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*Is the tariff greener
on the other side?*

*An analysis of the Ukrainian green tariff
changes and the threat of Investment
Treaty claims*



ΝΟΜΙΚΗ ΒΙΒΛΙΟΘΗΚΗ

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Is the tariff greener on the other side?

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When Ukraine introduced the green tariff in 2008, it did not expect that a boom, like the one in the recent years with unprecedented growth in the renewable energy generation sector leading to investments amounting to ca. 3 billion USD and 5.2 GW of power generation capacity, would occur. Together with the introduction of the green tariff in 2008 in the Law of Ukraine “On the Electric Power Industry”, the government also provided for an obligation to maintain the green tariff until the end of 2029 and reinforced its aims in the subsequent Laws of Ukraine “On Alternative Sources of Energy” and “On the Energy Market.” Yet, last year, the Ukrainian government, making a U-turn, stated that under the current circumstances the green tariff had become financially challenging to maintain and commenced negotiations with renewable energy producers on possible decreases of the green tariff. Upon the announcement of the Ukrainian government, several foreign investors threatened that they would initiate investment treaty claims under the Energy Charter Treaty leading to mediation proceedings and the signing of the 10 June 2020 Memorandum of Understanding. Nevertheless, on 21 July 2020, the Parliament of Ukraine passed the Law of Ukraine “On Amendments to Certain Laws of Ukraine on Improving the Conditions for Supporting the Production of Electricity from Alternative Energy Sources” which might have a negative impact on investors in the renewable energy sector and increases the chances of claims under the Energy Charter Treaty against the State. This article therefore discusses the recent changes in the Ukrainian green tariff regulations and the potential of investor-State arbitrations against the Ukrainian State due to these changes.

I. Introduction

The global consensus is that the consumption of fossil fuels causes drastic and previously unforeseen impact on the global environment. As the governments' awareness of the peril of humanity and the planet is raising, they incentivize the use of renewable energy sources. This will be the future trend that needs to be followed, and

has been already broadly implemented in Spain, Italy, the Czech Republic, and Ukraine, which renewables energy regulation is a subject of the discussion in the present paper.

Since 2008, when the so-called “green tariff” (“GT”) was included to the Law of Ukraine “On the Electric Power Industry” (“**Electric Power Industry Law**”),² foreign investors have invested ca. USD 3 billion into the Ukrainian renewable energy market³. The first provisions of the legislation on GT now differ significantly from the current conditions. For instance, in order to stimulate the use of alternative energy sources, the 2008 GT Amendments to the Electric Power Industry Law were further developed in 2009 and provided the renewable energy producers with the right to sell the energy to the

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1. This article was researched and prepared by the authors in their personal capacity. The views and opinions expressed in this article are the authors' own and do not reflect the views of their respective law firms, Peter & Kim and Schellenberg Wittmer or any of their present or future clients.
2. By virtue of the Law of Ukraine No. 601-VI “ On Amendments to Certain Laws of Ukraine on Establishing a “Green” Tariff” dated 25 September 2008 (“**2008 GT Amendments**”), Ukrainian version available at: <https://zakon.rada.gov.ua/laws/show/601-17/ed20080925#Text>), that introduced amendments to Law of Ukraine No. 575/97-VR “On the Electric Power Industry” dated 16 October 1997 (available at: <https://zakon.rada.gov.ua/laws/show/575/97-%D0%B2%D1%80/ed20080925#Text>).
3. GetMarket, To be in time until 2030: why is there a boom in investments in green energy in Ukraine and what will change in the market in 2020? (in Russian), <https://getmarket.com.ua/ru/news/uspets-do-2030-goda-pochemu-v-ukraine-nablyudaetsya-bum-investicij-v-zelenuyu-energetiku-i-cto-izmenitsya-na-rynke-v-2020-godu>.