

Legal challenges at the end of the fossil fuel era: Shaping energy futures through legal intervention

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PANEL 1. Diagnosis of the current energy crisis

Sustainable Energy' under Reformed International Investment Agreements?

Monika Feigerlova
(Institute of State and Law of the Czech Academy of Sciences)

The 2021 NDC Synthesis report, prepared under the UNFCCC, found that the world is not on track to meet the Paris Agreement goals. The report further shows that the most frequent mitigation measures adopted by States in order to combat climate change are measures for renewable energy generation. In the so called 'solar energy saga' several States already had to defend its renewable energy policies, resp. their modifications, before international arbitral tribunals and in many instances they were found liable for breaches of international investment agreements (IIAs). Decisions of arbitral tribunals displayed divergent interpretations on certain key issues and questioned the level of protection afforded to renewable energy investors by existing IIAs. The States have already taken action on reforming investment treaty standards or terminating IIAs in response to the evolving nature of economic relations. Modern treaty drafting focuses on elimination of shortcomings of the investment law regime, and preservation of State's regulatory space. Nevertheless, a few pioneering agreements, including the EU Proposal to modernize the ECT, start to refer to the importance of use of clean energy and renewable energy sources. One of the main objectives of the EU's proposal is to ensure that the ECT better reflects climate change and clean energy transition goals. The EU-UK Trade and Cooperation Agreement includes references to parties' commitment to 'climate change' and recognizes 'the benefits of sustainable energy, renewable energy, in particular offshore generation in the North Sea'. It also underlines the 'benefits of trade and investment in energy and raw materials and the importance of supporting the delivery of cost efficient, clean and secure energy supplies'. How do these recognitions translate into specific undertakings? Do the reformed IIAs encourage fossil fuel phase-outs and enhance protection of investments in renewable or sustainable energy?