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CHINA'S ENVIRONMENTAL PROBLEMS: IS A SPECIALIZED COURT THE SOLUTION?

Darcey J. Goelz[†]

Abstract: China's economic growth has come at a high price: environmental and natural resource destruction. Presently, China's legal system is not prepared to protect China's environmental resources. China's State Council has expressed an interest in establishing a civil and administrative system to manage environmental matters. Some of the objectives expressed by the State Council could be achieved by creating a special tribunal to address environmental issues, similar to New Zealand's Environment Court. A specialized court promotes environmental protection, and specialization creates experts in a specific field, allowing for consistency among decisions. An environmental court will fit into China's current legal system because Chinese law expressly authorizes specialized courts. In fact, China already has specialized courts, including special maritime courts. The creation of a specialized court would not be a panacea for China's environmental problems, but it is a fundamental first step.

I. INTRODUCTION

Environmental pollution in China is a profoundly urgent concern—and for good reason. China is faced with severe environmental challenges that must be met in order to prevent the destruction of the forests, the extinction of species,¹ the loss of land to desert, and the disappearance of potable water.² The impact of environmental damage is not limited to the environment; it also affects the people that live there. China's lack of legal environmental protection results in toxic living conditions and leaves environmental advocates without tools to protect the environment and themselves. For instance, some citizens wear gas masks to get to work,³ while other citizens are arrested for photographing illegal chemical discharges.⁴ In the time leading up to the Beijing Olympics, China's environmental problems steadily rose to the forefront of the world's

[†] I am indebted to many, but I must first thank my dad—for his guidance and assistance with drafts of this and many other papers over the years—and my mom—for providing her loving support and calm. To each of my editors, you have been a life-saver and I could not begin to thank you enough. Finally, I must thank Professor Dongsheng Zang for his remarks on this comment and our intriguing conversations over the year.

¹ See Jim Yardley, *Choking on Growth: Part VI, China's Turtles, Emblems of a Crisis*, N.Y. TIMES, Dec. 5, 2007.

² See Jim Yardley, *Choking on Growth: Part II, Beneath Booming Cities, China's Future is Drying Up*, N.Y. TIMES, Sept. 28, 2007 [hereinafter Yardley, *Part II*].

³ See Jim Yardley, *Choking on Growth: Part X, Beijing's Olympic Quest: Turn Smoggy Sky Blue*, N.Y. TIMES, Dec. 29, 2007.

⁴ See Joseph Kahn, *Choking on Growth: Part III, In China, a Lake's Champion Imperils Himself*, N.Y. TIMES, Oct. 14, 2007.

attention. These environmental problems are due primarily to the country's rapid economic development, but the country's tumultuous history and problems of corruption are also factors. Seemingly at odds with its environmental record, China has an extensive framework of progressive environmental laws, regulations, and policies. Unfortunately, these laws are often not implemented or enforced.⁵ China's government recognizes the need to reform its legal system to address environmental challenges.⁶

China has the potential to protect and restore the country's natural environment. To do so, China's leaders must strengthen the institutions responsible for environmental protection and the "necessary adjunct institutions such as the judiciary."⁷ Of the many possible approaches to addressing the environmental crisis in China, the Chinese government appears willing to embrace a specialized environmental court. In 2005, the State Council⁸ issued a decision regarding environmental protection.⁹ One of the provisions in the decision implicitly suggests the country harbors a desire to establish a specialized forum for environmental actions.¹⁰ This

⁵ See Richard J. Ferris, Jr. & Hongjun Zhang, *Reaching Out to the Rule of Law: China's Continuing Efforts to Develop an Effective Environmental Law Regime*, 11 WM. & MARY BILL RTS. J. 569, 589, 594-601 (2003). The State Council asserted that "the environmental protection legal system is not complete . . . and where laws exist they are not followed and enforcement is not strict." State Council, *Decision in Relation to Materializing Scientific Development Vision for the Strengthening of Environmental Protection*, No. 39 of 2005 (Dec. 3, 2005) (P.R.C.) [hereinafter State Council Decision], translated in part in 8 VT. J. ENVTL. L. 195, 201 (2006-2007). However, the author of this article translated the name of the Decision as the "Decision on Implementation of Scientific Development and Strengthening on Environmental Protection." Alex Wang, *The Role of Law in Environmental Protection in China: Recent Developments*, 8 VT. J. ENVTL. L. 195, 201 (2006-2007).

⁶ Wang, *supra* note 5, at 197.

⁷ See ELIZABETH C. ECONOMY, *THE RIVER RUNS BLACK: THE ENVIRONMENTAL CHALLENGE TO CHINA'S FUTURE* 92 (2004) [hereinafter ECONOMY, *THE RIVER RUNS BLACK*].

⁸ The State Council is China's highest executive and state administrative body. Wang, *supra* note 5, at 197. The State Council produces many of the country's rules and regulations, and its objectives should not be easily dismissed. Still, by no means does the State Council's proclamation mean that any perceptible change will occur; the Chinese government has been criticized for rhetoric that does not result in any substantive change. See *China: Attacks on Media Violate Olympic Commitments*, HUMAN RIGHTS NEWS, Aug. 7, 2007, <http://www.hrw.org/english/docs/2007/08/07/china16552.htm> (last visited April 18, 2008) (criticizing empty rhetoric about preventing obstruction of foreign journalists for the Olympic Games); Ke Zhang, *China to Hold Provincial Officials Accountable for Environmental Harm*, CHINA ENVIRONMENTAL NEWS DIGEST, Feb. 22, 2007, <http://china-environmental-news.blogspot.com/2007/02/china-to-hold-provincial-officials.html> (last visited March 26, 2008) (almost half of the investment pledged to prevent environmental pollution was never provided). See generally W. Scott Railton, Comment, *The Rhetoric and Reality of Water Quality Protection in China*, 7 PAC. RIM L. & POL'Y J. 859 (1998) (stating that water pollution control measures will be mere rhetoric unless action is taken).

⁹ State Council Decision, translated in Shun Yong Yeh, 2 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 399 (2007).

¹⁰ Nothing in the State Council Decision expressly states a desire to create a specialized court, but the Decision does imply that changes to the judicial system are a necessary step towards a healthier, cleaner environment. See Shun Yong Yeh, *Is China's Development Path Sustainable? An Overview on the Legal*

Comment outlines how China would benefit from the creation of a specialized court system for environmental issues.

To date, there has been no move to develop such a specialized court within China, but courts in other countries could serve as precedents.¹¹ The framework currently employed in New Zealand offers a useful model and it could be modified to conform to a structure similar to China's other specialized courts, such as the maritime courts. Such a court would have the expertise to appropriately handle environmental cases and would insulate judges from local pressure. This Comment argues that a specialized court should be adopted to strengthen the country's potentially powerful environmental regulatory framework.

Part II of this Comment provides an overview of China's major environmental issues. Part III then discusses China's legal system, including an assessment of its existing environmental legislation, a general overview of the country's governmental structure with particular focus on the failure of the current judicial system, and a caveat that a specialized court is not a panacea for the difficulties facing China. Part IV reviews two types of specialized courts that provide approximate potential models for a Chinese Environmental Court: the Environment Court of New Zealand ("NZEC") and China's maritime courts. Part V examines the viable structure, authority, jurisdiction, and standing requirements of a specialized environmental court in China. Finally, Part VI analyzes the potential benefits of a specialized

and Policy Framework in Relation to Environmental Protection in China, 2 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 399, 439-46 (2007) (describing the provisions of the State Council Decision). The Decision states that "The State shall . . . undertake researches on the establishment of a system for civil as well as administrative proceedings relating to environmental matters." *Id.* at 444. The Decision also stated, as objectives, that the "[p]rocedure for prosecuting environmental crime shall be improved" and that "[t]he State shall coordinate cross provincial boundary law enforcement and environmental dispute." *Id.* at 445. The Council further expressed the desire to "resolve the problem caused by local protectionism." *Id.* See also Wang, *supra* note 5, at 197 ("In recent years, China has recognized the key role that the legal system must play in addressing ever-worsening environmental problems. For example, the State Council, China's highest executive body, has specifically called for the 'perfection of the legal assistance system for pollution victims, and research and establishment of an environmental civil and administrative public interest litigation system.'").

¹¹ New Zealand has a prominent Environment Court, which will be discussed in more detail throughout this comment. See *infra* Part IV.A. New South Wales, Australia also has a specialist environmental and planning court. See generally Land and Environment Court, <http://www.lawlink.nsw.gov.au/lec>. India has the India National Environmental Tribunal and National Environmental Appellate Authority. See Manjit Iqbal, *Role of Judiciary in Providing Access to Justice and Enforcement*, presented at the Asia Pacific Regional Conference on Environmental Justice and Enforcement (Jan. 14-16, 2008), www.roap.unep.org/program/Documents/Law08_presentations/Day1/Role_Judiciary_Manjit.ppt (last visited Aug. 10, 2008). Bangladesh also created an Environment Court. *Id.* In addition, Thailand, Pakistan, and the Philippines have tribunals specializing in environmental matters. See Carmel Crimmins & Darren Schuettler, *Manila Creates Green Courts for Environmental Cases*, REUTERS, January 14, 2008, <http://www.reuters.com/article/latestCrisis/idUSSP16667> (last visited Aug. 10, 2008).

environmental court, including the advantages stemming from judicial expertise and awareness of a legal forum.

II. CHINA FACES SEVERE ENVIRONMENTAL AND NATURAL RESOURCE CHALLENGES

China has numerous environmental problems that are interrelated and increasingly dangerous to both human health and ecosystems. There are many explanations for these environmental problems, including China's complicated history, the country's rapid economic development, and the corrupting influence of local interests.

A. *China Has a Variety of Environmental Problems that Combine to Raise Major Political, Social, Economic, and Health Concerns*

China must address its environmental problems for economic, social, political, and environmental reasons. China's primary environmental issues are water pollution, lack of water, air pollution, deforestation, and desertification.¹² China must address these environmental problems because, among other things, the costs to the economy are crippling.¹³ The Communist Party of China ("CPC") is also concerned that environmental damage will prompt social unrest.¹⁴ The Chinese government itself recognizes the costs of environmental pollution, as indicated by its 2005

¹² For an additional overview of these and other environmental problems, see Eric W. Orts, *Environmental Law with Chinese Characteristics*, 11 WM. & MARY BILL RTS. J. 545, 549 (2003).

¹³ See Elizabeth C. Economy, *Environmental Enforcement in China*, in CHINA'S ENVIRONMENT AND THE CHALLENGE OF SUSTAINABLE DEVELOPMENT 102, 102 (Kristen Day ed., 2005) [hereinafter Economy, *Environmental Enforcement*]. "[T]he price tag for China's environmental degradation and pollution is estimated to be the equivalent of 8% to 12% of its annual gross domestic product (GDP)." *Id.*

¹⁴ ECONOMY, *THE RIVER RUNS BLACK*, *supra* note 7, at 87. In another article, Economy discussed a large protest in June 2007 against the construction of a petrochemical plant in Xiamen. Elizabeth C. Economy, *The Great Leap Backward?: The Costs of China's Environmental Crisis*, FOREIGN AFFAIRS, Sept. 1, 2007 [hereinafter Economy, *The Great Leap*]. She stated that the "Chinese leadership's greatest fear . . . [is] that its failure to protect the environment may someday serve as the catalyst for broad-based demands for political change." *Id.* "In 2005, China was shaken by 51,000 pollution-triggered 'public disturbances'—demonstrations or riots of a hundred or more people protesting the contamination of rivers and farms—according to the government's own statistics. (The real figures are almost certainly higher.)" Christina Larson, *China's Pollution Revolution: Contaminated Rivers and Farms Trigger Peasant Protests*, WASHINGTON MONTHLY, <http://www.washingtonmonthly.com/features/2007/0712.larson2.html> (last visited Aug. 10, 2008). One such "public disturbance" resulted when a phosphate fertilizer factory caused widespread damage to crops and endangerment of human health. Sun Xiangming, *Is This 'An Incident of Counterrevolutionary Destruction?'*, in ENVIRONMENTAL LAW AND POLICY IN THE PEOPLE'S REPUBLIC OF CHINA 277, 277 (Lester Ross & Mitchell A. Silk eds., 1987). The local brigade continually implored the factory and the county to correct the problems, but to no avail. *Id.* Finally, "[i]n response to the masses' strong and unanimous demand, and having no other recourse," a local brigade pulled the "factory's electricity switch in an expression of protest." *Id.*

declaration that “[e]nvironmental pollution and ecosystem destruction have caused enormous economic losses, harmed the health of the masses, and affected societal stability and environmental safety.”¹⁵ To provide a stable government¹⁶ and healthy society, China will have to rectify current, and prevent future, environmental and natural resource damage.

Water pollution and water shortages are “China’s No. 1 environmental problem.”¹⁷ One report indicates that the groundwater aquifers in ninety percent of Chinese cities are polluted, and more than seventy-five percent of surface water in urban areas is unsuitable for drinking and fishing.¹⁸ This leaves hundreds of millions of people without access to safe drinking water.¹⁹ Worse still, the Chinese government has categorized almost thirty percent of the country’s river water as unsuitable to use even for agriculture or industry.²⁰ These high levels of water pollution result primarily from the use of dirty industrial processes without modern environmental controls²¹ combined with rampant industrial irresponsibility.²² In fact, “[w]ater pollution is so widespread that regulators say a major incident occurs every other day.”²³ In addition, more than forty percent of China’s cities do not have a sewage treatment plant.²⁴ The lack of sewers and general scarcity of clean water cause “nearly 700 million people [to] drink water contaminated with animal and human waste.”²⁵ Major instances of water pollution only exacerbate the country’s increasing water shortages. The country is so large that the availability of water varies depending on the region: the country’s

¹⁵ See State Council Decision, *supra* note 5, at 201.

¹⁶ “The Ministry of Public Security has ranked pollution among the top five threats to China’s peace and stability.” Larson, *supra* note 14.

¹⁷ Orts, *supra* note 12, at 551 (quoting Sheri Liao, who is the head of Global Village). Global Village is an independent environmental group in China. *Id.*

¹⁸ Economy, *The Great Leap*, *supra* note 14 (discussing a report by the government-run Xinhua News Agency).

¹⁹ Joseph Kahn & Jim Yardley, *Choking on Growth: Part I, As China Roars, Pollution Reaches Deadly Extremes*, N.Y. TIMES, Aug. 26, 2007 [hereinafter Kahn & Yardley, *Part I*] (“Nearly 500 million people lack access to safe drinking water.”).

²⁰ Economy, *The Great Leap*, *supra* note 14.

²¹ See ECONOMY, *THE RIVER RUNS BLACK*, *supra* note 7, at 70 (“Factories and municipalities dump their untreated waste directly into streams, rivers, and coastal waters”).

²² See generally BENJAMIN VAN ROOIJ, *REGULATING LAND AND POLLUTION IN CHINA: LAWMAKING, COMPLIANCE, AND ENFORCEMENT; THEORY AND CASES* 191-209 (2006). Rooij discusses the necessity of “secret illegal nightly discharges” for the survival of many small companies, whose size makes compliance economically infeasible. *Id.* at 196.

²³ Yardley, *Part II*, *supra* note 2.

²⁴ See Shun Yong Yeh, *supra* note 10, at 413 (297 out of 661 cities do not have any sewage treatment plant). One report estimates that “roughly 200 million people live in towns that possess no sanitation system other than ‘pipes that lead wastewater to the nearest ditch.’” ECONOMY, *THE RIVER RUNS BLACK*, *supra* note 7, at 71 (quoting the China Human Development Report).

²⁵ Economy, *The Great Leap*, *supra* note 14.

northern region faces profound water shortages,²⁶ while in the south there is often destructive flooding.²⁷

Air pollution is another area of primary concern. The Beijing Olympics pushed air quality to the forefront of government officials' attention. In an effort to protect athletes' health, Beijing officials planned "to limit vehicle use, close factories and do everything in their power to bring blue skies to Beijing."²⁸ These are obviously only solutions for the very short-term. Air pollution is not just a problem in Beijing; throughout the country citizens breathe unhealthy air.²⁹ Particulate matter is one major air pollutant that makes China's air quality unhealthy.³⁰ Particulate matter is a result of diesel exhaust, coal-fired power plants, and other sources.³¹ It is suspected to be the cause of "up to 90 percent of all deaths from outdoor air pollution."³² Other problematic air pollutants include nitrogen oxide and sulfur dioxide.³³ The emission of sulfur dioxide, principally caused by coal burning, leads to acid rains,³⁴ and "China is now the largest source of SO₂ emissions in the world."³⁵ Sulfur dioxide (SO₂) is a serious problem both nationally and internationally. One-third of China is affected by acid rain³⁶ and neighboring countries have blamed China for acid rain occurrence within their borders.³⁷

²⁶ See Orts, *supra* note 12, at 552; Zachary Tyler, Note, *Transboundary Water Pollution in China: An Analysis of the Failure of the Legal Framework to Protect Downstream Jurisdictions*, 19 COLUM. J. ASIAN L. 572, 576 (2006). China is attempting to remedy this disparity and some of the attendant harms through major water diversion programs, such as the Three Gorges Dam. See Orts, *supra* note 12, at 552. These water diversion projects have their own attendant environmental harms. See *id.*

²⁷ See, e.g., Associated Press, *China Floods Kill 57, 1M Flee*, TIME, June, 15, 2008.

²⁸ Juliet Macur, *Olympic Teams Vying to Defeat Beijing's Smog*, N.Y. TIMES, Jan. 24, 2008, available at http://www.nytimes.com/2008/01/24/sports/othersports/24mask.html?_r=1&scp=2&sq=china+pollution&st=nyt&oref=login.

²⁹ See Kahn & Yardley, *Part I*, *supra* note 19. "Only 1% of the country's 560 million city dwellers breathe air considered safe by the European Union." *Id.*

³⁰ See Orts, *supra* note 12, at 555. "Airborne particulates in many cities are at two to five times the maximum concentrations recommended by the World Health Organization." *Id.*

³¹ Keith Bradsher, *Choking on Growth: Part VII, Trucks Power China's Economy, at a Suffocating Cost*, N.Y. TIMES, Dec. 8, 2007.

³² *Id.*

³³ *Id.*

³⁴ See Kahn & Yardley, *Part I*, *supra* note 19.

³⁵ The World Bank & The State Environmental Protection Administration, *Cost of Pollution in China: Economic Estimates of Physical Damages*, at xi (Feb. 2007), available at http://siteresources.worldbank.org/INTEAPREGTOPENVIRONMENT/Resources/China_Cost_of_Pollution.pdf.

³⁶ Shun Yong Yeh, *supra* note 10, at 407.

³⁷ ECONOMY, THE RIVER RUNS BLACK, *supra* note 7, at 72 ("Japan and South Korea also blame China for much of their problems with acid rain, a situation that has contributed to ongoing tensions in the region.").

Deforestation and desertification are interrelated environmental problems. Deforestation has caused such catastrophic flooding that most logging activities have been banned throughout the country.³⁸ Widespread desertification in western and northern China is transforming arable land into desert.³⁹ Although China has been fighting desertification through massive reforestation campaigns, these re-planting efforts are often unsuccessful.⁴⁰ In fact, despite aggressive reforestation efforts, reports show that a quarter of the entire country has turned to desert.⁴¹ Desertification is a result of poor anti-erosion practices as “[c]enturies of deforestation, along with the overgrazing of grasslands and overcultivation of cropland, have left much of China's north and northwest seriously degraded.”⁴² Desertification is also problematic because it results in major dust storms.⁴³

B. *There Is No Single Cause of China's Environmental Problems*

Ample reasons exist to explain China's environmental deterioration. Some primary causes include China's traditional approach to the environment and the devastating effects of rule under Chairman Mao Zedong. One of the more obvious reasons is the country's primary focus on economic development. Another factor is the existence of political and business influence and corruption at the local level.

1. *China's Traditions and Political History Contributed to the Country's Current Environmental Crisis*

Many traditional Chinese approaches to the environment have prevented successful environmental protection.⁴⁴ China's attitudes, institutions, and policies were, and to some extent still are, “rooted in and supported by traditional concepts and philosophies such as Confucianism.”⁴⁵ Confucianism promotes “man's need to overcome nature in order to utilize it

³⁸ See *id.* at 67; Orts, *supra* note 12, at 554.

³⁹ See Economy, *The Great Leap*, *supra* note 14. “The Gobi Desert, which now engulfs much of western and northern China, is spreading by about 1,900 square miles annually.” *Id.* The direct annual costs of desertification are estimated at \$6.5 billion (USD). Orts, *supra* note 12, at 553.

⁴⁰ ECONOMY, *THE RIVER RUNS BLACK*, *supra* note 7, at 123-24.

⁴¹ Economy, *The Great Leap*, *supra* note 14.

⁴² *Id.*

⁴³ See Orts, *supra* note 12, at 553.

⁴⁴ See generally Robert P. Weller & Peter Bol, *From Heaven-and-Earth to Nature: Chinese Concepts of the Environment and Their Influence on Policy Implementation*, in *ENERGIZING CHINA: RECONCILING ENVIRONMENTAL PROTECTION AND ECONOMIC GROWTH* 473, 473-99 (Michael McElroy et al. eds., 1998).

⁴⁵ ECONOMY, *THE RIVER RUNS BLACK*, *supra* note 7, at 55.

for his own benefit.”⁴⁶ While Confucian scholars held a variety of beliefs about the relationship between man and nature, man was the focus of most ideas.⁴⁷ In addition to Confucianism, other schools of thought influenced China’s treatment of nature and the environment, including Buddhism, Taoism, and legalism.⁴⁸

As China transitioned to socialist rule, the environment continued to suffer. The People’s Republic of China (“PRC”) was established in 1949,⁴⁹ and was led by Mao Zedong until his death in 1976.⁵⁰ Chairman Mao’s leadership had devastating consequences for China’s environment and natural resources. “[M]ajor environmental problems and institutional legal weakness are legacies of the Great Leap Forward and the Cultural Revolution.”⁵¹

2. *China’s Primary Focus on Economic Development Comes at the Expense of Environmental Degradation*

Although China’s history has had significant impacts on its environment, the country’s environmental problems persist because China continues to aggressively pursue economic growth.⁵² Since 1978, when the government first created a socialist market economy, China’s economy has continued to expand.⁵³ In fact, until 1996, China’s economy grew at an annual rate of almost ten percent.⁵⁴ Even today, the pace of economic growth has lessened only slightly.⁵⁵ Economic reform brought revolutionary changes to China,⁵⁶ including raising hundreds of millions of Chinese people

⁴⁶ *Id.*

⁴⁷ *See id.* at 31-33 for an explanation of the beliefs held by a variety of Confucian scholars.

⁴⁸ For a more complete survey of the effects of these philosophies on China’s environment, see *id.* at 31-36.

⁴⁹ Wang Chenguang, *Introduction: An Emerging Legal System*, in *INTRODUCTION TO CHINESE LAW* 1, 9 (Wang Chenguang & Zhang Xianchu eds., 1997).

⁵⁰ *ECONOMY, THE RIVER RUNS BLACK*, *supra* note 7, at 59.

⁵¹ Orts, *supra* note 12, at 557.

⁵² Mao initiated two “revolutions” intended to “catapult China into Communism and surpass the industrial achievements of Great Britain and the United States.” *See* *ECONOMY, THE RIVER RUNS BLACK*, *supra* note 7, at 51. Both the Great Leap Forward (1958-1961) and the Cultural Revolution (1966-1976) severely damaged the natural environment. *Id.* at 51-55. In order to increase grain production, the country began filling lakes and harvesting forests to open land for farming. *Id.* at 51-52, 54. With a shift towards the industrial age and the production of iron and steel, factories were built without consideration for environmental protection measures. Yuhong Zhao, *Environmental Dispute Resolution in China*, 16 *J. ENVTL. L.* 157, 157 (2004); *see also* *ECONOMY, THE RIVER RUNS BLACK*, *supra* note 7, at 52.

⁵³ Orts, *supra* note 12, at 549.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *See* *ECONOMY, THE RIVER RUNS BLACK*, *supra* note 7, at 62. The Chinese government may well be depending on continued economic growth to maintain power. *See* Kahn & Yardley, *Part I*, *supra* note 19 (“the country’s authoritarian system is addicted to fast growth”). China’s economic success has

out of poverty⁵⁷ and bringing the country to the top of the world economy.⁵⁸ However, this economic growth creates numerous environmental problems because the growth derives primarily from the expansion of heavy industry and urbanization, both of which increase the use of coal.⁵⁹ Many now question whether this fast-paced, environmentally unsustainable economic growth can continue.⁶⁰

3. *Local Interests and Corruption Prevent the Enforcement of Environmental Laws*

Local political and business interests are often opposed to increased environmental protection, particularly because of the economic implications of requiring expensive equipment and procedures.⁶¹ This “local protectionism” is one reason that existing environmental laws are not enforced.⁶² The provincial and local governments that are authorized to implement and enforce national policies do not necessarily follow the central

placated the public and provided benefits to government officials; but while prosperity continues to forestall demands for political change, a “major slowdown could incite social unrest, alienate business interests and threaten the party’s rule.” *Id.* One reason for the government’s greater focus on environmental matters is the CPC’s fear of social unrest stemming from major environmental pollution. *See Economy, The Great Leap, supra* note 14; *ECONOMY, THE RIVER RUNS BLACK, supra* note 7, at 87.

⁵⁷ *See* Kahn & Yardley, *Part I, supra* note 19; *see also* *ECONOMY, THE RIVER RUNS BLACK, supra* note 7, at 62.

⁵⁸ *See* T.N. Srinivasan, *China, India and the World Economy 2* (Stan. Ctr. for Int’l Dev., Working Paper No. 286, 2006), available at <http://scid.stanford.edu/pdf/SCID286.pdf> (“In terms of absolute level of Gross National Income (GNI) at Purchasing Power Parity (PPP) exchange rates in 2004, China . . . was second largest in the World, second only to the United States”); Kahn & Yardley, *Part I, supra* note 19 (“rapid industrialization and urbanization have . . . made the country the world’s largest producer of consumer goods”).

⁵⁹ Kahn & Yardley, *Part I, supra* note 19 (“there is little question that growth came at the expense of the country’s air, land and water”). “The economy is on a historic run, posting a succession of double-digit growth rates. But the growth derives . . . from a staggering expansion of heavy industry and urbanization that requires colossal inputs of energy, almost all from coal, the most readily available, and dirtiest, source.” *Id.*

⁶⁰ If China wishes to successfully transition to a global market economy, China will have to create a more sustainable economy and will have to discover ways to preserve the environmental resources on which social development depends. Orts, *supra* note 12, at 549. “[T]he rapidity of economic growth in China raises questions about its environmental sustainability. China has paid for fast economic growth with widespread environmental damage. To continue its successful transition to a global market economy, China must find ways to square the incentives of economic development with the preservation of the environmental resources on which social development depends.” *Id.*

⁶¹ *See* William P. Alford & Yuanyuan Shen, *The Limits of the Law in Addressing China’s Environmental Dilemma*, in *ENERGIZING CHINA: RECONCILING ENVIRONMENTAL PROTECTION AND ECONOMIC GROWTH* 405, 411 (Michael B. McElroy, et. al eds., 1998). The authors state that environmental laws “fail to anticipate the possibility that certain government interests, particularly those of departments with major economic responsibilities, might diverge sharply from those of local environmental protection officers. In such situations, local officials might be reluctant to impose serious sanctions even for major violations of environmental laws.” *Id.*

⁶² *Economy, Environmental Enforcement, supra* note 13, at 104.

government's dictates, especially national environmental policies.⁶³ These lower governments often have a stake in polluting industries,⁶⁴ allowing local and provincial officials to benefit from lax enforcement.⁶⁵ "China's weak legal tradition . . . enables corruption to flourish."⁶⁶ Within the judicial system, the self-serving local influence continues; local judiciaries often are dependant on provincial and local governments for funding,⁶⁷ and "[u]nsurprisingly, conflicts of interest frequently are resolved in favor of local officials' priority on economic development."⁶⁸ Corruption typically results from "family, friendships, and other contacts and reciprocities," and undermines all hope for evenhanded law enforcement.⁶⁹

III. CHINA'S LEGAL SYSTEM IS NOT PREPARED TO PROTECT CHINA'S ENVIRONMENTAL RESOURCES

There are legal obstacles to protecting the environment in China. Both the existing legal system generally and its specific environmental

⁶³ See Economy, *The Great Leap*, *supra* note 14 ("local officials rarely heed Beijing's environmental mandates"); Shun Yong Yeh, *supra* note 10, at 423-24; Economy, *Environmental Enforcement*, *supra* note 13, at 104 (no "follow-through on central mandates to local levels").

⁶⁴ See Adam Briggs, *China's Pollution Victims: Still Seeking a Dependable Remedy*, 18 GEO. INT'L ENVTL. L. REV. 305, 316-17 (2006) ("any municipality's worst polluter will often also be its largest employer and largest source of revenue"). See also Economy, *Environmental Enforcement*, *supra* note 13, at 108.

⁶⁵ See ECONOMY, *THE RIVER RUNS BLACK*, *supra* note 7, at 118. Interviews with local enforcement officials revealed that industries were difficult to fine or close down "because they are central to the health of the local economy." *Id.* A representative example of the pressure of local influence can be seen in the case of *Zhang Changjian et al. v. Rongping Chemical Plant*, where a group of villagers filed a lawsuit against Asia's largest producer of potassium chlorate. See Wang, *supra* note 5, at 212-19 (providing a review and analysis of the case). The plant was releasing pollutants that were negatively impacting villagers' health and destroying timber stands, bamboo, fruit trees, and crops. *Id.* at 213. The plaintiffs were subject to great pressures as a result of the lawsuit; for instance, the lead plaintiff was assaulted while collecting water samples, and other plaintiffs were attacked physically and financially. *Id.* at 215.

⁶⁶ ECONOMY, *THE RIVER RUNS BLACK*, *supra* note 7, at 92.

⁶⁷ Ruth Greenspan Bell, *Culture and History Count: Choosing Environmental Tools to Fit Available Institutions and Experience*, 38 IND. L. REV. 637, 645 (2005); Alford & Shen, *supra* note 61, at 416 ("Subnational judicial salaries and court operating expenses come from subnational, rather than national, funds, leading some observers to question their capacity to maintain a high degree of independence from local officialdom."). Judges' career advancement is also "frequently determined locally rather than nationally." *Id.* "The local government controls both the personnel and the budget of the courts, making political intervention in the legal system a common problem." Economy, *Environmental Enforcement*, *supra* note 13, at 109.

⁶⁸ ECONOMY, *THE RIVER RUNS BLACK*, *supra* note 7, at 92.

⁶⁹ Professor Jerome Cohen, Keynote Address at the Vermont Law School Symposium: An Introduction to Law in China (Mar. 2, 2007), in 8 VT. J. ENVTL. L. at 402. As one example, in a lawsuit against a copper factory, the factory "was set up by the local government itself, had the head of the local trade commission as its chief executive, and would certainly be indemnified by the local government if the plaintiffs' case was a success. . . . Any local judge weighing evidence and deliberating the outcome . . . would realize that his own salary was tied to his decision. This realization would make bias or the appearance of bias unavoidable." Briggs, *supra* note 64, at 330.

regulatory framework prevent adequate protection of the country's ecosystems. The government has an essentially non-existent enforcement mechanism, a weak judicial branch, and vague environmental laws. Each of these factors contributes to China's inability to protect its environmental resources and human health.

A. *China Has Numerous Environmental Laws, but They Have Not Effectively Addressed the Country's Environmental Challenges*

Historically, environmental protection was considered the purview of the Emperor and his officials; and so individual citizens had little responsibility and took little action to protect the environment.⁷⁰ Under that regime, the extent of protection afforded land and water resources depended on how responsibly individual officials executed their duty to protect the natural world.⁷¹

In 1978, China, recognizing the need for environmental protection, amended the Chinese Constitution by inserting provisions that require the state to protect the environment and natural resources as well as prevent pollution and other public hazards.⁷² Presently, the Chinese Constitution prohibits damage to natural resources⁷³ and places a duty on the State to protect the environment.⁷⁴ However, these constitutional rights are not directly enforceable by the judiciary unless statutes clearly direct the courts to apply a particular right.⁷⁵

Environmental laws abound in China. The National People's Congress ("NPC") has enacted roughly twenty statutes "primarily addressing pollution control, natural resource conservation, and product stewardship."⁷⁶ In addition to these statutes, China has extensive

⁷⁰ See ECONOMY, THE RIVER RUNS BLACK, *supra* note 7, at 56.

⁷¹ *Id.*

⁷² *Id.* at 95-96.

⁷³ XIAN FA [Constitution] art. 9, § 2 (1982) LAWINFOCHINA (last visited Oct. 28, 2008) (P.R.C) [hereinafter XIAN FA].

⁷⁴ XIAN FA art. 26. The Constitution also provides citizens the "right to criticize" and the "right to make complaints . . . for violations of law," both of which should be used to raise awareness of environmental and natural resource damage. XIAN FA, art. 41, § 1; see also Xioping Chen, *The Difficult Road for Rights Advocacy: An Unpredictable Future for the Development of Law in China*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 221 (2006).

⁷⁵ Ji Li, *When Are There More Laws? When Do They Matter? Using Game Theory to Compare Laws, Power Distribution, and Legal Environments in the United States and China*, 16 PAC. RIM L. & POL'Y J. 335, 340 (2007). But see M. Ulric Killion, *Post-WTO China and Independent Judicial Review*, 26 HOUS. J. INT'L L. 507, 553-56 (2004) (discussing action by the Supreme People's Court that arguably establishes the Court's ability to interpret and directly apply the Constitution); Chris Lin, *A Quiet Revolution: An Overview of China's Judicial Reform*, 4 ASIAN-PAC. L. & POL'Y J. 255, 270-74 (2003).

⁷⁶ Ferris & Zhang, *supra* note 5, at 583-84. These laws include: The Air Pollution Prevention and Control Law, The Clean Production Promotion Law, The Law on Desertification Prevention, The

administrative regulations.⁷⁷ While China has successfully passed a plethora of environmental laws, policies, and regulations, these have not been implemented.⁷⁸ According to one of China's top environmental lawyers, "barely ten percent of China's environmental laws and regulations are actually enforced."⁷⁹ The failure of China's extensive environmental regime is likely a result of weak legal institutions.⁸⁰

Another factor contributing to the failure of a seemingly comprehensive scheme is the vague language of the laws.⁸¹ The laws are drafted in such a manner that, even if local governments were to attempt enforcement, the laws can be interpreted with extreme lenity. Some have speculated that these laws are intentionally vague, designed to symbolize China's desire to correct the country's environmental problems, while maintaining the status quo in economic development.⁸² Thus, the laws function more like policy statements.⁸³

China's environmental laws provide the tools for non-governmental enforcement through a private right of action. The Environmental Protection Law,⁸⁴ China's general environmental statute, places liability on polluters.⁸⁵

Environmental Impact Assessment Law, The Energy Conservation Law, The Environmental Noise Pollution Law, The Fisheries Law, The Flood Prevention Law, The Forestry Law, The Grasslands Law, The Land Administration Law, The Law on the Prevention of Environmental Pollution Caused by Solid Waste, The Marine Environmental Protection Law, The Mineral Resource Law, The Water and Soil Conservation Law, The Water Law, The Water Pollution Prevention and Control Law, and The Wildlife Protection Law. *Id.*

⁷⁷ ECONOMY, *THE RIVER RUNS BLACK*, *supra* note 7, at 101. By 2001, China had passed more than 123 administrative regulations. Economy also explains that these laws are complemented by more than 20 technical environmental regulations issued by the State Council, 100 environmental rules and methods, and more than 300 standards formulated by SEPA and other State Council ministries and agencies. *Id.*

⁷⁸ Benjamin J. Richardson, *Is East Asia Industrializing Too Quickly? Environmental Regulation in Its Special Economic Zones*, 22 *UCLA PAC. BASIN L. J.* 150, 153-154 (2004). One issue that contributes to this implementation problem is that "legislative documents often contain ambiguities, irreconcilable provisions and indefinite standards." Yuhong Zhao, *supra* note 52, at 174.

⁷⁹ Economy, *The Great Leap*, *supra* note 14.

⁸⁰ Richardson, *supra* note 78, at 153-54.

⁸¹ Yuhong Zhao, *supra* note 52, at 174.

⁸² See Briggs, *supra* note 64, at 312-13. For a non-environmental example, see XiXin Wang, *Suing the Sovereign Observed from the Chinese Perspective: The Idea and Practice of State Compensation in China*, 35 *GEO. WASH. INT'L L. REV.* 681, 689 (2003) ("... the current state compensation system also reveals the hesitation and anxiety of the government, as evident in the substantial limits of individuals' right to state compensation... If we agree that the state compensation system must go beyond mere symbolism, those problems that are plaguing this system both in theory and in practice must be treated seriously").

⁸³ ECONOMY, *THE RIVER RUNS BLACK*, *supra* note 7, at 101. William Alford, a China legal expert, remarked that "China's environmental laws are like policy statements rather than laws in the Western sense." *Id.*

⁸⁴ The Environmental Protection Law is the "cardinal law for environmental protection in China." Srinii Sitaraman, *Regulating the Belching Dragon: Rule of Law, Politics of Enforcement, and Pollution Prevention in Post-Mao Industrial China*, 18 *COLO. J. INT'L ENVTL. L. & POL'Y* 267, 294 (2007) (quoting a 1996 State Council Report). The Environmental Protection Law establishes the national and local

A polluter will be liable for damages caused by its actions despite compliance with state standards; this is known as no-fault liability.⁸⁶ In addition, the burden of proof is placed on defendants in court proceedings; the polluter is forced to prove that its actions did not cause the damages at issue.⁸⁷ Each of these requirements should promote successful citizen suits. are more likely to be successful when a polluter is liable despite apparent compliance with state standards, because the polluter is forced forcing a polluter to prove that it did not cause the damage at issue.

Unfortunately, many observe that China's court system remains weak.⁸⁸ In addition, the nation has not traditionally had a culture of utilizing lawyers, courts, or the law in general to resolve disputes;⁸⁹ therefore, few will resort to court action on environmental matters.⁹⁰ As a result, the existing court system is woefully inadequate to remedy the spiraling deterioration of China's ecological systems.

B. *The Overall Design of the Chinese Legal System Prevents Adequate Enforcement of Environmental Laws*

China is essentially a one-party government,⁹¹ controlled by the CPC.⁹² The PRC, as a socialist state, centers its government in people's congresses, which are responsible for creating and supervising all

environmental protection bureaus, contains specific provisions for the management and supervision of the environment, pollution control, and legal liability associated with pollution, and requires that provincial governments evaluate the environmental impact of their activities. *Id.*

⁸⁵ Environmental Protection Law art. 41 (promulgated by the Standing Comm. of the NPC, Dec. 26, 1989, effective on date of promulgation) LAWINFOCHINA (last visited Oct. 28, 2008) (P.R.C.) ("A unit that has caused environmental pollution hazard shall have the obligation to eliminate it & make compensation to the unit or individual that has suffered direct losses.").

⁸⁶ Yuhong Zhao, *supra* note 52, at 178-79.

⁸⁷ Wang, *supra* note 5, at 209 (citing Some Provisions of the Supreme People's Court on Evidence in Civil Procedures, a document released by the Supreme People's Courts). One statutory example of the burden of proof states, "[f]or a damage suit arising from the environmental pollution by solid wastes, the inflictor shall assume the burden of proof for the statutory exemption and the nonexistence of causation between its acts and harmful consequences." Law on the Prevention and Control of Environmental Pollution by Solid Wastes art. 86 (promulgated by the Standing Comm. of the NPC, Dec. 29, 2004, effective Apr. 1, 2005), LAWINFOCHINA (last visited Oct. 28, 2008) (P.R.C.).

⁸⁸ Wang, *supra* note 5, at 202.

⁸⁹ *Id.*

⁹⁰ For instance, "[o]nly 9% of people will negotiate with the polluter directly, and only 2% [of] people will sue to the court . . ." Professor Li Zhiping, Address at the Vermont Law School Symposium: Environmental Challenges Facing Rural Areas in the Process of Industrialization (March 2, 2007), *in* 8 VT. J. ENVTL. L. at 426. Professor Li Zhiping's speech provides more information on the survey, particularly the specifics of how the survey was completed. *Id.* at 426-27. The survey was conducted by about thirteen students in his environmental law clinic and environmental law classes, over a period of four months, through interviews and questionnaires. *Id.*

⁹¹ See XIAN FA Preamble ("Under the leadership of the Communist Party of China . . .").

⁹² See JIANFU CHEN, CHINESE LAW: CONTEXT & TRANSFORMATION 106-07 (2008).

administrative, judicial, prosecutorial, and military agencies of the state.⁹³ The NPC is the highest “organ” of state power,⁹⁴ exercising legislative authority at the central level.⁹⁵ The Constitution also empowers a smaller body,⁹⁶ the Standing Committee of the NPC, with essentially the same authority as the NPC.⁹⁷

The directives of the NPC and the Standing Committee are executed by the State Council and its agencies.⁹⁸ The State Council is comprised of various departments, commissions, administrations, and offices.⁹⁹ The same legislative and administrative bodies exist at each level of government. The top-down structure provides for little oversight and thus prevents proper enforcement of environmental laws because prevalent regional protectionism creates a tendency for local governments to disregard central government rules and regulations.¹⁰⁰

The judicial branch consists of both courts and procuratorates.¹⁰¹ The courts’ structure, divided into four levels, mirrors the top-down hierarchy of the State Council.¹⁰² China’s judiciary is quite decentralized, with control of the lower courts’ personnel and budget resting in local governments.¹⁰³

⁹³ See Wang Chenguang, *supra* note 49, at 15. There are essentially five levels of government: 1) central, 2) provincial, 3) prefectural (which includes large cities and autonomous regions), 4) county and city, and 5) township/village. *Id.* at 16.

⁹⁴ XIAN FA art. 57. See JIANFU CHEN, *supra* note 92, at 113. The NPC convenes once a year, and is composed of almost 3000 deputies. CHINA: OUTLINES OF THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA 43, 45 (Zhang Fusen & Hu Zejun, eds., 2004).

⁹⁵ A GUIDE TO THE LEGAL SYSTEM OF THE PRC 3 (Chris Hunter et al., eds., 1997).

⁹⁶ The Standing Committee is composed of less than 200 members. JIANFU CHEN, *supra* note 92, at 117.

⁹⁷ The Standing Committee is, among other things, empowered to interpret the Constitution and supervise its implementation; to make, revise, and interpret most statutes; and to supervise the State Council and other government bodies. See XIAN FA art. 67.

⁹⁸ JIANFU CHEN, *supra* note 92, at 119. The State Council is elected by the NPC. A GUIDE TO THE LEGAL SYSTEM OF THE PRC, *supra* note 95, at 4. Although the Constitution theoretically vests all state power in the NPC and its Standing Committee, the State Council seems to be much more powerful than one would suspect. JIANFU CHEN, *supra* note 92, at 119.

⁹⁹ See A GUIDE TO THE LEGAL SYSTEM OF THE PRC, *supra* note 95, at 5.

¹⁰⁰ Shun Yong Yeh, *supra* note 10, at 424.

¹⁰¹ The Chinese procuratorate is not only responsible for prosecutions but is also responsible for “the supervision of law” and supervision of important State departments. Ye Feng, *The Chinese Procuratorate and the Anti-Corruption Campaigns in the People’s Republic of China*, in IMPLEMENTATION OF LAW IN THE PEOPLE’S REPUBLIC OF CHINA (Jianfu Chen, Yuwen Li, & Jan Michiel Otto, eds., 2002). The people’s procuratorates are the “state organs for legal supervision.” XIAN FA art. 129. The procuratorate system has an organizational structure similar to the court system. See A Brief Introduction to China, <http://www.lawinfochina.com/Legal/index.asp>.

¹⁰² ZOU KEYUAN, CHINESE LEGAL REFORM: TOWARDS THE RULE OF LAW 144 (2006). The levels are: 1) The Supreme People’s Court, 2) the Higher People’s Courts, 3) the Intermediate People’s Courts, and 4) the Basic People’s Courts. *Id.* To give an idea, there are more than 2200 county courts across the country; there are intermediate courts in every major city; and at the provincial level there are 32 high courts. XiXin Wang, *supra* note 82, at 682.

¹⁰³ ECONOMY, THE RIVER RUNS BLACK, *supra* note 7, at 112.

Traditionally, judges were often military officers or merely demobilized soldiers or other civil servants; these individuals often had only a high school education and had no legal training or practice.¹⁰⁴ While there is an ongoing effort to move away from this system, judges still often lack legal education and training.¹⁰⁵ This lack of legal competence is problematic because China's environmental laws and environmental issues are often complicated.

For China's legal system to effectively control environmental damage, it is imperative that the judicial system diligently sustain environmental laws and rights. "No matter how perfect the environmental law is and how propitious the provisions are to defend the environmental rights and interests, the environmental law is meaningless if lawyers and judges have no knowledge of the particularity of environmental law."¹⁰⁶ One organization stated that "[w]hile environmental law is a burgeoning field of study, few judges, lawyers or environmental officials have received formal training. Consequently, environmental cases are difficult to handle. Lack of knowledge of the law affects pollution victims' ability to get fair, timely redress."¹⁰⁷ Potential problems that arise as a result of a judiciary without expertise in environmental law include succumbing to local influence, failing to recognize an environmental pollution case, or misplacing the burden of proving causation.

One water pollution case highlights the corrupting effect that local pressures can have on the legal system. The plaintiffs' mango crops were diseased as a result of dust and smog pollution from two nearby cement plants.¹⁰⁸ After the plaintiffs prevailed in the first trial, the defendants inspired government and CPC party officials to get involved.¹⁰⁹ The resulting report by the government and party officials suggested that the first

¹⁰⁴ *Id.* at 113.

¹⁰⁵ Alford & Shen, *supra* note 61, at 417.

¹⁰⁶ Hu Jing, *Case of Water Pollution Damage in Dexing City of Jiangxi Province*, at 10, CLAPV Case Analysis, http://www.clapv.org/new/cate_en.php?catename=CA. CLAPV stands for the Center for Legal Assistance to Pollution Victims.

¹⁰⁷ Xu Kezhu, *Training Strengthens Environmental Law in China*, CLAPV Media Reports, Jan. 5, 2008, http://www.clapv.org/new/cate_en.php?catename=MR. In order to combat this lack of understanding and formal training, CLAPV provides annual training sessions in environmental law to increase judges', practitioners', and officials' practical and theoretical understanding of environmental law. *See id.* Lecture topics included current environmental legislation, handling complicated issues in environmental tort litigation, rules of evidence in civil cases, handling environmental disputes, application of environmental standards in litigation, and implementation of environmental law in China. *Id.*

¹⁰⁸ Xu Kezhu, *Case of Air Pollution Damage by Cement Plants in Yulin City of Guangxi Province*, at 1-3, CLAPV Case Analysis, http://www.clapv.org/new/cate_en.php?catename=CA.

¹⁰⁹ *Id.* at 7.

judge had incorrectly decided the case for a variety of reasons.¹¹⁰ A retrial was granted, and a panel determined that the plaintiffs' evidence was too general and that there was no direct evidence of pollution damages.¹¹¹ Local economic influences were able to manipulate the court's lack of awareness and comprehension of environmental laws. Confusion among the courts and judges will not result in constructive case decisions.

In another lawsuit, tendencies to protect local factories could not influence the court, because the impacted, polluting enterprises were in a different county from the court.¹¹² Upstream factories dumped numerous pollutants into a river, resulting in downstream duck and fish farmers losing significant portions of their stocks.¹¹³ The plaintiffs brought suit after government negotiations failed.¹¹⁴ The plaintiff farmers initiated suit in their home county, where the injuries occurred.¹¹⁵ The defendants attempted to have the case moved to the court in the defendant's county, but the court refused.¹¹⁶ While the plaintiffs in this case benefited from being before the local court,¹¹⁷ there are many other instances where the desire to protect local industries works against the plaintiff, especially when the polluting defendant resides in the same county as the court.¹¹⁸

A recent case highlights the failure of one court to recognize novel environmental pollution cases. In *LiFaJun v. Suzuki Car Company Ltd.*, a widower, Mr. Zhu, uncovered evidence that his wife may have died as a

¹¹⁰ *Id.* at 7-8.

¹¹¹ *Id.* at 8-9.

¹¹² See Wang Canfa, *Water Pollution Damages Case in Pizhou, Jiangsu Province*, at 1, CLAPV Case Analysis, http://www.clapv.org/new/cate_en.php?catename=CA (describing how pollution from the upper reaches of the Fang Ting River, which begins in Tongshan County, reached the lower reaches of the river, including portions in Pizhou City). Pizhou City is a different county-level city than Tongshan County, although both are under the jurisdiction of Xuzhou in Jiangsu Province. See *Cities and Towns*, <http://www.jiangsu.net/city/>.

¹¹³ Wang Canfa, *supra* note 112, at 4-5.

¹¹⁴ See *id.* at 1-4, 4.

¹¹⁵ See *id.* at 5.

¹¹⁶ *Id.* at 5.

¹¹⁷ Another factor weighing in the plaintiffs' favor in this instance was the provision of free legal resources that the plaintiffs received.

¹¹⁸ One prominent environmental lawyer explained that "[i]n all of the suits that we have lost, the courts have not followed the law. Instead they ignored the legal or technical merits of our case in order to support the local enterprises." Ted Plafker, *Nascent "Green Culture" is Challenging Authorities—and Being Heard: Chinese Activists Take to the Courts*, INT'L HERALD TRIB., August 28, 2002, available at http://www.iht.com/articles/2002/08/28/rbeijing_ed3_.php?pass=true. It is difficult to obtain information on Chinese cases because many of them are not published and when they are they are not available in English translations. When organizations, such as CLAPV, produce information about environmental cases, it is usually to laud the rare victory.

result of benzene poisoning.¹¹⁹ Shortly after purchasing a new car, Mrs. Zhu passed away; subsequently the benzene level in the car's interior was tested and found to exceed the indoor air quality standard.¹²⁰ Mr. Zhu sued Suzuki, the car manufacturer, because he believed that a flaw in their product resulted in Mrs. Zhu's death.¹²¹ The court rejected the lawsuit on the grounds that Mr. Zhu had not provided adequate evidence of causation that the benzene levels resulted in Mrs. Zhu's death.¹²² If the lawsuit had been brought under the Environmental Protection Law, Mr. Zhu would not have had the burden of proving causation; the burden would have been placed on the car manufacturer to show that the high levels of benzene in the car did not cause Mrs. Zhu's death.¹²³ The Center for Legal Assistance to Pollution Victims in China ("CLAPV") agreed to assist Mr. Zhu in his appeal after professors affiliated with CLAPV "determined that this was a unique type of environmental pollution case and that the first court had erred in its exercise of the law."¹²⁴ On appeal, Mr. Zhu's attorneys framed the case as an environmental pollution case, but the higher court still rejected the claim.¹²⁵ If the courts had recognized that benzene was an air pollutant and that cases regarding potential injuries resulting from that pollutant should be tried under the EPL,¹²⁶ the outcome for Mr. Zhu would likely have been very different. Lawsuits based on environmental torts are a relatively recent phenomenon; courts must be able and willing to recognize and accommodate cases involving environmental pollution.

As discussed above, Chinese environmental laws shift the burden of proof to the defendant.¹²⁷ In general, a plaintiff in a tort case would be required to prove that a defendant's actions had caused the alleged harm. In

¹¹⁹ CLAPV, *LiFaJun v. Suzuki Car Company Ltd.*, CLAPV Legal Aid Cases, July 11, 2008, http://www.clapv.org/new/show_en.php?id=89&catename=LAC [hereinafter *LiFaJun v. Suzuki Car Company*].

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ In the United States, indoor air pollution is regulated and monitored by the Environmental Protection Agency. See generally U.S. Environmental Protection Agency, Indoor Air Quality Homepage, <http://www.epa.gov/iaq/index.html>.

¹²⁷ Some Provisions of the Supreme People's Court on Evidence in Civil Procedures art. 4, states: "The burden of proof in the tort actions shall be assumed according to the following rules In a compensation lawsuit for damages caused by environmental pollution, the infringing party shall be responsible for producing evidence to prove the existence of exemptions of liabilities as provided in laws or that there is no causal relationship between his act and the harmful consequences . . ." Some Provisions of the Supreme People's Court on Evidence in Civil Procedures art. 4 (promulgated by the Supreme People's Court, Dec. 21, 2001, effective Apr. 1, 2002) LAWINFOCHINA (last visited Oct. 28, 2008) (P.R.C.).

environmental tort cases, once the plaintiff shows injury and some contact with the defendant, the defendant has to prove that the plaintiff's injuries were caused by something else besides the defendant's actions. This inversion of the burden of proof is extremely beneficial when employed. Often, however, a court does not understand that the burden of proof must be shifted or does not recognize that a case is an environmental tort deserving of the inversion. In the cement plant case described above, the court attempted on retrial to place the burden of proof onto the plaintiff, instead of on the defendant where it belonged because the case was for damages from environmental pollution.¹²⁸ The failure of courts to recognize that the burden of proof must be transferred to the defendant is especially problematic when the plaintiff does not know that the burden should be shifted either, so the plaintiff does not even present it as a possibility to the court. In one case, the plaintiff failed to raise the burden of proof allocation because the plaintiff lacked knowledge of environmental court cases.¹²⁹ The plaintiff, the Shuangxi Reservoir Management Bureau, stocked the reservoir with fish that were subsequently killed in large numbers by the release of machine oil from the generator room of the upstream Power Station.¹³⁰ As one lawyer on the case stated, "[t]he undertaking judge is obviously ignorant of environmental law, due to which Inversion of Burden of Proof is not adopted in the court hearing. It is urgent for judges and lawyers to take up universal knowledge of environmental law, independent branch of laws, with environmental torts taking place at an increasing rate."¹³¹ Cases involving complex environmental laws and science would be more appropriately handled in a court experienced in such cases.

C. *A Specialized Court Would Not Provide All of the Answers To China's Environmental Problems, But These Challenges Can Be Indirectly Addressed Through An Environmental Court*

While the solution to China's failing environmental paradigm offered in this comment—developing a specialized court to hear environmental issues—would benefit China's legal system and help the country face environmental challenges, the effectiveness of such a specialized court

¹²⁸ Xu Kezhu, *Case of Air Pollution Damage by Cement Plants in Yulin City of Guangxi Province*, at 8, CLAPV Case Analysis, http://www.clapv.org/new/cate_en.php?catename=CA.

¹²⁹ Hu Jing, *Case of Water Pollution Damage in Dexing City of Jiangxi Province*, at 10, CLAPV Case Analysis, http://www.clapv.org/new/cate_en.php?catename=CA.

¹³⁰ *Id.* at 1-2.

¹³¹ Hu Jing, *Case of Water Pollution Damage in Dexing City of Jiangxi Province*, at 10, CLAPV Case Analysis, http://www.clapv.org/new/cate_en.php?catename=CA.

should not be overstated. There are areas of concern that a specialized court could only indirectly ameliorate. China has grave environmental challenges that cannot easily be remedied. In addition, other issues may compromise any gain in environmental protection that results from a specialized court, including non-enforcement,¹³² corruption,¹³³ and the technical difficulty of correcting already existing problems. In order for the specialized court to effectively function, citizens must be aware of this forum and be willing to utilize it. It is encouraging to note that Chinese citizens are more frequently heading to court with the gravest pollution problems,¹³⁴ but people must be willing to challenge less obvious, but nonetheless serious, pollution and natural resource destruction. Ideally, providing a specialized forum will increase the use of litigation as a means of dispute resolution¹³⁵ to challenge a variety of environmentally destructive activities. However, without proper legal assistance, Chinese citizens may remain without adequate access to the judicial system. Non-profit legal assistance will be an important contributor to the effective operation and legitimacy of an environmental court system.¹³⁶

The legal road ahead for Chinese environmental activists promises to be difficult, but these difficulties and the potential for failure only underscore the importance of reform and should not prevent an attempt at stability and success. A specialized court would benefit China's legal system

¹³² An environmental court could not directly increase the level of enforcement. Increased enforcement will result most directly from changing attitudes of government officials.

¹³³ Corruption can be addressed to some extent when the State brings charges against government officials. The central Chinese government does realize the importance of environmental enforcement and has attempted to address the problem of lax enforcement and corruption through laws and regulations. In order to address dereliction of duty by government officials, the central government has produced the Provisional Measures on the Penalties for Violation of Law or Discipline in Environmental Protection, the Explanation on Certain Issues Relating to the Governing Law in the Criminal Trial for Environmental Pollution Cases by the Higher People's Court, and the Higher People's Procuratorate's Standard for Indictment of Dereliction of Duty. See Shun Yong Yeh, *supra* note 10 (translating the regulations).

¹³⁴ See Wang, *supra* note 5, at 204.

¹³⁵ The number of environmental disputes increases every year. Wang Canfa, Keynote Address at the Vermont Law School Symposium: Special Functions of Promoting Public Participation in Environmental Protection in Aiding Pollution Victims (March 2, 2007), in *China in Transition: Environmental Challenges in the Far East*, 8 VT. J. ENVTL. L. at 384-85. "[E]very year there's at least 20% to 30% increase in environmental complaints" submitted to environmental authorities. *Id.*

¹³⁶ See Wang, *supra* note 5, at 204-05. Many argue for NGO standing to sue in environmental pollution cases. See Patti Goldman, Panel Address at the Vermont Law School Symposium: The International Silk Road: Engaging Domestic Efforts to Protect China's Environment (March 2, 2007), in *China in Transition: Environmental Challenges in the Far East*, 8 VT. J. ENVTL. L. at 448-49; see also Orts, *supra* note 12, at 562-64. See generally Patti Goldman, *Public Interest Environmental Litigation in China: Lessons Learned From the U.S. Experience*, 8 VT. J. ENVTL. L. 251 (2007). This would greatly increase the likelihood that cases would be heard by a specialized environmental tribunal.

and would begin to resolve many of the problems responsible for environmental degradation.

IV. CHINA SHOULD USE THE MODELS OF EXISTING SPECIALIZED COURTS TO GUIDE THE DEVELOPMENT OF A CHINESE ENVIRONMENTAL COURT

China should adopt a specialized court system in order to address the complicated legal issues presented by environmental litigation. Both the New Zealand Environmental Court (“NZEC”) and China’s maritime courts could provide models for the development of an environmental court in China. Environmental and maritime issues are both very complicated areas of law, which benefit from having knowledgeable judicial officials resolve issues. The NZEC is a specialized tribunal that addresses environmental and natural resources issues and disputes in New Zealand. Similarly, the maritime courts in China have exclusive jurisdiction to resolve maritime and admiralty disputes.

A. *New Zealand’s Environment Court Offers a Solution for Managing Environmental Disputes*

New Zealand is at the forefront of developing specialized environmental jurisprudence.¹³⁷ It has benefited from the use of a special tribunal to review planning decisions since 1953, when the Town and Country Planning Appeal Board was created.¹³⁸ In 1991, the country merged statutory planning and environmental controls into one comprehensive law: the Resource Management Act (“RMA”).¹³⁹ The RMA is New Zealand’s primary environmental statute,¹⁴⁰ and “[t]here are few aspects of the management of the air, land and water that are not within its purview.”¹⁴¹ In

¹³⁷ “A specialised adjudicative tribunal . . . is a rarity in the world of environmental law Apart from New South Wales, Australia, and the Planning Board Tribunals in the United Kingdom . . . [there are no] other specialised tribunals with the status of courts of law that are particularly focussed on resolving environmental disputes.” Bret Birdsong, *Adjudicating Sustainability: New Zealand’s Environment Court and the Resource Management Act 1*, Ian Axford (New Zealand) Fellowship in Public Policy (Oct. 1998), available at <http://www.fulbright.org.nz/voices/axford/docs/birdsongb.pdf> [hereinafter Birdsong 1998].

¹³⁸ The Planning Appeal Board and its successors provided the basis for the current Environmental Court. Trevor Daya-Winterbottom, *Evolving Practice—the Environment Court of New Zealand*, 13 ENVTL LIABILITY 119, 119-20 (2005).

¹³⁹ Resource Management Act, 1991, No. 69 (N.Z.), available at <http://www.legislation.govt.nz/act/public/1991/0069/latest/DLM230265.html> [hereinafter RMA].

¹⁴⁰ David Grinlinton, *Access to Environmental Justice in New Zealand*, 1999 ACTA JURIDICA 80, 80 (1999).

¹⁴¹ *Id.* at 80. There are, however, “a number of areas of environmental law [that] remain outside the Act.” *Id.*

1996, amendments to the RMA created the Environment Court.¹⁴² This institution was an important addition to the RMA. One scholar notes that “[the Environment Court] can be said to serve as judge, jury, and executioner over most of the fundamental aspects of the RMA regime.”¹⁴³ The NZEC is an expert tribunal that primarily addresses public interest questions related to resource management and environmental law.¹⁴⁴

The establishment of the NZEC is generally accepted as a “notable success.”¹⁴⁵ One former Environment Court judge concluded that “the [NZEC] has established a practice of open and patient hearings, and reasoned decisions that have normative value for primary decision-makers and professional advisers.”¹⁴⁶ Overall, the NZEC plays an important role in protecting the country’s public resources and the public interest under the RMA.¹⁴⁷

B. Chinese Specialized Courts Address Complicated and Important Subjects in Ways that Can Inform the Creation of a Chinese Environmental Court

Specialized courts are authorized under the provisions of China’s Law on the Organization of the People’s Courts of the People’s Republic of China (“Organization Law”).¹⁴⁸ Article 2 of the 1979 Organization Law stipulates that “the trial power of the People’s Republic of China is exercised by the following people’s courts: (1) local people’s courts at various levels; (2) specialized people’s courts; [and] (3) the Supreme People’s Court Specialized people’s courts include: military courts, railway transport courts, maritime transport courts, forestry courts and other specialized courts.”¹⁴⁹

Currently, China has specialized courts for each of these areas of law,¹⁵⁰ as well as a specialized court for patent, copyright, and trademark

¹⁴² RMA, Part 11, §§ 247-308, and Part 12, §§ 309-343D, are the provisions that detail the specifics of the Environment Court.

¹⁴³ Birdsong 1998, *supra* note 137, at 1.

¹⁴⁴ Daya-Winterbottom, *supra* note 138, at 121.

¹⁴⁵ *Id.* at 120.

¹⁴⁶ *Id.*

¹⁴⁷ Stephen Higgs, *Mediating Sustainability*, 37 ENVTL. L. 61, 80 (2007).

¹⁴⁸ See Curtis Pew, Robert Jarvis, & Mark Sidel, *Maritime Courts in the Middle Kingdom: China’s Great Leap Seaward*, 11 MAR. LAW. 237, n.7 (1986). The law was adopted in 1951. *Id.*

¹⁴⁹ See *id.*; see also Organic Law of the People’s Courts (promulgated by the Standing Comm. of the NPC, Sept. 2, 1983, effective on date of promulgation) LAWINFOCHINA (last visited Oct 28, 2008) (P.R.C.).

¹⁵⁰ Mark Sidel, *The Acceptance of Emerging American Law Abroad: Could ‘Maritime RICO’ Work in the People’s Republic of China*, 12 TUL. MAR. L.J. 99, 105 (1987).

disputes.¹⁵¹ One scholar explains that the purpose of these courts is to provide a judicial body which is capable of handling specific, complex areas of the law.¹⁵² This same rationale suggests that a specialized environmental court would benefit both China's environment and China's judiciary, by raising the quality of judicial decision-making.

China's maritime courts serve as an instructive example of an effective specialized court whose structure and operation could be incorporated to develop an environmental court.¹⁵³ China's maritime courts system are a useful model because they have experience resolving complex disputes and they demonstrate the type of judicial institution that would be acceptable to the Chinese government.

V. A SPECIALIZED ENVIRONMENTAL COURT WOULD SUIT CHINA'S CURRENT LEGAL SYSTEM

The Chinese government should exploit its ability to develop specialized courts under Chinese law and create a court dedicated to overseeing environmental and natural resource disputes. In developing an environmental court, China should consider the examples that the NZEC and the Chinese maritime courts offer.¹⁵⁴ The Chinese Environmental Courts' structure, authority, jurisdiction, and standing requirements should be developed through modification of New Zealand's Environment Court and China's maritime courts.

A. *The Structure of the NZEC and the Maritime Courts Should Be Used as a Model for the Creation of a Chinese Environmental Court*

The NZEC is not a very large judicial body; it is currently composed of seven Judges, three Alternate Judges, fifteen Commissioners, and six

¹⁵¹ See Ryan Goldstein et. al., *Specialized IP Trial Courts Around the World*, 18 No. 10 INTELL. PROP. & TECH. L. J. 1 (Oct. 2006). These courts were created in 1993. *Id.*

¹⁵² Mark Hamilton, *Sailing in a Sea of Obscurity: The Growing Importance of China's Maritime Arbitration Commission*, 3 ASIAN-PAC. L. & POL'Y J. 477, 505-06 (2002). "[J]udges have developed technical and legal expertise from repeated exposure to . . . cases and experience interpreting . . . law. This enables . . . judges to resolve disputes quickly and efficiently." *Id.* at 505.

¹⁵³ Maritime courts were established by the NPC Standing Committee in 1984 with the Decision of the Standing Committee of the National People's Congress on the Establishment of Maritime Courts in Coastal Port Cities. Pew, Jarvis, & Sidel, *supra* note 148, at 241.

¹⁵⁴ Of course, "any recommendations coming from an outside Western observer must be careful to take into account the unique legal, political, and cultural situation of Chinese society. Direct 'transplants' of Western environmental laws are unlikely to take root very easily, if at all Environmental solutions for China should focus instead on building the basic institutional infrastructure and capacities needed for an effective and efficient administrative legal system" Orts, *supra* note 12, at 546.

Deputy Commissioners.¹⁵⁵ The Environmental Judges are ordinary judges who are appointed for life, while the Environmental Commissioners are experts who are appointed for five year terms.¹⁵⁶ The commissioners are technically-oriented laypersons¹⁵⁷ who work alongside judges, preside over hearings, and assist in writing judicial decisions.¹⁵⁸ The commissioners are not required to have legal training¹⁵⁹ because they are appointed to ensure that the NZEC “possesses a mix of knowledge and experience” in relevant matters.¹⁶⁰ Hearings are generally open to the public and are relatively informal, as the court is not bound by the country’s rules of evidence.¹⁶¹

China’s maritime courts have a different structure than the NZEC. There are multiple maritime courts, located all along China’s coast.¹⁶² The maritime courts are trial-level courts only,¹⁶³ with appeals managed by the relevant provincial Supreme Courts.¹⁶⁴ The individual maritime courts are divided into different offices, with two different trial divisions. One trial section handles admiralty cases, while the other manages maritime commerce issues.¹⁶⁵ Each court also has a research office and a court administration office.¹⁶⁶ There is a court president who oversees every office, while each trial division additionally has its own president.¹⁶⁷ Many of the maritime courts’ judges have formal training in maritime law.¹⁶⁸

¹⁵⁵ Environment Court of New Zealand, <http://www.justice.govt.nz/environment/home.asp> (last visited Apr. 17, 2008). “A quorum for the court is one judge and one commissioner, but hearings can also be held with one judge and two commissioners or, more rarely, a judge or commissioner sitting alone.” Higgs, *supra* note 147, at 75.

¹⁵⁶ Bret Birdsong, *Adjudicating Sustainability: New Zealand’s Environment Court*, 29 *ECOLOGY L.Q.* 1, 32-33 (May 2002) [hereinafter Birdsong 2002].

¹⁵⁷ *Id.* at 4.

¹⁵⁸ *See id.* at 33. The commissioners also oversee court mediation, which is a method of dispute resolution that is actively promoted by NZEC. *Id.*

¹⁵⁹ Higgs, *supra* note 147, at 75.

¹⁶⁰ RMA § 253. Desirable skills include expertise in business, economics, local government affairs, planning and resource management, environmental science, architecture and engineering, or techniques in alternative dispute resolution. Higgs, *supra* note 147, at 75; *see also* RMA § 253; Environment Court of New Zealand, *Mediation*, <http://www.justice.govt.nz/environment/procedure/mediation.asp> (last visited April 18, 2008) (“Experience in alternative dispute resolution is one of the criteria for eligibility for appointment as an Environment Commissioner.”).

¹⁶¹ Higgs, *supra* note 147, at 75. There are three courthouses where hearings take place, but, as a circuit court, it also will travel to hold hearings near the locality of the subject matter in dispute. *Id.*

¹⁶² Peter Murray, *China: An Emerging Jurisdiction*, in *JURISDICTION AND FORUM SELECTION IN INTERNATIONAL MARITIME LAW* 119-135, 119 (Martin Davies ed., 2005). Originally there were five maritime courts established, but currently there are ten maritime courts and twenty-seven branch courts. *Id.*

¹⁶³ The maritime courts have the same status as intermediate courts in the Chinese legal system. K.X. LI & C.W.M. INGRAM, *MARITIME LAW AND POLICY IN CHINA* 22 (2002).

¹⁶⁴ *Id.* at 22-23.

¹⁶⁵ Pew, Jarvis, & Sidel, *supra* note 148, at 242.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Murray, *supra* note 162, at 122.

Within the maritime court system there is also a powerful arbitration body. The maritime judges are empowered to compel and oversee maritime arbitrations.¹⁶⁹

Drawing from each of these examples, China can develop a court akin to the NZEC that fits within China's existing legal regime. The concept of using technically-oriented laypersons accords with the Chinese tradition of laypersons' participation in judicial decision-making, and could even improve the quality of decision-making by requiring technical expertise.¹⁷⁰ By adopting a preference for judges who have some relevant knowledge or experience in addition to legal comprehension, China would focus its environmental talent on environmental needs and develop a knowledgeable judiciary.

The NZEC's small size makes direct implementation of a similar structure in China impossible. China's large geographical and political size would require multiple specialized courts spread across the country. Like the maritime courts, the environment courts could be located without reference to the smaller political boundaries that the general courts follow. The maritime courts are located in relevant areas: port cities.¹⁷¹ Similarly, the environment courts should be located in areas of particular environmental importance and concern. The country's immensity generates numerous areas that would benefit from a specialized court. For example, courts could be located in larger cities—such as Beijing—that have rampant air pollution, in cities in the Northern provinces where desertification is quickly conquering the land, and near major waterways where water quality issues arise often.

Such specialized courts would accept the responsibility of overseeing both trial and appellate cases. The basic structure of the Chinese Environmental Court would have to follow the general structure of all Chinese courts, which are internally divided into various substantive and

¹⁶⁹ Pew, Jarvis, & Sidel, *supra* note 148, at 243.

¹⁷⁰ Historically, judges in the people's courts were not required to hold law degrees. China has recently strengthened the qualification requirements to be a judge, so that the level of education required is a bachelor's degree in law or a bachelor's degree in some other subject combined with knowledge of law. See Judges Law ch. 4 (promulgated by the Standing Comm. of the NPC, June 30, 2001, effective July, 1, 1995) LAWINFOCHINA (last visited Oct. 28, 2008) (P.R.C.) (amending the 1995 Judge's Law); see also RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 291 (2002). Thus, people with relevant environmental knowledge and training could become judges by gathering legal knowledge in their other studies. *Id.*

¹⁷¹ See Decision of the Standing Committee of the National People's Congress on the Establishment of Maritime Courts in Coastal Port Cities (promulgated by the Standing Comm. of the NPC, Nov. 14, 1984, effective on date of promulgation) LAWINFOCHINA (last visited Oct. 28, 2008) (P.R.C.); see also Pew, Jarvis, & Sidel, *supra* note 148, at 241.

administrative divisions.¹⁷² Adhering to the structure of all Chinese courts, the environmental court would be divided up by different substantive divisions, including an appellate division,¹⁷³ a civil division,¹⁷⁴ and a criminal division.¹⁷⁵ The administrative divisions would include a research office, a supervision office, a planning and finance section, and a political department.¹⁷⁶ Akin to both the NZEC and the maritime courts, a Chinese Environmental Court should have a mediation and arbitration section. This is an important component of all dispute resolution in China, and it would likely increase the efficiency and use of an environmental court.¹⁷⁷ That there are a large number of different divisions and sections of the court may raise concerns that the environmental court system would be quite large and unwieldy. However, these various divisions are present in all Chinese courts; installing another unique court system with the same fundamental design should not prove especially difficult.

B. To Accommodate Traditional Chinese Understanding of the Judiciary's Role, the Scope of the Chinese Environmental Court's Authority Should be a Modified Version of the NZEC's Authority

In New Zealand, the Environment Court has the authority to hear all cases brought under the RMA and some issues regulated by other statutes related to environmental and planning issues.¹⁷⁸ The NZEC exercises authority under the RMA in three realms. First, it has the power to interpret the law through declarations.¹⁷⁹ Second, it has the power to review de novo local government authorities' decisions when those decisions are brought to

¹⁷² PEERENBOOM, *supra* note 170, at 283.

¹⁷³ The appellate division within the environmental court would simply hear appeals from administrative decisions. Appeals from environmental court decisions would be brought before the Supreme Court in the relevant province, as maritime court appeals are brought. See LI & INGRAM, *supra* note 163, at 22-23.

¹⁷⁴ The civil divisions could be divided into core environmental categories, such as water, air, and forests.

¹⁷⁵ While China's maritime courts do not have jurisdiction over criminal cases, at least two of China's other special courts—the military court and the railway and transport court—have jurisdiction over criminal cases. Zhu Guobin, *Constitutional Law*, in INTRODUCTION TO CHINESE LAW 31, 61-62 (Wang Chenguang & Zhang Xianchu eds., 1997).

¹⁷⁶ See PEERENBOOM, *supra* note 170, at 284.

¹⁷⁷ For more on judicial mediation, see Yuhong Zhao, *supra* note 52.

¹⁷⁸ New Zealand Environment Court, *How Cases Come to Court*, <http://www.justice.govt.nz/environment/about/how-cases-court.asp> (last visited Apr. 17, 2008). The NZEC has jurisdiction over other statutes, including: Historic Places Act, Forests Act, Local Government Act, Transit New Zealand Act, Electricity Act, Crown Minerals Act, Maori Commercial Aquaculture Claim Settlement Act, Biosecurity Act, and Public Works Act. *Id.*

¹⁷⁹ RMA §§ 310-313; see also Birdsong 2002, *supra* note 156, at 28-30.

the NZEC by reference or appeal.¹⁸⁰ Lastly, the NZEC has the authority to enforce the RMA's requirements through civil or criminal proceedings.¹⁸¹

The power to make declarations regarding "[t]he existence or extent of any function, power, right, or duty" under the RMA is a powerful tool.¹⁸² The Environment Court is empowered to engage in fairly "sweeping and intensive environmental policymaking."¹⁸³ When combined with the power to review decisions by regional and territorial authorities, this power of declaration allows the NZEC to review generally the policy statements and policy decisions of the various levels of government, excluding national policy statements.¹⁸⁴ The NZEC has the authority to review other decisions of government authorities, such as decisions on applications for resource consents.¹⁸⁵ The Court also can issue enforcement orders under the RMA,¹⁸⁶ and this ability is far-reaching and powerful.¹⁸⁷

The Chinese maritime courts' authority is seemingly limited by the practical nature of the specialty area. Their authority appears to be limited mainly to reviewing de novo disputes between various parties.¹⁸⁸ These courts appear to handle contract disputes primarily,¹⁸⁹ and do not delve into

¹⁸⁰ See Birdsong 2002, *supra* note 156, at 28, 30-31.

¹⁸¹ See *id.* at 28, 31-32.

¹⁸² RMA § 310(a).

¹⁸³ See Birdsong 2002, *supra* note 156, at 39. Environment Court decisions can be appealed to the High Court, but review by the High Court is limited to points of law. The High Court itself recognizes that it lacks the expertise and background to address the matters of policy that drive environmental decision-making in the Environment Court: "[T]he role of this Court is not to delve into questions of planning and resource management. That is for the expert [Environment Court] to determine based on its knowledge gained from its day-to-day experience and its consideration of district and regional plans and submissions made to it." *Id.* at 38 (citing *Stark v. Auckland Reg'l Council*, [1994] N.Z.R.M.A. 337, 340).

¹⁸⁴ See Birdsong 2002, *supra* note 156, at 29; Birdsong 1998, *supra* note 137, at 19-20. Of the major policy statements, only the national policy statements are unreviewable by the Environment Court. Birdsong 2002, *supra* note 156, at 30.

¹⁸⁵ *Id.* at 30-31. Applications for resource consents are essentially an application for land use, and a resource consent must be obtained for most development and other land use activities. See Ministry for the Environment, *Setting the Scene: Resource Consents*, <http://www.mfe.govt.nz/publications/rma/everyday/consent-submission-jun06/html/page3.html> (last visited April 17, 2008). The NZEC is afforded de novo review of these proceedings. See RMA § 276; see also Birdsong 2002, *supra* note 156, at 30-31.

¹⁸⁶ RMA §§ 314-321. These enforcement orders may, among other things, 1) enjoin a person from acting in a manner that contravenes the RMA or other regulations, rules, or orders; 2) enjoin a person from acting in a manner that is likely to be objectionable or to have an adverse impact on the environment; 3) require a person to act affirmatively to ensure compliance with the RMA or to avoid, remedy, or mitigate adverse effects on the environment; and 4) require a person to compensate others for the reasonable costs associated with avoiding, remedying, or mitigating adverse effects on the environment caused by that person. RMA § 314. There are many other actions the NZEC may require through enforcement actions. See *id.*

¹⁸⁷ Birdsong 2002, *supra* note 156, at 32.

¹⁸⁸ See generally Pew, Jarvis, & Sidel, *supra* note 148, at appendices.

¹⁸⁹ See *id.* at 245-50 (three of the four cases that the authors describe are contract disputes, the fourth is seemingly a tort issue involving financial injury from an anchor severing an underwater electric cable);

policy or constitutional issues to resolve those disputes. The maritime courts have the authority to embark on investigations of cases, including requesting evidence that the court believes is necessary for the determination of the action.¹⁹⁰ The maritime courts also are granted the authority to issue injunctions; this power allows a maritime court to order someone to do or refrain from doing something in order to prevent infringement of the legitimate rights and interests of another.¹⁹¹

Chinese courts of second instance can review lower courts' decisions and administrative actions with the discretion to investigate and conduct a new hearing.¹⁹² Thus, one aspect of the NZEC and the maritime courts that should remain in effect in the Chinese Environment Court is the authority to review cases de novo. Understanding the centralized nature of Chinese political decision-making, the court would not be granted the legal authority to make broad declarations of law.¹⁹³ Furthermore, review cannot be granted over administrative decisions, as such review is precluded by China's Administrative Procedure Law.¹⁹⁴

see generally Detailed Regulations Governing Maritime Litigation Involving Foreigners art. III (promulgated by the Supreme People's Court, Jan. 31, 1986, effective on date of promulgation) LAWINFOCHINA (last visited Oct. 28, 2008) (P.R.C.) [hereinafter Maritime Litigation Involving Foreigners Regulations].

¹⁹⁰ *See* Civil Procedure Law ch. 6 art. 64 (promulgated by the Standing Comm. of the NPC, Oct. 28, 2007, effective Apr. 9, 1991) LAWINFOCHINA (last visited Oct. 28, 2008) (P.R.C.) [hereinafter Civil Procedure Law] ("For the evidence that cannot be obtained by any parties or their litigation representatives because of some realistic reasons or for the evidence that the people's court considers necessary for adjudicating the case, the people's court shall investigate and collect such evidence"); *id.* art. 65 ("The people's court shall have the authority to obtain evidence from any relevant units or individuals, and such units or individuals may not refuse to provide evidence"). Interestingly, the maritime courts also have the authority to arrest vessels, but this authority does not seem to have any importance in a specialized environmental court, as the factories that are polluting seem unlikely to just float away before the cases are decided. *See* Pew, note 148, at 243-44, Appendix D at 266-71.

¹⁹¹ LI & INGRAM, *supra* note 163, at 35.

¹⁹² *See* A Brief Introduction to China, <http://www.lawinfochina.com/Legal/index.asp> (last visited Apr. 17, 2008) ("Cases of second instance are often reviewed de novo as to both law and facts."); Civil Procedure Law ch. 14 art. 152 (establishing that people's courts of second instance should verify the facts "by consulting the file, making necessary investigations, and questioning the parties"). Having the authority to collect evidence is especially important in environmental pollution cases, because the plaintiffs do not often have the financial resources or knowledge to collect and analyze pollution samples.

¹⁹³ The Supreme People's Court may in reality be able to exercise this type of authority regardless of the constitutional provision. Since the NPC and the Standing Committee have not exercised their authority to construe the laws and enforce the Constitution, the Supreme People's Court has been left free to interpret laws even in the absence of a lawsuit. XIAN FA, art. 67; *see also* M. Ulric Killion, *Post-WTO China and Independent Judicial Review*, 26 HOUS. J. INT'L L. 507, 530, 536 (2004).

¹⁹⁴ *See* Administrative Procedure Law ch. II, art. 12 (promulgated by the National People's Congress, Apr. 4, 1989, effective Oct. 1, 1990) LAWINFOCHINA (last visited Oct. 28, 2008) (P.R.C.). This law is also known as the Administrative Litigation Law. The law prohibits courts from reviewing abstract administrative actions which have general applicability, restricting court review to "concrete administrative actions." Song Bing, *Assessing China's System of Judicial Review of Administrative Actions*, 8 CHINA L. REP. 1 (1994-1999).

C. *The NZEC's and the Maritime Courts' Jurisdictional Reach Should Be the Model for a Chinese Environmental Court*

The NZEC is an expert tribunal that primarily addresses public interest questions related to resource management and environmental law.¹⁹⁵ The NZEC exercises jurisdiction over all aspects of the RMA and some aspects of other statutes. It has the same status and powers in exercising its jurisdiction as a District Court,¹⁹⁶ but is “not bound by the usual procedural and evidentiary formalities of other courts of law.”¹⁹⁷ Rather, the Environment Court establishes its own rules of conduct and evidence.¹⁹⁸

China's maritime courts exercise exclusive jurisdiction over any maritime matter.¹⁹⁹ The rules for the maritime courts expressly designate the types of cases that the maritime courts are authorized to handle.²⁰⁰ The maritime courts are permitted to “hear appeals from maritime administrative decisions, fines, and rulings,”²⁰¹ but do not have any jurisdiction over criminal proceedings.²⁰² Interestingly, the maritime courts are granted express jurisdiction to hear cases involving marine pollution, such as discharge of oil or hazardous wastes.²⁰³ This overlap with a potential environmental court would have to be resolved by the NPC upon the creation of a specialized environmental court. The maritime courts have international jurisdiction, in order to hear cases involving foreign parties or elements.²⁰⁴ Each court's territorial jurisdiction is based on geographical location.²⁰⁵

China's specialized environmental courts should assume jurisdiction over questions of natural resource and environmental law. Beyond that critical resemblance to the NZEC, however, the jurisdiction granted to

¹⁹⁵ Daya-Winterbottom, *supra* note 138, at 121.

¹⁹⁶ RMA § 278.

¹⁹⁷ Birdsong 2002, *supra* note 156, at 28; *see also* RMA § 276(2).

¹⁹⁸ Birdsong 1998, *supra* note 137, at 18.

¹⁹⁹ LI & INGRAM, *supra* note 163, at 23.

²⁰⁰ *See* Some Provisions of the Supreme People's Court on the Scope of Cases to be Entertained by Maritime Courts (promulgated by the Supreme People's Court, Sept. 11, 2001, effective Sept. 18, 2001) LAWINFOCHINA (last visited Oct. 28, 2008) (P.R.C.).

²⁰¹ Pew, Jarvis, & Sidel, *supra* note 148, at 243.

²⁰² Decision of the Standing Committee of the National People's Congress on the Establishment of Maritime Courts in Coastal Port Cities § 3 (promulgated by the Standing Comm. of the NPC, Nov. 14, 1984, effective on date of promulgation) LAWINFOCHINA (last visited Oct. 28, 2008) (P.R.C.).

²⁰³ *See* Decision of the Supreme People's Court with Respect to Certain Questions on the Establishment of Maritime Courts § 3(3) (P.R.C.), *translated in* Pew, Jarvis, & Sidel, *supra* note 148, at 258-59 (Appendix B) [hereinafter Supreme People's Court, Maritime Courts]; *see also* Maritime Litigation Involving Foreigners Regulations art. III.

²⁰⁴ LI & INGRAM, *supra* note 163, at 23.

²⁰⁵ *See* Supreme People's Court Decision, Establishment of Maritime Courts § 4 (P.R.C.), *translated in* Pew, Jarvis, & Sidel, *supra* note 148, at 259-60 (Appendix B).

China's environmental courts would have to be modified. While the NZEC has jurisdiction over all cases and controversies arising primarily under one statute, China's environmental laws are not so consolidated.²⁰⁶ Either the Chinese specialized court should have express jurisdiction over the many specific environmental statutes and administrative regulations, or the types of disputes the court could hear should be specifically enumerated, much like China's maritime courts.²⁰⁷

To concentrate all environmental matters in one court, China's environmental courts should be empowered to hear both civil and criminal cases. While the maritime courts are not given authority to hear criminal cases, the NZEC does have such power. Criminal jurisdiction would be necessary for a Chinese Environmental Court because it would force all disputes involving environmental issues to be heard by one court, which would provide consistency in decision-making and also would allow citizens to better understand the court's purview. Specifically, a Chinese Environmental Court should have authority to hear those cases the State brings against Chinese officials for failing to enforce environmental statutes.²⁰⁸ These types of cases are likely to involve complicated environmental statutes, and it would provide the court with the ability to oversee this critical aspect of environmental problems.

D. The Standing Requirements for the NZEC Should be Modified to Follow Chinese Law

The standing requirements for a specialized court in China will necessarily have to be different than the NZEC's very open standing rules. The RMA gives any person standing to sue who participated in a government decision.²⁰⁹ In China, public participation in the creation of

²⁰⁶ See *supra* note 76 for a long list of environmental laws through 2003.

²⁰⁷ The second option would more likely prevent confusion and unnecessary statutory changes when new environmental laws are adopted, because the types of disputes, and not specific statutes, would qualify the cases that the environmental court would hear.

²⁰⁸ As an example of a criminal case brought by the State against government officials, in 2002, "the director and vice director of a county-level EPB in Shanxi Province were sentenced to prison for six and eight months, respectively, for failing to stop a chemical plant from discharging toxic waste into the drinking water system of a local village." ECONOMY, THE RIVER RUNS BLACK, *supra* note 7, at 114-15. Having these suits proceed in an environmentally focused tribunal may provide a greater incentive for officials to follow and enforce environmental laws.

²⁰⁹ Participation merely means commenting on a potential rule, action, or other decision, such as making a submission to a council. See Birdsong 1998, *supra* note 137, at 10. In addition, a person has standing to sue if she or he is affected by the decision or represents some relevant aspect of the public interest. *Id.* Also, any person may request that the NZEC initiate proceedings regarding a criminal offense committed under the RMA. *Id.*

rules and regulations is extremely limited.²¹⁰ The standing requirements in a Chinese specialized environmental court must comply with Chinese law. Only those individual citizens or organizations whose legal rights and interest have been directly affected by another's activities have standing to bring a lawsuit.²¹¹

In sum, a Chinese Environment Court would share much in common with the NZEC. Like the NZEC it would have jurisdiction over all environmental matters and it would have a similar structure to the NZEC. But a specialized court would need to fit within the existing Chinese legal system; it would therefore differ from the NZEC in its standing requirements and it would have more limited authority than the NZEC. Overall, these proposed aspects of a Chinese Environment Court would create a tribunal addressing environmental matters, which are often complicated and contentious. A specialized court would provide a forum for Chinese citizens to redress injuries to their health and environment. While it is daunting to fashion a specialized court for an issue of such importance, it is possible to learn from what has been done already and use that knowledge to create a unique and successful institution.

VI. A SPECIALIZED ENVIRONMENTAL COURT WOULD PROMOTE ENVIRONMENTAL PROTECTION IN CHINA

Specialized courts create experts in a specific field, and allow for consistency and uniformity in decisions. Each of these benefits could help stabilize the Chinese legal system and promote investment in China's economy. One commentator concluded that the use of a specialized and expert tribunal increases public confidence in that court's determinations; improves efficiency of environmental litigation, particularly because "[r]elatively less time (and expense) is necessary to reliably inform the Court about the issues it is adjudicating"; and contributes to environmentally sound decision-making.²¹² Another scholar found that specialization increases expertise, which is beneficial because expertise provides more ability to

²¹⁰ See generally Margaret Kim & Robert E. Jones, Commentary, *Public Participation with Chinese Characteristics*, in CHINA ENVIRONMENT SERIES 2006, at 98-102, available at http://www.ecolinx.org/press/CEF_Commentaries%201-4.pdf.

²¹¹ Yuhong Zhao, *supra* note 52, at 176. To establish standing, certain conditions must be met: "the plaintiff must be a citizen, legal person, or organization having a direct interest with the case; there must be a specific defendant; there must be a concrete claim, a factual basis, and a cause for the lawsuit; and, the lawsuit must be within the scope and jurisdiction of the court." Civil Procedure Law ch. 12, § 1, art. 108.

²¹² Birdsong 1998, *supra* note 137, at 55.

understand and interpret complex legislation.²¹³ Specialization may also improve consistency, which allows for greater predictability²¹⁴ and has the potential to enhance efficiency.²¹⁵ Moreover, specialization may have a positive impact on public opinion.²¹⁶ Expertise is improved in a specialized court both through initial appointments and continued education. The creation of a specialized unit makes it more feasible to hire staff composed at least partly of specialists, and expertise continues to develop as a result of repetition in subject matter.²¹⁷

The positive impact on public opinion and greater predictability both offer the Chinese government a reason to adopt a specialized court. Both of these effects could draw further economic investment from foreign corporations into the country.²¹⁸ More predictable and effective enforcement of existing environmental laws also has the potential to increase the appeal of using clean technology.²¹⁹

Having a special litigation forum where Chinese citizens can voice their concerns might ultimately improve the environmental protection system overall. One scholar noted three benefits that increased litigation

²¹³ STEPHEN H. LEGOMSKY, *SPECIALIZED JUSTICE* 8 (1990). One article suggests that "environmental education and related technical training for officialdom and the judiciary" is one measure that could assist in enhancing the effectiveness of environmental law in China. Alford & Shen, *supra* note 61, at 419.

²¹⁴ LEGOMSKY, *supra* note 213, at 12. "[E]xpertise breeds consistency within a specialized field." *Id.*

²¹⁵ *Id.* at 16-17.

²¹⁶ *Id.* at 19.

²¹⁷ *Id.* at 8.

²¹⁸ If citizens believe the government is attempting to remedy environmental problems and feel they have a place to voice concerns, then social instability is less likely. Studies suggest that social instability and volatility affect the amount of foreign direct investment in a country. See Ivar Kolstad & Espen Villanger, *How Does Social Development Affect FDI and Domestic Investment?*, p. 10, Chr. Michelsen Institute Development Studies and Human Rights (2004), available at www.cmi.no/publications/file/?1756=how-does-social-development-affect-fdi-and; Joshua Aizenman & Nancy Marion, *Volatility, Investment, and Disappointment Aversion*, p. 15, Working Paper 5386, National Bureau of Economic Research Working Paper Series (1995); AYO BRUNETTI & BEATRICE WEDER, *INVESTMENT AND INSTITUTIONAL INSECURITY: A COMPARATIVE STUDY OF DIFFERENT UNCERTAINTY MEASURES* 11 (The World Bank & Int'l Fin. Corp. 1997). But see Oladipo Busari & Lloyd Amaghionyeodiwe, *Private Investment and Political Instability: Evidence from Nigeria*, *INT'L J. OF APPLIED ECON. & QUANTITATIVE STUD.*, Vol. 4-2, 45, 64 (2007). When people feel less secure about their health and property, this instability spawns uncertainty; uncertainty reduces investment. See AYO BRUNETTI & BEATRICE WEDER, *INVESTMENT AND INSTITUTIONAL INSECURITY: A COMPARATIVE STUDY OF DIFFERENT UNCERTAINTY MEASURES* 4 (The World Bank & Int'l Fin. Corp. 1997) ("The more common violence in the political process, the less secure are people and property. Because this instability spawns uncertainty, it reduces investment according to the theoretical considerations").

²¹⁹ As it currently stands, multinational companies believe that using cleaner technology to comply with environmental laws will allow cheaper, dirtier plants to undercut the complying companies' profits; thus, many multinational companies do not use the same cleaner technologies in China that they use in other countries. See ECONOMY, *THE RIVER RUNS BLACK*, *supra* note 7, at 200. Most companies have cleaner technology available; if China wants to benefit from better technology, there will have to be predictability in enforcement. See *id.* at 198-99.

could offer China: improved environmental law-making,²²⁰ increased public awareness,²²¹ and pressure on polluting industries.²²² While these positive impacts of litigation have the potential to occur in the current Chinese legal system, these impacts would likely be amplified by the existence of an environmental court. A specialized tribunal will likely increase the amount of environmental litigation. This will occur because public awareness about environmental litigation will be raised by media attention to this new court and because citizens will likely feel that they will have more success in a court that specializes in understanding environmental laws and science. Ideally, the existence of a special forum for bringing environmental disputes should raise citizen awareness about environmental problems and about litigation as a dispute resolution tool.

VII. CONCLUSION

China has dealt itself a bad environmental hand. To continue playing it is a losing proposition, with assured catastrophic consequences to the Chinese people. The struggle to establish the rule of law as the final arbiter of environmental conflicts must begin with a credible legal process that offers participants and the public an impartial, efficient, and enforceable result. Without question, many changes must occur within the legal system in order to accomplish this goal;²²³ however, these barriers should not delay the establishment of a specialized environmental court. The success of the NZEC provides a model that can be modified to address the particular sensitivities of China's culture and political system. China must alter its

²²⁰ Litigation has the potential to improve environmental law-making because litigation more clearly defines the roles, rights, and responsibilities of parties by interpreting legislation. Yuhong Zhao, *supra* note 52, at 174. Legislation is often vague and ambiguous; but when judges understand the laws, litigation allows courts to detect the gaps, loopholes, and other contradictions that exist within those laws. *Id.* The Standing Committee or the State Council can alter laws and regulations if a court interprets them in unexpected ways. *Id.*

²²¹ Litigation creates ripple effects that raise public awareness. *Id.* When plaintiffs succeed in their challenges of polluting industries or destructive companies, these cases are reported in the media. This allows others to "become aware of their environmental rights" and encourages others to take legal action to assert their rights. *Id.* at 174-75. One prominent environmental advocate—the head of the Legal Aid Centre for Pollution Victims in Beijing—sees environmental litigation as "the most effective way to disseminate the law and educate the public." *Id.* at 175.

²²² Litigation coerces polluting industries to pay attention to their environmental effects; perhaps economic pressure is the most effective tool in combating the destruction that economic growth has wrought. Litigation allows victims to shift the cost of pollution to the polluters. Even if every case is not successful, litigation will send a "clear and strong warning to other potential offenders that pollution prevention needs to be taken seriously." Yuhong Zhao, *supra* note 52, at 175.

²²³ See generally Christine J. Lee, "Pollute First, Control Later" *No More: Combating Environmental Degradation in China Through An Approach Based in Public Interest Litigation and Public Participation*, 17 PAC. RIM. L. & POL'Y J. 795 (2008).

course in order to protect the country's important natural resources and to make the country a healthy place for its citizens. Adopting a specialized court will stimulate the country's potentially powerful environmental regulatory framework. The specific aspects of this specialized court could be developed through modification of China's maritime courts and the NZEC.

Providing a new forum for environmental disputes will focus the country's energy, which has long been used for economic growth and development, to create innovative solutions to China's environmental problems. In addition, an environmental court may inspire world leaders to assist China in solving the country's environmental difficulties; other countries and multi-national corporations could provide technology and knowledge to support China's movement towards environmental sustainability. China must provide some signal to others that it is willing and able to correct the country's environmental devastation; creating a special court could be just the indication necessary. It is important for China to find a balance between economic viability and environmental sustainability, and creating an environment court is one step on the path to this equilibrium.