

The background of the slide features a landscape with two large wind turbines in silhouette against a vibrant sunset sky. The sun is low on the horizon, creating a warm orange and yellow glow that transitions into a clear blue sky with wispy clouds. The turbines are positioned on a hillside, with their long blades extending upwards. The overall scene is serene and evokes a sense of clean, renewable energy.

# Ukraine's FITs Crisis: Arbitrations or Investments?

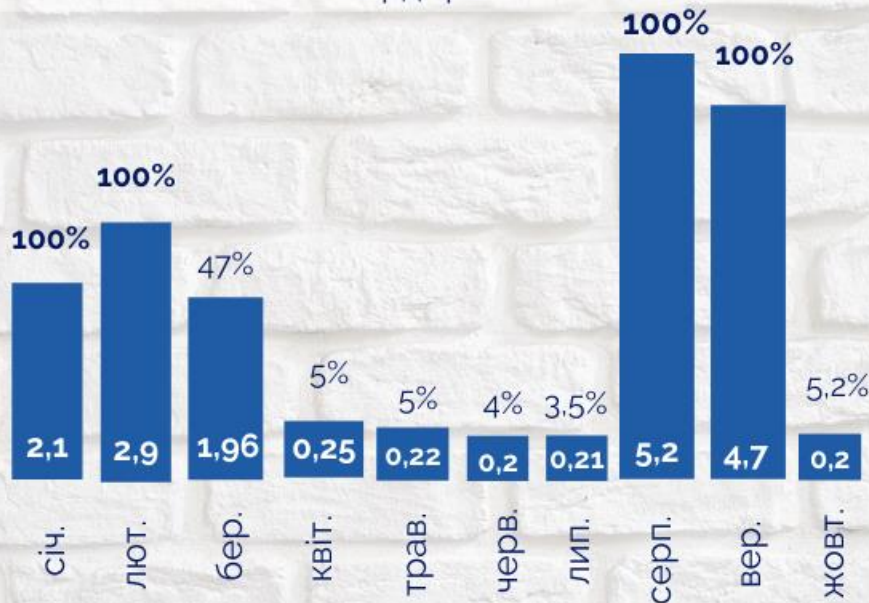
# АКТУАЛЬНА ІНФОРМАЦІЯ ЩОДО КУПІВЛІ ЕЛЕКТРОЕНЕРГІЇ ТА ВИПЛАТ ЗА «ЗЕЛЕНИМ» ТАРИФОМ

з 1.01.2020  
станом  
на 11.11.2020

**КУПЛЕНО**  
електроенергії



**СПЛАЧЕНО**  
за «зеленим» тарифом,  
млрд грн



**ВСЬОГО**  
виплат



**ДЖЕРЕЛО**  
для розрахунків

**ЗАБОРГОВАНІСТЬ**  
НЕК «УКРЕНЕРГО»

22,98  
млрд грн

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# Next Steps for a Treaty Arbitration

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**1.**

Send **trigger letter** to Ukraine

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**2.**

Use cooling-off period to **perform due diligence** on the claims, damages, and investment history

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**3.**

Decide **which companies in the corporate structure have the strongest claims** and are best suited to be claimants

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**4.**

Decide **which arbitral forum** is best for your claim (ICSID, SCC)

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**5.**

Prepare **Request for Arbitration** to formally commence a case

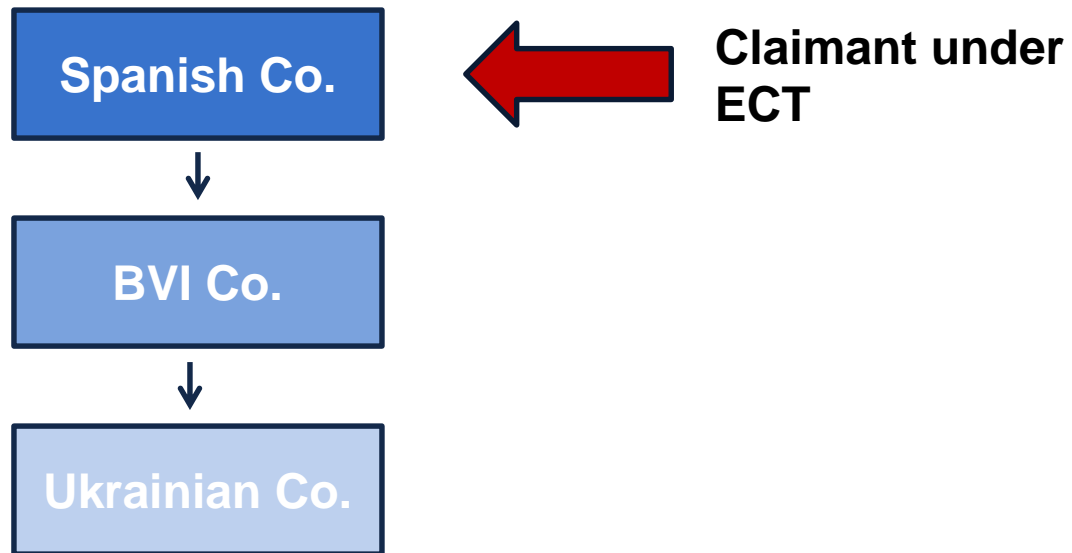
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# Who can Assert a Treaty Claim

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- Generally, an upstream owner or holding company based in another treaty Contracting State may claim for losses to the value of its interest in a Ukrainian project company.
- Possible to claim even if the investment is “indirect” – in other words, made through a company in a non-treaty Contracting State.

**Example:**



→ **Spanish Co. can claim for losses to Ukrainian Co., even though the BVI is not covered by any treaty.**

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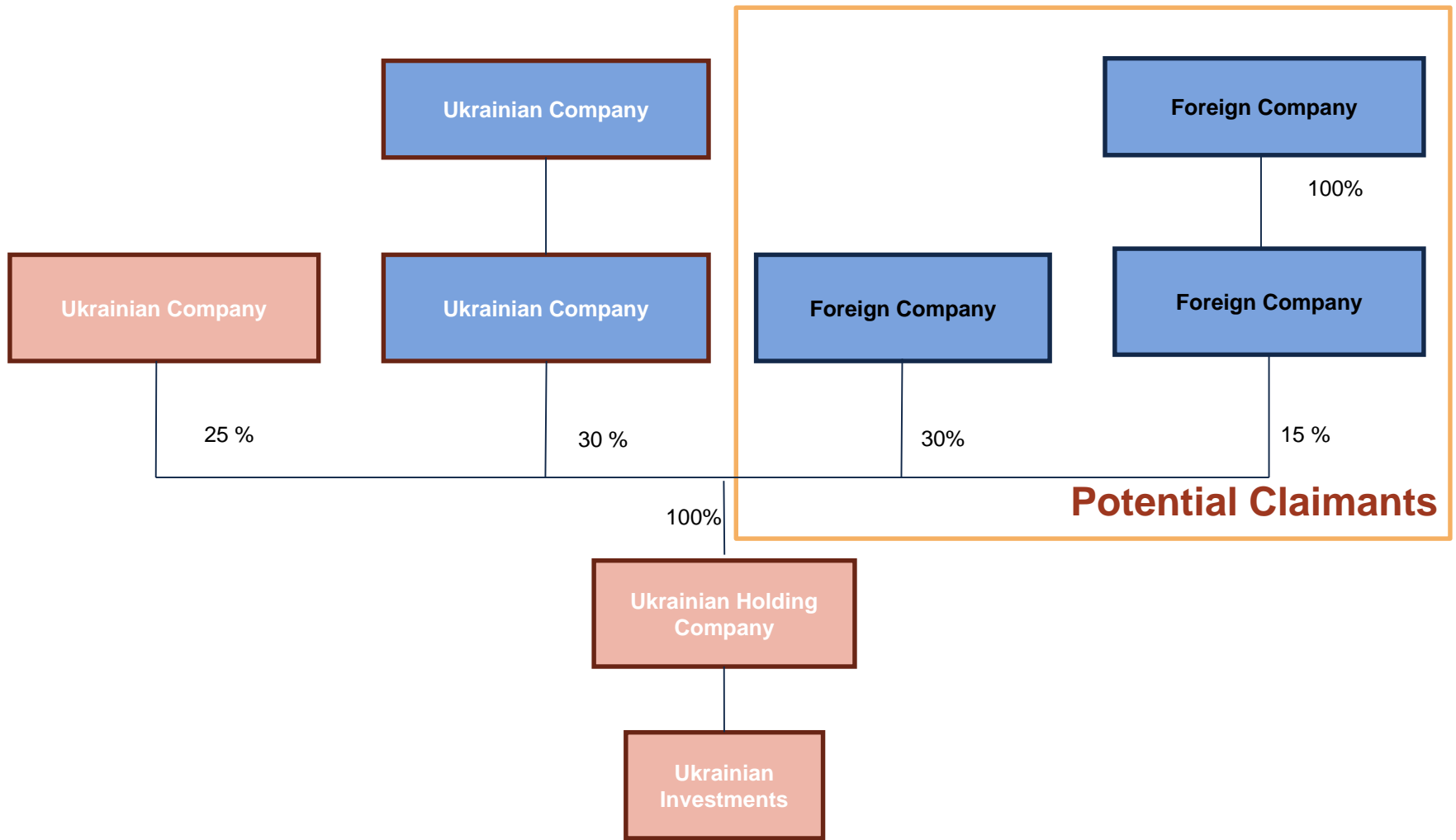
# Who can Assert a Treaty Claim – “Foreign Control” Exception

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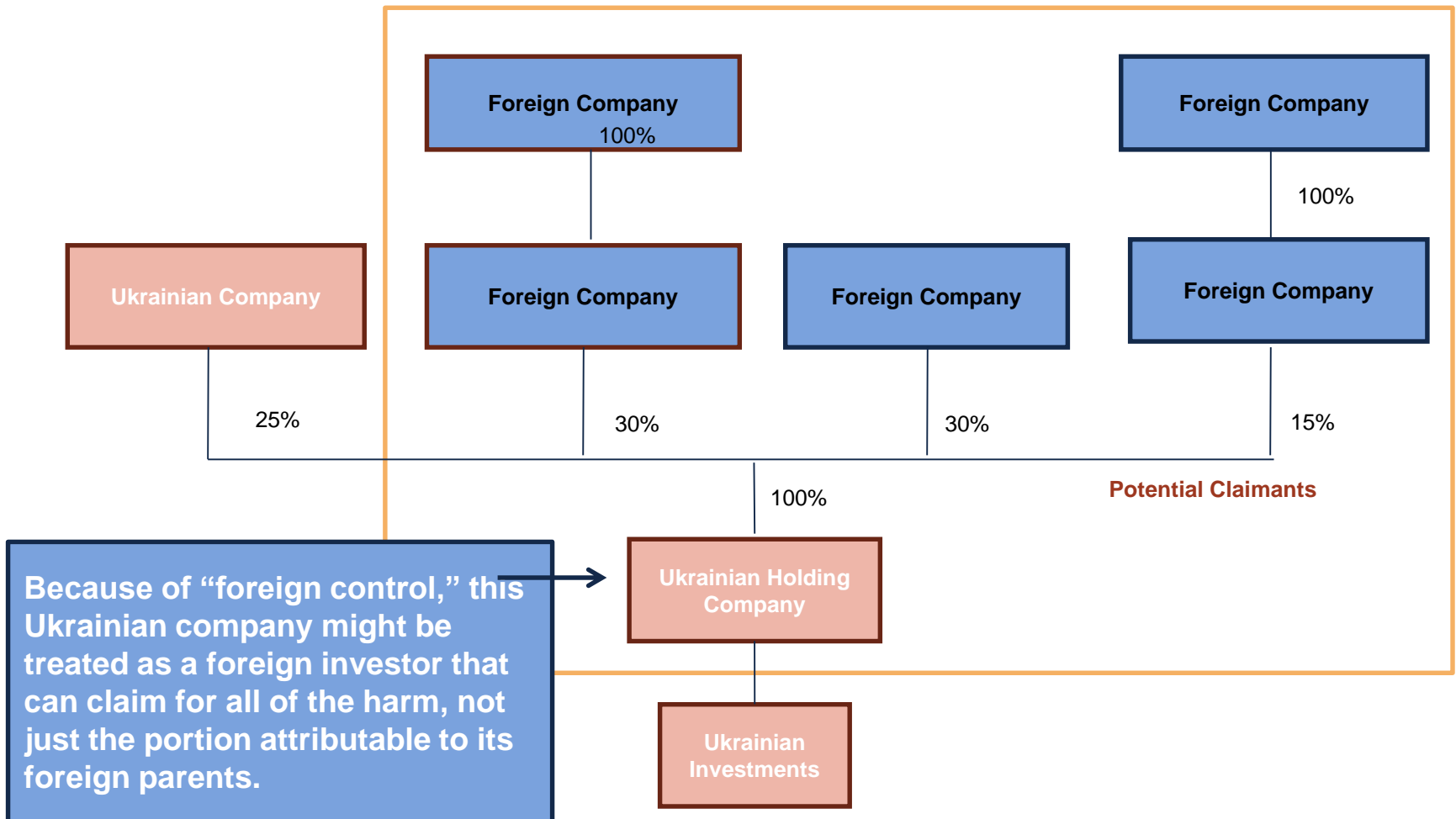
- As a general rule in investment treaty arbitration, a company cannot sue its home State. This is because investment treaties are designed to protect foreign – not domestic – investments.
- However, the ICSID Convention offers an exception to the general rule that a domestic company cannot sue its home State.
  - ICSID Convention Art. 25(2)(b) permits a domestic company that is “controlled” by a foreign national to claim the nationality of its controlling parent provided the Contracting States have agreed in the applicable treaty.
- The ECT refers to Art. 25(2)(b) and permits foreign control claims.

**Thus, it may be possible to bring a claim on behalf of a Ukrainian company if it is majority-owned or controlled (directly or indirectly) by a company in another Contracting State (e.g. France).**

# Without “Foreign Control”, only Foreign Companies can bring Claims



# With “Foreign Control”, Foreign and Domestic Companies can bring Claims



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# What Claimants Must Prove to Win

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## Jurisdiction

- Claimant must establish that it is a covered “investor” under the ECT and that it owns a covered “investment” as defined in the treaty.



## Liability:

- Claimant must prove that Ukraine’s conduct violated one or more of the standards of protection in the treaty.
- Broadest standard is “fair and equitable treatment” (FET)
- FET claims can be based on: legitimate expectations, lack of transparency and consistency, unstable or unpredictable legal framework and business environment



## Causation and Damages:

- Claimant must demonstrate that Ukraine’s treaty-breaching conduct caused harm to its investments
- Claimant must establish the quantum of damages caused by Ukraine, based on modelling of the costs and revenues of each project
- Lost profits claims are typically calculated using a discounted cash flow (DCF) model
- Compound interest may be added to the claim



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# Results of Ukraine cutting FITs

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## Regulatory / Investment Climate

1. Offtaker ongoing and future (?) liquidity crisis
2. Past debts not paid
3. Curtailment fears
4. Balancing responsibility fears
5. Day-ahead market price low
6. No feed-in premium regulation
7. No corporate PPA
8. Arbitrations? International or properly structured Ukrainian solar investors and trigger letters so far

## Financing

1. No bank debt financing available (IFIs, commercial banks) for FIT-based projects. Auctions, corporate PPA only
2. No re-financing (arguably)?
3. Any investors for:
  1. 7.62 Eurocents (<75MW solar) by 31 March 2021
  2. 4.35 after 31 March 2021
  3. Wind – 8.82 Eurocents, short timeframe to commission – 31.12.2022.
4. Projects with no subsidies?