

A Fair and Equitable Green Transition

Fernando Dias Simões, Associate Professor of Law at Lusíada University of Porto and Portucalense University, Porto, Portugal

Abstract:

Over the last decade, a large number of investors launched arbitration proceedings seeking compensation from governments who have revised economic schemes in support of the renewable energy market. The modification or withdrawal of such schemes might be considered a breach of the fair and equitable treatment standard. This presentation reviews decisions rendered so far, focusing on the cases where responding states were held liable, as these constitute the ‘red flags’ to host states’ freedom to amend their regulatory frameworks. What all these cases have in common is that tribunals found that host states had crossed the ‘line’ imposed by the fair and equitable treatment standard, thereby frustrating investors’ legitimate expectations to benefit from economic support mechanisms. However, tribunals diverge on where exactly that line falls. Decisions basically fit into one of three categories: tribunals drew the existence of legitimate expectations from general commitments contained in legislative frameworks, stabilisation clauses in legislation, or specific representations directed at particular investors. Despite the divergent approaches, these decisions identify a few red flags that governments should bear in mind when offering new guarantees to renewable energy investors or revising old ones.

The lack of certainty (reflected in apparently conflicting decisions and a high rate of dissenting opinions) raises the question of the necessity to create a specific investment regime for low-carbon investments. Investment treaty analysis and climate change concerns have developed since the drafting of the Energy Charter Treaty (ECT) and political changes and realignments have occurred which may require some fine-tuning or adjustments in its provisions. In 2019, the Energy Charter Conference launched the process for the reform of the ECT. However, state parties have significantly different perspectives on the need to amend the FET standard and possibly even introduce a specific provision on the states’ right to regulate; in addition, several states have announced or notified their withdrawal, and it is reported that the European Commission intends to withdraw as a bloc.

Governments should be aware that making long-term commitments to attract investment may result in expensive international arbitration proceedings and hefty compensations. The challenge is for policymakers to draft regulatory frameworks that inspire confidence without overcommitting and making promises they cannot keep. Economic support mechanisms must be designed prudently to allow for flexibility when market conditions change, while at the same time providing adequate assurances to investors. The decisions discussed in this presentation, while not univocal, offer valuable clues, identifying a series of red flags that governments should bear in mind when offering new guarantees to renewable energy investors or revisiting old ones.