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Investment treaties and constraints on policy space: The relevant state obligations

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Better living for all—sustainably




A BIT OF BACKGROUND




HISTORY: A short overview of multilateral frameworks

- 1948: Havana Charter (established GATT)
- 1995: WTO Uruguay Round (GATS, TRIMS)
- 1997: OECD Multilateral Agreement on Investment (MAI): Rejected by developing countries
- WTO Singapore issue: Rejected by developing countries at Cancun Ministerial
- OECD Policy Framework for Investment
- UNCTAD: Consolidation?



Fragmentation: Regional and bilateral approaches

- BITS: 1959, Germany-Pakistan
- RTA:s 1992, NAFTA
- Today: 3000 bilateral or regional agreements
- Over 200 FTAs or RTAs with investment chapters
- The integration of investment into trade agreements, 1990s and forward:
 - Rapid expansion from 2005 on
 - Bypassing Singapore and Cancun decisions
 - Developing country rush to participate
- Blocks negotiate (EU, ASEAN....)



THE POLITICAL CHALLENGE OF NEGOTIATING INVESTMENT AGREEMENTS: Why do it?

- Original purpose: protect Western capital from impacts of decolonization and expansion of communism
- Move to building demand: How do we sell these things?
 - Investment agreements will attract investment, build the right investment climate (but is there evidence?)
 - Developing countries are now capital exporters and need them (but should they repeat the post-colonial model?)
- The Photo-opportunity
- The fear of being left out: what if we do not do it?



HOST STATE OBLIGATIONS INVESTOR GUARANTEES

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The architecture of investment treaties

- State hosting the investment provides guarantees to the investor of the other state
- Typical Guarantees:
 - National Treatment (NT) and Most Favoured Nation Treatment (MFN)
 - Fair and Equitable Treatment and Full Protection and Security under “international law”
 - Compensation for expropriation
 - Free transfer of investment funds
- Investor-state arbitration

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National treatment and MFN

Each Contracting Party shall accord to investments and returns of investors of the other Contracting Party, *treatment which shall not be less favourable* than that accorded either to investments of its own investors or to investments of investors of any third State.

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Fair and equitable treatment

Investment of nationals or companies of each Contracting Party shall at all times be accorded *fair and equitable treatment*...in the territory of the other Contracting Party

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Expropriation

Investments of investors of either Contracting Party in the territory of the other Contracting Party shall not be nationalised, expropriated or subjected to *measures having effects equivalent* to nationalisation or expropriation except for public purposes, under due process of law, on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall be made without delay, and be effectively realizable.

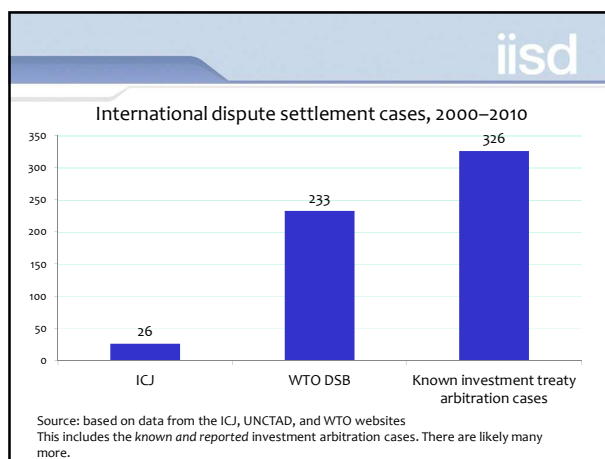
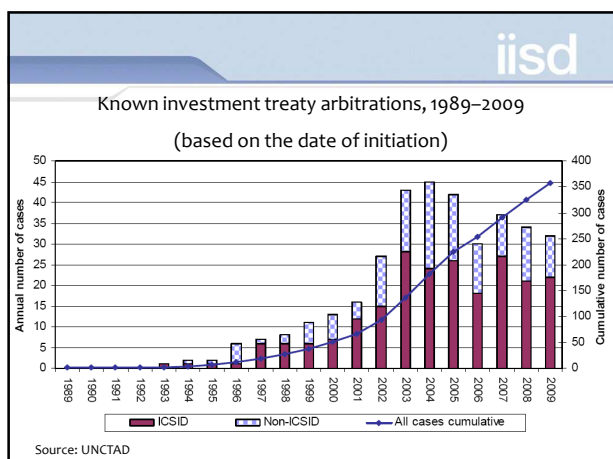
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Umbrella clause

Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.

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INVESTOR-STATE DISPUTE SETTLEMENT



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Problems of transparency, consistency and judicial independence

- Arbitration system lacks transparency
- Investment arbitrators are untenured, generally chosen by the parties, by the fellow arbitrators or an appointing authority; arbitrators can be arbitrators in one investment treaty case and counsel in another
- Decisions are final and binding – no appeal: legal and factual errors cannot generally be corrected

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WHERE DO WE STAND TODAY?

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**In sum: Lack of balance
(States have lots of obligations, no rights!)**

- Lack of balance: All obligations on host state to protect the investor
- Home state and investors have no obligations
- Host state obligations are short, vague and imprecise and have led to expansive and contradictory interpretations
- Investor rights are enforceable through a very powerful dispute settlement mechanism (investor-State arbitration)

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New approaches to investment treaties

- Brazil (No investment agreements ratified)
- Ecuador, Bolivia (Withdrawal from ICSID)
- Ecuador, El Salvador, Venezuela: (Renunciation of BITs = unilateral withdrawal)
- South Africa, Norway (Review; moratorium; re-negotiation)
- Intra-EU BITs; some EU BITs: Termination by mutual agreement
- COMESA, US, Canada, ASEAN (More careful drafting)
- Australia (no more investor-state); Philippines (???)
- India (???)
- EU??