9. Holistic approaches to development and international investment law: the role of international investment agreements

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1. INTRODUCTION

This chapter discusses the contribution made by 'international investment law' to the process of economic and social development in developing countries. This area is based on the myriad of international investment agreements (IIAs), especially bilateral investment treaties (BITs), which have existed in their broad current form for at least 50 years. In that time they have been seen as vehicles for development so far as they provide for improvements in the regulatory environment that could, in turn, facilitate the attraction of new foreign investment. Such agreements are said to secure the legitimate expectations of investors for a stable, transparent and predictable investment environment. More recently, IIAs have been subjected to extensive interpretation in arbitral awards as a result of the sharp increase in investor–state disputes under such treaties in the first years of the twenty-first century (see UNCTAD, 2009*b*). This has led to the development of a new 'international investment law'.[1] Concerns have been expressed as to the adverse effects of such agreements, and how they have been interpreted, on

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[1] This has led to the production of many recent works on international investment law. Prior to 2007 there was in effect only one major text dedicated to this subject, Sornarajah (2004) which first came out in 1994, and a section in the author's first edition of his treatise *Multinational Enterprises and the Law* (Muchlinski, 1995: Part III; see now 2007*b*: Part IV). Since 2007 we have: McLachlan et al. (2007); Dolzer and Schreuer (2008); Dugan et al. (2008); Muchlinski et al. (2008); Subedi (2008); Binder et al. (2009); Newcombe and Paradell (2009). A remarkable explosion of expert literature!

the balance of rights and duties between investors and host and home countries. It is the purpose of this chapter to examine such concerns.

In particular it has been argued that investors' interests are too readily protected at the expense of other significant social values which can only be secured through effective governance. Indeed it is arguable that investors' legitimate expectations need to be delimited by reference to the social context in which they operate (see Muchlinski, 2008: 640–41). Accordingly, new generations of IIAs may have to provide for a revised balance of rights and responsibilities for investors alongside the already existing responsibilities of host states. In addition, home states may have responsibilities to ensure adequate flows of investment to developing states and to police the behaviour of their investors.

A new approach to IIAs is becoming evident in some more recent model treaties and in the Canadian based International Institute for Sustainable Development (IISD)'s Model International Agreement on Investment. This will be used in Section 3 to illustrate how the above concerns can be placed on a more legal footing. Before this, however, Section 2 will set the scene through an examination of the concept of 'development' as it appears in relation to international investment law. A narrow economic focus may be inadequate to grasp the rich assortment of factors that may contribute to 'development'. Indeed a wider concept of development, one that is both social and economic, may be required so as to capture the various discourses that seek to reform existing IIAs where the idea of corporate social responsibility and home country responsibility for ensuring development-friendly investment is prominent.

2. THE CONCEPT OF 'DEVELOPMENT' IN INTERNATIONAL INVESTMENT LAW

In general IIAs do not refer to the concept of development in any detail. IIAs that do refer to development will usually do so in the Preamble. For example the Preamble of the US–Rwanda BIT (2008) recognises 'that agreement on the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties . . .'. The context is clearly that of stimulating investment flows and it stems from the greater economic co-operation between the contracting parties under the BIT itself (US–Rwanda BIT, 2008).

The treaty is, as such, silent on any social aspect of development. However the Preamble does stress the need to achieve the economic objectives of the treaty in a manner consistent with the protection of health, safety and the environment and the promotion of consumer protection

and internationally recognised labour rights. This is backed up by 'best efforts' clauses against lowering environmental and labour standards as an inducement to investment (ibid: Art. 12, 13). Some agreements link technology transfer with human development,[2] while other agreements stress that development should be sustainable but there are few examples.[3] Indeed one of the most significant examples, the draft Norwegian Model BIT of 2007, has been abandoned.[4] Thus IIAs say little about development save for generally accepting that a quantitative increase in foreign investment equates with development.

This stress on the quantitative aspect of investment for development is reinforced by the predominant use of a broad, asset-based definition of investment in IIAs. There is no reference to development concerns in such definitions (for examples see further UNCTAD, 2007: 8–10). On the other hand some recent arbitral awards have considered whether development concerns should affect their interpretation of whether an 'investment' has taken place for the purposes of establishing the jurisdiction of an arbitral panel under the International Centre for Settlement of Investment Disputes (ICSID). According to certain decisions on jurisdiction, for an arrangement to qualify as an 'investment' it should have 'a certain duration, a regularity of profit and return, an element of risk, a substantial commitment and . . . it should constitute a significant contribution to the host State's development'.[5] The contribution to development requirement may be open

[2] See Brunei–Darussalam–Republic of Korea BIT 2000: 'Recognising the importance of the transfer of technology and human resources development arising from such investments . . .' (cited in UNCTAD, 2007: 4).

[3] One such reference can be found in the Preamble to the Investment Agreement for the CCIA: Legal Tool for Increasing Investment Flows within the COMESA: 'REAFFIRMING the importance of having sustainable economic growth and development in all Member States and the region through joint efforts in liberalising and promoting intra-COMESA trade and investment flows . . .'(COMESA, 2007: 1, original emphasis).

[4] The Preamble to the Norwegian Model states *inter alia*: '*Recognising* that the promotion of sustainable investments is critical for the further development of national and global economies as well as for the pursuit of national and global objectives for sustainable development, and understanding that the promotion of such investments requires cooperative efforts of investors, host governments and home governments . . .' (see http://ita.law.uvic.ca/investmenttreaties.htm (accessed 25 September 2009)). The Draft Model Agreement was abandoned due to the polarisation of views upon it, with business interests fearing it did not protect investors enough and civil society groups fearing that it would restrain governments' ability to regulate in the public interest (see Vis-Dunbar, 2009*a*).

[5] *Joy Mining Machinery Limited v. Egypt*, para. 53; *Salini Construtorri S.p.A. and Italstrade S.p.A. v. Morocco*, para. 52; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, paras 122–38.

to criticism as it introduces an element of motivation into the definition. This may not be relevant if the given definition of 'investment' in the BIT is asset-based.[6] Nonetheless some tribunals have used the development element to deny jurisdiction over a dispute on the ground that the transaction involved failed to make a significant contribution to the development of the host country.[7] In general, the development element should be met in most cases where the first three elements are shown to exist (Dolzer and Schreuer, 2008: 69).

More recently, the validity of introducing the development criterion as a jurisdictional requirement has been criticised by the Annulment Committee in the case of *Malaysian Historical Salvors v. Malaysia*.[8] The question at issue was whether the salvage contract between the Government of Malaysia and Malaysian Historical Salvors was an 'investment' for the purposes of Article 25(1) of the ICSID Convention (2006), which governs the jurisdiction of an ICSID Tribunal.[9] The original sole arbitrator held that it was not, on the ground that, 'while the Contract did provide some benefit to Malaysia', there was not 'a sufficient contribution to Malaysia's economic development to qualify as an 'investment' for the purposes of Article 25(1) or Article 1(a) of the BIT'.[10] The Annulment Committee disagreed. They felt that the arbitrator had failed to take into account the fact that Article 1 of the BIT between the United Kingdom and Malaysia, under which the claimant – a British majority shareholder in the Malaysian incorporated contracting company – brought his claim, contained a broad asset-based definition of investment whose purpose was to give a wide range of investments protection under the BIT.[11] Instead the

[6] *Saluka Investments BV (The Netherlands) v. The Czech Republic*, paras 209–11.

[7] See *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, Award on Jurisdiction; and *Patrick Mitchell v. Democratic Republic of the Congo*, Decision on the Application for Annulment of the Award, paras 25–33 and 39.

[8] *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, Annulment Decision.

[9] Article 25(1) of the ICSID Convention (2006) provides that: '[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State . . .) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre'.

[10] *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, Award on Jurisdiction, para. 143.

[11] By Article 1: 'For the purpose of this Agreement (1)(a) 'investment' means every kind of asset and in particular, though not exclusively, includes: . . . (ii) shares, stock and debentures of companies or interests in the property of such companies; (iii) claims to money or to any performance under contract having a

sole arbitrator used the approach taken in earlier awards to the interpretation of 'investment' under Article 25(1) of the ICSID Convention as the basis for interpreting the same term in the BIT as well.

According to the Annulment Committee, the contract was an investment as it was a 'one of a kind of asset' and, in accordance with the definition in Article 1 of the BIT, there was 'a claim to money and to performance under a contract having financial value'.[12] Furthermore, 'the contract involves intellectual property rights; and the right granted to salvage may be treated as a business concession conferred under contract'.[13] The Annulment Committee went on to criticise the elevation, by the sole arbitrator, of the development criterion as a jurisdictional requirement under the ICSID Convention. To do so would have the effect of excluding small contributions, and contributions of a cultural and historical nature. It also

> failed to take account of the preparatory work of the ICSID Convention and, in particular, reached conclusions not consonant with the *travaux* in key respects. notably the decisions of the drafters of the ICSID Convention to reject a monetary floor in the amount of an investment, to reject specification of its duration, to leave 'investment' undefined, and to accord great weight to the definition of investment agreed by the Parties in the instrument providing for recourse to ICSID.[14]

Accordingly, the majority of the Annulment Committee concluded that the sole arbitrator had manifestly exceeded his powers in making this decision.

The majority decision was strongly criticised by Judge Mohamed Shahabuddeen in his dissenting opinion. He felt that the ICSID Convention set certain 'outer limits' to the meaning of an 'investment' based on the fact that a major aim of the Convention was to encourage the economic development of member countries by way of investment. Thus it was perfectly reasonable to read that term as being bound by a requirement that the investment should contribute to the economic development of the host country. Judge Shahabuddeen stated:

> In this connection, it is possible to conceive of an entity which is systematically earning its wealth at the expense of the development of the host State. However much that may collide with a prospect of development of the host State, it would not breach a condition – on the argument of the Applicant. Accordingly, such an entity would be entitled to claim the protection of ICSID. Host States which let in purely commercial enterprises would have something to worry about. Correspondingly, ICSID would seem to have lost its way: it is time to call back the organization to its original mission.[15]

financial value; (iv) intellectual property rights . . . ; (v) business concessions conferred . . . under contract . . .'.

[12] *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, Annulment Decision, para. 60.

[13] Ibid.

[14] Ibid: para. 80.

That original mission was, in the Judge's view, to provide a dispute settlement mechanism for investments that made a positive contribution to the economic development of the host country. Accordingly it was Article 25(1) that governed the definition of investments for the purposes of taking the dispute to ICSID, not the terms of the BIT. Otherwise the parties could determine the jurisdiction of ICSID and Article 25(1) would be rendered meaningless.[16]

The disagreement between the majority of the Annulment Committee and Judge Shahabuddeen encapsulates the dilemma in international investment law as to whether it is a law of investment protection, pure and simple, in which case the notion of investment must be given as wide a compass as possible so that access to dispute settlement procedures is made easier for the investor, or whether it is a law of international economic co-operation, in which case the need for a balancing of the private interests of the investor and the public interests of the host country may be essential. On this approach the requirement of a significant contribution to development arising out of the investment may be seen as a key jurisdictional prerequisite. It remains to be seen whether ICSID Tribunals will follow the majority position in *Malaysian Salvors* and ignore the development criterion or continue to apply it.

Another context in which arbitral tribunals have discussed the concept of development concerns the question whether the level of development of the host country can act as a mitigating circumstance in relation to a claim made by the investor. Some tribunals have taken into account exceptional circumstances that might affect the content of the investor's legitimate expectations as to treatment.[17] However the general trend has been not to take into account the developing host country's level of development (see further Gallus, 2005). On the other hand, in *American Manufacturing and Trading, Inc. v. Zaire* the issue was considered relevant to the

[15] *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, 'Dissenting Opinion of Judge Mohamed Shahabuddeen', Annulment Decision, para. 22.

[16] Ibid: paras 43–7.

[17] See for example *CMS Gas Transmission Company v. The Argentine Republic*, where the tribunal held that account should be taken of the effect of abnormal conditions, prompted by the economic crisis in Argentina, in assessing the scope of protection afforded to the investor by an investment treaty (para. 244).

determination of compensation, where the claimant was found to have been aware of local conditions (para. 7.14–7.15).

Discussion of 'development' in arbitral awards is therefore very limited. By reason of the narrow economic scope of the treaties that tribunals have to apply, they inevitably focus only on economic development. This is also the case in the academic literature that considers how far IIAs contribute to development. A number of studies have been made as to the correlation between the conclusion of, in particular, BITs and increases in foreign direct investment (FDI) flows.[18] Historically the aim of BITs has been to strengthen the protection of foreign investors, especially in developing and transitional country markets, in return for increased inward foreign investment flows. However the empirical evidence is mixed. Some studies find a positive correlation between the conclusion of BITs and increases in investment flows (notably Neymeyer and Spess, 2005, 2009: 225; Salacuse and Sullivan, 2005, 2009: 109); others do not (see in particular UNCTAD, 2009*e*, originally 1998*a*: ch. IV; Hallward-Driemeier, 2009, originally 2003; Rose-Ackerman, 2009). This is perhaps to be expected as it is difficult to consider one part of a wider regulatory framework in isolation. Equally it may be hard to exclude other factors that may affect the size and origin of inward FDI flows. The domestic political, economic and institutional environment may be as important in determining inward investment flows as are individual BITs (Rose-Ackerman, 2009: 321), as might the economic sector in which investment is made (Aisbett, 2009: 423).

Thus, there is still no incontrovertible evidence that BITs will deliver increased FDI flows. Yet developing host countries continue to sign up to them even though there are clear sovereignty and welfare costs involved, given the responsibilities host countries assume concerning the protection of investor rights and given the increased recent risk of investor–state arbitration resulting in an award of damages (see further Sauvant and Sachs, 2009: xli; Guzman, 2009). The true reasons for concluding BITs are many and varied, ranging from the 'state visit' treaty – where something concrete has to come out of such a visit and the signing of a BIT may be such a thing – to an indication that the host country is willing to provide a good regulatory environment for FDI. However, the enhancement of economic development through increased FDI flows may not be the most important of these reasons nor the most likely consequence of the signing of a BIT.

So far the discussion has emphasised the economic aspects of development, largely because IIAs tend to define development in that light – in so

[18] All of the major recent empirical studies on the effects of BITs on investment flows are brought together in Sauvant and Sachs (eds) (2009: Part II).

far as they offer any contribution to this concept. However this chapter argues that a wider, socially rooted conception of development is needed to understand the true impact of IIAs on the communities to which these agreements relate. That this approach should be taken can be justified by reference to contemporary thinking on the meaning of 'development'.

According to Amartya Sen (1999: 35) a distinction can be made between two attitudes to development:

> One view sees development as a 'fierce' process, with much 'blood sweat and tears' – a world in which wisdom demands toughness. In particular, it demands calculated neglect of various concerns that are seen as 'soft-headed' [including] social safety nets that protect the very poor, providing social services for the population at large, departing from rugged institutional guidelines in response to identified hardship and favouring – 'much too early' – political and civil rights and the 'luxury' of democracy . . . This hard-knocks attitude contrasts with an alternative outlook that sees development as essentially a 'friendly' process. Depending on the particular version of this attitude, the congeniality of the process is seen as exemplified by such things as mutually beneficial exchanges (of which Adam Smith spoke eloquently), or by the working of social safety nets, or of political liberties, or of social development – or some combination or other of these supportive activities.

Sen is persuaded by the latter approach, from which he builds his thesis that development can only occur as a process of expanding 'the real freedoms that people enjoy' (ibid: 36). Such freedoms include the provision of elementary capabilities for life but also run to political freedoms, access to economic facilities, social opportunities such as access to education or health care, transparency guarantees allowing for freedom to deal with one another in conditions of disclosure and lucidity, and protective security based on essential welfare support against abject misery (ibid: 38–40). Not only Sen but others, including Joseph Stiglitz (1998*b*, 2002*a*: ch. 9) and Jeffrey Sachs (2001), see development as a holistic process including not only economic growth but also societal transformation along the lines suggested by Sen.

What are the implications of this approach to the further evolution of international investment law? Two points may be made. First, international investment law exists within the wider framework of public international law and should be informed by its general principles (see further McLachlan, 2008). One such principle is the duty of international co-operation embodied in Article 56 of the UN Charter.[19] This duty is given substance by Article 55 of the Charter (UN, 1945) which states:

[19] By Article 56: 'All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55' (UN, 1945).

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
> a. higher standards of living, full employment, and conditions of economic and social progress and development;
> b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

The duty of co-operation between UN members is rooted in a wider conception of development such as that advocated by Sen. That duty can extend to relations based on IIAs in that they are treaties based in international law and should reflect its policies, though, as shown above, this is not made expressly clear in many existing IIAs. Given the list of issues covered by the duty in Article 55, it is clear that home and host countries could and, indeed, should co-operate to bring about an investment process and regulatory regime that seeks, as far as possible, to embody these wider social goals. This may require the development of certain new duties of co-operation on the part of home countries, in addition to the existing duties of host countries to protect investors and their investments, in new IIAs.

Second, the wider conception of development may require certain obligations from private investors. In this regard it should be noted that the UN Secretary-General has appointed a Special Representative on Business and Human Rights, Professor John Ruggie. In his work Ruggie has made clear that corporations have duties to respect human rights in the course of their operations and states have duties of protection (for the most recent restatement of this position see Ruggie, 2009). In his 2008 Report to the Human Rights Council, for example, the UN Special Representative made clear that the failure of companies to meet their responsibility to respect human rights

> can subject companies to the courts of public opinion – comprising employees, communities, consumers, civil society, as well as investors – and occasionally to charges in actual courts. Whereas governments define the scope of legal compliance, the broader scope of the responsibility to respect is defined by social expectations – as part of what is sometimes called a company's social licence to operate. (Ruggie, 2008: para. 54)

Ruggie clearly sees a social context for the operations of corporate investors in host countries. This echoes numerous 'soft law' instruments that also extend social responsibilities to corporations, including responsibilities based on the concept of sustainable development. Thus the OECD

Guidelines for Multinational Enterprises state as one of their General Policies:

> Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard, enterprises should:
> 1. Contribute to economic, social and environmental progress with a view to achieving sustainable development. (OECD, 2000: 14)

Such statements could of course be disregarded as irrelevant to the interpretation of IIAs, and, on strict cannons of interpretation, they most probably are unless the treaty in question actually refers to corporate obligations. Thus in relation to investors, whether corporate or natural persons, new IIAs may have to include language of this kind so as to make certain that the growing body of standards of international corporate social responsibility is not ignored in the context of IIAs.

The question of home country duties and investor duties under new generation IIAs is an issue that naturally emerges from current discourses on international investment law. These are not confined to the discourse of practitioners of investment arbitration or of academic commentators on that process. The discourse of international investment law has always been much wider than that. Indeed it is to be hoped that the current fashion for litigated solutions to investor–state disputes is no more than that and that a narrow focus on investor protection alone does not dominate the field. As noted in the Final Report of the International Law Association (ILA) Committee on the International Law on Foreign Investment:

> The rise in investment arbitration in the opening decade of the 21st century has pushed international investment law towards a more litigious character. While this may be a welcome and interesting development for international lawyers, it has to be asked whether this field should take on such a character. Given that the main aim of the parties to foreign investment contracts is to offer economic development for the host country in return for a reasonable rate of profit for the investor, disputes should not form the '*leitmotif*' of this subject. Rather co-operation and long term collaboration should play this role. Indeed co-operation and collaboration have been the principal characteristics of the field for many years and it is to be hoped that it will continue to operate in such a fashion. (International Law Association Committee on the International Law on Foreign Investment, 2008: 799)

Indeed the ILA Committee's Report also notes that a balancing of rights and obligations between the main actors could be required, given that the aim of international investment law is 'to allow host countries to attract and to benefit from foreign investment and for investors to enjoy

a transparent, secure and predictable investment environment' (ibid: 798). The Committee describes international investment law as:

> a field that combines both commercial and public law concerns and requires a balancing of rights and obligations to ensure that these complementary aims are achieved. This may require the highlighting of the social and economic consequences of investment activity upon host countries, as through increased awareness of the need to ensure that corporate social responsibility standards are respected by investors, through the possible introduction of new investor and home country obligations in new generations of agreements, and through the clarification of the scope of the host country's right to regulate alongside the existing rights of investors for protection of their assets. Equally a more development oriented approach may be needed. (ibid: 798–9)

How such a rebalancing should work out in new generation IIAs is the subject of the next section of this chapter.

3. RECALIBRATING IIAs[20]

The recalibration of IIAs to achieve greater balance between the rights and obligations of the main stakeholders in the investment process will be hard to operationalise given the general absence, at present, of a political will to change such agreements substantially. Apart from certain civil society groups and some academics few are actively engaged in such a debate.[21] Of these one body deserves special mention. The Canadian based IISD has put forward a draft IIA which seeks to redress the balance of rights and responsibilities between the host country and the investor to ensure that the latter also carries a measure of responsibilities (see Mann et al., 2006; for the Model Agreement see Mann et al., 2005. See further, Mann et al., 2006: 84; UNCTAD, 2003*a*: ch. VI). This model agreement will be referred to below in more detail.

A further point to note by way of introduction to this section is that not only host countries, investors and home countries should be considered stakeholders in the investment process but also the local communities in which investment takes place. So much is clear from the wider approach to development outlined above. Accordingly any recalibration of rights and obligations for investors and home countries will need to be undertaken

[20] This section of the chapter draws on Muchlinski (2007*a*, 2007*c*).

[21] For example the views of a group of academics at Columbia Law School calling for President Obama to initiate a review of IIAs along these lines (see Vis-Dunbar, 2009*b*).

in this context. Under international law the task of safeguarding local community interests will fall on the host country. Thus its approach to the issue of home country and investor obligations will be important.

Before the specific issues of investor and home country obligations are discussed, given the abovementioned international duty for UN members to co-operate in the pursuit of certain key social and developmental goals, it is interesting to note how far the UN itself has come in advocating reform of IIAs.

I. The Role of the UN

The principal body responsible for discussion of IIAs is UNCTAD.[22] In recent years it has evolved the concept of 'flexibility for development' as a means of dealing with the need to balance the different interests of stakeholders in the investment treaty universe. The risk that IIA provisions will restrict national policy space and the sovereign right to regulate has caused UNCTAD to consider how this possibility could be mitigated (see UNCTAD, 2003*a*: ch. V). This is especially the case for developing countries that may have greater difficulties than developed countries in opening up their economies to the full force of global competition.

According to UNCTAD, in order to reap the full benefits from FDI, the developing host country may need to supplement an open approach to inward investment with further policies. In particular, it may need positive measures to increase the contribution of foreign affiliates to the host country through mandatory measures such as performance requirements and through the encouragement of desired action by affiliates through, for example, incentives to transfer technology and to create local research and development (R&D) capacity.

Such policy measures entail a degree of regulation. This may involve some measure of intervention in the freedom of action of the foreign investor and controls over the manner in which the investment can evolve. Such regulatory instruments could infringe the investor protection provisions of IIAs. To avoid such an outcome in cases of legitimate, non-discriminatory regulation, IIA provisions may need to offer a degree of flexibility for development (Muchlinski, 2007*b*: 98; see further UNCTAD, 2000*b*, 2004*b*: vol. 1, ch. 2). Such flexibility can be introduced by way of certain changes in approach to the drafting of IIAs, including development oriented preambular statements, a degree of special and differential

[22] See generally the UNCTAD IIA programme, http://unctad.org/Templates/StartPage.asp?intItemID=2310&lang=1 (accessed 9 September 2009).

treatment for developing country parties to the agreement, substantive provisions drafted in a manner that allows for the recognition of special considerations for developing countries, including the use of exception clauses and variations in the normative force of certain obligations, and by the introduction of mechanisms through which development concerns can be articulated, such as intergovernmental commissions and interpretative mechanisms (see further UNCTAD, 2003*a*: ch. V, 2000*b*: Part Two).

UNCTAD's recommendations on flexibility in IIAs pertain to the drafting of the IIA but they do not mention the balance of rights and obligations between the parties. This is not to say that UNCTAD has ignored these issues. They are discussed in certain other research papers and in the *World Investment Report 2003* (see in particular: UNCTAD, 2001*c*, also found in 2003*a*: ch. VI, and 2004*b*: vol. III, ch.22; 2001*a*: 55–61, also found in 2004*b*: vol. II, 148–50). However, this policy option is presented as one among many options. UNCTAD does not commit itself unequivocally to the advocacy of this position. While suggesting that future IIAs should contain commitments for home country measures, based on existing national experience of unilateral initiatives (UNCTAD, 2003*a*: 163), on the question of including measures addressed to corporate actors, UNCTAD says no more than that 'good corporate citizenship – especially when it combines the interests of host countries and firms – deserves a careful examination in future IIAs' (ibid: 167). Thus UN policy in this area still needs further development. The establishment of a regular UNCTAD annual expert meeting to discuss developments in IIA practice is a welcome development in this regard and it is hoped that it will become a significant voice in the recalibration process.[23]

[23] See UNCTAD (2009*a*: 3): *Multi-year Expert Meeting on Investment for Development . . .*

8. *Reconfirms* UNCTAD's role as the key focal point in the United Nations system for dealing with matters related to international investment agreements (IIAs), and as the forum to advance understanding of issues related to IIAs and their development dimension;

9. *Endorses* the suggestion that experts in the field of IIAs should meet annually for the purposes of collective learning and collective advisory services, involving all stakeholders in developing countries, with a view towards facilitating increased exchanges of national experiences and sharing best practices;
10. *Welcomes* the utilization of UNCTAD's existing online IIA network as a platform for continued sharing of experiences and views on key and emerging issues;

11. *Requests* that UNCTAD, within its mandate, continue to analyse trends in IIAs and international investment law, and provide research and policy analysis on key and emerging issues, development implications and impact of technical assistance and capacity-building in this area, in accordance with paragraphs 149 and 151 of the Accra Accord.

II. Investor Obligations

A good starting point for a list of applicable obligations comes from the OECD Guidelines for Multinational Enterprises section on 'General Policies', which offers what appears as an emerging international consensus on the social obligations of multinational enterprises (MNEs):

> Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard, enterprises should:
> 1. Contribute to economic, social and environmental progress with a view to achieving sustainable development.
> 2. Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.
> 3. Encourage local capacity building through close co-operation with the local community, including business interests, as well as developing the enterprise's activities in domestic and foreign markets, consistent with the need for sound commercial practice.
> 4. Encourage human capital formation, in particular by creating employment opportunities and facilitating training opportunities for employees.
> 5. Refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labour, taxation, financial incentives, or other issues.
> 6. Support and uphold good corporate governance principles and develop and apply good corporate governance practices.
> 7. Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.
> 8. Promote employee awareness of, and compliance with, company policies through appropriate dissemination of these policies, including through training programmes.
> 9. Refrain from discriminatory or disciplinary action against employees who make bona fide reports to management or, as appropriate, to the competent authorities, on practices that contravene the law, the Guidelines or the enterprise's policies.
> 10. Encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines.
> 11. Abstain from any improper involvement in local political activities. (OECD, 2000)

As may be apparent from this wide-ranging list of issues, the precise classification of international corporate social responsibility (ICSR) standards is difficult as, potentially, the phrase could cover all aspects of corporate

regulation. By contrast, the UN Global Compact contains a more specific set of standards. The Ten Principles on which the Global Compact is founded concern the areas of human rights, labour, the environment and anti-corruption. These are said to enjoy universal consensus and are derived from a number of significant international instruments.[24] From the above, it is clear that social responsibility may take both an economic and a social and ethical dimension in that MNEs are expected to conduct their economic affairs in good faith and in accordance with proper standards of economic activity, while also observing fundamental principles of good social and ethical conduct (for a fuller discussion, see Muchlinski, 2008).

If extensive provisions were to be included on all of the issues that could possibly come within the ICSR rubric, multilateral, regional or bilateral investment agreements would probably be impossible to adopt, let alone apply, given the extensive subject matter. There would also be the problem of institutional overlap, given that many of these matters are already being dealt with by specialised intergovernmental organisations or other specialist bodies. Thus the drafters of IIAs will have to think very carefully as to how corporate responsibility provisions should appear.

Given the abovementioned problems, it is likely that corporate responsibility issues will be dealt with by means that do not seek to offer detailed provisions but, rather, provide for overall commitments to certain standards. This may be achieved in a number of ways. First a general commitment on the part of the signatory states to further the observance by corporate investors of corporate responsibility standards could be included in the preamble and/or in a specific substantive provision. Equally, where an issue is not yet fully developed, it can be expected that hortatory, best efforts provisions may be used. For example the European Free Trade Area–Singapore Agreement of 2002 includes a preambular paragraph, 'REAFFIRMING their commitment to the principles set out in the United Nations Charter and the Universal Declaration of Human Rights'. A further example of the inclusion of a commitment to respect for human rights and other social issues can be found in Article 7.2.d of the revised COMESA Agreement on a Common Investment Area (COMESA, 2007). This enables the COMESA Committee for the Common Investment Area to consider and make:

> recommendations to the [COMESA] Council on any policy issues that need to be made to enhance the objectives of this Agreement. For example the development of common minimum standards relating to investment in areas such as:
>
> (i) environmental impact and social impact assessments
> (ii) labour standards
> (iii) respect for human rights
> (iv) conduct in conflict zones
> (v) corruption
> (vi) subsidies.

This is the first time that any investment agreement has expressly included human rights issues related to investment as a possible future working item under the agreement (see Mann, 2008: 10, from which the examples are taken).

Second, international instruments and agreements that already contain a more extensive treatment of specific social responsibility issues could be incorporated as part of the new investment rules, in the manner that existing international minimum standards of treatment for intellectual property contained in the Paris and Berne Conventions were incorporated by reference into the TRIPS Agreement (see GATT, 1994*b*: Art. 2). A third possibility would be to follow the practice under NAFTA and use 'side-agreements' on specific social issues or to follow the precedent of the negotiations over the ill-fated MAI, where some delegations favoured appending the OECD Guidelines on Multinational Enterprises to the text of that agreement in a non-binding appendix (see Muchlinski, 2007*b*: 667).

Whatever approach is taken, one matter remains of central importance. So long as investor–state tribunals have their subject-matter jurisdiction controlled by the contents of IIAs, then such agreements will need to have some form of reference to and/or inclusion of standards found in other international agreements and instruments so as to make clear their relevance and applicability to the interpretation and development of the IIA in question. The current situation, where the vast majority of IIAs remain silent on home country and corporate responsibilities, leaves open to doubt whether an international tribunal is required to take account of wider international obligations contained in other instruments concerning these actors. While there are some examples of investment tribunals referring to issues covered by other international agreements, including the issue of whether human rights standards can govern the outcome of an investment dispute,[25] a clear indication in an IIA that other instruments apply is desirable in the interests of clarity and procedural certainty.

[24] See further http://www.unglobalcompact.org/ (accessed 9 September 2009).

[25] See further Mann, 2008: 26–9 citing *Maffezini v. Spain*, para. 67 (EC environmental impact assessment); *Parkerings-Compagniet AS v. Lithuania*, section 8.3.1, and *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (UNESCO World Cultural Heritage designation); *Aguas Argentinas S.A.*,

It may be added that, as an international adjudicating body, an international investment tribunal is under a duty to apply international law, and that failure to do so may amount to an error of law capable of rendering the award ineffective, but such a conclusion may involve much dispute and further litigation. It would appear much better simply to develop a practice of reference by inclusion to relevant agreements outlining home country and corporate responsibilities.

A possible approach to the inclusion of home country and investor responsibilities into IIAs is given by the IISD Model International Agreement on Investment for Sustainable Development (Mann et al., 2005). This agreement commits the parties, in the Preamble, to the adoption of a balance of rights and obligations as between the home and host countries and the investor. Accordingly it contains separate Parts dealing with the rights and obligations of each actor. In addition, existing investor rights are modified to take into account the rights of home and host states to regulate their activities.

Part 3 contains key provisions concerning investor obligations. Article 11 of Part 3 begins with a general obligation of subjection to the laws and regulations of the host state; compliance with any formalities required by host state regulations as a condition of establishment; and provision of information required by the host state for purposes of decision-making. A 'best efforts' commitment to contribute to the host's development objectives is also included. Articles 12 to 16 then detail more specific investor obligations. These include a pre-investment environmental and social impact assessment based on the more demanding of the host or home country law; a prohibition on participation in corrupt practices; a commitment to upholding environmental management systems in accordance with the ISO 14001 standard, human rights, and ILO labour standards; and a duty to comply with nationally and internationally accepted standards of corporate governance and corporate social responsibility. These provisions can be seen as relatively uncontroversial. They restate in effect what investors should already observe in terms of existing legal standards in national law and in international 'soft law' instruments such as the UN Global Compact.

By contrast Article 17 adds a significant new obligation. It states:

> Investors shall be subject to civil actions for liability in the judicial process of the home state for the acts or decisions made in relation to the investment where

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic, para. 19 (on whether human rights standards can be invoked in an investment dispute); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, para. 52. See further UNCTAD (2009*c*).

> such acts or decisions lead to significant damage, personal injuries or loss of life in the host state (Mann et al., 2005).

This provision seeks to institutionalise, at the level of an IIA obligation, the process of foreign direct liability litigation that has emerged during the last twenty years or so (on the meaning of foreign direct liability see, for example: Ward, 2001). Such litigation is brought by claimants located in the host country of a subsidiary against the parent company in home country courts where the subsidiary is alleged to have caused harm to victims of wrongful corporate acts, for which the parent company should be held responsible by reason of its control over the subsidiary.

The major problems arising out of such litigation have evolved out of the corporate separation between the parent and its subsidiaries. First, this separation can create jurisdictional barriers to the litigation. This is so because the parent is formally absent from the host country jurisdiction, even though it may operate there in fact through its subsidiary. Second, corporate separation can allow for the avoidance of liability for the acts of the subsidiary by reason that the acts of the subsidiary are not, in legal terms, the acts of the parent.

In an apparent effort to counter such problems, the IISD Model Agreement contains, in Part 6 on Home State Rights and Obligations, a duty on the part of home states to

> ensure that their legal systems and rules allow for, or do not prevent or unduly restrict, the bringing of court actions on their merits before domestic courts relating to the civil liability of investors for damages resulting from alleged acts or decisions made by investors in relation to their investments in the territory of other Parties.[26]

This provision would appear to require reform in the national laws of the Parties. In particular, the effects of the legal separation of companies in a group would need to be altered so as to allow for jurisdiction and for a finding of liability based on control. Whether states would be willing to do this is very much open to doubt. Indeed the trend in more recent years has been to narrow down the cases in which the corporate veil may be lifted and to restrict such cases to instances where the separation between the corporation and its owners is being used as a vehicle for fraud. Thus there is little

[26] Mann et al. (2005: Art. 3.1). It goes on to specify the doctrine of *forum non conveniens* – whereby the court may decline jurisdiction over a case because it feels that another jurisdiction offers a more appropriate forum – in a footnote to the relevant provision as an example of a jurisdictional rule that can impede such litigation. On this, see further Muchlinski (2007*b*: 153–60).

sympathy at the level of national law for a more liberal doctrine of corporate responsibility based on control (Muchlinski, 2007*b*: 308–13). By contrast the UN Special Representative on Business and Human Rights advocates the strengthening of national remedies for breaches of the corporate duty to respect human rights and even considers the possibility of establishing some sort of international review mechanism (Ruggie, 2009: paras 106–14).

Finally, Part 3 of the IISD Model Agreement ends with a provision on dispute settlement (Mann et al., 2005: Art. 18). Unlike existing provisions which give to the investor an unconditional right to bring a claim based on an alleged breach of an IIA protection standard, the IISD Model introduces certain requirements based on investor compliance with key standards. Thus, breach of the anti-corruption obligation in Article 13 bars any dispute settlement rights for the investor. A failure to undertake the required pre-investment environmental and social impact assessment under Article 12 will not bar a claim but may mitigate or off set the merits of the claim of the amount of damages payable to the investor. The same is true where the investor is shown to have breached the main post-establishment obligations listed in Article 14 and the corporate governance obligations in Article 15. A further change from existing IIA dispute settlement provisions is an express right of action granted to the host or home state. This can arise as a result of a breach of the anti-corruption provision or for persistent failure on the part of the investor to observe its obligations under Articles 14 or 15. Furthermore, the host state may bring a counterclaim before any tribunal established pursuant to the Agreement.[27] Finally, the right to bring an action against the investor, for breach of Part 3 obligations, before the courts of the home or host state on the part of one or other state is included.

A further element in the IISD Model that is of significance to the recalibration of the balance of rights and obligations under an IIA concerns the host country's 'right to regulate'. According to one of the principal authors of the IISD Model Agreement, current formulations of such a right in an IIA tend to subject it to the requirements of investor protection under the IIA by use of qualifying language such as 'consistent with

[27] The COMESA Investment Area Agreement (2007) includes a specific provision allowing counterclaims against investors who initiate the investor–state process in Article 28.9: 'A Member State against whom a claim is brought by a COMESA investor under this Article may assert as a defence, counterclaim, right of set off or other similar claim, that the COMESA investor bringing the claim has not fulfilled its obligations under this Agreement, including the obligations to comply with all applicable domestic measures or that it has not taken all reasonable steps to mitigate possible damages'.

this Agreement'.[28] As a result the provision tends to be 'legally useless in terms of reinforcing the right to regulate' (Mann, 2008: 19).

To remedy this limitation the IISD Model Agreement formulates the right to regulate on the basis of a right of the host state to pursue its own development objectives and priorities, subject only to customary international law and general principles of international law. This right may be protected by way of express exceptions to the obligations of the Model Agreement, but where such exceptions are not taken, it is to be 'understood as embodied within a balance of the rights and obligations of investors and investments and host states, as set out in this agreement, and consistent with other norms of customary international law' (Mann et al., 2005: Art. 25(C)). So as to protect exercises of regulatory discretion under other treaties, the IISD Model adds that 'bona fide, non-discriminatory measures taken by a Party to comply with its international obligations under other treaties shall not constitute a breach of this Agreement' (ibid: Art. 25(D)). Finally, host states may, through their applicable constitutional processes, fully incorporate the Model Agreement into their own domestic law so as to make its provisions enforceable before domestic courts or other appropriate processes (ibid: Art. 25(E)).

This provision is aimed at changing the nature of how the investor rights contained in an IIA impact upon the right to regulate. It makes those rights subject to the legitimate exercise of the right to regulate, rather than the other way round. However, the actual wording of the IISD provision leaves much room for speculation. In particular the reference to customary international law and general principles of international law, as an aspect of the process of interpreting the right to regulate, can leave important issues in the air. For example, how is the international minimum standard of treatment of aliens and their property to fit into this provision? Although it is an aspect of customary international law, it is also a highly contentious issue which not all states have accepted. Indeed IIAs exist in part because this standard is not universally accepted as customary law.

Equally, general principles of international law may favour the protection of private property and contractual obligations as well as procedural fairness. In other words they may reinforce the investor's rights and not subject them to regulatory control. Thus the reference to international law, while appearing to balance rights and obligations between state and

[28] See Mann (2008: 19), citing Article 43 of the EFTA–Singapore FTA 2002 entitled 'Domestic Regulation' which states: 'Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure consistent with this Chapter that is in the public interest, such as measures to meet health, safety or environmental concerns' (see also Mann et al., 2006: 38).

non-state actors, begs the question 'which version of international law?' or 'whose international law?' In practice it may be invoked precisely to do what the IISD draft seeks to avoid, namely, to subject the state's right to regulate to investor rights. The main way around this problem would be to give the concept of sustainable development, which appears to qualify the reference to international law in the way that the IISD provision is drafted, a core meaning that seeks to reinforce the right to regulate over investor rights.[29] In addition there is a catch-all reference to 'other social and economic policy objectives' which is very vague and open ended. It could mean that any regulatory policy at all can trump investor rights, thereby making the investor protection standards in the Model Agreement legally useless as they will always be subject to this overriding discretion.

It appears that a provision on the right to regulate may have to take a more specific approach than that offered by the IISD. In this regard, recent US and Canadian Model BITs explain that non-discriminatory regulatory actions that are designed and applied to effectuate legitimate public welfare objectives, such as public health, safety and the environment, do not constitute expropriations except in rare circumstances.[30] The Canadian model adds that such rare circumstances will exist where 'a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith . . .'(Canada Model BIT, 2004: Annex B 13(1)). Both Models add that, in determining whether a regulatory act has an effect equivalent to expropriation, the economic impact of the act (though the mere loss of economic value in itself does not show that the act is an indirect expropriation), the extent of interference with legitimate investment backed expectations and the character of the act are all of significance. In addition, the most recent US BITs contain provisions asserting that it is inappropriate for host countries to seek investment through the lowering of environmental or labour standards, while the Canadian counterpart applies to health, safety and the environment.[31]

[29] Article 25(b) of the IISD Model Agreement states: 'In accordance with customary international law and other general principles of international law, host states have the right to take regulatory or other measures to ensure that development in their territory is consistent with the goals and principles of sustainable development, and with other social and economic policy objectives' (Mann et al., 2005).

[30] These paragraphs draw on Muchlinski (2007*b*: 693). See The Republic of Uruguay and the United States of America BIT (2005: Annex B); Canada Model BIT (2004: Annex B 13(1)).

[31] The Republic of Uruguay and the United States of America BIT (2005: Art. 12, 13); Canada Model BIT (2004: Art. 11). The areas covered are: protection of human animal and plant life and health, compliance with laws not inconsistent with the agreement, the conservation of living or non-living exhaustible natural resources, prudential financial regulation, monetary credit and exchange rate policies, essential security interests, the upholding of UN obligations and international peace and security interests, confidentiality laws, cultural industries and measures taken in conformity with WTO decisions.

The Canadian model is also notable for the inclusion of a general exceptions clause protecting the rights of the Contracting Parties to regulate in the fields mentioned by its terms. The clause follows the general pattern of Article XX GATT 1994 by listing areas in which regulation is consistent with the provisions of the BIT and adds a 'chapeau' requiring such regulation not to be arbitrary, discriminatory or a disguised restriction on trade and investment (Canada Model BIT, 2004: Art. 10). By contrast the US model reserves only measures aimed at the maintenance or restoration of international peace or security, or the protection of essential security interests (The Republic of Uruguay and the United States of America BIT, 2005: Art. 18).

These provisions are by no means perfect answers to the balancing issue and they do rely heavily on a case-by-case analysis. That said, the introduction of a proportionality test would appear to be the only effective way of allowing balancing to occur in practice in that it avoids both the bias in favour of investor protection typical of first generation IIAs and the responsive bias towards the extensive protection of regulatory discretion exemplified by the IISD Model Agreement formulation.

III. Extending IIAs to Home Country Responsibilities

In its *World Investment Report 2003*, UNCTAD (2003*a*: 163) examined what types of home country responsibilities could be developed in relation to international investment. It asserted that dealing with home country measures 'is a new but potentially important aspect of how to make the evolving structure of IIAs more development friendly' and that this would be consistent with the call in the Doha Declaration for an investment framework that reflected in a balanced manner the interests of home and host countries. It concludes that this 'suggests that future IIAs should contain commitments for home country measures, building on the experience to date' (ibid). The experience referred to centres on unilateral efforts to assist in the promotion of development oriented investment by MNEs located in the home country. This can be achieved through the liberalisation of outflows, the provision of information on investment opportunities in host countries, encouraging technology transfers, providing incentives to outward investors and mitigating risk through investment insurance

schemes (ibid: 155–6). In addition the courts of the home country could be used to bring corporate conduct to account, as already seen above, and home country laws and regulations could be used to control corrupt practices overseas undertaken by home based investors.

These policy prescriptions find expression in the IISD Model Agreement. Part 6 covers all of the above. Article 29 deals with assistance and facilitation of foreign investment to developing and least developed countries. It states:

> (A) Home states with the capacity to do so should assist developing and least-developed states in the promotion and facilitation of foreign investment into such states, in particular by their own investors. Such assistance shall be consistent with the development goals and priorities of the countries in question. Such assistance may include, *inter alia*:
> i) capacity building with respect to host state agencies and programs on investment promotion and facilitation;
> ii) insurance programs based on commercial principles;
> iii) direct financial assistance in support of the investment or of feasibility studies prior to the investment being established;
> iv) technical or financial support for environmental and social impact assessments of a potential investment;
> v) technology transfer; and
> vi) periodic trade missions, support for joint business councils and other cooperative efforts to promote sustainable investments.
>
> (B) Home states shall inform host states of the form and extent of available assistance as appropriate for the type and size of different investments. (Mann et al., 2005)

The language is not mandatory in that home states 'should' assist developing and least-developed states. This reflects the fact that 'it is difficult to compel assistance between states' (Mann et al., 2006: 42). Thus the IISD Model Agreement takes a programmatic approach based on institution building that seeks to further inter-state co-operation. On the other hand the assistance given by the home state shall be consistent with the development goals and priorities of the host states. Thus the latter are to set the policy agenda, not the home states – which may be said to be the case with first generation IIAs, reflecting as they do the home state's interest in securing the best possible protection for investors and investments coming out of the home state.

The IISD Model Agreement then deals with the implication of the duty to provide information on the part of the home state. Thus Article 30 requires home states to give information to the host state to enable it to perform its obligations under the Agreement and to give details of home state standards that may apply to the investment in question. The IISD Model Agreement adds two further obligations for home countries. First,

Article 31 reinforces the need of the home state to make possible civil litigation before its own courts against investors. This Article is the companion article to Article 17 on liability of investors. It seeks to remove any barriers that preclude a hearing of such a case on the merits, as discussed above. In some states, this may require action by different governments, depending on the constitutional rules in place (Mann et al., 2006: 43). Second, Article 32 covers the obligation to render acts of overseas corruption as criminal offences under home country law.

The IISD Model does not address all possible home country measures that could be included in an IIA. Certain further measures could be introduced. According to UNCTAD, these may include provisions to improve the co-ordinated delivery of financial assistance for FDI promotion while minimising inefficient restrictions such as 'tied aid' limitations that are often found in unilateral or bilateral assistance schemes. Here the emphasis should be on recipient country enterprise needs not on reciprocal benefits for donor and recipient countries alike (UNCTAD, 2001*a*: 58, 2004*b*: vol. III, 23). These provisions could also include qualifications upon the MFN principle so as to ensure preferential treatment of certain recipient countries. A second set of provisions might involve tax preferences for developing countries as a means of stimulating FDI, and controls over transfer pricing practices which could divert taxable income from developing host countries (UNCTAD, 2001*a*: 59, 2004*b*: vol. III, 23). A third type of provision goes a step beyond the co-operative IISD Model's position and makes a developing country's obligations under the IIA contingent upon the actual provision of technical assistance that is sufficient for the latter to comply with those obligations (UNCTAD, 2001*a*: 60, 2004*b*: vol. III, 23–4). Further provisions could be included to promote technology transfer, whether in general or for specific projects, and preferential trade related investment measures such as rules of origin provisions, anti-dumping protection and product certification regulations favouring imports of goods produced in developing host countries by foreign investors (UNCTAD, 2001*a*: 61–2, 2004*b*: vol. III, 24).

4. CONCLUDING REMARKS

This chapter has shown that a holistic development oriented approach to international investment law may be achievable by way of a rebalancing of rights and obligations in IIAs so as to include investor and home country duties. In particular, it has shown that an extension of obligations to these two groups of actors can be justified philosophically on the basis of a wide-ranging conception of development, which accepts not only economic

growth through increased investment but also the creation of sustainable development based on community freedoms that can be furthered by way of a greater balance of rights and obligations between host and home countries as well as investors.

It has also shown that it is possible to draft provisions that seek to capture the essence of such a rebalancing. In this the IISD Model Agreement offers a useful, though by no means uncontroversial, step forward. However, despite the growth of unease with IIAs among a significant minority of countries, for the present this vision is likely not to be fulfilled. On the other hand, as the issue of rebalancing continues to be talked about, this in itself represents a major change in the continuing debate. The UNCTAD annual expert group meeting is one forum where this debate can take on a more robust content. It may well bear fruit in the future with a new generation of revised IIAs that contain provisions of the kind outlined in this chapter.

10. Human rights and transnational corporations: establishing meaningful international obligations

James Harrison*

1. INTRODUCTION

This chapter considers the value of international human rights norms and standards as mechanisms for effectively holding transnational corporations (TNCs)[1] accountable for their broader social impacts, particularly in the context of developing countries. It argues that there are a number of existing human rights initiatives directed at the human rights performance of TNCs. But these suffer from significant accountability gaps and coverage problems which throw into question whether international human rights obligations are well placed to act as a system for enhancing TNC conduct across the full range of their diverse social impacts. It therefore focuses upon two specific methodological frameworks which are addressed to all TNCs internationally to assess how they might contribute to the establishment of more meaningful obligations: the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights ('the UN Draft Norms') produced by the UN Sub-Commission on the Promotion and Protection of Human Rights; and 'Protect, Respect and Remedy: a Framework for Business and Human Rights' produced by the Special Representative of the Secretary-General on the issue of human rights and transnational

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[1] This article will use the term 'transnational corporation' (TNC) to describe a company with operations in more than one country. No differentiation is intended between this term and others such as 'transnational enterprise' or 'multinational corporation/enterprise'. For a more nuanced discussion of these terms, see Muchlinski (2007*a*: 5ff).