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A Comparison of Inbound and Outbound Investment Regulatory Regimes in China

Focus on Environmental Protection

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I Introduction

China is no longer only a major destination of foreign direct investment (FDI) but is one of the highest exporters of overseas direct investment (ODI) in the world. The two different legal and regulatory regimes for FDI and ODI are often conceptualized separately with the former being more advanced than the latter. The conventional explanation for this difference is that the former has simply had more time to develop, given that China opened to FDI in the 1980s, and it was not until the late 1990s that Chinese enterprises began investing abroad. We stake out a different position on the relationship between the FDI and ODI regimes. Rather than treat them as isolates, we juxtapose them (Bath, 2011) while recognizing that they are organized through different principles.

In accordance with a line of literature that conceptualizes domestic and foreign-related Chinese governance holistically (Foot, 2013; Ferchen, 2016; Shue, 2018; Erie, 2021), we compare the FDI and ODI regimes, finding that, at a general level, whereas the former has transitioned from restrictive to lenient, the latter has evolved in the opposite direction, from lenient to restrictive. The different trajectories cannot be explained solely in terms of the time lag in their respective development. While the primary reasons for change are domestic, we argue that one reason why the FDI regime is more advanced is because of the influence of the WTO accession of 2001. Whereas the FDI regime has become more streamlined, efficient, and coordinated, partly as a result of the WTO accession package, the ODI regime, which has not yet benefited from an analogous multilateral framework, remains bureaucratic, suboptimal, and disaggregated.

Our analysis is based on a data set of hundreds of normative documents that comprise the FDI and ODI regulatory regimes. For the most

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part, we have focused on normative documents issued by the People's Republic of China (PRC) government that pertain to FDI or ODI governance to provide a more granular view than a focus on the level of China's international investment agreements (Berger, this volume; Chi, this volume). For a number of reasons, including the breadth of documents that comprise these regimes and also our shared interest in China's impact on the environment, we focus on the specific example of the regulation of the environmental impact of FDI and ODI. Environmental concerns are closely related to a host of problems that have emerged in recent years as the most pressing problems for international trade and investment law, including technology transfer, climate change mitigation and adaptation, the protection of biodiversity, and pandemics (Cottier, this volume). Our particular focus is on how the FDI and ODI regimes have disparately affected environmental impact in China and developing countries, respectively. We find that the environmental and social impact of Chinese ODI is inadequately regulated resulting in potential harm to Chinese investors and impacted communities in host states alike in the course of Chinese-financed projects overseas. The remainder of this chapter is organized as follows: in Part II, we provide a snapshot of China's capital inflows and outflows; in Part III, we provide an historical overview of China's regulation of FDI, finding a general transition from restricting FDI to encouraging it; in Part IV, we provide a similar historical appraisal of China's regulation of ODI finding that the general trend works in the opposite direction; in Part V, we juxtapose the two regimes' treatment of environmental impact; and in Part VI, we provide a brief discussion of implications, including for understanding the relationship between China's domestic legal reform, outward-facing legal obligations, and the role of regulators in coordinating the foregoing.

II Trends in Chinese Capital Import and Export

As a preliminary matter, we recognize that FDI and ODI serve different purposes and do not assume that they should necessarily function in the same way; in fact, our comparison is meant to shed light on the different types of priorities a state may have in reforming the respective regimes. In considering the priorities that underlie the regimes, it is clear there are differences. For example, whereas FDI rules are designed to attract capital and technology, ODI rules aim to assist Chinese companies to obtain resources and to transfer excess capacity in manufacturing. There

are some shared underpinning principles, however, even if they assume different levels of importance in the two regimes. These include both national security and the encouragement and protection of investment.[1] So while there are clearly different reasons for the capital flows, there is also some overlap.

The overlap also applies to the regulators who determine capital inflows and outflows as they are essentially one and the same; despite this commonality, the regimes have evolved in quite different directions. The regulators include *inter alia* the Ministry of Foreign Trade and Economic Cooperation and its successor the Ministry of Commerce (MOFCOM), the National Development and Reform Commission (NDRC), the Ministry of Finance, the Ministry of Foreign Affairs, the State Administration for Industry and Commerce, the State Administration of Foreign Exchange, and the People's Bank of China. It is important to note, however, that economists, political scientists, and other social scientists who study China have consistently shown that regulators in China do not act with one mind, but rather, may exhibit significant inter-agency competition (Lieberthal, 1992; Mertha, 2008; Jones and Hameiri, 2021; Tan, 2021). Moreover, in the face of these agency problems, scholars have argued that the WTO accession presented China with an opportunity to circumvent entrenched discoordination problems and to marshal resources across the ministries, departments, and related administrative divisions (Kim, 2002; Qin, 2007). Indeed, the WTO accession was an exercise in institutional learning and problem-solving that required an unprecedented level of coordinated action (Hsieh, 2010; Ji and Huang, 2011; Shaffer and Gao, 2017). Yet while regulators underwent a steep learning curve to reform the FDI regime in light of the WTO accession package, there was no comparative multilateral framework for China's ODI regime and thus the same reformers have not undergone a similar process of coordinated learning. In the following sections, we take the FDI and ODI regimes in turn.

[1] 中华人民共和国国家安全法 [National Security Law of the PRC], promulgated by the National People's Congress (NPC) on July 1, 2015, and effective on July 1, 2015, art.59, https://perma.cc/LEW8-EH33. Cf. 企业境外投资管理办法 [Measures for the Administration of Overseas Investment by Enterprises], No. 11, promulgated by the National Development and Reform Commission (NDRC) on March 1, 2018, (hereinafter, "Overseas Investment Measures") art. 5, https://perma.cc/PY7A-YYED. 中华人民共和国外商投资法 [Foreign Investment Law of the PRC], promulgated by the NPC on March 15, 2019 and effective Jan. 1, 2020) [hereinafter, "Foreign Investment Law"], art 3. Cf. Overseas Investment Measures, art. 1, https://perma.cc/R2J4-8HFU.

III China's Regulation of FDI

At a general level, China's regulation of FDI has gone from more restrictive to more lenient, and, while there are a number of factors that contributed to this shift and most of which are domestic in nature, we argue that one reason for this change is the requirements imposed on China through the WTO accession package, a multilateral framework that has no corollary in terms of China's regime for regulating ODI. More specifically, China's approach to regulating FDI was caused by its "opening and reform" policy and the country's willingness to engage with global capital. China's commitments to joining the WTO, including making China a market economy and opening the domestic market to foreign investors, should be seen in this broader context.

We construct a basic chronology of the evolution of China's FDI regime. We find that China's evolving FDI framework coincides with China's national development plans as it transitioned from a command-control economy to one that increasingly integrated market principles without total privatization. This timeline can be broken down into five general phases: phase one (1979–1991), the establishment of a basic regulatory foundation for economic liberalization; phase two (1992–1999), an increased emphasis on economic efficiency causes legislative reform; phase three (2000–2008), the period of the WTO accession during which the government sought to internationalize by balancing economic efficiency with economic fairness; phase four (2009–2014) during which the government sought to balance internationalization with national security concerns; and phase five (2015-present) which is marked by not only efficiency and national security concerns but also greater openness and quality of cross-border business. In what follows, we trace China's gradualist approach to investment reform with particular reference to the pivotal phase three during which China's accession to the WTO shifted its FDI regime toward greater liberalization, yet one responsive to China's specific political economy.

(i) Phase One (1979–1991): The Establishment of a Regulatory Foundation for Economic Liberalization

The first phase of building a house amenable to foreign investment began in 1979 and lasted until the early 1990s. At this early stage in modern China's development, the PRC government sought to incentivize FDI to inject capital into the forces of production, specifically those in light

industry, agriculture, and heavy industry. The landmark event of the Third Plenary Session of the Eleventh Central Committee of the Chinese Communist Party (CCP) explicitly promoted legislation for foreign investment. Subsequently, the Sino-Foreign Equity Joint Ventures Law was promulgated in 1979 as the first legislation of the "socialist market economy" (*shehuizhuyi shichang jingji*). Three years later, the 1982 PRC Constitution gave legal recognition to foreign businesses and foreign-invested enterprises.[2]

In this phase, China's regulation of FDI is particularly strict and shows the following characteristics. First, regulators restricted access to foreign capital. The legislation establishes categories for investment (e.g., encouraged, permitted, restricted, prohibited), only some of which were slowly relaxed over time. Moreover, the regulations provide for approval and management of a number of areas, including the capital ratio of the parties involved,[3] and approvals for foreign-invested enterprise contracts and articles of association,[4] among other restrictions.[5] Second, regulators further exercised strict approval for foreign investment. Foreign-invested projects were, for the most part, discouraged, and the approval authority was concentrated at the level of the central government. The process for approval was cumbersome.[6] Third, foreign investment was not granted national treatment. Moreover, there were a number of restrictions placed on the purchase of raw materials as well as on the import and export of products,[7] and,

[2] 中华人民共和国宪法 (1982年)[1982 PRC Constitution], promulgated by the NPC on Dec. 4, 1982 and effective Dec. 4, 1982, art. 18, https://perma.cc/TK9K-WNMY.

[3] 关于中外合资经营企业注册资本与投资总额比例的暂行规定 [Interim Previsions on the Ratio of Registered Capital to Total Investment of Sino-Foreign Joint Ventures], issued by the State Administration of Industry and Commerce on March 1, 1987, https://perma.cc/D7N7-75XC.

[4] 关于严格审核举办中外合资经营企业中方法人资格的通知 [Notice on Strictly Examining the Legal Person Qualifications of the Establishment of Sino-Foreign Joint Ventures], issued by the Ministry of Foreign Economic Relations and Commerce on Sept. 21, 1987, https://perma.cc/DHD8-75UA.

[5] 中外合资经营企业合营各方出资的若干规定 [Several Provisions on the Capital Contribution of the Parties in a Sino-Foreign Equity Joint Venture], issued by the Ministry of Foreign Trade and Economic Cooperation and the State Administration for Industry and Commerce on Jan. 1, 1988, https://perma.cc/6VV9-JL42.

[6] 外国（地区）企业在中国境内从事生产经营活动登记管理办法 [Measures for the Registration and Administration of Foreign (Regional) Enterprises Engaged in Production and Business Activities in China], issued by the State Administration for Industry and Commerce on Aug. 15, 1992, https://perma.cc/YX43-YAH4.

[7] 关于中外合资经营企业外汇收支平衡问题的规定 [Regulations Concerning the Balance of Foreign Exchange Income and Expenditure by Sino-Foreign Joint Equity Ventures], issued by the State Council on Feb. 1, 1986, https://perma.cc/3B5Z-9PPM.

lastly, foreign exchange.[8] Fourth, both the methods to encourage foreign investment and the ultimate destinations were limited. As for methods, the main approach was to provide preferential income tax treatment for foreign-invested enterprises.[9] In terms of the permissible destinations for investment, the PRC government at this stage encouraged foreign investment only in designated locations.[10] In summary, the first phase is one of tight restrictions on amounts, methods, industries, and destinations of foreign investment.

(ii) Phase Two (1992–1999): Economic Efficiency Spurs Legislative Reform

In the second phase, some of the investment rules became more consolidated around the need to increase efficiency which, in turn, generated the need for legislative and regulatory reform. This phase is characterized by a number of features. First, the system for foreign investors to access Chinese markets became more regularized.[11] Whereas the categories for foreign investment were ill-defined in the first phase, in this phase, they became clearer under the Catalogue for the Guidance of Foreign Investment Industries, specifically, its categories of "encouraged," "permitted," "restricted," and "prohibited." Second, the authorities simplified the foreign investment approval system.[12] Third, foreign investments began to receive national treatment, in certain circumstances. Some foreign-invested enterprises even received "super-national treatment"

[8] 中华人民共和国外汇管理暂行条例 [Interim Regulations of the PRC on the Administration of Foreign Exchange], issued by the State Council on March 1, 1981, https://perma.cc/W6US-KFHC.

[9] 关于对中外合资，合作项目征收税问题的通知 [Announcement on Taxation of Joint Ventures and Cooperative Operations with Chinese and Foreign Investment], issued by the State Council on Sept. 21, 1982, https://perma.cc/Y6Y6-GW8E.

[10] 关于经济特区和沿海十四个港口城市减征、免征企业所得税和工商统一税的暂行规定 [Interim Provisions on the Reduction and Exemption of Corporate Income Tax and Consolidated Industrial and Commercial Tax in Special Economic Zones and 14 Coastal Port Cities], issued by the State Council on Dec. 1, 1984, https://perma.cc/X4SC-ZDAF.

[11] 指导外商投资方向暂行规定 [Interim Provisions on Guiding the Direction of Foreign Investment], issued by the NDRC, National Economic and Trade Commission and the Ministry of Civil Affairs on June 20, 1995, https://perma.cc/K7RH-5MG2.

[12] 关于扩大内地省、自治区、计划单列市和国务院有关部门等单位吸收外商直接投资项目审批权限的通知 [Notice on Expanding the Examination and Approval Authority of Inland Provinces, Autonomous Regions, Cities with Separate Plans, and Relevant Departments of the State Council to Absorb Foreign Direct Investment Projects, promulgated by the State Council on Aug. 22, 1996, https://perma.cc/53ZG-X9QR.

(*chaoguo minteyu*). For instance, the PRC Foreign-Invested Enterprise and Foreign Enterprise Income Tax Law grants foreign-invested enterprises the "two exemptions and three reductions" tax preference, and further stipulates that local governments can exempt or reduce local income tax.[13] Fourth, authorities expanded both the scope of foreign investment and the permissible destinations. An example of the former is the inclusion of "build-operate-transfer" projects within the investment regime[14] and the latter widened the type of destinations for foreign investment to include inland areas (Guojia tongji ju, 2002). In short, the second phase began greater liberalization but this process would not fully gain momentum until the WTO accession.

(iii) Phase Three (2000–2008): Internationalization through WTO Accession

In advance of its accession to the WTO in 2001, China began to reform its legislative and regulatory framework for FDI on a large scale in conformance with WTO expectations, and in particular, sought to meet the goals of both efficiency and economic fairness. The package agreement of the WTO had a significant influence on the reform of Chinese legislation, that is, the overall alignment of Chinese law with international norms, even if there was regulatory discoordination between different levels of government administration (Tan, 2000). According to the internal documents of the Working Party on the Accession of China, by November 9, 2000, the PRC government revised some 36 laws and regulations and 120 administrative rules for purposes of WTO compliance, including such statutes as the Contract Law of the PRC, Law of the PRC on Chinese-Foreign Equity Joint Ventures, and Law of the PRC on Chinese-Foreign Contractual Joint Ventures (Working Party on the Accession of China, 2000).

The changes to the investment regime were extensive. First, foreign investment access was expanded across industries, methods, and destinations. The Catalogue for the Guidance of Foreign Investment Industries

[13] 中华人民共和国外商投资企业和外国企业所得税法 [PRC Foreign-Invested Enterprises and Foreign Enterprises Income Tax Law], promulgated by the President of the PRC on Apr. 9, 1991 and effective on July 1, 1991, arts. 8 and 9, https://perma.cc/5PFE-NBUX.

[14] 关于以BOT方式吸引外商投资有关问题的通知 [Circular Concerning Integrating Investment by Means of BOT], issued by the Ministry of Foreign Trade and Economic Cooperation on Jan. 16, 1995, https://perma.cc/TR3F-RCGF.

was revised three times during this period to narrow the restricted and prohibited categories. Concurrently, separate policies were formulated for many industries to further expand opportunities for foreign investment, including in the financial, transportation, real estate, and entertainment industries.[15] Second, legislative reform began focusing on fair value. In 2004, the State Council promulgated the "Decision on the Reform of the Investment System" which stated that a fair and orderly competitive market environment promotes both investment efficiency and overall social progress.[16] Based on this direction, reforms were initiated in a number of areas. For instance, the 2007 Corporate Income Tax Law unified the income tax of domestic and foreign companies and abolished the "super national treatment" of some foreign-invested companies.[17] Additionally, the Anti-Monopoly Law provided a basis for regulating foreign monopolies and mergers and acquisitions.[18] Third, during this period, China's policy orientation shifted from "encouraging foreign investment" to "relying on foreign investment." This trend is illustrated in the use of foreign capital to reorganize SOEs and foreign mergers and acquisitions.[19]

(iv) Phase Four (2009–2014): Balancing Internationalization and National Security

The WTO accession continued to have transformative effects on the Chinese regulatory regime for FDI well beyond the third phase, and while efficiency continued to drive much of the reform, this requirement was balanced with additional concerns, including national security. The 2008 financial crisis increased international pressure on China to adapt its regulatory structure to resist exogenous shocks while continuing to

[15] 中华人民共和国外资金融机构管理条例 [Regulations of the PRC on the Administration of Foreign-Funded Financial Institutions], issued by the State Council on Dec. 1, 2001 and effective Feb. 1, 2002, https://perma.cc/MSF7-CBQA.

[16] 关于投资体制改革的决定 ([2004] 20 hao) [Decision on the Reform of the Investment System], issued by the State Council in 2004 (no. 20), https://perma.cc/8UMB-LFD4.

[17] 中华人民共和国企业所得税法 [PRC Corporate Income Tax Law], promulgated by the NPC on March 16, 2007, https://perma.cc/XXB5-9NL2.

[18] 中华人民共和国反垄断法 [PRC Anti-Monopoly Law], promulgated by the NPC on Aug. 30, 2007 and effective Aug. 1, 2008, https://perma.cc/XM2N-K4S6.

[19] 利用外资改组国有企业暂行规定 [Interim Provisions on the Reorganization of State-Owned Enterprises with Foreign Capital], jointly issued by State Economic and Trade Commission, Ministry of Finance, State Administration for Industry and Commerce, and State Administration of Foreign Exchange on the on Jan. 1, 2003, https://perma.cc/FXL9-EN39.

benefit from FDI. Hence, on the one hand, foreign investment regulations maintained the goal of pursuing efficiency.[20] As part of this process, the approval system was further simplified to delegate approval to lower-level administrative levels.[21]

On the other hand, whereas the WTO era ushered in the notion of "reliance" on foreign investment, the worldwide financial meltdown of 2008 tempered this view. National security and economic sovereignty became important counter-weights to foreign investment dependence. Consequently, the Catalogue for the Guidance of Foreign Investment Industries was revised successively to incorporate national security, and a raft of regulations was issued to introduce greater oversight into the system of mergers and acquisitions.

(v) Phase Five (2015-present): Embracing "Quality" FDI

In the most recent phase, the government has sought to increase openness to FDI while also improving the overall quality of FDI. In 2015, the Central Committee of the CCP and the State Council jointly issued the "Certain Opinions on Building a New System of Open Economy" which required that while China should expand market access in the service industry and further open up manufacturing, it should improve the quality of foreign investment.[22] This latter requirement led to adding a negative list to pre-access national treatment.

The NPC promulgated the Foreign Investment Law in 2019 which introduced major changes to unify the regimes for regulating domestic and foreign investment.[23] Specifically, the Foreign Investment Law abolished the trinity of WFOEs, equity JVs, and cooperative JVs. In their place, the new law permits investment from Chinese or foreign parties without the target company needing to change its legal form. Henceforth, corporate form and governance are determined by the Chinese company law, which

[20] 关于进一步做好利用外资工作的若干意见 [Certain Opinions on Optimizing the Utilization of Foreign Capital], issued by the State Council on Apr. 6, 2010, https://perma.cc/L8MA-K88K.

[21] 关于做好外商投资项目下方核准权限工作的通知 [Notice on Optimizing the Decentralization of the Approval Authority for Foreign-Invested Projects], issued by the NDRC on May 4, 2010, https://perma.cc/R6A6-5382.

[22] 关于建构开放性经济新体制的若干意见 Guanyu jiangou kaifang xing jingji xin tizhi de ruogan yijian [Certain Opinions on Building a New System of Open Economy], jointly issued by the Central Committee of the CCP and the State Council on May 5, 2015, https://perma.cc/82CW-LPLG.

[23] *See* Foreign Investment Law *above* note 1.

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relaxed some of the requirements foreign investors faced under the previous arrangement. Another purpose of the Foreign Investment Law was to further establish the national security review system for foreign investment. The most recent phase has also seen an encouragement of "quality" investment, particularly in the fields of science and technology. For example, the Foreign Investment Law encourages technical cooperation and includes the protection of IP rights.[24]

In summary, this brief chronology of the reform of the legislative and regulatory framework for FDI shows how it has shifted over time from one that was initially restrictive to one that encouraged low-level foreign investment, without a screening mechanism, to the current phase that encourages quality investment, albeit with a screening mechanism in place. These changes over time reflect the general priorities of national development. Specifically, the PRC government viewed the WTO accession as a catalyst for creating a system that was more conducive to attracting FDI. Yet this need has been counter-balanced, over time, with the priority on safeguarding national security.

IV China's Regulation of ODI

Compared with China's legal and regulatory system for governing FDI, which has evolved from more restrictive to more lenient, the legal and regulatory system for ODI has shifted from one of greater lenience to more regulatory control. By control, we mean regulatory tightening; the control does not mean prohibition. Further, control in this sense is a response to a variety of chronic investment failures from speculative investing in luxury sectors in developed economies to high-risk investments in low-income states. In assessing the underlying principles of the ODI regime, one difference with the FDI regime is that the former prioritizes mitigating risks that could harm the national interest.[25] Chinese investors have incurred losses as a result of failed investments, and especially when the investments are state-owned, they potentially endanger state interests abroad.

In addition, poorly governed Chinese investments also generated negative externalities for host states. Whereas foreign investors in

[24] *See* Foreign Investment Law *above* note 1, art. 22(2).

[25] 国家发展改革委关于发布境外投资敏感行业目录(2018年版)的通知 (2018 Edition) [Notice of the National Development and Reform Commission on Issuing the Catalogue of Sensitive Industries for Overseas Investment] No. 251, promulgated Jan. 31, 2018 and effective March 1, 2018, https://perma.cc/PA5Z-7J6L.

China must comply with Chinese environmental and social governance laws, the Chinese ODI regime does not have the corresponding safeguards. The lack of such compliance measures has caused human rights and environmental harm in a number of countries, particularly those with nascent legal systems. We argue the reason for the ODI regime's change from lenient to strict is that, unlike the case of FDI, there was no external-facing process, such as the WTO accession, which reformed domestic priorities in line with international ones, specifically to balance home and host state interests in the course of cross-border capital outflows.

Many of the regulators for ODI are the same for FDI. Specifically, the administrative management of ODI is led mainly by the NDRC and MOFCOM. These entities often issue joint rules, including departmental regulations and other normative documents. However, additional departments may also participate in the drafting and issuance of these rules, including the Foreign Exchange Administration, People's Bank of China, State-Owned Assets Supervision and Administration Commission (SASAC), Ministry of Finance, and Ministry of Foreign Affairs. One result of this pattern of multiple departments and administrators shaping the regulatory environment is inconsistency in rule design and enforcement as well as asymmetrical powers between departments. Likewise, given that each department issues rules within its purview (and sometimes jointly), there is no unified law regulating ODI. Moreover, policies that follow from scattered regulations and multiple and overlapping authorities lack clarity, stability, and rigor. In short, there was no WTO-centralizing force which could realign the authorities and coordinate their normative effects.

The current regulatory system for ODI can be divided into two historical phases. Phase one (1999–2015) was the formative period of China's "going out" (*zouchuqu*) strategy and phase two (2015–present) features the "Belt and Road Initiative" (BRI). The phases show, at a general level, a shift from a more permissive and decentralized regime that encouraged ODI to one that is characterized by a more restrictive "encouragement catalogue and negative list" (*guli mulu fumian qingdan*).

(i) Phase One (1999–2015): The Formative Period of China's "Going Out" Strategy

After the Asian financial crisis of 1997, the Chinese government implemented a strategy to expand exports. The "going out" strategy entered

the national development plan in the Tenth Five-Year Plan for National Economic and Social Development, issued in 2000.[26] Six years later, the State Council adopted the Opinions on Encouraging and Regulating Foreign Investment and Cooperation among Chinese Enterprises.[27] During this period, the government promoted dual-direction development, namely, that of "going out" and also "attracting in [FDI]" ([张建平] and [刘恒], 2019).

The regulatory framework for ODI during this period was formulated chiefly by the NDRC and MOFCOM, reflecting their status as the leading twin ministries. The overall trend of the regulation was a process of gradual simplification for the administrative procedure for ODI. The NDRC's regulations for ODI underwent two important changes. The first change occurred in 2004, under the Interim Measures for the Administration of Approval of Overseas Investment Projects, which reflected a shift from an audit to an approval (filing) system for Chinese enterprises engaged in ODI.[28] Subsequent normative documents further refined this system, including distinguishing those enterprises that rely on government funding as well as identifying approval systems for "special" or "sensitive" projects.[29] The second change occurred in 2014 when the NDRC established a "filing-based and approval-based" project management system, replacing the earlier 2004 decree. This regulation further specified two categories of "sensitive" projects, based on investment destination and industry, which required approval by the NDRC regardless of the investment amount.[30] The NDRC's regulatory changes in 2004 and 2014 are roughly mirrored by those of MOFCOM which

[26] 关于制定国民经济和社会发展第十个五年计划的建议 [The Formulation of Proposals for the Tenth Five-Year Plan for the National Economy and Social Development], issued by the Central Committee of the CCP on Oct. 11, 2000, https://perma.cc/Z8GD-DEMX.

[27] 关于鼓励和规范我国企业对外投资合作的意见 [Opinions on Encouraging and Regulating Foreign Investment and Cooperation among Chinese Enterprises], issued by the State Council on Oct. 25, 2006, https://perma.cc/Z7FS-PBNH.

[28] 境外投资项目核准暂行管理办法 (21 号令) [Interim Measures for the Administration of Approval of Overseas Investment Projects (Decree No. 21)], issued by the NDRC on Oct. 9, 2004, www.ndrc.gov.cn/xxgk/zcfb/fzggwl/200510/t20051010_960640.html?code=&state=123.

[29] 关于做好境外投资项目下放核准权限工作的通知 [Notice on Optimizing Decentralization of the Approval Authority in Overseas Investment Projects], issued by the NDRC on Feb. 14, 2011 (hereinafter, "Notice on Optimizing Decentralization"), https://perma.cc/QYU3-99RR.

[30] 境外投资项目核准和备案管理办法 (9 号令) [Administrative Measures for the Approval and Filing of Overseas Investment Projects) (Decree No. 9)], issued by the NDRC on Apr. 8, 2014 (hereinafter, "Decree No. 9"), https://perma.cc/T73A-4YXW.

also decentralized the approval authority and simplified the approval process for ODI.[31] In short, this early phase is characterized by a generally lenient approach to approval for ODI projects.

(ii) Phase Two (2015-Present): The BRI

In March 2015, three Chinese government ministries jointly issued the "Vision and Actions on Jointly Building Silk Road Economic Belt and the Twenty-First Century Maritime Silk Road" (hereinafter, "Vision and Actions"), inaugurating the BRI.[32] Since then, China's ODI administration and sectoral legislation have been closely tied to the BRI. The promotion of the BRI led to a peak in Chinese ODI and equity investment in 2016, an increase of 44 per cent from the year before (Bank, 2021). However, massive Chinese ODI in real estate, luxury hotels, sports and entertainment, and related industries not only failed to drive domestic economic development but also led to capital outflows not tied to state-led strategies, ultimately triggering the Chinese government's concerns about financial security and the safety of state-owned assets.

Subsequent normative documents built upon the Vision and Actions which is mainly an agenda-framing document. Specifically, guidance from the ministries adjusted the "filing and approval" regulatory approach to one based on "encouraging development" alongside a negative list.[33] In particular, ODI was divided into the following categories: encouraged, restricted, and prohibited. NDRC decrees for their part defined eight categories of ODI, abolished the previous reporting system, and narrowed the scope of projects that can be approved.[34] These decrees also introduced a post-event reporting system that specifies that a report must be submitted within five days of a material adverse circumstance in

[31] *See e.g.*, 境外投资管理办法(令第五号) [Measures for the Administration of Overseas Investment) (Decree No. 5)], issued by MOFCOM on March 16, 2009, https://perma.cc/733Z-ZJ9M.

[32] Vision and Actions on Jointly Building Silk Road Economic Belt and the Twenty-First Century Maritime Silk Road, issued by the NDRC, Ministry of Foreign Affairs, and MOFCOM in March 2015, https://perma.cc/Q37M-RYZN.

[33] 关于进一步引导和规范境外投资方向指导意见的通知 (国办发(2017)74 号) [Notice of Guiding Opinions Regarding Further Guidance and Regulation of the Direction of Overseas Investment (State Council issued (2017) No. 74), issued by the General Office of the State Council, MOFCOM, NDRC, and Ministry of Foreign Affairs on Aug. 4, 2017, https://perma.cc/C8EW-RVPW.

[34] *See above* Overseas Investment Measures note 1.

an investment project (e.g., significant causalities among expatriates, significant loss of assets abroad, or damage to the diplomatic relations with the host state).[35] The NDRC further formulated the Catalogue of Sensitive Sectors for Overseas Investment in 2018 which requires approval.[36] The NDRC has, during this phase, consolidated its authority over ODI, and requires that overseas investment by domestic entities, whether financial or non-financial, direct or indirect, be uniformly included in the scope of filing and approval by the NDRC.

MOFCOM also assumed greater authority over ODI under the new direction of this second phase. MOFCOM, together with other ministries, jointly issued new measures for the filing and approval of ODI projects.[37] These measures standardized the management of ODI by requiring a summary report of approval, supervision during and after the project, and a model for ODI that was characterized by "encouraging development plus negative list."[38] The summary report of approval must include *inter alia* information pertaining to any outbound investment and merger and acquisition, the progress of ODI projects, any problems encountered including compliance issues with local law and regulations, the protection of the environment, and the protection of employees' rights.[39] Additionally, any adverse event or security incident (including security accidents, terrorist attacks, and kidnappings, social security mass incidents, major negative public opinion reports, etc.) must be reported to the relevant competent department which then informs MOFCOM.[40]

Is it significant that the NDRC was not an issuing department for the measures led by MOFCOM? While the regulatory regime for FDI also demonstrates elements of inter-agency competition, the discoordination is greater in the ODI regime. The reason for this is not just the comparatively short period of evolution for the ODI regime but also that there

[35] Id.
[36] 境外投资铭感行业目录 [Catalogue of Sensitive Sectors for Overseas Investment], issued by the NDRC in Jan. 2018, https://perma.cc/V7US-6KST.
[37] 对外投资备案（核准）报告暂行办法（商合发 [2018] 24 号）[Interim Measures for Foreign Investment Filing (Approval) Reports (issued by MOFCOM and cooperating ministries [2018] no. 24)], issued by MOFCOM, PBC, SASAC, China Banking Regulatory Commission (CRBC), China Securities Regulatory Commission (CSRC), China Insurance Regulatory Commission (CIRC), and Foreign Exchange Bureau (FEB), on Jan. 25, 2018, https://perma.cc/3ZNP-FNE2.
[38] Id.
[39] Id.
[40] Id.

was no external pressure put on the various departments and ministries to achieve greater coordination as was the case with the WTO accession. In the next section, we examine the extent to which the two regimes have integrated concerns about environmental impact.

V A Focus on Environmental Impact

China's regulation of the environmental impact of FDI is much more developed than its environmental regulation of ODI, and while this difference can be explained, in part, by the long history of FDI in China, we argue that because regulation of the environmental impact of FDI grew out of a policy environment wherein China was integrating its national development plan into the global economy through multilateralism, this framework has led to a more robust result than regulation of the environmental impact of ODI. In this section, we briefly review the regulation of the environmental impact of FDI and then the regulation of the environmental impact of ODI to contrast the two regimes. We find that whereas the former suffers from a number of shortcomings, it nonetheless has gained some degree of traction in shaping foreign-invested enterprises conducting business in China. In contrast, the regime for ODI features far more severe "bugs," including a fundamental structural flaw: the limited jurisdiction of the Ministry of Ecology and Environment (MEE).

(i) Regulation of the Environmental Impact of FDI

Whereas the regulation of the environmental impact of FDI has had a long gestation period, China's trade obligations have further incentivized environmental considerations in the course of planning foreign-invested projects. In the early period of the "opening and reform," regulations often did not explicitly state whether they applied to FDI as the operative concept at the time was territoriality, that is, as long as a project was undertaken within the PRC – regardless of the source of the capital (domestic or foreign) – then the environmental rules applied.[41] The 1995 Catalogue for Guidance of Foreign Investment Industries further provided more detailed provisions for defining pollution-intensive industries and categories them accordingly (Zeng and Eastin, 2011, 58).

[41] *See e.g.*, 建设项目环境保护管理条例 [Regulations on the Environmental Protection Management of Construction Projects], issued by the State Council on Nov. 29, 1998, art. 2, https://perma.cc/QLX4-CBLA.

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Consistent with phase three identified above (2000–2008), during the accession period, China adopted a number of laws including the Environmental Impact Assessment Law (hereinafter, "EIA Law"), passed in 2002, which further regulated FDI.[42] The EIA Law was notable, in particular, for encouraging the public to participate in EIA.[43] Scholars have criticized the EIA Law for poor implementation, however, and have noted the disconnection between the EIA Law and China's trade regime (Zhao, 2007, 80). In fact, progress made in China's domestic environmental governance since the EIA Law was passed has been chiefly due to domestic reasons, namely, the severity of industrial pollution, the growth of political will and pressure from political leadership, and the emergence of China's environmental movement (Economy, 2004, 62–75; Mertha, 2008, 6–12; Stern, 2013, 25–27).

While reforms, especially those across legal domains such as environmental protection and trade, do not unfold in a unilinear manner, in recent years, the EIA system has become much more stringent through streamlined administration, delegation of powers, and improved service (Yang, 2020, 890–891). The reform of the EIA occurred hand-in-hand with the establishment of the MEE, which replaced the Ministry of Environmental Protection, in 2018. The MEE differs from its predecessors in that it consolidates powers that were previously scattered throughout a number of different regulatory bodies (Yang, 2020, 890). The consolidation of authority under the MEE has been part of an increasing effort to refine the regulation of the environmental impact of investment (Karplus et al., 2021, 315–316), and, yet, as we argue below, there is still room for improvement.

(ii) Regulation of the Environmental Impact of ODI

China's ODI regime is designed with the objectives of serving the BRI and safeguarding the safety of state-owned assets and their financial security. The environmental and social impact of offshore projects has not been a core concern of the Chinese government. As such, there is no legislation with enforcement effect to screen the environmental and social impact of overseas investment projects. Institutionally, the MEE, the main

[42] 中华人民共和国环境影响评价法 [PRC Environmental Impact Assessment Law], promulgated by the NPC on Oct. 28, 2002, and as amended Dec. 29, 2018, https://perma.cc/BG7Q-GPRC.

[43] Id., art. 5.

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administrative agency in charge of environmental affairs in China, also does not have the mandate to regulate overseas projects.

There is no doubt that, rhetorically, there is a degree of BRI greenwashing. The Vision and Actions, for example, state the need to "highlight the concept of ecological civilization in investment and trade, strengthen cooperation on ecological environment, biodiversity, and climate change, and build a green Silk Road."[44] Accordingly, the MEE, either alone or jointly with other ministries, has issued a number of policies related to the environmental protection of overseas investments. However, common features of these policies are they are voluntary, not legally binding, and as such, lack enforceability (Boer, 2019; Coenen et al., 2020). Examples of these normative documents include the following: the CBRC's Green Credit Guidelines of 2012,[45] the Environmental Protection Guidelines for Foreign Investment and Cooperation of 2013,[46] the Guiding Opinions on Promoting the Construction of the Green "BRI" of 2017,[47] the "BRI" Ecological and Environmental Protection Plan of 2017,[48] the Guidelines for Green Development of Foreign Investment Cooperation of 2021,[49] and the Ecological and Environmental Protection Guidelines for Overseas Investment Cooperation Construction Projects of 2022.[50]

In summary, while these guidelines and codes of conduct signal an awareness for including environmental impact in ODI planning, they mostly fall short in affecting corporate governance. It should be noted

[44] *See above* note 32.

[45] 关于印发绿色信贷指导的通知 (CBRC (2012) 4 号) (Notice on the Issuance of Green Credit Guidelines (CRBC (2012) No. 4)), issued by the CBRC on Jan. 29, 2012, https://perma.cc/8JBH-HXXE.

[46] 对外投资合作环境保护指南 (商合发 [2013] 74 号) [Environmental Protection Guidelines for Foreign Investment and Cooperation (MOFCOM and cooperating ministries issued [2013] No. 74)], jointly issued by MOFCOM and MEE on Feb. 18, 2013, https://perma.cc/7NST-6VYY.

[47] 关于推进绿色"一带一路"建设的指导意见 [Guiding Opinions on Promoting the Construction of the Green "BRI"], jointly issued by MEE, Ministry of Foreign Affairs, NDRC, MOFCOM on May 8, 2017, https://perma.cc/XW88-BU2V.

[48] "一带一路" 生态环境保护合作规划 [The "BRI" Ecological and Environmental Protection Plan], jointly issued by MEE on May 15, 2017, https://perma.cc/DEY3-52JF.

[49] 对外投资合作绿色发展工作指引 [Guidelines for Green Development of Foreign Investment Cooperation], jointly issued by MOFCOM and MEE on July 16, 2021, https://perma.cc/T8ZW-GEK2.

[50] 对外投资合作建设项目生态环境保护指南 [the Ecological and Environmental Protection Guidelines for Overseas Investment Cooperation Construction Projects], jointly issued by the MEE and MOFCOM on Jan. 5, 2022, https://perma.cc/9UY7-H59Q.

that not only Chinese ministries but also private organizations including chambers of commerce have also issued such soft law sources. For example, the China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters has developed industry guidelines related to environmental protection for ODI in the mining industry.[51] The "Green Investment Principles [for the BRI]" which was jointly issued by the Green Finance Committee and the City of London Corporations' Green Finance Initiative in 2018.[52] Whereas some 37 financial institutions have signed on as of 2020, it is wholly voluntary. Strikingly, the Supreme People's Court (SPC) has cited the Green Investment Principles in its own opinions, reflecting that the SPC has no national legislation to cite or enforce and instead must cite industry guidelines.[53]

In contrast, among the legally binding regulations on overseas investment, there are few provisions for environmental and social impact assessment requirements. One exception is transboundary water resource development and use projects which are classified as sensitive by both the NDRC and MOFCOM, requiring approval rather than filing.[54] It is likely that the reason why transboundary water resource projects are listed as sensitive is the Myitsone Dam project in Myanmar. The Myitsone project, the world's fifteenth largest hydropower plant, in which the China Power Investment Group began investing in 2006, was halted by the Myanmar government in 2011 due to opposition from the local population (Bian, 2018, 236–237). However, neither the NDRC nor MOFCOM requires environmental impact assessments for sensitive projects. Transboundary water resource projects are required to be registered for the purpose of protecting the security of Chinese overseas investment and risk mitigation, rather than on the basis of environmental impact considerations.

Lastly and related, in terms of both legislation and enforcing institutions, Chinese authorities are limited to governing environmental issues only within the PRC and not in the course of overseas projects. Both the

[51] 中国对外矿业投资社会责任指引 [China's Social Responsibility Guidelines for Foreign Mining Investments], issued by the China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters in 2017, https://perma.cc/AS9E-A9VZ.

[52] Green Investment Principles, https://perma.cc/9Z8X-JVC4.

[53] 关于人民法院进一步为"一带一路"建设提供司法服务和保障的意见 (法发 (2019) 29 号) [Opinion on Providing Judicial Services and Guarantees for the BRI (SPC issued (2019) No. 29)], issued by the SPC on Dec. 27, 2019, art. 11, https://perma.cc/RBE3-N7XC.

[54] *See e.g.*, Notice on Optimizing Decentralization *above* note 29.

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Environmental Protection Law and the EIA Law apply to matters only within the PRC.[55] Likewise, whereas both the NDRC and MOFCOM have responsibilities for regulating overseas investment projects,[56] the MEE has no such responsibility and thus no authority to regulate environmental concerns in projects abroad. Thus, there are hard limits placed on both the reach of regulators and the legislative basis upon which regulators, namely, the MEE, could govern the environmental impact of ODI. The overall picture is that China is an outlier in a growing trend of states' regulation of their overseas investments in terms of their impacts on host states' environments and social governance, including human rights.[57]

VI Implications

Comparing the reform trajectories of the FDI and ODI regimes has a number of implications for the study of Chinese domestic legal reform, its outward-facing legal obligations, and the role of regulators in coordinating the foregoing. Scholars have shown how the WTO accession process required Chinese regulators, policy makers, and academics to harmonize the WTO obligations with China's national development plans (Gao, 2021; Shaffer, 2021). One result is a degree of coordination between ministries, departments, and administrative units that otherwise may not exist. The ODI regime presents in many ways the counterfactual: there was no similar multilateral framework through which the Chinese regulators learned to balance the needs of China's national development with its obligations to host states. The result is discoordination and inefficiency that affects Chinese investors and host state alike.

This discoordination has specifically affected projects under the mantle of the BRI. As Min Ye (2020) has shown, the BRI was itself, in part, a response to state fragmentation. When Xi Jinping announced the BRI

[55] 中华人民共和国环境保护法 [Environmental Protection Law of the PRC], promulgated by the NPC on Apr. 24, 2014 and effective Jan. 1, 2015; art. 3, https://perma.cc/7JS4-Q3N7; EIA Law *above* note 42, art 3.

[56] 国务院机构改革方案 [State Council Institutional Reform Plan], issued by the Two Sessions of the NPC and CPPCC on March 17, 2018, https://perma.cc/QH72-N9H2.

[57] *See e.g.,* the US Magnitsky Act (2012), the UK Modern Slavery Act (2015), the French Corporate Duty of Vigilance Law (2017), the German Supply Chain Due Diligence Act (effective 2023), the UK Due Diligence Bill proposal, Canada's proposed Corporate Respect for Human Rights and the Environment, and other European supply chain and due diligence laws.

in 2013, it was a "whole-of-government and whole-of-society" call to implement projects that would support the BRI. Yet nearly a decade into the BRI, it is clear that inter-agency coordination has not been attained through internal efforts alone (Hale et al., 2020). To date, there has been no external framework through which BRI-related investment can undergo the type of institutional learning curve which Chinese regulators experienced through the WTO accession. Famously, proposals to conclude a multilateral investment treaty within the Organization for Economic Cooperation and Development (OECD) failed in 1998 due to civil society groups' opposition (Joseph, 2013, 843).[58] China's investment strategy remains reliant on piecemeal bilateral investment treaties, many of which are dated (Chaisse and Kirkwood, 2020). Inter- and intra-sectoral learning among enterprises remains nascent, compliance with local law remains a perennial problem, and, as a result, disputes arise that are addressed through international commercial arbitration, political intervention, or, increasingly, host state courts (Erie, 2021).

Perhaps ironically given the history of the failed OECD multilateral investment treaty, it is, in many cases, civil society groups in host states that are the source of Chinese enterprises' learning about local law, including the environmental and social impact of investment through protest and litigation (see e.g., Reporters, 2017; Zhongguo lüfahui [China Greenification Society], 2019). Certainly, much of the responsibility for protecting the environment of host states falls on local regulators, and not Chinese ones, given that most Chinese investors incorporate companies under local law. Yet for the BRI-like projects to truly promote sustainable development, Chinese regulators, and, specifically, the MEE, can also provide greater guidance for outbound investment, but only if an enforceable ODI law granted them such authority. Indeed, the Fourteenth Five-Year Plan (2021–2025) states the government will "promote ODI legislation."[59] Although it lacks details, it is hoped that the legislation would regulate highly polluted and carbon-intensive ODI projects and grant the MEE authority to screen the environmental,

[58] There are, of course, other examples, such as the Final Act of the UN Conference on Trade and Employment, the Havana Charter for an International Trade Organization, November 21, 1947 E/CONF/278; the failed 1948 effort of the International Chamber of Commerce, and others (Miles, 2013, 82).

[59] 中华人民共和国国民经济和社会发展第十四个五年规划和2035年远景目标纲要 [The Fourteenth Five-Year Plan for National Economic and Social Responsibility of the PRC and the Outline of Long-Term Goals for 2035], issued by the Two Sessions of the NPC and CPPCC on March 13, 2021, https://perma.cc/M4PT-XYEY.

climate, and social impact of ODI projects in order to assure China's climate pledge of carbon neutrality by 2060. While we applaud the inclusion of this ODI law in the future plan, along with communities in host states, we look forward to its practical implementation.

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