

Facilitating Green Transition through Plurilateral Instruments: Towards Right To Regulate For Climate Actions In International Investment Law Regime

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Abstract:

In line with international and domestic commitments of States, limitation of greenhouse gas emissions has become a tangible objective and process. This process necessitates material transformation of the energy sector aimed at fossil fuel phase out, clearly affecting investors and investments operating in the energy market. This exposes capital importing states to a risk of legal action and liability for the breach of commitments contained in international investment agreements ('IIAs').

The objective of this paper is to scrutinize how recent treaty drafting practice attempts to incorporate right to regulate into IIA framework and to provide critical assessment of such attempts. In this respect, the considerations are informed by a recent stream in legal doctrine focusing on right to regulate. A typology of such attempts, representative of general trends in treaty drafting practice, is introduced and evaluated. This paper also seeks to provide a regulatory proposal for aligning IIAs with the overarching objective of green energy transition. The considerations are centered on leaked agreement in principle on the modernisation of the Energy Charter Treaty. Other IIAs, primarily of plurilateral character, serve as points of reference for analysis. The right to regulate is approached narrowly, in the context of climate actions.

It is demonstrated that recent developments in treaty drafting practice are rather modest and inadequate to align IIAs with the objective of green energy transition.