

SCHOLARLY ARTICLE

# The Politics of Localizing Human Rights: Chinese Policies and Corporate Practices in Latin America

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## Abstract

The ‘Going Out’ strategy that China began in 1999 escalated to a global level with the ‘Belt and Road Initiative’ in 2013. However, the lack of a clear international framework for corporate accountability accentuates the risks of human rights’ affectation by Chinese corporations, considering their controversial performance in Latin America. This article engages with the scholarly framework of international norm localization to analyze the enactment of Chinese business and human rights standards and their concrete application. This assessment relies on an extensive review of academic and policy research and the analysis of social conflicts around one of the largest copper mines in the region, Las Bambas, located in the highlands of Peru. The case shows that the main problem is not the lack of incorporation of business and human rights standards into national laws and the guidelines of companies’ home regulators, but the different ways they are interpreted by social actors on the ground. Local communities are not passive receptors of those norms but norm makers who appropriate them and provide new meanings in line with their self-determination. Chinese and national authorities and firms, therefore, need to engage with those norms from the perspective of local people.

**Key Words:** Human rights standards; Chinese investments; due diligence; Latin America

## I. Introduction

The ‘Going Out’ strategy that China began in 1999 was elevated to a core foreign policy strategy with the launching of the ‘Belt and Road Initiative’ (BRI) in 2013. This geopolitical and geoeconomic plan for worldwide connectivity and infrastructural development, includes principles of integrity, transparency and accountability, which have been highlighted as a blueprint for Chinese business by the head of the Asian Infrastructure Investment Bank, Jin Liqun, and by President Xi Jinping.<sup>1</sup> However, recent studies<sup>2</sup> show that

<sup>1</sup> Asian Infrastructure Investment Bank (AIIB), ‘Inaugural meeting of the board of Governors’, Summary proceedings (January 2016), <https://www.aiib.org/en/about-aiib/governance/board-governors/.content/index/download/20160816034745788.pdf> (accessed 26 March 2021).

<sup>2</sup> Ruben Gonzalez-Vicente, ‘Make Development Great Again? Accumulation Regimes, Spaces of Sovereign Exception and the Elite Development Paradigm of China’s Belt and Road Initiative’ (2019) 21 *Business and Politics* 487–513; Bertram Lang, ‘China and Global Integrity-Building: Challenges and Prospects for Engagement’ (2019) *Anticorruption Resource Centre* 1–39; Jonathan E Hillman, ‘A ‘China Model?’ Beijing’s Promotion of Alternative Global Norms and Standards’, Center for Strategic and International Studies (13 March 2020), <https://www.u4.no/publications/china-and-global-integrity-building-challenges-and-prospects-for-engagement> (accessed 26 March 2021).

Chinese development banks have lower standards and less demanding enforcement mechanisms than the western multilaterals. Moreover, Chinese investors have relied on host governments to set corporate rules, and scholars often highlight that many of those governments have low levels of legitimacy, high degrees of corruption, or have diminished environmental and social standards to attract new capital.<sup>3</sup>

Thus, the acceleration of BRI projects might be a double-edged sword: Chinese companies enter the world stage with relatively little experience in navigating the changing international investment terrain and in dealing with social and political risks.<sup>4</sup> Scholars suggest that although the BRI might promote economic growth in national economies, local communities might bear the social and environmental costs.<sup>5</sup> The lack of a clear international framework for corporate accountability accentuates this situation. Corporations in fact operate in a legal and policy vacuum,<sup>6</sup> navigating between binding national laws, global accountability standards (only to some degree enforceable), and voluntary sectoral codes of conduct.

The definition of human rights standards for Chinese investments is crucial given its controversial performance in recent years. Some studies in Africa, Southeast Asia and Latin America argue that Chinese investments have tended to accentuate local environmental degradation and social conflicts.<sup>7</sup> In Latin America violations of human and environmental rights would not be isolated incidents, but a pattern of behaviour.<sup>8</sup> Other studies highlight that the actual impacts of Chinese investments are not substantially different from other international investments; the performance depends on the sector (for example, mining, oil and agribusiness) rather than company nationality.<sup>9</sup> Some case studies in Latin America found in this regard that Chinese companies do not perform

<sup>3</sup> Patrick Dumberry and Gabrielle Dumas-Aubin, 'How to Impose Human Rights Obligations on Corporations under Investment Treaties? Pragmatic Guidelines for the Amendment of BITS' (2013) *Yearbook on International Investment Law and Policy* 568–600; Jun Zhao, 'Human Rights Accountability of Transnational Corporations: A Potential Response from Bilateral Investment Treaties' (2015) 8 *Journal of East Asia and International Law* 47–48; Ratha Thuon, 'Holding Corporations from Middle Countries Accountable for Human Rights Violations: A Case Study of the Vietnamese Company Investment in Cambodia' (2018) 15 *Globalizations* 152–167.

<sup>4</sup> Pichamon Yeophantong, 'China and the Accountability Politics of Hydropower Development: How Effective are Transnational Advocacy Networks in the Mekong Region?' (2020) *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* 85–117.

<sup>5</sup> Mark SiuSue et al, 'Sharing the Spoils: Winners and Losers in the Belt and Road Initiative in Myanmar' (2020) *Journal of Current Southeast Asian Affairs* 381–404.

<sup>6</sup> Ciprian N Radavoi and Yongmin Bian, 'Enhancing the Accountability of Transnational Corporations: The Case for "Decoupling" Environmental Issues' (2014) 16 *Environmental Law Review* 168–182.

<sup>7</sup> Louise Lowe, 'La dimensión ambiental de las inversiones directas de China en América Latina y el Caribe', in E Pastrana and H Gehring (eds.), *La proyección de China en América Latina y el Caribe* (Pontificia Universidad Javeriana, 2017); Dynamic Mukete, 'China as Environmental Footprint: The Zambian Example', in L Jaivin and L Tomba (eds.), *Control* (Australia: ANU Press in China Story Yearbook, 2017); Sovida Po and Kimkong Heng, 'Assessing the Impacts of Chinese Investments in Cambodia: The Case of Preah Sihanoukville Province' (2019) 19 *Issues & Insights* 1–19; E Ballon et al, 'La Agenda de la Sociedad Civil frente a las Industrias Extractivas en América Latina', Natural Resource Governance Institute (May 2019), <https://resourcegovernance.org/sites/default/files/documents/reporte-regional.pdf> (accessed 26 March 2021).

<sup>8</sup> International Federation for Human Rights (FIDH), 'Universal Periodic Review, Third Cycle of the Civil Society's Evaluation of the Extraterritorial Obligations of the People's Republic of China: Case Studies from Argentina, Bolivia, Brazil, Ecuador and Peru No. 724', <http://cdes.org.ec/web/wp-content/uploads/2018/10/Regional-Report.pdf> (accessed 26 March 2021).

<sup>9</sup> Amos Irwin and Kevin Gallagher, 'Chinese Mining in Latin America: A Comparative Perspective' (2013) 22 *Journal of Environment & Development* 207–234; International Union for Conservation of Nature (IUCN), 'Case Study Series Shows Good Examples of Chinese Investor Responsibility' (12 November 2018), <https://www.iucn.nl/en/updates/case-study-series-shows-good-examples-of-chinese-investor-responsibility> (accessed 26 March 2021); R Ray et al, *China and Sustainable Development in Latin America: The Social and Environmental Dimension* (London: Anthem

significantly worse compared with other companies in the region.<sup>10</sup> A related discussion is about who must hold the main responsibility for enacting and enforcing human and environmental standards: the Chinese companies (and the home regulators) or the host governments<sup>11</sup>. Whereas most authors agree that the potential negative impacts of Chinese investments in infrastructure and extractive projects could be reduced if host governments develop innovative policy responses and regulations,<sup>12</sup> they tend to emphasize the need for a shared responsibility between Chinese regulators, banks, firms, and the host governments.

This article contributes to previous discussions by engaging with the scholarly framework of international norm localization to analyse the enactment of Chinese human rights standards and their concrete application. This is an exploratory study based on an extensive review of academic and policy research as well as the analysis of the case study of Las Bambas, led by the Chinese Minerals and Metals Group (MMG) and located in the central highlands of Peru. As an exploratory study, the case has been addressed by the analysis of policy documents, national regulations, corporate policies and public declarations of the company, and public declarations of peasant organizations. The case was selected because of its national and international relevance. Las Bambas is one of the largest copper mines in the region and one of the largest mining projects in Peruvian history with an approximate investment of 10 billion dollars,<sup>13</sup> whose production represents around 1 per cent of the national GDP,<sup>14</sup> and is expected to consolidate the country as the second copper producer in the world.<sup>15</sup> The recent announcement of the suspension of activities because of local conflicts has not only produced an economic loss for the firm, the local governments and the national government, but also would impact the price of copper in international markets.<sup>16</sup>

The case analysis shows how international standards of businesses and human rights such as due diligence, citizen participation and the right of Indigenous peoples to free, prior

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Press, 2017); Debrah Brautigam, '5 Myths About Chinese Investment in Africa', *Foreign Policy* (10 December 2015), <https://foreignpolicy.com/2015/12/04/5-myths-about-chinese-investment-in-africa/> (accessed 26 March 2021).

<sup>10</sup> Ray et al, note 9; Irwin and Gallagher, note 9; Cristelle Maurin and Pichamon Yeophantong, 'Going Global Responsibly? China Strategies towards Sustainable Overseas Investments' (2013) 86 *Pacific Affairs* 281–303; IUCN, note 9.

<sup>11</sup> Paulina Garzon, 'Manual sobre lineamientos ambientales y sociales chinos para los préstamos e inversiones en el Exterior. Una Guía para las Comunidades Locales', *IISCAL* (September 2018), <https://bit.ly/3BhJugU> accessed 16 March 2021; Rebecca Ray and Kevin Gallagher, 'China in Latin America: Environment and Development Dimensions' (2016) 2 *Tempo Do Mundo* 132–154.

<sup>12</sup> Wenyuan Wu, 'Chinese Oil Investments in Ecuador and Peru: The Role of Indigenous Civil Society and Government Regulations', in *Chinese Oil Enterprises in Latin America. Latin American Political Economy* (Switzerland: Palgrave Macmillan, 2019); Isabel Hilton, 'China in Myanmar: Implications for the Future' (2003) Norwegian Peacebuilding Resource Center 1–7; C Sanborn et al, 'China in Latin America: Lessons for South-South Cooperation and Sustainable Development' (2015), Boston University, 5–18; Lucrecia Wagner, 'Propuestas de inversiones chinas en territorio mapuche: Resistencias a la minería metálica en Loncopué' (2019) 63 *Estudios Atacameños* 315–339; Sol Mora, 'Resistencias sociales a la cooperación de China en infraestructura: las represas Kirchner-Cepernic en Argentina' (2018) 94 *Colombia Internacional* 53–81.

<sup>13</sup> Ministry of Energy and Mines, 'Proyecto Minero las Bambas' (2018), <https://bit.ly/3gCY7HI> (accessed 26 March 2021).

<sup>14</sup> Andina, 'BCRP: conflicto en Las Bambas solo tiene impacto marginal en economía' (2019), <https://bit.ly/3yzSku8> (accessed 16 December, 2021).

<sup>15</sup> Portal Minero, 'La Sociedad Nacional de Minería, Petróleo y Energía de Perú considera que una eventual paralización del proyecto podría afectar hasta dos puntos el crecimiento económico en 2016' (1 October 2015), <http://www.portalminero.com/pages/viewpage.action?pageId=102858951> (accessed 26 March 2021).

<sup>16</sup> Gestión, 'Funcionario del Minem exacerbó los ánimos y agravó conflicto en Las Bambas, denuncia SNMPE' (9 December 2021), <https://gestion.pe/economia/funcionario-del-minem-exacerbo-los-animos-y-agravo-conflicto-en-las-bambas-denuncia-snmpe-noticia/> (accessed 10 December 2021).

and informed consent have competing interpretations in the everyday operations of international investments. The main problem is not the lack of incorporation of these standards into national laws and the guidelines of companies' home regulators, but the different ways they are interpreted by social actors on the ground. Local communities are not passive receptors of those norms but norm makers who appropriate them and provide new meanings in line with their self-determination. Despite Chinese regulators and companies, state authorities and local communities coincide in the necessity of following these standards, the content of these norms, the degree of engagement and their scope are subjected to deep disputes that affect the project's economic and social viability. Chinese and national authorities and firms, therefore, need to engage with human rights norms from the perspective of local people.

Section II provides the background of international norm localization in relation to human rights standards for corporations. Section III explores the economic, geopolitical and developmental meaning of Chinese investments for the global political economy, and analyses the performance of Chinese regulators in adopting human rights standards. Section IV analyses the way Chinese corporations are engaging with human rights norms in Latin America and explores the case study of *Las Bambas*. Section V provides a reflection on the localization of human rights standards in contexts marked by huge inequality and social unrest.

## II. Localization of Human Rights Standards for Corporations

The diffusion of human rights norms has been largely theorized in the International Relations and Comparative Politics literature. In the original diffusionist framework,<sup>17</sup> norm diffusion and incorporation into national systems respond to a norm 'life cycle' heavily dependent on transnational networks: it starts by the persuasion of norm entrepreneurs that seek to diffuse the norm (often international organizations and international advocacy networks), the dynamic imitation by national leaders (authorities that seek international legitimation and local leaders that seek to advance their political agenda), and finally norm internalization by the beneficiaries of the norm.

Either to compliment or criticize diffusion theory, scholars have focused on complex local dynamics of norm resistance and adaptation through processes of 'localization',<sup>18</sup> 'national interpretation'<sup>19</sup> or 'vernacularization',<sup>20</sup> where local actors and domestic factors have a prominent role. This branch of scholarship has criticized the top-down dissemination of global norms as a mere mechanic and linear process of diffusion and incorporation.<sup>21</sup> Critical views observe how domestic political structures, local agents and the particular framing of international norms might transform those norms into ones with different meanings and with different degrees of adaptation into national and subnational contexts.<sup>22</sup> This analysis identifies enabling and constraining factors for norm incorporation. They include the importance of political systems and local opportunities structures such as

<sup>17</sup> Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *International Organization* 887–917.

<sup>18</sup> Amitav Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism' (2004) 58 *International Organization* 239–275.

<sup>19</sup> N Dawson et al, 'Barriers to Equity in REDD+: Deficiencies in National Interpretation Processes Constrain Adaptation to Context' (2018) 88 *Environmental Science and Policy* 1–9.

<sup>20</sup> Peggy Levitt and Sally Merry, 'Vernacularization on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States' (2009) 9 *Global Networks* 441–461.

<sup>21</sup> Maria M De Almagro, 'Lost Boomerangs, the Rebound Effect and Transnational Advocacy Networks: A Discursive Approach to Norm Diffusion' (2018) 44 *Review of International Studies* 672–693.

<sup>22</sup> Acharya, note 18; Dawson et al, note 19; Levitt and Merry, note 20.

societal openness, the absence of strong elites or veto players, and favourable decision-making environments.<sup>23</sup> Acharya,<sup>24</sup> for instance, notes that the success of norm diffusion is dependent upon norm-takers to build congruence between global norms and local beliefs and practices, and explains that norms differ to what extent they offer opportunities for such localization.<sup>25</sup>

The localization of norms, therefore, might be a complex practice as it often takes place in national contexts of conflicting policy preferences, power asymmetries and poor governance capacity, which undermine the ability of marginalized actors to influence the process.<sup>26</sup> For this reason, authors conceive as crucial the cooperation between actors at different levels to build coalitions from outside and within the state; these ‘brokers’ with high degrees of legitimacy can mediate among grassroots organizations, state agencies and international partners.<sup>27</sup> These brokers are local NGOs or local experts also conceived as ‘vernaculars’ who translate the meaning of international norms into one acceptable for the norm beneficiaries.<sup>28</sup> The notion of vernacularization has been formulated in the context of the diffusion of women’s human rights as a process by which ideas from transnational sources travel to small communities and are adapted to local institutions and meanings.

A third scholarly branch focuses on norm contestation, namely focusing on norm politics rather than norm diffusion.<sup>29</sup> It is not only a critique of the top-down conception of norm diffusion but to the fact that even those bottom-up approaches still conceive cultural adaptation of international norms without questioning the core of its ‘fixed meaning’<sup>30</sup> and without problematizing the agency not only of the local brokers but also of the beneficiaries of the norm, often marginalized people. In fact, scholarship on norm localization and vernacularization acknowledge that norm incorporation contains more friction than flows as global human rights ideas are reframed to fit into local ideologies, but the key actors in these frameworks are still ‘the people in the middle’: those who translate the discourses and practices from the arena of international law and legal institutions to local communities in a way to obtain acceptance from the beneficiaries.

While attention to translators is useful to problematize the power relations in which legal norms are negotiated, the very meaning of translation is not enough problematized as it does not stop at professional translators: users, clients, subjects of law themselves make meaning of legal norms and thus extend the chain of translations.<sup>31</sup> For instance, the forest steward norm that conceives Indigenous peoples as ‘forest protectors’ have been diffused by international and national NGOs to promote titling projects of Indigenous land as a means to fighting deforestation and climate change; however, Indigenous nations conceive this norm as an expression of their self-determination and, as a consequence, they not only demand

<sup>23</sup> Thomas Risse, ‘Transnational Actors and World Politics’, in W Carlsnaes, T Risse and B Simmons (eds.), *Handbook of International Relations* (Thousand Oaks, CA: Sage Publications, 2002) 255–274.

<sup>24</sup> Acharya, note 18.

<sup>25</sup> Ranita Ray and Badana Purkayastha, ‘Challenges in Localizing Global Human Rights’ (2012) 7 *Society Without Borders* 29–50.

<sup>26</sup> K Evans et al, ‘Global Versus Local Narratives of REDD: A Case Study from Peru’s Amazon’ (2014) 35 *Environment Science and Policy* 98–108.

<sup>27</sup> Craig Kauffman and Pamela Martin, ‘Scaling up Buen Vivir: Globalizing Local Environmental Governance from Ecuador’ (2014) 14 *Global Environmental Politics* 40–58.

<sup>28</sup> Levitt and Merry, note 20; Merry Sally Engel, ‘Transnational Human Rights and Local Activism: Mapping the Middle’ (2006) 108 *American Anthropologist* 38–51.

<sup>29</sup> De Almagro, note 21.

<sup>30</sup> Ibid.

<sup>31</sup> Julia Eckert et al, ‘Introduction: Law’s Travels and Transformations’, in Julia Eckert, Brian Donahoe, Christian Strümpell and Zerrin Özlem Biner (eds.), *Law Against the State: Ethnographic Forays into Law’s Transformations* (Cambridge: Cambridge University Press, 2012) 1–10.

the titling of their land but the recognition of their character of nations with territorial rights.<sup>32</sup> Acknowledging the agency of those marginalized people entails engaging in a process of reverse translation,<sup>33</sup> in which the claims that are expressed through local interpretations of law would be translated back in such a way that they have the possibility of influencing the global rights discourse. Thus norms appropriation and contestation might inspire the further interpretation and elaboration of human rights norms at levels ranging from the domestic to the global.<sup>34</sup>

In sum, to overcome the general tendency to ignore or downplay the agency of potential norm beneficiaries<sup>35</sup> it is crucial to conceive these beneficiaries not as norm takers<sup>36</sup> but as norm makers. This entails a meaningful engagement with subaltern uses and conceptions of rights discourses, a ‘law and globalization from below’,<sup>37</sup> in which national and global competing meanings might emerge from social struggles. For instance, the standard of free, prior and informed consent (FPIC) of Indigenous peoples, first recognized in the ILO Convention 169 and then developed by the United Nations Declaration on the Rights of Indigenous Peoples of 2007 (UNDRIP) and international jurisprudence of human rights, have at least three meanings. ILO Convention 169 recognizes the right of Indigenous peoples to be consulted before the approval of any regulation or decision able to affect their collective rights, and in case of displacements, the state needs to obtain the consent. The UNDRIP, a declaratory non-binding instrument, establishes that all consultation processes should try to obtain the consent, and adds that states need to obtain consent in cases of displacement, storage, or disposal of hazardous materials in indigenous territory, and the use or occupation of indigenous material and immaterial property. The Inter-American Court of Human Rights asserted that consent is also necessary in cases of ‘large-scale development or investment projects’ that would have a ‘major impact’ on ‘a large part of their territory’ (*Saramaka v Suriname*). On their part, multilateral organizations such as the World Bank, the International Finance Corporation – IFC (2012), the Inter-American Development Bank – IADB (2006), and private global organizations such as the International Council on Mining and Metals – ICMM (2013) have approved guidelines on FPIC as a limited participatory right (consultation) instead of an expression of indigenous self-determination.<sup>38</sup> Therefore, there is a consent standard, which includes the obligation to obtain consent in those cases recognized by the UNDRIP and international jurisprudence; the consultation standard as a limited right of participation recognized in the binding ILO Convention 169 and most guidelines of multilateral organizations (where actual consent is an exception); and consent as an expression of self-determination as a total power of decision of Indigenous peoples

<sup>32</sup> Roger Merino and Maria-Therese Gustafsson, ‘Localizing the Indigenous Environmental Steward Norm: The Making of Conservation and Territorial Rights in Peru’ (2021) 124 *Environmental Science & Policy* 627–634.

<sup>33</sup> Harri Englund, ‘Human Rights and Village Headmen in Malawi: Translation Beyond Venacularisation’ in Brian Donahoe, Christian Strümpell and Zerrin Özlem Biner (eds.), *Law Against the State: Ethnographic Forays into Law’s Transformations* (Cambridge: Cambridge University Press, 2012) 1–10.

<sup>34</sup> Koen de Feyter, ‘Localising Human Rights’, in W Benedek, K De Feyter and F Marrella (eds.), *Economic Globalisation and Human Rights: EIUC Studies on Human Rights and Democratization* (Cambridge: Cambridge University Press, 2007).

<sup>35</sup> Ciaran O’Faircheallaigh, ‘IR Theory and Domestic Adoption of International Norms’ (2014) 51 *International Politics* 155–176.

<sup>36</sup> Acharya, note 18.

<sup>37</sup> Boaventura de Sousa Santos and Francisco Rodriguez, *Law and Globalization From Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005).

<sup>38</sup> Philippe Hanna and Frank Vanclay, ‘Human Rights, Indigenous Peoples and the Concept of Free, Prior and Informed Consent’ (2013) 31 *Impact Assessment and Project Appraisal* 146–150; Fergus MacKay, ‘Indigenous People’s Right to Free, Prior and Informed Consent and the World Bank’s Extractive Industries’ (2004) 4 *Sustainable Development Law & Policy* 43–65.



(where actual consent should be the rule), not fully recognized by national and international standards.<sup>39</sup>

Whereas human rights international organizations and most international NGOs advocate for the *consent standard*, multilateral banks, companies and governments follow the *consultation standard*. Indigenous movements and organizations, in turn, conceive FPIC as an *expression of self-determination*. A similar dynamic might be seen in other norms such as citizen participation in the approval and implementation of investment projects or the extension of the duty of due diligence of corporations.

### Localization of Human Rights Standards for Corporations

What is the process of diffusion and incorporation of business and human rights standards? International organizations and human rights NGOs have been struggling to diffuse these standards into national jurisdictions. The UN Protect, Respect and Remedy Framework for Business and Human Rights of 2008 and the UN Guiding Principles on Business and Human Rights (Guiding Principles) adopted in 2011 proposed a set of global standards designed to prevent and address adverse impacts on human rights caused by business activities.<sup>40</sup> These principles regulate the duty of due diligence as a global standard of expected conduct for all enterprises to identify, prevent, mitigate and account for how corporations address their adverse human rights impacts.<sup>41</sup> In 2019, the Inter-American Commission on Human Rights enacted the Thematic Report on Business and Human Rights: Inter-American Standards, which analyzed the UN Guiding Principles and systematized the relevant standards developed by the Inter-American Commission and Human Rights Court. However, neither of these instruments establish binding obligations for corporations. Inter-American standards apply to states that do not fulfil their duty of regulating corporations. The Guiding Principles encourage companies to follow the standards, but they cannot be forced to do so on the basis of the Principles alone.<sup>42</sup> While these norms define clearly the state obligation to protect human rights under international law, the norms applicable to business actors rely on soft regulation, meaning a moral or voluntary 'responsibility to respect human rights' (Guiding Principle 11). Without the complement of stricter national legal obligations, this privatized voluntary process cannot be more effective than other voluntary self-regulation regimes.<sup>43</sup>

In this context, victims use civil and criminal remedies in national systems.<sup>44</sup> In fact, allegations of human rights violations committed by a corporation should be in principle addressed by the host country where business is conducted, a duty that has national and

<sup>39</sup> Roger Merino, 'Law and Politics of Indigenous Self-Determination: The Meaning of the Right to Prior Consultation', in Irene Watson (ed.), *Indigenous Peoples as Subjects of International Law* (London: Routledge, 2017).

<sup>40</sup> Annikki Laine, 'Integrated Reporting: Fostering Human Rights Accountability for Multinational Corporations' (2015) 47 *George Washington International Law Review* 256–300; Penelope Simmons, 'International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights' (2012) 3 *Journal of Human Rights and the Environment* 5–40.

<sup>41</sup> Yulia Levasheva, 'Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States through International Investment Law' (2018) 14 *Utrecht Law Review* 40–55; Surya Deva, 'Corporate Accountability for Human Rights Abuses in Asia: Critical Reflections on Lessons from Europe' (2018) 8 *Derecho y Estudios Empresariales* 51–88.

<sup>42</sup> Simmons, *note* 40; Nadia Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?' (2013) 117 *Business Ethics* 493–500.

<sup>43</sup> Ciara Hackett and Luke Moffett, 'Mapping the Public/Private-Law Divide: A Hybrid Approach to Corporate Accountability' (2016) 12 *International Journal of Law in Context* 312–336; Thuon, *note* 3.

<sup>44</sup> Aishwarya Padmanabhan, 'Human Rights and Corporations: An Evaluation of the Accountability and Responsibility of MNCs under the ILO framework' (2011) 42 *Journal of Corporate Citizenship* 8; Radavoi and Bian, *note* 6.

international sources.<sup>45</sup> However, many studies argue that host states in the South often lack the ability, resources, bargaining power or the political will to effectively regulate transnational corporations.<sup>46</sup> Rather than incorporating the highest human rights standards into national systems, often host governments compete in 'a race to the bottom' to lower their requirements on human rights compliance to attract foreign investments.<sup>47</sup>

Relying on home countries' regulations is also problematic because they have no clear obligation under international law to control corporations operating outside their territory.<sup>48</sup> Some countries have incorporated extraterritorial legislation, such as the Modern Slavery Act of 2015 of the United Kingdom or the more comprehensive Duty of Vigilance of Parent and Instructing Companies Law of France, adopted in 2017.<sup>49</sup> High Courts' interpretations have also opened a space for suing corporations in their home countries for human rights violations abroad, such as the Supreme Court of Canada on the case *Araya v Nevsun Resources Ltd*,<sup>50</sup> the UK Supreme Court in *Okpabi and others v Royal Dutch Shell Plc* (2021);<sup>51</sup> and the Court of Appeals of the The Hague in *The Netherlands in Milieudefensie et al v Shell* (2021).<sup>52</sup> In the United States, the courts reinterpreted the Alien Tort Claims Act to allow victims to sue in US federal courts over events that occurred in foreign countries,<sup>53</sup> but this trend has been rejected by recent US Supreme Court decisions such as *Kiobel v Royal Dutch Petroleum C*<sup>54</sup> and the majority opinion in *Jesner v Arab Bank, PLC* of 2018.<sup>55</sup>

Other more ambitious proposals include the creation of an international reparations court<sup>56</sup> (like the International Criminal Court) or adopting a multilateral investment agreement<sup>57</sup> to hold corporations responsible for human rights violations. The problem with these proposals is their feasibility because of the continuous disagreement on the specific content of any such global arrangements<sup>58</sup> Others suggest incorporating human rights obligations for corporations in bilateral investment treaties (BITs).<sup>59</sup> In fact, most BITs arbitral tribunals only have jurisdiction to adjudicate claims brought by investors; and even if a BIT allows a host country to institute arbitral proceedings, arbitral tribunals often adjudicate those disputes originating from alleged breaches of a treaty provision.<sup>60</sup> Only in

<sup>45</sup> Olivier de Schutter, 'Towards a New Treaty on Business and Human Rights' (2015) 1 *Business and Human Rights Journal* 41–67; Zhao, note 3; Dumberry and Dumas-Aubin, note 3.

<sup>46</sup> Thuon, note 3; Dumberry and Dumas-Aubin, note 3; Zhao, note 3.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid; Radavoi and Bian, note 6; Thuon, note 3.

<sup>49</sup> Almut Schilling-Vacaflor, 'Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?' (2020) 22 *Human Rights Review* 109–127.

<sup>50</sup> *Nevsun Resources Ltd v Araya*, 2020 SCC 5 (2020).

<sup>51</sup> *Opinio Juris*, UK *Okpabi et al v Shell*: UK Supreme Court Reaffirms Parent Companies May Owe a Duty of Care Towards Communities Impacted by their Subsidiaries in Third Countries (2 February 2021), <https://bit.ly/3sUZ6b5> (accessed 26 March 2021).

<sup>52</sup> Business and Human Rights Resource Center, 'The Hague Court of Appeals Rules on Shell in Nigeria', <https://www.business-humanrights.org/en/latest-news/commentary-the-hague-court-of-appeals-rules-on-shell-in-nigeria/> (accessed 26 March 2021).

<sup>53</sup> Radavoi and Bian, note 6.

<sup>54</sup> Zhao, note 3.

<sup>55</sup> L Kruse et al, 'Alien Tort Statute Cannot be Used to Sue Foreign Corporations' (26 April, 2018), <https://www.nortonrosefulbright.com/en-pk/knowledge/publications/c158e451/alien-tort-statute-cannot-be-used-to-sue-foreign-corporations> (accessed 26 March 2021).

<sup>56</sup> Hackett and Moffet, note 43.

<sup>57</sup> Dumberry and Dumas-Aubin, note 3.

<sup>58</sup> Ibid.

<sup>59</sup> Zhao, note 3; Levashova, note 41; Abdullah Al Faruque, 'Mapping the Relationship between Investment Protection and Human Rights' (2010) 11 *Journal of World Investment & Trade* 539–560.

<sup>60</sup> Dumberry and Dumas-Aubin, note 3.



recent decisions, such as *Urbaser*, arbitral tribunals have focused on human rights issues,<sup>61</sup> but this responded to the host country's counter-allegations and is not a general trend.

Finally, some scholars propose hybrid solutions. In this respect, Deva<sup>62</sup> argues that, as corporations are difficult regulatory targets, no single regulatory initiative – soft or hard, domestic, regional or international – would be effective in addressing human rights abuses by businesses. What is needed, then, is the combination of multiple regulatory tools at national, regional and international levels.

These legal approaches discuss the way to incorporate human rights obligations for business into national systems and corporate practices. They also conceive these norms as having a fixed and universal meaning shared by all actors (home and host regulators, companies, and local communities). In this view, the main problem is incorporation of norms and once they are integrated into national systems the analysis is limited to the level of implementation, a problem often associated with the deficient enforcement capacity of national agencies. However, international norms that establish specific duties for corporations such as due diligence, citizen participation and FPIC have been included in many national systems through compulsory laws and have been established not only by the companies' codes of conduct but by their own home authorities as is the case of Chinese investments. Even though the lack or weak enforcement mechanisms are issues at stake, social disputes around implementation are deeply related to how different actors interpret the content and scope of these norms.

### III. China's BRI: Matching Goeconomic Imperatives and Human Rights Standards

Since market reforms in the 1970s, Chinese macroeconomic performance has registered a 10 per cent growth rate for over three decades. Chinese foreign investments had a sharp rise from \$10 billion in 2005 to more than \$100 billion by 2015.<sup>63</sup> In contrast to the overall trend of global direct investment, which shrank annually by 8 per cent from 2011 to 2014, China's overseas direct investment grew with a compound annual rate of 16 per cent.<sup>64</sup> In 2019, Chinese investors invested directly in 6,535 overseas companies in 167 countries across the world, with a total amount of investment reaching US\$117.12 billion.<sup>65</sup>

Gonzalez-Vicente<sup>66</sup> identifies two modalities of Chinese overseas investments. Chinese businesses use 'embedded investments' when existing sectors suffer from high levels of complexity and difficult relationships between governments and civil society. They rely on local expertise via subcontracting, collaboration and hiring of qualified local and international staff. The other modality is 'state-coordinated investment partnerships', when a target sector is under-developed and the necessary expertise is lacking in the host country. These projects are often the result of government-to-government negotiations rather than market acquisitions or open bids. At the centre of these partnerships stand two Chinese

<sup>61</sup> *Urbaser v Argentina*: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration? (2017), <https://www.dipublico.org/105148/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/> (accessed 26 March 2021).

<sup>62</sup> Deva, note 41.

<sup>63</sup> United Nations Conference on Trade and Development (UNCTAD), 'World Investment Report 2016', [https://unctad.org/system/files/official-document/wir2016\\_en.pdf](https://unctad.org/system/files/official-document/wir2016_en.pdf) (accessed 26 March 2021).

<sup>64</sup> Ernst and Young, 'Riding the Silk Road: China Sees Outbound Investment Boom Outlook for China's Outward Foreign Direct Investment', [https://imaa-institute.org/docs/statistics/ey\\_china\\_outbound-investment-report-2015.pdf](https://imaa-institute.org/docs/statistics/ey_china_outbound-investment-report-2015.pdf) (accessed 26 March 2021).

<sup>65</sup> Ministry of Commerce People's Republic of China (MOFCOM), 'Brief Statistics on China's Direct Investment Overseas in 2019' (23 January 2019), <http://english.mofcom.gov.cn/article/statistic/foreigntradecooperation/202002/20200202933533.shtml> (accessed 26 March 2021).

<sup>66</sup> Gonzalez-Vicente, note 2.

policy banks (the China Eximbank and the China Development Bank) that fund projects globally, and China's central government, which seeks deals with foreign governments. The State-owned Assets Supervision and Administration Commission (SASAC) gives guidance and coordinates the 102 centrally owned state enterprises (SOEs).

Market reforms achieved sustained growth, but this trend could not continue if limited to the domestic market. China's policy of 'going out global' was an effort to enhance the country's global standing and address domestic needs, such as a rapid increase in demand for natural resources, high domestic labour costs, and the efficient use of abundant foreign exchange reserves. This policy also seeks to encourage domestic investors to look outside the country to acquire high-tech, reduce the knowledge gap, and explore new markets for Chinese products.<sup>67</sup> In this context, the multibillion dollar Belt and Road Initiative (BRI), announced in 2013, is the natural expansion of the 'going out' strategy as it seeks to expand China's growth model into new market frontiers.<sup>68</sup> This comprehensive programme for economic integration<sup>69</sup> means a significant shift in the composition of the country's growth drivers and a worldwide reallocation of economic activities.<sup>70</sup> The Chinese government has committed an investment of up to US\$150 billion per year in projects to develop international connectivity, networks of economic interaction, and corridors of trade and investment in what can be understood as a new phase of neoliberalism under Chinese characteristics.<sup>71</sup> Other scholars conceive the BRI as the export of the Chinese development model of infrastructural ideology.<sup>72</sup> Chinese officials proudly promote the BRI as a blueprint for global development and as a 'great milestone in human civilization'.<sup>73</sup>

Geopolitically, the BRI became an umbrella term that encompassed many of China's external activities. Narins and Agnew<sup>74</sup> argue that the absence of an official BRI map might promote a globalist or imperialist agenda. The first one refers to the development of a borderless and expansionist geopolitical identity, including a 'Pacific Silk Road', a 'Silk Road on Ice' that crosses the Arctic Ocean, and a 'Digital Silk Road' through cyberspace.<sup>75</sup> The imperialist agenda is represented by the expansion of China's state-owned enterprises that in practice challenges the sovereignty of other states by acting as the primary instrument for expanding the BRI architecture. These global ambitions would not correspond to the – still relevant – principles of harmonious co-existence proposed by China diplomacy since

<sup>67</sup> Abdul Kamal et al, 'Does the Quality of Institutions in Host Countries Affect the Location Choice of Chinese OFDI: Evidence from Asia and Africa' (2020) 56 *Emerging Markets Finance and Trade* 208.

<sup>68</sup> Gonzalez-Vicente, note 2; Yeophantong, note 4.

<sup>69</sup> Rosario Santa-Gadea, 'Understanding the Chinese Belt and Road Initiative' (2018) 18 *Harvard Review of Latin America* 1–3.

<sup>70</sup> Alastair Johnston, 'The Belt and Road Initiative: What is in it for China?' (2019) 6 *Asia and the Pacific Policy Studies* 40, 58.

<sup>71</sup> Gonzalez-Vicente, note 2.

<sup>72</sup> Francis Fukuyama, 'Exporting the Chinese Model', *Project Syndicate* (12 January 2016), <https://www.project-syndicate.org/onpoint/china-one-belt-one-road-strategy-byfranciskfukuyama201601/spanish?barrier=accesspaylog> (accessed 26 March 2021); Katherine Bersch and Riitta Koivumäki, 'Making Inroads: Infrastructure, State Capacity, and Chinese Dominance in Latin American Development' (2019) 54 *Studies in Comparative International Development* 323–345; Gonzalez-Vicente, note 2.

<sup>73</sup> Global Times, 'Belt and Road Envisions Great Win-Win Global Connectivity', <https://www.globaltimes.cn/content/1117401.shtml401.shtml> (accessed 26 March 2021).

<sup>74</sup> Tom Narins and John Agnew, 'Missing from the Map: Chinese Exceptionalism, Sovereignty Regimes and the Belt Road Initiative' (2019) *Geopolitics* 2–24.

<sup>75</sup> The Economist, 'China's Belt-and-Road Plans are to be Welcomed – And Worried About' (June 2018), <https://www.economist.com/leaders/2018/07/26/chinas-belt-and-road-plans-are-to-be-welcomed-and-worried-about> (accessed 26 March 2021).

the middle of the last century.<sup>76</sup> Under principles of mutual respect for sovereignty and territorial integrity, mutual non-aggression, equality and mutual benefit, peaceful coexistence, and especially mutual non-intervention into internal affairs, the Chinese approach to international relations has historically justified the emphasis on compliance with host country laws as a social responsibility strategy rather than following stricter rules.<sup>77</sup> This trend, however, might change with the recent enactment by the Ministry of Commerce and the Ministry of Ecology and Environment of the Guidelines for Green Development in Foreign Investment and Cooperation on 15 July 2021. These guidelines encourage companies to ‘adopt international or Chinese standards in investing activities where local laws and regulations are non-existent or too lenient’.

In this context, whereas for some authors managing adverse impacts of development activities does not seem an integral part of the BRI blueprint,<sup>78</sup> others<sup>79</sup> find in Chinese social responsibility guidelines – based on UN and OECD environmental and human rights global norms – a sign that China is displaying itself as a responsible actor on the international stage, even though it has not the same commitment to human rights standards at home.

### Standards Made in China

The implementation of the BRI has increased the urgency for China to build a more positive image of its overseas investments.<sup>80</sup> Gallagher and Qi<sup>81</sup> found that although the Chinese governance system for overseas investments has matured in recent years, enforcement mechanisms are still relatively weak. For Paulina Garzon, Director at the China-Latin America Sustainable Investments Initiative,<sup>82</sup> Chinese enterprises do not have the regulatory and institutional tools of Western companies and multilateral financial institutions. Most Chinese companies would lack a department of public relations or an office in the host country to ensure direct engagement with local communities.<sup>83</sup> Procedures to achieve dialogue on the ground, file complaints or access to information are weak.

Certainly, China has not enacted a formal law that regulates corporate activities abroad; China’s Supreme People’s Court has just issued an opinion on how the judiciary system should support the BRI, calling Chinese courts to strengthen environmental public interest litigation and tort litigation outside China’s borders.<sup>84</sup> Nonetheless, Chinese investments are subjected to a bunch of policies that encourage voluntary compliance with social responsibility norms. The main policies are listed below.

<sup>76</sup> Ren Xiao, ‘The International Relations Theoretical Discourse in China: One World, Different Explanations’ (2010) 15 *Journal of Chinese Political Science* 99–116.

<sup>77</sup> Karin Buhmann, ‘Chinese Human Rights Guidance on Minerals Sourcing: Building Soft Power’ (2017) 46 *Journal of Current Chinese Affairs* 135–154; Adina Matisoff, *Going Beyond Compliance to Mitigate Risks: CNPC’s Engagement with Indigenous Federations in Peru, Environmental and Social Risk Management of Chinese Transnational Corporations* (Yale University and WWF, 2016).

<sup>78</sup> Deva, note 41.

<sup>79</sup> Buhmann, note 77.

<sup>80</sup> Z Duan et al, ‘Road to Transparency: Relationship to Risks and How it is Perceived and Handled by Chinese Extractive Companies Involved in Overseas Investment’ (2015) 8 *Journal of International Business Ethics* 44–65.

<sup>81</sup> Kevin Gallagher and Qi Qi, ‘Policies Governing China’s Overseas Development Finance: Implications for Climate Change’ (2018) The Fletcher School, Tufts University 18–19.

<sup>82</sup> Interview with author, 9 November 2020.

<sup>83</sup> Benjamin Creutzfeldt, ‘One Actor, Many Agents: China’s Latin America Policy in Theory and Practice’, in Margaret Myers and Carol Wise (eds.), *The Political Economy of China-Latin America Relations in the New Millennium: Brave New World* (Routledge, 2016) 15–30.

<sup>84</sup> Jingjing Zhang, ‘Interview by M Tianje: How Does 2020 Bode for China’s Overseas Investment? A Chinese Lawyer’s Take’ (17 January 2020), <https://chinadialogue.net/en/business/11792-how-does-2-2-bode-for-china-s-overseas-investment-a-chinese-lawyer-s-take/> (accessed 26 March 2021).

*The Guide on Social Responsibility for Chinese International Contractors (2012), formulated by the China International Contractors Association (CHINCA) under the supervision of China's Ministry of Commerce (MOFCOM)*

This aims at establishing a benchmark of social responsibility for the industry and to encourage enterprises to uphold their global responsibility to operate overseas contracting projects. It highlights the importance of 'evaluat[ing] the potential impacts of project activities on the community, learn the needs of the community, and identify development priorities' (SC1) and 'actively communicate project related information and learn and respond to the opinions and suggestions of stakeholders' (SC2).

*The Guidelines for Environmental Protection in Foreign Investment and Cooperation (2013)<sup>85</sup>, enacted by MOFCOM and the Ministry of Environmental Protection (MEP)<sup>86</sup>*

The guidelines cover community relations, environmental policies, and guidance on legal compliance. It highlights the importance of 'timely identify and prevent environmental risks, guide enterprises to actively perform their social responsibilities of environmental protection, set up good international images for Chinese enterprises, and support the sustainable development of the host country' (Article 1). Regarding local communities, it encourages companies to 'take full into account of the impacts of their development and construction as well as production and operation activities on the social environment ... and to take reasonable measures to reduce possible adverse impacts' (Article 9). In addition, it states that 'in the course of active performance of their responsibilities of environmental protection, enterprises should respect the ... customs of community residents of the host country ...' (Article 3).

*The Guidelines for Social Responsibility in Outbound Mining Investments (2014)<sup>87</sup>, instructed by MOFCOM and the China Chamber of Commerce of Importers and Exporters of Metals, Minerals, and Chemicals (CCCMC)*

These guidelines emphasize the corporate responsibility to protect human rights under the UN Guiding Principles, including stakeholders' interests and development (Article 2.5). In this respect, companies shall take active measures to avoid causing or exacerbating the adverse impacts on human rights (Article 3.4). It also states that companies should ensure that all operations shall be in line with the UN Guiding Principles during the entire life cycle of the mining project (Article 3.4.1), and ensure non-complicity in human rights violations, 'in particular that private security personnel or public security forces designated to protect the mining and production operations do not violate human rights' (Article 3.4.2). These guidelines have also specific provisions for local participation and indigenous rights. It is a corporate duty to 'directly consult with potentially impacted communities, with the objectives of ensuring that the development of mining projects fosters respect for their rights, culture, and natural resource-based livelihoods' (Article 3.4.4). It also states that 'prior to any mining operations, the free, prior and informed consent of affected local communities (including Indigenous peoples) shall be pursued' (Article 3.4.5). The standard is as strict as the UNDRIP: companies should obtain the consent for new projects or for changes to existing projects located on lands traditionally owned by Indigenous peoples and are likely to have significant adverse impacts on them 'irrespective of recognition by the state' (Article 3.4.5).

<sup>85</sup> Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains, <https://extractiveshub.org/resource/view/id/9507> (accessed 26 March 2021).

<sup>86</sup> In 2018 it was renamed as the Ministry of Ecology and Environment (MEE).

<sup>87</sup> Guidelines for Social Responsibility in Outbound Mining Investments, <https://extractiveshub.org/servefile/getFile/id/6853> (accessed 26 March 2021).

*The Due Diligence Guidelines for Responsible Mineral Supply Chains (2015),<sup>88</sup> prepared by the CCCMC in cooperation with the OECD*

These guidelines provide guidance and support to companies that are extracting and/or using mineral resources and their related products to identify, prevent and mitigate their risks of directly or indirectly contributing to conflict, serious human rights abuses, and risks of serious misconduct. The guidance formulates a risk-based and flexible due diligence approach, meaning that the intensity of a company's due diligence requirements is proportional to the risks it faces. For instance, it considers the lack of FPIC to local communities and Indigenous peoples as a high risk of contributing to serious misconduct (Article 5.2.1). In these guidelines, the rights of communities do not depend on state recognition but 'where there are pre-existing legitimate claims to the land by local populations, including those which are under customary, traditional or collective land tenure systems' (Article 5.2.1.6). The duty of due diligence has also been incorporated into the Human Rights Action Plan of China (2021–2025),<sup>89</sup> which 'encourage Chinese businesses to abide by the UN Guiding Principles on Business and Human Rights in their foreign trade and investment, to conduct due diligence on human rights' (Section VI: Participating in Global Human Rights Governance).

*Chinese Financial Institutions that Provide Credits to Chinese Corporations have also their own Voluntary Standards*

The Green Credit Guidelines,<sup>90</sup> issued by the China Banking Regulatory Commission (CBRC) in 2012, advises banks to adopt relevant international best practices when evaluating projects' environmental risks. The Guidelines for Establishing the Green Financial System of 2016,<sup>91</sup> in turn, support and encourage domestic financial institutions and multilateral development banks with China's participation to strengthen environmental risk management, environmental information disclosure, and explore the use of instruments such as environment pollution liability insurance to manage environmental risks in implementing BRI projects. These guidelines only include weak mechanisms of enforcement, such as the potential loss of business qualification.<sup>92</sup>

In April 2017, the Ministry of Environmental Protection (MEP), together with the Ministry of Foreign Affairs (MFA), the National Development and Reform Commission (NDRC) and MOFCOM, published the Guiding Opinions on Promoting the BRI, which put forward more detailed suggestions for corporate social responsibilities under all Chinese guidelines. The MEP also enacted the BRI Ecological and Environmental Cooperation Plan 'to strengthen cooperation and enable eco-environmental protection to serve, support and guarantee the Belt and Road construction towards environment-friendly routes'. Under the principle of 'government guidance and diverse participation', the plan also states that 'the whole society will be mobilized to actively participate in environmental governance with the business sector bearing the main responsibility and the market playing the due role'. This approach has been strengthened by the previously mentioned

<sup>88</sup> The Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains, <https://mneguidelines.oecd.org/chinese-due-diligence-guidelines-for-responsible-mineral-supply-chains.htm> (accessed 8 November 2020).

<sup>89</sup> The State Council Information Office of the People's Republic of China, 'Human Rights Action Plan of China (2021–2025)', [http://english.www.gov.cn/news/topnews/202109/09/content\\_WS6139a111c6d0df57f98dfec.html](http://english.www.gov.cn/news/topnews/202109/09/content_WS6139a111c6d0df57f98dfec.html) (accessed 4 September 2021).

<sup>90</sup> China Banking Regulatory Commission, 'The Green Credit Guidelines', <http://www.wfchina.org/content/press/publication/2015/greenfinanceen.pdf> (accessed 26 March 2021).

<sup>91</sup> SINA, 'Development Trend and Thinking of Global Green Credit', <http://finance.sina.com.cn/money/bank/yhpl/2017-03-09/doc-ifychhus0202334.shtml> (accessed 26 March 2021).

<sup>92</sup> Gallagher and Qi, note 81.

Guidelines for Green Development in Foreign Investment and Cooperation of July 2021 as it put on Chinese firms the responsibility to apply Chinese and international standards stricter than national regulations if host countries lack their own standards or those are weak.

In sum, some analyses concur that the main concern behind Chinese policies is the management of risk to ensure profitability;<sup>93</sup> others, such as Garzon,<sup>94</sup> acknowledge their limitations given its non-binding nature but emphasize that they are positive steps because they indicate that Chinese banks and companies are aware of the importance of minimizing or avoiding negative impacts of Chinese investments. Indeed, Chinese standards have incorporated UN human rights norms and are supposed to be applied by their investments abroad. The next section assesses the implementation of these standards in Latin America.

#### IV. Human Rights and Chinese Corporations in Latin America

China's main economic interaction with Latin America has been through trade: between 2007 and 2012 Latin America became the region where Chinese trade increased the most, even eclipsing the European Union.<sup>95</sup> Nonetheless, since 2013, Chinese finance has increasingly focused on infrastructure development.<sup>96</sup> In fact, many countries have shown their interest in developing mega-projects of infrastructure under the BRI.<sup>97</sup> For instance, the former President of Argentina, Mauricio Macri, asserted: 'We have interest in articulating the BRI with the Initiative for the Integration of the Regional Infrastructure of South America (IIRSA) to prompt between our regions one of the key elements of the XXI century: connectivity'.<sup>98</sup> Other mentioned projects have been the *Corredor Ferroviario Bioceánico Central* (CFBC), connecting the Pacific of Peru with the Atlantic of Brasil;<sup>99</sup> the *Hidrovia del Paraná-Paraguay*, aimed at transporting commodities between Argentine, Bolivia, Brasil, Paraguay and Uruguay from and towards the Atlantic Ocean; and the Dam Tele Pires, located in Brazil Amazonia.<sup>100</sup>

The dimension that has reached the BRI generates expectations on potential partners, but also concerns regarding the social costs of the projects, the possible lack of reciprocity in shared benefits between host countries and China, and the lack of regional environmental standards.<sup>101</sup> In fact, civil society organizations and Indigenous peoples see the past Chinese

<sup>93</sup> D Leung et al, 'Environmental and Social Policies in Overseas Investments: Progress and Challenges in China' (2013), *World Resources Institute*.

<sup>94</sup> Garzon, note 11.

<sup>95</sup> David B H Denoon, *China's Arrival in Latin America. China, The United States, and the Future of Latin America: U.S.-China Relations* (New York: New York University Press, 2017) 3–15.

<sup>96</sup> Enrique Dussel, Ariel C Armony and Shoujun Cui, *Building Development for a New Era: China's Infrastructure Project in Latin America and the Caribbean* (Pittsburgh: University of Pittsburgh, 2018).

<sup>97</sup> Grupo Regional sobre Financiamiento e Infraestructura (GREFI) (2019), El rol de América Latina y El Caribe en la iniciativa de la franja y la ruta y la estrategia política de China hacia la región, [https://refi.info/wpcontent/uploads/2020/04/Informe\\_GREFI\\_Rol\\_America\\_Latina\\_iniciativa\\_franja\\_y\\_ruta.pdf](https://refi.info/wpcontent/uploads/2020/04/Informe_GREFI_Rol_America_Latina_iniciativa_franja_y_ruta.pdf) (accessed 26 March 2021).

<sup>98</sup> Banco Interamericano de Desarrollo BID (19 December 2017), Una mirada al futuro del EITI desde Latinoamérica, <https://blogs.iadb.org/administracion-publica/es/una-mirada-al-futuro-del-eiti-desde-latinoamerica/> (accessed 26 March 2021).

<sup>99</sup> Sophie Wintgens (2019), La influencia normativa de China en América Latina y en el Caribe Tecnos.

<sup>100</sup> Matias Lenicov and Jose Quesada, 'Zhuhai, la nueva entrada para LATAM: ¿oportunidad o amenaza?', <https://www.iri.edu.ar/wpcontent/uploads/2019/07/libroRutaDeLaSeda2019.pdf9/07/libroRutaDeLaSeda2019.pdf> (accessed 26 March 2021).

<sup>101</sup> Peter Wolff, 'China's "Belt and Road" Initiative – Challenges and Opportunities', [https://www.die-gdi.de/uploads/media/Belt\\_and\\_Road\\_V1.pdf](https://www.die-gdi.de/uploads/media/Belt_and_Road_V1.pdf) (accessed 29 March, 2021).



extractive and infrastructure initiatives in the region as precedents of what might occur with future BRI projects.<sup>102</sup>

A 2018 report by the International Federation for Human Rights (FIDH) and the Collective on Chinese Finance and Investment, Human Rights and Environment (CICDHA) featured case studies from 18 Chinese-led projects in Argentina, Bolivia, Brazil, Ecuador and Peru.<sup>103</sup> The document points out that violations of human and environmental rights are not isolated incidents, but a pattern of behaviour.<sup>104</sup> In Brazil, for instance, meat and soy production, main exports to China, are related to the growth of deforestation and displacement of local communities;<sup>105</sup> besides, NGOs and stakeholders questioned environmental impact assessments of dams such as Sao Manoel, developed by the Chinese State Grid and Three Gorges Corporation, for not considering the socio-environmental impacts over Indigenous communities.<sup>106</sup> Local communities have made a similar critique to the environmental impact assessment of the oil company Emerald Energy Plc Colombia (a subsidiary of Sinochem) regarding the oil block El Nogal in the Colombian Amazon.<sup>107</sup> In Peru, indigenous organizations have strongly criticized the Amazonian Hydroway led by the Chinese Sinohydro for the insufficient assessment of its social and health impacts over local communities.<sup>108</sup>

Other studies<sup>109</sup> found that Chinese companies do not perform significantly worse compared with other companies.<sup>110</sup> For instance, in Peru, the mining project Antamina led by the Chinese Shougang produced environmental impacts not substantially worse than the cooper complex La Oroya (by the American Doe Run) or gold mines of Yanacocha (by the American Newmont).<sup>111</sup> Other scholars found: 'some instances of Chinese firms outperforming their competitors, especially with proper incentives from governments and civil Society'.<sup>112</sup> They showcase the Jungie tin mine in Bolivia and the Toromocho copper mine owned by Chinalco in Peru (where the company built a new city for the community) as examples of success.<sup>113</sup> Other studies<sup>114</sup> highlight the experience of SAPET, a filial of the China National Petroleum Corporation (CNPC). After acquiring Block 113 in Peru and

<sup>102</sup> Derecho, Ambiente y Recursos Naturales (DAR), Los retos del estándar EITI frente al COVID-19 en América Latina y el Caribe, <https://dar.org.pe/21428-2/> (accessed 26 March 2021).

<sup>103</sup> FIDH, note 8.

<sup>104</sup> *Ibid.*

<sup>105</sup> Thais Lazzeri, 'Tracking China's Soy Footprint in Brazil', *China Dialogue*, <https://dialogochino.net/en/agriculture/25843-tracking-chinas-soy-footprint-in-brazil/> (accessed 26 March 2021).

<sup>106</sup> Philip Fearnside, 'Environmental Justice and Brazil's Amazonian Dams', in N A Robins and B Fraser (eds.), *Landscapes of Inequity: The Quest for Environmental Justice in the Andes/Amazon Region* (Lincoln: University of Nebraska Press, 2018); COICA, 'Informe EPU 2018, Vulneraciones a los derechos de los pueblos indígenas en la cuenca amazónica por inversiones chinas', [https://coalicionalregional.net/wp-content/uploads/2018/11/Informe\\_EPU\\_China\\_vulneracion\\_derechos\\_humanos\\_pueblos\\_ind%C3%ADgenas-cuenca-amazonica.pdf.pdf](https://coalicionalregional.net/wp-content/uploads/2018/11/Informe_EPU_China_vulneracion_derechos_humanos_pueblos_ind%C3%ADgenas-cuenca-amazonica.pdf.pdf) (accessed 26 March 2021).

<sup>107</sup> *Ibid.*; Asociación Minga, 'Sin licencia social, no hay licencia ambiental: Caquetá convoca audiencia Pública ambiental para exponer riesgos de explotación petrolera de la Emerald Energy', <https://asociacionminga.co/sin-licencia-social-no-hay-licencia-ambiental-caqueta-convoca-audiencia-publica-exponer-riesgos-de-explotacion-petrolera-de-la-emerald-energy/> (accessed 26 March 2021).

<sup>108</sup> DAR, note 102.

<sup>109</sup> Maurin and Yeophantong, note 10; Ray et al, note 9; Gallagher and Irwin, note 9; IUCN, note 9.

<sup>110</sup> Irwin and Gallagher, note 9.

<sup>111</sup> *Ibid.*

<sup>112</sup> Ray et al, note 9.

<sup>113</sup> Gervase Poulden, 'China has Higher Environmental Standards Abroad than at Home', *China Dialogue*, <https://dialogochino.net/en/trade-investment/217-china-has-higher-environmental-standards-abroad-than-at-home/> (accessed 26 March, 2021).

<sup>114</sup> IUCN, note 8; Matisoff, note 77.

knowing the situation of Indigenous peoples in voluntary isolation in the area, SAPET decided not to exploit the block, following a high standard of corporate responsibility even against the host government. The Chinese Sinohydro took a similar decision in Honduras when they gave up the dam project Agua Zarca due to local opposition.<sup>115</sup> These actions seem show that Chinese investors are concerned about the social impact of their investments.<sup>116</sup>

In sum, the performance of Chinese investments regarding the respect of human rights seems to be highly contextual; there is not a ‘Chinese way’ of doing business.<sup>117</sup> It depends on the economic sector, the strength and involvement of host governments and social movements, and strategic decisions taken on the ground. It must be also noted that Chinese investments are often the result of negotiations between governments, and representatives of Chinese institutions that conceive host authorities as being the representatives of the general expectations of the country. However, this image is problematic given the social fragmentation and grievances in regions with a high Indigenous population.<sup>118</sup> Sometimes, these different variables coincide in pushing Chinese firms to follow high human rights standards, but sometimes this is not the case.

In this context, among analysts, contrasting opinions exist about who must hold the main responsibility for upholding human rights standards and preventing human and environmental rights violations: if Chinese companies (and their home country regulators) or the host governments are blamed for lacking strong social and environmental standards, as well as enforcement capacity.<sup>119</sup> Scholars tend to coincide on the need for shared responsibility between China and host governments in the establishment and fulfilment of social and environmental standards.<sup>120</sup>

The problem, however, is how different actors interpret the proper application of these standards. For example, in the Mirador Project located in the Ecuadorian Amazon, Ecuacorriente SA (a subsidiary of the Chinese consortium CRCC-Tongguan) opted to buy the territories of some of the community’s inhabitants from the Shuar nation.<sup>121</sup> During this process, the company believed that was enough to propose to the Ministry of Environment ‘a program of negotiation and use of the land’ as part of its management plan with compromises of transparency and ‘adaptation’ to the cultural context of the area;<sup>122</sup> whereas the communities explicitly demanded the need to provide their consent to allow any activity. In the end, the people who refused to sell the land suffered intimidation and forced evictions with the support of public security.<sup>123</sup> The competing

<sup>115</sup> Ibid.

<sup>116</sup> Anna Aseeva and Ka Lok Yip, ‘Stakes and Prospects of the Right to Free, Prior & Informed Consent in “One Belt One Road” Initiative in the Framework of Transnational Investment Law and Arbitration’, in J Chaisse et al (eds.), *The Belt and Road Initiative: Law, Economics, and Politics* (Brill, 2018); Susanna Price, ‘Social Impact Assessment in China and its Overseas Investments: Some Recent Developments’, in *Advances in Asian Human-Environmental Research* (Springer International Publishing).

<sup>117</sup> Cynthia Sanborn and Victoria Chonn, ‘Chinese Investment in Peru’s Mining Industry: Blessing or Curse?’, in Rebecca Ray, Kevin P Gallagher, Andres Lopez and Cynthia Sanborn (eds.), *China and Sustainable Development in Latin America* (London: Anthem Press, 2017) 183–226.

<sup>118</sup> Garzon, note 11.

<sup>119</sup> C Bragagnolo et al, ‘Streamlining or Sidestepping? Political Pressure to Revise Environmental Licensing and EIA in Brazil’ (2017) *Environmental Impact Assessment Review* 86–90; A Gerlak and M Saguier, ‘Interdisciplinary Knowledge Frameworks for Transboundary River Basins’ (2015) 4 *International Journal of Water Resources Development* 790–794.

<sup>120</sup> Garzon, note 11; Ray and Gallagher, note 11.

<sup>121</sup> W Sacher et al, ‘Entretelones de la Megaminería en el Ecuador’ (2015), *Colectivo de Geografía Crítica del Ecuador*.

<sup>122</sup> Isabella Figueroa, ‘Desplazamientos en virtud del desarrollo: un estudio de caso del proyecto minero Mirador en Zamora Chinchipe, Ecuador’ (2018) 17 *Opinión Jurídica* 173–198.

<sup>123</sup> Ibid; Sacher et al, note 121.

views on how to engage with these standards generate not only human rights risks but also jeopardize the economic viability of the projects. In 2016, the Supreme Court of Justice of Argentina suspended Argentina's Patagonia dam project, the most expensive financed by China abroad (4.7 million dollars) because of deficiencies of the environmental impact assessment (EIA) and the lack of proper citizen participation.

In general, participation in mega investment projects has become a crucial standard in the region, even recognized at supra-national level by the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean or 'the Escazú Agreement', adopted in the city of Escazú, Costa Rica, on 4 March 2018. To date, the Agreement has been signed by 24 countries in the region and ratified by 12,<sup>124</sup> entering into force on 22 April 2021.<sup>125</sup> The Escazú Agreement focuses on the recognition and promotion of the rights of environmental defenders,<sup>126</sup> but also highlights the need for meaningful participation 'since the early stages in decision-making processes' (Article 7.4) and the dissemination of decisions resulting from the environmental evaluation, which 'must be done through appropriate means' (Article 7.4). For Ray et al,<sup>127</sup> Escazú will impact the new wave of Chinese investments, as they will face a changing environmental governance, with local and international actors claiming for more levels of transparency and accountability. This situation is particularly problematic in contexts of huge inequality and historical grievances where Chinese investments take place.

### The Case of Las Bambas

Mining is a crucial economic activity in Peru. It accounts for 10 per cent of the GDP and 60% of exports,<sup>128</sup> making the country highly dependent on mining revenues. The legal framework promotes mining investments and, at the same time, incorporates business and human rights standards. National authorities must approve the citizen participation plan delivered by companies for the elaboration of the EIA. The final approval of the EIA by national authorities is a requirement to start operations. Besides, Indigenous peoples hold the right to be consulted before the state approves the commencement of mining activities under the Prior Consultation Law, enacted in 2011 based on ILO Convention 169. In addition, specific guidelines on due diligence have been recently incorporated in Peru's National Plan of Action on Business and Human Rights.<sup>129</sup> Indeed, the Courts have already incorporated the duty of due diligence when ruling cases of oil and mining concessions without prior consultation. The argument is that even though these concessions were granted before the enactment of Consultation Law in 2011, companies had to apply the duty of due diligence and implement a consultation: 'The existence of ... an international obligation of the

<sup>124</sup> Argentina, México, Antigua and Barbuda, Bolivia, Ecuador, Guyana, Nicaragua, Panamá, Saint Kitts y Nevis, San Vicente and Granadinas, Santa Lucía and Uruguay.

<sup>125</sup> United Nations, 'Secretary-General's Message Marking the Entry into Force of the Escazú Agreement', <https://www.un.org/sg/en/content/sg/statement/2021-04-22/secretary-generals-message-marking-the-entry-force-of-the-escazu%C3%BA-agreement> (accessed 10 August 2021).

<sup>126</sup> Mario Melo, Daniel Espinoza and Jose Valenzuela, 'El Acuerdo de Escazu y su impacto en el ordenamiento jurídico vigente en Ecuador' (2019), <https://america-latina.hivos.org/assets/2020/11/Ratificacio%CC%81n-Acuerdo-de-Escazu%CC%81-EC.pdf> (accessed 10 August 2021).

<sup>127</sup> R Ray et al, 'Can Escazú Turn Mining Green in the Lithium Triangle? Lofty Promises Meet a Thirsty Industry in the Desert' (2021), *Dossier: The China-Latin America and Caribbean Relation*, <https://forum.lasaweb.org/files/vol52-issue3/Dossier-6.pdf> (accessed 20 August 2021).

<sup>128</sup> Gestion, 'Minería puede ser el salvavidas para economía peruana en recesión' (2020), <https://gestion.pe/economia/mineria-puede-ser-el-salvavidas-para-economia-peruana-en-recesion-noticia/> (accessed 16 December 2021).

<sup>129</sup> Supreme Decree 009-2021-JUS, 11 June 2021.

Peruvian state to consult Indigenous peoples since 1995 [year of ratification of ILO Convention 169] generates in interested companies ... a reasonable due diligence of any international investor ... they should know that Indigenous peoples' prior consultation was an unbreakable standard'.<sup>130</sup>

The contentious implementation of these standards has generated social conflicts around mega-mining projects and, eventually, activities had to be suspended in projects such as the gold mining project Conga by Newmont Mining Corporation<sup>131</sup> and Tia María Copper Mine by Southern Copper Corporation.<sup>132</sup> One case of persistent conflict and recent suspension of activities is *La Unidad Minera Las Bambas*, a copper and molybdenum mine located in the provinces of Cotabambas and Grau, in the Department of Apurímac.

In August 2004, the Swiss company Xstrata acquired concession rights for exploration. As part of its investment, the company created a trust of US\$63 million designated for the development of Cotabambas, managed under a Social Fund. The transport of minerals starts from Apurímac and crosses the provinces of Chumbivilcas and Espinar in the department of Cusco to arrive at the molybdenum plant of the mining project Tintaya, owned by Xstrata. Given these dimensions, authorities name the total area of operation as the 'South mining corridor'. According to the EIA, the districts directly affected by the operation encompass 17 peasant communities, six of them inside the mining complex. However, the National Coordinator of Human Rights (2019) has reported that through the highway that transports minerals there are 72 communities, many severely affected by the dust generated by the constant circulation of trucks.

The first conflicts around this project started in 2008 with demands of increasing jobs for locals and higher wages. In 2010, the community of Fuerabamba agreed to be relocated to a new town built by the company. In 2013, Glencore-Xstrata (the fusion of these two companies) acquired the ownership of the project and in 2014 the Chinese Minerals and Metals Group (MMG) acquired all rights. Since the approval of the EIA for mining exploitation in 2011, the EIA has been modified eight times: three of them through the regular procedure of EIA modification (which include a stage of citizen participation and opinions of different state agencies with competencies in those aspects to be modified) and five were made using the '*Informe Técnico Sustentatorio*' (ITS), a simplified procedure with no citizen participation allowed by the new legislation for 'non-significant changes'.<sup>133</sup>

In March 2014, a month before the formal involvement of MMG in Las Bambas, Glencore-Xstrata filed the second modification of the EIA to update the system of water management and the environmental and social baselines. This petition did not mention a change in the mode of mineral transport, planned through a pipeline. The EIA executive summary stated that 'the regular access to the mining area is the same as the original EIA'. For this reason, the modification procedure did not include as a requirement the technical opinion of the Ministry of Transport and Communications, and the stage of citizen participation did not include issues of mineral transportation. After an initial assessment, the Ministry of Energy and Mines (the authority in charge of approving the EIA

<sup>130</sup> Constitutional Court of Lima (2017), Decision of 28 March 2017, Zebelio Kayak and others versus MINEM, MEM, and Perupetro S.A.

<sup>131</sup> Roger Merino, 'Re-politicizing Participation or Reframing Environmental Governance? Beyond Indigenous Prior Consultation and Citizen Participation' (2018) 111 *World Development* 75–83.

<sup>132</sup> Alexander Dunlap, 'Agro sí, mina NO! the Tía María copper mine, state terrorism and social war by every means in the Tambo Valley, Peru' 71 *Political Geography* 10–25.

<sup>133</sup> Leonidas Wiener, *Gobernanza y Gobernabilidad: el caso Las Bambas* (CooperAcción, 2018); Ana Leyva, 'Los continuos cambios del proyecto minero Las Bambas y la debilidad del sistema de evaluación de impacto ambiental', <http://cooperacion.org.pe/los-continuos-cambios-del-proyecto-minero-las-bambas-y-la-debilidad-del-sistema-de-evaluacion-de-impacto-ambiental/> (accessed 26 March 2021).

modification) issued one observation stating that the company ‘must provide details on the possible changes in general information (such as transport, plan of management, among others)’.

In October 2014, when MMG was already in charge of the project, the company filed complementary information. This information mentioned a change in the form of mineral transport, from a pipeline to overland transport on the highway. This change also reduced the project’s area of influence, excluding those communities considered in the initial pipeline plan.<sup>134</sup> With this information, state authorities approved the EIA modification in November 2014 (Directorial Resolution 559-2014-MEM-DGAAM). The lack of provision of information from MMG to local communities about these changes created distrust in a population with high expectations about promised benefits.<sup>135</sup> As a result, a series of protests began in February 2015 and continued until 2016, resulting in the death of at least four peasants by police gunfire.<sup>136</sup> In fact, since 2015 both the government and the company have incriminated peasant leaders for exercising their right to protest,<sup>137</sup> requesting up to 17 years of prison to 19 peasants of the Cotabambas community and civil reparations.<sup>138</sup> Protest criminalization has also entailed the use of decrees that declare the ‘state of emergency’ in the area.<sup>139</sup> In October 2017, a writ of habeas corpus was filed requesting the suspension of Article 2 of Supreme Decree No. 101-2017-PCM, which declared a state of emergency in the provinces of Cotabambas (Apurímac) and Capaccmarca (Cusco). Three years later, the Constitutional Tribunal declared the lawsuit well-founded. Nonetheless, the government has continued enacting emergency decrees in part of the Apurímac road corridor.<sup>140</sup>

The main conflict today involves the communities of the province of Chumbivilcas in Cuzco and has environmental and economic angles, both related to the lack of participation. From the environmental angle, communities complain about the dust generated by the in-road transport of minerals. They argued that the modification of the EIA had to be subjected to citizen participation to establish adequate mitigation measures and compensation, as well as correctly define the area of influence. They ask for proper compensation to address the damage suffered over their health and environment and to be included in the area of influence. From the economic angle, the communities demand to be transport suppliers of the mine and thus be part of the supply chain and obtain permanent earnings from mining activities.<sup>141</sup> These demands were part of an agreement with the company in October 2021 but there are disagreements about when communities would start operations and the amount of the economic reattribution.<sup>142</sup>

<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

<sup>136</sup> El País, ‘Un conflicto minero pone a prueba al Gobierno peruano’ (11 April 2019) (accessed 26 March 2021).

<sup>137</sup> Coordinadora Nacional de Derechos Humanos, ‘La CNDDHH frente a la actuación del Estado por las protestas de las comunidades en Las Bambas’ (22 March 2019), <https://derechoshumanos.pe/2019/03/la-cnddhh-frente-a-la-actuacion-del-estado-por-las-protestas-de-las-comunidades-en-las-bambas/> (accessed 26 March 2021).

<sup>138</sup> Red Muqui, ‘Sentencia confirma inocencia de 19 comuneros que protestaron contra minera las Bambas en 2015’ (2020), <https://muqui.org/noticias/sentencia-confirma-inocencia-de-19-campesinos-que-protestaron-contraminera-las-bambas-el-2015/> (accessed 26 March 2021).

<sup>139</sup> Jose Saldaña and Jorge Portocarrero, ‘La violencia de las leyes: el uso de la fuerza y la criminalización de protestas socioambientales en el Perú’ (2017) 79 *Derecho PUCP* 311–315.

<sup>140</sup> OCMAL, ‘Las Bambas: El conflicto minero que pone a prueba a una inversión china en Perú’ (8 January 2021), <https://www.ocmal.org/las-bambas-el-conflicto-minero-que-pone-a-prueba-a-una-inversion-china-en-peru/> (accessed 26 March 2021).

<sup>141</sup> Frente único de Defensa de los intereses de la provincia de Chumbivilcas (FUDICH). Pronunciamientos de Las Comunidades Del Corredor Minero Sur (11 June and 17 August 2021).

<sup>142</sup> Jose V Salcedo, ‘El fracaso del diálogo en Las Bambas: no hay acuerdos para contratar a empresas comunales’, Ojo Público (12 December 2021), <https://ojo-publico.com/3220/las-bambas-sin-acuerdos-sobre-montos-contratar-empresas-comunales> (accessed 17 December 2021).

These apparent contradictory demands (environmental and economic) are indeed expressions of the communities' self-determination. In their view, participation is not simply a right to be heard by the company but to have direct incidence in the activity, so they might participate in the economic cycle of the mine under proper environmental conditions. However, given the lack of agreement between the company and the communities, MMG decided to progressively wind down operations.<sup>143</sup> The company alleges that it has experienced 400 days of stoppage due to road blockades since it began operations.<sup>144</sup>

## V. The Politics of Localizing Human Rights in Unequal Contexts

Business and human rights standards are critical in Latin America, given the possible expansion in the region of BRI projects and the legacy and ongoing development of Chinese infrastructure and extractive investments. A first view would show a gap between what has been enacted as international standards to guide 'good practices' for Chinese investments and how companies commonly implement these standards on the ground. However, more deeply, there are also competing views over the meaning and scope of these standards especially in relation to citizen participation and due diligence.

In the case of Las Bambas, even though the company shows general commitments to human rights (in the Report of Sustainability 2018, MMG stated that 'it has the commitment to respect human rights under UN Principles'<sup>145</sup>) and the Chinese Guidelines for Green Development in Foreign Investment and Cooperation encourage companies to apply stricter standards of those of the host governments, MMG just relied on the formal approval by Peruvian authorities of the EIA modification following strictly the requirements of national authorities and regulations. In fact, on the ground, the company did not pay sufficient attention to the local dynamics and the fact that deep participation is a sensitive issue given the long history of broken promises for communities living close to mining projects.

Other Chinese standards are relevant in this case. For instance, whereas the company minimized communities' concerns and provided limited information about the EIA modification, the Guide on Social Responsibility for Chinese International Contractors expressly establishes that companies must 'learn the needs of the community' and 'actively communicate project related information'. Moreover, MMG considered the problem of the dust as non-relevant when the Guidelines for Environmental Protection in Foreign Investment and Cooperation state that companies must 'take full into account of the impacts of their development and construction as well as production and operation activities on the social environment' (Article 9).

The deepest problem, however, is not the mere incorporation and application of these standards into national systems. For instance, the Business and Human Rights Inter-American Standards states that 'Ensuring mechanisms for participation in the issues that involve the field of business and human rights must be broad, and must aim to effectively listen to the directly affected persons, communities, and populations'.<sup>146</sup> This binding standard has been also incorporated into national legislation but the term

<sup>143</sup> MMG, 'Voluntary Announcement - Las Bambas Update' (3 December 2021), [https://www.mmg.com/wp-content/uploads/2021/12/e\\_2021-12-03\\_VA\\_Las-Bambas-Update.pdf](https://www.mmg.com/wp-content/uploads/2021/12/e_2021-12-03_VA_Las-Bambas-Update.pdf) (accessed 17 December 2021).

<sup>144</sup> *Ibid.*

<sup>145</sup> MMG, 2018. Report of Sustainability of Las Bambas, [http://www.lasbambas.com/informe-de-sostenibilidad-2018/assets/pdf/informe\\_sostenibilidad\\_las\\_bambas\\_2018.pdf](http://www.lasbambas.com/informe-de-sostenibilidad-2018/assets/pdf/informe_sostenibilidad_las_bambas_2018.pdf) (accessed March 2020).

<sup>146</sup> Thematic Report on Business and Human Rights: Inter-American Standards. Approved by the Inter-American Commission on Human Rights, on 1 November 2019 (OAS, Official Documents; OEA/Ser.L/V/II), Section H. Prior, Free and Informed Consultation and General Mechanisms for Participation.



'effectively listen' might mean different things to peasant leaders, state officials and company representatives. Similarly, under the firm perspective, it might not be clear about the level of 'community needs' that they must consider as mentioned by the Guide on Social Responsibility for Chinese International Contractors. Whereas companies and governments are more restrictive in the application of these standards, peasant organizations seek to maximize and enlarge the meaning of participation to have meaningful decision-making power over the project destiny as it deeply affects their everyday lives. Thus, under the standard of participation, they struggle not just to be heard but to have direct economic benefits from the operation under proper environmental safeguards.

This case thus shows how many local communities are not just 'norm takers' or simple norm beneficiaries, namely, passive receptors of international human rights norms. They do not require experts to properly translate these norms into their cultural values either. They are actually norms makers, they appropriate the norms and enlarge their meaning under their own views of self-determination. In this context, Chinese and other international investments should implement a 'walk and talk strategy':<sup>147</sup> Chinese companies should make efforts to continuously cooperate with indigenous organizations and other local actors to contextualize these standards. This is particularly relevant in contexts of profound social inequality where colonial legacies still reproduce patterns of social exclusion and social movements are very active to engage with international investments on their own terms.

## VI. Conclusions

Debates around Chinese investments tend to focus on the level of negative impacts they have produced on local communities (if systematic or dependent on specific companies and sectors) and the level of responsibility that must be held by either Chinese regulators and companies or host countries. These discussions assume that the problems with international norms of business and human rights are the lack of incorporation in national systems and corporate practices and the deficient capacity of national governments to enforce those norms.

Whereas the 'implementation gap' is an actual problem and many communities must deal with weak enforcement mechanisms to make human rights norms' effective, it is also relevant to note how local stakeholders have their own interpretation of the content and scope of these norms, contrasting to the way those are conceived by national authorities and international firms and regulators. Rather than having a fixed meaning, international standards, such as citizen participation and due diligence, are disputed by these different actors.

In fact, Chinese authorities have included these standards into their policies and guidelines following the highest international instruments and practices. In Peru, they have also been included in national legislation and in the judiciary. Indigenous and local organizations, in turn, continuously appeal to them in their social mobilizations. However, whereas national authorities and companies' conception of participation is limited to providing a voice to the communities in specific formal channels in the process of approving significant EIA modifications, indigenous and peasant organizations conceive participation as means to express their self-determination regarding any change that might affect their collective rights. Building on the literature on norm localization, this paper argues that those marginalized communities are not simple beneficiaries of the norm or norm takers,

<sup>147</sup> Xu Ying, 'The Interaction between Ecuadorian NGOs and Chinese Enterprises in Ecuador: Toward Better Corporate Social Responsibility' in S Cui and M Pérez García (eds.), *China and Latin America in Transition* (New York: Palgrave Macmillan, 2016).

but actual norm makers. They enlarge the meaning of the norms towards their own views of social development.

The expansion of Chinese investments worldwide has incentivized Chinese authorities to enact human rights standards to be applied to their firms as guidelines of good corporate conduct. Although these guidelines are relevant steps in recognizing the responsibility of their international firms, they will remain ineffective if the predominant approach of Chinese investments is just following national laws and the formal decision of national authorities; or even if they just apply higher standards but under restrictive interpretations. In contexts of high inequality, poverty and historical grievances, it is crucial to pay special attention to how the communities engage with human rights standards. If this is not the case, local communities through protests, litigation and the building of transnational networks of support might oblige national authorities and international firms to reinterpret those standards under their own terms.

The localization of business and human rights norms is therefore a political process, not simply a matter of legal implementation or a corporate or NGO technocratic strategy to convince the locals about the benefits or risks of the projects. Depending on the development vision of local actors, localization might be a very contentious process. Conceiving these norms from the perspective of marginalized people might reduce the gap between flows of investment and development outcomes in countries that need not only economic growth but also address historical grievances and deep inequality.

**Acknowledgements.** I thank the Global Development Policy Center at Boston University for supporting the research for this paper, and Professors Cynthia Sanborn and Rebecca Ray for providing important feedback to the first draft.

**Conflicts of interest.** The author declares none.