Feeding the Dragon: Managing Chinese Resource Acquisition in Africa

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INTRODUCTION

China's phenomenal growth over the last three decades has come at a well-documented price. High profile environmental disasters and the nation's pollution problems leading up to the Beijing Olympics have exposed the world to the problems China faces internally. With so much attention being paid to these domestic issues, it is easy to overlook the other side of China's environmental footprint: the country's rapid growth has required unprecedented levels of resource consumption, and China has had to begin reaching into the farthest corners of the globe in its search for raw materials. The finished products available on store shelves around the world may be labeled "Made in China," but they began as copper from mines in Zambia, timber from dwindling swathes of rainforest in Gabon and Guinea, and iron from the Congolese jungle—all shipped to China and forged into products using oil from Sudan, Angola, and Nigeria.

This aspect of the supply chain is the focus of this paper. During the last decade, China has forged close trade relationships with the many developing African nations that are eager to capitalize on their natural resources. This eagerness for foreign investment, however, can have

disastrous effects on the local environment. In many cases, the host nation's environmental laws and enforcement are weak or nonexistent, so foreign corporations may wreak havoc on the environment with relative impunity. This problem is exacerbated with regard to Chinese companies, which often have even less experience or incentive to implement environmental safeguards than other foreign investors. Even if mechanisms are in place that would protect the environment, local officials may have little incentive to enforce the laws because the corporations provide revenues and jobs to some of the poorest places on the planet. Thus, other avenues of encouraging these nations not to trade their environmental integrity and public health for short-term revenues must be explored.

This paper offers an analysis of some of the perplexing legal problems surrounding this important emerging issue. Part I briefly describes the intense levels of resource consumption fueling China's production economy and the trade relationships the country has developed with resource-rich African nations. We also identify the main concerns that increased Chinese involvement in Africa has created and note several examples of specific instances of environmental destruction to help illustrate these concerns. Next, Part II describes the difficulties of trying to address these problems through traditional legal regimes, both in the host Nation and in China. Part IIII explores the Chinese regulatory structure and entities that affect foreign investments from China into Africa, and Part IV explains why these entities should share a common goal of promoting responsible corporate conduct abroad. Part V offers an in depth analysis of several policy recommendations that are intended to begin addressing this problem from several different angles. We hope that this analysis can provide policymakers with some

new ideas and approaches, so we have focused our efforts on developing suggestions that are realistic and take into account the unique circumstances of both Chinese and African governance.

Before we begin, it is important to note that while this paper focuses on Chinese corporations and legal issues, China is by no means the only nation whose corporations have caused environmental destruction in developing nations. American and European explorers and corporations have exploited developing nations for centuries, and there is plenty of literature available detailing these investments and activities. However, the discussion of China's shifting role in the global economy—from capital-recipient to capital-exporter—is just beginning. So while we recognize that all capital-exporting nations and multi-national corporate activities can cause environmental problems, we focus on China because it presents unique challenges and an unprecedented opportunity to establish a framework for responsible investing at the earliest stages of the nation's global economic life.

Furthermore, we have constrained our analysis to legal and governmental issues, thereby excluding several topics that are closely linked to the problems we will identify. Most noticeably, we have refrained from delving too deeply into international law regimes and the partnerships and voluntary measures that corporations use to hold themselves to a higher standard of conduct than is legally required. Many Chinese corporations have signed onto the UN Global Compact, for example, and adopted internal systems to minimize their impacts overseas. While these kinds of initiatives and partnerships will be an important part of China's global corporate citizenship going forward, our goal has been to focus on legal and governmental actions rather than to analyze every possible method that could help address this daunting

problem. This narrow focus will allow us to provide more concrete analysis and recommendations for policy planners and regulators both in China and abroad.

I. THE TRADE SITUATION

A. China's Expansion into Africa

The relationship between China and Africa involves a wide array of geo-political and social factors, but the most important of these are China's need for raw materials and African nations' need for capital investment. While Africa holds some of the richest resource reserves on Earth, many of its nations remain among the world's poorest in terms of GDP and per capita income. On the other hand, Chinese corporations—particularly the large state-owned entities (SOEs) that dominate Chinese activities in other nations—are flush with cash from years of unprecedented growth and eager to secure long-term access to the minerals and fuel that are the lifeblood of the production economy. But the extraordinary increases in resource demand and increasing domestic scarcity have forced these companies to look for these resources outside of China. Thus, China, a late-comer to the game of international resource acquisition, has expended considerable resources cultivating its relationships with African nations that will be able to provide the resources China needs.

It is easy to see why this has become necessary. China is currently the top consumer worldwide of aluminum, copper, lead, nickel, tin, zinc, iron ore, coal, wheat, rice, palm oil,

cotton, and rubber.[1] It has been the world's leading consumer and producer of steel for over a decade, producing approximately one-third of the world's total output, three times the amount of the United States or Japan.[2] All of this production and growth have also vaulted China into the upper echelons of energy and oil consumers, where it is second only to the United States.[3] Clearly, all of this consumption is a result of the increased production of finished goods, stainless steel, electrical wiring, cable and infrastructure that have occurred in China throughout the last few decades. Furthermore, with GDP and per capita income still on the rise, demand will only increase in the foreseeable future.

This partly explains why China has been forced to secure access to as many resource deposits it can find. Because outward foreign direct investment (OFDI) emanating from China was limited to a few government run companies until the mid-1980s, the Chinese business behemoth was not turned loose on the global acquisitions market until just two decades ago. As a result, the vast majority of accessible resource reserves were already in the hands of major multinationals—many of them based in Europe or the Unites States—by the time Chinese companies began searching vigorously for foreign supplies of oil and minerals. Many of the available reserves that were not already depleted were (and still are) located in less developed or volatile nations in Africa, Latin America, and Asia. Chinese firms took advantage of these openings by making overtures to nations that many Western companies had ignored or avoided

[1] Daniel Griswold, Director, Ctr. for Trade Policy Studies, Cato Inst., Address to the Annual Meeting of TEGMA/CMC, The Competition for World Resources: China's Demand for Commodities (Feb. 8, 2007), *available at* http://www.cato.org/pub_display.php?pub_id=10906.

[2] *Id*.

[3] Energy Info. Admin. *Country Analysis Briefs: China* (July 2009), *available at* http://www.eia.doe.gov/cabs/China/ Full.html.

because of concerns over the safety of their investments or the perceived problems of doing business with unstable or undemocratic governments.[4]

The result is a marriage of opportunity between some of the most notoriously difficult governments around the world and Chinese companies seeking access to the resources those nations have to offer. The Chinese government itself paved the way for many of these arrangements, both by offering incentives for Chinese firms to "go global"[5] in their hunt for resources, and by cultivating relationships with the governments of African nations like Angola, Sudan, and Nigeria, all of which are now major oil suppliers to China.[6] The government's emphasis on these relationships reaches the highest levels: Premier Wen Jiabao and President Hu Jintao have visited at least twenty African countries combined since 2003.[7] China holds a great deal of African debt as well, which the State Council regularly refinances or forgives outright when it seeks to gain good will or needs a bargaining chip with a debtor nation.[8] Finally, Chinese government officials have signed off on dozens of commodities agreements that guarantee access or fixed prices to Chinese firms in exchange for Chinese-financed or constructed infrastructure projects. Widely known as "oil-for-infrastructure," these

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[4] A prime example is China National Petroleum Corporation's (CNPC) expanded operations in Sudan in the wake of Western withdrawals during that nation's brutal civil war. *See* Erica Downs, *The Fact and Fiction of Sino-African Energy Relations*, CHINA SEC., Summer 2007, at 58–62 (describing CNPC's role in Sudan). China is now the largest importer of Sudanese oil.

[5] ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), OECD INVESTMENT POLICY REVIEWS: CHINA 2008 83 (2008) [hereinafter OECD REVIEW].

[6] China's top five trading partners—Angola, South Africa, Sudan, Equatorial Guinea, and the Republic of Congo—contribute more than 80% of Chinese imports from Africa. DEUTSCH BANK RESEARCH, CHINA'S COMMODITY HUNGER IMPLICATIONS FOR AFRICA AND LATIN AMERICA 6.

[7] SIMON CLARK ET AL., *China in Africa: Young Workers, Deadly Mines*, BLOOMBERG, Sept. 2008, http://www.bloomberg.com/news/marketsmag/mm_0908_story3.html. This active government role, of course, is not fundamentally different from the role played by the political leaders of Western nations, who frequently cultivate and facilitate such relationships when it is in their national interest.

[8] Inyambo Mwanawina, China-Africa Economic Relations: The Case of Zambia 20 (Feb. 4, 2008), *available at* http://www.aercafrica.org/documents/china_africa_relations/Zambia.pdf .

arrangements are seen by both sides as the most efficient way to provide what each nation needs most, and they have become routine in almost every African nation with which China enjoys significant financial ties.

These financial ties are indeed profound. "More than 800 Chinese state-owned companies are managing about 900 projects in Africa, many of them in the oil industry. Last year Sino-African trade was $106.8 billion US, ten times the level of 2000 and more than double the value of bilateral trade in 2006."[9] The benefits flow both ways, however. While China enjoys increased access to much needed resources, African nations receive many of the goods and services that they need to raise their standards of living. In fact, China may be better suited than entrenched Western MNCs to develop practical solutions for the problems facing African nations because China faces many of the same challenges. Currently the worldwide leader in solar technologies, for example, China will be an essential partner in the quest to provide rural African communities with electricity.[10]

Furthermore, Chinese corporations offer African nations an alternative to the transparency and red-tape that Western corporations require for major OFDIs. These procedural and substantive hurdles have long prevented African nations from receiving aid to carry out some major projects, but African nations have now found many willing partners in Chinese business and government who are willing to make deals without imposing conditions related to

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[9] Jonathan Manthorpe, *The Party's Over for Chinese in Africa*, VANCOUVER SUN, Oct. 4, 2009. Lest we get too caught up in the bandwagon of commentators who frantically opine that China's buying power is cutting other nations out of the picture, it worth remembering that "China is only the third largest market for Africa's oil exports, accounting for 12.5%, behind the US (31.8%) and EU (31.5%)." TOM ORLICK, *Hu Jintao: 'Every time I go to Africa I feel like I am going home'*, CHINA TRANSLATED (Mar. 2, 2009).

[10] Peter Bosshard, *China's Environmental Footprint in Africa* 4 (Sch. of Advanced Stud., Working Paper No. 01-08, 2008), *available at* http://www.sais-jhu.edu/bin/i/f/ BosshardWorkingPaper.pdf.

human rights, the environment, and corruption. While this approach does indeed increase the availability of financing and investment, it does so at the expense of laborers and the environment. Simply ignoring these issues during the negotiations phase does nothing to prevent them from becoming major issues during construction and beyond, but African nations appreciate the fact that they are finally able to utilize their resources in order to bring in much-needed revenues.

B. Causes for Concern

While there are undoubtedly many Chinese companies operating responsibly in Africa, several concerns have arisen as a result of increasing corporate activities and some high-profile missteps. As we will see, Chinese corporate activities pose problems that are somewhat different from those that have accompanied foreign investment by other nations in the past. It is not that Chinese firms are any hungrier for profits than their Western counterparts, but simply that they are doing business under fundamentally different circumstances that pose unique threats to the environment. This section lays out several major concerns these developments have engendered and notes examples to help illustrate the problems in context.[11]

1. China's Environmental Track Record at Home

[11] *See id.* at 5 (providing an abbreviated version of this discussion that was a primary original source for the issues laid out in this section).

Simply put, China's limited success dealing with environmental issues domestically does not bode well for its foreign operations.[12] From everyday air pollution that threatened to scuttle the summer Olympic games to the high profile Benzene spill in the Songhua River that forced over ten thousand residents to evacuate, China's domestic struggles are well-documented and need not be described in detail here.[13] Worth noting, however, are a few of the major issues that hamper efforts to address pollution domestically, because these are the problems that China risks exporting as it expands into less-developed nations. China's environmental laws, for example, are more like policy statements than strict laws because they lack the details that allow for meaningful accountability and enforcement. Additionally, government officials often fail to prioritize environmental enforcement because they rely on polluting industries for revenues and to provide jobs for citizens.[14] Even when local officials want to confront a problem, they may be hindered by a lack of resources or authority, as the company may have allies in higher reaches of government who can prevent effective regulation.[15] Finally, a simple lack of understanding regarding environmental issues and the need for precautionary measures permeates the system generally, making it difficult to convince anyone with authority to take any meaningful action.[16] As we will see, all these problems also exist—often to an even worse degree—in the host nations where Chinese corporations are establishing so many operations.

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[12] *See id*. ("China's domestic policies have prioritized economic growth over the protection of the environment, with harrowing results."); ELIZABETH ECONOMY, THE RIVER RUNS BLACK 248 (2004) (generalizing about the priorities and general mentality of many Chinese decision-makers).

[13] *See, e.g.*, Lisa A. Kirschner & Edward B. Grandy, *Songhua River Spill: China's Pollution Crisis*, 20 Nat. Resources & Env't 66 (2005–2006) (describing the Songhua spill in detail); *see generally* ECONOMY, *supra* note 12, at 59–91 (thoroughly discussing the issues that plague environmental enforcement in China).

[14] ECONOMY, *supra* note 12, at 200.

[15] Erica Downs, *Brookings Foreign Policy Studies Energy Security Series: China* 16–24 (Dec. 2006), *available at* http://www.brookings.edu/fp/research/energy/2006china.htm (noting, for example, that "[t]he general managers of China's [national oil companies] … have direct access to the country's senior leadership ….").

[16] OECD REVIEW, *supra* note 5, at 265–67.

2. Activities in particularly sensitive places

When an area has been used for resource extraction before, it is often easier to mitigate (or, perhaps, simply overlook) destruction caused by ongoing projects. However, because of China's late entry into the global resource market, its companies are gaining access to many previously undeveloped areas in their quest for untapped resources. "While investments in the mining, oil, gas, hydropower and timber sectors generally carry high environmental risks, China's strategy of making previously inaccessible resources accessible compounds these risks. Chinese investors are developing projects in remote, ecologically fragile regions, in areas that have so far been protected as national parks, and in countries with weak governance structures."[17] This simple fact means that Chinese corporations will have impacts on pristine lands with extremely high ecological value that cannot be replaced or rehabilitated. While it may be possible to exploit resources in these areas responsibly, the China's domestic track record does not give critics any reason to believe that environmental concerns will outweigh financial ones as Chinese corporations continue to drill, chop, and mine the African backcountry.

This concern came to the forefront in 2006, when one of China's largest oil companies attempted to set up operations in Gabon's Loango National Park. Loango has been described as one of the last untouched paradises on earth—a lush coastal preserve where extremely rare wildlife species wander the beaches, blissfully unaware of man's existence. It is home to healthy populations of endangered lowland gorillas and elephants, as well as manatees that breed in the crystal clear waters off its coast. In 2006, scientists working in Loango reported that Sinopec

[17] Bosshard, *supra* note 10, at 5.

contractors had entered the park and were employing destructive exploratory tactics, including dynamiting gorilla habitat and a manatee breeding site.[18] One professor commented:

> They're using dynamite, which is killing and scaring the wildlife, sending the gorillas deeper into the forest and outside the protection of the park where they risk becoming bushmeat. They're bulldozing roads through the park, polluting the waters with chemicals and slurry and hunting the wildlife to eat …. I don't want to forbid the Gabonese from profiting from petrol but modern techniques exist, like horizontal drilling that would allow the oil to be extracted without setting foot in the park.[19]

Sinopec was ultimately forced out of Loango before they were able to cause the extensive damage that conservationists and scientists feared, but similar problems can occur wherever corporations move into previously untouched lands and virgin forests. With Chinese acquisitions rapidly expanding into these areas, immediate and irreparable damage is likely to occur.

3. Sensitive nature of the projects and investments

By their very nature, resource acquisition projects require extensive intrusion into local environments. Because China's investments in Africa are so heavily concentrated in environmentally sensitive sectors like mining and oil and gas development, Chinese corporations tend to have a disproportionately large impact on the environment of host nations. Mining and oil exploration entail significant levels of blasting, seismic testing, and pollution, all of which affect local ecosystems to varying degree.

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[18] Chris Haslam, *Oil Prospecting in Gabon*, WILDLIFE EXTRA NEWS, Oct. 2006, http://www.wildlifeextra.com/go/news/gabon-oil.html#cr.

[19] *Id*. (quoting Christophe Boesch).

The town of Kabwe, Zambia exemplifies the dangers of irresponsible mining. This town in the heart of the Zambia's Copperbelt has for decades been the site of destructive mining operations that have left the entire city covered in highly toxic lead dust, the air burning and acrid with sulfur dioxide fumes emitted from the smelters nearby.[20] Barefoot children play on mounds of poisonous waste, while citizens pick through the rubble searching for scraps of metal they might be able to sell for a few pennies.[21] As a result, citizens evidence levels of lead in their blood that is five to ten times that which the US government would consider safe.[22] In spite of all this, the Zambian government continues to welcome investors, offering tax breaks and waivers to anyone willing to invest in Zambian mines.[23]

While not responsible for the appalling conditions that exist today, Chinese firms have expanded into Zambia rapidly, often rekindling the same problems that have earned Kabwe its title as the fourth most-polluted place in the world.[24] A mine run by Chiman Manufacturing, Ltd., in particular, has been criticized repeatedly for failing to control air pollution at its smelter and slag at its dumpsites. Though town officials repeatedly "urged" Chiman to address the problems after it began operations several years ago, Chiman's smelter continued to pollute the

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[20] Danstan Kaunda, *Zambia Penalizes Chinese Investors for Pollution*, VOICE OF AMERICA, June 12, 2007, http://www.highbeam.com/doc/1P3-1287300591.html.

[21] Penny Dale, *Zambia's Child Poisoning Tragedy*, BBC, Nov. 6, 2003, http://news.bbc.co.uk/2/hi/africa/3241037.stm.

[22] *Id*.

[23] Chris Mfula, *Zambia Won't Reintroduce High Mine Taxes*, REUTERS, Dec.12, 2009, http://af.reuters.com/article/zambiaNews/idAFGEE5BB09G20091212. The tax incentives are still in place.

[24] *Kabwe, Africa's Most Toxic City*, IRIN NEWS, Nov. 9, 2006, http://www.irinnews.org/Report.aspx?ReportId=61521. The three cities topping the list of the world's most toxic sites ahead of Kabwe are Chernobyl, Dzerzhinsk, (a Russian, Cold War-era chemical weapons production facility), and Haina, Dominican Republic, "where emissions from an old car battery smelter have caused almost the entire population of 85,000 to suffer from lead poisoning." *Id*.

town with relative impunity.[25] This kind of serious and life-threatening pollution can accompany almost any of the intensive mining ventures in which Chinese firms are involved overseas, and exemplifies the dangerous nature of these investments.

4. Lack of environmental safeguards in associated projects

A less obvious result of these ventures, however, is the environmental damage caused by associated construction projects. Many of these resource acquisition contracts involve large-scale construction projects, either as compensation or to facilitate the extraction process. In January 2009, for example, China agreed to finance $9 billion of roads, railways and mines in Congo in exchange for 10 million metric tons of copper and 600,000 tons of cobalt at a fixed price over the next decade.[26] Though these oil-for-infrastructure contracts are popular with local governments because they provide much needed infrastructure and construction jobs, critics have complained that the projects often have negative environmental and social consequences that are not considered or mitigated adequately.[27] Until recently, developing nations needed to obtain financing from international lending institutions for the kinds of large scale projects that the Chinese are now willing to build and finance. However, these international institutions, such as the International Finance Corporation (IFC) of the World Bank Group, have "adopted environmental guidelines and standards to address the environmental impacts of their projects. Major Chinese investors, financiers and equipment suppliers have so far not adopted such

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[25] *Reduce Air Pollution, Chinese Firm Urged*, THE TIMES OF ZAMBIA , Feb. 11, 2008, http://allafrica.com/stories/200802110293.html.

[26] SIMON CLARK ET AL., *China in Africa: Young Workers, Deadly Mines*, BLOOMBERG, Sept. 2008, http://www.bloomberg.com/news/marketsmag/mm_0908_story3.html.

[27] *See* Mwanawina, *supra* note 8, at 10–11 (describing the lack of coordination among bureaucratic officials and contractors and the poor construction that results).

standards, or have developed policies which are not necessarily in line with international standards."[28]

Consequently, many of these projects are carried out without ever being subjecting to the scrutiny that large scale projects typically receive from the international organizations whose mission it is to facilitate worthwhile investments. By contracting directly for major construction projects, Chinese corporations and African governments can bypass the usual procedures for ensuring that internationally-financed public works projects meet certain environmental standards, such as completion of environmental impact assessments (EIAs). Furthermore, the parties are unlikely to require mitigation measures throughout the life of the project, as Western financial institutions usually do. By not analyzing potential environmental consequences before a project is approved and financing obtained, the parties virtually ensure that the project will go forward—and that it will go forward with minimal regard to its environmental consequences.

Of course, the underlying problem is that the Western transparency and environmental standards that China typically does not impose are the very ones that have kept many projects in Africa from being approved or financed by Western organizations in the first place.[29] Many of the projects currently being carried out with Chinese assistance have been on the table for years, but Western institutions refused to fund them.[30] Now, African governments may be able to

[28] Bosshard, *supra* note 10, at 5.

[29] Mwanawina, *supra* note 8, at 21 ("All Zambia[n] agreements with China are confidential, making them closed to public scrutiny and at variance with both China's and Zambia's increased commitment to openness and public transparency and accountability.").

[30] *Id*. at 6 (specifically noting that the Chinese generally fund Zambian "projects [that] other donors are not interested in").

obtain financing from parties who will allow them to achieve their goals with few strings attached.[31]

II. LEGAL DIFFICULTIES REGARDING ENVIRONMENTAL DESTRUCTION BY FOREIGN CORPORATIONS

It is clear that the environmental consequences of corporate activities abroad can lead to serious problems for local residents and ecosystems. Less clear is how those affected can successfully intervene to stop or mitigate the damage, or seek compensation after the fact. This section describes some of the ways in which traditional legal regimes are inadequate for dealing with instances of malfeasance by both Chinese and multinational corporations (MNCs) generally.

A. Domestic Law in Host Nations

In spite of the fact that all foreign investors are "subject to the control of the host State" under the principle of national sovereignty,[32] it is often very difficult to enforce environmental

[31] This is how the Sudanese government, for example, finally obtained financing to build the Merowe Dam on the Nile, a project that was uniformly rejected by major Western financiers because of its severe social and environmental impacts. Believing that the potential benefits of the project were worth the risks, the Sudanese government eventually received funding from China's Ex-Im Bank, the largest foreign aid bank in China, and hired China International Water and Electric Corporation to build the dam. The dam was built without any serious evaluation of the risks. In fact, the closed-door planning process resulted in several blatant breaches of accepted international environmental standards. Bosshard, *supra* note 10, at 7–8.

[32] ELISA MORGERA, CORPORATE ACCOUNTABILITY IN INTERNATIONAL ENVIRONMENTAL LAW 25 (2009).

laws against foreign firms in developing nations. Foreign firms must comply with all national foreign investment laws governing entry into the market, "which not only provide for guarantees against expropriation[,] … dispute settlement, and tax and non-tax incentives, but also detail a screening process of entry through administrative agencies and often require a feasibility study… [which] may include an EIA."[33] During the life of the project, investing companies must also continue to "abide by all national laws and regulations—including environmental ones, as the investor voluntarily subjects himself to regime of the host State by making entry into it."[34] Nevertheless, problems arise during both phases.

1. Compromises at entry into the market

There are no universal international standards for entry into foreign markets, so nations are both free to set their own regulations and to negotiate with specific investors over the terms of entry. The fierce competition for investment affects both of these issues. First, national entry regulations are often lax or vague, which can result in an open invitation to foreign investors who seek to maximize profits by operating as cheaply as possible.[35] Even basic requirements, such as creating an environmental impacts assessment, may be little more than mere formalities or overlooked entirely.[36] Second, the host nation's desire for capital investment generally puts the potential investor at a substantial bargaining advantage. The "ad hoc consultative process" used

[33] *Id*.
[34] *Id*. at 26.
[35] Mwanawina, *supra* note 8, at 10 (stating unequivocally that Zambia "lacks laws and systems which are results oriented and accountable").
[36] While most nations appear to have laws that require EIAs for major projects, few have any authoritative or meaningful guidelines for these reports, so it is not unusual for an EIA to be inadequate or even entirely inaccurate. Objective oversight or review by third parties is not required, and internal review by a host State's environmental officials is not guaranteed even when required by local law. *See* Bosshard, *supra* note 10, at 7 (describing the shortcomings in the Sudanese dam EIA).

to approve entry into most African markets does not provide safeguards sufficient to ensure the viability and safety of individual projects proposals.[37] During negotiations, a potential investor may extract from the host nation numerous contractual guarantees that protect the investor's money and property making any meaningful concession regarding the safety of the operation with regards to laborers and the environment.[38] An example of one seemingly innocuous provision with potentially far-reaching environmental consequences is the "stabilization clause," which "seeks to freeze the law of the host State as at the time of entry so that the operating conditions of the foreign investment project will remain constant throughout the life of the foreign investment contract."[39] A law that imposes new burdens on the investor may be deemed a breach of the stabilization clause, which can result in the host nation owing compensation to the investor. Such contractual provisions severely restrict the right of the host nation to update, enact, or enforce environmental laws that might apply to the foreign investors' operations.[40]

2. Lack of local enforcement

Host State legal systems often do not have adequate mechanisms for ensuring that foreign firms operate in an environmentally responsible way. Depending on what laws and procedures

[37] Mwanawina, *supra* note 8, at 22.

[38] MORGERA, *supra* note 32, at 27. Even beyond these specific agreements, there are international conventions dealing with the protection of alien property, and expropriation of assets is considered a breach of customary international law. It is important to note that these issues are regularly enforced at an international level: investor protections have "gradually been extended from tangible assets to cover … other investors' rights, thus limiting the sovereignty of host States over their natural resources, and enlarging the sphere of corporate interests protected at the international level." *Id*. at 51. This begs the question of why wealthy international investors have been given forums and mechanisms to protect their investments, while poor host nations have no comparable way to protect their communities from environmental destruction.

[39] *Id*. at 27.

[40] Even when this might otherwise be construed as a non-compensable regulatory taking, recent international law cases have indicated that an environmental regulation can, in some cases, "constitute an act 'tantamount to expropriation.'" ICSID, *Metalclad Corp. v. United Mexican States*, Case No. ARB(AF)/97/1, Award, 30 Aug. 2000, 40 ILM 35.

are applicable, a complaint may be addressed through either administrative or judicial mechanisms.[41] Administrative mechanisms may involve extensive proceedings that exhaust the resources of the complainant and do not guarantee any remedy. Local officials rarely have any incentive to crack down on industrial polluters because these companies are often the financial lifeblood of the community, providing much of the tax base and employment in the area.[42] This problem likely contributed to the town of Kabwe's unwillingness to close permanently the smelting operations that polluted the city for so many years. In some nations, concessions from these MNCs constitute a significant proportion of the national GDP, so there is incentive to look the other way even in the highest levels of government.[43]

Even when officials act in good faith, they may be hampered by a lack of enforcement resources, technological ability, and awareness of risks.[44] A local commentator in Zambia described the situation in stark terms: "There is a lack of workable systems, lack of capacity to implement anything and regulate anything, be it wildlife, forestry, building, hospitals, etc."[45] Without inspectors or oversight capabilities, a government obviously cannot enforce its regulations. Moreover, if governments do not have the technology to monitor pollutant discharge, for example, they must rely on self-reporting from the polluter itself. Even if these are fairly reported, there is likely to be a lack of understanding regarding the consequences of

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[41] Alice Palmer, Foundation for International Environmental Law and Development, Community Redress and Multinational Enterprises 7–10 (Nov. 2003).

[42] Mwanawina, *supra* note 8, at 10 (noting that Zambia, at least, "is a place where you keep your job by not doing it.").

[43] As an example, a Canadian MNC operating a gold mine in Guyana provided 20% of that nation's GDP in 1995 when it was sued for damages related to a massive spill into Guyana's Essequibo River. The Canadian court hearing the case acknowledged serious concerns regarding the fairness of proceedings involving such an influential entity in Guyana. *Recheres Internacionales Quebec v. Cambior Inc*., 1998 QJ N2554 (QL).

[44] Mwanawina, *supra* note 8, at 10.

[45] *Id*.

pollution levels, leading to regulations that, if enforced at all, are not sufficient to protect residents and ecosystems.[46] Finally, the potential legal consequences stemming from violations of any regulations that are actually enforced are often insufficient to motivate compliance. Fines, for example, may be so low that it is cheaper to violate the laws and risk paying the fine, if it is ever imposed.

3. Difficulty of pursuing a legal claim

If the administrative process fails, one would hope that a private suit could bring a party some relief from environmental harm. When the claim is one for civil damages, the parties should face off in the typical civil suit setting. Difficulties facing local plaintiffs in such a situation abound. They may lack standing to challenge a general harm inflicted on a region, particularly when the harms alleged are not specific to the individual filing suit or causation is difficult to prove.[47] What cause of action, for example, could a concerned citizen have brought to try to stop Sinopec's blasting in Luongo NP? The Luongo situation illustrates an additional practical problem: the Gabonese government initially authorized Sinopec's activities in that case, a fact that could constitute an effective defense (or an unofficial, but potentially insurmountable obstacle) to legal claims in the host country.

Even if they succeed in asserting a claim, local plaintiffs are usually underfunded and dependent upon legal aid that may not be available.[48] Chinese multinationals, on the other hand, have the resources to defend themselves and are likely to structure their deals in ways that limit

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[46] MORGERA, *supra* note 32, at 27.
[47] *Id*. at 29.
[48] Palmer, *supra* note 41, at 8.

liability. A host nation's court may not be able to assert jurisdiction over a Chinese parent company at all, and even it did, judgment amounts would likely be limited to the subsidiary's assets within the host State, which may be insufficient for proper remediation or compensation. Any judgment against a Chinese corporation, particularly the SOEs that conduct so much business in Africa, would be difficult to enforce either in the host nation or in China.[49] As a practical matter, therefore, foreign citizens are unlikely in the majority of cases to obtain adequate remedies or damages from Chinese corporations in host nation courts.

B. Foreign direct liability

Because redressing environmental harms can be particularly difficult in host nations, it is sometimes more effective for the home nation to regulate its corporations' activities abroad, which is known as foreign direct liability. This concept encompasses both extraterritorial regulation, wherein subsidiaries acting abroad are forced to abide by the laws of the home State throughout the life of the project, and home State liability, which allows host State citizens to seek damages from foreign corporations in the corporation's home State.[50]

1. Extraterritorial Regulation

While authors have identified many theoretical problems associated with extraterritorial application of home State law,[51] we will focus on the practical difficulties that can arise in such a scheme. First, it is important to note that in spite of the traditional objections to extra-territorial

[49] *Id*. at 10.

[50] DANIEL BODANSKY, THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW 131.

[51] *See generally* Surya Deva, *Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should "Bell the Cat"?*, 5 MELBOURNE J. INT'L L. 37 (2004) (discussing many of the theoretical and practical problems of implementing an effective extra-territorial enforcement regime in the human rights context).

regulation based on strict non-interference and national sovereignty principles, home States are permitted to exercise jurisdiction over their MNCs abroad.[52] Even developing nations that typically object to international interference in domestic affairs, such as China and India, have occasionally expressed support for the idea that a MNC's home government "should also undertake obligations, including … ensur[ing] that the investor's behavior and practices are in line with and contribute to the interests and development of policies of the host [State]."[53] This is in keeping with the recommendations of UN Special Representative John Ruggie, the head of UN initiatives regarding transnational corporations and human rights, who has indicated "that extraterritorial regulation by home States of TNCs headquartered in their territories is permissible under international law and may even be desirable in some circumstances."[54]

Nevertheless, the fact that such regulation is permissible does not make it particularly practical. Many significant obstacles impede the ability of home States to effectively oversee corporate activities in foreign States. First, the host State may view such intervention in its internal affairs with suspicion and could even prevent the home State from exercising effective control by asserting its own right to national sovereignty.[55] Courts around the world have been extremely reluctant to exercise extraterritorial jurisdiction in environmental damage cases,

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[52] *See* Christen Broecker, *"Better the Devil You Know": Home State Approaches to Transnational Corporate Accountability*, 41 J. Intl. Law & Politics 159, 178–79 (2008) (briefly describing the legitimate bases for permissible extra-territorial regulation).

[53] World Trade Organization, Working Group on the Relationship Between Trade and Invetsment: Communication from China, Cuba, India, Kenya, Pakistan, and Zimbabwe—Investors' and Home Governments' Obligations, WTO Doc WT/WGTI/W/152; (2002); see also MORGERA, *supra* note 32, at 30–34 (describing both the theoretical and practical problems with home State control and extra-territoriality).

[54] Broecker, *supra* note 52, at 177 (citing John Ruggie).

[55] Palmer, *supra* note 41, at 12.

precisely because the issues involved are generally so local in nature.[56] Second, a host nation that permits such intrusion risks establishing a system in which MNCs in the same industry operate "subject to different environmental regulations depending on their country of origin."[57] The host country would face tremendous regulatory and enforcement challenges in such a system.

On the other side of things, the home nation may not exercise effective control either. Given the difficulties that plague environmental enforcement *within* China, it is particularly difficult to imagine the Chinese government creating or exercising effective enforcement mechanisms that could stem pollution and resource damage in far-off, even less developed nations. Government capabilities are hampered by competing bureaucracies, devolved enforcement authority, lack of interest and knowledge on environmental issues, and vague laws. The home system is simply too weak to be capable of exportation at this point. On a deeper level, there is very little culture of compliance within China, nor any meaningful sense of responsibility for corporate actions abroad.[58] Dan Haglund of International Rivers reports that when he met with a Chinese official in Zambia, the official made a forceful argument "that Chinese companies must simply follow local laws, and that responsibility for identification and

[56] *See* J. K Rankin, US *Laws in the Rainforest: Can a US Court Find Liability for Extraterritorial Pollution Caused by a US Corporation? An Analysis of Aguindo v. Texaco, Inc*., 18 BC INTL. AND COMPARATIVE L.R. 221, 251 (1995) (noting the aversion that US courts seem to have against recognizing extraterritorial jurisdictional claims in environmental cases).

[57] MORGERA, *supra* note 32, at 31.

[58] Li Junhai, Chinese Academy of Social Sciences, Philosophy and Approaches to Strengthen Corporate Responsibility in China 13.

sanctioning of non-compliance should rest with the Zambian government."[59] This mentality poses a difficult obstacle to effective home State regulation.

2. Home State Liability

Home State liability is often used as a method of last resort for those complainants who have suffered harm but have not been able to pursue their claims in the host State.[60] Foreign citizens may bring claims against Chinese corporations in Chinese courts, but given the difficulty that domestic plaintiffs have collecting damages for environmental harms, such a suit would not be likely to succeed. Simply getting access to legal assistance within China from far off African nations would be difficult. Furthermore, procedural hurdles often keep plaintiffs from even making it past the pleading stages, "implicitly discriminating in favor of multinationals trying to escape responsibility for damages caused abroad."[61] If the plaintiff makes it to the courtroom, proving the case against the Chinese corporation could be impossible when the evidence needed "is in the hands of the [corporation] or of a host State unwilling to cooperate."[62] Even where a plaintiff can prove liability, Chinese courts may not be willing to hold Chinese firms responsible in cases where major SOEs are involved or when foreign subsidiaries caused the destruction and host nations allowed it to occur.[63] Finally, courts may be reluctant to impose liability when

[59] Dan Haglund, *Regulating FDI in Weak African States: A Case Study of Chinese Copper Mining in Zambia*, 46 J. MOD. AFR STUD. 547, 557 (2008).

[60] Palmer, *supra* note 41, at 10. This is the underlying principle for the U.S.'s Alien Torts Claim Act, which provides a forum for suits alleging violations of international law by those who cannot obtain justice elsewhere.

[61] MORGERA, *supra* note 32, at 33.

[62] *Id*.

[63] Collecting judgments from a Chinese parent company for a foreign subsidiary's actions poses unique problems as well. While piercing the corporate veil is not easy in Western nations, it is even more difficult in China. According to the Company Law of 2005, the parent company is considered a shareholder of its subsidiaries, but it will not be held liable for the subsidiary's liabilities unless the court finds two conditions met: first, the plaintiff must show that that the parent company/shareholder has attempted to "[evade] the payment of its debts by abusing the independent status of legal person or the shareholder's limited liabilities." Art.20-3. This subjective proof of

foreign relations issues are at issue, as they almost always are in Sino-African resource acquisition projects.[64]

III. LAW AND REGULATORY CONTROL OF OFDI AND OPERATIONS ABROAD

The discussion thus far has exposed some of the difficulties of dealing with destructive acts by multinationals generally and Chinese corporations in particular. It should be clear that both home and host State governments have at least some ability to influence corporate behavior in host nations, but that this power is largely underutilized or ineffective. While host States obviously need to take responsibility for protecting their own environments and citizens, this is far easier said than done, as discussed above.[65] So while we could simply exhort host States to crackdown on foreign polluters, we view that as an inadequate suggestion for our purposes.[66] Instead, the remainder of this paper will examine this problem in the context of actions that the Chinese government and other institutions could take to address the issues that have developed as Chinese corporations carry out their nation's global resource acquisition strategy.

The Chinese government already has an elaborate regulatory system in place to oversee foreign investments, but this system focuses primarily on commercial and strategic viability, rather than oversight and enforcement of environmental regulations. This active involvement in

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fault is exceptionally difficult to prove. Second, the plaintiff must show that the subsidiary's action has "seriously injure[d] the interests of [a] creditor …." Art.64. This amorphous requirement is not only difficult to prove, but gives the judge considerable discretion in deciding whether to hold a parent company liable. The creditor must also become involved in the case in order to prove this element.

[64] MORGERA, *supra* note 32, at 33

[65] See *supra*, Part II.A.

[66] Nevertheless, with Chinese entities so hungry for investment opportunities, one could argue that the resource-rich nations should not be so desperate for investment that they deal away their environmental integrity. As explained in Part I, China is in many ways as desperate for access to resources as the host nations are for investment, so perhaps the assumption that regulations will prevent investment should be questioned with regards to Chinese businesses. Regardless, practical reality dictates that simply urging host States to adopt higher standards is unlikely to be effective in the short-term, so our focus will remain on alternative ways of addressing the problem.

foreign investment reflects the command economy that continues to permeate China's unique brand of doing business. While it maintains a large degree of involvement in foreign investment projects, the central government has expressed a desire to transform its role from "one of approving and controlling to one of monitoring and facilitating investment projects,"[67] which could indicate a willingness to increase environmental oversight during the life of OFDI projects. Regardless, with the government already so deeply involved in foreign investment projects, it could exercise more effective and meaningful oversight if it chose to do so. Below the State Council, authority for regulating Chinese corporate activities abroad is split among many competing bureaucratic entities. This section describes the Chinese entities involved in OFDI regulation and the ways that environmental concerns affect the decision-making process of each.

A. NDRC

The National Development and Reform Commission (NDRC), an agency under the State Council, is a macroeconomic planning entity charged with managing general economic policy. It is responsible for "formulating policies for economic and social development … and guiding overall economic system restructuring."[68] Depending on the particulars of an OFDI project, it may also have to review and approve individual proposals. In order for the NDRC to approve a project, it must find that the project will comply with domestic laws, regulations, and policies, and "comply with the demands of sustainable development of the economy and society …."[69]

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[67] OECD REVIEW, *supra* note 5, at 85.

[68] *Id*. at 87

[69] Article 18 of *The Interim Measures for the Administration, Examination and Approval of Overseas Investment Projects* provides:

The requirements for the project that shall be examined and approved by the National Development and Reform Commission are as follows: (1) it shall abide by the laws and regulations of the state and the industrial policies, not do harm to the sovereignty, safety and public interests of the state and not violate the rules of international law; (2) it

Since these vague terms are undefined, however, such a finding may not ultimately require much by way of actual evidence that the project will operate sustainably, and given NDRC's macroeconomic focus, it does not seem to emphasize environmental issues in its review process. In most respects, its approval process and criteria are largely similar to that of the Ministry of Commerce, described below, except that NDRC is less likely to delve into the technical details and analysis of specific projects.

B. MOFCOM

The Ministry of Commerce (MOFCOM, or sometimes MOC) is responsible for "setting administrative measures and specific policies, guiding China's overseas investment, approving each OFDI proposal, and recording OFDI data."[70] MOFCOM and NDRC's review criteria may be similar, but MOFCOM tends to review projects in more specific detail, both with regards to economic viability and operations in the host country.[71] Overseas investors must submit various documents attesting that the project will comply with local laws, be compatible with Chinese strategic interests, and disclosing financial details. MOFCOM also administers a database regarding OFDI and the local laws everywhere Chinese businesses operate to help businesses succeed and comply with local laws.[72]

In fact, MOFCOM has several departments tasked with overseeing different aspects of foreign economic activity. The Department of Foreign Economic Cooperation (DFEC) is

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shall comply with the demands of sustainable development of the economy and society and be helpful to the development of strategic resources required for developing the national economy …" NDRC (Oct. 9, 2004), *The Interim Measures for the Administration, Examination and Approval of Overseas Investment Projects*, art. 18.

[70] OECD REVIEW, *supra* note 5, at 87.

[71] *Id*.

[72] *Id*. at 89, 93.

charged with regulating all Chinese companies operating overseas and has the authority to punish corporations that violate MOFCOM regulations or Chinese laws.[73] "The DFEC also regulates Chinese overseas labor corporations, in effect making the MOC responsible for the treatment of China's overseas workers by Chinese corporations."[74] Additionally, MOFCOM's Department of Foreign Aid (DFA) administers the bulk of China's aid projects, including the concessional loans and oil-for-infrastructure projects discussed in Part I. In this role, DFA is responsible for approving Chinese contractors for these projects and "takes direct responsibility for the safety and quality of construction in China's aid projects."[75]

All this project-level involvement puts MOFCOM and its departments in a good position to exercise oversight of OFDI, but this capacity is underutilized in the environmental context for a variety of reasons. Most importantly, MOFCOM has incompatibly conflicting responsibilities because it is charged with both helping Chinese companies succeed in their overseas business ventures and with regulating them. As long as MOFCOM and the State Council's primary interest continues to be economic development, regulatory enforcement is unlikely to emanate from MOFCOM itself in all but the most egregious cases. Furthermore, MOFCOM does not have direct authority over any of the SOEs operating abroad, so it cannot take effective action against these companies in most cases.

C. ECC

[73] Bates Gill & James Reilly, *The Tenuous Hold of China Inc. in Africa*, WASH. Q., Summer 2007, at 42.
[74] *Id*.
[75] *Id*. at 43.

Additionally, MOFCOM has some authority over yet another department, one that could be an effective instrument for oversight in foreign nations. The Chinese embassy in each host nation has an Economic and Commercial Counselor (ECC) office that manages economic links between the host nation and China. The ECC has multiple roles and duties and is subject to competing bureaucratic authority, but MOFCOM generally treats each ECC office as its local representative.[76] This partnership gives the ECC a unique role in OFDI policy. During the planning stages of a project, the ECC is responsible for providing MOFCOM with relevant information regarding any proposed project,[77] including an opinion regarding the proposal's impacts "on the bilateral political, economic and trade relationships."[78] The ECC also helps inform each company of the laws that apply to it in any given situation. In fact, the ECC can play a key role in helping Chinese corporations be aware of and obey the laws of the nations in which they operate, a job that draws significantly upon MOFCOM's resources and expertise with the financial and legal requirements in each host nation.[79]

This active role in host nations allows the ECC to be involved in projects as they are being planned and carried out, which theoretically means it should be in a position to observe both potential and actual environmental effects. As we have noted, part of its role is to assess each proposed OFDI project for its impacts on bilateral relations. Because significant harm to host nation environments can easily lead to strained relations, this assessment could include a

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[76] Gill & Reilly, *supra* note 73, at 43.

[77] Under Articles 10 and 11 of *The Measures on Overseas Investment,* MOFCOM must solicit the ECC's opinion regarding "the basic information on the investment and other relevant information" before MOFCOM can approve a proposed project.

[78] Article 11 states: "The [economic and trade counselor's office of the] embassy or consulate of China in the foreign country or region shall put forward its opinion in such respects as the security status of the host country and the impact of the investment on the bilateral political, economic and trade relationships, and make a reply within 10 workdays after receiving the letter of request for opinion."

[79] OECD REVIEW, *supra* note 5, at 93.

full report of the project's potential environmental impacts. However, the ECC must file its opinion on the project within ten days of receiving a request from MOFCOM, which is clearly not enough time to conduct a thorough environmental evaluation. Furthermore, although the ECC is tasked with helping Chinese corporations increase their knowledge and compliance with host State laws, including environmental ones, it has no environmental expertise. Thus, it is not particularly qualified to evaluate the accuracy of an impacts assessment if a company creates one or to monitor technical environmental data while the project is operating. Nor does it typically have the manpower to monitor operations; the ECC office in Zambia, for example, had only six staff members in 2007 when the Chiman mining problems occurred.[80]

Furthermore, the ECC's status within the bureaucracy means it is neither required to obey instructions from a ministry that might seek to enhance environmental compliance, such as MEP or MOFCOM (which does not have administrative authority over the ECC, in spite of their close relationship), nor powerful enough to effectively regulate most of the corporate actors who violate laws in host States.[81] Like MOFCOM, the ECC has no direct lines of authority over Chinese corporations in Africa.[82] "Low-ranking ECC staff officers in Africa would have little clout to monitor and challenge the operations of major Chinese SOEs."[83] Also, while both MOFCOM and the ECC have some authority and interest in regulating Chinese corporate

[80] Haglund, *supra* note 59, at 557 (as of 2007).

[81] To those who are less familiar with the workings of Chinese bureaucracy, or who accept the "China, Inc." model that portrays Chinese government and business interests as a unified force, this idea of vigorously competing bureaucracies may seem strange. However, the truth is that turf wars between ministries and with the central government are common, and regulating businesses is often more difficult than people presume. For further discussion of the complexities of the Chinese bureaucracy with regards to OFDI and the energy sector in particular, *see generally* Gill & Reilly, *supra* note 73 *and* Downs, *supra* note 15, at 16–39.

[82] Gill & Reilly, *supra* note 73, at 45, 47.

[83] *Id*. at 47; *see also* Downs, *supra* note 15, at 21–24 (describing some of the ways officers avoid responsibility or circumvent those who would seek to control them within the bureaucracy).

activities abroad, the overwhelming emphasis on economic development is likely to trump enforcement duties that will impede short-term profits or hinder ongoing business relationships. Accordingly, "reliance on local ECC staff in Africa to ensure the timely flow of information and rigorous enforcement of regulations on Chinese corporations in Africa may prove difficult in all but the most egregious incidents."[84]

D. SASAC

The State-owned Assets Supervision and Administration Commission (SASAC) either owns or holds a controlling share of stocks in all of China's state-owned entities (SOEs).[85] Because the SOEs carry out the vast majority of resource acquisition OFDI from China into Africa, SASAC is a key player in decisions regarding corporate operations in host nations.[86] SASAC's role is virtually indistinguishable from that of a typical managing shareholder in that its sole concern is in maximizing the economic performance of its companies."[87] This gives SASAC every incentive to operate as cheaply as possible and avoid costs associated with environmental compliance. This is particularly problematic because SASAC is not effectively checked by any other ministries with competing interests. As an organ of the State Council, SASAC's bureaucratic ranking is equivalent to any of the Ministries that might try to exert authority over SOEs, so state-owned corporations enjoy the privilege of influencing both the implementation and enforcement of regulations that affect them.[88] Furthermore, when

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[84] Gill & Reilly, *supra* note 73, at 47.

[85] *Id*. at 42

[86] Gill & Reilly, *supra* note 73, at 44 (noting that because "[p]rovince-level SOEs make up approximately 88 percent of all Chinese firms investing abroad, … provincial governments [are] a key player in China's corporate engagement strategy overseas").

[87] *Id*. at 42.

[88] *Id*.; Downs, *supra* note 15, at 21–24 (discussing the relationship of the oil companies to the government).

environmental and financial interests collide, SASAC officials can be counted on to encourage government officials to give priority to economic considerations.[89]

This is not to say that SASAC thwarts every attempt to regulate SOE conduct. It has issued several directives over the last three years ostensibly intended to raise the level of SOE conduct. The *Guiding Opinion on Fulfilling Social Responsibilities by Central Enterprises* (December 2007), for example, sets forth several lofty goals for sustainably conducting business domestically, including establishing norms for evaluating and reporting corporate social responsibilities.[90] Aside from the substance set forth in such directives, the *Guiding Opinion* specifically recognize that good corporate citizenship is increasingly important for fostering international political and economic relationships and developing an image of responsibility for central enterprises.[91] Accordingly, many of China's largest SOEs in Africa have adopted corporate codes of conduct and at least nominally committed themselves to international corporate social responsibility (CSR) initiatives like the UN Global Compact.[92] Some enterprises have even implemented external auditing procedures that are designed to demonstrate compliance with international standards and meet the expectations of foreign investors or partners.[93] While such voluntary initiatives are commendable, they are no substitute for effective governmental regulation and oversight.

E. Financial institutions

[89] Gill & Reilly, *supra* note 73, at 47 (pointing out that SOE's can skirt MOC regulation by "turn[ing] to their SASAC bureaucratic allies to resist direction from MOC officials").

[90] OECD REVIEW, *supra* note 5, at 190-91; *see also id*. at 225–35 (full text of the *Guiding Opinion*).

[91] *Id*. at 191.

[92] To see what companies are members of the Global Compact, go to http://www.unglobalcompact.org/participants/search.

[93] OECD REVIEW, *supra* note 5, at 214.

The final major players in foreign investment and aid projects are China's two major state-owned policy banks, China Development Bank (CDB) and the Export-Import Bank (Ex-Im Bank). CDB is responsible for managing the China Africa Development Fund, which makes approximately $5 billion available for increasing investments in ongoing Chinese projects in Africa.[94] It focuses on agricultural and manufacturing industries, including some resource acquisition projects, but is overshadowed by the much larger Ex-Im Bank. The Ex-Im Bank is the most important bank in African policy because it is coordinates with MOFCOM to authorize Chinese firms to bid for all of China's official economic aid projects.[95] It also provides low-rate loans to African governments for aid programs and encourages Chinese firms to invest in Africa through export credits and loans for overseas projects, often with direct support from government officials.[96] Through this work, it holds an outstanding loan balance of at least $7 billion for African projects, accounting for nearly 20% of its total business, though figures are inconsistent.[97] The vast majority of these projects are in the infrastructure development sectors, including "dams, hydropower, thermal nuclear power plants, oil facilities, copper mines, and railways."[98] It has reportedly made approximately $20 billion available for further projects in Africa in 2008-10, indicating that its role in Africa is increasing rapidly.

IV. THE GOVERNMENT INTEREST IN PROMOTING ENVIRONMENTALLY RESPONSIBLE CONDUCT

Though we have highlighted many ways that the current structure fails to adequately address environmental problems in foreign investment projects, we have also shown some of the

[94] *Id*. at 117.
[95] Gill & Reilly, *supra* note 73, at 43.
[96] *Id*.
[97] OECD REVIEW, *supra* note 5, at 115.
[98] *Id*.

ways the government is attempting to promote corporate environmental and social responsibility. Just as the Chinese government has acknowledged the need for better environmental protection domestically over the last decade, it seems to be realizing that rampant environmental destruction in host nations is unsustainable in every sense of the word. Every agency and level of government listed in the previous section has reasons to help ensure that Chinese corporations conduct business in environmentally responsible ways, even at the expense of some modest amount of profits.

At the national level, the Central Government has at least nominally recognized that it is not in China's long-term interests to allow its companies to operate with complete disregard for the local environments in which they operate. Such actions contribute to an already somewhat negative image of China as a player in the international business community, which can be damaging in several ways. First, wealthier Western corporations are increasingly conscious of public perceptions regarding their corporate responsibility.[99] Major companies, therefore, are less willing to be associated with high profile environmental destruction, even if the actions are perpetrated by suppliers or foreign partners.[100] This could make it increasingly difficult for China to attract foreign investment and forge partnerships with the wealthy corporations who can help ensure China's economic prosperity in the future.[101] Developing responsible environmental

[99] Karin Buhmann, *Corporate Social Responsibility in China: Current Issues and Their Relevance for Implementation of Law*, 22 COPENHAGEN J. OF ASIAN STUD. 62, 83 ("Low respect for CSR is increasingly recognized as a risk for corporate investment and reputation.").

[100] OECD REVIEW, *supra* note 5, at 157 (quoting Chinese scholar Wang Zhile, who points out that "[i]nternational society will not apply lower standards to Chinese corporations overseas simply because they are from a developing country").

[101] *Id.* at 162 ("[M]ultinationals may prefer to source items from suppliers deemed capable of implementing international standards of corporate conduct.").

operations and implementing credible mechanisms to report corporate responsibility can help Chinese suppliers and manufacturers secure and retain business from international customers.

Second, the perception that Chinese businesses are destructive to host nations may make it less likely that other nations will open their doors to Chinese corporations. This, of course, would not only hurt immediate business interests, but would seriously affect China's long-term resource goals. Rampant environmental destruction in host nations could cause such resentment that foreign governments are forced to address the problem, which could result in more stringent regulations. In the most egregious cases, a host nation may react even more harshly, as Sierra Leone did when it banned timber exports entirely at the beginning of 2010.[102] Such backlash could imperil the long-term relationships with the supplier nations that are vital to China's continued growth and development. So while NDRC and MOFCOM, for example, may not be very interested in environmental regulation, even they must come to realize that their goals of increased economic ties and prosperity can only be achieved by ensuring some level of responsible conduct.[103]

Accordingly, the government has adopted an active posture in urging corporations to conduct their operations abroad responsibly. The latest version of the national Company Law

[102] While not directly blaming any specific entities for the destruction, Sierra Leone officials noted that "tens of millions of dollars worth of logs were smuggled out of the country to Middle Eastern and Southeast Asian countries to be made into furniture and household decorations." Rhett A. Butler, *Sierra Leone Cracks Down on Illegal Logging by Banning Log Exports*, MONGABAY.COM, Jan. 2, 2010, http://news.mongabay.com/2010/0102-sierra_leone.html.

[103] Daniel H. Rosen and Thilo Hanemann, *China's Changing Outbound Foreign Direct Investment Profile: Drivers and Policy Implications*, Peterson Institute for International Economics ("Anti-Chinese sentiment in host countries and concerns articulated by third-country governments and nongovernmental organizations have forced an internal debate between the steward of China's new-found soft power, the Ministry of Foreign Affairs (MOFA), and those concerned only with maximizing overseas access.").

included requirements that companies adhere to notions of social and business morality.[104] China has also greatly increased its participation and visibility in regional and international programs aimed at fostering corporate responsibility.[105] The government has focused a great deal of energy on encouraging businesses to work voluntarily towards higher levels of CSR, in large part, perhaps, because it "is easier than relying on regulations that the state lacks the administrative capacity to enforce and that, if enforced, would reduce global competitiveness."[106] There also appears to be higher expectations that companies actually make efforts to live up to the commitments required by such programs, rather than simply signing onto them.[107] While this effort is commendable in many respects, Chinese notions of CSR must begin to include responsible conduct in the supply chain, rather than simply in the immediate production process. This is a crucial aspect of beginning to craft a solution to these problems, both in terms of voluntary and compulsory measures.

V. OPPORTUNITIES FOR IMPROVEMENT

A. Structural Improvement

This regulatory structure may be unwieldy and inefficient, but it does give the government several opportunities to review and regulate environmental impacts associated with OFDI. Even where the process currently purports to take environmental considerations into account, it could benefit from increased reference to accepted standards that have been adopted

[104] OECD REVIEW, *supra* note 5, at 144.
[105] *Id*. at 202–208 (describing several recent and ongoing efforts).
[106] China Development Brief, Nov. 5, 2009, http://www.chinadevelopmentbrief.com/node/1789.
[107] The enzyme producing company Novozymes China and mining company Lafarge, for example, have supported significant domestic projects by the Chinese chapter of the World Wildlife Federation (WWF), "partly in response to growing expectations from the Chinese government." Buhmann, *supra* note 100, at 72.

in other places. This final section contains an extensive analysis of several tools that could be employed to help Chinese companies pay more attention to environmental issues in foreign nations.

1. Consolidate Oversight Authority

The problems with the bureaucracy described above are obvious. Each of the bodies mentioned has a different mission and a different priority regarding overseas investments. SASAC's goal, for example, is to maximize profits, just like any corporate stakeholder. This can easily conflict with the goals of MOFCOM, for example, which is involved at the macro level, approving and facilitating projects that are consistent with larger goals. Even within these bodies, the State Council has decentralized much authority to lower levels, thereby increasing the number of competing offices involved in OFDI approval and oversight.[108] As a result, no single entity is ever responsible for evaluating and monitoring environmental impacts, nor is it clear who should have responsibility for addressing issues as they arise. This systemic problem makes it extremely difficult to conceive of a solution that could arise within the current governmental structure.

While we must recognize that it is unrealistic to expect wholesale changes to this bureaucracy—in spite of the obvious need for such reform—it is impossible to overstate the importance of empowering a specific governmental body to administer and regulate the environmental issues associated with foreign investment projects. Just as elevating SEPA to a

[108] Gill & Reilly, *supra* note 73, at 44 ("China relies heavily on coordination among a complex array of corporations and government bureaucracies to achieve its policy objectives in Africa. These companies are ranked at city, province, and national levels and are responsible to different bureaucracies, impeding effective government oversight.").

ministry-level body has greatly expanded its influence domestically, authorizing one department within the Chinese government to exercise control over environmental impacts abroad would greatly increase the likelihood that such power would actually be exercised. None of the current agencies involved in authorizing and regulating foreign investments is specifically responsible for the environmental aspects of these projects, so the government would either need to establish an new department or designate an existing one to assume this role.

A best-case scenario might be to authorize a department within MEP to exercise authority abroad and operate independently of the economic agencies that are already involved in the process. In fact, it would be virtually impossible to force any real changes in corporate practices abroad without MEP's involvement. First, MEP is the only existing ministry with the expertise to monitor projects in any meaningful sense. Second, MEP's exclusive duty is to deal with environmental issues, so it is the only agency that could begin to counteract the influence of the economic agencies that currently dominate the process. Third, MEP's ministry-level status makes it at least theoretically capable of exercising authority over the entities that it regulates. Thus, if MEP was specifically charged with regulating foreign investment projects, it would be able to compete with the economic agencies' efforts to maximize profits and business relationships in host nations.[109]

Currently, MEP is technically authorized to dispatch counselors abroad, but it needs permission from both the Ministry of Foreign Affairs and the State Council in order to do so in any specific instance, which impedes its independence and ability to maintain a presence

[109] *Id*. ("Finally, the interests of Chinese corporations and their supporting bureaucratic agencies of the Chinese government may conflict with the interests of other Chinese government bureaucratic actors also engaged in Africa.").

everywhere it is needed.[110] MEP should be independently authorized to establish offices in the nations where Chinese businesses operate (right alongside the ECC and DFEC, who could focus their efforts on economic and labor issues), so it would at least be in a position to exercise oversight of environmental issues in the host nation. Obviously, the same enforcement difficulties that plague MEP domestically would exist in foreign offices on an even larger scale. Such problems include "the limitations of bureaucratic capacity, geographical distance, and companies' incentives to hide information," all of which make it very difficult to "[access] timely information sufficient for oversight."[111] Nevertheless, the current situation allows corporate and economic interests to exercise virtually unfettered control over foreign operations, so any effort that brings environmental experts and policies into the foreign regulatory structure would be better than the status quo.

2. Meaningful Review and Oversight within the Current Structure

In the absence of a newly-authorized foreign division of MEP, there are other ways that current bureaucratic procedures could better address the environmental impacts of foreign projects. Within the current structure, MOFCOM and its DFEC seem best-positioned to provide substantive environmental review of investment projects. DFEC must approve projects at an operational level, which requires it (theoretically, at least) to engage in an analysis of the project itself and the environment—both physical and legal—of the location where it will take place. DFEC is also supposed to have authority to punish firms that do not adhere to MOFCOM

[110] This rule is distilled from the directions contained in *The Working Rules of the State Council*, art. 39; *The Regulation on the Main Functions and Staffing of the Ministry of Environmental Protection of China,* art. 16-4; and *The Law of China on Diplomatic Personnel Stationed Abroad,* art. 24-3.

[111] Gill & Reilly, *supra* note 73, at 44.

regulations and Chinese law, so it should be able to enforce requirements both before and during overseas investment projects.

MOFCOM already appears to be accepting increased responsibility for environmental issues pertaining to foreign projects, both in terms of information sharing and oversight. In order to help Chinese companies comply with local laws, MOFCOM administers a database of laws in every nation with which China enjoys significant economic ties, including environmental laws.[112] While these laws may not be rigorous enough to prevent environmental degradation in many situations, MOFCOM's efforts at least indicate a willingness to help companies comply with the laws. Increased consultations between operators and MOFCOM officials should be encouraged so that companies can use this information to guide development choices.

More importantly, MOFCOM has begun to coordinate with other bodies to require more responsible corporate conduct. For example, SEPA (now MEP) and MOFCOM issued a circular in October 2007 that instituted a "green trade policy" intended to increase domestic penalties for Chinese enterprises that have violated environmental laws and regulations within China. Under this policy, the government has the power to severely restrict a business's ability to engage in export and foreign trade if the business violates Chinese environmental regulations and laws.[113] This kind of policy promotes cooperation between agencies and shows that China is capable of using trade restrictions as an enforcement tool against polluting industries. If a comparable regulation applied to industries operating outside of China, those firms would have increased incentives to obey the laws and behave responsibly. The threat of losing import/export licenses

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[112] Gill & Reilly, *supra* note 73, at 42; OECD REVIEW, *supra* note 5, at 89.
[113] OECD REVIEW, *supra* note 5, at 265.

and government support would help force businesses to take modest steps towards living up to their environmental responsibilities in foreign nations.

More basic goals can be achieved by requiring that MOFCOM/DFEC's initial analysis include a substantial and reliable environmental impacts assessment of every major project. Mitigation measures and oversight during operational phases will be important as well, but neither of these goals is likely to be addressed until after reliable assessments become the norm for foreign investment projects and a single entity is responsible for reviewing them. Legal authority for this requirement arguably exists within the current *Measures for Overseas Investment*. Article 12 of the *Measures* requires an array of application materials be submitted to MOFCOM for approval before projects begin, but these deal almost exclusively with financial arrangements and investment conditions (in keeping with MOFCOM's primary interest, which is economic).[114] However, the final subsection (Art. 12, sec. 6) gives MOFCOM the authority to require "other documents as specified by the competent department," which could easily be defined to include an MEP-approved EIA. Ideally, there would even be some mechanism for ensuring that environmental data was subject to independent verification. Developing a culture of compliance and increasing the reliability of such assessments would be no easy task, but any

[114] Article 12: An enterprise making any overseas investment prescribed in Article 6 or 7 of these Measures shall submit the following materials:

1. an application form, which shall mainly cover the name, registered capital, amount of investment, scope of business and duration of business of the overseas enterprise, an explanation of sources of investment capital, the specific contents of the investment, the equity structure, the analysis and assessment of the investment environment, and a statement of lack of any of the circumstances prescribed in Article 9 of these Measures;
2. a photocopy of the business license of the enterprise;
3. the bylaw of the overseas enterprise and the relevant agreement or contract;
4. the approval or filing document issued by the relevant state department;
5. a Pre-report on Overseas Merger or Acquisition (see Annex 3 for its format) if it is an overseas investment in the category of merger and acquisition; and
6. other documents as specified by the competent department.

level of increased attention paid to environmental issues during both the planning and operational phases would be an improvement.

Additionally, Article 9 of the *Measures* requires MOFCOM to deny applications if a proposed project will damage China's relationship with the host nation.[115] As it becomes clearer that environmental destruction in host nations can in fact damage relationships between China and the host, this clause should be used to reject projects that pose a serious threat to the environment, particularly where that threat has health implications for local residents.[116] Central government and foreign affairs officials should be aware of this dynamic and urge MOFCOM to adopt an interpretation of Article 9 that includes negative environmental effects as one of the bases for determining that a project has the potential to "damage China's relationship with the host nation." A necessary prerequisite for this determination would be a thorough and accurate EIA, so MOFCOM is justified in requiring such an analysis before granting project approval.

3. Regulatory Standards

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[115] Article 9: Where the overseas investment of an enterprise falls under any of the following circumstances, the Ministry of Commerce or the provincial commerce department shall disapprove it:

1. endangering the state sovereignty, national security and public interests of China or violating a law or regulation of China;
2. damaging the relationship between China and a relevant country or region;
3. likely violating any international treaty concluded by China with a foreign party; or
4. involving any technology or goods prohibited by China from import.

The economic and technical feasibility of an overseas investment shall be the sole responsibility of the enterprise.

[116] Gill and Reilly recount a high-profile incident that actually did threaten to destroy Chinese relations with the host country:

> One of the most visible cases of a negative backlash against Chinese businesses was in Zambia, where on April 20, 2006, an explosion at a Chinese-owned copper mine killed 51 Zambian workers. Although Chinese firms had invested more than $300 million in Zambia and employed more than 10,000 Zambians, a presidential candidate for the October 2006 elections, Michael Sata, made an anti-China message the centerpiece of his campaign. The Chinese ambassador initially threatened to sever relations with Zambia if Sata won, but Beijing later distanced itself from the ambassador's remarks, and Sata lost the election.

Gill & Reilly, *supra* note 73, at 46.

While generally re-structuring bureaucratic oversight mechanisms might permit more centralized review, increased efficiency, and better decision-making,[117] improvements could occur within the current system just by applying meaningful standards to the approval process. For example, there are no firm guidelines for what initial environmental impact assessments must contain, nor any mechanisms to allow third parties to review them for accuracy and completeness. Thus, it is not uncommon for impact assessments to be rushed and full of faulty information, which neither forces companies to look deeply into the impacts of their projects, nor permits the host nation to evaluate accurately the costs and benefits of projects or require mitigation measures.

In order to facilitate meaningful oversight of corporate conduct generally, the government must develop and support a system of nationally-recommended standards that corporations will either be required or encouraged to meet. Such standards could draw on accepted environmental norms and specific international standardization systems, such as the *OECD Guidelines for Multinational Companies* and ISO systems. Each of these systems provides specific guidelines for ensuring responsible conduct, including due diligence and management of suppliers. Some 8,000 companies in China have been certified for meeting ISO 14001 standards, and there is increasing evidence of Chinese corporations referencing or working within OECD guidelines as a result of their global business contacts.[118] This is so because OECD member state corporations are expected to promote conformity with OECD standards throughout their supply chains.[119]

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[117] This assumes of course that the government's intense involvement in commercial transactions can deliver these benefits at all. The OECD recommends that the government remove its oversight authority and permit firms to make investment decisions based on their evaluation of the markets. OECD REVIEW, *supra* note 5, at 89.

[118] *Id*. at 151, 186.

[119] *Id*.; OECD Guidelines, ¶ 2, § 1, Concepts and Principles

Because China is a link in so many supply chains leading to Western OECD nations, its major international corporations have necessarily had to work with their Western partners to raise operating standards within China. The next step will be to extend these practices beyond China's domestic production facilities to their suppliers.

While we should not expect China to adopt these international standards universally, they provide a good starting point for developing a system to fit China's needs. In order to have an effect, any guidelines China issues will have to be sector specific and avoid the kind of vague language that plagues its legal regulations. While this is a daunting task, China's domestic textile industry successfully developed sector-specific national standards in 2006, which shows that such standards can, in fact, be created and implemented.[120] This kind of effort could be mounted in the mining industry, for example, with the aid of international organizations like the Extractive Industries Transparency Initiative and domestic coalitions like the China International Mining Group.[121] Industry trade groups should work with the government to develop meaningful standards in the sectors that Chinese companies are most involved in overseas because, as SEPA noted during the course of one such collaboration, "industrial associations are familiar with their own industry's technology and management, so their participation will make economic policy more relevant and achievable."[122] As long as this does not mean that industry gets to set its own rules, such collaboration can be valuable.

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[120] OECD REVIEW, *supra* note 5, at 213–14. China's National Textile and Apparel Council piloted a CSR standard among its ten member enterprises. The China Social Compliance standard (CSC9000T) is one result of an extended EU-China Trade Programme that has been working to support China's integration into the world trading system.

[121] OECD REVIEW, *supra* note 5, at 118, 211–12.

[122] *SEPA Working with Industrial Associations for Environmental Policy*, CSR CHINA, Sept. 17, 2007, http://www.chinacsr.com/en/2007/09/17/1689-sepa-working-with-industrial-associations-for-environmental-policy.

Once in place, specific standards can be used to hold companies accountable for their actions through several mechanisms. If the standards are legally binding (which is admittedly unlikely in the short- to medium-term), then companies that fail to achieve them could be punished or fined. More likely, perhaps, is a less strict approach that would use standards as reference points by which interested parties could measure a company's social responsibility. This would help facilitate meaningful assessment and reporting of corporate conduct abroad. Just as an American Health Department gives a restaurant a score indicating its level of compliance with established standards of cleanliness, so could government or non-government officials grade companies on their ability to maintain high levels of environmental responsibility. These "grades" or reports could have a real impact if government officials considered them when evaluating applications for further investment or expansion abroad. Even if such evaluations had no legal effect, public and governmental pressure would be more easily harnessed if an interested party could publicize specific shortcomings in a company's business practices.

4. Foreign Application of Chinese Laws

Another option is to extend the application of Chinese laws to foreign operators and subsidiaries so that these entities are subject to the oversight and legal authority of Chinese officials. The drawbacks and difficulty of implementing a system of extra-territorial application of home State laws are discussed in Part II.B.1, but it is nevertheless possible that the Chinese government will have to extend its reach further into foreign operations if it is truly going to confront this issue. As we noted earlier, China and several other developing nations appear to

increasingly expect home States to exert some control over the multinational corporations operating within developing host nations.[123] Thus, Chinese officials should recognize that they will need to accept that responsibility as well if their corporations are going to continue to spread across the globe.

While it will be difficult to implement such a program successfully, many States have laws that apply to corporate conduct in foreign nations, so there is a precedent for such a system.[124] But even the United States does not require its corporations to abide by all American laws in their overseas operations, such as minimum wage requirements,[125] so it is hard to imagine the Chinese government fully applying its domestic laws to operations in far off nations like Zambia and Sudan. Despite this, no corporation can expect its overseas operations to be entirely beyond the reach of the home State's legal authority. Thus, the Chinese government can legitimately attempt to implement and enforce regulations abroad if it chooses to do so.

This idea has gained some support in China, and the government now has some regulations that extend to operations outside of China.[126] The *Guide on Sustainable Overseas Silviculture*, for example, "applies to regulating and guiding the whole process of the overseas activities of Chinese enterprises in silviculture ...."[127] Most importantly, these regulations

[123] *See supra*, note 56 and accompanying text.

[124] In the United States, for example, "the Securities Act of 1933, the Securities Exchange Act of 1934, and the Foreign Corrupt Practices Act of 1977 (FCPA) all confer (or have been interpreted to confer) extraterritorial jurisdiction over corporate actors." Broecker, *supra* note 52, at 182.

[125] *Id*. at 183-84.

[126] Most of the regulations, however, apply to offshore oil activities and protecting the marine environment, both of which are areas in which all home nations are expected to regulate their corporations. *See, e.g.*, *Marine Environment Protection Law, Regulations Concerning Environmental Protection in Offshore Oil Exploration and Exploitation, Regulations on the Prevention of Pollution Damage to the Marine Environment by Land-sourced* Pollutants, Regulations on Environmental Impact Assessment Procedures of Offshore Oil Exploitation Projects.

[127] *Guide on Sustainable Overseas Silviculture*, Aug. 27, 2007.

require a thorough assessment and sustainability plan for all Chinese logging operations overseas, even when such a plan is not required by host State law.[128] The *Guidelines* also urge operators to reach out to local residents by "establish[ing] a consultative mechanism with the local community."[129] There are, however, no clear enforcement mechanisms built into the system, nor any way for affected residents to seek enforcement or compensation in the event they suffer harm. Furthermore, the guidelines suffer from a lack of specificity, as most Chinese laws do. Nevertheless, developing and issuing guidelines to other major industries would begin the process of extending extra-territorial jurisdiction to Chinese companies abroad. Enforcement will be its own challenge, but the regulations must at least be developed and promulgated soon so the process can get underway.

Another very recent development may indicate that Chinese officials are willing to move even farther towards directly applying Chinese law abroad. In the summer of 2009, *China Daily* reported that MEP and MOFCOM had completed a draft of mandatory measures that would apply to all Chinese companies involved in overseas projects.[130] The regulations would require all companies to comply with the environmental laws of the host nation, and in cases where Chinese standards exceed those of the host country, to meet Chinese standards. There are also provisions for requiring companies to compensate nations and/or victims for environmental damage they inflict, but no information on how that might be calculated is available yet. The draft also includes provisions mandating environmental impact assessments, mitigation strategies (such as facilities to treat sewage and waste) in all existing and planned projects, and adherence

[128] *Id.*, sec 5.2.
[129] *Id.*, sec 6.4.
[130] Li Jing, *Green Rules Eye Chinese Firms Abroad*, CHINA DAILY, May 29, 2009, http://www.chinadaily.com.cn/bizchina/2009-05/29/content_7952605.htm

to all environmental treaties to which China is a party. Presumably, these regulations would both encourage more responsible corporate behavior abroad and provide a legal tool that could be used against Chinese companies domestically if they fail to meet the appropriate environmental standards, even in situations where the host country did not specifically object to the operating conditions.

MOFCOM and MEP are apparently reviewing these guidelines for possible promulgation. If they are ultimately issued, the guidelines would be significant for a number of reasons. It is hard to say whether they would actually raise operating standards in a given situation, but companies would at least have to pay more attention to the legal requirements of the sector in which they are operating or risk violating Chinese law. They might be more likely to comply anyway because they are more familiar with the Chinese laws that apply to their particular business. Companies should also take more of an interest in compliance if penalties would be assessed at home, rather than in the host State. Nevertheless, the real effects on conduct in host countries might not be as substantial as one might hope, given the low standards of both host and Chinese laws. But the fact that the government is attempting to take this matter seriously is important in itself, and the regulations would, at the very least, bring foreign conduct into the realm of Chinese corporate law.

B. The Role of Financial Institutions

Financial institutions are also well-positioned to help push companies towards more environmentally responsible conduct. Over the last few years, Chinese banks have attempted to increase their corporate governance systems and have even made "progress in incorporating

environmental and social safeguards in their lending criteria."[131] But rather than accepting cursory assurances of environmental responsibility, Chinese financial institutions should adopt internationally recognized principles to guide their analysis of a project's impacts.

1. Lending Standards that Reference Environmental Issues

There are currently several sets of lending criteria that international banks and institutions use to evaluate the social and environmental impacts of proposed projects. The World Bank's IFC uses its Performance Criteria to evaluate aid projects worldwide, while traditional banks and lending institutions typically use the Equator Principles (EP).[132] Each of these systems evaluates projects based on certain standards regarding pollution prevention, greenhouse gas emissions, management of hazardous wastes, and biodiversity protection, among others.[133] If a proposal does not appear to meet the criteria, the lending institution is expected to deny funding for it, thus preventing the harm before it can begin. Even when a project is approved, early and frequent consultations between lenders, corporations, and independent experts help firms respond to environmental and social concerns earlier in the planning process, when it is still feasible to adjust the project and avoid problems.

Although reference to these standards has become routine in the international project finance market,[134] China's banks have not embraced them as fully as have the banks of Western nations. Part of the reason for this reluctance is cultural: banks in China do not face the kind of social pressure and criticism from being associated with destructive projects that Western

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[131] OECD REVIEW, *supra* note 5, at 91.
[132] MORGERA, *supra* note 32, at 169.
[133] *See id*. at 150–167 (describing the details of the IFC's Performance Criteria)..
[134] In fact, 75% of global project financing is done by banks that have signed onto the EPs. Haglund, *supra* note 59, at 561.

institutions do.[135] Additionally, publicly-listed Western institutions are subject to various disclosure requirements that allow shareholders and regulators to monitor CSR activities. The majority of Chinese lenders (including, most importantly, Ex-Im Bank) are not subject to such rigorous disclosure requirements, so they have neither social nor legal obligations to avoid potentially destructive projects.[136]

However, this appears to be changing. The OECD reports that the central government has recently been pressuring banks to help enhance China's image as a socially responsible business partner by paying more attention to the effects of the projects they finance.[137] As a result, there are some positive steps occurring at the lending stage. In the domestic arena, as early as the mid-1990s "the People's Bank of China adopted a policy of refusing to extend credit to firms that did not correctly dispose of their industrial waste or that failed to meet state standards for environmental protection."[138] An even more important policy was implemented in July 2007, when SEPA, the People's Bank of China (PBOC), and the China Banking Regulatory Commission (CBRC) issued their "green credit policy," which established systemic links between environmental protection agencies and credit administration institutions.[139] This policy allows banks "to suspend or limit loans to enterprises violating environmental laws."[140] The OECD reports that in the first year of the program's existence, SEPA "provided more than 30,000 pieces of information on violation[s] of environmental laws to the Credit Information System Bureau so that commercial banks" could implement the policy and begin restricting

[135] *Id* at 562.
[136] *Id*.
[137] OECD REVIEW, *supra* note 5, at 145.
[138] ECONOMY, *supra* note 12, at 116.
[139] OECD REVIEW, *supra* note 5, at 264.
[140] *Id*.

funds.[141] Finally, just a year later, SEPA signed an agreement with the IFC to help introduce the EPs domestically, though there was no indication that the criteria would be applied to overseas projects, nor was Ex-Im among those banks that adopted the EPs.[142]

Currently, the green credit system applies only to firms operating in China, but it should be expanded to deal with foreign operations in two ways. First, lenders should not extend credit to Chinese firms with a track record of violating the environmental laws of host nations. This should apply to all the subsidiaries of parent companies that violate foreign laws as well. Second, Chinese firms that violate Chinese laws should not be given access to credit to establish or participate in foreign operations. Because there is already a domestic system in place to manage this information, the responsible authorities should begin including information on companies who violate laws overseas. This system, however, would have to include Ex-Im Bank in order to cover most overseas projects.

Among credit exporting banks, both Ex-Im and CDB have increased the visibility of their CSR initiatives over the last couple of years. As a member of the UN Global Compact since 2006, CDB in particular has made significant strides in monitoring and reporting the impacts of the projects it finances. It has even brought in a leading international classification and compliance organization, Det Norske Veritas, to audit its reports and initiatives on at least one occasion.[143]

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[141] *Id*.

[142] Haglund, *supra* note 59, at 562.

[143] *China Development Bank Releases Corporate Social Responsibility Report*, CHINA CSR, Oct. 8, 2008, http://www.chinacsr.com/en/2008/10/08/3290-china-development-bank-releases-corporate-social-responsibility-report.

Although not a member of the Global Compact, Ex-Im Bank increasingly publicizes its own efforts to incorporate environmental standards into its project review process.[144] The Bank adopted its first environmental policy on overseas projects in 2004, but did not publicly release it until 2007.[145] While the policy lacks the details that can effectively guide decision-makers in evaluating proposals, it nevertheless indicates the Bank's willingness to begin incorporating environmental concerns into its lending process. Operators are required to conduct environmental impact assessments and obtain approval from the host State's environmental authority, and failure to obtain either is grounds for rejecting a proposal. Ex-Im Bank also retains authority to discontinue funding if negative environmental impacts occur during the life of the project, but it is doubtful that this extreme remedy has been utilized. Finally, a post-project review is supposed to be conducted to evaluate the accuracy of the EIA and address any outstanding problems.

While these policies are laudable (and not terribly different on their face from IFC's policies), the amount of damage done by Ex-Im Bank-funded projects suggests that the policies are not enforced or given only cursory attention. These guidelines clearly suffer from a lack of rigorous enforcement, accountability, and expertise in the field of environmental compliance. Because the Ex-Im policies are strictly internal, the bank suffers no real harm if it fails to abide by its policies. Equally important, there are no assurances regarding the accuracy of assessments or effectiveness of mitigation measures. Even if a host nation is required to approve assessments, that approval may be meaningless when the investing firm has underestimated or under-reported potential impacts, or when financial pressures have compelled the host nation to

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[144] OECD REVIEW, *supra* note 5, at 190.
[145] An English translation is available at http://www.internationalrivers.org/en/node/3318/.

sign off on destructive projects. The IFC addresses this problem by providing opportunities for independent experts with no financial stake in the outcome to analyze projects before funds are dispersed. There is no reason why such a review could not be a part of the Chinese lending process as well. The cost of such a review would be a fraction of the overall cost of most projects and could easily be dealt with as part of the already incentive-laden loan packages that operators usually receive. Regardless, if lenders are to play an effective role in this process, they must adopt more specific and meaningful guidelines for environmental review and implement some mechanism to ensure that applicant companies are complying with them.

2. Enforcement of Standards through the Contract

In the absence of the social pressures that exist in EP-observing nations, there must be some other mechanism to ensure that companies actually observe the standards embodied in the lending criteria once the project begins. The IFC has both a reporting process that local citizens can use to file complaints and an independent oversight office (the Compliance Adviser/Ombudsmen, or CAO) with independent authority to monitor projects throughout the life of all IFC loans.[146] The CAO fields complaints from local citizens, makes site visits to determine compliance with lending standards, and can exercise authority by limiting or conditioning continued financing. It also acts as a general communication facilitator between companies and local communities, thereby providing a forum for citizens to be heard outside of the host nation's legal institutions. If problems develop or complaints are received, the IFC

[146] MORGERA, *supra* note 32, at 217–19.

works with the borrower to implement a timetable for meeting the expected standards, and may suspend or even withdraw funding if the situation warrants it.[147]

A similar office could be responsible for fielding complaints on Chinese projects in foreign nations. In the absence of a new bureaucratic office specifically created to take on this role, this duty would likely fall to the ECC or MOFCOM, though one might argue that ECC is already supposed to be carrying out essentially this same role. While this might be effective, it would suffer many of the same problems that currently plague these departments' oversight capabilities. Additionally, increasing bureaucratic involvement is not likely to be an effective solution to this problem at this point.

A more successful solution than establishing new oversight authorities would be based on a different strength of the IFC system. Because significant consultations occur between operators, environmental experts, and lenders in the early stages of IFC project planning, these discussions are used to develop firm agreements on operating standards for individual projects based on the specifics of each venture and the local environment. Chinese lending institutions should follow this model as well. As specific plans are developed in the lending stages, the details should be reduced to writing and included as definitive operating standards that are referenced in the lending contract itself. The operating standards should then be treated as an enforceable term of the contract—a term that must be met in order to continue receiving funding.

[147] This extreme remedy is hardly ever invoked, but it has been used to suspend financing of the Chad-Cameroon oil pipeline because of concerns over human rights abuses in Darfur. *See* The World Bank, FAQs, *Chad-Cameroon Pipeline Project*, http://web.worldbank.org/WBSITE/EXTERNAL/EXTSITETOOLS/0,,contentMDK:20263700~menuPK:534319~pagePK:98400~piPK:98424~theSitePK:95474,00.html. More recently, the IFC expressed its commitment to sustainable investments by suspending all financing of palm oil plantations, which have devastated rainforests around the world, particularly in Indonesia. Rhett A. Butler, *World Bank's IFC Suspends Lending to Palm Oil Companies*, MONGABAY.COM, Sept. 9, 2009, http://news.mongabay.com/2009/0909-palm_oil_ifc.html.

Incorporating fixed standards for pollutant levels, for example, would contractually bind the borrower to stay within the permitted levels.

This system of contractually obligating borrowers to abide by certain fixed standards would help in cases when applicable national regulations do not set such standards at all or when the standard would not provide adequate protection for the situation. The loan agreement could also reserve monitoring rights to a third party, such as a local environmental NGO, to help ensure that the company abides by the contractually agreed upon standards. This would keep the banks out of the business of monitoring environmental impacts, and place this power with a party whose sole interest is in monitoring the environmental impacts with reference to the contractual standards. Furthermore, the contracts could include more creative provisions to address many of the other problems we have noted thus far, such as granting standing to third parties or jurisdiction to specific tribunals to enforce the terms of the contract in the event of a breach.

3. Financial Markets and Exchanges

Securities and stock exchanges can also help raise the environmental standards of the companies whose shares and commodities they manage. There are both institutional and practical reasons for this. As a practical matter, public companies—even those that are held largely under state control—must maintain at least some level of transparency, corporate governance, and social responsibility in order to be attractive investment opportunities in both domestic and international markets. As we have stressed already, investors are increasingly reluctant to be associated with environmentally irresponsible companies. Thus, companies who want to attract wealthy investors, particularly from Western nations and for high-profile projects,

must show that they are acting responsibly everywhere they operate. This means not only instituting policies to prevent environmental harm abroad, but also fostering a culture of compliance and developing methods for reporting and publicizing CSR efforts. Several Chinese banks have taken such initiatives as a result of their transformations into joint stock companies and subsequent IPO offerings.[148]

Legally, market regulators have the power to impose disclosure and corporate governance requirements on companies, and have done so with regard to accounting procedures, record authentication, and other internal processes.[149] For example, the national Accounting Law now requires listed companies to comply with the Ministry of Finance's Accounting Standards for Business Enterprises (ASBE), which are largely consistent with the International Financial Accounting Standards.[150] By requiring Chinese companies to adhere to these internationally-recognized principles, the government has forced them to raise their standard of corporate governance and has begun cultivating a fledgling culture of compliance.

The government might be capable of fostering respect for environmental concerns by continuing to emphasize this aspect of CSR through its stock market regulations. A few policies indicate that steps are being taken to utilize this mechanism domestically. SEPA's 2008 "green securities policy" requires companies in heavily-polluting industries who are seeking to issue an IPO or to refinance through a securities market to submit to an environmental audit and disclose environmental information.[151] Local exchanges have issued even more proactive directives designed to promote responsible corporate conduct even after the initial listing. The Shenzhen

[148] OECD REVIEW, *supra* note 5, at 91–2.
[149] *Id*. at 192.
[150] *Id*. at 193.
[151] *Id*. at 264–65

Stock Exchange, for example, issued its *Social Responsibility Instructions to Listed Companies* in September 2006 and has been helping the 488 companies listed on its exchange learn how to apply them.[152] The guidelines instruct listed companies to "formulate environmental protection policies" and devote resources to establishing, implementing, and improving systems to protect the environment wherever the companies operate.[153] Companies are supposed to ensure that their environmental protection procedures ensure compliance with the relevant laws, reduce resource consumption and waste, and minimize adverse impacts.[154] Significantly, Article 30 requires companies to report their pollution discharges to the proper authorities and pay any fines if they violate local laws.

While the actual effectiveness of all these provisions is obviously open for debate in light of the significant shortcomings in oversight and regulation of polluting industries within China, it is noteworthy that individual exchanges are stepping forward to institute their own requirements for corporate environmental responsibility. OECD reports that the Shenzhen guidelines have had at least some impact domestically,[155] so they could be even more useful if foreign conduct is increasingly considered as part of a company's overall corporate conduct performance under the guidelines. Of course, the effectiveness of the guidelines is limited by their non-mandatory nature, so an enforcement mechanism would be ideal. Companies require large amounts of capital to conduct operations overseas, so if listed companies faced the real possibility of

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[152] *Shenzhen Stock Exchange Social Responsibility Instructions to Listed Companies*, Sept. 25, 2006 [hereinafter *Shezhen Instructions*]; *see* OECD REVIEW, *supra* note 5, at 211 (describing implementation since the instructions were issued).

[153] *Shezhen Instructions* , *supra* note 152, art. 27.

[154] *Id*., art. 28.

[155] OECD REVIEW, *supra* note 5, at 211.

sanctions in the form of limited or suspended trading, owners and investors would have a meaningful incentive to raise their environmental standards in foreign operations.

C. Actions by Third Party Governments

Given the difficult nature of changing the system from within, outside pressures may be needed to raise the level of Chinese corporate conduct. Some nations have attempted to deal with illegal or destructive resource acquisition by controlling the products that can be imported into their nations. While such actions can draw criticism,[156] they can have a profound effect on behavior by shifting enforcement responsibility from the often unwilling or unable host nation to the more capable and concerned importing nation.

The European Union[157] and the United States, for example, have each implemented laws dealing with illegally harvested timber. The U.S.'s Lacey Act was initially drafted to address trade in endangered animals, but has been expanded to ban products made from illegally harvested foreign wood.[158] Under the Act, American importers and producers are barred from dealing in any wood products that were not harvested in accordance with the laws of the host State, wherever that may be. The underlying foreign law violation does not have to be a criminal violation, nor one that is even actively enforced in the foreign country; rather, importers are responsible for ensuring that their suppliers are in fact complying with local laws. All imported wood products must be labeled with a description of the scientific name of any wood used in the

[156] Principle 12 of the Rio Declaration, for example, which was signed by many developing nations, strongly condemns "trade policy measures for environmental purposes" as a means of "arbitrary and unjustifiable discrimination …." *Rio Declaration on Environment and Development*, excerpted in ECONOMY, *supra* note 12, at 202.

[157] Rhett A. Butler, *Illegal Timber Trade to Face Tough Penalties in the E.U.*, MONGABAY.COM, Feb. 18, 2009, http://news.mongabay.com/2009/0218-timber_eu.html.

[158] 16 U.S.C. § 3371–3378 (2006).

product, the value and quantity of each, and the name of the country from which it was harvested. But this documentation is not sufficient on its own. Rather, the Lacy Act relies on the principles of due diligence and strict liability: importers are strictly liable for possessing products made from illegally harvested wood. However, merchants are less culpable if they can demonstrate that they exercised effective due diligence. Essentially, "civil and criminal penalties vary according to how much the company or individual knew about the crime, as well as the value of the good or shipment in question."[159] The main problem with the system is that host laws may not be particularly rigorous, but this is a drawback that the Lacy Act cannot effectively overcome in its present form. The US has not been willing to apply stricter standards to importers than the host nation does to loggers within its territory.

Nevertheless, the Lacy Act is a good example of a third party government requiring companies to take responsibility for the actions of their suppliers. More than simply requiring a paper trail, the US and EU laws impose substantive investigative responsibilities on anyone wishing to import wood or wood products into the largest consumer markets in the world. This is crucial because a paper trail is not enough to ensure real compliance with host laws when "[i]llegal products are often accompanied by forged documents."[160] Rather, importers must investigate and develop relationships with suppliers that they trust to comply with local laws. "[E]valuating … suppliers and developing trust in them and the forest products they provide is as important as obtaining physical papers."[161]

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[159] World Resources Institute, *Fact Sheet: Are You Ready for the Lacey Act?* 2, 2010, *available at* http://pdf.wri.org/factsheets/factsheet_are_you_ready_for_the_lacey_act.pdf

[160] *Id*. at 3.

[161] *Id*.

The question is how the United States or any other consumer/importing nation could create a similar system to monitor the metals and minerals that Chinese corporations are acquiring in Africa. The unreliability and uncertainty of record keeping within the Chinese supply chains poses an initial hurdle: many producers have very little knowledge or interest in keeping up with the source of their raw materials.[162] In spite of this limitation, the Lacy Act applies to wood products moving through China, so one must assume that American firms are working with their Chinese partners to ensure compliance with it. Thus, it is at least possible that firms could begin implementing a tracking system if they were required to do so.

However, while supply chain tracking is possible in the wood industry, a system dealing with metals and minerals would entail additional practical difficulties. The ability to track shipments to their source, in particular, would be lost. Whereas a supplier can label a wood shipment with a scientific name and source location at the time it is harvested, the same may not be true for copper that was extracted from one of many mines in a region, processed and blended with copper from all over central Africa, and sent to China to be spun into wires and installed in hundreds of thousands of different machines and electronics. It would be almost impossible to examine a product or even a shipment of a single type of ore to verify that it came from a particular source and was extracted legally (much less sustainably).

Nevertheless, supply chain tracking and due diligence requirements could still prove useful in China. Supply chain tracking would force companies to keep records and pay some level of attention to the source of their raw materials. Such a system could be implemented piece-meal and build upon the kinds of reporting procedures that are already in place for wood

[162] Buhmann, *supra* note 100, at 77.

products and human rights issues. Supply chain tracking could also be done without requiring much, if any, involvement by the Chinese government, as Western MNCs would be urged or required to participate by the governments and organizations in their home countries. As records became more universally kept, MNCs and international NGOs would be better able to monitor source conditions and publicize shortcomings. Whether there are legal repercussions for failing to report or not, increased attention and negative publicity can be very effective tools for pressuring Western businesses to use suppliers with higher standards. This system could also eventually evolve into a more complete due diligence requirement that American companies could be required to fulfill with regards to supply chains that include metals or minerals imported from China (or anywhere else). The fact that wood importing companies are seemingly complying with this requirement means that it is at least possible that it could be done in other sectors if a practicable system could be devised.

CONCLUSION

The relationship between African nations and China has the potential to benefit both parties greatly. But the arrangements that have the potential both to help lift African nations out of poverty and to fuel the Chinese business behemoth should not be done recklessly. Throughout this paper, we have seen the many shortcomings and opportunities that exist in the Chinese-African OFDI process, and we have shown how the parties involved could incorporate environmental issues into the decisions they make. But most importantly, we have tried to illustrate how these concerns need not adversely affect the goals of each party. We have not advocated for any measures that would significantly curb trade or impose undue hardship. Rather, we have tried to suggest some strategies that would allow all the parties to achieve their

long term goals without sacrificing either the health of African citizens or the viability of Chinese industry. These goals are compatible, but they may not remain so for long if those with the power to affect the process do not act soon to develop a practical but sustainable trading relationship that is capable of providing benefits to everyone for the long term.

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