How Developing Countries Can Address Environmental Concerns in International Investment Agreements

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International investment has a substantial impact on the natural environment. In 2016 for instance, the energy sector attracted $1.7 trillion worth of investments, with two-thirds dedicated to fossil fuel power. That kind of power generation is the primary cause of air pollution, and poor air quality is linked to an estimated 6.5 million deaths each year. In coming years, the poor living in cities will suffer even more severe harm from air pollution. Furthermore, according to the new research conducted at Cornell University, by the year 2100 ocean levels rising amid global warming could make refugees out of about two billion people, one-fifth of the world's population.

Multilateral environmental treaties aim to address these issues, but agreements are not binding, thus making enforcement difficult. Perhaps it is time to look outside the sphere of international, environmental law and attempt to integrate environmental principles into international investment law, a legal regime that provides an enforcement mechanism. By incorporating environmental provisions into bilateral investment treaties, environmental standards could – finally – be legally binding and subject to an independent, international institution that could adjudicate disputes.

Environmental Protections, International Investment, and Enforcement

Despite consensus on the necessity of environmentally sound international investment law, there have been pushbacks from developing countries against proposals to incorporate environmental provisions into bilateral investment treaties. There are multiple reasons for this:

- Foreign investments are of central importance to emerging economies, and developing countries are often unwilling to implement measures that could discourage foreign investors. This reluctance is especially strong for countries that rely on foreign investments for a substantial part of their economic growth. When countries compete to attract foreign investors, a "race to the bottom" often results – as competition leads to repeatedly lowered standards.

- Many emerging economies now have dual interests in the international investment game, because today capital no longer flows only in one direction from advanced-industrial countries in the global "North" to less developed countries in the "South." Instead, countries like China, Russia, and Brazil are also investing tremendous amounts overseas. Now these developing states are no longer just considering their state interests when they enter into agreements with investors from the North. Instead, they must also consider their own investors' interests as they pursue investments abroad. Making fewer demands in all international deals appears to serve everyone's interests, pushing this emerging growth in nations to favor less regulation.

- Furthermore, experience shows that international arbitration may be inherently pro-investor, preferring the investor's interest over the receiving nation's public welfare concerns, when the two interests come into conflict. For instance, states sometimes have to pay large amounts to compensate investors for the profit losses they incur when environmental standards are tightened.

Ways Forward

The aversion that developing countries have to implanting environmental protections in bilateral investment treaties is understandable. Nevertheless, including environmental protections in investment agreements reaffirms state sovereignty to regulate public goods. Clarifications could be made in the investment agreements to avoid misinterpretation and prevent investors from abusing the dispute settlement mechanism.

Developing countries that become leaders in the environmental movement may become more inclined to tie investment treaties to environmental protections. In the developed world, opinions about environmental concerns diverge. With the U.S. administration of President Donald Trump retreating from international efforts to combat climate change, developing countries have an opportunity to seize leadership and channel cooperation among countries in ways that suits their current economic capacities and facilitates their development. The United States and the European Union have failed to create effective models for global environmental governance. If developing countries could work together to create a system that acknowledges their needs for environmental protections that complement their economic development, they might shape a new era of international environmental governance.

As countries and investors work out new approaches to melding environmental and development concerns, here are specific ways developing countries could shape international investment agreements that do not put their own economies at a disadvantage:

- Include in agreements sections that explain how environmental provisions relate to other parts of the treaty – such as clarifications of how environmental rules will affect investor property.

- Set out procedural standards that allow investors to adjust their strategies promptly if legislative or regulatory changes are made in the host country. Transparency could avoid arbitration and prevent investors from misusing the dispute settlement mechanism to stall the implementation of domestic legislation.

- Negotiate with other developing economies to create a model investment agreement that balances sustainable development with economic growth.

- Give special attention to environmental issues that most often occur in developing countries, such as the extraction of natural resources and generation of fossil-fuel power.

- Bind investors either to the local environmental laws of the receiving countries or to the laws in their own home countries, whichever are stricter.

Brief prepared as Yale Fox International Fellow 2017-2018, Yale University.

Read more in Hui Pang, "Integrating Sustainable Development with Bilateral Investment Treaties: The Approach for Developing Countries" (Working Paper, 2018).