Chapter Five

THE ROLES OF HOME AND HOST STATES

5.1 Home and Host States and Sustainable Development

The apparent gap in the relationship between TNCs and public international law, specifically with regard to regulation, raises the issue of the respective roles of home and host states.¹ The right to regulate foreign investment is implicit in the principles of territorial sovereignty of states and sovereignty over natural resources, but loses some of its original meaning in the context of globalization,² which affects the dimensions and ramifications of state sovereignty, yet does not supersede it. Host states may now have less territorial control over TNCs, but as a parallel process, home states appear to wield more extraterritorial control. Since TNCs are essentially still to be governed by national laws, there is a major role for states to play in their regulation. As the popularly elected guardians of the public interest, it is essential that states perform this function.

Home and host states are significant players in the matrix of actors in this study, and can, in principle, be instrumental intermediaries in several ways to make corporate activity consonant with international, regional and national standards and policies towards achieving sustainable development. Within the framework of sustainable development, sovereignty could also imply new obligations towards humanity and the environment. Sustainable development requires norm-setting followed by implementation and enforcement at all levels, particularly at the domestic level. Market-based reforms like deregulation, privatization and structural adjustment tend to weaken the capacity of the state to regulate foreign investment.³ On the whole, globalization, sovereignty and sustainable development all have significant, interrelated and at times conflicting impacts on foreign investment regulation vis-à-vis host and home states.


With regard to the economic, social and environmental dimensions of sustainable development, public international law in each of these spheres creates complex bodies of multilateral arrangements, including Multilateral Investment Treaties (MITS), at present confined mostly to guidelines, soft law and policy statements which impose obligations on actors including home and host states, which thereby have the potential to promote development, human rights as well as environmental protection. MITS emanate from consensus among states, and also serve to regulate, *inter alia*, the conduct of states. Bilateral Investment Treaties (BITS), which constitute a basic mechanism for the regulation of foreign direct investment, are premised primarily on the objective of promoting and protecting investments, rather than balancing interests. Hence, apart from the protection of property rights, the impact on the furtherance of economic development, human rights or environmental protection has not been a key concern, and whether there will be a change in this situation is yet to be seen. In fact, Sornarajah points out that the globalization protests against investment agreements were mainly based on the fact that they showed little concern for the international community or the host state in the protection of certain values, specifically human rights, environmental protection and economic development.

He states that those who argue along these lines would want to ensure that the regulatory function of the state in these areas of public interest be retained, that the state should have a defence to any claims made by foreign investors on the basis of the protection of its interests, and also have the means of recourse to the same dispute resolution mechanisms provided in the treaty in the event of violation of its interests. Recognition of a regulatory right of the state could undermine the aim of investment protection, requiring recognition that a state has a right to intervene in investments endangering broad social interests. Sornarajah states:

But, the issue now is whether there has been too rapid a movement in favour of the protection of the rights of the investor without heeding the interests of the host state and its environmental and other interests. A reaction will set in if there is further movement in favour of protection without assuaging the valid concerns of those who argue the case for environmental protection, human rights and economic development. Unless investment treaties come to reflect a balance between the rights of investors and the regulatory concerns of the host states, their future viability will continue to be

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4 Subedi, *ibid.*, at p. 180, states that unequal power relations between home and host states have led to most BITS being lopsided, and enabled the imposition of developed country standards on developing countries, which are desperate for foreign investment. He is thus of the opinion that it is unlikely that human rights protection will come about through this mechanism. See also M.K. Addo, *op. cit.* n. 1; M. Kamminga, S. Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law*, KLI, The Hague, 2000; N. Jagers, *Corporate Human Rights Obligations: In Search of Accountability*, Intersentia, Antwerp, 2002.

