

Taking responsibility

Human rights issues are no deal-breaker when it comes to Chinese oil firms investing abroad. But could US courts hold them to account?

When President Hu Jintao arrived in Sudan early February, his ears were ringing with US calls for progress on human rights issues in the country. But by the time Hu left Khartoum, Sudan's leaders had seen US\$70 million in debts wiped off the books and had US\$12.8 million to spend on a new presidential palace.

With 200,000 dead in Darfur over four years, 2.5 million more homeless and the government skeptical about UN peacekeepers, the international community is running out of alternatives.

Option one is to get China, as Sudan's principal oil buyer, to engage in some economic arm twisting to obtain peace commitments from Khartoum. Another option, according to those involved in the human rights movement, is to target Sudan's oil revenues by taking action through the courts.

If a credible link can be found between human rights abuses and the US-listed units of Chinese oil groups that buy Sudan's oil, the firms could face lawsuits filed by those who have suffered at the hands of the regimes this energy money supports.

"I have certainly heard people think out loud that it could be done," said Sophie Richardson, deputy director for Asia at Human Rights Watch, a New York-based action group.

It was said that Hu held talks with his Sudanese counterpart Omar al-Beshir raised on sending a peacekeeping force to Darfur. But getting China to make economic threats to a country that sends 60% of its oil to Beijing, and last year met 7% of China's growing energy needs, is asking a lot.

It was China National Petroleum Corp (CNPC) that filled the void in the mid-1990s following the exit of several Western oil firms from Sudan in response to the US imposing sanc-



OIL AGENDA: Foreign energy firms have made their mark on much of the developing world

tions on the country. Through a significant stake in Greater Nile Petroleum Operating Company, which controls the oilfields, CNPC boosted output to its current level of 500,000 barrels per day.

Beijing has subsequently protected Sudan from tougher UN Security Council action. It has done the same for Myanmar and Iran, two more countries deemed diplomatic no-go zones in which China has considerable energy investments.

Throw in the likes of Nigeria, Angola and Al-

► A step into the unknown: Complicit or not?

While it can be argued that China's overseas energy policy is morally suspect, it is not illegal. Beijing may have spent billions on energy investments in countries in which the governments have been implicated in human rights abuses, but no solid evidence has emerged to suggest China is a co-conspirator.

"China has blocked the sorting out of serious rights abuses but this does not mean it perpetrates human rights abuses," said Sophie Richardson, deputy director for Asia at Human Rights Watch. "People think that China is using its power to shield regimes that are abusing people. But it's far more complicated."

For legal action to be taken against Chi-

nese oil companies, proof of involvement in wrongful activity would be required.

"The test is not just, 'Is the company doing business in a bad place?' but 'Is the company contributing to the human rights violations?'" said Jennie Green, a lawyer at the Center for Constitutional Rights.

Indeed, China has grounds to claim that it is doing the people in these countries a favor.

In exchange for access to these countries' natural resources, Beijing not only offers to extract the materials in the first place but also spends big on domestic infrastructure. For example, Angola agreed to exchange future oil supplies for a US\$2 billion package of roads,

railways, bridges, hospitals and schools.

But it is hard to tell where the "non-interference in domestic affairs" pledge that comes with China's energy deals begins and ends.

Sudan is one of a number of African countries to which China is believed to have sold arms. Given that the Arab-dominated Sudanese government secured peace with black African minorities in the south only to then plunge into the ongoing conflict with rebels in Darfur, it is quite likely that those arms have been used in abuses at some point.

Whether this can in turn be traced back to an oil company or its assets is another matter.

But as Katie Redford, director of the US Office of EarthRights International, noted: "If companies are operating in countries where abuses are happening, the risk is there."



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geria too, and China's overseas energy portfolio is like a checklist of nations with current or recent histories of corruption and human rights abuses.

It's not uncommon for Western oil companies that strike energy access deals with the governments of these countries to find themselves caught up in abuse scandals. As a result, a number of the global oil giants have been sued under the Alien Tort Claims Act (ATCA).

"We are talking about complicity in genocide, torture and crimes against humanity," said Jennie Green, a lawyer for the Center for Constitutional Rights, who has experience in such cases.

The Chinese state-owned oil giants – CNPC (PetroChina), CNOOC and Sinopec – all have public listings so, in theory, all could be held publicly accountable in the same way.

"They cannot say we are Chinese so we are safe and we can be complicit in human rights abuses," said Katie Redford, director of the US Office of EarthRights International, a non-profit group that acts on behalf of the victims of human rights and environmental abuses.

The fact that this kind of legal action

is even on the table shows an evolution in human rights law over the past decade.

Holocaust survivors have filed cases against companies for using slave labor and looting the assets of Jewish victims. South African citizens have taken action against firms accused of adding to the suffering of black Africans by participating in key sectors during the apartheid era.

Long arm of the law

However, the apartheid case, for example, is not being heard in South Africa; it is taking place in an American court.

This is all down to the extraterritorial reach of the US judiciary – action can be taken against companies with a certain level of presence in the US for activities that take place beyond its borders.

Companies can no longer hide behind their borders, it seems.

"When I open the paper and read about a Chinese oil company making investments in Sudan or Nigeria, I ask myself, 'What are the plaintiff counsels going to be looking at?'" said Joe Cyr, head of Lovells's litigation and arbitration practice in the US.

However, of the two dozen or so >>



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SPECIAL REPORT

>> human rights cases filed against multinationals, about half have been dismissed and most of the rest remain locked in a cycle of denials and appeals.

In fact, so far only one group of plaintiffs has managed to get an oil company to court and walk away with a settlement.

Originally filed in 1996, the case saw Myanmar citizens sue Unocal for death, rape and forced labor suffered by them or theirs at the hands of local soldiers tasked to provide security for the US company's pipeline project. A confidential settlement was reached in 2005. It is said Unocal paid out as much as US\$60 million.

Tough to pin down

Pursuing these kinds of cases toward any kind of resolution is no easy task.

This is particularly true if the company in question is not domiciled in the US. To proceed with the case, it must be proved that the firm has sufficient US-related interests to be subject to US law. This involves trawling through a murky world of corporate structures.

"It makes Chinese companies more vulnerable that they are listed in the US but it's a lot more complicated than that," said Redford, who represented some of the plaintiffs in the Unocal case. "What kind of subsidiaries have they set up? Where are decisions being made?"

French oil company Total was dismissed as a defendant in the Unocal case as its US presence was limited. But Anglo-Dutch firm Royal Dutch Shell had to stand trial, accused of instigating abuses by Nigeria's government because it had a US-based investor relations office.

Canada's Talisman Energy was also deemed subject to US courts regarding its alleged role in the ethnic cleansing carried out by Islamic Sudanese troops.

"It is not a US company but it's being sued in a US court," observed Redford. "It's not a huge leap to think the Chinese

In the name of oil

China's controversial overseas energy interests

Country	Chinese interest	Human rights issue
Sudan	China receives 60% of oil exports; CNPC is the largest stakeholder in the company that runs the oilfields	Alleged genocide in Darfur has cost 200,000 lives and left 2.5 million others homeless
Myanmar	CNPC, CNOOC and Sinopec all involved in exploration; talks ongoing over pipeline linking the countries	Military regime is accused of torture, rape and execution, and waging war on minorities
Nigeria	2005: US\$800 million supply deal with PetroChina; 2006: CNOOC paid US\$2.7 billion for oil block stake	Government accused of violently repressing ethnic groups, particularly in Niger Delta region
Angola	China receives 25% of oil exports; agreed to a US\$2 billion oil-for-infrastructure aid package	Government accused of corruption and failing to provide for those displaced by civil war
Iran	2004: preliminary deal with Sinopec to sell 51% stake in oil field generating 150,000 barrels a day for 25 years	Concern over the treatment of political dissidents dwarfed by nuclear development fears

Source: Media reports

oil companies could be sued in the US."

As for the Chinese oil groups, the US investor relations trail appears to run no further than the banks that issue the American Depositary Receipts through which US stock in these firms is traded.

Both CNPC and Sinopec have representative offices in Houston, Texas, and Sinopec also runs a US subsidiary out of New York. Whether this amounts to a US presence that would satisfy the courts (on the basis of subsidiary activities or, say, petroleum arbitrage trading) is unclear.

The efforts to keep sensitive overseas operations away from listed assets after a human rights controversy derailed CNPC's New York Stock Exchange IPO in 1999, suggest that Chinese companies tread carefully around ownership issues. (See: Other avenues: Public pressure)

"Will the courts recognize that the subsidiary has a separate corporate identity?" asked Stephen Whinston, a partner at law firm Berger & Montague who is involved in the Talisman case. "Just because the subsidiary is US-based, does the

Snap retaliation: The Chinese response

If a Chinese oil company found itself on trial in a US court for conspiracy to commit human rights abuses in a third country, Beijing would not take the news well.

As China's UN Security Council voting record suggests, it doesn't approve of activities that threaten the autonomy of a sovereign state. A US court exercising its extraterritorial powers would be perceived as just that.

"They are not receptive to the assertion of jurisdiction beyond national borders," said Dr Jeffrey Bader, senior fellow in foreign policy studies at the Brookings Institution.

"The Chinese government's reaction would be pretty hostile. There is no doubt that if the US courts were taking action detrimental to PetroChina, the Chinese would quickly look for a tit-for-tat."

Regardless of the independence of the US justice system, it is thought that retaliatory action would likely target the US government. Through administrative or judicial measures, key US companies – not just in the energy sector – would find themselves under the cosh.

"Suddenly they announce that a Boeing deal or Airbus deal is not going through – but they don't give the real reason why," said Arvind Ganesan, director of the business and human rights program for Human Rights Watch.





ON THE RUN: Locals flee a burning oil pipeline in Nigeria

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on the country's energy interests.

ExxonMobil played the national security card in a case in which it was accused of complicity in kidnapping, torture and murder carried out on people in Indonesia's Aceh region by domestic soldiers in the company's employment.

"Exxon had the temerity to argue that any questions of its operations in Indonesia involved homeland security issues," said Michael D. Hausfeld, a partner at Cohen, Milstein, Hausfeld & Toll, who is involved in this ongoing case.

"The company hired military troops as a guard for its oil plant in Indonesia – this is not a homeland security issue."

Hired help

Ultimately, it is the hiring of local soldiers to perform security duties upon which many of these human rights cases hinge.

If human rights abuses have indeed been committed, legal and ethical lines must be drawn in the sand. Did the companies prioritize their energy assets above the welfare of local people? Was this done in ignorance or in knowledge?

If those who represent the plaintiffs in such cases are to be believed, the legal pendulum is swinging more towards accountability as both the judiciary and the public are looking to companies to implement best practice.

While the Unocal case hasn't opened the door to a stream of successful human rights settlements, it has – at least in theory – put oil firms on notice that they can be held accountable for their actions.

"Courts are catching up with the realities of globalization," said Redford. "Corporations are everywhere in terms of investment and so they can't be nowhere in terms of jurisdiction."

The reality for China is that, as its companies become more globally visible, there is a greater chance they will be caught up in this. The extraterritorial reach of the US courts may yet extend into the realm of the state-controlled sector and start asking questions about the ethics of Chinese foreign policy.

"If China wants to be seen as a responsible international player, it must not only make use of all of its available resources to help people in Sudan, but also make sure that this is visible to the rest of the world," said Richardson.

"It is quite unfair that there is this degree of suspicion of China over its activities in certain countries. But it does itself no favors in terms of transparency." ♦

Other avenues: Public pressure

Should Chinese oil companies ultimately prove unreachable through the courts, there are other ways in which they can be held to account through their publicly-listed assets.

"The way people have tried to get at Chinese companies is not through the law but through capital market sanctions," said Arvind Ganesan, director of the business and human rights program for Human Rights Watch.

While the most obvious of these – de-listing companies from US stock exchanges – has not proved popular with legislators, grassroots action has been taken against Chinese firms in the past.

In 1999, China National Petroleum Corp (CNPC) announced plans to become the first Chinese state-owned enterprise to list on the New York Stock Exchange. But its plan to raise up to US\$10 billion was undermined by claims that the proceeds could be used to perpetrate human rights abuses in a number of places, including Tibet and Sudan.

The bad PR forced CNPC into a rethink. A restructured deal saw the floatation of a CNPC subsidiary, PetroChina, which it was claimed would focus on China alone and not be linked to the parent company's overseas assets.

CNPC remains PetroChina's largest shareholder, though, and it could be argued that any income or debt passing between parent and subsidiary could ultimately be traced back to Sudan.

But Ganesan believes this grassroots-driven human rights agenda could be used to petition institutional investors not to back Chinese companies involved in countries such as Sudan.

"People don't just throw up their hands and give up. Things evolve and institutions are held accountable."

The bottom line is that a growing number of – generally Western – investors have ethical as well as financial expectations of the companies in which they put their money.

"Corporations that operate in such countries must appreciate that they may be held to scrutiny by the public, whether it is the media, courts or court of public opinion," said Stephen Whinston, a partner at law firm Berger & Montague.

court have jurisdiction over the parent?"

Another obstacle to pursuing multinationals in US courts is government intervention. The ATCA permits courts to consider international law cases but this doesn't stop defense lawyers arguing that a court doesn't have jurisdiction.

The untouchables

As state-controlled entities, the likes of PetroChina, CNOOC and Sinopec may try claiming sovereign immunity (foreign governments usually can't face trial in US courts). It might also be argued that a case threatens US foreign policy as it undermines Sino-US relations. (See: Snap retaliation: China's response)

"Defense lawyers often work with the State department and the foreign sovereign to make submissions that a case would harm international relations and prevent the foreign country dealing with the situation itself," said Cyr.

National security is also cited as grounds for dismissing cases against US firms as any action that threatens US oil operations overseas could have an impact