

## Human Rights-related Due Diligence in the Chinese Business Regulation System: Three Examples

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### Human Rights Due Diligence in General

- The Chinese official concept of human rights is about public authority vs. individuals (groups).
- The corporate responsibility to respect human rights is not explicitly embodied in Chinese business law or business regulations.
- Due diligence is largely left to companies as a business decision (especially for private businesses), not a general legal requirement (General mention of social responsibility in Company Law, as amended in 2005).
- Human rights-related due diligence (labor, environment, political impact) has recently become a regulation concern for investments by Chinese businesses (especially State Owned Enterprises, SOEs).

### Human Rights-related Due Diligence: Three Examples

- Safety of Overseas Chinese-invested Enterprises and their Personnel (*soft D.D.*)
- Overseas Investments by Chinese SOEs (*moderate D.D.*)
- Social Stability Risk of Major Investment Projects (*hard D.D.*)

### Human Rights-related Due Diligence: Example 1 Safety of Overseas Chinese-invested Enterprises and their Personnel

- Background: the "going-out" policy & Chinese FDI
- By the end of 2011, "there are 18,000 Chinese enterprises investing overseas, with 1.2 million workers and total asset of more than US\$ 1.5 trillion." (MOFCOM news release, <http://english.mofcom.gov.cn/article/newsrelease/press/201203/20120308015346.html>)
- The management and safety of the Chinese enterprises/institutions and their personnel has become a serious challenge (recall recent Zambia case)

### Human Rights-related Due Diligence: Example 1 Safety of Overseas Chinese-invested Enterprises and their Personnel

- Regulations & Guidance:
  - ✓ *Regulation on Safety Management of Overseas Chinese-invested Enterprises, Institutions and their Personnel* (issued by 7 ministries including MOFCOM, MFA, SASAC & MPS, Aug. 2010, available at: [http://www.gov.cn/gzdt/2010-08/18/content\\_1682340.htm](http://www.gov.cn/gzdt/2010-08/18/content_1682340.htm))
  - ✓ *Guidelines on Employee Management of Overseas Chinese-invested Enterprises/Institutions* (issued by MOFCOM, MFA, SASAC & All-China Federation of Industry and Commerce, Mar. 2011, available at: [http://fsc.mofcom.gov.cn/article/zc/fj/zcfb/dwfw/hz/201103/1312009\\_1.htm](http://fsc.mofcom.gov.cn/article/zc/fj/zcfb/dwfw/hz/201103/1312009_1.htm))
  - ✓ *Guidelines on Safety Management of Overseas Chinese-invested Enterprises, Institutions and their Personnel* (issued by MOFCOM, Feb. 2012, available at: <http://fsc.mofcom.gov.cn/article/zc/fj/zcfb/201202/20120207960102.html>)
  - ✓ *Regulation on the Administration of Foreign Labor Cooperation* (issued by the State Council, effective on 1 August, 2012, available at: [http://www.gov.cn/jfj/2012-06/11/content\\_2179951.htm](http://www.gov.cn/jfj/2012-06/11/content_2179951.htm))

### Human Rights-related Due Diligence: Example 1 Safety of Overseas Chinese-invested Enterprises and their Personnel

- Risk assessment (rather than due diligence) by enterprises is required by both *Regulations*, along with some human rights-related compliance requirements, as well as contingency plans- focusing on "after arrival" rather than "before departure".
- A relatively comprehensive due diligence investigation process (on foreign investment project) is provided in the *Guidelines on Safety Management*, with special attention to investment environment (political & social stability, etc.) and environmental protection due diligence (which have human rights impacts).
- Not extended to supply chain, and no monitoring process on due diligence is provided.
- The legal implications of due diligence activities (e.g., due diligence defense, sanctions & liability) are not specified.

### Human Rights-related Due Diligence: Example 2 Overseas Investments by Chinese SOEs

- Background: "China's overseas investment promotional system will be improved 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. The enterprises that are 'going out' and their overseas cooperation projects should bear corporate social responsibility in mind in order to bring benefits to the local people." (Chapter 52, *China's 12th Five-Year Plan*)
- Chinese SOEs (especially 117 "central enterprises") are backbones of Chinese overseas investments.
- The human rights impacts of Chinese overseas investment are increasingly under the spotlight, which tends to be politicized.

### Human Rights-related Due Diligence: Example 2 Overseas Investments by Chinese SOEs

- Regulations & Guidance:
  - ✓ *Opinions on Encouraging and Regulating Overseas Investment and Cooperation of Chinese Enterprises* (issued by the State Council, Oct. 2006, available at: [http://www.gov.cn/jdhd/2006-10/25/content\\_423660.htm](http://www.gov.cn/jdhd/2006-10/25/content_423660.htm));
  - ✓ *Model Outline of Application Reports for Overseas Investment Projects* (issued by NDRC, April 2007, available at: [http://www.ndrc.gov.cn/gzdt/200704/13\\_129297.htm](http://www.ndrc.gov.cn/gzdt/200704/13_129297.htm))
  - ✓ *Regulation on Overseas Investment* (issued by MOFCOM, Mar. 2009, available at: <http://politics.people.com.cn/GB/897111.htm>)
  - ✓ *Interim Measures for the Supervision and Administration of Overseas State-owned Assets of Central Enterprises* (issued by SASAC, June 2011, available at: [http://www.gov.cn/jfj/2011-06/24/content\\_1891821.htm](http://www.gov.cn/jfj/2011-06/24/content_1891821.htm))
  - ✓ *Interim Measures for the Supervision and Administration of Overseas Investment by Central Enterprises* (issued by SASAC, May 2012, available at: <http://www.sasac.gov.cn/11180/11566/1258237/1258899/14404719.htm>)

### Human Rights-related Due Diligence: Example 2 Overseas Investments by Chinese SOEs

- Except the *Opinions*, all regulations explicitly require or refer to due diligence (even in the *Opinions* "3. Improve the decision-making mechanism...conduct scientific study and review, make decisions prudently, so as to prevent investment and operation risks").
- Whether due diligence shall include human rights issues is not clear (for instance, in the *Model Outline*, due diligence investigation seems to be separated from human rights-related issues, "IV. Project background and investment environment: 1. Project background: ... due diligence investigation; 2. Investment environment: ... environmental protection and labor)."
- However, it seems that the government has the authority to do human rights-related "due diligence" for companies (according to the *Regulation*, investment projects that may violate international treaties that China ratifies will not be approved by the authority, while the "economic and technical feasibility of overseas investment is up to the enterprise itself", though it shall conduct an objective assessment of its own "conditions, capacities, as well as the investment environment of the host country (region)").

### Human Rights-related Due Diligence: Example 2 Overseas Investments by Chinese SOEs

- Therefore, such due diligence is largely a one-time, business-focused exercise, with a "pre-set" aim to obtain approval from the supervisory authority, which does not require a standing system within SOEs.
- Such requirements (and the *Interim Measures*) apply to all SOEs' subsidiaries, but not required to go through supply chain.
- However, as liability is provided for SOEs and the people in charge if "there is serious flaw in risk prevention" (*Interim Measures*), it can be expected that in practice, the central enterprises may take some evident human rights issues into consideration when conducting due diligence for overseas investments.
- Therefore, with liability in place, a good human rights due diligence may be an effective defense for disciplinary or legal actions.

### Human Rights-related Due Diligence: Example 3 Social Stability & Major Investment Projects

- Background: Major impacts of big fix asset investment projects on people's livelihood and rights
- Surging social instability incidents relating to business investment in recent years (real estate development, chemical plants, etc.)
- Posing conflicting stances between business development and human rights protection

### Human Rights-related Due Diligence: Example 3 Social Stability & Major Investment Projects

- Regulation:  
✓ *Interim Measures Concerning Social Stability Risk Assessment of Major Fixed Asset Investment Projects*  
Issued by the NDRC, Sep. 2012, available at:  
<http://www.ndrc.gov.cn/departmentsite/zc/zc/fb/zcjd/201209/1020120905276873340325.pdf>
- Representing the most stringent and broadly applicable human rights-related due diligence requirement for investment projects
- Objective: "to promote scientific decision-making, democratic decision-making, as well as decision-making according to the law, so as to prevent and mitigate social contradictions" (Art. 1)

### Human Rights-related Due Diligence: Example 3 Social Stability & Major Investment Projects

- Applicable scope: fixed-asset investment projects that need to be approved or authorized by the NDRC or the State Council & are implemented/constructed within PRC.
- Due diligence procedures:
  - ✓ Investigation & analysis of social stability risks (SSRs);
  - ✓ Consult the people concerned;
  - ✓ Identify risk points, likelihood, impact scale
  - ✓ Come up with prevention and mitigation measures
  - ✓ Identify the SSR degree if such measures are adopted
- SSRs analysis to be included in project feasibility study and application report as an independent chapter.

### Human Rights-related Due Diligence: Example 3 Social Stability & Major Investment Projects

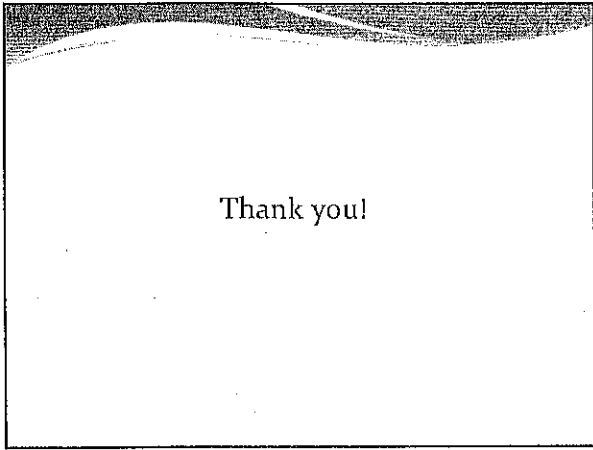
- SSRs Degrees:
  - ✓ High, Medium, Low
  - ✓ Based on two criteria: the scale of people with objection and reaction & the possibility to trigger mass incidents or contradictions
  - ✓ To be assessed by evaluation entities "designated by local government" which is to issue a SSRs report on the "legality, rationality and controllability" of the SSRs involved in the project
- SSRs Report:
  - ✓ Important basis for the NDRC/State Council's decision
  - ✓ Projects with high or medium SSRs will not be approved
  - ✓ Low SSRs projects can be approved with requirements on implementing prevention and mitigation measures

### Human Rights-related Due Diligence: Example 3 Social Stability & Major Investment Projects

- Twofold accountability:
  - ✓ For NDRC- if act not in conformity with the *Regulation* and cause significant consequences, "relevant departments and responsible persons shall be called to account according to the law"
  - ✓ For evaluation entities- if not follow the procedures and cause decision-making mistakes, or hide/falsify real situation and cause significant consequences, "responsible persons shall be called to account according to the law"
- Local implementation:
  - ✓ NDRC local chapters can establish their own SSRs evaluation mechanism for major investment projects with reference to the *Regulation*.

### Human Rights-related Due Diligence: Example 3 Social Stability & Major Investment Projects

- Comments:
  - ✓ A necessary precautionary step to lessen infringements of various rights by big investment projects
  - ✓ If implemented, it may greatly increase Chinese businesses' awareness of due diligence on social risks
  - ✓ An stability-oriented mechanism, not based on rights
  - ✓ Evaluation entities are appointed by local governments, not independent
  - ✓ People under possible impacts are consulted, not engaged/participating in the process



Thank you!