



# TRANSITION FROM FEED-IN TARIFFS TO FEED-IN PREMIUM FROM AN INVESTMENT PROTECTION ANGLE

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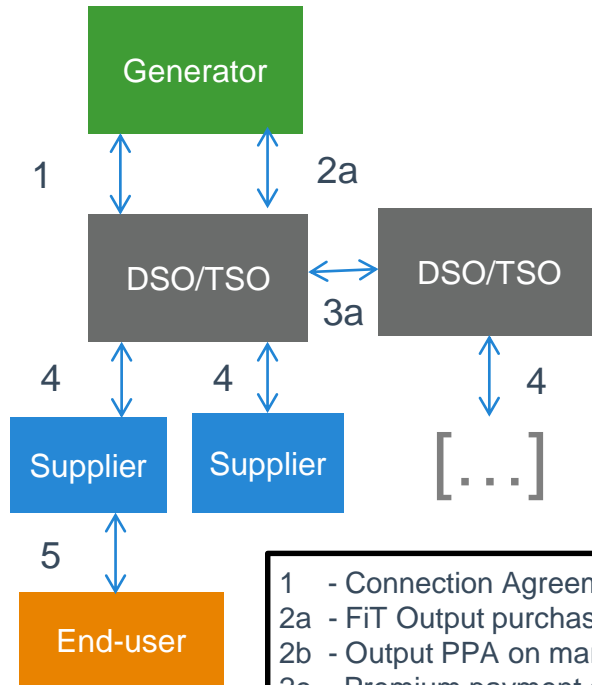
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## So far...

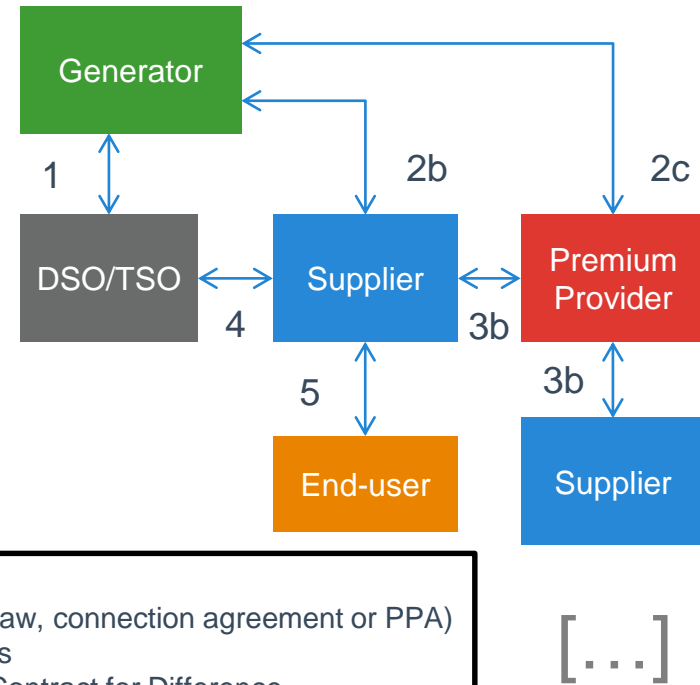
- Creation of mostly feed-in tariff (FiT) or certificate (e.g. RoC, Elcert, GoO, Certificati Verdi) renewable energy support schemes in the last decade.
- Schemes had issues with market model integration or perceived overcompensation and faster than expected take-up.
- Rise in change in law interventions into schemes followed (e.g. UK, Spain, Czech Republic, Romania, Albania, ...).
- Interventions were diverse in nature and in many cases had retrospective effect for existing installations under the respective support scheme.
- Commencement of litigation and BiT or ECT-based arbitration by investors.
- First rulings paint a diverse picture on investment protection and change in law.
- Meanwhile support schemes are being moved to auction / feed in tariff premium schemes.
- Parallel rise of voluntary corporate (virtual / synthetic) power purchase agreements with similar contractual structures to premium schemes.

# Legal Relations - FiT v. Premium

## ■ Example FiT Structure



## ■ Example FiT Premium Structure



- 1 - Connection Agreement
- 2a - FiT Output purchase (based on law, connection agreement or PPA)
- 2b - Output PPA on market conditions
- 2c - Premium payment agreement / Contract for Difference
- 3a - Inter-TSO FiT cost attribution and socialisation
- 3b - Supplier premium socialisation obligation (based on law or license)
- 4 - Use of system agreements passing on support cost socialisation
- 5 - Supply agreement passing on support cost socialisation

# FiT to Premium from an Investment Protection Perspective

- BIT or ECT investment protection claims:
  - Expropriation;
  - Fair and equitable treatment:
    - Legitimate expectation; and
    - Inducement to invest;
  - Observance of contractual obligations and other obligations under the "umbrella" clause; and
  - Most favoured nation treatment.
- Design changes from FiT to Premium:
  - Increased state participation through premium provider;
  - Splitting premium element from market price for electricity generated;
  - More detailed contractual change in law regimes;
  - Auctions limit overcompensation; and
  - Structure allows renewables to be included in general market design.



- Design changes seem to limit previous causes for state change in law intervention.
- PPA or CfD change in law regimes colour the assessment of "legitimate expectation".
- Classification of the Premium in the context of "investment" and "revenue" under BiT and ECT is more complex than in FiT and certificate-based cases currently being arbitrated.
- Developments on voluntary renewable corporate PPAs schemes likely to also influence the assessment in the future.

# Differences in Contractual Change in Law Compensation – Example



- Examples from comparable generation facilities (wind).
- Similar need for premium to make investment economic.
- Similar potential for market intervention.
- Yet, materially different approach to change in law compensation.

## ■ Non-EU Renewable PPA with Premium

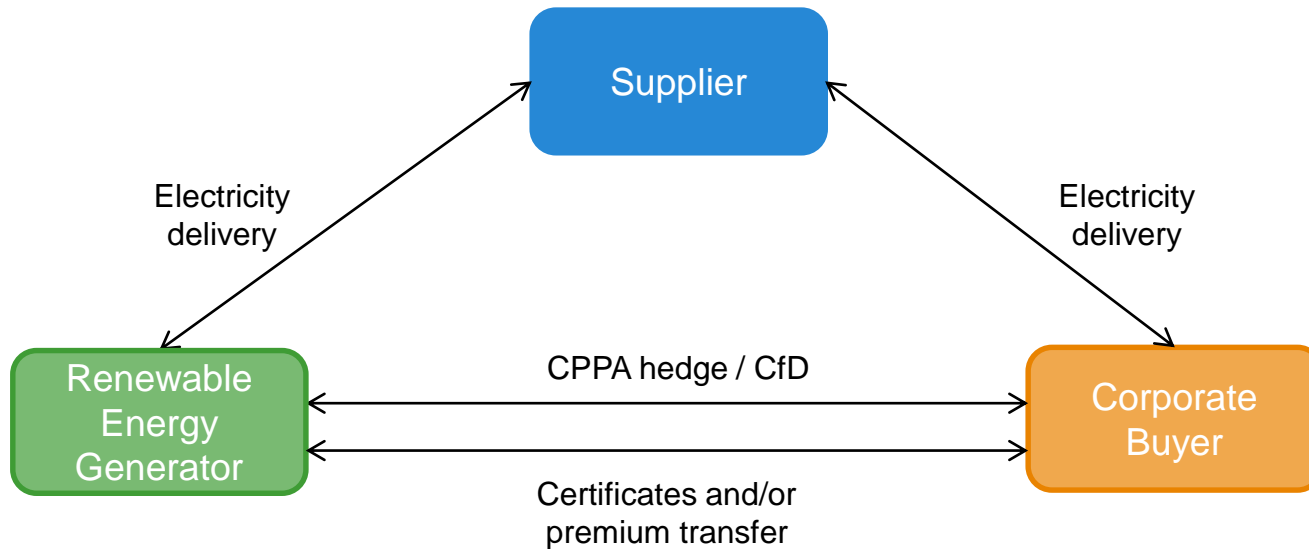
- Change in law = Political Force Majeure.
- Full tariff if Political Force Majeure impacts generation.
- Long-term Political Force Majeure:
  - Outstanding Project Debt *plus* the Depreciated Equity Amount *plus* x years of annual average profit *minus* insurance proceeds;
  - Transfer of plant.

## ■ UK Renewable CfD Standard Terms (Part 8)

- Detailed definitions of qualifying changes in law.
- Extensive premium adjustment formulae.
- Goes beyond restricted ability to generate to include change in economic equilibrium.
- QCiL Operations Cessation Event payment possible.
- No transfer of plant.

# Convergence – Voluntary Renewable Corporate PPAs

## 'Virtual' CPPA Structure



- Generator and facilitating supplier, as well as facilitating supplier and corporate each enter into a (conventional) PPA.
- Supplier arranges national or cross-border transmission.
- Generator and corporate agree on a hedging / fixed price structure, e.g. a contract for difference to provide cap and collar, with reference to pricing of the PPAs.
- Corporate also takes or buys tradable green certificates (e.g. GoOs) from generator for transfer of the CPPA renewable benefit.

# Observations for Discussion

- FiT Premium regimes come in various legal structures.
- Design changes from FiT to FiT Premium appear to reduce the need and likelihood of change in law intervention and thus investment protection claims.
- PPA or CfD Change in Law regimes appear to further limit BIT or ECT investment protection.
- Change in law compensation applicable to 'conventional' and the 'renewable' parts (arbitrarily) differs - why?
- Contractual change in law compensation is higher in developing, less regulated markets than in developed, more comprehensively regulated markets - why?
- Whilst the RES premium narrows, the gap between Premium support scheme change in law compensation and corporate renewable PPAs widens - why?
- Differences in contractual change in law compensation regimes are often not sufficiently considered and priced in by investors - why?
- Beware of generalisation - change in law investment protection is likely to materially differ even when FiT Premium systems are broadly similar in design.

# Further questions?



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