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Bursting policy bubbles: The international investment treaty regime

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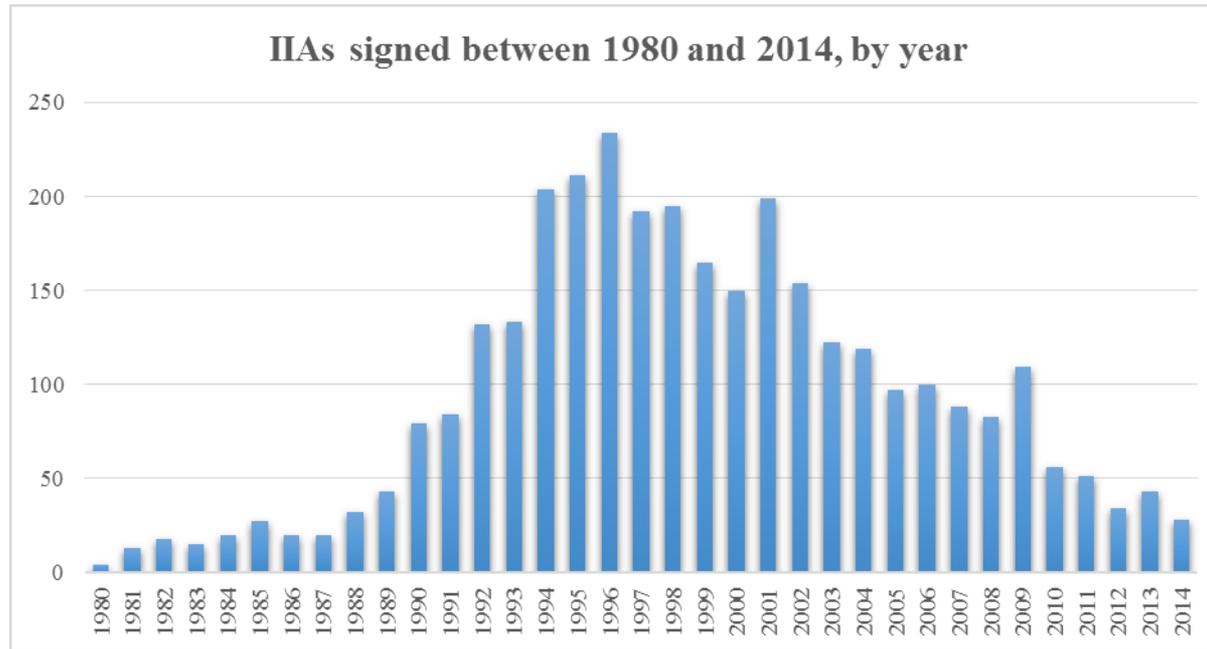
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The emergence and characteristics of international investment law

- From diplomatic protection to rights of investors
- The emergence of investor – state dispute settlement; exiting the jurisdiction of host states
- Characteristics of the basic rules
 - Fair and equitable treatment
 - Non-discrimination
 - De jure and de facto expropriation

A policy bubble?



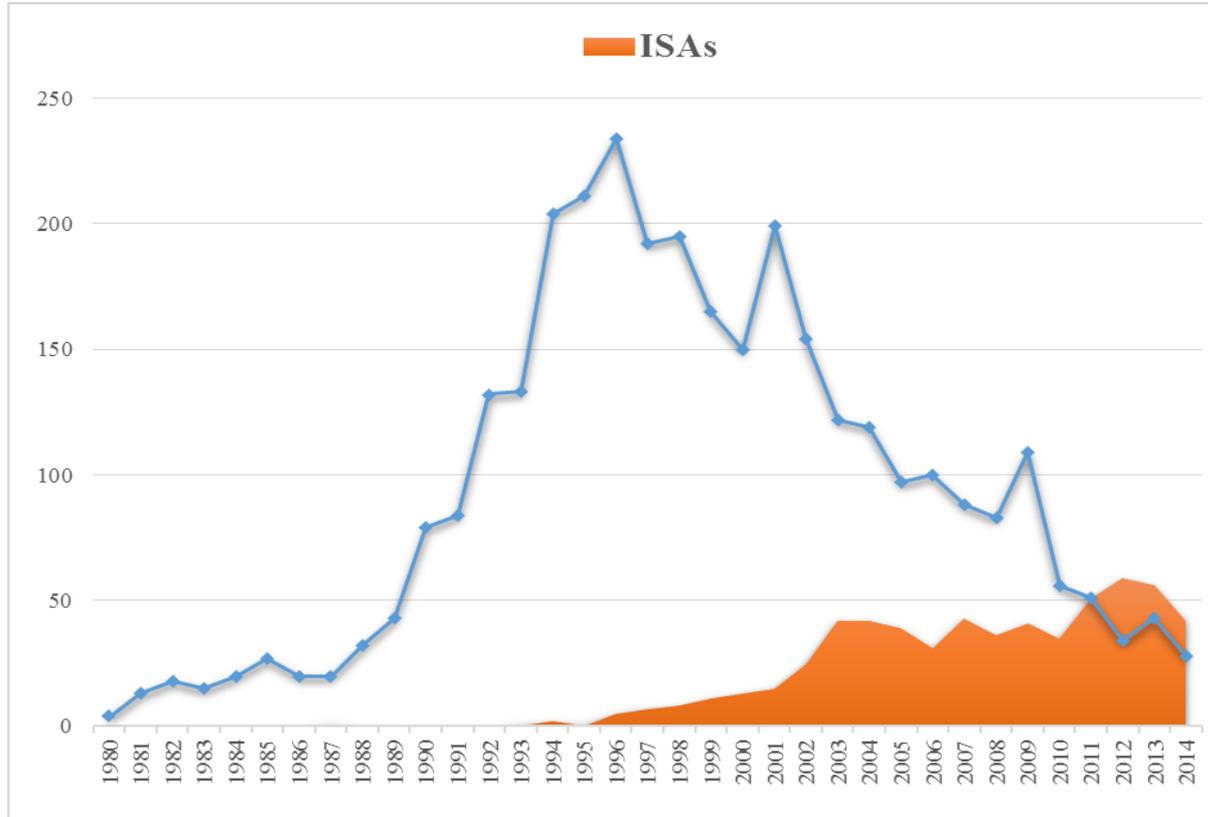
Are the treaties disproportionate to their purposes?

- What was / is the purpose of the treaties?
 - Increase flows of FDI and thereby contribute to development
 - Protect the interests of investors
 - Protect the interests of capital exporting countries
 - Contribute to development of dispute settlement capabilities in host countries
 - A sign of friendly relations
- To what extent do the treaties serve their purposes / have unintended negative side effects?
- Transparency issues

Has there been a change in attitude towards the treaties?

- The NAFTA negotiations of an investment chapter in early 1990s
- The OECD MAI negotiations in late 1990s
- The attempt at including investment in WTO negotiations in the late 1990s
- Increasingly made part of free trade agreements
- Emerging general knowledge regarding existence and content
- The proliferation of and controversies surrounding investor – state disputes

Growth in investor – state arbitration



Distorted policy valuation?

- The lack of policy coordination in most countries
- The lack of proper assessment of the rules and their consequences
- The reliance on a dispute settlement system set up to adjudicate private law disputes
- Knowledge regarding enforcement options
- (Implicit) assumptions regarding future investment flows

Self-reinforcing?

- Countries tending to copy others – fear of falling behind
- The power of precedent – burden of proof
- The emerging effects of the treaties
- The stickiness of the treaties and the ISDS

Countries' reaction to the bubble

- As principals / as litigants
- Proportionality issues
 - Proportionate in relation to whose interests? Treaty partner? Investors (at which stage)? Those affected by investments?
 - Relationship to lawfulness
 - Relationship to broader issues of international law and international relations

Mapping policy responses

		Principal responses	
		Strong	Weak or none
Litigation responses	Strong	I. Absolute opponents	III. Reluctant compliers
	Weak or none	II. Principled opponents	IV. Compliers

States as principals

	Strong (absolute or principled opponents)	Weak (reluctant compliers or compliers)
Exit	<p>Systemic termination of treaties</p> <p>Termination of ISDS provisions</p> <p>Withdrawal from ICSID</p> <p>Refraining from ratifying signed treaties</p>	<p>Sporadic termination of treaties</p> <p>Sporadic termination of ISDS provisions</p> <p>Sporadic refrain from ratifying signed treaties</p>
Voice	<p>Attempting forced treaty renegotiation</p> <p>Systemic political delegitimation</p> <p>New model treaties</p>	<p>Sporadic treaty renegotiation</p> <p>Sporadic clarifications of treaties</p> <p>Sporadic adoption of new model treaty clauses</p>

States as litigants

Strong
(absolute opponents or
reluctant compliers)

Weak
(principled opponents or
compliers)

(Ab)using
position as
sovereign

Abusing criminal proceedings
during disputes

Refusing to enforce or satisfy
arbitral awards

Seeking reinterpretation of treaty
after a dispute is filed

Active enforcement of
domestic law against investor

Initiating negotiations with
source state as a response to
dispute

Obstructionism

Vigorous litigation tactics (e.g.
jurisdictional challenges and
procedural tactics) to delay
proceedings or make them costly

Delaying enforcement of awards
(e.g., excessive use of the ICSID
annulment process)

Vigorous litigation tactics
within the parameters of the
'equality of arms' principle

What is gained by policy bubbles?

- Makes us ask new questions and look more systematically for certain explanatory factors
 - Has there been a distortive policy evaluation behind the signing of IIAs?
 - In what manner has the signing of IIAs been a policy overreaction?
 - Are there self-reinforcing elements of the IIA policy?
 - Can what we are seeing in some countries be an anti-bubble?
- Is the bubble label appropriate?
- Are some questions and explanatory factors getting too much attention relative to other questions and factors?
- Will the framework promote sound policy advise?