

Environmental Protection in China: The Role of Law

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"Faced with global warming, I am committed to a process of defense and protection against environmental issues."

Abstract

This article of environmental law in China has attracted the attention of scholars for several years. They produced a series of scientific works analyzing various aspects of this multi-component phenomenon. Our article is an attempt at a systematic classification and in-depth review of the literature on environmental law in China in the field of substantial developments in legislation and policy-making remain insufficient to address environmental degradation and the growing importance of environmental issues in Chinese politics, from pollution management to deepening academic research on environmental law in China. We used the Scopus database and a guided delineation approach to ensure the quality and relevance of selected articles. Based on the identified Chinese legislations, we propose promising avenues for future research in the field of pollution law research and management. Huge challenges remain in the areas of natural resource governance, environmental health, and transition pathways in agriculture and urban development. They must be addressed with an even stronger commitment from Chinese leaders, accompanied by meaningful reforms in the areas of environmental litigation, the transparency of local government decision-making, and the self-organizing capacity of Chinese citizens to mobilize on the environment problems. The modernity and thoroughness of the Chinese environmental legislation come as a surprise. The Constitution requires the State to protect and improve the environment, to prevent pollution, to ensure the rational use of natural resources. China is a party to the main international Treaties. Its major laws on air, water or waste, which have been revised several times are accompanied, already, by more transversal measures such as a broad statute on environmental protection in general and another one on the assessment of environmental incidences, which covers plans and programs as well as individual projects. First elements of economic instruments are progressively joining civil and criminal liability, just as a few applications of the precautionary principle.

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Introduction

Ecological civilization is a comprehensive government strategy. Many observers both in China and outside the country are quick to see it as nothing more than propaganda. In reality, ecological civilization constitutes the only "innovation" brought by Chinese Marxism to the classic Marxist formulation of the stages of development through which societies pass: from agriculture to imperialism, from imperialism to capitalism, then to socialism and, finally, communism. Chinese state-sponsored Marxists essentially suggest that ecological civilization is the transitional stage between socialism and communism. In other words, they argue that China is living an experience of a Marxist nature but that Karl Marx himself did not experience. In this sense, ecological civilization constitutes a unique intellectual contribution.

China also claims that before the Opium Wars, around the middle of the 19th century, it was among the most advanced civilizations on the planet, but that it subsequently experienced a century of humiliation. The CCP sees itself as an organization that is dusting off the "Chinese nation" and restoring it to its past glory: it is not building just one type of civilization; it is building a unique type of civilization, an ecological civilization. This is, in a way, what is currently becoming the CCP's trademark in China. It is essential to recognize the centrality of ecological civilization in the way the Chinese state conceives itself. In the future, environmental protection will continue to occupy a very important place in Chinese state policies.

The study of the ecological environment has experienced considerable development in recent years in China. The results of ecological damage caused by the misdeeds of mass industrialization and environmental disasters have upset the balance of the earth and increasingly pose a threat to our planet. This deterioration of the

planetary state has had as a corollary awareness on the part of scientific and political circles as well as popular circles. This interest in ecology has been accompanied by rigorous Chinese legislative actions (nationally and internationally), the application by companies of ecological management systems such as ISO 14001, the emergence of pressure groups, increasingly abundant and targeted communication on environmental protection and an increasingly felt sensitivity on the part of all stakeholders, including consumers.

International admiration for China's ecology comes largely from the government's promotion of renewable energy. Rather, a certain amount of caution should be called for in this regard. If hydroelectricity is indeed renewable in energy terms, dams mainly have the effect of destroying river ecosystems and generating terrible long-term social and economic impacts on local communities.

The recycling policy of the city of Shanghai is a good example of inequality between cities and countryside. Recycling has existed in this city for decades and is a main source of income for many migrant workers. The government is now trying to establish a more formalized recycling system in the city by driving out migrants and replacing them with local workers. At the same time, this policy gentrifies the city and restricts the economic space of migrant workers, to the point that it is no longer possible for them to prosper in the large metropolitan centers of Shanghai and Beijing. We see this trend in other places as well.

Symbol of China's entry into a process of building an "ecological civilization", Premier Li Keqiang explicitly declared war on pollution at the National Assembly popular in March 2014. The force of the expression used could not deprive this announcement of a major reform. The right the Chinese environment would indeed know, a month after this declaration, one of its most emblematic reforms. A significant strengthening of the major environmental protection law of 1979 was adopted from April 2014 by the National People's Congress¹. This reform then came to modify the legal framework for environmental protection through a set of fundamental revisions and, above all, by overhauling the means of implementing these provisions".² Such a legal upheaval now makes it possible to identify two stages in the construction of Chinese environmental law: a stage of creation of this law followed by a period of consolidation. The first of these phases represents the emergence of Chinese arrangements to preserve the country's natural resources. The environmental protection law, whose role must be compared to that of a genuine environmental constitution, (was adopted as early as 1979 but came into force ten years later, on December 26, 1989). This text includes the main principles of Chinese environmental law, such as those of including environmental concerns in economic measures, setting maximum standards for polluting discharges, pollution prevention or even the polluter pays rule. The progressive drafting of the environmental protection law was accompanied by the adoption of specific texts, corresponding to the measures for the protection of various components of the environment. (For example, the law relating to the preservation of air quality came into force on September 5, 1985, while the water pollution control law has been applicable since May 15, 1995).

The China is using the Belt and Road Initiative as a mechanism to absorb its economic surpluses. It exports high-speed rail technologies to its Silk Road partners while its domestic market is saturated. The New Silk Road is becoming a strategy for economic growth. It is quite astonishing to see how Chinese state actors continue, despite the environmental destruction caused by the New Silk Road, to describe it as "green, smart, win-win".

There is ample evidence of the destruction of ecological habitats, the damage that deep-water ports inflict on marine systems, and the carbon emissions into the atmosphere caused by coal-fired power plants.

China has announced a plan to peak its carbon emissions no later than 2030, followed by carbon neutrality by 2060. The real question is: how will they achieve it? Various local experiences seek to account for carbon neutrality. In Beijing, for example, any organization or person wishing to organize a sporting event must do a "full carbon inventory" and calculate the quantities of energy, fuel, water, etc. required by the event. The total will then be compared to the carbon quota allocated by the government. Anyone who exceeds their quota must turn to Beijing's carbon cap-and-trade mechanism to buy more carbon credits. This experience seems very risky to me. It gives Chinese government actors considerable authority in determining how much carbon any event is allowed to emit. It's not that far-fetched to imagine a scenario where events that are better aligned with state ambitions get more credit. If the commitment to carbon neutrality by 2060 were to be achieved in this way, it would be very worrying.

Within the framework of this general introduction, it will be a question of examining the object of environmental rights in China in the whole of our present article, the reduction of north-South distance; the new environmental concept; Internalize the cost of environmental protection; Strong pressure on polluting industries; Develop long-term industries. Our articles deal only with environmental law in China and pollution protection. We are going to ask a number of questions in this article.

1-What are the factors that contribute to awareness of environmental protection?

2-Is the new environmental concept in accordance with environmental protection law of the People's Republic of

¹ The term has been officially enshrined in the Chinese Constitution since March 2018.

² The term has been officially enshrined in the Chinese Constitution since March 2018.

China adapted on January 1, 2015?

3- How China's Environmental protection Law works and what is its insufficient performance?

4- How does China's environmental law influence economic activities?

China's environmental law has attracted academic attention for several years. He produced a series of scientific works analyzing various aspects of this multicomponent phenomenon. Our article is an attempt to systematically classify and comprehensively examine the awareness of environmental protection. Environmental law in the influential field of the Chinese economy in order to deepen academic research on the phenomenon of environmental law. We used the Scopus database and a guided scoping approach to ensure the quality and relevance of the selected articles. Based on the identified themes, we suggest promising avenues for future research in economics and management.

China has made continuous progress in environmental protection

In October 2005, I had the first opportunity to work in China as part of my participation in the wetland biodiversity conservation and sustainable utilization project in China. Many rare species have been observed in the Lurgai Wetland Nature Reserve in Sichuan Province, most of which live only in China: black-necked crane, Severzov grouse, Tibetan and antelope. For half a century, China has been actively promoting environmental protection. Since the United Nations Conference on the Human Environment in Stockholm in 1972, China has made firm efforts to strengthen environmental protection in the past 50 years.

While the Chinese economy has been booming in recent years, environmental problems are still serious. Its underdevelopment in the field of product certification due to incomplete environmental legislation has led to significant financial losses for China in international trade due to environmental barriers, Chinese products not meeting the standards of main countries to which they should be exported. The Environmental Protection Law of the People's Republic of China was enacted in 1989 and has gone through four revisions. The latest provisions adopted constitute an important development in Chinese environmental law: by setting more stringent standards for companies with a view to overcoming environmental barriers, they make it possible to reduce the North-South gap in the field of protection.

The difference in regulations aimed at environmental protection between developed and developing countries plays an important role in North-South trade. The revision of Chinese environmental law, begun at the beginning of 2011, resulted in the law of April 24th, 2014, passed unanimously; it entered into force on January 1st, 2015 after two sessions of the National People's Congress. This new legal framework means a fundamental change for China, because by enshrining environmental protection in law, it intends to approach the advanced environmental concept of developed countries. This change involves a new environmental concept and the realization of the internalization of the cost of environmental protection.

Does China intend to acquire global intellectual leadership on how states can reconcile economic development and ecological transition?

The Chinese diplomats are largely driven by the idea that the Chinese economic approach can be successfully replicated in other regions of the world such as Africa and South America. The Chinese state wants to be a world leader in environmental protection. Under Trump, the United States has dismantled much of its environmental apparatus. China seems very keen to fill this void. On the other hand, if it wants to live up to its potential as a world leader, China will have to learn to listen to non-state actors. It will need to learn to be sensitive to other conceptions of development and concerns that may or may not align with its urban-centered vision of development that seems to be so deeply embedded in the Chinese state.

One of the most important findings from environmental studies is the interconnectedness between everything that exists. We cannot isolate activities like corn or soy monocultures from the larger system that generates them, nor from the damage do they inflict on other parts of the ecosystem. Whether considering a forest, a marine ecosystem, or even an urban ecosystem, any project must be sensitive not only to long-term ecological impacts, but also to impacts that may not be immediately apparent. Take the case of the Three Gorges Dam: concerns had already been raised even before its construction, before many of the ecological consequences that had been predicted occurred. It is only after ten or twenty years that we begin to observe the disappearance of long-term sedimentation, with its consequences for communities living downstream. This phenomenon was previously unknown, simply because humans had never experienced a similar impact on such a scale. Now we know for a fact that because of the Three Gorges Dam the city of Shanghai does not receive enough sediment, so that it is gradually carried into the East China Sea because the ocean waters are salty and erosive. The ecological consequences will take a very long time to manifest themselves. If we are not careful now, the consequences can be very costly later.

This is a top priority. The city of Shanghai, a strategically important city for geopolitics, risks suffering serious climatic disruptions if sea levels continue to rise. Senior leaders are fully aware of this and are investing in a sea wall comparable to that of Venice. At the same time, Shanghai has invested in more than 600 pumps

installed on its waterways to pump water and limit impacts on human settlements in the event of storms. The city also invests in projects to strengthen its banks throughout the year. This struggle is permanent: Shanghai is the most important metropolitan center for the Chinese economy. The country simply cannot afford to lose it to climate change. However, it is striking to note that alongside these considerable efforts to make Shanghai climate resilient, the Chinese economy continues to emit carbon and all kinds of greenhouse gases which increasingly darken the long-term climate outlook.

The new environmental concept

The advanced environmental management that characterizes the China environmental policy results from a mature and progressive environmental concept. It develops from the first environmental plan, in 1973, to the fourth environmental plan, in 1992, which highlights the polluter-pays principle and the coordination of environmental policy with the economy.

Like the China pursued the principle of sustainable development, but never stated in explicit terms its position on the notion of environmental protection. As a fundamental and general right, the new environmental law ensures this time in its field of application the primacy of the environment over the economy. In its general provisions, the law specifies that “the protection of the environment is one of the fundamental policies of the Chinese government”¹, who participated in the drafting of the future text, the revision of the law “puts the environment before economic development” and “the fact of erecting the protection of the environment as a fundamental principle is a considerable change which shows that the environment is a priority”. This change is a reform of the Chinese environmental concept.

Chinese policy also respects the principle of coordinating environmental policy with the economy and society. This principle evolves in the new law of the environment, which replaces the expression “the protection of the environment must be coordinated with the economic development», the expression “the development must be coordinated with the protection of the environment”² (art 4: The protection of environment is a basic national policy for China. The state shall adopt economic and technological policies and measures favorable for conservation and circulatory use of resources, protection and improvement of environment and harmony between human and nature, so as to coordinate economic and social development with the work of environmental protection.) This review is unmistakably a reflection of adherence to a mature sustainable development perspective. The core of the social strategy is the transfer of development from the simple economy to the most profound sustainable development, that according to which economic development cannot pass the limit of the adaptive capacity of the environment.

When deepening the concept of environmental development, the new law adds the need “to stimulate the construction of ecological civilization and to promote sustainable economic and social development” (art 1: This Law is formulated for the purpose of protecting and improving environment, preventing and controlling pollution and other public hazards, safeguarding public health, promoting ecological civilization improvement and facilitating sustainable economic and social sustainable development.) as one of the legislative objectives, emphasizing that “the State supports the research, exploitation and application of scientific technology for the protection of the environment. The State also encourages industry and promotes the construction of information on environmental protection, in order to increase the scientific level of environmental protection”(art 7: The state supports scientific and technological research, development and application of environmental protection, encourages the development of environmental protection industry, facilitates the environmental protection information technologies and improves the scientific and technological level of environmental protection science.) Article: 15 of the new law stipulates that “the State encourages research on environmental criteria” considering that the development of environmental standards must be foreseeable and advanced. The increase in environmental quality criteria is a process to be strengthened in order to act in the direction of pollution prevention; this requires the development of scientific environmental criteria.³ Research on the environmental criteria stipulated by the new environmental law means that the state is trying to concretely raise the standards of environmental protection and the level of sustainable development.

Internalize the cost of environmental protection

Obstacles to Implementation

On the other side of the lake, in Baocun village [Yunnan province], Mr. Yang does not know what to do. “Look at my rice. You see, it is red.” He is standing in his rice paddy. Indeed about 60 % of his rice kernels are not yellow, but red. A giant phosphor chemical fertilizer plant emits a white smoke and acidic smells, not 500 meters from where we stand. Mr. Yang shrugs and points at the factory. “I know it is their fault, but what can I do? We all depend on them, in many ways.” What Yang means is that all income in Baocun is directly (jobs in the

¹ According to law professor Cao Mingde China University of political Science and Law

² Art 4: The protection of environment is a basic national policy for China

³ Article 15 of the environmental law which entered into force on January 1, 2015.

factory) or indirectly (selling farm produce or renting houses to factory workers) related to the dirty giant in the middle of the village. The factory has paid for most infrastructure, has built a school and even pays compensation for pollution related damages, all be it [sic] much less than the actual losses.¹

There are a number of factors that account for the implementation challenges that impede the creation of an effective environmental law system in China. Some of these factors relate to the tenuous status of law in general, and others are specific to the environmental context. The major factors are discussed below.

- Low Status of Law as a Means for Achieving Societal Goals

In the Confucian hierarchy of sources of authority for correct behavior, positive law ranked at the bottom.²

While law's status rose slightly in the later Imperial era and Republican eras, it returned to the bottom of the heap shortly after the founding of the People's Republic of China and did not get picked up and dusted off again until 1982 when Deng Xiaoping amended the Constitution and began his "opening up" reforms³. Given this history, Chinese culture has not traditionally looked to positive law as a model for public behavior.⁴

-Lack of Capacity within the Country's Bureaucracies and Legal Institutions

As a result of the low status historically accorded to the law in China and the nature of the Imperial administrative system, there were few institutions designed specifically to administer the law, and few people who functioned as judges or lawyers⁵. The new legal institutions created during the Republican period did not develop strong foundations and found little support after the 1949 establishment of the People's Republic of China, even when they were redesigned to serve a "socialist legal system."⁶

The reestablishment of legal administrative capacity in the late 1970s had to start from scratch. Lacking strong advocates and still viewed with suspicion by many within China's leadership, law continued to be beholden to political and ideological.⁷

With a moribund university system, bureaucrats trained in specialized areas such as environmental law and science were not available in sufficient quantities until, at least, the late 1990s to staff China's bureaucracies and legal institutions. Problems with capacity continue to exist, but these now stem primarily from the administrative agencies' lack of financial resources.

- Delegation of Responsibility for Environmental Protection to Local Authorities

Primary responsibility for environmental protection in China has been delegated to local authorities⁸. The administrative model employed has been characterized as an "area-based, level-by-level" regulatory system.⁹ The environmental protection bureau (EPB) of a given locality has two reporting lines. One line runs vertically, with each level of the environmental bureaucracy reporting to the next highest level, culminating in the provincial level EPB reporting to the national Ministry of Environmental Protection.¹⁰

¹ (Benjamin van Rooij, *Regulating Land and Pollution in China: Lawmaking Compliance and Enforcement; Theory and Cases* 107 (Leiden University Press 2006).

² . (The "Chinese neither saw public, positive law as the defining focus of social order nor divided it into distinct categories of civil and criminal. Rather, traditional Chinese thought arrayed the various instruments through which the state might be administered and social harmony maintained into a hierarchy ranging downward from heavenly reason (tianli), the way (tao), morality (de), ritual propriety (li), custom (xixu), community compacts (xiang yue), and family rules (jia cheng) to the formal written law of the state." William Alford, *To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization* 10 (Stanford University Press 1995).

³ Carlos Wing-hung Lo, *China's Legal Awakening: Legal Theory and Criminal Justice in Deng's Era* 38-41 (Hong Kong University Press 1995)

⁴ There was a Legalist tradition in China which "emphasized the use of positive law as an instrument of governance, to insure social control and provide standards for the imposition of punishment," but it never gained much traction among those in power who found law an occasionally useful mechanism for control, but were wary of the potential for "rule of law" systems to circumscribe their own actions. Charles Baum, *Trade Sanctions and the Rule of Law: Lessons from China*, 1 *Stanford Journal of East Asian Affairs* 46, 48 (2001).

⁵ (Id. page 40).

⁶ (The Ministry of Justice was shut down in 1959 and did not reopen until September 1979. Shao-Chuan Leng & Hungdah Chiu, *Criminal Justice in Post-Mao China: Analysis and Documents* 72 (State University of New York Press 1985). The legal institutions that managed to survive into the 1960s were forcibly weeded out or left to wither during the Cultural Revolution. (At the height of the Cultural Revolution, the legal system as a distinct entity effectively ceased to exist in many parts of the country Charles Baum, *supra*, at 49.

⁷ considerations (See, e.g., Randall P. Peerenboom, *China's Long March Toward the Rule of Law* (Cambridge University Press 2002); Stanley B. Lubman, *Bird in a Cage: Legal Reform in China After Mao* (Stanford University Press 1999).

⁸ (China's Environmental Protection Law has established the principle that "[t]he local people's governments at various levels shall be responsible for the environmental quality of areas under their jurisdiction and take measures to improve the environmental quality. [Environmental Protection Law] (Promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 1989, effective Dec. 26, 1989), art. 16, available at http://www.law-lib.com/law/law_view.asp?id=6229. Thus, responsibility for environmental protection is vested in over 3,000 local political entities).

⁹ (Lu Hong, "A Study of the Environmental Regulatory System for China's Power Industry: The Case of Jiangsu Province" 16 (June 2005), available at http://www.efchina.org/csepupfiles/report/2007122111511823.1751987353824.pdf/A_Study_of_the_Environmental_Regulatory_System_for_China's_Power_Industry.pdf).

¹⁰ .(The national environmental ministry makes general policy decisions which should be implemented by local bureaus, but local party committees and governments allocate their personnel and administrative funds. When local authorities push for high economic growth and pursue administrative goals, local environmental protection bureaus are often unable to implement environmental protection policies. In certain cases, some even become accomplices of the polluters they are supposed to oversee. This system cannot ensure the effective implementation of the environmental policy)

The other line runs in a general horizontal fashion from the EPB to the local people's government (LPG) of its locale. The head of the EPB is appointed by the LPG, and the bureau receives most of its funding from this source. Given this employment and financial dependence, when conflicts arise between national environmental laws and the policies and goals of local governments, they are more likely to be resolved in favor of the local governments.¹

- Developing the Economy Outranked Protecting the Natural Environment

Chinese government officials, including those within the national leadership, have for the past thirty years made economic growth the paramount goal. While environmental protection was occasionally acknowledged as important, when real or perceived conflicts between economic development and the enforcement of environmental laws and regulations arose, economic development won. The importance of environmental protection has recently been elevated at the national level and some localities have followed suit, but many LPGs still encourage unencumbered development and impress upon the local environmental regulators that certain projects that may be in clear violation of environmental laws need to be permitted nevertheless.²

- Horizontal Fragmentation of Environmental Compliance Responsibility Weakens Environmental Enforcement Efforts

Even when local authorities are inclined to enforce the environmental laws in their jurisdiction, the geographic fragmentation of the environmental responsibility system operates to restrain their zeal in deference to the local economy. They assume that other jurisdictions do not stringently enforce the environmental laws. Thus, they are hesitant to place a local industry at a competitive disadvantage by enforcing regulations they believe are not imposed upon the industry's competitors in other jurisdictions.

When enforcement occurs in one jurisdiction, its effect on motivating compliance in other jurisdictions is limited. Because enforcement decisions are primarily made at the county level where special local relationships may prevail, actions against a violator in one jurisdiction in China have much less of a general deterrent effect than similar actions would have in many Western countries where enforcement actions are often initiated by higher ranking officials within a larger geographic jurisdiction (national or state/provincial level).

- Public Oversight of the Implementation of Environmental Laws and Regulations Is Constrained

There is only sporadic and generally ineffective national oversight of environmental enforcement diligence. The attention paid by higher level local environmental authorities to subordinate ones varies. Oversight in both instances is hampered by a lack of personnel to devote to auditing.

In some countries where the designated authorities fail to diligently pursue their enforcement responsibility, the gap can be filled by concerned citizens and nongovernmental organizations (NGOs).

While China has a number of domestic environmental quasi NGOs, with a few notable exceptions, most are devoted to public education and environmental remediation tasks (e.g., planting trees, protecting endangered species habitat). They typically do not advocate for changes in environmental law or policy or become involved in litigation because such public advocacy could endanger their legal status.³

The Chinese populace is becoming more environmentally aware, and the avenues for public participation in environmental decision-making are increasing, but opportunities for the public and NGOs to ensure that environmental laws and regulations are effectively implemented remain limited.

-Strong Influence of Informal Networks on the Application and Administration of Laws and Regulations

These "informal networks" in China are usually referred to as *guanxi*. The effects of *guanxi* permeate all levels of Chinese society, and the concept is too complex to describe in any detail here. Basically it involves a system of hierarchical, horizontal (e.g., classmates), and "contracted" relationships.

These relationships establish a set of obligations that can, in certain situations, trump the authority inherent in relationships constructed by law such, as in the environmental context, that between environmental regulators and the regulated actors.

China has drafted its laws to operate at a level of generality that provides flexibility to those who are required to enforce them. They are often shorter and vaguer than their Western counterparts. This drafting style stems from a desire to provide those who administer the law with as much latitude as possible to reach a substantively correct result.

Unfortunately, this interpretive latitude gives the most pernicious forms of *guanxi* room to thrive

¹ Maohong Bao, *The Evolution of Environmental Policy and Its Impact in the People's Republic of China*, 4(1) *Conservation and Society* 36, 49 (2006). The minister of the Ministry of Environmental Protection has criticized the "the country's 'bumpkin policies' that [have] encouraged local officials to turn a blind eye to environmental hazards." *New Rules to Curb Violations of Pollution Laws*, *Xinhua*, Jul. 12, 2007, available at <http://english.cri.cn/2946/2007/07/12/48@248937.htm>.

² (In some instances "local EPB employees have had to write anonymous letters to the MEP to report environmental violations because they were afraid of being fined and punished by their local government leaders if identified as trying to enforce environmental laws which could be 'barriers for economic development.'" Id. (citing He Jianrong, *Environmental Implementation Urged for Vertical Management*, *Legal Daily*, Sept. 21, 2007).

³ (See Peter Ho, *Greening Without Conflict? Environmentalism, NGOs and Civil Society in China*, 32 *Development and Change* 893 (2002)).

unconstrained by a regulators need to justify actions against a definitive rule or detailed standard. As a result of these factors, “China’s law enforcement institutions run a higher risk of capture-like and corruptive practices than similar Western institutions.”¹

-Environmental Policymaking and Implementation Is Characterized by Bureaucratic Fragmentation

There are a number of ministries and agencies that are delegated responsibility for formulating, implementing, and supervising aspects of environmental policy. In some instances the assigned functions are overlapping and there are unclear rights and responsibilities. This can result in bureaucratic wrangling and inconsistent regulatory approaches that can hamper compliance.²

- Structural Flaws in Existing Laws and Regulations

In a number of situations, even if vigorously enforced, China’s environmental laws lack sufficient teeth to modify behavior. Penalties proscribed for violations of some laws and regulations are lower than the cost of compliance.

Thus, some entities may choose to run the risk of having penalties imposed (and paying those penalties if caught) rather than buying the equipment or making the process changes necessary to achieve compliance.³

The environment is considered as a component of production, and as such the market gives it a price. Production with weak environmental protection standards cannot properly assess and distribute an environmental resource, which leads to environmental dumping and increased environmental pollution.

In China, it was said that “breaking the law is more profitable than respecting the law” because the fixed fines for non-compliance with the legal provisions cost less than the establishment of measures aimed at compliance with standards or compensation for damages.⁴ Today, the government applies the polluter-pays principle by following the concept of the internalization of environmental costs (art. Indeed, to fight effectively against this problem, the new environmental law reinforces the sanctions against polluting industries and the powers of the leaders.

First, the new law stipulates in Article: 59 to “fine per day”, polluting industries will be fined according to the days of its illegal activities instead of a maximum fine. In addition, the new law establishes a “black list” of polluting industries by entering the figure of their pollutant emissions.⁵ This data should be published and accessible to the public in real time. Secondly, under article: 60 of the new law, the competent environmental body above the district level has the competence to order polluting industries whose sum of polluting emissions exceeds the standard of control to stop their production and proceed with their closure.⁶ Third, the new law stipulates the administrative and even penal sanction to polluting industries and their leaders. According to Article: 63 of this law, the construction of industries without the environmental assessment and which refuse to comply with the ordinance or alter the monitoring figures such as industries which refuse to operate the pollution prevention facility properly and elude pollution monitoring will be condemned by the administration or the courts. By applying these measures, the new law puts great pressure on the company through the implementation of more severe sanctions and, at the same time, brings new opportunities to transform and modernize companies.⁷

Strong pressure on polluting industries

The old environmental law did not sufficiently punish polluting industries, which allowed factories to continue to pollute by paying a sum much lower than the cost of bringing them up to standard: an industry could not be punished only once for a polluting case, and the maximum fine was 100,000 Yuan, or about \$12,500, which is far from enough to stop industrial pollution. With the application of the new environmental law, the fine mode “per day without maximum ceiling” (art 59: Where an enterprise, public institution or other producer or business operator is fined due to illegal discharge of pollutants, and is ordered to make correction, if the said entity refuses to make correction, the administrative organ that makes the punishment decision pursuant to the law may impose the fine thereon consecutively on a daily basis according to the original amount of the fine, starting from the second day of the date of ordered correction. The fine prescribed in the preceding paragraph shall, pursuant to relevant laws and regulations, be enforced in accordance with considerations of operating cost of pollution prevention and control facilities, direct loss or illegal gains caused by such violations. Local regulations, based on actual demand of environmental protection, may extend the coverage of types of violation activities to be

¹ Benjamin van Rooij, supra, at 372. Cf. Pitman P. Potter, Guangxi and the PRC Legal System: From Contradiction to Complementarity, in *Social Connections in China: Institutions, Culture, and the Changing Nature of Guangxi* 179 (Thomas Gold, Doug Guthrie & David Wankeds., Cambridge University Press 2002).

² (See discussion of “Ministry of Water Resources,” Chapter 6, III, B, 2. infra.)

³ (This is not strictly an implementation issue, since the law may in fact be implemented (through the imposition of penalties), but it is an issue of effective implementation mechanisms because the law as designed and enforced is not producing compliant behavior).

⁴ (Article 6 of the environmental law which entered into force on January 1, 2015).

⁵ (Article 59 of the environmental law which entered into force on January 1, 2015).

⁶ (Article 60 of the environmental law which entered into force on January 1, 2015).

⁷ (Article 63 of the environmental law which entered into force on January 1, 2015).

subject to the daily-based fine as stipulated in the first paragraph) makes companies liable to pay a high price for polluting emissions. This text therefore indirectly forces companies to invest more in the fight against pollution by meeting environmental standards.

Industries that do not comply with environmental provisions can be transformed or eliminated. Moreover, the establishment of a “black list” (art 54: The competent department of environmental protection administration under the State Council shall release national environmental quality, monitoring data of key pollutant sources and other major environmental information. Competent environmental departments of governments at or above provincial levels shall regularly publish environmental status bulletins. The competent environmental protection administrative departments of the people’s governments at or above the county level and other departments with environmental supervision responsibilities shall disclose information on environmental quality, environmental monitoring, environmental emergencies, environmental administrative permits, environmental administrative punishments, the collection and use of pollutant discharge fees, etc. in accordance with the law) greatly affects companies according to the new law: with regard to social credibility, they feel under pressure if their illegal polluting information is recorded. Thus, they will encounter difficulties in the following aspects: accessibility of credit, listing, cooperation with foreign countries and extension of production.

In the past, environmental administrations only had indirect coercive power, such as recommendations, but normally this type of recommendation is ineffective in the face of the inactivity of local governments. The new environmental law gives environmental administrations above the district level the power to seal polluting equipment, or even to seize it (art 25: Where enterprises, public institutions and other producers and business operators discharge pollutants in violation of laws and regulations, which may cause potential severe pollution, competent environmental protection administrations of the people’s governments at or above the county level and other departments that are responsible for environmental supervision and administration may seal up and detain the facilities and equipment that discharge pollutants). In this case, the administrations can control illegal polluting production and emissions by exercising direct powers. But the process will be long.

Develop long-term industries

In China, the problems of unfair competition widely exist in the steel market. For industries that do not comply with established environmental criteria, continuing to pollute is more profitable than installing “environmental” equipment: by selling at low prices, these polluting industries hold an advantageous position in the market.

It is a “price war” that hinders the normal development of steel industries and seriously damages the Chinese environment. If the new environmental law has a negative effect on the steel industries for the time being, it will undoubtedly have a positive effect for them in the long term. According to Liu Haimin, economic expert in Chinese steel industry, to say that the strengthening of environmental protection lowers the profit of the steel companies is a false proposition, because “the increase in the cost of production leads to the lowering of the profit in appearance, but it drives out of the market, in the long term, industries whose protection of the environment is insufficient”. These considerations on the steel industry restore order to the steel market and are likely to change the chaotic situation in this field.¹ After the price is restored, the regulation of the market economy begins to operate. The new environmental law is a surveyor’s sight, with which industries taking into consideration the protection of the environment work better than before, relying on a fairer market. The new environmental law eliminates industries whose standards do not correspond to national environmental standards and makes industries that have a real concern for the protection of the environment more competitive.

Conclusion

In this context, and in conjunction with the preparations for the Paris Agreement, the Chinese Government proposed a text restructuring the methods of implementing environmental law, in order to increase its effectiveness. The new environmental protection law, in its amended version in force since January 1st, 2015, includes a reinforcement of the means of control of compliance with environmental standards. This strengthening is reflected in particular by an extension of the means of control (opening of the right of recourse to environmental protection associations, passage from a competence entrusted to the provinces to a national-level inspection, obligation to publish environmental information) and the establishment of more diverse and severe sanctions (multiplication by ten of fines on average, possibility of pronouncing penalty payments daily, to suspend the activity temporarily or to place the operator in administrative detention). The reinforcement of the means of constraint within the environmental protection law inevitably provoked the successive reform of the special environmental laws. For example, the law relating to the preservation of air quality², the water pollution controls law.³

The increase in environmental protection measures has also led to the adoption of regulations devoted to

¹ (Article 63 of the environmental law which entered into force on January 1, 2015).

² (August 29, 2015)

³ (June 27, 2017) and the law for the prevention of pollution caused by solid waste (November 7, 2017).

new fields of law. Since January 1st, 2018, companies established in China have been subject to the environmental protection tax law¹, which creates a new tax burden proportional to the quantity of polluting discharges induced by an activity. Similarly, an important law aimed at defining an obligation to treat polluted sites and soils in the territory is expected for the end of 2018, which will oblige each industrial operator to worry about the environmental state of the land on which he operates his activity. As we can see, the current and future reforms demonstrate the liveliness of Chinese environmental law, which is evolving towards a more intense and broader framework for economic activities present in the territory.

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- 2-According to the polluter pays principle set out in Article L110-1 of the Environmental Code, the costs resulting from measures to prevent reduce and fight against pollution must be borne by the polluter.
- 3-The Polluter Pays Principle was adopted by the OECD in 1972 as an economic principle aimed at allocating the costs associated with pollution control.
- 4-The cross: China enshrines environmental protection in law
- 5- China's New Environmental Protection Law of the People's Republic of China 2015
- 6-The water pollution control law June 27, 2017 and the law for the prevention of pollution caused by solid waste November 7, 2017
- 7-The new environmental protection law, in its amended version in force since January 1st, 2015
- 8- The Chinese Constitution since March 2018
- 9- The Environmental Protection Law of the People's Republic of China was enacted in 1989 and has gone through four revisions
- 10- The law relating to the preservation of air quality came into force on September 5, 1985, while the water pollution control law has been applicable since May 15, 1995.
- 11- The environmental protection law, whose role must be compared to that of a genuine environmental constitution, (was adopted as early as 1979 but came into force ten years later, on December 26, 1989
- 12- The environmental protection law of 1979 was adopted from April 2014 by the National People's Congress; the term has been officially enshrined in the Chinese Constitution since March 2018.

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