



# Handbook on Overseas Investment by Chinese Enterprises



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## Statement

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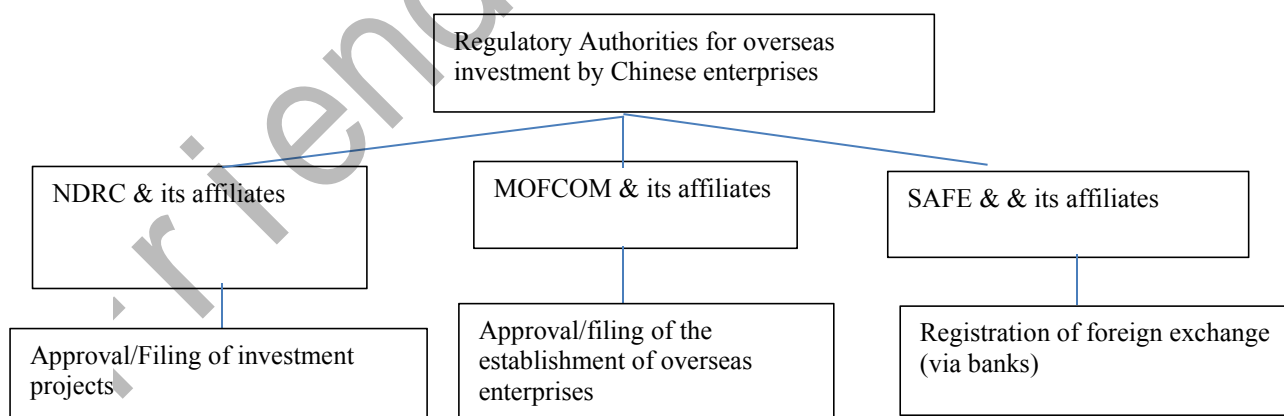
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## I. Administrative Regulations on Overseas Investment by Chinese Enterprises (General Introduction)

### 1.1 General Process of Overseas Investment by Chinese Enterprises

#### 1.1.1 Government Agencies in Charge of Overseas Investment by Chinese Enterprises

In accordance with effective Chinese laws and regulations, the overseas investment by Chinese enterprises is jointly regulated by the National Development and Reform Commission (NDRC), Ministry of Commerce (MOFCOM) and State Administration of Foreign Exchange (SAFE). On the basis of the *Measures for the Administration of Overseas Investment of Enterprises* (by NDRC in 2017), the *Measures for the Administration of Overseas Investment* (by MOFCOM in 2014) and foreign exchange regulations by SAFE, the basic approval process of overseas direct investment by Chinese domestic enterprises includes: First, investors should apply for project approval or complete project filing at NDRC or its affiliates; second, they should obtain approvals or complete filings at MOFOCO or its affiliates for the establishment of overseas investment enterprises, and obtain Enterprise Overseas Investment Certificate; finally, they should complete foreign exchange registration at SAFE or its affiliates. Below is a chart to demonstrate the three regulatory steams on overseas investment by Chinese enterprises.



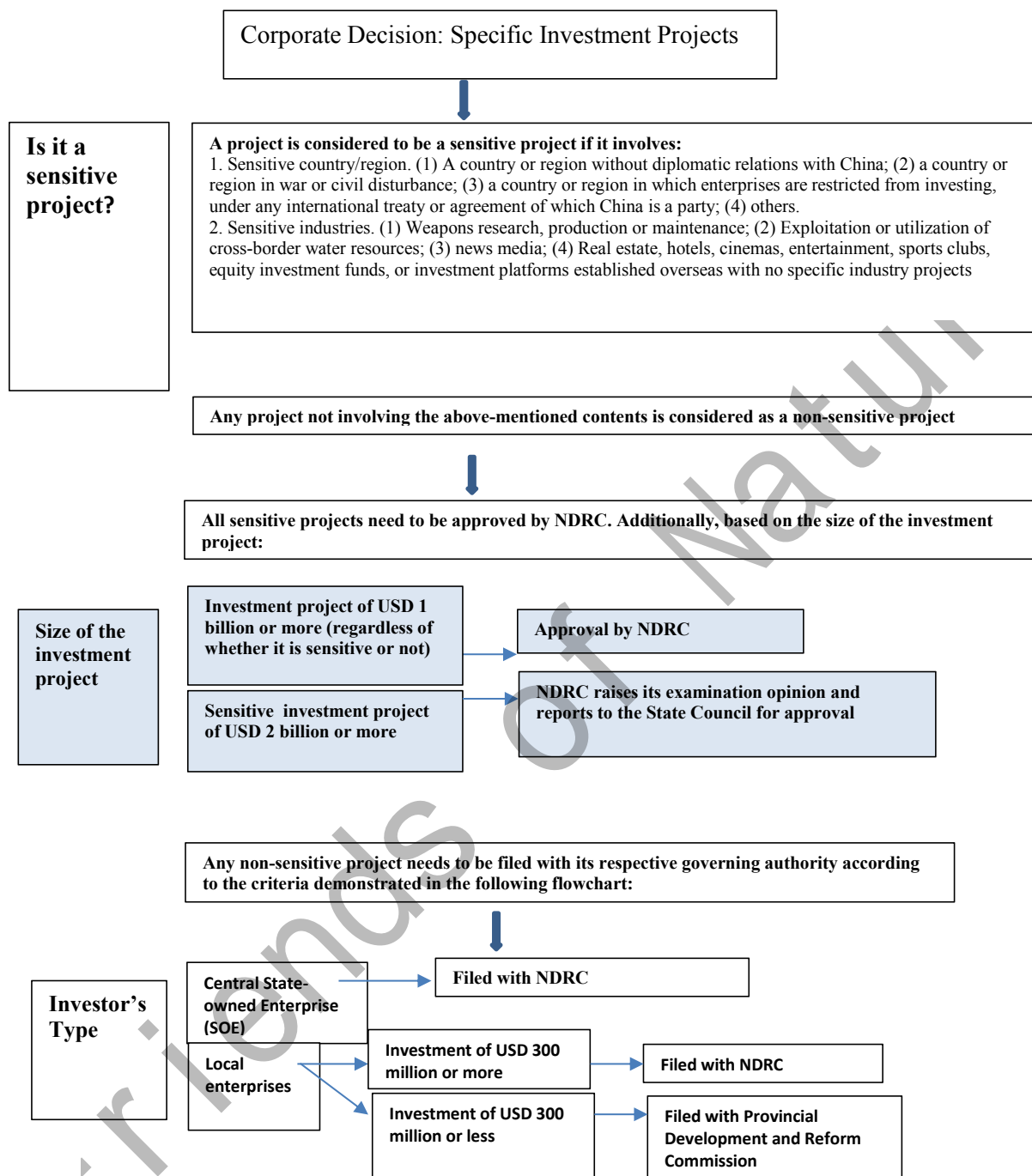
It should be noted that the respective levels of the regulatory authorities ( NDRC/MOFCOM or its affiliate at provincial level) and the respective requirement (approval or filing) are determined by the sizes and types of overseas investment projects. Please refer the flowchart in Section 1.1.2 to the detailed criteria.

### 1.1.2 General Process of Overseas Investment by Chinese Enterprises

In order to show a visual representation of the general process of overseas investment by Chinese enterprises, we have prepared the following flowchart in accordance with regulations:

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**Flowchart on Approval/Filing Process of Overseas Investment Projects:**



Note 1: Central SOEs include financial enterprises managed by the central government, and enterprises directly managed by the State Council or affiliates thereof.

Note 2: Governing authorities shall disclose information on approval and filing in accordance with the provisions of the *Regulation of the People's Republic of China on the Disclosure of Government Information*.



**Approval/Filing Criteria for the Establishment of Overseas Investment**

**Enterprises:**

Enterprise Type	Project Type	Approving Authority		Remarks
		MOFCOM	Provincial Department of Commerce	
Central SOE	Involves a sensitive country/region, or sensitive industry	Approval	/	For overseas investment subjected to approval, central SOEs should submit an application to MOFCOM, and the local enterprises should do the same through its provincial department of commerce.
	Other projects	Filing	/	
Local enterprise	Involves a sensitive country/region, or sensitive industry	Approval	Preliminary examination	
	Any other project	/	Filing	

**1.2 Different Administrative Regulations for SOEs and Private Enterprises**

1.2.1 SOEs

SOEs refer to solely state-owned enterprises, solely state-owned companies and companies in which the state has a controlling stake. Here the state refers to the State Council or the local governments. SOEs include the enterprises invested by central and local state-owned assets supervision and administration institutions and other departments, as well as the subsidiaries of these enterprises. Those SOEs funded by the State-owned Assets Supervision and Administration Commission of the State Council (SASAC) are known as central SOEs. SASAC and Ministry of Finance (MOF) have respectively introduced relevant regulations to manage overseas investment of SOEs.

SASAC has set out a negative list of overseas investment projects by central SOEs on **prohibited** and **specialy regulated** overseas investment projects. There are nine categories of prohibited overseas investment projects: (1) those have not completed necessary regulatory approval procedures; (2) those do not comply with the enterprise’s development strategy and plan as examined by SASAC; (3) those do not comply with the enterprise’ investment decision procedures and management rules; (4) commercial overseas investment projects with an expected rate of return lower than the yield of 10-year treasury bond of the project country ; (5) those do not meet the capital requirement of the project country; (6) the size of an individual investment

exceeds 50% of a central SOE's net asset of its consolidated statement in the previous year; (7) those do not specify financing, investment, management, exit method and related responsible personnel; (8) those will increase debt ratios of the enterprises under SASAC's control on debt risk; (9) those belong to "specially regulated enterprises" under by SASAC's debt risk control. There is one category of specially regulated overseas investment projects, which have an investment of USD 2 billion or more.

All central SOEs are not allowed to invest in any prohibited overseas investment project; specially regulated overseas investment projects shall be reported by the central SOE to SASAC for the examination procedures. Meanwhile, a central SOE may not make any overseas investment beyond the scope of its main business. But if a central SOE has to make such an investment with special reasons, it must obtain SASAC's approval. And the central SOE shall, upon closing of the investment, register its overseas state-owned property rights in a timely manner. Furthermore, on top of the negative list by SASAC, internally, a central SOE shall formulate a stricter and more specific negative list of overseas investment projects.

### 1.2.2 Private Enterprises

Overseas investments of private enterprises are having larger sizes and broader geographic coverage. The *Code of Conduct for the Operation of Overseas Investments by Private Enterprises* provides a standardized guidance on investment by private enterprises, and advocates that private enterprises should raise awareness on resource conservation and environmental protection, comply with environmental protection regulations in host countries, and fulfill environmental responsibilities and corresponding legal obligations. If not addressed properly, environmental issues will cause tension between enterprises investing abroad and local residents and governments. Major environmental accidents may even trigger host countries to take regulatory measures against China, which affects the development of Chinese overseas investment. After the *Guidelines for Environmental Protection in Foreign Investment and Cooperation* issued by MOFCOM and the former Ministry of Environmental Protection on 18 February 2013 to regulate environmental protection in overseas investment, the *Code of Conduct for the Operation of Overseas Investments by Private Enterprises* further proposes that "private enterprises shall pursue a resource-saving and environment-friendly business model". The private enterprise shall conduct an environmental impact assessment (EIA) before



construction, and carry out the necessary environmental due diligence (EDD) before any acquisition of target enterprise. The evaluation should be focused on hazardous waste, soil and underground water pollution as a result of the past operations of acquired enterprise and the corresponding environmental liabilities. In operation, a private enterprise shall, comply with the environmental protection laws and regulations of the host country (or region), apply for the necessary project construction permits, take reasonable measures to reduce possible adverse impacts of production and operation activities, and recycle and reduce the pollutants and the emission during production, service and product use. The enterprise shall also develop an emergency plan for possible environmental risks, and establish a communication mechanism with the local government and the public.

### **1.3 Special Administrative Regulations for the Finance Industry**

Overseas investment by enterprises in the finance industry must follow special administrative regulations by the relevant industry regulators (China Securities Regulatory Commission (CSRC) and China Banking Regulatory Commission (CBRC)) on credit, investment and financing, and others. For example, the *Law of the People's Republic of China on Commercial Banks* and the *General Rule for Loans*. Special provisions on environmental protection, Article 21 of the *Green Credit Guidelines* (Yinjianfa[2012] No.4) stipulates the overseas risks of banking financial institutions as follows: Banking institutions shall strengthen environmental and social risk management in the country where credit will be granted. To ensure project sponsors comply with applicable laws and regulations on environmental protection, land, health, safety, etc. of the host country or region of the project. Overseas projects to be granted credit must publicly commit to adopt relevant international conventions or international standards to ensure that the operation of the projects is substantially consistent with international good practices.

### **1.4 Specific Management Mechanism Examples for Overseas Investment by Chinese Enterprises**

Laws and regulations on overseas investment by Chinese enterprises only set forth mandatory provisions in the approval process of overseas investment, as stated above. For specific investment activities, particularly those in host countries, most Chinese

laws are more guiding and encouraging in nature. Notwithstanding, some systems and norms are still noteworthy which in this part we will introduce.

#### 1.4.1 Credit Rating Mechanism

In recent years the Chinese government has always emphasized the development of a credit rating system, including in the field of overseas investment. In accordance with the *Notice of the State Council on Issuing the Planning Outline for the Establishment of a Social Credit System (2014-2020)*(Guofa[2014]No.21) and the *Guiding Opinions of the State Council on Establishing and Improving the System of Joint Incentive for Keeping Faith and Joint Punishment for Losing Faith and Accelerating the Advancement of the Development of Social Honesty* (Guofa[2016]No.33), NDRC and MOFCOM issued *Guiding Opinions on Strengthening the Development of a Credit System in the Foreign Economic Cooperation Field* and the *Memorandum of Cooperation on Joint Punishment of Seriously Dishonest Entities in the Foreign Economic Cooperation Field*, which put forward requirements for the development of a credit system in overseas investments. Although the two documents (issuers include Party Organizations such as the Organization Department of the Central Committee of the CPC and others) are not legally considered as administrative regulations, their relevant requirements may be considered mandatory norms.

In accordance with the documents, China will accelerate the development of credit records in the field of foreign economic cooperation, promote information sharing, and establish a joint punishment mechanism for dishonesty. The joint punishment mechanism can reward the honest, restrict the dishonest, and increase impact on punishing dishonesty. Supported by the national credit information sharing platform and national enterprise credit information publicity system, the state will, in due course, collect, handle, disclose and apply credit information. , we can view overseas investors with bad credit records from “bad credit record” special website on the “Go Global” Public Service Platform on the official website of MOFCOM (website: <http://zsmtjhzs.mofcom.gov.cn/gsappp/pages/zsmwp/gov/BadRecordListShow.html>). However, information on this platform is not updated on time, and only 10 publicity examples are available but never updated).

#### 1.4.2 Regulations for Environmental Protection

The *Guidelines for Environmental Protection in Foreign Investment and Cooperation* (“*Guidelines*”) encourages enterprises to build the mentality of

environmental protection, fulfill respective environmental responsibilities according to the laws, comply with the environmental protection laws and regulations of host countries, and perform legal environmental obligations of host countries, including EIA, discharge in compliance with standards, and environmental emergency management. Pursuant to the *Guidelines*, enterprises shall set up their environmental management systems to prevent pollution, including the establishment of an internal environmental management system, environmental protection training for staff, EIA, biodiversity assessment, social impact assessment, discharge in compliance with standards, environmental monitoring requirements, EDD, hazardous waste management, prevention and emergency response of environmental accidents, ecological restoration, clean production, and sustainable procurement. Article 8 of this document states: Enterprises shall, in accordance with requirements of laws and regulations of the host country, conduct environmental impact assessment on their development and construction as well as production and operation activities, and take reasonable measures to reduce possible adverse impacts based on the findings of such environmental impact assessment. Article 15 states: Enterprises shall carefully consider the ecological function positioning of the area where the project is located. For the animal and plant resources with conservation value, which are located at the project area, the enterprise can, with the cooperation of the host country's government and the community, give priority to adopting measures such as on-site and nearby protection, so as to reduce the impact on local biodiversity. For negative ecological impacts caused by investment activities, enterprises are encouraged to carry out ecological restoration in accordance with requirements of laws and regulations of the host country or common practices in the industry.

The *Guidelines for the Green Development of Outbound Investment and Cooperation*, which was jointly issued by MOFCOM and Ministry of Ecology and Environment in July 2021, proposed that overseas investment enterprises shall adopt measures to reduce or mitigate the possible adverse impacts on the ecological environment caused by the investment, in accordance with requirements of laws and regulations of host countries. Regarding adverse impacts on biodiversity, enterprises shall protect and restore the ecological environment in accordance with laws or international practice. If there is no related laws and regulations in host countries or their standards are relatively too low, enterprises are encouraged to carry out investment activities under general standards of international organizations or

multilateral agencies, or under Chinese standards. Enterprises are supported in overseas investment on clean energy, including solar energy, wind energy and biomass energy.

#### 1.4.3 Encouraged, Restricted and Prohibited Industries of Overseas Investment

The *Guiding Opinions on Further Guiding and Regulating the Direction of Overseas Investment* (August 2017) (“*Guiding Opinions*”) provides a list of encouraged, restricted and prohibited categories of investment activities. Enterprises are encouraged to conduct overseas investment in infrastructure, production capacity and equipment, high technologies and advanced manufacturing, energy resources, agriculture, service and other sectors, including: (1) overseas investment beneficial to the Belt and Road Initiative and connection of existing infrastructures; (2) overseas investment that facilitates the export of advanced industrial capacity, high-quality equipment and technology standards; (3) investments and collaborations with overseas high-tech and advanced manufacturing companies, and establishment of overseas R&D centers; (4) participation in exploration and development of natural gas, minerals, and other energy resources based on a careful assessment of economic benefits and profitability; (5) overseas agricultural collaboration to carry out mutually beneficial and win-win investment cooperation in the fields of agriculture, forestry, stock farming, fishery and others; (6) investments in service sectors such as commerce, culture, and logistics, as well as establishment of overseas branches and service network of qualified Chinese financial institutions for operations in compliance with laws and regulations.

In recent years, some enterprises have frequently made big acquisitions in the areas of real estate, hotels, cinemas, entertainment, sports clubs, etc. In accordance with *Guiding Opinions*, such category of overseas investment is restricted, and subject to approval and supervision by relevant regulatory authorities. Additionally, overseas investment in projects, which adopt outdated production equipment and fail to meet environmental, energy consumption and safety standards in the host country, is restricted. Five types of overseas investment activities, which may undermine national interests or security, are prohibited: (1) overseas investment related to the export of core military technologies and products without government approval; (2) overseas investment using technologies, techniques, or products that are prohibited from export; (3) overseas investment in gambling or porn industries; (4) overseas investment prohibited based on international treaties and regulations in which China is a party; (5)

any other overseas investment that will or may undermine national interests or security.

Besides this, on 31 January 2018, NDRC issued the *Catalogue of Sensitive Industries for Outbound Investment* (Edition 2018) to announce sensitive industries for overseas investment in the format of an individual catalogue of sensitive industries, including research, production or maintenance of weapons, exploitation or utilization of cross-border water resources, and news media, etc.

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## II. Chinese NGOs' Way of Working and Case Study

To better understand the way of interaction and respective effective methods between civil society and the government in the Chinese context, in this section of the handbook, several common work methods and specific operation processes of non-governmental organizations (NGOs) in China will be introduced. This includes the application to disclose government information, participation in government-organized forums, communication with respective government departments through allegation letters, and litigation-based solutions.

Indeed, NGOs can participate to problem solving at any time. However, (in most cases) the NGOs are encouraged to participate earlier and proactively. When a project is found to (potentially) cause an adverse impact, we want to get involved and help eliminate or minimize these negative impacts. Most commonly, during or after ecological environment destruction or environmental pollution, NGOs identify the issue and participate in problem solving process. In recent years, however, more and more NGOs have shifted their attention to earlier stage of a project, such as planning stage, EIA, and even zoning stage of an area, in order to prevent problems before occurring. On the other hand, some case studies show that earlier participation also reduces resistance towards the NGOs, and offers more flexibility. Therefore, in this handbook, we will share the most common milestones that NGOs in China choose to participate in projects, these are: project planning and EIA planning, EIA, construction and post-construction stages.

### 2.1 Disclosure of Government Information

Before project commences, usually related information must be submitted to the relevant government agencies. They will, in accordance with the laws, regulations, plan and etc., examine and determine whether the project meets applicable regulations. Therefore, the government agencies will obtain large amounts of information related to construction projects. Disclosure of government information provides an effective way to obtain the aforesaid project information and an important way for local Chinese NGOs to perform routine work.

### 2.1.1 10 Frequently Asked Questions about Disclosure of Government Information

◆ What is the disclosure of government information?

It is a right of citizens, legal persons and other organizations under the *Regulation of the People's Republic of China on the Disclosure of Government Information*. To ensure the right to know of citizens, legal persons and other organizations, disclosure of government information means that the recorded and stored information, which the administrative organization (the government and its departments) produces or acquires in performing their respective administration functions, should be timely and accurately made public in an appropriate form.

◆ Who can request the disclosure of government information?

Any citizen, legal person and any other organization can obtain government information in line with the law. Environmental protection organizations as “other organizations” and staff of environmental protection organizations as “citizens” can request information disclosure in their respective status.

◆ Who is responsible for disclosure of government information?

Entities responsible for are: the government and its dispatched agencies, internal agencies, and public enterprises and institutions closely related to the people’s interests. For example, MOFCOM, DRC of XX Province, XX Municipal Government, Department of Ecology and Environment of XX Province, Ministry of Natural Resources, public enterprises and institutions in charge of education, hygiene and health, and environmental protection.

◆ What is “government information”?

Government information is the information produced or acquired by the government and/or its affiliates specified in the previous question while performing their administrative duties, which is recorded or stored in certain format. In other words, for the documents that are not available online, such as the approval and record information of XX overseas investment projects, *Environmental Impact Assessment Report of XX Construction Project* (Table), and Construction Permit of

**Tips:** The above description specified “...produced or acquired while performing their administrative duties”. The corresponding “information on the entity’s internal affairs”, and “discussion draft prepared during the performance of duty and information in administrative law enforcement script” and etc. can be exempt from disclosure.

XX Construction Project, we can try to get access by requesting the disclosure of



government information.

◆ Which information cannot be disclosed?

State secrets cannot be disclosed. Information related to trade secrets and personal privacy that will, if disclosed, damage the legitimate rights and interests of any third party, cannot be disclosed. However, if the third party gives consent for disclosure of such information, or non-disclosure of such information will have significant impact on public interests, such information shall be disclosed.

● In which ways will information be disclosed?

Information can be voluntarily disclosed or by request.

◆ Which government information shall be disclosed voluntarily? How do I know which information can be disclosed?

Public information, including administrative regulations, organizational structure, finance, healthcare and education, shall be disclosed voluntarily. For the detailed scope, see Article 20 of the *Regulation of the People's Republic of China on the Disclosure of Government Information*, and the catalogue of information disclosure available on the websites of administrative departments. You may retrieve information that has been voluntarily disclosed.

◆ To whom shall we send request on information disclosure? How do we request?

You shall send the request to the administrative department that has produced, obtained, recorded and stored the information. Log in to the website of the administrative department, refer to the *Guide to Information Disclosure* and fill in the Application Form of Information Disclosure. Generally, the administrative

**Tips:** Specify the information you are requesting to be disclosed, such as the name, and corresponding entity in charge of production and storage of the information, file name. Try to ensure that these information are accurate and complete.

department provides two different application methods: online or by mail.

◆ How long will we receive a reply after submission of the request on the disclosure of government information?

You will receive a reply within 20 working days upon receipt of the request by the administrative department. Extension of the deadline will not exceed 20 working days.

◆ Which remedies are available?

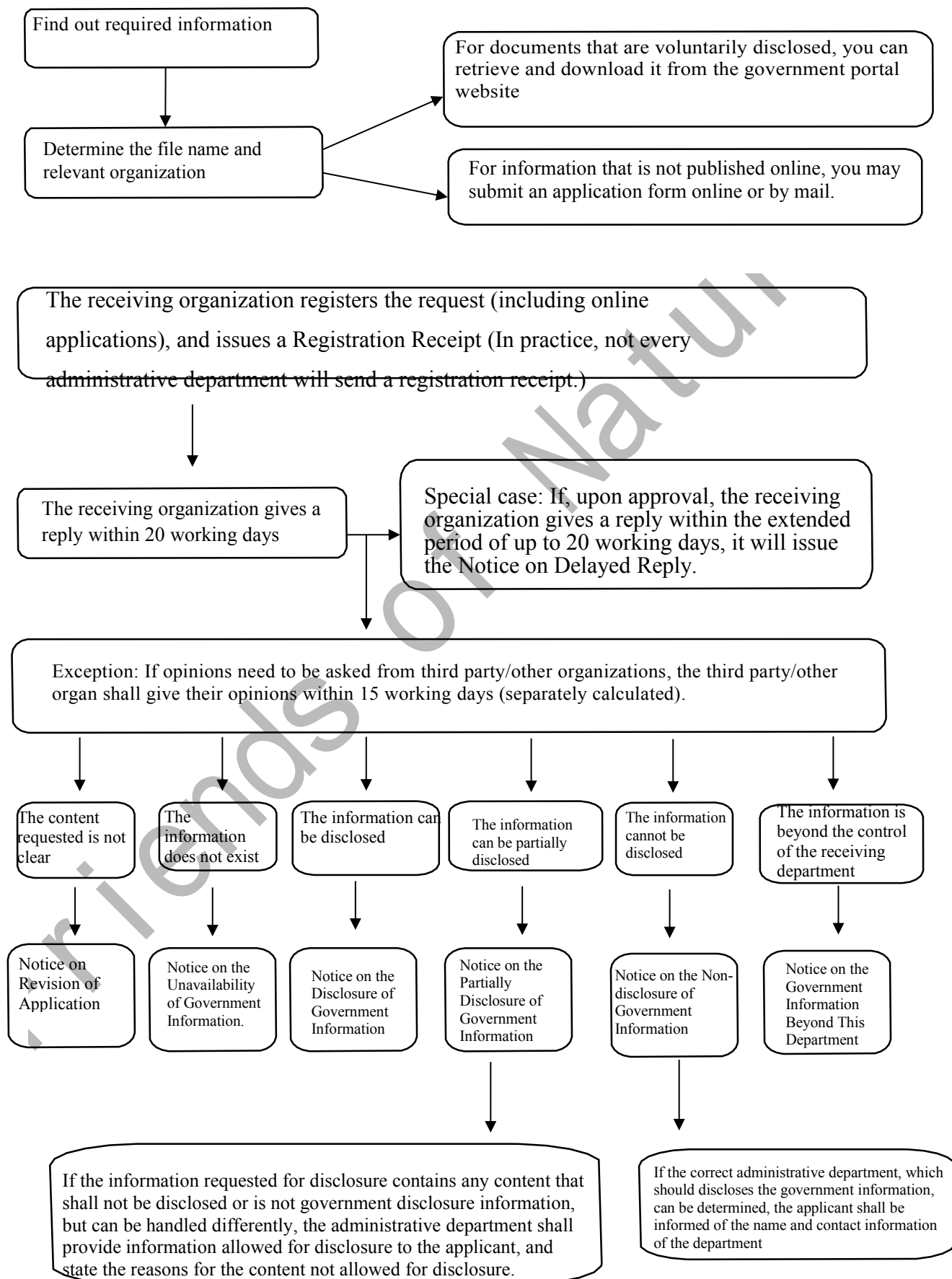
If the administrative department has rejected the request to disclose the

information, you can try the following remedies:

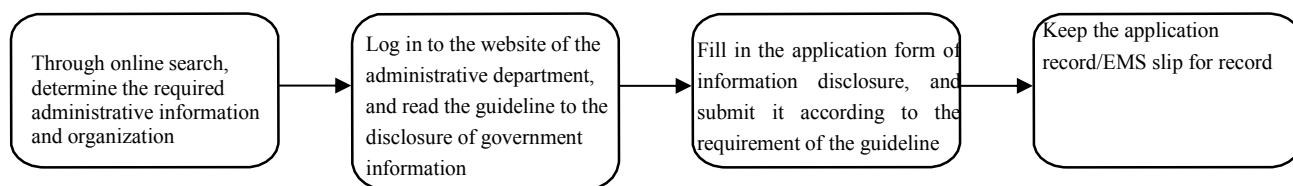
1. Make a public complaint or report to a higher level administrative department;
2. Apply for administrative reconsideration;
3. File for administrative litigation;
4. Appeal (public enterprises and institutions).

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2.1.2 Flowchart of Process on Information Disclosure Request



### 2.1.4 Operation Procedures



## 2.2 Reporting

Reporting by the public is a supervision behavior that any citizen, legal person and other organizations have the right to report any ecological damage or non-performance of its duty in ecological protection by any government department to relevant authorities. In accordance to the provisions of the *Environmental Protection Law of the People's Republic of China* and the *Measures for Public Participation in Environmental Protection*, the citizens, legal persons and other organizations are entitled to report to the environmental protection administrative departments if they find behavior of polluting the environment or destroying the ecology by any entity or individual. The citizens, legal persons and other organizations shall be entitled to report to the respective higher level of authorities or supervisory authorities if they find any non-performance of duties by the local people's governments at all levels, or the environmental protection administrative departments of a county governments or higher. The public can report the related information via the form of letter, email, call or other channels, through the environmental violation reporting hotline, the reporting platform of the government website, and mail box and telephone number or other channels provided by special task force such as the central environmental protection inspection task force. (In this section, based on the allegation letter as an example, we will show you how Chinese society participates in environmental protection through reporting.)

### 2.2.1 Components of the Allegation Letter

The allegation letter is also known as a letter that a citizen, legal person or other organizations use to report to the relevant government department.

The allegation letter includes the name, description of problem, the violation, the proposal, signature, date, and contact information.

Name: Refers to the receiving organization of the allegation letter, for example, the relevant industry department, and the relevant department of ecological environment.

Signature: the organization and individual submitting proposals (with seal, signature, etc.).

Contact information: Must provide true and effective contact information (address, telephone, mail box, etc.)

### 2.2.2 Key Points in the Allegation Letter

First, in terms of description of the core problem, basis of violation and proposal, based on different problems to be reported, there are different requirements for the content: For ecological damage caused by entities or individuals, the allegation letter must contain:

- (1) Detailed description of the facts of ecological damage (in writing and with image record);
- (2) Legal basis for the illegal act;
- (3) Specific provisions on the administrative department's duty to supervise;
- (4) Measures to be adopted by the government department.

Second, the allegation letter must be concise, clear and well-founded. It is recommended to contain as much evidence as possible such as pictures, images, GPS tracing and existing legal bases at home and abroad.

Third, the letter of proposal, for example, must have a solid basis of facts, scientific evidence or law or policy to raise any problem or propose solutions.

### 2.2.3 Submission of the Allegation Letter

In China, an allegation letter must be submitted through EMS service (because the administrative department usually does not receive mails from other express delivery companies). The applicant should record the tracking number to check the delivery status. Overseas applicants shall submit their allegation letter through an efficient mail delivery company.

In China, besides the allegation letter, environmental protection organizations and the public can report through phone calls (“12369” environmental protection hotline, “12345” mayor hotline, and any reporting hotline published by and other special task force such as the central environmental protection inspection task force),

websites (log in to the official website of a government department responsible for supervising the reported ecological damage problem, enter the page for online complaint or reporting, fill in and submit the accurate information to be reported).

#### 2.2.4 Case Study: Damage of North Chinese Leopards' Habitat in Shanxi

##### (1) Background

As the only subspecies of leopards found in China, North Chinese leopards, which are wild animals classified under first-class national protection, have been placed on the list of endangered species by International Union for Conservation of Nature (IUCN). After excessive poaching, the North Chinese leopards have almost disappeared in Gansu, Henan, Ningxia and Beijing, and a small number survived in Hebei and Shaanxi. At present, Shanxi is known to have the largest number of wild North Chinese leopards, and their habitats can be found in many places. Since 2008, several teams have recorded the activities of the North Chinese Leopards in mountainous areas of Heshun county, Shanxi province. In recent years, the Chinese Felid Conservation Alliance (a local Chinese organization focused on environmental and animal protection, known as CFCA) have recorded many videos of North Chinese leopards through an infrared camera and identified individual leopards. North Chinese leopards are used to acting alone in their territory. The territory of a leopard ranges from a little more than 10 square kilometers to hundreds of square kilometers. Therefore, they require space to hunt preys and reproduce. In August 2015, CFCA learned that a wind power project would be built on the habitat of North Chinese leopards and might cause damages. The CFCA delivered a proposal to the local county government, which emphasized the adverse impact of this project on the quality of North Chinese leopards' habitat. On 13 August 2015, however, the EIA report of the wind power project received an official, written approval from the Department of Environmental Protection of Shanxi Province. Construction of the wind power project would directly damage the core habitat of North Chinese leopards, thus causing a great impact on the survival and reproduction of this endangered species.

##### (2) Reporting Process

In August 2015, as soon as CFCA first learned that a wind power project would be built on the habitat of North Chinese leopards, the organization delivered a proposal to the local county government, which emphasized the adverse impact of this project on the quality of local habitat for North Chinese leopards. In April 2016, they

submitted a proposal to the local provincial department of environmental protection, department of forestry, local county government and etc. In June of the same year, CFCA, along with other environmental protection organizations as Friends of Nature and SEE Foundation, respectively sent an allegation letter to eight government departments, including National Forestry and Grassland Administration, Department of Environmental Protection of Shanxi Province, Department of Forestry of Shanxi Province, and Heshun County People's Government.

### (3) Content of the Report

According to responsibilities of the respective government departments, the content of the report showed different focus, but the core content included:

- a. The area of the wind power project is a core habitat of North Chinese leopards: This was supported by the data collected of their activities monitored by infrared cameras in this area over years;
- b. The EIA report of the construction project contained major flaws concerning the findings of wild animals: Comparison between the specific description in the EIA report and actual condition;
- c. The construction project violated the regulations on protection of wild animal habitats: list the provisions from the *Law of the People's Republic of China on the Protection of Wildlife* to show that the construction is illegal;
- d. The report urged relevant government departments to verify the reported fact and take protective measures as soon as possible;
- e. The report indicated that NGOs were willing to fully communicate with the government departments to promote protection.

### (4) Result of the Report

In June 2016, about one week after eight allegation letters were sent to the government departments, CFCA received *Reply of Department of Environmental Protection of Shanxi Province to the Letter of Proposal on Canceling the EIA Approval of the Wind Power Project in Heshun County, Jinzhong City*. The reply document pointed out the two issues stated in the allegation letter, namely, “the project is located within the habitat of North Chinese leopards” and “the construction and operation of the project will cause a serious impact on the survival and habitat environment of local North Chinese leopards”, the Department of Environmental Protection of Shanxi Province “has informed the development organization by letter to carefully verify the actual condition, and suspend project construction before a



result is reached. It will, based on the verified conditions, make a decision upon full argumentation and receipt of opinions from relevant departments.”

(5) Reflection on Experience

The following are learning points from the case on habitat protection of North Chinese leopards:

a. Early intervention. Before the construction project could damage the habitat of North Chinese leopards, environmental protection organizations intervened in this project, and were met with less resistance. In practice, however, ecological damage would have occurred before the problem was found and reported, which would be much harder to resolve.

b. Rich, reliable and well-founded reported material and data. For a long time, CFCA monitored and investigated the area involved in this case, so they were able to obtain detailed distribution data of North Chinese leopards. Through a comparison with information from the EIA, CFCA could clearly identify the problems of the construction project to determine that the laws were violated and could possibly impact the leopards.

c. Cooperation with government departments. In the reporting process, CFCA always fully communicated with the local government, actively interacted and assisted the department on the areas of supervision and protection;

d. Reporting through multi-party cooperation. CFCA cooperated with several other environmental protection organizations to prepare the report. Using their respective advantages and resources, those environmental protection organizations participated in the reporting work, including writing the allegation letter and identifying the government departments to which the letter was submitted. The joint reporting by these organizations also helped enhance the credibility and importance of the reported content.

### **2.3 Forums and Hearings**

As two channels of listening to and exchanging opinions, forums and hearings mainly involve the executive, legislature and judiciary (this handbook focuses on the executive decisions). In the field of ecological protection in China, targeting the formulation of major public policies and measures for environmental protection, or those for the development, utilization and protection of important natural resources

and cultural resources, and construction projects where public carry more divisive opinions of environmental impact, the decision undertaking organizations and others will hold forums and hearings to listen to opinions in accordance with regulations. Based on discussions during these sessions, a decision will be made.

In accordance with the provisions of the *Administrative License Law of the People's Republic of China* and the *Measures for Public Participation in Environmental Impact Assessment* and so on, unlike a forum, a hearing generally has stronger binding force and effect. The relevant provisions are stated as follows: Under circumstances stipulated by law, stakeholders will enjoy the right to demand hearing; the relevant department of ecological environment shall, on the basis of the provisions on the administrative license hearing, hold the hearing; the administrative department shall, based on the hearing record, make a decision on administrative approval.

### 2.3.1 Participation Procedures

#### (1) Participation Method

The public can actively apply to participate in a forum on the EIA and the impact assessment of a construction project (by sending an application letter to the organizer of the session), or may be invited to the forum because of a submitted proposal.

Generally, the NGOs that attended these forums are held by the plan preparation organization or the project EIA preparation organization. **It should be noted that NGOs can also attempt to get the related department to hold a forum.** In respect of the EIA report of Shandong xxx petrochemical industry base, Friends of Nature and several other NGOs submitted proposals to the plan preparation department, and indicated their desire to conduct a face-to-face exchange in the letter. To this end, the plan preparation department specially held a forum in the presence of NGOs. All the parties present at the meeting conducted face-to-face exchange over the potential environmental impact of this plan.

Residents within the scope of the environmental impact construction project are also allowed to apply to attend the hearing. Sometimes, the hearing only allows stakeholders within the impacted scope to attend the discussion. The environmental protection organizations beyond this scope are not allowed to participate.

#### (2) Participation Preparation

Before attending a discussion session, the public shall carefully study relevant documents, data, policies and laws. They shall, when necessary, seek support from

professional technical personnel, and ask these personnels to put forth opinions of and proposals for environmental impact on the basis of the EIA report.

### 2.3.2 Participation in the Follow-up Work of the Forum

The end of the forum does not mean the end of the work. Regardless of major administrative decisions or legislation, we propose that the public or environmental protection organizations continue to follow up on the work through multiple ways.

#### (1) Continue to submit written opinions

After attending a discussion session or hearing, the public can, according to the content of the above meeting, continue to submit the written opinion to the relevant department.

#### (2) Follow up on planning of the next process

It is recommended to establish contact with related organizations and maintain communications with them. In respect of any plan or other major decisions or local legislation, the public have more than one participation chances. The more information you obtain through early participation, forums and other channels will better help you participate in the next work.

#### (3) Media

Media usually focuses on major topics of discussion. The public or environmental protection organizations can establish good cooperation with media, through which they convey and express their desired opinions and proposals. Environmental protection organizations can also convey proposals for legislation or administrative decisions to the public through cooperation with media, or attract the attention of decision-makers or lawmakers by virtue of media platforms.

## 2.4 Environmental Public Interest Litigation

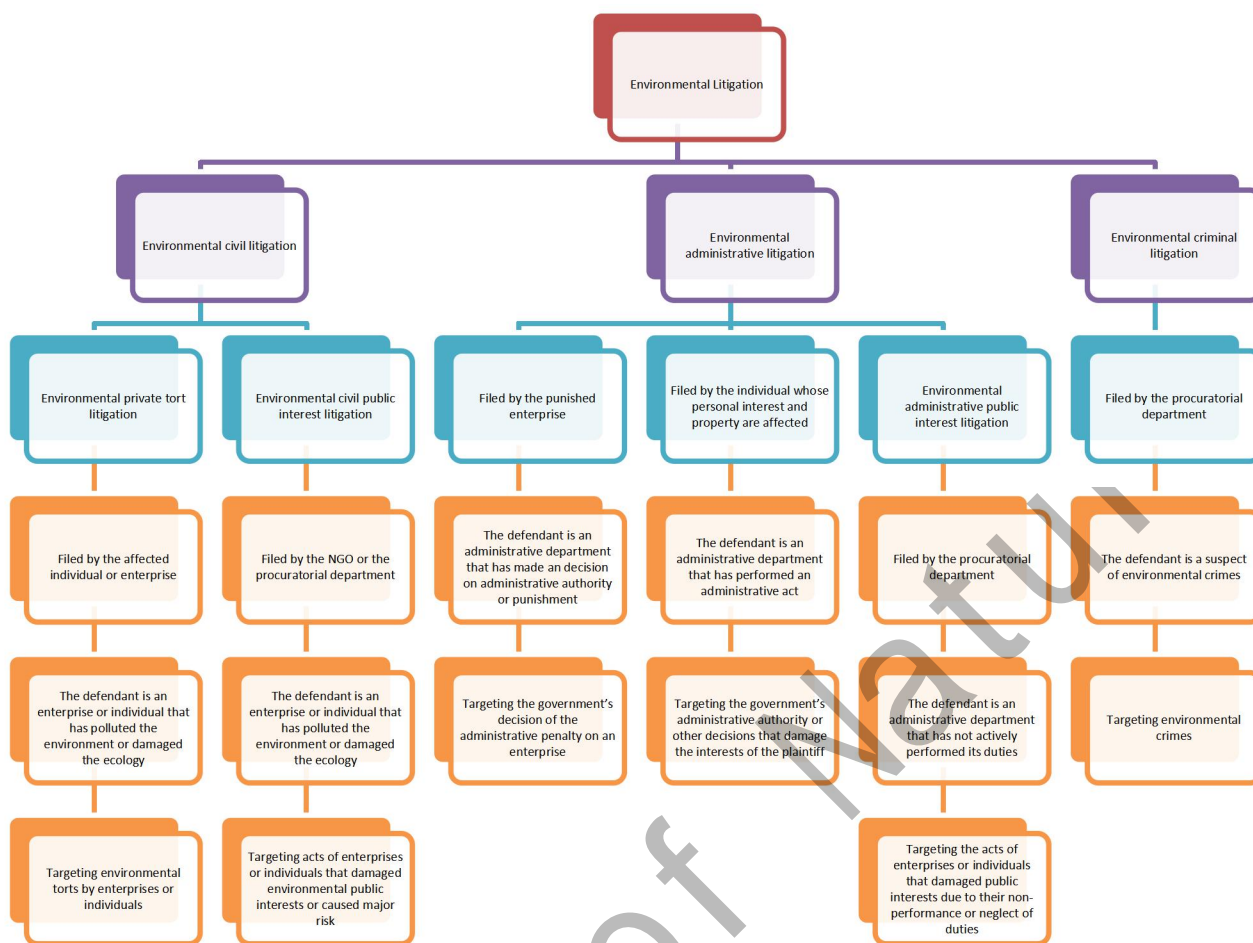
Chinese environmental litigation falls into environmental civil litigation, environmental administrative litigation and environmental criminal litigation, among which environmental civil litigation and environmental administrative litigation include private interest litigation and public interest litigation respectively.

Environmental private interest litigation is a civil or administrative litigation that an individual or group files against an enterprise or individual on the basis that wrongful actions or administrative act carried out damaged the personal interest or property of the above individual or group or the ecological environment. In this type

of litigation, the plaintiff is generally an enterprise or individual, and the defendant is generally an enterprise or individual having performed a wrongful act. In administrative litigation, the defendant is usually an administrative department (e.g., the department of ecological environment having approved the EIA report of a construction project, or the planning department having approved a plan) that performs a specific administrative act.

Environmental public interest litigation is litigation filed to the people's court by a subject without immediate interests affected. The litigation is carried out against an act which damages public interests through environmental pollution and ecological environment damage. It falls into the environmental civil public interest litigation and the environmental administrative public interest litigation. In the environmental public interest litigation, the plaintiff is an eligible environmental NGO or procuratorial department, and the defendant is usually an enterprise or individual that incurred damage or major risk to environmental public interests. At present, this type of litigation can only be filed by a procuratorial department, and the defendant is usually an administrative department that has incurred damage or major risk to environmental public interests due to its non-performance or neglect of its administrative duties.

In consideration of the main reader group of this report, we will mainly describe the experience and typical cases of environmental civil public interest litigation brought by local Chinese NGOs. In the period from January 2015, when the revised *Environmental Protection Law of the People's Republic of China* came into force, to the end of 2019, Chinese courts at all levels accepted and handled 356 cases of civil public interest litigation.



### 2.4.1 10 Questions about Environmental public interest litigation

- What is environmental public interest litigation?  
Environmental public interest litigation refers to the litigation that the legally prescribed authorities and relevant social organizations, in accordance with the law, take legal actions to the people's court against acts of environmental pollution and ecological destruction that has damaged or has a significant risk of damaging social public interests.
- Who can initiate environmental public interest litigation?  
Social organizations that have been registered in civil affairs departments of the people's governments and have been engaged in environmental protection public welfare activities for more than five consecutive years without illegal records; or any procuratorial department.
- Who is the defendant of environmental civil public interest litigation?  
The defendant is any enterprise or individual that, in the process of production or operation, pollute the environment or destroy the ecology,

thereby harming the public interests of the society or having major risks of harming public interests. For example, an enterprise that conducts mining activities in the core area of a nature reserve and has damaged important habitat of endangered wild animals. Or, a steel enterprise, which has discharged atmospheric pollutants such as carbon monoxide and nitrogen oxide to its surroundings for many years.

- How many types of environmental civil public interest litigation are there?
  - Atmospheric pollution;
  - Water pollution;
  - Soil pollution;
  - Solid waste pollution;
  - Noise pollution;
  - Biodiversity protection, for example, protection of wild animals and plants, habitats or ecological systems, and so on; litigation to cope with climate change;
  - Protection of marine environment, for example, damages to mangrove forests.
- What is the appeal of environmental civil public interest litigation?
  - Tort stoppage, for example, the plaintiff demands the offending enterprise to immediately stop discharging excessive amounts of atmospheric pollutants into the atmospheric environment;
  - Danger elimination, for example, the plaintiff demands the offending enterprise to immediately stop construction that may damage an important habitat of endangered wild animals;
  - Reinstatement, for example, the plaintiff demands the offending enterprise to clean up farmland polluted by heavy metal until the farmland is restored to an unpolluted state;
  - Compensation for damage, for example, the plaintiff demands the offending enterprise to compensate the plaintiff for restoration necessary to govern the polluted farmland;
  - Apology, for example, the plaintiff demands the offending enterprise to issue an apology in newspaper through a medium to ensure that the enterprise acknowledges its harm to public interests.
- Who is the trial court of environmental civil public interest litigation?
- The first instance of environmental civil public interest litigation shall be

under the jurisdiction of the local intermediate people's court or higher, in the place where the act of environmental pollution or ecological destruction occurred, or the defendant's residence.

- What is the relationship between environmental civil public interest litigation and Strategic Lawsuit Against Public Participation (SLAPP)?

In most cases, any environmental civil public interest litigation, initiated by social organizations, may meet conditions of SLAPP most of the time. That is, they want to rely on litigation to promote systematic change or accelerate the settlement of a type of problem, or change of an industry, or the improvement of a legal institution.

- How much is the cost to pursue environmental civil public interest litigation?

The plaintiff may be required to pay a series of fees in advance, such as acceptance fees, appraisal expenses, costs of investigation and evidence collection, inspection fees, lawyer's fees and expert's fees. If the plaintiff finally wins the case, the court may require the defendant to pay all or part of the aforementioned costs paid by the plaintiff, provided that if the plaintiff loses, the plaintiff will have to bear all the aforementioned costs.

- What is the goal of environmental civil public interest litigation?

Increase the cost of environmental violations and produce deterrent effect;  
Contribute to solve specific environmental problems, and protect public interests;  
Work hard to solve environmental pollution, biodiversity protection and so on from an institutional perspective.

- What social influence does environmental civil public interest litigation have?

In spite of a low number of environmental civil public interest litigation filed by social organizations, the types of cases are relatively rich, with high social attention and great influence.



## 2.4.2 Flowchart of Environmental Civil Public Interest Litigation



### Tips:

- Environmental civil public interest litigation initiated by NGOs tends to have a vast variety of sources, ranging from media coverage to reports from community residents. Although the public interest litigation to safeguard the public interest and private interest litigation in personal property interests are different, and also different types of litigation, public interest litigation for some cases, particularly in cases of pollution involving public health, the effective resolution of public interest litigation can, to some extent, help solve pollution problems faced by local communities or the protecting of biodiversity.
- Some public interest litigation cases require a longer period for enforcement. In particular cases which involve pollution control and ecological environment rehabilitation may sometimes take several years of enforcement upon judgment or mediation. In this period, the relevant environmental protection organizations have to continuously return to the sites involved in the cases to supervise the defendants to effectively govern and rehabilitate local ecological environment according to the judgment of the court or the agreed plans. The measures are in place to ensure that the goals of the litigation are reached, and public interests are protected.

## 2.4.3 Case Study: Chinese Environmental Protection NGO's Litigation Against Chinese Commercial Banks for Illegally Granting Loans to a Polluting Enterprise

### Case Details

When it conducted a survey on the water pollution of Han River (the largest tributary of the Yangtze River), an environmental protection organization found that an agriculture and animal husbandry co.ltd violated the EIA report and approval of the project. For many years, the company did not build farmland irrigation facilities, nor passed the environmental protection completion inspection. As a result, its breeding waste water was discharged into the spring water passing through the factory

area via the sewage pipe. The waste water then entered the Han River, thus contaminating the river and affecting water quality. After further investigation, the organization also found that during production, the company was granted loans as working capital by two Chinese commercial banks to support the breeding and production of its animal husbandry. The company did not build farmland irrigation facilities, nor passed the environmental protection completion acceptance, and its production clearly violated the legal regulations on environmental protection. From the view of the environmental protection organization, the two commercial banks broke the lender's obligation of compliance examination by offering loans to such company that supported its illegal production, and gained profit through obtaining loan interest from the illegal production, thus continuing and expanding the issue of pollution on the Han River. Therefore, the environmental protection organization believed that the two banks should bear joint liability for their fault in this process since they constituted a joint tort with such company.

In June 2018, the environmental protection organization filed an environmental civil public interest litigation to a local intermediate people's court against the agriculture and animal husbandry co.ltd regarding the pollution of the Han River by discharging breeding waste water. In July of the same year, the organization submitted to the same court an application for additional defendants in order to add the two commercial banks as joint defendants of the case. At present, this case is still being heard.

### **Influence of the Case**

This litigation is the first time that Chinese commercial banks were required to bear the legal liability for environmental problems at a Chinese court. The evolution from environmental risk into financial risk may contribute to the passing of the Chinese Superfund Act.

The litigation is the first time that the environmental liability of banks has been promoted to the legal level. Although the final result remains to be determined, it is a litigation of great influence. The case also sounded an alarm to financial institutions such as Chinese banks, indicating that the lender's environmental legal liability may eventually come. In this case, if the court decides that banks are to bear joint liability, this precedent will signify to banks the need to strengthen control over environmental

risk. In other words, if any bank fails to strengthen the control over environmental risk, and continue financing illegal polluting enterprises, the bank will possibly bear legal risk as well. Thus, the resulting environmental legal liability will cause the lender to lose both economic interests and reputation.

Friends of Nature

### **III. Case Analysis: Investment of CHN ENERGY Investment Group in Coal Power in Indonesia (Java 7, Sumsel 1, and Sumsel 8)**

#### **Background Information**

Over the past five years, the number of suspended or canceled coal power projects related to China has outnumbered the same types of projects that were put into production<sup>1</sup>. Overseas coal power projects face great political and financial challenges in most host countries. Indonesia is one of the major countries within the implementation of China's Belt and Road Initiative and also the world's largest archipelago country, with a focus on thermal power in its power generation energy structure. As the largest energy producer and consumer in Southeast Asia, it is one of the countries where China makes the most overseas investments in coal power projects. In the country, the power industry is facing rapid growth, but coal power plays a leading role in the current power generation structure and the renewable energy industry (primarily hydropower, geothermal and biomass power generation and secondarily PV and wind power generation) are slowly developing.

Among Chinese enterprises making energy investment in Indonesia, CHN ENERGY Investment Group Co., Ltd. ("CHN ENERGY") is the most important enterprise that made an investment in coal power projects. Guohua Electric Power Co., Ltd, a wholly-owned subsidiary under CHN ENERGY, mainly engages in thermal power business (After restructuring of several large Chinese energy companies, Beijing Guohua Power Co.,Ltd. and Guohua Power Branch of China Shenhua Energy Company Limited are collectively referred to as Guohua Electric Power Co.,Ltd). Now, Guohua Electric Power Co.,Ltd has established four holding subsidiaries and one joint venture in Sumatra Island and Java Island in Indonesia. By the end of 2019, CHN ENERGY had made an investment of over \$20 billion in the energy field in Indonesia, which makes CHN ENERGY the largest Chinese investor in the country's power generation industry.

On the basis of Indonesia-based coal power investment case of CHN ENERGY, the local conditions of the host country and concerns from the local communities and

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<sup>1</sup>Research Report of the Center for Research on Energy and Clean Air (CREA), <https://energyandcleanair.org/wp/wp-content/uploads/2021/06/CH-CH-Overseas-Coal-Briefing.pdf>

NGOs, this handbook will analyze how the problems can be resolved in these specific cases.

### **Coal Power Investment Project of Chinese Enterprises**

Java 7, namely, No.7 coal power generation project of Guohua Electric Power Co.,Ltd in Java Island, is located on Banten Bay in the northwest of Java island, Indonesia. This project involves a total investment of RMB 12 billion (US\$1.883 billion) and a total capacity of 2×1050MW. Shenhua Guohua (Indonesia) Java Power Generation Co., Ltd. (“Guohua (Indonesia) Java Power Plant”) was established as the core of this project, and is comprehensively controlled and managed by Guohua Electric Power Co.,Ltd. According to the contribution ratio of 7 to 3, Guohua (Indonesia) Java Power Plant is jointly established by a subsidiary of CHN ENERGY and a subsidiary of PT PLN (Persero) (PLN). The first set of equipment of this project started production in December 2019. It is understood that the project is financed by China Development Bank. Java 7 coal power project is the thermal power unit with the largest single set power capacity, invested by a Chinese enterprise overseas, and is the coal power generator set with highest rate of utilization in the Indonesian power industry.

As far as we know, the production and operation of Java 7 coal power project may lead to several environmental impacts on the surrounding mangrove (heat waste water discharged in the shallow coastal area may damage the surrounding ecological system) and coral reef on the seabed. Fishermen around the area are also concerned about the adverse impacts of the coal power project on fishery resources.

Sumsel 1 and Sumsel 8 are two coal power projects on Sumatra Island, with the former having a capacity of 2\*300 MW and the latter having a capacity of 2\*600 MW. Sumsel 1 project was jointly invested by Guohua Electric Power Co.,Ltd (75% stake) and Indonesia LPE (25% stake), and established in Indonesia in 2015 upon approval. It officially started construction in September 2020. This project is funded by Bank of China, China Construction Bank and Industrial and Commercial Bank of China. Since its construction, Sumsel 1 has faced many problems, including land dispute, and conflict with local communities. This is because the blockage of river water resulting from the project construction harmed local rubber planting industry. According to a NGO, this project cut off water source without the approval of the Department of

Water Resource Management. Funded by the Export-Import Bank of China, Sumsel 8 project met with several problems during the construction, such as the impact on local water source (Enim river) and local biodiversity (since the power plant damaged habitat of wild animals, there have been multiple staff death incidents due to conflicts between humans and tigers.). These problems are not effectively regulated by the related government department. In January 2020, for example, some local NGOs wrote to the Department of Labor, demanding an investigation into the death of a Chinese employee, but did not get any reply. In respect of the ecological problem caused by the Sumsel 8 project, a local NGO wrote to the Embassy of the People's Republic of China in Jakarta, and did not receive an effective solution, either.

### **Concerns by Indonesia's Local Communities and NGOs**

The author of this handbook understands that for environmental problems due to the abovementioned coal power projects, residents of local communities and NGOs in Indonesia focused on the following areas:

First, establish a sound environmental monitoring system during the operation of the coal projects. This system will continuously monitor the discharge of waste water and waste gas (for example) and release relevant information. The information on the discharge of pollutants shall be properly disclosed to ensure that the local public are involved in supervision of the clean operation of the projects.

Second, execute the same environmental standard as in China.

Third, adopt measures to urge the Indonesian government to reach peak carbon emission and carbon emission reduction. The proposed measures include more use of renewable energy.

### **Action Proposals and Cooperative Exploration**

As Chinese enterprises accelerate their movement to “go global”, the Chinese government always attempts to develop a code of conduct for overseas investment enterprises. Given the issue of judicial sovereignty, the investing home country finds it difficult to regulate the behaviors of enterprises in the host country. Even so, from the perspective of local NGOs, actions can still be taken in this regard. On the basis of the above cases, the administrative regulations for overseas investment of Chinese enterprises in Part I, and the work methods of Chinese environmental protection

organizations in Part II, we put forth the following action proposals for the issues raised in the above cases:

First, communication skills between Chinese enterprises and the Chinese government. Communication is an essential link or a precondition to resolve problems. Since they work locally for a long time, Indonesian NGOs better understand the impact of coal power projects on local communities, and have the authority to speak on the local impacts caused by Chinese projects. During the communication process, NGOs should well grasp means of communication, and select appropriate communication subjects. In respect of method of communication, NGOs generally write to (or send emails to) the relevant enterprises, or demand face-to-face exchanges (similar to Chinese forums) with the managers of the enterprises or the government officials (e.g., staff of embassies and consulates). For example, the conflict between humans and tigers caused by Sumsel 8 project is a typical ecological problem. China pays close attention to this type of ecological problems (involving natural habitat of wild animals). NGOs can report the problem to Chinese embassies and consulates in Indonesia and managers (including corporate executives and CSR departments in China) of the Chinese enterprises through multiple channels (letters, media or offline activities). The latest released *Guidelines for the Green Development of Outbound Investment and Cooperation* specially mentions the problems of ecological damage and ecological impacts. During communication, NGOs can quote specific clauses from the *Guidelines*.

Second, cooperation with Chinese NGOs. The work methods of Chinese local NGOs, which are introduced in Part II of this handbook, may be unfamiliar to Indonesian NGOs. In this situation, the cooperation between local forces of the two countries may provide a new way to solve problems. For example, the credit system, which Chinese government has always emphasized on the need to develop, demands to make public the credit information of overseas investment enterprises; at present, MOFCOM provides a special publicity platform to record the bad credit behaviors of overseas investors (see Section 1.4.1 in this handbook). Therefore, if an environmental problem is not resolved even after the use of every remedy of the host country, NGOs can work with Chinese NGOs to report the problem to China's relevant departments for overseas investment and demand to publish the bad credit information of the investors.

Third, cooperation with Chinese enterprises. As China already committed to



peak carbon dioxide emissions before 2030 and achieve carbon neutrality before 2060, carbon emission reduction has become the goal that the nation works hard to promote. In recent years, China has always advocated overseas green investment. The *Guidelines for the Green Development of Outbound Investment and Cooperation*, jointly released by MOFCOM and Ministry of Ecology and Environment, proposes clean energy investment. Against this background, Indonesian NGOs can seek cooperation with Chinese enterprises to guide the latter in turning more energy investments towards renewable energy. This move complies with the common goal of both sides.

Fourth, communication with the funding party (Chinese banks). For financing institutions of Chinese enterprises, the *Green Credit Guidelines* (Yinjianfa[2012] No.4) contains the special provision on environmental protection: Banking institutions shall strengthen the environmental and social risk management for overseas projects to which credit will be granted and make sure project sponsors abide by applicable laws and regulations on environmental protection, land, health, safety, etc. of the country or jurisdiction where the project is located. Therefore, besides the enterprise entity and the government, the funding bank is also obligated to examine the behavior of the enterprise. Overseas NGOs can cooperate with Chinese counterparts to jointly provide feedback on the environmental and social problems of the project to the investment bank.

In fact, from the perspective of Chinese enterprises: First, influenced by the global COVID-19, Indonesia saw lowered demand for power and serious excess capacity in coal power generation, which has become a jarring issue; second, carbon emission reduction has become the global goal. In 2020, coal power plants were built and planned in only seven countries (including Indonesia). On the other hand, Indonesia has started to reduce dependence on coal power. Therefore, Chinese enterprises are confronted with great risk when making a coal investment in Indonesia, but welcome an opportunity for transformation. Seizing this opportunity, NGOs of the two countries can enhance communication and cooperation to ensure that Chinese investments in Indonesia shifts towards lower carbon, cleaner and more standard fields, thus achieving a win-win result for all parties.

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