

Recent trends in international investment law

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RECENT TRENDS IN INTERNATIONAL INVESTMENT LAW

CONTEXT

- Backlash against globalization
- Growing scepticism about free trade and FTAs negotiations
- Issues of legitimacy and consistency in International Investment Agreements (IIAs)
- Right to regulate and ISDS

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- Negotiations of International Investment Agreements
 - Standards of treatment
 - Market access and liberalization
 - Dispute settlement

RECENT TRENDS IN INTERNATIONAL INVESTMENT LAW

- Standards of treatment
 - Non-discrimination: National Treatment and Most-Favoured-Nation
 - Fair and Equitable treatment: subject to Customary International Law
 - Expropriation: Direct and Indirect
 - Free transfers
 - Performance requirements
 - Senior management

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- Market access and liberalization
 - Pre and post establishment
 - Standstill and ratchet: non-conforming measures
 - Services and investment: mode 3

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- Investor – State Dispute Settlement
 - Selection of arbitrators
 - Transparency
 - Amicus curiae submissions and non-disputing parties
 - Frivolous claims and time limits
 - Binding joint interpretations
 - Parallel proceedings: waiver
 - Consolidation of claims

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Main points of Criticism of IIAs

- Legitimacy: focused on ISDS system regarding selection of arbitrators, lack of transparency, accountability
- Consistency: Negotiations of IIA and the standards contained, arbitral awards, review mechanism for decisions
- Right to regulate vis a vis investors' protection

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Legitimacy

- ISDS inspired in commercial arbitration
- Appointment of arbitrators
- Transparency in the procedures
- Correctness of the decisions

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Consistency

- Proliferation of IIAs: lack of multilateral rules
- Standards of treatment: scope and coverage of provisions
- Contradictory arbitral awards
- Review mechanism: annulment and other remedies. What about an appeal mechanism?

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Right to regulate

- ISDS focused on measures taken by the government
- Challenged by foreign investors'. Counterclaims?
- Public policy implications. Regulatory chill?
- Monetary compensation. Damages
- Jurisdiction to international tribunals. Role of local courts

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Possible responses

- Investment court: UNCITRAL or ICSID reform
- Multilateral rules: WTO?
- Recognition of the right to regulate: CETA approach
- Joint government interpretations