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International Investment Law and Sustainable Development: Developing a New Conceptual Framework

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Motivation (I)

- n Trade law and trade economics have a long common ground
- n Not the same holds true for investment law and economics
- n Investment Law and Development Law has been long discussed separately in legal science
- n Economic insights have been neglected in the legal discussion
- n Where they have been considered: only strictly economic matters (investment as a variable in the production function (capital, technology))

Motivation (II)

- n The institutional background ("Law and Development"; Investment treaties and Political Economy) has been almost forgotten in Investment Law
- n States were assumed a black-box (government "benevolent dictators"): insufficient from a developmental perspective
- n Those research strands allows us to have a more fine-grained analysis on investment law and to show that investment law and SD should not be seen as contradictory!
- n International Investment Law should bring all those strands together if it is a means of fostering development!
 - in treaty drafting
 - in interpretation

Overview

- n Sustainable Development: A Definition
- n Empirical Economic Insights in Investment and Development
- n The Neglected Variable: Institutions
- n A Possible Way Forward
- n Conclusions

What is Sustainable Development?

- n 1987: Brundtland Report (OUP, Our Common Future: “development that meets the needs of the present without compromising the ability of future generations to meet their own needs” (Environment)
- n IFIs and UNDP: "Good Governance" for development
- n Plan of Implementation of the World Summit on Sustainable Development, 2002, para 4: (Monterrey Consensus)
- n "*Good governance* within each country and at the international level is essential for sustainable development. At the domestic level, sound *environmental*, social and economic policies, democratic institutions responsive to the needs of the people, the *rule of law*, *anti-corruption* measures, gender equality and an *enabling environment for investment* are the basis for sustainable development"



What is Sustainable Development?

- n ILA New Delhi Declaration of Principles of International Law Relating to SD, 2002
 - The principle of the precautionary approach to human health, natural resources and ecosystems (Environmental Impact Assessments)
 - 5. The principle of public participation and access to information and justice
 - 6. The principle of good governance
 - 7. The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives

Empirical Economic Insights in Investment and Development (I)

- n In older economic textbooks (and by investment tribunals) assumed relationship between BITs and Development
- n $\text{BITs} \uparrow \Rightarrow \text{FDI} \uparrow \Rightarrow \text{Growth} \uparrow \Rightarrow \text{Welfare} (\approx \text{SD}) \uparrow$
- n $\text{BITs} \uparrow \Rightarrow \text{FDI} \uparrow$: empirically unproven (rather shaky)

Empirical Economic Insights in Investment and Development (II)

n FDI $\uparrow \Rightarrow$ Growth \uparrow :

– Theoretically:

- Washington Consensus (+, if no externalities)
- Development Economists (FDI not different from Investment; no special treatment;
- "Dirigisme resurrected": performance requirements

– Empirically:

- difficult to find a *universal* relationship between FDI and growth!
- Under certain circumstances : sector specific (services +, nat. resources: problematic); technological transfer; positive spill-overs to national industries, absorption capacity



The Neglected Variable: Institutions (I)

- n Growth $\uparrow \Rightarrow$ Welfare (\approx SD) \uparrow
- n Welfare: Measurement (HDI)
- n Here: institutions crucial (good governance: Rule of Law, Anti-Corruption, participation)
- n What does economics tell us about it?
 - Black-box (benevolent) state not able to capture lack of good governance
 - Need to break up the black-box state: political economy analysis

The Neglected Variable: Institutions (II)

- n Politicians have own interests
 - Reelection, personal benefits
 - But not necessarily: welfare (SD) of the country
- n Good governance not guaranteed
- n FDI can further politician's interests, but may potentially also be against the voters' interests (short term attraction of FDI)
- n FDI/IAs should be seen as a good governance spillovers (pressure) tool

A Possible Way Forward

- n Best: treaty design, but unrealistic for many treaties now
- n Second best: interpretation by object and purpose
- n Object: investment protection (promotion) = means
- n Purpose: development, by now SD = end
- n Jurisdiction:
 - Investment definition: no: impossible for tribunal to know, problem of which time is relevant
 - "in accordance with law of the host state": yes (corruption)
- n Merit Phase:
 - proportionality principles in conjunction with Art. 31 III c VCLT (expropriation, FET)
 - Other norms: procedural: waiting periods/local courts first: excellent good governance tool!

Conclusion

- n Economic insights should be incorporated into investment law as in trade law
- n Empirical and political economy studies are more differentiated than textbook wisdom
- n For development: institutions matter, IIAs as well: part of SD strategy
- n If SD is the purpose of IIAs AND economic insights are taken into account, Investment Law and SD can be harmonized!

THANK YOU!