Transnational Environmental Accountability

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The efforts of multinational corporations in extractive industries to obtain oil and mineral resources from developing countries have often caused severe environmental harm and intense conflicts with local populations. Chinese companies have been a particular focus of such conflicts, which have occurred in more than 50 developing nations. Beginning in the early 2000s, the Chinese government's "Go Out/Go Global" policy encouraged Chinese companies to increase their overseas presence. In 2013, the Go Out/Go Global policy reached a new stage when the Chinese government announced the "Belt and Road" Initiative, a massive global development strategy involving Chinese infrastructure investments in scores of countries. By 2015, China's outward foreign direct investment had soared to $183 billion, the second highest in the world, though it declined to $118 billion in 2019.

Although the Chinese government has pledged that its Belt and Road Initiative will be a "green Belt and Road," Chinese companies operating in the developing world often do not understand, or simply disregard, local environmental regulations. Many of these companies remain unaware of the Chinese government's efforts to encourage corporate social responsibility by Chinese corporations, and countries in which these companies operate often have weak state institutions unable or unwilling to hold them accountable. Chinese companies are also generally less transparent, and less willing to respond to affected communities' complaints, than companies in the developed world, in part because of the forces that shaped their business operations in their home country.

It has long been understood that governments have a responsibility to prevent companies from causing harm to the environment of other nations. Principle 21 of the 1972 Stockholm Declaration, reaffirmed as Principle 2 of the 1992 Rio Declaration, declares that states have "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction." This fundamental principle of global environmental law encompasses more than simply a duty to stop pollution from crossing national boundaries. Rather, these principles require better mechanisms to hold multinational corporations accountable when they neglect this duty.

After providing examples of environmental and human rights controversies caused by projects operated by multinational corporations, this article considers how to promote greater transnational accountability through legal measures, transparency initiatives, and other means.

Oil Pollution Caused by Multinational Companies in South America and Africa

Chinese companies have been the focus of many recent environmental and human rights controversies in developing countries, but corporations based in the United States and Europe have an even longer history of sparking such conflicts. For more than half a century, extraction of oil deposits in Ecuador and Nigeria, for example, has caused massive environmental contamination. For decades, residents of the Oriente region of northeastern Ecuador have been seeking compensation for, and remediation of, widespread oil contamination that began after the U.S. oil company Texaco discovered oil there in 1967. Using waste disposal practices that would not have been tolerated in the developed world, including placing oil wastes in unlined earthen pits, the company caused widespread pollution that is still evident today.

In 1993 a class action lawsuit was filed against Texaco by 76 residents of the Oriente on behalf of 30,000 others in federal court in New York. The suit was filed pursuant to the Alien Tort Statute (ATS), which expressly allows lawsuits by foreigners

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who are the victims of torts. Texaco argued that the case should be dismissed because the United States was an inconvenient forum with nearly all of the evidence in Ecuador. It maintained that the plaintiffs could seek redress in the courts of Ecuador, which it praised as fair. After years of legal wrangling, and the acquisition of Texaco by Chevron in 2001, an appellate court in 2002 upheld the dismissal of the case on the condition that the oil company submit to the jurisdiction of Ecuador's judiciary and abide by its judgment. *Aguinda v. Texaco*, 303 F.3d 470 (2d Cir. 2002).

In 2003 the plaintiffs refiled their case in Ecuador. Chevron argued that it had already cleaned up pollution for which it was responsible pursuant to an agreement with the government of Ecuador. After a regime less friendly to the oil company came to power in Ecuador in 2007, Chevron launched a "scorched earth" legal and public relations strategy in an effort to discredit the plaintiffs' lawyers and ultimately Ecuador's judiciary. In February 2011, less than two weeks before a court in Ecuador issued an $8.6 billion judgment against Chevron, the company sued all the plaintiffs and their lawyers in the very federal court in New York where the plaintiffs initially wanted their case heard. Chevron's lawsuit, brought under the Racketeer Influenced and Corrupt Organizations (RICO) Act, alleged that the proceedings in Ecuador were part of a corrupt conspiracy to extort money from the oil company.

Even before hearing the RICO case, the New York judge prohibited the plaintiffs from seeking enforcement of any judgment against Chevron in any court in the world. He was swiftly reversed on appeal for exceeding his authority. But in 2014, he ruled that the judgment of the court in Ecuador had been procured by fraud. He barred any attempt to enforce the Ecuadoran judgment in the United States and ordered the plaintiffs' lawyers to give Chevron any money they receive through enforcement in other countries. This decision was affirmed on appeal in 2016. *Chevron Corp. v. Donziger*, 833 F.3d 74 (2d Cir. 2016). Courts in Argentina, Brazil, and Canada have held that Chevron's subsidiaries within their jurisdiction are not legally responsible for acts of the parent corporation. *See, e.g.*, *Yaiguaje v. Chevron Corp.*, 2018 ONCA 472 (CanLII), 423 DLR (4th) 687 (2018). Thus, after more than a quarter century of litigation, the victims of oil pollution in Ecuador have received neither compensation for, nor remediation of, the contamination.

The victims of massive oil pollution in Nigeria have fared only marginally better. In 1958 the Royal Dutch Shell Corporation, now based in the Netherlands and the United Kingdom, discovered oil in Ogoniland in the Niger Delta. Repeated oil spills, uncontrolled flaring, and a refusal to share the benefits of oil production with the local communities sparked fierce protests and the founding of the Movement for the Survival of the Ogoni People (MOSOP). Led by environmental activist Ken Saro-Wiwa, 300,000 Ogoni marched in 1993 to demand a fair share of oil revenue and greater political autonomy. Saro-Wiwa, Barinmen Kiobel, and seven other Ogoni were captured by the Nigerian military and executed in November 1995, allegedly with the complicity of Shell.

The surviving family of Saro-Wiwa and Kiobel brought lawsuits against Shell in the United States under the ATS. On the eve of trial, Shell agreed to settle the Saro-Wiwa case for $15.5 million. But in 2013 the U.S. Supreme Court sharply narrowed the reach of the ATS and rejected the claims by Kiobel's surviving family. *See Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013). Writing for the Court, Chief Justice Roberts concluded that the presumption against extraterritorial application of domestic law generally bars suits for violations committed within the territory of another country. No environmental plaintiff has ever successfully litigated an ATS case to judgment, though the Saro-Wiwa case and a lawsuit against Unocal for human rights abuses in connection with construction of a pipeline in Myanmar have been settled on terms favorable to plaintiffs.

In 2011, the United Nations Environment Programme released a comprehensive assessment of the environmental contamination of Ogoniland. UNEP, Environmental Assessment of Ogoniland (2011). It concluded that oil pollution there was so widespread that it would take at least 25 years and billions of dollars to remediate it. Lawsuits have been brought against Shell and its Nigerian subsidiary (the Shell Petroleum Development Company of Nigeria) in both the Netherlands and the United Kingdom relating to the environmental damage. In January 2015 Shell agreed to pay $82 million to compensate Nigerian communities for two oil spills in 2008. In December 2015 a Dutch appeals court held that both Shell and its Nigerian subsidiary could be liable for other spills in Nigeria. However, in February 2018 a divided Court of Appeals in the U.K. ruled that the Ogale and Bille communities in Ogoniland could not sue Shell's London-based parent corporation, a decision now under appeal to the Supreme Court of the U.K. *Okpabi v. Royal Dutch Shell Plc* [2018] EWCA (Civ) 191 (Feb. 14, 2018).

Controversies over Mining by Chinese Companies Operating in South America and Africa

The more recent activities of Chinese mining companies have sparked fierce controversies in South America and Africa. In Ecuador, the Chinese mining company Junefield ÉcuagoÍdmining launched the Rio Blanco mining project to extract gold and silver from an environmentally fragile area within the Olleturo-Moltepongo protective forest in a buffer zone of El Cajas National Park. Although dozens of indigenous and peasant communities are located around the mining site, the company did not engage in any prior consultation with community residents or leaders. In a precedent-setting decision, a local court ordered the mining stopped for violation of the company's duty to consult the local population under the Constitution of Ecuador and article 169 of the Indigenous and Tribal People's Convention. This decision was then upheld by an appellate court in Cuenca in August 2018. *Vele v. Junefield Ecuagoldmining*, #01333201803, Provincial Ct. of Azuay (Aug. 3, 2018). The appellate court allowed Professor Jingjing Zhang, one of the authors of this article, to file an amicus brief and argue in support of the local community. Her brief argued that the company had violated not only the law of Ecuador, but also Chinese law that requires companies based in China to abide by the laws of the countries in which they operate.

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In northern Sierra Leone, a Chinese mining company, Tonkolili Iron Ore Limited (formerly a subsidiary of African Minerals Limited) was charged with serious human rights abuses by 142 villagers who were subjected to extreme violence when the company forcibly relocated hundreds of families to mine the largest iron ore deposit in Africa. In November 2010 and April 2012, "many villagers were variously beaten, shot, gassed, robbed, sexually assaulted, squalidly incarcerated, and in one case, killed." Paragraph 4 of *Kalma v. African Minerals Ltd.* [2018] EWHC 3506 (QB). The judge hearing the legal proceedings against the company in the U.K. Court of Appeals, visited Sierra Leone in February 2018 along with lawyers from both sides to facilitate taking testimony from witnesses located there. However, in December 2018, the Court of Appeals ruled against the plaintiffs, finding that the company was not liable for the actions of the police. *Kalma v. Afr. Minerals Ltd.* [2018] EWHC 3506 (QB). This decision has been appealed to the U.K. Supreme Court, which, in another case (*Vedanta Resources Plc v. Lungowe and Ors* [2019] UKSC 20), has allowed the U.K. parent corporation of a Zambian copper mining company to be sued in the U.K. because it controlled and directed the subsidiary's operation of the mine.

The West African country of Guinea holds the world's richest bauxite reserve, more than one-quarter of the world's supply. China, the world's largest consumer of bauxite, which is used to produce aluminum, obtains half of its bauxite supply from Guinea. Bauxite mining by Chinese companies in Guinea has severe environmental consequences, generating thick layers of fine particulates that cause respiratory problems, toxic water pollution from bauxite refineries, and the destruction of topsoil by strip mining. Since 2014 China has invested millions in Guinea's mining sector. In November 2018, Societe Miniere de Boke (SMB), a joint venture of Chinese mining companies, pledged an additional $3 billion to build a railroad and an alumina refinery to increase production. To secure its access to Guinea's bauxite reserves, the government of China promised to loan the government of Guinea $20 billion, twice the country's annual GDP.

Chinese bauxite mining in Guinea has forced the relocation of local communities and caused intense pollution with severe environmental and health consequences. Due to excessive levels of dust in the air, families living near the mines report high levels of dust in the food they cook and eat. Their children endure coughing fits that end with vomiting; some have noticed their saliva turning red. An audit by the government of Guinea in 2018 found that mining companies had been allowed to bypass environmental standards. Yet SMB failed to conduct any monitoring of air or water quality. Guinea's government almost entirely failed to implement or enforce the country's environmental laws. Environmental and social impact assessments are completed only after projects are underway, and when made available, they do not include measures to mitigate environmental harm.

The country of Ghana is another target of Chinese mining companies. In June 2017, the government of Ghana agreed to give the government of China access to its bauxite reserves in return for several billions of dollars' worth of infrastructure projects. Local environmentalists fear that bauxite mining threatens Ghana's world-renowned Atewa Forest Reserve, the source of three of the country's major rivers and one of the richest habitats for rare flora and fauna in the world.

Promoting Transnational Environmental Accountability

Growing global concern for environmental accountability has spawned several useful initiatives. In the late 1990s and early 2000s, global human rights organizations focused on exposing corruption surrounding oil extraction in developing countries, using the slogan "Publish What You Pay." After the oil multinational BP disclosed in 2001 that it had paid the government of Angola $111 million for an offshore oil concession, the Angolan government reacted angrily, convincing many that a unilateral approach to the corruption problem would not work. In 2003, the U.K. Department of International Development convened a conference of civil society organizations (CSOs), oil companies, and government leaders to develop a set of principles to promote transparency so that a country's natural resource wealth would benefit all of its citizens. A set of 12 principles was adopted for the Extractive Industry Transparency Initiative (EITI). Beginning in 2006, these principles were refined, expanded, and incorporated into what is now known as the EITI Standard. This standard requires governments to publicly disclose revenues from oil, gas, and mining assets, and for companies to make parallel payment disclosures. A review by the Anti-Corruption Resource Centre in 2017 of 50 studies assessing the EITI found that it had achieved mixed success. Many resource-rich countries in the Middle East and North Africa had failed to adopt the EITI, and others adopted EITI reluctantly while delaying its implementation.

The 2019 EITI Standard requires contract transparency for new contracts from 2021 forward and, for the first time, disclosures on environmental, social, and gender impacts of resource extraction. Implementation has been funded by the World Bank's Extractive Global Programmatic Support Multi-Donor Trust Fund. The 52 countries which now have embraced the EITI Principles are required to file annual reports on implementation that are reviewed and assessed by multi-stakeholder groups from governments, industry, and CSOs.

The 2010 Dodd-Frank Act required the U.S. Securities and Exchange Commission (SEC) to issue rules requiring companies to disclose annually payments made to foreign governments for development of oil, gas, or mineral resources. In 2013 the European Parliament and Council of the European Union adopted similar reporting requirements, followed by Norway in 2014 and Canada in 2015. However, on February 14, 2017, President Trump, with the support of oil companies, signed a joint resolution of Congress disapproving the SEC disclosure regulations under the Congressional Review Act. In November 2017, the U.S. formally withdrew as an EITI Implementing Country. Letter from Gregory Gould, Dir. of Off. of Nat. Res. Revenue, U.S. Dep't of the Interior, to Chair, EITI Bd. (Nov. 2, 2017).

China has not joined EITI, although Chinese companies operating in countries that have embraced the initiative have been required to report information under it. In 2014, one of the Chinese mining associations, the China Chamber

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of Commerce of Metals, Minerals & Chemical Importers & Exporters, issued voluntary Guidelines for Social Responsibility in Outbound Mining Operations, but many Chinese companies have either ignored or failed to implement the guidelines.

The United Nations (UN) long has been interested in promoting transnational corporate responsibility. In 1973, the UN created a Commission on Transnational Corporations and charged it with developing a code of conduct for transnational corporations. However, the Commission was disbanded in 1994 after sharp disagreements between developed and developing countries. In 2005, the UN Secretary General appointed Harvard Professor John Ruggie as his special representative on human rights and transnational corporations. In 2008, Ruggie's mandate was extended for three years after he presented the UN Human Rights Council with a "Protect, Respect, and Remedy" framework. Following extensive consultations with businesses, governments, and CSOs, Ruggie presented the Council with the UN Guiding Principles on Business and Human Rights (UNGPs). The Council unanimously endorsed the UNGPs in 2011. The foundations of the UNGPs are recognition of a state duty to protect against human rights violations and a corporate duty of due diligence to avoid rights infringement. This due diligence extends to affiliates of the parent corporation.

On February 21, 2017, the French National Assembly adopted a law establishing a "duty of vigilance" for large multinational firms conducting all or a large part of their business in France. The law requires companies to report annual "vigilance plans" detailing how they will prevent human rights violations and negative environmental impacts from their work and the work of their subsidiaries. Unlike the U.K.'s Modern Slavery Act and California's Transparency in Supply Chains Act, however, companies subject to the law have to do more than report—they have to implement procedures to identify human rights risks, take actions to mitigate those risks, and assess the effectiveness of their tactics. If companies do not create vigilance plans or fail to meet the standards of the law, French judges can compel compliance. If a company's failure to establish, publish, or implement a vigilance plan results in harm, companies can be subject to civil liability. The French Duty of Vigilance Law is a step in the right direction, but it contains several limitations. First, there is no public list of all the companies covered. Next, many companies have treated the law as simply a reporting exercise, submitting only cursory vigilance plans. Further, the burden of proof is on the plaintiffs to prove that the companies have not been vigilant. The French oil company Total, for example, maintains that the law does not require disclosure of risks involving individual projects; rather, it takes a more general approach to reportable risk.

In October 2019, Friends of the Earth France and several Ugandan NGOs filed suit against Total for failing to develop a vigilance plan to address human and environmental impacts from its operations in Tilenga, Uganda. After hearing from members of Ugandan communities affected by Total's operations, the Nanterre High Court ruled on January 30, 2020, that the case did not fall within its jurisdiction, but rather should be heard before one of France's commercial courts. Because the judges of these courts are selected by members of the business community, this decision is a substantial blow to the Duty of Diligence Law. Two days before the decision, on January 28, 2020, another lawsuit was filed against Total by French mayors and NGOs who claim the company failed adequately to identify risks to human rights and the environment related to the company's emissions of greenhouse gases.

Building on its Guiding Principles for Business and Human Rights, the UN Human Rights Council decided in June 2014 to establish an intergovernmental working group to help develop a legally binding treaty on Transnational Corporations and Other Business Enterprises with respect to human rights. On July 16, 2018, the working group produced a Zero Draft, a starting point for negotiations, which attempts to address companies whose misconduct evades national law in their home countries. Employing the "Protect, Respect, and Remedy" framework, the draft provides that legal remedies must be available for violations of those duties. Negotiation of the treaty is still in its initial stages, and the prospects for reaching agreement on it remain highly uncertain.

The United States has one of the most powerful legal tools to combat corruption by multinational corporations—the Foreign Corrupt Practices Act (FCPA). When Congress enacted the FCPA in 1977, the United States became the first country in the world to make it a crime to bribe foreign officials to obtain or retain business. It was not until 1997—when the Organization for Economic Cooperation and Development adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which requires signatories to adopt similar measures—that other countries followed the U.S. lead. Article 164 of China's Criminal Code, which prohibits gifts of money or property to a company to obtain illegitimate commercial benefits, was amended in 2011 to extend to bribery of foreign officials. Penalties include up to three years' imprisonment for small bribes and ten years for large ones. To our knowledge, however, Chinese authorities have brought no prosecutions against Chinese companies for bribery under the amended law. Environmental groups in Africa have complained to us about Chinese companies giving gifts to local officials responsible for environmental compliance. We believe that even a single prosecution by the Chinese government of a Chinese company for foreign bribery would be of immense value for improving transnational environmental accountability.

In 2017 President Donald Trump told Secretary of State Rex Tillerson that "It's just so unfair that American companies aren't allowed to pay bribes to get business overseas." Philip Rucker & Carol Leonig, *A Very Stable Genius* (2020). However, in November 2018, the U.S. Department of Justice announced a "China Initiative" to step up prosecution of Chinese companies for violations of U.S. law. Although only 14 prosecutions were brought for alleged FCPA violations prior to 2002, in 2019 alone 17 prosecutions were commenced. Each of these involved bribery of an official in a developing country, including Peru, Iraq, India, Thailand, Turkey, Brazil, Morocco, Angola, Bosnia, Mexico, China, Malaysia, and several West African countries. Patrick Ho, a Chinese businessman, was convicted in the United States of bribing officials in Uganda on behalf of the China Energy Company Limited.

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While the U.S. Supreme Court's *Kiobel* decision has sharply restricted the ability of foreigners to use U.S. courts to redress harm caused abroad, in 2019 the Court slightly opened the door to suing multilateral development banks that fund environmentally destructive projects. In *Jam v. International Finance Corporation*, 139 S. Ct. 759 (2019), the Court ruled that the International Organizations Immunities Act did not automatically grant the International Finance Corporation (IFC) immunity from suit for failing to enforce compliance with an environmental and social action plan upon which a loan it approved to construct a coal-fired power plant in India was premised. The Court held that the IFC was not immune from liability when it engaged in "commercial activity" in the United States. However, in February 2020 the district court dismissed the suit on remand. The court noted that the lawsuit was "based upon IFC's failure to ensure that the plant was designed, constructed, and operated with due care so as not to harm plaintiffs' property, health, and way of life." Because "plaintiffs have not established that such conduct was carried on in the United States; instead, it was focused in India, where the plant is and the harms occurred," the suit was dismissed. *Jam v. Int'l Fin. Corp.*, No. 15-cv-612, 2020 WL 759199, at *11 (D.D.C. Feb. 14, 2020).

The Asian Infrastructure Investment Bank (AIIB), launched by China in October 2013, established an Environmental and Social Framework policy in February 2016. This policy requires projects the AIIB funds to adopt "appropriate measures . . . to avoid, minimize, mitigate, offset or compensate for adverse environmental and social risks." However, we are highly skeptical concerning the impact of this policy. Despite its pledge to combat climate change, the policy does not prohibit the AIIB from funding coal projects. Although the policy requires consultation with affected indigenous communities, its grievance and enforcement mechanisms have yet to be used.

On December 27, 2019, China's Supreme People's Court issued a judicial policy document on Providing Services and Guarantees for the BRI. Article 11 of this document, which deals with environmental protection, states that China should "proactively contribute its judicial resources to global environmental governance." More specifically, it calls on the Chinese judiciary to strengthen environmental public interest litigation and tort litigation to "stop environmental violations" and "enforce liability for damages." Does this signal that Chinese courts are receptive to hearing cross-border, public interest litigation against Chinese companies for environmental harm they cause in other countries? Under China's current Civil Procedure Law, an environmental tort case can be filed in the jurisdiction either where pollution originates, where the environmental damage occurs, or where the defendant is registered. One observer interprets the new policy document as "merely a reminder to local courts that they can take such cases provided current legal requirements are met, such as jurisdiction over the defendant, location of the pollution, and the social organization meeting specified requirements." *Supreme People's Court Updates Its Belt & Road Policies*, *Sup. People's Ct. Monitor*, Jan. 28, 2020. Were a Chinese court to accept a lawsuit to police the behavior of Chinese corporations in developing countries, this would be a landmark step toward promoting greater transnational environmental accountability.

A half century ago, multinational corporations in extractive industries felt free to use lax environmental practices when operating in developing countries. This caused enormous environmental damage and social dislocation in many parts of the world. Today, a global network of concerned and increasingly sophisticated CSOs guarantees that no corporation can despoil the environment in a remote corner of the world, confident that its practices will escape scrutiny. Greater transparency has inspired many companies to improve their environmental practices in the developing world, but it has had less impact on state-owned enterprises, many of which are based in China. Transnational environmental accountability has become a global imperative, but considerable work remains before it can be achieved.

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