduction of FIT rates

Law 810-IX introduced rates by which FITs must be reduced. The rate of reduction depends on the date on which the generation facility was commissioned and the type of renewable energy technology used. The rate of reduction varies between 2.5% and 60%. Significantly, the new FIT rates apply not only to new but also to existing facilities. The table below provides an overview of the applicable reduction rates.

Type of renewable energy technology	Generation capacity	Date of commissioning			
		1.07.2015-31.12.2019	01.01.2020-31.10.2020	1.11.2020-31.03.2021	From 1.04.2021
Wind energy	≥ 2 MW	7.5%			
	Any			2.5%	
Solar energy	< 1MW	7.5%		2.5%	
	≥ 1 MW	15%	2.5%		
	1 MW – 75 MW			30%	60%
	≥ 75 MW				60%

3.2 Local content premium

Law 810-IX also introduced an additional 20%-premium to the FIT or the auction price when the share of domestically produced equipment that is used by an electricity generation facility is more than 70%. The rates of the local content premium are currently as follows:

Premium rate	Share of equipment produced in Ukraine
5%	30% to 50%
10%	50% to 70%
20%	70% and more

The 20%-premium will be available only for the first five years of the operation of a generation facility and subsequently will be limited to 10%.

3.3 Stabilization clause

Law 810-IX also amended the Law on Foreign Investment by introducing a new stabilization clause to protect investors in the renewable energy sector. In particular, the stabilization clause provides that State guarantees related to FIT schemes apply for the whole duration of a FIT contract, namely until 31 December 2029. The clause further provides that the rights and obligations of the parties under FIT contracts will continue to be governed by the legislation in force on 1 August 2020, the date when the Law 810-IX entered into force, except when the new legislation reduces or eliminates taxes or charges or improves otherwise the treatment of the FIT-recipients.

4. LEGAL ACTIONS BY FOREIGN INVESTORS

Despite two industry associations having participated in the Energy Community mediation procedure and the signing of the MoU, not all foreign investors – including Modus Energy - agreed with the conditions of the MoU or the subsequent amendments introduced by Law 810-IX.

As noted above, in March 2021, Modus Energy, a Lithuanian company which owns several solar energy plants in Ukraine, filed international arbitration proceedings against Ukraine under the ECT. Pursuant to Article 26 of the ECT, a foreign investor may submit a dispute against an ECT Contracting Party for resolution by way of international arbitration. Under Article 26, an investor may opt for *ad hoc* arbitration or institutional arbitration under the rules of either the International Center for Settlement of Investment Disputes (ICSID) or the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). Modus opted for Stockholm arbitration. SREW, which is bringing its claim under the BLEU-Ukraine BIT, opted for ICSID arbitration.

Renewable energy producers whose investments have been adversely affected by the amended FIT scheme may seek to hold Ukraine accountable under international law including by way of claims for breach of the ECT or other BITs. Ukraine has entered into more than 70 BITs which offer protections to foreign investors similar to those under the ECT as well as a right to international arbitration. Investors may therefore seek to bring claims under both the ECT and applicable BITs.

Ukraine is not the first State to face investment arbitration claims arising out of legislative reforms to FIT schemes. In recent years, there have been more than 60 cases brought against States such as Spain, Italy, the Czech Republic and Romania. If anything can be learned from the differing conclusions of the tribunals dealing with these cases it is that the specific facts of each case as well as the specific investment treaty invoked will be largely determinative. The outcome of investment treaty arbitration claims against Ukraine, including the claims by Modus Energy and SREW, will therefore largely depend on the particular investment treaty invoked and the specific factual circumstances related to the operation and amendment of the FIT scheme in Ukraine.

Useful links:

- The Law no. 810-IX "[On Amending Certain Laws of Ukraine to Improve Support of the Production of Electric Power from Renewable Energy Sources](#)" (in Ukrainian)
- ICSID, Case Details, SREW N.V. v. Ukraine ([ICSID Case No. ARB/21/52](#))
- Energy Community, [Dispute 02/2019: Ukraine / renewable energy](#)
- [Energy Charter Treaty](#), Article 26

VBB INVESTMENT ARBITRATION TEAM



Nicholas Lawn leads Van Bael & Bellis' London-based International Dispute Resolution team. He specialises in international arbitration and litigation with a particular focus on investment arbitration and public international law. Over the course of nearly 20 years, he has advised a range of clients - both investors and governments - in relation to international disputes across numerous sectors and under a variety of different arbitral rules. Nicholas has won some of the largest and most notable investment arbitration awards of recent years. Most recently, he successfully acted for Vodafone in its landmark US\$5.5 billion arbitral victory against the Republic of India. He was also involved in Cyprus' successful defence of a BIT claim arising out of the State's treatment of a major bank during the financial crisis. For a number of years, Nicholas has been identified as one of London's leading investment arbitration practitioners. Most recently, he was included in the International Arbitration Powerlist (2019) and was named as a Rising Star for International Arbitration and Public International Law by The Legal 500 UK (2021) for International Arbitration and Public International Law by The Legal 500 UK (2021).



Yuriy Rudyuk is a Partner in our Brussels Office. He specialises in International Dispute Resolution with a particular focus on international trade disputes including anti-dumping, anti-subsidy and safeguard proceedings involving exporters from Belarus, Russia, Ukraine and Kazakhstan. Over more than two decades, Yuriy has represented key Ukrainian exporters in all major EU anti-dumping proceedings concerning a wide variety of products, including steel, seamless and welded tubes, ammonium nitrate, urea, ironing boards and ferro-alloys. He also regularly represents CIS exporters in trade defence proceedings initiated by other jurisdictions such as Brazil, India, Pakistan, Taiwan and Turkey. In addition, he has substantial commercial arbitration experience in Ukraine-related matters and serves as a potential arbitrator appointed by Ukraine under the Dispute Settlement Mechanism of the EU-Ukraine FTA. Yuriy is admitted to practise in both Brussels and Ukraine.



Tetyana Payosova is an Associate in Van Bael & Bellis' Geneva office, specialising in international economic law and international dispute resolution. Her practice focuses particularly on environmental, climate change and energy-related issues. Before joining Van Bael & Bellis, Tetyana worked as legal adviser at the International Rail Transport Committee (CIT), where she advised numerous railway and shipping companies on various matters of international and European law. Tetyana also advised on various international economic law projects in her capacity as a research fellow at the World Trade Institute and the Institute for the International Economic Law of the University of Bern.

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With more than 30 years of experience in resolving international disputes, Van Bael & Bellis advises corporations, sovereign states and international organisations on their most complex and most critical disputes.

Van Bael & Bellis' lawyers have substantial experience in advising clients in relation to the disputes which arise out of foreign investment. Our team acts for both investors and States in investment arbitrations (and related court proceedings) under various bilateral and multilateral investment treaties including under the Energy Charter Treaty (ECT) and the North America Free Trade Agreement (NAFTA).

Our team members have deep experience in cases before all the major arbitral institutions which handle investment disputes, including the International Centre for Settlement of Disputes (ICSID) and the Permanent Court of Arbitration. Their experience spans diverse sectors ranging from banking & finance, energy and infrastructure to mining and telecommunications and covers investment issues arising in all parts of the world from Asia to Latin America.

In addition to advising clients before a dispute arises, our team acts at every stage of the investment dispute process from drafting submissions and appearing at hearings to challenging and enforcing awards. We also have expertise and experience in negotiating the settlement of investment disputes.

In addition to our contentious practice, we advise investors on the structuring and restructuring of foreign investments to secure the best available investment treaty protection. Our team also advises States on the negotiation, drafting and implementation of international investment agreements.



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