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Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)
Managing Editor: Jennifer Reimer (jreimer01@gmail.com)

Absent from the discussion: The other half of investment promotion

by
Lise Johnson[*]

As UNCTAD highlighted over a decade ago and again recently in its Investment Policy Framework for Sustainable Development, home-country measures (HCMs), like host-country commitments regarding the protection of foreign investors, are tools of promoting foreign investment.[1] Nevertheless, the vast bulk of investment treaties, which state the promotion of foreign investment as their objective, overlook the potential role of HCMs and focus rather singularly on setting out the obligations of host countries regarding the treatment of foreign investors. Even recent agreements and model investment treaties that should represent "next generation" practices incorporating accumulated learning about the impacts and effectiveness of these treaties remain relatively devoid of any obligation for governments to facilitate or promote the quantity and quality of *outward* investment that many countries want and need for sustainable development.[2]

A few countries (developed and, increasingly, developing) take HCMs to facilitate or promote outward investment. These measures can include such actions as providing information, technical assistance, insurance, and/or financial and fiscal support to domestic firms to encourage and aid them in establishing operations overseas; enhancing coordination among investment promotion agencies; and assisting potential host

[*] Lise Johnson (ljj2107@columbia.edu) is the Lead Investment Law and Policy Researcher at the Vale Columbia Center on Sustainable International Investment (VCC). The author wishes to thank Kathryn Gordon, John Kline, Peter Muchlinski, and Federico Ortino for their helpful peer reviews, and Lisa Sachs of the VCC and Howard Mann for their useful comments. **The views expressed by the author of this *Perspective* do not necessarily reflect the opinions of Columbia University or its partners and supporters. *Columbia FDI Perspectives* (ISSN 2158-3579) is a peer-reviewed series.**

[1] UNCTAD, World Investment Report 2012 (Geneva: United Nations, 2012), pp. 110, 155; UNCTAD, *International Investment Agreements* (New York: United Nations, 2005), ch. 22; UNCTAD, *Home Country Measures* (Geneva: United Nations, 2001).

[2] See, e.g., 2012 US Model BIT, available at http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf. But see also, e.g., UNCTAD (2005), ibid. 22.

countries in developing the infrastructure necessary for attracting investment. The dominant approach by home countries has been to formulate and implement these HCMs unilaterally as part of efforts to support FDI by domestic enterprises, and/or as part of international development assistance programs. And although some investment treaties do contain provisions on HCMs, those provisions have generally been limited to hortatory statements regarding FDI promotion and cooperation rather than specific obligations with mechanisms to ensure their implementation. To a great extent, therefore, the HCMs that have been referenced in investment treaties are weak, and lack the stability and predictability to make them the effective tools for sustainable development that they could be.

There is, however, nothing inherent in investment treaties that precludes or is inconsistent with including more obligations on HCMs, making such obligations measurable and enforceable under those agreements and using them to promote the amount and type of investment that can facilitate sustainable development. Countries could include in their investment treaties commitments on HCMs to allow, encourage and/or promote outward investment, and could craft these provisions to take into account the countries' special and differential obligations; their respective needs, priorities and industrial policies; specific development challenges; and the potential costs and benefits of investment treaties for state parties at the macro- and the micro-levels. Further, they could design the provisions to be flexible or evolve over time as levels of development change.

HCMs, it should be recognized, are not free from controversy. Some argue, for instance, that they raise issues of competitive neutrality, a topic that has recently attracted significant attention from OECD countries. Domestically, HCMs promoting home-country firms' efforts to establish overseas affiliates could potentially exacerbate opposition to investment treaties from constituents concerned about a consequent loss of jobs. Nevertheless, to the extent objections to some HCMs exist and are not assuaged by research or policy responses, home countries have various options for avoiding such objections when, for instance, designing and implementing HCMs that focus on increasing the capabilities of developing host countries to draw in and benefit from FDI. These include HCMs to promote the investment in infrastructure that will help host countries attract FDI, and HCMs that support host countries' development of the absorptive capacity that is crucial for enabling them to reap long-term benefits from such investment.

Home-country efforts to assist with investment promotion activities can truly be win-win measures for home and host countries,[3] helping investment treaties move beyond their arguable current role as mere regulators of the relationship between foreign investors and host countries, to actual tools for encouraging the FDI and economic cooperation that can lead to sustainable development: HCMs can help a home country's investors overcome myriad barriers that make it difficult for them to invest and succeed abroad; the measures can be targeted so as to help scale-up and channel investment into cutting-edge

[3] Because it is focused on the role of investment treaties as promoting investment for sustainable development, this note primarily envisions HCMs in agreements between developed and developing countries, where the HCMs are used to promote investment into the developing country treaty party.

technologies and inclusive business models aimed at solving some of the world's most pressing challenges such as poverty and climate change, while also enhancing the competitiveness of home-country firms; and, more generally, HCMs can serve as catalysts for the type and quantity of international flows of capital that are important for sustainable development, particularly in countries and regions that have struggled to attract such flows. It would thus be a welcome, feasible and overdue departure from traditional practice if new treaties were to contain these commitments, and is an issue policy makers and treaty negotiators should have on their agendas.

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