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VOICES FROM THE GROUND



Chinese Legal Expertise in International Environmental Activism: A Conversation with Jingjing Zhang

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Jingjing Zhang is the founder and Director of the Center for Transnational Environmental Accountability (CTEA), an organisation based in the United States that, in her words, is still ‘part of Chinese civil society’. A lawyer by training and profession, Jingjing has been involved in China’s environmental movement since the late 1990s, suing companies causing environmental damage and pushing for reforms in China’s environmental governance. Later, as concerns about the environmental impacts of many Chinese projects abroad started to grow, the focus of her work shifted to Chinese investment overseas. Jingjing now travels extensively in Africa and Latin America, learning about the impacts of Chinese projects and working with local partners to provide legal assistance to affected communities. This makes CTEA one of very few environmental nongovernmental organisations (NGOs) with expertise in Chinese law that actively address the challenges of Chinese investment overseas. In this conversation, Jingjing discusses her journey as an environmental lawyer working both within China and internationally, common misunderstandings about China’s environmental regulations, and why it is important to bring a Chinese perspective to international environmental advocacy.

Hong Zhang: As a Chinese legal professional working on litigation related to environmental violations linked to Chinese overseas investments, you have brought a rather unique approach to this activism space. Can you tell us more about your journey as an environmental lawyer, first in China and then overseas?

Jingjing Zhang: I started my journey as an environmental legal professional when I was still a graduate student at the China University of Political Science and Law (CUPL). Back in 1999, Professor Wang Canfa at the CUPL founded the Centre for Legal Assistance to Pollution Victims (CLAPV), an NGO that provided ‘legal assistance’ [法律帮助] to citizens. At that time, we could not use the term ‘legal aid’ [法律援助] because in the Chinese judicial parlance that specifically referred to the service provided

by the state. I was among the first student volunteers at the organisation. In the late 1990s and early 2000s, the CLAPV became very influential, due to the growing awareness of environmental issues in Chinese society. Chinese citizens started to use environmental laws to protect their rights, including to request environmental information disclosure and to participate in the government's decision-making regarding environmental issues, all of which laid the foundations for the environmental movement in China.

In 2004, we got involved in a landmark court case involving environmental administrative litigation. Residents of the Baiwang Jiayuan neighbourhood in Beijing were concerned about potential electromagnetic radiation pollution due to the planned construction of high-voltage transmission lines nearby, and they approached us. We found it an opportune time to take legal action because just one year before, in 2003, China's Environmental Impact Assessment Law had come into effect, following the enactment of the Administrative Reconsideration Law a few years earlier. These laws made it possible for citizens to request administrative reviews and to initiate public hearings. In fact, China's first public hearing related to environmental impact assessment had been held upon the request from the residents of Baiwang Jiayuan in July 2003. It was the first time for any Chinese citizen to use public hearings, administrative review requests, and litigation to influence government decision-making on environmental matters. Environmental administrative litigations like this also ushered in the so-called storm of environmental impact assessment [环评风暴], led by the famous official Pan Yue, then Deputy Director of the State Environmental Protection Administration, which resulted in the suspension of dozens of large-scale infrastructure projects between 2004 and 2005.

In the wake of the 'storm', we went on to push for greater information disclosure about the government's decision-making and companies' environmental impacts. A key event for government transparency was the enactment of the Regulations on Open Government Information in 2008, which was partly thanks to the 2008 Beijing Olympics, as the Chinese authorities had to respond to many questions about Beijing's air pollution.

Another major achievement was that we won a 'group litigation' case—or 'collective litigation' [集体诉讼] as it is known in China—on behalf of over 1,700 residents in Fujian Province who complained about toxic discharges into a local river by a chemical plant. Even though the compensation award was far below what we aimed for, the case was highly remarkable as such a case involving a great number of plaintiffs—and thus politically sensitive—was accepted in one lawsuit and eventually supported by the court; the court finally ordered the company to not only pay compensation but also clean up the pollution.

I started to follow China's overseas investment around 2009. As I attended international conferences, I started to hear colleagues from other countries mentioning the environmental problems caused by Chinese overseas investments. Around 2010, a few of us started the Mekong Legal Network, a small network of environmental

lawyers from countries in the Mekong Subregion. Through this initiative, I learned about the Chinese-built hydropower dams on the Mekong River, which had great impacts on the downstream communities. Back then, we were already discussing how to leverage the relatively better environmental legal enforcement in China and help the downstream communities to bring lawsuits to Chinese courts. Even though we did not fully realise the challenges with cross-jurisdictional and cross-cultural lawsuits, we have been pondering possible legal strategies to address international environmental issues since then.

HZ: You established the CTEA in 2020. Can you tell us more about what your organisation is working on, and your vision for it?

JZ: CTEA is a nonprofit environmental law organisation that builds on my experience as an environmental lawyer and activist. What distinguishes it is my professional experience in China's environmental movement and my practice of Chinese environmental law in the past two decades, which I believe give us a unique perspective and approach different from that of other US or European peers. Even though our organisation is incorporated in the United States, I am still a part of the Chinese civil society because of my identity as a Chinese citizen and lawyer who practices Chinese law. I think our perspective is crucial for understanding Chinese politics and the legal system, public opinion, and political and business culture, which is necessary for anyone dealing with Chinese outward investors, whether you choose to engage in amicable dialogue or more confrontational advocacy. It is my wish to preserve our perspective as a Chinese civil society organisation with our unique voice.

Our main objective is to assist local civil society organisations and empower communities adversely affected by Chinese-financed projects. We do so using legal tools, including the laws of the host country, international law, and Chinese law, and hold Chinese investors accountable. Towards this end, we work with partners in the host countries, including NGOs, lawyers, and legal scholars, and we try to help them develop a better understanding of China's legal system and internal politics.

Many lawyers in Africa and law students in African universities may have studied or will pursue higher law degrees in Europe or North America, and such in-country experience enables them to devise well-targeted action plans of advocacy when they deal with environmental damage caused by companies originating from these countries. The same cannot be said about China and Chinese companies. Very few students from Africa pursue their legal studies in China and, so far, I have not seen any law school in Africa offering a comprehensive curriculum on Chinese law. I am hoping to help promote better China literacy among environmental legal practitioners in Africa and Latin America. We are developing training programs for our partners, such as the one

that we started in 2022, the Africa China Legal Fellows Project—a series of monthly online lectures for a group of young African lawyers and law students on Chinese law, policies, and even Chinese culture.

One of our current priorities is to analyse and disclose the environmental and social impacts of Chinese companies' investment projects in bauxite and iron ore in Guinea and Ghana, in West Africa. The investment projects of Chinese state-owned enterprises (SOEs) Baowu Group, Chinalco Group, and private Hongqiao Group in the Simandou iron ore mine and its supporting railway and port in Guinea will have serious impacts on critically endangered species such as the West African chimpanzee. At the recently concluded UN Biodiversity Conference (COP15), China, as the host country, led and pushed for the adoption of the Kunming–Montreal Global Biodiversity Framework. How to regulate the investment and operation of large Chinese SOEs in the Simandou project, which has significant ecological impacts, will test whether China has taken real action on global biodiversity conservation, rather than just paying lip-service.

HZ: How has public interest litigation developed inside China over the past years, and how has that informed your legal activism overseas?

JZ: Before, I talked about some landmark events in the early days of China's environmental movement in which I am personally honoured and proud to have participated. But those litigations were still mostly civil lawsuits, with the aim of attaining compensation for damages. It was still 'private interest litigation' [私益诉讼], as the notion of 'public interest litigation' [公益诉讼] did not exist in China until 2012. But many environmental lawyers (including me) started to wonder whether we could use legal means to protect the greater public interest—that is, the public's right to be free from environmental pollution. Meanwhile, we also started to learn about various types of litigation in other countries, such as the 'citizen suit' in the United States, and other types of environmental lawsuits in Europe, as well as from developing countries such as India. We then started to push for environmental public interest litigation. The 2012 amendment to China's Civil Procedure Law made it lawful for civil society groups to litigate in representation of public interest; this procedural rule was then reaffirmed by the 2015 Environmental Protection Law, which allowed qualified civil society organisations to bring lawsuits to the court for cases of environmental pollution and ecological damage. This was a hard-won victory for China's environmental activists.

My point in tracing this history is that China's environmental laws did benefit from the joint efforts by China's legislators, regulators, civil society organisations, as well as individual citizens, who pushed together for China's environmental legislation to reach a relatively high level of sophistication. However, despite its achievement, China's environmental legislation is silent on regulating China's overseas investments. The Environmental Protection Law, which is China's 'basic law' in this sector, limits its jurisdiction to environmental issues taking place within Chinese territory.



It is true that the host countries' laws govern and regulate Chinese business entities' behaviour in their jurisdictions, but let's not forget that for any outward investment project, there is an administrative approval and recording process at the very beginning of the project's lifecycle, which necessarily takes place within China. China's National Development and Reform Commission (NDRC) and Ministry of Commerce (MOFCOM) are the two ministries responsible for the approval or filing of outward investment projects. Given this, should there not be a screening process regarding the investment projects' environmental credentials and human rights due diligence?

Currently, China's regulations related to environmental protection in overseas investment are merely ministerial administrative measures, which are in the lower order of China's legal hierarchy. We do not have a mechanism to coordinate various ministries in the regulation of overseas investments. Our Ministry of Ecology and Environment (MEE) has no power in the regulation of overseas investment. Even though the ministry has issued several 'guidelines', it has no role in the project approval process. The NDRC's own ministerial administrative rule, for example, does stipulate that projects involving cross-border water

Mining Roads

Truck driving through one of the mining roads connecting bauxite mines and the port in Boke, Guinea. Source: Jingjing Zhang.



Community Meeting

Jingjing Zhang and her colleagues meeting with community representatives from villages affected by bauxite mining in Boke, Guinea. Source: Jingjing Zhang.

resources are ‘restricted’ for investment. Such a clause should have subjected projects to procedures of appraisal and supervision, but even that did not result in the MEE gaining a seat in the overseas investment approval process, because that was just the NDRC’s own ministerial administrative rule, which has no power to mandate another ministry like the MEE. Only regulations set by the State Council or a law legislated by the National People’s Congress can do that.

HZ: On that note, do you think China’s pledges about the ‘Green Belt and Road Initiative’ in recent years can create the political space for environmental authorities to play a bigger role in the regulation of overseas investments?

JZ: There seems to be some positive development. Since President Xi Jinping promised not to build new coal power plants overseas in September 2021, several new policy documents have been issued by various ministries, including the ‘Guidelines for Ecological and Environmental Protection of Foreign Investment Cooperation and Construction Projects’ (hereinafter, the Guidelines) issued by the MEE jointly with MOFCOM in January 2022, and the ‘Opinions on Promoting Green Development under the Belt and Road Initiative’ (hereinafter, the Opinions) jointly issued by the NDRC, the Ministry of Foreign Affairs, the MEE, and

MOFCOM in March 2022. In terms of the forcefulness of the wording, the Opinions by the NDRC and others seems to be the strongest; however, the document lacks the specificity and preciseness found in the Guidelines issued by the MEE, which were drafted by environmental professionals. This is why it is important to read the original documents in Chinese, so that you can see the nuances in them, which would have been lost in translation. We can see that the MEE has a strong desire to participate in the regulation of overseas investments, as it has the professional expertise, but it does not have the power. By contrast, the two ministries with power, the NDRC and MOFCOM, are less versed in environmental expertise, but their stance matters more—the Opinions are tougher than the Guidelines in their connotations.

These linguistic nuances suggest that the Chinese Government's willingness to regulate the environmental impacts of overseas investments is growing, although that has not translated into real actions. We can therefore be hopeful that, going forward, there might be a higher-level administrative rule or regulation, possibly one coming from the State Council, which would then be used to assign regulatory authority to the MEE, unlike those Guidelines and Opinions mentioned earlier, which are not legally binding. In fact, legislation on China's outward investment is on the agenda for China's Fourteenth Five-Year Plan covering 2021–25. If we look back to the history of China's environmental movement, we followed such a path, starting with some 'soft' policy guidelines, which were later 'hardened' into administrative rules after enough experience was gained through practice, before finally becoming institutionalised through legislation. So, I think we could be a little patient with the Chinese Government, even though it is indeed frustrating that over the past 10 years there was very little concrete progress with regard to the environmental regulation of China's overseas investments.

HZ: The Chinese Government's general position has been to urge companies to comply with the laws and regulations of the host country. But as we know, many of the developing countries in which Chinese companies invest do not have strong institutions. How should activists deal with this dilemma in their push for Chinese investors to follow good practices?

JZ: Urging companies to comply with local laws really does nothing, as the companies of course must comply with the laws of the host country. What China should meaningfully do is to require preliminary environmental impact assessment (EIA) before the project even lands in the host country, during the feasibility study stage. Because the EIA has already become a universal practice, it goes without saying that investors must fulfill the EIA requirements of the host country. But should China also require a preliminary EIA for the approval of outward investment? If so, what standards should it be based on? We are now seeing that in the recent document issued by the NDRC and others, it refers to 'higher standards'. This may be a good sign. Back in 2012, the Ministry of Environmental Protection (the predecessor of the MEE) issued a guideline together

with MOFCOM on environmental protection in international economic cooperation, which was the first move in this direction. But a decade has passed and we are still only seeing ‘guidelines’ or ‘opinions’, which are more policy statements than legally binding regulations. These policy statements might be effective in restricting lending by Chinese state-owned banks to polluting projects overseas, but they can hardly serve as the basis of action for civil society organisations and affected communities in the host countries.

HZ: Can you give some examples of successful environmental litigation against Chinese overseas investments in which you have been involved or that you have seen? What can be learned from these cases?

JZ: A case I was personally involved in was the Rio Blanco mining project in Ecuador [profiled in *The People’s Map of Global China*, see LAS 2020]. It was not directly against the Chinese company involved in the mine, but rather against the Ecuadorian Government’s granting of the mining licence to the Chinese investors. Indigenous communities sued the government on the grounds that the Chinese mining company did not conduct adequate consultation with them, which violated the Ecuadorian Constitution. I submitted an *amicus curiae* during the appellate court trial. *Amicus curiae* is a widely used practice in common law systems, where a third party submits their opinion in support of either the plaintiff or the defendant. It is both a legal intervention and a way of campaigning, which has been used by many civil society organisations and research institutions in Europe in their advocacy.

In my *amicus curiae* supporting the Indigenous community plaintiffs, I cited China’s official statements on Indigenous peoples’ rights and some Chinese policies that require Chinese companies to comply with host countries’ laws and respect the local culture. My point was that China’s official stance was to urge Chinese companies operating overseas to abide by the laws of the host countries, so the judges should not worry about offending China by judging against the Chinese investor. I am proud to say that this was the first time a Chinese environmental lawyer and civil society practitioner presented an *amicus curiae* in an Ecuadorian court in support of the local Indigenous communities in a case related to Chinese investment.

Even though there are many instances where Chinese investment caused harm, lawsuits are few. I hope to see more lawsuits, not because I like to see confrontations, but because I think more lawsuits mean that the host countries’ justice systems are working and their civil societies are vibrant. Only when more lawsuits are happening can it create effective checks and balances against the powerful corporate interests.

HZ: Reflecting on what you have seen in this activism space regarding Chinese overseas investment, what do you think effective strategies should look like?

JZ: Again, I think it is crucial to interpret Chinese policies accurately. The Guidelines and Opinions that we discussed earlier were really just guidelines and opinions; they showed that the Chinese Government is taking note of the environmental challenges in Chinese overseas investments, but it has yet to develop the legal and regulatory tools to sanction Chinese companies' behaviour overseas. Without understanding this, advocacy might be misguided. I have encountered local partners who asked me why the Chinese companies were not fulfilling the commitment of the Chinese Government, based on their reading of the English or Spanish translation of these documents. I had to explain that while we could condemn the companies, we cannot take legal action based on those guidelines or opinions.

One consequence of the failure to differentiate between China's policy stance, the Chinese Government's capacity, and the behaviour of Chinese companies is the exacerbated hostility against 'China'. I have been personally affected because people assumed that since I look Chinese, I must necessarily be speaking in the interest of the Chinese companies. I mentioned the *amicus curiae* I submitted to the court in support of the Indigenous communities in the Rio Blanco case. In fact, before the court trial began, some local community members shouted 'Go back to China' at me. They were very surprised when they learned about my *amicus curiae* and came to take photos with me later.

I recently went on a field trip to Colombia with two other Chinese colleagues and we visited the Buriticá goldmine—a project invested in by China's Zijin Mining Group. Some local groups were confronting the company and some paramilitary personnel were present, so the situation was very tense. Our local guide told us that we must hide under the seat in our van because the angry crowd could attack us if they saw our Chinese faces. Luckily, a representative of the local community who had previously spoken with us vouched for us. Based on my own experiences, there is a much more intense anti-China sentiment in Latin America compared with Africa. It could result from the Indigenous peoples' long-lasting struggles to protect their territories, natural resources, and cultures from the modern nation-state governments and the powerful multinationals from Western countries, which have now been joined by the latest newcomers, Chinese investors.

This is why I believe it is very important for us—civil society practitioners, researchers, and journalists from China—to provide an accurate interpretation of Chinese policies, clarify their intent and limits, and communicate with local communities. We need to maintain our independent perspective—we do criticise the government and corporate powers, as I often do, but when it comes to unjustified accusations against China, or such assumptions that all Chinese people or companies and the government are the same, I feel the duty to speak out with clear facts and accurate interpretation of Chinese policies and laws. I feel I am a patriot—not that kind of patriotism defined by the Chinese Government, but it is a spontaneous love for my country based on my independent thinking. ●