Reforming IIAs - developing sustainable investment agreements

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Integrating sustainable development into investment treaties: Recent developments and new models

- Since 1960s: Traditional post-colonial investment protection
- 1994: NAFTA model on investment protection and liberalization (also TPP)
- 2005: IISD model
- 2012: UNCTAD's IPFSD
- 2012: Commonwealth guide
- 2012: SADC model template
- 2014-15: Brazilian model
- 2015: Indian Model Investment Treaty
- 2015: The Pan-African Investment Code project
- 2016: EAC, COMESA
- 2016: New investment court system (EU-VN, CETA, multilateral ambitions)
WHY NEW MODELS?

- BITs universe and investor-state arbitration is evolving
- Many countries "disencharnted" or worried
- Old style BITs have not delivered their promises
- Broad consensus today:
  - System is unbalanced, biased and unsuitable
  - Need for a systemic reform, a reorientation
WHY NEW MODELS?

• Several reform initiatives at global, regional and national level illustrate the need for a new investment policy

• Various approaches but common objectives
  ➢ Achieving a better balance between rights and obligations of investors and States
  ➢ Integrating sustainable development into the international investment regime
IISD MODEL AGREEMENT ON INVESTMENT FOR SUSTAINABLE DEVELOPMENT

• Drafted in 2005, revised in 2006
• Developed for developing country BIT negotiators
• First model to integrate SD issues
• Investor guarantees more clearly defined
  • General and specific exceptions to safeguard the right to regulate of host state
  • Investor obligations and CSR
  • Home state obligations
UNCTAD IPFSD: Quality of investment first

Investment Policy Framework for Sustainable Development (IPFSD), UNCTAD

- Launched on June 12, 2012, revised in 2015
- Comprehensive guide for national and international investment policy making
- Promotes quality investment as an vehicle for inclusive growth and sustainable development
- Approach:
  - 11 core Principles for Investment Policy making
  - Converted into guidelines for national investment policies, at strategic, regulatory and administrative levels
  - Policy options for international investment agreements design and implementation, from SD perspective
SADC Model BIT Template

Southern African Development Community (SADC) Model BIT Template, Commented

• Finalized in June 2012 by the Member States of the Community, under revision before formal adoption
• Inclusive process: conducted by and for Members States
• A model - not a binding text
• A model that member countries can use and adapt to their needs when negotiating
Integrates SD issues from the beginning to the end of the text

- Offers a concrete and accessible approach beyond analyses and general recommendations
- Guidance in the form of specific textual language
- Provisions followed by a commentary explaining the choices made
- Options to construct alternatives to controversial provisions
SADC Model BIT Template

- **Includes:**
  - Provisions on expropriation, NT, free transfer
  - Obligations of investors on: compliance with national law, anti-corruption rules, ESIA and management plans
  - Access to justice of victims of investment projects in home state courts
  - Social and economic development issues
- **Strengthens** the right of States to regulate and to pursue their development objectives
- **Transparency** in Business Conduct and Dispute Resolution
- **Recommends not to include:**
  - Liberalization obligations
  - Prohibition of Performance Requirements
  - Obligations on FET, MFN (but proposes alternate option)
  - Investor-State arbitration (but proposes alternate option)
Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators

• Launched in October 2012
• Assists developing countries in negotiating investment treaties that are more effective in promoting sustainable development
• Identifies and consolidates best practices from existing treaty models
• Evaluates the costs and benefits of different approaches
• Suggests new and innovative provisions to encourage foreign investment flows
• Outlines how states can achieve coherence among their investment treaties
Transitioning to SD models

Countries are:

• developing new national model BITs. Ex: India, Indonesia
• in the process of discontinuing/terminating their BITs or renegotiating them ... often discreetly
• incorporating elements of investment protection in investment laws instead of treaties
• withdrawing from ICSID
• adopting a moratorium on the conclusion of new BIT
Brasilian Model: Facilitation and Cooperation

Model Agreement for Cooperation and Facilitation of Investments

- Finalized in 2015, but not public
- 6 treaties signed on the basis of the model are public (Angola, Chile, Colombia, Malawi, Mexico and Mozambique), others underway
- Innovative alternative to investment protection treaties:
  - Institutional Governance and Dispute Prevention
  - Cooperation and facilitation rather than protection and arbitration
  - Bilateral Joint Commission with periodic meetings
  - National focal points and thematic agenda for negotiation on investment (transfers, visas, environment, technical standards, logistics, etc.)
  - Exchanges of information between States Parties
  - Interaction with the private sector
  - Only State-State disputes resolution mechanism (No investor-state arbitration)
Responding to ISDS Criticisms: The EU’s new ISDS mechanism

Main features

**New:**
- Departs from party-appointed arbitrators, using rosters and third party appointments
- Strengthens certain aspects of ethical standards
- Introduces appellate review process

**Old:**
- Follows investor-versus-state model
- Does not require exhaustion of local remedies or specific consent
- Reserves right of action to foreign investors (as opposed to domestic investors or other interested actors)

**Long term goal stated:**
- To establish multilateral dispute settlement mechanism
Conclusions

• Safeguard policy space to be able to implement SDGs at the national and regional levels (especially in light of ISDS)

• Use international investment law to promote and support investment in areas most important for achieving SDGs

• Use international investment law to improve investor behaviour, including on environment, corruption, labor, human rights

• Use international investment law to ensure access to justice for victims in home state courts