

Case Study 6.1

Chinese Overseas Investment and Environmental Accountability

A Legal Battle against the Chinese-Financed Coal-Fired Power Plant in Boké, Guinea

Jingjing Zhang and Emily Scherr

1 Overview

In 2014, a Chinese-financed company, Société Minière de Boké (SMB), contracted with the Guinean government and obtained three mining concessions to exploit bauxite reserves in Boké, Guinea.¹ Since then, SMB has had a tumultuous history working in Boké, with local residents complaining of copious amounts of dust being generated, depleted and polluted freshwater sources, and a reduction in farming capacity due to pollution and lack of fresh water. These environmental issues have also led to adverse health impacts within local communities, including respiratory illnesses as a result of excessive dust. However, despite these controversies, SMB's presence in the country has grown. In 2015, SMB began construction of major mining infrastructure, including roads and ports,² and in 2020, preparation for the construction of an alumina refinery and a coal-fired power plant in Boké started.

¹ As seen on 12 July 2023, SMB lists a Chinese company, Shandong Weiqiao Pioneering Group Company Limited's logo on its website, 'SMB, a Company of the SMB-Winning Consortium' www.smb-guinee.com/en/home/. On its website, Shandong Weiqiao describes itself as "a super large enterprise integrating spinning and weaving, dyeing and finishing, garment, home textile, thermal power, and other industries" (Weiqiao Pioneering, www.weiqiaocy.com/cn/about.html?idd=24). The world's biggest aluminum producer, China Hongqiao Group Ltd., expressed it has devoted itself to promoting the economic development of the places where it has overseas projects in recent years to advocate the economic strategy of China's BRI of the country, China Hongqiao Group Limited, 'Environmental Social and Governance Report 2022' www.hongqiaochina.com/Uploads/File/2023/04/21/3.20230421171705.pdf. The SMB Winning Consortium's operation in Guinea was listed as one of China Hongqiao Group Ltd.'s overseas projects. Both Shandong Weiqiao Pioneering Group Company and China Hongqiao Group Ltd. were founded by the entrepreneur Zhang Shiping, who passed away in 2019. The two companies have been controlled by Zhang Shiping's son, Zhang Bo, and his daughter, Zhang Hongxia, respectively, since then.

² Human Rights Watch, 'What Do We Get Out of It? The Human Rights Impact of Bauxite Mining in Guinea' (2018) www.hrw.org/sites/default/files/report_pdf/guineal018_web2.pdf 112–13.

SMB's operations in Guinea raise important questions about the Chinese leadership's commitment to green and sustainable development in China's overseas projects. The construction of the fossil fuel power plant continued after Chinese President Xi Jinping's public statement in 2021 that "China will vigorously support the green and low-carbon development of energy in developing countries and will no longer build new overseas coal power projects."³ Civil society organizations have made efforts to force SMB to use a cleaner energy source to power the refinery. Such efforts draw attention to the gap between rhetoric and reality in China's overseas projects.

This case study focuses on how local and international civil society organizations and public interest lawyers use legal instruments to ensure Chinese investors and the Guinean government comply with the laws of Guinea (as the host country of Chinese investments), of China (the home country), and international laws. Specifically, this case study shows how civil society organizations have been able to combat SMB's plan to use coal as an energy source by recourse to a number of legal strategies. More broadly, it demonstrates how non-state actors can use the law to hold Chinese investors accountable for environmental harms inflicted on host states, particularly those in the Global South.

The case study is written by members of an advocacy NGO that is leading actions against SMB for violating relevant laws. While procedures are still pending, the case study provides both the history of the project and a snapshot of current problems.

2 Introduction

2.1 Guinea Country Profile

The target project, the alumina refinery and proposed coal-fired power plant, is located in the Boké prefecture of the Republic of Guinea. Guinea is a West African country located on the Atlantic Ocean and bordered by Sierra Leone, Senegal, Guinea-Bissau, Liberia, Côte d'Ivoire, and Mali. Boké prefecture is located in the northeastern part of the country and is home to more than 480,000 people in ten subprefectures that are composed of twenty-four distinct village communities.⁴

³ Despite this commitment, several Chinese companies, including SMB, have forged ahead with plans to construct coal-fired power plants abroad. Paolo Gonzalez, Jincheng Dai, and Tom Xiaojun Wang, '2 Years Later: China's Ban on Overseas Coal Power Projects and Its Global Climate Impacts' (Centre for Research on Energy and Clean Air, 16 October 2023) <https://energyandcleanair.org/publication/2-years-later-chinas-ban-on-overseas-coal-power-projects-and-its-global-climate-impacts/>.

⁴ Natural Justice, 'Community Audit of Environmental and Social Impacts of the Société Minière de Boké' (February 2023) 17 <https://naturaljustice.org/wp-content/uploads/2023/07/community-audit-of-environmental-and-social-impacts-of-the-societe-miniere-de-boke-in-guinea.pdf>.

The major exploitable mineral resources in Guinea include bauxite, iron, diamonds, gold, and uranium.⁵ Guinea contains a third of all known bauxite reserves in the world and SMB is the largest producer of bauxite in the country.⁶ Bauxite is needed to produce aluminum, and China is the world's largest producer of aluminum, thus its access to Guinea's mines is an economic imperative. However, the main economic activities in the region include subsistence agriculture, fishing, salt farming, livestock, and handicrafts – all of which are threatened by bauxite mining activities.⁷ Despite Guinea's copious natural resources and bauxite reserves, it is one of the poorest countries in the world.⁸

The country's current predicament reflects a complicated history. Guinea achieved its independence from French West Africa in 1958.⁹ After gaining independence, Guinea was ruled by authoritarian leaders, Sékou Touré, Lansana Conté, and Captain Moussa Dadis Camara, for more than fifty years.¹⁰ In 2010, for the first time since gaining its independence from France, Guinea conducted elections to choose its next ruler, President Alpha Condé.¹¹ A new constitution was passed in 2010 and then again in 2020.¹² These legal reforms had limited effect on the mining industry, which has been central to the country's economy.

Condé expanded the mining sector, particularly the bauxite mining sector, during his time as president and promulgated a new mining code meant to improve mining regulations and increase profits for the government from mining.¹³ However, the bauxite mining sector faced some initial setbacks during Condé's first term, including resistance from companies that, as a result of the new regulations, had to pay higher taxes (the 2011 Mining Code was amended in 2013 because of this issue), the Ebola epidemic, and low global prices for bauxite.¹⁴ The bauxite sector boomed after Condé's first term in office after other bauxite-producing countries banned exports and Chinese demand for bauxite increased.¹⁵

Condé ran for and won a contentious third term in 2020 and remained in power until he was overthrown by a military coup in late 2021.¹⁶ The ruling military junta suspended the 2020 Constitution and instituted a Transitional Charter with Col. Mamady Doumbouya serving as the transitional president.¹⁷ As of 2023, Guinea's ruling military junta has yet to conduct elec-

⁵ CIA, 'The World Factbook – Guinea' www.cia.gov/the-world-factbook/countries/guinea/#geography.

⁶ Natural Justice (n 4) 15. ⁷ Natural Justice (n 4) 19. ⁸ Human Rights Watch (n 2) 27.

⁹ Thomas O'Toole, 'Encyclopedia Britannica – Guinea' www.britannica.com/place/Guinea.

¹⁰ Human Rights Watch, "We Have Lived in Darkness" A Human Rights Agenda for Guinea's New Government' (May 2011) 1 www.hrw.org/sites/default/files/reports/guinea0511webwcover_1.pdf.

¹¹ Human Rights Watch (n 2) 26. ¹² O'Toole (n 9). ¹³ Human Rights Watch (n 2) 27–8.

¹⁴ Human Rights Watch (n 2) 28. ¹⁵ Human Rights Watch (n 2) 29.

¹⁶ O'Toole (n 9). ¹⁷ O'Toole (n 9).

tions to determine the country's next leader. It is also worth noting that the Natural Resource Governance Institute has consistently given Guinea low scores in the category of rule of law; in 2021, Guinea received a ranking of just 15 out of 100.¹⁸

2.2 Guinea–China Relations

In the past decade, Guinea and China have deepened their relations. In November 2016, President Condé paid a state visit to China to meet with President Xi Jinping. The two heads of state decided to establish a comprehensive strategic partnership and to take the implementation of the outcomes of the 2015 Johannesburg Summit of the Forum on China–Africa Cooperation (FOCAC) as an opportunity to deepen and expand friendly and mutually beneficial cooperation between the two countries in various fields and create a broader future for China–Guinea relations.

In September 2017, China and Guinea signed the “China–Guinea Resource and Loan Cooperation Framework Agreement” in Xiamen, China.¹⁹ In the agreement, Guinea granted Chinese corporations exploration rights for bauxite, iron, and other mineral resources, while China agreed that Chinese financial institutions would provide the necessary loans for the extraction projects.²⁰ The agreement notes that over the next twenty years (2017–2036) the amount of money invested in mining projects in Guinea by China would reach US\$20 billion.²¹ A list of priority projects added as an addendum to the agreement includes bauxite mining projects in Boffa and Boké.²² Overall, this resource for infrastructure agreement seeks to accelerate China-financed extraction of mineral resources in Guinea.

In September 2021, after the military coup overthrew President Condé from office, Chinese companies remained active in Guinea. However, the Chinese government condemned the coup and urged for the immediate release of President Condé.²³ A spokesperson for the Chinese Foreign Ministry, Mr. Wang Wenbin, stated in a press conference concerning the coup that “[w]e hope relevant parties can exercise calm and restraint, bear in mind the

¹⁸ Natural Resource Governance Institute, ‘2021 Natural Resources Governance Index Guinea’ (2021) https://resourcegovernance.org/sites/default/files/documents/2021_resource_governance_index_guinea_mining.pdf.

¹⁹ Research Institute for International Trade and Economic Cooperation, Ministry of Commerce, Economic and Commercial Affairs, Department of the Chinese Embassy in Guinea, Department of Foreign Investment and Economic Cooperation, ‘Foreign Investment Cooperation Country (Region) Guide: Guinea’ (2021) 4 www.mofcom.gov.cn/dl/gbdqzn/upload/jineiya.pdf.

²⁰ China–Guinea Resource and Loan Cooperation Framework Agreement (2017). ²¹ *ibid.*
²² *ibid.*

²³ Xinhua, ‘China Opposes Coup Attempts to Seize Power in Guinea’ (*China Daily*, 6 September 2021) www.chinadailyhk.com/article/237059#China-opposes-coup-attempts-to-seize-power-in-Guinea.

fundamental interests of the nation and people, resolve the relevant issue through dialogue and consultation and safeguard peace and stability in Guinea.”²⁴

2.3 China’s Climate and Biodiversity Commitments in the Context of Chinese Laws and Policies on Outbound Direct Investments

China’s outbound direct investments regime is designed with the objective of safeguarding state-owned assets and their financial security. The environmental and social impact of offshore projects has not been a core concern of the Chinese government, and as such, there is no legislation with enforcement effect to screen the environmental and social impact of overseas investment projects. In addition, institutionally, the Ministry of Ecology and Environment, the main administrative agency in charge of environmental affairs in China, does not have the mandate to regulate overseas projects.²⁵

Recognizing the threat that climate change poses, China has made significant commitments to reduce emissions in its international investments, particularly in developing nations. In 2021, FOCAC published the “Declaration on China-Africa Cooperation on Combating Climate Change.”²⁶ The Declaration states that both China and African countries will advocate for and advance sustainable development and will “promote ‘green recovery’” in a post-COVID economy. Further, China commits to promoting low-emission technologies in Africa, including solar and wind-powered energy production. The Declaration also states that China “will not build new coal-fired BRI power projects abroad.” China’s National Development and Reform Commission (NDRC) has made similar commitments to sustainable development in the Belt and Road Initiative (BRI).²⁷ Specifically, the NDRC commits China to promoting green energy in its operations abroad linked to the BRI,²⁸ stating that “[e]nterprises shall be encouraged to promote green and environmental protection standards and best practices for infrastructure.” Additionally, the NDRC notes in their opinion that “the full implementation” of China’s and participating African countries’ commitments under international climate agreements including the Paris

²⁴ *ibid.*

²⁵ Matthew S. Erie and Jingjing Zhang, ‘A Comparison of Inbound and Outbound Investment Regulatory Regimes in China: Focus on Environmental Protection’ in Henry Gao, Damian Raess, and Ka Zeng (eds), *China and the WTO: A Twenty-Year Assessment* (Cambridge University Press 2023) 429–51.

²⁶ Forum on China-Africa Cooperation, ‘Declaration on China-Africa Cooperation on Combating Climate Change’ (3 December 2021) www.focac.org/eng/zywx_1/zywj/202201/t20220124_10632445.htm.

²⁷ Opinions of the National Development and Reform Commission and Other Departments on Promoting Green Development under the Belt and Road Initiative. Document number 408 (2022) of the National Development and Reform Commission www.ndrc.gov.cn/xxgk/zcfb/tz/202203/t20220328_1320629.html

²⁸ *ibid.*

Agreement shall be promoted.²⁹ The NDRC further states that “[t]he construction of overseas coal-fired power projects shall be completely stopped.”

China made similar goals for green international development in the notice by the Ministry of Commerce and the Ministry of Ecology and Environment on issuing the “Green Development Guidelines for Overseas Investment and Cooperation.”³⁰ An enumerated goal for Chinese outbound investment stated in the guidelines is to “support outbound investment in clean energy such as solar, wind, nuclear and biomass energy, facilitate the global revolution of energy production and consumption, and build a clean, low-carbon, secure and efficient energy mix.” In September 2021, at the 76th UN General Assembly, President Xi Jinping stated, “China will vigorously support the green and low-carbon development of energy in developing countries and will no longer build new overseas coal power projects.”³¹ Further, China reiterated the goal to not build any new coal power plants abroad in the communication to the UN Framework Convention on Climate Change (UNFCCC) on China’s Nationally Determined Contributions.³²

2.4 Guinean Governmental Structure on Mining, Natural Resource Management, and Environmental Matters

While conducting mining operations in Guinea, SMB not only should abide by the laws and policies of China but is legally bound by the laws of the Republic of Guinea in relation to the environment and human rights. Institutionally, both the Ministère de l’Environnement et du Développement Durable/Ministry of the Environment and Sustainable Development (MEDD) through the Guinean Environmental Assessment Agency (AGEE) and the Ministry of Mines and Geology have oversight of mining projects and the Environmental and Social Impact Assessment (ESIA) process in Guinea.

2.4.1 Ministry of Environment and Sustainable Development and the AGEE

The AGEE coordinates the administrative procedure of the mining projects’ ESIA’s and audits in Guinea. It approves the terms of reference of all ESIA’s submitted by the companies as a first step, receives the ESIA reports, and organizes public audiences with local stakeholders to ensure that the members of

²⁹ Ibid.

³⁰ The Ministry of Commerce and the Ministry of Ecology and Environment, ‘Green Development Guidelines for Overseas Investment and Cooperation’ (16 July 2021).

³¹ Statement by Xi Jinping, ‘Bolstering Confidence and Jointly Overcoming Difficulties to Build a Better World’ (translation, 2021) http://english.www.gov.cn/news/topnews/202109/22/content_WS614a9d11c6d0df57f98e0a81.html.

³² United Nations Framework Convention on Climate Change, ‘China’s Achievements, New Goals and New Measures for Nationally Determined Contributions’ (unofficial translation) 2, 45 <https://unfccc.int/sites/default/files/NDC/2022-06/China%E2%80%99s%20Achievements%2C%20New%20Goals%20and%20New%20Measures%20for%20Nationally%20Determined%20Contributions.pdf>.

communities who may be affected can participate in the ESIA's and are aware of the conclusions. It is responsible for approving the ESIA's through the Comité Technique d'Analyse Environnementale/Technical Committee for Analysis and Assessment (CTAE). The CTAE is a committee formed by the MEDD and coordinated by the AGEE. The CTAE is composed of members of ministerial departments and civil society representatives.³³

Additionally, the Comités Préfectoraux de Suivi Environnemental et Social/Prefectural Committee for Environmental and Social Monitoring (CPSES) was set up by the Ministry in charge of the MEDD to support the AGEE in its mission of monitoring the implementation of the projects' Environmental and Social Management Plans (ESMPs). The CPSES is represented in all prefectures where mining projects occur. It provides close monitoring for certain environmental and social components of mining projects being developed in the territories covered by their activities.

The AGEE carries out the monitoring and audits of the projects' ESMP and delivers, on behalf of the MEDD, the environmental compliance certificate for "Category A projects" (projects that have significant impacts on the environment) and environmental authorization for "Category B projects" (projects that have less effect on the environment).

2.4.2 Ministry of Geology and Mines

The Service National de Coordination des Projets Miniers/National Service for the Coordination of Mining Projects (SNCPM) coordinates the feasibility studies of all mining projects, which consists of evaluating both the technical feasibility and the economic viability of a project. The feasibility report is submitted to the Ministry of Mines and Geology through the SNCPM for the project evaluation and approval. The Direction Nationale des Mines/National Directory of Mines is in charge of monitoring the mining production and all related taxes while the Centre pour la Promotion et du Développement Minier/Center for the Promotion of Mining Development is responsible for managing the Guinean mining cadastre. The service delivers mining permits and authorizations for research, exploration, and exploitation activities.

2.5 Guinean Environmental Laws and Decrees

The Guinean legal system is highly influenced by its history of French colonization and prescribes a civil law system. The relevant sources of Guinean law that provide the framework for regulating the mining industry include the Guinean Constitution of 2010 and 2020, as well as the Transitional Charter, the

³³ Decree D/2014/PRG/SGG, Portant Adoption d'une Directive de Realisation d'une Etude d'Impact Environnemental et Social des Operations Minières [On the Adoption of a Directive for Carrying out an Environmental and Social Impact Assessment of Mining Operations], (January 2014) art 3.7.

Environmental Code of Guinea 2019 and implementing regulations, and the Mining Code and implementing regulations.

The Constitution of Guinea guarantees the right to a healthy environment along with other environmental protections.³⁴ Article 16 of the 2010 Constitution states, “[e]very person has the right to a healthy and lasting environment and the duty to defend it.”³⁵ As mentioned, in 2020, a reformed constitution was passed by referendum.³⁶ The 2020 Constitution contains a similar right to a clean and healthy environment in Article 22, which states in part that “[t]he right to a healthy environment is recognized throughout the territory.”³⁷ After the 2021 coup, the ruling military junta suspended the 2020 Constitution and instituted a Transitional Charter. Because the SMB project began in 2014, all three texts (2010 Constitution, 2020 reformed Constitution, and the Transitional Charter) apply. The Transitional Charter does not contain any explicit protections for the environment.³⁸

The Environmental Code of Guinea 2019 sets out a few basic overarching policies when it comes to environmental protection and energy generation. Generally, it promotes environmental sustainability, the consideration of climate issues, and the use of renewable energy. The Code places explicit duties on private companies operating in the extractives sector in Guinea, noting in Article 16 that “[p]rivate enterprises and public and mixed companies carrying out industrial and/or commercial activities shall be required to integrate environmental concerns into their operating, production and responsible management systems, meeting the requirements of sustainable development.”³⁹ Article 9 of the Code notes that development projects in Guinea must take into account the importance of environmental protection and must adhere to several principles of environmental stewardship including, among others, the precautionary principle and the principle of sustainable development.⁴⁰

Procedurally, the Environmental Code specifically requires that projects having an impact on the environment perform an ESIA.⁴¹ Article 142 of the Mining Code also requires that mining companies complete an ESIA as a part of the application for an Authorization or Operation Permit and that the ESIAs

³⁴ In addition to guaranteeing a right to a healthy environment, the 2010 Constitution criminalizes “[t]he transit, the importation, the storage, the dumping on the national territory of toxic waste or pollutants.” The 2020 Constitution contains a similar clause. Constitution of the Republic of Guinea, 2010, Art 17; Constitution of the Republic of Guinea, 2020, art 22 www.constituteproject.org/constitution/Guinea_2010.pdf?lang=en.

³⁵ Constitution of the Republic of Guinea (n 34). ³⁶ O’Toole (n 9).

³⁷ Constitution of the Republic of Guinea (n 34).

³⁸ Transition Charter of the Republic of Guinea, 2021.

³⁹ Decree No. D/2019/221/PRG/SGG promulgating Law No. L/2019/0034/AN of 04 July 2019 Portant Code de l’environnement de la République de Guinée (2019) art 16. (Environmental Code).

⁴⁰ *ibid* art 9.

⁴¹ *ibid* art 28 (“Any development or construction project likely to affect the environment is subject to a prior environmental and social impact study”).

prepared by companies abide by the Environmental Code and meet “internationally accepted standards.”⁴²

According to Article 31 of the Environmental Code, “[w]hen the environmental and social impact study is deemed to be satisfactory, the minister in charge of the environment shall issue to the developer a certificate of environmental compliance.”⁴³ Guinean regulations concerning ESIA require that after the completion of the study period for the ESIA, a report (an environmental and social impact study report, known as REIES) must be submitted to the Ministry in charge of the environment for review by the CTAE.⁴⁴ If the REIES is approved by the CTAE, the minister in charge of the environment must issue the environmental authorization or the environmental compliance certificate (*certificat de conformité environnementale*).⁴⁵ Article 22 of Order A/2022/MEDD/CAB/SGG of 25 July 2022 on the administrative procedure for environmental assessment states that the environmental compliance certificate, which is granted by the minister of the environment on the recommendation of the CTAE, is valid for one year and is renewable each year.⁴⁶

Additionally, as part of the ESIA process, companies operating in Guinea must produce an ESMP.⁴⁷ The ESMP is a document that lays out the procedure for managing, implementing corrective or mitigation measures, monitoring, and following up on the environmental and social risks and impacts in preparation for and during the project that operating companies must adhere to.⁴⁸ Each year, the company must submit an ESMP implementation report to the AGEE. This yearly report is a requirement for the renewal of the environmental compliance certificate.

2.5.1 The Use of Guinean Law by Civil Society

The accessibility of the judicial system by civil society organizations or impacted communities remains a challenge to be met in Guinea. Article 24 of the Environmental Code guarantees access to justice to “the State and the local collectivities; any company working in the field of the environment; and any approved association in the field of the environment; any natural person having a sufficient interest to act.” Further, Article 19 of the Environmental Code allows for environmental protection organizations to challenge any administrative act that may have a significant impact on the environment. Despite these legal guarantees, in practice, often access to justice is not granted. Specifically, as of the time of this writing, no administrative environmental action has been brought to the Guinean courts.

⁴² Amended 2011 Mining Code of the Republic of Guinea, art 142 (Mining Code).

⁴³ Environmental Code (n 39) art 31. ⁴⁴ Decree D/2014/PRG/SGG (n 33) art 3.7. ⁴⁵ *ibid.*

⁴⁶ Arrête A/2022/MEDD/CAB/SGG Portant Procedure Administrative d'Evaluations Environnementales, art 22.

⁴⁷ *ibid.* ⁴⁸ *ibid.*

2.6 International Treaties and Standards

Both China and Guinea are signatories of the UNFCCC. Article 3 of the UNFCCC states in part that “[t]he Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects.”⁴⁹ Additionally, the Guinean ESIA regulations note that companies should adhere to national standards when conducting ESIA, but when national standards are absent, companies should follow international best practices, specifically mentioning the International Finance Corporation (IFC) standards.⁵⁰ The IFC standards aim to guide corporations on best practices to ensure that environmental and social rights of affected communities are respected and preserved.

IFC Performance Standard 3 concerns “Resource Efficiency and Pollution Prevention.”⁵¹ A key objective of IFC Performance Standard 3 is “[t]o reduce project-related GHG [greenhouse gas] emissions.”⁵² In relation to GHG emissions, IFC Performance Standard 3 instructs companies to consider less polluting alternatives to energy generation stating, “the client will consider alternatives and implement technically and financially feasible and cost-effective options to reduce project-related GHG emissions during the design and operation of the project.”⁵³ The standard goes on to note that a reasonable project alternative may include “adoption of renewable or low carbon energy sources.”

Further, the IFC Performance Standards make reference to the World Bank Group Environmental, Health and Safety Guidelines (EHS Guidelines) and note that the EHS Guidelines are “technical reference documents with general and industry-specific examples of good international industry practice.”⁵⁴ The IFC Performance Standards note that when the standards of a host country differ from standards presented in the EHS Guidelines, the company should abide by whichever standards are more stringent.⁵⁵

3 The Case

The Société Minière de Boké was founded in 2014 by the SMB Winning Consortium, a consortium of companies including the Shandong Weiqiao/China Hongqiao Group Limited, Winning International Group of Singapore, Yantai Port Group, and United Mining Supply of Guinea.⁵⁶ SMB’s operations in Guinea include four bauxite mining sites, a railway, two ports, and two mining roads. SMB is the leading producer and exporter of bauxite in Guinea,

⁴⁹ United Nations, ‘United Nations Framework Convention on Climate Change’ (1992) 4 <https://unfccc.int/resource/docs/convkp/conveng.pdf>.

⁵⁰ Decree D/2014/PRG/SGG (n 33) s 2.3.2.

⁵¹ International Finance Corporation, ‘Performance Standards on Environmental and Social Sustainability’ (1 January 2012) www.ifc.org/content/dam/ifc/doc/2010/2012-ifc-performance-standards-en.pdf.

⁵² *ibid.* ⁵³ *ibid.* 7. ⁵⁴ *ibid.* 6. ⁵⁵ *ibid.* 7.

⁵⁶ China Hongqiao Group Limited, ‘Environmental, Social and Governance Report 2021’ <http://en.hongqiaochina.com/Uploads/File/2022/05/30/E1378-ESG.20220530185231.pdf>.



Figure 6.1.1 SMB's operations in Guinea: (a) truck transporting bauxite on an SMB mining road in Boké; (b) trucks kicking up dust on an SMB mining road in Boké; (c) mounds of bauxite at SMB headquarters in Boké; (d) front gate of SMB operations in Boké

responsible for about 40% of bauxite production in 2020 (see Figure 6.1.1).⁵⁷ Additionally, SMB is planning on building an alumina refinery; construction was set to begin in 2023 but has been delayed. The refinery will be powered by a captive coal-fired power plant. SMB began the ESIA process in September 2020 for the refinery project. SMB completed the ESIA in February 2021 and the report was validated and given an environmental compliance certificate in April 2021 after a virtual session organized by the validation committee (CTAE). The ESIA conducted by SMB combined both the refinery and the coal plant projects but did not independently assess the impacts of the coal plant. The planned coal plant is a “captive coal plant,” meaning that the energy produced from the coal-fired power plant will only be used to power the planned alumina refinery and will not provide any energy to the surrounding communities.

3.1 SMB's Environmental and Social Record in Boké, Guinea

In 2022, a Pan-African environmental NGO, Natural Justice, completed a Community Audit of the Boké area to determine the on-the-ground effects of SMB's mining activities on local communities and their livelihoods. The Community Audit Report notes that the local economic activities impacted by SMB's bauxite mining include agriculture (rice and mahogany), fishing, salt farming, livestock, trade, and handicrafts, and that these forms of subsistence are

⁵⁷ Natural Justice (n 4) 15.

under threat due to the bauxite mining activities.⁵⁸ Generally, the report notes the extreme degradation of the natural environment in Boké.⁵⁹ Additionally, according to a report by Human Rights Watch, the required ESIA was not finished and approved before SMB began constructing mining infrastructure such as mining roads and ports.⁶⁰ The same pattern of starting the operation before the ESIA was approved can be found at SMB's investors' Simandou iron mine-related infrastructure project, a violation of the Guinean Environmental Code.⁶¹

One of the main concerns of local communities noted during the community audit is access to safe drinking water. SMB discharges wastewater directly into fields and local waterways, thereby polluting local water sources and making them unsuitable for human domestic use.⁶² Uncontrolled and untreated runoff after periods of rain also contributes to pollution of local waterways, turning streams and rivers the deep red color of bauxite.⁶³ Additionally, local communities complain that many of the boreholes and wells drilled by SMB to compensate for the pollution of streams and rivers are not functional. Of the thirty-one boreholes surveyed for the community audit report, only seven were found to be operational at the time of the audit.⁶⁴

Another key environmental complaint of local communities is the copious amounts of dust generated from heavy machinery used for mining operations, including large trucks that travel through communities and on mining roads (Figure 6.1.1). Individuals from Katougouma complain that passing trucks kick up dust that deteriorates the air quality.⁶⁵ Communities also complain that the dust coats their farms and food and has caused respiratory disease among locals.⁶⁶ The Community Audit Report also notes that dust kicked up by trucks coats roadside fruit trees and discusses the need for a dust mitigation program.⁶⁷ Additionally, community members have complained that their land rights have been violated by SMB. Specifically, in Boké, individuals complain that their customary land rights have been ignored and they have not been provided with adequate compensation.⁶⁸

3.2 Civil Society Actions

Despite Xi Jinping's pledge that China will no longer build coal plants overseas, many Chinese companies have continued with their plans to construct coal-fired power plants.⁶⁹ Thus, bottom-up work led by civil society is necessary to ensure companies comply with both the Chinese government's and the host country's laws. A group of Guinean, regional, and international NGOs have been working together to design advocacy strategies to halt the construction of the coal plant

⁵⁸ Natural Justice (n 4) 19. ⁵⁹ Natural Justice (n 4). ⁶⁰ Human Rights Watch (n 2) 112–13.

⁶¹ Helen Reid and Joe Bavier, 'EXCLUSIVE: Guinea Rail Builders Blast in Chimp Habitat, No Plan to Protect Apes' (*Reuters*, 17 August 2021) www.reuters.com/world/africa/exclusive-guinea-rail-builders-blast-chimp-habitat-no-plan-protect-apes-2021-08-17/.

⁶² Natural Justice (n 4) 37–8. ⁶³ Natural Justice (n 4) 37. ⁶⁴ Natural Justice (n 4) 39.

⁶⁵ Natural Justice (n 4) 28. ⁶⁶ Natural Justice (n 4) 27. ⁶⁷ Natural Justice (n 4) 28, 52.

⁶⁸ Natural Justice (n 4) 34. ⁶⁹ Gonzalez et al. (n 3).



Figure 6.1.2 CTEA Executive Director, Jingjing Zhang, meeting with the Wawayiré village in the Boké prefecture

in Boké. These NGOs include the Guinean human rights legal nonprofit Les Mêmes Droits pour Tous (MDT), the Association pour le Développement Rural et l'Entraide Mutuelle de Guinée, the US-based environmental legal nonprofit Center for Transnational Environmental Accountability (CTEA, Figure 6.1.2), Natural Justice, and the Ghana-based Advocates for Community Alternatives.

Even though both the validation of the ESIA of the refinery with the coal plant and the environmental compliance certificate were issued to SMB for the planned refinery and coal plant before Chinese President Xi Jinping announced in September 2021 that China would no longer build coal-fired power plants abroad, nonetheless, SMB failed to change its plan of building a captive coal plant to power the alumina refinery to align the project with China's policy direction. The consortium of NGOs decided to take action to stop its plan. The main strategies identified include the following: first, applying pressure to SMB to comply with Chinese and Guinean climate policies and commitments, including by writing letters to the Guinean government and the Chinese Embassy in Conakry, media exposure, and participation in UN human rights mechanisms; and second, taking legal action, including access to information requests, *Compulsoire*,⁷⁰ and administrative litigation,⁷¹ in Guinea to challenge the approval process for the coal plant.

⁷⁰ *Compulsoire* is an old tool from French law and is available in any francophone jurisdiction to obtain permits, contracts, letters, and so on, that were not otherwise publicly available before and during the litigation process.

⁷¹ This administrative environmental litigation will be the first of its kind brought in Guinea by MDT with the help of international partners CTEA and Advocates for Community Alternatives.

According to the news on China's Ministry of Commerce website, other Chinese companies in the Boké and Boffa region, including the State Power Investment Corporation (SPIC), plan to build refineries with captive coal or heavy fuel oil burning plants despite Xi Jinping's policy prohibiting coal plants.⁷² The NGO consortium is currently working to expand its advocacy efforts to include all planned coal and heavy fuel oil burning plants.

On 13 June 2022, MDT submitted letters to the Ministry of Environment and Ministry of Geology and Mines urging them to cancel the plan to build a coal-fired power plant and replace it with a cleaner source of energy. Additionally, on 14 June 2022, one of the authors brought the MDT letters, two ESIA's (SMB and SPIC), and a letter calling for stopping the coal plants to the Chinese Embassy in Conakry (the capital of Guinea). These letters were meant to capitalize on China's recent pledge not to build new coal-fired power plants abroad while simultaneously setting up potential administrative litigation if the Guinean government refuses to compel SMB to find a cleaner source of energy for the refinery project. In July 2022, both ministries responded favorably to the letters submitted by MDT with the Ministry of Environment stating that the department "will take all necessary steps to examine the concerns of the communities in the SMB mining area."

In early 2023, MDT and CTEA submitted follow-up letters to both ministries and the Chinese Embassy in Conakry calling for the Guinean government to revoke the environmental compliance certificate and cancel the coal-fired power plant. Additionally, in April 2023, MDT submitted a request to the AGEE asking for a copy of the most recent environmental compliance certificate for SMB's refinery and coal plant project. MDT met with officials from the AGEE and was told that no environmental compliance certificate had been issued to SMB, which was an excuse to avoid disclosing it. If informal processes to obtain the certificate continue to prove unsuccessful, MDT will submit a *Compulsoire* or formal information request seeking the certificate.

Crucially, the *Compulsoire* can be addressed to both the Ministry and the company. The environmental compliance certificate (as discussed in Article 31 of the Guinean Environmental Code) must be renewed each year. The environmental compliance certificate for the SMB's refinery and coal plant ESIA are set to be renewed in May each year. If the certificate is renewed despite obvious deficiencies with the ESIA, as pointed out in MDT's letters to the ministries, then the NGO consortium would bring administrative litigation to challenge the decision to renew in the Guinean courts.

On the international stage, CTEA and Natural Justice coauthored and submitted a shadow report to the UN Committee for Economic, Social, and Cultural Rights during its periodic review of China and highlighted Chinese

⁷² Ministry of Commerce of the People's Republic of China, 'Summary of Alumina and Steelmaking Projects to be Launched in Guinea in the Coming Years' (2020) www.mofcom.gov.cn/article/i/jyj/k/202006/20200602972043.shtml.

companies' plans to construct captive coal-fired power plants and made recommendations to the Committee that China has the obligation to oversee Chinese companies operating abroad regarding their human rights impact. As a result of this engagement, the Committee made the following recommendation to China in their concluding observations: "Suspend permissions to construct coal-fired power plants as well as pause ongoing financing construction hereof, including in the State party and abroad," and "[e]nsure that business entities operating in the State party or those domiciled under the State party's jurisdiction and those acting abroad, including their sub-suppliers, as well as institutions that provide financing, are held accountable for economic, social and cultural rights violations, paying particular attention to indigenous and peasants' land rights, environmental impact."⁷³

Because of pressures built by the actions above, in July 2023, an SMB manager had orally promised to abandon its plans to build a coal-fired power plant. It was a victory for communities and civil society organizations. However, SMB is now looking to build a heavy fuel oil plant, which comes with more serious health impacts for the local community, and the legal battle and campaign to stop the fossil fuels power plants will be carried on to a new stage.

4 Conclusion

As SMB forges ahead with its plans to construct a coal-fired power plant, civil society organizations are working tirelessly to ensure that SMB respects the environmental and human rights of local communities. China's recent commitment not to build any new coal-fired power plants abroad gives civil society an opportunity to pursue advocacy efforts at the international level and exert pressure on SMB to find a cleaner source of energy for its planned refinery. The planned administrative litigation to challenge the renewal of the environmental compliance certificate for SMB's alumina refinery will be the first of its kind in Guinea and will set the stage for further legal challenges to other companies also planning to construct coal-fired power plants.

5 Discussion Questions and Comments

5.1 For Law School Audiences

Guinea is a country that has had a tumultuous political history and recently experienced a military coup in 2021. The military junta has yet to hold democratic elections to institute a new leader. Additionally, Guinea has suffered from a weak "rule of law." The rule of law is defined by the UN as "a principle of

⁷³ The Committee on Economic, Social and Cultural Rights, 'Concluding Observations on the Third Periodic Report of China, Including Hong Kong SAR, China, and Macao SAR, China' (Document E/C.12/CHN/CO/3, 2023) <https://digitallibrary.un.org/record/4007077>.

governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.”

While Guinea has several environmental statutes by which international corporations are required to adhere, Guinean institutions have failed to enforce these laws and the Guinean judiciary has proven difficult to access by impacted community members and the organizations representing community concerns. What actions do you propose such organizations take to ensure accountability in a country with a weak rule of law? Do you think mobilizing litigation, including administrative litigation or tort litigation, would be more successful in Guinea? Why or why not? What other legal tools are available? And who are the potential defendants? If formal institutions prove inadequate, what extralegal means may be more effective?

The SMB case may shed light on the disconnect, found elsewhere in China’s Belt and Road Initiative, between political rhetoric and the actual conduct of Chinese corporations. What legal avenues are available for affected parties to challenge environmental and human rights violations perpetuated by foreign companies or multinationals? What are SMB’s Chinese investors’ or its parent company’s legal liabilities? Can lawsuits similar to the US’s Alien Tort Claims Act be filed in China? What differentiates the legal liabilities of the parent company and its subsidiaries? Will using the corporation’s or financiers’ grievance mechanisms in China be possible? Are there any climate and biodiversity commitments strong enough to hold Chinese parties accountable to the host country’s laws and international law sources? Are current international environmental laws or international human rights laws adequate to provide legal bases and avenues to redress multinationals’ wrongdoings on the environment and communities?

5.2 For Policy School Audiences

As discussed in the case study above, SMB began construction of major mining infrastructure before completing the ESIA. The ESIA process is a crucial first step in any development project. Rushed or incomplete ESIA processes can undermine the entire purpose of evaluating the environmental and social impacts of a project. Additionally, SMB’s ESIA contained several deficiencies, including lacking a climate assessment, reasonable alternatives, and baseline air quality studies. An Environmental Impact Assessment (EIA) is a planning tool meant to assess environmental risks of a given project so that decision makers can make fully informed decisions regarding the project.⁷⁴ If project developers begin construction before completing the ESIA, then decisions are

⁷⁴ International Institute for Sustainable Development, ‘EIA Essentials, EIA: What? Why? When?’ www.iisd.org/learning/eia/eia-essentials/what-why-when/.

made without critical environmental and social information that is crucial to ensuring responsible and sustainable development.

Based on the facts in this case study, what policy tools do you think would be the most effective in ensuring that Chinese companies adhere to their ESIA requirements? Additionally, what are some of the dangers to communities when companies begin construction of large development projects without properly conducting environmental assessments?

Under Guinean law, it is the company proposing the project that is required to conduct ESIA's for proposed projects. However, in other countries, such as the United States, it is the government that is required to conduct such studies.⁷⁵ What are some of the benefits and/or risks of an EIA law that requires the company to conduct ESIA's? Do you think the purpose of environmental assessment laws would be better served if a company or the government conducted the studies?

⁷⁵ National Environmental Policy Act, 42 U.S.C. §§4321 et seq. (1969) www.energy.gov/sites/default/files/2023-08/NEPA%20reg%20amend%2006-2023.pdf.