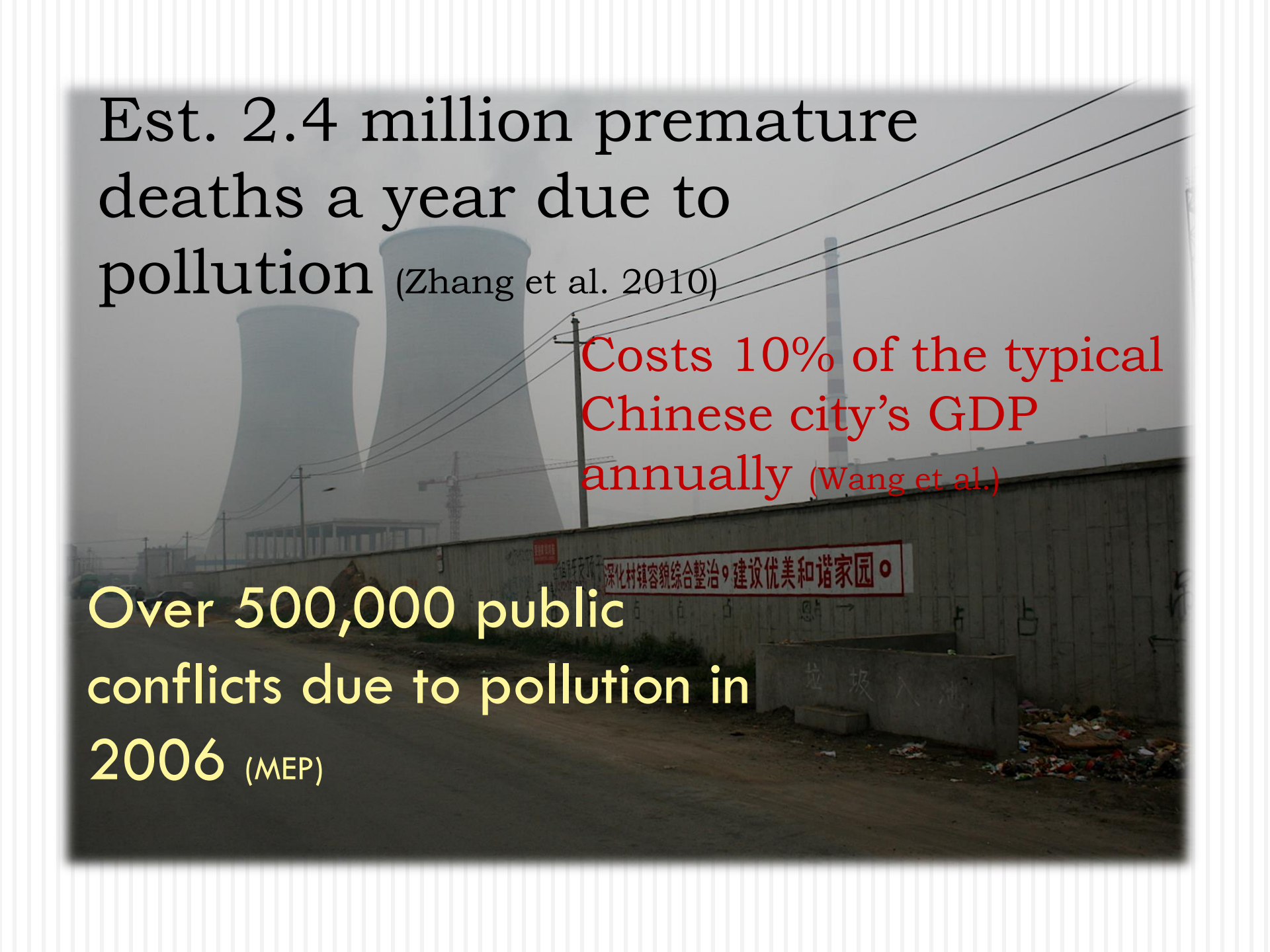


AN INTRODUCTION TO ENVIRONMENTAL LAW AND GOVERNANCE IN CHINA

PROF. TSEMING YANG

May 30, 2018

China's Environmental Situation

The background image shows a hazy industrial landscape. In the distance, two large, grey cooling towers are visible against a grey sky. In the foreground, there is a concrete wall with a banner that reads '深化村容镇貌综合整治，建设优美和谐家园。' (Deepen the comprehensive整治 of village appearance and town appearance, build a beautiful and harmonious home). To the right of the wall, there is a pile of trash. The overall atmosphere is one of pollution and industrial activity.

Est. 2.4 million premature
deaths a year due to
pollution (Zhang et al. 2010)

Costs 10% of the typical
Chinese city's GDP
annually (Wang et al.)

Over 500,000 public
conflicts due to pollution in
2006 (MEP)

First National Pollution Source Survey

Dirty secrets



Reuters

Drainage disparity

The current national survey tallied up pollution from 6 million industrial, agricultural and residential sources. Here are some findings compared to previous reports:

Discharge of chemical oxygen demand; a measure of water pollution in wastewater, in 2007, in millions of tons:

GOVERNMENT
REPORT, 2008

13.8

CURRENT REPORT,
2010

30.3

Source: Xinhua

Discharge of solid industrial waste in 2007, in millions of tons:

GOVERNMENT
REPORT, 2008

12

CURRENT REPORT,
2010

49.2



SCMP GRAPHIC

SOURCE: STATE COUNCIL INFORMATION OFFICE

Water Scarcity and Pollution





Tai Lake
Summer
2007

Drinking
water source
for millions



Water Scarcity and Pollution



Guardian

Under the Dome Documentary

8

- <https://www.youtube.com/watch?v=V5bHb3Ijbc&t=475s>



Environmental Laws in China

China's Environmental
Governance Challenges and
VLS Effects

China's Major Environmental Laws & Regulations

10

- 中华人民共和国 侵权责任法 (Tort Law) [2010]
- 中华人民共和国循环经济促进法 (Circular Economy Law) [2008, effective 2009]
- 中华人民共和国水污染防治法 (第二次修正) (Water Pollution Prevention and Control Law) (revised 1984, 1996, 2008 law) [second revision 2017, effective 2018]
- 中华人民共和国城乡规划法 (Urban Planning Law) [2007, effective 2008]
- 中华人民共和国节约能源法 (Energy Conservation Law) (amended 1997, 2007 law) [2016]
- 中华人民共和国可再生能源法 (Renewable Energy Law) (revised 2005 law) [2009, effective 2010]
- 中华人民共和国固体废物污染环境防治法 (Solid Waste Pollution Prevention Law) (revised 2005 law) [2016]
- 中华人民共和国防沙治沙法 (Desertification Law) [2002]
- 中华人民共和国放射性污染防治法 (Radiation Prevention Law) [2003]
- 中华人民共和国草原法 (Grasslands Law) (revised 1985, 2002, 2009 law) [2013]
- 中华人民共和国环境影响评价法 (Environmental Impact Assessment Law) (revised 2002 law) [2016]
- 中华人民共和国水法 (Water Law) (revised 1988, 2002, 2009 law) [2016]
- 中华人民共和国清洁生产促进法 (Clean Production Law) (revised 2002 law) [2012]
- 中华人民共和国海域使用管理法 (Coastal Management Law) [2001, effective 2002]
- 中华人民共和国渔业法 (Fishing Industry Law) (revised 1986, 2000, 2004, 2009 law) [2013]
- 中华人民共和国大气污染防治法 (Atmospheric/Air Pollution Prevention Law) (revised 1988, 2000 law) [2015, 2016 effective]
- 中华人民共和国气象法 (Meteorology Law) (revised 1999, 2000, 2014 law) [2016]
- 中华人民共和国环境噪声污染防治法 (Noise Pollution Prevention Law) [1996, effective 1997]
- 中华人民共和国煤炭法 (Coal Law) (revised 1996, 2011, 2013 law) [2016]
- 中华人民共和国农业法 (摘录) (Agriculture Law) (revised 1993, 2002 law) [2012, effective 2013]
- 中华人民共和国水土保持法 (Water and Land Preservation Law) (revised 1991 law) [2010, effective 2011]
- 中华人民共和国防洪法 (Flood Control Law) (revised 1997, 2009, 2015 law) [2016]
- 中华人民共和国环境保护法 (Environmental Protection Law) (revised 1989 law) [2014 effective 2015]
- 中华人民共和国标准化法 (Standardization Law) (revised 1988 law) [2017]
- 中华人民共和国野生动物保护法 (Wild Animal Protection Law) (revised 1988, 2004, 2009) [2016]
- 中华人民共和国土地管理法 (Soil Management Law) (revised 1986, 1998) [2004]
- 中华人民共和国矿产资源法 (Mineral Resources Law) (revised 1986, 1996) [2009]
- 中华人民共和国石油天然气管道保护法 (Petroleum and Natural Gas Pipelines Protection Law) [2010]
- 中华人民共和国森林法 (Forestry Law) (revised 1984, 2000) [2011]
- 中华人民共和国宪法(环境保护条款摘录) (Chinese Constitution) (excerpts) (1982) [amended 2018]
- 中华人民共和国海洋环境保护法 (Marine Environment Protection Law) (revised 1982, 1999, 2013, 2016 law) [2017]
- 中华人民共和国刑法 (节录) (Criminal Law) (excerpt) (revised 1979, 1997, 1999, 2001, 2002, 2005, 2006, 2009, 2011, 2005) [2017] *the Chinese here refers to Criminal Law, not administrative law
- 中华人民共和国行政诉讼法 (节录) (Administrative Law) (excerpt) (revised 1989, 2014) [2017] * the Chinese here means Administrative Procedure Law/Administrative Litigation Law.
- 中华人民共和国核安全法 (Nuclear Security Law) [2017, effective 2018]
- 中华人民共和国环境保护税法 (Environmental Protection Tax Law) [2018]
- 中华人民共和国航道法 (Waterway Law) (revised 2015 law) [2016] *Chapter II, III, and Article 44 mention environmental protection.
- 中华人民共和国防震减灾法 (2008年修订) (Earthquake Disasters Mitigation Law) (revised 1997 law) [2008, effective 2009] *Articles 13, 62, 70, and 84 mention environmental protection or prevent pollution.

The Governance Challenge: Implementation & Enforcement

- Politics/Culture of Economic Growth
 - Weak Commitment to Environmental Protection
- Weak Environmental Governance Institutions
 - Lack of Independence/Political Control - Weak Rule of Law
 - Insufficiency of Resources (Staff, Funding)
 - Knowledge/Understanding of Environmental Law is Poor (Lawyers, Judges, Prosecutors, Agency Officials) – No Environmental Bar
- Little Participation in Enforcement by NGOs & Procuratorate

China's Legal System

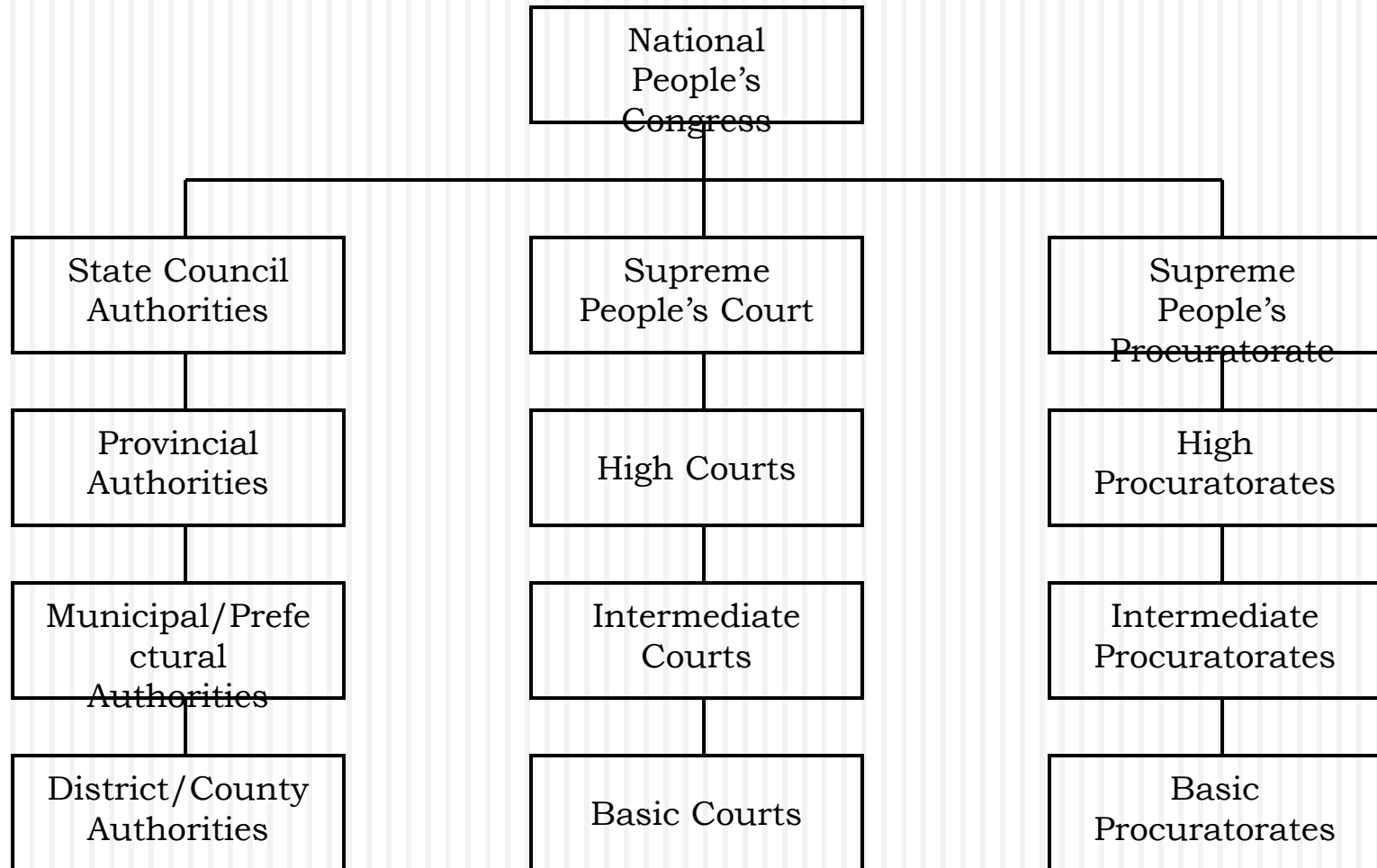
Key Characteristics of China's Government System

- Government System Compared to US
 - ▣ Parliamentary (vs. Presidential)
 - ▣ Unitary (vs. Federal), de facto decentralization
- Civil Law System (vs. Common Law)
 - ▣ Role of Courts/Case law
 - ▣ Courts are part of the Civil Service System
- Leadership of the Communist Party of China (CPC) at all levels of government
 - ▣ Informal/Non-transparent Control of Governmental Decisions

Key Characteristics of Traditional Chinese Legal Culture

- Emphasis more on stability & social order than individual human rights (survey, conviction rate, etc.)
- A highly developed bureaucratic structure, including accountability systems, to ensure gov. efficiency
- Emphasis on substantive justice & insufficient attention to procedural justice
- Preference for extra-judicial dispute resolution

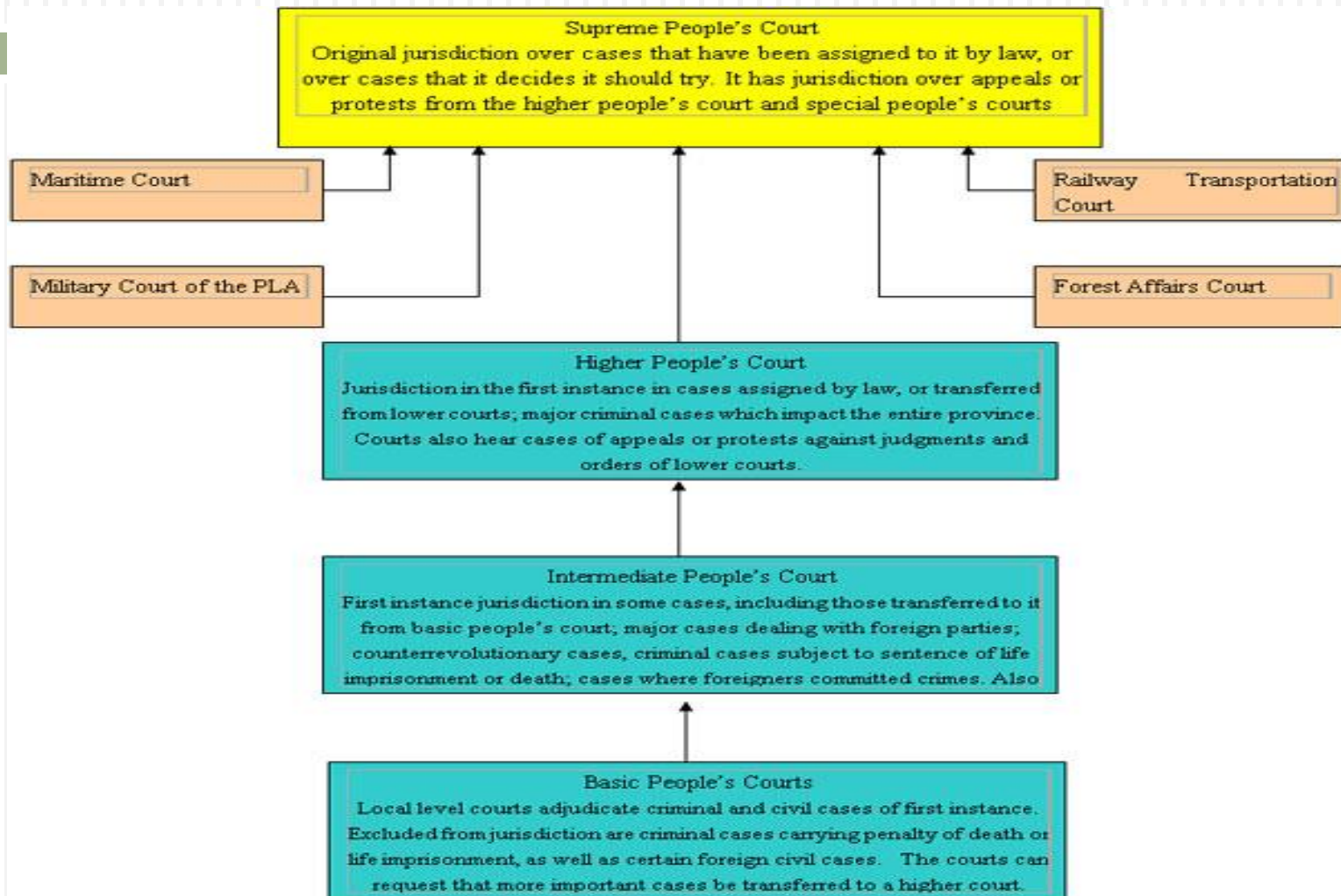
Governance Structure in China



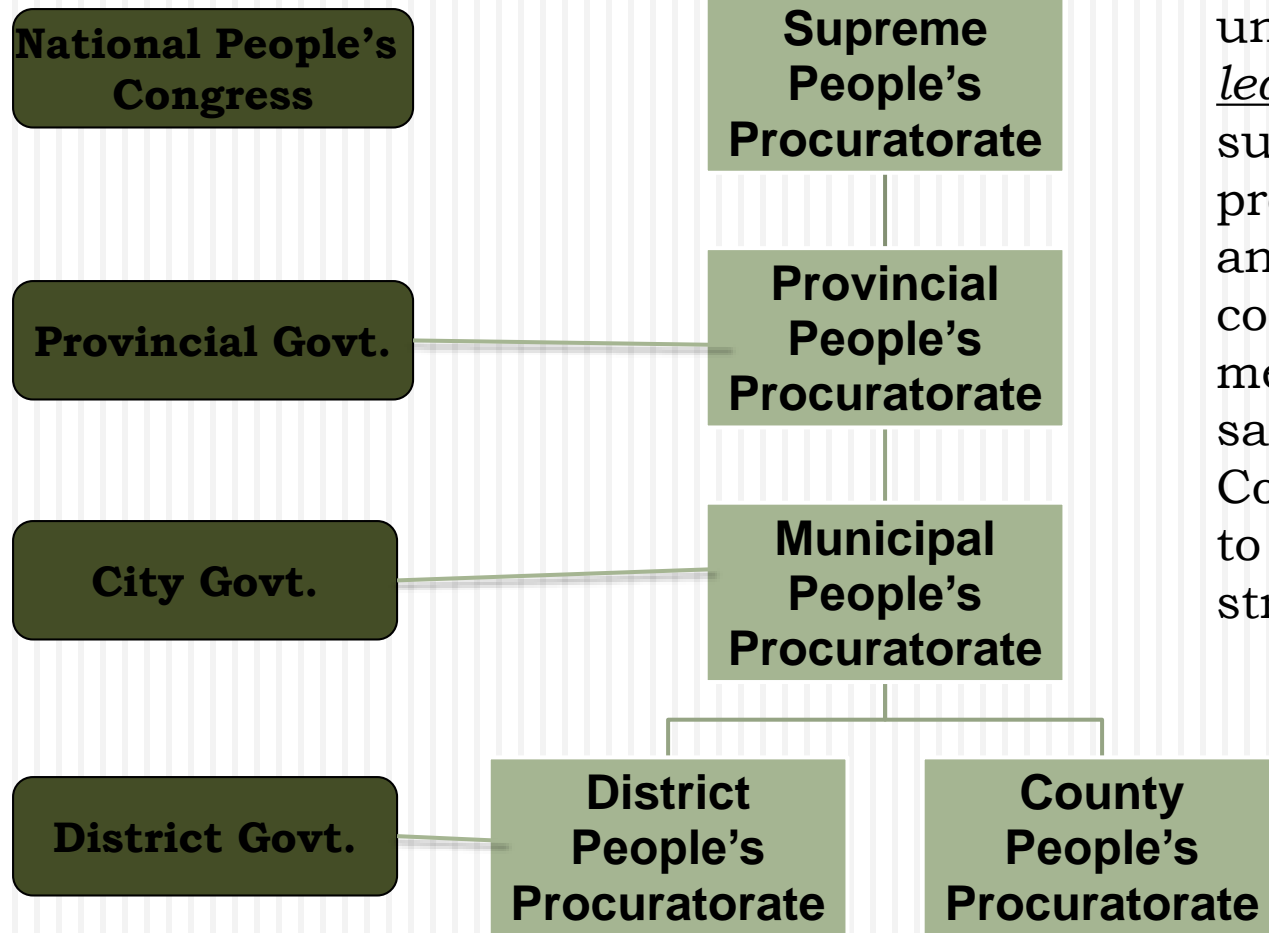
Other State Organs Involved in Law Administration

- Ministry of Justice: administer prisons, the People's Mediation Committees, oversee the lawyer system and the notary system, legal education, disseminate legal knowledge, etc.
- Ministry of Public Security: China's central police authority
- Supreme People's Procuratorate: China's equivalent of Attorney General and National Inspector General

China's Court System I



The Structure of the Procuratorate



- procuratorate under dual leadership of superior procuratorate and local congress/government at the same level
Corresponding to the court structure

Hierarchy of Legislation - I

- **Constitution** (宪法)
- **Laws** (法律) by the NPC and SCNPC
- **Administrative Regulations** (行政法规) by the State Council
- **Local People's Congress Regulations** (地方性法规) by local congresses and standing committees of provinces
- **Rules** (规章), including Government Rules (政府规章) by local governments of provinces, and Ministry Rules (部门规章) by central-level ministries, commissions and agencies directly under the State Council

Hierarchy of Legislation - II

- The role of international treaties: directly applicable, international treaties prevail if conflicting with domestic law
- The role of judicial interpretation by the Supreme Court and procuratorial interpretation by the Supreme Procuratorate:
 - authority to interpret questions of law arising out of specific applications of law in their adjudicative and procuratorial work
 - in practice treated as supplementary laws, very active
- The role of cases – may provide some guidance, but no binding effect & no precedential value

Courts in Operation I

- Responsible to the local congresses & financed by governments at the same level
- Theoretically required to exercise independent adjudication
- Open trial in general & publish judgments
- Usually judgment at the second instance is final, with the appeal being a de novo review of both facts and law

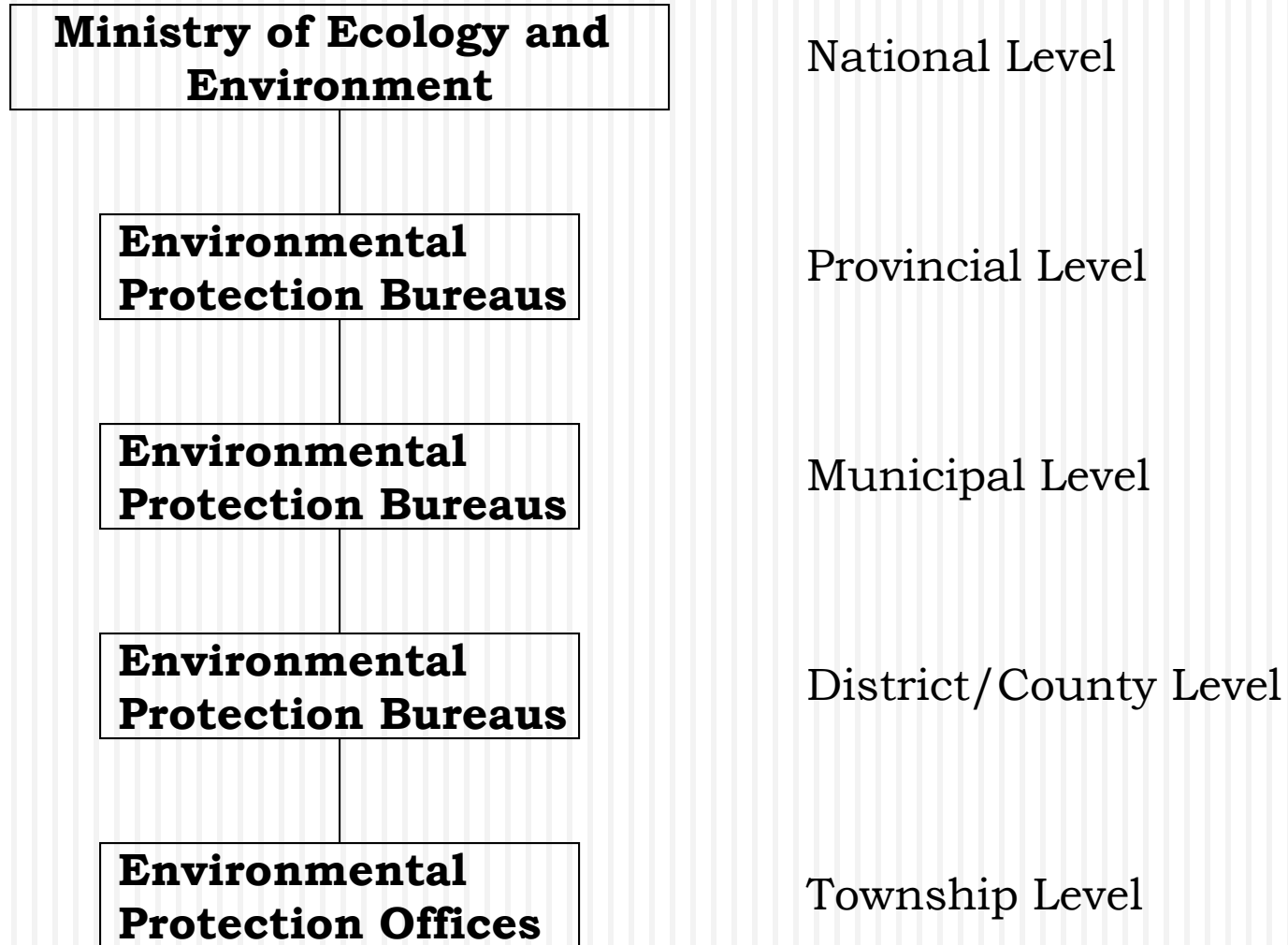
Courts in Operation II

- Cases decided by a collegiate panel except for minor cases, no jury
- Formal mediation by the courts for civil cases
- Responsible for enforcing their own judgments (difficulty in enforcement, only 60% of the civil awards are enforced)
- Courts are used overwhelmingly for commercial/individual disputes instead of addressing controversial social issues



Ministry of Ecology and Environment (MEE) and Provincial/Local Environmental Protection Bureaus (EPBs)

China's Primary Environmental Regulatory Agencies

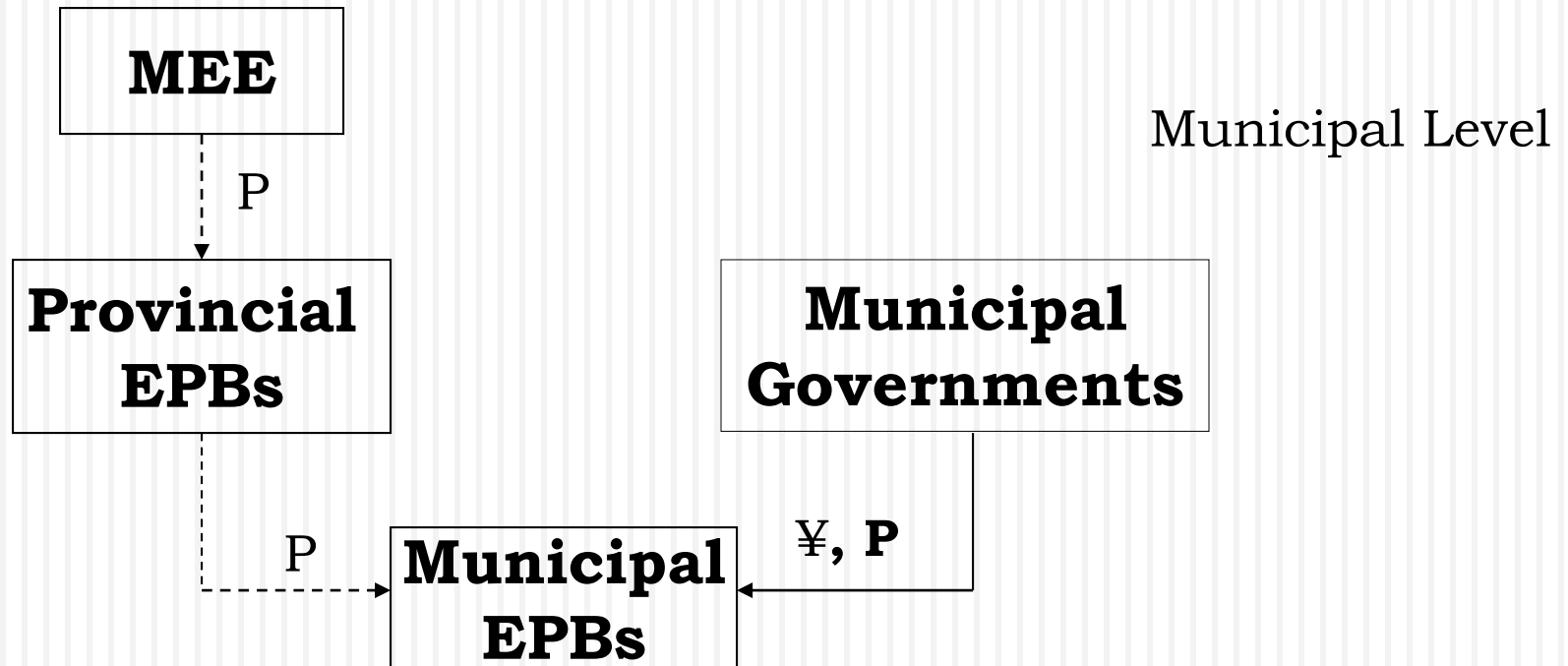


Major Responsibilities of MEE

27

- Organize the Formulation of National Environmental Regulations
- Establish National Environmental Standards
- Supervise Local Enforcement
- Coordinate Major Environmental Problems
- Take Direct Enforcement Measures
- Manage Environmental Monitoring, Statistics, and Information

Central-Local Relations



Chief Responsibilities of EPBs

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- Enforcing Environmental Laws and Policies
- Assisting in Drafting Local Rules and Standards
- Environmental Monitoring and Record Keeping
- Onsite Inspection of Polluting Facilities
- Investigation of Violations, Accidents, and Citizen Complaints
- Environmental Dispute Resolution

Main Regulatory Programs

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- Environmental Quality and Emission/Discharge Standards
- Discharge Permit System
- “Three Synchronizations”
- Environmental Impact Assessment
- Pollution Levy System
- Additional newer responsibilities

EPB Enforcement Process

31

- Review of Self-Reporting Polluting Information
- Onsite Inspection of Polluting Facilities
- Issuance of Warning Letters
- Impose Administrative Penalties and/or Set Compliance Schedules
- Seek Court Enforcement

Role of Courts and Citizens

32

- Court Enforcement of EPB Decisions Under the Administrative Litigation Law
- Prosecution of Environmental Crimes
- Environmental Citizen Complaints
 - Good Supplementary Source of Information for EPB Monitoring and Enforcement
 - Dominance of Noise and Air Pollution Issues

Main Enforcement Problems

33

- EPB Dependence on Local Governments
- Insufficient Enforcement Authority
- Lack of Funding, Qualified Inspectors, and Infrastructure
- Inefficient Use of Citizen Complaints
- Limited Court Enforcement and Oversight of EPB Decisions



Environmental Torts and Public Interest Litigation

Tort Litigation by the Numbers

- Over 678,000 complaints to EPBs in 2006
- Over 100,000 environmental/pollution related civil disputes filed annually in recent years
- **Around 1-3% will actually be litigated**
 - **Average 25% annual increase since 1998**
 - **(2004) 4453 cases; (2005) 1545 cases; (2006) 2146**

Law & Practice

- Polluter and victim settle out of court
 - Regular payoffs to victims not uncommon
- Chinese cultural & practical aversion to litigation
 - Prefer the xinfang system (i.e., petitioning higher levels of government and officials)
 - Little trust in the judicial system

Law & Practice

- And if going to the courts, lots of barriers
 - ▣ Few lawyers knowledgeable of environmental law and willing to work for possibly no pay
 - ▣ Court could decide not to accept the case
 - Too sensitive or too busy
 - Class actions are not generally liked
 - ▣ “Acceptance fee” of .5% to 4% of the compensation requested
 - Can petition to waive fee or postpone

Law & Practice

- If accepted and in litigation the immaturity, vagaries, and special characteristics of Chinese law come into play:
 - ▣ Evidentiary issues
 - ▣ Assessment of damages
 - Receipts please?
 - ▣ Judge is unfamiliar/unaware of special provisions for pollution cases
 - ▣ Judge must consider “social harmony”

Tort Law 2010

- Shifts burden of proof to polluter (Art. 65)
 - ▣ In practice, plaintiff must first make a *prima facie* case for causation
- No fault liability (Art. 68)
 - ▣ If pollution causes damages, **regardless of whether the polluter is at fault or whether the pollution discharges are within allowed volumes**, the polluter will be liable.
- No punitive damages for pollution cases

CLAPV Cases from 1999-2009

CLAPV Cases	Air Pollution	Water Pollution	Noise Pollution	Other	Total
Won	12	13	4	3	32
Lost	8	5	3	10	26
Judicial mediation	1	2	1	0	4
Admin. mediation	2	3	2	1	8
No decision or unfinished	26	23	5	11	65
Total	49	46	15	25	135

The Court's Decision

- “It is naive to think that cases can be decided only on the law.”
- “If I allow one plaintiff to win, then every other victim will want compensation as well, and what will that do to the broader society?”

- Chinese Judge 2008

Current Trends & Developments

- Administrative Changes
 - Promotion of public participation & information disclosure (May 2007 Public Disclosure Law)
- **Hot Topic** is Environmental courts and public interest suits
 - Environmental courts given lots of discretion in procedural rule making and standing, so far...

Public Interest Litigation

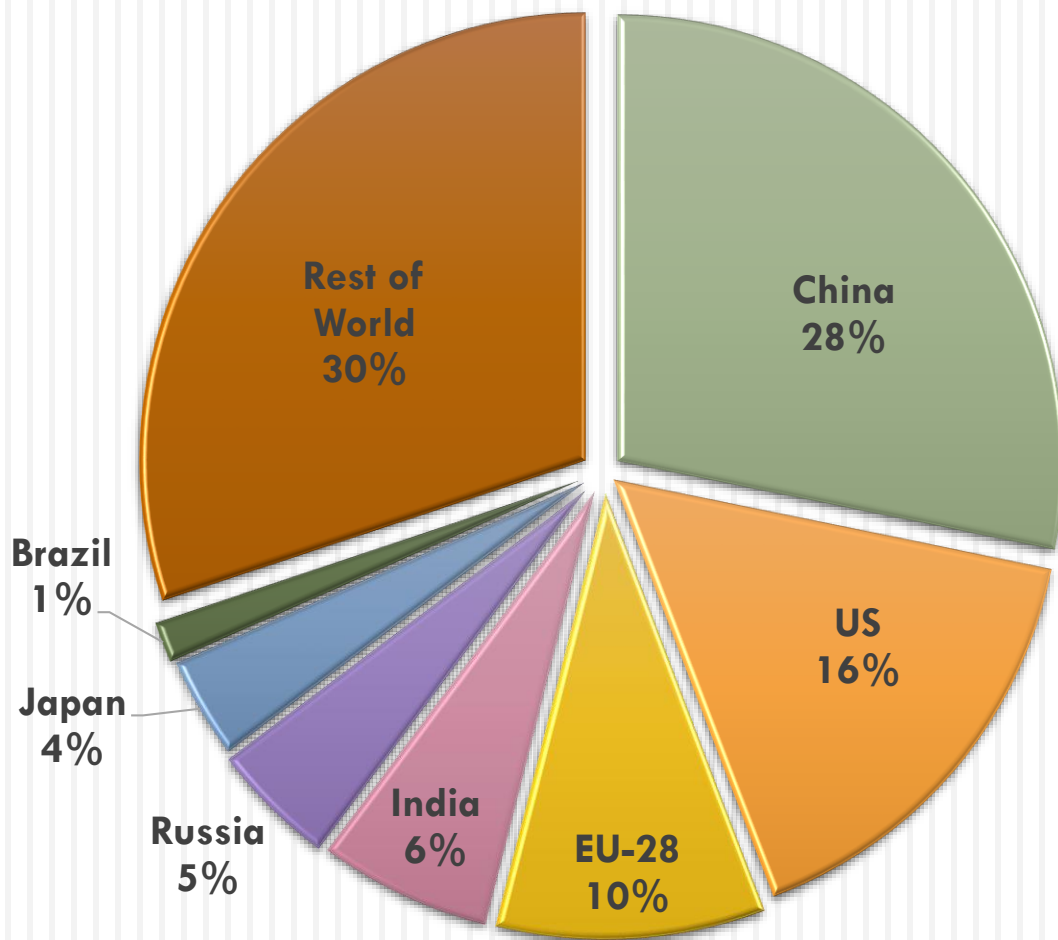
- E-courts actively promote PIL
- In 2009, two E-courts permitted the All China Environment Federation (ACEF) to bring suits **on behalf of the public interest**
 - 1) against a port facility for EIA, air, water and noise law violations – won compensation & injunction
 - 2) against a provincial land administration to reclaim land formerly leased and harming the environment – successful



Climate Change Regulation

Environmental Courts and
Public Interest Litigation

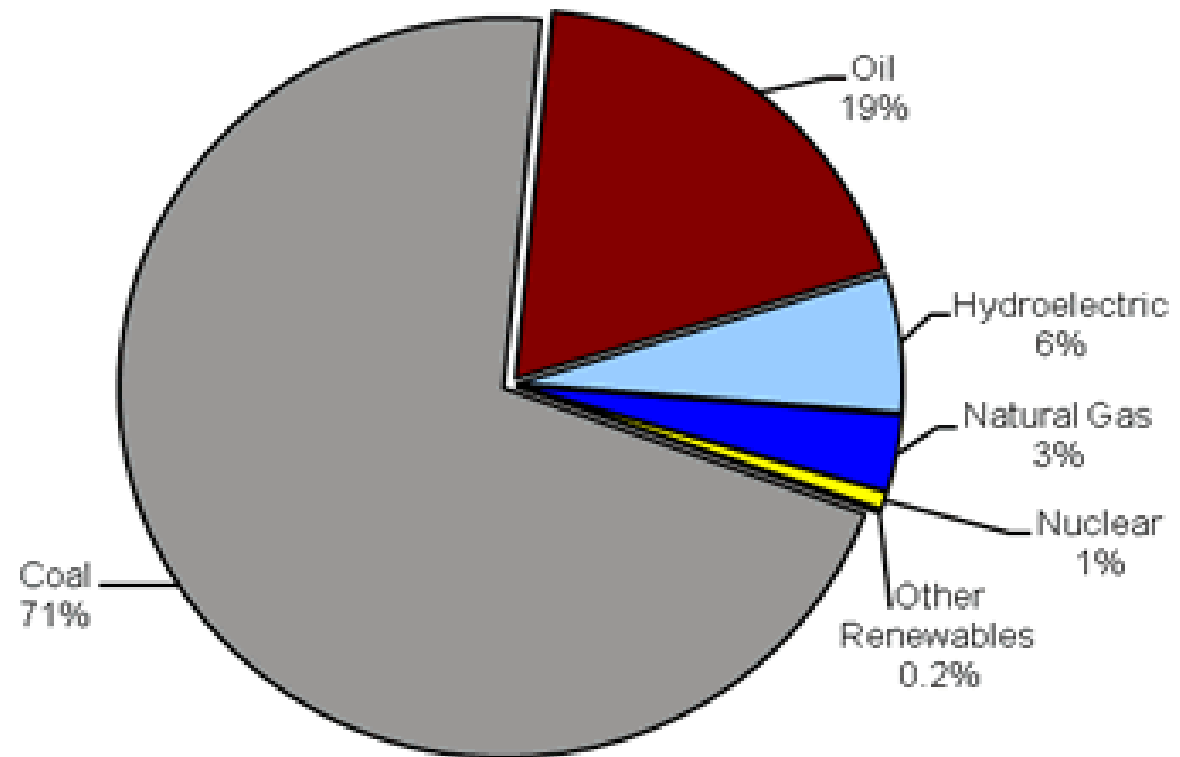
World CO2 Emissions in 2014 from Energy Consumption



Country	MMT
China	9134
US	5176
EU-28	3160
India	2020
Russia	1467
Japan	1189
Brazil	476
Rest of World	9759
Total	32381

Data from
International Energy
Agency 2017

Total Energy Consumption in China by Type, 2008



Source: EIA

China's UNFCCC Positions

47

- 2009 Copenhagen (Voluntary) Commitments
 - ▣ Reduce energy intensity per unit GDP by 40-45% by 2020 over 2005 levels
 - ▣ Increase non-fossil fuel in primary energy consumption to 15% by 2020
 - Increase forest cover by 40 mha

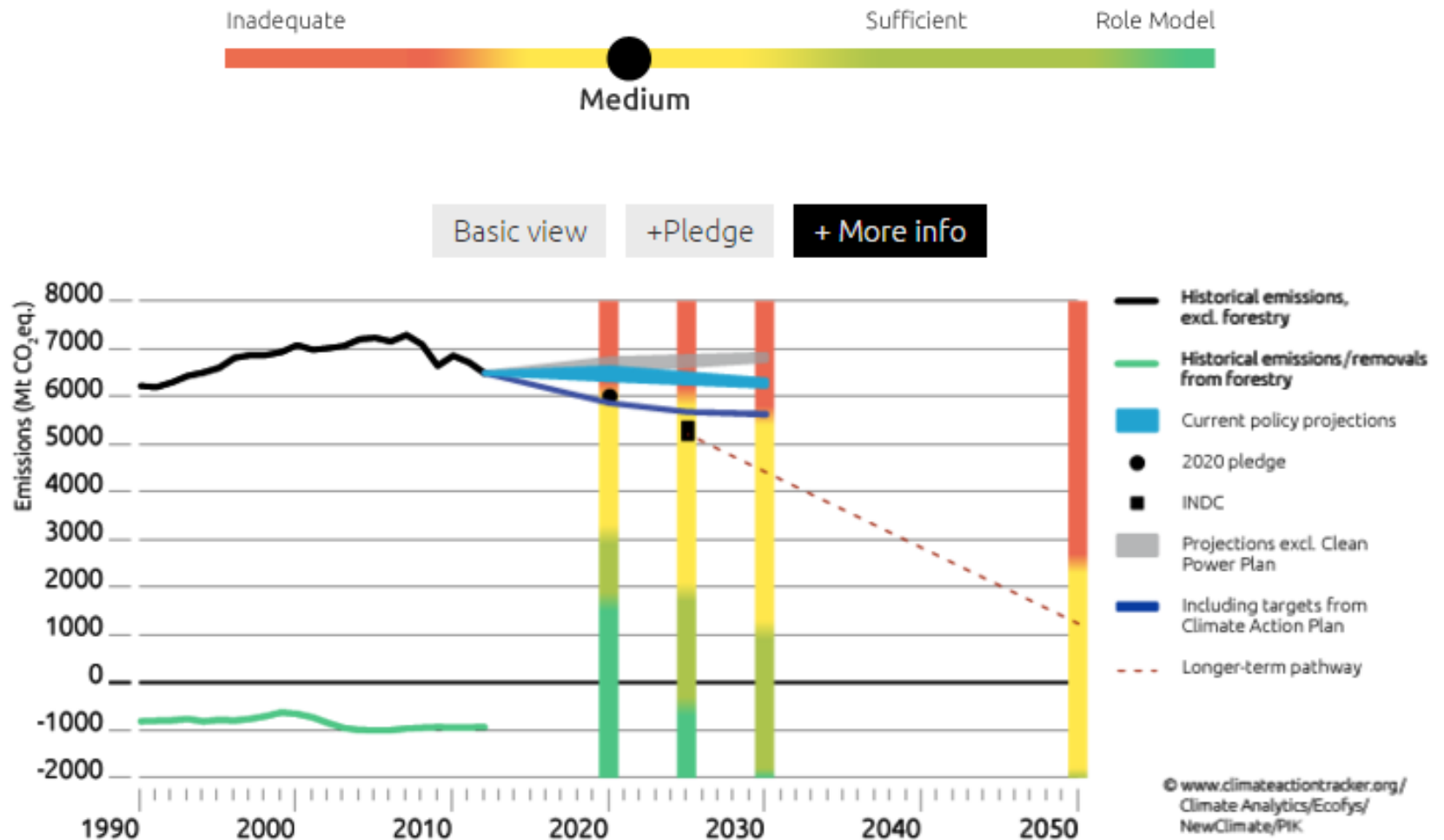
Recent US & China Commitments

48

- US
 - With all ongoing efforts, reduce GHG emissions by 26-28% below 2005 levels by 2025 (Paris INDC)
 - With Clean Power Plan, reduce CO₂ emissions from power sector by 32% below 2005 levels by 2030
- China
 - Peak carbon emissions by 2030
 - Lower CO₂ emissions per unit GDP by 60-65% from 2005 levels by 2030 (Paris INDC)
 - Plan for nationwide GHG cap & trade system (based on 6 local pilot programs)

US Projections (climatechangetracker.org)

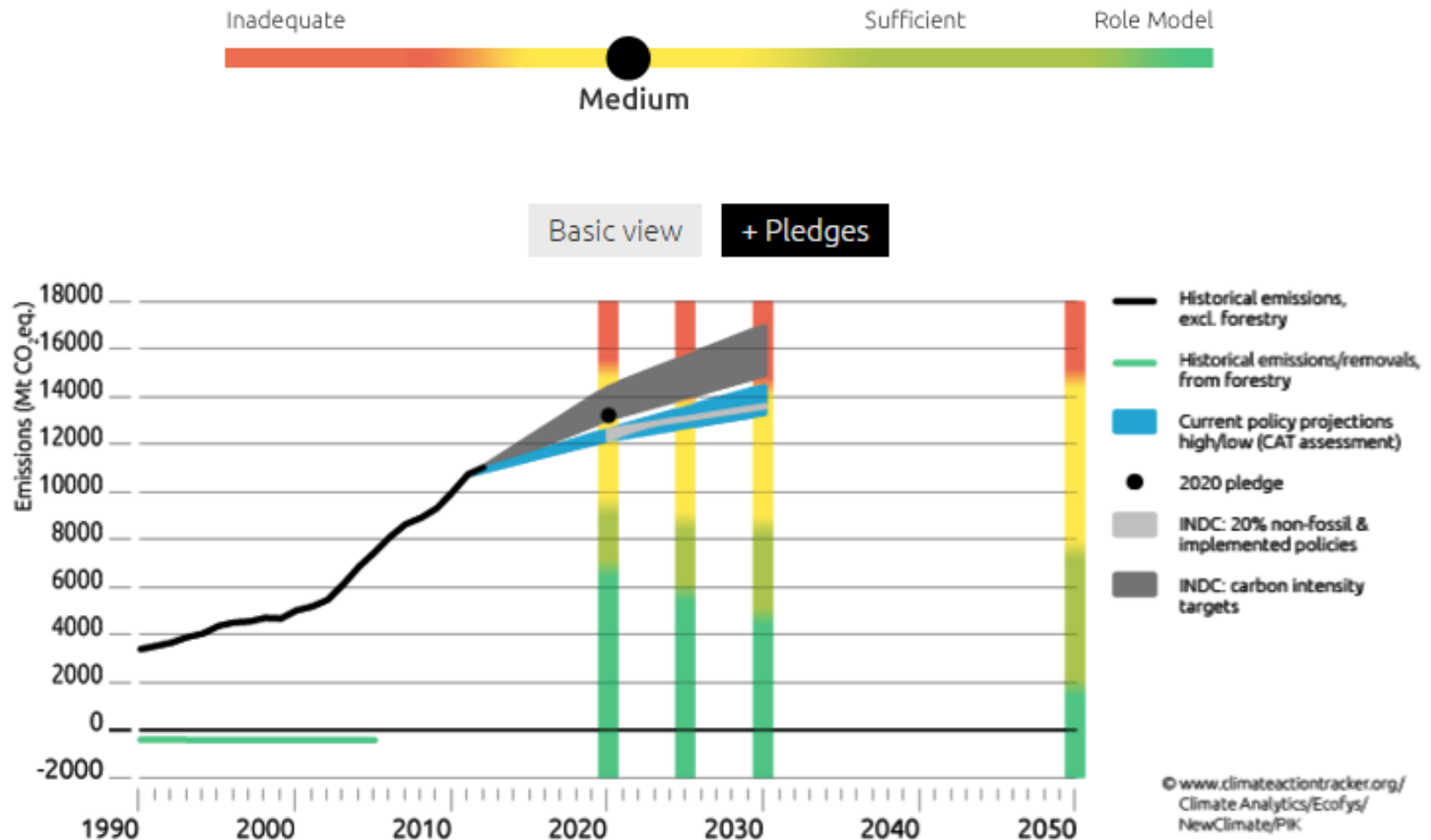
49



Note: Hover over the coloured bars for a pop-up with the fair emissions range per effort sharing category. More information [here](#).

China Projections (climateactiontracker.org)

50



Note: Hover over the coloured bars for a pop-up with the fair emissions range per effort sharing category. More information [here](#).

Significant Climate-Actions in China

51

- **Policy Shift in international engagement starting with 2009 Copenhagen (voluntary) commitments**
 - ▣ **Reduce energy intensity per unit GDP by 40-45% below 2005 levels by 2020**
- **Encouraging Record of Action**
- **But Institutional Capacity to Implement Publicly Announced Plans?**
- **How firm is commitment/motivation?**



?

Important Areas of Activity

53

- Climate White Paper (11/2011, “Policies and Actions for Addressing Climate Change”)
- **Industrial Policy/Restructuring (5-Year-Plans)**
 - Phase-out small/inefficient/dirty coal power plants
 - Make energy intensive industries more efficient/shift to less energy-intensive sectors (industrial energy efficiency)
- Energy Efficiency/Conservation
 - Demand-side management
 - Environmental Dispatch
- **Renewable Energy (Renewable Energy Law 2005/2009)**
- Kyoto Protocol CDM
- Afforestation

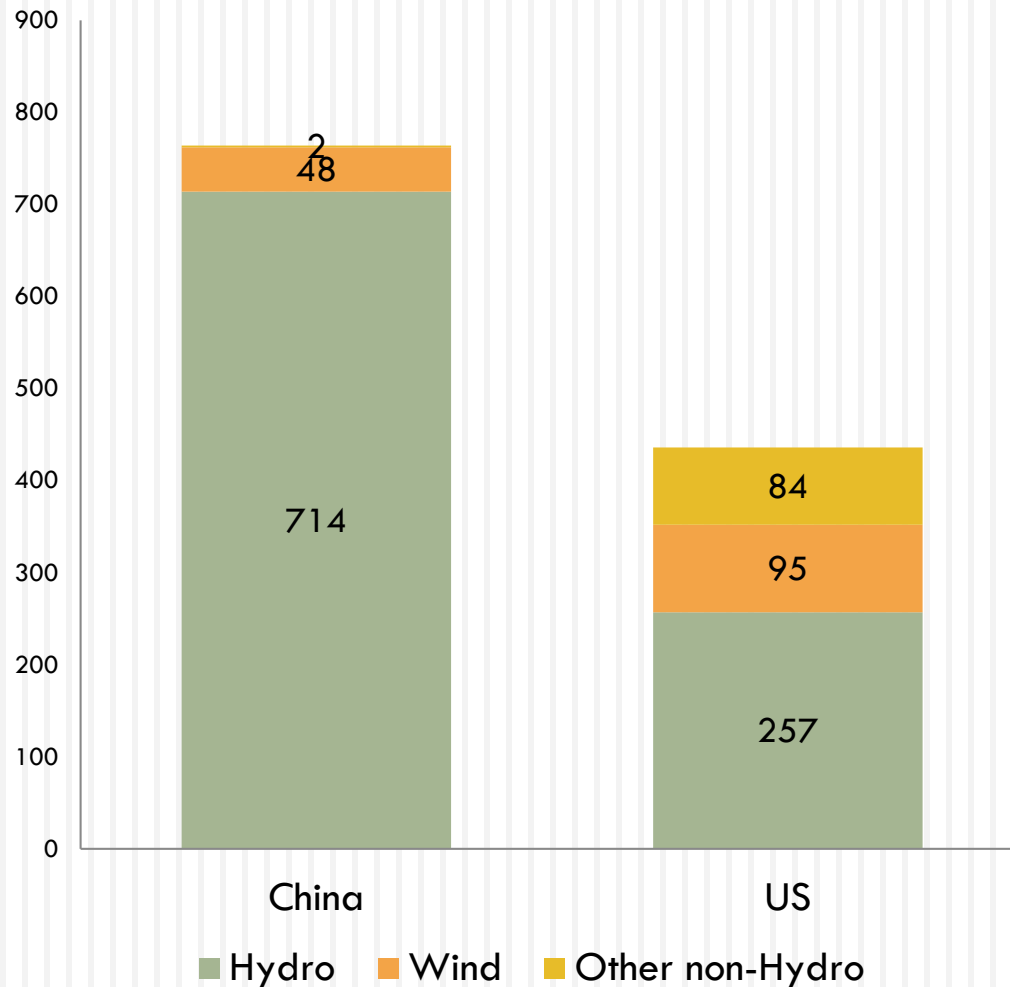
Key Climate/Energy Policies in 5YP

54

- 11th Five-Year Plan (2006-2010)
 - ▣ **Reduce Energy Intensity per unit GDP by 20%**
 - ▣ Reduce SO₂ Emission & COD by 10%
- 12th Five-Year Plan (2011-2015)
 - ▣ **Reduce CO₂ emission per unit GDP by 17% (and energy intensity by 16%)**
 - ▣ **Increase non-fossil fuel in energy consumption to 11.4% (from 8.3%)**
 - ▣ **Increase forest coverage by 12.5 mha**
 - ▣ Reduce COD by 8%, SO₂ by 8%, Ammonia nitrogen by 10%, Nitrous Oxides by 10%
 - ▣ Investment in Power section up to 5.3 trillion RMB
 - ▣ State Grid's Investment on smart grid to exceed 17 bln RMB

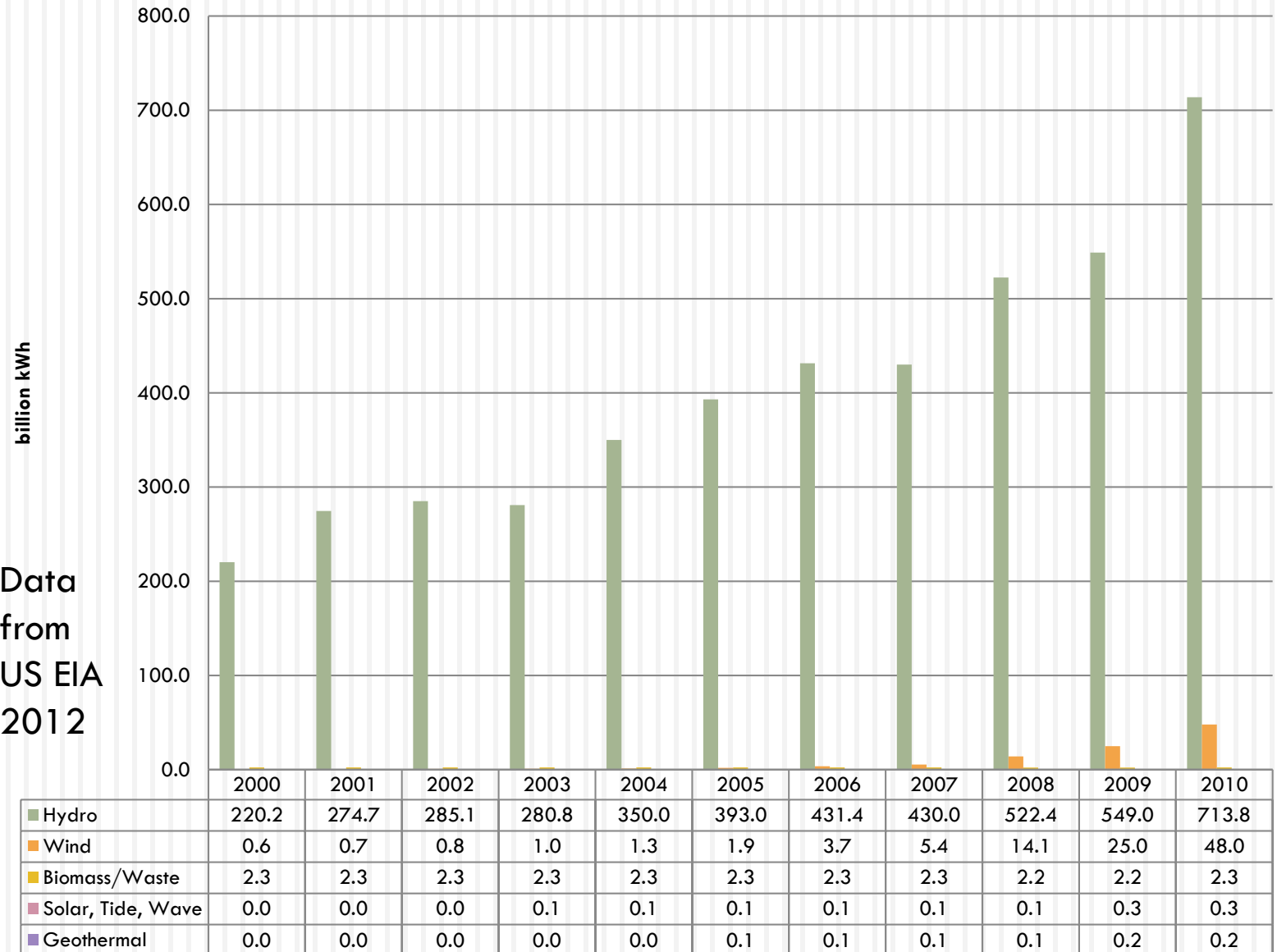
2010 Total Renewable Energy Generation in billion kWh

55



Data from
US EIA 2012

China Renewable Energy Generation 2000-2010



Significant Climate-Actions in China

57

- Policy Shift in international engagement starting with 2009 Copenhagen (voluntary) commitments
 - ▣ Reduce energy intensity per unit GDP by 40-45% below 2005 levels by 2020
- Encouraging Record of Action
- **But Institutional Capacity to Implement Publicly Announced Plans?**
- **How firm is commitment/motivation?**

Half empty?



The Challenge of Implementing China's Climate Plan

59

- Challenges of Full Implementation of Renewable Energy Law
- Primacy of Economic Development even in Climate Change Policies
 - ▣ Do Activities Promote Environmentally Sustainable Development?
- The Weakness of the Regulatory Infrastructure/Capacity
 - ▣ Can Emission Limitations/Reductions be Achieved?

Challenges for Full Implementation of Renewable Energy Law

60

- Grid Construction/Connection is bottle-neck
- Legislation serves primarily to set policy
 - ▣ Enforcement/implementation inconsistent
- Regulations for Renewable Energy Fund only issued just at beginning of 2012
- Pricing mechanisms remain unclear

Drivers of China's Energy Policy

61

- Environmental and Public Health Concerns
- Economic Competitiveness
- International Pressure
re Climate Change and
China's Changing Role in the World
- **Energy Security/Supply Concerns – Primacy of Economic Development**



Governance Challenges

62

- Fragmentation of regulatory authority – NDRC and SERC
- Accountability of State-owned Companies
- Diverging Economic Interests
- Continued Prevalence of Norm to promote rapid economic growth
- Accountability of local officials
 - Legal institutions
 - Civil Society
 - Decentralized governance/power

Implementing the Climate Plan: The Regulatory Infrastructure

63

- New Carbon Emission Cap & Trade Programs
- Challenge of Regulating in the public interest
 - ▣ Food & Drug safety issues
 - ▣ Consumer products/childrens' toys
 - ▣ Coal mine safety/worker safety
 - >6000 deaths annually
- Weakness of Environmental Regulation
- Problem of regulating concentrated interests/polluters to protect against diffuse harms to public health/environment

- Low-hanging fruit picked?
- Greater challenges of governance and rule of law ahead?