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Abstract

International law as a means of economic governance and instrument of development policy

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Economic Law is a tool of legislatures and governments to shape the economic order of a state, to preserve a functioning competition and to correct politically undesirable results of economic activities. International Economic Law as part of Public International Law regulates the ever increasing transnational transactions. It provides for the dependability of the rule of law that makes risks more assessable and stimulates transborder economic exchange. Furthermore, it secures rational economic behaviour of state organs against "public choice" protectionist opportunism. Therefore it is in the enlightened interest of states to develop such international law and to shape it in a way that will make it "self-enforcing" in most cases.

What is the role of Public International Law, particularly of International Economic Law, in the "North-South" context, the relations between developed and developing states? Here, too, it should provide for reliability, co-ordination and for the protection of individuals. It is governing the institutions, particularly international organizations that are now the keystones of development activities. This law of development is informed by particular concepts like sustainable development, special and differential treatment and the conditionality of financial help.

One of the most important tasks is the preservation and development of human rights and their protection. They are related to development in both directions: as its positive result and at the same time as its necessary precondition. They are a basis for individual activities that improve the economic performance in the developed as well as in the developing states. Is there, in addition to the individual human rights, also a collective "right to development"? Such right has been invoked in various declarations, but it remains vague and does not entail the obligation to particular steps. It is, however, a sufficient obligation for developed states not to remain inactive in matters of development.

One of the main tasks today is fighting poverty by transferring resources and providing aid as a starting incentive for developing countries. It is difficult to obtain binding obligations in this field if there is no mutual interest. In recent times most financial aid is connected with legally binding conditionality requirements, particularly with the development of good governance. The identification of the human rights' dimension of poverty reduction may contribute to the public readiness to fight it. The rule of law might help to institutionalize the conditions of efficient aid. The participation of developing countries in international trade can be stimulated and, at the same time, protected by special and differential treatment on a rational basis.

Economic development needs investment. Good governance guaranteed by law (and decreasingly by the conditionality of aid), is a prerequisite for the attraction of foreign investors. The same is true for the preservation of human rights that should gradually supersede the classical rights of aliens. However, conditionality will serve as a relative guarantee of good governance as long as the rule of law is not sufficiently and firmly established in the developing countries. It is also helpful to stabilize national governments against the temptations of uncontrolled power: abuse and wastefulness. The increasing importance of good governance as a duty to restructure the institutional system is obvious in the solution of debt problems. Forgiveness or rescheduling is most often conditioned by it. Conditionality is part of the larger picture of Global Governance that increasingly poses questions of justification, control and limitations. Given the diverging state interests it is good, that Global Governance is predominantly exercised by international organizations that combine manifold interests within their institutional structure. Its control, however, is one of the big novel tasks of Public International Law in the future.

Investment protection is increasingly providing for procedural protection of individuals, in bilateral as well as multilateral treaties. However, there is a reluctance of developing (and also developed) countries to raise the scope above the level of classical property protection. This was one of the major problems with the Multilateral Agreement on Investment (MAI) that could not be finalized, as well as it is now with the development of more stringent investment rules in the WTO. However, newer bilateral treaties now point in this direction and the question arises whether the developing countries are better off in such bilateral negotiating situations or whether they should rather try to gain additional strength in multilateral negotiations.

Another facet of improving the rule of law for the developing countries is their integration in the structures of global trade. However, the participation in the WTO raises new problems: unfavourable structures of customs duties, the impact of non-tariff barriers, the ongoing protection in agriculture, the problems with the privatisation of services and the marketing of cheap labour services and the problems with intellectual property rules, particularly in the sector of pharmaceutical products. The determination of the developing countries to participate in the WTO has cooled down because of the problems of implementation of Uruguay Round obligations by the developed partners and because of the unclear and unsatisfactory development of schemes of special and differential treatment for the developing countries. Furthermore, the costs and the intellectual capacities needed for participation in an increasingly complex legal order create new difficulties for these countries.

These problems are now the reason for the obvious difficulties of developing the WTO legal order to a more complex and elaborate system. Seattle and Cancun are landmarks of these difficulties, even if the Doha Round has been praised as being a development round. Although there are plans for decoupling

trade between developed countries and between them and the developing countries as well as between these countries themselves, this may not be in the interest of developing countries. Both groups might serve their own interest better if they are trying to keep common rules and carefully develop a more stringent and economically sound concept of special and differential treatment. The danger of a moral hazard arising from such a scheme has to be controlled efficiently by multilateral control in order to make sure, that such treatment is given as a help for real improvement and that it remains a temporal exception – in the best interest of the developing countries.

Capacity problems need an enormous technical assistance. This is already given increasingly within the framework of the WTO. The cornerstone of this legal system, the dispute settlement mechanism, is also criticised as creating capacity as well as substantial problems. In the framework of the Dispute Settlement Review, the problems of cost, complexity and sanctioning power have to be taken on with special regard to the problems of the developing countries.

In conclusion, it may be said that the rule of international law improves the situation of developing countries, because it always give additional strength to the weaker parties. On the other side, the costs of participation in the development of such law and in its administration are imposing an additional burden on the developing countries. Furthermore, the persisting partially vague and incomplete normative structure of International Economic Law still gives way to the predominance of politics and is favourable for the economically strong parties. Global Governance has to be controlled by strict law in order to avoid arbitrariness and as a justification for critique about its legitimacy.

On the other side, more rules of an increasing complexity are not only seen as an unnecessary additional binding obligation by the developed states, but also as an additional burden by the developing states. On the other hand, they are necessary to increase trustworthy trade structures in the interest of both sides. Consequently both, developing and developed countries, have a reason to develop more detailed International Economic Law, and at the same time they have a reason not to foster that development too much. There is a mutual interest to carefully go along that road, reducing the disadvantages and developing the advantages. A decisive factor might be, that in the end the real problem is to develop the rights of individuals: to a life in decency and to a freedom to economic activities.