

# INVESTMENT TREATY DISPUTES ROLE IN SUSTAINABILITY

Numerous states have introduced attractive legal and regulatory regimes designed to increase their renewable energy offering by attracting foreign direct investment into the renewables sector. As sustainability obligations become increasingly stringent in light of concerns about climate change, disputes related to environmental matters will inevitably rise in years to come. Many of these disputes will be between foreign investors and hosts states, which are frequently resolved by investment treaty arbitration, as provided for in bilateral and multilateral investment treaties. Investment treaty arbitration plays a key role in these disputes as an attractive neutral forum that offers foreign investors a direct cause of action against a host state conduct. The systems affords for an independent tribunal with relevant expertise selected by the parties, thereby avoiding an concerns of a "home court advantage". In addition, investment treaty awards have established, well-trodden enforcement regimes.

Claims will continue to arise out of alleged breaches by host states because of environmental permit denials or changes in regulations originally designed to attract foreign investors in the sphere of renewable and sustainable energies. Sustainable development requires structural economic changes, which are often brought about through foreign investment. When regulations or conditions designed to attract their investment then change to the disadvantage of the foreign investors, these foreign investors will frequently resort to investment treaty arbitration as a dispute settlement mechanism to protect their investments against host state conduct. There are various heads of claim under which environment-related cases are brought, spanning from alleged breaches of the host state's obligation to guarantee fair and equitable treatment to foreign investors, to resorting for protection against obstruction, or protection against nationalisation, expropriation or any other discriminatory measures.

In addition, host states are increasingly asserting claims against foreign investors for alleged breaches of their environmental obligations. Likewise, states are increasingly asserting counterclaims for a foreign investor's breach of a human right, for example, access to water, or the lack of public consultation of local communities on the impact of a potential energy project.

Following an increasing concern amongst the international community on climate change and sustainability issue, states have been adopting new-generation investment agreements, such as the Morocco-Nigeria BIT, the Netherlands draft model BIT, the EU-Singapore Economic Partnership Agreement or the EU-Canada Comprehensive Economic Trade Agreement. These treaties contain more specific and onerous obligations for host states to ensure high levels of environmental and labour protection, with provisions aimed at adding value to the enforcement of states' climate-related policies and objectives.



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