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Corporate Social Responsibility and International Investment Agreements

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International Research Project

International Trade Regulation: From Fragmentation to Coherence

Corporate Social Responsibility in International Investment Agreements (CSR & IIAs)

Jacylyn SHI

IP11 Workshop
9th May, 2006
World Trade Institute, Berne
Research Objectives

- Part of the grand project in searching for solution to the legal conundrum of regulating TNCs’ corporate social responsibility (CSR)

- The debate of CSR inclusion in international investment agreements (IIAs)

- The impact on the prospect of developing another round multilateral investment legal framework.
Research Questions

- Should CSR be incorporated in int’l investment agreements?
- What is the state of linkage between CSR and IIAs?
- What are the possible venues to incorporate CSR in IIAs?
- How will the changing landscape in world FDI outflows from developing economies impact on CSR development in future investment laws?
- What are the implications of expanded scope of CSR inclusion to a multilateral investment agreement?
Why CSR?

- pressures from NGOs and developing countries
- improved consumer awareness
- pressure from investors
- pressure from inside
- legislative changes
Proliferation of International CSR Standards and Norms

- Green Paper: Promoting a European framework for CSR
- Caux Round Table Principles for Business
- The Global Compact
- OECD guidelines for multinational enterprises
- Global Reporting Initiative
- Social Accountability 8000 (SA)
- Accountability 1000
- Ethics Compliance standard 2000
History of attempts to control activities of TNCs at international level

- ILO’s Tripartite Declaration (1997)
- The OECD Guidelines for MNEs (rev 2000)
- UNCTAD Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (1980)
1. CSR is on the agenda of int’l agenda attracting all stakeholders’ attention

2. Voluntary CSR norms are ineffective and weak, with limited impact on TNCs

3. Should agreements be voluntary or mandatory?

4. Is it the problem of choosing a right forum to deal with TNCs responsibility issues?

5. the continuing proliferation of initiatives, norms at international level leads nowhere if not linking them with Investment agreements
Rights-Obligations Balance in IIAs

Investor Obligations
Host-State Rights
IIAs
Investor Rights
Host-State Obligations
The Missing Link between BITs and CSR

- The rights under BITs are not linked to the compliance of companies to these national laws.
- BITs are free from including other international treaties signed by the contracting parties in the area of human rights;
- BITs do not contain substantive clauses to condition investor rights upon CSR
- BITs do not link investor’s rights to access to dispute settlement with investor’s obligation in CSR issues
BITs pose problems to host-State rights in regulating foreign investors

<table>
<thead>
<tr>
<th>Standard Bilateral Investment Treaty provisions</th>
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<tbody>
<tr>
<td><strong>National Treatment</strong></td>
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<td><strong>Most Favored Nation Treatment</strong></td>
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<tr>
<td><strong>Fair and Equitable Treatment</strong></td>
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<td>This protection offers minimum, or absolute protection, in contrast to other forms of protection which take as their reference point, the treatment accorded to nationals or other foreign investors</td>
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<tr>
<td><strong>Restrictions on Expropriation and Indirect Expropriation</strong></td>
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<td>Generally this includes a requirement that the host state pay full compensation for any investment</td>
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<tr>
<td><strong>Free Transfer of Funds</strong></td>
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<tr>
<td>The repatriation of investment-related funds (profits, interests, fees and other earnings) is typically guaranteed under treaties</td>
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</tbody>
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## Top Ten Respondents to Known Investor-State Disputes (till 2004)

<table>
<thead>
<tr>
<th>Ranking</th>
<th>Respondent</th>
<th>Number of Claims</th>
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<tbody>
<tr>
<td>1</td>
<td>Argentina</td>
<td>37</td>
</tr>
<tr>
<td>2</td>
<td>Mexico</td>
<td>15</td>
</tr>
<tr>
<td>3</td>
<td>US</td>
<td>10 (all under NAFTA)</td>
</tr>
<tr>
<td>4</td>
<td>Poland</td>
<td>7</td>
</tr>
<tr>
<td>5</td>
<td>Egypt</td>
<td>6</td>
</tr>
<tr>
<td>6</td>
<td>Canada</td>
<td>4</td>
</tr>
<tr>
<td>7</td>
<td>Chile</td>
<td>4</td>
</tr>
<tr>
<td>8</td>
<td>Czech Republic</td>
<td>4</td>
</tr>
<tr>
<td>9</td>
<td>Ukraine</td>
<td>4</td>
</tr>
<tr>
<td>10</td>
<td>DR Congo</td>
<td>3</td>
</tr>
</tbody>
</table>
How to include CSR in future IIAs? – Lessons Learned

From Fragmentation to Coherence

UNCTNC

MAI

Investor Obligations

Investor Rights
From Fragmentation to Coherence

Legal Problems

Home-State Rights and Obligations

Host-State Rights and Obligations

BITs
Possible scenarios of incorporating CSR in IIAs

1. Non-binding CSR standards included in the BITs
2. Reservation of regulatory powers on issues of social and environmental responsibility
3. No lowering standard clause
4. Home country obligations
5. Annex existing CSR instruments as binding provisions
6. Side Agreement
Impact of the changing landscape of world FDI outflows on the future of CSR inclusion in IIAs
Thank you very much for your attention!

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