

## An Overview of China's Environmental Legislation Regarding Climate Change

by Ying Shen

As the largest developing country, China<sup>1</sup> has become a primary focus of discussions about involving developing nations in global climate change mitigation efforts. China is now the world's largest source of energy-related carbon dioxide (CO<sub>2</sub>) emissions,<sup>2</sup> accounting for 29% of global annual emissions.<sup>3</sup> Excessive CO<sub>2</sub> emissions in China not only contribute to global climate change, but also endanger the lives of countless citizens and sap the nation's economic vitality. In response, the Chinese government has been taking steps to control greenhouse gas (GHG) emissions and to combat climate change.

This article examines climate change actions in China by reviewing the Constitution, discussing the role of the Communist Party of China (CPC) in environmental legislation, and introducing selected national laws relevant to climate change. China's implementation of its international obligations under the United Nations Framework Convention on Climate Change (UNFCCC)<sup>4</sup> and the Clean Development Mechanism (CDM) is also examined. Finally, weaknesses in Chinese environmental law and legal regime are analyzed.

### Chinese Laws Supporting Climate Change Actions

#### *Constitution*

The first Constitution of the People's Republic of China (PRC) was adopted in 1954 and has been amended several times. The Constitution does not establish environmental

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rights, but it does address environmental issues. Article 9 requires the state to promote the rational use of natural resources and protect rare plants and animals; Article 22 requires the state to protect "places of scenic . . . interest"; and Article 26 requires the state to protect and improve the environment, to prevent and remedy pollution, and to encourage afforestation and the protection of forests.

Some people, including some scholars, seek additional constitutional protections and advocate for constitutionalizing environmental rights.<sup>5</sup> For example, some members of the Chinese People's Political Consultative Conference proposed this in 2013, stating that it is necessary to deal with issues of ecological protection and air pollution.<sup>6</sup>

#### *Role of the CPC in Environmental Legislation*

Although the Constitution does not grant the CPC formal powers, the CPC controls almost every aspect of China's government.<sup>7</sup> Therefore, some scholars consider the CPC rather than the National People's Congress (NPC) as the "highest organ of state power."<sup>8</sup> The CPC has de facto discretionary power to intervene in the law making process any time it wishes.<sup>9</sup> All organizations, including all political parties, must abide by the Constitution and the law<sup>10</sup>; but "[t]o the Party, being bound to the law means first of all to execute the Party's leadership, especially over the law-making process."<sup>11</sup>

In terms of environmental law making, the CPC plays a subtle role. The Constitution of the CPC<sup>12</sup> provides that "[t]he Party works to balance . . . relations between man and nature,"<sup>13</sup> "making China an innovative country and a resource-conserving, environment-friendly society."<sup>14</sup> The CPC has facilitated China's modern environmental movement, especially by incorporating environmental protection and sustainable development into Chinese policy and law. However, unlike major laws in the political area, the CPC has not intervened in any significant manner in the crafting of China's environmental laws.<sup>15</sup>

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## *Chinese National Laws Relevant to Combating Climate Change*

### Environmental Protection Law

The Environmental Protection Law was adopted in 1979 and was amended and reenacted in 1989. It is the primary law setting out the basic principles and requirements for environmental protection in China, and aims to protect and improve the human and ecological environment, prevent and control pollution and other public hazards, and safeguard human health, while “facilitating the development of socialist modernization.”<sup>16</sup>

Since the last amendment of the law over two decades ago, environmental circumstances in China have changed significantly and the law has become outdated. A draft amendment was proposed in 2012, but changes have not yet been made, and discussions on amending the law continue.

### Law on the Prevention and Control of Atmospheric Pollution

The Law on Prevention and Control of Atmospheric Pollution was adopted in 1987 and took effect on June 1, 1988. Since then, it has been amended twice. The latest amendments came into force on September 1, 2000. The law aims to prevent and control atmospheric pollution, protect and improve the human and ecological environment, safeguard human health, and promote the sustainable development of the economy and society.<sup>17</sup>

The law was scheduled for amendment in the NPC’s five-year legislation plan for 2003-2008.<sup>18</sup> However, no amendments were processed during that period. The proposed amendment missed the NPC held in March 2013 as well. Whether it can be scheduled into the next session of the NPC is still unknown.

### Clean Production Promotion Law

The Clean Production Promotion Law was adopted and promulgated in 2002 and came into force on January 1, 2003. The law was enacted to promote clean production, increase the efficiency of the utilization rate of resources, reduce and avoid the generation of pollutants, protect and improve environments, ensure human health, and promote the sustainable development of the economy and society.<sup>19</sup>

### Environmental Impact Assessment Law

The Environmental Impact Assessment Law was adopted and promulgated in 2002 and took effect on September 1, 2003. It establishes guidelines for assessing certain

government planning activities and the construction of any project within the territory of the PRC to carry out sustainable development, prevent or mitigate unfavorable environmental impacts, and promote the concerted development of the economy, society, and the environment.<sup>20</sup>

The Environmental Impact Assessment (EIA) Report is the key element in appraisals of environmental impacts. However, there are vulnerabilities in EIA Reports, especially with respect to public participation, which is very easy to falsify. Experts suggest that the law should be amended as soon as possible to focus on all-around transparency.<sup>21</sup>

### Energy Conservation Law

The Energy Conservation Law was adopted and promulgated in 1997 and amended in 2007; the amendments took effect on April 1, 2008. The law aims at promoting energy conservation, enhancing energy utilization efficiency, protecting and improving the environment, and boosting the sustainable development of China’s economy and society.<sup>22</sup>

### Circular Economy Promotion Law

The Circular Economy Promotion Law was promulgated and adopted in 2008 and came into force on January 1, 2009. The law was enacted for the purposes of promoting the development of the circular economy, improving resource utilization efficiency, protecting and improving the environment, and realizing sustainable development.<sup>23</sup>

### Renewable Energy Law

The Renewable Energy Law was adopted and promulgated in 2005 and took effect in 2006. An amendment was approved in 2009 and came into force on April 1, 2010. Key objectives include promoting the development and utilization of renewable energy, diversifying energy supplies and improving energy structures, safeguarding energy security and protecting the environment, and facilitating sustainable economic and social development.<sup>24</sup>

The law has played an important role in promoting the development and utilization of renewable energy. However, the rapid development of China’s renewable energy industry has exposed problems with the implementation of the law. A draft amendment was approved in 2009 but has not yet been finalized.

### The Measures for Operation and Management of CDM Projects<sup>25</sup>

The Measures for Operation and Management of Clean Development Mechanism Projects (CDM Measures) were promulgated on October 12, 2005. The National

Development and Reform Commission (NDRC) and other departments jointly issued the revised CDM Measures<sup>26</sup> on August 3, 2011, to be in accordance with the UNFCCC and the Kyoto Protocol.<sup>27</sup>

According to the revised CDM Measures, CDM projects should promote the transfer of environmentally friendly technologies and focus on key industries, such as saving energy and increasing efficiency, developing and utilizing new and renewable energy, and recycling methane.<sup>28</sup> The Central Government established a Project Approval Council for reviewing and approving CDM projects.<sup>29</sup>

Since the Chinese government launched its first CDM projects in 2005, China's CDM market has grown rapidly, with the number of approved projects peaking in 2007.<sup>30</sup> Due to the global financial crisis and uncertainties with the Kyoto Protocol and the development of CDM projects, the number of approved projects experienced a slowdown after 2007.<sup>31</sup> Even so, there is still great potential for the development of CDM projects, given that China is consuming increasing energy, while its efficiency remains at 10% below the international average.<sup>32</sup>

#### Other National Environmental Laws

In addition to the above-mentioned national laws relevant to combating climate change, China has national environmental laws that protect specific resources or address a specific type of pollutant, such as the Law on Desert Prevention and Transformation, the Forest Law, the Grasslands Law, the Fishery Law, the Land Administration Law, the Water Law, the Mineral Resources Law, the Wildlife Protection Law, the Water and Soil Conservation Law, the Flood Control Law, and the Radioactive Pollution Law. Chinese policymakers rely on these laws to support adaptation efforts by government agencies, even though there is no specific legislation dealing with adaptation.<sup>33</sup>

#### Draft Energy Law

A draft Energy Law was submitted in January 2009, with an expectation of being passed by the NPC in 2010.<sup>34</sup> However, more than five years have passed since the draft Energy Law was first open to the public, and it now appears that the proposed law will not be passed in the near future. Even so, the expectation of establishing an Energy Law in China has historical significance.

Notably, principles of sustainable development were incorporated into the proposed Energy Law.<sup>35</sup> The law is intended to encourage the development of clean and low-carbon energy, but more significantly, if it is passed by the NPC, it will be the first Chinese law to specifically address and define high-carbon and low-carbon en-

ergy,<sup>36</sup> and to put renewable energy in context with other energy types.<sup>37</sup>

#### China's Implementation of International Obligations Under the UNFCCC and the CDM

On May 29, 1998, the PRC signed the Kyoto Protocol to the UNFCCC,<sup>38</sup> which was approved by the Chinese government in 2002 and entered into force on February 16, 2005.<sup>39</sup> China has made substantial efforts to comply with its obligations under the UNFCCC, even though it is a developing country and has no binding emissions reduction targets under the Kyoto Protocol. The main flexible mechanism for China to mitigate emissions and to comply with its international obligations under the UNFCCC is the CDM, which is defined in the Kyoto Protocol.

The CDM Measures, amended August 3, 2011, is the principle law regulating CDM projects in China. The law aims to facilitate the implementation of CDM projects in China that are consistent with the UNFCCC and the Kyoto Protocol.

Article 4 of the revised CDM Measures sets out priority areas for CDM projects in China, such as saving energy, increasing efficiency, developing and utilizing new and renewable energy, and recycling and utilizing methane.<sup>40</sup> Unlike other CDM host countries such as India, Indonesia, and Thailand, there are no sustainable development criteria.<sup>41</sup> It is generally acknowledged that projects in the above-mentioned priority areas will be approved as long as they are in accordance with China's laws and regulations, the decisions of the UNFCCC, the Kyoto Protocol and its Conference of the Parties, sustainable development strategies and policies, and the overall requirements for national economic and social development planning.<sup>42</sup> However, details of the project's contribution to sustainable development in China must be set out in the application form for CDM projects.<sup>43</sup>

The Chinese government has adopted a series of policies that actively support the CDM to positively contribute to the mitigation of climate change.<sup>44</sup> However, China imposes a variety of restrictions and requirements on CDM projects, which is unique among host countries.<sup>45</sup> Restrictions and requirements for CDM projects in China include a floor price for certified emission reductions (CERs), the Chinese control rule, the distribution of income from the sale of CERs and the levy on CER revenues, and the restriction on the sale of post-2012 CERs.

#### *Floor Price for CERs*

The NDRC has imposed an unwritten floor price on the sale of CERs since the very beginning of the implemen-

tation of the CDM in China.<sup>46</sup> The floor price remains twice as high as the current market price, and most investors consider it a troublesome bureaucratic barrier.<sup>47</sup> As a result, it is not uncommon for parties to sign two different contracts—one shown to the NDRC that meets the floor price criteria, and another containing the real price, which is kept confidential.<sup>48</sup> Furthermore, actual prices have remained below the so-called floor price for a long period, which fulfills experts' assertions that it is difficult to make people comply with the floor price in practice.<sup>49</sup>

It is possible that China will abandon its floor price policy, since most Chinese CDM projects are funded by Chinese investors<sup>50</sup> and the Chinese government can adopt appropriate measures to prevent them from losing the whole of their investment.<sup>51</sup>

#### *Chinese Control Rule*

Article 10 of the revised CDM Measures requires a company implementing a CDM project in China to be a Chinese domestic enterprise or an Equity Joint Venture, which is a Foreign Invested Enterprise.<sup>52</sup> The purpose of this rule is to ensure that the CDM project entity is under the control of the Chinese government.

#### *CER Income Distribution and Levy on CDM Revenues*

Article 36 of the revised CDM Measures requires proceeds from the sale of CERs to be shared by the Chinese government and CDM project-implementing entities; the proceeds cannot be shared directly with a third party. According to China's Contract Law, however, the CDM project owner may share the income indirectly with a third party by assigning some of the proceeds to that third party. The practical effect of Article 36 is to prevent intermediaries from taking a share of CERs or receiving CER proceeds directly upon the transfer of CERs to an Annex B buyer.<sup>53</sup>

According to Article 36 of the revised CDM Measures, the State may impose a levy of 2% to 65% on CER revenues, depending on the categories of CDM projects. The levy allows the State to share the benefits of CDM projects. The levies are used to finance sustainable development activities and projects dealing with climate change.

#### *Restriction on the Sale of Post-2012 CERs*

Article 37 of the revised CDM Measures prohibits the transfer of post-2012 CERs without permission from the NDRC.<sup>54</sup> This restrictive policy aims to discourage Chinese CDM project-implementing entities from selling CERs after 2012, due to current uncertainties in international climate change negotiations.

## **Conclusion: Weaknesses in Environmental Law and Legal Regime**

China's environmental laws and legal system contain significant weaknesses. First, the Constitution does not provide environmental rights to Chinese citizens. As a result, there are growing calls for constitutionalizing environmental rights in China. Also, vague statutory language is common in many provisions of important Chinese environmental laws, making it difficult to apply the laws consistently.

China's legal regime has several institutional weaknesses as well. For example, China lacks an independent judiciary. The weak and dependent status of the judiciary is attributed to its dependence on local governments, which provide judicial salaries, resources, and funding. The judiciary is also poorly trained, rife with corruption, and subject to political pressures to ignore the law. In addition, judges in China usually lack an inherent power to interpret the law. Instead, the NPC authorizes executive enforcement bodies to interpret the law.<sup>55</sup>

China also has enforcement problems. Local law enforcement officials are often poorly trained, ill-equipped, and reluctant to enforce environmental regulations. Sometimes, local officials are stakeholders of companies they are supposed to regulate, which may lead to weak and unfair law enforcement. Furthermore, private citizens and organizations in China are not able to seek enforcement of environmental regulations and statutes.

Despite these limitations, it is encouraging that the Chinese government is well aware of these problems and is seeking to make changes. It is anticipated that comprehensive legal reform, including the improvement of environmental legislation, will soon occur in China as a countermeasure to combat climate change.

#### ENDNOTES

- 1 Unless otherwise indicated, "China" used in this article refers to the mainland of the People's Republic of China (PRC), excluding Hong Kong, Macau, and Taiwan, which have different political and social systems. Similarly, references to "Chinese" mean individuals, entities, or subjects in the mainland of the PRC.
- 2 IEA, CO<sub>2</sub> EMISSIONS FROM FUEL COMBUSTION: HIGHLIGHTS 24 (OECD/IEA, 2012).
- 3 The top five emitters are China (29%), the United States (16%), the European Union (EU27) (11%), India (6%), and the Russian Federation (5%), followed by Japan (4%). See JOS G.J. OLIVIER ET AL., TRENDS IN GLOBAL CO<sub>2</sub> EMISSIONS: 2012 REPORT 6 (PBL Netherlands Environmental Assessment Agency, 2012).
- 4 United Nations Framework Convention on Climate Change, *opened for signature* May 9, 1992, S. Treaty Doc. No. 102-38 (1992), 1771 U.N.T.S. 107 [hereinafter UNFCCC].
- 5 See, e.g., Li Mingqi & Zhang Zhen, *Analysis on the Constitutionalisation of Environmental Rights*, 13(3) J. HENAN POLYTECHNIC U. (SOC. SCI.), 26, 26-30 (2012) (in Chinese, author's translation).
- 6 Beijing Times, *Environmental Protection Becomes Hot Issues of CPPCC Proposals, Committee Members Suggest Constitutionalizing Environmental Rights*, people.com.cn (Mar. 3, 2013), <http://politics.people.com.cn/n/2013/0303/c1001-20656147.html> (last visited Mar. 11, 2014) (in Chinese, author's translation).
- 7 CHARLES R. McELWEE, ENVIRONMENTAL LAW IN CHINA: MITIGATING RISK AND ENSURING COMPLIANCE 42 (Oxford Univ. Press, 2011).
- 8 *Id.*

- 9 ZOU KEYUAN, CHINA'S LEGAL REFORM: TOWARDS THE RULE OF LAW 50 (Martinus Nijhoff Pub., 2006).
- 10 CONSTITUTION (Mar. 14, 2004), art. 5, ¶ 4.
- 11 Harro von Senger, *Ideology and Law-Making, in LAW-MAKING IN THE PEOPLE'S REPUBLIC OF CHINA*, at 41, 44 (Jan Michiel Otto et al. eds., Kluwer Law International, 2000).
- 12 *Constitution of the Communist Party of China*, NEWS OF THE COMMUNIST PARTY OF CHINA (Sept. 15, 2009), <http://english.cpc.people.com.cn/65732/6758063.html> (last visited Mar. 11, 2014) (amended and adopted at the Seventeenth National Congress of the Communist Party of China on Oct. 21, 2007).
- 13 CPC CONSTITUTION, General Program.
- 14 *Id.*
- 15 McELWEE, *supra* note 7, at 43.
- 16 PRC ENVIRONMENTAL PROTECTION LAW (Dec. 26, 1989), art. 1.
- 17 PRC LAW ON THE PREVENTION AND CONTROL OF ATMOSPHERIC POLLUTION (Sept. 1, 2000), art. 1.
- 18 McELWEE, *supra* note 7, at 62.
- 19 PRC CLEAN PRODUCTION PROMOTION LAW (Jan. 1, 2003), art. 1.
- 20 PRC ENVIRONMENTAL IMPACT ASSESSMENT LAW (Sept. 1, 2003), art. 1.
- 21 Guangming Daily, *Too Many Tricks in EIA Reports, Experts Call for Amendment of the Environmental Impact Assessment Law as Soon as Possible*, CHINA NEWS (Jan. 13, 2013), <http://www.chinanews.com/gn/2013/01-13/4482888.shtml> (last visited Mar. 11, 2014) (in Chinese, author's translation).
- 22 PRC ENERGY CONSERVATION LAW (Apr. 1, 2008), art. 1.
- 23 PRC CIRCULAR ECONOMY PROMOTION LAW (Jan. 1, 2009), art. 1.
- 24 PRC RENEWABLE ENERGY LAW (Apr. 1, 2010), art. 1.
- 25 For more detailed discussion of the revised Measures for Operation and Management of Clean Development Mechanism Projects, see below.
- 26 NDRC, Ministry of Science and Technology, Ministry of Foreign Affairs & Ministry of Finance, *Measures for Operation and Management of Clean Development Mechanism Projects (Amendment)*, THE CENTRAL PEOPLE'S GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA (Sept. 22, 2011), <http://www.gov.cn/gzdt/att/att/site1/20110922/001e3741a2cc0fe52cf402.pdf> (last visited Mar. 11, 2014) (in Chinese, author's translation).
- 27 China Briefing, *China Revises Measures on Clean Development Mechanism Projects*, CHINA BRIEFING (Sept. 28, 2011), <http://www.china-briefing.com/news/2011/09/28/china-revises-measures-on-clean-development-mechanism-projects.html> (last visited Mar. 11, 2014).
- 28 THE MEASURES FOR OPERATION AND MANAGEMENT OF CLEAN DEVELOPMENT MECHANISM PROJECTS (AMENDMENT) (Aug. 3, 2011), art. 4.
- 29 The Ministry of Science and Technology and the NDRC are the leaders of the Project Approval Council and the Ministry of Foreign Affairs is the deputy leader. See THE MEASURES FOR OPERATION AND MANAGEMENT OF CLEAN DEVELOPMENT MECHANISM PROJECTS (AMENDMENT) (Aug. 3, 2011), art. 8.
- 30 China Briefing, *supra* note 27.
- 31 *Id.*
- 32 *Id.*
- 33 Christopher Tung, *Carbon Law and Practice in China, in LEGAL ASPECTS OF CARBON TRADING*, at 494 (David Freestone & Charlotte Streck eds., Oxford Univ. Press, 1st ed. 2009).
- 34 China Environmental Law, *China's Energy Law & 12th Energy Five Year Plan*, CHINA ENVIRONMENTAL LAW (Feb. 6, 2009), <http://www.chinaenvironmental-law.com/2009/02/06/chinas-energy-law-12th-energy-five-year-plan/>.
- 35 ONELG, *The PRC Energy Law (Draft for Comment)*, THE CENTRAL PEOPLE'S GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA (Dec. 4, 2007), [http://www.gov.cn/gzdt/2007-12/04/content\\_824569.htm](http://www.gov.cn/gzdt/2007-12/04/content_824569.htm) (last visited Mar. 11, 2014) (in Chinese, author's translation).
- 36 See PRC Energy Law (Draft for Comment), arts. 5, 36, 37 & 139.
- 37 Tung, *supra* note 33, at 497.
- 38 Kyoto Protocol to the United Nations Framework Convention on Climate Change, 2303 U.N.T.S. 162 (entered into force Feb. 16, 2005) [hereinafter Kyoto Protocol]. *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, U.N. Treaty Collection, [http://treaties.un.org/Pages/ShowM-TDSGDetails.aspx?src=UNTS&tabid=2&tmdsg\\_no=XXVII-7-a&chapter=27&lang=en#Participants](http://treaties.un.org/Pages/ShowM-TDSGDetails.aspx?src=UNTS&tabid=2&tmdsg_no=XXVII-7-a&chapter=27&lang=en#Participants) (last visited Mar. 11, 2014).
- 39 It is worth noting that the Kyoto Protocol to the UNFCCC was provisionally not applied to the Hong Kong Special Administrative Region and the Macao Special Administrative Region of the People's Republic of China when it was approved by the People's Republic of China on August 30, 2002. On April 8, 2003, the Kyoto Protocol to the UNFCCC began to apply to the Hong Kong Special Administrative Region of the People's Republic of China, while it began to apply to the Macao Special Administrative Region of the People's Republic of China on January 14, 2008. See U.N., *Status of Ratification of the Kyoto Protocol*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (Apr. 29, 2013), available at [http://unfccc.int/kyoto\\_protocol/status\\_of\\_ratification/items/2613.php](http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php).
- 40 THE MEASURES FOR OPERATION AND MANAGEMENT OF CLEAN DEVELOPMENT MECHANISM PROJECTS (AMENDMENT) (Aug. 3, 2011), art. 4.
- 41 Tung, *supra* note 33, at 498 n.29.
- 42 THE MEASURES FOR OPERATION AND MANAGEMENT OF CLEAN DEVELOPMENT MECHANISM PROJECTS (AMENDMENT) (Aug. 3, 2011), art. 3.
- 43 NCCCC, *Format for CDM Project Application in China*, CLEAN DEVELOPMENT MECHANISM IN CHINA (Apr. 20, 2008), <http://cdm-en.ccchina.gov.cn/Detail.aspx?newsId=5801&Tid=43> (last visited Mar. 11, 2014).
- 44 CNCCP, pt. 1 s. 1.3.
- 45 Tung, *supra* note 33, at 498.
- 46 Although there is no express provision for the floor price on the sale of CERs, the application for approval of a CDM project will be refused by the NDRC if the purchase price is unacceptably low. See Tung, *supra* note 33, at 498.
- 47 *Id.*
- 48 *Id.*
- 49 Valentin Bellassen et al., *Will There Still Be a Market Price for CERs and ERUs in Two Years Time?*, CLIMATE BRIEF (May 2012), available at [http://www.cdclimat.com/IMG/pdf/12-05\\_climate\\_brief\\_no13\\_-\\_supply\\_demand\\_for\\_cer\\_eru\\_in\\_the\\_ets.pdf](http://www.cdclimat.com/IMG/pdf/12-05_climate_brief_no13_-_supply_demand_for_cer_eru_in_the_ets.pdf).
- 50 Wei Shen, *Understanding the Dominance of Unilateral CDM Projects in China: Origins and Implications for Governing Carbon Markets* 8 (Univ. of East Anglia, Working Paper No. 016, 2011), available at [http://www.tyndall.ac.uk/sites/default/files/gcd\\_workingpaper016.pdf](http://www.tyndall.ac.uk/sites/default/files/gcd_workingpaper016.pdf).
- 51 Bellassen, *supra* note 49.
- 52 Both of the enterprises should be located in the territory of the PRC. See THE MEASURES FOR OPERATION AND MANAGEMENT OF CLEAN DEVELOPMENT MECHANISM PROJECTS (AMENDMENT) (Aug. 3, 2011), art. 10.
- 53 Tung, *supra* note 33, at 499.
- 54 THE PRC ADMINISTRATIVE MEASURES ON THE CLEAN DEVELOPMENT MECHANISM FUND (Sept. 14, 2010), art. 37.
- 55 Standing Committee of the National People's Congress, *Resolution of the Standing Committee of the National People's Congress on Reinforcing the Legal Interpretation Work*, CHINA.COM.CN (June 10, 1981), [http://big5.china.com.cn/law/flfg/txt/2006-08/08/content\\_7064460.htm](http://big5.china.com.cn/law/flfg/txt/2006-08/08/content_7064460.htm) (last visited Mar. 11, 2014) (in Chinese, author's translation).

# Pollution Pays? The State of Environmental Class-Action Litigation in China

by Li Li, Diyu Wu, Zhu Meng, and Tom McGinn

When the National People's Congress (NPC) passed the Civil Procedure Law (CPL) in 1991, China became one of the first countries to create a legislative basis for nonrepresentative class-action litigation.

Under then-Article 55 CPL, a party could bring an action on behalf of any person if the object of their respective claims fell within "the same category." The group could be "unascertainable," and the party did not have to be nominated by the class it was representing. This bore similarities to the U.S. model<sup>1</sup> and contrasted with the representative group litigation provisions found in most other developed countries. Many of these jurisdictions are now following suit.<sup>2</sup>

However, despite its early adoption, class-action litigation generally and environmental class-action litigation specifically rarely feature in Chinese courts.

There are a number of reasons for this. On the face of it, nongovernmental organizations (NGOs) appear better positioned to initiate class-action lawsuits than individuals are. They generally possess greater funds and thus are able to afford more experienced lawyers who specialize in such litigation matters. Additionally, expensive environmental reports from qualified certifying agencies, many costing millions of renminbi (RMB), provide less of a barrier to NGOs than lay litigants. Finally, as entities, NGOs often wield greater political influence. This may make it harder for courts to justify rejecting their claims. However, an NGO's entity status makes it harder for it to satisfy the requirement of "direct interest," which is necessary to establish legal standing under Article 119 CPL. As such, NGOs are frequently barred from initiating their claims.

Therefore, while claims brought by individuals fail for practical reasons, claims brought by NGOs fail for legal reasons.

Perhaps in light of the increasing public pressure to make polluters accountable, judges have recently been more willing to allow NGOs to initiate environmental class-action lawsuits—whether by accepting a case

brought jointly by an NGO and a victim with "direct interest"<sup>3</sup> or by relying generally on the CPL when awarding damages to an NGO acting as a sole claimant.<sup>4</sup>

On January 1, 2013, the most recent amendments to the CPL took effect. The essence of the original Article 55 is now located in Article 54. Additionally, a new Article 55 has been incorporated, which may spell an end to such judicial creativity. It allows "an authority or *relevant organization as prescribed by law*" (ROPL) to bring an action against "conduct that pollutes the environment (or) infringes upon the lawful rights and interests of vast consumers or otherwise damages the public interest."

While Article 55 offers the clearest ever basis for environmental class-action suits<sup>5</sup> and helps bypass Article 119's standing requirements, it is currently of limited use to NGOs. The CPL does not define an ROPL. Moreover, there is no uniform legal definition of "organization" in China.<sup>6</sup> Therefore, at this stage, it is only possible to say that an ROPL must: (1) be registered with the Civil Ministry to qualify as an organization; and (2) be prescribed by legislation.

In light of this uncertainty, a claim brought on August 2, 2013, in the Beijing Dongcheng District Court under Article 55 by the NGO Friends of Nature<sup>7</sup> was rejected via telephone on August 30, 2013, on the ground that the court was not able to define an ROPL. The court stated that while it was sympathetic to the claimant's case, as Article 55 had no interpretive guidance from either legislative sources or superior courts, it was unable to determine if Article 55 applied.<sup>8</sup>

The lawyer representing Friends of Nature explained that after the amendment of Article 55, the number of environmental protection cases has dropped due to judicial reticence and confusion over the interpretation of qualifying claimants under Article 55.<sup>9</sup> This confusion surrounding ROPLs contrasts with the relatively clear meaning of "authority prescribed by law." For example, according to Article 90 of the Marine Environmental Protection Law, a "department empowered by the provisions of this Law to conduct marine environment supervision and control" is entitled to bring claims against polluters. In light of Article 55, this right would extend to a class-action lawsuit.

At the end of October 2013, in its fifth meeting, the Standing Committee of China's NPC rejected the third draft of amendments to China's Environmental Protec-

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tion Law (EPL). Any change would constitute the first amendment to the EPL since it came into force in 1989.

The EPL currently does not contain a provision on class-action litigation. The legislation merely allows a “competent department” to levy administrative penalties such as fines or cautions on a polluter. While a number of NGOs have been allowed to initiate class-action lawsuits by relying on the EPL generally, most of the few favorable judgments have been awarded to the quasi-governmental All China Environment Federation (ACEF).

The draft EPL provision dealing with entities entitled to initiate class-action proceedings has been altered throughout the drafting process. While the first draft did not amend the law currently in force, the second draft designated the ACEF and “other environment federations” as qualifying claimants, and the third draft contained a “four-stage test.” The test stated that in order to initiate an environmental class action, a claimant must: (1) be a national organization; (2) be registered with the Civil Ministry; (3) have been continuously promoting publicly beneficial environmental initiatives for at least five years; and (4) have a “good reputation.”

Following the rejection of this qualifying test, it is unclear whether the new EPL will include a provision on class-action litigation. If it does, this will prove helpful in clarifying the meaning of an ROPL under Article 55 CPL. In light of the article being the clearest ever basis for environmental class-action lawsuits, any clarification would increase litigation risk for polluters. Additionally, each of the EPL’s three draft amendments contained pro-

visions aiming to increase public access to environmental data.<sup>10</sup> Such measures would increase the public’s power to hold polluters accountable, and would therefore further increase litigation risk.

In the absence of a class-action provision in the EPL, legislation defining an ROPL, or judicial guidance, Article 55’s transition period will continue. This is likely to result in more NGOs suffering the fate of Friends of Nature.

In order to spot the end of this transition period, interested parties are advised to stay abreast of developments affecting the meaning of an ROPL. Such organizations are also advised to inform themselves about the ACEF.

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ENDNOTES

- 1 U.S. FED. R. CIV. P. 23; 28 U.S.C.A. §1332(d).
- 2 *E.g.*, on June 11, 2013, the European Commission issued a Recommendation indicating that within two years, Member states should adopt a mechanism for “collective redress” so as to allow claimants to seek damages or injunctive relieve on a collective basis.
- 3 *See, e.g.*, Zhu Zhengmao & All China Env’t Fed’n v. Jiangyin Port Container Co. (July 6, 2009).
- 4 *See, e.g.*, All China Env’t Fed’n & Guiyang Pub. Env’tl. Edu. Ctr. v. Dingpa Paper Mill (Dec. 30, 2010).
- 5 Article 55 contains the CPL’s only reference to “environment.”
- 6 Under Chinese law, there are three types of organizations: social organizations; non-enterprises; and foundations, each of which has its own legal definition. The definitions are found in “The Administrative Regulation on Social Organizations,” “Interim Regulations on Registration Administration of Private Non-Enterprise Units,” and “Regulation on Foundation Administration,” respectively.
- 7 Friends of Nature was the first environmental NGO in China, founded in 1994. *See* Hsiang-Yuan Wu, *NGOs in China: The Case of Friends of Nature*, available at [http://www.academia.edu/3191274/NGOs\\_in\\_China\\_the\\_case\\_of\\_Friends\\_of\\_Nature](http://www.academia.edu/3191274/NGOs_in_China_the_case_of_Friends_of_Nature) (last visited Mar. 11, 2014).
- 8 Obtained from interview with lawyer on November 3, 2013. The court declined to provide a written clarification of the reasons for the refusal.
- 9 Obtained from interview with lawyer on November 3, 2013.
- 10 *E.g.*, governments above county level are required to provide environmental monitoring data information about environmental emergencies, and pollution charges.