

Understanding China's
Overseas Foreign Direct Investment:
**A Mapping of Chinese Laws
and Stakeholders**

Foreword

China continues to grow as an investor, a trading partner and a provider of aid to developing countries. China is already the fifth largest foreign investor in the world. Through its investment in developing countries, China is becoming an increasingly influential actor.

Chinese foreign direct investment (FDI) has helped to fund much-needed infrastructure such as roads, railways and buildings; to revitalise the private sector; and to provide job opportunities in a number of countries, thus supporting their development.

However, there have also been concerns about the social and environmental impacts of Chinese FDI in some developing countries. Reports show that some Chinese companies have failed to promote workplace safety, have caused damage to the environment, and have undermined local industries.

The impacts of Chinese FDI in developing countries have become a topic of interest to companies, civil society organisations (CSOs) and governments across the globe. In response, some Chinese companies have sought to improve their understanding of local investment contexts, community consultation mechanisms, impact assessments and environmental protection.

To promote responsible investment, Oxfam believes it is important to establish platforms for dialogue among concerned stakeholders, including the poor people 'on the ground', whose concerns and interests may otherwise be overlooked. Some CSOs have embarked on initiatives to help farmers, women and workers voice their concerns about the impacts of Chinese FDI on their livelihoods and environment, as well as their social, economic and cultural rights.

At the same time, the Chinese government has been exploring ways to better regulate companies' behaviour. For example, the Ministry of Commerce has been considering a comprehensive policy that would regulate Chinese companies' overseas investments.

This booklet aims to give Chinese companies an overview of the current laws and policies that apply to their overseas investments, including their responsibility to respect the local environment and people. We hope this booklet will contribute to better understanding of the problems, and to positive change in company policies and practices. We hope the booklet will also assist government officials and other stakeholders in host countries to engage with these Chinese companies.

Above all, we hope it will increase the Chinese government's awareness of the urgent need for greater effort in enforcing existing laws that regulate Chinese companies' investments overseas, and for new legislation in areas where it is lacking.

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Preface

1. Preface

1.1 Definition of OFDI

According to the International Monetary Fund's Balance of Payment Manual (5th Edition, 1993), foreign direct investment (FDI) refers to an investment made to acquire a lasting interest in an enterprise operating outside of the economy of the investor. Further, in cases of FDI, the investor's purpose is to gain an effective voice in the management of the enterprise. The foreign entity or group of associated entities that makes the investment is termed the 'direct investor'. The unincorporated or incorporated enterprise – a branch or subsidiary, respectively, in which direct investment is made – is referred to as a 'direct investment enterprise'.²

1.2 Background

Since the beginning of the 21st century, when the Chinese government formally adopted its 'going out strategy', Chinese outward foreign direct investment (OFDI), including investment in developing countries, has been growing at a rapid rate. According to statistics published by the Ministry of Commerce (MOC), of the first 30 countries which received Chinese OFDI in 2009, over half were developing countries, with the Mekong River basin, Africa and the Middle East the most concentrated areas of investment.³ China's investment in developing countries has had a positive impact on their economic and social development. As a nongovernmental organization, Oxfam follows with great interest the extent to which Chinese enterprises heed their social responsibility when investing in developing countries, especially with regard to issues such as environmental protection, sustainable development, labour and employment as well as compliance with local laws. This research analyses current Chinese OFDI laws⁴ on these issues, as well as the viewpoints of stakeholders.

1.3 Methodology

² See <http://www.unctad.org/templates/page.asp?intItemID=3146&lang=1>.

³ Ministry of Commerce: China Outward Foreign Direct Investment Statistics 2009 Annual Report.

⁴ In this report, references to law or laws include all laws, regulations, rules, guidance or instructions issued by Chinese government departments, including the Ministry of Commerce, the Ministry of Finance, State Administration of Foreign Exchange, etc.

1.3.1 Desktop Research

In order to prepare this report, we conducted comprehensive research with respect to:

- (1) Relevant laws
- (2) Relevant international laws
- (3) Relevant books
- (4) Reports of various institutions
- (5) Theses and articles
- (6) News articles

1.3.2 Interviews

In order to provide a comprehensive analysis, we conducted interviews with five types of interviewees, including government officials, staff at a big state-owned company, a big investment fund, an NGO and a social institution. The questions we asked included:

- (1) What do you think about the present legal system with regard to Chinese OFDI?
- (2) Have you faced any problems in complying with local laws related to environmental protection, sustainable development, labour or employment?
- (3) If the answer to the previous question is yes, how did you resolve such problems?
- (4) Do Chinese laws, in terms of environmental protection, sustainable development, labour and employment, influence or impact your OFDI activities?
- (5) Where do you think Chinese OFDI legislation should go?

1.4 Abbreviations of Government Agencies

In this report, China's government agencies shall be referred to by the following abbreviations, unless otherwise defined or provided:

Congress – National People's Congress of China

Standing Committee – Standing Committee of the National People's Congress of China

MOC – Ministry of Commerce

NDRC – National Development and Reform Commission

FEA – State Foreign Exchange Administration

Tax Administration – State Tax Administration

MEP – Ministry of Environmental Protection

MOFA – Ministry of Foreign Affairs

MOF – Ministry of Finance

SASAC – State-owned Assets Supervision and Administration Council

SAWS – State Administration of Work Safety

Statistics Bureau – National Bureau of Statistics

Central Bank – People's Bank of China

CBRC – China Banking Regulatory Commission

Export Credit Insurance – China Credit and Export Insurance Corporation

1.5 Legislative Authority and Legal Hierarchy in China

The National People's Congress and the Standing Committee of the National People's Congress exercise legislative authority.

The State Council formulates administrative regulations in accordance with the Constitution and laws.

Under the provision that they do not contradict the Constitution, state laws or administrative

regulations, People's Congresses and Standing Committees at the level of provinces, autonomous regions and municipalities directly under the Central Government may formulate local regulations according to the specific conditions and actual needs of their respective administrative areas.

In accordance with state laws and the State Council's administrative regulations, decisions and decrees, the State Council's ministries and commissions, the People's Bank of China, the National Audit Office and the organs directly under the State Council with administrative functions may formulate rules within the range of competence of their own departments.

The Constitution has the supreme force of law; other laws, administrative regulations, local regulations, and separate regulations for autonomous regions, may not contradict the Constitution.

The force of law is superior to that of administrative regulations, local regulations and rules.

The force of administrative regulations is superior to that of local regulations and rules.

The force of local regulations is superior to that of rules set by local governments at the same level or lower levels.⁵



The Development of China's OFDI Policy and an Overview of China's OFDI Laws

⁵ See Law of the People's Republic of China on Legislation.

2. The Development of China's OFDI Policy and an Overview of China's OFDI Laws

2.1 The Current Situation of China's OFDI

Statistics published in the MOC's Outward Foreign Direct Investment Statistics 2009 Annual Report reveal that in 2009 the net worth of Chinese OFDI was US \$56.53 billion, an increase of 1.1% over the previous year, and by the end of 2009, 12,000 Chinese investors had set up 13,000 OFDI enterprises in 177 countries around the world. The cumulative net worth of the OFDI made by these enterprises was US \$245.75 billion, and by year end their total assets were worth more than US \$1 trillion.⁶

According to the United Nations Conference on Trade and Development (UNCTAD)'s 2010 World Investment Report, in 2009 the global OFDI flow was US \$1.1 trillion, and by the end of that year the stock was US \$18.98 trillion. Based on this, China's OFDI made up 5.1% and 1.3% respectively of that year's flow and stock. In 2009, China's direct foreign investment flow was fifth place in global rankings, and first place among developing countries.⁷

2.2 The Development and Current Status of China's OFDI Policy

The success of China's OFDI is to a large extent due to China's continually evolving OFDI policy, which was developed in five phases:

2.2.1 The First Phase (1979-1983): Case-by-Case Approval

From 1979 to 1983, the State Council was the only OFDI approval body, and state-owned trading companies or provincial/city international commercial and technology companies were the only type of companies allowed to engage in OFDI. These companies had to seek approval for OFDI from the State Council on a case-by-case basis. Apart from such cases where the State Council gave special approval, in reality OFDI was banned, and thus no laws on OFDI existed at the time.

⁶ Ministry of Commerce: China Outward Foreign Direct Investment Statistics 2009 Annual Report.

⁷ Ministry of Commerce: China Outward Foreign Direct Investment Statistics 2009 Annual Report.

2.2.2 The Second Phase (1984-1992): Standardization of Approval Procedure

From 1984 to 1992, the Chinese government relaxed the ban on OFDI and began allowing a wider range of companies to invest abroad. Even non-state-owned companies could set up overseas subsidiaries. Although OFDI still had to be approved by a central body, the case-by-case approval process gradually transformed into a standardized procedure.

2.2.3 The Third Phase (1993-1998): Strengthening Supervision of OFDI Projects

From 1993 to 1998, the relaxation of OFDI policy and the overvaluation of the exchange rate helped bring about a small peak in Chinese OFDI. At the same time, these conditions led to opportunistic behaviour on the part of some Chinese enterprises in the Hong Kong real estate market and stock exchange. As a result, the Chinese government adopted more strict examination and supervision procedures for OFDI projects.

2.2.4 The Fourth Phase (1999-2002): OFDI in Processing and Trade Activities

From 1999 to 2002, China's entry into the World Trade Organization spurred the transformation of its OFDI policy. The Chinese government started to recognise the role of Chinese enterprises in world trade and in the production network. The Chinese government encouraged enterprises to actively participate in overseas processing and trade investment projects. Through a series of preferential policies such as export tax rebates, foreign exchange support and direct financial support, the Chinese government encouraged light industries such as textiles and electromechanical equipment to establish overseas production centres and to use Chinese raw materials or semi-finished products to engage in production and processing.

2.2.5 The Fifth Phase (2002 to the Present): Going Out Strategy

In 2002, the Chinese government formulated the 'going out strategy', encouraging Chinese enterprises to actively integrate into the global economy through exports and OFDI. This time, policy concentrated on five aspects: creating a driving force for OFDI; simplifying administrative procedures, including making regulations more transparent; relaxing capital controls; providing investment information and investment guidelines; and reducing investment risks.⁸

2.3 The Current Status of China's OFDI Laws

As a point of legal theory, policy and law are both manifestations of a nation's will. Policy is the framework that manifests the nation's will, while the law is its specific implementation. By the same logic, the development of China's OFDI policy propelled the development of China's OFDI laws. During the first phase of policy development, China implemented a case-by-case approval procedure, but in effect OFDI was banned and there were no laws to govern it. In the current phase, China has formulated its going out strategy, encouraging Chinese enterprises to integrate into the world economy through exports and OFDI. In this context, China has established preliminary laws and regulations with regard to OFDI.

China's current rules on OFDI include the following seven aspects: an approval system, a foreign exchange administration, a tax administration, a financial support system, a state-owned assets administration, an insurance system and an OFDI supervision system. (For the specific operations of these systems please see the introduction and analysis in Part 3 of this report.)

⁸ Yuen Pau Woo and Kenny Zhang: China Goes Global: The Implications of Chinese Outward Direct Investment for Canada.



**China's Legal System
and OFDI**

3. China's Legal System and OFDI

Following the inclusion of the going out strategy in the National Economic and Social Development 10th Five-Year Plan Outline (2001), approved by the fourth meeting of the 9th National People's Congress on March 15, 2001, a series of important policy documents made clear that the Chinese government supported the practice of qualified enterprises expanding their OFDI and multinational operations.⁹ A system of legal procedures was implemented to facilitate and oversee this process.

3.1 An Introduction to China's OFDI Laws

3.1.1 OFDI Approval System

In 2004, the State Council issued a series of provisions regulating the approval of mainland enterprises seeking to invest in or establish companies in Hong Kong or Macau. Following this, the MOC and the NDRC issued regulations concerning the setting up of enterprises abroad and making investments overseas. In 2009 the MOC issued further regulations concerning the management of overseas investment; at the same time the 2004 Hong Kong and Macau approval provisions were annulled. With this, China's new OFDI approval system was in place.¹⁰

The 2004 and 2009 regulations decreed that the NDRC (including provincial-level development and reform departments) and the MOC (including provincial-level commerce departments) were authorized to approve OFDI. The NDRC was to handle natural resource exploitation projects and foreign exchange-intensive projects¹¹, while the MOC was responsible for

⁹ These include the National Economic and Social Development 11th Five-Year Plan Outline (2006) approved by the fourth meeting of the 10th National People's Congress on March 14, 2006, and the Opinions on Encouraging and Standardising Chinese Enterprise OFDI Cooperation passed by the State Council in October 2006.

¹⁰ An Administrative Permission Decision and Structural Reform Decision were issued by the State Council in 2004; Provisions Regarding Approval Matters of Mainland Enterprises Investing and Setting up Enterprises in Hong Kong and Macau Special Administrative Regions were issued by the State Council and its Hong Kong and Macau Affairs Office on August 31, 2004. Then the MOC and the NDRC respectively promulgated Provisions in the Examination and Approval of Investment to Run Enterprises Abroad and Interim Measures for the Administration of Examination and Approval of the Overseas Investment Projects. On March 16, 2009, the MOC further promulgated Measures for Overseas Investment Management, while at the same time the 2004 Hong Kong and Macau approval procedures were annulled.

¹¹ Articles 4 and Article 5 of Outward Foreign Direct Investment Project Approval Provisional Administrative Measures.

¹² Articles 6 and Article 7 of Outward Foreign Direct Investment Administrative Measures.

domestic enterprises setting up enterprises abroad, apart from financial enterprises.¹² These laws, by delegating the power of approval and simplifying procedures, made it more convenient for Chinese enterprises to invest abroad.

3.1.2 OFDI Foreign Exchange Administration System

Prior to the 1990s, the Chinese government implemented a strict system to control foreign exchange, in line with domestic economic development needs. From the 1990s onwards, the Chinese government commenced the reform of the foreign exchange system. A number of laws were issued;¹³ the three most important were the 2008 Foreign Exchange Regulations, the 2009 Overseas Loans Notice and the 2009 Foreign Exchange Provisions.

The first simplified approval procedures for foreign exchange and indirectly recognised that Chinese individuals could undertake overseas investment.¹⁴ The second set up rules concerning account balance management for domestic enterprises' overseas loans,¹⁵ and broadened the means available to moneylenders to finance their loans.¹⁶ The third expanded the types of foreign exchange financing available to domestic institutions engaging in OFDI¹⁷ and set forth rules on foreign exchange use and foreign exchange settlement by domestic institutions engaging in OFDI.

¹³ Laws enacted included the Circular Concerning Relevant Issues on Sorting out Deposits that Guarantee Profits from Investments Abroad and are Remitted Back to China issued by the FEA on November 12, 2002; Circular on Relevant Issues Concerning Streamlining the Examination of the Foreign Exchange Funds Sources for Overseas as Investment issued by the FEA on March 19, 2003; Circular Concerning Relevant Issues on the Simplification of the Overseas Processing and Trade Projects Approval Procedure and on the Delegation of Power issued by the MOC and the FEA on June 26, 2003; Notice on Adjusting Some Foreign Exchange Management Policies Concerning Overseas Investments issued by the FEA on June 6, 2006; Regulation of the People's Republic of China on Foreign Exchange Administration, amended and issued by the State Council on August 5, 2008; Notice on Relevant Issues concerning the Foreign Exchange Administration of Overseas Loans Granted by Domestic Enterprises issued by the FEA on June 9, 2009; and Provisions on the Foreign Exchange Administration of the Overseas Direct Investment of Domestic Institutions, issued by the FEA on July 13, 2009.

¹⁴ Article 17 of 2008 Foreign Exchange Control Regulations.

¹⁵ Article 4 of 2009 Overseas Loan Circular.

¹⁶ Article 6 of 2009 Overseas Loan Circular.

¹⁷ Article 4 of 2009 Foreign Exchange Control Provisions.

3.1.3 OFDI Tax Administration System

Taxation of Chinese enterprises with OFDI is governed by the Enterprise Income Tax Law of the People's Republic of China, and the export tax rebate system. The tax law, which came into force on January 1, 2008, defines the designated taxpayer, the scope of taxation, the tax rate, tax concessions and the tax levying administration. Article 24 of the tax law stipulates that the dividends, bonuses and other equity investment gains earned outside the territory of China by an enterprise residing in China through its stakes in a foreign subsidiary it controls directly or indirectly, and the portion of income tax paid outside the territory of China by the foreign enterprise may be treated as allowable tax credit toward the resident enterprise's overseas income tax, and be deducted within the limit of tax credit as provided for in Article 23 of the same law.

China's law, the 1994 Tax Rebate (Exemption) Measures, stipulates that tax exemptions or rebates may be awarded on export link value added tax and consumption tax on goods used by enterprises in foreign contractual projects, foreign repair work and foreign investment.¹⁸ Additional laws further refine the export tax rebate system.¹⁹

With regard to OFDI, in March 2007 the Tax Administration issued Opinions of the State Administration of Taxation about Doing a Good Job in the Taxation Service and Management of Overseas Investments of Chinese Enterprises. This document pointed out that China's taxation system for OFDI required further refinement and standardization, and exhorted tax authorities to optimise their services, perfect their policies and standardise administrative procedures in order to provide enterprises with adequate services and administrative support.

¹⁸ Article 2 of 1994 Tax Rebate (Exemption) Measures.

¹⁹ Relevant laws include the Interim Regulation of the People's Republic of China on Value Added Tax and Interim Regulation of the People's Republic of China on Consumption Tax amended by the State Council and implemented on November 10, 2008; Measures Governing Tax Rebate (Exemption) of Exported Goods issued by the Tax Administration on February 18, 1994; Measures Governing Tax Rebate (Exemption) of Exported Good (For Trial Implementation) issued by the Tax Administration on March 16, 2005; and Notice Concerning the Implementation of Foreign Trade Law of the People's Republic of China and Adjustment of the Export Tax Rebate (Exemption) Measures issued by the Tax Administration on July 21, 2004.

3.1.4 OFDI Financial Support System

China's current OFDI financial support system is mainly composed of preferential credit and overseas guarantees, usually as investment insurance.

In 2003 China issued a law designed to provide financial support specifically to enterprises involved in the exploitation of natural resources in Africa, an area of major interest to the state. In 2004 and 2005, additional laws made it easier for overseas investment projects encouraged by the state to obtain credit.²⁰ The distinguishing feature of China's OFDI policy was that state administrative departments (mainly the NDRC), and state banks (mainly The Export-Import Bank of China and China Development Bank) provided financial support for major projects in key industries in key regions, and provided assistance for enterprises enacting China's going out strategy.

The overseas guarantee system was mainly formulated and implemented by the FEA.²¹ In line with the provisions of the 2010 External Guarantees Notice, the FEA implemented a principle of account balance management or case-by-case approval in providing foreign indemnity to domestic institutions. With regard to domestic banks, if a financial overseas guarantee was provided, then account balance management would be implemented; if a non-financial overseas guarantee²² was provided, there would be no index control, and no need to apply for case-by-case approval from the FEA; it was sufficient that banks satisfied the relevant risk management stipulations of supervising departments in the industry. With regard to domestic financial institutions other than banks and domestic enterprises, if an overseas guarantee was provided case-by-case approval would generally be required, while account balance manage-

²⁰ Relevant laws include the Notice Concerning Issues Regarding Greater Support of Investment Cooperation in Enterprise Exploitation of Natural Resources in Africa jointly issued by the MOC, the MOFA, the MOF, the Ministry of Land and Resources, the Taxation Administration and the FEA in 2003; the Notice Concerning Providing Credit Support to Key Overseas Investment Projects Encouraged by the State jointly issued by the NDRC and the Export-Import Bank of China in 2004; and the Notice Concerning Further Strengthening Financial Support of Key Overseas Investment Project jointly issued by NDRC and China Development Bank in 2005.

²¹ FEA-issued laws include Procedures for the Administration of Guarantees Overseas by Institutes within the Chinese Territory issued in 1996; Regulations of the Implementation of the Administrative Measures for the Provision of Foreign Guarantees by Domestic Institutions issued in 1997; and Notice on the Administration of External Guarantees Provided by Domestic Institutions issued in July 2010.

²² 'Non-financial overseas guarantees: guarantees not securing a loan or other credit.

ment would be applied to entities with certain qualifications.

3.1.5 State-Owned Assets OFDI Administration System

According to the MOC's 2009 China Outward Foreign Direct Investment Statistics Annual Report, in 2009 central government enterprises'²³ OFDI was US \$38.2 billion, making up 67.6% of OFDI flow; private enterprises' OFDI was US \$345 million, making up 0.6%.²⁴ Thus it can be seen that current Chinese OFDI is to a very large extent from state-owned enterprises.

The Chinese state-owned asset OFDI administration system is regulated by the Provisional Measures on Overseas State-Owned Assets Administration issued in 1999, and the Notice on Strengthening Administration over the Foreign Investment Activities of Central Enterprises issued in 2008.²⁵ The 1999 provisions defined the scope, administrative powers, procedures and standards of enterprises with overseas state-owned assets.²⁶ The 2008 notice included six stipulations: establishing an internal enterprise investment structure, an OFDI policy administration, and OFDI risk administration, advocating social responsibility awareness, OFDI cooperation and OFDI reports.

3.1.6 OFDI Insurance System

China's OFDI insurance system is rather underdeveloped. The only relevant law is the Notice Concerning Relevant Issues on Setting up a Risk Prevention Mechanism for Key Overseas Investment Projects issued in 2005 by the NDRC and Export Credit Insurance.²⁷ The law states that enterprise legal persons registered domestically in the People's Republic of China can apply for OFDI project risk insurance, to be provided by Export Credit Insurance under the guidance of the NDRC.

²³ Chinese state-owned enterprises, or SOEs, are either owned by China's national government or by provincial or municipal authorities.

²⁴ Ministry of Commerce: 2009 China Outward Foreign Direct Investment Statistics Annual Report.

²⁵ The Provisional Measures on Overseas State-Owned Assets Administration was issued by the MOF, the MOFA, the FEA and the General Administration of Customs in 1999; the Notice on Strengthening Administration over the Foreign Investment Activities of Central Enterprises was issued by the SASAC in 2008.

²⁶ Article 2 of 1999 Overseas State Owned Assets Administration Provisional Measures.

²⁷ Article 1 of 2005 Circular Regarding Issues on the Establishment of an Outward Foreign Direct Investment Key Project Risk Guarantee Mechanism.

3.1.7 OFDI Supervision System

China's OFDI supervision system consists mainly of the following three aspects: the OFDI statistical system, the OFDI joint annual inspection system and the OFDI comprehensive performance evaluation system.

3.1.7.1 OFDI Statistical System

In order to keep accurate records on the status of China's OFDI, the MOC and the Statistics Bureau created the Statistical System of Direct Overseas Investment on December 4, 2002. The statistical system was revised several times; the version currently in use was issued by the MOC, the Statistics Bureau and the FEA on December 31, 2008. From 2004 onwards, the regulations required the Chinese government to publish an annual Outward Foreign Direct Investment Statistics Report, providing statistics on Chinese enterprises' OFDI in the previous year.

3.1.7.2 OFDI Joint Annual Inspection System

A law was passed in 2002 requiring that enterprises making OFDI submit to an annual inspection.²⁸ The law decreed that overseas enterprises must participate in the annual inspection through their investors.²⁹ The inspection monitored the status of OFDI; an appraisal of the overseas enterprise by a Chinese overseas business organization; and the extent to which Chinese overseas-investment-related regulations were observed by principles and their overseas subsidiaries.³⁰ Annual inspection results were ranked at three levels, and according to their ranking, enterprises received different benefits from government OFDI preferential policies and different treatment in dealing with foreign exchange, customs, tax and personnel immigration. The rules allowed government departments to take measures against those principles that did not submit to the annual inspection, including temporarily refusing to accept applications for overseas investment-related foreign exchange purchases or payments and

²⁸ Interim Measures for the Joint Annual Inspection of Overseas Investment issued by the former Ministry of Foreign Trade and Economic Cooperation (the current MOC) and the FEA on October 31, 2002.

²⁹ Article 3 of Interim Measures for the Joint Annual Inspection of Overseas Investment.

³⁰ Article 7 of Interim Measures for the Joint Annual Inspection of Overseas Investment.

overseas guarantees; refusing to accept new applications to set up overseas enterprises; and refusing to accept applications to send staff overseas.

3.1.7.3 OFDI Comprehensive Performance Evaluation System.

An additional performance evaluation was also mandated in 2002 by the Ministry of Trade and Economic Cooperation (now the MOC).³¹ The performance evaluation of overseas enterprises included assessments of: effectiveness of the asset's operations; quality of the asset; ability to repay debt; ability to develop; and contribution to society. This performance evaluation was considered part of the overseas enterprise's joint annual inspection; enterprises that did not participate in the performance evaluation were deemed not to have passed the annual inspection.³²

3.2 Stakeholder Mapping

3.2.1 Chinese Government

In concert with the going out strategy, the Chinese government has regulated OFDI in the following seven areas: investment approval, foreign exchange, tax, insurance, administration of state-owned assets, financial support and supervision. Although this system is imperfect, it has helped to promote China's OFDI and support enterprises that invest overseas by creating a legal environment amenable to the going out strategy.

3.2.2 Chinese Enterprises

It can be said that Chinese laws now provide adequate legal support and protection for Chinese enterprises involved in OFDI. Although some areas need improvement, such as the provision of insurance, the government has simplified OFDI application procedures for Chinese enterprises; it has strengthened tax services and financial support; it has improved the supervision of Chinese OFDI enterprises. Overall, these moves have been beneficial to the continuing development and growth of OFDI by Chinese enterprises.

³¹ Measures for Overseas Investment Comprehensive Performance Evaluation (Trial).

³² Article 8 of 2002 Measures for Overseas Investment Comprehensive Performance Evaluation (Trial).

3.3 Summary

China has put in place a legal framework to simplify application and approval procedures for Chinese enterprises seeking to invest overseas, to improve the regulation of foreign exchange, and to strengthen tax services and financial support to enterprises with OFDI. It has improved the administration of state-owned assets and implemented a system of supervision of Chinese OFDI enterprises. All these moves conform to the Chinese government's going out strategy and are beneficial to the development of OFDI by Chinese enterprises.

However, the following problems remain:

- (i) As China's current OFDI legal framework is part of the greater going out strategy, it focuses on providing only certain types of support to Chinese enterprises. It neglects to provide guidelines on management or on social responsibility for enterprises investing abroad
- (ii) The majority of legislation concerning OFDI consists of low-level administrative rules, there is no overall plan directed at the development of OFDI enterprises
- (iii) There is a need to update the rules and procedures governing OFDI. Despite some improvements, approval procedures are still overly complicated and involve multiple government departments. The burden of meeting the requirements may cause some enterprises to miss out on good investment opportunities
- (iv) The OFDI insurance system needs improvement
- (v) The OFDI supervision system needs to be expanded. The current system focuses on the economic benefits of OFDI and ignores its social benefits. This has caused labour and employment problems in some places, and environmental problems which are referred to below. Thus, the OFDI supervision system needs improvement, as discussed below.



Relevant Legal Issues in Chinese OFDI

4. Relevant Legal Issues in Chinese OFDI

It should be clarified that although Chinese OFDI is first subject to the jurisdiction of the laws of host countries, Chinese domestic law can impact OFDI in the following ways:

(i) Improvements in China's domestic legal environment concerning such matters as environmental protection, sustainable development, labour and employment would affect Chinese enterprises; if forced to comply with such laws at home they would be more likely to extend these practices to their OFDI activities.

(ii) If Chinese enterprises incorporate the provisions of domestic law into their internal rules of operation, these would apply to all subsidiaries, including those overseas.

In this report, when discussing legal issues relevant to Chinese OFDI, reference is also made to Chinese domestic law.

4.1 Environmental Protection Issues in Chinese OFDI

4.1.1 China's environmental legislation

China has established a relatively complete legal structure concerning environmental protection and has formulated a series of laws focusing on pollution control and disposal.

4.1.1.1 Constitution

Article 6 and Article 26 of the Constitution of the People's Republic of China respectively include provisions regarding the protection of ecological environments and the protection of mineral resources, water, forests and other natural resources, providing a legislative basis for other laws and regulations regarding environmental protection.

4.1.1.2 Basic Laws on Environmental Protection

The Environmental Protection Law of the People's Republic of China was formulated by the Standing Committee and came into force on December 26, 1989. It applies to China's land and water territory and sets forth the purpose, tasks and targets of environmental protection,

as well as the related legal framework, responsibilities and obligations.

4.1.1.3 Specific Laws on Environmental Protection

In addition to the Environmental Law, the Standing Committee has passed other laws with more specific provisions concerning different aspects of environmental protection.

(i) Land Use

The Urban and Rural Planning Law of the People's Republic of China, formulated by the Standing Committee and effective from January 1, 2008, applies to the management and development of urban and rural land, with the intention of coordinating spatial layouts and improving living conditions.

(ii) Environmental Pollution and Forest Control

The Standing Committee has passed legislation aimed at the prevention and control of air and water pollution and the protection of forest resources. In 2000, it passed a law aimed at controlling and reducing air pollution, tasking the State Council with setting air quality standards and local governments with enforcing them. The law addressed the burning of coal, vehicle emissions and waste disposal. It specified the legal obligations of industrial enterprises and the penalties for failure to comply with the regulations.³³

In 2002 a water law was introduced to regulate the exploitation, utilization, conservation and protection of water resources, to address the prevention of water pollution, and to specify penalties for failure to comply with the regulations. In 2008 an additional law was passed to further address the prevention and control of water pollution and the safety of drinking water, tasking the State Council with setting water quality standards and local governments with enforcement.³⁴

³³ Law of the People's Republic of China on the Prevention and Control of Atmospheric Pollution, effective September 1, 2000.

³⁴ Water Law of the People's Republic of China, effective from October 1, 2002; Law of the People's Republic of China on the Prevention and Control of Water Pollution effective June 1, 2008.

China's law on forest management has been in place since 1985; it was amended in 1998 to further regulate the protection, cultivation and exploitation of forest resources, including afforestation and deforestation.³⁵

(iii) Nature Protection

In 2004 China issued two laws aimed at protecting wildlife, its habitats and the natural environment. The first concerned the protection and rescue of rare and endangered wild animals, as well as the reasonable utilisation of wild animal resources. It set forth rules and measures for protecting and managing wild animal populations, and legal liabilities for failure to comply with the rules. The second set forth rules for the construction and management of nature reserves for the protection of the natural environment and resources.³⁶

4.1.1.4 Other Relevant Laws on Environmental Protection

A 1997 law, Crimes of Environmental Resources Protection Destruction, applies to serious pollution or the destruction of environmental resources, which incur heavy penalties. In addition to major environmental pollution, these include illegal fishing, illegal hunting, illegal occupation of cultivated land, destructive mining, illegal logging, illegal water extraction, the destruction of precious trees, the illegal acquisition of illegally logged trees and reckless deforestation.

China's tort law, issued in 2010, applies to environmental protection. Chapter 8 stipulates that tort liability should be borne by persons who cause environmental pollution. This law specifies the scale of liability for environmental violations as well as who should assume them, and also indicates the burden of proof.³⁷

4.1.2 Analysis of China's Environmental Legislation

Although China has established a number of laws on environmental protection, there are still some deficiencies that need to be remedied.

³⁵ Forest Law of the People's Republic of China, effective from January 1, 1985, amended April 29, 1998.

³⁶ Law of the People's Republic of China on the Protection of Wildlife issued by the Standing Committee, effective from August 28, 2004; Measures for the Supervision and Inspection of National Nature Reserves issued by the State Council, effective from December 1, 2004.

³⁷ Tort Law of the People's Republic of China formulated by the Congress, effective from July 1, 2010.

(i) Basic Law

First, the current Environmental Law was issued by the Standing Committee and thus is an ordinary law. The status given to the Environmental Law does not reflect the importance of environmental protection. It is therefore recommended that the Environmental Law should be officially adopted by the Congress when it is next revised or amended, in order to secure its legal status as a basic law with higher standing than other specific laws.

Second, the Environmental Law is incomplete. It does not provide comprehensive regulations on regional environments. Also, it focuses excessively on pollution control and prevention but lacks provisions on the protection of natural resources.

Third, most provisions of the Environmental Law are too general and abstract to be practicable.

(ii) Specific Laws

The specific laws do not establish a coordinated and integrated system of regulations regarding environmental protection and the reasonable development and utilization of natural resources. At the same time, there are many overlaps and gaps between laws, which results in a lack of clear guidance on environmental protection.

(iii) Other Laws

Current environmental laws are not sufficient to protect the public interest. For instance, since major environmental pollution was criminalised in 1997, very few cases involving this crime have been brought before the courts nationwide. This obscures the actual number of major environmental pollution accidents, as the majority of cases of polluting behaviour are not prosecuted. At the same time, the scope of certain environmental crimes is very narrowly defined and the penalties awarded are relatively light, so the laws have a limited deterrent effect. However, the new Criminal Law Amendment (draft) that is presently open to public comments includes revisions that may resolve these issues to a certain extent.

4.1.3 Environmental Legislation Relating to OFDI

Currently, no environmental laws relate specifically to OFDI. Only general principles are found in the OFDI laws. For instance:

The Guidelines on Foreign Investment and Cooperation in Various Countries (Regions) issued by MOC in April 2009 require that Chinese enterprises protect the ecological environment of countries in which they invest and comply with local laws. However, it fails to provide any practical environmental protection measures.

4.1.3.1 Relevant Case

A Chinese state-owned mining company invested US \$150 million in a Zambian copper mining project in 2001. This was one of the largest investments under the going out strategy in the non-ferrous metal mining industry. However, there were serious problems in the formulation and implementation of the company's environmental policy. First, the Chinese mining company's environmental and social impact management standards did not meet Zambian requirements, and the company did not apply the standards of corporate social responsibility (CSR) adopted by other foreign enterprises. Second, although an environmental impact report was drafted in 2006 according to Zambian regulations, the Chinese mining company did not adopt the report's conclusions as internal company standards. Third, although the Chinese mining company submitted an Environmental Management Plan (EMP) to the Environmental Council of Zambia, it did so almost eight years after the deadline, allowing it to avoid its responsibility to adopt effective environmental controls for almost a decade. In addition, the solutions suggested in the draft plan were vague paper policies, likely to entail more delay and ineffective implementation.

Lessons learned from this case:

First, the environmental management of some Chinese OFDI enterprises only involves superficial commitments that are not actually made part of the enterprise's internal management rules.

Second, the absence of relevant legislation means no official instructions are available to en-

terprises concerning environmental policies for their OFDI projects.

Third, the superficial compliance with local legislation on the part of Chinese enterprises does not meet the substantive requirements of such laws. Delays in submitting reports and the proposal of vague, unfeasible policies allow enterprises to escape responsibilities they otherwise should have to undertake.

With regard to these issues, it is recommended that China improve its domestic legislation relating to OFDI and adopt effective and applicable measures for ecological environment protection. By doing so, China could regulate and supervise enterprises' OFDI activities and encourage such enterprises to take responsibility for environmental protection.

Although currently there is no environmental legislation specifically on OFDI operations, China has already established a Green Credit Policy to regulate OFDI financing. The Green Credit Policy achieves the aim of controlling the environmental impact of OFDI projects by regulating upstream OFDI financing. In international practice, measures such as the Equator Principles can serve as a guide and reference for the Green Credit Policy. In the following section, a detailed comparison of these two policies will be drawn along with corresponding stakeholder mapping.

4.1.4 Green Credit Policy

The Green Credit Policy is the official name, coined by the Ministry of Environmental Protection (MEP), of a set of documents containing binding and non-binding provisions linking credit to corporate environmental performance.

4.1.4.1 Legal documents

Article 3 of Opinions on Implementing Environmental Protection Policies and Rules and on Preventing Credit Risks, issued by the former State Environmental Protection Administration, the Central Bank and the CBRC on July 30, 2007, stipulates that all commercial banks should view supporting environmental protection and controlling the credit of polluting enterprises as an important part of their social responsibility. In response to information provided by environmental protection authorities, they should restrict loans to polluting enterprises; adjust

credit management; and prevent credit risks created by enterprises and construction projects responding to changes in environmental protection requirements. Commercial banks should check individuals or enterprises that apply for loans in the MEP credit information databases, and make previous compliance with environmental laws a prerequisite for loan approval.

In 2007 the China Banking Regulatory Commission (CBRC) issued guidelines pertaining to credit risks involving industries with high energy consumption and high pollution levels. These required financial institutions to actively cooperate with environmental protection authorities in implementing national policies to control emissions and conserve energy.³⁸

Currently, the MEP provides the Credit Reference Centre of the Central Bank with information regarding more than 30,000 environmental violations, based on which commercial banks could limit or refuse credit to enterprises.

Under the Green Credit Policy financial institutions rate a project A, B, or C based on information from this database on the enterprise's previous environmental violations. The rating affects the approval of loans and the amount of credit approved. The current system helps investment projects meet environmental protection requirements by linking the disbursement of funds with previous environmental impact approval, by the Three Concurrences policy³⁹ during project construction, and by requiring an Environmental Impact Assessment (EIA) after the completion of the project.

4.1.4.2 Problems in the Application of the Green Credit Policy

4.1.4.2.1 Commercial banks

(i) The cost of compliance with the law goes up while profits go down

Since the 2007 credit risk guidelines were issued, most commercial banks have taken steps to reduce credit to industries with high-energy use and high pollution levels. However, some

38 Notice regarding the Prevention and Control on Credit Risks of High Energy Consumption and High Pollution Industries and Guiding Opinions of the Credit Work for Energy Conservation and Emission Reduction, issued by CBRC in July and November 2007, respectively.

39 The prevention and control of pollution in construction projects should be carried out concurrently with their design, construction and commencement of operation.

commercial banks have turned a blind eye to CSR, exacerbating the environmental problems they are supposed to help solve⁴⁰. The government appears unable or unwilling to enforce policy compliance. For instance, some commercial banks strictly implemented the Green Credit Policy and restricted loans to a certain domestic steel company. However, other banks did just the opposite and quickly moved to take up the opportunity made available by the withdrawal of the first banks.⁴¹ This situation has substantially limited the effect of the Green Credit Policy on environmental protection. Statistics⁴² reveal that loans to high-energy, high-polluting industries account for a large part of the total credit balance of the five leading commercial banks and are their main revenue source. Thus limiting the number of these loans will decrease the banks' short-term profits.

(ii) Lacking specific laws or regulations on OFDI, policy banks play a prominent role

The implementation of the Green Credit Policy by China's commercial banks has had a limited impact on Chinese enterprises' OFDI projects. There are no relevant policies regarding the environmental or social risks that might be created by OFDI business. In contrast, China's policy banks play a much more important and active role in environmental issues. The Export-Import Bank of China has set guidelines regarding the inclusion of environmental and social considerations in issuing OFDI loans, emphasizing compliance with the laws of host countries, conducting environmental assessments, the banks' right to inspect environmental issues during the term of the loan, and the right to withdraw loans if necessary to protect the environment.⁴³ But it is unclear whether the activities of the policy banks lead to better compliance with their guidelines, how they monitor compliance, and whether they would make information on loan conditions and compliance publicly accessible.

(iii) Lack of technical and management staff

The Green Credit Policy requires a rather detailed EIA; however, financial institutions such as

40 Commercial banks are most likely to do this for their bigger clients, not for example for small and medium-size enterprises (SMEs).

41 Green credit standards in China: Pilots in Paper and Chemical Industries see <http://www.mm.packs51.com/news/detail.php?id=6291>.

42 Green credit standards in China: Pilots in Paper and Chemical Industries see <http://www.mm.packs51.com/news/detail.php?id=6291>.

43 China Export-Import Bank Loan Project Environmental and Social Impact Assessment Framework.

banks lack technical environmental experts who can carry out such tasks, and it is unrealistic that they would be able to train such staff within a short period of time. In reality, the staffs of banks' local branches usually have little knowledge of environmental protection or relevant policies, meaning that the initial implementation of the Green Credit Policy at grassroots levels is typically slow.

4.1.4.2.2 Enterprises

As a result of the Green Credit Policy, some small and medium-size enterprises (SMEs) in the high-energy, high-polluting industries that cannot obtain loans from commercial banks turn to private finance. Thus their potentially highly polluting projects can be funded and the Green Credit Policy cannot effectively regulate them. In addition, these projects usually require a low level of credit outside the scope of the Equator Principles. Therefore it can be observed that, on the one hand, the implementation of the Green Credit Policy has regulated and limited the lending practices of commercial banks. On the other hand, it has forced project initiators to turn to other capital resources, actually creating more business opportunities for private capital and other capital resources. Thus in practice it is often very difficult to cut off the credit sources of enterprises that seriously violate environmental laws and policies, and in particular those enterprises that only need a low level of credit.

4.1.4.2.3 Government

Limitations of communication channels between parties

Due to limitations of information and technology, at present most banks' county-level branches have not established an environmental violation information-sharing system with local environmental protection authorities. Local bank branches with limited access to such information are not able to implement the Green Credit Policy efficiently or make appropriate decisions according to the policies on granting credit. Some of the information provided by environmental protection authorities is too general or out of date to assist banks in making efficient decisions, reducing policy effectiveness. In addition, banks still cannot provide feedback to authorities to integrate their databases for information sharing.⁴⁴

Lack of guidance regarding environmental assessment standards

The Green Credit Policy framework guides bank lending practices and provides incentives for energy saving and emissions reduction; however it lacks detailed rules or standards for banks and relevant authorities to refer to. Thus commercial banks can only use the Green Credit Policy for general guidance. This means that commercial banks can only decide whether to classify a certain project as high-energy and high-polluting on the basis of their own internal rules, and not in accordance with Green Credit Policy. Policy implementation is therefore frustrated.

Absence of incentives to implement the Green Credit Policy

The Green Credit Policy is an effective government financial measure used to control environmental pollution and protect the environment. However, China has not yet introduced any incentives to encourage policy implementation such as tax subsidies, tax reduction or exemption, or financial subsidies.

There are no incentives for enterprises that effectively control environmental pollution and no means of subsidising losses incurred by commercial banks in supporting the Green Credit Policy. These factors seriously dampen commercial banks' and enterprises' enthusiasm for the policy and slow down its execution⁴⁵.

4.1.4.3 Relevant Case

In 2008, a Chinese state-owned import and export company signed an agreement with the Gabonese government to operate iron mines and construct railway, port and hydropower station facilities in Belinga, with funding from the Export-Import Bank. Brainforest, a nongovernmental organization, expressed concerns that the project would inundate the famous Kongou Falls and affect fisheries and logging activities in and around the national parks. The organization had tried to persuade the Government of Gabon to terminate the project, but without suc-

⁴⁴ Analysis on the Obstacles of Implementation of Green Credit Policy, see: http://news.xinhuanet.com/politics/2008-02/15/content_7609719.htm.

⁴⁵ The Ministry of Environmental Protection released a document on the implementation of the Green Credit Policy, Mr. Pan Yue Pointed Out Various Obstacles Ahead, see: http://news.xinhuanet.com/politics/2008-02/13/content_7596194.htm.

cess. The Export-Import Bank had previously issued guidelines under the Green Credit Policy specifying that before a loan was approved an EIA should be conducted in accordance with the standards of the host country or international standards. Thus the organization wrote to the governor of the bank, describing the Belinga project's environmental impact and pointing out that the bank needed to conduct a credible EIA and be open to public opinion on the project. Although no reply was received, in early 2009 the Belinga project was suspended. Information from the Government of Gabon showed that the Export-Import Bank indeed required that the company conduct an EIA according to international standards.

Lessons learned from this case

First, this case shows how local people can cooperate with NGOs and financial institutions to promote the development and progress of environmental protection work. NGOs can play an important role in the resolution of such issues. Therefore, it is recommended that China should strengthen its cooperation with NGOs and pay more attention to the resolution of environmental issues.

Second, the Green Credit Policy, as a domestic policy, is mainly focused on the regulation of domestic investments, and has indeed achieved some progress. But in fact it has proved applicable to Chinese enterprises' OFDI through the regulation of enterprise financing.

4.1.5 The Equator Principles

The Equator Principles are a set of voluntary guidelines established by major financial institutions around the world in accordance with the policies and guidelines of the International Finance Corporation (IFC) to prevent increasing credit risks potentially caused by environmental issues. They do not comprise an international legal norm that can be enforced, but have gradually become an industry standard defining internationally acknowledged practices. By implementing the Equator Principles commercial banks can reduce credit risks from environmental issues, maintain healthy business development and promote environmental protection and sustainable development. At present the Equator Principles are not universally accepted in China; among Chinese banks, only the Industrial Bank has adopted them.

There are ten general requirements under the Equator Principles, and only projects that meet all of them can obtain loans from banks that adhere to the principles. Generally speaking, each project that applies for a bank loan will be classified as Class A, B or C according to its environmental risks. Those labelled as a high or medium level of risk will be required to conduct social and environmental assessments, formulate plans and implement strategies to manage the risks. If the investment host country has higher environmental protection standards, those will apply. By imposing standards and measures to control the funding of projects that impact the environment, the Equator Principles succeed in compelling enterprises to behave responsibly toward the environment.

4.1.6 Stakeholders Mapping

The Green Credit Policy shares several key elements with the Equator Principles, and the fact that the Industrial Bank had gone further and adopted the Equator Principles reveals that financial institutions in China are paying more attention to environmental protection. From China's perspective, the Green Credit Policy has both advantages and disadvantages. It is enforceable, where the Equator Principles are not binding. It sets different standards for specific areas, such as tighter rules for high-energy consumption and high-polluting industries. Also, environmental protection authorities and financial institutions play a key role in implementing the policy.

As a domestic law, the Green Credit Policy was formulated to deal with domestic investment. However, as China's OFDI and the number of environmental issues grow, we expect the Green Credit Policy to be increasingly applied to OFDI projects.

4.1.6.1 The Chinese Government

The Chinese government has become aware of the importance of environmental protection in OFDI projects and has started to express its concerns on such issues. In September 2009, China declared at the United Nations General Assembly that China will actively promote the development of a green economy⁴⁶, indicating that the Chinese government would promote the

⁴⁶ China's green policy lauded at UN climate summit, see: http://news.xinhuanet.com/english/2009-09/23/content_12103241.htm.

implementation of environmental protection standards. As a matter of practice, an increasing number of banks have adopted and implemented relevant policies⁴⁷. Local governments have also shown certain executive ability in their support for environmental protection.⁴⁸ The MEP is currently working with the MOC and other departments to formulate and issue guidelines for Chinese overseas investment and to strengthen management of the environment. A draft of these guidelines has been completed and is currently being revised.⁴⁹

These facts show that the Chinese government has put the improvement of the existing Green Credit Policy on its agenda. Corresponding official legal documents are expected to be released in the near future.

4.1.6.2 Chinese Enterprises

Chinese enterprises, as investors, have relatively limited funding resources for OFDI. A government-sponsored survey on overseas investment in 2010 showed that 59% of enterprises with overseas investment relied on company capital, while 31% applied for loans from commercial banks. Despite concerns over the global economy, 61% said they would significantly or moderately increase their OFDI in the following two to five years⁵⁰. It can be concluded that the financial industry is an important funding resource for OFDI, and thus its regulation is a useful tool in environmental protection.

The same survey showed that 61% of enterprises had OFDI of less than US \$1 million, and

47 ABC won the Award of Leading Bank brand for low carbon for 2010, see: <http://stock.jrj.com.cn/2010/09/0813318126070.shtml>; ICBC: increasing new energy and energy saving loans to support green projects, see: <http://news.etnet.com.cn/category-bluechip/200903814.html>;

Strengthening environmental protection: Monetary financial sector actively promoting green finance, see: <http://www.chinanews.com.cn/ny/2010/09-03/2509524.shtml>.

48 Dongying: Environmental protection taking the priority ; Policy building up ecological and economic barriers, see: http://news.xinhuanet.com/society/2010-09/03/c_12516958.htm.

49 Environmental protection policy to be introduced in China's foreign investment, see: <http://www.zaobao.com/wencui/2010/07/hongkong100710s.shtml>.

50 China's foreign-investing enterprises gradually recovering from the financial crisis, see: http://www.gov.cn/jrzg/2010-04/28/content_1594180.htm.

80% had less than US \$5 million.⁵¹ The number of enterprises capable of investing more than US \$1 million is relatively small. The Equator Principles apply to investments of US \$10 million or more. Considering the size of Chinese OFDI, in order to achieve the purpose of environmental protection, the government should modify the Green Credit Policy and adopt the general positions of the Equator Principles.

In fact, our interviews with government officials and enterprises suggest that Chinese enterprises are beginning to pay more attention to environmental protection related to OFDI. According to one interview with a major state-owned petrochemical company, environmental impact studies are already part of the feasibility study process in considering OFDI projects, and technologies to reduce the environmental impact are built into some petrochemical projects. Many enterprises engage local lawyers to ensure compliance with local environmental protection laws. Although problems still exist, Chinese enterprises are willing to work toward environmental protection and are making some progress.

4.1.6.3 Host Countries

For host countries, especially developing countries, economic development is always accompanied by environmental issues. As Chinese regulations regarding the environmental impact and environmental standards of OFDI gradually improve, problems may arise if Chinese standards are higher and stricter than those of host countries. If a project meets the standards of a host country but not international or Chinese standards, our suggestion would be to adopt a flexible strategy. If the project does not include illegitimate activities and can gradually improve to meet the international and Chinese standards, we would recommend that credit policies support it. Similar practices can be found around the world.⁵² Meanwhile, China and host countries should take this into consideration in their legislation, and make specific regulations to accommodate such situations.

51 China's foreign-investing enterprises gradually recovering from the financial crisis, see: http://www.gov.cn/jrzg/2010-04/28/content_1594180.htm.

52 The Equator Principles' inspiration to the Green Credit Policy, <http://www.cnfinance.cn/magzi/2009-08/16-1161.html>.

4.1.7 International Conventions and Practices

International environmental conventions and agreements among international organizations have provisions relevant to environmental protection issues in OFDI.

The United Nations Framework Convention on Climate Change and the Kyoto Protocol are international conventions designed to address the threat to the ecological environment and the human environment caused by global warming. Both conventions are aimed at changing current investment patterns, reducing greenhouse gas emissions and promoting sustainable economic development. The Kyoto Protocol also provides a timetable for each signatory country to cut its carbon emissions.

Over 200 multilateral conventions have been made between various countries around the world on the protection of biodiversity, the atmosphere, oceans, lands and forests; the control of chemicals; and toxic and hazardous waste management. China is a party to dozens of international conventions or treaties on environmental and resource protection. (See Appendix II)

Our research indicates that multilateral environmental conventions provide no specific instructions on OFDI, foreign assistance or credit practices other than general requirements for environmental protection. China's obligations under the conventions are met through Chinese enterprises' OFDI practices; in this sense the multilateral conventions China has ratified can be considered an extension of its domestic environmental policies. Specific international practices that are gradually being adopted include environmental impact assessments (EIA), payments for environmental or ecological services (PES), conservation concession agreements (CCA), and corporate social responsibility (CSR) measures.

Under present circumstances, China would do well to implement an environmental policy package that would include specific standards and guidelines covering every aspect of environmental protection, as well as designating lines of authority and control. At the same time, the government could strengthen compliance by cooperating with other interested stakeholders, including NGOs. We would like to suggest a model of cooperation in which the government acts as a guide, enterprises provide support and NGOs design and undertake environmental

protection activities. Under this model, each part would be connected to the whole process of environmental protection, acting together to maximize their effectiveness.⁵³

Regulations have been formulated and published in China to require environmental impact assessments, compensation for ecological impacts, and corporate social responsibility.⁵⁴ But these are low-level regulations with little legal force. Currently, the adoption of international practices is not widespread enough to meet China's needs. Coordinated legal, administrative, economic and policy measures are required to ensure an effective system of environmental protection.

4.1.8 Summary

China has established a system of laws and regulations focusing on certain aspects of environmental protection. However, improvements are needed. There are no specific laws regarding environmental protection in OFDI projects. This has led some Chinese enterprises to ignore China's domestic laws with regard to their overseas operations; and where Chinese enterprises are ignorant of their host countries' environmental protection laws, problems arise. The Chinese government therefore needs to address such problems and improve its legal system with regard to environmental protection.

The Green Credit Policy somewhat fills this gap by controlling the upstream funding of enterprises' OFDI projects, similar to the Equator Principles. But it is recommended that China gradually improve its domestic legislation by adopting international best practices and provisions. This would regulate Chinese enterprises' OFDI activities and compel them to assume their environmental and social responsibilities, to respect and protect the interests of stakeholders including host country governments and residents.

⁵³ Environmental Protection Policies in China's foreign investment, China Environmental Science Press, Page 127.

⁵⁴ Rules of Environment Impact Assessment in Planning effective October 1, 2009; Guiding Opinions on the Experimental Work of Ecological Compensation published on August 24, 2007; Guiding Opinions on Central Enterprises Fulfilling their Social Responsibilities.

4.2 Issues of sustainable development in Chinese OFDI

Sustainable development is not an isolated concept. It has a close relationship with environmental protection, livelihoods protection and resource utilization. A widely accepted definition of sustainable development is provided in 'Our Common Future' published by the World Commission on Environment and Development in 1987: development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

4.2.1 Domestic Legislation on Sustainable Development

4.2.1.1 Theory and Instructive Documents

The White Paper on the Population, Resources, Environment and Development of China for the 21st Century, prepared by the Chinese government in March 1994, incorporated the strategy of sustainable development into China's long-term economic and social development planning for the first time. The White Paper put forth an overall strategy, measures and action plans to promote economic, social, resource and environmental development in a harmonious and sustainable way.

In July 2003 the Chinese government proposed the Scientific Outlook on Development theory. Sustainable development was included as an important part of the theory, as reflected in subsequent legislation and practices.

4.2.1.2 Specific Legislation

China passed a law to encourage the development and utilisation of renewable energy in 2006, which it amended in 2010. It tasks the State Council with surveying and managing renewable energy resources, as well as setting technical standards; sets up funding for research and construction of renewable energy projects; and calls on education authorities to include knowledge and technology related to renewable energy into relevant curricula, among other things.⁵⁵

⁵⁵ Law of the People's Republic of China on Renewable Energies promulgated by the Standing Committee, effective January 1, 2006 and amended on April 1, 2010.

A 2008 law on energy conservation⁵⁶ called for greater supervision of entities producing massive energy-consuming products, and urged them to take energy-saving measures, upgrade their product designs and manufacturing technology, and gradually reduce energy consumption per product unit. Article 65 called on financial institutions to increase credit support for energy-saving projects and to provide preferential loans for eligible energy-saving technology research and development, the manufacture of energy-saving products and the improvement of energy-saving technology.

A similar 2008 law applied to electricity, regulating the construction of power plants, as well as the production, supply and utilization of electric power.⁵⁷ Article 5 called for the sustainable development of electrical power through the adoption of new technologies, to minimize the discharge of poisonous waste and prevent pollution and other public hazards.

Sustainable development got a further boost with the publication in January 2009 of a Circular Economy Law,⁵⁸ which set forth a plan for reducing the consumption of resources and the generation of waste, and encouraging resource recovery and recycling. It specified, according to industry, producers' obligations to recycle and dispose of waste products.

In addition to these laws, a number of regulations and industry guidance documents have been produced on different aspects of sustainable development. For example, CSR guidelines for central enterprises issued in 2007 specified that resource conservation and environmental protection were to be priorities. A notice on central enterprises' OFDI in 2008 called on state-owned enterprises to enhance their sense of social responsibility and take the lead in resource conservation and environmental protection.⁵⁹

The Guidelines for Corporate Social Responsibility of Chinese Financial Institutions in the Banking Industry, issued by the China Banking Association on January 12, 2009, is the guid-

⁵⁶ Law of the People's Republic of China on Energy Conservation promulgated by the Standing Committee and effective April 1, 2008.

⁵⁷ Electricity Law of the People's Republic of China promulgated by the Standing Committee and effective April 1, 2008.

⁵⁸ Circular Economy Promotion Law of the People's Republic of China promulgated by the Standing Committee, effective January 1, 2009.

⁵⁹ Guidelines on Corporate Social Responsibility of Central Enterprises issued by the SASAC on December 29, 2007; Notice on Strengthening the Administration of Overseas Investment by Central Enterprises issued by the SASAC on December 31, 2008.

ing document on CSR for financial institutions. Article 3 specifies that CSR includes economic, legal, moral and charitable responsibilities to promote sustainable social and environmental development. Article 19 requires that financial institutions in the banking industry formulate plans regarding energy conservation and environmental protection in order to improve the negative environmental impact caused by their daily business operations; Article 16 stipulates that financial institutions shall set out their management policy to support sustainable social, economic and environmental development in accordance with national industry policies, environmental protection policies and relevant international conventions.

The Guidelines for Sustainable Management and Utilization of Forests by Chinese Enterprises, issued by the MOC and the Bureau of Forestry in March 2009, is the legal basis and management standard for Chinese enterprises' utilisation of overseas forest resources. Articles 4.1.2, 4.1.3, and 4.2.3 provide rules on overseas exploitation of forest resources by Chinese enterprises, including the rational use of forest resources, protection of the ecological environment and implementation of sustainable development. Article 4.2.1 requires that enterprises' management and utilisation plans be submitted to competent national or local authorities for approval. Article 5.3.2 and 5.3.3 concern the protection of biological diversity, requiring that forest areas to be exploited and the habitats of endangered species be marked on maps. They also include provisions regarding the education and training of employees.

4.2.2 Stakeholders Mapping

4.2.2.1 Chinese Government

The key issue requiring Chinese government attention is the improvement and optimisation of laws and practices to ensure sustainable development in both domestic and extraterritorial projects. The government, especially the Ministry of Environmental Protection (MEP), Ministry of Commerce (MOC) and the National Development and Reform Commission (NDRC), as stakeholders, needs to improve the following:

First, domestic legislation on sustainable development and environmental protection needs improvement. Although the increasing importance of such legislation has become apparent, and the Chinese government has paid more attention to it, the current legislative framework

remains inadequate. By improving the domestic legal system, China can first regulate investment activities within Chinese territory and then extend this regulation to Chinese enterprises' OFDI projects.

Second, legislation specifically aimed at OFDI should be formulated. For instance, the Forest Guidelines is one of few laws that apply to investment in foreign forest resources. However, these guidelines are merely a transitional measure as China slowly accepts the high requirements of international conventions. Generally speaking, Chinese laws on sustainable development in OFDI are incomplete. Accordingly, the Chinese government should formulate relevant laws based on the current situation of China's OFDI and taking the interests of host countries and local residents into consideration.

4.2.2.2 Chinese Enterprises

Enterprises are the actual operators and conductors of OFDI activities. Their activities directly affect host countries and local residents in the locales where they operate.

Our interviews show that Chinese enterprises are making progress in sustainable development, as in environmental protection. However, many problems remain.

In order to make further improvements, the following measures are recommended:

First, the internal standards of economic impact assessments conducted by Chinese enterprises should be gradually raised until the enterprises can meet advanced internationally accepted EIA standards. This is an important part of enterprise CSR.

Second, enterprises should upgrade their corporate culture so their rules and practices ensure compliance with local laws on sustainable development and environmental protection. They should adopt environmentally friendly technologies and machines in their production processes and voluntarily take responsibility for any adverse consequences caused by their investments.

Third, enterprises should seek greater interaction with government authorities to support improved legislation on sustainable development and environmental protection. The rules in Chi-

na, compared with those in developed countries, especially European countries, are not strict, resulting in a lack of evaluation standards in some areas. Enterprises, as investors, have first-hand information and a better understanding of investment advantages and disadvantages. Were enterprises to offer opinions and make requests during the legislative process, this would help improve the legal system.

4.2.2.3 Host Country Governments

Most developing countries are economically underdeveloped and in urgent need of foreign capital to promote their domestic economies. However, investments from foreign countries inevitably affect their natural environment and sustainable development. Developing countries need to maintain a balance in their own legislation between attracting foreign capital and maintaining sustainable development in their economy.

4.2.2.4 NGOs and Local Residents

First, the absence of relevant laws and inadequate enforcement of existing laws have led to the involvement of NGOs in the assessment and protection of environmental, cultural and sustainable development. At the same time, NGOs' participation in such activities to some extent helps promote, implement and apply the concept of sustainable development.

Second, NGOs can provide opinions and advice to enterprises and governments handling OFDI projects, based on their experience and knowledge of domestic legislation and international conventions.

Third, local residents are most affected by investment projects, which often impact their employment and living conditions. Accordingly, legislation should protect the human rights of local people, including their living standards, housing conditions and migration.

4.2.2.4.1 Relevant Case: The Kirirom III Dam Project in Cambodia, and Its Impacts

The Kirirom III Hydropower Dam development project in Cambodia was proposed in 2004 and undertaken by a Chinese state-owned export-import company, with loans provided by the Export-Import Bank. The project plan called for the submergence of a community forest in the

Elephant Mountain zone in south-eastern Cambodia, where local residents would be seriously affected. Therefore, before the project began, several NGOs conducted a study of the planned dam construction region. In 2008, the NGOs issued a report analysing the dam's impacts on residents' living environment and the regional eco-environment, and suggested that attention should be paid not only to influences on biodiversity but also on the community and the economy.

In addition, local community groups became involved. The project was expected to have a positive impact on the local community, however, potential conflicts between the company and local residents due to management problems were also possible. Local residents, with the aid of NGOs, negotiated with the company directors, organized several protests and made complaints to the local government.

Lessons learned from this case

First, OFDI can have various impacts on local residents. Enterprises may employ local residents and provide communities with convenient living facilities. However, they can also negatively influence the living conditions of local residents.

Second, the social influence of NGOs should not be underestimated. NGOs can make indispensable contributions to the sustainable development of local environments.

Third, EIAs have already become an indispensable part of foreign investment projects. EIAs should be conducted by professional independent third parties, and EIA reports should be publicized.

Last, it is necessary for China to formulate domestic legislation that requires enterprises to carry out EIAs in host countries; to improve legislation relating to sustainable development in OFDI projects; and to cooperate with relevant NGOs and utilize the accurate, up-to-date data and materials they provide.

4.2.3 Overview of International Legislation and Sustainable Development Practices

4.2.3.1 International Conventions

Major international conventions on sustainable development include:

The International Tropical Timber Agreement 2006 of the International Tropical Timber Organization outlines a strategy for sustainably managed sources of tropical timber in international trade.

The Convention on Biological Diversity concluded at Rio de Janeiro on June 5, 1992 stresses the importance of maintaining biological diversity for evolution and for maintaining life-sustaining systems of the biosphere.

The Convention on Wetlands of International Importance especially as Waterfowl Habitat, adopted by the International Conference on the Wetlands and Waterfowl at Ramsar, Iran on February 2, 1971, is aimed at protecting wetlands designated by member countries, as they constitute a resource of great economic, cultural, scientific and recreational value.

The World Conservation Strategy (1980) of the International Union for Conservation of Nature and Natural Resources (IUCN) supports research on the basic relations within nature, society, ecology, economy, and the process of utilization of natural resources, to ensure global sustainable development. It proposes that the formulation and implementation of national development policies should be combined with nature conservation, and that environmental policies should promote resource recycling as well the sustainable use of resources.

'Our Common Future', issued by the World Commission on Environment and Development in 1987, defines sustainable development as development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

In June 1992, the United Nations convened the Conference on Environment and Development in Rio de Janeiro, which adopted the Rio Declaration on Environment and Development, Agenda 21 and other documents. The Rio Declaration recognized for the first time that developing countries have the right to develop, but it also set forth policies aimed at ensuring sustainable development. While not legally binding, Agenda 21 is a blueprint for action aimed at encouraging development while protecting the global environment; it brings environmental, economic and social concerns into a single policy framework.

There are many other important international conventions on sustainable development.⁶⁰

Typical International Organizations and Relevant Practices

4.2.3.1.1 Mekong River Commission (MRC) and Mekong River Programme

In April 1995, the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin was signed by Thailand, Laos, Cambodia and Vietnam, creating the Mekong River Commission. Commission members cooperate on developing and managing the Mekong River basin, including river resources, navigation, flood control, fisheries, agriculture, power generation and environmental protection.

The Mekong River Programme is a regional cooperation plan for sustainable development of water and related resources, aimed at poverty elimination and environmental protection through integrated water resources management (IWRM). This is a model for the improvement, coordination, development and management of water, earth and other resources, to protect ecological systems while maximising economic benefit and social welfare.

4.2.3.1.2 Roundtable on Sustainable Palm Oil

The Roundtable on Sustainable Palm Oil (RSPO), founded in 2004, aims to accelerate the growth in use of palm oil through sustainable development. It involves producers, processors and traders, manufacturers of consumer goods, retailers, banks, investors and environmental and nature protection NGOs and social development NGOs in a common cause to develop and implement global standards in the palm oil industry.

(i) Principles and Criteria for Sustainable Palm Oil Production

The RSPO Principles and Criteria for Sustainable Palm Oil Production are the global standard, and the most stringent standard, for the sustainable agricultural and industrial production of palm oil. The principles are also widely applicable to other crops. These guidelines and stand-

⁶⁰ Convention Concerning the Protection of the World Cultural and Natural Heritage, Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Convention on the Protection and Use of Transboundary Watercourses and International Lakes, International Plant Protection Convention, Vienna Convention for the Protection of the Ozone Layer, etc.

ards include the provision that growers and processors shall inform every stakeholder of all developments, that RSPO members shall abide by local, national and international rules and regulations, that manufacturers' plans shall be financially viable in the long run and that growers and processors shall adopt the best operational approaches.

(ii) RSPO Certification

There is already an international consensus that the manufacture of products cannot unduly harm society and the environment.

RSPO certification is an authentication method that tracks the usage of palm oil in production processes. Manufacturers that comply with the strict production process outlined in the Principles and Criteria for Sustainable Palm Oil Production can obtain certification; they lose it if at any point they violate these rules and regulations. Through certification at each stage of the palm oil supply chain, sustainable development standards can be ensured. Certification is not compulsory, nor does it bring any direct economic benefits, but it demonstrates a manufacturers' commitment to responsible development.

4.2.3.2 International Conventions and Practices and China's OFDI

China was comparatively late in formulating national legislation on sustainable development, and its legislators lacked experience. Through the going out strategy China promotes OFDI to enhance the international competitiveness of both the state and its enterprises. But China is discovering that it must balance its own interests with the sustainable development needs of host countries. In the long term, it is in China's interest to behave responsibly toward the environment, both at home and abroad.

4.2.3.2.1 Adoption of International Practices

It would be advantageous for China's legislative bodies and its enterprises to learn from and absorb successful international practices such as the RSPO and MRC Environment Programmes mentioned above. China could adopt a voluntary certification model similar to the RSPO, which brings enterprises intangible benefits such as a good reputation and consumer trust. This kind of incentive can encourage Chinese enterprises to undertake their environmen-

tal and social responsibilities.

4.2.3.2.2 Communication with Host Countries

Recipients of Chinese OFDI often rely on such investment for their economic development and are willing to accept certain risks. For this reason host countries, especially developing countries, pay much attention to Chinese investment. This means it is not difficult for Chinese enterprises to communicate with local governments. Enterprises carrying out OFDI projects need to take advantage of this channel to understand the needs and concerns of host countries, to avoid misunderstandings and possible negative consequences resulting from their projects.

4.2.4 Conclusion

There are many overlaps in domestic legislation between laws on sustainable development and those on environmental protection. In some cases it would be more efficient to have uniform laws on similar issues. A review of its laws would provide an opportunity for China to study international conventions and adopt advanced international practices in accordance with its domestic conditions. It is also important to provide incentives for enterprises with OFDI to behave responsibly in host countries in accordance with CSR principles.

4.3 Labour and Employment Issues related to Chinese OFDI

4.3.1 Analysis of a Typical Case

4.3.1.1 Basic Facts

On November 5, 1992, a large Chinese steel company purchased 98.4% of the shares of a Peruvian state-owned iron-ore company facing bankruptcy, through its wholly owned subsidiary in Peru. Upon acquisition, the steel company obtained the permanent right to explore, survey and operate the 670.7 square kilometre mining area owned by the Peruvian company, undertook to pay off its US \$41.8 million in debt and promised to invest another US \$150 million within the following three years to modernize company operations.

However, following the acquisition, operations of the Peru subsidiary were beset with difficulties, including serious labour issues. Since 1992, the Peru subsidiary's employees have held

several strikes. According to postings on the Internet, on June 28, 2010, the Peru subsidiary's employees held another strike over the company's failure to keep its promise to raise salaries. The strike ended on July 10, 2010, at which point the Secretary of the National Federation of Mining stated that each employee had received a bonus and a salary rise.⁶¹ The Peru subsidiary suffered serious losses as a result of the continuous strikes.

4.3.1.2 Case Analysis

Based on our analysis, the reasons for the Peru subsidiary strikes are as follows:

(i) Low salaries and welfare benefits. Each strike was directly motivated by the employees' request for higher salaries. Although employees' salaries were raised more or less after each strike, they remained low compared with salaries at other mining companies in Peru.

(ii) Unreasonable salary standards. The Peru subsidiary enforced a two-tier salary standard, according to which the salaries and bonuses of new employees were less than half those of other employees.

(iii) Security of Retired Employees. The security of retired employees of the Peru subsidiary was a serious problem since many retired employees did not receive their pensions.

(iv) Reduction of Employees. Although the Peruvian company did not include an employee reduction clause in the original acquisition agreement, during the privatization that took place in 1993, the number of employees at the subsidiary company was reduced from 3,242 to 1,737.

(v) Inefficient Communication with Local Trade Unions. The manner in which the Peru subsidiary communicated with local trade unions was reproachable, as it did not pay due attention to the annual collective request list submitted by local trade unions. On the contrary, it sought to undermine the right of representation of local trade unions and employees' collective bargaining right, blocking the possibility of constructive dialogue between the subsidiary and its employees.

⁶¹ <http://finance.stockstar.com/JL2010071300001147.shtml>.

4.3.1.3 Reflections on the Case

Labour issues arising from Chinese enterprise's OFDI projects fall under the jurisdiction of the national laws of the host country. The labour issues at the Peru subsidiary were caused by its non-compliance with the laws, regulations and customs of the host country. However, since the Peru subsidiary was owned and operated by a Chinese company, these labour issues also reveal the following issues regarding Chinese law:

(i) There are serious gaps in current Chinese legislation regarding OFDI. Current laws only briefly refer to labour and employment issues in Chinese OFDI projects. There are no practical or specific regulations or guidance on these matters to inform the behaviour of Chinese enterprises operating overseas.

(ii) There are also gaps in China's domestic labour legislation. China's domestic labour laws do not come up to international labour standards or labour laws in many other countries around the world. Perhaps it is inevitable that a Chinese enterprise, whose experience is limited to a country with low levels of labour protection, would encounter difficulties functioning in a country with higher standards.

4.3.2 Chinese OFDI Labour and Employment Legislation

4.3.2.1 Basic Laws

Basic laws regarding labour and employment include:

(i) The Labour Law of the People's Republic of China, effective January 1, 1995, applies to all enterprises and economic organizations within China's borders, and to all labourers hired or contracted by these entities. The law stipulates that all labourers have the right to be employed on an equal basis, to choose their occupation, obtain remuneration, take rest, take leave, obtain occupational safety and health protection, to receive training in vocational skills, enjoy social insurance and welfare, submit applications for the settlement of labour disputes, and to enjoy all rights stipulated in other laws.

(ii) *The Trade Union Law of the People's Republic of China, issued in 1992 and amended in 2001, applies to all enterprises, institutions and state bodies within Chinese territory and to all labourers hired or contracted by these entities. This law stipulates that all manual or office workers in enterprises, institutions or state bodies within Chinese territory who rely on wages or salaries as their main source of income, have the right to organize and join trade unions according to law, irrespective of their nationality, race, sex, occupation, religious belief or educational background. The Trade Union Law also stipulates the rights and obligations of trade unions.*

(iii) *The Law of the People's Republic of China on the Prevention and Treatment of Occupational Diseases, effective May 1, 2002, concerns the prevention and treatment of occupational diseases within Chinese territory.*

(iv) *The Production Safety Law of the People's Republic of China, effective November 1, 2002, requires all entities engaged in production and business operations within Chinese territory to take measures to ensure the safety of their employees. It states the rights and obligations of employers and employees to ensure safe operating conditions, and outlines procedures in case of accidents.*

(v) *The Company Law of the People's Republic of China, effective January 1, 2006, applies to limited liability companies and joint stock companies set up in China. Article 17 of the Company Law stipulates that the company shall protect the lawful rights and interests of its employees, conclude employment contracts with employees, buy social insurance, strengthen labour protection and implement safe production.*

(vi) *The Labour Contract Law of the People's Republic of China, effective January 1, 2008 with supporting legislation issued later that year,⁶² applies to the conclusion of, performance of, amendment of, revocation and termination of labour contracts between labourers and organizations such as enterprises, economic organizations and private non-enterprise units in the People's Republic of China.*

⁶² Regulations of the Implementation of the Labour Contract Law of the People's Republic of China, effective September 18, 2008.

4.3.2.2 Special Laws

(i) *Special Laws Regarding the Safety of Chinese Enterprises and Personnel Overseas*

In 2006 the Ministry of Commerce and the State Council each issued regulations related to the overseas behaviour of Chinese companies with OFDI projects.⁶³ Article 4 of the State Council's directive provided that Chinese enterprises should protect the legal interests of their personnel overseas, comply with local laws, respect local customs, protect the local environment and promote local economic and social development. Article 8 of the same law specifies the qualifications enterprises must meet to be licensed to contract with foreign entities. The law also provides penalties for legal violations by enterprises operating overseas.

Additional rules, the Regulations on Human Safety and Protection of Chinese Enterprises and Organizations Overseas, were issued by the MOC, the Ministry of Foreign Affairs (MOFA), the NDRC, the Ministry of Public Security and the SASAC on August 13, 2010.

(ii) *Special Laws on Safety for Chinese Enterprises and Organizations Overseas*

In 2005 and 2006, additional laws were issued to protect the safety of workers at Chinese-invested projects overseas. These were the Notice on Strengthening the Supervision and Management of Work Safety of Chinese Enterprises Overseas, issued by the State Administration of Work Safety (SAWS), the MOFA, the MOC and the SASAC on September 5, 2005; and the Complete Foreign Aid Projects Work Safety Administrative Measures (Trial) issued by the MOC on August 16, 2006.

(iii) *Special Laws on Protection of Local Employees and Promotion of Local Employment for Chinese Enterprises and Organizations Overseas*

In addition to the special laws mentioned above, other regulations on foreign projects were

⁶³ The Chinese Ministry of Commerce Explanation Regarding Suggestions for Strengthening Human Safety and Protection of Workers for Chinese Enterprises and Organizations Overseas, dated August 31, 2006; the Administrative Regulation on Contracting Foreign Projects, issued by the State Council on Sept. 1, 2008.

⁶⁴ Notice on Strengthening Administration of the Foreign Investment Activities of Central Enterprises issued by SASAC on December 31, 2008; Notice on Further Regulating the Foreign Investment Cooperation of Chinese Enterprises, issued by MOC, MOFA and the SASAC on June 6, 2008.

issued by multiple authorities in 2007 and 2008.⁶⁴ These all stipulated that Chinese enterprises shall protect the interests of local employees, promote local employment and fulfil their social responsibilities.

These responsibilities mainly include:

(a) Providing both Chinese employees and local employees with salaries, welfare benefits and working conditions in accordance with the requirements of applicable laws and regulations and as agreed between the parties in employment contracts

(b) Maintaining a good relationship with the governments of host countries; strengthening communication with local unions, the media, religious figures and other community members; strengthening communication with Chinese and local employees, actively responding to their requests and providing them with adequate working conditions

(c) Promoting the localization of operations and promoting local employment through subcontracting.

4.3.3 Stakeholder Mapping

4.3.3.1 The Chinese Government

The Chinese government has enacted a series of laws to promote OFDI by Chinese enterprises, in keeping with the going out strategy. However, these laws are generally aimed at simplifying approval procedures, managing foreign exchange and tax, and providing financial support. They fail to provide adequate provisions and instructions regarding Chinese enterprises' operations overseas. In particular, there is no guidance regarding the fulfilment of Chinese enterprises' social responsibility. This omission has led to increasingly prominent labour problems involving Chinese OFDI projects.

We suggest, from a legal perspective, that the Chinese government can seek to resolve these problems by:

(i) Revising domestic labour and employment legislation. In OFDI projects, labour and employment issues are governed by the domestic law of host countries; therefore Chinese

labour and employment laws cannot apply directly to Chinese enterprises' operations overseas. Nevertheless, revising domestic legislation to bring it more in line with international practices would ensure that Chinese enterprises were familiar with such practices, making them better able to adapt to the labour and employment requirements of host countries, resulting in fewer conflicts.

(ii) Enacting practicable laws and directives to better regulate Chinese enterprises' behaviour with regard to labour and employment in their overseas operations. As mentioned above, the Chinese government, including the MOC, NDRC and SASAC, have emphasized in relevant laws that Chinese enterprises that invest overseas should promote local employment, protect the legal interests of local employees and strengthen communication with local trade unions and other social organizations. However, the majority of these are general provisions which cannot be enforced. They have no more than a persuasive effect on Chinese enterprises overseas. China doesn't lack general provisions concerning Chinese enterprises' labour and employment behaviour overseas, but it does lack the means to enforce these provisions by imposing specific penalties for non-compliance.

4.3.3.2 Chinese Enterprises

Chinese enterprises, including state-owned enterprises, big private enterprises and small and medium-size enterprises, are the executors of the going out strategy. Domestic labour and employment legislation has the following implications for Chinese enterprises overseas:

(i) Most of the labour problems faced by Chinese-invested projects overseas are caused by the failure of Chinese enterprises to grasp the differences between China's domestic labour laws and those of their host countries. By revising and modernising its domestic labour and employment legislation, China can reduce such differences and enable Chinese enterprises to adapt more easily to different labour and employment standards.

(ii) Although most of China's labour and employment legislation is not binding on Chinese enterprises overseas, to a certain extent it instructs and guides Chinese enterprises' behaviour overseas.

According to our interviews, Chinese enterprises are making progress in this regard. Localisation requirements are often included in OFDI contracts, and local labourers are being employed and trained by Chinese enterprises. Although there are still many negative reports on the behaviour of Chinese enterprises overseas, at least some are making progress and meeting local expectations with regard to employment and labour.

4.3.3.3 Host Country Governments

Host country governments are often in a dilemma when dealing with Chinese investment. On the one hand, in order to attract Chinese investment, host country governments need to maintain a pro-foreign investment environment; on the other hand, they need to promote employment and raise the salaries, welfare and working conditions of local employees.

Were the Chinese government to strengthen OFDI labour and employment laws and instruct Chinese enterprises to promote local employment, protect local employee interests, and actively fulfil their social responsibility; this would undoubtedly be encouraging to investment host countries.

4.3.3.4 Host Country Employees and Trade Unions

Host country employees are both the direct victims of labour and employment problems caused by Chinese OFDI and the direct beneficiaries of Chinese labour and employment laws on OFDI. Chinese enterprises can obtain a better reputation and investment environment by promoting local employment and protecting the interests of local employees, which would also benefit the long-term development of Chinese enterprises in host countries.

The labour problems faced by Chinese enterprises often involve conflicts with host country trade unions. There is a big discrepancy between China and host countries with regard to the concept and function of trade unions, with the result that Chinese enterprises often do not communicate with local trade unions. This causes conflicts to intensify. Fortunately, the Chinese

government is aware of the importance of this problem. It emphasizes in many labour and employment laws regarding OFDI that Chinese enterprises investing overseas shall strengthen communication with local trade unions, the media, religious figures and other community members, actively respond to their due requests and provide them with better working conditions.

4.3.4 International Legislation on Labour and Employment

4.3.4.1 International Labour Organization

According to the Declaration Concerning the Aims and Purposes of the International Labour Organization, the ILO encourages its member nations to strive for: full employment and improvement of living standards; effective recognition of the right of collective bargaining; improvement of working conditions; the extension of social security; adequate protection for the life and health of workers in all occupations; adequate nutrition, housing, and facilities for recreation and culture; and the assurance of equality of educational and vocational opportunities, among other things.

The setting of international labour standards is an important function of the ILO. These include international labour conventions (binding for countries that ratified a particular convention) and international labour recommendations (not binding). To date, the ILO has enacted 188 international labour conventions and 199 international labour recommendations. Eight of these conventions are considered to be Core Labour Conventions. The international standards provided by the Core Labour Conventions are Core Labour Standards, which include the following:

(i) Freedom of association and the right of collective bargaining

(ii) Abolition of forced labour

(iii) Abolition of discrimination in employment

(iv) Prohibition of child labour

To date, China has ratified 25 international labour conventions. (See Attachment II for details)

4.3.4.2 Purposes and Policies of Other International Conventions or Organizations

In addition to the ILO's international labour conventions and recommendations, other international conventions or organizations that support labour and employment principles include: the International Covenant on Economic, Social and Cultural Rights, the Articles of Agreement of the International Bank for Reconstruction and Development, the Articles of Agreement of the International Development Association, the Poverty Policy of the Asian Development Bank, and the Strategy of the Asian Development Bank.

4.3.4.3 Comparison between Chinese and International Legislation on Labour and Employment

(i) Freedom of Association

Freedom of Association is one of the Core Labour Standards. Article 2 of the Convention Concerning Freedom of Association and Protection of the Right to Organize (Convention No. 87) stipulates that workers and employers, without distinction, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization. To date, China has not ratified Convention No. 87.

Freedom of Association is one of the basic rights of Chinese citizens. Article 35 of the Constitution of the People's Republic of China stipulates that citizens enjoy freedom of speech, of the press, of assembly, of association and of demonstration. With regard to labour, freedom of association is acknowledged in the Trade Union Law. According to Articles 2 and 3, trade unions are mass organizations of the working class voluntarily set up by staff members and workers. Both manual and mental workers of enterprises, institutions and organs in China who rely on wages as their main income source, regardless of their nationality, race, sex, occupation, religious belief or educational level, have the right to participate in and organize trade unions in accordance with the law.

However, freedom of association under the Trade Union Law is further defined:

(a) Trade unions at all levels are to be established on the principle of democratic centralism, by which trade

union organizations at a lower level are under the leadership of trade union organizations at a higher level and the All China Federation of Trade Unions is the leading authority of all trade unions in China.

(b) The establishment of trade unions in China shall be subject to a prior approval procedure. According to Article 11 of the Trade Union Law, the establishment of grassroots trade unions, regional trade union federations at various levels and national or regional industrial trade union organizations must be approved by trade unions at a higher level. This is obviously contrary to Article 2 of Convention No. 87 mentioned above.

(c) Trade unions in China are delegated political duties such as organizing and educating labourers, which undermines their basic duty to protect labour interests.

(d) Grassroots trade unions are established within individual enterprises, institutions or organs. When an enterprise ceases to exist or when an institution or organ is abolished, the trade union of that enterprise, institution or organ is to be abolished accordingly. This limits the development of industrial trade unions.⁶⁵

Therefore, the current rules governing trade unions in China do not comply with the requirements of Convention No. 87.

From a practical perspective, most of the labour and employment issues encountered by Chinese enterprises overseas are caused by their failure to maintain a good relationship with host country trade unions. This is largely due to their misunderstanding of the role of trade unions in other countries. In China, trade unions have primarily an educational and political function, which is very different from the nature of trade unions in the majority of countries around the world. Coming from such a background, it is not surprising that Chinese enterprises have difficulty maintaining a good relationship with foreign trade unions, whose basic duty is to protect labour interests.

(ii) Right of Collective Bargaining

The right of collective bargaining, which is prescribed in the Right to Organize and Collective Bargaining Convention, also forms part of the Core Labour Standards (Convention No. 98). To date, China has not ratified Convention No. 98.

⁶⁵ Liangyong, Legal Protection and Risk Prevention on Outbound Investment by Chinese Investors, Law Press, Page 66.

According to Article 20 of China's Trade Union Law, it is a basic duty of trade unions to represent labour to engage in equal negotiations and to sign collective contracts with enterprises. The Labour Law and the Labour Contract Law both confirm this collective bargaining role. However, the provisions on collective bargaining under Chinese law are rather abstract. The Labour Law stipulates that labour may sign a collective contract, which is very different from the provision of Convention No. 98 that labour should sign a collective contract. The Trade Union Law also stipulates that trade unions may represent labour in equal negotiations with enterprises. This provision undermines the role of trade unions in collective bargaining. Moreover, in both China's Constitution and in its labour legislation, there are no provisions concerning the right to strike, which ultimately is the most important right of collective bargaining.⁶⁶

Like freedom of association, the right of collective bargaining is also undermined by Chinese labour legislation. Chinese law vaguely grants the right of collective bargaining to trade unions; however, as mentioned above, it seriously undermines their ability to protect labour interests. At the same time, Chinese labourers do not have the right to strike. Thus, to a large extent, the right of collective bargaining is only symbolic.

In the Peruvian example given above, the incompetence on the part of the Chinese steel company in dealing with strikes by local employees can to a large extent be attributed to the labour and employment legislation in China.

(iii) Right to Equal Employment Opportunity

The right to equal employment opportunity can also be understood as the abolition of discrimination in employment, which is one of the Core Labour Standards. The right to equal employment opportunity is prescribed in the Equal Remuneration Convention (Convention No. 100) and the Discrimination (Employment and Occupation) Convention (Convention No. 111). Convention No. 100 stipulates that men and women workers shall be paid equal remuneration for work of equal value. Convention No. 111 emphasizes that all member nations should eliminate

⁶⁶ Liangyong, Legal Protection and Risk Prevention on Outbound Investment by Chinese Investors, Law Press, Page.

discrimination in employment and occupation. It further stipulates that discrimination includes:

(a) Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

(b) Such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organizations, where such exist, and with other appropriate bodies.

China has ratified both Convention No. 100 and Convention No. 111.

Article 12 of China's Labour Law stipulates that labourers shall not be discriminated against in employment, regardless of ethnicity, community, race, sex, or religious belief. Article 13 of the Labour Law stipulates that females shall enjoy rights equal to males in employment. In the recruitment of staff and workers, sex is not to be used as a pretext for excluding females from employment or to raise recruitment standards for females, except in recruitment for the sort of work or posts that the State has stipulated to be unsuitable for females. It is obvious that although China has ratified Conventions No. 100 and No. 111, it had reservations when transferring the provisions of the Conventions into provisions of domestic law. Under the Labour Law, discrimination only includes distinction, exclusion or preference made on the basis of ethnicity, race, sex, and religious belief, which is much narrower than the provisions of Convention No. 111.

(iv) Abolition of Forced Labour

The abolition of forced labour is one of the Core Labour Standards. It is prescribed in the Forced Labour Convention (Convention No. 29) and the Abolition of Forced Labour Convention (Convention No. 105). To date, China has not ratified these two conventions. In December 1966, the United Nations passed the International Covenant on Civil and Political Rights, which reiterated the principle of the abolition of forced labour. China has ratified this Covenant.

Under present Chinese law, the Ordinance on Rehabilitation by Forced Labour 1954 has been repealed and replaced by the Detention Centres Ordinance 1990 and the Prison Law 1994. Although these prison laws differentiate between rehabilitation by forced labour and rehabilitation by education, the former still prevails. There are no specific provisions on the abolition of forced labour in present Chinese labour legislation.

Both the Chinese government and relevant legislation uphold the principle of abolition of forced labour. However, for historical and traditional reasons and due to China's domestic conditions, forced labour is still widely prevalent in specific places such as detention centres and prisons. However, the continued existence of forced labour has not adversely affected general labour conditions in China or in Chinese enterprises' projects overseas.

(v) Prohibition of Child Labour

The prohibition of child labour is also one of the Core Labour Standards. It is mainly provided for in the Minimum Age Convention (Convention No. 138) and the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Convention No. 182).

Among the Core Labour Standards, the Chinese government implements most strictly the prohibition on child labour. In addition to ratifying Conventions No. 138 and No. 182, China has included the prohibition of child labour in the Constitution of China, the Labour Law, the Law of the People's Republic of China on the Protection of Minors and the Provisions on the Prohibition of Using Child Labour. The minimum employment age in China is 16, which is higher than the international standard⁶⁷ and which is in compliance with the aim to raise the minimum age gradually to 16 as recommended by ILO Recommendation No. 146.

⁶⁷ Article 2.3 of Convention No. 138 stipulates that the minimum age specified in pursuance of paragraph 1 of this Article shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years. Article 2.4 of Convention No. 138 stipulates that notwithstanding the provisions of paragraph 3 of this Article, a Member whose economy and educational facilities are insufficiently developed may, after consultation with the organizations of employers and workers concerned, where such exist, initially specify a minimum age of 14 years.

4.3.5 Summary

Generally speaking, China's labour legislation is improving. On the one hand, China has taken steps to protect labour interests through the Constitution, the Labour Law, the Labour Contract Law, the Trade Union Law, the Production Safety Law and the Occupational Diseases Prevention and Treatment Law. On the other hand, China has enacted regulations and rules to guide the behaviour of Chinese enterprises overseas with regard to human safety, production safety, the protection of local employees and the promotion of local employment. In addition, China has ratified 25 ILO conventions (including three Core Labour Conventions) and is considering ratifying more international labour conventions. Thus it can be seen that China is taking steps to gradually close the gap between its labour legislation and international labour standards.

However, this report has exposed several problems and deficiencies in China's legislation with regard to OFDI and labour concerns in overseas projects. First, Chinese labour legislation is not up to international labour standards. To a great extent, the right of collective bargaining is only a symbolic right, a result of the fact that trade unions' roles in economic decision-making and in protecting labourers' interests are not given due prominence, and the fact that labourers' right to strike is not confirmed by law. Chinese enterprises, coming from such a background, have no sense of duty to protect labour interests and lack the ability to manage labour crises. Second, current Chinese OFDI labour legislation mainly focuses on the protection of Chinese employees, and ignores the protection of local employees. Although the Chinese government has put many provisions into OFDI laws that cover labour, and has even enacted specific laws in this regard, the scope and depth of this legislation is still insufficient.

From a legal perspective, in order to improve Chinese OFDI labour legislation, China can:

(i) With regard to domestic labour legislation, ratify more international labour conventions and accept more international labour standards in line with domestic social and economic development, which will help create a better legal environment for the development of Chinese enterprises. In particular, China needs to strengthen the economic function of trade unions, give more prominence to their role in protecting labour interests, strengthen labourers' right of collective bargaining and acknowledge the right to strike.

(ii) With respect to OFDI labour legislation, pay more attention to the promotion of local employment and the protection of local labour interests and maintain a good relationship with trade unions, social organizations, citizens and other community members of host countries in order to create a better investment environment for Chinese enterprises overseas.

4.4 Compliance with Local Laws in Chinese OFDI Projects

4.4.1 Analysis of Typical Cases

4.4.1.1 Zambia Kariba Hydroelectric Station Case

The Zambia Kariba hydroelectric station expansion project, with a contract value of US \$243 million, commenced on November 5, 2008. A Chinese hydroelectric company, the Sinohydro Group, was the engineering, procurement and construction (EPC) contractor.⁶⁸ On September 18, 2009, during construction of the Kariba project, a fire broke out that resulted in the deaths of three Zambian workers and injury to many other workers. Zambia's Minister of Energy stated: "The tragedy was caused by failure to comply with safety rules. Sinohydro must comply with Zambian law, or else we may seek to terminate the contract."⁶⁹

4.4.1.2 US Control Components Inc. Bribery Case

An investigation by the US Department of Justice revealed that between 2003 and 2007, the US company Control Components Inc. (CCI) made a profit of US \$46.5 million through 236 acts of bribery in more than 30 countries, including several involving prominent Chinese state-owned enterprises (SOEs). According to the US Department of Justice, during the ten years following 1998, CCI won many sales contracts by bribing US private enterprises, government officials of foreign countries, and employees of SOEs and private enterprises in a systematic way. On July 31, 2009, CCI pleaded guilty to three charges and agreed to pay a fine of US

⁶⁸ <http://www.powerfoo.com/news/gwsd/gwsdkf/2008/1120/081120844215BB2K97027H02A33D56B.html>.

⁶⁹ http://irn.blog.hexun.com/37778609_d.html.

\$18.2 million. CCI admitted paying more than US \$4.9 million in bribes to various foreign SOEs in violation of the Anti-Foreign Corruption Act.⁷⁰

4.4.1.3 Comparative Analysis of the Cases

The Kariba Case and the CCI Case have one point in common – the enterprises failed to comply with the laws of the OFDI host countries. In the Kariba Case, Sinohydro failed to comply with Zambian production safety laws. In the CCI Case, the US company also apparently ignored the host countries' anti-corruption laws.

According to information obtained from public sources, it has been established that Sinohydro was neither penalized under Zambian law, nor under Chinese law. However, CCI was penalized under US law, although it was not punished under the laws of various host countries. The reasons for this difference can be summarized as follows:

(i) There is one thing in common between Chinese investment in Zambia and US investment in China: the investor countries are important sources of foreign investment to the host countries. In order to attract more foreign investment, host countries seek to offer foreign investors favourable policies and to create a pro-investment legal environment. Therefore, host country governments often take a cautious attitude when dealing with illegal behaviour on the part of foreign investors. Host country governments who rely on foreign investment are often reluctant to enforce laws strictly against foreign investors. Thus it is easy to understand why the foreign investors in both cases were not penalized by the host countries.

(ii) Foreign investors' non-compliance with host country laws has an adverse effect on their long-term operations in the country and undermines the investor country's long-term interests in the host country. In addition, sometimes the investor country is in a better position to effectively handle illegal behaviour by enterprises engaging in OFDI. Take overseas bribery for example. Transnational companies can easily make bribes through overseas

⁷⁰ http://www.chinaacc.com/new/184_186_201007/14de1315166070.shtml.

payments. Judicial authorities in host countries often find it difficult to collect hard evidence of overseas bribery as they encounter many legal, political and economic obstacles in investigating the accounts of the transnational companies' mother company's accounts. So investor countries should actively enact and strictly enforce laws to regulate the behaviour of enterprise investments overseas. In the Kariba Case, given that Zambia did not penalize Sinohydro and as there are no relevant provisions under Chinese law, there was no way the Chinese courts could penalize the Chinese company. However, in the CCI Case, the US courts strictly enforced their law against foreign bribery and meted out a harsh penalty to the guilty company.

Enterprises from investor countries should strictly comply with the laws of host countries. Their non-compliance with the laws of host countries should be primarily governed by the domestic laws of host countries. However, non-compliance with the laws of host countries by overseas enterprises will ultimately undermine the interests of investor countries. Thus, whenever host countries for various reasons are unwilling to impose sanctions against illegal behaviour, investor countries should enact relevant laws and regulate the investment activities of enterprises overseas.

4.4.2 Legislation on Compliance with Local Laws by Chinese Investors

There are no specific Chinese laws regarding Chinese investors' compliance with local laws when engaged in overseas projects. There are some provisions in this regard contained in other laws concerning OFDI, which can be divided into the following two categories:

(i) General Provisions

Article 4 of the Notice on Strengthening Administration over the Foreign Investment Activities of Central Enterprises stipulates that central enterprises shall comply with local laws and regulations, respect local customs, be honest and trustworthy, strengthen their sense of social responsibility, actively fulfil their social responsibility and maintain the state's good image.

Article 2 of the Notice on Further Regulating the Foreign Investment Cooperation of Chinese Enterprises stipulates that Chinese enterprises shall earnestly study and strictly comply with Chinese laws on OFDI, and also earnestly study and strictly comply with the local laws of host countries, especially laws on environmental protection, labour, immigration, production safety and bidding. Furthermore, there are similar provisions in the 2006 Notice on Work Safety, the 2010 Regulation, the Administrative Regulation on Contracting Foreign Projects and the Guideline for Chinese Overseas' Investment and Cooperation 2010. However, all of the provisions are too general⁷¹ to have any binding effect on Chinese enterprises overseas.

(ii) Specific Provisions

Article 11 of the Further Regulations on the Development of Foreign Contract Projects, issued by 15 authorities on March 28, 2007, stipulates that Chinese enterprises shall be honest in their operations and shall not obtain projects through commercial bribery; Chinese enterprises shall not collude with foreign intermediaries and in the name of nonexistent projects deceive other Chinese enterprises to obtain commissions. Article 12 of the same law stipulates that in a bidding in which two or more enterprises participate, a Chinese enterprise shall not make unreasonably low bids and shall not damage the reputation of other enterprises by fabricating and spreading falsities. Article 17 stipulates that Chinese enterprises shall comply with local laws, respect local customs, protect the local environment, protect the interests of local workers, actively participate in local charity work and legally fulfil their social responsibilities. Unlike other laws, this one provides for a supervisory system and legal consequences for failure to comply with its provisions. Article 22 stipulates that local commerce, construction and production safety authorities shall enhance their supervision of the operations of enterprises that contract foreign projects and submit details to the MOC, the Ministry of Construction and the State Administration of Work Safety (SAWS) for approval. Article 23 stipulates that the Ministry of Commerce shall, in consultation with the Ministry of Foreign Affairs and another 10 authorities, penalize enterprises that violate this regulation. The 2005 Notice on Strengthening the Supervision and Management of Work Safety of Chinese Enterprises Overseas also stipulated that OFDI enterprises shall comply with local laws on work safety, and SAWS at each level

⁷¹ Providing only generally worded obligations without methods of implementation or penalties for non-compliance.

shall manage and supervise OFDI enterprises' compliance with work safety rules. Parent enterprises shall undertake direct responsibility for the work safety of OFDI subsidiaries.

It can be concluded that China has taken initial steps toward requiring enterprises to comply with local laws in their OFDI projects. However, most of the provisions are too general⁷² to be enforced. Although the 2007 Regulation and the 2005 Notice designate the responsible parties and the supervisory bodies tasked with compliance, these are low-level laws that can only be applied to specific industries and specific matters. Overall, Chinese legislation on OFDI projects' compliance with local laws is inadequate.

4.4.3 Stakeholder Mapping

4.4.3.1 The Chinese Government

It is in the interest of the Chinese government to strengthen the supervision of Chinese enterprises' OFDI, to regulate these companies' activities and to require them to comply with local laws. This will help the government maintain good relations with foreign governments and societies and maintain a positive state image. Thus it is reasonable for the Chinese government, especially the NDRC, SASAC and MOC, to enhance legislation requiring Chinese enterprises to comply with local laws by focusing on prominent problems that have emerged.

Another issue that requires attention is coordination between Chinese laws and host country laws. For example, if an enterprise has been penalized for illegal activity by the host country, it should not be penalized again by the Chinese government; this might lead to conflicts over jurisdiction. However, consideration may be given to whether the penalty imposed by the host country is greater or less than that China would impose, and legal adjustments made accordingly.

⁷² See footnote 71.

4.4.3.2 Chinese Enterprises

From the standpoint of Chinese enterprises, there will be more constraints on their OFDI as Chinese laws requiring compliance with local laws are strengthened, making them subject to regulation by both the host country and by China. Furthermore, illegal behaviour will be penalized under Chinese law even when it is tolerated by host countries. There is no doubt that this shift will burden Chinese enterprises. However, in the long run, sound Chinese legislation that requires compliance with local laws will standardize the operations of Chinese enterprises overseas, improve their relationships with local governments and societies, and promote the development of Chinese OFDI.

According to our interviews, Chinese enterprises admit that compliance with local laws is a big challenge to their OFDI projects. Therefore, they are paying special attention to this issue. Comprehensive environmental impact assessments are conducted in the host country during the feasibility study period, and local lawyers and experts are engaged by Chinese enterprises to help them meet local requirements. Although there are still many negative reports concerning the behaviour of Chinese enterprises overseas, many have made great progress in complying with local laws and meeting local expectations.

4.4.3.3 Host Country Governments

As mentioned above, under some circumstances host country governments choose to, or have no choice but to, ignore illegal behaviour on the part of foreign investors, in order to maintain good relations with them. If China can enhance legislation that requires Chinese enterprises to comply with local laws, host country governments will also benefit.

4.4.3.4 Host Country Society and Citizens

The society and citizens in host countries are the ultimate victims when host country governments choose to ignore illegal behaviour on the part of foreign investors. They will also be di-

rect beneficiaries if China can enhance legislation that requires Chinese enterprises to comply with local laws.

4.4.4 Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act (FCPA) is a US law passed in 1977 and amended twice, in 1988 and 1998. The law followed the Lockheed scandal and other cases of US companies' bribery of foreign officials to obtain business advantages. FCPA is a domestic US law with extra-territorial jurisdiction, which means it applies to US companies' overseas investments. This can serve as an example of the type of law China may consider implementing.

The FCPA made it illegal for US companies to bribe foreign officials, political parties or political candidates for the purpose of obtaining or maintaining business deals or seeking undue benefits. The 1998 amendment extended the law to apply to foreign enterprises and individuals acting within the United States.⁷³

The FCPA can be considered a model law for the regulation of OFDI activities by the investor country. Although it does not directly require enterprises that invest overseas to comply with local anti-corruption laws, the FCPA indirectly achieves this. In particular, when host countries have inadequate legislation or are unwilling to strictly implement their laws against foreign investors, laws like the FCPA are all the more necessary.

There are some problems with the FCPA, the most critical one being conflicts over jurisdiction, as an activity can violate the FCPA and the law in the host country at the same time. The FCPA does not provide a solution to this problem; neither do international laws at present.

4.4.5 International Legislation and Guidance on Compliance with Local Laws

There are no specific provisions on OFDI projects' compliance with local laws in current inter-

⁷³ Bi Jingjing, Foreign Corruption Practice Act and China's Anti-Commercial Bribery Legal System.

national legislation. However, there are international conventions on specific issues, including the United Nations Convention against Corruption (UNCC), the United Nations Convention against Transnational Organized Crime (UNTOC), the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (UNCITF), the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. To date, China has ratified the UNCC, UNTOC and UNCITF.

The main purpose of these conventions is to prevent and combat transnational crime such as organized crime, money laundering, corruption and drug dealing, through coordination among signatories. The UNCC, for example, applies to corruption on the part of government officials, officials of international organizations and private enterprises. It involves all aspects of fighting corruption, including prevention, investigation, litigation, judgements, extradition, judicial assistance, and the perusal and reimbursement of money gained through corruption. UNTOC highlights participation in organized criminal groups – with special attention to the trafficking of persons and arms – money laundering, corruption and obstruction of justice. It requires signatories to adopt legislation and other measures to ensure prosecution and punishment for these crimes.

Due to the fact that much of the illegal activity committed by enterprises in host countries is of a transnational nature, it can only be effectively prevented and combated through coordination between investor and host countries. China can effectively prevent and combat illegal behaviour by Chinese enterprises in host countries by ratifying relevant international conventions on combating transnational crimes and by incorporating them into domestic law.

However, the function of international conventions in promoting compliance with host country laws by enterprises overseas is limited, as:

(i) Most international conventions regarding transnational crime only apply to very specific crimes and not other criminal or illegal behaviour. More specifically, international conventions do not outlaw per se violations by foreign investors of the laws or customs of host countries.

(ii) International conventions only have a binding effect on signatories and do not apply if

either the investor country or the host country is not a signatory.

4.4.6 International Practice on Compliance with Local Laws

The World Bank's practices in combating bribery and fraud deserve attention. In order to monitor bribery and fraud in the bidding and construction phases of projects it finances, the World Bank adopted a project review procedure, with special attention to corruption. Enterprises that fail to pass the review will be blacklisted by the World Bank and prohibited from participating in any project financed by the Bank. Enterprises on the blacklist may raise objections or provide supplementary explanations, and the validity period of sanctions against them may be reduced if they improve their behaviour. There are currently 148 construction companies from 25 countries on the blacklist.

This practice of the World Bank may have the following positive effects:

(i) Due to the extensive influence of the World Bank, enterprises on the blacklist face media and customer pressure globally. This increases the cost of bribery or fraud and encourages enterprises to comply with the law.

(ii) The World Bank's practice sets a good example for other financial institutions. Just as they have adopted the Equator Principles to deal with environmental protection, financial institutions may adopt a similar approach to the World Bank's review procedure to ensure legal compliance by all enterprises involved in projects they fund.

4.4.7 Summary

Compliance with local laws by foreign investors operating in host countries is a complicated problem. Although OFDI projects fall under the jurisdiction of host country laws, investors' behaviour ultimately affects the interests of the investor country. Thus it is necessary for investor countries to effectively legislate the requirement that enterprises investing overseas comply with the laws of host countries.

Many Chinese laws regarding OFDI include requirements that Chinese enterprises comply with the laws of host countries. However, most of them are too general to be practicable; they offer no specific guidelines and provide no penalties for non-compliance. There are also no specific provisions on foreign investors' compliance with host country laws in current international legislation. Although there are some relevant international conventions, they only apply to specific issues and must be incorporated into domestic laws. The US Foreign Corrupt Practices Act (FCPA) is one example of effective domestic legislation by which an investor country can regulate the activities of enterprises with overseas investments.

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Conclusion

The Fifth Plenum of the 17th Central Committee of the Communist Party of China adopted the CPC Central Committee's Proposal for Formulating the 12th Five-Year Program for China's Economic and Social Development (2011-2015). The document stated that more effort should be made to further open to the outside world, optimize the foreign trade structure, improve the quality of foreign investment, and accelerate the pace of the country's going global strategy. It stressed the need to participate in global economic governance and regional cooperation, to push forward development, deepen reform and promote innovation by opening up, and to vigorously create new advantages for participating in global economic cooperation and competition.⁷⁴ Xiaoqiang Zhang, Deputy Director of the National Development and Reform Commission (NDRC), published an article on the rationale of this approach, mentioning that the focus of OFDI should include projects related to energy resources, high and new technology, manufacturing and civil construction.⁷⁵

China's legal system includes OFDI regulations related to investment approval, foreign exchange, taxation, insurance, state-owned asset management, financial support and supervision. Legislation over the past decade has been beneficial to Chinese enterprises with overseas investments; it has simplified OFDI application procedures, strengthened tax services and financial support for their overseas projects, and standardized supervisory functions by relevant authorities. However, legislation has focused only on assisting enterprises in going abroad; it has not dealt with how they should operate abroad in terms of their social responsibility or the impact of their projects on the host countries' citizens, environment and economic development, especially in developing countries.

As stated above, China's investment in developing countries is concentrated in the Mekong River Basin, Africa and the Middle East. The economies of these regions all rely heavily on the exploitation and use of national resources; their main industries include agriculture, forestry, animal husbandry, irrigation and mining. Chinese enterprises' investment in these countries is also mostly concentrated in these areas. From a positive perspective, Chinese investment

⁷⁴ Communiqué of the Fifth Plenum of the 17th Central Committee of the Communist Party of China (Oct 18th, 2010).

⁷⁵ Mutually Beneficial Strategy of Opening-up, Outlook Weekly, see <http://www.lwgcw.com/newsshow.aspx?newsid=17008>.

has increased financial support for these countries' key economic areas, which is beneficial to their economic development. From a negative perspective, Chinese enterprises have created problems for these countries in areas such as environmental protection, sustainable development, labour and employment.

In order to create a win-win situation for Chinese OFDI, in line with the main analysis of this text, the following measures are recommended to improve China's legislation with regard to OFDI:

(i) Formulate a uniform Outward Foreign Direct Investment Law. At present a classic problem with China's OFDI regulations is that they are low-level and issued by many different authorities. The functions and powers of each administrative department are not clearly divided and cannot be easily coordinated; for example, different departments do not have the same concept of OFDI. Thus it is advisable that a uniform Outward Foreign Direct Investment Law be formulated to serve as the basic law concerning OFDI.

(ii) Refer to the United States' Foreign Corrupt Practices Act and consider formulating similar laws to deal with problems caused by China's OFDI, such as environmental protection, sustainable development, labour and employment. Standardize the OFDI activity of Chinese enterprises through domestic legislation.

(iii) Improve supervision over OFDI. As stated above, China already monitors OFDI to some extent, in terms of gathering statistics, conducting annual inspections and carrying out performance evaluations. However, the criteria by which OFDI is evaluated are mainly economic, and there is a lack of consideration of social and environmental impacts. For example, the annual inspection of each enterprise with OFDI by the Ministry of Commerce and the State Administration of Foreign Exchange includes the status of its OFDI, its compliance with Chinese regulations and the compliance of its OFDI subsidiary. The subsidiary is subject to an appraisal by the Economic and Commercial Counsellor's Office of the Chinese Embassy in the host country. This performance evaluation, which is an important part of the parent enterprise's annual inspection, considers the subsidiary's operational efficiency, quality of assets, ability to repay debts, development capacity and social con-

tribution. The four indexes of social contribution are the payment of tax, earning foreign exchange, the quantity and monetary value of resources obtained and the net asset growth rate. Thus it can be seen that China's evaluation of OFDI does not yet touch upon social responsibility. We recommend that social responsibility, especially environmental protection, sustainable development, management of labour and employment issues and respect for local laws, be made an important part of the OFDI joint annual inspection and the overseas enterprise performance evaluation. Moreover, standards of socially responsible behaviour should be set, and penalties exacted for failure to meet those standards.

(iv) *Improve relevant domestic legislation. China's domestic legislation needs to be improved with regard to environmental protection, sustainable development, and the handling of labour and employment issues. Operational guidelines should be formulated, and a sense of social responsibility cultivated among Chinese enterprises. Also, in accordance with the uniform guidelines of the proposed Outward Foreign Direct Investment Law, specific legislation should be formulated to cover all aspects and impacts of OFDI. In particular, specific operational standards should be set concerning environmental protection, sustainable development, management of labour and employment issues and compliance with host country laws.*

(v) *Become a party to, and make reference to, more international conventions. International conventions represent the legislative standards and tendencies of the international community, and can be used for reference in developing China's legal system. In line with China's economic and social development, the Chinese government should join more international treaties and conventions as and when appropriate. It should then incorporate these international standards into domestic legislation through the formulation and revision of domestic law.*

(vi) *Strengthen communication with OFDI recipient countries. As mentioned above, the behaviour of Chinese enterprises in their host countries falls under the jurisdiction of the host countries' domestic law. Chinese enterprises should comply with local laws with regard to environmental protection, sustainable development, and labour and employment issues. As the investors' home country, China should also play a role in regulating the behaviour of*

OFDI enterprises, though this may result in jurisdiction conflicts between China and the host countries. To create win-win investment conditions, the Chinese government should actively communicate with host countries, sign bilateral agreements and make arrangements aimed at ensuring responsible behaviour by enterprises involved in OFDI projects...

In conclusion, while OFDI by Chinese enterprises in developing countries propels their economic development, this investment has sometimes led to problems in areas such as environmental protection, sustainable development, labour management and local employment, as well as compliance with the host countries' laws. These problems potentially jeopardise the long-term development of Chinese enterprises' projects in host countries. The causes of these problems may be political, economic, legal or cultural. Looking at the situation from a legal perspective, the best way forward for the Chinese government is to take an active role in shaping the overseas behaviour of Chinese enterprises by legislating clear standards of behaviour and establishing penalties for non-compliance with the standards. By using the legal system to raise standards and to ensure that irresponsible behaviour has consequences, China can reap greater long-term economic and social benefits from its OFDI, secure its welcome in host countries, and uphold its reputation as a responsible player on the world stage.

Attachment I: Key OFDI Laws of China

No.	Title	Body	Entry into Force
1	Decision of the State Council on Reforming the Investment System	StateCouncil	2004
2	Interim Measures on Management of State-owned Assets Abroad	MOF, MOFA, FEA	1999
3	Regulation of the People's Republic of China on Foreign Exchange Administration(2008)	FEA	2008
4	Regulations on Approval and Management of Overseas Non-trade Enterprises (Draft)	MOC	1992
5	Notice of Regulating Individual Nominated Shares in Foreign Investment of State-owned Enterprises	MOF	2010
6	Notice of the National Development and Reform Commission on Issues Concerning the Improvement of the Administration of Overseas Investment Projects	NDRC	2009
7	Notice of the General Office of the Ministry of Commerce on Adjusting the Relevant Matters on the Examination and Approval of Overseas Investment	MOC	2007
8	Notice on Relevant Issues concerning the Foreign Exchange Administration of Overseas Loans Granted by Domestic Enterprises	FEA	2009
9	Provisions on the Foreign Exchange Administration of the Overseas Direct Investment of Domestic Institutions	FEA	2009
10	Measures for the Overseas Investment with Insurance Funds	CIRC	2007
11	Opinions of the State Administration of Taxation about Doing a Good Job in the Taxation Service and Management of Overseas Investments of Chinese Enterprises	Tax Administration	2007
12	Notice Concerning Issues Regarding Greater Support of Investment Cooperation in Enterprise Exploitation of Natural Resources in Africa	MOC, MOFA, FEA	2003
13	Notice Concerning Providing Credit Support to Key Overseas Investment Projects Encouraged by the State	NDRC, Export-Import Bank	2004
14	Notice Concerning Further Strengthening Financial Support of Key Overseas Investment Project	NDRC, China Development Bank	2005
15	Notice on the Administration of External Guarantees Provided by Domestic Institutions	FEA	2010
16	Provisional Measures on Overseas State-Owned Assets Administration	MOF, MOFA, FEA	1999
17	Notice on Strengthening Administration over the Foreign Investment Activities of Central Enterprises	SASAC	2008

18	Notice concerning Relevant Issues on Setting up a Risk Prevention Mechanism for Key Overseas Investment Projects	NDRC, Export Credit Insurance	2005
19	Statistical System of Direct Overseas Investment	MOC, Statistics Bureau	2002
20	Interim Measures for the Joint Annual Inspection of Overseas Investment	MOC, FEA	2002
21	Measures for Overseas Investment Comprehensive Performance Evaluation Measures (Trial)	MOC	2002
22	Opinions on Implementing Environmental Protection Policies and Rules and on Preventing Credit Risks	MEP, Central Bank, CBRC	2007
23	Notice Regarding the Prevention and Control on Credit Risks of High Energy Consumption and High Pollution Industries	CBRC	2007
24	Guiding Opinions of the Credit Work for Energy Conservation and Emissions Reduction	CBRC	2007
25	Guidelines of Corporate Social Responsibility of Central Enterprises	SASAC	2007
26	Notice on Strengthening the Administration of Overseas Investment by Central Enterprises	SASAC	2008
27	Guidelines for Corporate Social Responsibility of Chinese Financial Institutions in the Banking Industry	China Banking Association	2009
28	Guidelines for Sustainable Management and Utilization of Forests by Chinese Enterprises	MOC, Bureau of Forestry	2009
29	Chinese Ministry of Commerce Explanation Regarding Suggestions for Strengthening Human Safety and Protection of Workers for Chinese Enterprises and Organizations Overseas	MOC	2006
30	Administrative Regulation on Contracting Foreign Projects	State Council	2008
31	Regulations on Human Safety and Protection of Chinese Enterprises and Organizations Overseas	MOC, MOFA, NDRC, SASAC	2010
32	Notice on Strengthening the Supervision and Management of Work Safety of Chinese Enterprises Overseas	MOFA, MOC, SASAC, SAWS	2005
33	Complete Foreign Aid Projects Work Safety Administrative Measures (Trial)	MOC	2006
34	Notice on Further Regulating the Foreign Investment Cooperation of Chinese Enterprises	MOC, MOFA, SASAC	2008
35	Guideline for Chinese Overseas' Investment and Cooperation 2010	MOC	2010
36	Regulations on Further Regulating the Development of Contracting Foreign Projects	MOC, FEA, SASAC, NDRC...	2007

Attachment II: Key International Conventions Regarding Environmental Protection Signed by China

1. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes (March 22, 1989)
2. Amendment of Basel Convention on the Control of Transboundary Movements of Hazardous Wastes (September 22, 1995)
3. London Guidelines on Exchange of Information on Chemicals in International Trade (June 17, 1987)
4. Rotterdam Convention on International Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (September 10, 1998)
5. Convention Concerning Safety in the Use of Chemicals at Work (June 25, 1990)
6. Vienna Convention for the Protection of the Ozone Layer (March 22, 1985)
7. Montreal Protocol on Substances that Deplete the Ozone Layer (September 16, 1987)
8. United Nations Framework Convention on Climate Change (June 11, 1992)
9. Kyoto Protocol to the United Nations Framework Convention on Climate Change (December 10, 1997)
10. Convention on Biological Diversity (June 5, 1992)
11. International Convention for the Protection of New Varieties of Plants (October 23, 1978)
12. Convention on Wetlands of International Importance Especially as Waterfowl Habitat (February 2, 1971)
13. United Nation's Convention to Combat Desertification (June 7, 1994)
14. Convention on International Trade in Endangered Species of Wild Fauna and Flora (March 3, 1973)

15. Amendment to Article 21 of Convention on International Trade in Endangered Species of Wild Fauna and Flora (April 30, 1983)
16. 1983 International Tropical Timber Agreement (November 18, 1983)
17. 1994 International Tropical Timber Agreement (January 26, 1994)
18. United Nations Convention on the Law of the Sea (December 10, 1982)
19. International Convention on Civil Liability for Oil Pollution Damage (November 29, 1969)
20. Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage (1992)
21. International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (May 6, 1975)
22. Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution by Substances Other Than Oil (November 2, 1973)
23. International Convention on Oil Pollution Preparedness, Response and Cooperation (November 30, 1990)
24. Resolution on Gradually Prohibiting the Disposal of Industrial Wastes at Sea (November 12, 1993)
25. Resolution on Burning Waste at Sea (November 12, 1993)
26. Resolution on Disposal of Radioactive Wastes at Sea (November 12, 1993)
27. International Convention for the Prevention of Pollution from Ships (November 2, 1973)
28. Protocol 1978 to International Convention for the Prevention of Pollution from Ships (February 17, 1978)
29. International Whaling Convention (December 2, 1946)

30. Antarctic Treaty (December 1, 1959)

31. Protocol to Antarctic Treaty on Environmental Protection (June, 23, 1991)

32. Convention Concerning the Protection of the World Cultural and Natural Heritage (November 23, 1972)

33. International Covenant on Economic, Social and Cultural Rights (December 9, 1966)

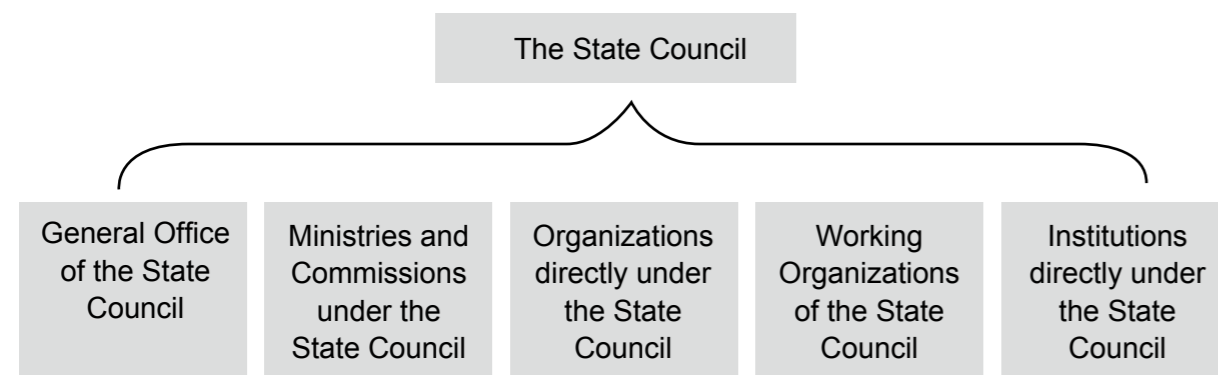
34. International Covenant on Civil and Political Rights (December 9, 1966)

Attachment III: International Labour Conventions Signed by China

No.	Title
1	Occupational Safety and Health Convention
2	Final Articles Revision Convention, 1946
3	Marking of Weight (Packages Transported by Vessels) Convention, 1929
4	Minimum Age (Industry) Convention (Revised), 1937
5	Underground Work (Women) Convention, 1935
6	Seamen's Articles of Agreement Convention, 1926
7	Repatriation of Seamen Convention, 1926
8	Convention Concerning the Creation of Minimum Wage-Fixing Machinery, 1928
9	Safety and Health in Construction Convention, 1988
10	Chemicals Convention, 1990
11	Equality of Treatment (Accident Compensation) Convention, 1925
12	Worst Forms of Child Labour Convention, 1999
13	Weekly Rest (Industry) Convention, 1921
14	Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983
15	Medical Examination of Young Persons (Sea) Convention, 1921
16	Tripartite Consultation (International Labour Standards) Convention, 1976
17	Minimum Age (Trimmers and Stokers) Convention, 1921
18	Employment Policy Convention, 1964
19	Minimum Age Convention, 1973
20	Equal Remuneration Convention, 1951
21	Right of Association (Agriculture) Convention, 1921
22	Minimum Age (Sea) Convention (Revised), 1936
23	Discrimination (Employment and Occupation) Convention, 1958

Attachment IV: Organizational Chart of the State Council

The organization of the State Council is outlined in the chart below:



Ministries and Commissions under the State Council (29)

1. Ministry of Foreign Affairs
2. Ministry of National Defence
3. State Development Planning Commission
4. State Economic and Trade Commission
5. Ministry of Education
6. Ministry of Science and Technology
7. State Commission of Science, Technology and Industry for National Defence
8. State Ethnic Affairs Commission
9. Ministry of Public Security
10. Ministry of State Security
11. Ministry of Supervision
12. Ministry of Civil Affairs

13. Ministry of Justice
14. Ministry of Finance
15. Ministry of Personnel
16. Ministry of Labour and Social Security
17. Ministry of Land and Resources
18. Ministry of Construction
19. Ministry of Railways
20. Ministry of Communications
21. Ministry of Information Industry
22. Ministry of Water Resources
23. Ministry of Agriculture
24. Ministry of Foreign Trade and Economic Cooperation
25. Ministry of Culture
26. Ministry of Health
27. State Family Planning Commission
28. People's Bank of China
29. National Audit Office

Organizations directly under the State Council (17)

1. General Administration of Customs of PRC
2. State Administration of Taxation
3. State Environment Protection Administration
4. Civil Aviation Administration of China
5. State Administration of Radio, Film and Television
6. General Administration of Sports
7. State Statistical Bureau
8. State Administration for Industry and Commerce
9. State Press and Publication Administration
10. State Forestry Administration
11. General Administration of Quality Supervision and Quarantine of China
12. State Drug Administration
13. State Intellectual Property Office
14. National Tourism Administration
15. State Administration for Religious Affairs
16. Counsellors' Office under the State Council
17. Bureau of Government Administrative Affairs under the State Council

Working Organizations of the State Council (8)

1. Office of Foreign Affairs of the State Council
2. Office of Overseas Chinese Affairs of the State Council
3. Hong Kong and Macau Affairs Office of the State Council
4. Legislative Affairs Office of the State Council
5. Economic Restructuring Office of the State Council
6. Research Office of the State Council
7. Taiwan Affairs Office of the State Council
8. Information Office of the State Council

Institutions directly under the State Council(12)

1. Xinhua News Agency
2. Chinese Academy of Sciences
3. Chinese Academy of Social Sciences
4. Chinese Academy of Engineering
5. Development Research Centre of the State Council
6. National School of Administration
7. China Seismological Bureau
8. China Meteorological Administration
9. China Securities Regulatory Commission
10. China Insurance Regulatory Commission
11. National Social Securities Fund Council
12. National Natural Science Foundation of China



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