

THE ROLE OF LAW IN ENVIRONMENTAL PROTECTION IN CHINA: RECENT DEVELOPMENTS

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† Where noted, the translations of Chinese materials referenced herein are the author’s, as is the responsibility for any inaccuracy in these translations. This article follows the Chinese practice of placing the family name before the given name. The original Chinese text for most laws and their implementing regulations cited herein can be found on the Law Info China database located at <http://www.lawinfochina.com>. Due to confidentiality concerns, the identities of interviewees referenced in this article have been kept anonymous. Information regarding all interviews is on file with the author.

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INTRODUCTION

In a rural village, set on the edges of a narrow mountain valley, a group of farmers go to court seeking relief from industrial pollution that has threatened their health and destroyed the crops that are the basis of their livelihoods. The defendants are two local factories that use a primitive industrial process to reduce copper ore. The process generates massive amounts of smoke and stench that decimate much of the surrounding forests and crops and cause local residents chronic headaches and coughing. The farmers ask for compensation and a court order halting the pollution. The court refuses to order a stop to the polluting activities because such an order would “blot out two great mining and manufacturing enterprises, destroy half of the taxable values of a county . . . and deprive thousands of working people of their homes and livelihood.”¹

This is a story that is all too familiar in China, reflecting the persistent distance between environmental degradation and a legal system struggling to keep pace with a rapidly growing economy. This particular case, however, does not come from China at all. Rather, it is the 1904 United States case of *Madison v. Ducktown Sulphur, Copper & Iron Co.*,² which arose out of an environmental dispute in southeastern Tennessee. As in China today, the industrial revolution in the United States brought with it increasing harm to the public from pollution and greater environmental conflict. In the United States, state and federal governments muddled through decades of inadequate environmental regulation and often unsatisfactory court decisions.³ It was not until the 1970s that the United

1. *Madison v. Ducktown Sulphur, Copper & Iron Co.*, 83 S.W. 658, 666–67 (1904).

2. *Id.*

3. For example, federal regulation for air quality did not emerge until the 1950s and until the 1970 Clean Air Act such regulation was largely lacking in any effective enforcement or implementation measures. *See, e.g.*, Air Pollution Control Act of 1955, Pub. L. No. 84-159, § 1, 69 Stat. 362 (codified as amended at 42 U.S.C. §§ 7401–7432 (2000)) (providing funds for technical assistance, research and training in air pollution control, but establishing no federal regulations on air pollution); Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392 (codified as amended at 42 U.S.C. §§ 7401-7432 (2000)) (authorizing the creation of advisory air quality criteria, but establishing only a seldom used conference

States passed a series of robust environmental laws and opened the door to a generation of environmental advocates who would use law and the courts to improve the environment.

There is some comfort in knowing that developed countries like the United States, Japan, and England were able to reverse decades of environmental degradation. The difficulty is that China's environmental problems are arguably moving faster and on a larger scale than anything the world has ever seen before.

How can China remedy its environmental problems given the pace and scale of change? In recent years, China has recognized the key role that the legal system must play in addressing ever-worsening environmental problems. For example, the State Council, China's highest executive body, has specifically called for the "perfection of the legal assistance system for pollution victims, and research and establishment of an environmental civil and administrative public interest litigation system."⁴ A robust debate has emerged in Chinese government, academic, and civil society circles regarding the exact form that such a public interest litigation system might take. This debate raises questions from the mechanical (e.g., how many days of notice should the government receive before the commencement of a suit?) to the existential (e.g., what is the "public interest?"). More generally, China is moving forward on a broad range of legal approaches to environmental protection, including expansion and standardization of environmental impact assessment procedures, encouragement of information disclosure-based regulation,⁵ and the creation of public hearing procedures.⁶

This article will first address the context of China's environmental challenges and discuss a number of recent developments in the utilization

procedure as an enforcement mechanism); Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 (codified as amended at 42 U.S.C. §§ 7401-7432 (2000)) (authorizing, *inter alia*, the creation of Air Quality Control Regions, but still only containing the conference procedure of the Clean Air Act of 1963 for enforcement).

4. Decision on Implementation of Scientific Development and Strengthening of Environmental Protection (promulgated by State Council, Dec. 3, 2005), *available at* <http://english.gov.cn/documents/gazettes/index.htm> (P.R.C.).

5. See Hua Wang et al., *Public Ratings of Industry's Environmental Performance: China's Greenwatch Program*, in INT'L CONF. ENVTL. COMPLIANCE & ENFORCEMENT 1 (2002), *available at* <http://www.inece.org/conf/proceedings2/52-Public%20RatingsChina.pdf> (noting the key components of the "Greenwatch" program, an example of disclosure-based regulation in Jiangsu Province). China's State Environmental Protection Administration (SEPA) has issued a notice encouraging environmental protection bureaus nationwide to implement industrial environmental information disclosure systems similar to "Greenwatch." *Id.* at 2.

6. Provisions on Code of Conduct for Environmental Impact Assessment and Honest and Clean Administration Concerning Construction Projects (promulgated by the State Env'tl. Prot. Admin. Nov. 23, 2005, effective Jan. 1, 2006) LAWINFOCHINA (last visited Mar. 12, 2007) (P.R.C.).

of law and litigation for environmental protection in China. Next, this article will examine more closely the legal framework that allows for environmental litigation in China, with a focus on the most prevalent form of Chinese environmental litigation—pollution compensation lawsuits.⁷ This article will also highlight key issues related to this type of litigation from the perspective of a major environmental class action lawsuit from Fujian Province. Finally, this article will discuss a number of the current proposals for an environmental public interest litigation system in China, which seek to overcome some of the shortcomings in the existing environmental litigation regime.

I. THE ENVIRONMENTAL CONTEXT: THE HIGH COST OF “POLLUTE FIRST, CONTROL LATER”

The United States (U.S.) and other developed nations, such as Japan and the United Kingdom, all followed what the Chinese refer to as the “pollute first, control later” (*xian wuran, hou zhili*) model of development, in which focus on environmental protection came only after a certain degree of economic development was achieved. Since the advent of Deng Xiaoping’s “reform and opening” (*gaige kaifang*) in the late 1970s, China has likewise aggressively followed a “pollute first, control later” path of development.⁸ Though a tremendous amount of work has been done in China in the realm of environmental protection,⁹ where economic development and environment protection have bumped up against each other in the bare-knuckled, high-growth capitalist environment that is China today, economic development has invariably prevailed. This is reflected in

7. This article will focus on environmental litigation, which has received a great deal of high-level Chinese government, academic, and civil society interest in recent years. *E.g.*, Decision on Implementation of Scientific Development and Strengthening of Environmental Protection (promulgated by State Council of the People’s Republic of China, Dec. 3, 2005), *available at* <http://english.gov.cn/documents/gazettes/index.htm> (P.R.C.). Other common dispute resolution approaches in China include mediation (*tiaojie*), reporting problems to administrative authorities (*jübao, konggao, jianji*), letters and visits (*xinfang*), seeking reconsideration of administrative decisions (*xingzheng fuyi*), and informal approaches such as reporting issues to the media.

8. Opinion, *Take the Law Seriously*, CHINA DAILY, June 6, 2006, at 4.

9. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD), ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT IN CHINA: AN ASSESSMENT OF CURRENT PRACTICES AND WAYS FORWARD 19–20 (2006), *available at* <http://www.oecd.org/dataoecd/33/5/37867511.pdf> [hereinafter ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT IN CHINA]. In the area of law, for example, since 1989, the National People’s Congress has enacted at least twenty-four environment and natural resources related laws. More than forty State Council regulations, 500 standards, and 600 other regulatory documents have been produced concerning pollution control, natural resources conservation, and other types of environmental management. *Id.*

the organizational structure of the government and in policies and governance practices. This can be seen most clearly in the system of government performance assessment, in which economic growth is one of the primary metrics of performance and environmental performance measures are virtually non-existent.¹⁰ It is also reflected in the relatively low-status of China's primary environmental enforcer, the State Environmental Protection Administration (SEPA).¹¹ SEPA also has a relatively small amount of staffing relative to the size and population of China, with some 2,200 employees (219 administrative staff in Beijing and some 2,000 staff in various SEPA-affiliated national offices and centers).¹²

The prioritization of economic development has produced a sustained period of impressive economic growth and an extensive reduction of poverty. Between 1978 and 2005, China's Gross Domestic Product (GDP) grew by an average of 9.4% per year and China rose from 48th in the world in 1978 to become the world's fourth largest economy in 2005, behind only the U.S., Japan, and Germany.¹³ Between 1981 and 2001, China reduced the number of its people living in extreme poverty by a staggering 400 million, and the proportion of the population living in poverty fell from 53% to 8%.¹⁴

10. Matt Perrement & Nick Young, *Premier Pledges Green Performance Assessment Amidst Dust-Filled Skies*, CHINA DEV. BRIEF, Apr. 24, 2006, <http://www.chinadevelopmentbrief.com/node/559>. Proposals have been made to add environmental criteria into government performance criteria. *Id.*

11. See ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT IN CHINA, *supra* note 9, at 15. The status of China's top environmental agency, however has improved gradually over the years. It began as the Environmental Protection Bureau, set up in 1974 with a staff of twenty as a unit of the State Council. After a series of incarnations, SEPA was created and placed directly under the State Council in 1998, replacing the sub-ministry level National Environmental Protection Agency (NEPA). Nonetheless, SEPA is still considered a relatively weak agency. *Id.*

12. Executive Summary of Task Force on Environmental Governance, Jan. 30, 2007, <http://www.harbour.sfu.ca/dlam/Taskforce/EnvironmentalGovernance.htm>. In comparison, the U.S. EPA employs some 18,000 people in Washington, D.C., ten regional offices, and more than a dozen laboratories. The German Federal Environment Ministry and its affiliated federal agencies employ over 1,700 people. *Id.*

13. Keith Bradsher, *China Reports Another Year of Strong (or Even Better) Growth*, N.Y. TIMES, Jan. 26, 2006, at C5. China's national economic output was US\$2.26 trillion in 2005. *Id.*; *China Moves to Fourth in Global GDP Rankings*, CHINA DAILY, Dec. 14, 2005, http://www.chinadaily.com.cn/english/doc/2005-12/14/content_503281.htm; accord INTERNATIONAL MONETARY FUND, WORLD ECONOMIC OUTLOOK DATABASE (2001), available at <http://www.imf.org/external/pubs/ft/weo/2001/01/data/index.htm> (noting China's rising place in global economies).

14. The World Bank, *Fighting Poverty: Finding and Lessons from China's Success*, <http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/0,,contentMDK:20634060~pagePK:64165401~piPK:64165026~theSitePK:469382,00.html> (last visited Apr. 6, 2007). Note, however, that half of this reduction occurred in the first half of the 1980s and was arguably due to the one-time benefits of undoing failed rural collective farming policies that restored incentives for individual household production. *Id.*

This economic growth, however, has come at a great environmental cost. The environmental impacts of China's growth are, by now, well known. China has 16 of the 25 most polluted cities in the world.¹⁵ China is the world's leading emitter of sulfur dioxide,¹⁶ and China's mercury emissions continue to rise.¹⁷ Additionally, China could surpass the U.S. to become the leading emitter of carbon dioxide by as early as 2009.¹⁸ In China, 300 million people, a population roughly that of the entire United States, do not have access to safe drinking water,¹⁹ and an estimated 400,000 people die prematurely each year because China's air pollution is below legal standards.²⁰ The government's own estimate puts the initial cost of environmental clean-up at a minimum of US\$135 billion.²¹ Environmental damage costs China anywhere from 3-8% of the country's GDP.²²

Severe environmental problems have led to significant social unrest. In 2005, there were some 50,000 disputes over environmental pollution, according to SEPA Minister Zhou Shengxian.²³ From 2001 to 2005, Chinese environmental authorities received more than 2.53 million letters and 430,000 visits by 597,000 petitioners seeking environmental redress.²⁴ Officials have expressed concern that China's environmental problems are a leading threat to social stability.

In response, the upper levels of Chinese government have expressed the

15. Jonathan Porrit, *China: The Most Important Story in the World*, GREEN FUTURES, Sept. 2006, available at <http://www.greenfutures.org.uk/>.

16. *China Leads World in Sulfur Dioxide Charge*, XINHUA, Aug. 3, 2006, available at <http://english.cri.cn/2946/2006/08/03/272@122190.htm> ("In 2005, China discharged 25.49 million tons of sulfur dioxide, the most in the world.")

17. See generally Ye Wu et al., *Trends in Anthropogenic Mercury Emissions in China From 1995 to 2003*, 40 ENV'T SCI. TECH. 5312 (2006) (documenting the rise in mercury emissions in China).

18. Keith Bradsher, *China to Pass U.S. in 2009 in Emissions*, N.Y. TIMES, Nov. 7, 2006, at C1.

19. *China to Supply Safe Drinking Water for 160 Million Rural People in Five Years*, CHINA PEOPLE'S DAILY, Aug. 31, 2006, http://english.peopledaily.com.cn/200608/31/eng20060831_298275.html.

20. Jonathan Watts, *Satellite Data Reveals Beijing as Air Pollution Capital of World*, GUARDIAN, Oct. 31, 2005, <http://www.guardian.co.uk/china/story/0,7369,1605146,00.html>.

21. Chen Feng, *Pollution Costs China 511.8b Yuan in 2004*, Sept. 7, 2006, http://english.gov.cn/2006-09/07/content_381756.htm (P.R.C.).

22. Compare THE WORLD BANK, CLEAR WATER, BLUE SKIES: CHINA'S ENVIRONMENT IN THE NEW CENTURY 23 (1997) (noting conservative estimate for the clean-up of air and water pollution in China is 8% of the country's total GDP), with *Green GDP Accounting Study Report 2004 Issues*, XINHUA, Sept. 12, 2006, http://news.xinhuanet.com/english/2006-09/12/content_5080599.htm (stating environmental damages create costs equivalent of 3.05% of China's GDP).

23. Li Fangchao, *Environmental Issues Addressed More Urgently*, CHINA DAILY, May 4, 2006, http://www.chinadaily.com.cn/bizchina/2006-05/04/content_582631.htm.

24. CHINESE GOVERNMENT WHITE PAPER, ENVIRONMENTAL SCIENCE AND TECHNOLOGY, INDUSTRY, AND PUBLIC PARTICIPATION, <http://www.china.org.cn/english/MATERIAL/170390.htm> (last visited Apr. 6, 2007).

need to move beyond the “pollute first, control later” mode of development.²⁵ In December 2005, the State Council, China’s leading executive body, issued a *Decision on Implementation of Scientific Development and Strengthening of Environmental Protection*,²⁶ stating that:

The environmental situation remains extremely grim. Although environmental protection in China has made positive progress, the grim environmental situation has not changed Developed countries experienced environmental problems in stages along their 100 year industrialization process. China has seen all of these problems appear in a concentrated 20 year period Environmental pollution and ecosystem destruction have caused enormous economic losses, harmed the health of the masses, and affected societal stability and environmental safety

At present, some places emphasize GDP growth and pay short shrift to environmental protection Environmental protection should be placed in a more significant strategic position.²⁷

In April 2006, the head of China’s State Council, Premier Wen Jiabao, emphasized in a speech before the Sixth National Environmental Conference the need for China to transition from a singular focus on economic development to a mode of development that placed the environment on par with economic development. There has been particular recognition in China of the need to reform the legal system to address ever-worsening environmental challenges. The *Decision*, for example, notes that “environmental protection laws and regulations are not up to the task. The environmental protection legal system is not complete . . . and where laws exist they are not followed and enforcement is not strict.”²⁸

25. Sina Information Center, *China Ends the Old Road of Polluting First and Then Resolving Later, and Will Strengthen Environmental Management from Seven Aspects*, SINA NEWS, Jan. 24, 2006, <http://news.sina.com.cn/c/2006-01-24/11318068759s.shtml> (author’s translation).

26. *Decision on Implementation of Scientific Development and Strengthening on Environmental Protection* (State Council, Dec. 3, 2005), available at http://www.gov.cn/zwggk/2005-12/13/content_125736.htm (P.R.C.) (author’s translation).

27. *Id.*

28. *Id.* (author’s translation).

II. RECENT DEVELOPMENTS: LEGAL TOOLS FOR ENVIRONMENTAL PROTECTION

For China, the challenges of using the law for environmental protection are formidable. Unlike the U.S. with its long history and culture of using law and the courts, China essentially began in 1979 to rebuild anew a legal system that had been entirely dismantled in the previous few decades.²⁹ China's court system remains weak, with poorly trained judges and regular intervention in cases by local governments that often have a financial interest in the polluting enterprises.³⁰ Chinese environmental laws are often lacking in effective enforcement provisions.³¹ Moreover, despite stated intentions to implement a rule of law system for environmental protection, China has not traditionally had a culture of utilizing lawyers, courts, or the law in general to resolve disputes.³²

Since the passage of the draft Environmental Protection Law in 1979,³³ China's environmental law framework has grown to include at least two dozen major statutes and countless State Council regulations, standards, and other legal-norm-creating documents. The major laws include the Law on the Prevention and Control of Atmospheric Pollution,³⁴ Law on the Prevention and Control of Water Pollution,³⁵ and the Environmental Impact Assessment Law.³⁶ Laws now cover forestry, fisheries, wildlife protection, marine areas, desertification prevention, clean production, solid waste,

29. ELIZABETH ECONOMY, *THE RIVER RUNS BLACK* 112 (2004).

30. Cai Dingjian, *Development of the Chinese Legal System Since 1979 and its Current Crisis and Transformation*, 11 *CULTURAL DYNAMICS* 135, 148, 153 (1999).

31. William Alford & Yuanyuan Shen, *Limits of the Law in Addressing China's Environmental Dilemma*, 16 *STAN. ENVTL. L.J.* 125, 127 (1997). A number of English-language articles have addressed various aspects of utilizing the law for environmental protection in China. *E.g.*, *id.* at 127; Yuhong Zhao, *Environmental Dispute Resolution in China*, 16 *J. ENVTL. L.* 157 (2004); Adam Briggs, *China's Pollution Victims: Still Seeking a Dependable Remedy*, 18 *GEO. INT'L ENVTL. L. REV.* 305 (2006); Note: *Class Action Litigation in China*, 111 *HARV. L. REV.* 1523 (1998); John Copeland Nagle, *The Missing Chinese Environmental Law Statutory Interpretation Cases*, 5 *N.Y.U. ENVTL. L.J.* 517 (1996); Richard B. Stewart, *Environmental Statutory Interpretation in China and the United States*, 5 *N.Y.U. ENVTL. L.J.* 556 (1996).

32. Robert Utter, *Dispute Resolution in China*, 62 *WASH. L. REV.* 383, 383-84 (1987).

33. Environmental Protection Law (promulgated by the President, Dec. 26, 1989, effective Dec. 26, 1989), art. 41, available at http://english.sepa.gov.cn/zffg/fl/198912/t19891226_49697.htm (P.R.C.).

34. Law on the Prevention and Control of Atmospheric Pollution (adopted by Standing Comm. Nat'l People's Cong., Sept. 5, 1987, revised Aug. 29, 1995) *LAWINFOCHINA* (last visited Mar. 12, 2007) (P.R.C.).

35. Law on the Prevention and Control of Water Pollution (promulgated by the President, May 11, 1984, effective Nov. 1, 1984) *LAWINFOCHINA* (last visited Mar. 12, 2007) (P.R.C.).

36. Environmental Impact Assessment Law (promulgated by Standing Comm. Nat'l People's Cong., Oct. 28, 2002, effective Sept. 1, 2003), available at http://www.sepa.gov.cn/law/law/200210/t20021028_84000.htm (P.R.C.).

energy, and numerous other areas.³⁷ The amount of work put into developing a legal framework for environmental protection has been impressive. It is now generally accepted that China's environmental laws are relatively complete and that enforcement is now the real problem. This is true in part. However, like early U.S. environmental laws, China's environmental laws, though broad in coverage, still suffer from weaknesses that limit their effectiveness. Provisions are often vague and more akin to policy statements.³⁸ They frequently "encourage" rather than "require."³⁹ Perhaps most importantly, enforcement provisions are often extremely weak.

The Environmental Impact Assessment Law (EIA Law) offers a good example of this. The EIA Law requires an environmental impact assessment to be completed prior to project construction.⁴⁰ However, if a developer completely ignores this requirement and builds a project without submitting an environmental impact statement, the only penalty is that the environmental protection bureau (EPB) may require the developer to do a make-up environmental assessment.⁴¹ If the developer does not complete

37. Forestry Law (promulgated by the President, Sept. 20, 1984, effective Jan. 1, 1985), available at http://english.sepa.gov.cn/zffg/fl/198506/t19850618_49703.htm (P.R.C.); Fisheries Law (promulgated by the President, Jan. 20, 1986, effective Jul. 1, 1986), available at http://english.sepa.gov.cn/zffg/fl/198601/t19860120_49705.htm (P.R.C.); Law on the Protection of Wildlife (promulgated by the President, Nov. 8, 1988, effective Mar. 1, 1989), available at http://english.sepa.gov.cn/zffg/fl/198811/t19881108_49709.htm (P.R.C.); Marine Environmental Protection Law (promulgated by the Standing Comm. of the Nat.'l People's Cong., Aug. 23, 1982, effective Mar. 1, 1983), available at http://english.sepa.gov.cn/zffg/fl/198208/t19820823_49698.htm (P.R.C.); Land Administration Law (adopted by the Standing Comm. of the Nat.'l People's Cong., Aug. 29, 1998, effective Jan. 1, 1999, revised Aug. 28, 2004), available at http://english.sepa.gov.cn/zffg/fl/198606/t19860625_49742.htm (P.R.C.); Law on the Promotion of Clean Production (adopted by the Standing Comm. of the Nat.'l People's Cong., June 29, 2002, effective Jan. 1, 2003), available at http://english.sepa.gov.cn/zffg/fl/200206/t20020629_49743.htm (P.R.C.); Law on the Prevention and Control of Environmental Pollution by Solid Waste (promulgated by the President, Oct. 30, 1995, effective Apr. 1, 1996), available at http://english.sepa.gov.cn/zffg/fl/199510/t19951030_49701.htm (P.R.C.); Law on Conserving Energy (promulgated by the Standing Comm. of the Nat.'l People's Cong., Nov. 1, 1997, effective Jan. 1, 1998), available at http://english.sepa.gov.cn/zffg/fl/199711/t19971101_49712.htm (P.R.C.).

38. See ECONOMY, *supra* note 29, at 101 (reflecting the opinion of Chinese legal expert William Alford who has "remarked that China's environmental laws are like policy statements rather than laws in the Western sense").

39. See *id.* ("According to many environmental protection officials and experts in both China and the West, most Chinese environmental protection laws are too broad, providing local officials with little guidance on implementation."); see also Law on the Prevention and Control of Environmental Pollution by Solid Waste (promulgated by the President, Oct. 30, 1995, effective Apr. 1, 1996), available at http://english.sepa.gov.cn/zffg/fl/199510/t19951030_49701.htm (P.R.C.).

40. Environmental Impact Assessment Law (promulgated by Standing Comm. Nat.'l People's Cong., Oct. 28, 2002, effective Sept. 1, 2003), available at http://www.sepa.gov.cn/law/law/200210/t20021028_84000.htm (P.R.C.).

41. *Id.*

this make-up assessment within the designated time, only then is the EPB authorized to fine the developer.⁴² Even so, the possible fine is capped at a maximum of about US\$25,000, a fraction of the overall cost of most major projects.⁴³ The lack of more stringent enforcement mechanisms has resulted in a significant percentage of projects not completing legally required environmental impact assessments prior to construction. The allowance for “make-up” environmental assessments creates a loophole around the fundamental *raison d’être* for environmental impact assessment (i.e., to build environmental considerations into the development of projects and plans *before* they are completed). Chinese environmental officials and scholars are well-aware of these weaknesses in the law and openly acknowledge that they are the result of compromises in the legislative process and concerns about limiting economic growth.⁴⁴

Despite these problems, there are signs that law and public advocacy could play a larger role in China. China’s leaders increasingly speak of “ruling the country according to law,” enshrining the principle in the Constitution in 1999 and, as Randall Peerenboom has noted, “there is considerable direct and indirect evidence that China is in the midst of a transition toward some version of rule of law.”⁴⁵

Moreover, as environmental consciousness increases, people in China are beginning to turn to the courts and the law in general to advocate for their rights. Cases handled or supported by non-governmental organizations (NGO), Government-Organized NGOs (GONGOs), and “public interest” lawyers are an influential, though still limited, aspect of this phenomenon. The Center for Legal Assistance to Pollution Victims (CLAPV), a Beijing-based environmental law NGO, is perhaps the best-known of a new generation of environmental legal advocates. Since its inception in 1999, it has handled over 70 cases and obtained favorable results in nearly half of them.⁴⁶ The government-sponsored All-China Environment Federation (ACEF) has taken on 23 environmental matters covering over 3,000 people since its founding in 2005, according to media

42. *Id.*

43. *Id.*

44. Interviews on file with author; *see also* Lu Hui, *China Fails to Achieve Pollution Control Goal in 2006*, XINHUA, Feb. 12, 2007, http://news.xinhuanet.com/english/2007-02/12/content_5731364.htm (reporting that Zou Shengxian, Director of the State Environmental Protection Administration said, “[l]ocal protectionism has resulted in rampant violation of the environment”).

45. RANDALL PEERENBOOM, *CHINA’S LONG MARCH TOWARD RULE OF LAW* 6 (2002).

46. Xu Kezhu & Alex Wang, *Spotlight on NGO Activism in China: Recent Developments at the Center for Legal Assistance to Pollution Victims (CLAPV)*, CHINA ENVTL. SER., 2006, at 103, available at http://www.wilsoncenter.org/topics/pubs/CEF_SpecialReport.8.pdf.

reports.⁴⁷ In Yunnan Province, an environmentalist named Li Bo has established a center for rights-based environmental conservation advocacy in the wake of a successful campaign to protect indigenous land rights against illegal tourism development in the Tibetan village of Jisha.⁴⁸ Professor Wang Jin and several other professors and students at Peking University Law School brought a novel suit on behalf of the Songhua River, a species of fish, and an island in an ultimately unsuccessful attempt to press for relief with respect to the Songhua River benzene spill in 2005.⁴⁹ Some of these disparate efforts have shown promising initial success.

However, public interest litigation of this sort requires the expertise and funding that only comes from the creation of more established, well-funded organizations dedicated to the work. To make public interest litigation more effective, laws and policies will need to be instituted to encourage the development of environmental public interest law organizations, such as CLAPV.

Another development is the advent of informal local community coalitions turning to legal advocacy to protect their interests. The White Swan Residential Development in Guangzhou opposed the construction of high-voltage transmission towers only a short distance from residents' homes and discovered clear violation of the EIA Law's requirement to conduct an environmental impact assessment prior to construction.⁵⁰ The residents, who feared the health and property value impacts of the transmission towers, filed suit and used the attention garnered by the lawsuit to lobby various levels of government, ultimately obtaining an agreement by the power company to bury the offending power lines.⁵¹ Similar cases have arisen in Beijing, Hangzhou, and elsewhere and the communities have informally provided each other with strategic advice.

The Bai Wang Jia Yuan Residential Development case in Beijing involved transmission towers built in anticipation of the 2008 Beijing

47. Li Fangchao, *Environmental Issues Addressed More Urgently*, CHINA DAILY, May 4, 2006, http://www.chinadaily.com.cn/bizchina/2006-05/04/content_582631.htm.

48. Mary Kay Magistad, *Part II—China's Green Army*, THE WORLD, July 18, 2006, <http://www.theworld.org/?q=node/4065>.

49. *PetroChina Branch Fined for Pollution*, CHINA DAILY, Jan. 25, 2007, http://www.chinadaily.com.cn/china/2007-01/25/content_792982.htm; *100 Fa Ji Lin Shi Hua 100 Wan, Fa Dan Neng Fou Zhen She Qi Ye Di Chen Ben Wei Fa* [*Fine Jilin Petrochemical One Million, Can This Violation Ticket Frighten Industry Away From Low-Cost Violation of the Law*], PEOPLE'S DAILY, Jan. 25, 2007, <http://finance.people.com.cn/GB/1038/59942/59952/5325814.html>.

50. Interview with residents, Jan. 12, 2006; see also Chen Zhilong, *Dian Ci Fu She Wei Hai Jian Kang, Jü Min Gao Zheng Fu Bai Su* [*Electromagnetic Radiation Harms Health, Residents Sue the Government and Lose*] JIN YANG WANG—XIN KUAI BAO, Oct. 21, 2005, <http://www.southcn.com/tech/science/kjsh/200510210005.htm>.

51. *Id.*

Olympics and, while ultimately unsuccessful, led to the first public hearing on environmental impact assessment pursuant to the new Administrative Licensing Law.⁵² In another case, a residential community in Shenzhen opposed the construction of an underground traffic tunnel between Hong Kong and Shenzhen because the exhaust outlets were located too near to their homes.⁵³ Several residents examined the environmental impact statement for the project and, suspecting errors, conducted their own environmental impact assessment. The new assessment found grave inaccuracies in the original report and dangerous levels of pollution in violation of relevant environmental standards. Although residents did not succeed in preventing the project in this case, residents' actions reflect a new awareness of, and willingness to use, legal procedures as tools for advocacy.

As in other jurisdictions around the world, even where Chinese court cases are ultimately unsuccessful, litigation has often served as a catalyst to negotiated solutions or government enforcement.⁵⁴ An example of this was an administrative lawsuit against an environmental protection bureau in Hebei Province for approval of a highly-polluting plant that refined silver from film sludge.⁵⁵ The case ultimately resulted in two court rejections on lack of standing grounds. Nonetheless, the plaintiffs' advocates used the court case to highlight gross errors in the approved environmental impact statement (EIS) and caused the State Environmental Protection Administration to suspend the firm that authored the EIS and render the EIS invalid.⁵⁶ Without a valid EIS, the factory was ordered to cease operation and remains shuttered as of this writing.⁵⁷

52. *Shi Min Jū Zhu Huan Jing Wu Ran Ting Zheng Hui Qian Ye De Huan Jing Quan Zhi Zheng* [Environmental Rights Dispute of City Residents on the Night Before Environmental Pollution Hearing], PEOPLE'S DAILY, Aug. 13, 2004, <http://www.people.com.cn/GB/huanbao/35525/2707280.html>.

53. Cao Yunwu, *Liu Chan De, Di San Fang Huan Jing Ce Ping* [Aborted Third Party Environmental Evaluation], S. WEEKEND, Nov. 25, 2004, <http://www.southcn.com/weekend/top/200411250044.htm>.

54. See Minxin Pei, *Citizens v. Mandarins: Administrative Litigation in China*, CHINA Q. 843 (1997) (discussing the success rates of administrative litigation in China).

55. Interviews on file with author; see also Qie Jianrong, *Huan Bao Zong Ju Dui Wei Gui Huan Ping Zai Kai Fa Dan—Ji Ceng Huan Ping Shen Pi Cun Zai San Da Wen Ti* [SEPA Issues a Fine With Respect to an Illegal EIA—Basic-level EIA Approval Has Three Major Problems], FA ZHI WANG, Dec. 14, 2005 (author's translation).

56. Interview on file with author.

57. *Id.*

III. THE LEGAL FRAMEWORK FOR POLLUTION COMPENSATION CASES

Although there are a variety of channels for dispute resolution in China, environmental litigation and the role of lawyers and courts have received a great deal of interest from government, academic, and civil society in China in recent years. The next part of this article explores the existing legal foundation for environmental litigation in China, and the way these cases are brought. The vast majority of environmental litigation cases in China are what are known as “pollution compensation cases” (*wuran sunhai peichang anjian*), in which plaintiffs seek compensation for losses caused to property or health by environmental pollution.⁵⁸ The following discussion will set forth the key legal provisions governing this type of environmental litigation. The next section will discuss a number of issues with respect to environmental litigation in practice from the perspective of an environmental class action from Fujian Province decided in 2005.

The legal basis for pollution compensation claims can be found in the General Principles of Civil Law (“General Principles”) and the Environmental Protection Law. Article 124 of the General Principles states that:

Any person who pollutes the environment and causes damage to others in violation of state provisions for environmental protection and the prevention of pollution shall bear civil liability in accordance with the law.⁵⁹

Article 41 of the Environmental Protection Law (EPL) states that:

A unit that has caused an environmental pollution hazard shall have the obligation to eliminate it and make compensation to the unit or individual that suffered direct losses.⁶⁰

A number of specialized environmental protection statutes on air,

58. The focus here will be on key legal provisions related to civil litigation seeking compensation for damages from pollution. This is the most prevalent kind of environmental litigation. Administrative cases challenging, for example, the approval (or lack thereof) of projects that have environmental impacts constitute a less common, but nonetheless important, type of environmental litigation.

59. General Principles of the Civil Law (adopted Apr. 12, 1986), art. 124, available at <http://en.chinacourt.org/public/detail.php?id=2696> (P.R.C.).

60. Environmental Protection Law (promulgated by the President, Dec. 26, 1989, effective Dec. 26, 1989), art. 41, available at http://english.sepa.gov.cn/zftg/fl/198912/t19891226_49697.htm (P.R.C.).

water, solid waste, noise, and other issues also contain provisions concerning liability for pollution.⁶¹ The EPL sets forth certain defenses to liability. For example, if the harm is caused by pollution that resulted solely from natural disaster where reasonable precautionary measures were promptly taken then no liability attaches.⁶²

A. No-Fault Liability

Chinese law sets forth a no-fault liability regime for pollution compensation cases; that is, a plaintiff is not required to show a violation of applicable emissions standards or other fault by the defendant.⁶³ Note that the “in violation of state provisions” language in Article 124 of the General Principles has engendered some debate as to whether no-fault liability should apply in environmental cases. Scholars generally believe that Article 41 of the Environmental Protection Law, which does not require a violation of law as a condition to liability, controls.⁶⁴ The primary argument relies on general principles of Chinese statutory interpretation, which hold that in cases of conflict specialized provisions supersede more general ones, and newer provisions supersede older provisions.⁶⁵ This

61. See Marine Environmental Protection Law (promulgated by the Standing Comm. of the Nat'l People's Cong., Aug. 23, 1982, effective Mar. 1, 1983), arts. 32–40, available at http://english.sepa.gov.cn/zffg/fl/198208/t19820823_49698.htm (P.R.C.); Law on the Prevention and Control of Water Pollution (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 23, 1982, adopted May 11, 1984, amended May 15, 1996), art. 46, LAWINFOCHINA (last visited Feb. 21, 2007) (P.R.C.); Law on the Prevention and Control of Atmospheric Pollution (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 5, 1987, amended Aug. 29, 1995), art. 46, LAWINFOCHINA (last visited Feb. 21, 2007) (P.R.C.); Law on Water and Soil Conservation (promulgated by President of the People's Republic, June 29, 1991, effective June 29, 1991), arts. 32–40, LAWINFOCHINA (last visited Feb. 21, 2007) (P.R.C.); Law on the Prevention and Control of Environmental Pollution by Solid Waste (promulgated by the President of the People's Republic, Oct. 30, 1995, effective as of Apr. 1, 1996), arts. 59–73, available at http://english.sepa.gov.cn/zffg/fl/199510/t19951030_49701.htm (P.R.C.); Law on the Prevention and Control of Noise (promulgated by the President, Oct. 29, effective Mar. 1, 1997), ch. VII, LAWINFOCHINA (last visited Feb. 21, 2007) (P.R.C.); Law on Radioactive Pollution Prevention and Control (promulgated by the President, Oct. 30, 1995, effective Apr. 1, 1996), ch. VII, available at http://english.sepa.gov.cn/zffg/fl/199510/t19951030_49701.htm (P.R.C.).

62. Environmental Protection Law (promulgated by the President, Dec. 26, 1989, effective Dec. 26, 1989), art. 41, available at http://english.sepa.gov.cn/zffg/fl/198912/t19891226_49697.htm (P.R.C.) (“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.”).

63. *Id.*; General Principles of the Civil (adopted Apr. 12, 1986), art. 124, available at <http://en.chinacourt.org/public/detail.php?id=2696> (P.R.C.).

64. See Yuhong Zhao, *Environmental Dispute Resolution in China*, 16 J. ENVTL. L. 157, 175 (2004) (highlighting the lack of liability in the Environmental Protection Law).

65. Hu Jing, *A Case of Water Pollution Damage in Dexing City, Jiangxi Province*, in STUDIES ON ENVIRONMENTAL POLLUTION DISPUTES IN EAST ASIA: CASES FROM MAINLAND CHINA AND TAIWAN 135 (2001), available at http://www.clapv.org/new/file/20031217154827_1071647307.pdf.

argument is not merely academic. It is not uncommon for defendants to claim lack of violations as a defense to liability and for courts to accept this argument or utilize it as a basis for reducing compensation.⁶⁶ A clarification of this no-fault regime for pollution compensation cases is reportedly included in a draft amendment to the General Principles that is under consideration by the National People's Congress.⁶⁷

B. Reversal of Burden of Proof in Environmental Cases

Another key element of pollution compensation cases is the reversal of the burden of proof. This is clearly set forth in Article 4, Section 3 of the Supreme People's Court Various Regulations Regarding Evidence for Civil Suits, which states that: "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."⁶⁸ In practice, however, courts are still known to require plaintiffs to produce evidence sufficient to demonstrate causation.⁶⁹ Given the difficulty of proving causation in environmental pollution cases, this reversal of burden of proof is often the critical determinant of outcome in environmental litigations.

C. Statute of Limitations

Article 42 of the EPL sets forth a three year statute of limitations for claiming compensation, which starts at such time when "the party becomes aware of or should become aware of the pollution losses."⁷⁰ This is one year longer than the typical statute of limitations for tort cases under Chinese law.⁷¹ In the Rongping Case,⁷² described below, the court tolled

66. *Id.*; Yuhong, *supra* note 64, at 178. The author has also been personal witness to at least one basic people's court judge who, at an environmental law training, vigorously denied the applicability of the no-fault liability principle to environmental cases.

67. Interview with environmental law expert (Feb. 5, 2007) (on file with author).

68. 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) LAWINFOCHINA (last visited Mar. 19, 2007) (P.R.C.) (author's translation).

69. *See* Xu & Wang, *supra* note 46, at 103–104 (noting a number of cases dismissed for lack of standing to sue).

70. Environmental Protection Law (promulgated by the President, Dec. 26, 1989, effective Dec. 26, 1989), art. 42, available at http://english.sepa.gov.cn/zffg/fl/198912/t19891226_49697.htm (P.R.C.).

71. General Principles of the Civil Law (adopted Apr. 12, 1986), art. 135, available at <http://en.chinacourt.org/public/detail.php?id=2696> (P.R.C.).

72. *See generally* Shai Oster & Mei Fong, *In Booming China, A Doctor Battles A Polluting Factory-Foul Waters Lead to Flood of Protests Nationwide*, WALL ST. J., July 19, 2006, at A1

the statute of limitations during the period that plaintiffs were actively seeking resolution through administrative channels.

D. Remedies

The General Principles of Civil Law provide for ten primary forms of civil liability, including “cessation of infringement” (*tingzhi qinghai*); “compensation for losses” (*peichang sunshi*); “removal of obstacles” (*paichu fangai*); “elimination of dangers” (*xiaochu weixian*); and “restoration of original condition” (*huifu yuanzhuang*).⁷³ The Environmental Protection Law specifically mentions: (a) elimination of harm (*paichu weihai*);⁷⁴ and (b) compensation for losses⁷⁵; and in practice these are the two most common types of claims for relief in environmental pollution cases. “Elimination of harm” refers to three types of remedies: cessation of infringement, restoration of original condition, and elimination of dangers.⁷⁶ “Cessation of infringement” refers to an injunction to halt an ongoing harm. “Restoration of original condition” requires the infringing party to conduct clean-up or reparation of damage already caused. “Elimination of dangers” refers to situations where harm has not yet occurred, but a substantial threat of harm exists.

With respect to damages compensation, recovery may be had for actual damages and so-called emotional damages (*jingshen sunhai*), which are akin to pain and suffering.⁷⁷ Punitive damages are not available in pollution compensation cases.

E. Class Actions

Another aspect of pollution compensation cases is the prevalence of class actions or group lawsuits. Polluting activities often affect large numbers of people in similar ways. Class actions are governed by

(discussing the class action litigation brought by rural Chinese farmers against Rongping Joint Chemical Plant).

73. General Principles of the Civil (adopted Apr. 12, 1986), art. 134, available at <http://en.chinacourt.org/public/detail.php?id=2696> (P.R.C.).

74. Environmental Protection Law (promulgated by the President, Dec. 26, 1989, effective Dec. 26, 1989), art. 29, 39, available at http://english.sepa.gov.cn/zffg/fl/198912/t19891226_49697.htm (P.R.C.).

75. *Id.*

76. Yuhong, *supra* note 64, at 187–88.

77. 2001 Interpretation of the Supreme People’s Court on Certain Problems Regarding the Ascertainment of Compensation Liability for Emotional Damages in Civil Tort Cases, (promulgated by the Judicial Comm. of the Sup. People’s Ct., Feb. 26, 2001, effective, Mar. 10, 2001) LAWINFOCHINA (last visited Mar. 15, 2007) (P.R.C.).

provisions of the Civil Procedure Law (1991).⁷⁸ Article 54 concerns class actions in which the number of litigants is fixed.⁷⁹ Article 55 concerns cases in which the number of plaintiffs or defendants is not fixed.⁸⁰ With Article 55 class actions, “the people’s court may issue a public notice, stating the particulars and claims of the case and informing claimants to file at the people’s court within a fixed period of time.”⁸¹ Class actions may have two to five representatives.⁸²

In either type of class action, the representatives’ actions are binding on the class. However, “modification to or waiver of claims of action, or confirmation of the claims of the other party, or resorting to compromise by the representatives shall be subject to the approval of the party they represent.”⁸³ Article 55 also provides that judgments or orders of the court “shall be effective for all the claimants who have filed at the court,” and shall be binding on those with similar claims who initiated legal proceedings during the prescribed litigation period.⁸⁴ Additionally, the Civil Procedure Law dictates that “[t]he same judgments or orders shall be binding on the claimants who have not filed at the court but initiated legal proceedings during the limitation of action.”⁸⁵

Recent guidelines issued by the All-China Lawyer’s Association placing certain restrictions on cases with ten or more plaintiffs may, in practice, limit utilization of class action procedures.

F. Costs

Costs of litigation, including attorney’s fees, court costs, and expert fees, can be high in any country. A particularly onerous requirement of Chinese law is the “case acceptance fee” (*anjian shouli fei*), which is calculated as a percentage of the total amount of relief requested.⁸⁶ Plaintiffs must pay anywhere from 0.5 to 4% of the relief requested as an

78. Civil Procedure Law (promulgated by the President on Apr.9, 1991, effective Apr.9, 1991), arts. 54, 55, LAWINFOCHINA (last visited Mar. 5, 2007) (P.R.C.).

79. Civil Procedure Law (promulgated by the President on Apr. 9, 1991, effective Apr. 9, 1991), art. 54, LAWINFOCHINA (last visited Mar. 5, 2007) (P.R.C.).

80. *Id.* art. 55.

81. *Id.*

82. *Id.*

83. Civil Procedure Law (promulgated by the President on Apr. 9, 1991, effective Apr. 9, 1991), arts. 54, 55, LAWINFOCHINA (last visited Mar. 5, 2007) (P.R.C.).

84. *Id.*

85. *Id.*

86. Notice of the Supreme People’s Court on the Printing and Distribution of “Measures for Handling Lawsuit Fees for People’s Courts” (promulgated by Sup. People’s Ct. June 29, 1989), available at <http://www.court.gov.cn/lawdata/explain/civilcation/200304010191.htm>.

acceptance fee.⁸⁷ The rules require the party that loses a lawsuit to assume responsibility for the acceptance fee.⁸⁸ 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.⁸⁹ If a losing defendant does not pay the amount ordered by the court, the plaintiff must pay a fee to institute execution (*zhixing*) proceedings.⁹⁰ Proposals to prohibit arbitrary levying of “other litigation costs” and to place the cost of execution proceedings on the party that owes payment are currently under consideration.⁹¹

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.⁹² In the Rongping Case, noted below, appraisal fees totaled 100,000 yuan (US\$12,903).⁹³ Fees on this order of magnitude can equal many years of salary for an average individual in China.⁹⁴ In this regard, the pooling of financial resources allowed by class actions may be the most likely way to surpass this barrier.

IV. THE CASE OF *ZHANG CHANGJIAN ET AL. V. RONGPING CHEMICAL PLANT*

The case of *Zhang Changjian et al. v. Pingnan Rongping Chemical Plant* (the “Rongping Case”) provides an illustration of how these legal principles are carried out in practice and how various legal and non-legal factors potentially affect the outcome of cases.⁹⁵ This case concerned

87. *Id.* art. 5. Plaintiffs must pay 50 yuan for the portion of requested relief less than 1,000 yuan; 4% on the portion greater than 1,000 up to 50,000 yuan; 3% on the portion greater than 50,000 up to 100,000 yuan; 2% on the portion greater than 100,000 up to 200,000 yuan; 1.5% on the portion greater than 200,000 up to 500,000 yuan; 1% on the portion greater than 500,000 up to 1,000,000 yuan; 0.5% on the portion greater than 1,000,000 yuan. *Id.*

88. *Id.* art. 19.

89. Interview with environmental lawyer (Feb. 6, 2007) (on file with author).

90. Notice of the Supreme People’s Court on the Printing and Distribution of “Measures for Handling Lawsuit Fees for People’s Courts” (promulgated by Sup. People’s Ct. June 29, 1989.), art.8, available at <http://www.court.gov.cn/lawdata/explain/civilcation/200304010191.htm> (P.R.C.).

91. Interview with environmental lawyer (Feb. 6, 2007) (on file with author).

92. Interview with environmental law expert (Feb. 8, 2007) (on file with author).

93. *Zhang Changjian et al. v. Pingnan Rongping Chem. Plant* (Pingnan Interm. People’s Court, Apr. 2005) (on file with author); *Zhang Changjian et al. v. Pingnan Rongping Chem. Plant* Fujian Provincial High People’s Court, Nov. 2005) (on file with author).

94. The World Bank, China Quick Facts, <http://web.worldbank.org/> (follow “Countries” hyperlink; then follow “China” hyperlink; then follow “Data and Statistics” hyperlink; then follow “Facts and Figures” hyperlink) [hereinafter The World Bank, China Quickfacts]. The average income in 2005 was US\$1,290US. *Id.*

95. Ping Nan Lv Se Zhi Jia [Pingnan Home of Green], <http://www.pnlszj.ngo.cn/cn> (last visited Mar. 15, 2007). Ping Nan Lv Se Zhi Jia is an organization started by the lead plaintiff in the

pollution emanating from Fujian Province (Pingnan) Rongping Chemical Ltd., Asia's largest producer of potassium chlorate,⁹⁶ which is located in the southeastern province of Fujian (the "Rongping Plant"). Plaintiffs alleged that pollution first commenced in 1992 with the construction of the first stage of the plant. The most serious harms occurred, however, after 1998 when the second stage of the plant was constructed.⁹⁷ It was then that villagers began to notice that local timber stands, bamboo, fruit trees, and crops began to wither and die.⁹⁸ The volume of fish and shrimp in the local waters decreased markedly.⁹⁹ Villagers began to experience a variety of illnesses that were not common before the factory began production and incidences of cancer increased markedly.¹⁰⁰

Beginning in 1999, Mr. Zhang Changjian, a local "barefoot doctor," and a number of other villagers first attempted to obtain relief through a letter writing campaign to various government agencies.¹⁰¹ In 2001, Mr. Zhang organized a formal petition that he sent to China's State Environmental Protection Administration (SEPA). The actions of the villagers drew attention from national media and, ultimately, led to SEPA designating the plant one of the 55 worst polluters in China.¹⁰² In 2002, with the assistance of the Beijing-based Center for Legal Assistance to Pollution Victims (CLAPV),¹⁰³ Mr. Zhang and four other villagers, acting as class representatives (*susong daibiao ren*), filed a class action lawsuit in the Ningde Municipality Intermediate People's Court that included more than 1,700 plaintiffs.¹⁰⁴ Plaintiffs requested the following relief:¹⁰⁵

1. A court order for defendant to immediately stop the infringement,
2. 10,331,440 yuan (US\$1.3 million) in compensation for losses to crops, bamboo, timber, etc,

Rongping case, Zhang Changjian.

96. Shai Oster & Mei Fong, *In Booming China, A Doctor Battles a Polluting Factory*, WALL ST. J., July 19, 2006, at A1.

97. Duan Jongqing, *Pingnan Environmental Protection Case: A Tragic Trade*, CAIJING MAGAZINE, Sept. 14, 2005, available at [http://www.gvbchina.org/EnglishWeb/11111Environmental%20News/\(14%20Sep%202005\)The%20Pingnan%20Environmental%20Protection%20Case.htm](http://www.gvbchina.org/EnglishWeb/11111Environmental%20News/(14%20Sep%202005)The%20Pingnan%20Environmental%20Protection%20Case.htm).

98. Oster & Fong, *supra* note 96.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. Lawyers Wang Canfa and Zhang Jingjing from CLAPV, as well as a local lawyer named Lin Dingbin represented the class.

104. Sarah Schafer, *China: Suing for the Environment*, NEWSWEEK INT'L, Nov. 20, 2006, available at <http://www.msnbc.msn.com/id/15672081/site/newsweek/>.

105. Duan, *supra* note 97.

3. 3,203,200 yuan (US\$413,316) in emotional damages, and
4. a court order for defendant to clean up waste within the plant and in the back mountains.

Plaintiffs prevailed at the Intermediate People's Court and on appeal to the Fujian Provincial High People's Court.¹⁰⁶ The final judgment ordered defendant: (a) to immediately stop the infringement, (b) to pay plaintiffs 684,178.2 yuan (approximately US\$88,000) in compensation for losses to crops, bamboo, timber, etc, and (c) to clean up chromium-containing waste in the factory and in the back mountains within one year.¹⁰⁷ Plaintiffs' request for "emotional damages" (*jingsheng sunhai peichang*) was denied. The 77,683 yuan case acceptance fee was allocated as follows: 45,000 yuan to plaintiffs; 32,683 yuan to defendant.¹⁰⁸ However, plaintiffs' portion of the acceptance fee was waived by the court. Responsibility for paying the 100,000 yuan appraisal fee was placed on defendant.¹⁰⁹

Despite the relatively modest amount of compensation per plaintiff ultimately achieved, the legal victory was hailed as a landmark by domestic and international media, and was selected as one of the "ten most influential Chinese lawsuits of 2005" by a consortium led by the Legal Daily and the All-China Lawyers Association.¹¹⁰

While one case is an insufficient sample from which to draw definitive conclusions, some preliminary lessons can be drawn from this case.

A. External Issues

Local protectionism and pressures on judicial independence were present in this case. Indeed, the local government had a strong interest in maintaining the factory in operation as it accounted for a third of the county's tax and other revenues.¹¹¹ Under such circumstances, it is typically very difficult to obtain judgment against such an entity because of the economic benefit to local government and the sway that government holds over all hiring, firing, promotion, and budgeting decisions at the

106. Schafer, *supra* note 104.

107. *Id.*

108. Zhang Changjian et al. v. Pingnan Rongping Chemical Plant (Pingnan Interim. People's Court, Apr. 2005) (on file with author).

109. *Id.*; Zhang Changjian et al. v. Pingnan Rongping Chemical Plant (Fujian Provincial High People's Court, Nov. 2005).

110. *Fa Zhi Ri Bao* "2005 Zhong Guo Shi Da Ying Xiang Xing Su Song" Ping Xuan Jie Xiao [Legal Daily "2005 China Ten Most Significant Impact Litigations" Selection Announcement], XINHUA, Jan. 1, 2006, http://news.xinhuanet.com/legal/2006-01/09/content_4026867.htm.

111. Oster & Fong, *supra* note 96.

court.¹¹²

Plaintiffs were able to file the case in the Intermediate People's Court because it was considered to have met the threshold set forth in the law as a case of "significant impact within the particular jurisdiction."¹¹³ This decision to commence the litigation at the Intermediate People's Court was likely helpful to plaintiffs. The Intermediate People's Court was located more than a two-hour drive from the site of the factory. The basic level court, located within the same county as the factory, would have been most susceptible to local factors. This jurisdictional decision also allowed for appeal to the provincial High Court, located in Fuzhou City. The simple physical distance from the factory site, along with the tendency towards higher quality judges in the upper-level courts, may have combined to give plaintiffs a fairer trial.

Beginning in 2006, Supreme People's Court rules have made it more difficult to file a class action above the basic level courts. On December 30, 2005, the Supreme People's Court issued a "Notice Regarding Problems with the Acceptance of Class Action Lawsuits by the People's Courts,"¹¹⁴ which stated that class action lawsuits with large numbers of litigants should be accepted by the basic level People's Court.¹¹⁵ Cases with significant impacts within the area under the jurisdiction of the High People's Court should be handled by the Intermediate People's Court. If strictly followed, this guidance would appear to force cases to be accepted at a court one level lower down than required by the Civil Litigation Law,¹¹⁶ and could potentially exacerbate pressures from local protectionism for these cases.

Plaintiffs clearly faced great pressure in their village. Lead plaintiff, Zhang Changjian, was assaulted while collecting water samples, and his wife was attacked at their home.¹¹⁷ The county government shut down Mr. Zhang's clinic.¹¹⁸ When the villagers attempted to raise funds on their own to pay for a lawsuit, their donations box was confiscated.¹¹⁹ The plaintiffs' lawyers believe that the difference between the requested compensation and

112. Donald Clarke, *The Execution of Civil Judgments in China*, 141 CHINA Q. 65, 71 (1995).

113. Civil Procedure Law (promulgated by the President on Apr. 9, 1991, effective Apr. 9, 1991), art. 19(2), LAWINFOCHINA (last visited Mar. 5, 2007) (P.R.C.).

114. Notice Regarding Problems with the Acceptance of Class Action Lawsuits by the People's Courts (promulgated by the Sup. People's Ct. Dec. 30, 2005, effective Jan. 1, 2006) LAWINFOCHINA (last visited Mar. 16, 2007) (P.R.C.).

115. *Id.*

116. Civil Procedure Law (promulgated by the President on Apr. 9, 1991, effective Apr. 9, 1991), art. 19, LAWINFOCHINA (last visited Mar. 5, 2007) (P.R.C.).

117. Oster & Fong, *supra* note 96.

118. *Id.*

119. Interview with environmental lawyer (Feb. 7, 2007) (on file with author).

the actual amount of compensation granted may be the result of local protectionism.¹²⁰

It is possible, for example, that local protectionism resulted in lower compensation estimates in the key reports upon which the courts relied.¹²¹ The court used an appraisal report authored by Mr. Tang Qingshan, a senior engineer from the Ningde Municipality Bureau of Forestry (the “Tang Report”), in determining compensation.¹²² Mr. Tang was commissioned by the court, with the approval of both parties, to do the primary appraisal of damages for the case.¹²³ The court also relied on a report with calculations of the economic value of damages described in the Tang Report and a Pingnan County report entitled “Ping Township Xiping Village Pollution Situation Due to Rongping Chemical Factory.”¹²⁴

B. Difficulties in Obtaining Remedies

Even when the court decides in favor of plaintiffs, it can be difficult to enforce orders to stop infringements or to obtain payment of compensation. This was the situation in the Rongping case.

First, the court ordered the defendant to immediately “stop infringement” (*tingzhi qinhai*) against the plaintiffs, but did not specify how this was to be accomplished.¹²⁵ As of the publication of this article, it is unclear whether the defendant has taken any action in response to this order. The plaintiffs’ lawyers acknowledge that the request for relief should have provided the court with a more specific recommendation.¹²⁶ Because the relief order was not specific, it will be difficult for plaintiffs to seek enforcement or even to know whether the defendant has complied. As was the case in *Duckworth*¹²⁷ in the United States, it is difficult at present in China to obtain an injunction against polluters to stop production or even to install equipment to reduce pollution, because of costs involved and the potential negative impacts on economic growth.¹²⁸

Second, at the time of this writing, over a year after the final decision in

120. *Id.*

121. *Id.*

122. Ashley M. Howlett, Partner, Jones Day, *International Construction Developments—What Comes After Partnering?*, May 2002, http://www.jonesday.com/news/news_detail.aspx?newsID=S290.

123. *Id.*

124. PING TOWNSHIP XIPING VILLAGE POLLUTION SITUATION DUE TO RONGPING CHEMICAL FACTORY (on file with author).

125. See Duan, *supra* note 97 (noting the court ordered the defendant to “immediately stop causing damage to the plaintiffs”).

126. Oster & Fong, *supra* note 96.

127. *Madison v. Ducktown Sulphur, Copper & Iron Co.*, 83 S.W. 658, 666–67 (1904).

128. Xu & Wang, *supra* note 46, at 103–104.

this case, plaintiffs still have not received any of the funds. The factory has paid the funds to the county court; however, the court refuses to release the money until a system has been established for determining how to allocate the money among the plaintiffs in the class.¹²⁹

Although the court granted significantly less relief than requested, and enforcement of the court's decision has been difficult to obtain, plaintiffs nonetheless prevailed. This victory came despite the various pressures militating against a court victory. A number of factors may have contributed to this outcome.

C. Media and Central Government Attention

Lawyers on the case believe that the high-level of media attention on the case contributed to the favorable outcome for plaintiffs.¹³⁰ Central government scrutiny may have also played a role. The State Environmental Protection Administration was aware of the case and had listed the defendant as one of the 55 worst polluters in the country.¹³¹

D. Presence of a Large Class

The lawyers on the case noted that the presence of a large class helped to bring about a ruling for plaintiffs by helping to sustain media and government attention. This attention created the possibility of unrest if an unfair ruling were issued. Moreover, the large class made the economic aspects of this lawsuit much more feasible. While a US\$10,000 case acceptance fee and US\$12,903 appraisal fee could easily equal many years of salary for an average Chinese citizen,¹³² such an amount divided among 1,721 plaintiffs amounts to a mere US\$13.31 per person.

Courts have discretion to divide class actions into individual cases and courts in China almost always do so.¹³³ Experts have posited a number of theories as to why this is so prevalent in practice. First, courts can increase their revenue by separating class actions into individual cases. The court in the Rongping case not only maintained the class, but also waived 45,000 yuan of the acceptance fees allocated to the plaintiffs and so only

129. Oster & Fong, *supra* note 96.

130. Interview with environmental lawyers (Feb. 7–8, 2007) (on file with author).

131. Oster & Fong, *supra* note 96.

132. The World Bank, China Quick Facts, *supra* note 94.

133. Yuhong, *supra* note 64, at 177. It is not entirely clear why the class was not separated in the Rongping Case; however, the administrative burden of handling nearly 2,000 cases if the class action were separated may have contributed to maintenance of the class.

would have claimed 32,683 yuan (US\$4,217).¹³⁴ This particular court did not act to maximize court fees. Second, one important metric of work achievement for a court is the number of cases handled. A court can boost its case load numbers by separating class actions into individual cases. Third, courts sometimes claim that class actions may lead to social instability.

Concern about the impact of class actions on social stability seems to have prompted the All-China Lawyers Association's (ACLA) recent guidelines placing restrictions on "collective cases" (*quntixing anjian*), or cases with more than ten plaintiffs.¹³⁵ These guidelines may limit the willingness of lawyers to take on such cases. For example, the "[ACLA] Guiding Opinion Regarding Lawyers Handling Collective Cases" ("Guiding Opinion"), among other things, requires lawyers taking collective cases to report such cases immediately to the local court, bar association, and relevant government agency.¹³⁶ If lawyers discover any problem or trend that may lead to a conflict, the lawyer has the duty to report to the courts and administrative agencies immediately.¹³⁷ Law firms that take on such cases also have new obligations, which include reporting to the local bar association and having at least three partners, including the director of the firm, sign on to take responsibility for the case.¹³⁸ Anecdotal evidence suggests that such restrictions will have a chilling effect on the willingness of lawyers to take on *pro bono* environmental lawsuits.¹³⁹ For example, many *pro bono* environmental cases have traditionally been taken by mid-level associates, who may be reluctant to go to three partners in the firm to seek approval for the case.

E. Knowledge of Correct Legal Doctrine

In the Rongping case, the judges in both trials correctly applied the doctrines of no-fault and reversal of burden of proof. The defendant presented evidence that the factory's equipment was modern and that a provincial environmental protection bureau inspection had shown its air and

134. Zhang Changjian et al. v. Pingnan Rongping Chem. Plant (Pingnan Interm. People's Ct., Apr. 2005) (on file with author); Zhang Changjian et al. v. Pingnan Rongping Chemical Plant (Fujian Provincial High People's Ct., Nov. 2005).

135. *Zhong Hua Quan Guo Lv Shi Xie Hui Guan Yu Lv Shi Ban Li Qun Ti Xing An Jian Zhi Dao Yi Jian* [All-China Lawyers Association Guiding Opinion Regarding Lawyers Handling Collective Cases], available at <http://www.acla.org.cn/pages/2006-5-15/s34852.html> (last visited Feb. 23, 2007).

136. *Id.*

137. *Id.*

138. *Id.*

139. Interview with environmental law expert (Feb. 7, 2007) (on file with author).

water emissions to be in accordance with standards. However, the court correctly noted that:

In accordance with the “Supreme People’s Court Certain Regulations Regarding Evidence in Civil Litigation” in compensation litigation brought about by environmental pollution, the polluter has the burden to raise evidence to show the lack of causal connection between his behavior and the harmful result So, although [defendant] has provided evidence that its environmental protection certification is in order, its machinery is first rate, its emissions of the “three wastes” [gas, water, industrial residue] meet standards, there have been no pollutant accidents, and related expert testimony, but whether or not pollutant discharges meet standards is not the criteria by which we determine whether liability attaches to a polluting unit.¹⁴⁰

Moreover, the defendant claimed that another nearby factory caused the harm to crops, bamboo, fruit trees, and timber stands.¹⁴¹ The court correctly placed the evidentiary burden on the defendant and held that the defendant had provided no appraisal evidence to demonstrate causation between the emissions from the nearby factory and the damage suffered by plaintiffs.¹⁴²

Furthermore, lawyers for the plaintiffs believe that the judge applied the correct legal doctrine in the initial court decision because the judge had received specialized environmental law training.¹⁴³ The courts’ application of the correct legal doctrine could also be attributed to the lawyers for plaintiffs, who were among the most experienced environmental litigators in China.¹⁴⁴

140. Zhang Changjian et al. v. Pingnan Rongping Chemical Plant (Pingnan Interm. People’s Ct., Apr. 2005) (on file with author); Zhang Changjian et al. v. Pingnan Rongping Chemical Plant (Fujian Provincial High People’s Ct., Nov. 2005).

141. *Zhang Changjian et al.* (Fujian Provincial High People’s Ct., Nov. 2005).

142. *Id.*

143. Schafer, *supra* note 104. The judge at the Intermediate People’s Court had taken part in an environmental law training held by the Center for Legal Assistance to Pollution Victims (CLAPV). Lawyers for plaintiffs, who were from CLAPV, do not believe that the relationship between CLAPV and the judge through these trainings created any improper or unethical influence on the decision. *Id.*

144. *See id.* (noting that CLAPV has taken more than 80 cases).

V. PUBLIC INTEREST LITIGATION IN CHINA

Certain sectors of the Chinese government have recognized the value of environmental litigation. To expand the impact of environmental litigation on environmental protection, various sectors of the government are exploring the possibility of establishing some form of public interest litigation to address many of the barriers found in traditional pollution compensation litigation. These include the high cost of litigation, the reluctance of local residents to sue, and the difficulties of causation.¹⁴⁵ The State Council December 2005 Decision previously mentioned specified “public interest litigation” as a favored tool for environmental protection.¹⁴⁶

Broadly speaking, there are two types of proposals being forwarded, (1) broadened standing for citizens and legal persons, including NGOs, to bring lawsuits in the public interest, and (2) expanded authority for the procuratorate (now authorized to bring and supervise criminal cases) to bring civil suits on behalf of the public interest.¹⁴⁷ One initial point to note is that there is no clear definition of what constitutes the “public interest.” The notion of “public environmental rights and interests” (*gongzhong huanjing quan*) has appeared in Chinese law; however, a specific definition has not been provided.¹⁴⁸ One expert has posited that any continuing pollution or “ecosystem destruction” (*shengtai pohuai*) is an

145. Interestingly, none of the Chinese proposals reviewed for this essay included proposals to ease the burden of proving causation, which was a primary outcome of the creation of citizen suit provisions in the U.S. This may reflect the belief that the reversal of burden of proof in pollution compensation cases already provides sufficient and reasonable assistance to plaintiffs, and that the primary task now is to ensure that judges decide cases according to the existing legal principles.

146. Decision on Implementation of Scientific Development and Strengthening of Environmental Protection (promulgated by State Council, Dec. 3, 2005), available at <http://english.gov.cn/documents/gazettes/index.htm> (P.R.C.).

147. The procuratorate plays a similar role to a prosecutor in the United States, but also has a much broader role in supervising the courts. The Supreme People’s Procuratorate is structurally at the same level as the Supreme People’s Court. See The Supreme People’s Court, <http://english.gov.cn/links/supremeprocucuratore.htm> (last visited Mar. 19, 2007) (stating that the Supreme People’s Procuratorate is authorized “to handle charges, appeals, and reports made by citizens” among other functions).

148. See Environmental Impact Assessment Law (promulgated by Standing Comm. Nat’l People’s Cong., Oct. 28, 2002, effective Sept. 1, 2003), art. 11, available at http://www.sepa.gov.cn/law/law/200210/t20021028_84000.htm (P.R.C.).

Toward special plans which may possibly cause adverse environmental impact and involve environmental rights and interests of the public, the special plan drafting organ shall . . . hold evidentiary meetings or testimony hearings or adopt other forms of soliciting opinions on the environmental impact report from relevant units, experts and the public.

Id. (author’s translation).

appropriate object of public interest litigation, consistent with the goal of obtaining injunctions against harmful activity or orders to restore damage done.¹⁴⁹

A. *Expanded Standing for Citizens and Legal Persons*

The first type of public interest litigation refers to a system that allows citizens and legal persons (particularly officially registered environmental NGOs) to bring either civil or administrative lawsuits on behalf of the public interest. In early 2005, this form of public interest litigation garnered a great deal of media and scholarly attention when Liang Congjie, the founder and chairman of China's first registered environmental NGO, Friends of Nature,¹⁵⁰ submitted a proposal entitled "Rapidly Establish a Complete Environmental Public Interest Litigation System" to the Chinese People's Political Consultative Conference.¹⁵¹ The proposal called for, among other things, an amendment to relevant laws to allow any work unit or individual to sue when the "public interest" has been harmed and to eliminate the statute of limitations for environmental public interest cases.¹⁵² Some proposals clarify that non-governmental environmental organizations should have standing to sue, but that they must be officially registered environmental NGOs.¹⁵³ This sort of NGO litigation is well-suited to situations where there might be no clear plaintiff (such as in cases of harm to endangered species or damage to national forests) or where potential plaintiffs may be afraid to sue or otherwise lack the capacity to sue. Such a system might include something akin to the advanced notice requirements set forth in U.S. citizen suit provisions. This requires the plaintiff to first notify relevant government agencies and the proposed

149. Xu & Wang, *supra* note 46, at 103–104. In contrast, China's current system mainly provides for compensation. *Id.*

150. *Lawmakers, Advisors Concerned About Environment*, PEOPLE'S DAILY, Mar. 11, 2005, http://english.people.com.cn/200203/11/eng20020311_91870.shtml.

151. Guo Xiaojun, *TAO Chun, Liang Cong Jie: Huan Bao Gong Yi Su Song Zhi Ji Dai Jian Li [Liang Congjie: Promptly Establish Environmental Protection Public Interest Litigation System]*, PEOPLES DAILY, Mar. 7, 2005, available at <http://env.people.com.cn/GB/1072/3223270.html> (author's translation).

152. *Id.*; see also Wang Jin, *Zhong Guo Huan Jing Gong Yi Su Song: He Shi Cai Neng Fu Chu Shui Mian [When Will China's Environmental Public Interest Litigation Come Into Our Lives?]*, SHI JIE HUAN JING [WORLD ENVIRONMENT], June 2006, at 18; Chen Wan Zhi Wei Yuan: *Wan Shan Xian Xing Fa Lv Tui jin Gong Yi Su Song [Committee Member Chen Wanzhi: Perfect the Existing Law and Promote Public Interest Litigation]*, LEGAL DAILY, Mar. 9, 2006, http://www.legaldaily.com.cn/bm/2006-03/10/content_280024.htm.

153. Bie Tao, *Wo Guo Huan Jing Gong Yi Su Song Li Fa She Xiang [Initial Plan for China's Environmental Public Interest Litigation Legislation]*, CHINA ENVTL. NEWS, Mar. 10, 2006, <http://www.cenews.com.cn/news/2006-03-10/54641.php>.

defendant in advance of filing suit to allow the opportunity for the government to commence enforcement action and the proposed defendant to remedy the situation on its own.¹⁵⁴

B. Procuratorate Public Interest Litigation

Another proposal is to make the procuratorate (broadly speaking, akin to prosecutors in the United States) a permissible plaintiff in civil and administrative public interest lawsuits.¹⁵⁵ Although the law does not explicitly provide for it, procuratorates have already brought civil lawsuits with respect to environmental damage. For example, in May 2004, the Yan Jiang Procuratorate in Sichuan Province sent a letter to eight stone materials factories that were causing serious local river pollution requesting that they stop pollution or face civil lawsuit brought by the procuratorate.¹⁵⁶ The procuratorate took this action after local environmental protection bureau orders to correct the pollution went unheeded.¹⁵⁷ Moreover, local residents were reluctant to bring suit because they believed the cost to be prohibitive and their chances of success in the courts to be slim.¹⁵⁸ The first known instance of procuratorates bringing civil lawsuits occurred, not in the environmental arena, but with respect to the sale of state-owned property at below legally-stipulated prices. The Henan Province Fangcheng County Procuratorate successfully sued the local Industry and Commerce Bureau, asking the court to annul the sales contract.¹⁵⁹ Since 1997, at least 200 such cases have been brought around China.¹⁶⁰ In the 70 cases with known court decisions, the procuratorate prevailed in every one.¹⁶¹ Defendants did not appeal a single one of these cases.¹⁶²

Since 1997, procuratorates in a number of places, including Shanxi, Sichuan, and Hunan, have brought civil environmental claims against polluters; however, such cases to date have always been “bootstrapped” onto criminal suits that are clearly within the current legal authority of the

154. Clean Air Act, 42 U.S.C. § 7604(b) (2000); Clean Water Act, 33 U.S.C. § 1365(b)(1)(A) (2000).

155. Jiang Wei & Duan Housheng, *Lun Jian Cha Ji Guan Ti Qi Min Shi Su Song* [Discussing Civil Litigation By the Procuratorate], (XIAN DAI FA XUE) MODERN LAW SCIENCE, Dec. 2000.

156. Bie Tao, *Huan Jing Gong Yi Yu Huan Jing Gong Su* [Environmental Public Welfare and Environmental Public Prosecution], GREEN VISION, 2005.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

procuratorate.¹⁶³ Given the efficacy of procuratorate-led public interest litigation, it is no wonder that environmental officials are supportive of a public interest litigation system that involves the procuratorate.

Nonetheless, it would be a mistake for China to only allow government-led public interest litigation. A system that allows both government and public litigation to protect the environment would, however, be optimal. The sheer magnitude of China's environmental challenges requires a broader system that includes government litigation and wider support for public citizen enforcement. The United States long ago recognized that citizen litigation could provide an indispensable supplement to scarce government enforcement resources and serve to supervise recalcitrant government agencies as well. China's State Environmental Protection Administration, with some 300 employees at the national level, suffers from an even greater lack of resources and could benefit even more from enforcement assistance from the public and the procuratorate.

CONCLUSION

Environmental law and public involvement in enforcement have played a constructive and indispensable role in environmental protection in the U.S. and other countries. The environmental challenges in China today are immense, but so are the opportunities for environmental improvement if the legal tools and involvement of the public, so effective elsewhere, can be harnessed in the name of environmental protection.

163. *Id.*

