Globalization, International Law and the Future of International Investment Treaties

An Introductory Workshop on the International Institute for Sustainable Development's Model International Agreement on Investment for Sustainable Development

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The Carnegie Endowment hosted a workshop on the International Institute for Sustainable Development's *Model International Agreement on Investment for Sustainable Development*. The Model Agreement is an alternative to the current collection of bilateral agreements, and aims to ensure that foreign investment creates development benefits in host countries. IISD's Howard Mann, the primary author of the Model Agreement, and his colleague Aaron Cosbey, introduced the Model Agreement. Daniel Price, Partner at Sidley, Austin, Brown & Wood, and William Reinsch, President of the National Foreign Trade Council, along with Carnegie's Viji Rangaswami (Trade, Equity and Development Project), offered diverse opinions on the Model Agreement.

Viji Rangaswami, Carnegie Endowment for International Peace

Foreign direct investment (FDI) is generally perceived as having a positive impact on development. It provides access to capital, creates jobs, and can play an important role in bringing new technologies to developing countries. However, concern has been raised that developing countries are giving up too much in order to attract FDI, including by signing onto bilateral investment treaties (BITs) that provide foreign investors with numerous rights, without any assurance that it will generate pro-development investment.

IISD's model multilateral investment agreement attempts to change the prevailing structure of investment treaties to specifically introduce development objectives into them. The IISD agreement achieves this by creating both rights and obligations for investors and host countries.

There is much commendable in this document, including the provisions related to addressing corruption, and improving transparency in investment disputes. However, there are major questions raised by the model agreement – including, fundamentally, whether it attempts to achieve too much through the structure of an investment treaty. We need to consider carefully whether provisions, such as the lack of compensation for some expropriations and the need to exhaust all domestic means for dispute settlement, place too much of a burden on investors, and ultimately, will serve as a disincentive for investment.

Aaron Cosbey, International Institute for Sustainable Development

The International Institute for Sustainable Development began work on investment in 1997, and has since expanded its focus beyond just the environment to include all aspects of the impact of investment on developing countries. A new model agreement for investment is needed because the old paradigm has become irrelevant – these agreements have not necessarily increased investment or promoted growth. The current mandate is too narrow, concentrating only on protection of investor rights and increasing the amount of investment. Investment agreements should focus on the quality of investments and purposefully try to foster international development. While any agreement needs to be underpinned by investor rights, there needs to be a greater balance with the rights of the host country than what currently exists.

Howard Mann, primary author of the Model Agreement from the International Institute for Sustainable Development

Investment agreements originated from Western Europe in the 1950s amid fears of the spread of communism and the impact of decolonization. From that time onwards, the scope of these agreements was limited to investor rights. Only in the 1990s were goals of investment liberalization (i.e., opening specific sectors to foreign investment) included in these agreements. There continue to be few, if any, references to development.

The current structure of agreements reduces needed policy space for developing countries, while providing a very broad scope for investor rights. These agreements should be changed to focus on sustainable development and include rights and obligations for all parties involved (investors, host states, and home states).

Highlights of the model agreement include: (1) limitation of rights to post-establishment (i.e., eliminate decisions about market access for investments from binding international agreements, allowing these decisions to be made on a more flexible basis by the host country instead); (2) a clearer definition of investor rights, particularly in areas like national treatment and expropriation; (3) addition of new obligations for investors in the areas of anti-corruption, domestic legal compliance, environment, human rights, and core labor standards. The model agreement, while very different from current agreements, should not be viewed as radical. In fact, many investors already voluntarily follow most of the obligations.

The model agreement also seeks to improve the mechanism for addressing investment disputes. The current international investment regime has no structure, institutional controls, or monitoring, and was built on an ad hoc basis. The approach in the model agreement is based on the international environmental experience, which developed a specific institutional framework incorporating national authorities, technical assistance committees, and financial mechanisms.

The model agreement also seeks to resolve certain problems created by the unique nature of investment disputes. Most of the disputes under investment treaties are between host governments and private investors. State-to-state disputes are rare. In contrast, there have been many private arbitrations between investors and governments, in fact over 200 to date. While there has been a move towards greater transparency (e.g., in the NAFTA and other U.S. agreements), many arbitrations are still conducted in secret.

Moreover, arbitrators in these cases very often are lawyers who also represent clients in other investor-state dispute settlement cases. This use of active practitioners can lead to conflicts of interest. To resolve this, the model agreement creates a standing panel of arbitrators and an accompanying appeals process.

Finally, arbitrations are often used to circumvent domestic courts. To prevent this, the model agreement requires investors in most instances to exhaust all domestic options before proceeding under the agreement's dispute settlement mechanism.

Daniel M. Price, Partner at Sidley, Austin, Brown & Wood

The model agreement is a very ambitious and radical document. I will provide a few examples of how it is a major departure from current practice.

First, the agreement considers pre-establishment (i.e., market access) to be an inappropriate subject matter for international agreements, even though commitments for market access have long been made in the GATT and now the WTO. The model agreement relies on an overblown argument on developing countries' need for policy space.

Second, the agreement does not balance rights and obligations between investors and host states – the balance is really between investors and organizations established by the model agreement. The agreement removes the host government from making decisions about what is in the public good, and instead creates a super legislature in the form of the Conference of the Parties to make these decisions.

Third, the model also defines investment in such a way that intellectual property rights, portfolios, futures, and investments that lack a physical presence, are excluded. This definition leaves in doubt whether any service sector investments are covered.

Fourth, the model agreement also creates confusion with its definitions of national treatment and expropriation. With respect to expropriation, under the model agreement, if a country expropriates property through a series of regulations, and states that the regulations are for the public good, the property owner does not have to be compensated. But by definition, all expropriation is for the public good – and just because an action is for the public good does not relieve the government of the obligation to provide fair market compensation.

I believe there should be increased dialogue and transparency about international investment agreements. That said, I do not believe that this model agreement will encourage investment.

William A. Reinsch, President of the National Foreign Trade Council

There are divergent views about the roles of corporations. Most companies view their responsibility as maximizing profit, which in turn will improve social welfare. Segments of civil society feel that companies should focus more on social issues.

This model agreement creates disincentives for investors to enter countries. A few examples illustrate how. First, the domestic judicial system in many developing countries is corrupt, inefficient, and/or inexperienced. Yet the agreement would require investors to exhaust all domestic options before resort to an international tribunal. That requirement, coupled with the three year statute of limitations on claims, creates a formidable hurdle for investors to protect their investments. Second, the agreement discounts the need for experts on arbitration panels – practitioners are the best suited to make these types of decisions, not novices.

Overall, it is not a corporation's responsibility to act as a shadow government, as it would have to under this model agreement.