



Columbia Center on Sustainable Investment

A JOINT CENTER OF COLUMBIA LAW SCHOOL
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

Raising the Bar: Home Country Efforts to Regulate Foreign Investment for Sustainable Development

**November 12-13, 2014
Columbia University**

PROGRAM

With support from:



What role should home countries play in monitoring or regulating the activities of companies operating abroad, particularly to facilitate sustainable development outcomes? Policies and regulations that govern foreign direct investment help shape whether such investment supports sustainable development in recipient host countries. Yet *host* countries have primary responsibility for regulating foreign investment within their territories, and traditional efforts to ensure that foreign investment contributes to development and avoids social and environmental harms have focused on the actions of host countries, with less attention paid to the role of home countries. Indeed, home country regulations that extend extraterritorially can be controversial, and home countries' forays into this area have been varied. Over the years, however, home countries have proven willing to exercise certain powers extraterritorially, and have implemented a number of measures to monitor or regulate overseas conduct. These measures have been buttressed by a growing debate over home countries' obligations and responsibilities, a mounting desire to see greater coherency on the part of home state policies and actions and increased interest in the potential of such measures to address continued governance gaps.

Yet as home countries increasingly turn to regulations with extraterritorial implications, a fierce debate has arisen over their practicality, usefulness, impacts, and costs. Home country efforts also generate a range of dilemmas, many of which have no clear answers. These include whether and how the perspectives of host governments or affected communities should be incorporated into home country regulations; the benefits and drawbacks of mandatory regulations versus non-binding guidelines; whether home state measures should be used primarily to require transparency or to require specific business conduct; how to address potential conflicts between different sets of home country measures or between home and host country regulations; and whether investors from countries that impose home country regulations are put at a competitive disadvantage, and, if so, what mechanisms could level the playing field again.

The time is ripe for a deeper examination of home country efforts to monitor or regulate foreign investment for sustainable development. This conference brings together stakeholders representing policymakers, the private sector, academia, and civil society to discuss the reasons for and against home country regulations, the lessons learned from past and current attempts, the implications for the private sector and affected communities, and what further efforts may be useful or necessary to regulate investment for sustainable development.

The conference will commence with a panel that provides context on the issue of home country measures, exploring the ways in which home countries assist their firms in undertaking foreign investment, and asking whether countries have legal or moral obligations to regulate the extraterritorial conduct of their nationals. The second panel will examine the unilateral efforts that home countries have taken to regulate or monitor foreign investment, as well as the challenges that investors confront in complying with these measures. Following the discussion of unilateral efforts, the third panel will turn to the successes and failures of multilateral efforts to regulate foreign investors or encourage responsible business conduct, as well as the benefits and drawbacks of such initiatives compared to unilateral ones. To conclude, the final panel will consider what needs to be done to ensure more coordinated and effective home country measures to foster foreign direct investment that promotes sustainable development, as well as how such measures compare with or could be supplemented by multi-stakeholder initiatives.

November 12, 2014, Wednesday

8:30 – 9:00 **Breakfast and registration**

9:00 – 9:15 **Opening remarks**

9:15 –12:30 **Session I: Setting the scene: Home country support and home country responsibilities**

Countries have traditionally helped their firms undertake foreign direct investment (FDI). Such home country assistance includes, among others, financial and fiscal support, investment treaty protections, political risk insurance, diplomatic support, and official development assistance tied to particular projects.¹ Home countries thus play an important role in the global economy, using a diverse array of tools to facilitate and shape international investment by their companies.

Against the backdrop of home country support to their investors, there has been a growing dialogue over whether home countries have obligations or responsibilities to monitor or regulate the activities of companies operating abroad. In terms of legal obligations, some legal experts have argued that home country governments have obligations under international human rights law that extend beyond their borders, including in some cases an obligation to regulate the activities of non-state actors such as companies.² While not everyone agrees that governments have extraterritorial *obligations*, there are also increasing pressures on home countries to take steps on account of moral duty, the desire for greater coherency of governmental policies and actions and perceptions of potential political or economic self-interest. These steps would not be out of character for many home countries, which have proven willing to exercise some level of extraterritorial power in regulating overseas conduct in certain areas, for example, by criminalizing bribery of foreign officials or enforcing antitrust standards for conduct in other territories.

This panel sets the scene for the conference by focusing on the role of home countries in promoting responsible outward investment and overseas investor conduct. The panel will thus consider how home countries support FDI by their nationals, the legal and non-legal arguments for why home countries could or should regulate the conduct of those outward investors and other companies resident in their jurisdictions and whether there is a need for more coherent home country policies and actions.

This first panel reviews:

- Why and in which ways do home countries provide support to their outward investors?
- What types of support are contingent on investors meeting certain standards on responsible business conduct, and which types of support are provided without such requirements?
- 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

¹ Some of these home country support measures resemble variations of the incentives offered by host countries to attract FDI, the topic of last year's Columbia International Investment Conference.

² For example, in 2011, a group of 40 international legal experts adopted the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, which seek to codify existing international human rights law that addresses extraterritoriality, and which state that countries have certain extraterritorial obligations, including an obligation to regulate non-state actors such as companies, to ensure that they "do not nullify or impair" the enjoyment of rights.

rights obligations influence how home countries support or regulate their outward investors or other companies resident in their jurisdictions?

Moderator:

Karl Sauvant, Resident Senior Fellow, Columbia Center on Sustainable Investment

Panelists:

Margaret Kuhlow, Vice President, Office of Investment Policy, Overseas Private Investment Corporation

Ariel Meyerstein, Vice President, Labor Affairs, Corporate Responsibility & Corporate Governance, United States Council for International Business

Zaw Oo, Executive Director, Myanmar Development Resource Institute's Center for Economic and Social Development

Marcos Orellana, Director, Human Rights & Environment Program, Center for International Environmental Law

M. Sornarajah, CJ Koh Professor of Law, National University of Singapore

12:30 – 14:00 **Lunch**

UNCTAD Presentation on Investing in the SDGs (World Investment Report 2014)

Keynote: Jeffrey Sachs, Director, The Earth Institute, Columbia University

Introduction by: Michael Shank, Associate Director, Legislative Affairs, Friends Committee on National Legislation

14:00 – 17:30 **Session II: Unilateral home country efforts to monitor or regulate foreign investment**

In response to the pressures discussed in the first panel, 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 human rights, labor standards, the environment, and payments to governments. Many efforts have been unilateral, but have inspired other countries to take similar actions. In the United States, for example, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 requires U.S.-listed extractive industry companies to disclose payments to governments, and creates assessment and reporting requirements for any companies issuing U.S. securities whose products contain certain minerals from the Democratic Republic of Congo or neighboring countries. Similarly, and in part inspired by the Dodd-Frank requirements, a 2013 EU Directive requires country-by-country and project-based reporting on payments to governments made by large extractive and logging companies.³ Regulations of outward investors can also be host-country-specific: for example, the U.S. Treasury Department requires U.S. entities investing in Myanmar and meeting certain conditions to submit reports on human rights and environmental policies and procedures, arrangements with security providers and property acquisition, among other things. Aside from regulations focused on specific sectors or specific host governments, home countries also have regulated against specific types of actions, such as bribery. The United States, for example, took an early unilateral step when it passed the Foreign Corrupt Practices Act in 1977, which criminalizes bribery of foreign officials and requires U.S. companies, as well as U.S.-listed foreign companies, to keep transparent and audited books. Many other countries have followed suit.

Moreover, some governments, through their judicial systems, have proven willing in certain 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 has been interpreted by some federal courts to provide jurisdiction of civil actions by non-U.S. citizens for certain

³ In addition, the recently adopted European rules on non-financial 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.

human rights abuses, including by corporate actors, that occur in other countries.⁴ Similarly, tort claims against domiciled entities for abuses abroad have been entertained in British and Dutch courts.

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. 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. This panel will explore lessons learned from existing unilateral home country measures, including whether and to what extent home country regulations have been, or are likely to be, effective.

This panel considers:

- 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?
- What criteria should be used to define whether a company should comply with home country regulations?
- 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?

Moderator:

Julie McCarthy, Director, Fiscal Governance Program, Open Society Foundations

Panelists:

Mark Beckett, Partner, Chadbourne & Parke LLP

Marie-Chantal Kaninda, Chief Advisor, External Affairs Africa, Rio Tinto

Lisa Misol, Senior Researcher, Business and Human Rights, Human Rights Watch

Mark Pearson, Director General, External Relations, Natural Resources Canada

Werner Thut, Senior Policy Advisor, Swiss Agency for Development and Cooperation

James Zhan, Director, Investment & Enterprise Division, UNCTAD

⁴ The U.S. Supreme Court's ruling in *Kiobel v. Royal Dutch Petroleum* (2013) significantly narrowed the extraterritorial reach of the Alien Tort Statute (ATS), but did not fully preclude cases based on harms that occurred abroad. Aside from the ATS, other types of tort claims based on harms that occurred in other territories have proceeded through U.S. courts, including "transitory tort" claims.

November 13, 2014, Thursday

8:30 – 9:00 **Breakfast**

9:00 – 12:15 **Session III: Multilateral home country efforts to monitor or regulate foreign investment**

Aside from the unilateral home government efforts discussed in the previous panel, governments have also worked to develop multilateral initiatives to monitor or regulate the overseas conduct of companies. Such multilateral initiatives have included legally binding instruments requiring governments to regulate the conduct of their investors abroad, such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. That convention, which was first signed in 1997, has since been adopted by the 34 OECD member countries and six non-member countries, and requires its state parties to criminalize bribery of foreign public officials in international business transactions.

Multilateral efforts to regulate overseas business conduct may also arise in the context of larger multilateral agreements, such as antitrust provisions incorporated into trade agreements.

In addition, countries have found non-binding ways to multilaterally promote more responsible overseas investment, without necessarily promulgating specific laws to do so. For example, the OECD Guidelines for Multinational Enterprises provide recommendations addressed by governments to companies operating from (or in) adhering countries. The recommendations focus on responsible business conduct over issues ranging from human rights to taxation.⁵ The guidelines also require adhering governments to establish their own implementation mechanism through National Contact Points, which are meant to promote the guidelines and also serve as grievance mechanisms to resolve issues arising from non-observance of the recommendations.

Multilateral initiatives can offer more policy coherence for companies operating in multiple jurisdictions. Depending on their uptake, they also may help combat a potential “race to the bottom” by companies relocating from jurisdictions with particularly onerous requirements. Yet, as illustrated by failed initiatives such as the UN Code of Conduct on Transnational Corporations, it can be difficult to develop stringent and binding multilateral efforts, slowing the pace of potential home government efforts. Of course, this does not always prevent governments from trying, as evidenced by the renewed debate on the development of a legally binding international instrument on business and human rights.⁶

This panel thus explores:

- What are the roles, effects and limits of multilateral initiatives to address the conduct of outward investors?
- What benefits do multilateral initiatives hold over unilateral ones, and what are the drawbacks?
- Are there particular issues that are particularly ripe for collaborative efforts? Should certain issues be prioritized?
- What lessons can be learned from failed multilateral efforts? What are the factors that have led to multilateral successes?

⁵ The OECD Guidelines for Multinational Enterprises do not provide one specific and concise definition of “responsible business conduct.” However, the OECD provides the following explanation: “Responsible business conduct (RBC) entails above all compliance with laws, such as those on respecting human rights, environmental protection, labour relations and financial accountability, even where these are poorly enforced. It also involves responding to societal expectations communicated by channels other than the law, e.g. inter-governmental organisations, within the workplace, by local communities and trade unions, or via the press. Private voluntary initiatives addressing this latter aspect of RBC are often referred to as corporate social responsibility (CSR).”

<http://www.oecd.org/investment/toolkit/policyareas/responsiblebusinessconduct/>

⁶ In June 2014, the UN Human Rights Council adopted a resolution to establish a working group with the mandate to develop a legally binding instrument on transnational corporations and human rights, as well as another resolution to review the benefits and limitations of legally binding instruments. For more information, see <http://business-humanrights.org/en/binding-treaty>.

- 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?

Moderator:

Roel Nieuwenkamp, Chair OECD Working Party on Responsible Business Conduct

Panelists:

Daniel Cerqueira, Senior Program Officer, Due Process of Law Foundation

Yenga Mabolia, National Coordinator, Promines Project, Ministry of Mines, Democratic Republic of Congo

Marcio Senne de Moraes, Director of External Affairs, Vale S.A.

Michael Tracton, Office Director, Office of Investment Affairs, U.S. Department of State

Mei (Lisa) Wang, Deputy Director, National Economic Research Institute, China

12:15 – 14:00 **Lunch**

UNCTAD Presentation on Investment Policy Framework for Sustainable Development and International Investment Agreement Reform

14:00 – 17:15 **Session IV: Looking ahead: What needs to be done to ensure more coordinated and effective home country measures to regulate investment for sustainable development?**

While there are some examples of global, coordinated efforts to formalize the role of home country governments in monitoring and regulating the activities of their outward investors (or other relevant companies) as seen in Panel 3, many other initiatives continue to develop at the national level and remain more common for some sectors and issues than others, as observed in Panel 2. Some objectives may require global collaboration because of the disincentives of being a “first-mover.” In those areas, however, the lack of coordination, information sharing and collective action continues to thwart global progress to address the major negative externalities of international investment, despite widespread global awareness of the problems. This panel will therefore explore whether, where and how home country measures to regulate and promote responsible investment should be implemented or strengthened, attempting to differentiate among areas and sectors in which (i) individual home country efforts are desirable, (ii) bilateral collaboration is more effective and (iii) global cooperation is required. The panel will also consider how home country efforts compare with or could be supplemented by multi-stakeholder attempts to promote responsible outward investment.

This panel aims to address:

- 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?
- Do voluntary mechanisms help achieve the same goals when binding multilateral agreements are too difficult to reach?
- 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?
- What effective roles are there for other stakeholders in coordinating with or feeding into home country measures?

Moderator:

Ben Skinner, Co-founder and Senior Vice President, Tau Investment Management, LLC

Panelists:

Patrick Alley, Co-founder and Director, Global Witness

Lesley Coldham, Group Head of Government, Public Affairs & Policy, Tullow Oil Plc

Niki Kruger, Chief Director, Trade Negotiations, Department of Trade and Industry, South Africa

Lisa J. Kubiske, Deputy Assistant Secretary of State for International Finance & Development, U.S.
Department of State
Francisco Rivadeneira, Minister of International Trade, Ecuador
Leopoldo Rubinacci, Head of Unit, Investment (B2), DG Trade, European Commission

17:15 – 17:30 **Closing remarks**

Conference Organizers and Supporters

Columbia Center on Sustainable Investment (CCSI)

The Columbia Center on Sustainable Investment (CCSI), a joint center of Columbia Law School and the Earth Institute at Columbia University, is a leading research center and forum dedicated exclusively to the study, practice and discussion of sustainable international investment (SII) worldwide. Through research, advisory projects, multi-stakeholder dialogue and educational programs, CCSI constructs and implements an investment framework that promotes sustainable development, builds trusting relationships for long-term investments, and is easily adopted by governments, companies and civil society.

For more information, see: <http://ccsi.columbia.edu>.

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For more information, see: <http://www.nbim.no/en>.

UNCTAD Investment and Enterprise Division (DIAE)

The Division is recognized as a global centre of excellence on issues related to investment and enterprise for sustainable development. Built on several decades of successful experience, its staff provide international expertise in research and policy analysis, inter-governmental consensus-building, and technical assistance to over 150 countries. Its flagship product is the annual World Investment Report and its main global stakeholder event is the biannual World Investment Forum. The Division also maintains the interactive World Investment Network of over 9,000 members to disseminate and promote all its work on investment and enterprise.

For more information, see <http://unctad.org/en/pages/DIAE/DIAE.aspx>.

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