



## **Fair and Equitable Treatment in Portugal's Investment Treaties**

The Fair and Equitable Treatment (FET) standard lies at the heart of international investment law. It serves as a safeguard for foreign investors, ensuring that host states uphold principles of fairness, consistency, and predictability in the treatment of their investments. Portugal's bilateral investment treaties (BITs) and other investment agreements take a distinctive approach to the FET obligation, reflecting both traditional treaty practice and innovative drafting choices.

### **Universal Inclusion of FET**

A clear feature across Portugal's treaty practice is the explicit inclusion of the FET standard in all of its BITs. Unlike some jurisdictions that may omit or dilute the concept, Portugal consistently recognizes FET as a central protection for foreign investors. However, Portuguese BITs typically refrain from providing a detailed list of state obligations arising from FET, leaving interpretation to arbitral tribunals.

## **Pairing with Other Standards**

Another notable aspect is the pairing of FET with related protections. Many Portuguese BITs place FET alongside the Full Protection and Security (FPS) standard (e.g., Portugal–Angola BIT (2008)) or the Most-Favoured-Nation (MFN) standard (e.g., Portugal–China BIT (2005)). This drafting approach reinforces the interconnected nature of these guarantees and strengthens the overall framework of investor protection.

## **The Usual Clause in Portuguese BITs**

Portuguese treaties frequently add depth to the FET obligation by prohibiting arbitrary or discriminatory measures. The typical clause reads as follows:

*“Neither Party shall in any way impair by unreasonable, arbitrary or discriminatory measures the management, maintenance, use, enjoyment and disposal of investments in its territory of investors of the other Party.”*

This formulation, included in agreements such as the Portugal–Qatar BIT (2009) and the Portugal–Pakistan BIT (1995), gives investors a concrete textual basis to challenge unfair conduct.

## **Relationship with Customary International Law and Comparative Practice**

Most Portuguese BITs do not expressly address the link between FET and the minimum standard of treatment under customary international law. This silence

provides arbitral tribunals with room for interpretation, which in practice has led to diverging approaches.

Some tribunals have read FET expansively. In *Tecmed v. Mexico* (2003), for example, the tribunal held that FET requires the host state to act consistently, transparently, and without ambiguity, so that investors can reasonably anticipate the consequences of state conduct. This interpretation resonates with Portuguese clauses against arbitrary measures, as they aim to prevent unexpected and unjustified interference. By contrast, the tribunal in *Waste Management v. Mexico* (2004) took a narrower approach, linking FET to customary international law and focusing on egregious misconduct such as denial of justice or manifest arbitrariness. Between these poles lies *Saluka v. Czech Republic* (2006), where the tribunal emphasized that FET protects legitimate investor expectations but must be balanced against a state's right to regulate — reasoning that mirrors Portugal's practice of pairing FET with non-discrimination provisions to ensure regulatory balance.

### **Portugal's Own Experience: Contrasting Outcomes**

Portugal's treaty practice has itself been tested in arbitration, producing contrasting outcomes for Portuguese investors.

#### **Case Spotlight: Dan Cake v. Hungary (ICSID ARB/12/9)**

- Background: A Portuguese investor in Hungary sought approval for a bankruptcy reorganization plan. Hungarian courts repeatedly delayed and ultimately refused approval.
- Claim: Investor alleged violation of the FET standard under the Portugal–Hungary BIT (1992).

- Tribunal's Finding: Hungary's conduct was arbitrary, lacked transparency, and denied the investor due process. The tribunal ruled that Hungary had breached FET.
- Relevance for Portugal: Demonstrates how Portuguese BIT drafting — especially the prohibition of unreasonable or arbitrary measures — provides a solid basis for investor protection in arbitration.

### **Case Spotlight: Cavalum v. Spain (ICSID ARB/15/34)**

- Background: Cavalum SGPS, a Portuguese renewable energy company, challenged Spain's withdrawal of generous feed-in tariffs for solar energy, relying on protections in the Energy Charter Treaty (ECT).
- Claim: Investor argued that Spain's regulatory rollback violated FET by frustrating its legitimate expectations.
- Tribunal's Finding: The tribunal rejected the claim, holding that while investors may expect stability, they must also anticipate regulatory change, particularly in sectors like renewable energy. Spain's measures were found consistent with its right to regulate and did not breach FET.
- Relevance for Portugal: Highlights the limits of the FET standard and shows that not all regulatory changes, even if harmful to investors, amount to unfair treatment.

Together, these cases illustrate that FET under Portuguese treaties is not a guarantee of absolute stability but rather a shield against arbitrary or discriminatory state conduct. The contrasting outcomes show how the same broad standard can be applied differently depending on the facts, the sector, and the tribunal's interpretive approach.

## Conclusion

Portugal's investment treaties stand out for their consistent incorporation of FET and their use of explicit anti-arbitrariness clauses. By combining FET with other standards like FPS and MFN, Portuguese BITs strengthen investor protections while leaving space for tribunals to adapt the standard to evolving circumstances.

When viewed against international arbitral practice — and in light of Portuguese investors' experiences in *Dan Cake v. Hungary* and *Cavalum v. Spain* — the country's treaty drafting reflects a middle ground: open enough to allow tribunals to interpret FET dynamically, but structured to prevent the most arbitrary forms of state conduct. In an era of growing scrutiny over investor–state dispute settlement (ISDS), this flexibility could prove decisive in future disputes involving Portugal or Portuguese investors abroad.