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Rebalancing sovereignty and investor rights: reforming International Investment Agreements in the 21st century

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ABSTRACT

This article examines the evolving relationship between state sovereignty and investor rights in international investment law, with a focus on recent reforms aimed at rebalancing the two. Over the past few decades, the traditional regime of international investment agreements (IIAs) has been criticized for favoring investor rights at the expense of host states' regulatory authority. In response, many states have moved towards new-generation treaties that safeguard public policy objectives while ensuring fair treatment for investors. The article explores key reform initiatives, including substantive changes to treaty provisions and procedural adjustments to the investor–state dispute settlement (ISDS) system. It also critically assesses whether these reforms effectively address the concerns of sovereignty and investor protection in the context of global challenges such as climate change, public health, and economic security.

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XXI asrda xalqaro investitsiya bitimlarini isloh qilish: davlat suverenitetini va investor huquqlarini qayta muvozanatlash

Kalit so‘zlar:
Xalqaro investitsiya bitimlari,
suverenitet,
investor huquqlari,
Investor-davlat nizolarini hal qilish,

ANNOTATSIYA

Ushbu maqola xalqaro investitsiya huquqida davlat suvereniteti va investor huquqlari o‘rtasidagi o‘zgaruvchan munosabatlarni tahlil qiladi, bunda asosiy e’tibor ularni qayta muvozanatlashtirishga qaratilgan so‘nggi islohotlarga qaratiladi. O‘tgan bir necha o‘n yilliklar davomida xalqaro investitsiya bitimlarining an’anaviy tizimi qabul qiluvchi

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shartnoma islohoti,
davlat siyosati.

davlatlarning tartibga solish vakolatlarini cheklab, investorlar huquqlarini ustun qo‘ygani uchun tanqidga uchradi. Bunga javoban ko‘plab davlatlar investorlarga adolatli munosabatni kafolatlab, ayni paytda davlat siyosati maqsadlarini himoya qiluvchi yangi avlod shartnomalariga o‘tdilar. Maqolada islohotlarning asosiy yo‘nalishlari, jumladan, shartnoma qoidalarini mazmun jihatidan o‘zgartirish va investor-davlat nizolarini hal qilish tizimiga (ISDS) protsessual tuzatishlar kiritish masalalari o‘rganiladi. Shuningdek, ushbu islohotlar iqlim o‘zgarishi, aholi salomatligi va iqtisodiy xavfsizlik kabi global muammolar sharoitida suverenitet va investorlarni himoya qilish masalalarini samarali hal eta olishi tanqidiy baholanadi.

Восстановление баланса между суверенитетом и правами инвесторов: реформирование международных инвестиционных соглашений в XXI веке

Ключевые слова:
Международные инвестиционные соглашения,
суверенитет,
права инвесторов,
механизм урегулирования споров между инвестором и государством,
реформа договоров,
государственная политика.

АННОТАЦИЯ

В данной статье исследуется эволюция взаимоотношений между государственным суверенитетом и правами инвесторов в международном инвестиционном праве, с особым вниманием к недавним реформам, направленным на восстановление баланса между ними. На протяжении последних десятилетий традиционный режим международных инвестиционных соглашений (МИС) подвергался критике за предоставление преимуществ правам инвесторов в ущерб регулятивным полномочиям принимающих государств. В ответ многие страны перешли к договорам нового поколения, которые защищают цели государственной политики, обеспечивая при этом справедливое отношение к инвесторам. В статье рассматриваются ключевые инициативы по реформированию, включая существенные изменения в положениях договоров и процедурные корректировки системы урегулирования споров между инвестором и государством (ISDS). Также критически оценивается эффективность этих реформ в решении вопросов суверенитета и защиты инвесторов в контексте глобальных вызовов, таких как изменение климата, общественное здравоохранение и экономическая безопасность.

INTRODUCTION

International investment agreements (IIAs) have grown rapidly in recent decades, with over 3,200 treaties signed globally (around 2,600 currently in force). Most of these are older “first-generation” agreements from the 1990s–2000s, which often granted broad investor rights, such as guarantees of “fair and equitable treatment” (FET) and access to investor-state dispute settlement (ISDS) arbitration, while imposing few

obligations on investors. Critics argue that this system has created an imbalance, favoring investors' rights over host states' sovereign ability to regulate in the public interest. The increasing number of arbitral awards holding states liable for breaching expansive treaty standards, resulting in significant financial burdens, has led to growing calls for reform. This article examines the tension between sovereignty and investor rights, reviews key reforms in recent years, and critically assesses whether these changes effectively address the concerns driving them.

The central debate revolves around the tension between a state's sovereignty to regulate for public policy objectives and the rights granted to foreign investors under IIAs. Governments need adequate policy space to regulate health, safety, the environment, and other public interests. However, traditional IIAs, enforced through ISDS arbitration, can limit this space by allowing investors to challenge domestic regulations that affect the value of their investments. These tribunals can award damages that strain government budgets, creating a phenomenon known as "regulatory chill." This issue is particularly acute in areas like environmental regulation, where investor rights have been used to challenge public health measures or bans on harmful substances. Many developing nations view the traditional system as inequitable, arguing that it prioritizes foreign investors' interests over national laws and democratic processes. Reform efforts seek to rebalance the protection of investors with the need to preserve state sovereignty.

Several trends over the past decade have increased pressure to reform the investment treaty system. High-profile ISDS disputes, such as those related to the Energy Charter Treaty (ECT), have raised awareness about the overreach of investor protections, especially in the context of climate and energy policies. For example, the ECT's provisions, including FET and the protection of investors' "legitimate expectations," were increasingly criticized for allowing fossil fuel investors to challenge reforms aimed at meeting Paris Agreement targets. In response, several European Union (EU) countries have withdrawn from the ECT to preserve their ability to enforce climate policies. Similarly, developing countries, many of which signed old-generation Bilateral Investment Treaties (BITs) in the 1990s, have faced costly ISDS awards that have undermined their regulatory autonomy. This has led to a legitimacy crisis in the international investment regime, prompting countries like South Africa and Indonesia to terminate or renegotiate outdated treaties. Broad coalitions, including UN agencies and reform-oriented governments, are now pushing for comprehensive reforms.

Reforming International Investment Agreements: Recent Developments

To address these criticisms, states and international organizations have undertaken a range of reforms focused on two key areas: (1) substantive treaty provisions and (2) procedural and institutional changes to the ISDS mechanism.

A significant trend in recent years is the emergence of "new-generation" IIAs that safeguard states' regulatory prerogatives while narrowing investors' rights. Post-2015 treaties often include provisions affirming the "right to regulate," clarifying that states can enact measures for public health, safety, and environmental protection without violating the treaty, provided they are non-discriminatory and in good faith. Furthermore, new agreements typically exclude non-discriminatory regulatory actions from being considered indirect expropriation. A notable example is the 2023 Protocol on Investment under the African Continental Free Trade Area (AfCFTA), which omits the FET standard and replaces it with a narrower obligation to ensure "administrative and

judicial treatment" following due process. This change, along with other innovations such as excluding certain sensitive sectors like taxation and government procurement from investor-state coverage, signals a shift towards a more circumscribed approach.

Some newer agreements also impose obligations on investors, ensuring a more reciprocal balance. For example, recent African and Asian BITs require investors to comply with domestic laws and anticorruption standards. Additionally, these treaties may allow states to bring counterclaims against investors for damage or misconduct, a feature almost absent in older BITs. However, not all countries have embraced these reforms. For instance, the United States-Mexico-Canada Agreement (USMCA) of 2020 continues to prioritize investor protections, signaling that the rebalancing trend is not universal.

Alongside substantive changes, procedural reforms to the ISDS system have been introduced. Notable changes occurred in 2022 with an overhaul of the ICSID arbitration rules, aimed at increasing transparency and improving fairness. These include automatic publication of awards and orders, shorter timelines for rendering decisions, and disclosure of third-party funding. These reforms, while not solving all criticisms of ISDS, represent a meaningful effort to improve the system's efficiency and transparency. On a broader scale, the UNCITRAL Working Group III has made progress on creating a Code of Conduct for ISDS adjudicators and has discussed the creation of an Advisory Centre to assist developing countries facing ISDS claims.

The most ambitious reform proposal is the creation of a permanent multilateral investment court with an appellate mechanism. While this idea has garnered support, especially from the EU, it has faced significant challenges due to differing views on how the court should be structured and funded. In the meantime, some states have moved towards establishing bilateral or regional appellate mechanisms, such as the EU-Canada CETA's Investment Court System. The fragmentation of ISDS reforms suggests a complex, evolving path forward.

CONCLUSION

The efforts to rebalance sovereignty and investor rights in international investment agreements are well underway, with recent reforms marking a shift toward a more equitable system. While many new IIAs reflect a better balance between protecting investors and preserving state sovereignty, challenges remain. The process of reform is ongoing, with debates over the scope of changes continuing. Old-generation treaties still represent a significant portion of global FDI protection, and the full impact of recent reforms remains to be seen. While some reforms have been significant, more radical changes, such as the establishment of a multilateral investment court, remain elusive. The future of international investment law hinges on achieving a balance that allows for both investment protection and state regulatory freedom.

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