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Raising the bar: Home country efforts to regulate foreign investment for sustainable development

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Background Note*

Attention has long been concentrated on understanding government policies that can and should be used to attract and regulate *inward* foreign direct investment (FDI) so as to capture and maximize the benefits that such capital flows can bring to its host economies. In contrast, less attention has been paid to the home country measures (HCMs) that are used to promote *outward* flows of investment or to shape those flows to achieve positive development outcomes in the host and/or home country. This is changing. There is a growing awareness that achieving sustainable development goals and combatting its associated challenges such as climate change necessitate a more comprehensive and strategic use of investment promotion strategies, mandate closure of governance gaps and require closer coordination between the public and private sectors on advancing development priorities. In these areas, HCMs are crucial.

In recognition of the important role of the home country in furthering sustainable development, this Ninth Annual Columbia International Investment Conference focuses on HCMs. In order to advance the dialogue over the two-day conference, CCSI has prepared this background note to provide examples on existing practice and recent trends on HCMs, and some issues and challenges associated with their use.

The note begins with a brief overview of the use of HCMs to promote and shape outward investment, illustrating how governments around the world have used those tools to catalyze and, in some cases, influence or govern the international activities of multinational enterprises. Second, the note focuses on HCMs that countries take – or should take – as a result of international commitments and obligations. Third, the note explores the HCMs that countries have taken on a unilateral basis to monitor or regulate outward investment, highlighting measures adopted to address issues such as corruption and bribery, or tackle challenges particular to international operations in certain sectors. Finally, the note concludes by raising issues and questions to help guide the conversation at the Conference and beyond.

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1. HCMs – an overview

1.1. Investment-promotion HCMs

Much focus on HCMs to date has been on the measures that countries have taken to *promote* outward foreign direct investment (OFDI), rather than to regulate it. Evidence on the impacts of OFDI on the home country is limited and mixed; and, within the body of research that does exist, much less is known about the impact of OFDI on low-income or middle-income countries than on high-income ones.[1] Yet some studies indicate that, like inward FDI, OFDI can help increase the competitiveness of the home-country economy by assisting home-country firms (which can include firms beneficially owned by home country nationals or foreign firms with affiliates in the home country) in accessing "markets, capital, technological know-how, managerial practices, natural resources, and so forth."[2] Presumably based on the possibility of reaping such benefits, high-income countries have for decades used a range of HCMs to promote outward investment. More recently, some emerging economies have also employed similar measures.

Investment promotion HCMs can be grouped into five broad categories: (1) information and support (e.g., providing information on the legal and business environment in the host country); (2) financial measures (e.g., grants, loans, guarantees, and insurance); (3) fiscal measures (e.g., tax exemptions and credits); (4) diplomatic support; and (5) treaties (e.g., investment treaties and double-taxation treaties).[3] Some examples are:

- the ongoing negotiation of the Trans-Pacific Partnership and the Trans-Atlantic Trade and Investment Partnership agreements that are motivated, at least in part, by the desire of home countries to protect and promote their investors' investments in foreign territories;
- diplomatic action such as efforts by the French government to intervene on behalf of BNP Paribas in connection with an investigation and legal action taken against the company by the U.S. government;[4]
- concessional loans or other supports provided by China to secure access to natural resources abroad that are relatively scarce at home;[5] and

[1] Sauvant et al., "Trends in FDI, Home Country Measures and Competitive Neutrality," in Andrea Bjorklund, ed., *Yearbook on Investment Law and Policy 2012/2013* (Oxford University Press 2014), pp. 7-10.
[2] *Id*. p. 9.
[3] This draws from the taxonomy included in Sauvant et al., *supra* n.2, but includes insurance among the financial measures as opposed to listing it as its own category, and includes diplomatic support as a separate category.
[4] Protess, B. and Jessica Silver-Greenberg, "French Officials Twist U.S. Arms in Bank Inquiry," *New York Times*, June 2, 2014.

- political risk insurance, guarantees and equity offered by government entities such as the United States' Overseas Private Investment Corporation (OPIC) that aim to promote outward investment by domestic firms into developing countries.[6]

As these examples illustrate, the home country often plays an active role in using its own advantages, including capital, resources and political strength, to support "its" firms' global activities and overseas presence. Home-country reach into international investment and host country economies through HCMs is therefore not a new phenomenon. But what is newer is a deeper inquiry by academics, governments and civil society alike into what such extraterritorial reach can and should aim to accomplish.

1.2. Using HCMs to shape or regulate OFDI

Investment-promotion HCMs often have certain eligibility criteria used to determine who may benefit from the home country support and under what circumstances. These include criteria relating to the ownership of the investor; the nationality of the investor; the size of the investor; the location of the investment; and the sector of the investment.[7] (See Box 1). These can be used to help ensure that support for OFDI advances policy aims at *home* (e.g., by ensuring that the beneficiary has substantial ties with the home country that can translate into such benefits as increased employment, tax revenues, and competitiveness).

Box 1

What is a "home" country firm covered by an HCM? Examples of ownership- and nationality-based criteria for investment-promotion and investment-regulation HCMs

In **France**, enterprises eligible for financial guarantees from the French public company, OSEO, are companies registered under French law that are directly or indirectly majority-owned by nationals or companies within the European Union.

In the **United States**, the Overseas Private Investment Corporation "provides insurance to U.S. citizens, corporations and other legal entities created under the laws of the United States and that are more than 50% beneficially owned by U.S. citizens, foreign corporations that are at least 95% owned by previously said investors, and other foreign entities that are fully U.S.-owned." (Sauvant et al., *supra* n.2, p. 37).

In **China**, enterprises that are eligible for support from Sinosure, the government's political risk insurance provider, are enterprises "'registered and having principal place of business in Mainland of China excluding those controlled by foreign, Hong Kong, Macau

[5] Chinese Outward Investment: An Emerging Policy Framework, Nathalie Bernasconi-Osterwalder, Lise Johnson, and Jianping Zhang, eds. (IISD and IIER, 2012), p. 48.
[6] For more information on OPIC and its programs see generally http://www.opic.gov.
[7] See Sauvant et al., *supra* n.1, for more examples on how states use these criteria for different types of HCMs.

and Taiwan enterprises, institutions and citizens.'" (Sauvant et al., *supra* n.2, p.36). Affiliates of foreign companies in China cannot apply for investment insurance.

Under Chinese criminal law, enterprises governed by its anti-bribery legislation consist of companies, enterprises and institutions organized under the laws of China, including (1) joint ventures (including ones involving non-Chinese companies); (2) wholly foreign-owned enterprises operating in China; and (3) representative offices of non-Chinese companies.

Under Section 1502 of the **US Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010**, companies may be covered with respect to their extraterritorial activities if they file reports with the U.S. Securities and Exchange Commission under Section 13(a) or 15(d) of the Exchange Act. This includes foreign issuers.

Sources: Sauvant et al., *supra* n.1; PRC Criminal Law, Art. 164.

Criteria can also be used to condition eligibility on positive (or at least neutral) impacts in the *host* country. OPIC is an example of a home country institution that uses such host-country criteria.[8] To be eligible for coverage, for example, each project must score adequate points on a "development matrix," which is used to objectively quantify the project's expected contribution to the host country's development through job creation, training, infrastructure improvements, private sector development, and other areas. Projects scoring too low on the "development matrix," as well as certain projects that are deemed to have harmful and unavoidable environmental and social impacts, are categorically excluded from OPIC coverage. For eligible projects, investors must comply with a range of due diligence requirements and social and environmental performance standards that may go beyond what is strictly required by the law of the host country and that are intended to reflect and advance OPIC's role as a development agency.

To ensure compliance with its standards and requirements, OPIC requires insurance holders to submit annual self-monitoring reports and conducts periodic site visits. If an insurance policy holder is found to have violated its environmental and social obligations, OPIC may take various actions, including potentially terminating the insurance policy.

Although these types of host-country-focused criteria have been relatively uncommon features of investment-promotion HCMs,[9] this appears to be changing. Moreover, there is also an increasing body of investment-regulation HCMs that are not tied to investment-promotion measures.

Various factors seem to be driving these shifts. For one, there is a growing effort to understand how the *obligations* that home countries may have under international human

[8] See OPIC, "Doing Business with Us – OPIC Policies," available at: http://www.opic.gov/doing-business-us/OPIC-policies.

[9] *Id*. p. 41.

rights law affects their responsibilities to govern the conduct of international investors and investments, or multinational enterprises and their affiliates (whether directly benefitting from HCMs or not). Other international legal obligations also arise from multilateral agreements that governments have concluded to promote or ensure the use of HCMs to combat certain challenges that are more effectively addressed on a global scale, such as terrorism, corruption in international business and climate change.

Mounting pressure on home countries to use HCMs to govern or monitor the overseas conduct of multinational enterprises has also arisen in individual countries, driven by a range of domestic stakeholders. These include citizens and organizations concerned about the negative impacts that those firms can have on environmental or social conditions in other countries (which may or may not have impacts that spill over into the home country), labor unions concerned about companies moving facilities overseas to take advantage of low labor standards and lax enforcement of labor laws in the host country and policymakers concerned about multinational firms' use of complex international corporate structures to evade home country taxes.

The following sections examine some of these drivers of investment-regulation HCMs and the measures that they have produced.

2. International law and multilateral agreement on HCMs

Many countries adopt HCMs as a result of international law or international agreement.[10] Some legal scholars argue that governments are required under international human rights law to use HCMs to ensure compliance with their human rights obligations. Countries may also agree to use HCMs to seek to influence or regulate the extraterritorial conduct of non-state actors when, for example, there is a global issue involving systemic risk or common resources (e.g., the U.N. Convention on the Law of the Sea), when the international activities of private actors or activities render intra-national regulation inadequate to address the problem (e.g., the International Convention for the Suppression of the Financing of Terrorism) or when there is an issue in the host country or countries that implicates international concerns or is exacerbated by international dynamics and for which host country regulation is or has been ineffective (e.g., Recommendation of the Council on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas). These issues are discussed further below.

2.1. HCMs and human rights

Extraterritorial obligations to respect and protect human rights

As noted above, there has been a growing dialogue in recent years regarding whether home countries have obligations to monitor or regulate the activities of their companies

[10] For more examples of these types of HCMs, see the *HCM Taxonomy* prepared by Herbert Smith Freehills LLP for CCSI in preparation for this Conference. The *HCM Taxonomy* is available at the Conference website, http://ccsi.columbia.edu/2014/01/01/raising-the-bar-home-country-efforts-to-regulate-foreign-investment-for-sustainable-development/.

operating abroad. Under international human rights law, such an obligation arguably exists under certain circumstances.

While governments have traditionally focused on their human rights obligations in respect of individuals within their territories, a number of legally binding human rights instruments imply, or have been interpreted to incorporate, an extraterritorial obligation. This includes references to international cooperation in multiple treaties,[11] as well as interpretations by U.N. treaty bodies[12] and leading legal scholars.[13] Under international human rights law, extraterritorial obligations require governments to respect and protect human rights by taking certain actions, and refraining from others, either within or beyond their territories, that affect human rights beyond their borders. In addition, governments' obligations to fulfill human rights include efforts to realize rights globally, through international assistance and cooperation.[14]

Extraterritorial obligations, combined with governments' obligations to protect against rights abuses by corporations, as outlined in the Guiding Principles on Business and Human Rights: Implementing the United Nations "Respect, Protect and Remedy" Framework, which were endorsed by the U.N. Human Rights Council in 2011,[15] mean that governments must extend their efforts to protect human rights from adverse corporate actions to include efforts that apply extraterritorially in certain circumstances, as outlined below.

Three situations in which extraterritorial obligations in respect of human rights arise for a government

Extraterritorial obligations do not require governments to act extraterritorially all the time. This raises the question of when governments should undertake HCMs protecting human rights from corporate conduct abroad. Some guidance arises from the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (Maastricht Principles), which were adopted by a group of 40 international law experts in September 2011 in an attempt to codify existing international human rights law regarding extraterritorial obligations. The non-binding principles note that extraterritorial human rights obligations (regarding economic, social and cultural rights) arise for a government in three situations:

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[11] See, for example, the International Covenant on Economic, Social and Cultural Rights (Art. 2), the Convention on the Rights of Persons with Disabilities (Art. 32) and the Convention on the Rights of the Child (Arts. 4 and 24).

[12] See, for example, Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 10, available at: http://www1.umn.edu/humanrts/gencomm/hrcom31.html (last visited Oct. 31, 2014). General Comments are a treaty body's interpretation of the treaty's provisions.

[13] See, for example, United States Department of State, Office of the Legal Advisor, Memorandum Opinion on the Geographic Scope of the International Covenant on Civil and Political Rights (Oct. 19, 2010), available at: http://www.nytimes.com/interactive/2014/03/07/world/state-department-iccpr.html (last visited Oct. 31, 2014).

[14] Maastricht Principles, para. 8, available at: http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 (last visited Oct. 31, 2014).

[15] Available at: http://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_en.pdf.

i. when it exercises authority or effective control over a territory, regardless of whether such control is exercised in accordance with international law;
ii. when its acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights outside its territory, even in the absence of effective control over the territory or situation; or
iii. when it is in a position to exercise decisive influence or take measures through its executive, legislative or judicial branches to realize economic, social and cultural rights extraterritorially, in accordance with international law, be it acting separately or jointly.[16]

UN treaty bodies examining extraterritorial obligations have primarily focused on cases covered by the second situation, which arises when a country can exercise influence beyond its borders through its conduct alone.[17] Examples of such situations include trade agreements that could negatively affect human rights in third countries, a government's failure to regulate its companies creating harm abroad or a situation in which a state promotes the exports of subsidized agricultural products to developing countries to the detriment of local farmers, who cannot compete with the subsidized prices to maintain their livelihoods.[18]

When governments must regulate, and when they may be liable for not doing so

Principle 25 of the Maastricht Principles sets out the circumstances in which governments have a duty to act or use their influence to prevent human rights abuses by third parties from occurring in another government's jurisdiction. In relation to transnational corporations and other business enterprises, this obligation to protect human rights arises when "the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned."[19]

Governments seeking to meet their extraterritorial obligations to protect human rights generally have significant discretion in designing relevant HCMs and determining which enterprises or activities trigger their provisions. For example, the United States decided to enact measures to ensure that new U.S. investment into Myanmar would not contribute to

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[16] Maastricht Principles, para 9, "Scope of jurisdiction."
[17] ESCR-NET Corporate Accountability Working Group, "Global Economy, Global Rights: A practitioners' guide for interpreting human rights obligations in the global economy," (August 2014), available at: http://www.escr-net.org/sites/default/files/e7f67ea7483fd5bad2dd4758b597d8ff/Global%20Economy%20Global%20Rights.pdf.
[18] ESCR-NET Corporate Accountability Working Group, "Global Economy, Global Rights: A practitioners' guide for interpreting human rights obligations in the global economy," (August 2014), available at: http://www.escr-net.org/sites/default/files/e7f67ea7483fd5bad2dd4758b597d8ff/Global%20Economy%20Global%20Rights.pdf.
[19] Maastricht Principles, para 25(c), "Bases for protection."

human rights abuses or other issues of concern and established specific rules identifying when the measures' requirements would be triggered. More specifically, the Burma Responsible Investment Reporting Requirements apply to all U.S. persons with an investment over a certain threshold in Myanmar or in the oil & gas sector, but then includes an expansive definition of "new investment" to include all U.S. persons making direct or indirect investments into that country, through a directly or beneficially-owned investment vehicle. (Box 2).

Box 2

Which U.S. persons are covered by the Burma Responsible Investment Reporting Requirements?

A part of the U.S. Government's easing of sanctions against Myanmar, the U.S. Office of Foreign Assets Control (OFAC) issued General License No. 17, pursuant to which U.S. persons can engage in new investments in Myanmar. However, any U.S. person (individual or corporation) doing so who invests $500,000 or more in Myanmar, or who invests pursuant to an agreement with Myanma Oil and Gas Enterprise (MOGE), is required to complete the U.S. State Department's Reporting Requirements on Responsible Investment in Burma, which include questions on human rights, workers' rights and environmental policies and procedures.[20]

For the purposes of the reporting requirements, a "new investment" by a U.S. person includes any of the following activities in Myanmar if they are undertaken "pursuant to an agreement, or pursuant to the exercise of rights under such an agreement, that is entered into with the Government of Burma or a nongovernmental entity in Burma on or after May 21, 1997:

1) The entry into a contract that includes the economic development of resources located in Burma, as defined in § 537.302;
2) The entry into a contract providing for the general supervision and guarantee of another person's performance of a contract that includes the economic development of resources located in Burma;
3) The purchase of a share of ownership, including an equity interest, in the economic development of resources located in Burma; or
4) The entry into a contract providing for the participation in royalties, earnings, or profits in the economic development of resources located in Burma, without regard to the form of the participation."[21]

The term expressly excludes any agreement for the performance or financing of a contract to sell or buy any goods, services or technology.

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[20] Responsible Investment Reporting Requirements, available at: http://www.humanrights.gov/wp-content/uploads/2013/05/Responsible-Investment-Reporting-Requirements-Final.pdf.
[21] "New Investment" is defined in 31 CFR 537.311, available at: http://www.law.cornell.edu/cfr/text/31/537.311.

In addition to regulating private business enterprises, a government's extraterritorial obligations also extend to making sure that the government respects human rights by regulating or otherwise ensuring that its activities and the activities of its state-owned entities, as well as non-state business actors who are acting under the direction or the control of the government, or are empowered to exercise a governmental power by the government, do not violate human rights.[22] Such actors include export credit agencies, agencies providing investment insurance or guarantees, state pension funds, and, under certain circumstances, private contractors.

Governments that have failed to appropriately regulate business actors (either non-state or state-affiliated) in order to prevent rights abuses may have failed to uphold their obligations to protect and respect human rights. These issues have recently been raised before the Inter-American Commission on Human Rights (IACHR), which began hearing arguments in 2013 regarding whether and under what circumstances a company's home country can be held liable for the actions of the company abroad, or for the home country's failure to provide a remedy to the company's victims.[23] In late October 2014, for example, the IACHR heard testimony from the Canadian Network of Corporate Accountability that the Canadian government is failing to either investigate or hold its extractives sector accountable for abuses committed in Latin America, and is also not making its legal system available to victims of the abuses.[24]

Moving beyond arguments of whether international law imposes obligations on governments to regulate the activities of companies operating abroad in certain situations, there has also been a push to augment current international law through the creation of a new treaty that would establish human rights legal obligations for transnational corporations.[25] Such a treaty would not remove the obligations of governments to

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[22] ESCR-NET Corporate Accountability Working Group, "Global Economy, Global Rights: A practitioners' guide for interpreting human rights obligations in the global economy," (August 2014), available at: http://www.escr-net.org/sites/default/files/e7f67ea7483fd5bad2dd4758b597d8ff/Global%20Economy%20Global%20Rights.pdf.

[23] Benjamin Hoffman, Inter-American Commission on Human Rights to Consider "Home Country Liability" for the Extraterritorial Actions of Transnational Corporations, EarthRights International (Nov. 7, 2013), available at: http://www.earthrights.org/blog/inter-american-commission-human-rights-consider-home-country-liability-extraterritorial-actions (last visited Oct. 31, 2014); see also Canadian Network on Corporate Accountability, "Human Rights, Indigenous Rights and Canada's Extraterritorial Obligations: Thematic Hearing for 153rd Period of Sessions, Inter-American Commission on Human Rights," (Oct. 28, 2014), available at http://www.miningwatch.ca/sites/www.miningwatch.ca/files/canada_mining_cidh_oct_28_2014_final.pdf (last visited Oct. 31, 2014).

[24] Carey Biron, "Canada Accused of Failing to Prevent Overseas Mining Abuses," *Inter Press Service News Agency*, October 31, 2014, available at: http://www.ipsnews.net/2014/10/canada-accused-of-failing-to-prevent-overseas-mining-abuses/.

[25] In June 2014, the UN Human Rights Council voted to establish an intergovernmental working group focused on elaborating this potential treaty. OHCHR Press Release, "Human Rights Council concludes twenty-sixth session after adopting 34 texts," June 27, 2014, available at:

regulate corporations or other business enterprises, including over their extraterritorial conduct, but it would add a new layer of international legal obligations for companies, presumably with corresponding increased accountability.

2.2. Other multilateral agreements on HCMs

As noted briefly above, human rights law is not the only source of international law obligations driving action on HCMs. There are a multitude of other issues on which countries have entered into agreements whereby they commit to regulate the overseas conduct of enterprises based or operating in their jurisdictions. These agreements help establish global norms and can be essential to addressing problems whose solutions require collective action.

One relatively well-known example is the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997). As the treaty's preamble emphasizes, states concluded the agreement based on the shared view that bribery needed to be fought through a concerted effort. They described bribery as "a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions." The states also recognized that "all countries share a responsibility to combat bribery" and that "achieving progress in this field requires not only efforts on a national level but also multilateral co-operation, monitoring and follow-up."

This Convention mandates its state parties to take measures necessary to establish that it is a criminal offense under its law for any person to "brib[e] a foreign public official," and defines (albeit broadly) what types of conduct constitutes such bribery. States are also to take measures necessary to establish liability (although not necessarily criminal liability) for legal persons (e.g., corporations) who bribe foreign public officials. It thus requires states to enact HCMs regulating overseas conduct of individuals or entities.

The Convention further imposes requirements on the home state to ensure its courts have authority to hold offenders liable for violating the rules against bribery of foreign public officials. It states:

> 1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.
> 2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.
> …

http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14798&LangID=E#sthash.rmhcrdX8.dpuf (last visited Oct. 31, 2014).

> 4. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.

To help promote its effective implementation, the Convention also contains an article requiring parties to cooperate "carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention" which, "[u]nless otherwise decided by consensus," is to be "done in the framework of the OECD Working Group on Bribery in International Business Transactions."

Overall, while some critics have argued that the Convention leaves individual home states too much discretion regarding how to implement their obligations under the treaty, it serves as an important model of how a multilateral framework can oblige each of its state parties to enact unilateral HCMs to govern conduct of individuals and entities outside its borders, and also put in place an international mechanism to help ensure effective implementation of the Convention's provisions.

Other examples of treaties requiring states to adopt HCMs to govern foreign conduct of individuals and enterprises, or imposing HCMs directly, include agreements addressing:

- **Antitrust issues:** e.g., the Treaty on the Functioning of the European Union can apply in certain circumstances to the conduct of EU- (and even non-EU-) firms that is carried out or implemented outside the EU if the conduct (i) affects trade between EU Member States; and (ii) has the object or effect of restricting competition within the EU.

- **Issues relating to the world's oceans and seas:** e.g., under the UN Convention on the Law of the Sea (UNCLOS) a ship on the high seas is subject to the legislative and enforcement jurisdiction of its "flag state" (i.e., the state in which the ship is registered). Article 94 of UNCLOS requires the flag state to "exercise its jurisdiction over ships flying its flag and … take necessary measures to ensure that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the prevention, reduction and control of marine pollution."

- **Criminal liability for environmental harms:** e.g., under the Council of Europe Convention on the Protection of the Environment through Criminal Law, states are required to, inter alia, "adopt such appropriate measures as may be necessary to establish jurisdiction over a criminal offence" for environmental harms "when the offence is committed …. on board a ship or an aircraft registered in it or flying its flag; or by one of its nationals if the offence is punishable under criminal law where it was committed or if the place where it was committed does not fall under any territorial jurisdiction." The Convention also requires its state parties to "adopt such appropriate measures as may be necessary to enable it to impose

criminal or administrative sanctions or measures on legal persons on whose behalf" an environmental crime has been committed.

The agreements profiled above all directly impose HCMs, or require their state parties to take unilateral HCMs; but there are also multilateral instruments that take a softer approach, encouraging home states to try to influence conduct of their domestic individuals and entities when investing overseas. The OECD Guidelines on Multinational Enterprises is one example, setting forth recommendations by governments to companies with respect to operations at home and abroad. Strengthening those recommendations, OECD- and non-OECD-countries adhering to the Guidelines have also made binding commitments to establish "National Contact Points" (NCPs) designed to help promote and advance the implementation of the Guidelines.

Another example of these softer multilateral HCMs is the Recommendation of the [OECD Ministerial] Council on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas. This instrument includes recommendations that states "actively promote the observance of the Guidance by companies operating in or from their territories and sourcing minerals from conflict-affected or high-risk areas with the aim of ensuring that they respect human rights, avoid contributing to conflict and successfully contribute to sustainable, equitable and effective development." While not legally binding itself, the Recommendation has served as the basis for unilateral HCMs taken by states to regulate in this area (see discussion on unilateral measures below).

A final example of these types of recommendations can be seen in more modern investment treaties. Beginning in 2013, for instance, Canada has begun including in its investment treaties "corporate social responsibility articles," stating:

> Each Contracting Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Contracting Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption. [26]

This and other "soft law" instruments have certain benefits, namely that they can attract buy-in from a larger number of countries than more binding instruments, and can contribute to setting global norms. Nevertheless, they are generally non-binding and unenforceable,[27] a characteristic that reduces their effectiveness, particularly when the softly regulated entities "wish[] to resist reform and other nations [and companies] can benefit from regulatory arbitrage."[28]

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[26] Canada-Benin Foreign Investment Promotion and Protection Agreement (FIPA), Art. 16 (May 12, 2014).
[27] As with the OECD's NCPs, however, "soft law" instruments may include mechanisms to help further implementation.
[28] Coffee, Jr., J., "Essay: Extraterritorial Financial Regulation: Why Can't E.T. Come Home," 99 *Cornell Law Review* 1259, 1266 (2013).

2.3 Multilateralism versus "Minilateralism"

Not all multilateral HCMs are truly global. Some are what may be termed "minilateral":

> As opposed to "multilateralism," minilateralism asks what is the smallest number of nations needed to reach a workable solution to a specific problem. While a multilateral agreement may take a decade or more to negotiate (if the process is successful), a "minilateral" solution can come much quicker through bilateral or limited multilateral negotiation.[29]

In contrast to multilateralism, minilateralism can be initiated by and result in an agreement among a smaller number of willing states with similar or identical interests in addressing a particular problem; and, depending on the size and role of the states involved in the minilateral initiative, these governments can effectively establish the rules by which other states (and non-state actors) will have to comply.[30] Some scholars have advocated minilateral agreements for HCMs in areas such as financial regulation where those states or groups of states with the greatest incentives to adopt strong regulations to mitigate systemic risks or problems arising from international activities of non-state actors (e.g., the US and the EU with respect to the financial services industry) are also the states that have the market power in that sector or activity to effectively set the rules that can translate into broader global norms.[31]

3. Unilateral HCMs

Driven by international obligations or commitments, or domestic constituents, there is an increasing tendency towards home country efforts to monitor, regulate, or provide a forum for raising grievances regarding the overseas conduct of companies, especially in respect of financial regulation, human rights, labor standards, the environment, and payments to government officials. Many such efforts have been unilateral, but have inspired other countries across the globe to take similar actions. Such unilateral measures have also tended to focus on particular issues (e.g. bribery and corruption), types of harms (e.g. violations of human rights, labor, or environmental standards), or sectors (e.g. extractive industries or the financial services industries).

While the most aggressive extraterritorial enforcement measures have been taken by high-income countries such as the United States and United Kingdom, low- and middle-income countries have also been adopting unilateral measures to regulate the conduct of their companies abroad and, in the realm of corruption, have increasingly cooperated with other states in the enforcement of such measures.

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[29] *Id*. at 1266 (internal citations omitted).
[30] *Id*.
[31] See generally, Coffee, *supra* n.28.

Some examples of recent developments in unilateral HCMs are described below.[32]

3.1. Sector-specific home country measures – U.S. Dodd-Frank Act, disclosure requirements and the extractive industry

In the United States, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) requires U.S.-listed extractive industry companies to disclose payments to governments on a per-project basis as well as the type and amount of payment made to each government entity (section 1504), and creates assessment and reporting requirements for any companies issuing U.S. securities whose products contain "conflict minerals" (gold, tin, tungsten, tantalum) from the Democratic Republic of Congo (DRC) or neighboring countries (section 1502).[33] The "conflict rule" in section 1502 of the Dodd-Frank Act requires companies that have a reason to believe their products include conflict minerals from the DRC or surrounding countries to exercise due diligence on the source and chain of custody of those minerals in line with the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.[34] Its purpose is to ensure that companies' supply chains do not contribute to human rights abuses in the DRC or surrounding region, given that the sale of conflict minerals by armed groups is believed to be financing the conflict there.

The actual effectiveness of the Dodd-Frank Act's conflict rule remains to be seen. In April 2014, just a month before the first filing deadline, a U.S. appeals court in *Nat'l Ass'n of Manufacturers v. SEC* upheld the majority of section 1502, but struck down the requirement for companies to disclose whether the products they produce are "conflict free" on the grounds that it violates the U.S. constitutional right of free speech.[35] The first reports following the filing deadline also revealed that only 1,300 listed companies filed the required conflict mineral disclosure form, whereas the U.S. Securities Exchange Commission (SEC) has estimated that closer to 6,000 companies should be doing so.[36] There has also been some criticism about whether the SEC is the right forum for monitoring and enforcing such types of rules against companies, given its limited resources. For example, in October 2014, Daniel Gallagher, Jr., one of the SEC's five commissioners, told an audience at Fordham University School of Law that "those [Dodd-Frank] mandates distract from the SEC's proper regulatory oversight and strap its limited resources."[37]

[32] More examples are provided in the *HCM Taxonomy*, *supra* n.10.
[33] Section 1502. Conflict minerals are defined as gold, tin, tungsten, and tantalum.
[34] OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas available at: http://www.oecd.org/fr/daf/inv/mne/mining.htm.
[35] "Conflict Minerals: Perspectives on Initial Filings and Preparations for 2015," *Beveridge & Diamond,* September 3, 2014, available at: http://www.bdlaw.com/news-1637.html
[36] *Id*. See also: Sarah Lynch and Lawrence Hurley, "U.S. appeals court finds conflict-minerals rule violates free speech," *Reuters*, April 14, 2014, available at: http://www.reuters.com/article/2014/04/14/us-court-sec-conflictminerals-idUSBREA3D13U20140414.
[37] John Kester "SEC Should Not Handle Conflict Minerals Reports: Commissioner," The *Wall Street Journal*, October 17, 2014, available at: http://blogs.wsj.com/cfo/2014/10/17/sec-should-not-handle-conflict-minerals-reports-commissioner/.

Similar measures, in part inspired by the Dodd-Frank reporting requirements, have been enacted elsewhere. For example in 2013, the European Commission adopted a Directive for implementation in each EU member state, which requires country-by-country and project-based reporting on payments to governments made by large extractive and logging companies.[38] In March 2014, the European Commission further proposed a draft regulation to set up an EU-system of self-certification for importers of conflict minerals who choose to import responsibly into the EU.[39] While the proposed certification-system is voluntary, the European Union is coming under pressure to make the certification requirements mandatory so that they more closely align with Sections 1502 of the Dodd-Frank Act and don't unfairly advantage companies listed in Europe over their US.-listed counterparts. For example, in October 2014, 24 asset management funds representing EUR 855 billion in assets under management, including Trillium Asset Management, Boston Common Asset Management, and Eurosif, released a joint statement urging the EU to amend its proposed March 2014 proposals "to ensure an important level of harmonization between the European proposal and currently operational US federal rules on corporate conflict minerals due diligence and reporting."[40]

In addition, the recently adopted European rules on non-financial and diversity reporting will require large companies in all EU member states to disclose information relating to environmental, social and employee-related issues; respect for human rights; and anti-corruption and bribery matters. This reporting presumably will encompass information relevant to overseas operations.[41]

Canada is in the process of designing similar home-country regulations for its extractive industries sector. Following the publication by Canadian mining industry groups and NGOs of a recommendation for the development of a payment transparency standard for all publicly-traded mining companies in Canada earlier this year, the Extractives Sector Transparency Measures Act was introduced in October 2014. This act aims to establish new mandatory reporting standards for Canadian extractive companies to increase transparency of the payments they make to governments and to align with U.S. and E.U. standards.[42] The government's proposals would require Canadian extractive companies to publicly report payments exceeding $100,000 to all levels of government (both domestic

[38] Covington & Burling LLP, "EU agrees on disclosure rules for extractive and logging industries," June 19, 2014, available at: http://www.cov.com/files/Publication/2c5f1ad6-f0fd-4edc-b11b-58dd9e358af0/Presentation/PublicationAttachment/efeeef7d-599c-4e5a-9d9d-62d67b04a31c/EU_Agrees_on_Disclosure_Rules_for_Extractive_and_Logging_Industries.pdf.

[39] *European Commission Press Release:* "EU proposes responsible trading strategy for minerals from conflict zones," March 5, 2014, available at: http://europa.eu/rapid/press-release_IP-14-218_en.htm.

[40] Andrew J. Renacci, "Socially Responsible Investors Urge European Parliament to Make Proposed EU Conflict Minerals Regulation More Compatible with U.S. Rule," Conflict Minerals Rule Weekly Recap #85 – October 24, 2014, available at: http://www.conflictmineralslaw.com/.

[41] *European Commission Statement*: "Improving corporate governance: Europe's largest companies will have to be more transparent about how they operate ," April 15, 2014, available at: http://europa.eu/rapid/press-release_STATEMENT-14-124_en.htm?locale=en.

[42] Government of Canada, Natural Resources Canada, "Mandatory Reporting in the Canadian Extractive Sector," available at: http://www.nrcan.gc.ca/media-room/backgrounder/2014/15565 (last visited Oct. 28, 2014).

and abroad, including Aboriginal entities) on a project-by-project basis.[43] The approach would apply to public and private oil and gas companies operating in Canada that meet or exceed two of three thresholds: C$20 million in assets; C$40 million in revenue; or an average of 250 employees.[44] Parliament is expected to consider the draft legislation introduced by the House of Commons in December 2014.[45] The aim is for legislation to be enacted by April 2015.

3.2. HCMs focused on a specific host country – Myanmar

Unilateral regulations of outward investors can also be host-country-specific where there is a concern about human rights or environmental abuses, terrorist activities, or corrupt practices in a particular host country. For example, pursuant to General License 17, the U.S. Department of Treasury, Office of Foreign Assets Control (OFAC) requires U.S. entities investing over $500,000 in Myanmar and meeting certain conditions to submit certain types of information related to due diligence policies procedures on human rights, worker rights, anti-corruption, and environmental policies and procedures, arrangements with security providers and property acquisition, among other things.[46] Twelve submissions have been made since the reporting requirements came into effect in 2013 and the verdict is still out as to their effectiveness.

3.3. Home country measures targeting specific types of actions - bribery

Aside from regulations focused on specific sectors or specific host governments, home countries have also regulated against, and are increasingly starting to enforce prohibitions on, specific types of actions such as bribery. Unilateral measures in relation to bribery and corruption have become more common around the world with state regulators showing a greater appetite to enforce such legislation for alleged crimes abroad as well as to cooperate with other state regulators in doing so.

The United States, for example, took an early unilateral step when it passed the Foreign Corrupt Practices Act (FCPA) in 1977, which criminalizes bribery of foreign officials and requires U.S. companies, as well as U.S.-listed foreign companies, to keep

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[43] Government of Canada, *Natural Resources Canada*, "Mandatory Reporting in the Canadian Extractive Sector," available at: http://www.nrcan.gc.ca/media-room/backgrounder/2014/15565 (last visited Oct. 29, 2014). *See also* Keith Chatwin and Ivan T. Grbesic, "Federal government introduces legislation to mandate disclosure of payments by extractive industry participants," (Oct. 24, 2014), available at: http://www.lexology.com/library/detail.aspx?g=da4f9617-6045-44b0-88fd-9f4ae690afa4 (last visited Oct. 29, 2014).

[44] Proposed Act available at: http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6737565&File=464#27 (last visited Oct. 29, 2014).

[45] Government of Canada, "Consultation – Mandatory Reporting Standards for the Extractive Sector," available at: http://data.gc.ca/eng/forms/consultation-mandatory-reporting-standards-extractive-sector#toc1 (last visited Aug. 27, 2014).

[46] U.S. Department of State, "Fact Sheet: Burma Responsible Investment Reporting Requirements," June 19, 2013, available at: http://www.humanrights.gov/2013/06/19/fact-sheet-burma-responsible-investment-reporting-requirements/. See also the U.S Embassy in Burma's Reporting Requirements website page, available at: http://burma.usembassy.gov/reporting-requirements.html (last visited on November 3, 2014).

transparent and audited books. The enforcement of the FCPA has been vigorous, with penalties (fines, disgorgement and prejudgment interest) imposed between January 2012 and October 2013 exceeding US$740 million.[47] In May 2013, Total S.A, the French oil & gas company listed in the U.S., received one of the highest penalties in FCPA history, when it agreed to pay US$245.2 million in fines to the Department of Justice and disgorge US$153 million in profits to the SEC as part of a deferred prosecution agreement.[48] The penalties were imposed after Total was found to have paid an estimated US$60 million to intermediaries to induce senior Iranian government officials to grant it access to the Sirri A and E oil and gas fields and parts of the South Pars in Iran between 1995 and 2004.[49]

Many other countries, both high-income and low-and middle-income ones have followed suit by enacting more stringent anti-corruption laws to their companies operating both within their borders and beyond, and have also been enforcing these rules. The United Kingdom's Bribery Act of 2010, for example, makes it an offence to bribe or offer to bribe a foreign official, request or receive a bribe, or to fail to prevent bribery as a corporate officer (for which there is strict corporate liability). The first charges under the act, albeit for an alleged act of bribery within the UK, were made in August 2013.[50] In May 2014, after the prosecution for bribery of GlaxoSmithkline in China, the UK's Special Fraud Office announced that it would be investigating the company's practices abroad under the Bribery Act.[51]

In China, criminal law provisions that make it an offence to bribe a domestic official also apply to Chinese nationals who commit bribery outside of the country, punishable in China unless the maximum punishment in the host state for such crime is a fixed-term imprisonment of not more than three years. [52] Following a recent trend of Latin American companies to enact new anti-corruption laws, Brazil also enacted a new *Lei Anticorrupção*, which became effective on January 28, 2014 and similarly has extra-territorial reach in relation to both employees and agents of Brazilian companies operating abroad.[53]

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[47] Hughes, Hubbard and Reed LLP, "FCPA-Anti-Bribery Alert," Winter 2013, available at: http://www.mondaq.com/unitedstates/x/284740/White+Collar+Crime+Fraud/FCPAAntiBribery+Alert+Winter+2013.

[48] Gabriel Colwell, "Oil And Gas Giant Total S.A. Pays Fourth Highest Penalty In FCPA Enforcement History," *Squire Patton Boggs – The anti-corruption blog*, June 5, 2013, available at: http://www.anticorruptionblog.com/industry-investigations/oil-and-gas-giant-total-s-a-pays-fourth-highest-penalty-in-fcpa-enforcement-history/.

[49] *Id.*

[50] Bruce Carton, "After Two Years, SFO Brings Its First-Ever Charges Under UK Bribery Act," *Compliance Week*, August 2015, available at: http://www.complianceweek.com/blogs/enforcement-action/after-two-years-sfo-brings-its-first-ever-charges-under-uk-bribery-act#.VFarMfldWSo.

[51] Daniel Roule and Louise Roberts, "GSK bribery case – end of the matter?" *Squire Patton Boggs – Anti-corruption blog*, October 6, 2014, available at: http://www.anticorruptionblog.com/china/gsk-bribery-case-end-of-the-matter-2/.

[52] Criminal law of the People's Republic of China database available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384075.htm.

[53] Reed Smith, "New Brazilian Anti-Corruption Law Will Soon Take Effect," November 20, 2013 available at: http://www.reedsmith.com/New-Brazilian-Anti-Corruption-Law-Will-Soon-Take-Effect-11-20-2013/.

3.4. Home country measures taken through their judicial systems

Finally, some states have ensured that their courts are open to cases involving extraterritorial offenses, or at least authorized the courts to accept such claims in certain circumstances. As noted above, for instance, parties to the OECD Convention Combating Bribery have committed to making particular offenses committed abroad justiciable in their territories. Additionally, through their judicial systems, governments have proven willing in some contexts to provide access to remedies for those who have suffered severe negative consequences of their outward investors' conduct beyond their borders. For example, the United States' Alien Tort Statute (ATS) is one avenue that non-U.S. citizens have employed to seek relief for certain human rights abuses committed abroad by corporate actors. Although the U.S. Supreme Court's ruling in *Kiobel v. Royal Dutch Petroleum Co.*[54] significantly narrowed the extraterritorial reach of the ATS, it did not completely preclude cases based on wrongful conduct that, at least in part, occurred abroad. Plaintiffs therefore are still trying to use the ATS to seek relief for international harms.[55] Tort claims against domiciled entities for abuses abroad have also been entertained in courts of other countries, such as in England and the Netherlands.[56]

3.5. Pros and cons of unilateral measures

Advocates for greater disclosure, reporting and regulatory requirements, as well as those seeking broader scope for courts to entertain claims for harms that occurred abroad, contend that such measures help facilitate and ensure accountability in an era in which international activities and corporate forms can create governance gaps if not applied equally to all companies operating abroad. The joint statement of asset management funds to the European Union in relation to its proposed self-certification scheme for conflict mineral importers is one such example.

Critics, on the other hand, bemoan the additional administrative burden and compliance costs, the alleged subsequent competitive disadvantage and the ineffectiveness of non-global measures due to the risk of companies relocating to less-regulated jurisdictions. SEC Commissioner Daniel Gallagher, Jr.'s remarks against the SEC's responsibilities to enforce the Dodd-Frank's conflict minerals rules underscore this view from the SEC's perspective, whereas the low number of companies complying with the conflict mineral disclosure requirements under the Dodd-Frank Act show the possible ineffectiveness of such unilateral measures in achieving their purported goal. There is also the risk that unilateral measures may conflict with domestic laws in other jurisdictions; for instance, the US' Foreign Account Tax Compliance Act (FATCA), designed to counter tax evasion by US nationals with assets overseas, may conflict in some cases with data protection and privacy laws of other countries.

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[54] 133 S. Ct. 1659, 1669, 185 L. Ed. 2d 671 (2013),

[55] See, e.g., Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 323-24 (D. Mass. 2013); Al Shimari v. CACI Premier Tech., Inc., 13-1937, 2014 WL 2922840 at *10 (4th Cir. June 30, 2014).

[56] See Jägers, N. et al., "The Future of Corporate Liability for Extraterritorial Human Rights Abuses: The Dutch Case Against Shell," *Agora: Reflections on* Kiobel (2014), pp. 36-41

4. Conclusion

As the examples above show, home countries use a range of HCMs to both promote and regulate outward-investing firms' activities and impacts. Some of these HCMs, such as those calling for compliance with corporate social responsibility norms and sustainable development goals, are phrased in general and non-binding terms, reducing the legal force and sway of those HCMs. Other HCMs, however, are binding and use enforcement mechanisms to help drive compliance.

To date, these types of binding and enforceable HCMs have been used to tackle certain specific challenges like ensuring effective protection of common resources (oceans and seas), combatting corruption and bribery, and ensuring the stability of the financial services industry. Many other issues like climate change and tax evasion have remained outside of comprehensive HCM-reach.

The Conference will explore in a more in-depth manner some of the advantages and disadvantages of HCMs, the challenges being targeted, the lessons learned from past attempts to enact HCMs and current efforts to implement them, and the implications for the government and the private sector. Additionally, the discussions will address whether some unilateral HCMs are ripe for mini- or multilateralism, and what global challenges need more attention in this area.

As highlighted in the program, some of the more specific questions to be addressed include:

- Given global consensus on the need to advance sustainable development, should home countries do more to monitor or regulate their nationals that are investing abroad to address their development impact?
- Should some of the same norms that apply to companies in their home countries be imposed when they invest abroad? What sort of enforcement mechanisms might be used? What obstacles might arise when regulations conflict?
- To what extent and how does international law create obligations on home countries to regulate the extraterritorial conduct of their nationals? How might the growing legal debate on extraterritorial rights and obligations influence how home countries support or regulate their outward investors or other companies resident in their jurisdictions?
- What can we learn from various unilateral home country regulations in terms of compliance, enforceability and the corporate responses to new standards and increased accountability? What challenges do home countries face in taking these steps, and how have they been able to overcome them?

- Are individual home country measures and initiatives a good first step towards more effective global governance, or are uncoordinated efforts creating an overly complicated and onerous framework for investors and other stakeholders?
- What are the modern objections to extraterritorial unilateral regulations or redress mechanisms, and who is raising them? Host countries? Companies? Both?
- Are alleged competitive disadvantages or uneven playing fields due to home country regulations real, and, if so, what are the costs of compliance?
- Do home country measures incentivize companies to switch domiciles to countries with less onerous requirements?
- What are the impacts on and roles of host states and third parties (including communities in host states), neither of which may have any influence in the design of the home country policies?
- What types of multilateral cooperation among home country governments could help "level the playing field" for companies and improve outcomes for other stakeholders? Are there examples of efforts that have successfully done so?
- What are the next steps that home countries should take, unilaterally or multilaterally, to foster investment that promotes sustainable development?
- Who should take the lead on global collaborative efforts?
- Would some home country measures be more effective if they were multi-stakeholder? Are there multi-stakeholder unilateral or multilateral efforts that serve as particularly useful examples?