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THE CHALLENGE OF CHINESE ENVIRONMENTAL LAW

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The enormous environmental problems that have
accompanied China’s rapid development are readily
visible to anyone who has lived or traveled in China.
This damage has occurred despite aggressive efforts
by the Chinese government to adopt environmental
protection laws. One might assume that a country
governed by a communist dictatorship would have no
trouble enforcing its environmental laws. But the
environmental situation in China is far more
complicated than that, as I discovered while teaching
environmental law as a J. William Fulbright scholar at
the China University of Political Science and Law
(CUPL) in Beijing.
China’s Environmental Problems

Living in Beijing during the last five months, I have rarely seen blue sky because the city is plagued with chronic air pollution that often makes it difficult to tell whether or not it is cloudy. While breathtaking new architectural wonders spring up around the city, tap water remains unsafe to drink even in luxury hotels. Last year the World Health Organization (WHO) estimated that air pollution kills 656,000 Chinese annually, a third of all deaths worldwide from air pollution. WHO also estimated that polluted drinking water kills nearly 100,000 Chinese every year. While well-off residents of Beijing have access to every creature comfort in the world, the U.S. State Department still considers it to be a hardship post largely due to its pollution problems.

The Chinese government has vowed to control pollution in order to host a “Green Olympics.” Yet the problem is so enormous that the Chinese are being forced to resort to drastic, temporary measures during the Olympics, such as shutting down factories and construction sites and banning private cars from driving. When construction of the Olympic Village was completed earlier this year, the government proudly announced that athletes staying there would have access to safe drinking water, something that Americans already take for granted, but for which ordinary Chinese will have to wait years.

China’s Environmental Laws

In 1979, when it launched the economic reforms that produced China’s rapid development, the National People’s Congress (NPC) adopted the country’s first national Environmental Protection Law. Five years later it enacted the Law on Water Pollution Prevention and Control and in 1987 it passed the Law on the Prevention and Control of Atmospheric Pollution. The NPC replaced China’s basic Environmental Protection Law with new legislation in 1989 and during the 1990s it adopted legislation to regulate solid waste, to control noise pollution, and to conserve energy. In 2000 China strengthened its controls on water pollution and in 2002 it adopted an Environmental Impact Assessment Law. In addition to these environmental laws, China has more than a dozen natural resource protection laws, including a Renewable Energy Law, Water Law, Forest Law, Grassland Law, and Mineral Resources Law.

The NPC meets each March to adopt legislation and environmental laws, which are now a prominent part of each year’s legislative package. In 2008 the NPC adopted a new water pollution control law and will soon require a national cap and trade program for controlling emissions of sulfur dioxide. Chinese officials have carefully studied the environmental laws of other countries and have readily borrowed from them. After initially following U.S. models of environmental law, the Chinese government has become more attracted to European approaches that place more emphasis on the precautionary principle. This is reflected in China’s Law on the Promotion of Clean Production, its “circular economy” producer responsibility law, and legislation requiring pre-market testing of chemicals similar to the European Union’s far-reaching REACH program.

Obstacles to Implementing and Enforcing China’s Environmental Laws

China’s State Council, the branch of government responsible for issuing regulations, has promulgated more than fifty administrative regulations dealing with environmental protection. It reports that as of spring 2008 there were more than 660 local and sectoral regulations and over 800 national standards related to environmental and resource protection. Why have these laws and regulations not been more successful in controlling China’s burgeoning environmental problems? Several factors have contributed to this problem.

The initial generation of Chinese environmental laws largely consisted of statements of general principles that were ambiguous and difficult to enforce. China’s economic boom roared forward faster than these laws could be implemented and enforced. Enforcement concerns were divorced from the process of lawmaking. At a conference on improving China’s environmental laws, I witnessed one of the NPC organizers rejecting a suggestion to include
enforcement in future conferences by stating that the job of the NPC is to write the laws, not to enforce them.

Even after national environmental legislation was strengthened, it has proven difficult to enforce because of the highly decentralized nature of China's government. Most enforcement is the responsibility of local authorities who often fear that environmental regulation will disadvantage local firms. China may serve as a testament to the validity of the "race to the bottom" hypothesis that was a factor in centralizing environmental regulation in the United States. Some local officials have even encouraged companies to pay small emissions charges rather than operate pollution control equipment because the charges provide revenue for local governments.

Penalties for environmental violations in China are still so low that it often is far more economical to pay the small penalties rather than to comply with the law. Fines for water pollution violations were long capped at 100,000 Renminbi (RMB) ($14,500), a ceiling recently raised by new legislation. However, efforts to persuade the Chinese government to adopt the U.S. Environmental Protection Agency's (EPA) policy of ensuring that fines at least recoup the economic benefit of non-compliance are as yet unsuccessful.

China's national Ministry of Environmental Protection (MEP) has few direct enforcement authorities and a very small staff. In July 2008, MEP was allowed to expand from 250 to 300 employees. By contrast, EPA has 17,000 employees for a country with less than one-fourth the population of China. MEP has many contract employees and is now establishing regional offices, but it actually operates more like the U.S. Council on Environmental Quality (CEQ) than EPA. Like CEQ, it must rely almost entirely on its ability to persuade other, more powerful agencies and officials to act. To be sure, MEP's predecessor, the State Environmental Protection Agency (SEPA), occasionally did make waves by launching "environmental storms." In 2005 it suspended approval for twenty-two energy projects and in 2007 it suspended eighty-two steel and chemical projects for failing to comply with environmental assessment requirements. But these "storms" were temporary and undertaken in part to cool down an overheating economy.

Chinese environmental officials lack much of the supporting infrastructure that helps to ensure implementation and enforcement of U.S. environmental laws. While there have been many public protests concerning environmental problems, the general public in China is not well educated about environmental concerns. The number of non-governmental organizations (NGOs) focusing on the environment is growing, but they lack the resources and influence of environmental NGOs in the United States. NGOs may operate only with the permission of the Chinese government and can be shut down at any time for no reason. Chinese tax laws do not encourage donations to NGOs, and government censorship of the media can make it difficult for NGOs to publicize problems. In June 2008, a Hong Kong-based NGO called Civic Exchange issued a report on the health consequences of pollution in the Pearl River Delta. The report was headline news on CNN International but was not mentioned in the state-run Chinese media. NGOs lack the legal tools they have in the United States because there are no express provisions for citizen suits to enforce the Chinese environmental laws. China also lacks an independent judiciary and a tradition of respect for the rule of law.

The result is described in a frank "White Paper" on "Promoting the Rule of Law" that the State Council issued in February 2008, which stated: "in some regions and departments, laws are not observed, or strictly enforced, violators are not brought to justice; local protectionism, departmental protectionism and difficulties in law enforcement occur from time to time; some government functionaries take bribes and bend the law, abuse their power when executing the law, abuse their authority to override the law, and substitute their words for the law . . . ." (State Council, Promoting the Rule of Law (Feb. 28, 2008)).

Efforts to Improve Chinese Environmental Law

The good news is that the Chinese government now is moving aggressively on many fronts to overcome the obstacles to implementation and enforcement of its
environmental laws. This movement was spurred in part by embarrassing incidents including a major benzene spill in the Songhua River in November 2005. The spill, which local officials initially sought to conceal, created an international incident with Russia and forced a four-day cutoff of water supplies to Harbin, a city of nearly 5 million people. The Chinese government responded by imposing national environmental reporting requirements and encouraging greater openness about environmental problems. Further impetus toward reforming China’s environmental laws was provided when it was revealed that the country badly missed the first-year goals for reducing pollution that are contained in its 11th Five-Year Plan (2006-2010).

Chinese media, including the English-language China Daily, now report aggressively about environmental problems and the importance of devoting more resources to combating them. The national government has been remarkably tolerant of environmental protests by the public, including flash mobs that helped block the siting of a chemical plant in Xiamen. However, local authorities arrested and imprisoned Wu Lihong, an environmental activist who protested local officials’ failure to control pollution that caused a massive algae bloom in Lake Taihu.

Some Chinese NGOs are aggressively pursuing environmental issues. Wang Canfa’s Center for Legal Assistance to Pollution Victims (CLAVP) operates a hotline that fields environmental complaints from ordinary citizens. CLAVP frequently goes to court to seek redress for these complaints even in the absence of clear legal authority for citizen suits. While many courts rebuff the group, it has won some important victories, much like the pioneering lawyers for U.S. environmental groups in the late 1960s. Ma Jun’s Institute of Public Policy focuses on publicizing environmental violations, which the Chinese media eagerly report when the sources are multinational corporations.

In March 2008 SEPA was upgraded to full ministry status with the creation of a Ministry of Environmental Protection (MEP). While many details of MEP’s new powers remain to be worked out, the Chinese government has pledged to increase its authority at the expense of competing agencies like the powerful National Development and Reform Commission (NDRC). For now the effect has been largely just a change of name with MEP still trying to figure out its functions, personnel, and other issues, questions that are not clearly answered by any underlying law.

MEP has some progress to report. In June 2008 its Report on the State of the Environment in China disclosed that emissions of sulfur dioxide declined by 4.7 percent in China in 2007 and emissions of water pollutants declined by 3.2 percent. The percentage of coal-fired powerplants using technology to reduce their sulphur emissions increased to 48 percent from 12 percent two years before. During the same period the percentage of cities with wastewater treatment increased from 52 percent to 60 percent. Yet, MEP conceded that pollution of the country’s major rivers—the Yangtze, Yellow, and Huaihe rivers—is serious and not improving, and that lake pollution and pollution in rural areas also remains severe.

MEP officials have been encouraging greater participation by the public on environmental issues. A new Open Information Law, which became effective on May 1, seeks to provide for public access to information possessed by government agencies. The law is virtually identical to the U.S. Freedom of Information Act, but for an exception for information whose release might undermine “social stability.” In May of this year I spoke at a conference in Shanghai where MEP officials explained to environmental NGOs and environmental journalists how to use the law. Representatives of these groups complained that it heretofore has been difficult even to obtain copies of environmental impact assessments, something that hopefully will change as the new law is implemented. Sometimes there is less than meets the eye in new environmental legislation. China’s new water pollution law supposedly authorizes class actions, but it also appears to bars lawsuits over problems that were known by the plaintiffs.

Chinese law has not yet developed to the point where there is a substantial private bar specializing in environmental law, aside from lawyers working on
Clean Development Mechanism of the Kyoto Protocol projects on behalf of foreign investors. Yet as Chinese environmental law matures, the demand for environmental lawyers should increase dramatically. The Chinese Ministry of Education is now requiring that all law schools in China teach environmental law, which may temporarily strain the supply of qualified professors. The environmental law students I taught were truly extraordinary and if they are at all representative of the future generation, there is room for considerable optimism. Environmental education also is expanding outside of law schools. Groups like Shanghai Roots & Shoots are working on environmental education in Chinese primary schools and Yao Ming, the country’s most revered hero, now appears on billboards urging Chinese to eschew shark fin soup to protect endangered species.

Conclusion

China has come a long way since the days of Chairman Mao’s campaign to “subdue nature.” While Chinese environmental law is now moving in a positive direction, it will take considerable time before environmental conditions in China improve substantially. The question is how much damage will be done in the interim, a question that increasingly affects the entire planet. Transboundary pollution from China already is a serious problem—nearly one-third of all mercury in the western United States originates in Chinese coal-fired powerplants. Last year China became the largest source of greenhouse gas (GHG) emissions in the world, surpassing the United States by a whopping 14 percent. When the nations of the world meet in Copenhagen next year to negotiate a successor to the Kyoto Protocol, it will be absolutely critical for China to commit to reducing its GHG emissions, even though on a per capita basis they are much lower than those of the United States. While many believe that it will be impossible to get the Chinese to make such a commitment, China’s emissions are now so large that they will have to do so to avoid potentially catastrophic consequences for their own environment.

Environmental law in China today bears some similarities to environmental law in the United States in the early 1970s when its basic infrastructure was being erected. In both countries environmental policy has evolved from ad hoc efforts to relocate polluting industries to emphasis on end-of-the-pipe pollution controls, followed by efforts to encourage process changes to achieve source reduction. To secure truly dramatic changes in environmental conditions, China will have to integrate environmental concerns more closely into its energy, land use, transportation, housing, and tax policies that affect environmental conditions far more than environmental law and regulation. China has adopted ambitious plans to improve energy efficiency, reduce pollution, and produce more energy from renewable sources. But it also has demonstrated that it is much easier to adopt plans and environmental laws than it is to develop the supporting institutions—such as strong NGOs, effective administrative agencies, an independent judiciary, an environmental bar, and an informed public—that are necessary to ensure their effective implementation and enforcement.

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The International Environmental Law Committee welcomes the participation of members interested in preparing this newsletter. If you would like to lend a hand by writing, editing, or identifying authors or issues, please contact the editor, Brett Grosko, at Brett.Grosko@usdoj.gov.