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Fedding 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 is now 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 article focuses on this aspect of the supply chain. 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. As Sino-African trade relations continue to expand, China, African nations, and the international community must develop a more effective environmental regulatory system in order to protect local environments from irresponsible corporate development.

This article identifies the array of environmental problems surrounding Chinese resource extraction in these developing nations and recommends reasonable and potentially effective legal solutions. Part I provides background on China's consumption of African resources and the negative effects the trade relationship has on the environment in Africa. Part II explains why traditional legal regimes are often inadequate to address the issues that arise in international resource extraction projects. Part III examines the roles of each of the Chinese bureaus and agencies that influence or regulate foreign investments. Part IV explains the common goals that might be achieved if these departments emphasized responsible corporate conduct abroad. Part V considers several approaches that might help reduce the negative environmental impacts associated with the growing trade relationship between China and African nations. 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.[1]

It is important to stress at the outset that 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, China's shifting role in the global economy—from capital-recipient to capital-exporter—is just beginning and is therefore ripe for both discussion and early policy implementation that might help all parties achieve short and long term goals.

I. SINO-AFRICAN TRADE

A. China's Expansion into Africa

Trade between China and Africa has flourished primarily as a result of China's expanding need for raw materials and African nations' hunger

1. Additionally, 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 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 U.N. 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.

for capital investment.[2] China is currently the top consumer worldwide of aluminum, copper, lead, nickel, tin, zinc, iron ore, coal, wheat, rice, palm oil, cotton, and rubber.[3] 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.[4] All of this production and growth have also vaulted China into the upper echelon of energy and oil consumers, second only to the United States.[5] 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. With GDP and per capita income still on the rise, demand will only increase in the foreseeable future.

The dichotomy is clear: Chinese corporations are flush with cash from years of unprecedented growth and eager to secure long-term access to the minerals and fuel that will be the lifeblood of its production economy for the foreseeable future. On the other hand, the African continent holds some of the richest resource reserves on Earth, but many of its nations remain among the world's poorest.[6] The result is a marriage of opportunity between some of the most notoriously unstable and corrupt governments in the world and Chinese companies seeking access to the resources those governments control.

Thus, China—a relatively new player in the game of international resource acquisition—has worked hard to cultivate its relationships with the African nations that are capable of providing the resources it needs. 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 United States—by the time Chinese companies began searching 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

2. TAMARA TRINH ET AL., CHINA'S COMMODITY HUNGER, IMPLICATIONS FOR AFRICA AND LATIN AMERICA 2 (Maria L.Lanzeni ed., Deutsch Bank Research 2006).

3. 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.

4. *Id.*

5. ENERGY INFO. ADMIN., COUNTRY ANALYSIS BRIEFS: CHINA (May 2011), *available at* http://www.eia.doe.gov/cabs/China/Full.html.

6. Econ. & Soc. Council of the United Nations, *Least Developed Countries,* NATIONS ONLINE PROJECT, http://www.nationsonline.org/oneworld/least_developed_countries.htm (last visited Feb. 29, 2012).

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 because of concerns over the safety of their investments or the perceived problems of doing business with unstable or undemocratic governments.[7]

The Chinese government itself paved the way for many of these arrangements, both by offering incentives for Chinese firms to "go global"[8] 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.[9] 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.[10] 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 arrangements are seen by both sides as the most efficient way to provide what each nation needs most. 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 U.S., ten times the level of 2000 and more than double the value of bilateral trade in 2006."[11] The benefits flow both ways, however. While China enjoys increased access to much needed resources, African

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7. 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*, 3 CHINA SEC. 42, 58–62 (2007) (describing CNPC's role in Sudan).

8. ORG. FOR ECON. CO-OPERATION & DEV. (OECD), OECD INVESTMENT POLICY REVIEWS: CHINA, ENCOURAGING RESPONSIBLE BUSINESS CONDUCT 83 (2008) [hereinafter OECD REVIEW].

9. China's top five trading partners—Angola, South Africa, Sudan, Equatorial Guinea, and the Republic of Congo—contribute more than eighty percent of Chinese imports from Africa. TRINH, *supra* note 2, at 6.

10. INYAMBO MWANAWINA, AFRICAN ECON. RESEARCH CONSORTIUM, CHINA-AFRICA ECONOMIC RELATIONS: THE CASE OF ZAMBIA 20 (2008), *available at* http://www.aercafrica.org/documents/china_africa_relations/Zambia.pdf.

11. 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 is 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), http://www.chinatranslated.com/?p=178.

nations receive many of the goods and services they need to raise standards of living.[12]

Furthermore, Chinese corporations are able to provide these services quickly and without the transparency and red tape that Western corporations require for major OFDIs. These procedural and substantive hurdles have, for better or worse, long prevented African nations from carrying out some major projects, but African nations have now found partners in Chinese business and government who are willing to make deals without imposing stringent conditions related to human rights, the environment, and corruption. While this approach does indeed increase the availability of financing and investment, it very likely does so at the expense of laborers and the environment.

B. Causes for Concern

While there are undoubtedly many Chinese companies operating responsibly in Africa, the increased corporate activity raises new environmental concerns. It is not that Chinese firms are any hungrier for profits than their Western counterparts, but that they are doing business under fundamentally different circumstances that pose unique threats to the environment. This section identifies these unique concerns.[13]

1. China's Environmental Track Record at Home

China's limited success dealing with environmental issues domestically does not bode well for its foreign operations.[14] From everyday air pollution that threatened to scuttle the 2008 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 detailed here.[15] Worth noting, however, are a few of the major issues that hamper efforts to address

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

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

14. *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).

15. *See, e.g.*, Lisa A. Kirschner & Edward B. Grandy, *Songhua River Spill: China's Pollution Crisis*, 20 NAT. RESOURCE & ENV'T 66 (Spring 2006) (describing the Songhua spill in detail); *see generally* ECONOMY, *supra* note 14, at 59–91 (thoroughly discussing the issues that plague environmental enforcement in China).

pollution domestically because these are the problems that China risks exporting as it expands into less-developed nations.

First, China's environmental laws lack the level of detail required for meaningful accountability and enforcement. Additionally, government officials often fail to prioritize environmental enforcement because polluting industries typically provide many local jobs and government revenues.[16] Even when local officials want to confront a problem, they may be hindered by a lack of resources or authority, as many governments have allies in higher reaches of government who can prevent effective regulation.[17] Finally, the system is permeated by a lack of understanding of environmental issues and the associated health and safety risks, making it difficult to convince anyone with authority to take meaningful action.[18] These problems also exist—often to an even worse degree—in the host nations where Chinese corporations are establishing so many operations, as described below.

2. Activities in Particularly Sensitive Places

Because of China's late entry into the global resource market, its companies are gaining access to many previously undeveloped areas. Extractive industries typically carry above average environmental risks, but Chinese investors are developing projects in remote and previously untouched areas that are likely to be very sensitive to disturbances.[19] While it may be possible to exploit resources in these areas responsibly, China's domestic track record does not give critics reason to believe that it will value environmental concerns over financial gain as its 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.[20] 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 humankind'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

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16. ECONOMY, *supra* note 14, at 200.

17. ERICA DOWNS, BROOKINGS INST., BROOKINGS FOREIGN POLICY STUDIES, ENERGY SECURITY SERIES: CHINA 16–24 (Dec. 2006), *available at* http://www.brookings.edu/~/media/Files/rc/reports/2006/12china/12china.pdf (noting, for example, that "[t]he general managers of China's [national oil companies] . . . have direct access to the country's senior leadership . . . .").

18. OECD REVIEW, *supra* note 8, at 265–67.

19. Bosshard, *supra* note 12, at 5.

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

Sinopec contractors had entered the park and were employing destructive exploratory tactics, including dynamiting gorilla habitat and a manatee breeding site.[21] 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.[22]

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.

3. Sensitive Nature of the Projects and Investments

Because China's investments in Africa are so heavily concentrated in natural resource extraction, Chinese corporations tend to have a disproportionately large impact on the environment of host nations. For example, mining and oil exploration entail significant levels of blasting, seismic testing, and pollution, all of which can affect local ecosystems to varying degrees.

The town of Kabwe, Zambia exemplifies the dangers of irresponsible mining. This town, in the heart of the Zambia's Copperbelt, has for decades suffered from highly toxic lead dust and sulfur dioxide fumes emitted from the smelters nearby.[23] 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.[24] As a result, the level of lead in citizens' blood is five to ten times that which the U.S. government would consider safe.[25] In spite of all this, the Zambian government continues to welcome investors,

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21. *Id.*

22. *Id.* (quoting Christophe Boesch).

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

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

25. *Id.*

offering tax breaks and waivers to anyone willing to invest in Zambian mines.[26]

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.[27] A mine run by Chiman Manufacturing, Ltd., in particular, has been criticized repeatedly for failing to control air and water pollution at its smelter and 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 town with relative impunity.[28]

4. Lack of Environmental Safeguards in Associated Projects

Mines and smelters like those described above are obvious pollution sources. However, Chinese companies are often involved in massive construction projects that may result in less apparent environmental impacts. Companies carry out these projects both to facilitate the extractive process and as a form of compensation for the right to operate in the host counties, an arrangement often referred to as "oil-for-infrastructure."[29] In September 2007, for example, China agreed to finance thousands of miles of roads and railways in Congo in exchange for 10 million metric tons of copper and 600,000 tons of cobalt.[30] These oil-for-infrastructure contracts are popular with local governments because they provide much needed infrastructure and construction jobs.[31]

However, the projects often have negative consequences that are not adequately considered.[32] Traditionally, developing nations relied

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26. 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.

27. *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.*

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

29. *New Trends in Financing Infrastructure*, FUTURE CHALLENGES (Feb. 6, 2012), http://futurechallenges.org/searchlight/new-trends-in-financing-infrastructure/.

30. GLOBAL WITNESS, CHINA AND CONGO: FRIENDS IN NEED, A REPORT ON THE DEMOCRATIC REPUBLIC OF CONGO 9 (Mar. 2011), http://www.globalwitness.org/sites/default/files/library/friends_in_need_en_lr.pdf.

31. *See* FUTURE CHALLENGES, *supra* note 29.

32. *See* MWANAWINA, *supra* note 10, at 10–11 (describing the lack of coordination among bureaucratic officials and contractors and the poor construction that results).

upon international lending institutions to finance the large scale projects now being built or financed by the Chinese. These international institutions, such as the International Finance Corporation (IFC) of the World Bank Group, have adopted environmental guidelines that projects must meet in order to receive financing. Chinese investors and suppliers often do not have guidelines or standards that are consistent with international standards.[33] Consequently, many of these projects never receive the kind of environmental review that international institutions require, such as environmental impact assessments (EIAs).[34]

On the other hand, the transparency and environmental standards that Western institutions tend to enforce have prevented many African projects from going forward.[35] By lowering or eliminating these standards, Chinese corporations and financiers allow African leaders to pursue projects they believe will help their communities.[36] From the African perspective, this allows leaders to achieve their development goals with few strings attached.[37]

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 to seek compensation after the fact. Traditional legal regimes are generally inadequate for dealing with instances of malfeasance by both Chinese and multinational corporations (MNCs).

A. Domestic Law in Host Nations

Although all foreign investors are subject to the control of the host State, it is often very difficult to enforce environmental laws against

33. Bosshard, *supra* note 12, at 5.

34. GLOBAL WITNESS, *supra* note 30, at 35.

35. MWANAWINA, *supra* note 10, 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.").

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

37. *See* Bosshard, *supra* note 12, at 6–8. 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 closed-door planning process resulted in several blatant breaches of accepted international environmental standards.

foreign firms in developing nations.[38] Prior to entering the market, foreign firms must comply with all national foreign investment laws governing entry, "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."[39] 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."[40] Nevertheless, problems arise during both phases.

1. Compromises at Entry into the Market

The fierce competition for investment in developing countries can significantly affect the terms under which investors operate. First, national entry regulations are often lax or vague.[41] Even basic requirements, such as EIAs, may be little more than mere formalities or overlooked entirely.[42] Second, the host nation's desire for capital investment generally puts the potential investor at a substantial bargaining advantage. During negotiations, a potential investor may extract from the host nation numerous contractual guarantees that protect the investor's money and property, but which can prevent the host nation from enforcing or enacting meaningful environmental standards.[43]

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38. ELISA MORGERA, CORPORATE ACCOUNTABILITY IN INTERNATIONAL ENVIRONMENTAL LAW 25 (2009).

39. *Id.* at 26.

40. *Id.*

41. MWANAWINA, *supra* note 10, at 10 (stating unequivocally that Zambia "lacks laws and systems which are results oriented and accountable").

42. 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 12, at 7 (describing the shortcomings in the Sudanese dam environmental impact assessment).

43. MORGERA, *supra* note 38, 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 "been gradually 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.

An example of one seemingly innocuous provision with potentially far-reaching environmental consequences is the "stabilization clause."[44] Stabilization clauses "seek to freeze the laws of the host State as at the time of entry so that the operating conditions of the foreign investment process will remain constant throughout the life of the foreign investment contract."[45] 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.[46]

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. 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.[47] In some nations, concessions from these MNCs constitute a significant portion of the national GDP, so there is incentive to look the other way.[48] Even when officials act in good faith, they may be hampered by a lack of enforcement resources, technological ability, and awareness of risks.[49] Finally, the potential legal consequences stemming from violations of regulations that are enforced are often insufficient to motivate compliance.

3. Difficulty of Pursuing a Legal Claim

Compounding the problem are numerous obstacles that prevent plaintiffs from successfully asserting civil claims in response to environmental harm. Plaintiffs may lack standing to challenge a general harm inflicted on a region, particularly when the harms alleged are not specific to the individual or causation is difficult to prove.[50] What cause

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44. *Id.* at 27.

45. *Id.*

46. 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.' " Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), 40 ILM 35.

47. MWANAWINA, *supra* note 10, at 10 (noting that Zambia, at least, "is a place where you keep your job by not doing it.").

48. As an example, a Canadian MNC operating a gold mine in Guyana provided twenty percent 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).

49. MWANAWINA, *supra* note 10, at 10.

50. *Id.* at 29.

of action, for example, could a concerned citizen have brought to try to stop Sinopec's blasting in Loango National Park?

Even if local plaintiffs succeed in asserting a claim, they are usually underfunded and dependent upon legal aid that may not be available.[51] Chinese multinationals, on the other hand, have the resources to defend themselves and are likely to structure their deals in ways that limit liability. A host nation's court may not be able to assert jurisdiction over a Chinese parent company at all, and even it did, judgments would be difficult to enforce either in the host nation or in China.[52] As a practical matter, local plaintiffs are simply unlikely 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 State 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, and also home State liability, which allows host nation citizens to seek damages from foreign corporations in the corporation's home State.[53]

1. Extraterritorial Regulation

There are several practical difficulties with applying home State law to activities occurring abroad. First, it is important to remember that home States *are* permitted to exercise jurisdiction over their MNCs abroad.[54] 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]."[55] U.N.

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51. ALICE PALMER, FOUND. FOR INT'L ENVTL. LAW & DEV., COMMUNITY REDRESS AND MULTINATIONAL ENTERPRISES 8 (Nov. 2003), *available at* http://www.field.org.uk/files/Com munity_redress.pdf.

52. *Id.* at 10.

53. DANIEL BODANSKY, THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW 131.

54. *See* Christen Broecker, *"Better the Devil You Know": Home State Approaches to Transnational Corporate Accountability*, 41 J. INT'L L. & POL. 159, 178–79 (2008) (briefly describing the legitimate bases for extraterritorial regulation).

55. World Trade Organization, Working Group on the Relationship Between Trade and Investment: Communication from China, Cuba, India, Kenya, Pakistan, and Zimbabwe—Investors' and Home Governments' Obligations, WTO Doc WT/WGTI/W/152 (2002); *see also* MORGERA,

Special Representative John Ruggie, the head of U.N. initiatives regarding transnational corporations and human rights, has also 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."[56]

Nevertheless, the fact that such regulation is permissible does not make it particularly practical. Many significant obstacles impede a home State's ability to oversee corporate activities effectively 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.[57] 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."[58] The host country would face tremendous regulatory and enforcement challenges in such a system.

On the other hand, the home nation may not exercise effective control either. In a nation like China, for example, competing bureaucratic interests, devolved enforcement authority, lack of interest and knowledge on environmental issues, and vague laws all conspire to prevent effective regulation of foreign activities.[59] Courts around the world have been extremely reluctant to exercise extraterritorial jurisdiction in environmental damage cases, precisely because the issues involved are generally so local in nature.[60] 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 distant and less developed nations. On a deeper level, there is very little culture of compliance within China, nor any meaningful sense of responsibility for corporate actions abroad.[61] This mentality poses a difficult obstacle for effective home State regulation.

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supra note 38, at 30–34 (describing both the theoretical and practical problems with home State control and extraterritoriality).

56. Broecker, *supra* note 54, at 177 (citing Mr. Ruggie).

57. PALMER, *supra* note 51, at 12.

58. MORGERA, *supra* note 38, at 31.

59. *See generally* ECONOMY, *supra* note 14, at 59-91(thoroughly examining the ineffectiveness of China's environmental laws and general disinterest in environmental policy).

60. *See* Jennifer. K Rankin, *U.S. Laws in the Rainforest: Can a U.S. Court Find Liability for Extraterritorial Pollution Caused by a US Corporation? An Analysis of Aguindo v. Texaco, Inc.*, 18 BC INT'L & COMP. L. REV. 221, 251 (1995) (noting the aversion that U.S. courts seem to have against recognizing extraterritorial jurisdictional claims in environmental cases).

61. LI JUNHAI, CHINESE ACAD. OF SOC. SCI., PHILOSOPHY AND APPROACHES TO STRENGTHEN CORPORATE RESPONSIBILITY IN CHINA 13; s*ee also* Dan Haglund, *Regulating FDI in Weak African*

2. Home State Liability

Home State liability is often used as a method of last resort for complainants in host States who have suffered harm but have not been able to pursue their claims in their own nation's courts.[62] Foreign citizens may bring claims against Chinese corporations in Chinese courts, but considering 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 pleadings stage.[63] If plaintiffs make 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."[64] 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.[65] Finally, courts may be reluctant to impose liability when foreign relations issues are involved, as they almost always are in Sino-African resource acquisition projects.[66]

States: A Case Study of Chinese Copper Mining in Zambia, 46 J. MOD. AFR. STUD. 547, 559 (2008) (recounting the forceful argument of a Chinese official in Zambia "that Chinese companies must simply follow local laws, and that responsibility for identification and sanctioning of non-compliance should rest with the Zambian government").

62. PALMER, *supra* note 51, at 10. This is the principle that underlies the United State's Alien Torts Claim Act, which provides a forum for suits alleging violations of international law by those who cannot obtain justice elsewhere. 28 U.S.C. § 1350 (2006) (also known as the Alien Tort Statute).

63. MORGERA, *supra* note 38, at 33.

64. *Id.*

65. Collecting from a Chinese parent company on judgments rendered against its foreign subsidiaries poses unique problems as well. While "piercing the corporate veil" is not easy in Western nations, it is even more difficult in China. Under the Companies Law of 2005, the parent company is considered a shareholder of its subsidiaries, but it is not held liable for the subsidiary's judgment debts unless two conditions are 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. This subjective standard of 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. Additionally, the creditor must also become involved in the case in order to prove this element. *Companies Law of the People's Republic of China* (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2005, effective Jan. 1, 2006) (China), *available at* http://www.csrc.gov.cn/pub/csrc_en/laws/rfdm/statelaws/200904/t20090428_102712.htm.

66. MORGERA, *supra* note 38, at 33.

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 in general and Chinese corporations in particular. The remainder of this article will examine this problem in the specific context of the Chinese government and related institutions that are involved with Chinese corporate actors around the globe.

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 environmental oversight and enforcement. Nevertheless, 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. This section describes the Chinese entities involved in outward foreign direct investment (OFDI) regulation and the ways that environmental concerns are incorporated into their decision making.

A. National Development and Reform Commission

The National Development and Reform Commission (NDRC), an agency under the State Council, is a macroeconomic planning entity charged with managing general economic policy.[67] Depending on the particulars of an OFDI project, it may also review and approve individual proposals.[68] 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] 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. Finally, given NDRC's macroeconomic focus, NDRC does not seem to

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67. OECD REVIEW, *supra* note 8, at 87.

68. *Id.* at 83.

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 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 . . . .

The Interim Measures for the Administration, Examination and Approval of Overseas Investment Projects (promulgated by the Nat'l Dev. and Reform Comm'n, Oct. 9, 2004) (China), *available at* http://www.asianlii.org/cn/legis/cen/laws/timftaoeaaotoip1038/.

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 disclosing financial details and attesting that projects will comply with local laws and be compatible with Chinese strategic interests. MOFCOM also administers a database regarding local laws in nations where Chinese businesses operate in an effort to help businesses succeed and comply with local laws.[72]

MOFCOM's authority is further split among several departments tasked with overseeing different aspects of foreign economic activity. The Department of Foreign Economic Cooperation (DFEC) is charged with regulating all Chinese companies operating overseas and has the authority to punish corporations that violate MOFCOM regulations or Chinese laws.[73] The Department of Foreign Aid (DFA) administers China's aid projects, including concessional loans and oil-for-infrastructure projects. In this role, DFA is responsible for approving Chinese contractors and "takes direct responsibility for the safety and quality of construction in China's aid projects."[74]

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

70. OECD REVIEW, *supra* note 8, at 87.

71. *Id.* at 87–88.

72. *Id.* at 89, 93.

73. Bates Gill & James Reilly, *The Tenuous Hold of China Inc. in Africa*, WASH. Q., Summer 2007, at 42.

74. *Id.* at 43.

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.[75]

C. Economic and Commercial Counselor

The Chinese embassy in each host nation also has an Economic and Commercial Counselor (ECC) office that manages economic links between the host nation and China. The ECC has a unique role in OFDI policy because it is sometimes the only office in a position to oversee projects from beginning to end, but occupies a sort of no-man's land in the bureaucracy that leaves it at once independent from oversight, yet powerless in its own right. On one hand, the ECC is not directly subject to the administrative authority of any 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), so it need not enforce any other department's decision if it chooses not to do so.[76] On the other hand, 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] Yet, the ECC has no authority to do anything if its opinion is negative. The ECC also helps inform each company of the laws that apply to it in any given situation. This role draws significantly upon MOFCOM's expertise with the financial and legal requirements in each host nation, but again ECC's

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75. *Id.* at 44–45.

76. 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 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 17 at 16–39.

77. Under Articles 10 and 11 of *The Measures for Overseas Investment Management*, 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. *The Measures for Overseas Investment Management* (promulgated by the Ministry of Commerce, Mar. 16, 2009) (China), *available at* http://www.procedurallaw.cn/english/law/200904/t20090402_202192.html.

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.

Id.

role is limited to information sharing.[79] Finally, like MOFCOM, the ECC has no direct lines of authority over Chinese corporations in Africa.[80]

In spite of these handicaps, the ECC is in a position to observe both potential and actual environmental effects in projects. In fact, it is arguably required to do so. For example, the ECC's assessment of probable trade effects could include a full report of a project's potential environmental impacts since adverse effects to host nation environments can easily lead to strained relations. However, the ECC must file its opinion on the project within ten days of receiving a request from MOFCOM, which is not enough time to conduct a thorough environmental evaluation.[81] Furthermore, although the ECC is tasked with helping Chinese corporations increase their knowledge and compliance with host State laws, it has neither the environmental expertise nor 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.[82]

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).[83] 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.[84] 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.[85] This gives SASAC every incentive to 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

79. OECD REVIEW, *supra* note 8, at 93.

80. Gill & Reilly, *supra* note 73, at 45, 47; *see also* DOWNS, *supra* note 17, at 21–24 (describing some of the ways officers avoid responsibility or circumvent bureaucratic oversight).

81. *The Measures for Overseas Investment Management*, *supra* note 77, at Art. 11.

82. Haglund, *supra* note 61, at 557 (as of 2007).

83. *Id.* at 42.

84. 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 key players "in China's corporate engagement strategy overseas").

85. *Id.* at 42.

both the implementation and enforcement of regulations that affect them.[86]

This is not to say that SASAC thwarts every attempt to regulate SOE conduct. It recently issued several directives 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 lofty goals for sustainably conducting business within China, including establishing norms for evaluating and reporting corporate social responsibilities.[87] The *Guiding Opinion* also specifically recognizes that good corporate citizenship is increasingly important for fostering international political and economic relationships and developing an image of responsibility for central enterprises.[88]

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 U.N. Global Compact.[89] 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.[90] While such voluntary initiatives are commendable, they are no substitute for effective governmental regulation and oversight.

E. Financial Institutions

China Development Bank (CDB) and the Export-Import Bank (Ex-Im Bank) are China's two major State-owned banks that deal with foreign investment and aid projects. As the primary funding source for the kinds of development projects we have discussed, these financial institutions often have the most direct contact with the operating details of specific projects. CDB is responsible for managing the China Africa Development Fund, which makes approximately $5 billion available for increasing agricultural and manufacturing investments in ongoing Chinese projects in Africa.[91]

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86. *Id.*; *see also* DOWNS, *supra* note 17, at 21–24 (discussing the relationship of the oil companies to the government).

87. OECD REVIEW, *supra* note 8, at 190–91; *see also id.* at 225–35 (full text of the *Guiding Opinion*).

88. *Id.* at 191.

89. UNITED NATIONS, PAMPHLET, THE UNITED NATIONS GLOBAL COMPACT (2011), *available at* http://www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf. To see what companies are members of the Global Compact, see http://www.unglobalcompact.org/participants/search.

90. OECD REVIEW, *supra* note 8, at 214.

91. *Id.* at 117.

The Ex-Im Bank, however, is the most important bank in African policy, holding an outstanding loan balance of at least $7 billion for African projects, which account for nearly twenty percent of its total business.[92] Ex-Im Bank coordinates with MOFCOM to arrange bidding for all of China's official economic aid projects, 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.[93] 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."[94] Ex-Im Bank reportedly made approximately $20 billion available for further projects in Africa in 2008–2010.

IV. THE GOVERNMENT INTEREST IN PROMOTING ENVIRONMENTALLY RESPONSIBLE CONDUCT

Although the governmental structure described above does not appear to provide sufficient oversight, the Chinese government has shown an increased interest in promoting corporate environmental and social responsibility. Just as the government has acknowledged the need for better environmental protection domestically over the last decade, it seems to have realized that rampant destruction in African host nations is unsustainable as both an environmental and a commercial practice. Each of the governmental bodies detailed in the previous section has reason to help ensure that Chinese corporations conduct business in environmentally responsible ways, even if it comes at some expense.

At the national level, the Central Government has at least nominally recognized that it is not in China's long term interest to allow its companies to wreak havoc on the environments of host nations.[95] 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.[96] Major companies are therefore less willing to be associated with high profile environmental destruction, even if the

92. OECD REVIEW, *supra* note 8, at 115.

93. Gill & Reilly, *supra* note 73, at 43.

94. *Id.*

95. OECD REVIEW, *supra* note 8, at 186.

96. *See, e.g.*, Karin Buhmann, *Corporate Social Responsibility in China: Current Issues and Their Relevance for Implementation of Law*, 22 COPENHAGEN J. ASIAN STUD. 62, 83 (2005) ("Low respect for CSR is increasingly recognized as a risk for corporate investment and reputation.").

actions are perpetrated by suppliers or foreign partners.[97] This trend could make it increasingly difficult for China to attract foreign investment and forge partnerships with the wealthy corporations that will help ensure China's economic prosperity in the future.[98] Developing environmentally responsible operations and implementing credible mechanisms to report on 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 makes it less likely that other nations will open their doors to Chinese corporations. This not only hurts immediate business interests but also affects China's long term resource goals.[99] Rampant environmental destruction in host nations may cause such resentment that foreign governments are forced to address the problems through more stringent regulations. In the most egregious cases, a host nation may react more harshly still, as Sierra Leone did when it banned timber exports entirely at the beginning of 2010.[100] Such backlash could imperil long term relations with the supplier nations that are vital to China's continued growth and development. So while NDRC and MOFCOM, for example, may not presently be interested in environmental regulation, they must come to realize that their common goal of increased economic prosperity can only be achieved by ensuring a certain level of responsible conduct.[101]

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 includes a requirement that

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97. OECD REVIEW, *supra* note 8, 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").

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

99. DANIEL H. ROSEN & THILO HANEMANN, PETERSON INST. FOR INT'L ECON., CHINA'S CHANGING OUTBOUND FOREIGN DIRECT INVESTMENT PROFILE: DRIVERS AND POLICY IMPLICATIONS (2009) ("Shielding pariah-state governments or providing 'no strings attached' loans to the developing world might help some of the established OFDI players, but it hurts the reputation of China's firms among consumers and thus harms the interest of China's next generation of OFDI investors.").

100. 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 . . . ." Rhett A. Butler, *Sierra Leone Cracks Down on Illegal Logging by Banning Log Exports*, MONGABAY, Jan. 2, 2010, http://news.mongabay.com/2010/0102-sierra_leone.html.

101. ROSEN & HANEMANN, *supra* note 99, at 12 ("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.").

companies adhere to notions of social and business morality.[102] China has also significantly increased its participation and visibility in regional and international programs aimed at fostering corporate responsibility.[103] The government has focused on encouraging businesses to work voluntarily toward higher standards of CSR, perhaps because this "is easier than relying on regulations that the State lacks the administrative capacity to enforce and that, if enforced, would reduce global competitiveness."[104] There also appears to be a heightened expectation that companies actually make efforts to abide by the commitments of such programs, as opposed to simply signing onto them.[105] While this effort is commendable in many respects, Chinese notions of CSR must begin to include responsible conduct in the supply chain, rather than only in the immediate production process.

V. OPPORTUNITIES FOR IMPROVEMENT

A. Structural Improvement

The current regulatory structure may be unwieldy and inefficient, but it does allow 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 would benefit from increased reference to objective standards. This final section presents an analysis of several tools that can be employed to help Chinese companies address environmental issues in foreign nations.

1. Consolidate Oversight Authority

The problems of the bureaucracy described above are clear. Each of the bodies mentioned has a different mission and different priorities regarding overseas investments. SASAC seeks, for example, to maximize profits, just as any corporate stakeholder does.[106] This purpose can easily conflict with the goals of MOFCOM, which is involved at the macro level in approving and facilitating projects that are consistent with

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102. OECD REVIEW, *supra* note 8, at 144.

103. *Id.* at 202–08 (describing several recent and ongoing efforts).

104. *Editorial: 'CSR' Will Not Be Delivered by Businesses Alone*, CHINA DEV. BRIEF, Nov. 4, 2005, www.chinadevelopmentbrief.com/node/287.

105. 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 96, at 72.

106. Gill & Reilly, *supra* note 73, at 42.

larger policy goals.[107] 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 responsible for evaluating and monitoring environmental impacts, nor is it clear who should be responsible for addressing issues as they arise. This systemic problem makes it extremely difficult to conceive of a solution within the current governmental structure.

While we recognize that it is unrealistic to expect wholesale changes to this bureaucracy, the preferred solution is to empower a single governmental body to administer and regulate the environmental issues associated with foreign investment projects. Just as the elevation of SEPA to a ministry-level body has greatly expanded its influence domestically,[109] designating one department within the Chinese government to exercise control over all environmental impacts abroad would greatly increase the efficacy of the regulatory power. None of the current agencies is specifically responsible for reviewing and overseeing the environmental aspects of these projects, so the government should either establish a new department or designate an existing one to assume this role.

The best solution is to authorize a department within MEP to exercise authority abroad and to operate independently of the economic agencies that are currently involved in the process. It would be virtually impossible to force any real changes in corporate practices abroad without MEP's involvement. MEP is the only existing ministry with the expertise to monitor projects in any meaningful sense. Additionally, MEP's exclusive duty is to oversee environmental issues, so it is the only agency that could begin to counteract the influence of the economic agencies that currently dominate the process. Finally, MEP's ministry-level status makes it at least theoretically capable of exercising authority over the corporate entities it would regulate. If MEP were specifically charged with regulating foreign investment projects, it would be able to contend with the economic agencies' efforts to maximize profits and business relationships in host nations.[110]

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107. OECD REVIEW, *supra* note 8, at 87.

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.").

109. OECD REVIEW, *supra* note 8, at 263.

110. Gill & Reilly, *supra* note 73, at 44 ("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.").

Currently, MEP is technically authorized to dispatch counselors abroad, but it needs the permission of both the Ministry of Foreign Affairs and the State Council in order to do so.[111] This impedes its independence and ability to maintain a presence where it is needed. MEP should be independently authorized to establish offices alongside the ECC and DFEC in the nations where Chinese businesses operate so that it is in a position to exercise oversight of environmental issues in these host nations.

The same enforcement difficulties that plague MEP domestically would be present in foreign offices on an even larger scale.[112] However, the current situation allows corporate and economic interests to exercise virtually unfettered control over foreign operations. Any effort that brings environmental experts and policies into the foreign regulatory structure would be an improvement over 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,[113] which requires it (theoretically, at least) to engage in an analysis of the project itself and the environment—both physical and legal—of its proposed location. DFEC also supposedly possesses the authority to punish firms that do not adhere to MOFCOM regulations and to Chinese law,[114] so DFEC 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,

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111. 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.

112. 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." Gill & Reilly, *supra* note 73, at 44.

113. *Id.* at 42–44.

114. *Id.* at 42.

including environmental laws.[115] While these laws may not be rigorous enough to prevent environmental degradation in all situations, MOFCOM's efforts at least indicate a willingness to help companies comply with these 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.[116] Under this policy, the government has the power to severely restrict a business's ability to engage in export activity and foreign trade if the business violates Chinese environmental regulations and laws.[117] This sort 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 or government support would force businesses to take modest steps toward fulfilling 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 impact assessment of every major project. Legal authority for this requirement arguably exists within the current *Measures for Overseas Investment Management*. Article 12 of the *Measures* requires that an array of application materials be submitted to MOFCOM for approval before projects begin,[118] but because that Ministry's primary

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115. *Id.* at 42; OECD REVIEW, *supra* note 8, at 89.

116. OECD REVIEW, *supra* note 8, at 265.

117. *Id.*

118. Article 12 requires:

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;

focus is economic, it reviews primarily financial arrangements and investment conditions. However, the final subsection (Article 12, Section 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.[119] Ideally, there would be some mechanism for ensuring that environmental data were subject to independent verification. Developing a culture of compliance and increasing the reliability of such assessments would be no simple task, but any level of increased attention to environmental issues in both the planning and operational phases will be an improvement.

Additionally, Article 9 of the *Measures* requires MOFCOM to deny an application if a proposed project will damage China's relationship with the host nation.[120] As it becomes clearer that environmental destruction can 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.[121]

3. Regulatory Standards

While a general re-structuring of the bureaucratic oversight mechanisms would permit more centralized review, increased efficiency, and better decision making,[122] improvements are possible within the

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> 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
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> 6. other documents as specified by the competent department . . . .

The Measures for Overseas Investment Management, *supra* note 77.

119. *Id.*

120. Article 9 provides:

> 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:
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> 1. endangering the state sovereignty, national security and public interests of China or violating a law or regulation of China;
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> 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 . . . .

Id.

121. *See, e.g.*, Gill & Reilly, *supra* note 73, at 46 (describing the high profile anti-Chinese backlash in Zambia following a deadly mine explosion in 2006).

122. This assumes of course that the government's intense involvement in commercial transactions can deliver these benefits at all. OECD REVIEW, *supra* note 8, at 89. The OECD recommends that the government remove its oversight authority and permit firms to make investment decisions based on their evaluation of the markets.

current system by the simple application of meaningful standards to the approval process. For example, there are no firm guidelines governing environmental impact assessments, nor is there any mechanism to allow third parties to review them for accuracy and completeness. Without third party review, there is no mechanism to verify the accuracy of completed project assessments.

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 eventually be required to meet. Such standards could draw on accepted environmental norms and specific international standardization schemes, 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 as meeting ISO 14001 standards,[123] and there is increasing evidence of Chinese corporations referencing or working within OECD guidelines as a result of their global business contacts.[124] This is so because OECD member State corporations are expected to promote conformity with OECD standards throughout their supply chains.[125] Because China is a link in so many supply chains leading to Western OECD nations, its major international corporations have necessarily worked with their Western partners to raise operating standards within China. The next step is 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 proper 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 will have to 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,[126] which shows that such standards can, in fact, be created and implemented. 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

123. *Id.* at 186.

124. *Id.* at 151.

125. *Id.*; OECD GUIDELINES, ¶ 2, § 1 (Concepts and Principles).

126. OECD REVIEW, *supra* note 8, 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 E.U.-China Trade Program that has been working to support China's integration into the world trading system.

Group.[127] 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 pertinent."[128] So long as industry is not empowered to entirely write its own rules, such collaboration can be valuable.

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 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 stringent approach that would use the 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 and could have a real impact if government officials considered these reports when evaluating applications for further investment or expansion abroad. Even if such evaluations had no legal effect, public 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 difficulties of implementing a system of extraterritorial 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 truly wants to confront this issue. As 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. Chinese officials should recognize that they must accept that responsibility if their corporations are to continue spreading across the globe.

While it will be difficult to implement such a program, many States have laws that apply to corporate conduct in foreign nations, so there is

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127. OECD REVIEW, *supra* note 8, at 118, 211–12.

128. *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.

precedent for such a legal regime.[129] But even the United States does not require its corporations to abide by all American laws in their overseas operations (minimum wage requirements, for example),[130] so it is difficult to imagine the Chinese government fully applying its domestic laws to operations in far-off nations such as Zambia and Sudan. Nevertheless, no corporation can expect its overseas operations to be entirely beyond the reach of its home State's legal authority. The Chinese government can legitimately implement and enforce regulations abroad if it chooses to do so.

This idea has gained some support in China, and the government now has certain regulations that extend to corporate operations outside of its borders.[131] 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 . . . ."[132] Most importantly, these regulations require a thorough environmental assessment and a sustainability plan for all Chinese logging operations overseas, even when such a plan is not required by host State law.[133] The *Guidelines* also urge operators to reach out to local residents by "establish[ing] a consultative mechanism with the local community."[134] There is, however, no clear enforcement mechanism, nor any avenue for affected residents to seek enforcement or compensation if they suffer harm. Furthermore, the guidelines suffer from a lack of specificity, as do most Chinese laws. Nevertheless, the development and issuance of guidelines in other major industries would begin the process of extending extraterritorial jurisdiction to Chinese companies that operate abroad.

Another recent development may indicate that Chinese officials are moving even further toward 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 set forth many of the legal obligations we have discussed in this article to all Chinese

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129. "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 54, at 182.

130. *Id.* at 183–84.

131. 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. These include, for example, *the 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*.

132. GUIDE ON SUSTAINABLE OVERSEAS SILVICULTURE (Aug. 27, 2007), *available at* http://www.geichina.org/_upload/file/Guide_silviculture_EN.pdf.

133. *Id.* § 5.2.

134. *Id.* § 6.4.

companies involved in overseas projects.[135] 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 nation, to meet Chinese standards.[136]

MOFCOM and MEP are apparently reviewing these guidelines for possible promulgation.[137] If the guidelines are ultimately issued, they would be significant for a number of reasons. Companies would be forced to pay more attention to the legal requirements of the sector in which they operate or risk violating Chinese law. Companies would hopefully be more likely to comply because they are more familiar with the Chinese laws that apply to their particular business and might be more concerned if penalties were assessed at home rather than in the host State. The real effect on conduct in host countries may 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 considering this matter seriously is important in itself. If these regulations become part of Chinese corporate law they could have a real effect on the ground.

B. The Role of Financial Institutions

Financial institutions are also well positioned to encourage more environmentally responsible conduct. Chinese banks appear to have recognized this in recent years, but they must begin to move beyond cursory policy statements and implement recognized international standards to ensure that the projects they fund are not overly destructive.[138]

1. Lending Standards that Reference Environmental Issues

International banks and institutions currently use several sets of lending criteria to evaluate the potential social and environmental impacts of proposed projects. While traditional banks and lending institutions typically use the Equator Principles (EP) to evaluate aid projects, the World Bank's IFC uses its Performance Criteria.[139] Both systems employ specific standards to evaluate projects with respect to pollution prevention, greenhouse gas emissions, management of

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135. 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.

136. *Id.* There are also provisions requiring companies to compensate nations and/or victims for environmental damage they inflict, but no information on how that might be calculated is yet available. The draft also includes provisions mandating environmental impact assessments, mitigation strategies, and adherence to all environmental treaties to which China is a party.

137. Jing, *supra* note 135.

138. OECD REVIEW, *supra* note 8, at 91.

139. MORGERA, *supra* note 38, at 169.

hazardous wastes, and biodiversity protection.[140] If a proposal does not satisfy the criteria, the lending institution is expected to deny funding.[141] If a project is approved, frequent consultations between lenders, corporations, and independent experts help firms respond to environmental and social concerns early in the planning process when it is still feasible to adjust the project to avoid the identified problems.[142]

Such standards are now routine in the international project finance market.[143] However, China's banks have not embraced the standards as fully as Western banks.[144] Banks in China do not face the degree of social pressure and criticism that Western banks associated with environmentally destructive projects tend to receive.[145] Publicly-listed Western institutions are typically 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 rigorous disclosure requirements, so they feel neither social nor legal pressure to avoid potentially destructive projects.[146]

The central government has recently pressured banks to pay more attention to the environmental effects of the projects they finance in order to enhance China's image as a socially responsible business partner.[147] As a result, some positive steps have occurred to improve consultation at the lending stage. In the domestic arena, beginning in 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."[148] Moreover, in July 2007, SEPA, the People's Bank of China (PBOC), and the China Banking Regulatory Commission (CBRC) implemented the "green credit policy," establishing systemic links between environmental protection agencies and credit administration institutions.[149] The "green credit policy" allows banks "to suspend or limit loans to enterprises violating environmental laws."[150] The OECD

140. *See id.* at 150–67 (describing the details of the IFC's Performance Criteria); *see also* Haglund, *supra* note 61, at 565.

141. Haglund, *supra* note 61, at 565.

142. MORGERA, *supra* note 38, at 154.

143. In fact, seventy-five percent of global project financing is provided by banks that have signed onto the EPs. Haglund, *supra* note 61, at 565.

144. *Id.* at 565–66.

145. *Id.* at 566.

146. *Id.*

147. OECD REVIEW, *supra* note 8, at 145.

148. ECONOMY, *supra* note 14, at 116.

149. OECD REVIEW, *supra* note 8, at 264.

150. *Id.*

reported 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 funds.[151] One year later, SEPA signed an agreement with the IFC to help introduce the Equator Principles domestically. However the criteria are not slated to apply to overseas projects, and Ex-Im has not fully adopted the EPs.[152]

Currently, the "green credit policy" only applies to firms operating within China.[153] The green credit system should expand to include foreign operations in at least two ways. First, if a Chinese firm has previously violated the environmental laws of a host nation, lenders should refuse to extend credit to that firm and its subsidiaries. Second, Chinese firms with excessive violations of Chinese law domestically should not receive financing to establish or invest in foreign operations. Responsible authorities need to establish a system for disclosing information on companies who violate laws overseas in order to make such a system successful. Ex-Im Bank must be covered in order for the policy to have any meaningful effect.

Among credit exporting banks, both Ex-Im and CDB have increased the visibility of their CSR initiatives over the last couple of years. A member of the U.N. Global Compact since 2006, CDB claims it has made significant improvements in monitoring and reporting the environmental impacts of the projects that it finances.[154] On at least one occasion, CDP hired Det Norske Veritas, a leading international classification and compliance organization, to audit its reports and initiatives.[155]

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.[156] Though many of its policies arguably lack the necessary detail to guide decision makers in evaluating proposals, they nevertheless indicate the bank's willingness to begin incorporating environmental concerns into its lending process. Ex-Im

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151. *Id.*

152. Haglund, *supra* note 61, at 565–66.

153. OECD REVIEW, *supra* note 8, at 264.

154. *See, e.g.*, Press Release, China Development Bank, CDB Releases 2010 Social Responsibility Report (June 24, 2011), *available at* http://www.cdb.com.cn/english/NewsInfo.asp?NewsId=3776.

155. *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.

156. *See, e.g.*, OECD REVIEW, *supra* note 8, at 190 (citing the environmental policy guidelines of Ex-Im Bank).

Bank also retains authority to discontinue funding if negative environmental impacts occur during the life of a project,[157] but it is doubtful that this extreme remedy has been utilized. Finally, the policy requires a post-project review to evaluate the accuracy of the EIA and address outstanding concerns.[158]

While these policies are laudable (and similar on their face to IFC's policies), the amount of damage done by Ex-Im-funded projects suggests that the policies are not enforced in practice. Because the Ex-Im policies are strictly internal,[159] the bank suffers no real harm if it fails to abide by them. Equally importantly, there are no assurances regarding the accuracy of assessments or effectiveness of mitigation measures. Even if a host nation approves the assessments, the approval may be meaningless if the investing firm has underestimated or underreported potential environmental impacts, or if financial pressures compel the host nation to 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 disbursed.[160] The Chinese lending process should include a similar review. In order to play an effective role, lenders must adopt more specific and meaningful guidelines for environmental review and implement mechanisms to ensure compliance.

2. Enforcement of Standards Through the Contract

Beyond assessments and simple reporting, financial institutions can enforce substantive requirements on projects they fund through contractual stipulations and contingent funding. For example, the IFC requires projects it funds to establish a reporting process that local citizens can use to file complaints and an independent oversight office (the Compliance Adviser/Ombudsmen, or CAO) with authority to monitor active projects.[161] The CAO fields complaints from local citizens, makes site visits to determine compliance with lending standards, and exercises authority by limiting or placing conditions on continued financing.[162] If problems develop or complaints are received, the IFC works with the borrower to implement a timetable for meeting the expected standards, and the IFC may suspend or even withdraw

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157. *Id.*
158. *Id.*
159. *Id.*
160. MORGERA, *supra* note 38, at 152, 210.
161. *Id.* at 217–19.
162. *Id.*

funding if the situation warrants it.[163] Ex-Im Bank and other Chinese lending institutions should require similar mechanisms to field complaints regarding Chinese projects in foreign nations, perhaps in connection with ECC offices.

A more effective solution would emphasize the inclusion of stipulated operating standards in the lending contract as a condition of receiving continued funding for a project. Early in the stages of project planning, the IFC uses consultations between operators, environmental experts, and lenders to develop firm agreements on operating standards for individual projects based on the specifics of each venture and the local environment.[164] Chinese lending institutions should follow this model as well. As specific plans develop in the lending stages of a project, the details should be reduced to writing and included in the lending agreement as definitive operating standards. The operating standards become an enforceable term of the contract that must be met in order to continue receiving funding. Incorporating fixed standards for pollutant levels, for example, would contractually bind the borrower to stay within the permitted levels.

The loan agreement should also reserve monitoring rights to a third party, such as a local environmental NGO, to help ensure that the company abides by the stipulations. This will keep banks out of the business of monitoring environmental impacts and give that power to a party whose sole interest is monitoring the environmental impacts with reference to the contractual standards. Furthermore, the contracts should include more creative provisions to address other unique problems, 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 companies whose shares and commodities they manage. There are 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,

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163. *See Frequently Asked Questions: Chad-Cameroon Pipeline Project*, THE WORLD BANK (2007), http://go.worldbank.org/MBUL0L3FO0. 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. 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. Robert B. Zoellick, *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.

164. MORGERA, *supra* note 38, at 153–54.

corporate governance, and social responsibility in order to attract investors. As noted, investors are increasingly reluctant to associate with environmentally irresponsible companies.[165] Companies who want to attract wealthy investors, particularly those from Western nations, must act responsibly. This requires companies not only to institute policies to prevent environmental harm abroad, but also to foster a culture of compliance by developing methods to report and publicize CSR efforts. Several Chinese banks have undertaken such initiatives in connection with their transformations into joint stock companies and IPO offerings.[166]

Chinese market regulators have the power to establish disclosure and corporate governance requirements and have done so with regard to accounting procedures, record authentication, and other internal processes.[167] For example, the national Accounting Law now requires listed companies to comply with the Ministry of Finance's Accounting Standards for Business Enterprises, which are largely consistent with the International Financial Accounting Standards.[168] 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.

A few policies indicate that this mechanism is becoming more popular domestically. SEPA's 2008 "green securities policy," for example, requires companies in heavily polluting industries to submit to an environmental audit and disclose environmental information prior to issuing an IPO or refinancing through a securities market.[169] Local exchanges have issued even more proactive directives designed to promote responsible corporate conduct. The Shenzhen 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.[170] 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.[171]

165. *See, e.g.*, Buhmann, *supra* note 96, at 83.

166. OECD REVIEW, *supra* note 8, at 91–92.

167. *Id.* at 192.

168. *Id.* at 193.

169. *Id.* at 264–65.

170. *Shenzhen Stock Exchange Social Responsibility Instructions to Listed Companies*, SHENZHEN STOCK EXCH. (Sept. 25, 2006), http://www.szse.cn/main/en/rulseandregulations/sserules/2007060410636.shtml [hereinafter *Shenzhen Instructions*]; *see also* OECD REVIEW, *supra* note 8, at 211 (describing implementation since the instructions were issued).

171. *Shenzhen Instructions*, *supra* note 170, at Art. 27.

Companies are supposed to ensure that their environmental protection procedures facilitate compliance with the relevant laws, reduce resource consumption and waste, and minimize adverse impacts.[172] Significantly, Article 30 requires companies to report their pollution discharges to the proper authorities and pay any fines if they violate local laws.[173]

While the effectiveness of these provisions is 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,[174] implying that the guidelines could be even more useful if foreign conduct is increasingly considered part of a company's overall CSR profile. An enforcement mechanism would be ideal since the effectiveness of the non-mandatory guidelines is necessarily limited. Companies require large amounts of capital to conduct operations overseas. Therefore, if listed companies face the real possibility of sanctions in the form of limited or suspended trading, owners and investors will have sufficient 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 China, outside pressures may be needed to raise the level of responsible 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. The European Union has, for example, implemented laws to address illegally harvested timber.[175] While such actions may draw criticism,[176] they can have an effect on behavior by shifting enforcement responsibility from an unwilling host nation to an interested importing nation.

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172. *Id.* at Art. 28.

173. *Id.* at Art. 30.

174. OECD REVIEW, *supra* note 8, at 211.

175. 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.

176. Principle 12 of the Rio Declaration on Environment and Development, 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." United Nations Conference on Environment and Development, Rio de Janiero, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. 1), Annex 1, Principle 12 (Aug. 12, 1992), *excerpted in* ECONOMY, *supra* note 14, at 202.

1. The Lacey Act

The U.S. Lacey Act[177] was initially drafted to prevent trade in endangered animals but has been expanded to include trade in products derived from illegally harvested foreign wood.[178] Under the Act, American importers and producers are barred from dealing in any wood products harvested in violation of the producing nation's laws.[179] The Act applies regardless of whether the foreign law imposes civil or criminal penalties, and even if the law itself is not actively enforced in the producing nation.[180] All imported wood products must be labeled with a description of the scientific name of any wood used in the product, the value and quantity of each, and the name of the country from which it was harvested.[181]

However, this documentation is not sufficient on its own. The Lacey Act imposes strict liability: importers are strictly liable for possessing products made from illegally harvested wood,[182] though they may be found less culpable depending on the degree of due diligence.[183] The main problem with the system is that host State laws may not be particularly rigorous. No matter how lax a producing State's laws may be, the Lacey Act does not impose liability if producers comply with those laws.[184]

Nevertheless, the Lacey 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, it imposes investigative responsibilities on anyone wishing to import wood or wood products into the largest consumer market in the world. This is crucial because a paper trail is not enough to ensure real compliance with host laws when forgery is commonplace.[185] Rather, importers must investigate and develop relationships with suppliers that they trust to comply with local laws.[186]

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177. 16 U.S.C. §§ 3371–3378 (2006).

178. Pub. L. No. 110-246, § 4(a), 122 Stat. 1664, 2052–2056 (2008).

179. 16 U.S.C. § 3372(a)(2)(A) (2006), *amended by* Pub. L. No. 110-246, § 4(a), 122 Stat. 1664, 2053 (2008).

180. *Id.*

181. WORLD RES. INST., FACT SHEET: ARE YOU READY FOR THE LACEY ACT? (2009), *available at* http://www.wri.org/stories/2009/12/fact-sheet-are-you-ready-lacey-act.

182. *See, e.g.*, United States v. Proceeds from Sale of Approximately 15,538 Panulirus Argus Lobster Tails, 834 F. Supp. 385, 390–91 (S.D. Fla. 1993) (interpreting 16 U.S.C. § 3374(a)(1)).

183. WORLD RES. INST., *supra* note 181.

184. 16 U.S.C. § 3372 (2006), *amended by* Pub. L. No. 110-246, § 4(a), 122 Stat. 1664, 2053 (2008).

185. WORLD RES. INST., *supra* note 181.

186. *Id.*

2. Supply Chain Tracking for Other Resources

The question is whether the United States (or any other importing nation) can 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.[187]

Moreover, even if 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 of harvesting, the same may not be true of metals, which are smelted and blended together soon after extraction in order to be sent to China for use as wires or other components in countless factories across the country. It may be 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.

Despite these inherent difficulties, supply chain tracking and due diligence requirements may still prove useful. 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 piecemeal and build upon the kinds of reporting procedures that are already in place for wood products and human rights issues. Furthermore, supply chain tracking could occur without requiring much, if any, Chinese government involvement, as Western MNCs would be urged or required to participate by the governments and organizations of their home countries. As records are kept more universally, MNCs and international NGOs should be better able to monitor source conditions and publicize shortcomings. Whether or not there are legal repercussions for failing to report, increased attention and negative publicity could be very effective tools for pressuring Western businesses to use suppliers with higher standards. This system could eventually evolve into a more complete legal regime to foster due diligence regarding supply chains that include metals or minerals imported from China and elsewhere.

CONCLUSION

The relationship between African nations and China has the potential to benefit both parties greatly. But the projects that have the potential both to help lift African nations out of poverty and to fuel the

187. Buhmann, *supra* note 96, at 77.

Chinese business machine must involve some level of environmental awareness and responsibility. This article has discussed the shortcomings and opportunities that exist in the Chinese-African OFDI process and how the process could be changed to further incorporate environmental considerations. Most importantly, this article has suggested some ways to improve the process without adversely affecting the parties' goals. None of the suggestions we make would significantly curb trade or impose undue hardship on businesses. We hope that by fostering a system that protects long-term interests while facilitating short-term acquisitions, the Chinese-African relationship can contribute to the development of these two vital regions in a way that is mutually beneficial and environmentally and economically sustainable.