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## **New Features in Investment Agreements and their Relevance for Services and the Right to Regulate**

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# New Features in Investment Agreements and their Relevance for Services and the Right to Regulate

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# Introduction

- Determinants of Investment Flows:
  - Economic Factors
  - Political Factors
  - What Role Do Investment Agreements Play?
- Policy Space

# Investment Agreements: Three Pillars

## Protection of the investor and his investment

- Free Transfer
- Protection Against Expropriation
- Minimum Standard of Treatment
- Liberalization
  - National Treatment
  - MFN Treatment
  - Performance Requirements
  - Freedom to Hire
- Dispute Settlement

# Coverage in Investment Agreements

	Examples
Goods	WTO TRIMs
Services	WTO GATS
Good and Services	Bilateral Investment Treaties, and majority of free trade agreements in the Americas
Sector-specific	Financial services in NAFTA and NAFTA-type agreements

# New Features in Investment Agreements and their Relevance for Services

- Expropriation
- Minimum Standard of Treatment
- Environment

# Expropriation

- Expropriation (direct and indirect expropriation)
  - Investment Agreements prohibit expropriation except when done:
    - 1) for a public purpose
    - 2) on a non-discriminatory basis
    - 3) in accordance with due process of law, and
    - 4) with prompt, adequate, and effective compensation

# Definition of Indirect Expropriation and Its Relevance for Services: Right to Regulate vs Investor Protection

- Indirect expropriation: case-by-case, fact-based inquiry based on the economic impact of the government action, the extent to which it interferes with reasonable expectations, and the character of the government action
- ***Except in rare circumstances***, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriation

# Minimum Standard of Treatment and Its Relevance for Services

- Minimum Standard of Treatment: A narrower concept in new agreements
  - Customary International Law
  - Breach of another provision or a separate agreement do not constitute a breach of the Minimum Standard of Treatment Standard

# Investment and Environment: Relevance for Services

- Investment Chapter in new FTAs:
  - Nothing in the Investment Agreement prevents a Party from adopting, maintaining, or enforcing any measure other consistent with Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns
  - Chapter on Environment vs Investment Chapter: The other chapter (in this case, the Chapter on Environment) *always* prevails in case of inconsistency

# New Features in Services Agreements and their Relevance for Investment

- In the new FTAs signed by the United States:
- Three provisions of the Chapter on Cross-border Services *also* cover investment:
  - Market Access
  - Domestic Regulation
  - Transparency