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

Energy Community Workshop on RES and Arbitration, Vienna, 17 November 2017

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So far…

- Creation of mostly feed-in tariff (FiT) or certificate (e.g. RoC, Elcert, GoO, Certificate 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

- **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.

- 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.
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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