

**KEYNOTE: SPECIAL FUNCTIONS OF PROMOTING
PUBLIC PARTICIPATION IN ENVIRONMENTAL
PROTECTION IN AIDING POLLUTION VICTIMS**

*Professor Wang Canfa*²

Thursday, March 1, 2007

PROFESSOR WANG CANFA
(TRANSLATED)³

Thank you. Thank you every one. Hello. The first thing I want to say is I feel so lucky and so happy to be in the beautiful state of Vermont. And also I want to thank Dean Jeff Shields for inviting me here to attend this event. I want to thank Professor Tseming Yang. When he was in Beijing we had several nice discussions which lead to this visit in Vermont. I want to thank everybody here, because right now is time after work but you're still willing to be here and attend this event. I'm very happy and excited that you all are here. And I feel especially lucky to meet Professor Jeremy Cohen who is the Chinese law specialist here. I wanted to meet with him several years ago but I didn't make it. And also Professor Jeremy Cohen is a special professor at China University of Political Science and Law. I feel extremely fortunate to meet him here. I'm also very happy to meet Professor Li Zhiping from Sun Yat-sen University School of Law, and also Alex Wang from the Natural Resource Defense Council's Beijing office. Actually I can speak a little bit English, but my familiarity with English is not comparable to my familiarity with environmental law in China. So I decided to go ahead with this presentation in Chinese.

The topic of my presentation today is Chinese environmental law enforcement, current deficiencies, and suggested reforms. I'm going to talk about five topics tonight. The first one is the current system of Chinese environmental laws, rules, and regulations. The second topic is about deficiencies in environmental law enforcement in China. I'm

2. Wang Canfa is a Professor at the China University of Political Science and Law in Beijing and Director of the Center for Legal Assistance to Pollution Victims (CLAPV).

3. Professor Wang Canfa's keynote speech was translated by Anne-Marie Liu.

going to discuss why there is not sufficient environmental law in China. I'm also going to discuss the potential ways of reforming in order to address China's environmental legal problems. I'm also going to give you several cases in order to tell you how the environmental law is enforced in China. Since the time is limited but the content is complicated, I'm not going to discuss every topic in detail. Since the time is limited we're not going to discuss the work we do with the Center for Legal Assistance to Pollution Victims, I've saved that content for tomorrow's presentation. So, please come on tomorrow. I hope tomorrow's snowstorm will not make you guys stop and not come in to attend this event, so please come.

China started legislation on environmental law about three decades ago, that's at the end of 1970s. On September 13, 1979, the Chinese government issued provision Environmental Protection Law, and that's the first environmental law in China. So the development of China's environmental legislation system is at least two decades behind the environmental legislation in Western countries. But since it started developing it developed very quickly, and in the past 20 years there has been a set of relatively comprehensive environmental law system, it's actually the law branch which is developing the most quickly in China.

Starting from 1979 'til now, it's about 25 years and China has now established a relatively comprehensive environmental law system. And there are a couple contents of this law system. The first one is the comprehensive environmental protection laws. This system includes the provision in the constitutional law related to environmental protection. This system also includes the Environmental Protection Law, which in 1979 was still a provisional law. And then in 1989 it was amended, and it is still in effect today. Regarding other legislation, many environmental professors don't include it in the formal system, but I think they're very, very important. So I include it in my system. The first one is the Urban Planning Law. The second one is the Regulation on Urban Planning and Construction. And the second major part in this environmental law system is the Pollution Prevention and Control Law. And nowadays the law on environmental pollution prevention and control is relatively comprehensive. It includes a law on marine protection, the law on the prevention and control of water pollution, the law on the prevention and control of air pollution, the law on the prevention and control of environmental pollution from solid waste, and the law on prevention and control of pollution from environmental noise, and also the law on the prevention and control of radiation pollution.

The third major part in this law system is related to controlling toxicants and pollution of dangerous materials, and that they are basically administrative regulations instead of formal laws. Under this part there are regulations on secure management of hazardous chemicals, regulations on management of nuclear materials, regulation on management of radioactive materials, regulation on the export of nuclear materials, regulations on emergency reaction to a nuclear accidents from nuclear power plant, regulation on supervision of chemicals, regulations on the secure management of civil nuclear facilities, regulations on the management of pesticide, and regulations on the labor protection for using toxic materials in work places.

And in the fourth part of the law system are laws regarding ecological preservation. And as you can see from the PowerPoint, there are several laws under this category. And the most important two are the law on protecting wild animals and regulations on the protection of wild plants. The regulation on the administration of genetically modified organisms in agriculture. And the last part in the law system is laws regarding natural resources protection, and includes forest law, grassland law, fishery law, the law on land administration, water or the law on mineral resources, the law on coal resources, the administration of sea area, and the law on energy efficiency and saving. And another part under the law system is regarding management of special areas. Many environmental law professors in China don't include this part as the overall law system, but I think they're very important so I include them here. They include regulation on environmental management of construction projects, the law on promotion of clean production, the law on environmental impact assessment, the law on renewable energy and finally the law on energy conservation.

And another part under the law system is regarding environmental responsibilities and procedures on how to seek remedies. And this part of the law includes regulation on management discharge fee, provisions on environmental crimes in the criminal court and provisions on civil liability in general rules of civil law, and the explanation on environmental crimes from the Supreme People's Court and also the explanation on civil litigation from the Supreme People's Court. And I want to make a special note here, in China the judicial explanation is also part of the legal system. It's not only law and regulation but also judicial interpretation from the Supreme Court in China.

The next part in the law system is regarding international conventions and treaties on environmental protection approved by Chinese government. Our Chinese government has participated and

approved 48 international conventions, and these conventions became part of the environmental law system in China. And they can be directly applicable. In order to save time I won't discuss each convention here.

So the next topic is about deficiencies in environmental law enforcement in China. In the past two decades the environmental law system in China has experienced significant development and nowadays has established a relatively comprehensive law system. However, there are many problems in the development of the law.

One of the major problems is that environmental law nowadays informs mainly under the administrative system, and the judicial system doesn't have much role in enforcing environmental law in China. Though theoretically the legislature has some supervising power over the enforcement of the environmental law in China, in practicality such power has not been used. Although the law stipulates NGOs, non-governmental organizations and public also has a role to play in China's environmental law enforcement. However since there is no sufficient procedures and process to allow this type of involvement. The public interest litigation is very limited in China, and also the public and NGOs involvement in environmental impact assessment is not enough.

There are several deficiencies in environmental law enforcement in China which needs to be resolved immediately. The first one is some objectives in the legislation remain unachieved. China enacted the Environmental Protection Law as a basic law in environmental protection. The first article of this law clearly stipulates the objective of environmental protection and improvement. However, it should not be overlooked that although there exists some progresses in the protection of the ecosystem and the environment, the environment is deteriorating as a whole, except for improvements in certain areas and aspects. Even the urban planning plan and the environmental protection plan made by the administrative agencies in China is inconsistent with the legal objective of that plan because their plan is not to make the environment better but only to mitigate a deterioration.

And another problem is enforcement of some environmental management mechanisms is still at a very superficial level. There are many detailed environmental management systems in China's environmental laws, which covers all of the following aspects. The first is the precaution systems ahead of environmental pollution and damages. The operation systems of the environmental protection facilities during normal business process. The environmental recovery

system and also the responsibility undertaken system. And even the penalty, obligations of the environmental protection supervisors are stipulated. For the government employees who does not perform their obligations there also are criminal penalty obligations being stipulated.

However, a lot of this environmental regulations are not fully implemented. For example, China's Environment Impact Assessment law clearly stipulates that the assessment a system of the environmental impact of construction projects. According to the statistics of the State Environmental Protection Administration, which is SEPA. SEPA is equivalent to EPA in United States, construction projects that have been undertaken the environmental impact assessment exceeds over 90% ever since 1998, and in 2002 the percentage is even up to 98.3%. Actually all the environmental projects which carry out environmental impact assessments, it's fewer than 50%. And even for those construction projects which have environmental impact assessments there are many cheatings been going on. For example the real distance between a gas station and residential area is within 20 meters, but in the EIA, environmental impact assessment report the distance turned out to be 400 meters. Consequently the construction project is approved, but causes severe pollution later.

And the third issue is some illegal actions cannot be investigated and punished in time. China's environmental laws not only stipulates the protection requirements of all kinds of activities, but also stipulates the corresponding punishment. If all the environmental laws had been fully enforced it would surely safeguard the environment and deter future illegal actions. But in reality the fact is that many illegal actions cannot be investigated and punished in time. Those offenders are free from responsibility. This significantly undermined the authority of the law. For example, there's a rule in China's environmental law called three simultaneities rule, I will explain it later. It is one of the basic rules of China's environmental law. It stipulates that the environmental protection facilities of construction projects must be designed, constructed and put into use with the main buildings at the same time. So that's the reason why there's three simultaneities. According to the law this rule applies to all the construction projects likely to cause environmental pollution and damages. This rule has been in effect since 1970s. However, even until now some construction projects with severe environmental influences still began to construct without any environmental supervision or approval. At the beginning of this year, SEPA made investigations and discovered over 80 projects which did not comply with this three simultaneities rule. The cost of these

construction projects was over 200 billion yuan.

And another problem is that many environmental disputes cannot be resolved reasonably and fairly, and many pollution victims cannot get appropriate compensation. Since the pollution is getting more and more serious, there are increasingly more environmental disputes. According to the statistics of SEPA, the complaints submitted to environmental authorities regarding environmental damages are more than 50,000 cases in 2002. And every year there's at least 20% to 30% increase in environmental complaints. A lot of these disputes have not received reasonable settlements in time, and there are even some disputes remain unresolved for over 10 years. And this not only greatly affected people's environmental rights, but also make polluters lack of motives and pressures to reduce pollution. As long as pollution costs no additional compensation responsibilities who would like to invest millions of dollars to reduce pollution? Therefore, many environmental disputes cannot be solved reasonably and the pollution victims cannot receive sufficient compensation. This too explains why China has not managed to deter pollution effectively.

And another problem is that some environmental criminals receive an administrative punishment instead of criminal penalties. Using criminal liability and penalties on environmental polluters is proved to be one of the most effective solutions to solving environmental disputes in the worldwide. China has also realized a necessity of using criminal law in environmental protection, and do have some articles regarding criminal penalties for environmental crimes. However, these stipulations have not been executed or enforced formally. In 1997, the Chinese government put criminal penalty in the criminal court, and since then to 2002 that's five years. And during these five years there has been particularly serious environmental pollution cases of 387. According to the criminal law, each of these serious environmental pollution accidents is an environmental crime. However, in fact, only less than 20 cases have been prosecuted. That is to say the percentage of actual prosecution is less than 5%. And when I was giving lectures in China, people asked me how many environmental laws are actually enforced, Professor Wang answers no more than 10%. This provision within criminal law has not been fully enforced. Instead environment protection bureaus use an administrative fine to replace the criminal penalties.

And the final problem regarding China's environmental law enforcement is that environmental protection administration's lack of authority. According to current legal provisions, environmental

protection agencies in China are subject to the corresponding administration departments in each level of Chinese government. Most of this illegal environmental action is caused by pollution enterprises. Such enterprises usually compose the main aspect of local economic development because they have paid no environmental protection cost and they are the main revenue producers in the local economy. For example, in Pingnan County of Fujian province, the amount of taxation levied on a chemical plant with heavy pollution accounts for 25% of the county's financial income. Thus, once the environmental protection department is going to punish the pollution enterprises, the local government tends to interfere. The head of the local environmental protection bureaus are appointed by the local government, so they are hesitant to enforce the environmental laws in pollution cases. So the polluting enterprises avoid their legal responsibilities.

Next I want to address why there are so many enforcement problems, what are their reasons. And there are complicated reasons for why there's not sufficient enforcement of environmental law in China. It includes the political reasons, I mean the drawbacks within the political bureaucracy, and also the economic development. Some of the reasons are with the legislation and also the ability of the enforcement staff to actually carry out the enforcement activities. The first main reason is that some of the legislation has deviated from reality in taking no enforcement condition into account when they are drafted. Though China's environmental laws have experienced significant development in the past 20 years, however many of these laws are not actually enforceable. The legislators didn't make any investigation into the reality, and they don't count how much cost would there be if such legislation came into effect. Take the Law on the Prevention and Control of Environmental Pollution by Solid Waste, for example, the pollution mechanism, the disposal technology and the government supervision on the disposal process, are lacking the basic researchers needed, even before the law was drafted. Also it has not been emphasized enough on the reality of inadequate construction funds. All this caused the unsatisfying enforcement of this law. The NPC, which is the National People's Congress, standing committee report indicates that the disposal rights of municipal domestic sewage in 2003 is only 58.2%. It's still very common that many counties and towns discharge waste without any treatment. All these problems obviously conflict with the legal provisions.

Many of the legislative agencies draft the laws just in order to finish their task. In order to accomplish the agenda stated by the

legislative plan, the legislation agencies tend to set a deadline for the adoption of a certain law. This result in the fact that relevant officials devote themselves to appealing to the counselors rather than to care about whether the law can really be observed. Another problem is in order to speed up the legislative process, so many people will just basically cut the useful part of the legislation in order to reach a consensus in order to pass the law. The legislation sometimes stipulating some laws an urgent need to catch international. Some legislative departments submitted legislation proposal in order to appeal to the international community. An example would be the Clean Production Law. Now China has a law regarding clean production, which would probably be the first in the world. The reason why there is such a law is because the legislators want to appeal to the international community. But actually in effect, this law has not been enforced there at all.

One problem related to the legislation is there's been too much emphasis on substantial legislation, but there's not enough attention to procedure laws. However, there are not detailed procedures or processes regarding how these laws are going to be enforced. So basically this equals to no enforcement at all.

Another problem regarding China's legislation is that the implementing regulations cannot keep up with the laws and regulations in time. Sometimes when the NPC, the National People's Congress, attempts to draft laws, since there are conflicting opinions among the subordinating agencies, the NPC cannot draft a law because there is no consensus. So the NPC delegates the authority to draft implementation regulations to the state council. The state council is the executive branch of the Chinese national government. And the state councils face a similar problem too, because there are always conflicting interests among its subordinated agencies. So finally the state council also does nothing. That is the reason why there are few implementing regulations to the environmental laws.

Another reason of lack of enforcement is that local governments pursue economic benefits while overlooking environmental protection. Currently in China, the central government actually is paying a lot of attention to environmental protection. However, when it reaches to the local level many of these laws are not enforced. The reason why the local government doesn't pay enough attention to environmental protection is because the way the valuation of the local government officials is based on his achievement of GDP, instead of the quality of the environment in the local area. For example, in some areas the

pollution is really serious. However, the local GDP is really high. So the head of this local government still can get promoted from the head of the county to the head of the city or even to the head of the province. The drawbacks within the administrative hierarchy enforcement power of the local environmental protection bureau, because they are appointed by the local government.

Another problem is that the opinions of the public are neglected in the environmental administration and the environmental legislation. In China, the government has a lot of administrative power, a belief it can do anything it wants without any participation from the public. However, environmental protection requires public participation. For example, in a county there are a lot of people and a lot of enterprises, but there may be only ten people within the local environmental protection bureaus. So it's not possible for them to enforce every environmental law in every enterprise. So there has to be public participation. Actually, in Chinese environmental law every city's NGO has a responsibility to protect the environment. And they're encouraged to report those pollution activities. However, in reality, when these NGOs or citizens report those environmental pollutions nobody would care.

Then how do we deal with these deficiencies in the environmental law enforcement in China? Now many scholars and officials in China have proposed the following ideas, in terms of reform. And the first reform idea is to establish specialized environmental supervision bureau with the SEPA in charge of law enforcement. Also learning from the American experience, SEPA established five original supervision centers for environmental law enforcement in order to avoid local government's interference with the environmental law enforcement. Another idea is to transform environmental protection bureaus at the basic level into detached agency. Here basic level means the lowest level in the administrative hierarchy. And the idea basically is to let these local environmental protection bureaus be no longer affiliated with the local government. Instead they are under the supervision of the environmental protection bureau of higher level. So, there is a vertical supervision system instead of being controlled by the local government. Another idea is to reform the assessment message of local government achievement, replacing traditional GDP with green GDP. Another reform idea is to reform the judicial management mechanisms in China in order to free court from the influence of local government. And another idea is to establish the procedural message to enhance public participation.

Last spring, SEPA drafted a new rule called Message on Public to Participate in Environmental Impact Assessment. Last year Professor Wang's organization, Center for Legal Assistance to Pollution Victims working with (NRDC) to help SEPA draft a new law on the message on public participation in environment impact assessments. And this year SEPA is going to draft a new rule on publishing environmental information. Of course, enforce these reforms will face a lot of difficulties. However, there will be some difficulties in terms of the reform of judicial system. As you may know, in China the judges are appointed by the local people's congress. However, there has been strong influence from the Chinese Communist Party on the local congress. Also, there are some special problem with participation and environmental NGOs. As you may know the regime in Eastern European countries changed because there were a lot of NGOs in the country at that time. So, the Chinese Communist Party is a little bit afraid if there are too many environmental NGOs the regime may change also in China. The Chinese Communist Party learned a lot of experience and lessons from the change of regime in Eastern European countries and it doesn't want such things happen also in China. So that's a reason why NGOs develop very slowly in China.

However, the environmental laws in China are getting more and more detailed, and there are more implementing regulations. The laws are getting increasingly consistent with the goals of the general environmental policy that is to protect the environment. China has been experiencing significant development both politically and economically. So, I'm confident that the current problems with China's environmental law enforcement will be conquered in the future as China's economy continues to develop. Environmental protection has become a common task for people from every country. And in order to fulfill its responsibilities under the international environmental conventions the Chinese government will do everything it can to make its environmental law enforcement more and more consistent with the international practice. Therefore, I'm very confident in the development of China's environmental law and enforcement in future.

Originally, Professor Wang planned to talk about three cases his organization has been dealing with, and it's actually three important environmental cases. However the time is limited for today. So he will save the content for tomorrow. And again, please come. Thank you, everyone. I can answer questions. Is there anyone with questions that they want to ask Professor Wang? I can answer any questions.

AUDIENCE QUESTIONS

Audience

Professor, thank you for coming here, for being so candid about the issues and the challenges that face your country. We have many of those same problems here. We try to walk the walk, but we don't always do it. I wonder can these issues—are they being discussed as candidly in China as you have been able to discuss them tonight? Is there a dialogue going on in China at this time?

Professor Wang Canfa (translated)

In an academic conference you definitely can. But in the meetings with Communist Party you probably won't.

Professor Jerome Cohen

You've given us a wonderful report. The only question I have is about your optimistic conclusion. I agree China is making great progress. But I worry about the time. Is the progress going to be done in time to meet this horrendous challenge? A challenge that affects us as well as those in China. It seems to me we need more vigorous leadership from the 17 party congress that's about to convene this fall, as well as the National People's Congress that will convene next week. Time is the problem. Is there going to be enough time?

Professor Wang Canfa (translated)

Professor Cohen knows a lot about China. And Professor Wang thinks in the near future the environmental deterioration will continue in China. However, he thinks central government has been paying more and more attention to the environmental protection in China. For example, at the end of 2005 the state council issued a policy document focused on improving China's environmental protection. Since then China's environmental policy changed significantly from prioritizing economic development to prioritizing environmental protection. With such change in the overall policy, the enforcement of China's environmental laws will hopefully make big improvements in the future. Also, in the coming National People's Congress convention in March, that probably will not be special decisions on environmental protection. However, in the Chinese government's 11th five year plan the content regarding environmental protection has increased dramatically than past years. However, the key problem right now is how to enforce the central government's policy idea in the local level.

Audience

I was wondering if you could maybe comment to follow up on Professor Cohen's question on the recent promotion of Xie Zhenhua. Xie Zhenhua, for those of the audience who don't know was the director of the SEPA, of the State Environmental Protection Administration up until about a year and a half ago, just before the big in Songhua River. And he was supposed to resign, and a new person took over. And then just a month ago he was promoted to the deputy director of the National Reform Commission, which is one of the very powerful commissions in China. And so, part of the reason why he resigned, was forced to resign was for him to take responsibility for this environmental disaster and he is now being promoted. I'm wondering what your thoughts are about that.

Professor Wang Canfa (translated)

There are some political reasons behind resignation. Actually, the Songhua River oil spill caused some tension between China and Russia. So there has to be someone to stand up and take the responsibility. So the person who should be taking responsibility is probably the premier. But however you can't ask the premier to step down. So instead Mr. Xie Zhenhua resigned. Another reason is there may be another person who should take the responsibility, and that's the president of China's biggest gas company. However, that guy made significant contribution to China's economic development. So it may not be appropriate, again, to ask him to step down. So, that's a reason why Mr. resigned. However, after his resignation he became the deputy director of China's national development and reform commission. That's actually not a promotion, it's the same political rank. So he's back to his job again without promotion. Another person who should take responsibility is the mayor of Harbin City. However the vice mayor of Harbin City committed suicide after this event. So if you ask the mayor of Harbin city to step down, again, there may be another person committing suicide. So, one thing after another became the scapegoat in this case.

Audience

I'm from Canada. And rest assured that you're not alone. And your efforts are supported by others. And we are very aware of the problems in China, and there's people really concerned and want to help, in a humble way.

Professor Wang Canfa (translated)

Thank you.

Audience

The efforts that you are doing shows that China is by yourself showing the problems to the world. And except that others also are interested by these problems. In fact as the professor mentioned before, time is of the essence. But I think that time is going to be favorable to us, because we wouldn't be in this room tonight if we didn't believe there was a solution.

Professor Wang Canfa (translated)

Nowadays there are more and more people in China paying attention to environmental protection. But the problem is still with the enterprises because they are really the entity polluting the environment. I think one of the proposals to deal with it is through legislation, and ask for public participation of every citizen in China. And particularly those pollution victims should bring action in court, exactly as Professor Wang's organization, Center for Legal Assistance to Pollution Victims, did is to help the citizens in China with their environmental litigation. Also another key is environmental protection. Nowadays in China, the citizens' awareness in terms of environmental protection is not as high as the citizens in the United States. Many people are just wasting resources. For example, use plastic bags instead of paper bags.

The last couple of days Professor Wang visited Oregon University School of Law for an activity there. And he went to the library and found there are lots of environmental magazines and journals in the library, for example, the Harvard Law Review. And there is even a special magazine for environmental lawyers. However, in China there's not even one specialized environmental journal. So he thinks this is the area that we should pay attention to, and that is environmental education. Thank you, thank you everybody.

KEYNOTE: AN INTRODUCTION TO LAW IN CHINA

Professor Jerome Cohen⁴

Friday, March 2, 2007

Many months ago, when Professor Tseming Yang broached the idea of this conference with me, I replied that I would surely be interested in participating if it could be held during ski season. Of course, when visitors come to Vermont in winter, they are sometimes disappointed by a lack of snow. But today nature has vindicated my hopes with a vengeance, and I am impressed that so many of you have managed to surmount the elements to get here.

I want to congratulate Vermont Law School on its accomplishments, especially on its good judgment in emphasizing the environment and in sponsoring the *Vermont Journal of Environmental Law*. I also want to congratulate Professor Wang Canfa for last night's very comprehensive, interesting and frank appraisal of China's progress in environmental law, its problems and its prospects. I learned a great deal. I'm not a specialist in this field. My major incentive for attending this conference is to learn more, not to go skiing.

When I started to study about China, it was still possible for a single scholar responsibly to tell people about the entire contemporary Chinese legal system. Soon after, following the outbreak of the Cultural Revolution in 1966, although the excitement was titillating, there was even less formal legal content to master. Nevertheless, to some social scientists interested in law, China at that time seemed more fascinating than other major countries precisely because in many respects the country continued to function despite the absence of a conventional Western-type legal system. To be sure, there were political and military interruptions and sometimes chaos. Yet, the society and economy endured. Not long after the end of that cataclysm, following Chairman Mao's death in 1976, one of my first students published a book about this new Chinese phenomenon called "Law

4. Jerome A. Cohen is Professor of Law at New York University School of Law, Counsel in Paul, Weiss, Rifkind, Wharton & Garrison, LLP, and Senior Fellow for Asia Studies at the Council on Foreign Relations.

Without Lawyers.”⁵ Of course, there wasn’t even much law in that era. One wondered how a nation could hold itself together without legislation and a structured court system, not to mention a legal profession. During that period even Communist legal observers from the Soviet Union and Eastern Europe professed to be puzzled, indeed shocked, at China’s lack of legal institutions. Then Deng Xiaoping completed his return to power in December 1978, and that ended the country’s brief experiment with radical legal innovation. Deng and his colleagues decided that, in order to achieve their ambitious modernization goals, China did need something that resembled a formal legal system.

The National People’s Congress is about to convene its annual session. It usually meets for about a week. But this time its legislative agenda is so crowded that the meeting has been extended to eleven days. It has several controversial draft laws on the agenda, and I am eager to see what will emerge. In the autumn an even more important meeting will take place. As Professor Wang made clear last night, the real power in China, of course, is the leadership of the Chinese Communist Party—the Politburo and especially its nine-member Standing Committee. This fall the 17th Party Congress that supposedly provides guidance to the Party leaders every five years will convene in Beijing, and it will be important to see what, if anything, it and the Party leaders decide to do about what is now China’s increasingly formal legal system. Should they proceed with further Western-style norms and forms? Should they stop where they are? Have they gone too far? Should they try to reverse things? Would it be possible to do so at this point? This is an immediate and practical problem, not just a theoretical question.

You have in your materials a short talk I gave in January at the annual meeting of the Association of American Law Schools.⁶ If you would like to pursue the subject, you may look at some recent articles I have published in the *Far Eastern Economic Review*.

Let’s start with a quick historical perspective—a little bit of instant China for busy people. The effort that Deng Xiaoping began in 1978 to import and adapt a Western legal system for purposes of China’s modernization was certainly not the first such effort that Chinese leaders have made. At the end of the nineteenth century, the rapidly declining Qing or Manchu dynasty began to show interest in Western

5. VICTOR H. LI, *LAW WITHOUT LAWYERS* (1978).

6. *Can, And Should The Rule Of Law Be Transplanted Outside The West? The Case Of China*, (Hong Kong) *AMCHAM MAGAZINE*, Jan. 2007, at 14-16.

law, especially Continental European rather than Anglo-American law. The would-be modernizers of that era had two purposes in mind. Their immediate purpose was more political than strictly legal—to rid the nation of foreign extraterritorial jurisdiction, the power that foreign consuls and courts were then exercising to adjudicate civil and criminal cases on Chinese soil. A spirit of nationalism was developing in China during that period, and the country's leaders became aware of the fact that extraterritoriality was not a normal method of sovereign international intercourse. Indeed, it was a humiliating symbol of China's second-class status in the world.

The second purpose of China's early modernizers in looking to Western law was related to the first but of a longer run nature. They wanted China to become strong and follow the example of Japan, which, in forty years, had adapted the forms and norms of Western justice and thus managed to throw off the incubus of extraterritoriality. Japan seemed to have made the importation of Western law an instrument of self-strengthening and become so powerful that in the war of 1894-95 it defeated Mother China from which, a thousand years earlier, it had imbibed much of its culture. Public international law was the first Western legal subject to enter China's educational system, and it started to be taught not in a law school, for there were none as yet, but in a newly-established military academy. Foreign law was seen as a weapon to be utilized in the nation's defense, and we should bear this in mind.

The late imperial attempt to absorb European law continued after the Revolution of 1911 put an end to the last of the dynasties, and it expanded after Chiang Kaishek seized nationwide power in 1927-28. Over the next decade Chiang's regime adopted codes of law that are, by and large, still in effect in Taiwan, to which he fled after losing to the Communist Revolution in 1949. This first Chinese effort to adapt Western law, from the end of the nineteenth century to the middle of the twentieth, deserves far greater attention than it has received. Unfortunately, for a variety of reasons, its practical impact was limited. It developed Chinese-language equivalents for Western legal terms and produced impressive codes of law, and it gave China experience using Western-type law in its contacts with foreigners. But China was such a huge, populous, traditional, and economically backward land that implementing major legal changes proved very difficult. Bringing change to the vast rural areas was, and still is, especially challenging. For example, by 1949, after decades of effort to establish modern courts, only one-quarter of China's 1800-odd counties had done so.

Here I should say a word about the pre-modern Chinese legal tradition. Many people do not understand that China had a great legal tradition for some 2,000 years. The imperial legal system, embracing, and enforcing Confucian norms, at its higher reaches employed some officials who were learned in the law and conscientious in its application. The emperor himself, although in principle not subject to the law, was nevertheless restrained by its spirit on numerous occasions. By the time of the last dynasty the accretions of the centuries had made legislation very complicated. Although this gave the magistrate at the county seat, the lowest level of imperial government, considerable discretion in applying the law, he had to exercise that discretion carefully to avoid rejection of his decisions or recommendations by appellate authorities and even his own punishment. The traditional system was very different from any that prevailed in the West by the nineteenth century.

Yet some of the few Westerners who began to visit China as early as the sixteenth century had a fairly good opinion of the legal system of the then Ming dynasty. In comparison with the Inquisition that they had left behind, some travelers from the Iberian Peninsula formed a favorable opinion of Chinese trials that they witnessed. To be sure, the magistrate was authorized to employ torture and frequently did. But at least torture was regulated in detail by law. Moreover, the trial was held in public rather than in the dank, dark dungeons of the Inquisition.

By the mid-nineteenth century, however, Western views of the imperial legal system had begun to change radically. Not because the Chinese system had changed in any major way. It had not. What had changed was the West. In the seventeenth century England had gone through two great revolutions that advanced slowly developing concepts of constitutional law from which we benefit today. The eighteenth century witnessed the American Revolution and the written constitution and Bill of Rights that it spawned as well as the French Revolution with its emphasis on the rights of man. Thus, what had changed were the spectacles through which Westerners were viewing legal developments in other lands.

Some Westerners had political or economic motives for criticizing the traditional Chinese system. The term "human rights" was not yet in use. Yet, when the English wanted to conjure up excuses for invading China in 1839 in order to open up the country to business including the opium trade, one of their major complaints was the failure of the Chinese judicial system to give what we today call "due process" to those foreigners unfortunate enough to become embroiled in it.

We must not ignore history, not only because of its intrinsic value but also for practical reasons. My own experience in dealing with China in business law, human rights, and legal education suggests that the impact of the Chinese tradition is abiding in many, if not all, respects. Yesterday Professor Wang noted that contemporary Chinese law and practice emphasize substantive matters much more than procedural ones, and that this trait is increasingly thought to be a defect in the legal system. Well, this defect came from somewhere—from the legal experience of the imperial dynasties.

China's second great effort to import and adapt foreign law began in 1949. Although we Americans don't think of the Soviet system as a Western system, from the perspective of China it surely was. Of course, Marx himself was a Westerner, and Russia, despite its large Asian minority population, was perceived to be a white, Western regime. When Japan in 1905, ten years after its defeat of China, went on to humiliate Russia, one of the original imperialist powers, Chinese leaders began to see what a self-strengthened China might do some day. The Bolshevik Revolution dramatically altered Russia in 1917, but Lenin, who had studied law and practiced briefly, was wise enough not to throw out the pre-1917 legal system. In 1864 the Czar had imported elements of the Continental European system of Switzerland, France and Germany. Lenin retained that system, but put a socialist gloss on it, thereby providing continuity together with some ideological flourishes. By the time the Chinese Communists seized power in 1949, the Soviet system, although highly repressive, had achieved a degree of legal sophistication, and it was that system that Chairman Mao decided to import. Thus, from 1949 until 1957 China's new leaders, rather than steal a page from Lenin's book by retaining and adding some socialist flourishes to Chiang Kaishek's version of a European legal system, instead totally abolished the pre-existing system and imported the Soviet model lock, stock and barrel. Soviet law professors came to teach in China. Soviet law books were translated into Chinese. Many who were to become China's leading legal scholars, some still active even today, were sent to Leningrad, Moscow and other Soviet cities to study Russian language and Soviet law.

Yet this second Chinese effort to import Western law did not last very long. In 1957-58 Chinese leaders, in a notorious and harsh mass political campaign led by Chairman Mao and administered by Deng Xiaoping, imposed the Anti-Rightist Movement upon the country, and this was almost immediately followed by the Great Leap Forward. That potent combination put an end to the brief reign of Soviet law.

Ironically, at the same time in Moscow, after Khrushchev denounced Stalinism at the January 1956 Soviet 20th Party Congress, the Soviet Union ended some of the worst excesses of its legal system as part of the process of “deStalinization”. But China went the other way, into a more radical and lawless phase, culminating in the Cultural Revolution, which demolished whatever shreds remained of the Soviet legal model. That was a time when Chairman Mao and his wife Jiang Qing boasted: “All is chaos under Heaven. The situation is excellent” and one editorial in the People’s Daily, the voice of the Chinese Communist Party, was titled: “In Praise of Lawlessness.”⁷

The Cultural Revolution caused many arbitrary killings and suicides and a huge amount of cruelty and suffering. Over a hundred million people were profoundly affected. Deng Xiaoping’s son was pushed out of a window and crippled for life. Such a nightmare had to create a strong reaction. After the nightmare ended, Deng, who himself had suffered, decided that China had had enough of “class struggle” and that the country had to catch up with all the nations around it that had developed more rapidly than the Central Realm during the previous thirty years. Law was to become a principal instrument of China’s belated modernization push.

Law was invoked to serve a number of critical functions. First of all, every political system needs a legal system to communicate and enforce its policies and norms and to structure its government. Another role that Deng wanted the legal system to play was economic. Buyers need to know that sellers will come through with the promised goods or pay the consequences. The domestic economy, Deng recognized, needed a legal system to enhance its predictability and the stability of expectations. Moreover, the new leaders wanted to end China’s relative economic isolation and reach out to the world’s most developed countries in order to benefit from foreign trade, technology transfer and investment, and this too required a formal legal system.

Also, the country had just emerged from a horrible twenty-year period, and many people, including Communist officials, were demanding protection of “the basic rights of the person.” They were not yet using the term “human rights,” although the Communists prior to “Liberation” had used it to condemn Chiang Kaishek’s oppression.

7. China’s Legal Reform at the Crossroads, FAR EAST. ECON. REV., Mar. 2006, at 23–27; China Trips Up It’s Barefoot Lawyers, FAR EAST ECON. REV., Nov. 2005, at 17–20; Jerome A. Cohen, *Law in Transitions: Lessons from East Asia and the Road Ahead for China*, 37 N.Y.U. J. INT’L. L. & POL. 423 (2006); Human Rights and the Rule of Law in China, Statement Before the Congressional-Executive Commission on China, Sept. 20, 2006.

Until recently, after the Party gained control of the country, it regarded “human rights” as exclusively a Western political slogan designed to discredit governments with which the Western powers disagreed. Nevertheless, the post-Mao leaders recognized the need for a legal system that would be seen to protect people against arbitrary rule.

In addition, China was seriously troubled by crime and needed a legal system that would be seen to effectively suppress what was deemed to be anti-social conduct. It also required more competent institutions for settling interpersonal disputes and complaints against the state, since no government can ignore the accumulation of a large number of unsettled grievances.

When we compare the situation in 1978 with that of today, of course we see tremendous progress. There is no doubt that China now has a formal legal system. If we look for the existence of adequate norms, just consider, for example, what Professor Wang showed us last night about the proliferation of environmental laws and regulations in recent decades. Similar legislative strides have been made in virtually every field. Moreover, these norms have been supplemented by those enshrined in an enormous number of recently concluded multilateral and bilateral international commitments. All of this is a huge achievement. I don’t know of another national elite in history that has done more to produce legislation, regulations, guidance and other norms in so short a time.

Of course, norms are not enough. A country has to have institutions, and in 1978 one was hard-pressed to find any significant legal institutions in China. Now China has gradually rebuilt its court system, brought back its prosecutors and rehabilitated and expanded its long absent legal profession. Today it has perhaps 200,000 judges, 160,000 prosecutors and 140,000 lawyers. There are roughly 625 law schools and law departments.

When I first visited China in 1972—even though the Cultural Revolution was still going, its most violent phase had passed—I was eager to get acquainted with my Chinese counterparts. I went out to Peking University but couldn’t find any law professors. They were all either at home or down on the farm having their thoughts remolded. The next year, although legal education had not yet resumed, I went back and managed to find a few law teachers. They were different from their American counterparts in two respects. First, they looked a lot healthier since they had acquired good suntans working in the fields while most of us had been laboring in the library. Second, they were very silent. American law teachers like to talk. I’m Exhibit A. But my

new Chinese acquaintances had little to talk about except some bad experiences they weren't allowed to relate, and in any event they were too intimidated by the political campaigns of previous years to say anything at all.

That was legal education in the early 1970s. Today it is booming. As early as 1981 I asked a Peking University student why she was studying law. "Oh," she said, "law's the 'hot ticket.'" And it has been ever since. Legal scholarship has also begun to flourish. When I lived in Beijing from 1979-81 its bookstores had no special section for legal materials. Now publication of law books and law reviews is big business, and quality is improving daily. The legal system is not yet nearly transparent enough, but, under the stimulus of China's WTO obligations, it is making progress on this front as well.

Perhaps the most important thing to note about the new situation, and that was evident last night because Professor Wang is a principal symbol, is that there is now a new elite of overlapping legal specialists who did not exist in 1978 and who are increasingly influential: judges, prosecutors, lawyers, legislative and administrative officials, corporate counsel and law professors and scholars. Every government agency now has legal experts. It's not like 1979 when a man came to me who was in the First Ministry of Machine Building's Law and Contracts Division. He said he wanted to study law abroad. When I asked why, he replied: "Look, every day my colleagues and I have to negotiate with the giants of the world's automotive industry and their lawyers. (They were negotiating with Volkswagen at the time). We in the Law and Contracts Division have only one problem. We don't know anything about law or contracts!" That is not the situation today. These elites, especially the law professors—and Professor Wang embodies that—are influential people. They are not only scholars who teach and publish but they also lobby for and participate in law reform, often handle concrete cases and sometimes serve in government, the courts or the legislature.

China's legal progress has been especially prominent in certain fields, for example, in the area of foreign investment and business and financial law. Yet the courts have thus far not begun to play an important role in some of these fields including public regulation of business. I was struck by what Professor Wang said last night, that, in environmental law, enforcement in the courts is not yet a major factor. It may be that public interest litigation of this type will become increasingly significant in China. I am glad to note that two of our able N.Y.U. graduates, Alex Wang, who is at this conference, and his wife

Ms. Hyeung-Ju Roh, are working with Chinese colleagues including Professor Wang in the hope of expanding the role of the courts in this respect. But at the moment, the role of administrators overshadows that of the courts as it has always done in China. That is still also the case with regard to foreign investment, trade and technology transfer, although both arbitration and litigation are becoming increasingly significant despite the persistence of serious doubts about their fairness.

There have been three big pushes behind the rapid development of the financial/economic legal system. The first was the desire in 1979 immediately to attract foreign investment. At that time outsiders did not appreciate how much China intended to rely upon cooperation with foreign capitalist enterprises for its capital needs rather than the World Bank, the International Monetary Fund, the Asian Development Bank and foreign governments. The second big push came in 1992 when Deng Xiaoping fostered the development of capital markets, and stock exchanges were established in Shanghai and Shenzhen. The third big push began in the late 1990s as China prepared to enter the WTO. These economic policies have had transforming effects upon the Chinese legal system.

Of course, there are some weak links in the Chinese legal system. Criminal justice is the weakest of them, and that's why I take part in efforts to improve that aspect. The era of making gross generalizations about China's legal progress is coming to a close, as each aspect and area require careful scrutiny and analysis. This is why I value the opportunity to take part in conferences such as this. Of course, whether we study topics such as regulation of the environment, protection of intellectual property rights, control of the securities markets or enforcement of judgments and arbitration awards, we see one common problem—the weakness of the Chinese central government.

Most Americans have grown up on the assumption that China is run by a totalitarian dictatorship led by the Politburo Standing Committee, whose rule supposedly reaches every village. But that is a skewed view of the actual situation. Once I started working in China I learned that in many, not all, respects the country is more like a series of feudal baronies. The reach of the central Party and government authorities is limited, except for those matters that are accorded the highest priority, such as suppression of what used to be called “counterrevolution,” espionage, political democracy and the Falungong. Highest priorities evoke extraordinary efforts on a nationwide basis, but no government can give everything its highest priority. Every government agency has to make choices about how to allocate scarce

resources, even at the local level. I remember when I was interviewing a former public security officer from Fuzhou while in Hong Kong in 1964, in the days before China enacted a criminal code, I was trying to find out what conduct was deemed “criminal” and what conduct, although disapproved, was not to be punished as a “crime.” When I asked about adultery, the ex-policeman replied: “If we tried to punish all the adulterers, we wouldn’t have time to pursue the counterrevolutionaries!”

So every system has to have priorities, and in most cases, even in China, the central government’s writ does not run very far. It doesn’t have the financial resources because of an inadequate tax system. Moreover, local power-holders are extremely important. We heard last night that one of the problems of environmental regulation in China—and of all regulation—is “local protectionism.”

Another major problem, of course, is corruption, which has increased greatly in China. It affects the judiciary as well as other government institutions, and is one of many distorting influences upon the judiciary’s operation. Another is politics. Party control of the courts is still universal, although manifested to different degrees in different places and times and with regard to different legal issues. A political-legal Party committee that corresponds to every level of government and court gives guidance to the courts at its level, often in actual cases. Moreover, wholly apart from outside Party instructions, in important cases the judges who hear the case generally do not get to decide it. Rather the court’s “adjudication committee” composed of the highest court administrators usually decides the case and is often influenced by factors other than the legal merits.

The biggest problem in achieving fair adjudication in China, and it affects commercial arbitration as well as court decisions, is “*guanxi*,” that network of family, friendships and other contacts and reciprocities by which Chinese live and that seems to undermine all hope of evenhanded enforcement of the law. How to control and restrict its application? How to apply legal ethics? Of course, as I said to Professor Wang at breakfast, we have “*guanxi*” in America—classmates, relatives, friends, etc—but we generally know its limits with respect to our legal system. To be sure, further empirical research may teach us that those limits are wider than we realize in America, but, in comparison with China, our situation seems under better control. I hope I’m not being naive. In any event, “*guanxi*” seems to have a special impact in China.

I’ll give you just one example. Not long ago, I asked a fortyish

Chinese businessman whether he used lawyers in his work. “No,” he said, “I don’t need lawyers. I use standard trade contracts for both my local and international business.” I said: “But don’t you have disputes?” “Oh, of course I have disputes,” he replied. I said: “Then don’t you need a lawyer to help you in disputes?” He responded: “Why should I hire a lawyer? My wife is a judge.” Through her he could go to whatever local court he had to in order to get the case taken care of. This attitude permeates Chinese society and demoralizes many of its younger lawyers. One experienced Beijing litigator told me: “I wish I were just doing corporate work. I don’t like going into court. It’s like a crapshoot. You don’t know whether the judge has been reached. It’s too unpredictable and arbitrary.”

In my own sad experience, and I’ve written about this in the *Far Eastern Economic Review*,⁸ even China’s leading international arbitration organization suffers from similar distorting influences. It is a challenge for any legal institution to escape the influence of the environment within which it has to operate. Some Chinese institutions, such as the Beijing Arbitration Commission, are striving especially hard to overcome these problems and appear to be making progress, but only time and research will tell. In the interim, all of us who deal with the Chinese legal system have to recognize its limitations and use it the way Chinese criminal defense lawyers deal with the criminal process, where they are required to fight with one arm tied behind their back.

The struggle to establish a genuine rule of law in China, in the sense of government under law and a functioning and impartial system for arbitrating and litigating important disputes, will be under way for a very long time. As already mentioned, we need to know much more about the actual conduct of the Chinese legal system, and Chinese scholars and law reformers recognize that they do too. Empirical legal research is just beginning to take off in China, and foreigners occasionally also manage to make a contribution. The other day I read a very good book by a Dutch scholar from Leiden named Benjamin Van Rooij.⁹ Some of you know him. I’m sure he has worked with Professor Wang. He has done an empirical study of efforts to enforce

8. See generally Jerome Cohen, *Time to Fix China’s Arbitration*, FAR EAST. ECON. REV., Jan. 2005, at 31; Jerome Cohen, *Letters to the Editor*, FAR EAST ECON. REV. June 2005, at 6; Jerome Cohen, *Letters to the Editor*, FAR. EAST ECON. REV., July 2005, at 4; Jerome Cohen, *Letters to the Editor*, FAR. EAST. ECON. REV., Aug. 2005, at 5.

9. BENJAMIN VAN ROOIJ, REGULATING LAND AND POLLUTION IN CHINA: LAWMAKING, COMPLIANCE, AND ENFORCEMENT; THEORY AND CASES (2006), available at <https://openaccess.leidenuniv.nl/dspace/bitstream/1887/5433/1/Thesis.pdf>.

environmental protection in some villages near Kunming. It demonstrates the desirability and importance of such research as well as the difficulties that confront this research. I assure you that in my field, criminal justice, empirical research confronts even greater difficulties because of the sensitivity with which the Chinese government regards even inquiry into minor, mundane criminal cases.

Yet the effort has to be made. Many Chinese scholars, lawyers and officials are reaching out for cooperation, and we should positively respond to their requests, but with open eyes. What can we do? I am delighted at what Vermont Law School is doing in collaboration with Sun Yatsen University Law School and Professor Li. Projects such as yours put flesh on the bare bones of often tired slogans exhorting us to enhance "mutual understanding." They not only help each side to learn about the other but also improve our professional techniques as well as our substantive knowledge. In addition, they provide moral support for Chinese scholars who sometimes risk their professional position or even their personal security in controversial areas such as the environment. We need more projects like this, and we need more American professors to go to China as Professor Yang did on a recent Fulbright grant. We also need more Chinese to come here to teach, do research and study.

At New York University Law School, I am pleased to note, we have just established a U.S.-Asia Law Institute that will focus on Greater China. One of our first projects has been to join Shanghai Jiaotong University Law School in setting up a Center for Chinese and American Law in Shanghai. At NYU we also welcome each year about 35 students from China, mostly LL.M. candidates but a few J.D. and J.S.D. candidates as well, in addition to about 15 students a year from Taiwan. We also have distinguished visiting scholars from China and have begun to invite Chinese experts to join us as visiting professors. Other law schools are making similar efforts. For example, on a recent visit to the University of Indiana Law School in Indianapolis I was surprised to find some 30 students from China. This is terrific progress. There's nothing sadder than to receive an email such as I got this morning from an able Chinese law student who bemoans the fact that she can't find the money to come here for advanced study. I get these messages every week. So there's a lot more to be done.

Whether we focus on the environment, criminal justice or other topics, we have to conclude that China is making legal progress, but not rapidly enough to meet its formidable challenges. I am confident, however, that if the Chinese and we in America and other countries

significantly increase our cooperation, as the Chinese popular song goes, “Tomorrow will be even better.”

AUDIENCE QUESTIONS

Audience

I wondered if you could comment on one observation or issue. Law in China, as you explained, has a long history. It appears that most of the recent attention and efforts at reform, however, have focused mostly on business law—contract, intellectual property, international trade, for example. Public law fields, like the environment, food safety, drug safety, seem to have been neglected. The steady stream of stories out of the Chinese media about huge failures with respect to pollution, food scares, and contaminated or counterfeit drugs seem to confirm that. For example, a few years ago, there was a scandal involving substandard baby milk powder that did not meet nutritional standards. Hundreds of infants were hospitalized for malnutrition and several babies died. Can you comment on this issue?

Professor Cohen

Well, law reform in China often comes in spurts as a result of tragedy, as you point out. People die because food has been polluted or you have false labeling. They get serious about punishing intellectual property violations if it turns out that the trademarks were false and somebody was really harmed; and that’s perfectly understandable. The trouble is, there are so many conflicting interests now in China. Although China does not have a conventional western style democratic system, it does have, as you know well, and as we heard last night, many conflicting interests. The Chinese have lobbying of a very intense nature. Chinese government owned enterprises are very influential. They often are the biggest obstacles to public law reform.

Yet, there is a kind of public opinion in China, however restrained. The Internet is playing an increasing role. The newspapers, having now to make a living rather than get supported by the government, are trying to appeal to popular interests. So these kinds of unhappy incidents do play up and develop more of a role for law reform. I wouldn’t exaggerate how much is being done in the private field; that’s also been very slow. The National People’s Congress is now considering, as you know and it may enact finally, a real property law. And a labor contract law—wildly controversial—may finally come out. These

things take, sometimes, decades. Of course in our own legislative congressional system we have similar problems.

One problem in comparative law, especially looking at China, is you have to compare apples to apples. We like, instinctively, to compare our theory with their practice, and that leads to some distortions. You have to look at: how does our criminal justice system really work? And we see many unpleasant aspects there. Sometimes Chinese see them to a greater extent than we do. That's the advantage of having foreigners looking at your own legal system. So there is this public law problem. China is increasingly under pressure. Look at the AIDS problem, for example. On the one hand, they must exterminate the problem; on the other hand, they don't want to wash their dirty linen in public. That wonderful woman, Dr. Gao, at first wasn't allowed to come to this country; she's in New York now, however. Which shows you there is repression, but there is also more and more collaboration in China, among intellectuals, lawyers, and scholars who are speaking out. Sometimes this has an impact. There is progress being made in all these fields, but it's fitful, it's uneven, and it requires a terrific amount of energy. You have to admire this relatively small group. You know, a few thousand people can write a lot of law, but it takes hundreds of thousands to administer the legal system. It just has to be stimulated further. The leadership is perfectly ambivalent. They're stuck. I think, if today they had to decide whether or not to import a western legal system, maybe they wouldn't do it; but they are stuck with it. They inherited this from Deng Xiaoping. Now, the legal system has its own momentum. They have halfway imported an adversary system. Can the Communist Party live with an adversary system? Taiwan is just taking that on now.

One point I should have mentioned is that we have to look at Taiwan; we have to look at South Korea, places that are similar, very similar culturally to China, and have similar circumstances and challenges. They are small places in comparison with China. Taiwan has 23 million people. Less than the size of greater Shanghai. South Korea has 45 million or so, half of Shandong Province's population. But nevertheless, these are very significant examples of Confucian cultures that have made a genuine transition to something that has to be recognized as a variant of the rule of law, just as Japan has done.

Something will happen in China. But I like the Chinese phrase "everything takes time." That is, a process. Rome wasn't built in a day. But we can't just sit back and say, "history will take care of the problem," because there're real live people involved. I have friends in

jail in China. I can't sit back and say, "well tomorrow will be better and just let education take its course," and international contact and all that. I think we all have to try to help, but be realistic about it. The nice thing is, this is not an American missionary impulse that's stimulating this. We are responding to impulses now within in China. One of the big questions will be whether China is going to finally ratify the U.N. Convention on Civil and Political Rights. If they do that, it will have an impact on Chinese justice, just as profound as the entry into the WTO has had on Chinese economic and administrative law.

Professor Wang Canfa (translated)

I think Professor Cohen gave a very wonderful presentation on China's legal system. Professor Cohen knows Chinese law very well. Professor Cohen's comment on Chinese law's historical development and current situation is very objective and Professor Cohen knows a lot of the litigation problems in China and particularly *guanxi* China's litigation. But, what I want to tell you [that] it is not every lawyer [who] takes a lawsuit *guanxi*. There are some lawyers who like to use law as the tool to proceed with the case. For example, I mean sometimes I help the pollution victims with the litigation, even though I know that I may lose the case; but I won't use my *guanxi* case. I have many classmates and students who work in the court. Also, one of my classmates is currently vice president of the Supreme Court in China. When I litigated for pollution victims, I lost some good cases. But I won't ask for help from my classmates and students who work in the courts because I don't think going for *guanxi* is consistent with my personal values. Even if I win the case through *guanxi*. I don't and that's consistent with the rule of law concept in China. There are some lawyers in China, particularly lawyers, who don't pay attention to *guanxi*. They pay more attention to the influence of the specific case. But if you want to win a case in China you've got to try to use your *guanxi* on that.

Professor Cohen

Good. Of course, I tried to make that clear that you have uneven development and you have different practices. I'll give you an example. In the intellectual property field, the three basic rubrics are patent, trademark, and copyright. The patent area seems to be run quite legally—playing it straight administratively and especially on judicial review of patent decisions. But copyright and trademark are more, or less regulated, more subject to all these distorting influences, and you

have to know each field. Secondly, as a practicing lawyer, whether you're a foreigner as I was in China or Chinese, you have ethical dilemmas to confront. One of them is that you know the other side is using *guanxi*. What should you do? Should you say, "Well in America we don't do this, and the best people in China don't do this, therefore I'll let my client lose" or do you say, "I'm gonna do this"? Well, you're not gonna do this, I'm sure, if the other side is engaging in corruption. *Guanxi* may be one thing, but corruption may be another. You're faced with all these ethical questions because you have a duty to the client and you have to be honest with the client. This is a problem that one has in daily life. These are not abstract philosophical, purely academic questions. These are problems of interaction in the legal system.

Well, I've used up too much time. I apologize to my revolutionary successors. And I look forward to learning from them and I thank you for your interest.

PANEL: ENERGY: CHINA'S CURRENT STATUS AND FUTURE OUTLOOK

Panelists: Robert Jones¹⁰ & Fredrick Weston¹¹

Friday, March 2, 2007

ROBERT JONES

Well, thank you for that very kind and lovely introduction. Actually I really didn't expect to be here today addressing you. In fact I thought that I would just come along for the ride with my wife, Margret Kim, who's sitting in the front row, as Margret will be speaking to you later on this afternoon. Margret and I co-founded the Ecolinx Foundation¹² about four and a half years ago with the express purpose of assisting China's transition to a more sustainable environment and energy future. And over the last four years or so, we've been very active in China. We go there about every two or three months, on average. And we've been focusing on the area of public participation, building capacity in public participation in the environment, and environmental governance. And of course Margret will be telling you a lot about that a bit later this afternoon. I am not a lawyer nor am I an engineer, but as mentioned earlier, I'm an Entrepreneur or an ecopreneur, as I've dubbed myself. And I have two (2) great passions in life, apart from my wife. And they are the environment and China. And my roots in China go way back to the sixteen hundreds when my ancestors first went to it's southern shores. I was born and brought up in Hong Kong. And I learned how to speak Cantonese before I could even speak English, which I still seem to have some trouble with today.

When you think about China, what images come to mind? The mist shrouded peaks of Wuling? The Forbidden City? Oceans of

10. Robert Jones is the President and Co-Founder of the Ecolinx Foundation.

11. Fredrick (Rick) Weston is a Director of The Regulatory Assistance Project.

12. The Ecolinx Foundation, http://www.ecolinx.org/ef_keystone.htm (last visited Apr. 4, 2007).

cyclists perhaps? Or even the Great Wall itself? And incidentally it's never been determined whether the Great Wall was built to keep marauding barbarian hordes out or the Chinese people in. But anyway, that's another story for another time perhaps. But when I think about China, I think about the single most ravaged environment in the world. The air in her major cities is so thick with coal dust, vehicle exhaust fumes, and a cocktail of other pollutants that the inhabitants live in an almost perpetual murky twilight. By some estimates China has 16 out of twenty 20 of the worlds most air-polluted cities; at least according to the World Bank. And nine out of ten of the world's most polluted rivers. And during this century China is expected to become the world's next super power.

But in actual fact China is already an environmental and energy super power with the capacity to wreck havoc on ecosystems the world over. With 1.3 billion people, a rapidly expanding economy, and one that's seemingly on steroids, and the desire to emulate higher consumption patterns in the west. China's declaration to quadruple her GDP by 2020, this highly combustible mix poses an enormous threat to the global environment. China is now the second largest consumer of energy in the world after the United States, of course. And is responsible for about 14% of the world's greenhouse gas emissions.

Second, again, only to the United States. And there are some reports that China will probably overtake the US in GHG emissions by as quickly as 2010. Also if China were to attain the same level of affluence that we have here in the United States, we will need the equivalent resources of three worlds. And unfortunately this world is the only one we've got at the moment. Therefore any attempt by the international community to reduce greenhouse gas emissions is bound to fail without China's active cooperation. And this also bears some thinking about. Through our extravagant consumption patterns we Americans consume, or some might say devour, about 50 times more goods and services than an average person in China. At the present time only a small minority in that country can afford an even pale imitation of the American excess. But as that minority grows, so too does the threat to the global environment. In fact, over the last twenty five years or so since the late Premier Deng Shao Ping first began his market reforms, incomes in China have tripled and quadrupled, allowing literally tens of millions of people to claw their way out of absolute poverty to join the ranks of the only conventionally impoverished and also the rapidly expanding ranks of the Chinese middle class. Now that may not seem like a lot to you, but in actual

fact that's a very significant improvement.

And for the first time in Chinese history most people in that country can now afford to keep warm in the winter, but unfortunately with the use of high polluting high sulfur coal and biomass. And it's this coal which makes up about 70% of China's energy mix. And China's rapid industrialization that are the reason why China today has the dubious distinction of being the second largest emitter of greenhouse gases in the world after the United States. More than 70% of all new coal fired power plants are expected to be located in China in the foreseeable future. Currently, coal makes up nearly 70% of the energy mix as previously stated, oil a little under 20%, about 2% for nuclear, 3% for natural gas, 5-6% for hydro, and a tiny, miniscule 1%, if that, for renewables.

But coal isn't the only culprit in China. Of growing concern are the rapidly increasing numbers of automobiles on China's roads. As of the end of last year China had about 25 million cars on its roads. And by some of the more dire predictions, China will have maybe as many as 150 million cars by 2015, which is about 18 million more than we had in this country in 1999. And this will be due in no small part in the Chinese government using the auto industry as an engine of economic growth. No pun intended.

With the wholesale use of tens of millions of refrigerators and air conditioners and the like, China is the largest emitter of CFCs, Chlorofluorocarbons (CFCs), which are responsible for the gaping hole that we now have in the ozone layer above the Antarctic. I'm not saying that China is solely responsible for this, because she isn't, we all are in one way or another.

So China finds herself in a classic catch-22. Can an increasingly stressed Communist party afford to threaten a new found economic gains of literally tens of millions of Chinese with environmental reform, especially at a time when so many find themselves having to join the ranks of the unemployed as China shifts to a market economy? And particularly as China steps up reform of the state owned enterprises. Also, there is this veritable flood of humanity and impoverished farmers to the urban centers of China from the countryside. So we see China paying lip service to the concept of environmental reform but with very little in the way of concrete measures to show for it. And a case in point was China's response to, or some might say lack of response to, the massive flooding which occurred in 1998 in the Yangtze basin when literally millions of people were displaced, and this was due largely to environmental factors like deforestation and

overgrazing. And unfortunately much of the world was seemingly oblivious to this environmental catastrophe, particularly in the United States, as we were so apparently mesmerized by such earth shattering subjects as stains on various items of Monica Lewinsky's wardrobe, remember her, and the dalliances of former President Clinton.

So what to do? I believe it's time for us to welcome China with open arms, especially as China becomes increasingly more important on the global stage. At the same time we need to try to ratchet down the level of criticism of China and the China bashing, which reaches fever pitch at times, and give that country the benefit of our environmental and energy technology and expertise. And, help China find that very delicate balance between growing her economy and preserving her environment. Because by preserving her environment, China also helps us preserve ours.

So what does the future hold? What can we expect to see in China over the next, say, decade? Well the sad fact of life is that China will continue to rely heavily on her vast reserves of coal, at least into the foreseeable future. But a number of things have happened recently and in the recent past and are continuing to happen in China that give us some hope for optimism. There is the 20% reduction target by 2010, which was announced by the eleventh five year, in the eleventh five-year plan. There is the renewable energy law, which passed in 2005, which became effective in January 2006 along with its implementing regulations. And there, of course, is the comprehensive energy law, which is being formulated as we speak. And we should be hearing a lot more about that over the next several months to a year. Then there are the fuel economy standards in China which are actually more stringent than the ones that we have here than our CAFE standards. And of course there is the clean development mechanism, the CDM, of the Kyoto protocol, which China ratified in 2002. And this has resulted in nearly 60% of all of the CDM projects being located in China. And this should have a very positive effect on China's sustainable development plans.

So to recap, China faces some enormous challenges. But thankfully the powers that be in Beijing are beginning to come to the realization that business cannot continue as usual. Of course, how they address these problems is going to be interesting to observe, especially in the absence of legal and political reform. We won't know, of course, for several years down the road what will happen, but we cannot afford to be complacent. We cannot simply wait and see. All the more reason why it's so very important for far sighted, progressive institutions like

the Vermont Law School to be engaged in China and help China realize a more sustainable future. 'Cause China will have and indeed already has such a profound effect on all of us, on the entire world. Thank you very much for your kind attention.

FREDRICK WESTON

My father would have been impressed by that resume. My mother would have believed that. While we're getting this set, since Mark Levine couldn't make it I'm back-filling a little bit. Robert did a terrific job of setting the stage. I'm going to sort of fill in with a number of revealing statistics that will frighten you, if Robert's alone did not. And then I'll talk a little bit after that about some of the work that my organization is doing. We're funded by a group called the Energy Foundation out of San Francisco. Alex Wang is also partly funded by the Energy Foundation and I'm going to talk about some of the work that the Energy Foundation's grantees are doing. But I'll focus in the end largely on the electric industry.

As David said, I was at the Public Board for a while. I'm not a lawyer. I played one for those 11 years, but I'm not a lawyer. I do have to start with one thing that sort of caught my attention. It's funny. One of the programs for this event misnamed the Regulatory Assistance Project and called it the Vermont Regulatory System. Now if any of the current regulators in Vermont had seen that they would have reacted. We are already often considered officious intermeddlers in Vermont regulatory affairs. I heartily deny it, but I did get a kick out of it.

OK. I'm just going to sort of go through this Gattling-gun style, some fun facts to know and tell about China. Robert gave you the statistics. China is 70% coal in its energy mix. Hydro, oil, nuke, and natural gas fill out the rest. China's just recently opened a gas line from the west to the east and it's going to begin importing LNG. And it plans to add 24 to 32 nuclear plants by 2020. Four times the current capacity.¹³ That's a good day in China. I'm partly exaggerating. I just returned from a month in Beijing. I spend about two months a year there. And every morning one wakes up and checks the air. It does affect what you might be doing that day. Here, as you can see, is a

13. Mr. Weston refers to accompanying PowerPoint slides throughout his presentation. These slides are available at the *Vermont Journal of Environmental Law*, <http://www.vjel.org/events/2007.03%20Symposium%20-%20China.htm> (last visited Apr.4, 2007).

projection of carbon dioxide emissions in China from coal use over the next 20 years, going from about 2,000 million metric tons to over 500 thousand in the next 15, 20 years. So we're talking about more than doubling, perhaps even tripling. Oil use is going up. By 2020 China will import 80% of its oil. Ten years ago it was a net exporter of oil and it now imports 45%. And of course with the growing use of cars this has changed.

On the left is a graph showing the changes in gross domestic product since 1978. Rapid growth during the '90s as you can see. And that slope looks to be maintaining itself. In fact in 2006 China's GDP growth was the largest it had been in 15, at least 10 years. It's huge. Roughly rising at 10% per year. Electricity use is rising at 15% per year. So energy intensity, in fact, is going down. It's going the wrong way. And that graph on the right, can I go the other way. I can. OK. As you see energy intensity. The upper line is the increase in energy use. The middle line is gross domestic product. So energy intensity, the amount of energy being used per unit of GDP is going up, which is the wrong direction.

And I'll show you the graph about how China had done earlier and you'll see how that's changed. This slide speaks for itself. The World Bank estimates that China's annual pollution costs amount to around 8% of GDP per year. As Robert had said, 16 of the world's 20 most polluted cities are in China. Respiratory and heart diseases from polluted air kill a half a million people per year. And cause over 75 million asthma attacks.

This is an interesting one. Forty percent of US mercury pollution originates overseas. That means that 60% comes from within the United States and I don't want, I don't want that fact not to be appreciated. And China admits 25% of the world's global mercury. And these are maps of how that moves.

And this is the, this is the graph of the numbers that we've been talking about. US carbon dioxide emissions in million metric tons a year, if I've read that correctly, about 6,000. China is second and the prediction, as you said [referring to Robert Jones], 2010 will be when China catches up. I just heard two days ago it's going to be 2009, but it's frightening nevertheless. Here on this graph the numbers are different because it's carbon, not carbon dioxide. So, when you think of carbon you multiply by about 3.6 to get the equivalent tons of carbon dioxide. But you can see how quickly China's carbon dioxide emissions are rising. And as we see it looks like this graph is already out of date. This also speaks for itself. Changes, expected changes in

world gross domestic product over the next 15 years. China and the U.S., of course, are the world's two great carbon dioxide emitters and we are the two that aren't part of the Kyoto protocol. China has signed it but not yet ratified it.

Just some additional statistics. Seventy-five percent of the greenhouse gas emissions in the world originate in the industrialized countries and 80% of the cumulative emissions originate in industrialized countries. So let's not have any misapprehension about who's the bad actor here. The bad actors. But as Robert has said, if the average Chinese consumed as much energy as the average American, China alone would be emitting the entire world's current CO₂ emissions plus 22%.

Population. We know these numbers. Let's take a look at GDP per capita. And you see, of course, the great reverse. And so, as GDP increases in China, so will emissions output. The U.S. has 4% of the world's population, we consume 25% of the world's oil. China, with 20% of the world's population consumes 8% of the oil but twice as much coal. That was on an earlier slide. China uses twice as much coal. China's GDP is one eighth, as you can see, of ours. In per capita terms, China's economy is ranked 100 in the world. Energy consumption per capita, again, these are statistics that I'm sure you all have a sense of.

OK. So I'm just going to flip through them. If you want copies of the slides you can get them from me, or I think from Amanda or and there are notes. In fact the notes associated with them fill out some of these statistics.

I put this up here just to give you an idea of how quickly, in 13 years Chinese industrialization, particularly in the output of minerals, has increased. Industry is 63% of GDP and the raw materials sector is growing much faster than expected. It's extraordinary. And here's a statistic that I find . . . I thought it was wrong. And I've seen it twice now and I just couldn't believe it. China has built roughly 80 thousand high-rise buildings per year for the last 15 to 20 years. Now I do know, I've heard this one as well. Eighty percent of the world's construction cranes are in China. There is nowhere you can look in any city and not see many, many construction cranes.

You've seen this. I've already shown you this one. Here's a projection of future world oil use and the key thing here is that China and India are expected to consume more oil by the year 2025 than all other regions of the world. Robert talked about vehicle growth. Here's where China is as of, I'm not sure what year this was. This may be

2004 I think. But as you said, by 2015—other numbers I’ve seen say later, but in any case soon enough— the Chinese vehicle population’s expected to exceed that of the US. Crude oil imports, once again, these are the areas from which they come. If you’ve been reading the news you know that China is investing heavily in Africa for energy and mineral purposes. This is just another graph showing how oil use is going up in China. It’s the, I guess, the lavender line is the one that would be business as usual in China if there’s no change in how China uses oil.

Electricity growth. This is the one that I have more involvement with or more knowledge of. You can see that as of about, as of 2000, installed capacity was 300 gigawatts. What does that mean? Here in New England we have 30 gigawatts, 30,000 megawatts of capacity that we use to serve all of New England. New York is 35, 37, somewhere in that range. California is in the fifties. Margret can correct me if I don’t remember the numbers exactly. In China every year they’re adding 75 gigawatts, at least, of new capacity. That’s more than twice of all of New England’s, every year. And most of it, the large majority of it is coal fired. OK. So that gives you an idea.

So let’s put it another way. More than 1,000 megawatts of new power plants are being brought on line in China every week. It’s phenomenal. Vermont’s peak load, by the way, is slightly more than 1,000 megawatts. OK. The development targets for 2020. These are the official government targets. They want to quadruple the GDP by, it should be 2020. But they want to double, only double energy use in that period. So we’ll see what happens. President Hu called for in 2003 when this target, this development target was set, President Hu called for what was translated as the “Three Transcendences.” One is to “transcend old resource wasteful technology, maximize recycling and move to sustainable development.” Two is to “transcend traditional ways for great powers to emerge in the world to effectively reject hegemony and pursue peaceful ascendancy.” And then three is to “transcend outmoded approaches of social control, job assignments, etc., and strengthen, as we heard today, the rule of law and build a harmonious stable society.” It is a laudable goal. And here’s sort of in a nut shell what needs to happen. There’s a great deal of energy waste in China and it needs to be utilized. Here you see relative statistics showing greenhouse gas emissions per dollar of output. This is analogous to the energy intensity statistics that you often see. Energy usage per dollar of output. But you can see that technologies in China are older and less efficient than they are elsewhere. And so this is why

you see the differences here. Comparing old installed investment to current standards as well. OK. Some solutions.

I'm going rapidly go through some of the things that are being done largely, obviously by the Chinese, but some of the programs that the Energy Foundation is funding and I'll talk a little bit about something that we're working on specifically in China these days. The low-carbon program in China, of the Energy Foundation, which has, is established in Beijing. It's called the CSEP, the China Sustainable Energy Program. It's funded by the Packard Foundation and Hewlett Foundation. Their low-carbon program has done some work, done some modeling. And their hope is with a multi-sectoral approach to dealing with energy use and emission controls. You know, environmental controls. That bottom line, the yellow one might be sustained over the next, again a couple of decades. And that's million metric tons of carbon equivalent output. So it's a very ambitious target given that the base line is, as you see, rising fairly rapidly.

OK. I spoke earlier about some of the efficiency gains. I alluded to them, in China. For many years China prior to the late '90s invested heavily in energy efficiency to improve the economic and thermal efficiency of its industries. And you see without those investments where energy use would be. That's the peak of the green area in 1998 had those efforts not been made. So, there have been phenomenal improvements in the use of energy in China. However in the later '90s, starting in the '90s and certainly toward the end, investment in energy efficiency began to fall off. And this is a percent of total energy investment, these numbers.

OK. One of the programs that the government has just begun in 2006 is called the Top-1000 Enterprises Program. And the idea here is through government investment and other lending, the objective is to save 100 million tons of coal by 2010 which would reduce CO₂ output by 242 million tons. This is—Robert alluded to the goal by 2010 of reducing energy usage by 20%—this is the centerpiece of that program. We'll see how it goes. We know however that China is already behind in making that 2010 objective. So we'll see what happens.

But this is all...they're targeting all the energy intensive industries naturally in China. I'm not going to spend time on this one. I'm not really familiar with the programs that the Energy Foundation is engaged in with some of its grantees and partners in the Chinese government. But I did want to point out this: recently adopted fuel economy standards, fleet economy standards for automobiles in China are 20% more stringent than ours. That should tell you something.

And I love this one: after 2008 about 90% of the SUVs currently on the roads being sold in China will no longer be allowed to be sold. If you want more information on that I can get some for you. And here's what is expected to happen as a consequence of those fleet efficiency standards: roughly 900 million barrels of oil will be saved by 2030 and 490 million metric tons of carbon dioxide.

OK. The renewable energy law, I think you may have alluded to it, calls for 15% of all electricity to be provided by renewable sources by 2020. Robert talked about the energy law that's currently being debated and developed. For a couple of years now an electricity law has been under development. It was put on hold as a consequence of some severe power shortages during the last several years. And we'll see what happens with that.

China is trying to restructure its electric industry quite significantly to develop wholesale competitive markets for generation. There had been hopes at one point or another for retail competitive markets, but a variety of events both in China and certainly elsewhere, California for example, have put that idea on hold. And I frankly think that's a very good idea. I happen not to be one who believes that retail competition in the electric industry really works. But we can save that for another discussion. In any case, the 15% goal is a government mandated goal.

And these are the, you can see what the shares are that they hope will make a difference. There are to date about a thousand megawatts of wind concessions throughout the country. The hope is by 2010 there will be over thirty five hundred. Appliance efficiency standards are being developed and put in place. That, again, as you can see from these numbers are, if, if they go, if they're enforced, if manufacturers in fact stick with, you know, adopt them and stick with them, these are the kinds of savings that are expected. So we'll see. We will see.

Let me just turn a couple of pages here. Building codes: I'll flip a page here. There are six implementation pilots around the country. We talked about the 85,000 or 80,000 buildings per year. None of these have been built so far to modern efficiency, building energy codes. We'll see what happens. There are, as I say, six implementations, six pilots, and we'll see if some improved building codes go into effect.

The final point is local building materials. There are, of course, a scarcity of building materials and as you know this has affected the prices, the world prices, of steel and other commodities.

OK. Very quickly. Electric power. The work that I get involved in is utility regulatory reform. In 2002, China created the State Electricity Regulatory Commission, SERC. Sort of the equivalent of

the Federal Energy Regulatory Commission here in the US except that it has much less authority. It doesn't have pricing authority over wholesale markets and that's a significant problem. We've been advocating quite strongly that that be changed. They are seriously talking about new pricing policies, particularly with respect to how generation is priced for the purposes of dispatch. And by dispatch we're talking about what machines get turned on to provide power as demand increases during the day and over time. Pricing matters because the more efficient units are going to be the less expensive unless they are uncontrolled dirty coal. So that's another issue.

But the general matter is that more efficient plants will be dispatched first in a marginal cost-based system, which China does not have. And as a consequence, just from the manner in which they manage the day to day operations of the grids, more pollution is occurring than needs to. And this is one of the things that we've been working on them with. We've been trying to persuade the provincial and central governments that energy efficiency is less expensive than supply and should be treated as a resource and thus paid for through electricity rates prices, just as we do here in many states in the United States—and you all, and those of you here in Vermont should be familiar with Efficiency Vermont. Same idea. It's a resource. Efficiency is a more cost-effective resource than alternative generation and we're working with the Chinese to help them think about how best to go through that, how to do that. And it involves least-cost planning, how to plan for the future of the grid, and investment.

Very quickly. One project we're involved with right now in Guangdong is called the Efficiency Power Plant, where we've actually designed a set of efficiency programs that will target high-usage, high-volume consumption industries for energy efficiency investments. And the way the investments work is that they're savings. They're reductions in the energy that they use. It will look like, will mirror, the output of a three hundred-megawatt coal-fired power plant. So in fact you're treating efficiency as a power plant and you're financing it the same way that you finance a power plant.

And the Asian Development Bank, the folks that we're working with and the folks in Guangzhou and in Jiangsu and Shanghai, where the numbers that you see here, are the original proposals that we put together a couple of years ago. In Shanghai we think we're going to be moving forward with it as well. But it's just another way of thinking about energy efficiency programs. Treat them as power plants and move forward.

I won't go into Kyoto except that clean development, the CDM components of the Kyoto Protocol, actually can work here and could in fact provide some funding for such things as efficiency power plants. There is a national goal for reducing sulfur dioxide emissions. It's not yet mandatory. There are pilot trading schemes. They do have a pollution levey, which is terrific. It operates on the principle that the polluter ought to pay. It's a fee per metric ton of pollutants. It has the effect of linking the emissions of pollutants to the output of electricity, so you have a very strong incentive for improving the efficiency with which you produce electricity. And there's no move yet to impose a carbon cap and trade program in China.

And I'll just leave it with this. The challenges are immense, obviously. That's what you've been hearing today. There are a lot of really terrific international experiences that China has been looking at that I think we'll be taking advantage of in the years to come. And I would just say that there's this trap that we sometimes hear in our meetings with folks in China: that we need to develop first and then we can clean up. Well, the economic impacts of not cleaning up as you develop, the economic and public health impacts, are huge as we've already seen. And there's every reason to think about China leap-frogging the mistakes that we've made. And there's, well there's, I guess we have, and this gives you an idea of all the things that can be done to move toward a low carbon path. And I'll just leave it at that. Thank you very much.

AUDIENCE QUESTIONS

Thank you. Excellent presentations. We have, I understand, we're supposed to run this panel until a quarter of. So we have a little time for questions. As moderator I'll think I'll take my prerogative and ask the first one: maybe it's just an all-American thing but we rush to technology fixes, and so I'm going to ask about a possible technology fix - integrated coal gasification, gasification, IGCC¹⁴. It's something that seems to me the United States could take advantage of. And perhaps China as well in as much as they are, we and they are, so coal rich.

Coal gasification basically is a chemical plant that takes coal and turns the by-products into natural gas and it's burned off. Natural gas is used to burn and make electricity so it's somewhat cleaner, fairly, quite

14. Integrated Gasification Combined Cycle.

a bit cleaner. And then the other by-products are used as feed stocks for certain industries for production. In addition to IGCC there's a hope and an assumption that there's an ability to sequester the carbon that comes out of such a plant. That often times is looked at more hopeful than otherwise because there are various attempts around the world to try to sequester carbon. IGCC. Are things being done with respect to that technology? What are the forecasts for that?

Robert Jones

I believe they're being looked at now but that's about as far as it's gone at this point. But yes, of course, given China's huge reserves of coal, of high polluting dirty high sulfur content coal, I think this would be a natural for China. And we have the technology in the United States and we should be talking very seriously to the Chinese government about it.

Rick Weston

And it has come up in discussions. I would just add that of course the issue is sequestration. And with the amounts of carbon dioxide we're talking about, putting back in the ground or in the oceans is huge. And we have no idea whether such geologic sequestration is going to succeed for any significant length of time. We just don't know. But it certainly needs to be pursued.

Audience

I was hoping that either one of you or both might be able to address China's increasing pursuit of natural resources outside of that country. Both for consumer, just general consumption purposes. But by also more of the energy context, the pursuit of oil in countries such as Africa. And perhaps comments on the ensuing political and environmental effects.

Rick Weston

I think your question actually answers itself. And I have to say that I don't, I haven't given much thought yet to the issue. And I don't know more than what I've read recently in the papers. And certainly there has been discussion of the geopolitical impacts of China, China's significant investments in sub-Saharan Africa. Looking for, you know, supporting mineral extraction, oil and other minerals there. And I don't know what to say other than that China is obviously going to play a very, very significant role in development and political, the political

future of such areas. And I don't have any great insight other than to say, as I said a moment ago that it's certainly affecting the global prices of many commodities. Forgive me for being less knowledgeable on this subject.

Moderator

Can I just add to that? When I was in the Peace Corps in 1982 to '85 in Rwanda, China built a highway from the town where I lived to another town. It was a fabulous road, and (Rwanda) benefited from it. It was an excellent piece of work. They made friends. Now if you look at the history in Africa the British, the Belgian, the French, and their relationship with Africa, you look at the abject poverty that Africa represents today. Making friends with Africa is probably a good idea. And I'm sure they're ready to make friends with anybody who will be a friend to them. Other questions? Yes ma'am.

Audience

This is for Rick. You indicated that you are working with the Chinese, and you mentioned that Asian development thing [referring to the Asian Development bank]. But, this sort of leads into our next panel, what exactly is the context? At what levels are you working with in government?

Rick Weston

All. Primarily though with the central government. We're spending, my work which is to help the Chinese think about regulatory reforms, to support clean energy initiatives. One thing that, in this country as well, that we don't fully appreciate is that government oversight of monopoly network industries, and in this case we're talking about electricity, has profound impacts on the behavior of those industries and thus on the environmental profile of them. So there's a very strong nexus between environmental regulation and economic utility regulation as we traditionally think about it.

And utility regulators often don't appreciate what their decisions, you know, what the outcomes what the effects of their decisions are. So we're spending a lot of time talking with both, working with both SERC and the National Development and Reform Commission which is sort of the equivalent of our Department of Energy, but it actually has pricing authority over retail and wholesale and electricity use in the country. The national, the central government authority works with its provincial equivalents to set prices, at both wholesale and retail. So

we're working with these folks providing advice. That we're, as I say we're funded by the Energy Foundation, to talk about what kinds of policies would, they ought to be, we think they ought to be thinking about as they further reform the sector.

So, national government level, provincial level, so we're working with folks in Guangdong right now. We've been...we were in Jiangsu for quite a while. And now it looks like we're going to be going back. Shanghai as well. We provide some advice when we can on the rewrites of the energy and electricity laws. But we also work with other NGOs. Alex Wang is here from NRDC¹⁵ and his organization and ours have been working together on these energy efficiency power plants that we've been talking about. Primarily though we work with other grantees, as well—I shouldn't say primarily—we work with other grantees of the Energy Foundation. And those grantees are typically, for lack of a better word, think tanks that are attached to various organs of the government or the State Grid Company, the state power company. They all have their own sort of think tanks that do a lot of the nuts-and-bolts analysis of various policies.

And they're funded both by the government and in certain cases by the Energy Foundation. Our work with the Asian Development Bank is actually fairly new. And the idea there is that the ADB is funding the analysis of the EPPs¹⁶. And it may in fact end up funding the EPPs themselves or commercial lending from in the country would fund them.

Moderator

Another question?

Audience

Although it wasn't the first time you mentioned it, I read an article about nuclear energy. Is that something that's being considered as clean air cheap solution?

Robert Jones

Well it's very debatable how clean nuclear energy really is. I believe that China will double its capacity of nuclear facilities within the next ten years or so. But yes, it's definitely on the table and it's going to be a very important part of the energy mix. I'd like to see

15. Natural Resources Defense Council

16. Energy Efficiency Power Plant

other forms of energy, personally, but you know, China needs to get energy from where ever it can basically. So I guess we have to live with that fact.

Rick Weston

I think, I'll just add that, sure folks think about nuclear energy and call it non-emitting, but of course we know that is not true. And that the full fuel cycle for nuclear energy is, has a very significant carbon footprint.

Audience

I'd be curious to hear about whether the countries that are downwind and downstream of China have any leverage on their activities: the dams that they've constructed on the Yukon River, and with the air pollution that drifts over from China. Do these countries have any influence or leverage on China's internal processes or are they pretty much?

Rick Weston

You know I might not be the person to answer that question. Perhaps Professor Wang could. I have, I've met with Korean officials and Japanese officials occasionally in China. But the degree to which their influence in policy, the degree to which we're influencing policy—I mean I can't begin to measure it. But yes there are certainly concerns about as you say the downwind impacts.

Robert Jones

Yes, that's a huge issue for South Korea and Japan, but there's very little they can do about it. And as you know, Rick said I don't think they have much influence. So maybe my wife Margret could answer that question a little better being South Korean or Korean American.

Moderator

Thank you. Professor Cohen? Yes sir.

Professor Cohen

I just wondered—can you say to what extent the Chinese perceptions of what their neighbors and the United States are doing effects their own willingness to take necessary measures? This is such a ball of wax. Do they say well, we'll do something but we're helpless too because the United States isn't pulling it's weight and expects us

to I'm thinking of the analogy of this whole currency valuation. Why should China take us seriously in our huge pressure on them to alter their currency valuation when we refuse to take steps to reduce our consumption of imports. Is there an analogy here in the energy field?

Rick Weston

I think yes, there is. You're absolutely right. In the meetings I've had and workshops that we've been involved in these issues come up. When is the United States going to take action. That sort of thing. We, frankly our response to that is always "don't do what we did." You know? We're not doing it right. We're here to talk to you about what you can do. But you're absolutely right.

One thing I find very interesting, and I greatly appreciate the Chinese in this respect is they are very, very . . . the folks we work with are very, very curious about what the rest of the world is doing in the way of clean energy policy. And they want, they have a voracious appetite for what's going on in Europe, in South America, in America, and what has been done.

We just brought fifteen folks over from Guangdong and Beijing for a week in California to meet with folks from California and Vermont, from Efficiency Vermont, to talk about ways to deliver energy efficiency. And by all accounts it was a very, it had a very profound impact on the study tour. And folks went back to Beijing and were really geared up on these kinds of issues. So there's a, I guess what I would say is that there's, you know, a great interest in good policy. They want to see what the world is doing and, you know, the United States may or may not get its act together, but they're moving, they're trying to move forward in certain respects.

Professor Cohen

Well, there's two questions in addition. One is a question of equity in terms of sacrifice, and the other is just the intrinsic hopelessness of their situation that they do everything. Are they still going to be victims of what's going on around them or are they so much more the malefactor that they don't have to or we don't have to worry about whether they clean up their act or not, they are going to suffer because they're more of the problem. On every item you mentioned, we're the ones.

Rick Weston

Yup.

Professor Cohen

We're still consuming more, using more, and wasting more than they are.

Rick Weston

Yup. I guess I agree with you. I don't know what else to say. But you're absolutely right. And still, 75 gigawatts of new cold generation are built in China every year. I don't...there's a paradox, an irony. I don't know what to say. But there are folks who are very concerned about it. And yet these machines are being built, in many cases without siting approval. Sorry that I'm not able to

Robert Jones

It's very unfortunate that the United States has absolutely no credibility. Especially in regard to Kyoto, the Kyoto protocol, and the non-ratification of that. We live and hope of course, and lots of things are happening on Congress right now as we speak, leading hopefully toward active participation in the future in that accord. But China's stance is that we in the west are responsible for what's happened with the global climate, so we need to clean it up. And to a very large extent I would agree with that assessment. We need to step up to the plate. We need to assume our position as global leaders as the only super power. So it's really up to us to step up to the plate and do what needs to be done.

Well I think there are innumerable opportunities for students to get involved in China through corporate America.

In fact, what we're doing through our foundation is we're going to set-up an internship program for young Chinese environmental professionals and get them in through the back door, so to speak, to American corporations in China. Because they've been complaining to us for years now that there are no opportunities for environmental jobs in China. So they just go and they gravitate towards whatever there is out there. But this will give them the opportunity to actually get involved in the environment and put to practice some of the things that they have learned in University.

Rick Weston

I would agree with that and merely add that experience matters. And it's not absolutely necessary that one started immediately in China to affect good policy outcomes that will in the long run have an impact on both China and America. And I think that there are lots of

opportunities in regulation. For example our field, my field here in America, there's still thirty states in America that are not doing good things. And to move out into those areas would be terrific as well.

**SPEECH: ENVIRONMENTAL CHALLENGES FACING
RURAL AREAS IN THE PROCESS OF
INDUSTRIALIZATION**

*Professor Li Zhiping*¹⁷

Friday, March 2, 2007

PROFESSOR LI ZHIPING

Thank you very much. Thank you Tseming for your wonderful introduction. And I'm really very excited to have this opportunity to come back to Vermont again. I was here for one semester in 2004, and I spent a very productive and very happy time here. I would like to thank Vermont Law School and the *Vermont Journal of Environmental Law* for making this opportunity for me to come back again and give a presentation here. I will go through my presentation very quickly because the time is maybe a little behind schedule.

My topic is about the petition on peasant's environmental law in transition. There are several main points including an introduction, the environmental change in peasants' eyes, and peasants' understanding of environmental protection and environmental protection law—and there many difficulties in the protection of peasants' environmental rights. And the last one I would like to put forward is some counter measures.

I will begin with the introduction. My presentation is based on a survey. And this survey was conducted by the students of my environmental law clinic and my environmental law classes. And this survey lasted from July to October—almost half a year—during last year. About 13 students were involved in these activities. The way we are doing the survey is in two major ways. The first one is the interview, and the other one is questionnaire. We have already collected 350 questionnaires so far, so my analysis was basically on this questionnaire.

The purpose of the survey is to gather peasants' opinion about their

17. Professor, Sun Yat-sen University Law School, Guangzhou, China.

environment, and the peasants' sense of environmental rights and peasants' ability, and the obstacles they face, to protect their environmental rights.

Why do we focus on peasants' environmental protection? As we all know, in the past several decades, great effort has been put into environmental protection. But most of this effort was put into the city. And we can say that almost all the legislation, and all the systems and institutions relate to the city, and not to rural areas. The peasants are the biggest weak group in China in many aspects, especially in environmental protection. So, I think it's time that we focus our efforts on rural areas environmental protection.

Our survey was conducted in Guangdong Province, so I would like to give some idea to you about the province. Because, as you know, we have already discussed Guangdong province, so this is the map you are already familiar with. This is the map of China, and Guangdong is in the southern part, yes, in here. So it's near the South China Sea. It's right in the south, in China. And this is the map of Guangdong province. And here is Guangzhou—the capital city of Guangdong province—and also a huge super city of China. And here is Hong Kong. Here is Macau. And this area is the most urbanized, industrialization area in China. And the majority of our survey was conducted in this area. It also included some other areas as the east in Shantou, and the north, and in the rest of the province. So it almost covered all 11 cities of Guangdong province and included each type of area typical of this province.

So, how significant is this province in this region? I can show you some numbers. It contributes about 11% of China's GDP, and about 12% of China's total financial income or about 31% of China's total world exports. All these three areas are being listed as the number one place in China for decades. So maybe we can see it as the most powerful province in China.

It is also the most economically dynamic area in the world. Some people say that 31% of China's world export comes from Guangdong province. So some people even said that if there is traffic jam in Guangdong it will cause a shortage in world supplies! So many people will think that maybe, you will have many opportunities to meet Chinese products from Guangdong.

So the economy was developed so quickly. How about the environment? I'm not going to show you the figure in the formal way. I just would like to show you some pictures from the peasants' eyes. The peasant—the word I use here—is equal to farmer. There is no

difference between the peasant and the farmer in China, so I need to give some explanation to this.

The second part is about the environmental change in peasants' eyes. When we asked about the change to the environmental rights this year, about 44% of the respondents said it's getting worse, 30% of people think there is no change, and 21% of people answer it's getting better. And almost half of the respondents worry about the quality of environment. So, when did this happen?

You can see from the chart most of the people think that this happened within ten years or five years. It reflects that this change happened since the 1990s. And since the 1990's, if we consider most of the environmental impacts are up here, several years—even ten years—behind the people's behavior, it means that those changes were caused by people's behavior since late 1980's and early 1990's. And these periods just are the key time that Guangdong Province carried out its industrialization and urbanization. So this is about the time.

So what's the main phenomenon of environmental change? We can see that the people listed solid waste as the number one, water second, air the third, and noise the fourth. It also reflects that people's living condition has risen.

Because in the past there was almost no waste in rural areas, almost everything could be re-used as fertilizer. But now they get so much waste, it means they have consumed more than they produced, such as plastic and metal just like this. So the waste problem in rural areas has become more and more serious. As we surveyed, some of the villagers have already established a system to correct for this waste. But since there are no central rural waste areas, what they do is just move this waste from one place to another place, but the problem still exists.

About air quality, about 45% of people answer it's getting worse, 40% of people think it's really bad, and 26% of people think there is no change. Only 8% of people think it's getting better. So, as you know, generally speaking, air quality in the rural area is much better than in the city, but it still has already become very serious question now.

And about the quality of drinking water, I need to add more words on this. According to our survey about 15% of the respondents still fetch their drinking water from nature directly, such as spring water and well water, and some even from the river. So 15% of the people still fetch their drinking water from nature. How do people think about the quality of those drinking waters? Near 30% of the respondents think it's getting worse, 28% think it's always good, 17% think it's always bad, and 16% think it's getting better. So we can tell that if we add

those people that think the water is getting worse or very bad, the number is almost 50%. So, almost half of all those people who fetch drinking water from nature are facing environmental deterioration problems now.

So, how about the situation of farmland? As we surveyed, 34% of the respondents think there has been no big change, 33% think it's getting worse and has led to reduction of crops, 11% think it's getting worse and unsuitable for cultivation anymore, and only 2.8% of people think it's getting better. So it's very serious in Guangdong Province.

And when we asked, do you and your family members ever suffer from environmental pollution, there are almost 34% people who answer yes. So it's quite common for the people in the rural area, they suffer from the environmental damage.

When we ask the reason for the environmental change that is the biggest reason, the people think that it is impact by factory pollution discharge. Second is the peasants' lifestyle, and third is rural building and developing activities. When we ask, are there any enterprises in your village, about 65% of the people answer yes. What are those factories in the villages? We can say from this chart, most of them are chemical, electroplating, mining, hardware, and papermaking. All these factories are highly polluting enterprises.

As to the people's knowledge about their local environmental situation, we can tell from this chapter that people have very, very little knowledge about the situation of the local environment. About 54% of people think about it a little, 29% are not so clear, only 11% answer very much. But how do you know? It is very interesting. The people got the majority of the information about their environment this way, you can see it's split, just by their physical feeling – by their eye and what they touch. And hearsay is almost the main way to get the information.

Very few people can get government announcements and get notice from village committees. So, people have really few means to get precise environmental information. Why does this happen? Because even the government doesn't have such information because the budget is seriously insufficient in China. Sometimes the government keeps this information confidential, so it's very hard for a peasant to get environmental information. Separate I will talk about the peasants' understanding of environmental protection and environmental right.

As to the attitude of polluting enterprises, we know the peasant has clearer and more reasonable mind about factories being nearby. About 54% of people object to those polluter enterprises, but about 40% of

people, they don't mind and even welcome them. So, what's the main reason for this? You can tell that people still have very high expectation that they can bring job and business opportunities to them.

About the willingness to change the situation, if it is being damaged by pollution, we can tell here that 41% of people answer very much. And nearly 40% of people think sometimes. So, we take up these two parts and you can see they're willing to change the environmental situation, very strong, really high. But if we consider the means for today, it's a totally different picture. When we ask the men to safeguard their environmental rights, most of the people will chose to complain to the village committee, and the second option is to complain to the government. And these two parts take up almost 75%.

And peasants hope not to report to the government, that the government can—that they have power to stop this environmental issue. What they hope, it says, is that they want the government to represent them, to negotiate with the factory, to serve as a source of power for them. Because, as we know, the village committee has no power to regulate the factory and to treat their environmental issues, so what they hope is just that they have some organization, some institution, to do this job for them. Only 9% of people will negotiate with the polluter directly, and only 2% people will sue to the court, and also less than 1% will choose petition.

And the survey shows a very different picture to us than other surveys. Maybe some people will think that the petition in China is very popular, especially in the rural area. Because they are peasants, they have no legal knowledge, so they cannot. But as we surveyed, we cannot find this preference. So I think maybe Guangdong is just different from the other provinces, or maybe the opinion and situation has changed. So, the chapter shows us that the peasant greatly rely on government—across the government organization—and the means they take to safeguard their right are negative and positive.

So, how do they deal with the environmental problem issue? We also have some data to show here. The methods they take to deal with environmental pollution are very positive, very positive, such as the way to treat polluted drinking water. Most of the people will choose to buy bottled water. And then the second choice is to still drink polluted water. And the survey is finding other water sources. Maybe the question is will they also find another source. And when we asked, how do you deal with the polluted farmland, you can see here, almost 30% of the respondents will choose to give up agriculture and find a job outside. And 24% of people will choose just nothing. So, we have

asked them about whether they want to leave their hometown to make a living outside. Almost half of the people choose yes.

So giving up agriculture and moving out has become a main method for peasants to deal with environmental issues. There are several reasons for this. First is that the peasants do not depend so heavily on agriculture, and agriculture does not attract peasants very much. The second reason, peasants have more chance to find other job in the cities. And thirdly, in Guangdong, the population movement is very, very frequently. It is the home of the oldest, biggest migrant worker group of China, so it provides quite a suitable condition for peasants to move.

But, is this good or bad for the environment? I think it's really, really very bad for environmental protection. Because the people move out, the problem still exists, they cannot solve them by themselves. But it means they just move out, just escape and leave the problem behind. But people choose to move out because they also have another reason, it is about the ownership of the land. So far, Chinese law does not allow the people, the individual, to own land. So most of the peasants only own a contract to the farmland for no longer than 30 years. So for them, maybe they are not so concerned about the quality of the farmland because they think it's not their property.

So, about the difficulty in protecting peasants' environmental right, we have concluded several such difficulties. The first one is peasants' high expectation on government for many environmental issues. As I mentioned before, the peasants rely heavily on the government. We showed the data just now. But the government is far from satisfying these demands. For example, we still have many holes in law and regulation. The institution and system are far from enough to protect the environment in rural areas. The resources—the financial support—are far from enough to meet the demand of rural areas. So, as a result, the public good of environmental protection in rural areas is in serious shortage.

So, when we ask, what are the main difficulties in improving the environment—people will choose a lack of government support as the first reason. So, we can say the peasants rely much on the government. They are also very disappointed in the government. The government can be the biggest force to improve environment. They also can be the biggest barrier to protect the environment. The other expert has talked much about that.

The second difficulty is that peasants depend on the environment, whereas there is little ability as a group to ensure environmental

protection. We think the peasants have more of a dependence on nature than urban residents. First their living conditions are strongly related to natural consequences and their productivity also strongly relies on nature's conditions. And peasants are vulnerable in two aspects. It's a doubly vulnerable group: vulnerable to polluters and also vulnerable to urban residents. Compared to the polluters they are weak in negotiation and compared with the urban resident they are weak in environmental resources of preventing the environmental transformation. So, their environmental rights are more easily damaged by the polluter and other humans' behavior.

Peasants' lack of relative knowledge and the complicated polluter issues are the third difficulty. I will not go into so much detail. And the fourth difficulty is peasants' poverty, whereas the litigation costs are high.

So, what's the countermeasure? We all can list a number of questions about the problems to the rural area, but how to deal with them? When we think of the solution—the way out—we always face an obstacle. Maybe we all know what the problem is, but the solution is hard to find. What we propose here involves some thinking, especially on our research.

The first thing, we need to strengthen the growth of grassroots organizations in rural regions. Because they're peasants, they need organizational support. So, the best way is to better use the organizational resources. So, what are the available organization resources in rural areas? We can say it is the village committee. The village committee is a self-regulated organization in rural areas. It has been established everywhere now. It is still short of manpower and resources, but it is the nearest group to the peasants, and also they know the situation of the peasant. Because they are elected by peasants directly, they are willing to help the peasants more than other organizations. So, we must make greater effort to improve this organization, to give them more support to represent the peasants in the court and in negotiations with enterprises, and then give them a more fundraising to protect their environment.

We need to fill in the gaps in the laws and regulations. As I mentioned earlier, the environmental regulation in China is urban environmental legislation. And although those environmental issues in the city and in rural areas have much in common, they still have a lot of differences. So we need additional rural environmental protection regulation. And to strengthen the environmental currency in rural regions is also a very urgent need. As has been mentioned just now,

people don't have enough information about the environment, we have no monetary equipment located in rural areas, and the majority of environmental protection resources are located in the city. So, we need to extend those monetary forces to improve the peasants' protection ability on their environmental rights. In this field, I think we can do a lot.

We hope that we can have more environmental protection education, more training, and also more legal aid for them. Extending the existing legal aid system to cover the worst rural areas is also a very useful way to protect the peasants' environmental rights. Although China has already established a legal aid system, so far its major focus is also on the urban areas. In recent years, as we know, the Chinese Government has already put forward more resources to extend the legal aid system. We hope that it will be a main way for the peasants to protect their environmental rights.

So, just very briefly about the solution, we are still in the early stage for these issues. So thank you very much for your attention.

I would like to take some of your questions.

AUDIENCE QUESTIONS

Moderator

Can we take maybe just a couple minutes for just a couple questions?

Professor Li Zhiping

So, I will ask Anne Marie to...

Professor Li Zhiping

You mean the village committee. The village committees are a quasi-governmental organization. It was formed by the law. We have our village committee organization law. It required every village to establish such an organization. The main function for this organization is to deal with the public affairs in rural areas and to mediate disputes between the peasant and also represent the peasant and to reflect their opinion to the government.

Professor Jerome Cohen

That ties in. You have not grasped her question. It ties in with the question I wanted to ask. You point out that there's a restriction on

access to legal knowledge. That's one problem. There's also a lack of legal or specialized personnel. So knowledge, people. Do the knowledge and people come from the outside of the village? Outside agitators, organizers, NGOs, lawyers, barefoot lawyers? You have a whole range of outside people. So what's the relationship between people on the outside and people in the village? Who stirs up the masses?

Professor Li Zhiping

This comes up in the land ownership incidents in Guangdong. Some people have been killed. There have been huge struggles. And the government blames outside agitators who give the local people the knowledge and the inspiration.

Translator

The villagers are very welcome of outside help from media, NGO's, government or scholars. Actually sometimes the villagers themselves would directly ask outsiders for help.

Translator

Currently, the Chinese government is very sensitive to NGO's activity in areas, and particularly in some sensitive cases. Now some key people in the Chinese government threatened the local farmers not to involve outside NGO's in their environmental protection activities. However, if we interfere with the environmental protection from a harmonious society perspective, the government actually welcomes such activity. So it really depends on which perspective you are using to interfere.

Audience

Can I just say one thing? The key point is in many villages of China, the village and township leaders do not want the masses of people to get legal knowledge. Because when they get legal knowledge then they have a grievance, they have a weapon that causes conflict between local leaders and local people. Even if the local people want to carry out the national law, often the local people want to carry out the national law and the local leaders don't want to do that because it contradicts their own needs and interests.

Translator

Professor Li basically agrees with what you said, but she also

mentioned in terms of attitude of local governments, it really depends on where the problem is coming from. So, for example, if the problem is coming from local government itself, then it doesn't want the local farmers to be too involved in those environmental protection activities. But if the problem arises from, for example, the outside enterprise, the investments of outside enterprises or higher level of government, the local government is actually quite willing to cooperate with the local farmers in terms of environmental protection.

**PANEL: THE INTERNATIONAL SILK ROAD: ENGAGING
DOMESTIC EFFORTS TO PROTECT CHINA'S
ENVIRONMENT**

*Panelists: Professor Wang Canfa,¹⁸ Margret Kim,¹⁹
Alex Wang,²⁰ and Patti Goldman²¹*

Friday, March 2, 2007

PROFESSOR WANG CANFA

Thank you. Ladies and gentlemen good afternoon. You really get drowsy after lunch so in order to keep all of you alert Professor Wang put a lot of photos of his beautiful colleagues, handsome guys and beautiful women, in his PowerPoint. So when you feel a little bit drowsy just pay attention to the PowerPoint, not my speech. There are three questions. The first is improve the rule of law in Rymangton Field. The second and the main one is the business our centers, rules and it's a fact. This is the center's logo. It's the arm and its law, Rymangton Law. It means protecting the earth with legal arms. The center was established in 1998 and it was approved by China University of Political Science and Law, the traditional ministry of the PRC.

Translator

And the small point here, the Judicial Ministry means Department of Justice.

18. Wang Canfa is a Professor at the China University of Political Science and Law in Beijing and Director of the Center for Legal Assistance to Pollution Victims (CLAPV).

19. Margret Kim is the former Public Advisor to the California Energy Commission and Co-Founder of the Ecolinx Foundation.

20. Alex Wang is Attorney and Director of the China Environmental Law Project for the Natural Resources Defense Council (NRDC). Mr. Wang has chosen not to publish his presentation given at the Symposium, his article is included in this book on p. 191, and an audio presentation can be heard via the *Vermont Journal of Environmental Law* website located at www.vjel.org.

21. Patti Goldman is the managing attorney of Earthjustice's Northwest office.

Professor Wang Canfa

These are pictures, you can see my central walls are composed of scholars. They are from some universities in China. These professors are from Peking University. This professor is from Beijing University, my university. Another volunteer is from the Salmon Law Firm. They are lawyers in China. My center has three missions. The first is the rising consciousness of law and the protection of rights of the public. The second mission is improving the capacity of the administrative agency and the traditional bodies. The third is promoting the enforcement of Chinese environment law. My center's organization is composed of, the director, the deputy director, the consulting department, the litigation department, the administrative office, the research and the (cleaning) department, the protector of the development department. My center's main job is to be in the business of helping pollution victims for free. This line means any pollution can qualify. The center has been called to the Hoke country, under Tibet. We have answered 19, 487 calls during the seven years. The reply letters count three hundred and thirty-two received visitors, the five hundred and twelve proposing. This is my center. The volunteer receives a visitor. This is the legal consultant teaching rights. Last summer we organized the volunteers in western China.

We also provide legal assistance for the citizens on the street. I tried to have a truck.

Translator

Professor Wang said he wants to have a truck so that the can ship his volunteers to anywhere in China he wants to, in order to promote environmental education.

Professor Wang Canfa

My center's second work is having a pollution lawsuit and the paid part of the (quarter) and the lawyer's for the pollution. If their case is fateful and typical, the pollution victims are very poor.

Translator

As you can tell from the chart in the past seven years Professor Wang's organization has represented pollution victims in eighty-nine cases altogether. During these eighty-nine cases there are seventy-five civil cases, ten administrative cases, and four criminal cases. Some of the audience may have questions regarding the number of cases

received by Professor Wang's organization. There are only altogether eighty-nine cases. You may think this number is too few. There are reasons for this.

First one, there is restriction on the funding. If there is not sufficient funding Professor Wang's organization cannot take many cases. As you may know, each case involves a lot of money and for Professor Wang also mentioned a specific case. In this case the appraisal fee alone in this case is one hundred and fifty thousand (150,000) RMB which is, I think, twenty thousand US dollars. So that's a lot of money.

And on the other hand, the reason is that Professor Wang uses a special calculation method to calculate the number of cases. For example, if a case involves the trial of first instance and the trial of second instance Professor Wang will calculate this as one case only. But there are many professors in China who would calculate it as two cases.

If these cases involve more than one litigant. For example, some of Professor Wang's cases involve over a thousand litigants. Professor Wang will still count it as only one case. As you may see from the chart shown on the screen, Professor Wang gave us a calculation of all the cases he did in terms of the result of the cases. Do you want me to go through the numbers, or if you can see I probably just won't.

Please pay attention to unsettled cases. In this chart as you can see there are a total of forty-two cases which are unsettled because the court won't take these cases for a lot of reasons. Some of them are political considerations.

Please pay attention to the number of the cases lost, twenty-four out of ninety-seven altogether. So in these twenty-four cases the plaintiff means the pollution victims lost the case. But as a result of the litigation the factories are closed. So, on the other hand this is a good result of the case, even though they lost the case itself.

This is a picture showing Professor Wang helping pollution victims file lawsuits. And this is a picture showing three lawyers from Professor Wang's organization litigating a case in Fujian Province. These four pictures show Professor Wang himself and his volunteers meeting with pollution victims in different provinces including Fujian Province and Guizhou Province.

Another main activity that Professor Wang's organization is doing is to provide environmental training to lawyers, judges, and environmental officials in order to promote or enhance their capacity of handling environmental cases, and also to promote their environmental

consciousness. Until last year there have been six training sessions held for this environmental training to judges and lawyers. And the total number of lawyers being trained in these six programs is two hundred and thirty-nine. There are a hundred and ninety-nine judges trained in these six training sessions. We also provide free legal training to government officials responsible for environmental enforcement. This picture is showing the environmental legal training classes in 2004.

Professor Wang Canfa

The government from the America was having a lecture.

Translator

Another major activity of Professor Wang's organization is holding some seminars on environmental law and to promote international and inner-country exchange and improving the environmental legislation in China.

Professor Wang Canfa

This picture is the conference held at Beijing with the Japanese scholar. This picture is another workshop in Western China. When we research environmental litigation it is a very difficult question. This picture is the international symposium on the litigation for composition, which means the law. This workshop has a very important effect on the environmental law in China.

Translator

The center also holds some lectures on environmental law and some seminars on environmental cases with the news media in order to let the public know their environmental laws and rights. The center also studies some key questions on environmental law in China and puts forward proposals on improving environmental legislation and its enforcement. The center has been raising a lot of wonderful proposals to the Central Legislation in China.

Next he wants to discuss the work being done in his center on China's environmental protection. Their work protects victims' environmental rights and interests. And we are going to discuss a case that happened in the Shiliang Reservoir. And we're going to discuss the details soon. His work also creates pressure on polluting enterprises and administration agencies who don't perform their statutory duties. His work forced a lot of polluting facilities in the Tianjin-Hebei

Province to be closed. His work also promotes public awareness of protecting the environment. He once litigated a case in Pinang County in China and after this case the local residents there established an NGO, an environmental NGO to deal with the environmental protection cases in future. The environmental training provided also improved the ability of lawyers and judges to deal with the environmental cases. Many of his colleagues, who are lawyers in his organizations, have been paying visits to the United States.

Also the Center's working to improve environmental legislation, for example, the solid waste law, the environment damage compensation law, and public participation in environmental protection. He will go quickly through the cases Professor Wang did. I will just give a very brief description of the case.

The first case is the ninety-seven households and villages of Donghai County in Jiangsu Province who sued two factories in Shandong Province for damages for polluting the Shilianghe Reservoir. The Shilianghe Reservoir is a big reservoir along the Huai River. It is located in Donghai County of Jiangsu Province, which borders Shandong Province. In order to promote the development of local economy and improve the living standards of farmers around the reservoir the government of Donghai County in compliance with the national fisher law encouraged local villagers to use net cages for fishing in the reservoir. There have been over two thousand cages of fish since the year 2000.

However the influence of polluted water from upstream in October 2000 and May 2001 caused the deaths of all the fish and shrimp in the reservoir. With the direct economy cost of over eleven million (yen) equivalent to about 1.4 million U.S. dollars. According to the investigation of the local environmental bureau protection bureau and fisher environment-monitoring center, the polluted water came from a paper mill and the chemical plant in Shandong Province. The villagers who suffered serious economic loss transported the dead fish to the neighboring county and asked the local government for compensation. The local government admitted there was pollution and promised to compensate.

However, when these villagers left the local government took no action at all, even though the villagers continuously went to the state environmental protection administration and provincial government of Jiangsu and Shandong Province to call for attention to this case, and the news media reported on this case. The problem remained unresolved.

These ninety-seven households sent a representative to visit

Professor Wang's center, and with the help of the center, these villagers brought an action for environmental damages. In the trial of first instance the court ordered the paper mill and the chemical plant to compensate these ninety-seven households 5.6 million yuen equivalent to seven hundred thousand (700,000) US dollars.

Defendants appealed to the Supreme Court of Jiangsu Province and the court decided to affirm the decision. In July 2004 these ninety-seven households received the full amount of damages and defendants are prohibited from discharging polluted water secretly. The quality of the water in the reservoir has improved and the villagers raise more and more fish in the reservoir.

Now also in other cases, in Beijing one hundred and eighty-two households and residents sued the Beijing Municipal Urban Planning Commission for illegal issuance of permits. In this case the Beijing Municipal Urban Planning Commission issued a construction permit to two research institutes for building an animal laboratory, and the distance between this lab and the residential buildings is only 19.06 meters, while according to a national law such distance needs to be at least twenty meters. So in order to let the Planning Commission vacate the permit residents first went through the administrative process but without any success. So they filed this case to court with the support of Professor Wang's center. And then finally they won the case and the court asked the Planning Commission to vacate the permits. This is the first case in Beijing where the residents sued the Planning Commission of a government and won. As a result of this case there are more and more residents in Beijing are now suing the Planning Commission.

And the final case is 1, 722 people suing the biggest potassium chlorite plant in Asia in order to protect residents and trees in the whole county from pollution. And finally with the help of Professor Wang's center this case was won. And we also discuss the case a little bit more in the question and answer session.

And this case was rated as one of the top ten most influential litigations in 2005 in China. Ford Motor Car Company awarded this environmental protection award to Professor Wang and his center. Professor Wang was awarded a prize as the person of the year 2005 in green China. Professor Wang was also rated one of the top ten rights fighters by a Chinese human rights web site. Chicago Tribute also gave a special report on Professor Wang's work and listed him along with the Mexican president and the Palestinian Prime Minister as the eleven people who are going to have significant impact in the world in 2007.

Professor Wang Canfa

Thank you. Thank you everyone.

[Applause]

MARGRET KIM

Honestly some of you may be wondering, Margret Kim, public adviser, California Energy Commission? What's that got to do with China? I mean when I looked up my name and title and where I was coming from, I questioned that myself. And thought maybe the *Journal* was getting desperate to get someone to speak. That's why I wanted to briefly explain to you what a public advisor is.

A public advisor is a statutorily created position at the California Energy Commission. And it is an independent council position appointed by the governor of California as an administrative watchdog, and makes decisions largely in power plant citing decisions. I'm no longer at the California Energy Commission as public advisor effective, which became effective two weeks ago.

I've been transferred to California Environmental Protection Agency as their China program director and special council to the California EPA Secretary to be posted in Beijing. So we're moving to Beijing in two weeks.

I wanted to thank the Vermont Law School for this wonderful opportunity because it is important for me to share with you my experience and my continuing efforts in China. This is all the more meaningful at a personal level in light of what happened to me a few months ago, which in my opinion was rather shocking. I started receiving strange email, almost like hate emails, and my assistant rushed over to my office and said, "tell me what I'm to do. I keep getting phone calls." "Phone calls from whom," I asked. "About what?" And she said, "Phone calls from within the Energy Commission. Staff people are interested. It's about you and what you're doing in China. They don't like it. They don't think you should be sharing with the Chinese guest or that you should be going to China to talk about procedural rights, public participation, administrative law." I said, "that is shocking. After all this is good for us, it's good for China." And much to my surprise my assistant said, "Margret I'm afraid I'll have to agree with them. China is our enemy, don't you know? They're gonna learn the democratic ways and use that against us someday." I was thinking, this is California, I know its Sacramento but it's California. And I started feeling, oh, maybe the rest of the country may feel the same way. But because I'm here it reassures me that this is not the case.

So what is it that I have been doing for the past several years that's so troubling? It's in my own way to bridge the rule of law and the environmental law through sharing what we do in the government in terms of promoting public participation, public comments, public disclosure of information, conducting public hearing in the environmental review process.

But how I got started in this work is rather interesting because my background is that I come from the private sector. In a law firm as a litigation partner and later as a general consultant to a large Korean conglomerate. And I never really had a chance to deal with the public. And when I went from the service general council to the California Resources Agency I was tasked to draft environmental impact (NEPA) impact laws and regulations. And in that process you have to engage the public. But I never really thought it was very useful. I thought why can't we just have expert lawyers get involved and that should be sufficient? In fact I even hired a special council to deal with the public. We had a 1-800 number assigned to get public comments and what not.

It was not until I moved to California Energy Commission as the public advisor responsible for procedural rights, and especially it was not until I actually got involved in China, that I really got to realize the true value and appreciate our open government system. I assume most of you are environmental law students but how many of you consciously think about public participation when studying environmental law? Oh, better than me. Without procedural rights, of course, substance of law has really no meaning.

This is what I've realized in China. I looked at their environmental laws and some were very good. But there was lack of compliance and enforcement. And in my opinion it's largely due to the inability of the civil society groups and the public members to meaningfully participate. What I mean by as "meaningfully" is to have the opportunity to comment, to attend hearings, to testify, and to litigate. And so my experience in China for the past few years has been wearing one hat as the government official but the other hat through the non-profit that Robert and I formed, the Ecolinx Foundation.²²

And I know that there are other NGOs, US and European NGOs, such as Earthjustice and the NRDC assisting the civil society groups, but I thought that we needed to have a balance. So our focus has been mostly on sharing government perspective, government information, and how do we do things within the government and to share that with

22. Ecolinx Foundation, www.ecolinx.org.

the State and Environmental Protection Administration, which is the equivalent of the US's EPA.

And one reason was, if there are other foundations and non-profits helping the civil society groups, and if the government and local and central government officials feel that they're not increasing their capacity, the easiest thing for the Chinese government to do is to just clamp-down on the NGOs. It hasn't been easy, but we've trained throughout China as far north as Harbin and as west as Xingjiang and south as the Hainan Islands. And basically the training was on the administrative licensing process.

How do we have early outreach to let the communities know that we're going to consider a power plant? By conducting workshops. The ABCs of how to conduct workshops. How to conduct public comment hearing as well as evidentially hearing. How to respond to the comments instead of ignoring them. Cause once you ignore them they will feel cynical about it and they will go back to maybe some more protests. How to communicate unpopular decisions. Very often the Chinese officials would say, we can't satisfy everyone. So we might as well not go through this process but that is not the reason. And also on appealing administrative decisions. We've also assisted in developing guidelines for SEPA's training arm on public participation.

I think that Professor Wang Canfa yesterday mentioned the law that they passed last year, which is the measure on public participation. And we've also provided guidelines, implemented guidelines for that. And I must admit that there has been a marked difference in attitudes toward public participation.

In the beginning I felt like they were sixty to a hundred people just sitting there kind of frozen and I felt like they were there because they were compelled to be there. And I wasn't sure whether they were listening. And towards the end, as they warmed up, they admitted there is no need for this. Just like how I originally thought. They said we are engineers, we are experts, we are government people, we have all the answers. We are trying to protect the public; they don't need to know.

So some people also thought that in the US we were crazy to allow anyone to participate in government decision making. Of course the Europeans have this tendency to approach it from a different perspective. They're also there in China but they talk about selective and qualified participation. And, of course, that is not the case here. And some even suspect that, that maybe you in the west, the US would like to slow us down. That's why you're introducing this whole idea of public participation.

I know they are trying to slow down their economy and that may not be a bad way. But most recently, last November, we had a delegation for a whole six weeks. And this was partly from the passing of the measure of public participation law. They called and said we want to come and we want training. So I immediately thought it must be an environmental impact assessment technical training. They're always interested in technology. And they said, "no, no." We only want to talk to people on public participation, which was surprising. They came. And they said, "also Margret we want to talk to people on the street. We want to know if what you've been saying is really true." I said to them, "you can't really stop people on the street but we will organize a group of civil society groups and reporters to talk about their role in public participation."

And at the end, the leader from SEPA, there with fifteen people, said, "you know, this is not just about protecting our environment, this is going to bring democracy to our country." I was shocked. I know the meaning of democracy is slightly different there than here. But I was thinking I hope he will not lose his job when he returns. I haven't spoken to him since so I don't know what happened to him.

So where is China on public participation? Progress is slow and incremental, but with Chinese characteristics. In fact there is a commentary that Robert and I wrote, if you'd like to learn a little more about our work.

I was talking to a professor at Beijing University recently and he was concerned. "Margret, I don't think the public participation approach is working. We've had 86,000 protests in 2005 largely due to land use issues and pollution. And we've tried to hold one or two public hearings and that is after the decision is pretty much made and it didn't work. More protests. Angry people." I told them, "of course it won't work because the public participation process is not occurring early enough and you're picking and choosing, you know, it's a cafeteria approach." A little bit of European methods here a little bit of American methods there. It's not inclusive enough to have a limited number of people who can actually testify. And they don't disclose the information.

The report, the very hearing, is about commenting on the report, but the reports are withheld because most of the time its considered to be state secret. And they said we need to protect the public from information. So of course it didn't work. They were more outraged.

And I say Chinese characteristics because I think of South Korea. And South Korea has democracy, but because of the political history

they are extremely suspicious and cynical about government. And so even today, while we have public participation law, when I talk to NGOs they still feel that political climate is still uncertain. The law, while they do have law, is still unclear. And they need to be cautious, and they feel that they still have to be invited to participate in government decision making. I believe that more training is needed throughout China at all levels. And I truly hope that Vermont Law School will also join in this effort to promote public participation in environmental review. Thank you.

[Applause]

PATTI GOLDMAN

Well, I too was a little concerned coming after lunch and realizing I was last and the cookie malaise would set in. So I put together some PowerPoint images last night to hopefully keep your attention.

Well, I am, first in the interest of transparency and disclosure, I'm not a China expert at all. I consider myself very much a student probably in the 101 series. And I first went in China just in 2005 and I went to one of Professor Wang's training sessions. And was called the American expert, but to explain public interest environmental litigation in the United States. And there was tremendous interest among Chinese lawyers in trying to expand public interest environmental litigation. And I was just amazed at the thirst for information about our system. And the desires to push for law reform and expansion of what I do.

And so what I've been doing since I've had several other trips there and we're now working with the Asia Law Institute²³ which is the ABA's rule of law program, and the All China Lawyers Environment and Resources Committee²⁴. And what we're trying to do is look at well what could you do and the question I keep asking, I have no answers but I'll ask you throughout my presentation, is if you could make some changes, what would have the greatest effect and is it feasible? And that's the kind of questions we've been asking around this subject.

So today, what I want to talk about is citizen enforcement. And

23. The American Bar Association, <http://www.abanet.org/aba-asia/projects/china.shtml> (last visited Apr. 4, 2007).

24. *Id.*

that's my bias, so another disclosure. I firmly believe that citizen enforcement is essential to environmental protection. You can have all the laws on the books. They can be the best laws on the books, but they're not going to mean anything unless they're enforced. I also think in any system the government is not up to the task. I think throughout the world there are insufficient resources for all the enforcement that needs to happen in any government. I can't imagine, I mean I challenge you if there's a situation where that's not true, but also even if there were resources, there's often not a lack of political will.

You've heard about "*guanxi*" (relationships) through the networks or the local government's connection to the industry are dependent on the local polluter for tax base or for jobs and a sort of a social security system. Well in our system here, think of politicians dependent on political contributions from well-heeled industries. Whatever the reason, we often have a lack of political will to enforce the laws. So, that's my premise. You can disagree with that, but that's the premise on which I'm doing this presentation.

And I look at citizen enforcement has having three elements. First, access to information about what's happening. It could either be government information about government actions or information about discharges, air discharges, water discharges, waste impacts on your health.

The second is an opportunity to participate in the decision making. You've heard a lot of talk about the environmental impact assessment law in China. And it has made inroads in both of these areas—in providing more information to the public and opportunities for public participation. And then the last, which is what I'm going to talk about, is access to legal redress. And there are a lot of issues you could approach with this, the lack of legal expertise, and the financial obstacles to bringing a case.

I'm going to talk about the legal obstacle of standing. And to do that, I'm going to go back first and talk about our situation in this country before we had liberalized standing. Which in many ways I think is analogous to the kinds of rights and remedies in China today. And then look at three questions about potential expansion that may or may not fit the Chinese system.

So for those of you who are law students, this is my attempt to reduce your semester of torts to one little icon. So, if you go back forty, fifty years, we had environmental litigation but it was basically common law, rights and remedies. And the rights were personal or

property and individual, uniquely individual. So an individual whose rights were infringed could go to court and seek compensation for the infringement of their rights. And the other kind of litigation we had would be more in the area of nuisance. And there again, it's a right, it's a property kind of right. Maybe a right to bottle the integrity, but it's something that is held by the person and when it's infringed, the individual could go to court and seek abatement of the nuisance. I pick the pigs as one of the best known nuisance kinds of cases.

And in China there is litigation that is analogous to both of these. I think Professor Wang was talking about a paper mill. There it seemed like one of the remedies was abatement, not just money damages. And many of the other cases that have been discussed are compensation for the people that are harmed. The purpose of the compensation is to make the victims whole. The only people that can really bring that case are the people whose rights are infringed, who are trying to be made whole.

Well we had an earth shattering event and change in our environmental law predicated on Earth Day, where there was a huge demand for more responsiveness of our laws. And in particular prevention and restoration. Two kinds of remedies that were not available under the common law system. And after Earth Day you had, I think it was more than two-dozen laws passed and signed by then President Nixon, a little bit Ford. And they looked at different kinds of rights and remedies. So you had the needs to have discharge permits that would restrict pollution and they would get at some issues that were not attainable with the kind of compensation scheme.

For example, incremental contributions to the environmental damage by multiple actors, or prevention before the harm occurs, or restoration. You know, if they get, I have another slide I didn't put here of, you know, the headlines about Lake Erie is dead. Well, you know, it goes to stop the pollution but also clean-up, which is something that you wouldn't necessarily get if you're just trying to make victims whole.

So as these new laws moved into these new areas, there were new rights. And then the courts started recognizing new rights and new interests that could give rise to standing. The key case, and here I don't know if any of you have seen it, the Mineral King case. This is Mineral King. From the law books you may know it better as *Sierra Club versus Morton*.²⁵ It was actually the first case that was started by the

25. *Sierra Club v. Morton*, 405 U.S. 727 (1972).

people that started my organization and it went to the Supreme Court and established our broadening of standing.

So here's Mineral King, it's in the Sierra Nevada National Forest, excuse me. And while Disney was going to build this huge mega project there of amusement park, hotels, huge amounts of traffic and it would fundamentally alter the character of this area. So Sierra Club challenged that decision on multiple different grounds. And it established two principles in the Supreme Court.

The first is injuries do not need to be personal or economic. And the court issues a very broad pronouncement that esthetic environmental and recreational interests can give rise to standing. The second was that organizations can sue. And it wasn't a home run victory for Sierra Club in that case, because what Sierra Club wanted was the right to sue in its own right.

The right for an organization to speak for the trees, to be the representative of the environment. And what the Supreme Court said instead is Sierra Club could sue on behalf of its members. But it would have to prove some members were injured. That those members essentially could go to court on their own, but Sierra Club is going to go to court in a representational capacity. The lawsuit then also has to be germane to the organization's interest and the individual members do not have to be necessary for the case or for the remedy. So for example you could never have a representational kind of case for compensation for damages because the individual members are essential.

So that brings me to my three questions that I want to pose. The first is that China, in looking at organizational standing, could deviate from the US model as some other countries have, and organizations could have standing to sue in their own right. So the first question is should environmental NGOs have standing to sue in their own right, to basically speak for the trees?

My first observation on that is that there would be advantages to an organization to be able to sue in their own right. My practice, or anyone who does what I do, we spend a tremendous amount of time and effort proving that individual members are harmed by the action that we're trying to challenge. I once was interviewing a young lawyer who was fascinated with the issues and we were working on a standing case that was going to the Supreme Court. And he said, you know, I really don't want to deal with those issues. I just want to get to the merits. And I said, maybe you should go somewhere else.

It is just a core piece of the work that you do of, you know, you've

documented the problem, you've got your experts lined up, you've figured out the law and then the organization has to figure out, OK which ones of our members go to this place or are exposed to this problem. And then they have to speak up. They have to provide evidence that they are injured. So if the concern is that individuals don't want to step forward, because maybe there would be retaliation or it puts a burden on them, if an organization can sue in its own right then you insulate the individuals from having to basically bear the brunt of the burden or be exposed.

So in thinking about this issue, the reason we have membership standing is really grounded in Article III of the United States Constitution.

The Supreme Court has said Article III creates limited federal court jurisdiction to hear cases or controversies. And it has said that in order for there to be a real controversy you need to have a party that's got a stake, that's harmed, it's adverse to bring it to the court and without that kind of individual harm there isn't enough of a controversy.

Well obviously this doesn't need to pertain to be exported to a country that has no similar constraints and doesn't have that kind of case or controversy requirement. The second and I was actually was rereading the Christopher Stone piece "Should Trees have Standing?"²⁶ that he wrote when the Mineral King case was being heard. And there actually is a lot of precedent for representative standing for people to represent others or objects. Like in guardianship cases for minors, in cases where there's fiduciary. Even corporations are often in there as a trustee for the entity.

So there could be that kind of a model for NGOs to represent the environment. There could be all sorts of different questions. Which NGO, what are their duties, how do you make sure they are meeting those duties? And then I think the last caution that I put here is one that would be huge, which is if NGOs could sue on behalf of the environment that gives the government more power over who can sue. And the Chinese government already has a tremendous amount of power over registering NGOs, a potentially decertifying NGOs. So to raise the stakes around litigation would only enhance that power.

So my second question, if you look at the Mineral King case, the Supreme Court issued a broad pronouncement that all environmental, aesthetic, recreational injuries give rise to standing. And it was

26. CHRISTOPHER STONE, *SHOULD TREES HAVE STANDING? AND OTHER ESSAYS ON LAW, MORALS AND THE ENVIRONMENT* (1971).

answered in a broad brush way. But the answer could be more incremental or more particular. And so I would encourage in looking at the issue of standing, not to look at it across the board for all injuries and all claims but to break it down. So for example one of the options is that the pollution victims who are suing for compensation or abatement could be suing instead for prevention.

And I was interested to see the, what is it, the Beijing Municipal Urban Planning Commission case. Where it seemed like it was just that kind of case where people were participating in an administrative law proceeding to challenge an approval, it sounded like it was an approval of that animal laboratory. Which is instead of seeking compensation after the fact, trying to prevent the harm. So it puts people who are clearly injured, clearly have a stake and have standing to seek the after the fact remedy going to court to seek prevention.

Another option is to look at different kinds of economic injury. It's seen in evolution of our system, there's a lot more acceptance of economic types of injuries before there was these aesthetic kinds of injury. While it seems that a lot of the cases in China are based on personal harm or a property kind of right, there could be other economic interests that could give rise to standing.

And let me give an example. Some of the cases in China have been kind of fish farms, or people who have had a right to basically grow fish and have a fish farm and have invested in it and then the fish have been killed. And so it's analogous to a property kind of right. Well in many of our cases out in the Pacific Northwest on salmon issues, we represent fishing interests. Commercial fishing, recreational, subsistence fishing. They don't have a property right, unless it's an Indian tribe. It's not a property right. It's an interest, it's an economic dependency, it's a right to get a license if licenses are given out. But if there are no fish, then there's no right. And so they have been in court suing to prevent harm. Dams that would cause extinction of fish runs, pollution that would wipe out runs or degradation of their habitat that would diminish the runs as well. So again it's prevention but it's a different kind of interest—economic, but not property right—not our traditional kinds of rights.

We've also represented ecotourism kinds of businesses. In the fishing context the people who sell the fishing gear or do the fly fishing tours, or the boats. And they all have an economic interest in helping fisheries. They don't have a property right in it, but they will suffer economic loss if there are no fish to catch. We also have in some of our cases asserted property value interests that are a little unusual. For

example, somebody who lives near a national forest and has valued the access to the forest and the beautiful vistas, then trying to challenge a logging project that would basically create a deforested landscape. And the argument was that the property values would diminish because of that action.

So my last question is that standing should not be looked at as a monolithic concept. But instead the question should be: standing to do what? And that the different interests that are required to have standing varied depending on the claim asserted and the remedy that is sought. And sometimes also vary depending on who the defendant is, particularly government or non-government.

So in the classic cases in China, the individuals are the only ones that can sue for compensation for harm to their person or their property. On the very other end of the spectrum, if the right is the right of access to information that is available to all people, all citizens, then everybody has that right. And that pretty much is the principle in this country for any, like discharge reports or freedom of information act kind of rights. That's pretty much a right everybody would have. For environmental impact statements it's closer to that kind of access to information right.

The way our courts have dealt with it is anyone who would be impacted by the project, if it causes the environment harm would have standing to sue to compel preparation of an environmental impact statement or to challenge its inadequacy. And if you're challenging a zoning decision like the animal laboratory case, I think the general rule is the zoning is there for the benefit of the other people within that zone I guess, if you will. And anyone that would be injured or harmed or affected by a different incompatible use would have standing to try to challenge that deviation from the zoning scheme. I'm kind of trying to go in order where it's harder and harder to get at the end here.

In terms of permits, there we have citizen suits, which liberalize standing directly. But again the principle is if you are affected by the resource and there's going to be pollution into that resource that's enough to have standing. And the litigant does not need to show that this discharge is going to cause the harm. The theory is, the government decided that in the standards and the permit and the citizens should be able to enforce those standards. If the polluter wants to pollute more the answer is to go to change the permit or the standards, not to just violate the permit. And now we get to the harder kinds of cases.

And the last three that I have up here are government actions. I

think some of our most restrictive standing doctrine has been developed in cases challenging government actions. The one, so the first is an inadequate government permit. In that situation your classic kind of administrative licensing kind of case, an individual could have standing on a particular license, on a particular matter if it affects them. And actually the law in China is similar on administrative licenses. It's just that the interests that are recognized there are more your personal property interests.

In this country long ago it was recognized that that's not very fair to let the people who want less regulation to be in court but not the people that want more regulation. And so we recognize both kinds of harm to get in court. Justice Scalia might not agree with that, but that's down the law that we have. But the two situations that are the hardest are challenging government policies, particularly broad policies and broad programs. And here the theory is that's the prerogative of the political branches. And if you don't like it elect someone else. And when you get to that point of challenging policies you've got to have a clear violation of statute, a clear abuse of process in order to be able to have a right. And to be able to get into court there are a lot of limits on how much you can prove that you're impacted, and often you can't prove it enough because it's a broad kind of policy.

And then the last situation, you might be impacted, there might be a kind of standing showing, but it would be if the government was not enforcing laws. That's almost an impossible case to bring. And there the theory is the government has prosecutorial discretion to decide when to enforce and that citizens don't have the right to go reorient the priorities or the use of resources. So with this kind of illustration of the various kinds of claims I want to give you a flavor of how to look at standing. I think it's important to break it down, so that you know what are the interests so who has to show what kind of interest in order to go to court to get a remedy. That while standing and the cause of action are distinct things they often do merge as you start to figure out if you can get into court to assert them.

But my, I guess my threshold proposition at the beginning that citizen enforcement is essential is reinforced when I went through and started to think what is the hardest claim to bring. And it is suing the government for not enforcing. And that brings me back and reinforces the point that I think it is essential to have citizen enforcement, to have an effective environmental regime.

[Applause]

AUDIENCE QUESTIONS

Moderator

Thank you for four excellent presentations. I feel as though there's so much to discuss. But we'll try to take two or three questions at least. So let's open the floor to questions and please address them to individual speakers or generally.

Audience

This question can be for everybody; Professor Wang Canfa might be able to best address it. I'm wondering first is there a distinction between law and equity in the Chinese system similar to the Anglo-American traditions? And secondly if in the realm of the equity and injunctions in the US there's, you know, we would use something like an economic balancing analysis, cost benefit analysis often times. I'm wondering if under the government with Communist ideology whether those sorts of economic considerations have the same kind of weight or whether there's a more heavily rights based sort of rule.

Professor Wang Canfa (translated)

You raise a very good question. In China, when we decide cases, we first go to the law. If there are no specific provisions in the law, we will also look into equality and justice this type of concept order to make the most reasonable decision. However something with Chinese characteristics that in China if there is no law we will probably go into policy. That's what we called government policy or the policy of the Chinese Communist Party. So that policy would be a sort of main guideline in terms of deciding cases when there's no related law in the legislation.

Also, in some cases, if there is no specific law, a judge may have some discretion in his deliberation of the cases, but that's not common. In law there is no requirement to do a cost benefit analysis when you deliberate a decision, however in fact when judges make their decisions they will also take economic factors into account.

One example is the case Professor Wang just mentioned, the Beijing Residence sued Urban Planning Commission to vacate the permit it has already issues to build animal laboratory. The reason why the residents could win that case is exactly because the laboratory has not yet been built. So if it is, if it has been built it's very difficult for the residents to win the case. If, you know, those economic factors take into account. Another case there are also residents suing Beijing Urban

Planning Commission, but these residents lost the case because the building has already been built. So, when the judges deliberate the decision, it is just not consistent with the economic considerations. So, they decided not to vacate the permit and let the building continue. Therefore when judges are considering the decision they would take economic factors into account.

Patti Goldman

There's one thing I just want to share because I know when I was first in China and there was this discussion of substance and procedure and I completely misunderstood what it meant. Because as an environmental lawyer I think I want a substantive victory because to me a substantive victory means they did the wrong thing and they can't turn around and do it again. The law says: you may not do X. And a procedural victory means you get a remand from a process but you don't know what the outcome is. And so I had this bias that I always want substance, but there was a wonderful presentation that Professor Wang Canfa's group did that was the dean of the Shanghai Law School. And he was explaining what procedural means is, there's law and there's process and there's evidence and the judge will go through and write a decision that applies the law to the facts, logically come to a result and explain it in a way that you can see what it is and it's accountable. And a substantive result would be you win because I say so. And when you start thinking of it that way, I mean a lot of what Wang Canfa was saying in answer to your question is, a lot of the same factors come in that we would think of as equity. But there isn't that distinction between law and equity and it isn't limited to a remedy after there's a violation. It kind of gets jumbled together in deciding if there's a violation.

Moderator

I'm reminded of Professor Cohen's comment earlier this morning about the form not mattering so much as the substance and the result.

Professor Cohen

I wanted to follow up Alex Wang's point. That last spring the All China Lawyer's Association issued a so called. That said in all mass cases defined when cases have ten or more litigants the lawyer is suppose to immediately report to the law enforcement authorities including the police, become an agent of the police of the government is being retained. It also precludes lawyers not to take part in mediation

of controversies involving mass cases. Now what is happening in practice? Has this so called guiding opinion affected his organization's work?

Professor Wang Canfa (translated)

Actually the ink pad of these guidelines will be significant on Professor Wang's center's work. The main consideration for issuing such guidelines is to try to constrain mass action in order to maintain social stability. According to the new guideline, Alex Wang has just mentioned, if lawyer wanted to take mass action cases which means the case involved more than ten people, he has to report not only to his partners of the firm but also to the All China Lawyers Association so that just puts a lot of obstacles in terms of the procedures and processes.

Both Department of Justice and Supreme Court of China jointly issue a document to let the Trial Court, which is the lawyer's court in China, to make hearings on those mass actions. Actually, according to the original law in China in the past, mass action cases usually have big influence so the most appropriate court to hear these cases should be the intermediate court in China. And, if the parties are not satisfied with the judgment, they can either appeal to the Supreme Court of each province or even appeal the Supreme Court of China. But things, according to the new rule only the lowest court, that's the trial court in China to hear that type of case. This case will never have a chance to appeal to the Supreme Court of China. And the Supreme Court of each provinces also makes there own rules according to the document from the Supreme Court of China. And put more constraints on the procedures and process in order to initiate mass action.

Last year the Dean of the University School of Law and the Dean of the Peking University School of Law and also the former presidents for China University of Political Science and Law had a discussion to, regarding this rule. They are considering to ask the National People's Congress to vacate the rule issued by the Supreme Court of China, which is illegal. And then the former president of China University of Political Science and Law said we should probably not go to the Supreme Court of China first. Let's just go to, for example the (Shando) Province Supreme Court to set it's own rule regarding the rule just now I mentioned it's illegal instead of saying directly that the Supreme Court of China's rule is illegal because of the political considerations. So you can see it's really difficult to have rule of law in China at this point because even the court itself doesn't follow the law. Thank you.

Moderator

How much time do we have? So we'll take one last question.

Audience

I have a quick question. In doing the math. So with about a hundred victims that comes out to about fifty six thousand yen which is about eight thousand (8,000) US dollars. How much of that have you been paid in lawyer's fee or have you ever been paid a lawyer's fee? I mean the question is relevant because there's such a, there's an insignificant environmental law barring China at this point. Fewer attorneys in all of China probably are equivalent to the number of attorneys in California alone. And so to the extent that, I think I know what the answer is, to the extent that, you know, they have difficulty paying lawyers, I mean how can you ever have lawyers representing the clients?

Professor Wang Canfa (translated)

Professor Yang raises a very important question regarding attorney fee for environmental cases. Actually regarding the case Professor Yang just discussed there is a, there was an agreement between the lawyers and the plaintiff in this case saying that if the farmers won the case the lawyer would receive 5% of all the compensation as the attorney fee. However after those farmers received compensation they refused to pay the lawyers. But since Professor Wang's center is a nonprofit organization, it's not about money making. So he has already made effort to pre-warn those lawyers that there may be a chance the lawyers can't receive any payment after litigating the cases.

**PANEL: REGULATING CHINA'S WATER RESOURCES:
PERSPECTIVES, CONCERNS, AND RESPONSIBILITIES OF
GOVERNMENT, BUSINESS, AND THE COMMUNITY**

Panelists: Dr. Irene Klaver²⁷ & Marcia Mulkey²⁸

Friday, March 2, 2007

DR. IRENE KLAVER

Thank you for your generous introduction of our panel. Unfortunately, due to the weather, I will not be the last one to talk today. I had my spiel ready, invoking a traditional image of philosophy: Appropriately the philosopher gets the last word to bring sense and order to the events of the day, like the owl of Minerva who flies over Athens at dusk to reflect on what happened in the city of Athens. But the snow intervened and I have to depart earlier and leave it to the EPA, to Marcia, to close the day. I'm sure, it will make more sense.

What is a philosopher doing here you might wonder. I think it's an excellent move of the *Vermont Journal of Environmental Law* to invite one to this Symposium. Especially one from the University of North Texas, because we are not just a philosophy program, but an environmental philosophy program—the only one in the world with this focus. Just like you are not just a law school but an environmental law school. And just like you, we house the first and premier journal in the field: *Environmental Ethics*. The *Journal* started in the 1970s and was one of the first to discuss Christopher Stone's article, which discussed whether trees have standing, an idea that has been invoked a couple of times today.²⁹

27. Associate Professor, University of North Texas, Department of Philosophy and Religion Studies, and Director of the Philosophy of Water Issues Program.

28. Director of the National Enforcement Training Institute, United States Environmental Protection Agency.

29. CHRISTOPHER STONE, *SHOULD TREES HAVE STANDING? AND OTHER ESSAYS ON LAW, MORALS AND THE ENVIRONMENT* (1971).

Why philosophy? Well, the strength of philosophy is making connections, something we desperately need in a globalizing world, especially dealing with environmental issues. We need to see how things are connected. One of my favorite philosophers, Ludwig Wittgenstein explained how understanding “consists in the very fact that we ‘see connections.’”³⁰ This is a transformative process—it changes our interpretative frameworks. I want to start with connecting back to the beginning, the title and openings speech of the Symposium: “China in Transition: Environmental Challenges in the Far East.” As Professor Wang Canfa stated yesterday in his keynote address, the central government in China has implemented a comprehensive environmental law. Its deficiency, however, lies in enforcement. One of the major problems is the enforcement of public policy on the local level. Too often local governments pursue economic benefits over environmental concerns. Professor Wang Canfa emphasized public participation as one of the crucial ingredients for environmental protection. At this last session I want to zoom in again on the importance of public participation. It lies at the heart of the encompassing theme, “China in Transition: Environmental Challenges in the Far East.” Public participation forms a major challenge and embodies the potential for a major transition.

I want to begin with sketching certain tools to facilitate public participation. In order to do that I first want to thank the *Journal* for this magnificent symposium. I brought a gift for you—for the office of the *Journal*. It is the “Don’t Mess with Texas” cup. The gift is part of my strategy. Yes. Very well thought out, eh. That’s what we philosophers do. We’re not just thinking about Kant and Hegel. We are thinking about these kind of issues, like public participation through a slogan like “Don’t Mess with Texas.” Who of you is familiar with it? You all know, of course, that you should not mess with Texas, but do you also know the slogan? Yes? Good for you! Amazing, it reached all the way to the East Coast.

Well, rightfully so, it’s an extremely, cleverly constructed slogan of the Texas Department of Transportation. It started in 1986 as a tough talking litter prevention campaign, meant to educate Texans about the litter problem in their Lone Star State. This is of course a hard thing to pull off in a state like Texas. The campaign was featured widely on

30 LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 49 (G.E.M. Anscombe trans., Macmillan 2nd ed. 1968) (1953) (“Die übersichtliche Darstellung vermittelt das Verständnis, welches eben darin besteht, das wir die ‘Zusammenhänge sehen.’ Daher die Wichtigkeit des Findens und Erfindens von Zwischengliedern.”) (translation by author).

television, radio, billboards, and involved local celebrities like Willie Nelson. You know Willie Nelson? Excellent! The campaign basically told people to keep their trash in their truck and off the road—no more burrito wrappers and beer bottles hurdling out of your window, and became wildly popular! It turned into its own product line with cups and caps, t-shirts, and bumper stickers. Of course all made in China.

The campaign was a huge success. 96% of the Texans came to know the slogan—and apparently 100% of a 2007 audience of lawyers in Vermont, too! Most importantly, the campaign actually succeeded in reducing 52% of the litter in the 1990s and it still holds up today. The slogan managed to capture the spirit of Texans themselves. A tough, independent, don't tell me what to do, kind of folk. Sometimes I regret not being a real Texan, don't you?

The strength of the slogan, “Don't Mess with Texas”—and this leads to the point how it is crucial for thinking about methods of public participation—is that it connects very different, in a way, mutually exclusive, worlds or frames of minds. It speaks to the mentality of the independent cowboy, as well as to the world of environmental concern—both appealing to a sense of belonging to Texas. And in Texas those were two worlds that did not mix too well, until the slogan. It forms, what I call, a perfect boundary object between worlds that have little in common, inhabited by people who often despise each other. The crux, the bridging element, is the double meaning/function of the word “mess.” It facilitates transition, the moment and place where the two worlds can meet and work together, and crystallize into a circumstance, a technique of connecting—a concrete connection in a particular activity. Don't tell a Texan what to do; don't mess with him; mind your own business. But, also don't touch his Lone Star State; don't mess with it; don't make a mess of it; keep it clean, keep it beautiful. In both cases, there is a convincing appeal to Texas pride.

Don't Mess with Texas functions as a boundary object, an intermediate between heterogeneous groups. Philosophers Star and Griesemeier developed the term “boundary object” in the context of scientific fieldwork where diverse groups try to achieve common understanding or collaboration across disciplinary divides through “translation of each other's perspectives.”³¹ The same applies to many other situations where people from widely different backgrounds have to find common ground.

31. Susan Leigh Star & James R. Griesemeier, Institutional Ecology, “Translations” and Boundary Objects: Amateurs and Professionals in Berkeley's Museum of Vertebrate Zoology, 19 SOC. STUDIES OF SCI. 387, 412 (1989).

The question is how to find something that binds people together despite their adversities and that creates a common cause that both of them can endorse without necessarily having to give up their own principles. A cowboy does not have to become an environmentalist and an environmentalist does not have to become a redneck. But still they both can stand behind “Don’t Mess with Texas”. That’s the art, to find that connection.

Searching for such a boundary object around water issues, I develop the notion of a water basin mentality. The boundaries of a river are not only formed by its banks or even floodplains, but as much by its watershed or basin—the whole area of land that drains into a river. Only when one can make these connections—from what I call a water basin-mentality—can one understand that good water management is intrinsically related to good land management. One needs to understand how practices in place have effects downstream. A water basin mentality can function as a boundary object to connect people with mutually exclusive water interests and hence facilitate public participation. Where environmental philosophy is often “reduced” to environmental ethics, my focus is on exploring the cultural aspects of environmental thinking. I work together with scientists, policy makers, social scientists, and artists, to see how we can bring environmental issues on people’s agenda, within people’s public imagination, or awareness. A water-basin mentality is a public awareness that water is not just something that comes out of a faucet, but starts somewhere else, in a watershed. I see this awareness as crucial for sound environmental decision making.

In this context I started an initiative, called “River Cultures and Ecological Futures,” in collaboration with Mr. Natarajan Ishwaran, Director of UNESCO’s Division of Ecological and Earth Sciences in Paris. He is also the Secretary of the Man and the Biosphere (MAB) Program. In the initiative UNESCO Biosphere Reserves and linked landscapes of trans-boundary river basins are priority areas for focused interdisciplinary research. Goal is to develop a cultural component in transnational ecosystem based water management and to implement this component in water policy practices. Where in academia the new buzzword is ‘interdisiplinarity’, in water management it is ‘integrated water management.’ But what exactly is integrated boils usually down to hydrology, geology, and engineering. Lacking in the integration is a connection to the social, political, cultural aspects. That is what we focus on. It’s a wonderful project. I think this might be a really nice occasion to work together with the Vermont Law School. If there are

students who are interested in this project come and let me know. It will be good for your program, good for my program to have that exchange.

Back to China. Rivers are excellent vehicles for potential boundary objects, facilitating public participation, especially in contentious stakeholders meetings. Water in China is a huge issue of concern. Many regions of China, especially in the north where almost half of the population lives, are dealing with serious water shortages. Two thirds of China's 600 cities are struggling with their water supply—aquifers are depleting rapidly, some cities are thinking about reuse—which we actually do in Denton, Texas—some are taking recourse to desalination plants, but turning seawater into drinking water is still an expensive because energy intensive business. Northern China has only 15% of the country's water supply, but most of the people live there. You all know about the “South-to-North” transfer project one of the major mega-projects to transfer water from the Yangtze River to the Yellow River and other areas.

The Yangtze is one of the rivers we focus on in our “River Cultures and Ecological Futures” project. I want to mention another program related to this, a program at the University of Nijmegen in the Netherlands. I'm originally Dutch. It's a Dutch twang you hear not a Texas twang, before you started wondering. I am starting a collaboration with Professor Toine Smits who's the director of the Centre for Sustainable Management of Resources (CSMR). He has set up a fantastic Transboundary Water Management program, to create water managers who are capable of dealing with integrated water management in the broad sense. Also on an international level—it's a European community funded project. There are students from the Netherlands, Germany, and Norway. And they are in the process of recruiting from China, Mexico, and the United States. Again I would love to include one of you if you are interested in this issue. It is a burgeoning field.

Professor Toine Smits's is involved with the World Wildlife Fund in a fascinating project around the Yangtze River. It's called the Yangtze Forum. It was inspired by international experience of the World Wildlife Fund and the Transboundary Water Management program involving problems of implementing integrated river basin management in China. Concepts as integrated river basin management are generally not well known in China. This is an ecosystem based approach of Chinese water management via bottom up analysis. For the Chinese society these kind of public participation processes are a

novel experiment. Provinces and ministries in China used to have a high degree of independence, and cooperation between the organizations is poor. Therefore, the China Counsel for International Cooperation and Development decided to launch a special task force around integrated river basin management. The objective of this task force was to deliver recommendations to premier Wen Jiabao for successful implementation of the integrated river basin management. One of the recommendations was to create a round table for all stakeholders in the Yangtze River basin, the so-called Yangtze Forum. In 2005 the provincial governance, key ministers from China's water environment, forest, and agricultural sectors gathered for the first time to develop a common strategy and action plan for protection for this entire basin. The next Yangtze Forum is organized this April 2007.

What I'm hoping for is that there will be a water basin mentality created through these kind of projects, these kind of changes in interagency contexts together with public participation, together with an institutional changes on the level of education of engineering schools and water managers education, so that ultimately we can come towards a water basin mentality.

I conclude with a quote of Sandra Postel and Brian Richter from their book on river flows.³² According to them we need a "fundamental shift in how society uses, manages, and values fresh water—one that recognizes from the outset the importance of healthy ecosystems and humanity's dependence on them." And they continue by invoking Einstein that "you cannot solve a problem within the mindset that created it." The mindset change they advocate sees human water economy as a subset of nature's water economy and recognizes that human societies depend on healthy ecosystems.

To change a mindset we have to be very creative. One way to start is to initiate international exchange. That's why this symposium is so timely. China and the United States need to know each other, to become more familiar with each other's environmental issues, to try to understand each other. Understanding in a sense of connecting with each other a connection that leads to transitions and translations not just from Chinese to English and vice versa, but a translation that connects the local, global and regional through the mindset of public participation in a water basin mentality. Thank you.

32. SANDRA POSTAL & BRIAN RICHTER, RIVERS OF LIFE: MANAGING WATER FOR PEOPLE AND NATURE 37 (2003).

MARCIA MULKEY

Thank you. Well, I'm delighted to be here. I want to start by thanking Vermont Law School and VJEL. All the evidence is the future of environmental law is in good hands. I plan to start with a little mention of our mutual past, Karin Sheldon. We were environmental lawyers together when there really wasn't such a thing. I don't know if you know that country song, "I was country when country wasn't cool?" That's sort of us in environmental law. I've enjoyed getting to know Tseming Yang more recently and he's helped me at my efforts to act like an academic. And Pat Parenteau of your faculty and I have a common resume entry. So I've got multiple degrees of connection to Vermont Law School and it occurred to me thinking about that, that most environmental lawyers in America probably are no more than a degree or two of separation from some kind of connection with this law school. And that's something for you all to be very proud of. I also have to tell you that although EPA supports my attendance, and as far as I know I don't have anything to say that they wouldn't like me to say, these are my views and not theirs or the U.S. government's.

And finally, I'll try not to disappoint those of you who stuck with us and see if I have anything to add—I will say I was heartened and encouraged in most ways to learn that much of what I had to say, somebody has said at least a little snippet of by now. So, that means at least that I've figured out China a little better than I feared. And it also means that we are collectively beginning to put together what we all know in a way that helps us have a more meaningful understanding of what's going on. You all know China's amazing economic growth story—almost 10% a year or about 10% a year—you know that means their economy doubles every, you do the math, six or seven years. Think about that. I mean it's just astounding, and add to that hurdling into international markets, hosting the 2008 Olympics.

This is an era of amazing developments in China. And with the time I have I couldn't even give a basic look at Chinese environmental problems. Fortunately, everybody has a few good nuggets that they've shared with you. And each one of them is a gasper if you stop and think about it before it runs past you. Just to add a couple more, almost half of China's 661 cities—and China has no small cities—do not have sewage treatment at all. Think about that. Raw sewage is going into streams in 40% or so of China's cities. One-fourth or more of the population does not have drinkable water. And by that I don't mean that it's a good idea for you to drink bottled water. I mean it is not

drinkable. It causes defined immediate health problems even to people who are used to it. Virtually every river is subject to massive dam projects. Hydroelectric adoption is fast as it can be. Desertification is moving fast. And since, although it's relevant to water pollution, it doesn't scream relevance, we won't even talk about coal developments. But you heard a little bit about them.

The use of coal, especially high sulfur coal at the rate it's occurring, is astounding. Just one story is the Laza River where ten times the permitted levels of lead and heavy metals are in the water. In that area we have subsistence farming. The farmers are told, "you can't eat your food." What are they going to eat? And of course they have therefore continued to irrigate and eat. And sometimes the solutions are almost comic. You've all heard the story about the mountain sprayed green? In time for the Olympics. That takes care of strip mining impacts.

The Yellow River is losing about 40% of its fish population. What is the cure? Dump six million fish a year in there. Think about it. Here is a quote from Pan Yue, vice minister of SEPA, in a written editorial, "In just thirty years China has made economic advances that took western countries a century to accomplish." Proud man, rightly so. He went on to say, "it is equally true that environmental problems suffered by western countries have been visited upon China within just three decades." Acknowledging the underbelly of this incredible achievement—and that's a high level official. That's one of the reasons for encouragement.

The environment seems to be one of those topics where there is at least somewhat more openness to frankness by government officials, to public criticism, to allowing NGOs to actually be meaningful players. I like to think of it as the stalking horse for democratization across other topics. There's something about environment that's either less threatening or more daunting or whatever, that has made it a pretty good example, notwithstanding some disturbing things we heard here, of the openness movement.

But the problems are so vast. It will take a massive amount of money, a massive amount of institutional reform, a massive amount of long-term commitment, and more than a little luck. So, Professor Cohen, I don't know that I'm an optimist. But I am heartened that more and more people throughout the world and especially all those incredibly capable people in China are beginning to think hard about it, and us among them. We get a little credit for how we have spent our time here.

And we've heard most of what I have to say. Of course you can't

talk about government in China without talking about the Communist Party. But the main impression I wanted to leave you with, we heard first thing this morning, which is, in our conception, a centrally planned and operated and commanded government. I don't think so. Yes, if the issue's important enough. Environment as it relates to the Olympics, for example, is being very centrally commanded and controlled. But, you still have to understand the Communist Party and its impact. We're not talking just about a central committee of the Communist Party, but rather a party that operates throughout the system. And in fact environmental protection in China is highly, dysfunctionally decentralized. And that's a large part of what I want to leave you with today, is some feel for the particulars of that in the environmental context.

The National People's Congress Committee on Natural Resources and Environmental Protection together with the State Council are sort of the on-going legislative and senior level executive branch, if you will, oversight of the national government's role. And the national government does certainly more than the federal government had done here in the United States before 1970. They're past that. There is some setting of meaningful national standards, directions, and so forth.

But by and large the operational implementation is left to SEPA, the State Environmental Protection Administration, which is not unlike EPA. It's sort of sub-cabinet and not loved by too many, and doesn't really have too much of its own constituency to take care of it, except that the people understand its importance. And that takes you a long way, my long government career would inform me.

But there are about 300 people working in SEPA. Now, the Vermont Department of the Environment may not have quite 300 people. I don't know, but I guarantee you that there is no good size state that doesn't have a whole lot more than that in the United States. EPA has about 18,000 just by comparison. China has what, four times as many people, six times as many people as we have? Having said that, it's worth noting that there are about 60,000 professionals in the Environmental Protection Bureaus. So, I don't want to leave you with the impression that there is nobody working on the government side in environment in China.

SEPA is largely a direction setting and policy articulating entity. That's all they can be. They do some science. They do some public information campaigns. And they make an effort to oversee the environmental protection bureaus. But it's a losing effort under their current infrastructure and capacities. The commissions of

environmental protection, you heard a little bit about, they're the so-called planning commissions. I won't say much about them. But it was cool to hear that they can be sued successfully. Another thing you learn in a long career in government is that sometimes it's good to be able to be sued successfully. It enhances government—materially.

But mainly I wanted to talk about the environmental protection bureaus at some length. Understanding them is all about understanding the governmental infrastructure in China. Their relationship to the central government is indirect. There's no direct reporting relationship to SEPA. There's little or no money coming from SEPA to them. Their relationship to the local government, whatever it may be, provincial EPB or a city EPB, but whichever you are, you are part of the governmental entity where you're involved. Your money comes from them, your direct reporting chain comes from them, and your fundamental sense of priorities comes from them. And among other things, the heads of all these governmental units are really fixated on results, economic results. And so you're very much subject to that driver. And you internalize those values as part of that entity.

But the EPBs pretty much—this is that board chart, you can look at it, but we won't spend any time on it—pretty much are charged with everything, almost everything that matters. EPBs are charged with applying national and provincial law, and that doesn't just mean enforcing it. It usually means fleshing it out, putting the meat on the bones. It means putting any of the meaningful requirements that implement the larger more hortatory, more general national standards. Anything that is within their jurisdiction, they're free to make law. And they often make law inconsistent with these national standards.

So, you have a lot of locally made law. EPBs do all the facility specific work, the permitting, and the environmental impact assessments; all the things that dictate the actual applicable terms for individual facilities or projects. They handle complaints. They're intimately intertwined with the fee structure, including the building permit fees as well as fees to pollute. There is essentially a license to pollute as well as penalties of the more conventional type. And they have access to and often control all the compliance monitoring. So, they are where the rubber meets the road.

Now, there is some directional change underway. This slide is actually a list of recommendations that a task force put together and recommended to go into the eleventh five-year plan. But you will see that it almost all had to do with addressing this problem I've just described by giving SEPA more vision, visibility; by doing something

about the EPBs, about where they get their money, about how they're controlled, about to whom they report, and thinking about the budget differently. It also involved whether their monies all come from the local level and the whole approach about how penalties are used. This has to do with whether they are just income for EPBs therefore maintained at a level so that polluters will keep paying them or whether they are more a tool to accomplish some other things.

Some of this will be adopted. SEPA is clearly moving to regional offices, where they have to have some enforcement, at least oversight capacity. So, some of these kind of reforms will be adopted, but the bolder reforms like linking success at the provincial level to a green GDP instead of mere GDP growth has not yet gotten attraction. In fact, it was expressly rejected.

All you law students are familiar I trust with that not yet over period in our history where there's this huge debate about the role of the federal government versus the U.S. states—the great federalism debate. And depending on who you talk to and which side of the political spectrum they're on or what kind of academic career they've built for themselves or whatever, you can hear very different takes on this whole question of what ought to be the roles of the central government, what ought to be the roles of the state governments.

You don't hear a lot of argument for much environmental protection responsibility other than solid waste at more localized levels. But I want to remind us a little bit of that because it's so salutary for our thinking about this Chinese challenge.

Do you want, a national floor? What are the drivers for having at least the minimum protection level be consistent and established at a national level? Well, one of the first rationales is the transboundary nature of pollution. Water, of course, is the perfect example of that although it's not the only kind of pollution that moves across jurisdictional lines. Pollution doesn't quite know how to stop at the border, as we all know. The whole issue of the race to the bottom is whether jurisdictions will compete to be pollution havens. There's a general sense that they will. That's debated. And I'm less convinced than I once was that it's automatic that jurisdictions will compete to be pollution havens.

As a child of the south I had my doubts about states on anything when I was growing up. But these days sometimes I think the states are going to be the saviors of us all. In any event, the notion is that they might compete, and it doesn't take more than one or two, to destabilize the whole confidence in the notion of a national floor. And in any

event, a level playing field is generally a good thing.

One of the things that's fascinated me in my career is the arc of industry point of view on this issue of national versus state standards. When I was young all of industry lined up with the devolution of power. These days they want federal preemption. And I don't think it's just because they think they have a hospitable federal government right now. I think it really is they've come to learn that if you're gonna operate throughout the system, it's just healthier to have a common set of standards.

There are issues of political will that are very different depending on at what level of government you operate. Not exclusive of corruption, small corruption is easier to pull off and sustain and keep hidden at lower levels, but far more significant to political will are issues relating to priorities, interests. It's very, very difficult for even a United States state government to have the strength to take on a truly major economic player in the state and certainly hard for smaller units of government where the stakes are so much greater. There are issues of sources of influences as I've said. They're just different at different levels of government. Not in any improper way, just in a realistic way.

And finally environmental problems are fraught with complexity. They are scientifically difficult. They require, look, I mean we didn't get it perfect. But can you imagine tackling air pollution without all the kinds of tools we have in the Clean Air Act? And can you imagine simplifying it in any useful way? These are complicated legal problems. They're complicated technically. They're complicated from a science point of view, and it just is harder to do the less capacity you have.

So, all of that sort of taken together is the notion of why you want some kind of national floor. Economies of scale are pretty obvious. Generally, although not always, it's more efficient if you do things at the larger scale. It relates heavily to this notion of capacity. How do you maintain the kind of scientific expertise you have to have in fifty U.S. states? And there's comparable kinds of questions that relate to China of course. It has led to our sort of favorite solution, cooperative federalism. I want to talk about that just a little bit in my solutions discussion. Which is basically a way of having your cake and eating it too, of having what is offered by centralization, together with some of the real and material advantages that come from governing at a level closer to the people.

Here's a quick side story. I was fortunate enough to do some work in central Europe shortly after the end of the Soviet Regime, and I was

interested in what my colleagues from government had to say about things. They didn't trust the press at all. That was fascinating. You would have thought of the free press as liberators, but almost equally fascinating was that there was a trust only in local government in those areas because their experience was all of excessive centralized control, incompetent centralized control, and authoritarian. I don't think you'll run into that issue in the same way in China because it isn't the same dynamic. But it's sort of indicative that what you trust and what you believe in is a function of what you've experienced and what has worked where you have been.

Finally, one of the big arguments for why you want variability is that states and others can be laboratories of creativity. And this is very real. You need only look at climate change regulatory initiatives to see that but for the U.S. states we would have no regulatory action.

Another favorite story of mine is that I understand the State Department when it attends the Climate Change Convention, to which we are a party as opposed to Kyoto. We're required to say what progress we're making on greenhouse gas change. And so our State Department talks about all the things the U.S. states are doing, very pride-fully in that forum.

So, it is great to have the kind of initiative that comes from variability. And China has such differences across it that the opportunity for some local areas to take the lead is very welcome. The Beijing Olympics is an opportunity to set a model and it's being used that way. And ABA and NRDC, the World Bank, the World Wildlife Fund, you've heard a lot about their projects. A lot of those peel off one EPB or one community and start an experiment of public participation and so forth. So, you want to preserve that.

So, I guess it's no surprise for an EPA person that my recommendations do include expanding the central government role. I definitely think that China needs to empower the national level of government in the area of environment considerably, but you want to preserve all those 60,000 professionals that are in EPBs now. You want to engage them. You want to take advantage of what they bring to the table. You need energy and you need leadership at these lower levels of government. You need to find some way to enhance that to get them on a better page. Maybe we need a philosopher or several to get us there. You want to embrace and design a system that will be science based, so you don't want public participation literally run amuck. You have got to have some, you know, some hard science in there.

You also want one that will be a rule of law, not individuals. I didn't fully understand all that term meant until I began understanding China. And it's literally the case that a mayor or whatever can defacto decide what the law is. And we heard stories about that in the judiciary—it's just hard for us to conceive of. I mean we know that there are things at the margins that feel a little bit like that to us and we're outraged by them, but in general we so comfortably expect the rule of law over the rule of any man or woman. And you want therefore the advantage of dual, shared, and joint responsibility for the environment. You want a mix of national and local standards but the local shouldn't be able to undermine the national.

Is this sounding a little bit like the U.S. system? Maybe too much. You want to make some centralized funding sources. We do that too. The federal share has declined, but it's still enough to make a difference and impact in the behavior of states. You want both general oversight—oversight of the quality of like an EPB program or a provincial program and you want for some, facility specific oversight—oversight of some individual permits. And my experience tells you that at least when it comes to enforcement, it's healthiest if both levels of government have the capacity to act. You don't want to limit your enforcement capacity to the national government. Only the biggest cases will ever get brought. But you do want some relatively easy way to fill the gaps left. And it's not easy to just say we're gonna have to declare you incompetent systemically in order to do that. Those of you who know our statutes very well recognize that they all have some version of a mix of this with little twists that are different depending on the statute, but they basically involved this kind of partnered multi-level, in some ways arguably duplicative approach.

And so I think that if China can find ways, and I think it's beginning to buy into at least this enhanced central government role. And it almost can't avoid preserving the local government role. It's just too endemic to its system. So it will probably wind up okay. So I will wind up, because of my current job, by touting the role of capacity building, training, information exchange, expertise exchanges. And there's a place for all of us in that.

Moderator

Thank you very much.

Marcia Mulkey

Thank you. It was great fun to be here.

AUDIENCE QUESTIONS

Moderator

Oh, thank you Marcia, very much. Any questions for her? Oh, my. Professor Cohen.

Professor Cohen

You reinforced the point I tried to make this morning, of the irony of talking about a Communist totalitarian government that for reform purposes needs to strengthen the central government.

Marcia Mulkey

I thought it was so cool when you said that because I had that insight. And I thought, wow, I had this insight with dabbling in China and here's somebody who really knows and sees that.

Professor Cohen

If you look at the Supreme Court's recent five-year plan it's very similar to this. They're trying to reduce local authority, enhance the central authority, promote the budget decision making, promote the appointment personnel decision making to get away from this local control. China needs to have a stronger central government. It runs contrary to our initial political view of what China really needs is more experimentation, more federalism type of grandiose laboratories and experimentation. You mentioned we should be weakening the Communist Party, but actually experience suggests in the circumstances in which they find themselves, China would be better off with a stronger more responsible central government.

Marcia Mulkey

Well, I've come to that conclusion without anywhere near the depth of experience you've had with it. But it seems to me, and I may be wrong about this, that it's partly because the Communist Party itself in China is not as highly centralized, I mean that the party infrastructure is sort of decentralized too in its own way. But anyway, I must say that my ego was soaring as soon as you said that this morning 'cause that's my big insight.

Audience

And it's a question for both our speaker and for Jerry Cohen. To what extent does the Communist Party have to struggle with it's loss of

authority? That is its own sense of credibility among Chinese people. As we're looking at bolstering authority they're really saddled with the perception that they're corrupt and that they're just not going to be taken seriously. How do you deal with that issue as well?

Professor Cohen

The party has seventy-one million members. The party is losing the scope of its powers, shrinking gradually. The party's moral is sagging. Its sense of popular legitimacy is declining. One fascinating area where they're trying to improve this is the party is importing into it's own processes for disciplining its own members relative sanctions. They're importing initial ideals. Before you kick me out of the party I have a right to know what I did wrong. You must produce evidence. I have a right to know. I have a right to have another party member help me defend myself. I have to have a hearing. If I lose the hearing I have a right. All these ideas that are western due process. Judicial ideals that have not yet been implemented well in the judiciary of China itself are already being prescribed and to some extent are beginning to be practiced by the Communist Party in order to stand more legitimacy in the eyes of their own members. I've written about this briefly in the talk I gave to the Congressional Executive Commission on China. It was published in *NYU Journal of International Law and Politics* last year.³³ It's one of the most interesting developments in law in China involving areas of the party that isn't formally involved. Good question.

Audience

Actually I have a two-part question. I'm going to direct mine to Jerry.

Marcia Mulkey

Maybe we should just bring Jerry [Professor Cohen] up.

Audience

It's all about centralization and centralized power. I guess the first

33. See Jerome A. Cohen, *Law in Political Transitions: Lessons from East Asia and the Road Ahead for China*, 37 N.Y.U. J. INT'L L. & POL. 423, 435-36 (2005) (explaining that the Communist Party Charter recognizes Western notions of due process, including notice and the right to be heard, but such provisions have not been well enforced. In recent years, however, local Party Discipline and Inspection Commissions have taken steps to begin resolving this lack of implementation.).

part of the question; I've actually been dying to ask these questions. Somebody think about this stupid question. But maybe, I'm just wondering about your comment. One of the issues in the central government is that it's made up of individuals who at the same time are occupying positions with the state or the central government also occupy positions out in the provinces, right? I mean they have separate interfaces of power. And I'm curious about those influences, I mean the level of centralization that you can possibly expect from China.

Marcia Mulkey

Well, before Jerry answers with some knowledge of China, let me observe that that's also true of the U.S. system, and that almost everybody who's engaged in the national government has some sort of prior life. It's not unusual that it be with a U.S. state or a city government. It might be industry or regulated community. And there is, in my experience, a pretty rapid sort of changing of hats that where you sit is what you see and so forth. On the other hand, there's a lot of value added from having that experience. So at least in the U.S. system I don't think that's fatal. In fact, it might be an asset. But maybe that's not relevant to the—

Professor Tseming Yang

Right. The governor of Fujian Province is a member of the state council.

Marcia Mulkey

But that's different. I mean that's sort of the appointment of people. That sort of goes to the rule of people not of law question.

Professor Cohen

But everybody is. [Some people having already been Wong Dong whatever or Mayor of Shanghai becomes central full-time apparagics defending standing under the Polit Bureau. But others as you say different areas in China. They all come together. And they all have to be bargained with. A consensus has to be forged.

Marcia Mulkey

Absolutely.

Professor Cohen

They offer a lot of resistance.

Marcia Mulkey

Plus these people moved, you know, they move with the party which sort of decides where they get to go. I thought this, the fellow who had been head of SEPA who I met, so I'm embarrassed that I can't remember his name. Actually, I was pretty impressed by him. He'd been there for a long time. But he was pretty outspoken. I think he'd shown some real leadership. I thought it was somewhat ironic that he sort of took the fall for that mistake. And it is fascinating to hear that he so quickly was rehabilitated by the party, which may mean that he was regarded as not having been the source of that.

Professor Cohen

Efficient holding between those who represent the promises as it were, and those who represent the center. Bargaining is also among those who represent the center. The former, the present Minister of Public Security, a very powerful person, who at the next meeting of the full party, the elevated, the head of the national political party group used to be the governor of Central. Now, although he's the center person now, loyal to the center, he would like to build up the control of the Ministry of Public Security over all the provincial police organizations. But he also is in opposition to the Ministry of Justice and the Supreme Court. And they're not represented in the. He's more powerful; he's more resourceful, but there are other people in the Polit Bureau who take account of even though they all have central government hats as well as party hats. So it's really quite.