

US Could Soon Find Itself On Wrong End Of Energy Disputes

By **Caroline Simson**

Law360 (January 16, 2025, 10:27 PM EST) -- America's energy landscape has been marked in recent years by the Biden administration's enthusiastic support of renewable energy projects, but international disputes experts are predicting that the incoming Trump administration's promise to derail such projects could land the U.S. in legal hot water.

Under the Biden administration's watch, the U.S.' passage of legislation like the CHIPS and Science Act and the Inflation Reduction Act has led to an uptick in the number of renewable energy projects. But that support is likely to dry up over the next four years, as the new administration of Donald Trump — whose ire toward renewable energy projects is well documented — and Republicans in Congress assume power.

Many of those projects are backed by foreign investors, meaning the Trump administration could soon find itself on the wrong end of an investor-state claim if those investors feel that the incentives supporting their projects are unfairly revoked. Moreover, if government money for these types of projects dries up, commercial disputes are also likely to arise.

"The one thing we can know for sure is change is coming," said Benesch Friedlander Coplan & Aronoff LLP partner Thomas O. Crist, who chairs his firm's global infrastructure team and co-chairs its construction group. "I think the most likely result is that renewable energy projects in the U.S. are going to compete with clean fossil fuel projects [like natural gas], certainly over the next four years, in a way that has not been the case for the last four years."

"I think that if dollars attributed to [renewable energy] projects start to be restrained, there will be more disputes," Crist added.

One way the Trump administration could dial back renewable energy incentives would be to try to repeal at least parts of the IRA that are unpopular among Republicans, such as clean energy tax credits, according to Jenner & Block LLP partner Kenneth Beale. He added that the president-elect is unlikely to fully repeal the law, which has resulted in incentives and loans benefiting red states.

Morgan Lewis & Bockius LLP partners Jim Tynion and Ken Nunnenkamp agreed that IRA tax credits could become a target for the Trump administration.

"The IRA also contains other popular tax credits such as [Section] 45X, for advanced manufacturing facilities, and they may face scrutiny and possible revisions in any congressional amendment caused by

concern that the owners of such new U.S. facilities actually benefit non-U.S. investors, such as China," they told Law360 in an email.

"We expect those concerns to be carefully debated since the local benefits of the manufacturing facilities as well as the onshore wind, solar and battery storage projects create jobs and needed investment in many communities in so-called red states," they added.

Alternatively, Trump could use executive action to tighten the rules around qualifying for tax credits, or to freeze the rollout of grants and loans for green energy projects, according to Beale. If those incentives are rolled back, it "could potentially trigger new [investor-state dispute settlement] claims by foreign investors against the U.S., especially if the withdrawal of the incentives or tax credits destroys the financial viability of a renewable energy project," he said.

"This happened in numerous countries in the 2000s and 2010s, including Spain, Italy, the Czech Republic, which secured vast sums of private investment in wind farms, solar parks and hydro projects through ambitious government support schemes — schemes that subsequently were cut," Beale explained.

As Inauguration Day draws closer, one category of such projects in particular could soon find itself on the chopping block: wind farms. In a news conference earlier this month, Trump told reporters he would "try and have a policy where no windmills are being built."

"The only people that want them are the people that are getting rich off windmills — getting massive subsidies from the U.S. government," he added.

Currently, offshore wind farms are operating in the waters off Rhode Island and Virginia, according to a 2023 publication issued by the U.S. Department of Energy's Office of Energy Efficiency and Renewable Energy. The Northeast Regional Ocean Council says other projects are in the works for locations across the Eastern Seaboard, from Maine to North Carolina.

And while there are no wind farms on the West Coast currently in operation, there are plans in motion to construct floating wind energy turbines in the waters off California, Oregon and Washington, according to the Energy Department.

Morgan Lewis' Tynion and Nunnenkamp told Law360 that once Trump is in office, his new administration could slow down the permitting process for offshore wind projects currently under consideration by the Bureau of Ocean Energy Management.

"For offshore wind projects, several federal agencies are needed to cooperate in the permitting process, and issues with fisheries and other environmental claims by stakeholders may be utilized to slow down the approval process," they said.

If the Trump administration were to slam the brakes on such projects, foreign investors may look to claim damages under international law — and they might have a viable case, depending on the mechanism the administration uses.

"If the incoming administration were to step in and revoke any financial incentives that the previous administration offered to encourage investment in those areas, or take any other measures inconsistent with those incentives or other commitments, I think that's where you might see disputes arise," said

Wade Coriell, the co-head of King & Spalding LLP's international disputes practice.

"There could be commercial disputes ... if there's a contract between a project owner and the government," Coriell added. "But I think there'd also be a chance for investment disputes under the U.S.-Mexico-Canada Agreement, or under bilateral investment treaties ... where somebody could say, 'I had a legitimate expectation and relied on this incentive system in deciding to invest in the project, and you've taken it away.'"

Another way disputes could potentially arise would be as a result of new tariffs imposed by the Trump administration, if the companies constructing the new energy projects aren't able to get the equipment that they need from outside the U.S.

"There are several large hubs that develop this kind of technology and equipment, and if tariffs are imposed in 2025 that impact the cost of the available equipment from overseas, it could be devastating to these projects," Crist said. "So, if the result of a tariff is that the technology is quickly developed and the equipment is built in the United States, that will ultimately be a really good thing. If it turns out that the result of the tariff is that the cost of equipment needed for these projects skyrockets, it'll be a bad thing.

"If the incoming administration does anything to make supply chain issues more difficult, it will absolutely spawn construction and infrastructure related disputes," he added.

More broadly, any dialing back by the Trump administration on renewable energy subsidies could have effects far beyond U.S. borders, according to London arbitration lawyer Tomas Vail. He noted that if the Trump administration does back away from renewable energy projects, there could be a global impact.

In places like Canada and Germany, fractures within the progressive movement have already become apparent.

"If, indeed, Trump's administration is going to come away from renewable energy in the U.S., what we might see more globally is that other states are inspired to move in the same direction, and de-emphasize the green transition," Vail said. "That might lead to disputes around the world — more of the kinds of disputes that we've already been seeing, where international investors in wind farms and solar farms have their contracts curtailed by states."

--Editing by Marygrace Anderson and Lakshna Mehta.