

C O M M E N T S

Overview of the Chinese Legal System

by Jingjing Liu

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The People's Republic of China (PRC) was founded in 1949 by the Chinese Communist Party (CCP). For almost three decades after the PRC's establishment, there was a perception that a formal legal system for many areas of national life was unnecessary since the economy was centrally controlled and conflicts could thus be resolved through mediation or administrative means without reference to legal rights and obligations.¹ However, the "Reform and Open Door" policy in the late 1970s, which began China's current rapid economic development and initiated the ongoing transition to a market economy, has had enormous implications for the country's legal development. The 1980s and 1990s saw massive and rapid enactment of laws, including many environmental laws, regulations, and rules.

The rebuilding of China's legal system over the past few decades has generally abandoned ideological requirements and embarked on a massive effort of law transplantation from western legal systems and internationally recognized practices, especially matters related to economic management, as a tool for attracting foreign investment. Modern Chinese law in its forms, structure, and methodologies thus exhibits many western characteristics, though it is generally modeled on the European continental civil law tradition in its legislative techniques.² There has also

been development in the public law areas and significant implications for protecting human rights (written into the 2004 Constitutional Amendment) since China's entry into the World Trade Organization (WTO), which imposes requirements on transparency and accessibility of law, reasonable administration of law, and impartiality, independence, and effectiveness of judicial review.

I. The Political Structure

Modern China is in form a unitary state, as compared to the federal system of the United States. All power flows from the central government in Beijing. However, economic reform has brought significant decentralization of economic administration, and in many cases, Beijing has been unable to supervise effectively the exercise of local government power, leading to substantial de facto autonomy for local governments in many areas of activities.³

The PRC's system of government has not adopted American-style ideas of separation of powers as a form of "checks and balances" between different branches of government, due to the belief that disagreement between different governmental institutions should be avoided because efficiency is the most important consideration for a socialist state like China. Instead, China's central government resembles much more the parliamentary systems common in Europe, where the governmental head, the prime minister, is chosen from and forms a cabinet with other members of the legislature. Thus, unlike in the American system, the head of government (the prime minister) is an individual and office distinct from the head of state (the president of the nation). In the United States, both functions are combined in the American presidency.

According to the Constitution, all power in the PRC belongs to the people and is to be exercised through the National People's Congress (NPC) and local people's congresses at lower governmental levels.⁴ Thus, the NPC in appearance sits on top of China's political power structure as the supreme organ of the state. As a matter of practi-

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1. DONALD C. CLARKE, *THE CHINESE LEGAL SYSTEM* (2005), available at <http://docs.law.gwu.edu/facweb/dclarke/public/ChineseLegalSystem.html>.
2. JIANFU CHEN, *CHINESE LAW: CONTEXT AND TRANSFORMATION* 73 (Leiden, the Netherlands, Martinus Nijhoff Publ. 2008).

3. CLARKE, *supra* note 1.

4. China Constitution, art. 2 (2004).

cal reality, however, most governmental power is exercised by the Standing Committee of the Politburo of the CCP. Because the CCP has party organizations attached to government institutions at all levels and because the great majority of government officials are CCP members, the party plays an important but nontransparent role in and has enormous influence over the operation of China's government at all levels. The result is that even if the law specifies particular requirements, the policies of the Communist Party organization, through the party's influence over the government officials who are also CCP members, may greatly influence how the government implements or otherwise follows the law. The result has been significant transparency issues regarding governmental decisionmaking, including decisionmaking related to projects that have major impacts on the environment.

The NPC, as the supreme organ of state power, has the authority to issue laws binding across China, appoints the president of the nation (currently President Hu Jintao), the premier (the head of the State Council, China's cabinet, currently Premier Wen Jiabao), and the presidents of the Supreme People's Court and the Supreme People's Procuratorate (the national prosecutorial agency). NPC delegates are not elected by a popular vote; they are chosen by the people's congresses at the provincial level. Similarly, provincial people's congress delegates are chosen by people's congresses immediately below them. Direct popular elections are only held at the township and county levels. The NPC has no more than 3,000 delegates,⁵ and representation of women and ethnic minorities is required.⁶ The delegates are selected for a term of five years and can be reappointed for further terms. The NPC convenes once a year, usually in March, for several weeks to discuss important matters of the state.

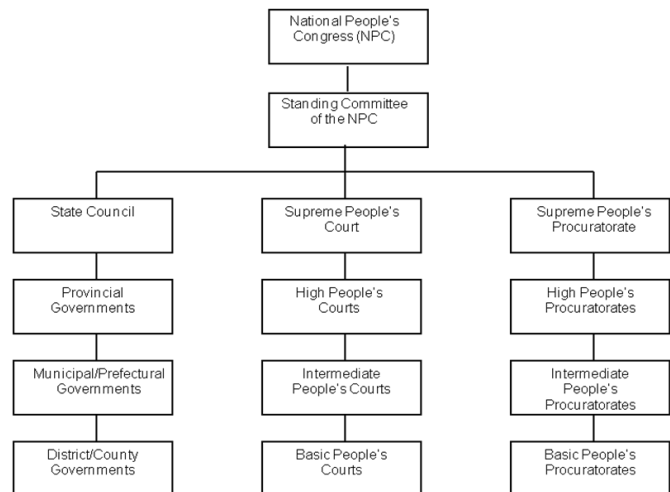
The large number of delegates in the NPC and the infrequency of its meetings prevent the NPC from exercising its stipulated supreme power.⁷ To facilitate the functioning of the government, the Constitution also establishes the Standing Committee of the NPC (SCNPC) as a permanent body of the NPC. The 175 members of the SCNPC are elected by the NPC. The SCNPC is vested by the Constitution with extensive powers, including the power to interpret the Constitution, make and revise laws, certain powers to appoint top government and judicial officials, and otherwise act when the NPC as a whole is not in session. Within the environmental arena, the SCNPC and the Environment and Natural Resources Protection Committee of the NPC play an important role in making, revising, and interpreting environmental statutes, inspecting the implementation of environmental laws, as well as

supervising the work of environmental protection agencies and courts.⁸

The State Council in the central government is responsible for the day-to-day work of operating the government as the highest organ of state administration.⁹ The premier is the head of the State Council, which is divided into various ministries and commissions. This structure of a people's congress on the one hand and a day-to-day government on the other hand is replicated at the local levels as well.

The Supreme People's Court is the highest judicial organ,¹⁰ and the Supreme People's Procuratorate is the highest state organ for legal supervision,¹¹ which includes functions of both bringing criminal prosecutions and ensuring that government agencies act in accordance with the law. The State Council, the Supreme People's Court and the Supreme People's Procuratorate are all responsible to the NPC and the SCNPC.¹² A similar structure exists at the provincial, municipal/prefectural, and district/county level with the local governments, people's courts and people's procuratorates being responsible to the local people's congresses (see the chart below on China's governance structure). An important ministry within the State Council is the Ministry of Justice, which administers prisons, oversees the People's Mediation Committees, the lawyer system and the notary system, manages legal education, and otherwise disseminates legal knowledge.

Figure 1: China's Governance Structure



Though the NPC and the SCNPC are the main legislative bodies, the State Council is de facto the most powerful lawmaking institution, given its extensive inherent and delegated powers of lawmaking. It issues administrative regulations that touch upon almost every aspect of political, social, and economic life in China, and over 70% of the

5. Electoral Law of the PRC on the National People's Congress and Local People's Congress, art. 15 (2010).

6. Electoral Law of the PRC on the National People's Congress and Local People's Congress, arts. 6, 17 (2010).

7. CHEN, *supra* note 2, at 115.

8. Jingjing Liu & Adam Moser, *Environmental Law—China*, in THE ENCYCLOPEDIA OF SUSTAINABILITY VOL. 3: THE LAW AND POLITICS OF SUSTAINABILITY 220-23 (Klaus Bosselmann et al. eds. 2011).

9. China Constitution, art. 85 (2004).

10. China Constitution, art. 127 (2004).

11. China Constitution, arts. 129, 132 (2004).

12. China Constitution, arts. 92, 128, 133 (2004).

laws considered by the NPC and the SCNPC are initiated and drafted by the State Council.¹³

II. History and Legal Context

China's modern legal system combines a number of legal traditions, including features of the continental European civil law tradition, substantial elements borrowed from the socialist law system of the former Soviet Union, and principles inherited from imperial Chinese law. In recent years, especially in the environmental area, American legal principles are also increasingly reflected in China's legal system.¹⁴ Unlike the western legal systems of continental Europe, however, which have been shaped by their roots in the private-law system of Rome or their early religious basis, traditional Chinese law instead centered on state concerns and dealt with private matters only incidentally.¹⁵ There was no special, differentiated institution, such as a "court," before which disputing parties could advance their legal claims.¹⁶ Instead, law was considered to be primarily an instrument for the sovereign to protect and advance the interests of the state and the rulers. As a result, traditional Chinese law was largely penal in nature; civil matters, those dealing with the interests of private parties, were largely left in the hands of customary law.

While ancient China had a highly developed and sophisticated administrative law system, its primary purpose was to ensure that officials followed the law and to increase government efficiency, not to protect individual rights from abuse by public power.¹⁷ The development and operation of the legal profession was strongly discouraged, and lawyers were seen primarily as "litigation tricksters." The emphasis was on substantive justice, with significant attention paid to fact-finding. Notions of procedural justice and due process were virtually nonexistent. In criminal trials, confessions were generally required for conviction, and torture was common. The heavy influence of Confucian values on traditional Chinese legal philosophy is particularly reflected in the general antipathy toward litigation and preference for extrajudicial mechanisms such as mediation as the primary means for dispute resolution. Some of these features in traditional Chinese law, to a certain degree, still influence the development of many aspects of the modern legal regime.

One of the most visible set of characteristics of China's modern legal system arises from the principles adopted from the civil-law tradition: statutory laws are of key importance; court judgments have formally no precedential effect, though they may serve as guidance. However, Chinese laws do give authority to the Supreme People's

Court to issue judicial interpretations, essentially interpretive regulations, and to the Supreme People's Procuratorate to issue procuratorial interpretations on questions of law arising out of specific applications of law in their adjudicative and procuratorial work. In practice, the Supreme People's Court is very active in issuing judicial interpretations that are oftentimes extensive and detailed, and are treated as supplementary laws.

The hierarchy of China's laws and regulations is as follows:

- *Constitution*
- *Laws* by the NPC and the SCNPC
- *Administrative Regulations* by the State Council
- *Local People's Congress Regulations* by local people's congresses and their standing committees at the provincial level
- *Rules*, including *Government Rules* by local governments of provinces, and *Ministry Rules* by central-level ministries, commissions, and agencies directly under the State Council

International treaties ratified by China are directly applicable and prevail if they conflict with domestic law.

III. The Judicial System

There are four levels of general courts in China: the Supreme People's Court at the central government level, the High People's Courts at the provincial level, and the Intermediate and Basic People's Courts at the local level. In addition to these general courts, there are several types of specialized courts that include military courts, maritime courts, courts of railway transportation, courts of forestry affairs, courts of agricultural cultivation, and, recently, environmental courts. Except for military courts, maritime courts, and environmental courts, these specialized courts are generally established at the intermediate court level and at the basic court level. They are subject to the supervision of the high people's court of the provinces where these specialized courts are located.

The Supreme People's Court has jurisdiction as the court of first instance, i.e., original trial jurisdiction, over cases that have major impacts on the whole country, as well as jurisdiction over appeals from high people's courts and specialized people's courts. The Supreme People's Court also issues judicial interpretation, reviews death penalty cases, administers the judiciary, and participates in certain legislative activities.

There are a total of over 30 high people's courts at the provincial level. They serve as the court of first instance over cases that have major impacts on the areas of its jurisdiction and hear appeals from the lower courts. There are around 400 intermediate courts in cities and prefectures within provinces. They serve as the major appellate review body for most of the cases, and have jurisdiction as the

13. CHEN, *supra* note 2, at 183-84.

14. Liu & Moser, *supra* note 8.

15. CLARKE, *supra* note 1.

16. *Id.*

17. There was a notion in traditional Chinese culture that there could not possibly be any substantial conflict between the interests of the state and the interests of its individual citizens, and therefore it was unnecessary to protect individual rights against abuse by public power.

court of first instance over criminal cases subject to sentence of life imprisonment or death, cases where foreigners are accused of committing a crime, major civil cases involving foreign parties, cases that have major impacts in the area of its jurisdiction, and other cases as determined by the Supreme People's Court. The basic courts, a total of over 3,000 at county/district level, serve as the first-instance trial court of most criminal, civil, and administrative cases. Within the environmental arena, the Supreme People's Court plays a role in issuing judicial interpretation, as mentioned above, to clarify important environmental legal concepts and principles, as well as guiding lower-level courts in the application of environmental law by retrial of important and complicated cases. For all other courts, their role in environmental governance includes hearing environmental tort litigation and environmental public interest litigation, conducting judicial review of decisions by environmental protection agencies, and mediating environmental disputes.¹⁸

Courts are responsible and accountable to the people's congresses at the corresponding governmental levels and are financed by the governments at the same level. Courts and judges are, at least theoretically, required to exercise independent judgment in accordance with law. In practice, they are oftentimes subject to influences from a variety of sources, including officials from their local governments, the CCP, powerful individuals, and public opinion (for example, evidenced through the media or public protests). Other than for simple civil and minor criminal cases, trials are conducted by a collegiate panel consisting of judges and layperson assessors¹⁹ (or judges alone for appeal cases). There is no jury. Trials are generally open to the public, except when a case involves state secrets, business secrets, as well as personal privacy. While a judgment at the second instance is usually final, with no further appeals permitted except otherwise provided by law, the appeal involves *de novo* review of both factual findings and legal determinations.

Under its authority to create specialized maritime courts in certain coastal port cities, the Supreme People's Court has established 10 maritime courts, located in the following port cities: Beihai, Dalian, Guangzhou, Haikou, Ningbo, Qingdao, Shanghai, Tianjin, Wuhan, and Xiamen. Maritime courts have only one level, equivalent to that of the intermediate people's courts. Their decisions can be appealed to the high people's court of the provinces where these 10 maritime courts are located. Maritime courts have jurisdiction over maritime torts and contract disputes of first instance. In 2006, maritime courts were given relatively clear jurisdiction over cases involving land-originated pollutants contaminating the ocean as well as navigable watersheds. Experts have supported the maritime courts' jurisdiction over pollution affecting the ocean

and other waters because their specialization in maritime cases has led them to accumulate significant experience in hearing ocean and watershed-related pollution cases. Possibly equally important is the prevailing view that maritime courts are relatively insulated from the local government, since their jurisdiction is not defined by administrative districts and thus may be less subject to the pressures of local protectionism. The result may be lesser risk of interference by local government officials and a greater likelihood that environmental pollution cases are heard fairly and disposed of efficiently.

Another promising new initiative within the Chinese court system to promote stronger environmental governance and better environmental enforcement is the rapid development of specialized environmental courts. The history of environmental courts in China can go back to as early as in the late 1980s, but the speed of establishing environmental courts picked up since 2007 in response to a series of devastating environmental disasters. So far, there are already over 50 environmental courts, environmental tribunals, and environmental collegiate panels set up in more than one dozen provinces across China, in both developed and underdeveloped areas, at the levels of high, intermediate, and basic people's courts. The establishment of these specialized environmental courts helps streamline the process of hearing environmental cases, allows cases to be heard by judges (and layperson assessors) with enhanced technical expertise, and expands the standing for plaintiffs to facilitate environmental public interest litigation that regular courts generally would not accept under existing Chinese law.²⁰

Judicial review in the form observed in the United States, where the courts may review the constitutional validity of legislative acts, does not exist in China. Under China's Constitution, the SCNPC has ultimate authority over legal interpretation, an arrangement that some have described as legislative supremacy. The interpretations of law of the Supreme People's Court may be reviewed and adjusted by the SCNPC.

In keeping with the continental civil-law tradition, the judiciary is viewed largely as a bureaucratic institution, and the status of judges is more akin to civil servants. To become a judge, now one must pass a national judicial bar exam. Law school graduates commonly enter the judiciary soon after graduation and advance in rank and the internal court hierarchy based on their seniority and experience. The adjudication committee, present in each court, is another unique aspect of China's judicial system. An adjudication committee is a body of senior judges and court officials that reviews controversial or complicated cases already tried by other judges in the court to ensure that such cases are resolved appropriately and "correctly." Because the committee does its work generally outside of the view of the public and the parties, and without the benefit of having experienced the trial itself, it has been heavily criticized by foreign as well as Chinese legal scholars. Among the

18. Liu & Moser, *supra* note 8.

19. The use of layperson assessors in trials is viewed by the CCP as a form of public participation in the judicial process and represents one way of exercising popular democracy related to legal processes.

20. Liu & Moser, *supra* note 8.

most significant issues raised have been concerns about the potential for inappropriate political influence in cases and the nontransparent nature of that process.²¹

In addition to trying cases, courts also make extensive use of mediation in civil cases, including in environmental matters. Especially under the leadership of the current Supreme People's Court Chief Justice, Shengjun Wang, the role of mediation has been heavily emphasized in adjudicating civil cases. In court-performed mediations, the judge who hears the case also acts as mediator and sometimes may decide cases based on a proposed solution that was not accepted by parties. A mediation agreement has the same effect as a judgment award and generally cannot be appealed.

Contrary to the U.S. practice of having the sheriff enforce a judgment, Chinese courts are generally responsible for enforcing their own judgments. As a result, courts have encountered significant difficulties in enforcing their awards because of local protectionism and due to the low status of courts in the political hierarchy. It is estimated that as many as 50% of civil awards are actually unenforced.²² While significant efforts are being made to make the judiciary more professional and independent, there are still many poorly trained judges who are susceptible to undue outside influence in Chinese courts.

The procuratorate system is the prosecutorial counterpart to the courts. It has a structure similar to that of the

courts. The Supreme People's Procuratorate operates at the central government level, while there are provincial, municipal, and basic procuratorates at the local level. Similar to other government agencies, all procuratorates are under the dual leadership of the superior procuratorate, as well as the local people's congress and government at the same level. China's procuratorate system performs the following major functions: (1) initiates prosecution of criminal cases investigated and handled by the public security bureaus (local police); (2) investigates and initiates prosecution of criminal cases investigated and handled directly by the procuratorate, e.g., embezzlement and bribery, dereliction of duties, and violation of citizens' corporal rights and democratic rights committed by government employees; (3) supervises the legality of public security authorities' decision on arrests and their criminal investigation; (4) supervises the trial, rulings, and judgments on criminal cases and the legality of activities of jails, detention centers, and reform-through-labor institutions; and (5) supervises civil and administrative trials of courts. When it comes to protecting the environment, the procuratorate is responsible for prosecuting environmental crimes. Also, in recent years, several local people's procuratorates have been experimenting with bringing civil environmental enforcement cases, despite a lack of clear authorization by existing Chinese law, in maritime court, environmental court, as well as regular court.

21. There have been some reforms in recent years on the adjudication committee, such as creating more specialized adjudication committees within a court, e.g., an adjudication committee hearing criminal cases only, as well as requiring members of the adjudication committee to personally attend the hearing. The effectiveness of these reform measures remains to be seen.

22. RANDALL PEERENBOOM, *CHINA'S LONG MARCH TOWARD RULE OF LAW* 287 (Cambridge Univ. Press 2002).

Environmental Tort Litigation in China

by Adam Moser and Tseming Yang

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The use of environmental tort claims to compensate pollution victims or to protect the environment and human health is still in an early stage of development in China. Nevertheless, tort cases play an outsized role in China's environmental law system. From 2004 to 2009, China's courts heard more environmental pollution-related tort cases than pollution-related administrative and criminal cases combined. Since 1998, the number of environmental lawsuits filed with the courts increased at an annual average of 25%.¹ This rise corresponded with a large rise in civil disputes and tort claims in general.² From 1981 to 2009, the number of civil lawsuits handled by courts rose by nearly 400%; the courts received over 8.8 million applications for civil and administrative lawsuits in 2009.³ In recent years, roughly 100,000 applications were filed annually as environmental lawsuits with the people's court. On average, only 1-3% of all the environmental law-

suits filed will actually be adjudicated before people's court judges. From 2004 through 2008, there were over 10,700 environmental tort cases before the courts nationwide. In 2009, there were over one million tort actions decided, 1,783 of which were environmental torts.

These numbers suggest an increasing importance and a growing role for environmental tort law. However, the numbers do not provide a sense of the challenges that environmental tort plaintiffs and lawyers continue to face in China. Courts are not required to release opinions to the public, nor is there a centralized system for collecting and disseminating court decisions from around the nation. A search of one of China's primary legal databases shows only 79 environmental tort decisions available; a non-negligible portion concerned noise and light pollution. Another database only turned up 42 such cases for the period 2000 to 2007.⁴ A Chinese nongovernmental organization (NGO), the Center for Legal Assistance to Pollution Victims (CLAPV), maintains its own database of cases that it has assisted with. Between 1999 and September 2009, CLAPV received over 12,000 complaints and requests for assistance; it offered direct assistance in 135 cases, of which 70 cases were officially closed by the courts.

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I. The Cultural and Historical Context of Civil Litigation in China

It is generally accepted that corruption and local protectionism often unduly influence court decisions regarding civil cases in China.⁵ But it would be an oversimplification to characterize such interventions as purely rogue. There are cultural, developmental, and systematic elements within China's legal system that facilitate political intervention by both local and national-level authorities. First, law in China primarily exists as a tool to facilitate the administration of the country and society and enable the ruler to achieve gov-

1. TUN LIN ET AL., GREEN BENCHES: WHAT CAN THE PEOPLE'S REPUBLIC OF CHINA LEARN FROM ENVIRONMENT COURTS OF OTHER COUNTRIES?, ASIAN DEVELOPMENT BANK 5 (2009).
2. In the Chinese legal system, administrative actions are classified separately from civil actions because they are brought before the people's courts under the Administrative Procedure Law of the People's Republic of China (PRC) and not the Civil Procedure Law of the PRC.
3. Supreme People's Court 2009 Annual Report to China's National People's Congress (Mar. 11, 2010).

4. Rachel Stern, *On the Frontlines: Making Decisions in Chinese Civil Environmental Lawsuits*, 32 LAW & POL'Y 1, 79, 80 (Jan. 2010).
5. RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 281 (2002).

ernmental objectives more effectively, not to protect individual rights or impose limits on the power of the ruler.⁶ Such a philosophy helps explain why courts often place an emphasis on social stability as the current overriding government objective, over individual “legal” rights.

Second, since ancient times, Chinese legal systems have strongly favored nonadversarial forms of dispute settlement, and the current court’s position on promoting dispute resolution remains strong. While complete data is not available for all environmental tort cases nationwide, it is estimated that nearly one-half of all environmental tort cases are decided through court-managed mediation. From 2006 through 2010, courts in Jiangsu Province handled a total of 504 environmental tort cases, of those, 304 (61%) were resolved through mediation.⁷

Third, for all intents and purposes, China’s present legal system only began to operate as a venue for adjudicating civil disputes around 1978.⁸ At a meeting in 1978, the then-Supreme People’s Court President, Jiang Hua, argued that civil cases should be treated as important as criminal trials. Jiang Hua then elaborated on why civil cases deserved more attention from the courts, and laid a jurisprudential foundation that would influence how Chinese judges approach civil cases up through the present day.⁹

Civil cases concern the interests of the state, collectives, and individuals . . . and affect the harmony of the family, stability of society and the construction of the four modernizations¹⁰ . . . when handling civil cases the people’s courts must take the overall interest into account in making decisions and the decisions have to be not only lawful, but appropriate and reasonable.¹¹

While a court’s decision should be lawful, a reasonable decision “must” consider the “overall interests,” presumably of the state and society. In recent practice, overall interests have been defined as protecting social stability. In practice, that has meant preserving the status quo, which generally supports immediate economic growth, and ensuring that there is no imminent threat of large-scale social conflicts. These factors, in addition to law and justice, continue to influence how judges decide cases in China.

This approach to civil jurisprudence goes well beyond common-law notions of balancing the equities, or weighing the social utility of how one uses land or property, as

found in common-law nuisance cases. China’s Supreme People’s Court is very conscious of the need to adapt its approach to handling cases to the perceived challenges and broader political or economic climate. Sometimes such judicial responses are formal, other times they are not. A recent example involves a semiformal policy response by the courts to the international financial crisis.¹²

Clearly, the promotion of economic growth has driven state policy for several decades. It is evident that the courts’ promotion of pro-growth policies could potentially be detrimental to plaintiffs who aim to force industries to internalize the costs of pollution. Additionally, those environmental tort cases that pit common individuals against larger economic actors make them susceptible to the courts’ “duty” to preference economic growth and stability over legally recognized rights.¹³ China’s twelfth five-year plan, which covers the 2011 to 2016 time period, seeks to cool economic growth and provide more sustainable development. It remains unclear whether the plan’s sustainable development rhetoric will influence how the legal system addresses environmental tort cases.

II. Chinese Statutory Law and Practice in Environmental Tort Cases

While the cultural, political, and historical influences on the Chinese legal system have created substantial challenges for plaintiffs bringing environmental tort actions, China’s statutory law has designed certain doctrinal elements to favor plaintiffs.

The core principles of private enforcement of China’s pollution control laws can be found in the civil liability principles of Article 124 of the General Principles of the Civil Law and Article 41 of the 1989 Environmental Protection Law.

Article 124 of the General Principles of the Civil Law of the People’s Republic of China provides:

Any person who pollutes the environment and causes damages to others in violation of state provisions for environmental protection and the prevention of pollution shall bear civil liability in accordance with the law.

Article 41 of the 1989 Environmental Protection Law states:

A unit¹⁴ that has caused an environmental pollution hazard shall have the obligation to eliminate it and make

6. Not only is this common amongst statist socialist regimes, but this notion can be traced back to the ancient Chinese philosophy of legalism, and its founder Han Feizi (280-213 B.C.). While legalism held that law should rule the country rather than an individual, its focus was on law as a utilitarian tool to assist the ruler, not as something to protect the rights of the governed or limit the ruler.

7. Yan Yan et al., China Environment News, June 21, 2011, http://www.cenews.com.cn/xwzx/fz/qf/201106/t20110620_703500.html.

8. FU HUALING & RICHARD CULLEN, FROM MEDIATORY TO ADJUDICATED JUSTICE: THE LIMITS OF CIVIL JUSTICE REFORM IN CHINA 11-12 (Oct. 2007), <http://ssrn.com/abstract=1306800>.

9. *Id.* at 12 (citing *Civil Adjudication Is Equally Important*, in JIANG HUA ZHUAN, THE BIOGRAPHY OF JIANG HUA §5, ch. 16 (2007)).

10. The “four modernizations” refer to central plans to modernize agriculture, industry, national defense, and science and technology.

11. HUALING & CULLEN, *supra* note 8, at 13.

12. In the Supreme People’s Court’s 2009 Annual Report to the 2010 National People’s Congress, the international financial crisis was mentioned 13 times, and almost exclusively in the context of what the courts were doing to help address it. The report highlights that several provincial high courts have released policy statements specifically promoting economic development goals to their lower courts in response to the financial crisis.

13. Generally, the courts’ ability to exercise this “duty” or permit other factors beyond law and fact to impact its decision can be reduced substantially in cases led or supported by the Procuratorate. The Supreme People’s Procuratorate is a government body at the same level as the Supreme People’s Court, but is generally considered more politically powerful.

14. Under the formerly centrally planned economy, virtually all organized entities, including business entities, were controlled by the state and designated

compensation to the unit or individual that suffered direct losses. A dispute over the liability to make compensation or the amount of compensation may, at the request of the parties, be settled by the competent department of environmental protection administration or another department invested by law with power to conduct environmental supervision and management. If a party refuses to accept the decision on the settlement, it may bring a suit before a people's court. The party may also directly bring a suit before the people's court.

If environmental pollution losses result solely from irresistible natural disasters which cannot be averted even after the prompt adoption of reasonable measures, the party concerned shall be exempted from liability.

However, many practitioners and scholars also argue that ambiguities of law and regulations continue to limit citizen rights and offer discretion to the courts to deny relief.¹⁵ In addition to bringing tort claims against polluters directly for harms, pollution victims can at times use administrative litigation to challenge government actions that have contributed to or licensed pollution. In both tort case and administrative action, the most common form of redress is a payment for damages or fines. Because of difficulties ensuring compliance, it is rare for a court to require environmental remediation or behavioral change from a polluter.

Most recently, China's National People's Congress passed a new tort law (effective July 2010) that for the first time explicitly and formally addresses liability for environmental pollution.¹⁶ Though consistent with the existing body of law, its inclusion of a specific chapter on environmental pollution liability (Chapter 8) and its codification of rules that have previously been controversial is expected to clarify ambiguities and benefit plaintiffs. Articles 65 and 66 of the Tort Law unambiguously state that the burden of proof in environmental tort actions is on the polluter.

Article 65 of the 2009 Tort Law:

Where any harm is caused by environmental pollution, the polluter shall assume the tort liability.

Article 66 of the 2009 Tort Law:

Where any dispute arises over an environmental pollution, the polluter shall assume the burden to prove that it should not be liable or its liability could be mitigated under certain circumstances as provided for by law or to prove that there is no causation between its conduct and the harm.

Previously, the shifting of the burden of proof from the victim plaintiff to the polluter-defendant was based pri-

marily on a 2001 interpretive regulation of the Supreme People's Court, which specifically stated: "In compensation lawsuits concerning environmental pollution, the polluter carries the burden of proof with respect to . . . demonstrating the lack of causal link between the polluter's actions and the harmful result."¹⁷

It is still too early to know whether Articles 65 and 66 of the 2009 Tort Law will actually benefit plaintiffs. Plaintiff's lawyers often claim that judges do not apply Article 66 correctly. Judges claim that China's Civil Procedure Law sets a high bar for plaintiffs. Before accepting a case, most courts require substantial evidence from the plaintiff as to the harm, the source of harm, and even evidence of a causal link. However, even after an environmental tort case is accepted, the plaintiff will likely need to provide additional evidence linking the harm to the polluter, only then will the court shift the burden of proof to the defendant.¹⁸

A further new provision of the tort law is Article 68, which many scholars believe codifies existing law that polluters are subject to no-fault liability.¹⁹

Article 68 of the 2009 Tort Law:

Where any harm is caused by environmental pollution for the fault of a third party, the victim may require compensation from either the polluter or the third party. After making compensation, the polluter shall be entitled to be reimbursed by the third party.

Though these principles have previously been raised in other relevant environmental laws, their former exclusion from the tort law provided ample room for polluters to craft legal arguments why such principles should not be applied to them, an argument many courts were willing to accept.

Under Chinese law, the applicable statute of limitation for environmental tort claims is three years "from the time that the party becomes aware of or should become aware of the pollution losses."²⁰ This is one year longer than the statute of limitations for other tort cases. Plaintiffs are also required to pay a case "acceptance fee" of .5% to 4% of the compensation requested of the court. The loser of a lawsuit ultimately becomes responsible for this fee. While plaintiffs may petition to reduce, waive, or postpone payment of the fee, the requirement creates a deterrent effect that makes it difficult for indigent plaintiffs to bring claims. Furthermore, some courts may rely significantly on such fees for their operational budget, hence creating disincentives for waivers. There can also be other fees.

Plaintiffs often also face so-called "other litigation costs" that are levied at the court's discretion and which can be a source of abuse. If a losing defendant does not pay the amount ordered by the court, the plaintiff must pay a fee

as "work units." Legislation that preceded China's opening up in the late 1970s /early 1980s and transition to a market economy (which led to a proliferation of privately owned enterprises) still refers to such units as the responsible entities for purposes of the law. The 1989 Environmental Protection Law was originally enacted in 1979 on a trial basis and then continued in its effectiveness in 1989.

15. Benjamin Van Rooij, *People v. Pollution: Understanding Citizen Action Against Pollution in China*, 19 J. CONTEMP. CHINA 63, 68 (2010).

16. Tort Liability Law of the People's Republic of China, Dec. 26, 2009, available at http://www.gov.cn/flfg/2009-12/26/content_1497435.htm.

17. Supreme People's Court Various Regulations Regarding Evidence for Civil Suits (promulgated by the Sup. People's Ct. Dec. 6, 2001, effective Apr. 1, 2002) (quoted in Alex Wang, *The Role of Law in Environmental Protection in China*, 8 VT. J. ENVTL. L. 196, 209 (2007)).

18. Interview With Chinese Environmental Court Judge, June 2011 (notes on file with author).

19. Tort Law of the People's Republic of China (2009).

20. 1989 Environmental Protection Law, art. 42.

to institute execution proceedings. . . . Appraisal fees in pollution compensation cases can also be prohibitive. In pollution compensation cases, appraisals by a certified, court-appointed entity typically provide the key court evidence regarding damages and causation.²¹

Standing issues (*locus standi*) have arisen in the context of joint action lawsuits (very similar to class actions) and in public interest litigation (asserting a general community or society interest not specific to a particular individual). How each of these fits into China's legal system remains generally unresolved. Article 55 of China's Civil Procedure Law and Article 88 of the Water Pollution Law permit joint action suits. In practice, however, courts are granted a lot of discretion in deciding whether or not to permit joint actions. Because this discretion is provided even at the basic court level (the lowest level court in China's judiciary), it can amplify the effects of local protectionism.²²

III. Environmental Tort Litigation in the Context of the Xinfang and Mediation Processes

Since the end of the Cultural Revolution in 1976, China has sought to rebuild its judiciary, especially by striving to increase the level of professionalism and qualifications of judges. Nevertheless, the traditional "Xinfang" system of petitioning higher level government officials to correct the perceived failings of their lower level counterparts has persisted as an important avenue for common citizens to seek relief when other options have failed. Literally translated, "Xinfang" means "letters and visits"—the process by which private citizens file petitions with Xinfang offices of various government agencies at successively higher levels of government to seek administrative intervention and redress for grievances against the government bureaucracy or other entities or persons.²³ At its core, one might analogize such efforts to a private citizen seeking the assistance of members of the U.S. Congress in addressing problems and grievances with particular federal agencies, for example. While Xinfang petitions generate responses from the government, only a small fraction leads to positive remedies for the petitioners. And while it is a time-honored practice, it has also remained controversial.

In pollution situations, a victim might directly petition the local environmental protection bureau (EPB) to investigate the pollution, to identify the source of pollution, the specific pollutant, and to provide relief. If the EPB finds the pollution to be harmful, the EPB may suggest that the relevant parties engage in mediation under the EPB's guidance. The authority of EPBs to facilitate mediation processes

between victims and polluters to settle environmental tort claims, in fact, is statutorily set out in provisions in various environmental laws, including Article 41 of the 1989 Environmental Protection Law. If at the end of administrative mediation the victim is not satisfied with the outcome, or the polluter fails to perform under the mediation agreement, the victim can then file a tort claim against the polluter with the local court. It is not, however, a prerequisite that citizens inform the local EPB of an issue before filing suit.

Both petitioning and mediation processes continue to be used widely by the citizenry. In fact, their widespread use in response to pollution issues suggests a set of reasons for why environmental tort litigation and use of the courts as venues for remedies has not increased nearly as much as the growth in pollution and environmental problems would otherwise suggest. Distrust of the legal system, combined with the traditional roots of the petitioning system and a general preference of mediation over litigation as a tool for resolving disputes in China, has limited the rise of environmental tort cases.

IV. Major Challenges for More Effective Use of Environmental Tort Litigation

The future impacts of the 2009 Tort Law notwithstanding, there are several important obstacles facing plaintiffs suing to redress damages or enforce the law. First, among the most significant challenges remains the cost of filing cases and the difficulties of finding competent lawyers trained in environmental law able to provide assistance to pollution victims. Second, there are significant challenges to proving and quantifying damages; victims must frequently depend on "experts from law firms, NGOs, or local environmental or other authorities, including for instance agricultural or fishery bureaus."²⁴

Third is the challenge of proving the defendant's polluting activities, as enterprises do their best to hide pollution. In one case studied, a company added a substance to the water that made it impossible to detect that the original pollution had created a hydrogen ion concentration (pH) level that exceeded the relevant water quality standards there. In another case, even a report by a local EPB attesting to the existence of indoor pollution was deemed insufficient evidence, because the court ruled that it lacked details about "the scope of the pollution."²⁵

Fourth is the more general challenge of showing causation. While the 2001 Supreme People's Court's interpretive regulations already placed the burden of proof for causation on the defendant, thereby relieving the plaintiffs of that obstacle to proving their claim, some "local courts [continued to] rule against plaintiffs because [plaintiffs] were not able to provide evidence for the causal relationship between the polluting act and the damages incurred."²⁶

21. Wang, *supra* note 17, at 212.

22. *Id.* at 192.

23. The Xinfang system has roots in ancient China's imperial governance structure, where the emperor might intervene to mete out justice or other imperial largess to a petitioner's grievances. For a general discussion, see Carl Minzner, *Xinfang: An Alternative to Formal Chinese Legal Institutions*, 42 STAN. J. INT'L L. 103 (2006).

24. *Supra* note 19, at 68-70.

25. *Id.*

26. *Id.*

The issue of evidence collection for both causation and damages is a major burden for plaintiffs, even though they do not technically shoulder the burden of proof. In general, Chinese courts give great deference to reports from official or certified entities that assess the environmental damage or the causal link between the pollution and the harm. This is a problem for several reasons. The costs associated with getting a scientific study can be very high. If the plaintiff disagrees with a report from a certified entity, it can be difficult to find another certified entity to provide an additional report, and courts regularly discredit or ignore reports from entities that do not have official certification. Some environmental advocates and scholars claim that because polluters generally have more money and influence than pollution victims, they are able to influence the outcome of certified reports. Because environmental cases often involve complex scientific issues, and because many judges are unfamiliar with how to synthesize scientific uncertainty with legal liability, judges very rarely stray from the outcomes contained in a certified report. A certified report on causation or damages is often unassailable evidence that will determine the court's decision.

Finally, local protectionism remains an important impediment to just resolution of environmental tort claims. As described elsewhere, it means that local government agencies favor industries or look the other way when pollution causes harm, simply because polluters frequently provide significant economic benefits to local jurisdictions. Because such cases oftentimes pit poor and less-vocal plaintiffs against large enterprises or government agencies, the susceptibility of courts to such influence from local government officials remains a serious challenge.

V. China's Environmental Courts: If You Build It, Will They Come?

The recent emergence of environmental courts (e-courts) or e-tribunals in China is a pragmatic response to the fact that there is inadequate enforcement from government agencies and that most courts were unwilling or unable to justly adjudicate public enforcement actions. Since 2007, over 40 e-courts and e-tribunals have been established in China at the intermediate and lower levels in the provinces, primarily to enhance the judicial enforcement of pollution laws. In fact, some of these courts have granted standing for plaintiffs, organizations, and government agencies to sue on behalf of the public interest. The Kunming City Court even developed a special fund to help cover the costs of litigation for plaintiffs suing in the public interest. However, the vast majority of cases brought to the e-courts have been routine administrative and criminal actions, though the number of such cases has risen in the e-courts since their establishment.²⁷

At the end of 2010, there had been 15 public interest suits decided in the e-courts, and all but five were brought by local procuratorates. Of the cases not brought by government prosecutors, one was brought by the Kunming City EPB as a public interest case, in part, to force compliance with orders and fines that the bureau previously issued. One was brought by a local city government, and another by a local government bureau. Two cases were brought by an official state-sponsored NGO under the Ministry of Environmental Protection (MEP), the All China Environment Federation (ACEF). In all of these public interest actions, plaintiffs generally prevailed.²⁸ Scholars in China point to these cases as examples of the good that can come from promoting more public enforcement and expanding public interest standing. Although there have only been a few cases filed with courts, none of China's courts have accepted a case brought by a true NGO as plaintiff in the name of the public interest. Some scholars are concerned that the current trend will limit public interest litigation standing to government entities or organizations with strong government support.

Because a major justification for these courts is to increase public enforcement, their survival is questionable, if more public actions and public interest cases are not brought. Some scholars question the legal validity of the e-courts' provisions granting standing to organizations suing in the public interest, as Article 108 of China's Civil Procedure Law requires that plaintiffs have a direct interest in the case. But to date, the Supreme People's Court has allowed the e-courts to experiment with their expanded standing provisions. How much longer will the courts persist if public enforcement and public interest cases do not increase? And will the Supreme People's Court or other legislation legitimize the e-courts and their standing provisions in the near future? For the time being, the e-courts are an exciting pragmatic experiment that speaks more to China's environmental enforcement challenges than to the power of public enforcement.

VI. The Center for Legal Assistance to Pollution Victims (at the China University of Political Science and Law)

The CLAPV is one of the most successful environmental NGOs in China and has received significant international media attention. It is also the only environmental law NGO that is independent of the government. Founded by Prof. Wang Canfa in 1999, it has represented pollution victims from all over China and recovered significant pollution compensation for its clients.

27. GAO JIE, ENVIRONMENTAL PUBLIC INTEREST LITIGATION AND THE VITALITY OF ENVIRONMENTAL COURTS: THE DEVELOPMENT AND FUTURE OF ENVIRONMENTAL COURTS IN CHINA 16 (2010).

28. Lin Yanmei, Environmental Judicial Bulletin (Huanjing Sifa Tongxun) Second Edition DRAFT, 2011, at 21, available at <http://chinaenvironmentalgovernance.com/2011/07/12/china-environmental-law-newsletter-and-curriculum-development-for-judges/>.

CLAPV Cases 1999-2009²⁹

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

APPENDIX:

CLAPV cases, as described by Professor and lawyer Wang Canfa:

(1) Improving the Environment Through Litigation: 97 Families in Shiliang River Reservoir of Jiangsu Province v. Factories in Linmu County of Shandong Province for Pollution Damages³⁰

The Plaintiffs were 97 families in Shilianghe River Reservoir who had bred fish in net cages since July 1997. From July 1999 through June 2000, large fish kills occurred within the reservoir on three separate occasions. The confirmed cause of these incidents was found to be Linmu County Paper Mill of the Shandong Province and Linmu Chemical Plant of Shandong Province. Together, the plants discharged a sizeable amount of sewage into the reservoir, suffocating the fish in large numbers. The Plaintiffs brought action in the Intermediate People's Court of Lianyungang City of Jiangsu Province, requesting an injunction for the two parties, damages in the amount of RMB [Renminbi] 5,652,000 Yuan (US\$ 730,185), and attorneys fees. The court found in favor of the Plaintiffs and required the Defendants to bear joint liability. The Defendants appealed to the High People's Court of Jiangsu Province on April 16, 2002. After a hearing, the court affirmed the judgment of the intermediate court. More than a year since the judgment became effective, however, Defendants had yet to compensate the families. The CLAPV and its lawyers became involved and were able to secure RMB 5,600,000 Yuan (US\$ 723,467) in payment. The most important effects of this litigation are that the defendants dare not discharge sewage into the reservoir again, and fish are once again abundant.

(2) Local Government Action Protecting Polluters and Hindering Enforcement of Environmental Laws: Li Jianguo and Four Victims in Laoting County of Hebei Province Are Accused of Disrupting the Social Order by Assembling in a Crowd and Blackmail³¹

Li Jianguo and four other victims were peasants living on the bank of the Tingliu River, Laoting County of Hebei Province. In February 2000, Lefeng Steel Plant, which lies to the east of Li Jianguo's village, began to manufacture steel. According to the related laws and regulations, the steel plant was a severe polluter and should have been closed. It had not completed either an environmental protection examination or approval procedures during its construction, and there were no active environmental protective measures in place. The factory seriously polluted the local environment. In May 2000, crops and vegetation around the plant began to wither and die. The village leader, Zhao Wentu, and several other victims reported the incidents to the local authorities and the county environmental protection agency, but nothing was done. Because of this inaction, 100 villagers blocked the door to the plant, stopping steel production and the noxious emissions. The villagers elected six people as representatives, including Li Jianguo. These representatives petitioned the government to close the plant in accordance with pertinent environmental laws and regulations. Meanwhile, the crowd was disbanded by the police, and the representatives were arrested and released on bail pending a trial.

In October 2000, Li Jianguo and other villagers sought legal assistance from the CLAPV, and in December 2000, they sued the government of Laoting County. They requested that the court require the government to fulfill its duties in accordance with the law and to order the plant closed. During the litigation, the plant offered to compensate the victims if they would withdraw their suit. In January 2001, Li Jianguo and other victims accepted the compensation of RMB 300,000 Yuan (US\$ 38,757) and withdrew their claims.

On February 6, 2003, however, the six representatives were again detained for the crimes of racketeering and inciting a mob; unfortunately because of a severe acute respiratory syndrome (SARS) outbreak, the CLAPV could not offer legal assistance.³² On May 7, 2003, the People's Court of Laoting County held that the six village representatives had committed the crimes of inciting a mob and racketeering and sentenced them to a maximum of four years imprisonment. Li Jianguo and the others appealed the decision, and the Intermediate People's Court of Tangshan City sent the case back for a retrial. The CLAPV offered legal assistance, and the trial was to be covered by numerous newspapers and media outlets, but nothing was reported by the media. On March 25, 2004, the People's Court of Laoting County found that the defendants com-

29. CLAPV 10th Anniversary materials (on file with author).

30. Wang Canfa, *Chinese Environmental Law Enforcement: Current Deficiencies and Suggested Reforms*, 8 VT. J. ENVTL. L. 159, 179 (2007), available at <http://www.vjel.org/journal/pdf/VJEL10058.pdf>.

31. *Id.* at 181.

32. In the spring and summer of 2003, many government offices were closed and travel was restricted to contain the spread of SARS in China.

mitted the above crimes and sentenced the individuals to one to four years in prison.

The Defendants appealed once again. The CLAPV consulted numerous criminal and environmental law experts,

who determined that the defendants had not violated existing Chinese law. The last decision from the Intermediate People's Court of Tangshan City canceled the racketeering crime, but the mob incitement was upheld.

China's Environmental Administrative Enforcement System

by Dr. Xuehua Zhang

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Over the past three decades, the Chinese government has established a comprehensive environmental legal system and organizational infrastructure to address the increasing environmental degradation that has resulted from its unprecedented economic growth. As of 2008, approximately 3,000 local environmental protection bureaus (EPBs) with about 180,000 staff members were working at the sub-national level throughout the nation.¹

This Comment presents an overview of China's environmental administrative enforcement primarily regarding pollution control. It introduces the institutional framework of China's environmental enforcement at the national and local levels and discusses the role of citizens and courts. The main challenges with China's environmental enforcement are also presented.

I. Overall Institutional Framework of China's Environmental Enforcement

The Chinese environmental administration reflects the basic features of the Chinese state, which is a multilayered institutional structure with territorial divisions at the center, province, city, county, township, and village levels.²

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At the top is the Ministry of Environmental Protection (MEP), a cabinet-level ministry in the executive of the Chinese government. Directly under the State Council, the MEP has 15 divisions and is primarily charged with the task of protecting China's air, water, and land from pollution and contamination. Examples of the MEP's primary responsibilities are to organize the formulation of national policies, laws, and regulations, to develop national environmental quality and pollutant discharge standards, to guide and coordinate major environmental problems, e.g., severe pollution accidents, at the regional and local levels, to formulate pollution reduction programs and supervise their implementation, and to manage environmental monitoring, statistics, and information.

While the MEP is primarily responsible for supervising local environmental enforcement, it has also taken direct enforcement measures.³ This has often been done through special environmental enforcement campaigns launched in cooperation with local EPBs. Almost every year, the MEP initiates countrywide campaigns to address specific environmental problems, such as excessive pollution from Township and Village Industrial Enterprises, prevention of accidents in the chemical sector, pollution from mining activities, etc. For example, the MEP launched a major campaign in 2005 to enforce the Environmental Impact Assessment (EIA) Law, which came into effect in September 2003.⁴ The campaign, widely known as the "Environmental Protection Storm," started with a nationwide public education program on the EIA Law. In an unprecedented move, the MEP slapped "regional permit restrictions" on four cities and four major power companies, suspending approval of any new projects until they brought their existing facilities into compliance with environmental regulations. The campaign even halted some Three Gorges-related dam construction activities. However, the construction

1. MINISTRY OF ENVIRONMENTAL PROTECTION (MEP), 2008 BULL. CHINA'S ENVTL. STAT. (in Chinese), available at http://zls.mep.gov.cn/hjtj/qghjtjgb/200909/t20090928_161740.htm.
2. Kenneth Lieberthal, *China's Governing System and Its Impact on Environmental Policy Implementation*, 1 CHINA ENV'T SERIES 3-8 (1997).

3. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD), ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT IN CHINA: AN ASSESSMENT OF CURRENT PRACTICES AND WAYS FORWARD (2006), available at <http://www.oecd.org/dataoecd/33/5/37867511.pdf>.
4. *Id.*

activities were soon permitted to continue after additional documentation was provided.

The MEP is replicated at the provincial, city, city-district/county level, and, in some places, township level, in units known as EPBs.⁵ Like most local government agencies in China's unique bureaucratic system, local EPBs must be responsive to two leaders: the administratively higher tier EPB; and the local governments where they reside. Under this dual leadership, the MEP and provincial EPBs provide city EPBs with policy directives and guidance for the implementation of national and provincial environmental regulations. District and county EPBs are below the city level in the Chinese bureaucracy, and thus receive guidance from city EPBs. Therefore, the chief responsibility of EPBs at and below the provincial levels are to enforce laws and policies designed by the MEP and to assist in drafting local rules to supplement central ones. Monitoring, recordkeeping, fee collection, on-site inspection, and violation and accident investigation are also assigned to them.

However, it is local governments, not the MEP or higher tier EPBs, that provide local EPBs with their annual budgetary funds, approve institutional advancements in rank, and appoint the bureau directors.⁶ As a result, the local government is considered to be the more powerful of local EPB's two administrative supervisors. Local EPBs are so dependent on local governments that they must take those governments' concerns into account when regulating polluting sources or taking enforcement actions. The MEP has limited control over the priority and activities of local EPB enforcement.

To strengthen its influence at the local level, by 2009, the MEP had created six regional "environmental protection supervision centers" (known as "regional environmental watchdogs").⁷ These centers were modeled directly after the U.S. Environmental Protection Agency's Regional Office system. Under the sole and direct leadership of the MEP, each center is entrusted with supervision of local enforcement and with coordination and resolution of major and transboundary pollution disputes (involving multiple regulatory jurisdictions) and ecological destructive accidents. In practice, the centers have largely served to keep the MEP informed of important local problems and check on regulatory compliance violations of local polluters.⁸ The centers themselves have limited autonomy. They have no monitoring capacity and rely on local EPBs for that. Nor may they engage in direct enforcement actions. Moreover, a center cannot direct the EPBs' work in its jurisdiction.

II. Local Environmental Enforcement

In China, local EPBs have relied on a number of specific regulatory instruments for industrial pollution control. The most important ones, introduced by the 1989 Environmental Protection Law (EPL), include environmental quality and emission/discharge standards, "Three Synchronizations," EIA, Pollution Levy System (PLS), and the Discharge Permit System (DPS).⁹ The MEP is authorized to establish national environmental quality standards, which are maximum allowable concentrations of pollutants in water, air, or soil, and national discharge/emission standards, which are maximum allowable concentrations of pollutants in industrial emissions or discharges. Those standards provide a basis for EPB inspections.

The "Three Synchronizations" requires that (1) the design, (2) the construction, and (3) the operation of a new industrial enterprise (or an existing factory expanding or changing its operations) be synchronized with the design, construction, and operation of an appropriate pollution treatment facility. Once the construction of the project is completed, inspection and approval by EPBs are required (for large projects, or in case of a dispute at the local level, the approval has to be confirmed by the national-level authority). If project operations begin without EPB approval, the owner of the project can be sanctioned. The 1989 EPL requires projects with potentially negative environmental effects to be subject to EIA before approval by local Development and Reform Commissions. The MEP conducts nationwide checks on the implementation of EIA, while local EPBs are responsible for the compliance of EIA requirements at the local level.

The PLS links an economic incentive for pollution reduction with sanctions in case of noncompliance. The polluting sources that refuse to register their waste releases or fail to pay the amount of due pollution levies face an administrative penalty. In practice, the actual levy paid by a firm is usually negotiated between the EPB and the firm, rather than calculated using formulas detailed in regulations. Under the DPS, EPBs issue permits that limit both the quantities and concentrations of pollutants in an enterprise's wastewater discharges and air emissions. DPS rules require enterprises to register with EPBs and apply for a permit. The discharge permits provide a basis for collecting pollution levies and are used to verify whether polluting sources discharge wastes illegally. The violations of the discharge permit requirements are subject to administrative penalties.

At present, the most common offenses found in practice are failure to comply with the EIA or "Three Synchronizations" requirements, noncompliance with environmen-

5. Abigail Jahiel, *The Organization of Environmental Protection in China*, CHINA Q. 757-87 (1998).

6. *Id.*

7. OECD, *supra* note 3.

8. Interview with the vice-director of a regional supervision center conducted by the author.

9. OECD, *supra* note 3. XIAOYING MA & LEONARD ORTOLANO, ENVIRONMENTAL REGULATION IN CHINA: INSTITUTIONS, ENFORCEMENT, AND COMPLIANCE (2000).

tal standards and failure to pay pollution levies, operating without necessary environmental permits, and failure to operate pollution control facilities.¹⁰ The violations are usually detected by EPBs through regular inspections or by the victim, local public, or media, and then made known to EPBs. In most cases, violations are detected following citizen complaints.

After a violation is detected, EPB inspectors carry out on-site inspections (in the case of violations detected during EPB regular inspections, EPBs inspectors are already onsite) to gather evidence, sometimes working in tandem with environmental monitoring staffs who collect pollutant samples and generate monitoring results for verifying the violation.¹¹ This is difficult, because violators often do their utmost to obstruct EPB work. For example, they might refuse to provide relevant information, to sign the EPB on-site inspection documents, and might use personal connections to influence EPB work. On the basis of the evidence collected, inspectors write a sanction proposal and submit it to EPB leaders for review and a final sanction decision.

In principle, EPBs have jurisdiction over issuing several administrative sanctions, such as warning letters, fines, unlawful gains confiscation, stoppage of production or use, discharge permit revocation, enterprise closure, or relocation orders.¹² In reality, fines are the most frequently applied measure, while closing down a polluter, revoking its permits, or ordering it to stop production are seldom used, because the issuance of those sanctions needs approval from local leaders. Different levels of EPBs have different responsibility and authority to impose penalties. County EPBs can impose fines of up to 10,000 Chinese Yuan Renminbi (CNY) (approximately US\$ 1,500), and city EPBs can impose fines up to CNY 50,000, while provincial EPB can impose up to CNY 200,000. When deciding on the proposed sanction, EPBs look at the statutory sanction limitations and take into account such factors as the degree to which regulations were violated, the number of times violations occurred, and the response to the violation (whether voluntary corrective action was taken).

It is EPB leaders, not on-site inspectors, who exercise considerable discretion in deciding the types and amount of penalties imposed. EPB leaders often face tremendous external pressures in making a final sanction decision.¹³ For example, they frequently need to consider "requests" from local leaders on behalf of violators in order to evade the punishment, the future relationships with violators (often influential local enterprises), interpersonal connections of violators with EPB leaders through which violators ask for favors of reducing or waiving fines. The maximum statutory penalty is rarely issued in practice.

Compliance schedules ("pollution control within deadlines") are also frequently used: they require enterprises to

reduce their pollution releases to acceptable levels by specific dates. Cleanup deadlines for enterprises are usually imposed by the national or local governments, but EPBs can also be authorized to set such deadlines. Enterprises that do not abate pollution on time risk being fined or shut down. In recent years, the system was expanded by offering the possibilities for technological renovation, phaseout of outdated technologies and products, and promotion of cleaner production in exchange for extending the shutdown deadlines.

There are three verification procedures designed to check or review EPB administrative decisions: internal review; administrative review; and court review.¹⁴ Internal review means that higher tier EPBs take initiatives to verify the enforcement work of lower tier EPBs. Administrative review of a county EPB decision can be carried out by a municipal EPB or by the legal office of the county government, when the latter receives a request from a regulated party who disagrees with the county EPB decision. Court review of EPB decisions is usually initiated by regulated parties under the Administrative Litigation Law (ALL).

III. Role of Courts and Citizens in Local Environmental Enforcement

When administrative enforcement is insufficient or fails, noncompliance can be addressed through the courts in China. This can include actions ranging from gaining court assistance in collecting pollution levies or fines to criminal sanctions for serious environmental degradation. The ALL, which went into effect in 1990, permits citizens and organizations to sue administrative organs in court.¹⁵ One provision of the ALL also allows courts to enforce the administrative decisions of agencies. In judicial practice, the annual number of lawsuits filed by agencies increased from 88,147 in 1993 to 217,488 in 2005, while that of cases filed by citizens merely climbed from 27,911 in 1993 to 96,178 in 2005; the average ratio of two types of cases filed under the ALL is 3.5:1.¹⁶ This indicates that the ALL has largely empowered regulatory agencies.

Studies have found that court enforcement of EPB decisions has enhanced EPB regulatory power by generating notable deterrent effects on the regulated community.¹⁷ Since the majority of the ALL cases filed by EPBs involved collection of pollution levies and fines from small tertiary industries, court enforcement has not had significant effects on pollution reduction. Although the number of the ALL cases brought by citizens is relatively small, research has found that many lawsuits, such as collective ones filed

10. Interviews with local EPB officials conducted by the author.

11. Interviews with local EPB officials conducted by the author.

12. OECD, *supra* note 3.

13. Benjamin van Rooij, *Organization and Procedure in Environmental Law Enforcement: Sichuan in Comparative Perspective*, 17 CHINA INFO. 36-64 (2003); Interviews with local EPB officials conducted by the author.

14. *Id.*

15. Pitman Potter, *The Administrative Litigation Law of the PRC: Judicial Review and Bureaucratic Reform*, in DOMESTIC LAW REFORMS IN POST-MAO CHINA 270-304 (Pitman B. Potter ed. 1994).

16. CHINA LAW YEARBOOK (1993 and 2005). The ratio is the author's calculation.

17. Xuehua Zhang et al., *Agency Empowerment Through the Administrative Litigation Law: Court Enforcement of Pollution Levies in Hubei Province, China*, CHINA Q. 307-26 (2010).

by citizens against EPBs for inaction, have brought fundamental changes to EPB enforcement procedures and practices.¹⁸ It is these cases that demonstrate the ALL's long-term potential for placing EPB enforcement activities under the supervision of citizens and the courts.

While the 1979 EPL had previously authorized criminal prosecutions of serious pollution accidents, the 1997 amendments to the Criminal Law, for the first time, formally introduced into the criminal code that violation of environmental law would be subject to prosecution.¹⁹ The Criminal Law now stipulates up to three years of imprisonment and/or a fine for individuals involved in illegally discharging pollutants. The police are charged with investigating environmental crimes together with the prosecutor's office. EPBs are consulted to facilitate the investigation and provide information. However, current laws are silent on such issues as liability for activities that are potentially dangerous and liability in the absence of either intent or negligence. Moreover, although a number of high-profile cases of environmental crime have been submitted to the courts, this avenue has generally not been used very often, due to difficulties in establishing causal relationships between pollution and harm, uncertainty over legal responsibility, and lengthy judicial procedures.

In recent years, the Chinese central government has increasingly emphasized the importance of public participation to improve local environmental enforcement and compliance. The most commonly used channel for citizen participation in environmental enforcement is the citizen complaints system. The majority of citizen complaints about the environment are lodged at local EPBs. The government has taken many important measures to encourage citizens to report environmental violations by polluting sources, so that EPBs can undertake quick enforcement actions. Examples of such measures are the passage of the national Environmental Complaint Management Measures in 1990, the revisions in 1997 and 2006 respectively, and a mandatory requirement of the nationwide installation of 24-hour telephone hotlines. As a result, the annual number of environmental complaints increased from 98,207 in 1993 to 738,304 in 2009 throughout the nation, an increase of about 650%.²⁰

In many regions, accepting and responding to citizens' complaints has become the priority of local EPBs. EPBs are required to take complaints 24 hours per day, and many EPBs instituted a rotation system, whereby the entire staff of an EPB would rotate taking night shifts to answer phone calls. In urban areas, the EPB staff is required to arrive at the affected areas within two hours after receiving a complaint; this time limit extends to six hours in rural areas. To accommodate the high volume of citizen complaints, EPBs have each established internal structures and procedures

to accept complaints. In many localities, this includes a newly formed complaints department under the direction of the EPB administrative headquarters or supervision stations. This department is responsible for accepting letters, visits, phone calls, and e-mails, arranging follow-up inspections by the EPB supervisory station, and delivering responses to the complainants. In some localities, the reporting parties are rewarded financially for providing information on noncompliance.²¹

While citizen complaints have been a good supplementary source of information on pollution discharges for local EPBs, the complaint system has failed to identify in a timely or consistent manner some of the most important environmental violations that are also uncovered by EPBs' formal pollution data-gathering program.²² This has primarily resulted from the dominance of complaints about nuisance noise problems, such as noisy air conditioning motors on apartment buildings. In practice, most reported complaints relate to noise pollution, followed by air and water pollution.

IV. Challenges for China's Environmental Enforcement

China has developed a robust set of environmental regulations and a comprehensive administrative setup, but implementation has been hobbled by systemic impediments. First, local EPBs' continuing dependence on local governments for funding, personnel arrangements, and resources has been a fundamental structural impediment to effective enforcement. The actions of EPBs are thus directed more by local governmental leaders than by the MEP, as those leaders' performance has been evaluated using criteria that emphasize gross domestic product growth, with little, if any, consideration of environmental performance. When stringent environmental enforcement has perceived negative impact on short-term economic development, local leaders frequently intervene in EPBs' work in order to ease environmental requirements. Such intervention has seldom had severe and predictable legal consequences, as China is still in its infancy of developing the rule of law.

Second, Chinese environmental laws are imperfect, and, in particular, EPBs have insufficient enforcement authority and consequently have low status. Chinese environmental laws and regulations are generally vague, broad, impractical, and difficult to enforce. They have granted local EPBs a wide range of enforcement responsibilities without a solid legal basis for their work. The laws usually grant EPBs certain punishment rights without specific punishment provisions. When facing violations, EPBs sometimes lack solid legal provisions to support their punishment decisions. Meanwhile, Chinese environmental laws do not grant EPBs enforcement measures

18. Xuehua Zhang & Leonard Ortolano, *Judicial Review of Environmental Administrative Decisions: Has It Changed the Behavior of Government Agencies?*, 64 CHINA J. 97-119 (2010).

19. OECD, *supra* note 3.

20. CHINA ENVIRONMENT YEARBOOK (1991 and 2009). The percentage is the author's calculation.

21. Xuehua Zhang, *Green Bounty Hunters: Engaging Chinese Citizens in Local Environmental Enforcement*, 11 CHINA ENV'T SERIES 137-53 (2010).

22. Mara Warwick & Leonard Ortolano, *Benefits and Costs of Shanghai's Environmental Citizen Complaints System*, 21 CHINA INFO. 237-68 (2007).

like the ones that other government agencies such as tax bureaus have. Local EPBs' status is regarded as low relative to other governmental departments.

Third, EPBs' insufficient funding, lack of qualified enforcement personnel, and infrastructure have all contributed to poor enforcement. The process of decentralization has resulted in more responsibilities delegated to local governments by the central government for addressing local problems without necessary means to fulfill them. This has created a revenue-raising problem for local EPBs. Without sufficient funds from local governments, particularly ones in the less-developed regions, many EPBs have continued to depend on revenues from the pollution levy to finance their operations. As a result, there has been a greater focus on collecting levies than pollution reduction. EPBs are also found to be involved in both conducting and preparing EIA documentation, as well as assessing EIAs required by the environmental laws—this creates conflicts of interests.

Moreover, when local governments in many regions cannot even pay the salaries of local officials, training for EPB staffs appears to be a nonessential luxury. The lack of qualified enforcement personnel and infrastructure has become increasingly severe at the county level, where the widespread relocation of polluting sources into the outskirts of major cities has been taking place. In general, a county EPB is more dependent on its county government

for resources than a city EPB is on its city government, and has less funding, less qualified enforcement personnel, and poorer infrastructure than a city EPB.

Fourth, the Chinese people represent an inefficiently and inadequately utilized resource in environmental enforcement. Although the number of environmental citizen complaints has increased dramatically in recent years, a significant portion of the complaints have focused on nuisance problems. As a result, such complaints have not provided as much important noncompliance information for local EPBs as might otherwise be expected. This has resulted in the misallocation of EPBs' already constrained enforcement resources, as local EPBs are required to respond to every single complaint swiftly.

Last, but not least important, there has been ineffective court enforcement of EPB decisions and insufficient court oversight of EPB enforcement activities. Many EPBs have largely relied on court assistance for collecting pollution levies and administrative fines; very few have used courts for pollution reduction purposes. Moreover, courts have received a significantly smaller number of lawsuits filed by citizens (compared with a large number of cases filed by EPBs) to challenge EPB decisions or against EPB's inaction; this has greatly limited the judicial oversight of environmental administrative enforcement.