Discussion, debate and dissent about investment and sustainable development at the 2023 World Investment Forum*

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Abstract

The recently completed 2023 World Investment Forum in Abu Dhabi saw a rare confluence of leaders from public, private and civil society sectors gathering at dozens of scheduled and dozens more impromptu meetings aimed at building better cross-sector relationships and a common understanding about current best practices and near-term trends in sustainable development around the world. Here is what I took away from those meetings: (1) discussions there were building an investment regime to guide leaders within and across sectors who are trying to achieve the Sustainable Development Goals, leading to faster economic development and better environmental, social and governance practices; (2) debates there were focusing on how and how quickly to build that regime and reach those goals with investment projects based on public-private-partnerships; and (3) occasional dissent there about how to build that regime and reach those goals reminded some about inconvenient evidence-based truths about investor–State dispute settlement clauses in bilateral investment treaties and foreign direct investment. I elaborate on those points and conclude with some personal reflections and suggested additions to future meetings aimed at building that investment regime and advancing towards those development goals.

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1. Hammering out an investment regime that supports sustainable development

Good policy is hammered out on the anvil of vigorous discussion, debate and dissent. I saw and heard all three at the recently concluded WIF23 in Abu Dhabi. As a university professor attending my first WIF, I experienced more than a little awe at the sight of so many senior officials and executives from public, private and civil society sectors rubbing elbows with academics more at home in their ivory towers. With the awe, I also found the opportunity to explore some of the 150,000 square meters of the Abu Dhabi National Exhibition Center (ADNEC) – I easily got my 10,000 steps in each day – and sit in on conversations about how and how fast leaders from different sectors could work together to build an investment regime supporting sustainable development.

By regime, I mean the notion of Stephen Krasner (1982) that international actors can establish principles, norms, rules and decision-making procedures around which expectations can converge in a given area of international policy. Here, the international policy area is development – that is, how to explain and enhance economic growth and poverty alleviation. The principles, norms, rules, and procedures address development sustainability and its underlying environmental, social and governance (ESG) dimensions: principles help define those ESG dimensions; norms help assess progress toward them; rules and procedures help evaluate investment projects consistent with those principles and norms. Expectations converge with repeated discussion, robust debate and a healthy level of constructive dissent.

That is what I saw and heard in my wanderings about the ADNEC last October. It might have been a session on developing sustainable power projects, a presentation of provisional ESG standards for corporate accounting and reporting, or a statistical analysis of infrastructure investment and gender equity in Latin American countries. No matter the session, there were similarly themed discussions prompting shared understanding, expectations convergence and coordinated action among public, private and civil society leaders about the need for an investment regime that supports sustained development. Hammers were loudly clanking away on the policymaking anvil in Abu Dhabi.

Other hammers were clinking quietly. I lost count of how many times my UNCTAD hosts would appear briefly and then suddenly disappear from scheduled sessions. At first, I attributed those disappearances to the usual host concerns about assuring the timely launch of future sessions –panel chairs and wireless microphones often fail to appear on their own. But over the week, I noticed several instances of UNCTAD representatives and country representatives huddled together in conversation in the ADNEC hall or heading to and from some smaller ADNEC meeting room.

During conversations with academics attending their *n*th rather than first WIF, I learned more about the purpose of those meetings. They were important private discussions aimed at persuading country officials to “sign up” for some or all of the policies supporting UNCTAD’s emerging investment regime for sustainable development.

2. Debating the effectiveness of public-private partnerships

It is hard to argue with the general proposition that development policy should emphasize sustainability. It is easier to argue about how to emphasize that. Investment based on public-private-partnership (PPP) was a popular topic at several panel sessions, but notions about how best to structure the ownership of those PPPs differed. Some advocated for approximately equal ownership shares in infrastructure investment projects. Others argued for majority State ownership in such PPPs.

My own research-based view is that “less can be more” when it comes to host-country State ownership in power, water, transportation, telecommunication and other infrastructure investment projects. My view begins with the assumption that government’s natural role in any investment project is as a regulator rather than a partial owner, but in some developing countries there is no regulatory agency to look out for the public interest or if there is such an agency, it is understaffed and underfunded. Regulatory agencies take time to develop, but investment project opportunities sometimes cannot wait. So, if the regulatory rules of the investment game seem a little less reliable to private foreign investors, then host-country governments may need to provide second-best assurances.

Host-country government co-ownership of investment projects might serve that end. I say “might” because those same private foreign investors usually want to retain day-to-day control over investment project construction and operation. Host-country governments can accommodate that preference by taking a substantial but non-controlling minority ownership interest. That would signal stability in the regulatory environment affecting investment project revenues and expenses. The host-country government also suffers losses if those regulatory arrangements change suddenly and adversely. Minority ownership signals the host-country government’s interest in having a voice in broader governance while letting private foreign investors and operators take the leading role in day-to-day construction and operation of the investment project.

There is a broad base of empirical support for these “minority rules” for governing PPPs. Banks are more willing to lend to developing-country investment projects in power, water, telecommunication, transportation and other sectors when host-country State co-ownership is, say, in the range of 20–30 per cent (James and Vaaler, 2018). Those same investment projects with the same substantial but non-controlling State co-ownership close on financing and move to construction faster, especially for wind, solar and other renewable power projects (James and Vaaler, 2022). Less can be more when it comes to host-country State ownership and investment project governance and related performance.

A great example of this approach to PPPs is in Colombia, where national and local government agencies have taken small co-ownership shares and then partnered with multilateral lenders such as the Inter-American Development Bank, private lenders like Scotiabank, foreign development agencies such as the United States Agency for International Development, and private owner-operators such as Isagen-Brookfield, which is building and operating hydroelectric and other renewable power projects in more remote, underserved regions such as La Guajira. These PPPs incorporate training and employment for indigenous groups as well as equitable allocation of project benefits across stakeholder groups. They serve Colombia's broader strategy of shifting to renewable energy generation and inclusive development consistent with the United Nations Sustainable Development Goals as well as Isagen's commitment to the goals of the United Nations Global Compact and the Dow Jones Sustainability World Index.[1] Less can also be more when it comes to host-country State ownership and investment project social inclusiveness.

There is no time to lose in bringing this type of PPP structure to other regions in the developing world. In Southeast Asia, Indonesia is on a spree of having private foreign investors build and own coal-fired power plants in remote regions of the archipelago, where nickel mining is on the rise.[2] Ironically, nickel extracted with this "dirty" non-renewable power is a key input into battery technologies critical to the production of "clean" electric-powered automobiles. Earlier this year, the national government decided to exclude these private power projects when reporting progress toward Just Energy Transition Partnership targets.[3]

We can do better. Giving local and national governments some minority co-ownership of investment projects would almost certainly strengthen their voice in how to bring renewable power technologies into the project mix faster. Including multilateral and private lending institutions with a strong track record of social inclusiveness would almost certainly improve equitable allocation of project benefits, particularly for surrounding Indigenous communities. These and other PPP structures can improve ESG dimensions of investment projects without hindering projects' day-to-day commercial performance.

1 Brookfield Asset Management, "A Leading provider of renewable power generation in Colombia", www.brookfield.com/news-insights/insights/leading-provider-renewable-power-generation-colombia (accessed 4 December 2023).

2 Hans Nicholas Jong, "Captive to coal: Indonesia to burn even more fossil fuel for green tech", 10 August 2023, https://news.mongabay.com.

3 Gayatri Suroyo and Fransiska Nangoy, "Exclusive: Indonesia to omit private coal power plants from its JETP investment plan", Reuters, 30 October 2023.

3. Dissent about disputes

Good policy comes from robust discussion, debate *and* dissent. I saw and heard that, too, in certain WIF sessions. One session saw a large roundtable discussion about international investment agreements (IIAs) and their investor–State dispute settlement (ISDS) provisions. That roundtable was helmed by senior UNCTAD staff and included several senior officials from country investment and economic development agencies as well as a smattering of academic researchers. The 5- to 10-minute commentaries from the investment and economic agency officials touched on similar points. Their countries presented great opportunities for foreign investors. Their agencies stood ready to assist those investors. And if there were any disputes between foreign investors and host-country governments, they could and should be resolved quickly and amicably without need for "confrontation" in international arbitration panels.

Some of these commentaries came with anecdotes about the perils of negotiating IIAs with broad-ranging access to binding arbitration. National legislatures would be loathe to confirm them. They would poison host-country government relationships with current foreign investors and create disincentives for future foreign investors. Better to have less confrontational mediation or conciliation before host-country government agency officials specializing in amicable dispute resolution.

Near the end of the session, a legal academic at the roundtable offered what I thought to be a diplomatically formulated dissent. He began by pointing out that host-country governments rarely prefer to give up sovereign power when addressing foreign investor grievances running from small adverse changes in tax rates on their project profits to much larger threats of temporary project shutdown or outright project nationalization. Then came the dissenting challenge. He reminded all that credible commitments by host-country governments to *waive* such sovereign power and grant wide-ranging access to binding arbitration of disputes reassure private foreign investors who promise new capital, technology and employment. IIAs with strong ISDS provisions signal commitment to protecting contract and property rights of private foreign investors. They signal confidence in the settlement of disputes through timely presentation before and adjudication by impartial tribunals following international rule of law principles rather than national politics. Waiving some sovereignty in disputes prompts greater respect for those sovereign States and attracts more private foreign investment.

Recent empirical evidence based on careful analysis of IIA data housed at UNCTAD backs up this dissenting challenge. A November 2022 study by the chief economist of the United States International Trade Commission, Saad Ahmad, with Benjamin Liebman and Heather Wickramarachi (2022), analyzes the inward foreign direct investment (FDI) impact of ISDS chapters in thousands of bilateral investment treaties and other types of IIAs. UNCTAD evaluates the strength of those ISDS provisions on several dimensions related to their range of application in different industrial sectors and the number of exceptions to the binding nature of international dispute arbitration. ISDS provisions deemed "strong" by UNCTAD have wide-ranging application with very few, if any, exceptions to their binding nature. Nearly 80 per cent of IIAs in force from 1980 to 2011 had such strong ISDS provisions.

A set of cleverly implemented panel data analyses yields these two important findings: IIAs with strong ISDS provisions increased inward FDI by as much as 22 per cent, and IIAs concluded with weaker ISDS provisions saw much smaller inward FDI increases or even decreases. Waiving some sovereignty in disputes prompts greater respect for those sovereign States and attracts more private foreign investment, often billions of United States dollars more.

Ahmad et al.'s (2022) findings are still preliminary, and their study awaits academic journal submission and rigorous peer review that will no doubt point to previous studies suggesting different relationships. Still, their findings constitute an empirical inconvenience for many WIF attendees. For those country investment and economic development officials, the findings challenge assumptions and anecdotes about private foreign investment preferences for informal national mediation or conciliation. For UNCTAD staff seeking to enlist those ministers in a sustainable investment regime, the findings may mean coaxing reconsideration of ISDS provisions that seemingly uphold home-country government sovereignty but actually undercut private foreign investor confidence in that government. Dissent is rarely popular, but it is occasionally necessary when hammering away on the policymaking anvil.

4. Lessons and invitations for the future

I found the WIF energizing for my academic research and related teaching and community engagement. I have been studying the commercial behaviour and performance of infrastructure investment projects in developing countries for nearly 20 years. I came to the WIF thinking I would be saying more than listening to others about how those projects advance and what helps them survive and be successful. Wow, was I wrong. In sessions I attended and sessions I contributed to as a panelist, there were so many others who brought new and novel insights based on their professional and policy experience or their own academic research experience.

On the last day of the WIF, I was honored to participate as the sole academic on a high-level panel discussing PPP structure and sustainable development trends. The other government ministers, business executives and international organization professionals on that panel brought years of hands-on, practical experience with organizing, financing, building, operating and resolving disputes in sustainable investment projects. I may have known something more about how to run statistical analyses about broader project trends, but they knew the individual projects and their own particular challenges. I came away resolved to be more of an "engaged" scholar with deeper knowledge from fieldwork taking me to the project solar array, the desalination plant, the high-speed rail depot and the deepwater port. I came away from the WIF determined to get out of my ivory tower.

As I finish my commentary, I am also following developments at the 2023 United Nations Climate Change Conference in Dubai (COP28). It is easy to see how the two United Nations-sponsored meetings are linked by common goals of developing a sustainable investment regime to foster both economic growth and poverty alleviation in the developing world and to fight the climate change threatening the whole world.

If I could, I would hand out invitations to some COP28 attendees I thought underrepresented at the WIF: private lending and investment institutions, including private equity and hedge fund firms. The New Jersey-based investment arm of Prudential Insurance, Prudential Investment Management (PGIM), has more than $1.5 trillion under management with nearly $100 billion in "alternative" credit and investment around the world. The Netherlands-based Triodos Investment Management bank has €5.7 billion under management and hundreds of investments in renewable energy projects in developing countries. Both highlight their commitment to ESG-based investing and broad stakeholder engagement. PGIM, Triodos and so many others like them in the private sector are critical to scaling up the sustainable investment regime UNCTAD is fostering. There are definitely places for leaders from those organizations at the next WIF. And I cannot wait to meet and learn from them.

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