

Compilation and Analysis of Laws, Regulations and Policies on Overseas Investment by Chinese Enterprises

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Contents

Preamble	3
Chapter One General Norms for Chinese Enterprises’ Overseas Investment (an Overview)	7
1.1 Measures for the Administration of Overseas Investment by Enterprises - approval/filing of overseas investment projects	8
1.1.1 Classification of overseas investment projects	9
1.1.2 Scope of approval/filing of overseas investment projects	10
1.1.3 Process of approval/filing of overseas investment projects	10
1.2 Measures for Overseas Investment Management - approval/filing of establishment of overseas investment enterprises	11
1.2.1 Criteria for division between filing and approval	12
1.2.2 Process of filing and approval.....	13
1.3 Management measures jointly issued by multiple departments	15
1.3.1 Interim Measures for Outbound Investment Filing (Approval) Report and Implementation Rules for Outbound Investment Filing (Approval) Report.....	15
1.3.2 Detailed Rules of Regulation Featuring Random Inspection and Public Release for Overseas Investment and Cooperation (Trial)	17
1.4 Provisions on foreign exchange administration.....	18
1.4.1 Registration procedures for foreign exchange administration	18
1.4.2 Other provisions on foreign exchange	18
1.5 Provisions on taxes and investment security	19
Chapter Two Special Regulations on Management of State Owned and Private Enterprises...20	
2.1 Regulations on management of State Owned enterprises	20
2.1.1 Measures for the Supervision and Administration of Overseas Investments by Central Enterprises.....	20
2.1.2 Measures for the Financial Management of the Overseas Investments by State-owned Enterprises(CZ [2017] No. 24)	21
2.2 Regulations on management of private enterprises	21
2.3 Special regulations on management of financial industry	22
Chapter Three Guiding Opinions, Guidelines, Guides and Other Normative Documents.....23	
3.1 Guiding Opinions on Further Guiding and Regulating the Direction of Overseas Investment (2017, NDRC, Ministry of Commerce, People’s Bank of China and Ministry of Foreign Affairs) (GBF [2017] No. 74)	23
3.2 The Guiding Opinions of 28 Departments including NDRC and Ministry of Commerce on Strengthening the Construction of Credit System in Overseas Economic Cooperation (January 2018) and the Memorandum of Cooperation on Joint Punishment of Serious Dishonest Entities in the Foreign Economic Cooperation Field.....	25
3.3 The Guide for Environmental Protection in Overseas Investment and Cooperation (Ministry of Commerce and Ministry of Environmental Protection, 2013) and the Interpretation of the Guide for Environmental Protection in Overseas Investment and Cooperation by the Department of Foreign Investment and Economic Cooperation of the Ministry of Commerce	26
3.4 Country-specific Industry Guidelines on Outbound Investment 2011 (Ministry of Commerce, NDRC and Ministry of Foreign Affairs)	27
3.5 Guiding Opinions on Promoting the Construction of Green Belt and Road (HGJ [2017] No.	

58) and Cooperation Plan for Ecological and Environmental Protection along Belt and Road.....	27
3.6 Opinions on Development of a Culture by Chinese Enterprises Oversea (Ministry of Commerce, Public Relations Office of the CPC Central Committee, Ministry of Foreign Affairs, NDRC, SASAC, National Bureau of Corruption Prevention, National Association of Industry and Commerce, etc., 2012).....	28
3.7 A Guide on Sustainable Overseas Forest Management and Utilization by Chinese Enterprises (LJF [2009] No.76).....	28
3.8 Guiding provisions formulated by industry associations such as Chinese Guidelines for Social Responsibilities in Outbound Mining Investment Industry and Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains ²⁹	
Chapter Four Status of Dispute Settlement in Chinese Enterprises' Overseas Investment	29
4.1 A major decision:Opinion Concerning the Establishment of the Belt And Road International Commercial Dispute Resolution Mechanism and Institutions	30
4.2 Establishment of the international commercial dispute settlement mechanism	31
4.2.1 China International Commercial Court(CICC) of the Supreme People's Court	31
4.2.2 "One-stop" diversified international commercial dispute resolution mechanism	33
Chapter Five Case Analysis: the Case of Guinea Bauxite Mines.....	34
5.1 Background.....	34
5.2 Environmental impact.....	36
5.3 Application of law	37
5.3.1 Laws of Guinea	37
5.3.2 Laws and regulations related to Chinese enterprises' overseas investment.....	39
Chapter Six Chinese Enterprises' Overseas Investment from the Perspective of International Environmental Law	41
Appendix Names and Document Numbers of Laws and Regulations Related to Chinese Enterprises' Overseas Investment.....	43

Preamble

The Belt and Road Initiative of Chinese government and the international cooperation in production capacity is driving growth of outbound direct investment from China, which involves more and more countries and organizations. And the industries involved are expanding from mainly infrastructure construction to various sectors, including more and more private enterprises, in addition to state-owned enterprises and central government-owned enterprises. According to the World Investment Report 2019 of United Nations Conference on Trade and Development (UNCTAD), against the background of continuous drop in foreign direct investment globally for several years, China remains the world's second country in outbound investment, thanks to its strong performance in international investment. A study on the restrictive guidelines formulated by the Chinese government on the enterprises' overseas investment is essential in this context, and this report aims also to serve as an effective reference for various stakeholders in the host countries.

“Overseas investment of Chinese enterprises” means Chinese enterprises' investment in other countries, other than foreign investment in China. For example, the Foreign Investment Law put into effect in 2020 and the matching rules on its implementation (substituting the former laws on enterprises with foreign investment), which govern foreign enterprises' investment in China, is out of the scope of this report.

Laws, regulations and other normative documents in China can be classified as follows based on their levels of effect: (1) laws; (2) administrative regulations; (3) administrative rules, including departmental rules and rules of local governments; (4) local regulations; and (5) other normative documents. The aforesaid 5 classes signify different levels of effect based on their source of laws and the organs which enact them.

While there has been a long-term lack of laws with high level of effect, with no laws adopted by National People's Congress (NPC) or its Standing Committee on overseas investment of Chinese enterprises, Chinese government and its agencies have issued a variety of normative documents that constitute a set of regulatory system. The main regulatory procedures for overseas direct investment of Chinese enterprises consist currently of filing, approval and registration procedures with the departments of commerce, development and reform, and foreign exchange administration. Among them, where the investor is a financial enterprise, the reply or no-action letter should be obtained from the competent authority of the industry; in case the investor is a state-owned enterprises, approval from the state assets supervision department is needed.

The Measures for the Administration of Overseas Investment by Enterprises (issued by National Development and Reform Commission in 2017), the Measures for Overseas Investment Management (issued by Ministry of Commerce in 2014) and provisions on foreign exchange management formulated by the foreign exchange administrations form 3 lines of regulation on overseas investment by Chinese enterprises, featuring joint regulation by the departments of development and reform, commerce, and foreign exchange administration. According to the departmental rules formulated by the above 3 departments, the overseas direct investment by enterprises in China should go through the following procedures: (1) application for approval for the project from or filing with the department of development and reform; (2) application for approval for establishment of the overseas investment enterprise from or filing with the department

of commerce, and obtaining of the Overseas Investment Certificate; and (3) foreign exchange registration with the foreign exchange administration. Specifically:

(1) The outbound investors should go through the approval or filing procedures for their overseas investment projects with the department of development and reform, report relevant information, and cooperate in the supervision and inspection of the competent department. Projects involving sensitive countries, regions and industries are subject to approval, while other projects should be filed with the competent department. Sensitive countries and regions include countries and regions that have not established diplomatic relations with China, countries and regions that are in war or civil strife, and countries and regions where enterprise investment is restricted to the international treaties to which China is a party. Sensitive industries involve development, production and maintenance of weapons and military equipment; development and utilization of cross-border water resources; and the news media industry, etc. In addition, investment in some industries where enterprise overseas investment is restricted by China is also subject to approval, which include real estate, hotels, cinemas, entertainment, sports clubs, and establishment of equity investment funds or investment platforms abroad without physical industrial projects. Please refer to the Catalogue of Sensitive Industries for Outbound Investment (2018) issued by the National Development and Reform Commission in January 2018 for the specific list of sensitive industries.

(2) The outbound investors should carry out the approval or filing procedures for their establishment of overseas enterprises with the department of commerce or the competent financial regulator. The non-financial companies should be approved by or filed with the department of commerce according to the current effective Measures for Overseas Investment Management, who should issue the Enterprise Overseas Investment Certificate to the enterprises that have been approved or filed, while the financial institutions should obtain approval for their overseas investment from or have the investment filed with the competent financial regulators (China Securities Regulatory Commission and China Banking and Insurance Regulatory Commission) respectively in accordance with relevant provisions. It should be noted that the overseas investment of central government-owned enterprises shall be supervised and regulated by the State-owned Assets Supervision and Administration Commission (SASAC) in accordance with the Supervision and Management Measures on Outbound Investment of Central Government-Owned Enterprises (SASAC Order No. 35), which will be elaborated in Chapter II of this report.

(3) Foreign exchange should be registered according to the requirements of the foreign exchange administration. The Circular on Further Simplifying and Improving Policies for Foreign Exchange Administration for Direct Investment issued by the State Administration of Foreign Exchange in 2015 exempted the domestic enterprises from foreign exchange registration and approval of their overseas direct investment, and modified the procedure into a mode of “Handling by Bank and Supervision by Foreign Exchange Administration”. That is, the foreign exchange registration under overseas direct investment should be directly reviewed and approved by the bank, which should be regulated indirectly by the foreign exchange administration via the bank.

Besides, the National Development and Reform Commission, Ministry of Commerce, People’s Bank of China, Ministry of Foreign Affairs and other ministries have also introduced a series of normative documents such as Guiding Opinions, Guidelines and Guides, which, together with the above departmental rules, constitute a system of regulatory policies and rules for Chinese enterprises’

“going global”. Some of these normative documents are mandatory. For instance, the Guidelines on Further Guiding and Standardizing the Direction of Overseas Investment (GBF [2017] No. 74) provides lists of encouraged, restricted and prohibited overseas investment activities, which raises the threshold for outbound investment by Chinese enterprises and demand their more rational and prudent attitude in “going global”. Overseas investment is prohibited in such industries as “export of core technologies and products of military industry without state approval”, “use of technologies, processes and products prohibited by the state”, and “gambling and pornography”. Overseas investment in “real estate, hotels, movie theatres, entertainment industry, sports clubs” and “overseas investment that does not meet the environmental protection, energy consumption and safety standards of the host countries” is restricted. Overseas investment to the benefit of construction of the Belt and Road and interconnectivity of the relevant infrastructure should be promoted. Overseas investment that drives the export of superior production capacity, high-quality equipment and technical standards should be encouraged. Safe participation in exploration and development of overseas oil, gases, minerals and other energy resources should be encouraged, and international cooperation in agriculture be expanded.

In addition, several ministries and commissions of the State Council have introduced measures to strengthen construction of the credit record system in overseas investment by enterprises, aiming to establish a joint punishment mechanism for dishonesty. Normative documents such as the Guiding Opinions of 28 Departments including NDRC and Ministry of Commerce on Strengthening the Construction of Credit System in Overseas Economic Cooperation and the Memorandum of Cooperation on Joint Punishment of Serious Dishonest Participants in Overseas Economic Cooperation call for speeding up construction of credit records in overseas economic cooperation, promoting shared use of credit data and establishment of a joint punishment mechanism for dishonesty. Rules for collection and sharing of credit information should be established and improved, so as to strictly protect the privacy and information security of organizations and individuals, and promote the disclosure and application of credit information in accordance with laws and regulations. Development of credit products and use of credit information and credit products should be encouraged, and joint punishment for dishonesty be promoted, so as to benefit the honest participants, restrict the dishonest participants and strengthen the punishment for negative behaviors. Aggregation, processing, publicity and application of credit information should be realized gradually based on the National Credit Information Sharing Platform and the National Enterprise Credit Information Publicity System. There is a special web page of “bad credit records” at the Ministry of Commerce’s “Public Service Platform for Going Global” which publicizes the bad credit records of the enterprises or individuals engaging in outbound investment (but the website is not updated in time and there is little information available at present).

In terms of the environmental protection in Chinese enterprises’ overseas investment, the Ministry of Commerce, together with the former Ministry of Environmental Protection (now the Ministry of Ecology and Environment), formulated the Guide for Environmental Protection in Overseas Investment and Cooperation in 2013. However, the document is not mandatory, providing only guidance for the environmental performance in Chinese enterprises’ overseas investment. The Outline of the 12th Five Year Plan for National Economic and Social Development provides that enterprises “going global” and their overseas cooperation projects should fulfill their social responsibilities and benefit the local people. The Guide for Environmental Protection in Overseas

Investment and Cooperation aims mainly to promote environmental protection concepts among enterprises, so that they can fulfill their responsibilities of environmental protection according to law, abide by the environmental protection laws and regulations of the host countries, and meet their legal obligations in environmental protection such as environmental impact assessment, emission in line with standards, environmental emergency management, etc. Article II of the Guide stipulates that “This Guide shall apply to the environmental protection in Chinese enterprises’ overseas investment and cooperation, and should be complied with by the relevant enterprises.”

The Guide requires the relevant enterprises to establish the environmental management system and carry out measures of pollution prevention, including establishment of the internal environmental management system, environmental protection training for the staff, environmental impact assessment, biodiversity, social impact assessment, emission in line with standards, environmental monitoring requirements, environmental due diligence, hazardous waste management, prevention of and emergency response to environmental accidents, ecology restoration, clean production, green purchasing, etc.

This report consists of 6 chapters. Chapter One provides an overview of the regulatory system for Chinese enterprises’ overseas investment, presents and analyzes the general norms for the enterprises’ overseas investment, and elaborates the basic process of Chinese enterprises’ overseas investment. Chapter Two presents and analyzes the special regulations for private enterprises and state-owned enterprises, and outlines the provisions on outbound investment of the financial industry. Chapter Three outlines and analyzes other normative documents, including the regulations on overseas investment of Chinese enterprises issued by different departments of the State Council in forms of “Guiding Opinions”, “Guidelines” and “Guides”. This report analyzes these provisions and clarifies the different articles on “compulsory”, “encouraged” or other behaviors in these documents. Chapter Four addresses the dispute settlement in Chinese enterprises’ overseas investment, and summarizes the status and latest development in the judicial system. Chapter Five, a case study, analyzes the application of Chinese laws and regulations on overseas investment and environmental laws and regulations of the Republic of Guinea in the case of Sangarédi bauxite mines. Chapter Six introduces some principles of the regulation of the enterprises’ overseas investment from the perspective of international environmental laws, and briefly analyzes the application of Chinese laws in overseas investment.

Chapter One General Norms for Chinese Enterprises' Overseas

Investment (an Overview)

Within the framework of China's current legal system, there are three lines of regulation on Chinese enterprises' overseas investment: the department of development and reform, the department of commerce (or competent financial supervision department) and the foreign exchange administration. At present, there are no laws in this field enacted by the National People's Congress or its Standing Committee. The legal norms of the highest level are mainly the departmental rules formulated by the Ministry of Commerce and the National Development and Reform Commission (hereinafter the "NDRC").

These departmental rules are normative documents with certain legal effect formulated by various ministries and commissions of the State Council. According to the Constitution of China, "the ministries and commissions of the State Council shall, in accordance with the laws and the administrative regulations, decisions and orders of the State Council, issue orders, instructions and rules within their scope of authority." The departmental rules, formulated by the ministries and commissions of the State Council based on their administrative functions, are norms of conduct for administrative or technical management of the respective departments or industries. The Ministry of Commerce is an organ of the State Council in charge of domestic and foreign trade as well as international economic cooperation. A major part of the responsibilities of the Ministry of Commerce is international economic cooperation and relevant policies, including the formulation of administration measures and specific policies for overseas investment, and the approval of Chinese enterprises' outbound investment according to law. The responsibilities of the Ministry of Commerce of the People's Republic of China include... "to draft the laws and regulations governing ... overseas investment and foreign economic cooperation, devise relevant departmental rules and regulations..." (Source: official website of the Ministry of Commerce). NDRC, the department leading the implementation of the Belt and Road construction, undertakes the overall planning and coordination of related work of "going global", and mainly provides macro guidance and supervision for enterprises' overseas investment. Therefore, it has also formulated a series of relevant departmental rules.

According to the departmental rules such as the Measures for the Administration of Overseas Investment by Enterprises and Measures for Overseas Investment Management, the overseas direct investment by enterprises in China should go through the following procedures: (1) application for approval for the project from or filing with the department of development and reform; (2) application for approval for establishment of the overseas investment enterprise from or filing with the department of commerce, and obtaining of the Overseas Investment Certificate; and (3) foreign exchange registration with the foreign exchange administration. Specifically:

(1) **Approval or filing procedures for their overseas investment projects** with the department of development and reform, reporting relevant information, and cooperating in the supervision and inspection of the competent department. The main legal basis in this regard is the Measures for the Administration of Overseas Investment by Enterprises, which regulates the behavior of financial

and non-financial enterprises, public institutions, social organizations and other non-business organizations in China.

(2) **Approval/filing procedures for their establishment of overseas enterprises** with the department of commerce or the competent financial regulator. The non-financial companies should be approved by or filed with the department of commerce according to the current effective Measures for Overseas Investment Management, who should issue the Enterprise Overseas Investment Certificate to the enterprises that have been approved or filed, while the financial institutions should obtain approval for their overseas investment from or have the investment filed with the competent financial regulators (China Securities Regulatory Commission and China Banking and Insurance Regulatory Commission) respectively in accordance with relevant provisions.

It should be noted that the overseas investment of central government-owned enterprises shall be supervised and regulated by the State-owned Assets Supervision and Administration Commission (SASAC) in accordance with the Supervision and Management Measures on Outbound Investment of Central Government-Owned Enterprises (SASAC Order No. 35), which will be elaborated in the next Chapter.

(3) **Registration of foreign exchange** for overseas direct investment according to the requirements of the foreign exchange administration. The main basis for this is the Provisions on Foreign Exchange Administration of Overseas Direct Investment by Domestic Institutions issued by the State Administration of Foreign Exchange on July 13, 2009 (HF [2009] No. 13). According to the Circular on Further Simplifying and Improving Policies for Foreign Exchange Administration for Direct Investment issued by the State Administration of Foreign Exchange on February 13, 2015 (HF [2015] No. 13), domestic enterprises were exempted from foreign exchange registration and approval of their overseas direct investment, which was modified into a mode of “Handling by Bank and Supervision by Foreign Exchange Administration”. That is, the foreign exchange registration under overseas direct investment should be directly reviewed and approved by the bank, which should be regulated indirectly by the foreign exchange administration via the bank.

The following parts of this Chapter will present a detailed introduction to and analysis of these management measures.

1.1 Measures for the Administration of Overseas Investment by Enterprises - approval/filing of overseas investment projects

The NDRC issued the Measures for the Administration of Overseas Investment by Enterprises (NDRC Order No. 11) on December 26, 2017, and the Measures for the Administration of Approval and Filing of Overseas Investment Projects (NDRC Order No. 9) was abolished simultaneously.

As the department leading the implementation of the “One Belt And One Road” construction, the NDRC undertakes the overall planning and coordination of related work of “going global”, and mainly provides macro guidance and supervision for enterprises’ overseas investment. Responsibilities of the Department of Foreign Capital and Overseas Investment of the NDRC include putting forward strategies, plans and relevant policy suggestions on the utilization of foreign investment and overseas investment, and reviewing major projects within its scope of authority.

The definition of “overseas investment” in the Measures for the Administration of Overseas

Investment by Enterprises: overseas investment refers to the investment of an enterprise in the People’s Republic of China (hereinafter the “investor”) to, directly or through the overseas enterprise(s) under its control, acquire overseas ownership, control, business management rights and other related rights and interests by means such as investing assets or equity or providing financing or guarantee. The “Measures” constitutes basic rules in China’s policy system for overseas investment. It loosens the proactive regulation, adopts the regulation mode of “differentiated proactive management, full coverage during and after the event”, lowers the investment threshold, and facilitates the “going global” of private enterprises.

1.1.1 Classification of overseas investment projects

The Measures for the Administration of Overseas Investment by Enterprises classifies overseas investment projects into sensitive projects and non-sensitive ones, for which different management modes are implemented: filing or approval.

Sensitive projects consist of those involving sensitive countries and regions, and those involving sensitive industries. Sensitive countries and regions include: (1) countries and regions that have not established diplomatic relations with China; (2) countries and regions that are in war or civil strife; (3) countries and regions where enterprise investment is restricted according to the international treaties and agreements, etc. to which China is a party; and (4) other sensitive countries and regions (see the table below). The Catalogue of Sensitive Industries for Outbound Investment (2018) issued by the National Development and Reform Commission on January 31, 2018 (FGWZ [2018] No. 251) listed the sensitive industries for overseas investment in form of a catalogue of sensitive industries for the first time, which involves development, production and maintenance of weapons and military equipment; development and utilization of cross-border water resources; and the news media industry, etc.

Classification of overseas investment projects	Sensitive projects	(I) Projects involving sensitive countries and regions	(1) Countries and regions that have not established diplomatic relations with China
			(2) Countries and regions that are in war or civil strife
		(3) Countries and regions where enterprise investment is restricted according to the international treaties and agreements, etc. to which China is a party	
		(4) Others	
		(II) Project involving sensitive industries	(1) Development, production and maintenance of weapons and military equipment (2) Development and utilization of cross-border water resources (3) News media (4) Industries where enterprise overseas investment is restricted ¹ Industries where investment is restricted: real estate, hotels, cinemas, entertainment, sports clubs, and establishment of equity investment funds or investment platforms abroad without physical industrial projects.
	Non-sensitive projects	Projects not involving sensitive countries and regions or sensitive industries	

¹Circular of the National Development and Reform Commission, the Ministry of Commerce, the People’s Bank of China and the Ministry of Foreign Affairs on Guiding Opinions on Further Guiding and Regulating the Direction of Overseas Investment (GBF [2017] No. 74), see Section 3.1 of this report.

1.1.2 Scope of approval/filing of overseas investment projects

Approval. Those subject to approval are sensitive projects operated by the investors directly or through the overseas enterprises they control. These sensitive projects shall be approved by NDRC. Sensitive projects consist of projects involving sensitive countries and regions, and those involving sensitive industries. Overseas investment projects where the investment of the Chinese enterprise(s) is USD 1 billion or above shall be approved by NDRC. Overseas investment involving sensitive countries and regions or sensitive industries shall be approved by NDRC, regardless of the amount of investment. Among them, overseas investment projects involving sensitive countries and regions or sensitive industries where the investment of the Chinese enterprise(s) is USD 2 billion or above shall be approved by the State Council based on NDRC’s opinion after its review.

Filing. The non-sensitive projects directly carried out by the investors, that is, non-sensitive projects involving the investors’ direct investment of assets or equity or provision of financing or guarantee, shall be managed by means of filing. For projects subject to management via filing, where the investor is an enterprise managed by the central government (including financial enterprises managed by the central government and enterprises directly managed by the State Council or its affiliated institutions), the project shall be filed with NDRC; where the investor is a local enterprise and the investment of the Chinese enterprise is USD 300 million or above, the project shall be filed with NDRC; where the investor is a local enterprise and the investment of the Chinese enterprise is less than USD 300 million, the project shall be filed with the provincial department of development and reform in the place where the investor is registered.

Article 39 of Measures for the Administration of Overseas Investment by Enterprises provides that the approving or filing authority shall publicize the approval and filing information in accordance with Regulations on Disclosure of Government Information.

Type of enterprises	Non-sensitive projects (direct investment)		Sensitive projects (direct investment and indirect investment)
	Investment of the Chinese enterprise of USD 300 million or above	Investment of the Chinese enterprise of less than USD 300 million	
Central government-owned enterprises	Filing with NDRC		Approval by NDRC
Local enterprises	Filing with NDRC	Filing with the provincial department of development and reform in the place where the investor is registered	

1.1.3 Process of approval/filing of overseas investment projects

Approval procedures	Filing procedures
<p>1. Online submission of application materials. The investor shall submit the project application report with relevant documents to the approval authority via the online system. Where the investor is an enterprise under management of the central government, its group company or</p>	<p>1. Online submission of filing form. The investor shall submit the project filing form with relevant documents to the filing authority via the online system. Where the investor is an enterprise under management of the central government, its group company or head office</p>

<p>head office shall submit the application to the approval authority; where the investor is a local enterprise, it shall submit the application directly to the approval authority.</p>	<p>shall submit the application to the filing authority; where the investor is a local enterprise, it shall submit the application directly to the filing authority.</p>
<p>2. Acceptance of the application. The approval authority shall accept the project application report and the attachments if they are complete and in the legal form. In case the project application report or the attachments are incomplete or not in the legal form, the approval authority shall <u>notify the investor</u> of all the materials to be supplemented and/or corrected at a time within 5 working days after it receives the project application report. The project application report shall be deemed accepted since the date the project application form is received if no feedback is provided within the time limit.</p>	<p>2. Acceptance of the filing form. In case the project filing form or the attachments are incomplete or not in the legal form, the project is not under management via filing, or the project is not under the management of the filing authority, the filing authority shall <u>notify the investor of the case at a time within 5 working days</u> after it receives the project filing form. The project filing form shall be deemed accepted since the date the project filing form is received if no feedback is provided within the time limit.</p>
<p>3. Decision on approval. The approval authority shall make a decision as to whether the application is approved within <u>20 working days</u> after the project application report is accepted. In case the project is complex and opinions of the relevant organization(s) are needed, the time limit of approval can be extended subject to the consent of the head of the approval authority, provided that the time limit shall not be extended for more than 10 working days and the investor shall be informed of the reasons for the extension. The approval authority shall approve the project that meets the requirements of approval, and issue a written approval document to the investor. For the project that does not meet the requirements of approval, the approval authority shall <u>issue a written notice on not approving the application</u> and give the reasons therefor.</p>	<p>3. Notice on filing or not. The filing authority shall issue a notice of filing to investor within 7 working days since the project filing form is accepted. In case the filing authority finds that the project violates relevant laws and regulations, relevant plans or policies, or relevant international treaties or agreements, or threatens or damages China's national interests and national security, it shall issue a written notice on not filing the project to the investor within 7 working days since the project filing form is accepted, and give the reasons therefor.</p>

1.2 Measures for Overseas Investment Management - approval/filing of establishment of overseas investment enterprises

The Ministry of Commerce issued the Measures for Overseas Investment Management (MOC Order 2014 No. 3) in 2014, which sets forth procedural requirements on establishment of overseas investment enterprises in form of departmental rules. The Ministry of Commerce is an organ of the State Council responsible for domestic and foreign trade as well as international economic cooperation. A major part of the responsibilities of the Ministry of Commerce is international economic cooperation and relevant policies, including the formulation of administration measures

and specific policies for overseas investment, and the approval of Chinese enterprises' outbound investment according to law. The department of the Ministry of commerce in charge of outbound investment are the Department of Overseas Investment and Economic Cooperation. (The responsibilities of the Ministry of Commerce of the People's Republic of China include... "to draft the laws and regulations governing ... overseas investment and foreign economic cooperation, devise relevant departmental rules and regulations..."). "Outbound investment" defined by the Ministry of Commerce: outbound investment is the activity of the enterprise incorporated in the People's Republic of China according to law to own enterprises overseas or acquire the ownership, control, business management rights or other rights and interests of existing enterprises via incorporation, M&A or other means.

The Ministry of Commerce manages the overseas investment of enterprises via approval and filing based on different cases. The enterprises' overseas investment projects involving sensitive countries and regions or sensitive industries are subject to approval, while other overseas investment projects are managed via filing. It should be noted that the scope of sensitive countries and regions and sensitive industries in the rules of the Ministry of Commerce is slightly different from the relevant provisions of the department of development and reform. Countries subject to approval refer to those that have not established diplomatic relations with the People's Republic of China and countries subject to United Nations sanctions; the Ministry of Commerce may publish additional lists of other countries and regions subject to approval when necessary. The industries subject to approval refer to those involving the export of products and technologies restricted by the People's Republic of China, and those that affect the interests of a country (region) or more. What's more, the departmental rules of the Ministry of Commerce apply only to non-financial enterprises; financial enterprises are subject to approval of/filing with the corresponding financial regulation authorities.

1.2.1 Criteria for division between filing and approval

The departments of commerce manage the enterprises' overseas investment with "filing as the main means supplemented by approval". The Ministry of Commerce and the provincial competent department of commerce manage enterprises' overseas investment by means of filing and approval respectively based on different cases. Enterprises' overseas investment involving sensitive countries, regions and industries shall be managed via approval. Other cases of enterprises' overseas investment shall be managed by means of filing. The countries where management via approval is implemented are those that have no diplomatic relations with the People's Republic of China and those subject to sanction by the United Nations. The Ministry of Commerce may publish additional lists of other countries and regions subject to approval when necessary. The industries subject to approval refer to those involving the export of products and technologies restricted by the People's Republic of China, and those affecting the interests of a country (region) or more. As of January 16, 2020, 56,610 overseas enterprises (institutions) were established upon filing with the Ministry of Commerce, and 489 upon approval.

For specific criteria for division, please see the table below:

Type of enterprises	Type of projects	Approval authority		Notes
		The Ministry of Commerce	Department of commerce at provincial level	

Central government-owned enterprises	Those involving sensitive countries and regions or sensitive industries	Approval	/	For overseas investment subject to approval, the central government-owned enterprises shall submit the application to the Ministry of Commerce, and the local enterprise shall file the application with the Ministry of Commerce via the provincial level authority of commerce at the place where the enterprise is located.
	Other projects	Filing	/	
Local enterprises	Those involving sensitive countries and regions or sensitive industries	Approval	Preliminary review	
	Other projects	/	Filing	

1.2.2 Process of filing and approval

Process of approval	Process of filing
<p>1. Submission of application materials. The enterprise shall submit the following documents to the department of commerce via the “Overseas Investment Management System”:</p> <p>(1) the application, which includes mainly the information of the investor, the name of the overseas enterprise, the ownership structure, the amount of investment, the business scope, the term of business operation, the source of funds invested, the content of investment, etc.; (2) the Overseas Investment Application Form; (3) contracts or agreements related to the overseas investment; (4) materials of approval by relevant authority for export of products or technologies restricted by the People’s Republic of China involved in the overseas investment; and (5) a copy of the business license of the enterprise.</p>	<p>1. Submission of filing materials. The enterprise shall fill in the Overseas Investment Filing Form via the “Overseas Investment Management System” as required, print it out, affix the seal, and then submit it to the Ministry of Commerce or the provincial competent department of commerce for filing, together with the copy of the business license of the enterprise.</p>
<p>2. Solicitation of opinions from the overseas embassy (consulate). The opinions of (the business office of) the overseas embassy (consulate) shall be solicited for approval of the overseas investment. Where the central government-owned enterprise is involved, the Ministry of Commerce shall solicit the opinions; where the local enterprise is involved, the provincial commerce authority shall solicit the opinions. When soliciting the opinions, the Ministry of Commerce and the provincial commerce authority shall provide the basic</p>	<p>2. Issuance of the certificate. The Ministry of Commerce or the provincial commerce authority shall handle the filing and issue the Overseas Investment Certificate within 3 working days since the Filing Form is received.</p>

<p>information of the investment and other related information. The (business office of the) overseas embassy (consulate) shall reply within 7 working days since the solicitation of opinions is received.</p>	
<p>3. Acceptance of the application. The Ministry of Commerce shall make a decision as to whether the application is approved within 20 working days (including the time to solicit opinions from the (business office of the) overseas embassy (consulate)) since the approval application of the central government-owned enterprise is received. In case the application materials are incomplete or not in the legal form, the Ministry of Commerce shall notify the applicant of all the materials to be supplemented and/or corrected at a time within 3 working days. The application shall be deemed accepted since the day the application materials are received if no feedback is provided within the time limit.</p>	<p style="text-align: center; opacity: 0.5; font-size: 48px; transform: rotate(-15deg);">Natu</p>
<p>The provincial commerce authority shall, after accepting the approval application of the local enterprise, conduct a preliminary review on whether the application involves the prohibition of enterprise' overseas investment (Article IV of the Measures for Overseas Investment Management), and submit the preliminary review opinions and all application materials to the Ministry of Commerce within 15 working days (including the time to solicit opinions from the (business office of the) overseas embassy (consulate)). (Note: Article IV of the Measures for Overseas Investment Management: Article IV The overseas investment of the enterprise shall not have the following conduct:</p> <p>(1) Endangering the national sovereignty, security and public interests of the People's Republic of China, or violating the laws and regulations of the People's Republic of China;</p> <p>(2) damaging the relationship between the People's Republic of China and related countries</p>	

<p>(regions); (3) violating the international treaties or agreements concluded or acceded to by the People’s Republic of China; or (4) exporting products or technologies prohibited by the People’s Republic of China.)</p>	
<p>4. Decision of Ministry of Commerce on approval. For the overseas investment approved, the Ministry of Commerce shall issue a written approval decision and the Enterprise Overseas Investment Certificate. For the project not approved due to the circumstances listed in Article IV of the Measures for Overseas Investment Management, the applicant shall be notified in writing of the reasons therefor and of its right to apply for administrative reconsideration or to file administrative proceedings according to law.</p>	

1.3 Management measures jointly issued by multiple departments

1.3.1 Interim Measures for Outbound Investment Filing (Approval) Report and Implementation Rules for Outbound Investment Filing (Approval) Report

As mentioned above, China’s current overseas investment regulatory system is one via multi-departments and multi-lines, where each department carries out separate regulation according to its own provisions, and there is a lack of a high level law for coordination. In practice, the relatively independent operation of each department, the lack of a coordination mechanism and the existence of certain loopholes in regulation results in difficulties in the approval of enterprises’ overseas investment. On January 25, 2018, the Ministry of Commerce, together with the People’s Bank of China, SASAC, CBRC, CSRC, CIRC and SAFE, jointly issued the Interim Measures for Outbound Investment Filing (Approval) Report (SHF [2018] No. 24) to promote the centralized information management and classified and hierarchical filing/approval. In order to implement the above measures, strengthen the in-process and post-event regulation of outbound investment, and promote its healthy and orderly development, the Ministry of Commerce issued the Implementation Rules for Outbound Investment Filing (Approval) Report (SBHH [2019] No. 176) in 2019. The key objective is to strengthen the information sharing and cooperation mechanism among the departments and improve the internal information aggregation mechanism within the departments. The main content is summarized as follows:

(1) Establishment of an outbound investment management mode of “Classified and Hierarchical Filing/Approval, Centralized Information Management, and Joint Punishment for Violation” by various departments

According to the Interim Measures, the commerce and financial authorities are responsible for the filing or approval of the investors’ outbound investment according to their respective responsibilities. The SASAC is responsible for the supervision and management of outbound investment of central government-owned enterprises. The Interim Measures further clarify the division of responsibilities between the departments for approval/filing of overseas investment of different entities. The

Ministry of Commerce is responsible for aggregation of the information on outbound investment approval/filing and reporting, and the other departments shall regularly send to the Ministry of Commerce their approval/filing and reporting information. The Ministry of Commerce shall regularly feed the aggregated information back to these departments for sharing. An initial mechanism of internal information aggregation and sharing among the departments shall be established, which will help all departments with their monitoring and reporting, analysis and early warning, and effective intervention based on the aggregated information.

At the same time, the Interim Measures specifies the punishment measures for the investors' violations. In case the investors fail to perform the approval/filing procedures and information reporting obligations in accordance with the provisions of the Interim Measures, the Ministry of Commerce, together with the relevant authorities, may take such measures as reminding, admonition, and notification depending on the case. The enterprise's violation information shall be entered into the National Credit Information Sharing Platform when necessary, and the administrative punishment for the enterprise shall be recorded under the name of the enterprise and publicized via the National Enterprise Credit Information Publicity System. In case the domestic investors are found to have tax evasion and foreign exchange fraud, the relevant regulators shall transfer the relevant cases and clues to the tax, public security, industry and commerce, foreign exchange administration and other authorities for handling according to law.

(2) Management mode of “Encouragement for Development + Negative List” for approval/filing of overseas investment

Overseas investment projects are divided into those encouraged, restricted or prohibited. According to the Interim Measures, the relevant authorities shall establish and improve their measures of outbound investment filing (approval) based on their respective responsibilities in the mode of “Encouragement for Development + Negative List”. The fields and directions of restricted and prohibited industries for outbound investment are specified in the negative list. The mode of “Negative List” can help domestic investors evaluate the compliance risk of their investment as early as possible, and provide guidance in terms of the fields and directions of outbound investment.

(3) The principle of management based on final destination

- The Interim Measures provides that the objects of approval/filing for outbound investment are enterprises established overseas. Meanwhile, it is further clarified that enterprises established overseas refer to those at the final destination, which is the place where the investment of the domestic investor is ultimately used for project construction or continuous production and operation.
- ▶ That is, no shell company set up by the domestic investor along the path of their investment to the enterprise at final destination will be filed or approved.

(4) The principle of “reporting obligations for all filing (approval)”

The Ministry of Commerce requires investors to perform their reporting obligations in accordance with the principle of “reporting obligations for all filing (approval)”. After completing the filing (approval) procedures for their outbound investment, the domestic investors shall regularly submit information on key elements of their outbound investment to corresponding authorities according to relevant regulations, and report the overseas enterprises' compliance construction and obstacles encountered in their investment every half a year. Enterprises meeting certain conditions shall also

report more detailed information (for example, enterprises with Chinese investment of more than USD 100 million should also report their sales revenue and net profit, etc.) It is worth noting that Article XIII of the Measures provides that the information submitted by the investors shall include “compliance with the local laws and regulations, protection of resources and environment, protection of the employees’ legitimate rights and interests, performance of social responsibilities, implementation of safety protection systems, etc.”

The specific contents, channels and frequency of the information submitted by domestic investors shall be specified by relevant authorities according to their responsibilities. In case of major adverse events or emerging security incidents in the outbound investment of domestic investors, they should report to the relevant authorities “case by case” in a timely manner, and the relevant authorities should report the case to the Ministry of Commerce.

1.3.2 Detailed Rules of Regulation Featuring Random Inspection and Public Release for Overseas Investment and Cooperation (Trial)

In 2017, the Ministry of Commerce issued the Detailed Rules of Regulation Featuring Random Inspection and Public Release for Overseas Investment and Cooperation (Trial) (SBHH [2017] No. 426). According to Article XIX of the Interim Measures for Outbound Investment Filing (Approval) Report, the Ministry of Commerce shall take the lead in carrying out the random spot check of outbound investment, and regularly implement in-process and post-event regulation on the authenticity, completeness and timeliness of the outbound investment filing/approval reports. The relevant authorities shall formulate their implementation rules of random spot check, and carry out the spot check according to their respective responsibilities. For example, the overseas investment and cooperation activities of the overseas enterprises filed or approved in accordance with the Measures for Overseas Investment Management shall be randomly inspected, and the results of the inspection be publicized in a timely manner. The main items of the inspection include implementation of personal and property safety precautions by overseas enterprises, establishment of early warning mechanism and response plans for emergencies, etc.²

There is a special web page of “Bad Credit Record” for publicity at the Ministry of Commerce’s “Public Service Platform for Going Global”³. But the website is not updated in time and only 10 bad credit records of companies/individuals have been publicized, most of which involve labor disputes. For example, in April 2012, Beijing Everbright International Construction Engineering Corporation, a state-owned enterprise registered in Beijing, signed a contract to undertake the subcontract project of the Saudi Orphan Charity and Care Committee’s office building project without filing with the Economic Counsellor Office of the Chinese Embassy in Saudi Arabia. On October 6, 2013, 24 workers from the project went to the Chinese Embassy in Saudi Arabia to petition, saying that the company owed them their wages of four months, and asking for immediate payment of the wages and arrangement for their return to China. After the coordination by the Embassy for many times, the person in charge of the Saudi Arabia branch of Everbright International was still unable to raise funds to pay the wages owed. These workers repeatedly went to the Embassy to petition, which seriously disturbed the order of the embassy district, violated the local regulations prohibiting assemblies, and caused a very bad impact on the overall image of Chinese enterprises and people in Saudi Arabia. The Ministry of Commerce considered that the company seriously

²The inspection on corporate social responsibilities and environment issues is not included here.

³<http://zsmjtjhzs.mofcom.gov.cn/gsapp/pages/zsmwp/gov/BadRecordListShow.html>

violated relevant provisions, which constituted the following circumstances that should be included in the bad credit record in overseas investment and cooperation as defined in Measures for Trial Implementation of Bad Credit Records in Overseas Investment Cooperation and Foreign Trade: (1) major labor disputes caused by the enterprise's violation of labor contracts or labor laws and regulations of the host country, resulting in major adverse effects; (2) failure to apply for overseas work permits for the workers or dispatching the workers by means of travel or business visas; and (3) failure to sign or perform the contracts with the workers.

1.4 Provisions on foreign exchange administration

1.4.1 Registration procedures for foreign exchange administration

According to the Provisions on the Foreign Exchange Administration of Overseas Direct Investment by Domestic Institutions, to apply for foreign exchange registration for the overseas direct investment, approval from the competent department of overseas direct investment is needed. That is, the approval document or certificate for the investment from the competent department of overseas direct investment is required. According to the Operation Guidelines for Foreign Exchange Business for Direct Investment, it is only clear that the Enterprise Overseas Investment Certificate (for non-financial enterprises) issued by the commerce department is required for foreign exchange registration for overseas direct investment, but the approval/filing documents from the department of development and reform are not specified. Whether the approval/filing documents from the department of development and reform are needed for foreign exchange registration depends mainly on the internal provisions or internal control requirements of banks, and some banks will require domestic enterprises to provide such approval/filing documents. The main procedures for the registration of initial expenses and the foreign exchange registration in overseas direct investment by domestic institutions can be seen in the Operation Guidelines for Foreign Exchange Business for Direct Investment issued by SAFE in 2015.

1.4.2 Other provisions on foreign exchange

Besides the Provisions on Foreign Exchange Administration of Overseas Direct Investment by Domestic Institutions and the Operation Guidelines for Foreign Exchange Business for Direct Investment mentioned in the previous section, China has other provisions on foreign exchange administration for overseas investment:

(1) The **Provisions on Foreign Exchange Administration of Cross-border Guarantee** divides the cross-border guarantee structure into three categories: onshore guarantee for offshore loans, offshore guarantee for onshore loans and other forms of cross-border guarantee. The management matters such as approval, registration or filing of the foreign exchange administration are decoupled from the judgment of the validity of the cross-border guarantee contract. The onshore guarantee for offshore loans and offshore guarantee for onshore loans are managed via post-event registration instead of the quota management and prior approval. Registration or filing is not needed for other forms of cross-border guarantee. It means streamlining administration and delegating powers, with the scope of foreign exchange administration and the border of regulation for cross-border guarantee clarified.

(2) The **Notice on Improving Foreign Exchange Administration of Banks' Onshore Guarantee for Offshore Loans**, an important supplement to the Provisions on Foreign Exchange

Administration of Cross-border Guarantee, requires banks to strengthen the audit of onshore guarantee for offshore loans in terms of the debtor's qualifications as a subject, overseas capital use and transaction background, the first source of repayment and performance tendency, and the source of counter collateral.

(3) The **Circular of SAFE on Further Simplifying and Improving Policies for Foreign Exchange Administration for Direct Investment** (HF [2013] No. 13) eliminated the administrative review for approval of foreign exchange registration under overseas direct investment, and modified the procedures into direct review by banks in accordance with the Operation Guidelines for Foreign Exchange Business for Direct Investment for foreign exchange registration under the overseas direct investment. That is, the foreign exchange administration is no longer responsible for the foreign exchange registration under overseas direct investment, but conducts indirect regulation of the foreign exchange registration under direct investment via the banks.

(4) The **Circular of SAFE on Further Promoting the Reform of Foreign Exchange Administration and Improving the Verification of Authenticity and Compliance** (January 26, 2017) strengthened the verification of the authenticity and compliance of overseas investment to prevent false investment, which means the further tightening of the foreign exchange administration.

1.5 Provisions on taxes and investment security

China also formulated special provisions on the taxes and security of overseas investment by Chinese enterprises. Provisions on the taxes are mainly the **Opinions of the State Administration of Taxation on Further Improving the Tax Services and Management for Enterprises "Going Global"** issued by the State Administration of Taxation (GSF [2010] No. 59) and the Notice of the Ministry of Finance and the State Administration of Taxation on Issues Related to Tax Credit for Overseas Income of Enterprises jointly issued by the Ministry of Finance and the State Administration of Taxation (CS [2009] No. 125). In addition, the **Regulations on the Security Management of Institutions and Personnel of Overseas Chinese Funded Enterprises** requires overseas investment enterprises to develop the overseas security management system and relevant management measures referring to the **Guidelines on the Security Management of Institutions and Personnel of Overseas Chinese Funded Enterprises** formulated by the Ministry of Commerce. It also requires local commerce authorities to provide guidance on the construction of the overseas security risk management system and measures of the overseas investment and cooperation enterprises within its authority. The **System for Early Warning and Information Notification of Security Risks in Overseas Investment and Cooperation** (Ministry of Commerce, 2012) defines the types of overseas security risks, specifies the procedures, contents and forms of early warning and information notification of overseas security risks, and puts forward specific requirements for overseas business institutions, local commerce authorities and relevant business associations to carry out early risk warning and information notification. The system helps further improve the overseas security protection mechanism in outbound investment and cooperation, and enhance the ability of the enterprises to withstand overseas security risks.

Chapter Two Special Regulations on Management of State Owned and Private Enterprises

2.1 Regulations on management of State Owned enterprises

State owned assets play a dominant role in China's national economy, and state-owned enterprises are major players in China's overseas investment. State owned enterprises are the wholly state-owned enterprises, wholly state-owned companies and companies in which the state has a controlling stake for which the State Council and the local people's governments respectively perform the functions of investors on behalf of the state, which include the enterprises formed by the investments at the current level and level by level under the supervision and administration of the central and local state-owned assets supervision and administration institutions and other departments.. Among them, the state-owned enterprises where the State-owned Assets Supervision and Administration Commission of the State Council plays the role of investor on behalf of the State Council are central government-owned enterprises. The State-owned Assets Supervision and Administration Commission of the State Council and the Ministry of Finance have issued special regulations to manage the outbound investment of state-owned enterprises. According to China's Report on Development of China's Outward Investment issued by the Ministry of Commerce, the flow of non-financial outbound direct investment of the central government-owned enterprises and institutions accelerated in 2017, which was USD 53.27 billion, an increase of 73.4% year on year, while that of the local enterprises was USD 86.23 billion, a year-on-year decrease of 42.7%.

2.1.1 Measures for the Supervision and Administration of Overseas Investments by Central Enterprises

In January 2017, the State-owned Assets Supervision and Administration Commission of the State Council (the SASAC) issued the Measures for the Supervision and Administration of Overseas Investments by Central Enterprises (SASAC Order No. 35), which provides special regulations on the management of central government-owned enterprises. The Measures for the Supervision and Administration of Overseas Investments by Central Enterprises is a mandatory norm, where the SASAC puts forth a negative list of overseas investment projects of central government-owned enterprises, sets up prohibited and specially supervised overseas investment projects for classified supervision on overseas investment projects of central government-owned enterprises, defines the bottom line for supervision of investment of the investors, and draws a red line for the investment of the central government-owned enterprises. The central government-owned enterprises are not allowed to invest in the prohibited overseas investment projects listed in the negative list. For the overseas investment projects listed in the negative list under special supervision, the central government-owned enterprises shall submit them to the SASAC to perform the verification and control procedures as investors. The overseas investment projects out of the negative list shall be decided by the central government-owned enterprises independently according to their strategic planning for development. At the same time, the central government-owned enterprises shall not engage in overseas investment out of their primary business in principle. If special reasons necessitate investment out of the primary business, they shall report it to SASAC for review.

Moreover, the central government-owned enterprises shall register the property rights of the overseas state-owned assets in time after the completion of their investment. The central government-owned enterprises are the entities to make decisions on, implement and be responsible for their overseas investment projects. The central government-owned enterprises shall formulate a stricter and more detailed negative list of overseas investment projects for themselves based on the one issued by SASAC.

2.1.2 Measures for the Financial Management of the Overseas Investments by State-owned Enterprises (CZ [2017] No. 24)

While great progress has been made in overseas investment of the state-owned enterprises, there are also some problems, such as poor asset status, weak profitability and low return on investment. The root cause lies in the enterprises' poor financial management ability that is unsuitable for their investment. The Measures for the Financial Management of the Overseas Investments by State-owned Enterprises (CZ [2017] No. 24) provides regulations on key financial issues involved in the whole process of overseas investment. It clarifies the financial management responsibilities in overseas investment, so as to build a reasonable mechanism for prior decision-making in overseas investment, and specify the decision-making rules, procedures, subjects, authorities and responsibilities. It also puts forward clear requirements for financial management matters such as capital control, cost control, dividend distribution and foreign exchange transaction. The Measures points out that overseas investment enterprises (projects) shall be included in the comprehensive budget management system, and the annual budget objectives should be defined, so as to strengthen the budget control of major financial matters. It also stresses the establishment and improvement of the internal financial supervision system and performance evaluation system of the overseas investment, to regularly evaluate the management level and efficiency of the overseas investment enterprises (projects).

2.2 Regulations on management of private enterprises

As major players in China's "Going Global" strategy, private enterprises have accelerated their pace of "going out" in recent years, which drives the export of domestic products, technologies and services, and makes a positive contribution to the promotion of the Belt and Road construction. At the same time, there are also problems in some enterprises' overseas investment, such as illegal operation, blind decision-making, vicious competition, and neglect of quality and safety management. On December 6, 2016, the Xinhua News Agency issued the "Answers to Reporters' Questions by Heads of NDRC, Ministry of Commerce, People's Bank of China and SAFE", which mentioned that the 4 departments paid close attention to the tendency of irrational acts in outbound investment in specific fields recently. They expressed their support for real and compliant outbound investment by domestic enterprises with necessary capacity and conditions, and for market-oriented outbound investment with enterprises as the main players in accordance with business principles and international practices, especially investment and operation of enterprises in the Belt and Road construction and international cooperation in production capacity. In order to further regulate the overseas investment and operation of private enterprises and upgrade the "going global", on December 6, 2017, the NDRC, the Ministry of Commerce, the People's Bank of China, the Ministry of Foreign Affairs and the All-China Federation of Industry and Commerce jointly issued the Code of Conduct for the Operation of Overseas Investments by Private Enterprises

The Code urges private enterprises to enhance the awareness of resource conservation and environmental protection, abide by the host countries' environmental laws and regulations, and fulfill their environmental protection responsibilities and relevant legal obligations. If not properly addressed, the environmental problems will lead to the tension between the enterprises “going global” and local residents and governments. Major environmental accidents may even cause the host countries to take regulatory measures against China, thus affecting the development of overseas investment. Building upon the code of conduct on environmental protection in outbound investment set forth in the Guides for Environmental Protection in Outbound Investment and Cooperation issued by the Ministry of Commerce and the Ministry of Environmental Protection on February 18, 2013, the Code of Conduct for Overseas Investment and Operation of Private Enterprises further requires the “private enterprises to adopt resource-saving and environment-friendly operation mode overseas”. It provides prior, in-process and post-event regulations, stipulating that the environmental impact assessment shall be carried out before the project construction, and the environmental due diligence shall be conducted for the target enterprise before the acquisition of an overseas enterprise, with a focus on the assessment of the hazardous wastes, soil and groundwater pollution in the business history and the related environmental debts of the target enterprise. During the construction of the project, the enterprise shall apply for the project construction permit in accordance with the environmental protection laws and regulations of the host country (region). Reasonable measures shall be taken in the production and operation to reduce the possible adverse effects. Clean production shall be carried out and recycling be promoted to reduce the generation and emission of pollutants in the process of production, service and product use. Contingency plans shall be made for possible risks of environmental accidents, and communication mechanism with local government and the public be established.

2.3 Special regulations on management of financial industry

The outbound investment in the financial industry is subject to special regulations on credit, investment and financing, such as the Commercial Bank Law and the General Rules of Loans. With regard to the outbound investment of financial institutions, Article XXI of the **Green Credit Guidelines** (CBRC [2012] No. 4) issued by China Banking Regulatory Commission (CBRC) on February 24, 2012 sets forth special provisions on the overseas risks of banking institutions: “Banking institutions shall strengthen the environmental and social risk management for overseas projects to which credit will be granted and make sure project sponsors abide by applicable laws and regulations on environmental protection, land, health, safety, etc. of the country or jurisdiction where the project is located. The banking institutions shall make promise in public that appropriate international practices or international norms will be followed as far as such overseas projects are concerned, so as to ensure alignment with good international practices” It reflects the Chinese government’s requirements on financial institutions to pay attention to and prevent the project risks arising from environmental and social problems, and China’s active undertaking of the environmental and social responsibilities in outbound investment so as to promote sustainable green investment and financing.

In order to improve the macro prudential management framework of cross-border financing, the **Notice of the People's Bank of China on Matters concerning the Macro-Prudential Management of Full-Covered Cross-Border Financing** further expands the space of cross-border financing for enterprises and financial institutions, and reduces the financing cost of the real

economy, which helps broaden the financing channels for enterprises and financial institutions. Based on the concept of prudential operation, it improves the autonomy of cross-border financing and the utilization efficiency of overseas funds, which is in line with the policy guidance of “Expanding Inflow” in current regulation.

In addition, there are also regulations on warning of risks in the financial industry, such as the Measures for the Administration of the Formation, Acquisition and Purchase of Non-Controlling Shares of Overseas Business Institutions by Securities Companies and Securities Investment Fund Management Companies (Draft), Guidelines on the Management of Country Risk by Banking Financial Institutions, and Notice by the State Administration of Foreign Exchange of the Issues concerning Improving the Management of Foreign Exchange Risks of Overseas Institutional Investors on the Interbank Bond Market. These documents will not be elaborated here.

Chapter Three Guiding Opinions, Guidelines, Guides and Other Normative Documents

In addition to the above-mentioned departmental rules and administrative regulations, administrative bodies and industry associations have also formulated guidelines and guiding documents for overseas investment of Chinese enterprises. While most of these documents are not mandatory, some prohibitive provisions must be observed by investors. For instance, investment projects involving the export of core technologies and products of military industry without state approval are prohibited. Most of these regulations except the aforementioned are of the nature of guidelines and guidance, which are to be observed by enterprises on their own. Nevertheless, these regulations have certain binding force on investors. For example, the regulations on the construction of enterprise credit system include punishment for dishonesty and incentive mechanism for trustworthiness. These regulations will be introduced and analyzed in this Chapter.

3.1 Guiding Opinions on Further Guiding and Regulating the Direction of Overseas Investment (2017, NDRC, Ministry of Commerce, People’s Bank of China and Ministry of Foreign Affairs) (GBF [2017] No. 74)

In August 2017, the General Office of the State Council forwarded the Guiding Opinions on Further Guiding and Regulating the Direction of Overseas Investment of the NDRC, Ministry of Commerce, People’s Bank of China and Ministry of Foreign Affairs, and made arrangements to strengthen the macro guidance on overseas investment, guide and regulate the direction of overseas investment, and promote the sustainable, rational, orderly and healthy development of overseas investment. According to the Report on Development of China’s Outward Investment 2018 issued by the Ministry of Commerce, China strengthened the authenticity review of overseas investment in 2017, which curbed irrational outbound direct investment, leading to good performance of outbound investment in real economy and emerging industries, and optimized industry structure of China’s outbound direct investment. The Guiding Opinions sets out detailed lists of three types of overseas

investment activities: encouraged, restricted and prohibited. The strengthening of government regulation via policies has raised the threshold for Chinese enterprises' outbound investment, which requires a more rational and prudent attitude of Chinese enterprises when "going global". The Guiding Opinions is partly mandatory. For instance, the prohibition on some overseas investment projects, such as those involving the export of core technologies and products of military industry without state approval, shall be observed by the investors; otherwise the Ministry of Commerce will not file or approve the investment in related fields.

Encouraged projects. The Guiding Opinions puts forward six types of encouraged overseas investment in infrastructure, production capacity and equipment, high technology and advanced manufacturing, energy resources, agriculture, and service industries, in order to further support domestic enterprises having the ability and conditions to actively participate in international competition and cooperation in accordance with business principles and international practices and actively integrate into the global industrial chain and value chain. Encouraged projects of overseas investment are as follows: (1) Overseas investment in infrastructure benefiting the construction of the Belt and Road and the interconnection of surrounding infrastructure should be promoted as key projects. (2) Overseas investment that drives the export of superior production capacity, high-quality equipment and technical standards should be steadily carried out. (3) Investment in cooperation with overseas high-tech and advanced manufacturing enterprises should be strengthened, and establishment of R&D centers abroad be encouraged. (4) On the basis of prudent evaluation of economic benefits, steady efforts should be made to participate in the exploration and development of overseas oil, gases, minerals and other energy resources. (5) Efforts should be made to expand overseas cooperation in agriculture and carry out mutually beneficial and win-win investment and cooperation in fields such as agriculture, forestry, animal husbandry, sideline production and fishery. (6) Overseas investment in business, culture, logistics and other service sectors should be orderly promoted, and qualified financial institutions be supported to establish branches and service networks overseas so as to carry out business according to law.

Restricted projects. In recent years, some enterprises frequently made large-scale acquisitions in real estate, hotels, cinemas, entertainment industry, sports clubs and other fields, which has aroused widespread concern in the market and public opinion. The Guiding Opinions includes such overseas investment into the restricted category, and requires relevant authorities to implement management via approval, in order to strengthen the government's guidance via policies and provide the enterprises with a reminder for prudent participation. In addition, the Guiding Opinions sets forth clear restrictions on overseas investment that uses backward production equipment and that does not meet the environmental protection, energy consumption and safety standards of the host countries.

Prohibited projects. The Guiding Opinions prohibits the enterprises from participating in five types of overseas investment activities that endanger or may endanger national interests and national security. It draws a clear "red line" and "forbidden zone" for Chinese enterprises' "going global" so as to safeguard national interests and security. In addition, the **Catalogue of Sensitive Industries for Outbound Investment (2018)** issued by the NDRC on January 31, 2018 listed the sensitive industries for overseas investment in form of a separate catalogue of sensitive industries for the first time, which involves development, production and maintenance of weapons and military equipment; development and utilization of cross-border water resources; and the news media industry, etc.

3.2 The Guiding Opinions of 28 Departments including NDRC and Ministry of Commerce on Strengthening the Construction of Credit System in Overseas Economic Cooperation (January 2018) and the Memorandum of Cooperation on Joint Punishment of Serious Dishonest Entities in the Foreign Economic Cooperation Field

The Guiding Opinions provides requirements on credit record construction specially for outbound investment issued by the NDRC, the Ministry of Commerce and other departments according to the Notice of the State Council on Printing and Distributing the Outline of Social Credit System Construction Planning (2014-2020) (GF [2014] No. 21) and the Guiding Opinions of the State Council on Establishing and Improving the Joint Incentive System for Integrity and Joint Punishment System for Dishonesty to Accelerate the Construction of Social Integrity (GF [2016] No. 33). Although the document is not a departmental rule in terms of legal effect (which was issued by departments including the Organization Department of the CPC Central Committee and other organizations of the Party), the relevant requirements therein can be considered as mandatory norms. The document calls for accelerating the construction of credit records in overseas economic cooperation, promoting the sharing and application of credit information, and establishing a joint punishment mechanism for dishonesty, to effectively regulate the order of overseas economic cooperation and the behavior of the participants. Rules for collection and sharing of credit information should be established and improved, so as to strictly protect the privacy and information security of organizations and individuals, and promote the disclosure and application of credit information in accordance with laws and regulations. Development of credit products in overseas economic cooperation and use of credit information and credit products should be encouraged, and joint punishment for dishonesty be promoted, so as to benefit the honest participants, restrict the dishonest participants and strengthen the punishment for negative behaviors. The construction of credit records in overseas economic cooperation should be strengthened, with a focus on **overseas investment**, overseas contracted projects, overseas labor cooperation, foreign trade and overseas financial cooperation. Aggregation, processing, publicity and application of credit information should be realized gradually based on the National Credit Information Sharing Platform and the National Enterprise Credit Information Publicity System.

The document also establishes safeguard mechanisms for the above requirements:

- ▶ **Guidance and coordination mechanism.** The guidance and coordination for the construction of credit system in overseas economic cooperation should be strengthened within the mechanism of the inter-ministerial joint meeting of the State Council on “going global”. All relevant departments and local governments should attach great importance to the task, and carry out relevant research to
- ▶ formulate disciplinary measures for dishonesty, and actively implement various policies and measures.

Repair mechanism. The objection and appeal process for the subjects of credit information should be formulated to protect their legitimate rights and interests. The credit information correction and repair mechanism should be established, and periods of validity of credit information and periods of punishment for dishonesty be specified, so as to streamline the credit repair channels and expand methods of credit information repair.

Information collection and query mechanism. Relevant government departments, industry associations and social credit service providers should strictly abide by relevant regulations,

establish and improve rules and regulations to ensure security of credit information, and keep strictly in line with the authority and procedures for credit information collection, query and use.

Notification mechanism. A mechanism for periodic notification of the results of punishment in overseas economic cooperation should be established, and all departments involved should send periodic feedback on implementation of joint punishment to the NDRC, the Ministry of Commerce, the People's Bank of China, the Ministry of Foreign Affairs and other relevant departments via the National Credit Information Sharing Platform.

3.3 The Guide for Environmental Protection in Overseas Investment and Cooperation (Ministry of Commerce and Ministry of Environmental Protection, 2013) and the Interpretation of the Guide for Environmental Protection in Overseas Investment and Cooperation by the Department of Foreign Investment and Economic Cooperation of the Ministry of Commerce

The Guide for Environmental Protection in Overseas Investment and Cooperation (“the Guide for Environmental Protection”) is not mandatory, providing only guidance for the environmental performance of Chinese enterprises’ overseas investment. That is, failure of the investor to comply with the guiding opinions in the Guide for Environmental Protection will not result directly in negative legal consequences.

It is mentioned in the Interpretation that the Outline of the 12th Five Year Plan for National Economic and Social Development provides that enterprises “going global” and overseas cooperation projects should fulfill their social responsibilities and benefit the local people. In their overseas investment and cooperation, most Chinese enterprises attach great importance to environmental protection, abide by the laws and regulations of the host countries exactly, and actively fulfill their social responsibilities. However, some enterprises lack experience in environmental protection overseas, and need essential guidance from the government. In order to address the challenges of environmental protection together with relevant countries, guide Chinese enterprises in environmental protection in the process of “going global”, and promote sustainable development of overseas investment and cooperation, the Ministry of Commerce and the former Ministry of Environmental Protection (current Ministry of Ecology and Environment) , on the basis of international experience and ideas and taking into account China’s national conditions, formulated the Guide for Environmental Protection. The Guide for Environmental Protection aims mainly to promote environmental protection concepts among enterprises, so that they can fulfill their environmental protection responsibilities according to law, abide by the environmental protection laws and regulations of the host countries, and meet their legal obligations in environmental protection such as environmental impact assessment, emission in line with standards, environmental emergency management, etc. It also encourages the enterprises to explore internationalization in this regard.

The purpose of the Guide is to serve as a code of conduct for Chinese enterprises’ environmental protection in their overseas investment and cooperation, guide them to actively fulfill their social responsibility for environmental protection, and promote the sustainable development of the overseas investment and cooperation. Article II of the Guide stipulates that “This Guide shall apply to the environmental protection in Chinese enterprises’ overseas investment and cooperation, and should be complied with by the relevant enterprises on their own.”

The Guide for Environmental Protection requires the relevant enterprises to establish the environmental management system and carry out measures of pollution prevention, including establishment of the internal environmental management system, environmental protection training for the staff, environmental impact assessment, biodiversity, social impact assessment, emission in line with standards, environmental monitoring requirements, environmental due diligence, hazardous waste management, prevention of and emergency response to environmental accidents, ecology restoration, clean production, green purchasing, etc. **Article VIII:** The enterprises shall, in accordance with the laws and regulations of the host countries, assess the environmental impact of their development, construction, production and operation, and take reasonable measures to reduce the possible adverse effects based on the findings of the environmental impact assessment. **Article XV:** The enterprises shall carefully consider the ecological functions of the region where the project is located. With the cooperation of the host governments and the communities, the enterprises may give priority to in situ conservation of the animal and plant resources with value of protection that may be affected, to reduce the adverse impact on the local biodiversity. For the ecological impact caused by the investment, the enterprises are encouraged to carry out ecological restoration according to the laws and regulations of the host countries or the common industry practices.

3.4 Country-specific Industry Guidelines on Outbound Investment 2011 (Ministry of Commerce, NDRC and Ministry of Foreign Affairs)

The Guidelines introduces the priority areas for investment, main industrial development goals, and key areas and industries for development of relevant countries, so as to guide Chinese enterprises in their overseas investment and help them integrate their operations with the needs of the host countries. For example, Myanmar's primary industrial development goal is to implement its economic development strategy of "An Industrialized Country with the General Development of All Industries Based on Agriculture". It encourages the development of private enterprises and actively introduces foreign capital, with a plan to achieve a GDP growth of 10.7% in 2010-2011. Priority industries of the country include crop cultivation and agricultural product processing, electric power, oil and gas, industry, mining, transportation, tourism, hospitality and construction.

3.5 Guiding Opinions on Promoting the Construction of Green Belt and Road (HGJ [2017] No. 58) and Cooperation Plan for Ecological and Environmental Protection along Belt and Road

On April 26, 2017, the Ministry of Ecology and Environment (formerly Ministry of Environmental Protection), and other 3 ministries jointly issued Guiding Opinions on Promoting the Construction of Green Belt and Road (HGJ [2017] No. 58), which states that the construction of a green Belt and Road should be guided by the concept of ecological civilization and green development, and the principles of resource conservation and environmental friendliness, so as to integrate environmental protection into the whole process of the Belt and Road construction. The Opinions also mentions that the environmental protection information sharing and disclosure should be promoted, to provide comprehensive information support and guarantee.

Construction of big data on environmental protection should be strengthened, to give full play to the national spatial and information infrastructure, strengthen the sharing of environmental information, and jointly build a big data service platform for ecological and environmental protection along the green Belt and Road. In general, the Opinions provides provisions of the nature

of guidance and principles, which might have limited effect in its implementation.

In May 2017, the Ministry of Ecology and Environment (formerly Ministry of Environmental Protection) issued the Cooperation Plan for Ecological and Environmental Protection along Belt and Road, which specified the following six key tasks: (1) to highlight the concept of ecological civilization and strengthen communication on ecological and environmental protection policies; (2) to promote green international cooperation on production capacity and infrastructure construction in accordance with laws and regulations; (3) to promote sustainable production and consumption and develop green trade; (4) to strengthen support to promote green financing; (5) to initiate ecological and environmental protection projects and activities and promote exchanges between peoples; and (6) to strengthen capacity building and give play to strengths of local communities. The Plan also makes detailed arrangement on key projects and safeguard measures in various sectors.

3.6 Opinions on Development of a Culture by Chinese Enterprises Oversea (Ministry of Commerce, Public Relations Office of the CPC Central Committee, Ministry of Foreign Affairs, NDRC, SASAC, National Bureau of Corruption Prevention, National Association of Industry and Commerce, etc., 2012)

The Opinions serves as encouragement and guidance for outbound investors. The Opinions requires the enterprises to strictly follow the principle of legality and regulatory compliance. The enterprises shall consciously protect the legitimate labor rights, conscientiously implement environmental regulations, and ensure that their international operations are in line with relevant laws and regulations. They should conscientiously fulfill their social responsibilities to benefit the local community and people, and build a responsible image of Chinese enterprises. Efforts should be made to provide the best goods and services for the local community, and promote the prosperity of the host country and region. The enterprises should release corporate information to the public in time, to ensure open and transparent business operation. They should actively participate in local public welfare undertakings and solve problems for the local community. The enterprise should perform well in environmental protection, pay due attention to resource conservation, and minimize the environmental pollution and damage caused by their production and operation. They should make active effort in training management and technical talents for the local area and promoting local employment.

3.7 Guide on Sustainable Overseas Forest Management and Utilization by Chinese Enterprises (LJF [2009] No.76)

The purpose of the Guide, jointly formulated by the former State Forestry Administration and the Ministry of Commerce, is to guide Chinese enterprises for rational management, utilization and protection of overseas forests so that they can play a positive role in the sustainable development of global forest resources, further standardize the behavior of Chinese enterprises engaged in overseas forest resources operation and wood processing and utilization, improve self-discipline in the industry, and promote the legal and sustainable operation and utilization of global forest resources as well as related trade activities. According to the Guide, Chinese enterprises should follow the principle of integrating ecological, economic and social benefits, attach great importance to the ecological benefits of the forests in their forest resources operation and utilization abroad, to realize a good balance of the ecological, economic and social benefits. Their forest resources operation and

utilization should benefit the sustainable development of local forests and contribute to the local ecological and environmental security. And they should abide by the relevant agreements/treaties signed by China and the countries where forest resources are located as well as relevant international conventions/treaties.

3.8 Guiding provisions formulated by industry associations such as Chinese Guidelines for Social Responsibilities in Outbound Mining Investment Industry and Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains

Both documents are industry guiding norms formulated by China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters (hereinafter referred to as “CCCCMC”). CCCCCMC is a trade association directly under the Ministry of Commerce. In principle, the norms formulated by CCCCCMC apply only to its members, and can only be implemented in accordance with its organizational documents and membership agreements. The primary purpose of CCCCCMC is to coordinate and guide the members’ import and export activities in accordance with the organizational documents, and to provide information and consulting services for members.

Issued by CCCCCMC in 2015, Guidelines for Social Responsibility in Outbound Mining Investments provides guiding norms for the mining industry. The Guidelines sets 8 agendas of social responsibilities, including organizational governance, fair operating practices, supply chain management, human rights, labor issues, occupational health and safety, environment, and community development, and elaborates the key contents of each agenda and the specific methods, measures and paths for implementation. The guidelines puts forward high standards for decision-making and operation of the enterprises’ outbound investment in mining, requiring the enterprises to keep social and environmental factors in mind, and effectively manage the impact of mineral resources exploration, exploitation, processing, investment & cooperation and related activities on society and environment, so as to realize the coordination of mineral resources development and the environmental and social development. They should contribute as much as possible to the sustainable development of the area and the community where they are located so long as economically feasible, and minimize the environmental footprint in the mining cycle.

Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains was also formulated by CCCCCMC, in response to the United Nations Guiding Principles for Business and Human Rights adopted by the UN Human Rights Council in 2011. The international community has formulated a series of compliance frameworks of due diligence guidelines for enterprises purchasing ores from conflicts-affected regions and high-risk regions. The Guide is expected to provide guidance for Chinese enterprises on identification, prevention and mitigation of risks in their overseas investment, cooperation and trade in mining, so as to avoid the aggravation of the conflicts, serious violations of rights and serious dereliction of duty in the process. The Guide is not mandatory and does not include any provisions in terms of enforcement or penalties.

Chapter Four Status of Dispute Settlement in Chinese Enterprises’

Overseas Investment

Chinese enterprises are exposed to multiple factors in their process of “going global”, and many disputes will inevitably arise. Overseas investment is subject to the laws of the country where the investor is located, the laws of the host country, bilateral or multilateral international agreements and other multi-level legal norms; accordingly, multi-level and multi-dimensional dispute settlement platforms and channels are involved. Therefore, the Chinese government has established the Belt and Road International Commercial Dispute Settlement Mechanism and Institutions since 2018. Led by the Supreme People’s Court, the China International Commercial Court was established at the Supreme People’s Court, which incorporated five international commercial arbitration institutions (the China International Economic and Trade Arbitration Commission, Shenzhen Court of International Arbitration, Shanghai International Economic and Trade Arbitration Commission, Beijing Arbitration Commission, and China Maritime Arbitration Commission) and two international commercial mediation institutions (the China Council for the Promotion of International Trade Mediation Center and Shanghai Commercial Mediation Center) into the arbitration and mediation institutions in the diversified resolution mechanism of the “one-stop” international commercial dispute resolution platform.

The core concept of the Belt and Road International Commercial Dispute Settlement Mechanism is the combination of diverse dispute resolution means with a one-stop platform for litigation, arbitration and mediation. Directly connected with mediation and arbitration, judicial settlement plays the role of final and mandatory settlement. Fair, transparent and efficient judicial adjudication, promoted by the court and aided with arbitration and mediation, provides a final safeguard for settlement of international disputes, and makes it convenient and efficient.

4.1 A major decision: Opinion Concerning the Establishment of the Belt And Road International Commercial Dispute Resolution Mechanism and Institutions

In January 2018, the CPC Central Committee Leading Group for Deepening Overall Reform considered and adopted the Opinion Concerning the Establishment of the “Belt and Road” International Commercial Dispute Settlement Mechanism and Institutions (hereinafter the “Opinion”). The Opinion require proper resolution of commercial disputes arising from the construction of the Belt and Road in accordance with the law and equal protection of the legitimate rights and interests of Chinese and foreign parties, so as to create a fair and just business environment, and provide judicial services to promote the Belt and Road construction.

The “Opinions” puts forward four principles for establishment of the “Belt and Road” International Commercial Dispute Settlement Mechanism and Institutions: (1) Planning together, building together and benefiting together. Experts from countries participating in the “Belt and Road” construction who are proficient in international laws and domestic laws are encouraged to take an active part. The right of the parties to choose legal experts at home and abroad to resolve the dispute should be respected. (2) Justice, efficiency and convenience. It is necessary to study and draw on the effective practices of the current international dispute settlement mechanism, so as to establish a widely accepted new international dispute settlement mechanism and related institutions in line with the national conditions and characteristics of the countries participating in the Belt and Road construction, and solve cross-border commercial disputes arising from the Belt and Road construction fairly and efficiently. (3) Party Autonomy.. The right of the parties in the countries

participating in the Belt and Road construction should be respected so that they can choose based on agreement their means of dispute settlement and the laws of their own countries or a third country with which they are familiar. Active efforts should be made to apply international treaties and customs to protect the legitimate rights and interests of all parties on an equal footing. (4) Diversified dispute resolution. The diversity of participants in the Belt and Road construction, the complexity of the types of disputes and the differences of legislation, judiciary, legal culture should be fully considered, so as to actively cultivate and improve the dispute settlement mechanism integrating litigation, arbitration and mediation, and meet the diverse needs of the Chinese and foreign parties in their dispute resolution.

The establishment of the China International Commercial Court by the Supreme People's Court, and its leadership in organizing the International Commercial Expert Committee, provides support for the settlement of international commercial disputes via arbitration, mediation and other means, and promotes the establishment of a diverse mechanism for dispute settlement incorporating litigation, mediation and arbitration, so as to form a one-stop convenient, fast and low-cost dispute settlement center that provides high-quality and efficient legal services for parties in the countries participating in the Belt and Road construction. The Supreme People's Court has set up the First International Commercial Court in Shenzhen, Guangdong Province, and the Second International Commercial Court in Xi'an, Shaanxi Province to handle cases of cross-border commercial disputes between parties concerned. The Fourth Civil Division of the Supreme People's Court coordinates and oversees the work of the two international commercial courts. An International Commercial Expert Committee composed of experts proficient in international laws and domestic laws should be established to formulate corresponding operating rules. In case of a cross-border commercial dispute between the parties concerned, the Committee should first mediate the dispute on a voluntary basis and issue a mediation document. The Committee may provide expert opinion on the application of foreign laws as necessary when the Chinese court hears a case.

The Supreme People's Court shall lead the work related to the establishment of the international commercial dispute settlement mechanism and institutions, make full use of results of the intelligent court construction, build a database of laws in countries participating in the Belt and Road construction and a foreign law ascertainment center, strengthen the informatisation and big data analysis in cases involved in the Belt and Road construction, to provide intelligent services to the judges and ensure proper application of laws and consistent adjudication. A talent pool on laws of the countries participating in the Belt and Road construction should be established, to encourage domestic and foreign legal experts proficient in international laws, international trade rules and foreign languages to participate in the dispute settlement. Domestic law experts should be encouraged to strengthen the research on issues related to the settlement of international commercial disputes, so as to achieve valuable research results and the effective use thereof in practice. Exploration should be made to promote the corresponding revision of relevant laws and regulations such as the Civil Procedure Law and Arbitration Law, judicial interpretations and other normative documents, so as to provide sufficient legal basis and guarantee for the establishment and improvement of the Belt and Road international commercial dispute settlement mechanism and institutions.

4.2 Establishment of the international commercial dispute settlement mechanism

4.2.1 International Commercial Court of the Supreme People's Court

From the perspective of international trends, the establishment of an international commercial court has become the latest and most important step in building the global business environment and enhance the strength of rule of law in the international competition. In June 2018, the Supreme People's Court established an International Commercial Court (the "First International Commercial Court") as one of its permanent judicial organs. For cases of international commercial disputes brought to the International Commercial Court, the parties concerned may, according to the terms of the Provisions of the Supreme People's Court on Several Issues Concerning the Establishment of the International Commercial Court and the Procedural Rules for the China International Commercial Court of the Supreme People's Court (For Trial Implementation), choose a mediation institution for mediation as agreed. Where the parties reach a mediation agreement via the mediation, the International Commercial Court may issue mediation document in accordance with the provisions of the law. Where a party requests a written judgment to be issued, the written judgment may be prepared and served to the party according to the content of the agreement.

The Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court stipulates that the court shall adopt the system of final decision at first instance, thus providing a basis for the efficient handling of cases by the International Commercial Court. In addition, the parties may submit evidence materials in English directly without translation. Upon the consent of the other party, the judge may directly conduct cross-examination, saving time and cost. When hearing a case, the Court may also consult with a number of members of the International Commercial Expert Committee for their expert opinions.

According to its official website⁴, the First International Commercial Court of the Supreme People's Court has applied jurisdiction over 5 cases as the superior court, including 3 for confirming the validity of the arbitration agreements. The rulings of these 3 cases clarified several major legal issues and further confirmed the principle of separability of arbitration agreements.

The First International Commercial Court also concluded a case concerning product liability and contract dispute, which was the first case where it made a substantive judgment: the case of product liability dispute between Guangdong Herbal Pharmacy Co., Ltd. (the plaintiff, the Herbal Company) and Bruschetini S.r.l. of Italy. The case was originally put on file by the Guangzhou Intermediate People's Court, Guangdong Province, on October 11, 2018, and was subsequently upgraded to jurisdiction by the Supreme People's Court according to law. During the trial, both the plaintiff and the defendant agreed that the case be heard under the law of the People's Republic of China. (Article 3 of the Law of the People's Republic of China on the Laws Applicable to Foreign-related Civil Relations stipulates that "The parties may explicitly choose the law applicable to their foreign-related civil relation in accordance with the provisions of this law".) The focus of the dispute: where there is no sales contract between the seller and the producer, whether the former may claim the right to the latter in accordance with the relevant provisions on product recall? The fundamental problem to be solved in this case: after the Herbal Company performed its legal obligations of recall to the consumers (or the Mainland China companies as buyers), whether it may bypass its direct seller in the trade (in this case Aprontech) and directly require the defendant (the pharmaceutical manufacturer) to fulfill its obligations to recall the products that the Mainland China companies returned to Herbal Company and those unsold products in the inventory of the Herbal Company? In the judgment of this case, it is made clear that where there is no contractual relationship established

⁴<http://cicc.court.gov.cn/html/1/218/180/index.html>

between the two parties, the seller who has fulfilled its recall obligations should be entitled to seek relief according to the relevant provisions on product recall. The judgment fully protects the rights and interests of consumers and the rights of trading parties in the market.

4.2.2 “One-stop” diversified international commercial dispute resolution mechanism

In December 2018, the Supreme People’s Court issued the Notice of the General Office of the Supreme Peoples' Court on Inclusion of the First Group of International Commercial Arbitration and Mediation Institutions in the “One-Stop” Diversified International Commercial Dispute Resolution Mechanism, Procedural Rules for the China International Commercial Court of the Supreme People’s Court (For Trial Implementation), and Working Rules of the International Commercial Expert Committee of the Supreme People’s Court (For Trial Implementation). The three normative documents are important supporting documents of the Provisions of the Supreme People’s Court on Several Issues Regarding the Establishment of the International Commercial Court. This is an act of the Supreme People’s Court in implementing the Opinion Concerning the Establishment of the Belt And Road International Commercial Dispute Resolution Mechanism and Institutions issued by the General Office of the CPC Central Committee and General Office of the State Council. The implementation of these normative documents marked the formal completion of the “one-stop” diversified international commercial dispute resolution platform integrating litigation, arbitration and mediation, which entered the stage of operation.

The Notice of the General Office of the Supreme Peoples' Court on Inclusion of the First Group of International Commercial Arbitration and Mediation Institutions in the “One-Stop” Diversified International Commercial Dispute Resolution Mechanism specified five international commercial arbitration institutions (the China International Economic and Trade Arbitration Commission, Shenzhen Court of International Arbitration, Shanghai International Economic and Trade Arbitration Commission, Beijing Arbitration Commission, and China Maritime Arbitration Commission) and two international commercial mediation institutions (the China Council for the Promotion of International Trade Mediation Center and Shanghai Commercial Mediation Center) as the first batch of arbitration and mediation institutions in the diversified resolution mechanism of the “one-stop” platform of international commercial dispute resolution.

The Procedural Rules for the China International Commercial Court of the Supreme People’s Court (For Trial Implementation) stipulates the working procedures of the International Commercial Court in case acceptance, service of process, pre-trial mediation, trial, enforcement, and support for dispute resolution via arbitration, and makes clear the connection between litigation and mediation as well as judicial proceedings and arbitration: a case management meeting of the parties concerned and/or their attorneys should be convened within 7 working days since the date the case materials are served on the defendant (counting from the date of the last service if there are more than one defendant), to discuss and determine the method of pre-trial mediation, and agree on the mediation period, which is generally no more than 20 working days. Where the parties fail to agree on the pre-trial mediation, the timetable of the proceedings should be fixed. The parties concerned may jointly choose the mediators and mediation institution.

The Working Rules of the International Commercial Expert Committee of the Supreme People’s Court (For Trial Implementation) specifies the functions and composition of the International Commercial Expert Committee; the qualifications, roles and duties of the committee members; the

responsibilities of the Expert Committee Office; the mediation and consultation mechanism of the committee members; and the guarantee of the Expert Committee's performance of duties.

4.3 Guiding Cases of the Supreme People's Court

Guiding cases refer to the cases determined and uniformly issued by the Supreme People's Court to provide guidance in the trial and enforcement by the courts all over China⁵. In recent years, guidance via cases has become an important part of China's socialist judicial system. After the Fourth Plenary Session of the 18th CPC Central Committee proposed to "strengthen and standardize judicial interpretation and case guidance, and unify the standards of law application", higher attention was paid to the case guidance system than ever before. In October 2018, the Organic Law of the People's Courts of the People's Republic of China included the guiding cases in the law for the first time: "The Supreme People's Court may interpret issues pertaining to the specific application of law in judicial work. The Supreme People's Court may issue guiding cases." The Case Guidance Office of the Supreme People's Court is responsible for the selection and review of the guiding cases as well as the application for approval. People's courts at all levels should refer to the guiding cases issued by the Supreme People's Court when hearing similar cases.

In February 2019, the Supreme People's Court issued special guiding cases for the Belt and Road construction (6 cases as batch 21)⁶, which mainly involved contract disputes in international goods sales, contract disputes in carriage of goods by sea, letter of guarantee fraud disputes, salvage contract disputes, L/C issuing disputes, disputes in application for establishing a fund for limitation of liability for maritime claims, etc.

Chapter Five Case Analysis: the Case of Guinea Bauxite Mines

5.1 Background

The Republic of Guinea ("Guinea") is located in the most western part of Africa. While having extremely rich mineral resources, it is one of the least developed countries identified by the United Nations. Known as the "Kingdom of Bauxite", Guinea has bauxite reserves of about 40 to 41 billion tonnes, about two-thirds of the world's total. The proved reserves are 29 billion tonnes, ranking first in the world. Bauxite is widely distributed in Guinea, and there are mines in almost every part of the country. The Lower Guinea Natural Area is considered one of the best bauxite mine areas in the country, with reserves of more than 10 billion tonnes, mainly located in Fria, Kindia and Boké. The bauxite in this region is of the best quality in the world, with aluminum content of up to 60%. With an average thickness of 36 meters, the mines are exploited in three layers opencast. Guinea's bauxite output is relatively low compared with its largest reserves in the world. Guinea produced 27.61 million tonnes of bauxite in 2016, becoming the world's fourth-largest bauxite exporter ahead of

⁵For detailed provisions, please refer to the Provisions of the Supreme People's Court on Case Guidance Work and the Implementation Rules for the Provisions of the Supreme People's Court on Case Guidance Work.

⁶<https://www.chinacourt.org/article/detail/2019/02/id/3736851.shtml>

India, but behind Australia, China and Brazil.

Chinese companies have been active in Guinea's bauxite development for several reasons. First, while China's output of primary aluminum accounted for 58% of the global total in 2017 and its demand for bauxite was about 175 million tonnes, its output of bauxite was only 68 million tonnes in the same year. Although the output ranked second in the world, China's dependence on external sources was over 60%. As of the end of 2017, China's bauxite reserves stood at 1 billion tonnes, just 3.33 per cent of global total. Second, due to the low grade of ore in China, alumina can only be produced via sintering process with high energy consumption, and there are environmental problems in both the mining and production of alumina. As the environmental law enforcement is increasingly strict in China, the costs begin to rise. Third, China has traditionally imported bauxite mainly from Australia and Southeast Asia countries such as Indonesia and Malaysia. However, since 2012, India, Malaysia and other countries have issued export bans on raw bauxite ore, leading to the cut off of supply for China. So it is a natural choice for China to turn to Guinea, a country with huge reserves and low output.

China's first shipment of aluminium from Guinea came from the SMB-Winning Consortium. The SMB-Winning Consortium is a consortium of four companies: Winning International Group of Singapore, China Hongqiao Group (a subsidiary of China's Shandong Weiqiao Pioneering Group), Yantai Port Group of China and UMS of Guinea. Among them, China Hongqiao is mainly responsible for mining and is the final user of the bauxite; Winning International Group is responsible for general contracting, integrated management, inland waterway shipping and sea freight; Yantai Port Group is responsible for port construction and operation management, and port transportation of the bauxite; and UMS is responsible for leasing mining equipment, heavy mining trucks and land transport for rapid development and shipping of Guinea's bauxite resources. SMB entered Guinea in 2014 to engage in the development of bauxite. Société Minière de Boké, the SMB Africa Port Company and the SMB Guinea Railway Company and other companies were registered in Guinea, dedicated to mining, port construction and operation and railway construction respectively.

The SMB Guinea project was officially inaugurated on March 26, 2015. On July 20, 2015, Société Minière de Boké and Boké Port were officially completed and put into operation. On September 25, 2015, the first shipment of 180,000 tonnes of bauxite by the "M.V. WINNING CONFIDENCE" departed for China. The shipment arrived at Yantai Port on November 14 the same year, was transferred to the terminal of Binzhou Port for unloading, and was then directly delivered to the yard of the alumina plant. So far, a complete industrial chain integrating multimodal transport from overseas mines to the plants in China was completed. Until 2016, China imported very limited volume of bauxite from Guinea. After SMB was established, China imported 1,500 tonnes of bauxite from Guinea in 2016, and Guinea overtook Australia to become China's largest source of bauxite in 2017.

In addition to the SMB-Winning Consortium, Chinalco entered Guinea in 2016, the first "national team" of mining from China. On October 28, 2016, Chinalco and Rio Tinto signed the Framework Agreement for Equity Transfer of Simandou Project. On October 31, 2016, Chinalco and the government of Guinea signed an investment and cooperation agreement in Beijing. The project officially started in October 2018, with a total investment of \$ 585 million in the first phase. On-site mining started in October 2019, and the first shipment of the ore arrived in China in February 2020.

On April 6, 2020, the Chinalco Guinea bauxite project of ten million tonnes was completed and put into operation.

In November 2019, the Ministry of Mines and Geology of Guinea officially announced that Société Minière de Boké of the SMB-Winning Consortium acquired the contract object of the Simandou Iron Ore Mine Block 1 and Block 2 project exclusively. Located in the Simandou Mountains in the southeast of Guinea, about 650 kilometers from the capital Conakry, Simandou Iron Mine is the world's richest and highest-grade large-scale open-air hematite mine, with estimated reserves of billions of tonnes.

Besides, SMB signed the mining agreement, alumina plant agreement and railway agreement with the Guinean government to build the first alumina plant to come into operation in Guinea in nearly half a century.

5.2 Environmental impact

It took SMB less than a year to go through the process from inception to production and to the first shipment of bauxite to China. In order to save upfront infrastructure investment, reduce risks, and realize fast mining, the SMB-Winning Consortium adopted an innovative “easy” mining model.

Since the operation of the project, much controversy was aroused as to its impact on the local environment and people's livelihood. In the process of mining with explosives, the siting of the shot points was accused of damaging the water supply of local villagers, and the blasting harmed the safety of villagers' houses. Surface water pollution caused by the open-cast mining directly affected the precious drinking water resources of the villages, contaminated the wells the villagers relied on for their living, worsening the local villagers' water environment. The open-cast mining also caused damages to the ecology, which was not effectively restored. The construction of simple red gravel roads (using on-site materials) instead of asphalt roads for transportation resulted in large amounts of dust pollution during the mining and transportation of bauxite, leading to poor air quality in the area. Mining trucks of 75 tonnes that hauled ore to inland ports on the 15-kilometer simple road raised a cloud of dust during the dry season, bringing constant complaints from local villagers. At the same time, as no deep-water port was built, the insufficient water depth made SMB adopt the transportation mode of ship-ship connection. That is, the ore was loaded onto a conveyor belt at the inland port and transported by barge to the estuary. The forwarding of the bauxite to ocean going vessels was also blamed for damaging the local marine environment.

In addition to the damage to water sources, dust and noise pollution, and possible loss of fish stocks due to disturbances from the barges, Société Minière de Boké of the SMB-Winning Consortium was also accused of insufficient compensation for land acquisition because the compensation paid by local mining companies did not go to the farmers entirely. 70% of the local young people were still considered unemployed as they were not skilled enough to be employed. And there were also a series of other issues such as the interests of the local communities and the risk of casualties from traffic accidents.

In 2017, deep resentment over the lack of water, electricity and other basic services in the area led to widespread rioting in the Boké mine area, where thousands of youths attacked the government buildings and took actions to stop the mining operations. “As the resentment builds up, it will explode at some time,” said an official of Guinea's Ministry of Mines. “People saw capital going

into the mining companies and truckloads of bauxite being transported from their farms. While the government gain high taxes, what are they getting? The land, water and air they depend on for a living have been severely damaged.” The mining companies were under pressure to re-conduct the environmental and social impact assessment (ESIA) of the existing mines, which has not been completed yet.

The international organizations noted in a 2018 report on Guinea’s mining industry that the government did not pay enough attention to the environmental problems related to mining. The government’s priority was development of mining, but not the complex and serious environmental and social problems as a result thereof.

SMB is currently expanding the scale of its bauxite projects in Guinea, and from mining to downstream smelting projects with higher value added; it will also invest in alumina plants. The production of alumina from bauxite produces large amounts of waste liquid with strong alkalinity and waste residue such as red mud. Red mud piles occupy a lot of land. If the “Triple protection” measures are not in place, infiltration of pollutants will result, leading to land alkalization, as well as possible pollution of surface water and groundwater. Given the environmental performance of the company in Guinea, mining of larger scale and related activities will bring major potential environmental risks.

The attitude of the Guinea government towards SMB also contributes to the problems. The government of Guinea facilitated the SMB bauxite projects by granting permits to the investment projects before the environmental and social impact assessment, which results in a series of subsequent environmental and social problems.

5.3 Application of law

5.3.1 Laws of Guinea

The air pollution, water pollution, ecological damage and other impacts on local communities caused by SMB’s mining operations in Guinea violate relevant provisions of Guinea’s Environmental Protection and Development Law on the prevention and control of pollution.

First, according to the provisions on the environmental impact assessment in the Environmental Protection and Development Law (Chapter 1 of Part V), “where the development project, construction or facilities may impact the local natural environment, or may cause harm to the environment due to their size and the nature of their activities, the applicant or owner shall prepare an environmental impact assessment report and submit it to the Ministry of Environment, with the aim of assessing the direct or indirect impact of the project on the ecological balance of Guinea, the environment and quality of the people’s lives, and on overall environmental protection.” Before implementing a mining project, the mining company shall prepare an environmental impact assessment report to assess the impact of the project on the surrounding environment and the community. However, the Law does not provide for the legal consequences of failure to carry out an environmental impact assessment, but only the legal liability of falsifying data related to an environmental impact assessment (Article 113: Anyone who falsifies the results of an environmental impact study as stipulated in Article 82 or deliberately changes the necessary parameters in the study shall be liable to a fine of GNF 250,000 to 1,000,000 and imprisonment of 2 to 5 years. That makes the Article not sufficiently mandatory.

Second, the dust of SMB's mining and transport vehicles pollutes the atmosphere, which violates the provisions on air pollution in the Environmental Protection and Development Law, and the environment authority has the right to order the SMB to stop the pollution. Article 41 of the Environmental Protection and Development Law prohibits the emission into the air of any pollutant (in particular smoke, dust, toxic gases, and corrosive or radioactive gases) that exceeds the emission standards specified in the applicable text of the Law. According to Article 42: in order to prevent air pollution, all construction plants, as well as agricultural, industrial, commercial, handicraft business institutions, vehicles or all other mobile equipment and their use and operation, must meet the requirements of the current technical specifications or the implementation rules of the Law. Article 43: in case the emission of air pollutants exceeds the emission standards stipulated by the government authorities, and the responsible person concerned fails to take any measures to make its emissions meet the regulations, the environmental authority can issue an order to the relevant responsible person for correction. In case the order falls short, or the expected effect is not produced within the prescribed period of time, the agency of the Ministry of Environment may suspend the operation of the equipment as the pollution source or demand necessary measures after seeking opinions from relevant departments under emergency circumstances. The relevant costs shall be borne by or charged to the owner of the equipment. The penalty provisions of the Law stipulates a fine of GNF 250,000 to 2,500,000 and an imprisonment of 1 to 3 years for violations of Articles 41, 42 and 43 that result in a decline in air quality.

Third, the pollution caused by SMB's mining to the surrounding drinking water source violates the provisions of the Environmental Protection and Development Law on protection of drinking water source. The Law provides that protective boundaries shall be established around the water intake points and that any activity within the boundaries which may impair the quality of the water shall be prohibited or regulated. Obviously, SMB's mining results in the pollution to the surrounding surface water and wells in violation of these provisions. (Article 25: The aforesaid public interests project reporting shall be carried out for human water intake projects. Protective boundaries shall be established around one or more water intake points, and any activity within the boundaries which may impair the quality of the water shall be prohibited or regulated.)

Fourth, SMB's mining causes ecological damage and it fails to restore the reclaimed land vegetation, which violates the provisions on reclamation in mining and plant protection in the Environmental Protection and Development Law and the Mineral Resources Law. Article 143 of the Mineral Resources Law stipulates the obligations of the holder of the mining rights certificate to protect the environment and health, and the holder of the mining license or mining rights certificate shall prevent or reduce the damage to the ecosystem and biodiversity caused by the mining activities. Reclamation operations (such as tree felling or vegetation removal), mining and quarrying, and construction of arterial roads within the scope of the mining rights certificate must be approved by the Minister of Forestry in advance, and a felling or reclamation permit must be obtained. Special protection should be provided for valuable forest species specified in the Forestry Law and its enforcement provisions. During mining and quarrying as well as the construction of arterial roads within the scope of the mining rights certificate, only with the prior authorization of the Minister of Forestry can these species be felled or part of them removed. The penalty provisions of the Environmental Protection and Development Law also stipulates a fine of GNF 250,000 to 500,000 and an imprisonment of 2 to 5 years for any person who, in violation of the law, damages or destroys animals, plants and their natural habitats (Article 107).

In sum, the environmental, ecological and social problems caused by SMB's mining in Guinea are in clear violation of relevant Guinean laws and regulations. But the Guinea's government regulation is not in place in this regard. Loose approval is granted for relevant permits, and priority is given to economic development. As a result, SMB's mining and related operations have increasingly expanded without properly addressing the adverse impact on the local area.

5.3.2 Laws and regulations related to Chinese enterprises' overseas investment

The "overseas investment" as defined in the Measures for the Administration of Overseas Investment by Enterprises refers to the investment of an enterprise in the People's Republic of China (the "investor") to, directly or through the overseas enterprise(s) under its control, acquire overseas ownership, control, business management rights and other related rights and interests by means such as investing assets or equity or providing financing or guarantee. The SMB is a consortium of China Hongqiao Group (an affiliated company of China's Shandong Weiqiao Pioneering Group), Winning International Group of Singapore, Yantai Port Group of China and UMS of Guinea.

Among them, China Hongqiao is mainly responsible for mining; Winning International Group is responsible for sea freight; Yantai Port Group is responsible for port transportation of the bauxite; and UMS is responsible for land transport, for rapid development and shipping of Guinea's bauxite resources. Shandong Weiqiao Pioneering Group is a private enterprise registered with the Administration for Market Regulation of Binzhou, Shandong Province in 1998. Yantai Port Group is a wholly state-owned enterprise registered with Yantai Administration for Market Regulation, mainly engaged in port related business. Mineral resource development is an industry that is encouraged to invest in according to the Guiding Opinions on Further Guiding and Standardizing the Direction of Overseas Investment issued by the State Council; and Guinea is not a sensitive country specified in the Measures for the Administration of Overseas Investment by Enterprises. Therefore, the outbound investment of Shandong Weiqiao Pioneering Group and Yantai Port Group was subject only to filing with the development and reform department, filing of the establishment of overseas enterprises with the commerce department, and the subsequent foreign exchange registration. While Yantai Port Group is a state-owned enterprise, it is not a central government-owned enterprise. Therefore, the general provisions on outbound investment of Chinese enterprises apply to its outbound investment approval.

The mining project in Guinea carried out by SMB incorporated on the investment of Shandong Weiqiao Pioneering Group and Yantai Port Group has damaged the local ecology, polluted the environment and affected local people's livelihood. It violates not only Guinean laws, but also a series of Chinese laws, regulations and normative documents on outbound investment. The Guide for Environmental Protection in Overseas Investment and Cooperation issued by the Ministry of Commerce and the former Ministry of Environmental Protection in 2013, the

Opinions on the Cultural Construction of Chinese Overseas Enterprises issued by seven ministries and commissions including the Ministry of Commerce in 2012 and other normative documents all mention that Chinese enterprises should pay attention to environmental issues in their overseas investment. These documents promote environmental protection concepts among enterprises, so that they can fulfill their environmental protection responsibilities according to law, abide by the environmental protection laws and regulations of the host country, and meet their legal obligations

in environmental protection such as environmental impact assessment, emission in line with standards, environmental emergency management, etc.

For outbound investment in mining industry, Guidelines on Social Responsibilities in China's Outbound Mining Investment Industry formulated by the CCCMC requires Chinese enterprises to carry out comprehensive environmental assessment in their overseas mining investment, ensure the closure and reclamation of the mines, implement environmental risk management, and promote protection of the biodiversity, so as to minimize the impact on the environment and the ecological footprint in the mining cycle. Although these industrial guiding norms are not mandatory, Shandong Weiqiao Pioneering Group and Yantai Port Group, as large enterprises with social responsibilities, should be strict with their investment behaviors and actively address and rectify the problems arising in their investment in the host country.

In addition, according to the Guiding Opinions of 28 Departments including NDRC and Ministry of Commerce on Strengthening the Construction of Credit System in Overseas Economic Cooperation, the Memorandum of Cooperation on Joint Punishment of Serious Dishonest Participants in Overseas Economic Cooperation and other normative documents, SMB's violation of the local environmental protection laws and regulations may cause the company to be included in list of dishonest entities and publicized on the special webpage for "bad credit records" at the Ministry of Commerce's "Public Service Platform for Going Global". The aforementioned normative documents on credit system construction also state that "credit information disclosure should be promoted in accordance with the laws and regulations" on the basis of strict protection of the privacy and information security of organizations and individuals. Accordingly, social organizations or individual citizens may apply to the authorities in charge of outbound investment for information disclosure in accordance with the law. However, as the official information may not be accurate and timely, social organizations can also report the information on the projects' violations obtained from multiple channels to the competent authorities, and require to have the dishonest entities publicized. Commercial disputes arising from the outbound investment projects, such as disputes over the contract of carriage of goods by sea, can be settled via litigation in the International Commercial Court of the Supreme People's Court in accordance with the law. The International Commercial Court has made a major judicial innovation within the framework of China's current Civil Procedure Law, granting the parties the right to choose direct jurisdiction by the Supreme People's Court via agreement. According to the provisions on the scope of cases to be accepted by the International Commercial Court in the Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court: "The International Commercial Court accepts the following cases: (1) first instance international commercial cases in which the parties have chosen the jurisdiction of the Supreme People's Court according to Article 34 of the Civil Procedure Law, with an amount in dispute of at least CNY 300,000,000; (2) first instance international commercial cases which are subject to the jurisdiction of the higher people's courts who nonetheless consider that the cases should be tried by the Supreme People's Court for which permission has been obtained; (3) first instance international commercial cases that have a nationwide significant impact; (4) cases involving applications for preservation measures in arbitration, for setting aside or enforcement of international commercial arbitration awards according to Article 14 of these Provisions; and (5) other international commercial cases that the Supreme People's Court considers appropriate to be tried by the International Commercial Court." If the case of the investment project falls in the above scope, a direct litigation can be filed

at the International Commercial Court of the Supreme People's Court, where convenient channels for dispute resolution can be enjoyed. For example, the parties may apply to the International Commercial Court for preservation arbitration, and for setting aside or enforcement of the arbitration award by the international commercial arbitration institution included in the "one-stop" diversified resolution mechanism for international commercial disputes, and the parties may choose to have a mediation presided over by a member of the International Commercial Expert Committee. The International Commercial Court adopts the system of final decision at first instance, and its judgments and orders have legal effect.

Chapter Six Chinese Enterprises' Overseas Investment from the Perspective of International Environmental Law

Within the framework of the traditional international law, based on the principle of respect for national sovereignty, each country has independent jurisdiction, and the home country of transnational corporations has fewer obligations and responsibilities for their overseas investment. Due to the lack of effective regulation and remedy for problems arising from the investment and business operation of transnational corporations in the host countries, the social responsibilities of transnational corporations have aroused concern. In recent years, promoted by several developing countries and NGOs, there has been a growing emphasis on the need for the home countries of transnational corporations to exercise control over and assume certain obligations for the overseas investment of their corporate entities.

At present, the international law mainly regulates the international investment of multinationals in the following ways. First, the United Nations Global Compact is the highest corporate social responsibility initiative in the world so far, which requires enterprises to abide by the 10 universal principles of human rights, labor standards, environmental protection and anti-corruption put forward by the United Nations. Second, the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights approved by the resolution of the Sub-Commission on the Promotion and Protection of Human Rights of Commission on Human Rights. The Human Rights Norms sets out the human rights principles that corporations should observe in areas such as international criminal law and humanitarian law; civil, economic, social and cultural rights; and consumer protection and the environment. This is an important attempt of the international community to regulate the behavior of transnational corporations. Third, the Guidelines for Multinational Enterprises adopted by the Organization for Economic Co-operation and Development (OECD) advise multinational enterprises operating in or based in accession countries on voluntary principles and standards for responsible business conduct in a global context in conformity with applicable laws and internationally recognized standards. The Guidelines for Multinational Enterprises is the only multilaterally agreed comprehensive code of responsible business conduct that governments are committed to promoting, which features a system of "National Contact Points" (NCP). National focal points are governmental bodies of accession countries that, among other functions, receive "specific complaints" (reports) on corporations' non-

compliance with the Guidelines. The complaints can be placed by any individual or organization. Such a mechanism has the potential to help address business and human rights challenges, which covers issues in both home and host countries.

Starting from the area where the international community generally believes that problems are likely to arise in the process of the global business development, these “soft laws” have established global systems and rules on human rights, labor rights, environment, corruption, bribery, consumers’ rights and interests and shareholders’ equity and so on, providing a reference for transnational corporations’ social responsibility behaviors.

There are different theories about the social responsibilities of transnational corporations in academic circles. For example, transnational corporations can be regarded as subjects of the international law; on this basis, the equality of rights and obligations of transnational corporations can be advocated, the application of the international law can be expanded horizontally, and the regulation of behaviors of transnational corporations can be strengthened. Alternatively, transnational corporations can be regarded as “global citizens”, where theories on moral duty of citizens apply. International human rights instruments (such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination) provide for only “indirect” corporate responsibilities. However, both direct and indirect responsibilities are basis for regulating the human rights obligations of multinational corporations. Multinational corporations should assume their social responsibilities and human rights obligations based on the relevance and equivalence of rights and obligations in social connections.

At present, China ranks top in the world in terms of outbound investment and direct utilization of outbound investment. As the home country of the enterprises making overseas investment, China is facing increasingly important issues of social responsibilities arising from the enterprises’ overseas investment. In terms of China’s domestic laws, as described in this report, the regulatory system for enterprises’ overseas investment is gradually taking shape, and the regulation mode is increasingly comprehensive and systematic, with an emphasis on the in-process and post-event regulation of the overseas investment. However, due to the lack of laws of high legal effect, there are multiple lines within the regulatory system for Chinese enterprises’ overseas investment that are not coordinated, and the approval process for Chinese investors’ overseas investment is still cumbersome and time-consuming. Furthermore, as mentioned several times in this report, there is still a lack of effective

- ▶ mandatory norms in the regulatory system for outbound investment by Chinese enterprises to regulate the extraterritorial social responsibilities of the enterprises, let alone the extraterritorial
- ▶ legal liability of the multinational corporations.

Appendix Names and Document Numbers of Laws and Regulations Related to Chinese Enterprises' Overseas Investment

1. Measures for the Administration of Overseas Investment by Enterprises (NDRC Order No. 11)
2. Measures for Overseas Investment Management (MOC Order 2014 No. 3)
3. Catalogue of Sensitive Industries for Outbound Investment (2018) (FGWZ [2018] No. 251)
4. Interim Measures for Outbound Investment Filing (Approval) Report (SHF [2018] No. 24)
5. Implementation Rules for Outbound Investment Filing (Approval) Report (SBHH [2019] No. 176)
6. Detailed Rules of Regulation Featuring Random Inspection and Public Release for Overseas Investment and Cooperation (Trial) (SBHH [2017] No. 426).
7. Provisions on Foreign Exchange Administration of Overseas Direct Investment by Domestic Institutions (HF [2009] No. 30)
8. Operation Guidelines for Foreign Exchange Business for Direct Investment
9. Provisions on Foreign Exchange Administration of Cross-border Guarantee (HF [2014] No. 29)
10. Notice on Improving Foreign Exchange Administration of Banks' Onshore Guarantee for Offshore Loans (HZF [2017] No. 108)
11. Circular of SAFE on Further Simplifying and Improving Policies for Foreign Exchange Administration for Direct Investment (HF [2013] No. 13)
12. Circular of SAFE on Further Promoting the Reform of Foreign Exchange Administration and Improving the Verification of Authenticity and Compliance (HF [2013] No. 30)
- ▶ 13. Opinions of the State Administration of Taxation on Further Improving the Tax Services and Management for Enterprises "Going Global" (GSF [2010] No. 59)
- ▶ 14. Notice of the Ministry of Finance and the State Administration of Taxation on Issues Related to Tax Credit for Overseas Income of Enterprises (CS [2009] No. 125)
15. Regulations on the Security Management of Institutions and Personnel of Overseas Chinese Funded Enterprises (SHF [2010] No. 313)
16. System for Early Warning and Information Notification of Security Risks in Overseas Investment and Cooperation (SHF [2010] No. 348)
17. Supervision and Management Measures on Outbound Investment of Central Government-Owned Enterprises (NDRC Order No. 35)

- 18.2 Measures for Financial Management in Overseas Investment of State-owned Enterprises (CZ [2017] No. 24)
19. Code of Conduct for Overseas Investment and Operation of Private Enterprises (FGWZ [2017] No. 2050)
20. Guiding Opinions on Further Guiding and Standardizing the Direction of Overseas Investment (2017, NDRC, Ministry of Commerce, People's Bank of China and Ministry of Foreign Affairs) (GBF [2017] No. 74)
21. Guiding Opinions of 28 Departments including NDRC and Ministry of Commerce on Strengthening the Construction of Credit System in Overseas Economic Cooperation
22. Memorandum of Cooperation on Joint Punishment of Serious Dishonest Participants in Overseas Economic Cooperation
23. Notice of the State Council on Printing and Distributing the Outline of Social Credit System Construction Planning (2014-2020) (GF [2014] No. 21)
24. Guiding Opinions of the State Council on Establishing and Improving the Joint Incentive System for Integrity and Joint Punishment System for Dishonesty to Accelerate the Construction of Social Integrity (GF [2016] No. 33)
25. Guide for Environmental Protection in Overseas Investment and Cooperation (Ministry of Commerce and Ministry of Environmental Protection, 2013)
26. Country-specific Industry Guidelines on Outbound Investment (2011)
27. Opinions on Cultural Construction of Chinese Overseas Enterprises (SZF [2012] No. 104)
28. Guide for Utilization of Overseas Forests by Chinese Enterprises for Sustainable Operation (LJF [2009] No.76)
29. Opinions on the Establishment of the "Belt and Road" International Commercial Dispute Settlement Mechanism and Institutions
30. Provisions of the Supreme People's Court on Several Issues Concerning the Establishment of an International Commercial Court
- ▶ 31. Notice of the General Office of the Supreme People's Court on the Determination of the First batch of International Commercial Arbitration and Mediation Institutions Involved in the "One-stop" Diversified Resolution Mechanism for International Commercial Disputes
- ▶ 32. Rules of Procedure of the International Commercial Court of the Supreme People's Court (Trial)
33. Rules of Procedure of the International Commercial Expert Committee of the Supreme People's Court (Trial)
34. Green Credit Guidelines (CBRC [2012] No. 4)
35. Guiding Opinions on Promoting the Construction of Green Belt and Road (HGJ [2017] No. 58)
36. Cooperation Plan for Ecological and Environmental Protection along Belt and Road

37. Notice of the People's Bank of China on Issues Related to the Macro Prudential Management of Unified Cross-border Financing

38. Guidelines for Country-specific Risk Management of Banking and Financial Institutions

39. Measures for Administration of Establishing and Acquiring Subsidiaries and Shareholding Overseas by Securities Companies and Securities Investment Fund Management Companies (Draft)

40. Notice on Issues Related to Foreign Exchange Risk Management of Overseas Institutional Investors in the Inter-bank Bond Market

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