

Energy Transition and Investor-State Disputes: Scientific Knowledge as a Solution to the Burden for Climate Policy-Making

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Abstract : It is now well-established that the fight against climate change and its consequences, which are a threat to mankind and to life on the planet Earth, requires that global temperature rise be kept under 1,5°C. It is also well-established that this requires humanity to put an end to the use of fossil fuels in the next decades, at the latest. However, investors in the fossil energy sector have brought or threatened to bring investment arbitration claims against States which put an end to their activity for the purpose of reaching their climate change policies' objectives. Examples of such claims are provided by the cases of WMH v. Canada, Lone Pine v. Canada, Uniper v. Netherlands and RWE v. Netherlands. Irrespective of the outcome of the arbitration proceedings, the risk of being ordered to pay very substantial damages may have a 'chilling effect' on States, meaning that they may hesitate to implement the energy transition measures needed to fight climate change and its consequences. Although mitigation action is a relatively recent phenomenon, knowledge about the negative impact of fossil fuels has existed for a long time ago. In this paper, it is argued that structured documentation of evidence of knowledge about climate change may influence the adjudication of investment treaty claims and, consequently, affect the content of energy transition regulations that will be implemented. For example, as concerns investors, evidence that change in the regulatory framework towards environmental protection could have been predicted would refute the argument concerning legitimate expectations for legislative stability. By reference to relevant case law, it attempted to explore how pre-existing knowledge about climate change can be used in the adjudication of investor-State disputes and resulting from green energy transition policies.

Keywords : climate change, energy transition, international investment law, knowledge

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