中国海外投资法律体制:
重塑制度框架,实现互利共赢原则

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CHINA'S OUTBOUND INVESTMENT LEGAL REGIME: Reworking the institutional framework to maximize the application of the Mutual Benefit and Shared Gain Principle

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摘 要

近年来，伴随着一股在中国企业内刮起的“全球化”浪潮，中国已经逐渐成为海外直接投资市场上的一支重要力量。这种趋势得益于中国近年来“走出去”战略的实施以及外汇储备的积累。然而，有鉴于高度管制的对外投资制度，为了保持世界主要经济体的地位，中国“走出去”的步伐需要慎之又慎。更为重要的是，如果中国想成为世界贸易的领跑者，一些制度上的限制亟待解决，只有这样中国的企业才能够在适用国际准则的过程中更为负责任地进行海外投资;也只有这样，其他国家才愿意敞开贸易之门，接受中国的投资。

本文详细探讨了中国对外投资制度的相关法律构架，并特别分析了如何最大限度地适用中国的“互利共赢原则”。在探讨中国的制度设计以及现行法律框架的过程中，拉美南方共同市场（MERCOSUR）的案例也将作为参照和借鉴，在文中予以讨论。

在对中国“互利共赢原则”相关制度框架进行阐释的过程中，本文着眼于探讨一些中国的政府机构或非政府组织，如中国国务院、商务部、财务部、国家发展改革委员会、国有资产监督管理委员会，它们在海外投资制度的设计中所体现的作用。

最后，本文得出结论：中国如果想扩大和深化海外投资，必须从精简机构着手，并将“互利共赢原则”落到实处。为此，本为尝试作出建议，认为中国应该建立一个新的机构专门用以支持和发展海外投资。这一新机构的设立将使中国的海外投资更加多元化，为商务部在海外投资事务上提供协助，更好地解决投资环境的问题，拓宽国有企业对外投资的机遇，并为与贸易国家的政府、其他组织的合作以及推动海外项目的设立提供渠道。这个机构也可以最终成为中国在中国-拉美共同市场投资委员会上的代表，参与到更广泛的投资活动中。有鉴于现行制度下“互利共赢原则”在实际适用过程中存在的挑战与困难，这一新机构的设立也可以作为一种简单而有效的手段，改善这一局面，从根本上拓宽中国海外投资的广度和深度。

关键词：中国海外投资，“走出去”战略，海外投资制度，“互利共赢”原则，拉丁美洲，拉美南方共同市场，体制

ABSTRACT

In the past decade, China has become a major player in the overseas foreign direct investment arena, with several companies aiming to globalize their businesses. The phenomenon is due to the implementation of the "*Going Out" ("走出去")* strategy and to the immense foreign exchange reserves accumulated by China in recent years. However, with a highly regulated outbound investment regime, China needs to tread carefully if it seeks to maintain its position as a global economic power. More importantly, it needs to address its institutional limitations if it wants to become a global *leader*, where it is essential for its enterprises to behave responsibly and accept international standards, so that recipient countries will be eager to receive Chinese investments.

This thesis carefully examines China's institutional structure with regard to the outbound investment regime. In particular, this paper analyzes how the application of China´s legal system´s *Mutual Benefit and Shared Gain Principle* can be maximized. In doing so, Chinese investments in the MERCOSUR countries of Latin America are considered, while maintaining the focus on China's legal system and current institutional framework.

In detailing the current institutional structure related to the *Principle of Mutual Benefit and Shared Gain*, this thesis looks at the role of State Council, the Ministry of Commerce, the Ministry of Finance, the National Development and Reform Commission, and the State-Owned Assets Supervision and Administration Commission, in addition to various financial institutions and non-governmental organizations that complement the governmental institutional framework, in the overall outbound investment scheme.

This thesis ultimately finds that China must streamline its institutional structure to increase and broaden its overseas investments, and to better implement the *Principle of Mutual Benefit and Shared Gain*. To do this, this thesis proposes the creation of a new outbound investment support and promotion agency. The new agency would permit greater investment diversification, provide assistance to MOFCOM in its own overseas investment competences, contribute to better address environmental concerns, optimize the access of State Owned Enterprises to investment opportunities, provide venues of cooperation with recipient countries government and their respective organizations, facilitate the creation of overseas projects, and finally, provide representation for China in an eventual China-MERCOSUR Investment Council. In recognizing the legal challenges and practical problems in applying *Principle of Mutual Benefit and Shared Gain*, the creation of a new agency is a simple but efficient way to increase the application of this principle, and consequently the number and breadth of China's outbound investments.

Key Words: Chinese Overseas Investments, Going Out Strategy, Outbound Investment legal regime, Principle of Mutual Benefit and Shared Gain, Latin America, MERCOSUR, Institutional Framework

China's Outbound Investment Legal Regime:

Reworking the institutional framework to maximize the application of the *Mutual Benefit and Shared Gain Principle*, particularly with investments in the MERCOSUR

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CHAPTER I. INTRODUCTION

1.1 Thesis Overview

In the past decade, China has become a major player in the overseas foreign direct investment (OFDI) arena, with Chinese companies aiming to globalize their businesses. This phenomenon is a consequence of China's *Going Global* strategy[1] and also due to the huge amount of foreign exchange reserves accumulated by China during the last years.[2] It represents a unique opportunity for China and the rest of the world to achieve their development goals, and particularly for Latin American countries. However, in order for China to demonstrate its commitment to global economic and sustainable development and to position itself as a respectable global leader, it is essential for its enterprises to behave responsibly and accept international standards when investing overseas, so that their operations not only satisfy China´s needs but also the recipient countries'. In this process, China's legal system plays a very important role.

China is one of the few countries in the world with a legal regime that regulates outbound investments. To improve the functioning and efficiency of this legal regime, it

[1] The *Going Global* strategy was officially launched during the first years of the last decade. *See, e.g.*, *China Launches Two-Way Investment Strategy*, PEOPLE'S DAILY, Sept. 21, 2001, *available at* http://english.peopledaily.com.cn/english/200109/12/eng20010912_80006.html (last visited Apr. 27, 2012); Peter Thomas, *Chinese Sectoral Industrial Policy Shaping International Trade and Investment Patterns – Evidence from the Iron and Steel Industry* 20 (Duisburger Arbeispapiere Ostasienwissenschaften [Duisburger Working Papers on East Asian Studies], Working Paper No. 88, 2011), *available at http://econstor.eu/bitstream/10419/45004/1/654795150.pdf* (last visited Apr. 25, 2012) (describing the 1979 "Fifteen measures for economic reform" as the "establishment of Chinese companies' overseas and outward investment in general for the first time"). The *Going Global* strategy is also referred to as the *Going Out*, *Go Global*, and the *Go Out* strategy.

[2] China´s foreign exchange reserves are over $2 trillion USD, and therefore, China has the necessity of turning this money into tangible assets. *See* White Paper, *A brave new world: the climate of Chinese M&A abroad*, ECONOMIST, ECONOMIST INTELLIGENCE UNIT (Special Issue), 2010, at 7, *available at* http://www.managementthinking.eiu.com/sites/default/files/Brave%20new%20world.pdf (last visited Apr. 27, 2012); NARGIZA SALIDJANOVA, GOING OUT: AN OVERVIEW OF CHINA´S OUTWARD FOREIGN DIRECT INV., US-CHINA ECON. & SEC. REVIEW COMM'N 8 (2011) ("China has capital available to invest in any business if it believes that it is in China´s national interest").

is essential to update institutions to create a more solid institutional framework and a strong legal system focused on risk and damages prevention guided by clear conduct principles. This research will analyze how the application of the *Mutual Benefit and Shared Gain Principle*[3] of China´s Outbound Investment Legal Regime can be maximized by creating a new and improved outbound investment support and promotion agency, with emphasis on Chinese investments in the MERCOSUR[4] countries of Latin America, which consists of Argentina, Brazil, Paraguay and Uruguay. This paper, however, will be focused on the Chinese legal system and institutional framework and not that of the MERCOSUR countries.

1.2 China, the "Going Global" Strategy, and Latin America

In 1978, the People´s Republic of China initiated an opening up and reform process that eventually transformed itself from a precarious country to the second largest economy of the world. This transformation was possible thanks to historic economic growth levels, which in turn increased the global economic influence of this Asian giant. Simultaneously, it created a reliance on certain raw materials and goods needed to maintain the system. Consequently, the Chinese government and corporations started to focus their attention on the outside world, specifically on outbound investment opportunities.[5]

The *12th Five Year Plan of the People's Republic of China* established an outline for China's *Going Out* strategy. Increasing overseas investments is essential to reach the goals established by the Chinese government under this strategy. Nevertheless, Chinese authorities have been conscientious that the process may not be easy and that it is vital to consider carefully the types of projects to develop.

Chapter 52 of the *12th Five Year Plan* mentions the necessity of speeding up the implementation of the *Going Global* strategy. In particular, it expresses that: "China

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[3] The *Mutual Benefit and Shared Gain Principle* is contained in Art. 3 of *境外投资管理办法*[*Measures for the Admin. of Overseas Inv.*] (promulgated by the Ministry of Commerce, Mar. 16, 2009, effective May 1, 2009) (China).

[4] The concept of the MERCOSUR will be explained *infra* Section 1.3 of this thesis.

[5] Lutz-Christian Wolff, *Inv. Modes, Inv. Vehicles & Inv. Restrictions, in* CHINA OUTBOUND INVS.: A GUIDE TO LAW & PRACTICE 131, 131 (2011) (discussing the trend of globalized entrepreneurship where "enterprises establish and operate their business or parts of their business wherever the conditions are most appropriate or where this is required by market needs," and that specifically, "Chinese multinationals will eventually also have to adopt this approach.").

will follow the strategy of market orientation and self-willingness of enterprises to guide enterprises with different ownerships to develop overseas investment cooperation in an orderly manner."[6]

According to the plan, the main goals in developing overseas investment cooperation are:

- To deepen the development of international energy resources and mutually beneficial processing cooperation;
- To support the carrying out of technology R&D investments abroad and to encourage leading enterprises in the manufacturing industry to conduct foreign investment to create internationalized marketing and sales channels and famous brands;
- To enlarge international cooperation in the agricultural sector and develop overseas engineering contracts, labor cooperation and cooperation projects that can improve living standards in local areas;
- To gradually develop its own large cross country corporations and cross country financial institutions to increase China's level of international operations;
- To conduct research for overseas investments and enhance scientific evaluation of investment projects;
- To increase its ability of comprehensive all-round consideration, optimize the cross-agency coordination system, and enhance the guidance and services to enforce the 'going out' strategy;
- To speed up the formulation and optimization of laws and regulations concerning overseas investments;
- To actively discuss and sign mutual agreements on investment protection and agreements to avoid double taxation as well as other multilateral or bilateral agreements;
- To improve China's overseas investment promotional system to increase the level of investment facilitation for enterprises to invest overseas and to protect the overseas rights of China and to minimize different kinds of risks; and
- To assure that enterprises that are "going out" and their overseas cooperation projects bear corporate social responsibility in mind in order to bring

[6] 中国第十二个五年规划 (12th Five Year Plan), ch. 52 (Mar. 14, 2011).

benefits to the local people.[7]

Traditionally, outbound investments are generated from *developed* countries, as opposed to *developing* countries. However, China is changing this paradigm, as it is a major source of outbound investments.[8] Statistics shows that the volume of outbound investments made by Chinese enterprises has increased significantly.[9]

In this context, Latin America has become a strategic region for China, in large part due to its abundance of natural resources, which China desperately needs.[10] In fact, in 2010, 90% of China's confirmed investments in Latin America targeted the extraction

[7] 中国第十二个五年规划 (12th Five Year Plan), ch. 52 (Mar. 14, 2011).

[8] U.N. Conference on Trade & Dev., New York, NY and Geneva, Switz., 2011, *World Inv. Report 2011*, xii, U.N. Doc. UNCTAD/WIR/2011 (2011), *available at* http://www.unctad-docs.org/files/UNCTAD-WIR2011-Full-en.pdf (last visited Apr. 26, 2012) (showing that for the first time in history, investments from transition or developing economies absorbed more than half of global FDI inflows in 2010); *cf.* Yiping Huang & Bijun Wang, *Chinese Outward Direct Inv.: Is There a China Model?*, 19 CHINA & WORLD ECON., no. 4, 2011, at 1, 1-2 (noting that "[o]utward direct investment (ODI) has mainly been a phenomenon of advanced economies" with "[d]eveloping countries tend[ing] to be on the recipient side of such investment", recognizing a shift in this "traditional pattern… when China commenced economic reform in the late 1970s," and articulating that "Chinese enterprises [are] investing so much overseas at such an early stage in China´s economic development" because of their size).

[9] China is today the fifth largest outbound investor and its overseas investments account for 68 billion USD in 2010. *See* U.N. Conference on Trade & Dev., New York, NY and Geneva, Switz., 2011, *World Inv. Report 2011*, 9, U.N. Doc. UNCTAD/WIR/2011 (2011), *available at* http://www.unctad-docs.org/files/UNCTAD-WIR2011-Full-en.pdf (last visited Apr. 26, 2012). However, with regard to these statistics, it is important to note that different institutions and sources utilize differing analysis parameters so therefore, do not necessarily present a clear panorama of the matter. *See, e.g.,* DANIEL H. ROSEN & THILO HANEMANN, PETERSON INST. FOR INT'L ECONS., CHINA'S CHANGING OUTBOUND FOREIGN DIRECT INV. PROFILE: DRIVERS & POLICY 3 (June 2009), *available at* http://www.iie.com/publications/pb/pb09-14.pdf (last visited Apr. 15, 2012) (noting that "[s]everal factors distorts the accuracy of China´s aggregate data on OFDI," including, *inter alia*, MOFCOM's reliance "on information collected by local commerce bureaus" instead of "direct enterprise surveys," which can "result in significant underreporting by firms that wish to side-step approval procedures for a variety of reasons"; the failure of "Chinese firms [to] report foreign earnings that are reinvested abroad as OFDI as required by international standards"; and "round-tripping" – "reporting OFDI (mostly to Honk Kong or tax havens) only to bring it back into China in order to enjoy preferential FDI treatment and other advantages."); *id.* at 5 n.16 (estimating that "the official statistics only capture about one half to one third of all OFDI projects in number terms"); MINISTRY OF COMMERCE OF CHINA, 2010 STATISTICAL BULLETIN OF CHINA´S OUTWARD FOREIGN DIRECT INV. 79 (2012), *available at* http://hzs.mofcom.gov.cn/accessory/201109/1316069658609.pdf (last visited Apr. 15, 2012) (detailing that China´s non-financial outward FDI net flows reached USD 60.18 billion in 2010, which was an increase of 25.9% compared with 2009, but only accounted for 5.2% of the world total outbound investment amount); Ligang Song, Jidong Yang & Yongsheng Zhang, *State-owned Enters.´ Outward Inv. & the Structural Reform in China*, 19 CHINA & WORLD ECON., no. 4, 2011, at 38, 48 ("For example, although it has increased rapidly over the past 5 years, China´s total ODI flow accounted for only 5 percent of the global total in 2009) (internal citations omitted).

[10] ECON. COMM'N FOR LATIN AMERICA & THE CARIBBEAN (ECLAC), FOREIGN DIRECT INV. IN LATIN AMERICA & THE CARIBBEAN 107 (2010), *available at* http://www.eclac.org/publicaciones/xml/0/43290/Chapter_III._Direct_investment_by_China_in_Latin_America_and_the_Caribbean.pdf (last visited Apr. 1, 2012).

of natural resources.[11] Certain Latin American countries, however, have demonstrated hesitance to such a resource-focused investment strategy from China as it can have the negative effect of prolonging Latin American economies´ high dependence in commodities and stunting their development of knowledge-added products.[12] Consequently, this has led to the establishment of legal regimes attempting to restrict such foreign investments.[13] What has not been given enough attention, however, is the potential of broadening the scope of Sino-Latin investment relations, while also taking into account the unique investment model and economic development of this Asian giant. A broader diversity of investments can be encouraged by updating legal regimes and creating institutional frameworks to refocus the attention of Chinese investments. Simultaneously, the quality of the investment decision process can be improved.

1.3 The Common Market of the South (MERCOSUR) as a Component of the Latin American Region's Integration Framework

The Common Market of the South (MERCOSUR) was constituted on March 26, 1991, by the Asunción Treaty, subscribed by Argentina, Brazil, Paraguay, and

[11] ECON. COMM'N FOR LATIN AMERICA & THE CARIBBEAN (ECLAC), FOREIGN DIRECT INV. IN LATIN AMERICA & THE CARIBBEAN 107 (2010), *available at* http://www.eclac.org/publicaciones/xml/0/43290/Chapter_III._Direct_investment_by_China_in_Latin_America_and_the_Caribbean.pdf (last visited Apr. 1, 2012).

[12] Kevin P. Gallagher, *China and the Future of Latin American Industrialization*, ISSUES IN BRIEF (Boston Univ., The Frederick S. Pardee Center for the Study of Longer-Range Future, Boston, M.A.), Oct. 2010, at 1, 4, *available at* http://www.bu.edu/pardee/files/2010/10/18-IIB.pdf (last visited Apr. 20, 2012) (reporting that "China could accentuate Latin America´s [over] reliance on commodities exports and jeopardize the region´s capabilities for diversifying its export basket toward manufacturing and modern services" and that "[l]ong-lasting social and environmental effects could be acute as well."). Gallagher provides an example of the negative impact on natural resources due to China's reliance on these exports. *Id.* (reporting that "between 1995 and 2009, Brazilian soy production quadrupled, in part because approximately half of all Brazilian soy exports went to China," but at the same time, the "increased demand for soy [was] linked to deforestation of more than 528,000 square kilometers in the Brazilian Amazon" and such "deforestation has threatened the livelihoods of many indigenous Brazilians and contributed to accentuating global climate change.").

[13] *See, e.g.*, Alejandro E. Moreno, *Argentina limits foreigners' land purchase rights*, NUWIRE INVESTOR, Feb. 17, 2012, http://www.nuwireinvestor.com/articles/argentina-limits-foreigners-land-purchase-rights-58748.aspx (last visited Apr. 20, 2012); Dawn Powell, *The Dragon's appetite for soy strokes Brazilian protectionism*, FOOD CRISIS & THE GLOBAL LAND GRAB, Oct. 10, 2011, http://farmlandgrab.org/post/view/19423 (last visited Apr. 20, 2012).

Uruguay.[14] MERCOSUR is constituted within the framework of the ALADI (*Asociación Latinoamericana de Integración* or Latin American Integration Association), an area of economic preferences created by a group of Latin American countries in 1980, when subscribing to the Montevideo Treaty.[15] The Agreement of Economic Complementation (ACE) No. 18 is the ALADI agreement that authorizes the creation of the MERCOSUR.

According to Article 1 of the Asunción Treaty, the MERCOSUR establishes the "free movement of goods, services and productive factors between countries."[16] This is accomplished mainly through the "elimination of customs duties and non-tariff restrictions on the movement of goods."[17] Naturally, not only is this the main point of the agreement, but it is also the most relevant as far as this research is concerned. As it will be explained *infra*, Chinese investments in the MERCOSUR countries can be widely diversified if Chinese enterprises take into consideration all the benefits of this free trade zone when planning overseas investments in the Latin American region.[18] Finally, it is worth noting that MERCOSUR and China have created a group for analyzing the possibilities of establishing a Free Trade Agreement. However, in practice,

[14] Today, Bolivia, Chile, Peru, Ecuador, and Colombia are associated members; associated members do not have the same benefits as full members. The acceptance of Venezuela as a full member is currently pending, as the Paraguayan parliament has not yet approved it. *See, e.g.*, JORGE E. FERNÁNDEZ REYES, CURSO DE DERECHO DE LA INTEGRACIÓN: LOS PROCESOS DE INTEGRACIÓN Y EL MERCOSUR 300-314 (2006) [COURSE OF INTEGRATION LAW: THE INTEGRATION PROCESS AND THE MERCOSUR].

[15] The members of the ALADI are: Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela. *See, e.g., Which are its member countries?*, ALADI-ASOCIACIÓN LATINOAMERICANA DE INTEGRACIÓN, http://www.aladi.org/nsfaladi/preguntasfrecuentes.nsf/5094e65262960d6d03256ebe00601b70/5d03f704298b453e03256edf006df804?OpenDocument (last visited Mar. 3, 2012).

[16] Treaty of Asunción, Mar. 26, 1991, http://www.sice.oas.org/trade/mrcsr/mrcsrtoc.asp (last visited Apr. 3, 2012). With regard to this point, the Asunción Treaty included an Annex (Annex I) containing a Program of Commercial Liberalization that detailed the process of achieving the free movements of goods and services. *Id.*

[17] Treaty of Asunción, Mar. 26, 1991, http://www.sice.oas.org/trade/mrcsr/mrcsrtoc.asp (last visited Apr. 3, 2012).

[18] Although it is named "Common Market of the South," the structure and functioning of the MERCOSUR is typical of Free Trade Zones, and not Common Markets, mainly because the common external tariff is not completely coordinated and there is still no compulsory coordination of macroeconomic policies and legislative harmonization. Furthermore, for the history of the MERCOSUR, the asymmetries between big and small countries have affected the correct functioning of the agreement because the larger countries have always prioritized their interest in times of crises, instead of coordinating actions with the smaller countries.

there have not been any significant advances towards that end.[19]

[19] *Cf.* Decision No. 9/03, MERCOSUR Council (Oct. 6, 2003), *available at* http://www.glin.gov/view.action?glinID=164911 (last visited Apr. 12, 2012) (where the MERCOSUR Council, the governing organ, established a framework agreement with India for the creation of an area of preferential tariffs). A similar agreement with China has yet to be subscribed. Notably, China has signed Free Trade Agreements with Chile (2006), Peru (2009) and Costa Rica (2011). *See e.g., China Free Trade Agreement Network*, MINISTRY OF COMMERCE OF CHINA, http://fta.mofcom.gov.cn/english/fta_qianshu.shtml (last visited Apr. 27, 2012).

CHAPTER II. CHINA´S OUTBOUND INVESTMENT LEGAL REGIME

2.1 The Significance of China's Outbound Investment Regime in Academia

China rise as an outbound investor have been extremely steep, accelerating after 2004.[20] As it is a very contemporary topic, there has been very little comprehensive study devoted to it. However, because China´s Outbound Investment Regime has a lot of particularities, it must be further studied in academia, from the perspective of different disciplines.[21] Notably, Peter Buckley, a prominent scholar in international business, catalogues this topic as "an emerging and under-researched but vital aspect of China´s internationalization."[22] Ilan Alon, Marc Fetscherin, and Philippe Gugler, scholars who also have written on international business, and particular as it relates to China, also highlight the need for additional research on this emergent area of international business.[23] The importance of studying the topic from a legal academic perspective is even greater, as the research is scarce, despite the existence of an authentic China´s Outbound Investment Legal regime.

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[20] In 2004, the total amount of Chinese outward investment was 5497 millions of dollars; in 2005, 12,261.17 million; in 2006, 17,633.97 million; in 2007, 26,506.09 million; in 2008, 55,907.17; in 2009, 56,528.99; and in 2010, 68,811.31. *See* MINISTRY OF COMMERCE OF CHINA, 2010 STATISTICAL BULLETIN OF CHINA´S OUTWARD FOREIGN DIRECT INV. 82 (2012), *available at* http://hzs.mofcom.gov.cn/accessory/201109/1316069658609.pdf (last visited Apr. 15, 2012).

[21] For example, Lutz-Christian Wolff has expressed that "China´s outbound investment regime is still incomplete and the implementation practice may differ depending on the location, the size and the type of an outbound investor as well as on the respective Chinese authority involved." Lutz-Christian Wolff, *Introduction, in* CHINA OUTBOUND INVS.: A GUIDE TO LAW & PRACTICE 11, 11 (2011).

[22] Peter Buckley, *Foreword in* CHINESE INT'L INVS. xiii, xiii (Ilan Alon, Marc Fetscherin & Phillipe Gugler eds., 2011); Shiro Armstrong, *Assessing the Scale and Potential of Chinese Inv. Overseas: An Econometric Approach*, 19 CHINA & WORLD ECON., no. 4, 2011, at 22, 22 ("Foreign Direct Investment (FDI), both in and out of China, is one of the most important dimensions of China´s economic agreement and integration into the global economy").

[23] *Id.; cf.* GLOBAL ENVTL. INST., ENVTL. POLICIES ON CHINA'S INV. OVERSEAS 27 (2011) (noting that with regard to principle of mutual benefit and shared gains, "Academics pay very little attention to the environmental impact of OFDI and foreign aid [and] [a]lthough a few articles mention China´s Go Global strategy and south-south cooperation, almost none focus specifically on the environmental issues relating to China´s OFDI and foreign aid.").

2.2 China Outbound Investments as a Matter of Law

Can China's outbound investments be analyzed as a matter of law?[24] This is a very valid question. Naturally, one tends to approach this topic from an economic or social viewpoint, not a legal one. Therefore, it is important to determine why this topic can be addressed from a legal perspective.[25]

If China was not the originating country of these investments, the legal system of the home country would likely not be relevant because the most important investment regulations are generally those of the recipient country. However, because the originating country is in fact China, different rules apply given the unique Chinese characteristics of its socialist legal system. Even though China is no longer hinged to a planned economy,[26] the central government still plays an important role in designing the global expansion of the country and its companies. This is implemented basically through regulations, which makes China's legal regime extremely relevant.[27]

[24] Lutz-Christian Wolff, *Approval & Registration Requirements, in* CHINA OUTBOUND INVS.: A GUIDE TO LAW & PRACTICE 13, 13 (2011) (noting that some of the reasons given by scholars to study the topic include the amount of unclear regulations result in lack of predictability).

[25] *Cf.* Lutz-Christian Wolff, *Inv. Modes, Inv. Vehicles & Inv. Restrictions, in* CHINA OUTBOUND INVS.: A GUIDE TO LAW & PRACTICE 131, 136 (2011) ("Whatever investment mode is used, investment projects will have to take some kind of legal form").

[26] *See* HINRICH VOSS, THE DETERMINANTS OF CHINESE OUTWARD DIRECT INV. 4-5 (2011) ("[T]o account for China´s heritage of economic planning, which is still visible in the government´s involvement today, and the continuous changes in the institutional environment since 1979, a special emphasis is placed on institutional theory. This book advances a framework which allows the testing of the extent to which institutional theory bears explanatory power for the evolvement of Chinese OFDI") (internal citations omitted).

[27] *See* Lutz-Christian Wolff, *Approval & Registration Requirements, in* CHINA OUTBOUND INVS.: A GUIDE TO LAW & PRACTICE 13, 13 (2011) (noting that with regard to outbound investments in particular, they "are subject to a restrictive regulatory onshore regime" where "[r]elated rules appear in a variety of laws and regulations which are unfortunately not always absolutely clear.").

Accordingly, the issue can and should be analyzed from a legal perspective.[28] Yuen Pau Woo and Kenny Zhang, specialists in the area of Asia-business relations, in explaining that this issue must be analyzed as a matter of law, have expressed that "compared with major source countries for FDI, Chinese outward investment is highly regulated."[29] The importance of the issue is even greater, especially when considering the essentialness of timing in today's business world. Specifically, delays caused by administrative procedures can have opportunity costs and present openings for competitors to swoop in and take investment targets. In a world in which big corporations are interested in maintaining the *status quo* and permanently trying to prevent the growth and development of new companies, particularly those from

[28] Qi Gei & Hui Zheng, *Outbound Inv. from China*, *in* CHINESE BUSINESS LAW 355, 368 (Yuanshi Bu ed. 2010) (noting that "the Chinese government and its legislators have established a comprehensive and complicated legal framework to both facilitate and supervise outbound investment by domestic investors" and that "it will be interesting to observe further development of relevant legislation, particularly with respect to… whether there will be a piece of comprehensive legislation governing all types of outbound investments issued in future."). Since it clear that the topic can be analyzed from a legal point of view, the legal scope of this thesis analysis must also be defined. There are a multitude of available perspectives, as so many legal sectors are involved in Chinese outbound investments – for example, international investment law due to China's signing of several international investment treaties; administrative law due to the complex several approval and registration requirements for investing overseas; and international finance law as fundraising is an essential stage of the outbound investment process. However, this thesis will focus on the principles governing China´s Outbound Investment Legal Regime and in particular, the so called *Mutual Benefit and Shared Gain Principle*, which can be defined as the mother principle of the whole China´s Outbound Investment Legal Regime.

[29] Yuen Pau Woo & Kenny Zhang, *China Goes Global: The Implications of Chinese Outward Direct Inv. for Canada*, CANADA ECONS. ASSOC., 2006, at 2, *available at* http://economics.ca/2006/papers/0892.pdf (last visited Feb. 5, 2012).

developing countries, this is a critical issue.[30]

2.3 The Legal Construct of Chinese Overseas Investment

International investments are the phenomenon that International Investment Law aims at regulating. From a legal perspective, the term investment is generally defined in the investment treaties subscribed to by two or more countries. Scholars have explained that,

> [T]he economic debate often assumes that a direct investment involves (a) the transfer of funds, (b) a longer-term project, (c) the purpose of regular income, (d) the participation of the person transferring the funds, at least to some extent, in the management of the project, and (e) a business risk.[31]

Other scholars, Gallagher and Shan, after careful study of several bilateral investment treaties subscribed to by China, have proposed a definition of investments for Chinese bilateral investment treaties as: "any assets owned or controlled, directly or indirectly, by investors of a Contracting Party…."[32]

[30] *See, e.g.,* Lutz-Christian Wolff, *Approval & Registration Requirements, in* CHINA OUTBOUND INVS.: A GUIDE TO LAW & PRACTICE 13, 13 (2011) (expressing that the restrictive regulatory onshore regime to which Chinese outbound investments are subject to have sometimes become *de facto* deal-breakers, just because of the aforementioned reasons); *see also* White Paper, *A brave new world: the climate of Chinese M&A abroad*, ECONOMIST, ECONOMIST INTELLIGENCE UNIT (Special Issue) 2010, at 16, *available at* http://www.managementthinking.eiu.com/sites/default/files/Brave%20new%20world.pdf (last visited Apr. 27, 2012) (reporting that "China's own regulatory hurdles are a particular problem… [and] deals involving small to mid-cap companies state banks are said to take several weeks to conduct due diligence and risk assessment, while foreign competitors are likely to take a matter of days," and that "many of the large Chinese companies interviewed… said that identifying appropriate targets is a major challenge in overseas M&A [which] suggests that there is a lot of preliminary discussion before formal offers are made… [and] "once formal negotiations begin, lack of experience and the state-approval regime can put larger deals at risk in certain situations."); Qi Gei & Hui Zheng, *Outbound Inv. from China, in* CHINESE BUSINESS LAW 355, 368 (Yuanshi Bu ed. 2010) (noting that "seeking prior approval from different governmental authorities will inevitably delay the process of an outbound investment, and in many circumstances such delay may result in losing a valuable business opportunity").

[31] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INT'L INV. LAW 60 (2008).

[32] WENHUA SHAN & NORAH GALLAGHER, CHINESE INV. TREATIES: POLICIES & PRACTICE 390 (2009) (The proposed definition further specifies: "including but not limited to: (a) a legal entity; (b) shares, stocks, or other forms of equity participation in an enterprise, and rights derived therefrom; (c) bonds, debentures, loans and other forms of debt, and rights derived therefrom; (d) rights under contracts, including turnkey, construction, management, production or revenue-sharing; (e) contracts; (f) claims to money and claims to performance; (g) intellectual property rights; (h) rights conferred pursuant to law or contract such as concessions, licenses, authorizations, and permits; (i) any other tangible and

International investments can be inbound or outbound. As previously mentioned, the legal regimes of the host country generally regulate the *inbound* investment, or, in other words, the investment from foreign parties that come into the host country.[33]

A unique characteristic of the Chinese legal system is that it has developed the legal concept of overseas investment and constructed a whole legal system around it. The *Measures for the Administration of Overseas Investment*[34] (MAOI) play an important role in this legal system, particularly as they establish the general framework of this area of regulation.

According to Article 2 of the MAOI an overseas investment takes place when an enterprise legally established in China either (1) constitutes a new non-financial enterprise overseas; or (2) acquires the right to own, control or manage an existing non-financial enterprise overseas in the way of merger or acquisition.[35] Additionally, also included in the regulation are: when (1) an enterprise establishes any non-enterprise legal person overseas; or (2) a non-enterprise business unit legal person establishes any overseas investment.[36] In order to clearly define the concept of overseas investments, it is necessary to analyze it step by step.

The first part of the article implies that the overseas investment must be carried out by an enterprise legally established in China, according to Chinese law.[37] It is important to mention that the MAOI does not apply to companies set up in the Hong Kong Special Administrative Region. The fact is not minor, as Hong Kong is being utilized by many Chinese companies as a business hub and conduit through for

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intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges.").

[33] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INT'L INV. LAW 3 (2008) ("Moreover, it has long been observed that the rules on foreign investment by necessity also incorporate aspects of the laws of the host state. Depending upon the setting of an individual case and issue, the interplay between relevant domestic rules of the host state and applicable rules of international law may become central to the required analysis of a case.").

[34] *境外投资管理办法* [*Measures for the Admin. of Overseas Inv.*] (promulgated by the Ministry of Commerce, Mar. 16, 2009, effective May 1, 2009) (China).

[35] *境外投资管理办法* [*Measures for the Admin. of Overseas Inv.*], art. 2 (promulgated by the Ministry of Commerce, Mar. 16, 2009, effective May 1, 2009) (China).

[36] *Id., art 38*

[37] *Id.*

investing in overseas projects in different regions of the world.[38] This is a way for companies to avoid governmental controls and to have more flexibility in their decision-making.[39] Nevertheless, overseas investments carried out by state-owned companies are specifically addressed by article 2 of the *Interim Measures for the Supervision and Administration of Overseas Investments by Central Enterprises*.[40]

The regulation states that:

> For the purpose of these Measures, "overseas investments" means such investment activities such as asset investments and equity investments made by central enterprises and/or the wholly-owned or holding subsidiaries thereof (hereafter referred to as "subsidiaries") outside the territory of the People's Republic of China as well as in the Hong Kong Special Administrative Region, Macao Special Administrative Region and the Taiwan Region of China.[41]

By including the "wholly-owned or holding subsidiaries of the central enterprises located outside the territory of the PRC and in the Special Administrative Regions," State-Owned Assets Supervision and Administration Commission (SASAC) prevents central enterprises from dodging the requirements of this regulation. Furthermore, companies with "economic activities centering on investors within the territory of China, directly or through overseas holding companies" must abide by the *Policy for the Guidance of Overseas Investment Industries* of the National Development and Reform Commission (NDRC).[42]

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[38] *See, e.g.*, Bao Chang, *Construction firm to begin overseas investment arm*, CHINA DAILY, Mar. 22, 2012, *also available at* http://www.chinadaily.com.cn/cndy/2012-03/22/content_14885376.htm (last visited Apr. 15, 2012).

[39] Lawrence Shu & Hui Zheng, *Offshore Inv. Vehicles*, *in* CHINESE BUSINESS LAW 373, (Yuanshi Bu ed. 2010) (noting that "For Chinese investors, offshore vehicles primarily serve two purposes," including the ability to "circumvent strict domestic regulations").

[40] *中央企业境外投资监督管理暂行办法* [*Interim Measures for the Supervision & Admin. of Overseas Invs. by Central Enters.*] (promulgated by the State-owned Assets Supervision and Admin. Comm'n of the State Council, Mar. 18, 2012, effective May 1, 2012) (China).

[41] *Id.* at art. 2.

[42] *境外投资产业指导政策* [*Policy for the Guidance of Overseas Inv. Indus.*], art. 2 (promulgated by the Nat'l Dev. & Reform Comm'n, July 5, 2006, effective July 5, 2006) (China).

Going back to the MAOI, the regulation utilizes a restricted concept of overseas investment by only addressing non-financial investments and therefore, financial outbound investments are not covered by these measures. With regard to non-financial outbound investments, the MAOI comprehends different investment modalities, including Greenfield investments, and mergers and acquisitions, which allow the investor to have a controlling share of the invested company.

2.4 Classifying Chinese Overseas Investments

Scholars have established several criterions for the classification of Overseas Foreign Direct Investment. Those criterions are plenty applicable to Chinese Outbound Investment, which can be classified according to the following parameters.

2.4.1 By Object: Financial – Non Financial

Taking into consideration the **object** of the investment, the investment can be classified as financial or non-financial. As previously explained, the MAOI only applies for non-financial investments. The main difference between the two categories is that while financial investors do not aim at having an active role in running the invested company and just focus on maximizing the return of the investment, non-financial investors have a more active role in the operations of the company and the projects they take in.[43]

2.4.2 By Investing Entity

Under this classification, it is possible to distinguish by the investing entity[44]:

[43] For example, China Investment Corporation (CIC) is a typical financial investor. *See* MICHAEL F. MARTIN, RESEARCH SERV., R41441, CHINA´S SOVEREIGN WEALTH FUND: DEVS. & POLICY IMPLICATIONS 3 (2010) **(**CIC "abides by four key investment principles. First, it selects investments based on commercial criteria. Second, it is a passive, financial investor, and does not seek control of companies. Third, the CIC complies with the laws and regulations of the countries in which it makes investments. Fourth, investments are selected based on research utilizing standard evaluation techniques. In addition, the CIC is a founding member of the International Forum of Sovereign Wealth Funds [IFSWF] and has agreed to abide by the IFSWF´s Santiago Principles, which set voluntary guidelines of behavior for SWFs.").

[44] *Cf.* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INT'L INV. LAW 46 (2008) (distinguishing investing entities and further noting that "[i]nternational investment law is designed to promote and protect the activities of private foreign investors" but that "[t]his does not necessarily exclude the protection of government-controlled entities as long as they act in a commercial rather than in a governmental capacity."). Dolzer and Schreuer further specify that "[w]hether non-profit organizations may be regarded as investors… will depend on the nature of their activities." *Id.*

- State-Owned Enterprises (SOEs)[45]
- Private Companies
- Sovereign Wealth Funds
- Qualified Domestic Institutional Investors (QDIIs)
- Individuals

In the field of non-financial overseas investments, SOEs and private companies play the most important role.[46] Therefore, this research will focus on these two entities, without analyzing the implications and legal regime of investments carried out by the others subjects here.[47]

2.4.3 By Objective / Finality:

Investments can also be categorized by the objective or end-goal of the investment. Accordingly, the categories are:

- Resource-Seeking: this type of investment is generally carried out in developing nations. It aims at obtaining the necessary natural resources to maintain China´s economic and industrial development. This is the typical kind of investments that Chinese companies have carried out in Latin America.[48]
- Market-Seeking: this type of investment is carried out both in developed and developing countries. It generally involves manufacturing sector and is usually motivated by the size of the recipient country´s market. According to Voss,

[45] *See* HINRICH VOSS, THE DETERMINANTS OF CHINESE OUTWARD DIRECT INV. 59 (2011) (defining SOEs as "all companies which are directly or indirectly held by the Chinese government," which includes "CNOOC and SHOUGANG which are both partially owned by the State Asset Supervision and Administration Commission [SASAC], as well as enterprises controlled directly or indirectly by a ministry, provincial or municipal governments" and "firms which have been converted to a new company form and are registered today as joint-ownership enterprises or limited liability corporations because a government authority often represents a significant shareholder.").

[46] Lutz-Christian Wolff, *China Outbound Invs.: Facts & Dev., in* CHINA OUTBOUND INVS.: A GUIDE TO LAW & PRACTICE 1, 4 (2011) ("Traditionally, Chinese state-owned enterprises [SOEs], in particular those controlled by the central government´s ministries and agencies, have been behind the majority of China´s outbound investment projects…. In contrast, attempts of small and medium sized Chinese enterprises where hindered by difficulties to get access external funding.") (internal citations omitted).

[47] Such categories are based on those utilized by Qi Gei & Hui Zheng. *See* Qi Gei & Hui Zheng *Outbound Inv. from China, in* CHINESE BUSINESS LAW 355 (Yuanshi Bu ed. 2010).

[48] *See* HINRICH VOSS, THE DETERMINANTS OF CHINESE OUTWARD DIRECT INV. 95 (2011) ("Hence, resource-seeking investments occur currently and predominantly in developing countries").

"it is undertaken by companies to strengthen existing markets [defensive strategy] or to develop and explore new markets [offensive strategy]".[49]

- Technology-seeking: this type of investment is generally carried out in developed countries and its main motivation is to narrow the gap between developed countries and China in the area. According to Voss, "Chinese companies which access foreign technology by acquisition tend to transfer the technology and other tangible assets back to China to strengthen their production facilities"[50]

- Strategic asset-seeking: this type of investment is generally carried out in developed countries and it aims at obtaining key technologies or goodwill such as access to distribution networks or first class brands. [51]

- Efficiency-seeking: this type of investment is carried out in both developed and developing countries. Nevertheless, as explained by Voss, this modality is used by Chinese investors only in exceptional cases.[52]

2.4.4 By Governmental Categorization: Encouraged / Allowed / Prohibited[53]

The NDRC, together with other agencies[54], issued the *Policy for the Guidance of Overseas Investment Industries*.[55] According to article 4 of the regulation, overseas

[49] *See* HINRICH VOSS, THE DETERMINANTS OF CHINESE OUTWARD DIRECT INV. 17 (2011) ("Hence, resource-seeking investments occur currently and predominantly in developing countries").
[50] *Id.* at 96.
[51] NARGIZA SALIDJANOVA, GOING OUT: AN OVERVIEW OF CHINA´S OUTWARD FOREIGN DIRECT INV., US-CHINA ECON. & SEC. REVIEW COMM'N 11 (2011) ("A top priority for the Chinese government under its 'going global' strategy is the creation of a number of 'global champions', large multinational firms with globally recognized brands able to compete in the international market place."); HINRICH VOSS, THE DETERMINANTS OF CHINESE OUTWARD DIRECT INV. 98, table 3.9 (2011) (table on historic and emergent investment behavior of Chinese MNE´s).
[52] HINRICH VOSS, THE DETERMINANTS OF CHINESE OUTWARD DIRECT INV. 97 (2011) (explaining the two reasons for multinational enterprises (MNE) and Chinese firms lack a motive for foreign direct investments: "Chinese MNEs hardly coordinate international supply chains which they could re-organise to benefit from different factor prices" and "China possesses abundant low-cost labour and cheap land, so Chinese MNEs may rather relocate their production within China than moving abroad.") (internal citation omitted). Furthermore, Voss explains that exceptions have been found in cases where "Chinese companies seek to benefit from lower transportation costs and avoidance of trade restrictions and barriers by establishing production facilities in developing countries. In so doing, these companies also outsource production facilities of low-technology intensity and establish a regional production network, i.e. supply chain, in which the Chinese parent company is the kernel." *Id.* at 97-98.
[53] As it will be explained in *infra*, Section 3.2.3, this is relevant for obtaining financing and insurance.

investment projects shall be divided into three categories: (a) encouraged; (b) allowed and (c) prohibited.[56] In addition, the NDRC, together with other relevant government units, is in charge of formulating the *Catalogue for Guidance of Overseas Investment Industries*.[57] The Catalogue lists only encouraged[58] and prohibited[59] investment projects. Overseas investment projects that are not included in the *Catalogue* shall be deemed as allowed.

2.5 Principles Governing Conduct for China´s Outbound Investments

China is a world economic power and as such, generates concerns in certain countries where China is eyeing for investments.[60] There have been cases in which Chinese investments have been rejected, not only because of the nature of the investment, but because authorities of recipient countries prejudge investors just for being Chinese.[61] A way to avoid this kind of situations is by establishing clear

[54] Ministry of Commerce, Ministry of Foreign Affairs, Ministry of Finance, the General Administration of Customs, the State Administration of Taxation and the State Administration of Foreign Exchange.

[55] *境外投资产业指导政策* [*Policy for the Guidance of Overseas Inv. Indus.*] (promulgated by the NDRC, July 5, 2006, July 5, 2006) (China).

[56] *Id.* at art. 4.

[57] *Id.*

[58] *Id.* at art. 6 ("Projects under any of the following circumstances shall be listed as the encouraged overseas investment projects: (1) Where resources or raw materials that are domestically in shortage or those needed for development of national economy can be obtained; (2) Where the export of domestic products, equipment, technologies, etc. with comparative advantages as well as the labor export can be driven; or (3) Where China's capacity in technology research and development can be conspicuously promoted, and international advanced technologies, advanced managerial experience and professional talents can be used.").

[59] *境外投资产业指导政策* [*Policy for the Guidance of Overseas Inv. Indus.*], art. 7 (promulgated by the NDRC, July 5, 2006, July 5, 2006) ("Projects under any of the following circumstances shall be listed as the prohibited overseas investment projects: (1) Where national security is threatened and social public interests are damaged; (2) Where our unique craft or technology that is prohibited to be exported is used; (3) Operation areas that are prohibited by China's laws; (4) Industries invested in sites prohibited by laws of subject countries or regions, and industries that are prohibited to invest compliant with regulations in International treaties which China has concluded or has participated in; or (5) Other circumstances provided in laws and administrative regulations.").

[60] For example, because of China´s dimensions, the country requires a huge number of natural resources to continue its development, which naturally creates concerns in countries that receive Chinese investments and fear the destruction of their natural environment. *See also infra* Section 2.7 on environmental protection.

[61] The best example of this is the case of the Zhong Kun Group (中坤), which intended to buy a large extension of land in Iceland and was summarily rejected. *See* Mei Jia, *Investor: Iceland sale rejection 'irresponsible',* CHINA DAILY, Nov. 26, 2011, *also available at*

conduct principles to be followed by all Chinese outbound investors. Simultaneously, implementation of accountability mechanisms aimed at enhancing the corporate social responsibility of Chinese companies must also be required. These two devices provide recipient countries with the necessary guarantees and assurances for accepting Chinese investors without hesitation, especially when investments are targeted at natural resources.

China's government has understood this and has taken action over. Under Chapter IV of the MAOI, the Chinese legal system includes a set of principles that might govern Chinese Outbound Investment.[62] Those principles can be divided into two groups: (a) those governing the conduct of the enterprise on the pre-investment

http://www.chinadaily.com.cn/china/2011-11/26/content_14168611.htm (last visited Mar. 30, 2012); *see also* Yuen Pau Woo and Kenny Zhang, *China Goes Global: The Implications of Chinese Outward Direct Inv. for Canada*, CANADA ECONS. ASSOC., 2006, at 2, *available at* http://economics.ca/2006/papers/0892.pdf (last visited Feb. 5, 2012) ("While some of the concerns around Chinese ODI are not without merit, it would be foolhardy for recipient countries, including Canada, to ignore the phenomenon of China as a capital exporter or, worse, to reject Chinese investment on the basis of gross generalizations about the motivations and practices of the Chinese government and of Chinese industrial concerns"); *id.* ("While most economies would welcome the inflow of long-term equity investment, there are concerns—especially in industrialized countries—about the motivations and quality of Chinese capital. These concerns include the fear of ceding sensitive technologies to a potential military competitor; loss of control over natural resources in the event of global scarcity; poor management and governance practices; and the unsavory human rights reputation of the Chinese government and, by extension, of its stable of state-owned companies.).

[62] *境外投资管理办法* [*Measures for the Admin. of Overseas Inv.*], ch. IV (promulgated by the Ministry of Commerce, Mar. 16, 2009, effective May 1, 2009) (China) (the Code of Conduct for Overseas Investments).

stage;[63] and (b) those governing the conduct of the enterprise on the post-investment or execution stage[64].

However, all these principles are governed by the mother principle that guides the whole Chinese outbound investment legal system: the ***Principle of Mutual***

[63] Under this category, there are two main principles, with multiple sub principles. Firstly, the "principle of objective analysis" requires that Chinese enterprises "assess their own conditions and ability and the investment environment of the recipient country." *See 境外投资管理办法* [*Measures for the Admin. of Overseas Inv.*], art. 21 (promulgated by the Ministry of Commerce, Mar. 16, 2009, effective May 1, 2009) (China). Sub-principles of this one include the "principle of secure investment" and "principle of active investment." The former implies that Chinese enterprises should launch their investment projects in a safe way, remarking on the necessity of careful study of all details prior to decision-making, while the latter encourages Chinese enterprise to combine careful analysis with their commercial necessities and act in a way that prevents competitors from taking away profitable investment opportunities. Secondly, the "principle of policies and legal requirements comprehension and fulfillment" is perhaps a father-principle to the mother-principle of mutual benefit and shared gain. It expresses that "in launching any overseas investment, the Enterprises shall seriously form an understanding of and comply with the relevant laws, regulations and policy both domestic and overseas." *Id.* at art. 3. Sub-principles to this may include the "principle of enterprise naming in accordance with the law" and the "principle of approval obtainment first." The first principle explains that the names chosen for the enterprise must be respectful of both Chinese and recipient country laws, regulations and policies. *Id.* at art. 22. In particular, the principle aims at preventing the usage of words such as "China", "State" or "National" in the name of the company. *Id.* Although this may seem to be a mere technicality, it is a factual necessity relevant especially for westerners whom have a different language matrix. The regulation also allows the Chinese enterprises to pre-register in the home country or region the names of the overseas enterprise before the application approval being given. *Id.* The second sub-principle, the "principle of approval obtainment first," implicates that enterprises must obtain the relevant approvals of the competent governmental departments before the contract or agreement on overseas investment becomes effective. *Id.* at art. 26.

[64] Under this category, there are two main principles and several sub-principles. Firstly, under the "Principle of Risk Prevention," Chinese enterprises must be extremely cautious when developing their overseas investment projects. *境外投资管理办法* [*Measures for the Admin. of Overseas Inv.*], art. 23 (promulgated by the Ministry of Commerce, Mar. 16, 2009, effective May 1, 2009) (China). The practical importance of this principle is that it creates two obligations: the (i) implementation of measures aiming to maintain personal and property safety and (ii) establishment of emergency mechanisms and response plans. Additionally, there are three subcategories: (i) the "principle of prompt and appropriate address of contingencies"; (ii)"principle of acceptance of the guidance of the Chinese authorities in the foreign country"; and (iii) the "principle of registration of the person in charge of the overseas enterprise." *Id.* at art. 23-24. Under the first sub-principle enterprises may immediately take mitigating actions for emergencies. With regard to the second sub-principle, Chinese enterprises must accept the advisory of the Chinese embassy or consulate in the locality of the overseas investment, and contingencies should be immediately reported to the overseas embassies in the country. Under the third sub-principle, the individual should register in the economic and trade counselor's office of the embassy or consulate of China in the foreign country, personally or in written form. The second main principle is the "Principle of Information Supply" which creates the obligation for enterprises to provide to the approving organ information about their business operation and statistical data, and companies must be accurate and veracious in reporting. *Id.* at art. 25.

Benefit and Shared Gain. In simple words, this principle holds that outbound investment operations carried out by Chinese companies should forge a win-win relationship both for the Chinese company and the recipient country.[65] This analysis will now focus in defining the limits and main characteristics of this principle.

2.6 The *Principle of Mutual Benefit and Shared Gain* as the Governing Principle

As the core principle of the system, the *Principle of Mutual Benefit and Shared Gain* synthesizes the Chinese government's long-term strategy and it should be followed by Chinese authorities when creating rules and policies related to overseas investments, as well as by Chinese enterprises when developing their overseas investment policies and projects. It operates as an "umbrella" principle and constitutes the legal basis above which, in theory, the "Going Global" strategy should be implemented.

This principle can be utilized to address the sensitive issues related to outbound investment activities of Chinese companies. The most important issues are those related to the environmental protection of the regions when investment projects involve the exploitation of natural resources. However, the limits of the principle are broader and do not end with just environmental matters. The principle also implicates labor issues concerning the working conditions of both Chinese and foreign workers; the concern for respecting local policies and regulations; and also issues regarding the design of investment strategies aimed at diversifying the scope of investments.

In particular, this last point is vital, as the broader the scope of investments is, the better the development of the recipient country. As the *Principle of Mutual Benefit and Shared Gain* is part of the Chinese legal system, Chinese authorities have an obligation to create conditions to facilitate access to investment opportunities beyond the natural resources sector for Chinese companies, and therefore, cannot be indifferent to this point, in particular with regard to their Latin American relations. This is an important point that warrants greater clarification: under the *Principle of Mutual Benefit and Shared Gain*, Chinese authorities should not force investments in

[65] *境外投资管理办法* [*Measures for the Admin. of Overseas Inv.*], art. 3 (promulgated by the Ministry of Commerce, Mar. 16, 2009, effective May 1, 2009) (China).

other sectors beyond natural resources, but because those investments are beneficial for China, the principle should therefore be applied and should be grounded in economic and market-related reasons, and not in politics. Succinctly, the government must contribute to create the conditions to enable broader investments.

A good example of how the application of the principle might work, specifically with Latin American countries, is the following: over-investment in their natural resources by overseas entities is not beneficial for Latin American states in the long-term. However, at the moment, China has a great need for natural resources. Therefore, to achieve mutual benefit and shared gain, Latin American countries should continue to permit Chinese investments in this area, but simultaneously, China should invest in other sectors as well, such as in retail, private sector industries, or the manufacturing of more high-end goods.

Finally, it is worth mentioning that paragraph 7 of Section III, Ch. 2 of the *Guiding Opinions of the Ministry of Commerce on the National Work Overseas Investment and Cooperation for 2010* specifically points out the necessity of urging and directing enterprises to establish mutually beneficial relations, and to comply with laws of investment recipient country.[66] This section recognizes as other activities of importance in reaching win-win investment solutions:

- Regulating overseas business activities and establishing a good image;
- Promoting legal and standardized operations;
- Strengthening the sense of social responsibility for the success of multinational companies;
- Establishing long-term mechanisms, policies and measures to allow an orderly implementation of the *Going Global* Strategy; and
- Enhancing the capacity for sustainable development.[67]

[66] *商务部关于 2010 年全国对外投资合作工作的指导意见* [*Guiding Opinions of the Ministry of Commerce on the National Work Overseas Inv. & Coop. for 2010*], section III, ch. 2, para. 7 (promulgated by the Ministry of Commerce, Feb. 26, 2010, effective Feb. 26, 2010) (China).
[67] *Id.*

2.7 An Application of the *Mutual Benefit and Shared Gain Principle*: The *Principle of Environmental Protection of the Recipient Country*

The *Principle of Environmental Protection of the Recipient Country* can be subsumed under the *Mutual Benefit and Shared Gain* principle. Although it is not expressly contained in the MAOI, it is pacifically understood it can be inferred from other regulations. Increasing environmental consciousness makes this one of the most important principles of all.[68] Chinese enterprises are fiercely criticized because of the environmental impacts of their investments in the recipient countries. They face several environmental pressures, both from foreign governments and social organizations.[69]

China has issued certain regulations concerning protection of overseas environments. For example, in 2007, the Ministry of Commerce (MOFCOM) together with the State Forestry Administration (SFA) issued the *Guidelines on Sustainable Overseas Silviculture by Chinese Enterprises*. Section I of the regulation states:

> [T]he Guidelines applies to regulating and guiding the whole process of Chinese enterprises´ overseas activities in silviculture, to evaluating the Chinese enterprises´ activities pertinent to silviculture, to guiding the Chinese enterprises in providing non-timber products as well as other services, enabling them to protect and develop the global forest resources in a rational, efficient, and sustainable way.[70]

[68] *See, e.g.,* Peng Ren, Global Envtl. Inst., Presentation, *Envtl. Policies on China's Inv. Overseas*, Jun. 8, 2011, at 24 (citing a member of the National People´s Congress, "Even in developing countries, foreign companies that turn a blind eye to their environmental and social responsibilities will be kicked out of the market").

[69] For example, the railway project in the "Tapón del Darién" area in Colombia, generated several concerns because part of the railway will pass through "Los Katíos" park, which has been declared as Natural World Heritage by UNESCO. *See* Proyecto ferroviario de China y Colombia atravesaría el Tapón del Darién [Railway project of China and Colombia may cut-through the Tapon del Darien], TERRITORIO CHOCOANO NOTICIAS, Feb. 15, 2011 (Colom.), *available at* http://www.territoriochocoano.com/secciones/informacion-general/1409-proyecto-ferroviario-de-china-y-colombia-atravesaria-el-tapon-del-darien.html (last visited Apr. 1, 2012).

[70] *Guidelines on Sustainable Overseas Silviculture by Chinese Enterprises*, sec. 1 (promulgated by the Ministry of Commerce and State Forestry Administration, printed and issued Aug. 27, 2007). For a translation, see A Guide to Sustainable Overseas Silviculture by Chinese Enterprises, *in* GLOBAL ENVTL. INST., ENVTL. POLICIES ON CHINA'S INV. OVERSEAS 131, 131 (2011).

The Guidelines also refer to the necessity of overseas companies observing both Chinese and recipient country regulations[71], and specifically focus on the necessity of protecting biodiversity, assessing environmental impacts, and considering forest conservation, forest monitoring and community development. [72]

The 2009 *Guidelines on Sustainable Overseas Forests Management and Utilization by Chinese Enterprises* contains similar dispositions. According to Section 2.2, the guide is applicable to "Chinese enterprises logging and processing lumber, as well as to other, related activities in foreign countries."[73] The Guide is interpreted by the SFA´s Department of Development Planning and Finance Management and the Department of Outward Investment and Economic Cooperation of the MOFCOM.[74] Furthermore, the regulation expressly mentions mutual beneficial cooperation and makes clear that:

- "Chinese enterprises shall promote local economic and community development and cooperate for mutual benefit when managing and utilizing forest resources in foreign countries"; and
- "Chinese enterprises shall highly value the ecological benefits of forests and ensure the equal value of ecological, economic, and social benefits when managing and utilizing forest resources in foreign countries."

Several of the Chinese projects in Latin America involve serious environmental issues and generate concern both in the population and local authorities.[75]

[71] *Guidelines on Sustainable Overseas Silviculture by Chinese Enterprises*, sec. 2 (promulgated by the Ministry of Commerce and State Forestry Administration, printed and issued Aug. 27, 2007). For a translation, see A Guide to Sustainable Overseas Silviculture by Chinese Enterprises, *in* GLOBAL ENVTL. INST., ENVTL. POLICIES ON CHINA'S INV. OVERSEAS 131, 131 (2011).
[72] *Id.* at sec. 4-5.
[73] *Id.* at sec. 2.2.
[74] *Guidelines on Sustainable Overseas Forests Mgmt. & Utilization by Chinese Enters.*, Preface (promulgated by the Ministry of Commerce and State Forestry Administration, printed and issued Mar. 31, 2009). For a translation, see A Guide to Sustainable Overseas Forests Mgmt. & Utilization by Chinese Enterprises, *in* GLOBAL ENVTL. INST., ENVTL. POLICIES ON CHINA'S INV. OVERSEAS 140, 140 (2011).
[75] *See, e.g., Ecuador indigenous protesters march against mining*, BBC, Mar. 9, 2012, http://m.bbc.co.uk/news/world-latin-america-17306228 (last visited Apr. 1, 2012) (reporting on indigenous protests of a Chinese company's mining plans).

Finally and notably, the Chinese regulatory framework concerning the environmental impact of Chinese overseas investment is not yet fully developed. Despite the issuance of some regulations, evaluation mechanisms to determine the level of compliance with the principle have not yet been completed.[76] The Chinese government is planning to issue *Guidelines for the Environmental Conduct of Chinese Enterprises Investing Overseas*, with a primordial objective to create a win-win result for the companies and the local environment.

A draft version of the regulation jointly elaborated by the Ministry of Environmental Protection and non-governmental organizations [77], defines their objectives[78], scope of application[79] and functions[80], as well as establishes general

[76] *Cf.* GLOBAL ENVTL. INST., ENVTL. POLICIES ON CHINA'S INV. OVERSEAS 31-32 (2011) ("Although the Chinese government and businesses are beginning to act on the environmental front, they still have not drawn up a comprehensive framework of environmental policies, guidelines, and codes of conduct governing OFDI activities… [and] existing laws and their enforcement have many loopholes, which has led to criticism of some Chinese multinational corporations… for not observing labor rights and social and environmental interests…China thus needs to improve its environmental policy guidance, and Chinese companies need to improve their corporate social responsibility").

[77] For example, the 全球环境研究所 [Global Environmental Institute] is a NGO that has collaborated with the Ministry of Environmental Protection.

[78] Guidelines for the Environmental Conduct of Chinese OFDI Companies (Proposed Draft), art. 1, *in* GLOBAL ENVTL. INST., ENVTL. POLICIES ON CHINA'S INV. OVERSEAS 124, 124 (2011) (noting the objections of the Guidelines is to "regulate the environmental conduct of Chinese Overseas Foreign Direct Investment and aid companies and to encourage them to adopt environmental planning, to use environmental impact assessments, to engage community stakeholders, and to implement environmental ideas and sustainable strategies throughout the project, thus creating a win-win result for the companies and the local environment.").

[79] *Id.* at art. 2 ("All Chinese OFDI companies and aid implementation bodies should abide by the Guidelines in their conduct of economic activities related to manufacturing, mining, infrastructure, building, wholesaling and retailing (import and export), transportation, and warehousing").

[80] Guidelines for the Environmental Conduct of Chinese OFDI Companies (Proposed Draft), art. 2, *in* GLOBAL ENVTL. INST., ENVTL. POLICIES ON CHINA'S INV. OVERSEAS 124, 124 (2011)("The Guidelines are to be used to regulate and direct Chinese companies´ overseas investments and project implementation for the complete duration of the project… to evaluate the environmental performance of Chinese OFDI companies and may be used by the government for managing OFDI companies and aid projects.").

provisions for the operation of construction projects and financial programs[81].

[81] *See* Guidelines for the Environmental Conduct of Chinese OFDI Companies (Proposed Draft), art. 10, *in* GLOBAL ENVTL. INST., ENVTL. POLICIES ON CHINA'S INV. OVERSEAS 124, 125 (2011) ("Companies should demonstrate the awareness of and requirements for environmental protection when developing OFDI or foreign aid programs and strategies"); *id.* at art. 11 ("in conducting investment and business activities, OFDI companies should abide by the international conventions and agreements on the environment and sustainable development to which China and the recipient country both are parties"). Article 11 is perhaps the one with the most important practical implication. *See id.* ("if the recipient country does not have environmental laws and regulations, China may invoke its own environmental laws and regulations as the minimum requirements or, alternatively, internationally accepted norms, being careful not to violate any local laws or regulations").

CHAPTER III. THE INSTITUTIONAL FRAMEWORK OF CHINA'S OUTBOUND INVESTMENT REGIME RELEVANT TO THE *PRINCIPLE OF MUTUAL BENEFIT AND SHARED GAIN*

3.1 Overview

The institutional framework of the China Outbound Investment Legal Regime relevant to the *Principle of Mutual Benefit and Shared Gain* is composed of various institutions, both at a governmental and at a non-governmental level. It is possible to distinguish three main functions that are carried out by the involved organs and institutions: a) guidance and administration; b) support and promotion; and c) control. This research will emphasize the first two categories.[82] It is important to make clear that some of the organs involved have competence in more than one area (*e.g.*, MOFCOM, NDRC). However, this paper focuses mainly on the support and promotion competences and will consider guidance, administration and control competences only when they are related to the *Principle of Mutual Benefit and Shared Gain*.

3.2 The Institutional Framework at an Administrative Level and Competences Related to the *Principle of Mutual Benefit and Shared Gain*[83]

3.2.1 State Council

The State Council is the highest administrative authority of the Chinese government. It is the governmental body in charge of designing the engineering of China outbound investments and its main goals in the long term. It establishes the

[82] The State Administration of Foreign Exchange (SAFE), the People´s Bank of China (PBOC), and the China Securities Regulatory Commission (CSRC) competences in this area will not be analyzed, not because they are not extremely important, but because the thesis is focused on the *Principle of Mutual Benefit and Shared Gain* and therefore, on the organs involved in controlling and enhancing the principle's application.

[83] This thesis research will focus only on the main bodies involved in guidance and supervision, support and promotion. *See generally*, Huang Wenbin & Andreas Wilkes, *Analysis of China's Overseas Inv. Policies* v (Ctr. for Int'l Forestry Research, Working Paper No. 79, 2011) (noting that the "analysis of Chinese policy documents related to OFDI finds that a total of 26 central government agencies have been involved in issuing the policies.").

central guidelines and general concepts, which then are developed through concrete regulations by the organs in charge of executing the policies.

In 2006, the State Council issued the *Nine Principles Regulating Foreign Investment of Chinese Companies*.[84] The document contains general guidelines on this area, with important guidelines on: the necessity of fostering mutual respect and creating win-win results, of abiding by local laws and regulations, of performing the necessary social responsibilities, of protecting the environment and resources, and of creating a good image of Chinese companies within the public opinion of the foreign country.

This document should be seen as one of the first clear steps of the Chinese government in regulating the conduct of enterprises investing overseas. The *Principle of Mutual Benefit and Shared Gain* is already in use as a theoretical foundation by policy makers.

Another example of the guidance competences of the State Council can be found in Section 9, paragraph 43 of the *Opinions of the State Council on the Division of Responsibilities among Departments for Performing the Key Tasks Stated in the Government Work Report*, which expresses that for implementing the *Go Global* strategy, it is necessary to "enhance macro guidance, reinforce policy support, streamline examination and approval procedures and improve service safeguards."[85]

3.2.2 The role of the Ministry of Commerce in controlling the application of the *Principle of Mutual Benefit and Shared Gain*

The MOFCOM is the organ in charge of administering and supervising overseas investment projects. It carries out its competence through the Department of Outward Investment and Economic Cooperation (DOIEC).[86] From a general

[84] Scott Zhou, *China as Africa's 'angel in white'*, ASIATIMES ONLINE, Nov. 3, 2006, http://www.atimes.com/atimes/China_Business/HK03Cb04.html (last visited May 1, 2012).

[85] *国务院关于落实《政府工作报告》重点工作部门分工的意见* [*Opinions of the State Council on the Div. of Responsibilities among Dep'ts for Performing the Key Tasks Stated in the Gov't Work Report*] (promulgated by the State Council, Mar. 22, 2012, effective Mar. 22, 2012).

[86] *See Functions*, MINISTRY OF COMMERCE OF CHINA, DEP'T OF OUTWARD INV. & ECON. COOP., http://hzs2.mofcom.gov.cn/ (last visited Apr. 25, 2012).

viewpoint, the main activities of the MOFCOM in the area of overseas investments are: formulating the strategies, guidelines and policies for developing overseas investment and foreign economic cooperation, and guiding and monitoring overseas projects.[87]

Nevertheless, the most important activities from a practical viewpoint are:

- To create administrative measures and specific policies guiding outbound investments by Chinese companies. The most important regulation governing this area is the previously mentioned *Measures for the Administration of Overseas Investment*, or the MAOI.[88]

- To approve Chinese companies to invest in and set up overseas establishments in the non-financial sector. The procedure for companies obtaining this approval is described in detail through these measures, and it is certainly one of the key issues of the outbound investment legal regime. [89]

Also of note are the activities carried out by the MOFCOM through its overseas branches. The tasks of the overseas commercial offices include: collecting project information, giving general advice to Chinese companies about the

[87] These include labor service cooperation in overseas projects. *See Functions*, MINISTRY OF COMMERCE OF CHINA, DEP'T OF OUTWARD INV. & ECON. COOP., http://hzs2.mofcom.gov.cn/ (last visited Apr. 25, 2012) (noting as a function, "[t]o… establish, perfect and implement the statistical system on foreign direct investment, foreign contracted projects and *labor service cooperation*) (emphasis added).

[88] The *境外投资管理办法* [*Measures for the Admin. of Overseas Inv.*] (promulgated by the Ministry of Commerce, Mar. 16, 2009, effective May 1, 2009) replaced the *Provisions on the Approval of Investing in or Establishing Overseas Enters.* (promulgated by the Ministry of Commerce, issued and effective Oct. 1, 2004) and the *Provisions on the Approval of Investing in or Establishing Enters. in Hong Kong and Macao by Domestic Enters.* (promulgated by the Ministry of Commerce, issued and effective Aug. 31, 2004) (China). *See* Qi Gei & Hui Zheng, *Outbound Inv. from China*, *in* CHINESE BUSINESS LAW 355, 360-61 (Yuanshi Bu ed. 2010) (detailing the new regulations and further noting that "[c]ompared with the Old MOFCOM Rules, the [new] MOFCOM Rules illustrate both (i) an expanded scope of outbound investments that specifically require MOFCOM approval, rather than approval from its provincial branches… and (ii) more efficient approval procedures for small outbound investments….").

[89] As the scope of this research is limited to the Outbound Investment Regime principles and institutional framework, the MOFCOM approval process will not be analyzed in detail. *See generally* Lutz-Christian Wolff, *Approval & Registration Requirements, in* CHINA OUTBOUND INVS.: A GUIDE TO LAW & PRACTICE 13, 13-24 (2011) (providing a complete description of the approval process and registration requirements).

investment environment in the target country, providing opinions about the security and safety of the host country, preparing reports explaining the possible impact of the investment projects in bilateral political and commercial relationships, and promoting the commercial interests of China.[90]

In addition, commercial authorities at a provincial level also play a very important role in the administration of the special funds for foreign trade and technical cooperation.[91] These funds will be further described in the next section, *infra* Section 3.2.3.

Finally, there is a China Investment Promotion Agency (CIPA) under MOFCOM, which works in conjunction with local investment promotion agencies. Despite having competences in the outbound investment promotion arena, as a traditional investment promotion agency, its main functions are related to inbound investments.

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[90] *See, e.g., 境外中资企业机构和人员安全管理规定* [*Admin. Provisions for the Safety of Overseas Chinese-funded Enters., Insts. & Their Staff*], art. 3 (promulgated by the Ministry of Commerce, Aug. 13, 2010, effective Aug. 13, 2010) ("All Chinese embassies and consulates abroad shall be responsible for providing guidance and supervision over the security administration of the Chinese-funded enterprises, institutions and the staff thereof within their respective host countries."); *see also id.* at arts. 12, 13, 14 & 17.2(6) (describing other relevant competences of the MOFCOM overseas branches). In application of this regulation, the MOFCOM has issued a manual regarding risk prevention for overseas projects. *See 商务部合作司关于下发安全管理指南的通知 [Coop. Div. of the Ministry of Commerce issued safety management guide*], Ministry of Commerce, Feb. 11, 2012, http://www.mofcom.gov.cn/aarticle/b/bf/201202/20120207960510.html (last visited May 1, 2012).

[91] Other tasks that are carried out by the provincial commerce departments are included in the *商务部关于做好境外投资管理工作有关事项的通知* [*Notice of the Ministry of Commerce on Relevant Issues on Improving Admin. of Overseas Inv.*], sec. V (promulgated by the Ministry of Commerce, Apr. 24, 2009, effective Apr. 24, 2009) (detailing the works of the provincial commerce departments: "(1) The Provincial Commerce Departments shall timely inquire registrations and other information of overseas enterprises through the System and procure overseas enterprises to timely register with relevant business institutions in foreign countries. (2) A file administration system for overseas investments shall be established and improved to properly store relevant documents related to enterprise overseas investments for a period of 30 years. The Ministry of Commerce will check the files from time to time. (3) The Provincial Commerce Departments shall research and analyze the general situation, development trend and actual problems of overseas investments of their local enterprises. A written summary of analysis shall be submitted to the Ministry of Commerce to put forward work suggestions every six months. (4) The Provincial Commerce Departments shall make use of synergistic effects, actively cooperating with departments such as finance, foreign exchange, customs, exits and entries, banking, quality investigation at the same level to formulate policies and measures to promote overseas investments of local enterprises.").

3.2.2.1 The Joint Annual Inspection of Overseas Investment as an example of the control exerted over Chinese companies in application of the *Principle of Mutual Benefit And Shared Gain*

One of the most important pieces of China´s overseas investment legal regime is the annual inspection jointly conducted by MOFCOM and SAFE [hereinafter referred as Joint Annual Inspection]. The instrument was created by the *Interim Measures for the Joint Annual Inspection of Overseas Investments* issued by MOFTEC[92] and SAFE.[93]

There are three different organs in charge of conducting the inspection:

- Provincial Commerce Authorities;
- Headquarters of enterprises directly under the central government; and
- Foreign Exchange Administrative Departments.[94]

The Provincial Commerce Authorities and the Foreign Exchange Administrative Departments are in charge of controlling overseas investment by enterprises within their jurisdiction. The headquarters of the enterprises directly under the central government control the overseas investment of their respective enterprises. In this case, the foreign exchange administration (or department of foreign exchange) of the local place also controls the foreign exchange.

The Joint Annual Inspection is further regulated in the *Notice of the Ministry of Commerce and the State Administration of Foreign Exchange on Issues concerning the Joint Annual Inspection of Overseas Investment*.[95] According to this regulation, Chinese overseas investors receive a grade according to their performance

[92] The MOFCOM succeeded the Ministry of Foreign Trade & Econ. Coop. (MOFTEC) in 2003, which had succeeded the Ministry of Foreign Economic Relations & Trade (MOFERT) in 1993.

[93] *See 境外投资联合年检暂行办法 [Interim Measures for the Joint Annual Inspection of Overseas Inv.]*, art. 2 (promulgated by the Ministry of Foreign Trade & Econ. Coop., Oct. 31, 2002, effective Jan. 1, 2003) (China), *available at* http://www.by-cpa.com/html/news/20077/906.html (last visited Apr. 1, 2012).

[94] *See id.* at art. 5.

[95] *See 商务部、国家外汇管理局关于境外投资联合年检工作有关事项的通知 [Notice of the Ministry of Commerce and the State Admin. of Foreign Exchange on Issues concerning the Joint Annual Inspection of Overseas Inv.*] (promulgated by Ministry of Commerce and the State Administration of Foreign Exchange, Dec. 28, 2009, effective Jan. 1, 2010) (China) (No. 60 [2009] of the Ministry of Commerce).

from 0 to 100 points. Up to 60 points shall be assigned by the provincial commerce authority or the headquarters of the enterprises directly under the central government and up to a maximum of 40 points by the Foreign Exchange Administrative Departments.[96] As noted *infra*, the number of points attributed is relevant to the level of support the company will receive for future investment projects.

3.2.2.1.1 Time and Subject of Annual Inspection

According to paragraph one of the Notice:

> [A]ll overseas enterprises (excluding those formed with foreign aid funds and financial overseas enterprises) formed by domestic investors in the manner of new formation, merger or acquisition (including holding non-controlling shares) prior to the annual inspection year shall be subject to the annual inspection. For example, the objects of annual inspection in 2010 were overseas enterprises formed prior to December 31, 2009, and so on.[97]

3.2.2.1.2 Contents of the Inspection

The *Notice* also describes the facts and issues to be analyzed by the competent authority.[98] They are limited to:

- Determining if there was a violation of the relevant laws, regulations and policies of the host country by: (a) overseas enterprises or (b) any of its personnel dispatched by the Chinese party that ended in a punishment. The concept of punishment is broad, so it has to be interpreted as including administrative and judicial sanctions.

[96] *See 商务部、国家外汇管理局关于境外投资联合年检工作有关事项的通知 [Notice of the Ministry of Commerce and the State Admin. of Foreign Exchange on Issues concerning the Joint Annual Inspection of Overseas Inv.*] (promulgated by Ministry of Commerce and the State Administration of Foreign Exchange, Dec. 28, 2009, effective Jan. 1, 2010) (China) (No. 60 [2009] of the Ministry of Commerce).
[97] *Id.* at ch. I.
[98] *Id.* at ch. II(I)(3).

- Determining the occurrence of any quality, security, environmental protection, employment, relationship or other problem or dispute during the business operations.[99]

If the companies successfully pass the two inspections, they will get 20 points, 10 for each inspection. If they do not pass either inspection, then no points will be awarded.[100]

3.2.2.1.3 Procedure

According to Chapter III of the *Notice*, the overseas investors shall complete with good faith and submit a copy of the Annual Inspection Report to the provincial commerce department or the headquarters of the central enterprise.[101] For central enterprises, which must submit the report to their headquarters, the regulation does not specify which sector of the company must fill the Annual Inspection Report.

According to Chapter III of the *Notice*, after receiving the Annual Inspection Report, the provincial commerce authority or the headquarters of the central enterprise "shall conduct a careful investigation and make an objective evaluation."[102] Naturally, in the case in which the evaluation needs to be carried out by the headquarters of the companies, it is difficult to ensure impartiality and objectiveness. The regulation adds that, "when necessary," the competent organs for carrying out the inspection can consult the economic and trade counselor´s office of the embassy (or consulate) of China in the foreign country or region about the relevant information.[103] Once again, there remain two critiques of this: (1) The existence of the report is

[99] *商务部、国家外汇管理局关于境外投资联合年检工作有关事项的通知 [Notice of the Ministry of Commerce and the State Admin. of Foreign Exchange on Issues concerning the Joint Annual Inspection of Overseas Inv.*], ch. II(I)(3)(2) (promulgated by Ministry of Commerce & State Admin. of Foreign Exchange, Dec. 28, 2009, effective Jan. 1, 2010).
[100] *Id.* at ch. II(I)(3).
[101] *Id.* at ch. III(I)(1) (detailing the requirements for submitting the annual inspection report). Another copy shall be submitted to the local foreign exchange administration, together with the financial statements of the overseas enterprise in the previous year, including balance sheet, profit and loss statement and cash flow statement. *Id.* Chinese versions of the financial statements shall also be submitted. *Id.*
[102] *Id.* at ch. III(III)(1).
[103] *Id.*

optional, and it should be compulsory; first hand information is essential to conduct a successful and realistic inspection; and (2) the MOFCOM may not have the resources to carry out this activity in a proper way and instead, may be overwhelmed.

3.2.2.1.4 Consequences of non-observance of the regulations

Article 20 of the *Interim Measures* and Chapter IV of the *Notice* detail the consequences for the non-observance of these regulations.[104]

Firstly, Article 20 of the *Interim Measures* establishes that in case an enterprise does not file for annual inspection, it will be subjected to three kinds of punishments:

- Refusal to accept for the time being the applications of the subject of investment for purchasing or paying foreign exchanges or making foreign-related warranties in overseas investment;
- Refusal to accept the applications of the sanctioned company for establishing any new overseas enterprises; and
- Refusal to accept the applications for sending any persons abroad.[105]

Secondly, Sections IV and V, of Chapter IV (Work Requirements) of the *Notice* outline further consequences of non-compliance. Section IV states that "for enterprises which fail to participate in the annual inspection as required, the commerce department shall reject their applications for special funds for foreign

[104] *境外投资联合年检暂行办法 [Interim Measures for the Joint Annual Inspection of Overseas Invs.]*, art. 20 (promulgated by the Ministry of Foreign Trade and Econ. Coop., Oct. 31, 2002, effective Jan. 1, 2003) (China), *available at* http://www.by-cpa.com/html/news/20077/906.html (last visited Apr. 1, 2012); *商务部、国家外汇管理局关于境外投资联合年检工作有关事项的通知* [*Notice of the Ministry of Commerce & the State Admin. of Foreign Exchange on Issues concerning the Joint Annual Inspection of Overseas Inv.*], ch. IV (promulgated by Ministry of Commerce & State Admin. of Foreign Exchange, Dec. 28, 2009, effective Jan. 1, 2010) (China).

[105] *境外投资联合年检暂行办法 [Interim Measures for the Joint Annual Inspection of Overseas Invs.]*, art. 20 (promulgated by the Ministry of Foreign Trade and Econ. Coop., Oct. 31, 2002, effective Jan. 1, 2003) (China), *available at* http://www.by-cpa.com/html/news/20077/906.html (last visited Apr. 1, 2012).

economic and technical cooperation in the current year."[106] Section V of the same chapter states:

> [W]here a domestic investor applies for support according to the policy on the special funds for foreign economic and technical cooperation, it must provide its annual inspection certificate for an overseas enterprise in the current year, which shall be related with the contents of application, and only an enterprise with an annual inspection grade-I (the score of annual inspection is more than 80 points) may enjoy the policy support.[107]

Sanctions are imposed for failing to file, but not for failing in performance. The only consequence for failure to perform is denied access to the funds, but without a punishment. This is, however, logical because it is likely that if the company committed a violation, the host country has already sanctioned it and therefore, if China sanctions again for the performance, it would be violating the *non bis in idem* principle.

3.2.3 Ministry of Finance (MOF)

The Ministry of Finance (MOF) competences concerning outbound investment are related to:

- Creating special funds for supporting overseas investment
- Drafting taxation policies regarding overseas investment projects[108]

We will only focus in the first one of its competences, as a mechanism of enhancing the application of the mutual benefit and shared gain principle for being a support tool for the private sector. Analyzing taxation of outbound investment would require another whole paper, as the topic is very broad.

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[106] *商务部、国家外汇管理局关于境外投资联合年检工作有关事项的通知* [*Notice of the Ministry of Commerce & the State Admin. of Foreign Exchange on Issues concerning the Joint Annual Inspection of Overseas Inv.*], sec. IV (promulgated by Ministry of Commerce & State Admin. of Foreign Exchange, Dec. 28, 2009, effective Jan. 1, 2010) (China).
[107] *Id.* at sec. V.
[108] This task is carried out jointly with the Ministry of Taxation. *See* Bing Ren, Hao Liang, & Ying Zheng, *An Institutional Perspective and the Role of the State for Chinese OFDI*, *in* CHINESE INT'L INVS. 11, 23 (Ilan Alon, Marc Fetscherin & Phillipe Gugler eds., 2011).

3.2.3.1 Funds for Foreign Trade and Technical Cooperation as an instrument created to contribute to the internationalization of Chinese enterprises[109]

3.2.3.1.1. General Overview

In 2004, MOF and MOFCOM jointly promulgated the *Circular on the Support of the Prior Period Expenses of Overseas Investment in Resources and the Foreign Cooperation Project.* [110] The main objective of the regulation was to encourage overseas investment in resources by enterprises with comparative advantages. The aforementioned regulation was complemented by *The Supplementary Circular of the MOF and MOFCOM on the Support of the Prior Period Expenses of Overseas Investment in Resources and the Foreign Economic Cooperation Project*.[111]

In 2005, MOF and MOFCOM issued the *Measures for the Administration of Special Funds for Foreign Economic and Technical Cooperation* (MASF).[112] This regulation offers more details of the limits and extension of the Special Funds, and is the most important regulation of the Special Funds System. According to article 1, its main objectives are:

[109] Funds for specific industries, such as those supporting overseas development in the mining area, will not be analyzed in detail. *See generally* Peter Thomas, *Chinese Sectoral Indus. Policy Shaping Int'l Trade & Inv. Patterns – Evidence from the Iron & Steel Indus.* 21 (Duisburger Arbeitspapiere Ostasienwissenschaften [Duisburg Working Papers on East Asian Studies], Working Paper No. 88, 2011)**,** *available at* http://econstor.eu/bitstream/10419/45004/1/654795150.pdf (last visited Apr. 25, 2012) ("Key steelmakers can also apply for support from various government-sponsored assistance funds. The ARPISI urges companies to make full use of three separate special funds: the Fund for Mining Rights to Overseas Mineral Resources, the Fund for economic and Technical Cooperation Overseas and the Fund for Reducing Risk in Prospecting of Overseas Mineral Deposits").

[110] *Circular on the Support of the Prior Period Expenses of Overseas Inv. in Res. and the Foreign Coop. Project* (promulgated by Ministry of Finance & Ministry of Commerce, Sept. 19, 2004) (China).

[111] *The Supplementary Circular of the MOF and MOFCOM on the Support of the Prior Period Expenses of Overseas Inv. in Res. and the Foreign Economic Coop. Project* (promulgated by the Ministry of Finance & Ministry of Commerce, June 17, 2005, effective June 17. 2005) (China).

[112] *对外经济技术合作专项资金管理办法 [Measures for the Admin. of Special Funds for Foreign Econ. and Technical Coop*.] (promulgated by the Ministry of Commerce & Ministry of Finance, Dec. 9, 2005, effective Dec. 9, 2005) (China).

- Supporting the *Going Out* Strategy
- Encouraging enterprises with comparative predominance to carry out all kinds of foreign economic and technical cooperation
- Strengthening and regulating the administration of special funds for foreign economic and technical cooperation
- Improving the efficiency of using funds[113]

Article 2 of the regulation establishes requirements for the projects being eligible for obtaining the funds. Those requirements are:

(a) Projects should comply with China´s industrial policies

(b) Alignment with national industrial policies and

(c) Contribute to the economic development and technological progress of the recipient country. This last requirement is a very important manifestation of the principle of mutual benefit and shared gain.

(d) Funds should be managed according to the law, in an open and transparent basis.[114]

Finally, according to Article 8 (2) of the NDRC Policy for the Guidance of Overseas Investment Industries, these funds shall be assigned adhering to the principles of market economy and complying with WTO plans.[115]

<u>3.2.3.1.2. Types of Special Funds</u>

The special funds may adopt three different forms, as explained in article 4 of the MASF. Those forms are:

(1) Subsidies for pre-operational fees[116];

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[113] *对外经济技术合作专项资金管理办法 [Measures for the Admin. of Special Funds for Foreign Econ. and Technical Coop*.] (promulgated by the Ministry of Fin. & Ministry of Commerce, issued and effective on Dec. 9, 2005) (China).

[114] *Id.* at art. 2.

[115] *境外投资产业指导政策* [*Policy for the Guidance of Overseas Inv. Indus.*] art. 8(2) (promulgated by the NDRC, July 5, 2006, July 5, 2006) (China).

[116] *See 对外经济技术合作专项资金管理办法 [Measures for the Admin. of Special Funds for Foreign Econ. and Technical Coop*.], art. 2 (promulgated by the Ministry of Fin. and the Ministry of Commerce, issued and effective on Dec. 9, 2005) (China) (defining "pre-operational fees" as "the relevant fees incurred before a domestic enterprise makes registration of any overseas enterprise at the country where the project is located or concludes overseas economic and technical cooperation

(2) Interest discounts for medium and long-termed loans; and

(3) Subsidies for operational fees.[117]

3.2.3.1.3. Requirements for enterprises eligibility

Article 7 of the MASF establishes the requirements that have to be met by an enterprise when applying for a Special Funds. Those requirements are the following:

(1) Having registered within the territory of the People's Republic of China and having the independent legal-person status;

(2) Having obtained written documents of the relevant state departments on the approval (verification or archival filing) of foreign economic cooperation;

(3) Having no major illegal or irregular act or malicious default of governmental funds within the latest five years; and

(4) Having submitted statistical materials as required.[118]

3.2.3.1.4. Requirements for project eligibility

Article 3 states that:

> The scope of foreign economic cooperation as mentioned in these Measures includes: overseas investment, overseas agricultural, forestry and fishery cooperation, overseas project contracting, overseas labor services, establishment of overseas research and development centers, and overseas designing consultation, etc.[119]

Article 8 states that, a project being applied for must meet the following conditions:

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agreements (contracts) with any entity of the country where the project is located for the purpose of winning the project, and including: legal, technical and commercial consultation fees for employing the third party, fees for compiling feasibility study report on the project, translation fees for regulative documents and bidding documents, fees for purchase of regulative documents, bidding documents and other materials, and fees for exploration of mineral resources, etc."). This regulation has to be read in conjunction with art. 9, which establishes a limit for the amount of pre-operational fees. *Id.* at art. 9 ("As a general principle, the proportion of subsidies for pre-operational fees shall not exceed 50% of the fees actually paid by an application enterprise, and the above-mentioned subsidies can be given to one project just once.").

[117] *See id.* at art. 4.

[118] *Id.* at art. 7.

[119] *Id.* at art. 3.

(1) Having been approved, registered or put on records by the relevant state departments;

(2) Having been registered or put on records by the country where the project is located, and the project has come into effect;

(3) The contractual sum for an overseas contracting project shall not be lower than 5 million USD (or equivalent currencies); the investment amount of the Chinese party for an overseas investment project or an agricultural, forestry or fishery cooperation project shall not be lower than 1 million USD (or equivalent currencies); and the contractual sum for overseas labor services, overseas research and development centers and foreign designing consultation shall not be lower than 500 thousand USD (or equivalent currencies);

(4) As to the projects for which the interest discounts for medium and long-termed loans are applied for, the following requirements shall be met:

i. the loans with discounted interests as applied for shall be medium and long-termed domestic bank loans for more than one year;

ii. the loans shall be used for construction and operation of foreign economic cooperation projects;

iii. the sum of a single loan shall not be lower than RMB three million yuan (or equivalent currencies);

iv. the accumulative sum of loans with discounted interests for each project shall not exceed the total amount of Chinese investment or the contractual sum; and

v. the support of interest discounts may be given to each project for less than five years.

(5) The financial method of rationed operational fees shall be applicable to the projects for establishment of overseas research and development centers, cooperation

of overseas labor services and foreign designing consultation, and the specific conditions thereof shall be separately formulated.[120]

As expressed by Jun Dai, "in general, as the subsidy is granted by the local finance authorities, local legislation will provide detailed requirements for outbound investment projects which are eligible to receive the subsidy."[121] For example, the Beijing Government issued the *Interim Measures for the Administration of Beijing Municipal Foreign Economic and Technical Cooperation Special Fund*[122], the Shanghai Government in 2008 issued a *Circular with Rules on Declaration of Special Funds for Outbound Investment*[123] and the Zhejiang Government issued the *Measures on Administration of the Use of the Special Funds for Implementing the "Going Out" Strategy.*

3.2.4 National Development and Reform Commission (NDRC)

The NDRC coordinates the main policies in the overseas investment area and aims to make these policies coterminous with China´s long-term strategy. It carries out its competences regarding overseas investment through the Department of Foreign Capital and Overseas Investment (DFCOI). The main tasks of the organ are to approve outbound investment projects when NDRC approval is required according

[120] *对外经济技术合作专项资金管理办法 [Measures for the Admin. of Special Funds for Foreign Econ. and Technical Coop.]*, art. 8 (promulgated by the Ministry of Fin. & Ministry of Commerce, issued and effective on Dec. 9, 2005) (China).

[121] Jun Dai, *Financing of China Outbound Invs.*, *in* CHINA OUTBOUND INVS.: A GUIDE TO LAW & PRACTICE 59, 67 (Lutz-Christian Wolff ed., 2011).

[122] *北京市对外经济技术合作专项资金管理暂行办法 [Special Funds Interim Measures for the Admin. of Beijing Mun. Foreign Econ. & Technical Corp.]* (promulgated by the Beijing Mun. Comm'n of Commerce, Aug. 5, 2008) (China), *available at* http://www.bjmbc.gov.cn/web2/fcsArticleDetail.jsp?article_id=12687060000001 (last visited Apr. 21, 2012).

[123] *上海市关于做好年对外经济技术合作专项资金申报工作的通知和规则* [*Circular and Rules of Shanghai on Declaration of Special Funds for Outbound Investment for the Year of 2008*] (promulgated by the Shanghai Commerce Comm., Nov. 21, 2008, effective Nov. 21, 2008).

to State Council mandates[124] and to draft the *Guidance Catalogue for Overseas Investments* in cooperation with other relevant agencies.[125]

Other competences of the DFCOI include: analysis of international capital dynamics and its utilization in outward investment; determination of main objectives and policies concerning strategies, plans, and optimization of the structure of foreign capital utilization and overseas investments; drafting plans for loans by international financial organizations and foreign governments; and recommending major candidate projects.[126]

Important, however, is the incorporation of the *Principle of Mutual Benefit and Shared Gain* in the *Notice of the NDRC on Issues Concerning the Improvement of the Administration of Overseas Investment Projects*.[127] Paragraph 13 of the *Notice* reads,

> [T]he development and reform authorities at various localities and all centrally-administered enterprises shall seriously implement the various provisions of the State on administration of overseas investments, guide the relevant enterprise in carrying out overseas investments sturdily, improve the rationality and efficiency of overseas investments, safeguard the order of overseas investments effectively, and promote steady, orderly and healthy development of overseas investments by China.[128]

A harmonious interpretation of this disposition within the overseas investment legal system indicates that in order for the development of Chinese OFDI to be "steady", "orderly" and "healthy", it is essential that the entities within the system apply the *Principle of Mutual Benefit and Shared Gain*, as this is the gateway for creating a solid, long-term overseas investment agenda.

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[124] *See generally* Lutz-Christian Wolff, *Approval & Registration Requirements, in* CHINA OUTBOUND INVS.: A GUIDE TO LAW & PRACTICE 13, 14-17 (2011) (providing a comprehensive explanation of when NDRC approval is required).
[125] Mainly the MOFCOM and the Ministry of Foreign Affairs (MFA).
[126] *Main functions of Dep'ts of the NDRC*, NAT'L DEV. & REFORM COMM'N (NDRC), http://en.ndrc.gov.cn/mfod/t20081217_252124.htm (last visited Apr. 25, 2012) (China).
[127] *国家发展改革委关于完善境外投资项目管理有关问题的通知* [*Notice of the Nat'l Dev. & Reform Comm'n on Issues Concerning the Improvement of the Admin. of Overseas Inv. Projects*] (promulgated by the Nat'l Dev. & Reform Comm'n, Jun. 8, 2009, effective Jun. 8, 2009) (China).
[128] *Id.* at para. 13.

3.2.5 State-Owned Assets Supervision and Administration Commission (SASAC)

As a key organ in the administration and supervision of state-owned assets, the SASAC plays a role in overseas investments. It main functions in this area are detailed in the 2011 *Interim Measures for the Administration of the Overseas State-owned Property Rights of Central Enterprises*[129], and in the 2012 *Interim Measures for the Supervision and Administration of Overseas Investments by Central Enterprises* and the *Interim Measures for the Supervision and Administration of Overseas Investments by Central Enterprises*, Order of the SASAC of the State Council No. 28.[130] The first measure is important with regard to a general overview, but the latter one more directly addresses issues related to the *Mutual Benefit and Shared Gain Principle*.

In Article 5(e) of the *2012 Interim Measures*, which includes principles that should be followed by overseas investors, specifies an obligation to comply with the laws and regulations as well as local customs of the countries (or regions) where such investments are made.[131] From the Chinese perspective, the regulation aims to improve the abilities and specialization of the Chinese central enterprises. In particular, article 5(b) and (c) express that overseas investments carried out by central enterprises shall:

> Conform to the distribution pattern and orientation of the structural readjustment of the State-owned sector of the national economy; [and be] in line with the development strategies and international business strategies of the enterprise, with the primary business of the enterprise to be given priority, and [be] conducive to raising the international competitiveness of the enterprise.[132]

[129] *中央企业境外国有产权管理暂行办法*［*Interim Measures for the Admin. of the Overseas State-owned Property Rights of Central Enters.*] (promulgated by the State-owned Assets Supervision and Admin. Comm'n of the State Council, June 14, 2011, effective July 1, 2011) (China).
[130] *中央企业境外投资监督管理暂行办法* [*Interim Measures for the Supervision and Admin. of Overseas Invs. by Central Enters.*] (promulgated by the State-owned Assets Supervision and Admin. Comm'n of the State Council, Mar. 18, 2012, effective May 1, 2012) (China).
[131] *Id.* at art. 5(e).
[132] *Id.* at art. 5(b)-(c).

Furthermore, with regard to risk prevention, articles 3, 4 and 14 of the regulation create the obligation for the companies to establish an overseas investment management system, aimed fundamentally at preventing risks by evaluating, auditing and intensifying the supervision of overseas investment projects.**[133]**

3.3 The Institutional Framework of China Outbound Investments at a Financial Level: Financial access and its implications to the *Principle of Mutual Benefit and Shared Gain*

Chinese financial institutions are key players in the Outbound Investment Institutional Framework. Financial support is the practical instrument upon which the *Going Global* strategy is based. Additionally, Chinese banks are increasingly important in the global economy. In fact, with regard to Latin America in particular, recent research shows that in 2010, Chinese banks financed more projects in Latin America than Western banks, including the World Bank and the United States Export-Import Bank.[134] This section will detail the role played by policy banks and by policy insurance institutions.

3.3.1 Policy Banks

The most relevant policy banks involved in overseas investment financing in China are the Export-Import Bank of China (China EXIM Bank) and China

[133] *中央企业境外投资监督管理暂行办法* [*Interim Measures for the Supervision and Admin. of Overseas Invs. by Central Enters.*], arts. 3, 4 & 14 (promulgated by the State-owned Assets Supervision and Admin. Comm'n of the State Council, Mar. 18, 2012, effective May 1, 2012) (China).

[134] *See generally* K. Gallagher, K. Koleski & A. Irwin, *A better deal? Chinese Finance in Latin America*, AMS. QUARTERLY, Feb. 16, 2012, http://www.americasquarterly.org/node/3349 (last Visited Apr. 26, 2012).

Development Bank (CDB).[135] These two policy banks provide long-term and low-interest financing for overseas investment projects. However, they are focused in financing only certain kinds of projects.[136]

The policy banks play an important role in creating special funds designed for investing in certain overseas regions (*e.g.*, China EXIM Bank – Inter-American Development Bank (IDB) Fund, see, *infa*, Appendix I).

In furtherance of the *Principle of Mutual Benefit and Shared Gain*, these banks can increase the environmental responsibility of the projects they finance by setting requisite environmental standards.[137] For example, banks have established "green lending" criterions.[138] On August 28, 2007, China EXIM Bank issued the *Guidelines on Environmental and Social Impact Assessment of Loan Projects*, taking

[135] *See* Huang Wenbin & Andreas Wilkes, *Analysis of China's Overseas Inv. Policies* 13 (Ctr. for Int'l Forestry Research, Working Paper No. 79, 2011) (reporting that "in 2003 the NDRC and China´s export and import credit institution, EXIM Bank, published the 'Circular on prior support to significant overseas investments'… [and] in 2005, China Development Bank (CDB) and the NDRC published the 'Circular on strengthening financial support to significant overseas projects.'"). To a lower degree, Bank of China, China Constr. Bank, and Indus. & Commerce Bank of China (ICBC) are starting to play a more important role in overseas investment financing. *See, e.g. China's ICBC to open overseas service divisions*, CHINA ECON. REVIEW, Mar. 21, 2012, http://www.chinaeconomicreview.com/node/56402 (last visited Apr. 23, 2012).

[136] *See* Jun Dai, *Financing of China Outbound Invs.*, *in* CHINA OUTBOUND INVS.: A GUIDE TO LAW & PRACTICE 59, 63 (Lutz-Christian Wolff ed., 2011) (The China EXIM Bank "gives priority to: offshore processing projects and offshore plant construction projects which may boost the export of domestically-manufactured equipment, technology and export; the establishment of offshore R&D centres, product sale centres and service centres which may improve the product research and development capacity and export competitive advantage of domestic companies; and outbound investments by means of mergers and acquisitions which may expand the international market and enhance the international competence of domestic enterprises."); Huang Wenbin & Andreas Wilkes, *Analysis of China's Overseas Inv. Policies* 13 (Ctr. for Int'l Forestry Research, Working Paper No. 79, 2011) (The "CDB arranges a credit quota from its stock capital to improve its ability to fund support to significant overseas investment projects.").

[137] *See, e.g.*, Kirk Hebertson, *Leading While Catching Up?: Emerging Standards for China´s Overseas Invs.*, 11 SUSTAINABLE DEV. LAW & POLICY no. 3, Spring 2011, at 22, 24 ("China´s financial sector has the potential to play an influential role in strengthening the environmental and social performance of China´s overseas investments, [but because] many Chinese companies do not raise funds in the capital markets, the majority of total capital available to Chinese industry comes from financial institutions.").

[138] GLOBAL ENVTL. INST., ENVTL. POLICIES ON CHINA'S INV. OVERSEAS 120 (2011) (noting that scholars believe that Chinese banks still do not have "comprehensive environmental policies and evaluation measures").

into consideration the relevant laws of the PRC.[139] The guidelines oblige the Bank to consider not only economic returns but also the social and environmental impacts of the projects it finances.[140] Furthermore, under the regulation, the Bank shall carry out environmental assessments prior to granting a loan, during the execution of the project, and after the project is completed so that the Bank can form better criterions for future cases.

CDB has also adopted environmental lending policies[141], but they are adapted to Chinese regulations and not to global standards. Neither China EXIM Bank nor CDB have adhered to the Equator Principles, which are today the most important international standard concerning green lending. To this date, the only Chinese bank that has adopted the Equator Principles is the Industrial Bank.[142]

3.3.2 Insurance Institutions

In addition to policy banks, insurance institutions also play a very important role in the overseas investment area, as they provide services that make the projects safer for financial players. In particular, China Export & Credit Insurance Corporation (also known as Sinosure) is the most important organization in this area. It has been defined as a "Chinese-policy insurance company" and is the "only

[139] *See, e.g., Law of the People's Republic of China on the Envtl. Impact Assessment* (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2002, effective Sept. 1, 2003) 2002 STANDING COMM. NATIONAL PEOPLE'S CONG. ORDER NO. 77 (China), *available at http://www.npc.gov.cn/englishnpc/Law/2007-12/06/content_1382122.htm* (last visited Apr. 26, 2012).
[140] GLOBAL ENVTL. INST., ENVTL. POLICIES ON CHINA'S INV. OVERSEAS 61(2011) (noting that scholars believe that banks still do not have "comprehensive environmental policies and evaluation measures").
[141] *See, e.g.,* Kevin P. Gallagher, Amos Irwin, Katherine Koleski, THE NEW BANKS IN TOWN: CHINESE FINANCE IN LATIN AMERICA (Inter-American Dialogue, Washington, D.C.), Feb. 2012, at 21-22, *available at* http://ase.tufts.edu/gdae/Pubs/rp/GallagherChineseFinanceLatinAmerica.pdf (last visited Apr. 26, 2012) (detailing CDB's "Guidelines on Environmental Protection Project Development Review" which "focuses on client suitability review, ex-ante EIA, and ex-post environmental monitoring.").
[142] *Members & Reporting*, EQUATOR PRINCIPLES, http://www.equator-principles.com/index.php/members-reporting (last visited Apr. 27, 2012).

insurance company authorized to issue insurance policies for so-called political risks connected with outbound investments."[143]

Additionally, through the *Notice of the National Development and Reform Commission and China Export & Credit Insurance Corporation concerning Relevant issues on Setting up a Risk Prevention Mechanism for Key Overseas Investment Projects*,[144] there is a protection mechanism for Chinese overseas investments. The regulation was issued on Jan. 25, 2005. According to Paragraph I of the *NDRC-Sinosure Notice*, Sinosure "will provide the State-encouraged key overseas investment projects with investment consulting, risk evaluation, risk control, investment insurance, and other similar risk prevention services…."[145]

However, the mechanism is limited to investments in certain sectors:

- Overseas resource exploitation projects that palliate the domestic insufficiency;
- Production and infrastructural projects that promote the export of domestic technologies, products, equipment and labor services;
- Establishment of research and development centers overseas which may make use of internationally advanced technologies, management experiences and professional talents; and
- Merger and acquisitions operations that (a) enhance the international competitiveness of Chinese enterprises and (b) contribute to expand international markets.

Paragraph III of the *NDRC-Sinosure Notice* also encourages Sinosure to offer services related to the pre-investment stage. However, it is worth noting that Sinosure functions are limited to advising in risk prevention matters, and do not support

143 Jun Dai, *Financing of China Outbound Invs., in* CHINA OUTBOUND INVS.: A GUIDE TO LAW & PRACTICE 59, 63 (Lutz-Christian Wolff ed., 2011).

144 *国家发展和改革委员会、中国出口信用保险公司关于建立境外投资重点项目风险保障机制有关问题的通知* [*Notice of the Nat'l Dev. & Reform Comm'n & China Export & Credit Ins. Corp. concerning Relevant Issues on Setting up a Risk Prevention Mechanism for Key Overseas Inv. Projects*] (promulgated by the Nat'l Dev. and Reform Comm'n & China Export & Credit Ins. Corp., Jan. 25, 2005, effective Jan. 25, 2005) (China).

145 *Id.*

Chinese enterprises with commercial information directly obtained from foreign countries.

3.4 Non-Governmental Organizations that are Officially Supported by China and their Role in the OFDI Institutional Framework

3.4.1 China Council for the Promotion of International Trade (CCPIT) – 中国国际贸易促进委员会

CCPIT[146] was founded in 1952 and is one of the most proactive and relevant non-governmental institutions in the area of international business promotion. It represents several Chinese companies as well as institutions related to different business sectors.

CCPIT main activities are related to trade promotion. However, in the last years it has expanded its competence and is also working in other fields.[147] In particular, CCPIT is increasingly focusing on "building business cooperation and exchange platforms, facilitating the implementation of the 'Going Global' Strategy."[148] The main objective of CCPIT in this area is to provide professional services to Chinese enterprises investing overseas. This objective is mainly carried out by organizing outbound investment promotion seminars[149] and trips to investment target countries, accompanying Chinese enterprises, and receiving foreign delegations

[146] The institution used to be known as China Chamber of International Commerce (CCOIC), but today it is frequently referred to with the abbreviation CCPIT and considers the CCOIC as a "Social Organization Affiliated" with them, along with the Chinese Arbitration Law Research Institute and China Association of Foreign Trade Service. The CCPIT Annual Report 2010, is available at: http://bizchinanow.com/Contents/Channel_1856/2011/0622/299916/asset000070060583341_1_1308704391093.pdf (last visited Apr. 23, 2012).

[147] *See, e.g.*, *About CCPIT*, CHINA COUNCIL FOR THE PROMOTION OF INT'L TRADE, http://bizchinanow.com/aboutCCPIT/aboutCCPIT.htm (last visited Apr. 23, 2012) (outbound investment promotion competences can be included within its activities of "Sino-foreign economic and technological cooperation in various form", "promotion of the development of economic and trade relations between China and other countries and regions around the world", and promotion of "the mutual understanding and friendship between China and peoples and economic and trade circles of all nations around the world, in line with law and government policies of the People's Republic of China").

[148] *Id.*

[149] The main event in the area is the Chinese Enterprises Outbound Investment Conference held in Beijing, China.

of government officials and business leaders. CCPIT also co-organizes international business forums with foreign counterparties (*e.g.*, the Canada-China Business Council).[150]

As far as Latin America is concerned, CCPIT has co-organized the China-Latin America Business Summit.[151] Notably, during the China-Latin America and the Caribbean Business Forums held in Chengdu in 2010, CCPIT and the IDB signed a cooperation agreement to foster programs and initiatives aimed at increasing trade and investment connections between China and Latin America and the Caribbean.[152]

CCPIT has several overseas representative offices, which can potentially operate as key contact points to access investment opportunities.[153]

3.4.2 China Council for International Investment Promotion (CCIIP) – 中国国际投资促进会

China Council for International Investment Promotion (CCIIP) is a "national non-profit organization responsible for promoting China's inward and outward

[150] For example, on Feb. 9, 2012, CCPIT co-hosted with the Canada-China Business Council the 5th Canada- China Business Forum, where Chinese outbound investment was a focus. *See, e.g., PM speaks at the Canada-China Business Forum*, PRIME MINISTER OF CANADA, http://www.pm.gc.ca/eng/media.asp?id=4669 (last visited Apr. 28, 2012).

[151] The last edition of the China-Latin America Business Summit took place in Lima, Peru, on Nov. 21 and 22, 2011. At the end of the event, several Latin American countries' China Chambers of Commerce subscribed the Lima Declaration. The Declaration echoed the conclusion of this paper, on the importance of strengthening the institutional framework of China's outbound investment regime; the Declaration remarked the necessity of creating a Commercial Latin American organization, composed by all the bilateral chamber of commerce. Authorities of the Argentinean, Chilean, Peruvian and Paraguayan's China chambers of commerce, have been put in charge of drafting a proposal for the organ creation. *See Reseña V Cumbre Empresarial China-América Latina 21 Y 22 De Noviembre De 2011- Lima, Perú* [Report made by the Uruguayan-Chinese Chamber of Commerce on the 5th China-Latin America Business Summit, Held in Lima, Perú] (2011), URUGUAYAN-CHINESE CHAMBER OF COMMERCE (unpublished report) (on file with author).

[152] Press Release, Inter-American Dev. Bank, IDB and CCPIT Strengthen Ties of Cooperation (Oct 21, 2010), http://www.iadb.org/en/news/news-releases/2010-10-21/idb-and-ccpit-strengthen-ties-of-cooperation,8317.html (last visited Apr. 15, 2012).

[153] According to the 2010 Annual Report, CCPIT has overseas representative offices in the following places: Hong Kong, Japan, Korea, Gulf Area, Australia, United States, Mexico, Canada, Germany, France, United Kingdom, Italy, Belgium, Russia, Singapore, Brazil and Costa Rica. *See* 2010 ANNUAL REPORT, CCPIT (June 2011), http://bizchinanow.com/Contents/Channel_1856/2011/0622/299916/asset000070060583341_1_1308704391093.pdf (last visited Apr. 23, 2012).

investment in line with China's economic strategies, with a view to advancing economic development and social progress."[154]

As far as outbound investment is concerned, CCIIP has among its objectives the facilitation of Chinese overseas investment and "international economic and technical cooperation projects."[155]

CCIIP acts as a counter-party in bilateral business councils. Among Latin American countries, CCIIP represent the Chinese side in the Chilean-China Business Council (CCBC) and the China-Brazil Business Council (CBBC).[156] Both councils are influential within the countries they represent, centralize the most important companies doing business with China, and periodically elaborate reports analyzing the state of the bilateral economic relations.[157]

3.4.3 China Industrial Overseas Development & Planning Association (CIODPA) – 中国产业海外发展和规划协会

China Industrial Overseas Development and Planning Association (CIODPA), created in 2004, is perhaps the most appropriate business association in connection with promotion and implementation of the *Going Global* strategy.

The organization defines itself as "an industry organization of enterprises, individuals and related planning, design and research institutes who have invested or

[154] *Introduction to CCIIP*, CHINA COUNCIL FOR INT'L INV. PROMOTION, http://en.cciip.org.cn/english/about/about.htm (last visited Apr. 23, 2012).

[155] *Id.*

[156] For example, the China-Brazil Business Council express that its efforts are focused on "addressing structural issues underlying bilateral relations, with the objective of enhancing the Brazil-China trade and investment environment." *Institutional Information*, CONSELHO EMPRESARIAL BRASIL-CHINA [CHINA-BRAZIL BUSINESS COUNCIL], http://www.cebc.org.br/ (follow "English" hyperlink; then click "read more" under Institutional Information) (last visited Apr. 26, 2012).

[157] The CBBC published a report analyzing Chinese Investments in Brazil, which offers a quite complete overview of the investment relations between the two countries. *See* CHINESE INVS. IN BRAZIL: A NEW PHASE IN THE CHINA-BRAZIL RELATIONSHIP, CONSELHO EMPRESARIAL BRASIL-CHINA [China-Brazil Business Council] (May 2011), http://www.cebc.org.br/sites/500/521/00001760.pdf (last visited Apr. 23, 2012).

planning to invest overseas. The Association is a nationwide, non-profit juridical association organized on voluntary bases and with trades characteristics."[158]

The main objectives of the organization are:

- To play an active role in the promotion of China's strategy to invest overseas;
- To link Chinese government and overseas industries; and
- To provide information and services to Chinese enterprises for better developing their overseas projects.[159]

Among its activities, CIODPA assists governmental departments in charge of orienting and supervising overseas investors, provides consulting services to companies planning to invest overseas, and collaborates in the financial and legal designs of the outbound investment operations. Furthermore, CIODPA organizes delegation trips to target countries, as well as one central event aimed at compiling investment opportunities from different parts of the world for Chinese enterprises: The China Overseas Investment Fair (COIFAIR). CIODPA does this because it estimates that the referred actions contribute to the "healthy" development of the Socialist Market Economy.[160]

The Association is supervised by the NDRC and guided by its Department of Foreign Capital Utilization and Overseas Investment.[161]

3.4.4 Other Associations Relevant to the Institutional Framework

In addition to the previously discussed associations, which are the most relevant achievements in the overseas investment area, it is also important to mention that there are other organizations that although they are not specifically focused in the area, collaterally develop activities related to the issue. They are the following:

- **All-China Federation of Industry and Commerce (ACFIC)**

[158] 中国产业海外发展和规划协会 [CHINA INDUS. OVERSEAS DEV. & PLANNING ASSOC.] http://www.ciodpa.org.cn/En_intro.asp (last visited Apr. 23, 2012).
[159] *Id.*
[160] *Id.*
[161] *Id.*

中华 全国工商业联合会

This is one of the most influential organizations for private sector enterprises.[162] It was founded in 1953 and since then, the organization has been playing an important role in supporting private companies in its relation with the Chinese government.[163] Through the Department of International Liaison, the organization strengthens links with foreign chambers of commerce and organizes delegations trips to different parts of the world. It counts amongst the largest private enterprises networks of China, if not the largest.[164]

- **China International Council for the Promotion of Multinational Corporations (CICPMC)**
  中国国际跨国公司促进会

The association works to create opportunities for Chinese and international companies by strengthening their relations and enhancing their cooperation activities. It is directly supervised by the Ministry of Commerce. With the implementation of the *Going Global* strategy, the association has gained a whole new spectrum of activities, as it was originally limited to collaborating with multinational corporations investing in China.[165]

- **China International Contractors Association (CHINCA)**
  中国对外承包工程商会

CHINCA plays a very important role in representing the interests of companies from the construction sector and in the implementation of international

[162] The organization enjoys strong support from both the Communist Party of China (CPC) and the Chinese People´s Political Consultative Conference (CPPCC).

[163] *Functional dep'ts,* 中华全国工商业联合会 [ALL-CHINA FED'N OF INDUS. & COMMERCE], http://www.chinachamber.org.cn/publicfiles/business/htmlfiles/qleng/s2578/index.html (last visited Apr. 23, 2012).

[164] *Brief Introduction,* 中华全国工商业联合会 [ALL-CHINA FED'N OF INDUS. & COMMERCE], http://www.chinachamber.org.cn/publicfiles/business/htmlfiles/qleng/s2578/index.html (last visited Apr. 23, 2012) ("By end of 2010, ACFIC had 3,345 branches at the county-level and above, 26,359 grassroots branches at the urban district, community and village levels, and 14,251 trade associations and chambers of commerce, forming a network covering the whole country.").

[165] *Multinational Corporations,* 中国国际跨国公司促进会 [CHINA INT'L COUNCIL FOR THE PROMOTION OF MULTINATIONAL CORPS.], http://www.cicpmc.org/en/article.asp?Channel=1&ClassID=8 (last visited Apr. 6, 2012).

infrastructure projects carried out by Chinese corporations. It also advises the government on the industry´s regulations-making process.[166] It has played an important role in certain Chinese investments in the MERCOSUR, particularly in Argentina in the railway construction area.[167] It is sector-oriented and through its delegations trips, contributes to the detection of investment opportunities around the world.

- **China Association for the Promotion of Industrial Development (CAPID) – 中国产业发展促进会**

The main functions of the association are to provide a space for the discussion between government and enterprises on topics concerning industrial development and carrying out research. With regard to outbound investment, the organization has appointed senior advisors for investments in Latin America.[168]

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[166] 中国对外承包工程商会 [CHINA INT'L CONTRACTORS ASSOC.], http://www.chinca.org/templates/e/index.aspx?nodeid=463 (last visited Apr. 6, 2012).

[167] Silvia Naishtat, *China presiona para concretar acuerdos firmados por Cristina* [China pressure for concreting deals signed by Cristina Fernandez de Kirchenr], CLARÍN.COM, Apr. 6, 2012, http://www.ieco.clarin.com/economia/China-presiona-concretar-firmados-Cristina_0_677332328.html (last visited Apr. 10, 2012).

[168] *See, e.g.*, MACRI GROUP, http://www.macrigroup.com/ (last visited Apr. 23, 2012) (follow "English" hyperlink; then "China, A Passion" link) (noting a diploma from CAPID provided to Franco Macri).

CHAPTER IV. PROPOSAL: THE CREATION OF AN OUTBOUND INVESTMENT SUPPORT AND PROMOTION AGENCY AS A WAY OF ENHANCING THE APPLICATION OF THE *PRINCIPLE OF MUTUAL BENEFIT AND SHARED GAIN* IN CHINA OUTBOUND INVESTMENTS

4.1 Overview: The need for a Support and Promotion Agency[169]

As explained, the *Principle of Mutual Benefit and Shared Gain* with regard to Chinese investments in MERCOSUR countries mainly address the following issues:

- Environmental protection;
- Hiring practices of overseas projects workers;
- Respect of recipient countries policies and regulations; and
- The diversification of the scope of Chinese outbound investments.

Despite China's tremendous economic growth rates, China still lacks an adequate institutional infrastructure according to its economic capacities.[170] The main cause of this is that China´s economic growth has been faster than China´s capacity for developing institutional frameworks and legal instruments to properly address the challenges raised by this economic rise.[171]

In particular, it is those institutions related to the internationalization of Chinese economy that urgently need to be updated, because of the changing role of

[169] *See 关于加快转变外贸发展方式的指导意见* [*Guiding Opinions on Accelerating the Transformation of Mode of Foreign Trade Dev.*] (promulgated by the Ministry of Commerce, Feb. 17, 2012, effective Feb. 17, 2012) (China) (further supporting this view and establishing as a priority to "step up efforts to perfect the overseas investment promotion system and the service support system").

[170] *See* Shiro Armstrong, *Assessing the Scale & Potential of Chinese Inv. Overseas: An Econometric Approach*, 19 CHINA & WORLD ECON., no. 4, 2011, at 22, 35 ("China´s ODI achieves less of its potential compared with that of other major sources of FDI, given China´s size, location in the global economy, and its endowments").

[171] The Chinese government is aware about this and has taken action. *See, e.g.*, Yuen Pau Woo and Kenny Zhang, *China Goes Global: The Implications of Chinese Outward Direct Inv. for Canada*, CANADA ECONS. ASSOC., at 4, *available at http://economics.ca/2006/papers/0892.pdf* (last visited Feb. 5, 2012) ("Recent changes in ODI policy have focused on five areas: creating incentives for outward investment; streamlining administrative procedures, including greater transparency of rules and decentralization of authority to local levels of government; easing capital controls; providing information and guidance on investment opportunities; and reducing investment risks").

China in the international investment field. Until the last few years, China´s growth was based in attracting foreign investment and developing an export-oriented economic model, but now the situation is changing.[172] If China aims at maintaining itself as a global leader for the long-term, it needs to accelerate the process of internationalizing its economy.[173]

To better understand the actual situation of Chinese companies as far as overseas investment is concerned, an analogy will be used. Like a child that is learning how to ride a bike, he will extra wheels in order to keep balance when he first learns. Once he starts to improve its practical skills, there will come a critical moment when the wheels will be taken off. However, despite all the challenges, the child cannot be so scared he stops the process because if he does not keep going, he will be stuck indefinitely without having learned how to ride a bike. He might need his father to push him and encourage him during these first difficult periods. Finally, after much support and effort, he can ride effortlessly on his own.[174]

This story of the child learning to ride a bike is analogous to the situation of China's companies in the OFDI arena. China's companies are the children first learning to ride a bike. They need a "father", or the government to guide them while they learn. The children will first need to rely on training wheels, or the agency, to help and support them while they learn. This support entity is particularly crucial

[172] DANIEL H. ROSEN & THILO HANEMANN, PETERSON INST. FOR INT'L ECONS., CHINA'S CHANGING OUTBOUND FOREIGN DIRECT INV. PROFILE: DRIVERS & POLICY 2 & 7 (June 2009), *available at http://www.iie.com/publications/pb/pb09-14.pdf* (last visited Apr. 15, 2012) ("For 30 years China has sustained high growth by producing goods for export to the world without a significant presence in the world beyond its borders… [However,] China[] [has] shift[ed] to a new model of economic growth… pushing firms from all sectors of its economy abroad.").

[173] *Cf.* Peter Buckley, *Foreword in* CHINESE INT'L INVS. xiii, xiii (Ilan Alon, Marc Fetscherin & Phillipe Gugler eds., 2011) (expressing that "the Chinese economy is under-internationalized compared with other large economies (USA, EU countries) [and that] [i]t is inconceivable that large economies can remain for long without extending their international reach.").

[174] *Cf.* GASTÓN FORNES & ALAN BUTT-PHILIP, THE CHINA-LATIN AMERICA AXIS 12 & 32 (2011) (noting that "[t]here is no in-depth discussion on how macro-level institutional foundations shaped by the state could influence micro-level firm strategic choices", but that there is "an extensive interplay between the macro-level state policy and institutional frameworks and the micro-level firm and OFDI strategic choices.").

because the speed of Chinese development was much faster than China´s acquisition of professional capacity in the overseas investment area. But like the father, once Chinese companies can "ride the bike" on their own, the agency too will draw back with time and reduce its supportive functions.

4.2 Legal Challenges and Practical Problems in Applying the *Principle of Mutual Benefit and Shared Gain*[175]

The legal challenges and practical problems concerning the application of the *Principle of Mutual Benefit and Shared Gain* to Chinese investments in Latin America can be analyzed from two different perspectives: the Latin American perspective and the Chinese perspective. As a note, cultural differences are a common obstacle to better understanding during the pre-investment stage and for the success of the projects once they have been initiated.

From the Latin American viewpoint, the main legal challenges and practical problems are:

- **Environmental protection.** Chinese companies have focused on investments in the natural resources sector in Latin America. As previously stated, this has the negative effect of prolonging Latin American economies' high dependence in commodities and stunts their development of knowledge-added products. Consequently, this creates the necessity of promoting a strong consciousness amongst the Chinese investing companies to encourage the

[175] 商务部、外交部、国务院国有资产监督管理委员会关于进一步规范我国企业对外投资合作的通知 [*Notice of the Ministry of Commerce, the Ministry of Foreign Affairs & the State-owned Assets Supervision and Admin. Commission of the State Council on Further Regulating the Foreign Inv. Coop. of Chinese Enters.*] (promulgated by the Ministry of Commerce, Ministry of Foreign Affairs & State-owned Assets Supervision and Admin. Comm'n, June 6, 2008, effective June 6, 2008) (China) (distinguishing as the main problems the following: "frequent occurrence of labour-related mass incidents, the increase of disputes involving local employees, the occurrence of environmental protection issues from time to time, the construction delay in some projects and the upward trend of quality and safety incidents. Although these problems are not in a dominant position in China's foreign investment cooperation, they will result in significant harm in the absence of attention and control.").

development of a sound relationship with the local communities. If they do not so, their actual and projected investments will face several difficulties because Latin American countries will want to avoid a natural-resources-only investment model.[176]

- **Creating instruments for deepening Chinese investments in areas other than natural resources with regional projection**. More Chinese companies should follow the examples of Chery, Lifan and JAC, which are Chinese companies that have invested in assembling and producing automobiles in Brazil and Uruguay, and have taken advantage of the MERCOSUR benefits. Accordingly, other Chinese companies should similarly take advantage of the investment promotion laws of each of the MERCOSUR countries, as the MERCOSUR provides tax-free access to signatory countries markets, and increase their investment in the manufacturing sector in general.

- **International labor cooperation**. Chinese companies have shown their preference for Chinese workers, and tend to shy away from hiring nationals from the recipient countries.[177] Latin American governments generally prefer job creation within their own country, instead of bringing in overseas workers, which can cause problems including with worker unions. China has acknowledged the importance of this issue and has expressly regulated it in the *Guidelines for the*

[176] *See, e.g., Freeze A Controversial Mining Project To Exploit Open Pit Iron In Uruguay*, BLUECHANNEL24.COM, Aug. 23, 2011, http://www.bluechannel24.com/?p=5618 (last visited Apr. 3, 2012) (reporting on the controversy in Uruguay over mining activities over concerns of environmental exploitation); *see generally* GLOBAL ENVTL. INST., *Preface in* ENVTL. POLICIES ON CHINA'S INV. OVERSEAS (2011) ("in order for its outward investment and foreign aid to grow rationally; to share its resources and profits with, and promote sustainable development in, the host countries and regions; and to build a positive image as a peace-loving country, China must place environmental protection at the forefront of its overseas economic strategy and regard it as the centerpiece of strong foreign economic cooperation based on innovation.").

[177] *See, e.g.,* Antonio De la Jara & Alonso Soto, *IADB and China launch $1 billion Latam Investment Fund*, REUTERS, Mar. 19, 2012, *available at* http://www.reuters.com/article/2012/03/19/us-iadb-china-fund-idUSBRE82I0QA20120319 (last visited Apr. 23, 2012) (noting the hesitation of Latin American countries in the face of Chinese investments, particularly of "China's deep pockets and labor practices" and quoting Brazilian planning minister, Miriam Belchior as stating, "We need to look at these kind of proposals cautiously because the Chinese presence in some places has meant that they bring over their own workers and practices.").

Management of Employees of Overseas Chinese-funded Enterprises.[178] Article 2 expressly mentions that "in conducting overseas investment… domestic enterprises shall adhere to the business principle of 'mutual benefits to achieve a win-win situation and mutual development'… trying the utmost to create job opportunities for the local places."[179] However, there needs to be an establishment of more detailed mechanisms to foster the hiring of local workers. Furthermore, Article 8 of the regulation also creates for Chinese enterprises the obligation of adhering to equal employment practices and non-discrimination based on race, ethnicity, color, religion or gender when hiring.[180] It is worth noting that while the article does not explicitly mention discrimination based on nationality, it should be viewed as non-exhaustive and under the *spirit* of the regulation, discrimination based on nationality should be included. Perhaps a prohibition against nationality-based discrimination should be included ad hoc, or a compromise that requires a certain percentage of local workers for each project, especially when labor issues are expressed with regard to a specific overseas project.

From the Chinese perspective[181], the legal challenges and practical problems concerning the application of the *Principle of Mutual Benefits and Shared Gain*[182] include:

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[178] *境外中资企业（机构）员工管理指引* [*Guidelines for the Mgmt. of Employees of Overseas Chinese-funded Enters. (Insts.)*] (promulgated by the Ministry of Commerce & Ministry of Foreign Affairs, Mar. 14, 2011, effective Mar. 14, 2011).
[179] *Id*.
[180] *Id.*
[181] *See generally* Lutz-Christian Wolff, *China Outbound Invs.: Facts & Devs.*, *in* CHINA OUTBOUND INVS.: A GUIDE TO LAW & PRACTICE 1, 4 (2011) ("Restrictions imposed by China´s own regulatory system, cultural differences between Chinese parties and their foreign partners, the lack of necessary management skills and, last but not least, the perceived or actual lack of transparency of foreign markets and related legal and tax systems are among the main reasons for the difficulties" in successful Chinese outbound investment projects).
[182] *商务部、外交部、国务院国有资产监督管理委员会关于进一步规范我国企业对外投资合作的通知* [*Notice of the Ministry of Commerce, the Ministry of Foreign Affairs & the State-owned Assets Supervision and Admin. Commission of the State Council on Further Regulating the Foreign Inv. Coop. of Chinese Enters.*], para. 2 (promulgated by the Ministry of Commerce, Ministry of Foreign Affairs & State-owned Assets Supervision and Admin. Comm'n, Jun 6, 2008, effective June 6, 2008) (Firms shall develop their business activities by "holding the business philosophy of "mutual benefits

- **The necessity of improving access to investment opportunities in other sectors than natural resources and governmental projects.** Latin America in general and MERCOSUR countries in particular, offers thousands of profitable investment opportunities for Chinese SMEs These opportunities, however, cannot be acknowledged by Chinese corporations due to the absence of active institutional bridges that would help diminish the cultural differences and lack of knowledge of the region.
- **The necessity of adapting the principle fulfillment control mechanisms to international and objective standards.** In general, the control mechanisms of the *Principle of Mutual Benefit and Shared Gain* currently lack objectivity because there is no separate entity to review the acting party. For example, the control mechanisms of the Joint Annual Inspection of Overseas Investment present these difficulties. The mechanism by which central enterprises evaluate the fulfillment of the inspection requirements lacks objectivity because they are simply self-evaluating. Reforming this part of the legal system is essential as a large quantity of Chinese OFDI is carried out by these SOEs. Not carrying out this reform may lead to lyrical and disingenuous controls.

to achieve a win-win situation and mutual development"…and the relevant organizations shall enhance our consciousness of "understanding and abiding by laws and operating business in good faith". They shall seriously study and strictly abide by laws, regulations and policies on China's foreign investment cooperation, and delve into and abide by laws and regulations of the host country, especially the provisions on environmental protection, labor and employment, exit-entry administration, production safety, bidding and so on.").

- **The necessity of increasing financial and professional support for private enterprises.**[183] It is necessary to develop mechanisms to allow enterprises other than big SOEs to access financial instruments with more affordable conditions, in order to take the *Going Global* Strategy to a whole new dimension, which in the long-term is beneficial for the Chinese economy.[184] The concretion of cooperation agreements between Chinese banks and multilateral financial entities have been successful in addressing this necessity for financing Latin American projects, with the agreements signed between IDB and China EXIM Bank as a benchmark. This is vivid proof of how the improvement of the institutional framework can foster dialogue and facilitate Chinese investments and in the region. Additionally, professional support is required in order to avoid mistakes related to corporate inexperience.

- **Abundance of promotional institutions.** As it was described in *supra*, Section 3.4, there are a vast number of non-governmental organizations working in the area of overseas investment promotion. However, in practice, none of them are fully equipped with instruments for definitively collaborating with the companies

[183] According to government officials consulted, this is the most important obstacle faced by private companies trying to go abroad, and particularly, the absence of long-term financing instruments. *See also* Yiping Huang & Bijun Wang, *Chinese Outward Direct Inv.: Is There a China Model?*, 19 CHINA & WORLD ECON., no. 4, 2011, at 1, 6 (**"**The fact that SOEs dominate Chinese ODI is interesting, and deserves further investigation… It is possible that SOEs are able to invest overseas because they have greater access to finance and pay less attention to profitability than LLCs."); Jun Dai, *Financing of China Outbound Invs., in* CHINA OUTBOUND INVS.: A GUIDE TO LAW & PRACTICE 59, 60 (Lutz-Christian Wolff ed., 2011) ("small and medium-sized companies eager to expand their offshore business can seldom obtain loans from the banks directly as they are marked with high potential default risks by the banks."); Ligang Song, Jidong Yang & Yongsheng Zhang, *State-owned Enters.' Outward Inv. & the Structural Reform in China*, 19 CHINA & WORLD ECON., no. 4, 2011, at 38, 45 (**"**In principle, private investors are allowed to enter all sectors of the Chinese economy, except for a few special industries…. However, in reality, private investors are confronted with various intangible barriers to market entry… [and as a result,] [m]ost lucrative resource and service sectors are dominated by SOEs, including mining, financing, banking, rail, aviation, telecommunication, media and education").

[184] Freeman Briefing, Ctr. for Strategic Int'l Studies, Issue in Focus: China's 'Going Out' Inv. Policy 4 (May 27, 2007), http://csis.org/files/publication/080527_freeman_briefing.pdf (last visited Apr. 20, 2012) (noting that "just a few years ago… private Chinese enterprises had no access to preferential financing and had to resort to their domestic parent companies or high-cost 'underground channels' for funds, which severely hindered their efforts to 'go out' [and] [t]his is still the case for most SMEs in China today.").

they intend to support.[185] Perhaps more importantly, their functions overlap, and this fact produces inefficiency and waste. Furthermore, practitioners usually complain that these agencies compete among themselves, which additionally leads to duplicated efforts and negatively affects coordination. Some of them are better positioned but the abundance has resulted in competition among the institutions instead of cooperative work. It might be paradoxical, but the problem is not the absence of institutions in the area, but the abundance of them and the absence of a strong, specialized agency.[186]

4.3 Proposal: Creation of an Outbound Investment Support and Promotion Agency

Based on this research, to improve the implementation of the *Going Global* strategy, the institutional structure at a support and promotional level must be streamlined and optimized.[187] However, this proposal does not aim to increase bureaucracy in the area.[188] Rather, the body should be created by combining the

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[185] *See, e.g,.* Peter Thomas, *Chinese Sectoral Indus. Policy Shaping Int'l Trade & Inv. Patterns – Evidence from the Iron & Steel Indus.* 22 (Duisburger Arbeitspapiere Ostasienwissenschaften [Duisburg Working Papers on East Asian Studies], Working Paper No. 88, 2011)**,** *available at* http://econstor.eu/bitstream/10419/45004/1/654795150.pdf (last visited Apr. 25, 2012) (reporting that the General Office of the State Council "listed institutional deficiencies as the most important obstacle to outward investments and promised the reduction or cancellation of certain registration and approval procedures").

[186] GLOBAL ENVTL. INST., ENVTL. POLICIES ON CHINA'S INV. OVERSEAS 13 (2011) (noting that while the "Chinese government has created a sound policy framework for companies investing overseas" through its *Going Global* strategy, "its domestic legislation concerning OFDI still is lacking" and the "government needs to improve its supporting services, industry associations and service providers must match their activities to the current state of OFDI.").

[187] This proposal is not an isolated proposal as the elaboration of this thesis coincided with the Chinese People´s Political Consultative Conference National Committee. During the last day of it annual session, the creation of a specialized organ in the outbound investment area was suggested. *See e.g.*, Tan Yingzi, *New body proposed for ODI promotion*, CHINA DAILY, March 14, 2012, at 5.

[188] On the contrary, it is inspired in the necessity of improving the institutional environment due to its importance. *See generally* HINRICH VOSS, THE DETERMINANTS OF CHINESE OUTWARD DIRECT INV. 36-37 (2011) (noting the importance of the institutional environment and in particular that the "institutional environment on the sub-national, national and international levels in China is an important factor in the development of Chinese OFDI" and while in the "early stages it was a hurdle… it has now developed slowly into a more supportive environment.").

different commercial councils or its sections that have competence in the area of outbound investment into a centralized entity that specializes in this area.[189]

Among several advantages for China, one of the most relevant in creating an outbound investment support and promotion agency is that it will produce the conditions to enhance the application of the *Principle of Mutual Benefit and Shared Gain*, as the agency will be a strong partner for Chinese companies, and be a gateway to Chinese investors for target countries and companies.[190] China has created an overseas investment management system with several government units and regulations involved. A new agency could have a pivotal role, facilitating the interplay between Chinese organs involved in the overseas investment control, and foreign governments, associations, and enterprises engaged in promotional activities.

Optimally, the organ shall operate as a commercial council, and be quasi-governmental, while not existing under government structures. The structural concept should be similar to the so-called non-governmental public persons that exist in in some Latin American countries. Several investment promotion agencies, like UruguayXXI, from Uruguay, adopt this form. Such a hybrid nature will guarantee the independence of the agency and demonstrate to the international community that China is both working to create a solid institutional framework, and is fully committed to international standards.[191] This can also help move China away from

[189] The bodies which are better positioned in this area are the CCPIT and CCIIP, as they have achieved a higher degree of internationality.

[190] The proposal is not intended to benefit only Latin America. On the contrary, it should also contribute to the development of Chinese Investment Model based on its own characteristics. *See, e.g.*, Yiping Huang & Bijun Wang, *Chinese Outward Direct Investment: Is There a China Model?*, 19 CHINA & WORLD ECON., no. 4, 2011, at 1, 19 ("There probably is a 'China model' for ODI, where for China, the motivations for and determinants of ODI differ significantly from those of developed countries…The motivation for the 'China model' is strengthening domestic industry (or production) through ODI. [and] ODI does this through the acquisition of management skills, technology, brands or raw material supply").

[191] *See, e.g.*, Ligang Song, Jidong Yang & Yongsheng Zhang, *State-owned Enters.´ Outward Inv. & the Structural Reform in China*, 19 CHINA & WORLD ECON., no. 4, 2011, at 38, 41 (**"**Opening up the sectors occupied by the SOEs to domestic private enterprise is an important way to enhance competition, which is crucial for reforming the state-owned sector…China´s entry to the WTO accelerated the pace of this change, but further work is needed for these institutional and policy frameworks to be in-step with international standards.").

being the focus of criticism by the governments of developed countries.[192] Furthermore, the Chinese government should aim at positioning the institution as the sole entity with strong official support in the outbound investment area.

In addition, this is aligned with the strategies carried out by other major players in the international investment field, and China can learn from their experience.[193] The organ should work with and for Chinese companies, cooperating with them to increase their international reach[194], as a way of inspiring trust in the recipient countries and improving their management standards.[195] As it will be

[192] MICHAEL F. MARTIN, RESEARCH SERV., R41441, CHINA´S SOVEREIGN WEALTH FUND: DEVS. & POLICY IMPLICATIONS 10 (2010) (articulating that with regard to investments carried out by CIC, "[t]he first issue is whether the CIC´s investments are being made on commercial merit, or are being made for strategic reasons as part of a larger government policy. The second issue is the CIC´s commitment to 'passive' investment.").

[193] The Japan External Trade Organization (JETRO) may be a good model to follow. The organization counts 73 overseas offices worldwide and is dedicated to promote trade and investment between Japan and the rest of the world. *See generally* JAPAN EXTERNAL TRADE ORG., http://www.jetro.go.jp/en/jetro/ (last visited Apr. 1, 2012). In comparison, CCPIT, which is a commercial council with a more extended network, has 17 overseas offices. *About CCPIT*, CHINA COUNCIL FOR THE PROMOTION OF INT'L TRADE, http://ipr.ccpit.org/lzh-2.asp (last visited Apr. 23, 2012). Furthermore, some practitioners have expressed that the U.S. Chamber of Commerce plays a similar role for the U.S.

[194] Less 关系[guānxì] or interpersonal relationships should be relied upon, and instead, investment potential should be measured on its merits. *See, e.g.,* HINRICH VOSS, THE DETERMINANTS OF CHINESE OUTWARD DIRECT INV. 58 (2011) Less guānxì is required. ("For most of the time, business transactions and government supervision of state-owned enterprises have been based on personal networks and small 'fiefs' rather than codified impersonal procedures as typically found in a market economy") (internal citations omitted); Ligang Song, Jidong Yang & Yongsheng Zhang, *State-owned Enters.´ Outward Inv. and the Structural Reform in China*, 19 CHINA & WORLD ECON., no. 4, 2011, at 38, 44 ("SOEs have privileged access to various resources, such as policy supports and financial resources, including loans from China´s state-owned banks[, which reduce] both financial and political risks… when lending to SOEs… [and therefore,] an outstanding constraint on the development of the private firms in China is lack of access to financial resources [which]… affects the private sector´s ability to make investments overseas."); *see generally* Ling Li, *Lost in Translation: The 'rule of guanxi 關系', an alternative to the rule of law?*, *in* INTERPRETATION OF LAW IN CHINA – ROOTS AND PERSPECTIVES 163, 166 (Michal Tomasek & Guido Muhlemann, eds., 2011) (articulating the usage the word *guanxi* as being "applied to denote activities of favour exchange taking place between a person, who is endowed with delegated power, and another person, whose interests will be affected by the exercise of that power.").

[195] *See, e.g.,* Jun Dai, *Labour Issues Related to China Outbound Invs., in* CHINA OUTBOUND INVS.: A GUIDE TO LAW & PRACTICE 29, 29 (Lutz-Christian Wolff ed., 2011) ("Despite being cash-rich, Chinese companies lack the confidence and expertise to deal with labo[u]r obstacles in outbound

explained in the following point, the new or improved organ should have concrete functions and competence, aimed at tackling the main problems concerning COFDI, and fostering mutual benefit and shared gain as its guiding principle. It should ask a Chinese overseas investment "intelligence" agency, following the example of organs such as the Spanish Institute of Foreign Trade (Instituto Español de Comercio Exterior – ICEX).[196]

4.4 Main Functions and Competences

4.4.1 Administering special funds created jointly by MOF and MOFCOM to finance outbound investment activities during the application and pre-investment stages.[197]

Diversifying the investing entities and the investment target-areas to increase the support of private companies enhances the benefits of the *Going Global* Strategy and the application of the *Principle of Mutual Benefit and Shared Gain*.

As it was explained in *supra*, Section 3.2.3, special funds for the better implementation of the *Going Global* Strategy have been created. These programs could have greater benefits if there is an agency in charge of managing the funds, with specialization in the outbound investment area. Foreign and national professionals can consult this agency in forming overseas investment projects, and by doing so, will be familiarized with the instruments that can be used in structuring the finances. This goes in line with Article 15 of the *Measures for the Administration of Special Funds*, or MASF, which states that MOF and MOFCOM shall "entrust

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investment. Several high-profile companies have learned the hard way that they are ill-equipped to confront such challenges").

[196] *See* INSTITUTO ESPAÑOL DE COMERCIO EXTERIOR – ICEX [SPANISH INST. OF FOREIGN TRADE], http://www.icex.es/icex/cda/controller/pageICEX/0,6558,5518394_5518974_5536731_0_0_-1,00.html (last visited Apr. 23, 2012).

[197] Despite the Chinese government creation of several instruments for funding overseas investment, 73.7% of SMEs and 61.1% of large enterprises considered lack of funds as the main challenge when investing overseas in last CCPIT survey. *Survey on Chinese Enters.' Outbound Inv. & Operation*, CHINA COUNCIL FOR THE PROMOTION OF INT'L TRADE (Apr. 2012) (unpublished report) (on file with author).

intermediary institutions to examine and verify the application materials as submitted by the enterprises directly under the Central Government and the regions, and determine the amount of subsidies and the amount of interest discounts."[198] The existence of an agency that coordinates the special funds to ensure an efficient distribution of countries and sectors in which the enterprises invest, will contribute to streamlining and improving Chinese government's overseas investment strategy as a whole.

4.4.2 Linking private companies with overseas financial institutions and development agencies.

Local financial institutions of the host country generally offer long-term and low interest rate loans to new investment projects, and overseas investors can apply for these in the recipient country. For example, in Uruguay, the Bank of the Republic (BROU) annually organizes a public tender in which investment projects compete for preferential financing. Furthermore, in Brazil, the National Development Bank (BNDES) has created the Merchant Marine Fund in order to finance projects for the construction, modernization and repair of vessels and ships. In addition, regional financing institutions (*e.g.*, Inter-American Development Bank, *see infra* Appendix I) in cooperation with Chinese banks have created financing mechanisms for Chinese companies investing in Latin America.[199] Finally, local development agencies (*e.g.*, National Agency of Research and Innovation in Uruguay, known as ANII) offer grants for high impact investment projects. Foreign invested projects can also apply for these special funds. Although in the majority of cases the agencies provided the

[198] *对外经济技术合作专项资金管理办法* [*Measures for the Admin. of Special Funds for Foreign Econ. & Technical Coop.*] (promulgated by the Ministry of Finance & Ministry of Commerce, Dec. 9, 2005, effective Dec. 9, 2005) (China).

[199] The Inter-American Dev. Bank (IDB) offers a lot of opportunities for financing Chinese investments, particularly following the creation for Latin America of the equivalent to the China-Africa Development Fund, jointly with the China EXIM Bank. More details of the topic are included *infra* Appendix I.

grant after the investment is completed, the governmental pre-approval of the grant contributes for obtaining bridge loans from financial institutions.

4.4.3 Advising IDB and China Exim Bank on using portions of the newly created SME fund for overseas investments in a comprehensive spectrum of industries and sectors.[200]

This solution is inspired by the Overseas Private Investment Corporation (OPIC), the United States government's development finance institution. Part of the fund recently created by the IDB and China Exim Bank shall be destined exclusively for financing overseas investment projects by private corporations constituted under Chinese law or foreign corporations majority-owned by a private Chinese enterprise[201]. This fund can be called the Private Overseas Investment Fund (POIF).

In order to access the fund, the projects shall fulfill the following conditions: a) financial feasibility; (b) commercial feasibility; and (c) environmental feasibility. The agency shall operate as an expert advisor for the assignment of funds and establish sectors in which projects will not be financed (*e.g.*, projects that create unacceptable environmental risks for the recipient country). The fund should prioritize the financing of manufacturing projects that require components from

[200] Ligang Song, Jidong Yang & Yongsheng Zhang, *State-owned Enters.´ Outward Inv. and the Structural Reform in China*, 19 CHINA & WORLD ECON., no. 4, 2011, at 38, 44-45 (arguing that if "companies are presented with equal opportunity to invest overseas, it is likely that the predominant overseas investors from China would be more dynamic and efficient private companies" and that "if the same amount of ODI were invested by the private sector, the economic benefits from investing overseas could be larger or the financial losses could be smaller as the investment decisions made by private firms are essentially based on economic rather than political considerations").

[201] This proposal goes in line with the *国务院办公厅关于鼓励和引导民间投资健康发展重点工作分工的通知* [*Notice of the General Office of the State Council on Division of Key Work Relating to Encouraging & Guiding the Healthy Dev. of Private Invs.*] sec. 9 (promulgated by the General Office of the State Council, July 22, 2010, effective July 22, 2010) (China) (encouraging and guiding private enterprises to actively participate in international competitions, by articulating that the Chinese government shall "Strive for favorable investment and trading environments and more preferential policies for private enterprises that 'go global' by entering into bilateral private investment and cooperation agreements and leveraging the multilateral agreement system. Improve and perfect the policies that encourage overseas investment. Ensure that private enterprises receive treatment equal to that of other enterprises in aspects such as fund support, financial insurance, foreign exchange administration, quality inspection and customs clearance.").

China, in order to maintain the levels of Chinese exports.[202] Notably, OPIC projects have generated $74 billion in U.S. exports and supported more than 275,000 American jobs up to now.[203]

The agency should also annually make a call for proposals within China so that companies fulfilling certain requirements will be able to compete for project financing in certain prioritized areas. A system of objective, measurable filters should be established in order to determine which companies can apply for the fund and which ones cannot.[204]

4.4.4 Assisting SMEs in applying for overseas business licenses.[205]

The agency shall act as a link between Chinese SMEs, and foreign professional firms and governmental authorities to facilitate the procurement of business licenses in overseas countries.

4.4.5 Assisting the MOFCOM in tasks related to overseas investment.

Overseas MOFCOM offices generally have a passive role, acting only when required by certain circumstances (*e.g.*, a Chinese company has a problem with local workers or a Chinese company projects investing in a critical industry of the recipient country). The agency should be a support organ for the overseas MOFCOM offices, and assist in making their approach to the investment climate of the country more accurate. It should play a more active role than the MOFCOM, which is inherently limited by diplomatic issues.

4.4.6 Positively lobbying for Chinese investments.

[202] Nevertheless, CKD (Completely Knocked-Down) operations should be partially applied, in order to promote industrial development of the recipient country. CKD operations are those in which "all the components are sent from the headquarters [and] the subsidiary only carries out the assembly work. CBBC, page 10.

[203] *Overview*, OVERSEAS PRIVATE INV. CORP., http://opic.gov/about-us (last visited Apr. 23, 2012).

[204] For example, such filters may include: regional, income-based, and/or by degree of internationalization, taking into account their annual exports.

[205] 67.9% of SMEs considered application for business licenses the main challenge when investing overseas. *Survey on Chinese Enters.' Outbound Inv. & Operation*, CHINA COUNCIL FOR THE PROMOTION OF INT'L TRADE (Apr. 2012), at 41 (unpublished report) (on file with author).

The agency should positively lobby for Chinese overseas interests, specifically those connected to the investments carried out by Chinese companies in the recipient country. It should also focus in fostering strong relationships with local chambers of commerce, as it is essential to improve the access of Chinese companies to international networks.[206] The tangible presence of an agency like this would ameliorate the relationship between China and the rest of the world, contributing to dissipate doubts about Chinese investors and serving as a cultural bridge. CCPIT overseas offices can be also be a base for the construction of these outbound investment international networks.

4.4.7 Supporting Chinese companies in addressing conflicts with labor unions.

The agency may play a role in supporting Chinese companies when conflicts with labor unions arise. Note that article 11 of the *Guidelines for the Overseas Employees Management* express that in case of conflict with a labor union the enterprise "shall set up a dedicated department or designate special personnel to contact and communicate with such labor union."[207] The agency can operate as this special department.

4.4.8 Contributing to make the Joint Annual Inspection Controls more objective.

As it was expressed, certain details of the Joint Annual Inspection procedure should be adjusted in order to better adapt the procedure to international standards

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[206] *See, e.g.*, *境外中资企业（机构）员工管理指引* [*Guidelines for the Mgmt. of Employees of Overseas Chinese-funded Enters. (Insts.)*], art. 15 (promulgated by the Ministry of Commerce & Ministry of Foreign Affairs, Mar. 14, 2011, effective Mar. 14, 2011) (China) (expressly recommending overseas Chinese-funded Enterprises to join chambers of commerce, as a way of strengthening industry self-regulation and coordination as well as mutual help and supervision between enterprises); *see generally* HINRICH VOSS, THE DETERMINANTS OF CHINESE OUTWARD DIRECT INV. 36-37 (2011) (arguing that the Chinese OFDI contains informal elements, which provide "access to an international social or business network" and that "[s]uch a network may exist between (i) a mainland Chinese company and Overseas Chinese, (ii) a domestic firm and its trading partners, or (iii) international business facilitators such as investment promotion agencies.").

[207] *境外中资企业（机构）员工管理指引* [*Guidelines for the Mgmt. of Employees of Overseas Chinese-funded Enters. (Insts.)*], art. 11 (promulgated by the Ministry of Commerce & Ministry of Foreign Affairs, Mar. 14, 2011, effective Mar. 14, 2011).

and to increase its reliability. In particular, a report directly obtained from a source with presence in the country in which the investment takes place should contribute to make the inspection more accurate. The agency shall collaborate in the elaboration of this report, and MOFCOM overseas offices should be authorized to modify it only when the MOFCOM office considers that there are sensitive issues that have not been addressed by the agency report.

This report would solve the objectivity problem, while leaving a gateway for Chinese government control. An independent report is an excellent instrument for evaluating the performance of Chinese enterprises overseas, especially when the projects are carried out by central Chinese enterprises. It is worth remembering that in this cases the company themselves evaluate their performance.[208]

Furthermore, a compulsory report would contribute to close the loopholes of Chapter III (Procedures for Annual Inspection), Section III (Provincial commerce departments or headquarters of central enterprises), Sub-paragraph 1 of the *Notice*.[209] In a complex and bureaucratic procedure like this, the report would contribute to provide a more realistic view of the performance of the overseas investment project.[210]

4.4.9 Contributing to better address environmental issues

Following the example of OPIC, the agency should have an Office of Accountability, which, *inter alia*, will address any potential environmental issues associated with the overseas project. The competences of this office shall include the preparation of a report on sensitive issues of the investment projects and an

[208] *境外中资企业（机构）员工管理指引* [*Guidelines for the Mgmt. of Employees of Overseas Chinese-funded Enters. (Insts.)*], art. III (promulgated by the Ministry of Commerce & Ministry of Foreign Affairs, Mar. 14, 2011, effective Mar. 14, 2011).

[209] *商务部、国家外汇管理局关于境外投资联合年检工作有关事项的通知 [Notice of the Ministry of Commerce & State Admin. of Foreign Exchange on Issues concerning the Joint Annual Inspection of Overseas Inv.*], ch. III(III)(1) (promulgated by Ministry of Commerce & State Admin. of Foreign Exchange, issued Dec. 28, 2009, effective Jan. 1, 2010) (China).

[210] *Id.* at Preamble (recognizing that " "there are such problems as complexity of the contents of and the procedures for the annual inspection").

evaluation of the measures proposed by the company to avoid problems related to those issues, which shall operate as a crucial element in deciding whether the project will be financed by the Private Overseas Investment Fund.[211] Notably, the environmental footprint of Chinese investments can create social problems and affect the viability of the project.

4.4.10 Optimizing SOEs' access to investment opportunities[212]

In order to avoid losing investment opportunities, the agency shall actively research the public bidding opportunities, utilize specialized staff members in detecting outbound investment opportunities, and establish direct communications channels with SOEs' outbound investment divisions.[213]

In the exercise of its pivotal role, the agency shall contribute with the SASAC in coordinating overseas investment strategies of state-owned companies in order to avoid unnecessary intra-SOE competition. It is necessary to make clear that the

[211] The same report can serve as a basis for Chinese financial institutions' decision to fund a project, although in this case it should be non-binding. Nevertheless, the agency shall be able to procure agreements with Chinese financial institutions by which the agency would be the organ in charge of evaluating in situ the performance of enterprises in projects financed by Chinese banks. For the banks, having an external auditor will be a better way of adapting to international standards.

[212] *See, e.g.*, Ligang Song, Jidong Yang & Yongsheng Zhang, *State-owned Enters.´ Outward Inv. & the Structural Reform in China*, 19 CHINA & WORLD ECON., no. 4, 2011, at 38, 38-39 ("China´s outward investment (ODI) has increased rapidly with the expansion of its income and, in particular, since its entry into the WTO in 2001… However, unlike in other countries, in China, state-owned enterprises (SOEs) are the major investors on a value basis… By the end of 2009, China´s 108 central government-owned SOEs had invested in 5901 foreign firms.") (internal citations omitted). Song, et al. further find that the "reform of SOEs is an unfinished task," because "although most of the small- and medium-sized SOEs have already been privatized, the state still controls a number of the large SOEs, most of which are in monopoly positions…[and] [i]ncentives exist for firms to lobby, bargain or even bribe government officials to protect their own sectoral interests." *Id.* at 41.

[213] This will also contribute to make more professional the management of SOEs companies, which is extremely necessary. *See* Ligang Song, Jidong Yang & Yongsheng Zhang, *State-owned Enters.´ Outward Inv. & the Structural Reform in China*, 19 CHINA & WORLD ECON., no. 4, 2011, at 38, 41-42 ("The participation of SOEs in overseas markets can be linked with domestic structural reform and firm development as they are forced to navigate a new business and political or institutional environment in which privileged enjoyed in China are no longer available,"; as a result, SOEs are forced to change the "basic characteristics of [their] activities, including the way they operate to be more in line with international practice," and in particular, in "three fundamental areas of reform: competition, ownership and regulation," which are "crucial for the success of SOEs´ investment abroad and will have some impact on China´s reform agenda for the state sector in the future.").

function of the agency should not prevent competition by recommending against investment in an area just because another Chinese company has already invested in the same foreign country.[214] On the contrary, the function should be assessing the Chinese companies only in cases in which is evident that investments from different companies in the same country and industry will probably lead to collective failures.

4.4.11 Creating cooperation programs with recipient countries government and industrial and commercial chambers

The agency shall annually launch a call for investment opportunities within MERCOSUR countries. The objective of this procedure is to attract countries' companies with investment opportunities, in order to evaluate their suitability within China's overseas investment global strategy and to rank them accordingly. Projects that obtain a certain amount of points will obtain the *Certificate of Promoted Project*, issued by the agency. This will be a way of diminishing cultural differences, by filtering projects and helping Chinese companies to understand which ones are serious and which ones are not. It will not only benefit Chinese (public and private) companies, but also Latin America's private sector, forging a win-win relation.

4.4.12 Facilitating the Structuring of Projects.[215]

The agency shall also contribute to structure cooperation programs with government units[216] and companies of recipient countries in order to be a better target

[214] *See, e.g.*, Peter Thomas, *Chinese Sectoral Indus. Policy Shaping Int'l Trade & Inv. Patterns – Evidence from the Iron & Steel Indus.* 25 (Duisburger Arbeitspapiere Ostasienwissenschaften [Duisburg Working Papers on East Asian Studies], Working Paper No. 88, 2011), *available at http://econstor.eu/bitstream/10419/45004/1/654795150.pdf* (last visited Apr. 25, 2012) ("By acting as a gatekeeper controlling all inward and outward-directed activities the Chinese government has been trying to hold the market forces in check and gain maximum advantage for China, its iron and steel industry and the economy as a whole. In doing so, China´s administrators have proven a remarkable degree of un-dogmatic flexibility and goal orientation").

[215] *Survey on Chinese Enters.' Outbound Inv. & Operation*, CHINA COUNCIL FOR THE PROMOTION OF INT'L TRADE 38-41 (Apr. 2012) (unpublished report) (on file with author) (reflecting that 74.3% of the interviewees considered finding business partners in the host country as the most important challenge that Chinese companies faced investing overseas and more specifically, that "85.5% of SMEs and 68.1% of large firms considered that the most important challenges of all.").

for Chinese investors. The idea is to multiply the cases of investments carried out in a similar modality as in the case of Chongqing Grain Group in Brazil[217], in which the Chinese company set a production base in cooperation with a set of local producers. Nevertheless, in order to better apply the *Principle of Mutual Benefit and Shared Gain*, investments in other sectors than agriculture are required. But even in those sectors, is still possible to structure projects by putting together different relevant actors.

With regard to the MERCOSUR in particular, multinational programs can be established by considering the benefits of intra-zone trade. Projects should proceed by first selecting a priority area of development for Chinese government or group of Chinese private companies, then putting together the relevant actors in the recipient country (private sector, government units involved in the area), and finally, structuring the project according to those bases.[218]

4.4.13 Representating China in an eventual China-MERCOSUR Investment Council.

The agency shall represent China in an eventual China-MERCOSUR Investment Council. This can be accomplished by taking advantage of the networks that have already been created by CCIIP. Note that presently, at a Latin American level, CCIIP is the representative of China in the China-Brazil Business Council and in the Chile-China Business Council. The new agency should further the

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[216] For example, in Uruguay the Unit of Support of the Private Sector (UNASEP) centralizes investment opportunities to present them to foreign investors.

[217] Bao Chang, *CGG is setting up a soybean base in Brazil*, CHINA DAILY, Nov. 24, 2011, http://www.chinadaily.com.cn/bizchina/2011-11/24/content_14153948.htm (last visited Apr. 30, 2012).

[218] Even within China, the agency shall contribute to joining parties for overseas investment projects. This goes in line with *国务院办公厅关于鼓励和引导民间投资健康发展重点工作分工的通知* [*Notice of the General Office of the State Council on Div. of Key Work Relating to Encouraging & Guiding the Healthy Dev. of Private Invs.*], sec. 9 (promulgated by the General Office of the State Council, July 22, 2010, effective July 22, 2010) (China) (Chinese government shall "[s]upport private enterprises to form consortiums among themselves and with state-owned enterprises to bring into play their respective advantages and jointly commence overseas investment in numerous forms.").

establishment of business councils with official support, especially with the other members of MERCOSUR countries, both on an individual and collective base.[219]

[219] The collective idea goes in the same line than the idea proposed during the last China-Latin America Business Summit. *See Reseña V Cumbre Empresarial China-América Latina 21 Y 22 De Noviembre De 2011- Lima, Perú* [Report made by the Uruguayan-Chinese Chamber of Commerce on the 5th China-Latin America Business Summit, Held in Lima, Perú] (2011), URUGUAYAN-CHINESE CHAMBER OF COMMERCE (unpublished report) (on file with author).

CONCLUSION

If well administered, overseas investment can be an instrument for accelerating economic reform in China. However, regulations and institutions need to continue to develop instruments aimed at enhancing the benefits of Chinese overseas investments for the recipient country, as that is the only way of creating lasting conditions for the *Going Global* strategy and making more efficient Chinese legal, institutional, and economic structures. It may be thought by many scholars and government officials –Chinese and foreigners–that the *Principle of Mutual Benefit and Shared Gain* has more lyrical than practical implications. However, believing this is a big mistake, as developing countries today have gained a stronger conscious regarding, for example, the protection of their environmental resources, their development model and the labor conditions of its people.

Regulations cannot change social realities, but they can contribute to *improve* them. While bureaucracy in general can be negative or create inefficiencies, institutional frameworks can however be useful to coordinate supporting mechanisms that have been created by the legal system and to take full advantage of these mechanisms. Critics may argue that the proposed agency herein is not a *necessary* tool for the outbound investment regime, but what they cannot deny is that such an entity is useful to create a framework that modifies and supports behavioral changes to comply with international standards and to, consequently, enhance the outbound investment regime through the maximization of the application of the *Principle of Mutual Benefit and Shared Gain.* Thinking that legal principles are simply imaginary tools is the first step of unraveling the rule of law. China has constructed the legal foundation for its *Going Global* strategy under the mother principle of *Mutual Benefit and Shared Gain*. Thus, it is the responsibility of Chinese companies, authorities, and government to put that principle into practice when investing overseas. The proposed agency would certainly be an ideal embodiment of this principle.

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APPENDIX I

The cooperation agreements between the Inter-American Development Bank (IDB) and Chinese financial institutions as a proof that strengthening the institutional framework contributes to a better application of the mutual benefit and shared gain principle.

A.1. Overview of the Inter-American Development Bank Group (IDB Group)

The Inter-American Development Bank Group (IDB Group) is one of the most influential financing institutions of the Western hemisphere. IDB Group's most important part is the Inter-American Development Bank (IDB). The Bank is the largest financing institution of economic and social development projects as well as regional integration projects in Latin America and the Caribbean.[220]

Founded in 1959, today the Bank is composed by 48 country members, which, simultaneously, are its shareholders. The members are divided into borrowing[221] and non-borrowing[222]. Only the countries included in the first category can apply for project financing. The IDB plays a very influential role in the region and through its different divisions seeks to create a framework under which investment in development projects can be enhanced. Additionally, the Bank aims at establishing

[220] The IDB considers Latin America and the Caribbean as one region, commonly referred to as LAC.

[221] This group is composed by the following countries: Argentina, The Bahamas, Barbados, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay, Venezuela. *See Borrowing Member Countries*, INTER-AMERICAN DEV. BANK, http://www.iadb.org/en/about-us/borrowing-member-countries,6005.html (last visited Apr. 29, 2012).

[222] This group is composed by the following countries: Austria, Belgium, Canada, China, Croatia, Denmark, Finland, France, Germany, Israel, Italy, Japan, The Netherlands, Norway, Portugal, Republic of Korea, Slovenia, Spain, Sweden, Switzerland, United Kingdom and the United States. *See Non-Borrowing Member Countries,* INTER-AMERICAN DEV. BANK, http://www.iadb.org/en/about-us/non-borrowing-member-countries,6006.html (last visited Apr. 29, 2012).

strategic partnerships and alliances with other actors of the development community, including trust fund donors, co-financing counterparties and private sector.[223]

The other parts of the IDB Group are:

- **Inter-American Investment Corporation (IIC)**

The mission of the organization is "to promote economic development in its regional developing member countries by fostering the establishment, expansion, and modernization of private enterprises in a manner complementing the activities of the IDB, with the focus on small and medium-size enterprises."[224]

- **Multilateral Investment Fund (MIF)**

The MIF's main objective is supporting private sector development and providing professional assistance for SME business growth. MIF´s activities aim to help SMEs access to basic services, finance, markets and capabilities. [225]

A.2. Export – Import Bank of China (China Eximbank): a policy bank financing Chinese enterprises outbound investments in the LAC region

A.2.1. China becomes a member of the Inter-American Development Bank

In 2009, China joined the Bank, becoming its 48th member and the third Asian country, after Japan and South Korea. It is worth noting that the main goal of this

[223] Specifically, this task is carried out by the Office of Outreach and Partnerships (ORP), which is the unit responsible for strengthening the links with organizations that may contribute to reach the IDB main goals. The ORP has an Asia Office, through which links with Chinese institutions are established. The unit is also in charge of supporting the "identification and development of harmonization initiatives and establishes the Bank-wide framework to guide the development and maintenance of country-focused and sector specific partnerships and outreach." *Office of Outreach & P'ships.*, INTER-AMERICAN DEV. BANK, http://www.iadb.org/en/about-us/departments/about,1342.html?dept_id=ORP (last visited Apr. 29, 2012). Furthermore, it "acts as the sole channel for the IDB's resource mobilization efforts with (i) corresponding ministries and bilateral development agencies of member countries; (ii) agencies of the EU and UN system that provide development assistance to the Latin America and Caribbean region; (iii) non-member institutions that finance development activities in the region; (iv) the philanthropic foundations that provide development assistance to the Latin American and Caribbean region; and (v) the private sector." *Id.*

[224] INTER-AMERICAN INV. CORP., http://www.iic.org/about-inter-american-investment-corporation (last visited Apr. 29, 2012).

[225] MULTILATERAL INV. FUND, http://www5.iadb.org/mif/About/Whatwedo/tabid/82/language/en-US/Default.aspx (last visited Apr. 29, 2012).

movement of China was to strengthen their relationship with Latin America.[226] Since then, the cooperation agreements between the IDB and different Chinese financing institutions have flourished. China is represented in the IDB Board of Governors, the organ in charge of the main decisions, by the Governor of the People´s Bank of China (PBOC).

After formalizing its accession, the first step taken by China was to contribute $350 million to the IDB Group, which were assigned to different funds, as illustrated in the following chart:

AMOUNT	BENEFICIARY	MAIN INTENDED USE
$ 125 Million	Fund for Special Operations (“IDB´s soft-loan window for its poorest member countries”)	• Reducing poverty and social inequalities; • Addressing the needs of small and vulnerable countries; • Fostering development through the private sector; • Addressing climate change, renewable energy and environmental sustainability; and • Promoting regional cooperation and integration[227]
$ 75 Million	Institutional Capacity Thematic Fund	Strengthen the institutional capacity of Latin American and Caribbean countries
$ 75 Million	China-Interamerican Investment Corporation SME Equity Investment Trust Fund	Provide investment capital to small and mid-sized enterprises investing in equity and quasi-equity instruments in SMEs in the IIC’s

[226] During the joining ceremony at IDB headquarters at Washington D.C., Zhou Wenzhong (the Chinese Ambassador to the USA, expressed, “At the conjuncture of the current financial crisis, it is of greater importance to strengthen comprehensive cooperation between China and Latin America. China’s accession to the IDB will create a new platform and opportunity to boost China-Latin American cooperation, hence a win-win choice for both sides.” Press Release, Inter-American Dev. Bank, China joins IDB in ceremony at Bank headquarters, Jan. 12, 2009, http://www.iadb.org/en/news/news-releases/2009-01-12/china-joins-idb-in-ceremony-at-bank-headquarters,5095.html (last visited Apr. 29, 2012).

[227] Further information is available at *Our priorities and areas of action*, INTER-AMERICAN DEV. BANK, http://www.iadb.org/en/about-us/our-priorities-and-areas-of-action,6007.html (last visited Apr. 29, 2012).

		twenty-six regional member countries
$ 75 Million	Multilateral Investment Fund (MIF)	Promote projects designed to increase economic opportunities for the poor in the region
Total Amount Contributed: $ 350 Million		

A.2.2. China accession to the IDB and Investment Funds creation: The role of the China Eximbank in financing Chinese enterprises outbound investment in Latin America

Since its accession to the IDB, China has been actively contributing to the creation of project financing mechanisms. In addition to China's initial contribution, which was mainly aimed at creating new trust funds, several funds have been created jointly with different Chinese financial institutions for Chinese and LAC companies. While some of these funds are oriented to supporting trade activities[228], others are specially focused on investment projects financing, which are the focus of this thesis as well. China's main goal in contributing to these funds is to allow Chinese enterprises to have instruments for backing its outbound investment projects in Latin America, in accordance with the main guidelines of the *Going Global* strategy.

A.3. Towards a huge China – Latin America and the Caribbean Investment Fund

A.3.1. IDB – China Eximbank Infrastructure Facility and Public-Private Investment Fund for Latin America and the Caribbean

During the 2011 IDB Board of Governors Annual Meeting, held in Calgary, Canada from March 25 to 28, 2011, IDB and China Eximbank signed a letter of

[228] For example, in 2011, China Eximbank signed an agreement with the IADB for joining to the IADB´s Trade Finance Facilitation Program. The referred program provides credit guarantees for trade financing operations. *See generally* Press Release, Inter-American Development Bank, IDB and Export-Import Bank of China Sign Financing Deal to Promote Trade, Sept. 16, 2011, http://www.iadb.org/en/news/news-releases/2011-09-16/idb-and-export-import-bank-of-china-promote-trade,9548.html (last visited Apr. 29, 2012); *Trade Finance and Facilitation Program*, INTER-AMERICAN DEV. BANK, http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=1897026 (last visited Apr. 29, 2012).

intent to establish an infrastructure investment mechanism to finance public and private sector investment projects in the LAC region.[229]

A.3.2. China- Latin America and the Caribbean Investment Platform

During the 2012 IDB Board of Governors Annual Meeting, held in Montevideo, Uruguay from March 16 to 19, 2012, the IADB and the China Eximbank announced that are advancing in the creation of an investment platform for Latin America and the Caribbean to mobilize as much as $1 billion for equity investments for the promotion of sustainable economic development in the region, following a letter of intent signed between both parties in 2011.[230] This is certainly one of the most ambitious cooperation projects in the investment area announced until now.

Taking into consideration IADB official press releases, it could be projected that the new fund main characteristics will be the following:

- Develop the China-LAC institutional framework in order to increase technical and economic cooperation;
- Strengthen the investment ties between China and the LAC region by developing investment mechanisms;
- Fostering Chinese investments in the LAC private sector.

According to information provided by IDB members, until now, the parties are working on regulations for the operations of the platform, the requirements for enterprises accessing the funds, and the application procedures for enterprises obtaining these funds.[231]

[229] Press Release, Inter-American Dev. Bank, IDB, China Eximbank join forces to set up infrastructure facility and a public-private investment fund for Latin America and the Caribbean, Mar. 28, 2011, http://www.iadb.org/en/news/news-releases/2011-03-28/china-eximbank-latin-america-investment-fund,9323.html (last visited Apr. 29, 2012).

[230] *China, IDB to Create Investment Fund*, LATINFINANCE, Mar. 21, 2012, http://www.latinfinance.com/Article/2998599/Banking/China-IDB-to-Create-Investment-Fund.html (last visited Apr. 29, 2012).

[231] Press Release, IDB, China Eximbank further advance in the creation of equity investment platform for Latin America and the Caribbean, IDB News, Mar. 19, 2012, http://www.iadb.org/mobile/news/detail.cfm?language=English&id=9894 (last visited Apr. 29, 2012) ("[t]he IDB and China Eximbank are in the process of selecting internationally recognized asset management firms to manage the investments and raise funds from the markets").

A.3.3. The IDB China-Latin America and the Caribbean Investment Fund as a gateway to improving the application of the *Mutual Benefit and Shared Gain Principle*

This fund will be an important tool to obtain the win-win scenarios as articulated in relation to the *Principle of Mutual Benefit and Shared Gain.* In particular, "[t]he Fund will follow the two banks' standards on social and environmental protection as well as sustainability and financial reporting requirements."[232] Finally,

> The new platform will pave the way for the IDB and China Eximbank to continue expanding their efforts to promote development through the private sector in Latin America and the Caribbean. Equity provided by the new platform will complement loans and credit guarantees that already are directly offered by the IDB and China Eximbank in the region.[233]

[232] *Id.*
[233] *Id.*

ACRONYMS & ABBREVIATIONS

ACE	Agreement of Economic Complementation of the ALADI
ACFIC	All-China Federation of Industry and Commerce (中华全国工商业联合会)
ALADI	Latin American Integration Association (Asociación Latinoamericana de Integración)
BNDES	National Development Bank in Brazil
BROU	Bank of the Republic
CAPID	China Association for the Promotion of Industrial Development (中国产业发展促进会)
CBBC	China-Brazil Business Council
CCBC	Chilean-China Business Council
CCIIP	China Council for International Investment Promotion (中国国际投资促进会)
CCPIT	China Council for the Promotion of International Trade (中国国际贸易促进委员会)
CDB	China Development Bank
China EXIM Bank	Export-Import Bank of China

CHINCA	China International Contractors Association (中国对外承包工程商会)
CICPMC	China International Council for the Promotion of Multinational Corporations (中国国际跨国公司促进会)
CIODPA	China Industrial Overseas Development & Planning Association (中国产业海外发展和规划协会)
COIFAIR	China Overseas Investment Fair
DFCOI	Department Of Foreign Capital Utilization And Overseas Investment of the NDRC
DOIEC	Department of Outward Investment and Economic Cooperation
ICEX	Spanish Institute of Foreign Trade (Instituto Español de Comercio Exterior)
IDB	Inter-American Development Bank
IDB Group	Inter-American Development Bank Group
IIC	Inter-American Investment Corporation
MAOI	Measures for the Administration of Overseas Investment (境外投资管理办法)
MASF	Measures for the Administration of Special Funds for Foreign Economic and Technical Cooperation (对外经济技术合作专项资金管理办法)

MERCOSUR	Common Market of the South
MIF	Multilateral Investment Fund
MOF	Ministry of Finance
MOF	Ministry of Finance
MOFCOM	Ministry of Commerce
NDRC	National Development and Reform Commission
OFDI	Overseas Foreign Direct Investment
OPIC	Overseas Private Investment Corporation
POIF	Private Overseas Investment Fund
QDII	Qualified Domestic Institutional Investors
SASAC	State-Owned Assets Supervision & Admin. Commission
SFA	State Forestry Administration
SOE	State-Owned Enterprises

鸣谢 | ACKNOWLEDGEMENTS

在这里请允许我在这有限的数行文字里，表达对我的家人、朋友以及导师们诚挚的感谢，感谢他们在这篇论文的写作以及我的职业生涯发展中给予我的支持和指引。

首先，我想感谢我远在故乡乌拉圭的家人和朋友。是他们曾鼓励我做出了申请清华大学法学院 LL.M.项目的决定，并在我每次思想心切的时候，给予我无限的支持，让我的心中充满信念。

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第三，我想对前清华大学法学院院长、现 LL.M.项目《中国社会与中国法律》任课教师王晨光教授表达我无限的敬意与感激。作为我在 LL.M 项目中的授课教师同时也是我的论文指导老师，王教授给予了我宝贵的知识与指导。在我对论文的选题以及范围感到迷茫的时候，他为我将研究范围缩小在“互利共赢的基本原则”这一主题上提供了关键性的帮助和指引。

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孙振宇教授曾在我就论文题目向他请教时，与我无私地分享了他在担任中国前商务部长以及中国驻 WTO 大使期间所积累的宝贵经验。他与中国世界贸易组织研究会常务副秘书长任以锋教授针对“走出去战略”所做的演讲毫无疑问是我在中国期间所听到过的最发人深省的讲座，给我以极大的启迪。他们的真知灼见以及丰富的实务经验都对我的论文写作起到了重要的作用。

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最后，我想引用王晨光教授在指导我的论文过程中说过的一句话与君共勉：“享受这个过程吧，今天的挑战将会变成你明天的财富！”对这句话，我深有感触。为了出色地完成这篇论文，我从乌拉圭的蒙特维迪亚来到中国的北京、上海，甚至到了美国的华盛顿、纽约；从泛美开发银行总部到美国国会图书馆，从巴西和乌拉圭驻北京大使馆到富丽辉煌的中国国家图书馆。这个过程让我在对知识的探求中行万里路，读万卷书。何其有幸，我能够成为清华大学法学院 LL.M.项目的一员，并结识这些曾对我慷慨相助甚至影响终生的人。谨以此文献给你们和其他的读者，谢谢！

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本人郑重声明：所呈交的学位论文，是本人在导师指导下，独立进行研究工作所取得的成果。尽我所知，除文中已经注明引用的内容外，本学位论文的研究成果不包含任何他人享有著作权的内容。对本论文所涉及的研究工作做出贡献的其他个人和集体，均已在文中以明确方式标明。

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ASSEVERATION

The author asseverates: this thesis was prepared solely by myself under instruction of my thesis advisor. To my knowledge, except for documents cited in the thesis, the research results do not contain any achievements of any others who have claimed copyrights. To contributions made by relevant individuals and organizations in the completion of the thesis, I have clearly acknowledged all their efforts.

Signature:

Date:

个人简历 | RESUME

- Pedro Nicolás Santo Rosenblum -

Narrative Summary

Pedro Nicolás Santo Rosenblum is a lawyer who graduated from the Universidad de Montevideo School of Law. He is currently completing his LL.M. in Chinese Law at Tsinghua University School of Law in Beijing in order to achieve his goal of becoming an international expert in Sino-Latin American relations.

He participated in congresses, conferences, and seminars related to the legal profession. Additionally, he had published papers related to economic, social and cultural rights as well as environmental law. During his undergraduate studies, he obtained several academic awards, including an Honor Mention in the V Latin-American Human Rights Essay Contest organized by the Universidad de la República UNESCO Chair of Human Rights (2008) and Second Prize in the X "Semilleros" Iberoamerican Competition organized by the Colombian Institute of Procedural Law for the conference on "The Judicialization of the economic, social and cultural rights" (2009).

In 2010, he was invited by the Ministry of Commerce of the People´s Republic of China to attend the Seminar on Policy and Planning of Climate Change for developing countries organized by the National Development and Reform Commission in Beijing. And since 2011, he has been the Director of ChinaXXI, the first blog specializing in China by the Uruguayan newspaper "El Pais." He is a Member of the Uruguayan-Chinese Chamber of Commerce.

Academia

Universidad de Montevideo, Uruguay

Doctor of Law — December 2010

Tsinghua University School of Law, Beijing, China

LL.M, Chinese Law — Expected 2012

Honors: Ming Li Scholarship (2011)

Honors

Interamerican Essay Contest, Interamerican Institute for Democracy (2010)

Awarded 2nd prize for the essay “Guardians of the Democracy: Challenges of the Judiciary Branch in the 21st Century” in an essay competition open to any student, in any field, between the ages of 18-25.

X *Semilleros* Legal Essay Competition, Colombian Inst. of Procedural Law (2009)

Awarded 2nd prize during the seminar “The Judicialization of the economic, social and cultural rights” between 80 Iberoamerican universities for the essay entitled “Challenges of the Iberoamerican Proceduralism concerning the Judicialization of Social, Economic and Cultural Rights.” Recognized as the highest position ever attained by a foreign student in the thirteen years of the competition’s existence.

Fifth Latin-American Human Rights Essay Contest, University of the Republic UNESCO Chair of Human Rights (2008)

Awarded Honorable Mention for the essay entitled “The Human Rights Atmosphere” in a writing competition open to all students throughout Latin America.

Environmental Law Essay Contest, Hughes & Hughes Law firm (2008)

Awarded Special Mention for the paper entitled “The General Principles of Environmental Law and Industrialization: Theoretical-Practical study about the influence of the general principles of environmental law in legal system at a national, regional and European level.”

PUBLICATIONS

Santo Rosenblum, Pedro Nicolás, *The General Principles of Environmental Law and the Industrialization: theoretical-practical analysis about the incidence of the general principles of environmental law in the national, regional and European legal systems*, included *in Trabajos premiados en el Concurso de ensayos sobre Derecho Ambiental ‘Aportando al Medio Ambiente’*, Ed.Linardi y Risso, Montevideo, Republic of Uruguay, 2008, pp. 79-99.

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