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**ENVIRONMENTAL LAW IN CHINA BETWEEN MODERNIZATION AND LEGAL  
TRANSPLANTS: THE ROLE OF INTERNATIONAL LEGAL COOPERATION**

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## Abstracts

La ricerca si propone di ricostruire i più recenti sviluppi nel regime giuridico cinese di tutela ambientale, esaminando in particolare l'influenza sempre più importante esercitata dalla cooperazione giuridica internazionale. A tal fine, si esamineranno i principali programmi di cooperazione, illustrandone gli obiettivi e l'impatto sulla formulazione e sull'implementazione della legislazione in materia ambientale nella Repubblica Popolare Cinese. L'indagine procederà di pari passo con un'analisi dei principali trapianti giuridici promossi dai programmi di cooperazione internazionale e delle criticità (di ordine linguistico, culturale e giuridico) incontrate da tali programmi. L'indagine si soffermerà quindi sulle iniziative implementate da numerose organizzazioni internazionali al fine di assicurare l'accesso alla giustizia per le vittime di danni ambientali e di promuovere l'adozione di strumenti privatistici per la tutela dell'ambiente. Infine, si trarranno le conclusioni dell'analisi condotta, sottolineando l'impatto dei programmi di cooperazione esaminati sullo sviluppo del diritto dell'ambiente in Cina e prospettando le sfide future.

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The objective of this research is to assess the role which international legal cooperation initiatives have played in the development of environmental law in the People's Republic of China. To this end, the most significant cooperation programmes shall be examined, outlining their targets and scope and their impact on the drafting and implementation of Chinese environmental law. The analysis shall proceed in lockstep with an inquiry on the legal transplants which may have been channeled through these cooperation projects and on the tensions caused by the introduction of foreign models whenever insufficient attention was paid to the pitfalls of legal translation or to the existing legal and institutional framework. I will then try to show how, over the last decade, international actors have relied on legal cooperation projects to ensure access to justice for environmental tort victims and to carve out a bigger role for private enforcement mechanisms. Finally, I will draw some conclusions as regards the effectiveness of legal cooperation as a tool to influence policy and to channel foreign legal models into the Chinese legal system and I will examine some of the challenges which lay ahead.

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# Chapter 1. Legal transplants and international legal cooperation in the People’s Republic of China

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## 1.1. INTRODUCTORY REMARKS

The earliest modern<sup>1</sup> examples of legal cooperation projects between the PRC and the West were set up in the late 1970s by U.S. governmental bodies such as the Environmental Protection Authority and the U.S. Agency for International Development and by organizations such as the Ford Foundation, the American Bar Association, the Asia Foundation, the National Committee on United States China Relations (NCUSCR) and the Hopkins-Nanjing Center for Chinese and American Studies<sup>2</sup>. Their goal was to promote the establishment of a “*favorable legal-institutional and legal cultural environment*” in a country where the United States had already significant economic interests and where it therefore sought “*to promote markets, democracy and the rule of law*”<sup>3</sup> and thus make China “safe for capitalism” (to paraphrase Woodrow Wilson’s famous appeal<sup>4</sup>). Legal

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1 Scientific cooperation between China and the West has a long history. One of the earliest “capacity-building initiatives” was probably the educational mission sent to the United States under the T’ung-chih Emperor (1862 – 1874). In 1871, at the insistence of a group of reform-minded intellectuals close to the imperial court, 120 teenage boys were sent in groups for fifteen years of education. These Chinese students had a chance to study a wide variety of subjects, ranging from engineering to law and social sciences at some of the most prestigious universities and colleges in the United States. However, the educational mission was abruptly recalled after only a few years due to the cooling of relations between United States and Qing China (see MESKILL J. (edited by) *An Introduction to Chinese Civilization*, Columbia University Press, New York, 1973, p. 218). As we shall see, international cooperation has come a long way since these early tentative steps.

2 On the work of the Hopkins - Nanjing Center and of the NCUSCR and its impact on Chinese civil society, see WHEELER N., *The role of American NGOs in China’s modernization, invited influence*, Routledge, 2013.

3 DELISLE J., “Lex Americana? United States Legal Assistance, American Legal Models and Legal Change in Post- Communist World and Beyond”, *University of Pennsylvania Journal of International Economic Law*, Vol 20, No. 2, 1999, p. 183.

4 In his address to the U.S. Congress regarding the declaration of war upon Germany and Austria-Hungary on 2<sup>nd</sup> April 1917, President Woodrow Wilson stated that “*the world must be made safe for democracy*”.

cooperation programmes allowed the U.S. to affect public policy and academic debate in China without compromising its commercial interests or its relationship with the government of the PRC. The goal of these cooperation projects, i.e. the promotion of the “rule of law”, was sufficiently ambiguous to gain the endorsement of human rights groups, business interests and even of the Chinese Communist Party. However, while all parties involved appeared to favour the establishment of the “rule of law” in China, it soon became evident that there was no agreement as to what they meant as “rule of law”<sup>5</sup>. Indeed, while human rights advocates interpreted the rule of law as a bulwark against the government’s arbitrary powers and the best guarantee for the rights of the individuals, business groups saw in it the recognition of the rights of private companies and foreign investors<sup>6</sup>. Moreover, some of the advocates of these cooperation programmes believed that the promotion of legal and judicial reforms will ultimately (but inevitably) result in the enhancement of human rights protection in China<sup>7</sup>. While this finalistic argument has

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5 On the difficulty of defining the notion of “rule of law”, Professor Ajani has observed that “*la nozione può essere intesa come un poliedro che esprime i più diversi significati a seconda del punto di vista dell’osservatore*”, AJANI G., “La Rule of Law in Cina”, *Mondo cinese*, Issue 126, 2006, p. 18. In this essay, Professor Ajani also examined some of the defining traits of China’s “long march towards the rule of law” (to borrow Peerenboom’s metaphor), such as the absence of a direct causal link between the promotion of the rule of law and the country’s economic performance (see AJANI G., *Ibid.*; as well as OHNESORGE J.K.M., “Developing development theory: law and development orthodoxies and the Northeast Asian experience”, *University of Pennsylvania Journal of International Economic Law*, Vol. 28, Issue 2., 2007, pp. 219- 308). It is worth pointing out that legal doctrine generally distinguishes between formal and substantive rule of law (a distinction which in many ways reflects the traditional distinction between formal and substantive justice): see HIPPER A., *Beyond the rethorics of compliance: judicial reform in Romania*, Springer, 2015, p. 26; and ELLIS M., “Toward a common ground definition of the rule of law incorporating substantive principles of justice”, *University of Pittsburgh Law Review*, Vol. 72, 2012, pp. 191 – 215. “*The rule of law, revived in the earlier Washington consensus orthodoxy, is still the unifying rhetorical concept (‘the sine qua non of development’ [...])*”, OHNESORGE J.K.M., *Op.cit.*, pp. 255 – 256.

6 STEPHENSON M., “A Trojan horse in China?”, in CAROTHERS T. (edited by), *Promoting the Rule of Law Abroad: in Search of Knowledge*, Carnegie Endowment for International Peace, Washington DC, 2006, pp. 191 – 215. On the ambiguity of the notion of rule of law and the role which this ambiguity played in the field of international legal cooperation, see also NOVARETTI S., *Le ragioni del pubblico. Le “azioni nel pubblico interesse” in Cina*, Edizioni Scientifiche Italiane, Naples 2012, pp. 112 – 114. In particular, the U.S. – China Business Council and the American business community lobbied Chinese authorities to promote the adoption of foreign investment regime disciplined by transparent rules and of a more favourable taxation system (see DELISLE J., *Op.cit.*, p. 220). “*Multinationals headquartered in the West have a strong interest in China developing a legal system that can protect their investments, and this concern may be the most important reason why Western governments are keen to contribute to this aspect of China’s development*”, WOODMAN S., “Bilateral aid to improve human rights”, *China Perspectives*, 2004, [last accessed on 22<sup>nd</sup> August 2016] available at: <https://chinaperspectives.revues.org/788>.

7 WOODMAN S., *Op.cit.* U.S. scholars have argued that the “export of legal education” through international cooperation programmes might have a positive impact on the development of democracy

garnered some support over the years<sup>8</sup>, there is as yet scant evidence of any direct correlation between the development of the “rule of law” and the advancement of human rights protection.

If the U.S. State Department has played on the ambiguity of the notion of rule of law<sup>9</sup> to persuade the PRC to reform and open itself to foreign influence and to the transplant of foreign legal models, Chinese authorities have been just as eager to use legal cooperation programmes to acquire much-needed legal and technical expertise, without however relinquishing their tight control over the domestic debate on politically sensitive issues. This is the background over which every legal cooperation project implemented over the last three decades by any foreign (governmental or non-governmental) actor was played out (see *infra*, chapters four and five).

In the 1980s and the early 1990s international legal cooperation involved U.S. support to the drafting of anti-corruption legislation<sup>10</sup>, of the 1986 Bankruptcy Law<sup>11</sup>, of the Equity Joint Ventures Law<sup>12</sup>, of antitrust and labour legislation and securities regulation<sup>13</sup>. Cooperation programmes also provided significant support to the development of China’s fledgling intellectual property regime and generally (but by no means always) tended to advocate the adoption of U.S. legal models<sup>14</sup>. However, given the importance attributed to IP rights protection by the business community, “*in the 1990s, the United States relied on*

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and the rule of law in developing countries (see e.g., BRAND R.A., “Cooperation in legal education and legal reform”, *University of Pittsburgh Law Review*, Vol. 74, 2013, pp. 652 – 659). However, the evidence is inconclusive as regards the effectiveness of these cooperation programmes or the impact of foreign-trained lawyers on legal reform in their home countries.

8 See e.g., BRAND R.A., Op.cit., pp. 652 – 659.

9 “*The ambiguity of the term is a disadvantage in academic discourse. However, the same ambiguity is an advantage in political discourse, which may go a long way to explaining why rule of law is used as the catchphrase for the China legal assistance projects. One academic China law expert put the point bluntly: ‘Rule of Law’ has no meaning. Everyone uses the phrase because everyone can get behind it and it might make it easier to get funding’.* Another scholar makes a similar observation on how the phrase is used in the policy discourse: ‘*The rule of law means whatever one wants it to mean. It’s an empty vessel that everyone can fill up with their own vision’.* This ambiguity serves a very clear political purpose, stated explicitly by one State Department official: ‘*the beauty of the rule of law is that it’s neutral. No one – the human rights community, the business community, the Chinese leadership – objects to it’*”, STEPHENSON M., Op.cit., p. 196.

10 DELISLE J., Op.cit., p. 217.

11 DELISLE J., Op.cit., p. 221; CHANG. T., “The making of the Chinese Bankruptcy Law. A study in the Chinese legislation process”, *Harvard International Law Journal*, Vol. 28, Issue 2, Spring 1987, pp. 332 - 372.

12 CAMPBELL POTTER B., “China’s Equity Joint Venture Law: a standing invitation to the west for foreign investment?”, *University of Pennsylvania Journal of International Business Law*, Vol. 14, 1993, pp. 1 – 36. See also DELISLE J., Op.cit., p. 220;

13 DELISLE J., Op.cit., p. 221. See also NOVARETTI S., Op.cit., p. 114.

14 DELISLE J., Op.cit., p. 224.

*pressure, more than assistance*<sup>15</sup> in order to influence China's IP regime. U.S. legal models influenced Chinese lawmaking also through the United Nations Development Programme, which provided assistance in the drafting of legislation by advocating the adoption of U.S. and common law models and legal theories<sup>16</sup>. Moreover, in the early 1980s, private institutions such as the Ford Foundation set up sponsorship and grant schemes which allowed hundreds of Chinese law students to study abroad (mostly in the United States)<sup>17</sup> and provided funding and technical assistance to dozens of Chinese universities, in an attempt to “convey the perceived virtues of U.S. law schools and the norms and modes of the legal thinking taught there”<sup>18</sup>.

The American example was promptly followed by governmental and private bodies from Canada, Australia, Japan<sup>19</sup> and Europe, which in turn set up their own training programmes and began to fund international conferences, research projects and grant schemes<sup>20</sup>. However, at least throughout the 1980s and the early 1990s, these attempts were mostly prompted by the (somewhat parochial) desire to promote one's own legal and cultural traditions and to cultivate a relationship with what was potentially the largest market in the world, rather than by any coherent foreign policy objective.

Sophia Woodman has identified two main types of legal cooperation programmes: the

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15 DELISLE J., *Op.cit.*, p. 224.

16 Jacques DeLisle cites, by way of example, “a UNDP-sponsored program for China that included a large number of Americans in its limited cadre of foreign consultants and trainers. Even within the frame work that insisted, and to a significant degree acted, on the premise that laws are not readily ‘transplanted’, the consultants and trainers relied heavily on American law materials as references and sources of comparative insight when they sought to equip Chinese recipients with the analytical tools necessary to draft legislation appropriate to local circumstances”, DELISLE J., *Op.cit.*, p. 203.

17 The flagship programme of the Ford Foundation was the U.S. – China Committee for Legal Education Exchange. See McCUTCHEON A., “Contributing to legal reform in China”, p. 166, in McCLYMONT M., GOLUB S. (edited by), *Many Roads to Justice*, The Ford Foundation, 2000, [last accessed on 11<sup>th</sup> August 2016] available at: <http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/ManyRoadstoJustice.pdf>.

18 DELISLE J., *Op.cit.*, pp. 225 - 226.

19 Mostly through the Japan International Cooperation Agency (“JICA”). The website of JICA [last accessed on 12<sup>th</sup> December 2015] is available at: <https://www.jica.go.jp/english/>.

20 WOODMAN S., *Op.cit.* The funding provided by the U.S. government and by the Ford Foundation for legal cooperation projects with China and the developing world in general contributed to the development of the “law and development movement”. For an analysis of the shortcomings of this movement, which for a time held sway in the United States and had a profound influence on international legal cooperation projects with the developing world, see *infra* (Chapter 6), and MERRYMAN J.H., “Comparative law and social change: on the origins, style, decline & revival of the law and development movement”, *The American Journal of Comparative Law*, Vol. 25, Issue 3, Summer 1977, pp. 457 – 491; and ZAGARIS B., “Law and development or comparative law and social change – The application of old concepts in the Commonwealth Caribbean”, *University of Miami Inter-American Law Review*, 1988, Vol. 19, p. 553 – 554.



projects which focused on the promotion of human rights law and those aimed at presenting Western legal models and practice as examples which China should follow<sup>21</sup>. In this latter category fall the cooperation programmes implemented by France<sup>22</sup>, Germany<sup>23</sup>, the United Kingdom<sup>24</sup>, the Netherlands<sup>25</sup>, Canada, Australia and Italy<sup>26</sup>, which aimed at improving the professionalism of Chinese lawyers and judges and focused on economic governance and on financial, commercial and administrative law reform<sup>27</sup>. While some of these countries did provide funding to projects on criminal law reform and human rights protection, these efforts were usually a small part of broader “rule of law” programmes. On the other hand, the cooperation projects implemented by the Scandinavian countries,

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- 21 WOODMAN S., “Bilateral aid to improve human rights”, *China Perspectives* 2004, [last accessed on 22<sup>nd</sup> August 2016] available at: <https://chinaperspectives.revues.org/788>. See also WOODMAN S., “Driving without a map: implementing legal projects in China aimed at improving human rights”, in BELL D.A., *Ethics in action, the ethical challenges of international human rights nongovernmental organizations*, Cambridge University Press, 2009, pp. 132 – 150.
- 22 Over the last twenty years the French government and the Université Paris II – Panthéon Assas, in cooperation with the Chinese government and the China Scholarship Council have offered scholarships and the opportunity to study French and EU law to Chinese students. More information on this programme is available at: <http://www.ambafrance-cn.org/-Tour-d-horizon-de-la-cooperation-juridique-franco-chinoise-> [last accessed on 13<sup>th</sup> August 2016]. Moreover, in 2001 the Conseil Supérieur du Notariat and the Chinese Notaries’ Association established the *Centre sino-français de formation et d’échanges notariaux et juridiques* in Shanghai, which has allowed hundreds of Chinese notaries and legal professionals to study in France (the website of the project, last accessed on 13<sup>th</sup> August 2016, is available at: [http://www.cnfr-notaire.org/aboutus\\_f.asp](http://www.cnfr-notaire.org/aboutus_f.asp)).
- 23 The most active player was the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH. Their website [last accessed on 13<sup>th</sup> August 2016] is available at: <https://www.giz.de/de/weltweit/377.html>.
- 24 The United Kingdom has promoted a series of projects over the years to improve the professionalism of Chinese judges and lawyers, and to advocate the establishment of land dispute tribunals in rural China, the reform of Chinese administrative and labour legislation and to promote freedom of the media. See Great Britain China Centre, *Rule of law reform in China*, [last accessed on 8<sup>th</sup> September 2016] available at: <http://www.gbcc.org.uk/rule-of-law-reform-in-china.aspx>.
- 25 In particular, the Center for international legal cooperation (an organization based in The Hague and founded in 1985), has implemented several projects in the PRC to illustrate the Dutch legal aid system and to promote the rule of law. The CILC collaborated with Chinese academics and government officials to translate part of the Dutch Civil Code. For additional information on their work, see Center for international legal cooperation, *Projects & news: China*, [last accessed on 8<sup>th</sup> September 2016] available at: <http://www.cilc.nl/cilc-meets-rule-of-law-representatives-from-kazakhstan-and-china/>.
- 26 The Italian government has focused, in recent years, on strengthening intellectual property rights in the PRC (partly as a way to protect the IP of Italian firms operating in China). This strategy has relied heavily on cooperation initiatives between academic institutions and has often been implemented (as we shall see in greater detail over the course of this dissertation) within the framework of wider EU projects. On these projects, see Ministero degli Affari Esteri e della Cooperazione Internazionale, *Scienza & Tecnologia, Per una strategia italiana in Cina*, 2015, [last accessed on 8<sup>th</sup> September 2016] available at: <http://www.esteri.it/mae/resource/doc/2015/06/studiocina.pdf>.
- 27 See Gesellschaft für Technische Zusammenarbeit, *Sino-german legal cooperation programme*, [last accessed on 4<sup>th</sup> September 2016] available at: <https://www.giz.de/en/worldwide/15590.html>; as well as WOODMAN S., Op.cit.

through institutions such as the Danish Institute for Human Rights, the Swedish International Development Cooperation Agency, the Raoul Wallenberg Institute of Human Rights and the Norwegian Center for Human Rights, reflect a radically different approach, since their initiatives have focused mostly on human rights protection, workers' rights and access to justice<sup>28</sup>. These projects often involved capacity-building initiatives which targeted Chinese judicial officials and lawyers, as in the case of the human rights education programme launched in 2014 by the Raoul Wallenberg Institute of Human Rights<sup>29</sup>.

Over the last decade, the European Union has also become a major player in the field of international legal cooperation with China, through the channels of the Environmental Policy Dialogue and of the Bilateral Cooperation Mechanism on Forests<sup>30</sup> and through ambitious programmes such as the strategic partnership on Intellectual Property<sup>31</sup> and the EU-China Environmental Governance Programme (EU-China EGP)<sup>32</sup>. As we shall see in greater detail in the course of this dissertation (and notably in the fourth and fifth chapters), the EU-China EGP was an ambitious cooperation programme (launched in 2008) which hoped to “*improve environmental governance in China by strengthening environmental information disclosure, public participation, access to justice and corporate environmental*

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28 See the websites of the Danish Institute for Human Rights (available at: <http://www.humanrights.dk/>, last accessed on 13<sup>th</sup> August 2016), of the Swedish International Development Cooperation Agency (available at: <http://www.sida.se/English/where-we-work/terminated-development-cooperation/China-/Our-work-in-China/>, last accessed on 13<sup>th</sup> August 2016), and of the Norwegian Centre for Human Rights (available at: <http://www.jus.uio.no/smr/english/about/programmes/china/>, last accessed on 13<sup>th</sup> August 2016). “*Compared to other donors that tend to support generalized legal programs in China [the Raoul Wallenberg Institute] and the other Nordic human rights institutes [...] are unique in explicitly and consistently advancing international human rights law as their main entry point*”, YEH J.I., “Promoting human rights in China through education: an empirical impact evaluation of the Swedish approach from a student perspective”, *Asian-Pacific Law & Policy Journal*, Vol. 10, 2008, p. 117. MAGNUSSON LJUNGMAN C., SIDEL M., *Mid-term review of the Raoul Wallenberg Institute's Programme in China*, Swedish International Development Cooperation Agency, November 2015, [last accessed on 8<sup>th</sup> September 2016] available at: <http://www.sida.se/contentassets/b731781a197b408eaa655b0f403b78b2/01b84e05-7cce-489c-9449-b50316d4d16f.pdf>. See also WOODMAN S., Op.cit.

29 Raoul Wallenberg Institute of human rights and humanitarian law, *China*, [last accessed on 8<sup>th</sup> September 2016] available at: <http://rwi.lu.se/where-we-work/regions/asia/china/>. Over the course of three years, this project has provided professional training on human rights protection for Chinese procurators and police officials.

30 European Commission, *General co-operation with China*, [last accessed on 14<sup>th</sup> December 2016] available at: [http://ec.europa.eu/environment/international\\_issues/relations\\_china\\_en.htm](http://ec.europa.eu/environment/international_issues/relations_china_en.htm).

31 IPKey, *Strategic partnership and cooperation between EU and China on IP*, [last accessed on 22<sup>nd</sup> August 2016] available at: <http://www.ipkey.org/en/>.

32 EU-China Environmental Governance Programme, *Presentation*, [last accessed on 13<sup>th</sup> August 2016] available at: <http://www.ecegp.com/english/aboutus/aboutus.asp>.

responsibility both at the national and local level”<sup>33</sup>. The initiatives enacted under the umbrella of the EU-China EGP focused on four main “themes”: 1) public access to environmental information; 2) public participation in environmental planning and decision making; 3) access to justice in environmental matters; 4) corporate environmental responsibility<sup>34</sup>. These partnerships represent a significant step forward from the earliest cooperation efforts, such as the EU – China Legal and Judicial Cooperation Programme (which ran between 2000 and 2005), considered by some scholars to be wasteful, ineffective and excessively broad in their scope<sup>35</sup>.

It is hardly necessary to emphasize the important role which China plays in the international effort to reduce greenhouse-gas emissions or the seriousness of the environmental crisis which this country is currently facing. It is therefore easy to understand why the PRC is today the most important partner for international legal cooperation programmes in the field of environmental protection. Moreover, the PRC offers the unique opportunity to test the effectiveness of legal cooperation projects in a country which has had to build from scratch a modern legal system<sup>36</sup> and a “*socialist market economy with Chinese characteristics*”<sup>37</sup> after the legal nihilism which

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33 European Commission, *EU-China Environmental Governance Programme*, [last accessed on 14<sup>th</sup> December 2016] available at: [https://ec.europa.eu/europeaid/case-studies/eu-china-environmental-governance-programme\\_en](https://ec.europa.eu/europeaid/case-studies/eu-china-environmental-governance-programme_en).

34 EU-China Environmental Governance Programme, *Presentation*, [last accessed on 13<sup>th</sup> August 2016] available at: <http://www.ecegp.com/english/aboutus/aboutus.asp>. The first three “themes” of the EU-China EGP reflect the three pillars of the Aarhus Convention. On this subject, see also VERRI B., “The role of EU-China cooperation in the promotion of environmental protection”, in TIMOTEO M. (edited by), *Towards a smart development. A legal and economic inquiry into the perspectives of EU-China cooperation*, Bononia University Press, Bologna, July 2016, pp. 101 – 108.

35 SCHULTE – KULKMANN N., HEILMANN S., *U.S. – China Legal Cooperation – Part III: an overview of private American-Chinese cooperation programmes*, *Chinapolitik*, China Analysis 44, June 2005, p. 34, [last accessed on 28<sup>th</sup> November 2016] available at: [http://www.chinapolitik.de/files/no\\_44.pdf](http://www.chinapolitik.de/files/no_44.pdf); WOODMAN S., Op.cit.

36 For an overview of China’s legal reform process see TIMOTEO M., “Cina”, in *Digesto delle discipline privatistiche*, UTET, Turin, 2010, pp. 181 – 238; CAVALIERI R., *La legge e il rito. Lineamenti di storia del diritto cinese*, Franco Angeli, Collana storica – Centro studi dell’Università di Pavia, 2011; CHEN A., *An Introduction to the Legal System of the People's Republic of China*, LexisNexis/Butterworths, Hong Kong, 2004; AJANI G., SERAFINO A., TIMOTEO M., *Diritto dell'Asia Orientale*, UTET Giuridica, 2007; CAVALIERI R., “Il diritto nella Cina socialista e post-socialista”, in SAMARANI G., SCARPARI M., *La Cina (III). Verso la modernità*, Einaudi, Turin, 2009, pp. 443 – 503; LUBMAN S.B., *Bird in a cage: legal reform in China after Mao*, Stanford University Press, 2002.

37 “*The establishment of a socialist market economy means to enable the market to establish itself as the foundation of the economy under the State’s macroeconomic control*”, GAO S., *Two decades of reform in China*, World Scientific, Singapore, 1999, p. 42. “*The concept of a socialist market economy implies an economy in which the market mechanism governs economic interactions but ownership over the*

characterized the Mao Era.

The ostensible goal of most legal cooperation programmes in the field of environmental protection has been the establishment in the People's Republic of China of what has been called an "environmental rule of law". The first international document which mentioned this term was a 2013 Decision of the Governing Council of the United Nations Environmental Programme ("UNEP"), which emphasized the need to "*support national Governments [...] in the development and implementation of environmental rule of law*"<sup>38</sup>. There is as yet no agreed definition of the notion of "environmental rule of law" and this uncertainty has allowed the development of competing views with regard to the objectives which legal cooperation projects should pursue. However, inspite of the protean nature of the notion of environmental rule of law, the International Union for the Conservation of Nature has attempted to outline its defining traits:

*"The environmental rule of law is premised on key governance elements, including, but not limited to:*

- a. The development, enactment and implementation of clear, strict, enforceable, and effective laws, regulations and policies that are efficiently administered through fair and inclusive processes to achieve the highest standards of environmental quality at national, sub-national, regional and international levels;*
- b. Measures to ensure effective compliance with laws, regulations, and policies, including adequate criminal, civil and administrative enforcement actions, and mechanisms for timely, impartial and independent dispute resolution;*
- c. Effective rules on access to information, public participation in decision-making and access to justice;*
- d. Environmental auditing and reporting, together with other effective*

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*most important means of production remains in the hands of the public sector or the collectivity, thus preserving the socialist character of the society", MEHRAN H., QUINTYN M., NORDMAN T., LAURENS B., Monetary and Exchange System Reforms in China, International Monetary Fund, Occasional Paper n. 141, September 1996, p. 1. "Though the term 'socialist market economy' was never well defined, it clearly reflected the ideological thinking of [the] Chinese communist government: on the one hand, the country must stay with [...] socialism where [...] public ownership (or state ownership) remains a dominant force; and on the other hand, in order to make the country strong, its economic development shall be driven more by market force[s] than by the government plans", ZHANG M., Chinese Contract Law, Theory and Practice, Martinus Nijhoff Publishers, Leiden/Boston, 2006, p. 45.*

38 UNEP, Governing Council, Decision n. 27/9, "*Advancing justice, governance and law for environmental sustainability*", 2013, [last accessed on 27<sup>th</sup> November 2016] available at: [http://www.unep.org/delc/Portals/24151/Documents/Decisions27-9Advancing\\_Justice\\_Governance&Law.pdf](http://www.unep.org/delc/Portals/24151/Documents/Decisions27-9Advancing_Justice_Governance&Law.pdf).

*accountability, integrity and anti-corruption mechanisms*”<sup>39</sup>.

The same desire to promote an “environmental rule of law” guided the efforts of the China Council for International Cooperation on Environment and Development (CCICED)<sup>40</sup>, when it decided to set up a task force to “*develop appropriate policy recommendations on the implementation of the rule of law which should effectively promote the realization of China’s ‘Ecological Civilization*”<sup>41</sup>.

While some authors have criticized (not without some reason) the inefficiency of legal cooperation programmes (arguing that they often failed to take into consideration the reality on the ground and the actual needs of their beneficiaries) and the fact that “*many donors end up working with the same set of institutions, particularly central government agencies, the National Judges College and Peking-based universities and think-thanks*”<sup>42</sup>, in this dissertation I will try to demonstrate that international legal cooperation can (and did) influence the Chinese legal system and the public debate on environmental policy.

## **1.2. LEGAL TRANSPLANTS AND ENVIRONMENTAL PROTECTION**

As we shall see over the next chapters, international actors have often employed legal cooperation as a tool to promote the transplant of foreign legal models and doctrines in the

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39 International Union for Conservation of Nature, *World Declaration on the Environmental Rule of Law*, Outcome Document of the 1<sup>st</sup> World Environmental Law Congress, [last accessed on 22<sup>nd</sup> August 2016] available at: <http://iucnael2016.no/wp-content/uploads/2016/06/WORLD-DECLARATION-ON-THE-ENVIRONMENTAL-RULE-OF-LAW-Near-Final-Draft-.pdf>.

40 The China Council for International Cooperation on Environment and Development was established in 1992 to support cooperation between China and the international community in the fields of environment and development. It is a non-profit body that supports the development of an integrated and coherent approach to environment and development and promotes close cooperation between China and other countries. The CCICED was founded by the Canadian International Development Agency (CIDA) and the Chinese environment agency (SEPA), but several European organizations and institutions today support the work of the Council. See the website of the China Council for International Cooperation on Environment and Development, [last accessed on 14<sup>th</sup> December 2016] available at: <http://www.cciced.net/cciceden/>.

41 Sino-German Environmental Partnership, *Inception meeting of CCICED Task Force on the Rule of Law and Ecological Civilization*, 3<sup>rd</sup> June 2015, [last accessed on 3<sup>rd</sup> December 2016] available at: <http://environmental-partnership.org/activities/inception-meeting-of-cciced-task-force-on-the-rule-of-law-and-ecological-civilization-20-04-21-04-2015/>.

42 WOODMAN S., Op.cit. For an overview of the criticism leveled against legal cooperation programmes in the field of environmental protection, see also STERN R.E., *Environmental Litigation in China: A Study in Political Ambivalence*, Cambridge University Press, Cambridge and New York, 2013, p. 181; ORTS E.W., “Environmental Law with Chinese Characteristics”, *William and Mary Bill of Rights Journal*, Vol. 11, 2003, pp. 566 – 567; CARPI A., “Climate Change and Clean Energy in the EU-China Perspective”, in TIMOTEO M. (edited by), *Environmental Law in Action. EU and China Perspectives*, Bononia University Press, Bologna, 2012, p. 60.

Chinese legal system.

The notion of legal transplants, popularized by Alan Watson in the 1970s<sup>43</sup>, has been essential for the development of a more dynamic approach to comparative law and has sparked a debate which is still ongoing. In particular, Watson argued that the “legal transplants” (by which we mean the transfer of a rule or of a set of rules from one country or legal system to a different one) historically represented the most fertile source of legal development. Empiric evidence suggests that in law the transposition of foreign rules is generally much more common than innovation<sup>44</sup>, and Professor Rodolfo Sacco has authoritatively pointed out that “*borrowing and imitation is [...] of central importance to understanding the course of legal change*”<sup>45</sup>. Over the last four decades, comparative law has therefore employed the notion of legal transplants as a heuristic device to examine how the transfer of legal models and institutions into alien legal systems affects those systems, causing them to change and adapt (and how in turn those systems reinterpret the foreign model in light of their own legal traditions)<sup>46</sup>.

Watson’s approach to legal transplants brought into question a conception of the relationship between law and society which harkens back to Montesquieu<sup>47</sup> and von

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43 See WATSON A., *Legal Transplants: An Approach to Comparative Law*, Scottish Academic Press, Edinburgh, 1974.

44 ÖRÜCÜ E., “Law as Transposition”, *International Comparative Law Quarterly*, Vol. 51, Issue 2, April 2002, p. 205.

45 SACCO R., “Legal Formants: A Dynamic Approach to Comparative Law”, *American Journal of Comparative Law*, Vol. 39, 1991, p. 394. However, Prof. Sacco also emphasizes that any comparative analysis should be based on the implicit assumption that “*living law contains many different elements such as statutory rules, the formulations of scholars, and the decisions of judges [...]*”. These elements are the “legal formants” of a legal system (see also GAMBARO A., SACCO R., *Sistemi giuridici comparati*, UTET, 3<sup>rd</sup> Edition, 2011, p. 4). On the issue of legal transplants, see also AJANI G., “By chance and prestige: legal transplants in Russia and Eastern Europe”, *American Journal of Comparative Law*, Vol. 43, Winter 1995, pp. 93 – 117; AJANI G., *Sistemi giuridici comparati. Lezioni e materiali*, Giappichelli, 2006, Turin; WISE E.M., “The transplant of legal patterns”, *The American Journal of Comparative Law*, Vol. 38, 1990, pp. 1 – 22; GRAZIADEI M., “Legal transplants and the frontiers of legal knowledge”, *Theoretical Inquiries in Law*, Vol. 10, 2009, pp. 723 – 743; CANDIAN A., GAMBARO A., *Casi e materiali per un corso di diritto private comparato. Le tradizioni di Common Law e Civil Law*, Giappichelli 2015pp. X - 318; COHN M., “Legal transplant chronicles: the evolution of unreasonableness and proportionality review of the administration in the United Kingdom”, *The American Journal of Comparative Law*, Vol. 58, Issue 3, Summer 2010, pp. 583 – 629; SACCO R., “Circolazione e mutazione dei modelli giuridici”, in *Digesto delle discipline privatistiche*, UTET, Turin, 1988, p. 368.

46 ROSENFELD M., SAJO A. (edited by), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, 2012, p. 1305; CAIRNS J.W., “Watson, Walton and the history of legal transplants”, *Georgia Journal of International and Comparative Law*, Vol. 41, 2013, pp. 637 – 696.

47 “*La loi, en général, est la raison humaine, en tant qu'elle gouverne tous les peuples de la terre; et les lois politiques et civiles de chaque nation ne doivent être que les cas particuliers où s'applique cette*

Savigny<sup>48</sup>, and has attracted considerable criticism over the years. In particular, Pierre Legrand questioned what he saw as Watson's representation of the law as a "somewhat autonomous entity unencumbered by historical, epistemological or cultural baggage"<sup>49</sup>. According to Legrand, rules should instead be seen as "incorporative cultural forms", whose empirical existence cannot be separated from the "world of meanings that characterizes a legal culture"<sup>50</sup>. Therefore, when rules (or, as Legrand put it, "words") are transplanted into a different legal system, different meanings are inevitably ascribed to them, in light of the history, the culture and the tradition of the host country. The logical conclusion which Legrand draws from these premises is that it is not possible to transfer a rule from one legal system to another without in some way reshaping the rule itself<sup>51</sup>. While it is difficult to deny that cross-jurisdictional legal transplants regularly take place and that lawmakers, especially in the developing world, regularly borrow foreign models for various reasons (and with varying degrees of success)<sup>52</sup>, Legrand made an invaluable contribution to the field of comparative law by emphasizing that, in order to produce any

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*raison humaine. Elles doivent être tellement propres au peuple pour lequel elles sont faites, que c'est un très grand hasard si celles d'une nation peuvent convenir à une autre. [...] Elles doivent être relatives au physique du pays; au climat glacé, brûlant ou tempéré; à la qualité du terrain, à sa situation, à sa grandeur; au genre de vie des peuples, laboureurs, chasseurs ou pasteurs; elles doivent se rapporter au degré de liberté que la constitution peut souffrir; à la religion des habitants, à leurs inclinations, à leurs richesses, à leur nombre, à leur commerce, à leurs mœurs, à leurs manières. Enfin elles ont des rapports entre elles; elles en ont avec leur origine, avec l'objet du législateur, avec l'ordre des choses sur lesquelles elles sont établies. C'est dans toutes ces vues qu'il faut les considérer", MONTESQUIEU C.-L. S., De l'esprit des lois, Gallimard 1995, Book I, Chapter 3.*

- 48 The theory of legal transplants appears to be irreconcilable with von Savigny's notion of Volksgeist as the basis or origin of the law (see GAMBARO A., SACCO R., Op.cit., p. 249).
- 49 LEGRAND P., "The impossibility of legal transplants", *Maastricht Journal of European and Comparative Law*, 1997, p. 114.
- 50 LEGRAND P., Op.cit., p. 117.
- 51 "[A]s the words cross boundaries there intervenes a different rationality and morality to underwrite and effectuate the borrowed words: the host culture continues to articulate its moral inquiry according to traditional standards of justification. Thus, the imported form of words is inevitably ascribed a different, local meaning which makes it ipso facto a different rule. As the understanding of a rule changes, the meaning of the rule changes. And, as the meaning of the rule changes, the rule itself changes", LEGRAND P., Op.cit., p. 117. Legrand concludes that since what can be transferred from one legal system to another is, at best, "a meaningless form of words", legal transplants are not possible "in any meaningful sense of the term" (See LEGRAND P., Op. cit., p. 120).
- 52 MARKOVITZ I., "Exporting law reform, but will it travel", *Cornell International Law Journal*, Vol. 37, Issue 1, 2004, pp. 95 – 114; MATTEI U., "Efficiency in legal transplants: an essay in comparative law and economics", *International Review of Law and Economics*, Vol. 14, Issue 3, 1994, pp. 3 – 19; SPĂTARU-NEGURĂ L.C., *Exporting law or the use of legal transplants*, contribution to the International Conference "Challenges of the Knowledge Society", May 2012, [last accessed on 22<sup>nd</sup> August 2016] available at: <http://connection.ebscohost.com/c/articles/92000796/exporting-law-use-legal-transplants>.

effect, legal transplants must also entail a cultural transfer between two legal systems<sup>53</sup>. The same shift of the focus of research from the mere text of the norm to its context appears to characterize Ugo Mattei's well-known critique of legal positivism, which he considers to be the true "enemy of understanding" in the field of legal research<sup>54</sup>. The importance of the social, economic and cultural context of the borrowed legal models has also been emphasized by Otto Kahn-Freund<sup>55</sup> and by Gunther Teubner. The latter even coined the expression "legal irritants" to describe the complex role played by the foreign norms in the host country and the unintended consequences of legal transplants<sup>56</sup>. The practice of legal transplants has indeed shown that the host legal systems may "*suffer from the transplant effect, that is the mismatch between pre-existing conditions and institutions and transplanted law*"<sup>57</sup>. According to Teubner, this mismatch can make the transplanted legal model altogether ineffective or it may trigger the transformation of native laws and institutions.

Carlos Rosenkrantz has taken a considerably more critical view of the notion (and of the practice) of legal transplants, arguing that it is generally preferable to "*look inward, rather than outward*"<sup>58</sup> and that borrowing foreign models is in most cases a highly problematic operation. Other authors have also questioned the usefulness of the metaphor of "legal

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53 CHEN L., "Contextualizing legal transplant: China and Hong Kong", in MONATERI P.G. (edited by), *Methods of Comparative Law*, Elgar, Cheltenham UK, 2012, p. 192.

54 Prof. Mattei argues that legal positivism adopts "*a reductionist perspective that artificially excludes from the picture the deeper structure of the law (things like legal culture, language of legal expression, revolutionary moments and so on) as well as (in typical postmodern style) the decorative, and symbolic elements of it. Positivism, as a consequence, is unmasked as an inherently formalistic approach, in the sense that form prevails over structure in determining the law's domain. It outlaws (considers outside the law) deeper structural aspects, such as political power, economic hegemony (including economic efficiency), cultural legitimacy, intellectual prestige, sexual dynamics, race relations and so on*", MATTEI U., "The comparative jurisprudence of Schlesinger and Sacco: a study in legal influence", in RILES A. (edited by), *Rethinking the Masters of Comparative Law*, Hart Publishing, Oxford and Portland, 2001, p. 254.

55 Otto Kahn-Freund argued that "[...] *we cannot take for granted that rules or institutions are transplantable. The criteria answering the question whether or how far they are, have changed since Montesquieu's day, but any attempt to use a pattern of law outside the environment of its origin continues to entail the risk of rejection*". The borrowing of foreign legal models therefore "*requires a knowledge not only of the foreign law, but also of its social, and above all its political, context*", KAHN-FREUND O., "On uses and misuses of comparative law", *The Modern Law Review*, Vol. 37, Issue 1, 1974, p. 27.

56 TEUBNER G., "Legal irritants: good faith in British law or how unifying ends up in new divergences", *The Modern Law Review*, Vol. 61, Issue 1, January 1998, pp. 11 – 32.

57 WANG Chenguang, "Legal transplantation and legal development in transitional China", *The World Bank Legal Review*, December 2012, p. 165.

58 ROSENKRANTZ C.F., "Against borrowings and other non-authoritative uses of foreign law", *International Journal of Constitutional Law*, Vol. 2, 2003, p. 294.



transplants”, which they consider excessively narrow or even misleading<sup>59</sup>. In particular, Maximo Langer has proposed the alternative notion of “legal translation”, arguing that the transferred legal model can more aptly be characterized as a text, translated from one language into a different one<sup>60</sup>. According to Langer, “*the metaphor of the translation retains the comparative dimension that has made the metaphor of the transplant so powerful and that the legal irritant metaphor lacks*”<sup>61</sup>. Moreover, this alternative metaphor allows for the distinction between the “original text” or original legal model or institution and the “translated text” and “*captures the transformations that the legal idea or practice may undergo in its exchanges with the target legal system after its initial translation*”<sup>62</sup>. Finally, Edward M. Wise has suggested the term “circulation” of legal models as a more fitting metaphor to describe the phenomenon described by Watson<sup>63</sup>.

In the course of the dissertation, I will employ the notion of the legal transplant, since it is the most widely used and most easily understandable heuristic tool among comparative law scholars. However, it is important to be mindful of the valuable contributions made by some of the critics of this metaphor, especially as regards the importance of the culture and the socio-economic background of the host legal system.

In the People’s Republic of China, the legislator relied heavily on foreign models and on comparative research as a tool to draft legislation<sup>64</sup> and some authors have even argued that “*the modern evolution of Chinese law is largely a process of legal transplantation in the name of modernisation*”<sup>65</sup>. While the transplantation of Western legal models and

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59 “*Its chief problem is that it conveys the notion that legal ideas and institutions can simply be ‘cut and pasted’ between legal systems. Thus this metaphor fails to account for the transformation that legal ideas and institutions may undergo when they are transferred between legal systems*”, LANGER M., “From legal transplants to legal translations: the globalization of plea bargaining and the Americanization thesis in criminal procedure”, *Harvard International Law Journal*, Vol. 45, Issue 1, Winter 2004, p. 5.

60 LANGER M., Op.cit., p. 6. See also PEERENBOOM R., “Toward a methodology for successful legal transplants”, *The Chinese Journal of Comparative Law*, Vol. 1, No. 11, 2013, pp. 4 – 20.

61 LANGER M., Op.cit., p. 32.

62 LANGER M., Op.cit., p. 34.

63 WISE E.M., “The transplant of legal patterns”, *The American Journal of Comparative Law*, Vol. 38, 1990, pp. 1 – 22.

64 “*Before undertaking any significant reform, the [Chinese] government conducts extensive comparative research, carries out empirical research, consults with a wide variety of stakeholders including academics and representatives from the main interest groups affected by reforms, increasingly invites public comment on major laws and pieces of public regulation, and establishes pilot programs to test results before scaling them up nationally*”, PEERENBOOM R., “Toward a methodology for successful legal transplants”, *The Chinese Journal of Comparative Law*, Vol. 1, No. 11, 2013, pp. 19 – 20.

65 CHEN Jianfu, “Modernization, westernization and globalization: legal transplant in China”, in OLIVEIRA J., CARDINAL P., *One Country, Two Systems, Three Legal Orders – Perspectives of*

institutions in the developing world has been one of the most significant factors in the evolution of these legal systems<sup>66</sup>, the reaction of the host legal systems has however varied significantly (from wholesale acceptance to outright rejection) and has been influenced not only by political and historical considerations, but also by the cultural and socio-economic background and by the reaction of the public to the transplant of different norms and institutions<sup>67</sup>. Legal doctrine<sup>68</sup> has identified various types of legal transplants:

1. The cost-saving transplant, through which the legislator is able to draft laws drawing on foreign models and experience, without bearing the costs and the risks involved in developing (by trial and error) an original solution to the problem.
2. The transplant dictated by a foreign (governmental or non-governmental) body as a condition for doing business or through political and economic pressure<sup>69</sup>.
3. The “entrepreneurial” transplant, promoted by groups or individuals “*who reap benefits from investing their energy in learning and encouraging local adoption of a foreign legal model*”<sup>70</sup>.
4. The “legitimacy-generating transplant”, which involves the introduction of legal models and institutions in view of their prestige<sup>71</sup> (or of the prestige of the legal system from which they have been borrowed) or “*because they signal a desired*

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*Evolution*, Springer, 2009, p. 91. On this issue, see also ZHUANG S., *Op.cit.*

66 The attempt to export Western, and in particular U.S. legal models and institutions in the developing world has also drawn strong criticism. In particular, Jedidiah Kroncke has questioned the ideological underpinnings of the law and development movement and of its contemporary adherents, see KRONCKE J., “Law and development as anti-comparative law”, *Vanderbilt Journal of Transnational Law*, Vol. 45, pp. 477 – 555.

67 See WANG Chenguang, “Legal transplantation and legal development in transitional China”, *The World Bank Legal Review*, December 2012, pp. 161 – 177.

68 MILLER J.M., “A typology of legal transplants: using sociology, legal history and Argentine examples to explain the transplant process”, *The American Journal of Comparative Law*, Vol. 51, Issue 4, 2003, pp. 839 – 885. See also SIEMS M., *Comparative Law*, Cambridge University Press, 2014, pp. 192 – 193; and ZHUANG S. *Op.cit.*, pp. 166 – 169.

69 “[In] recent times, and contrary to the past, reception is not only due to the initiative of those who receive the legal transplant, but also due to those who propose it. Several international organizations conditioned the grant of economic aid to the adoption of legal reforms in different legal fields, and the proposed model has been the Anglo-American pattern”, MANCUSO S., “Legal Transplants and Economic Development: Common Law vs. Civil Law?”, in OLIVEIRA J., CARDINAL P., *One Country, Two Systems, Three Legal Orders – Perspectives of Evolution*, Springer, 2009, p. 91.

70 MILLER J.M., *Op.cit.*, pp. 849 – 850. With regard to the PRC; there is reason to believe that transplants of foreign models in the field of environmental law might fall in this category, see WANG A.L., “The search for sustainable legitimacy: environmental law and bureaucracy in China”, *Harvard Environmental Law Review*, Vol. 37, 2013, pp. 365 – 440.

71 See SACCO R., “Circolazione e mutazione dei modelli giuridici”, in *Digesto delle discipline privatistiche*, UTET, Turin, 1988, p. 369.

*turn towards modernity*”<sup>72</sup>, rather than on the basis of their intrinsic merits or of their ability to fit into the host legal system.

5. Transplants which benefit both the country of origin and the host country by reducing transaction costs and removing market barriers<sup>73</sup>.

However, the reasons lawmakers decide to adopt a foreign legal model are usually extremely complex, and most transplants could not be neatly classified under one single category<sup>74</sup>. “Horizontal” borrowing of legal models between different countries and “vertical” (or “trans-echelon”) borrowing between national legislation and international law have also played a particularly important role in the field of environmental law<sup>75</sup>.

The importance of international cooperation as a channel to exchange best practices and legal and institutional models in the field of environmental protection has also been explicitly recognized by the United Nations in the 1992 Rio Declaration, which encourages States to:

*“co-operate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies”*<sup>76</sup>.

This collaborative approach to sustainable development<sup>77</sup> was later extended to the civil

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72 SIEMS S., Op.cit., p. 193.

73 From SIEMS S., Op.cit., p. 193.

74 SIEMS S., Op.cit., p. 193.

75 WIENER J.B., “Something borrowed for something blue: legal transplants and the evolution of global environmental law”, *Ecology Law Quarterly*, Vol. 27, 2001, pp. 1295 – 1371; TEWS K., BUSCH P.-O., JÖRGENS H., *The diffusion of new environmental policy instruments*, Forschungsstelle für Umweltpolitik, Freie Universität Berlin, 2002, pp. 1 – 32, [last accessed on 22<sup>nd</sup> August 2016] available at: [http://userpage.fu-berlin.de/ffu/download/rep\\_02-01.pdf](http://userpage.fu-berlin.de/ffu/download/rep_02-01.pdf); RUIZ FABRI H., GRADONI L., *La circulation des concepts juridiques: le droit international de l’environnement entre mondialisation et fragmentation*, Société de Législation Comparée, Paris, 2009; MORAND DEVILLER J., BÉNICHOT J.-C., *Mondialisation et globalisation des concepts juridiques : l’exemple du droit de l’environnement*, IRJS Éditions, 2010.

76 Principle 9, United Nations, Rio Declaration on Environment and Development, 1992, [last accessed on 2<sup>nd</sup> July 2016] available at: [http://www.unesco.org/education/nfsunesco/pdf/RIO\\_E.PDF](http://www.unesco.org/education/nfsunesco/pdf/RIO_E.PDF).

77 The modern definition of sustainable development was developed by the World Commission on Environment and Development (so-called “Brundtland Commission”). According to their report “Our Common Future”, published in 1987, “Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts: 1) The concept of ‘needs’, in particular, the essential needs of the world’s poor, to which overriding priority should be given; and 2) The idea of limitations imposed by the state of technology and social organization on the environment’s ability to meet present and future needs”. The text of the “Report of the World

society, which found a channel to contribute to global environmental governance in the “Type II partnerships” developed at the 2002 Earth Summit in Johannesburg<sup>78</sup>. However, the drafters of the Rio Declaration were mindful of the cultural implications of legal transplants and of the need to assess the compatibility of the transplanted law with the pre-existing culture and institutions to avoid rejection. They therefore introduced an important caveat through Principle 11 of the Rio Declaration, which states that:

*“States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries”<sup>79</sup>.*

The Chinese legislator has proved to be particularly eager to import foreign models and institutions and to rely on Western experiences and expertise, and the drafting phase of the 2002 Cleaner Production Promotion Law<sup>80</sup> offers a good example of this approach. In the drafting of this piece of legislation, the lawmakers drew largely on French and Canadian models conveyed through international legal cooperation initiatives<sup>81</sup>. In particular, the team entrusted by the National People’s Congress of the PRC with the drafting of the law benefited from the China – Canada Cleaner Production Cooperation Project, a programme promoted by the Canadian International Development Agency and by the Chinese government which allowed hundreds of lawyers and experts to investigate Canadian clean production policies. Moreover, in 1999 the French Senate offered to the drafters of the Chinese Cleaner Production Promotion Law the opportunity to meet key French regulators and lawmakers and to acquire first-hand experience on cleaner production legislation<sup>82</sup>.

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Commission on Environment and Development: Our Common Future”, transmitted to the UN General Assembly as an Annex to document A/42/427, 1987, is available at: <http://www.un-documents.net/wced-ocf.htm> [last accessed on 13<sup>th</sup> December 2016].

78 HALE T.N., MAUZERALL D.L., “Thinking globally and acting locally: can the Johannesburg Partnerships coordinate action on sustainable development?”, *Journal of Environment & Development*, Vol. 13., Issue 3, September 2004, pp. 220 – 239.

79 Principle 11, United Nations, Rio Declaration on Environment and Development, 1992.

80 (中华人民共和国清洁生产促进法; zhōng huá rén mín gòng hé guó qīng jié shēng chǎn cù jìn fǎ), Cleaner Production Promotion Law of the People’s Republic of China, 2002, [last accessed on 17<sup>th</sup> June 2016] available at: <http://www.lawinfochina.com/>.

81 TIMOTEO M., ZHOU J., “Channeling Foreign Law Models into Domestic Legislation: A First Inquiry on the Making of the Chinese Environmental Protection Laws”, in SCAFFARDI L., LUPO N., (edited by), *Comparative Law in Legislative Drafting*, London, International Publishing Eleven, 2014, pp. 285-296.

82 Ibid.

There is reason to believe that these initiatives may have influenced the drafters of the law, since legal doctrine has clearly identified the influence of the French model on Article 7 of the 2002 Cleaner Production Law, which recognizes the importance of fiscal incentives to ensure compliance, and of the Canadian model on Article 17, which introduces a blacklist of heavily-polluting undertakings<sup>83</sup>.

The transplant of foreign models in the absence of the necessary legal infrastructure can however pose daunting challenges for the host legal system. In particular, inexperienced Chinese lawmakers may “*look too quickly or too easily to foreign models of regulation*”<sup>84</sup>, adopting for example complex market-based mechanisms to control atmospheric pollution which may prove ineffective in the absence of the necessary legal and administrative framework<sup>85</sup> and of a sufficient level of participation or compliance from polluters (see *infra*, Chapter 6).

### 1.3. RESEARCH OBJECTIVES

The objective of my research is, first of all, to assess the role which international legal cooperation initiatives have played (and will – in all likelihood – continue to play) in the development of environmental law in China. To this end, I shall examine the most significant cooperation programmes, outlining their targets and scope and their impact on the drafting and implementation of Chinese environmental law.

While the second chapter of this dissertation provides an overview of the historical and political process which led to the creation a legal framework and of the ideological and cultural underpinnings of Chinese environmental policy, in the following chapters I shall delve into the role which international legal cooperation played in shaping Chinese environmental law and governance. In my analysis of legal cooperation programmes with the PRC I will rely to some extent on the findings of Rachel Stern<sup>86</sup>, who has identified (on the basis of extensive field research) three main types of cooperation:

- Initiatives designed to influence or even “lobby” legislators and policymakers<sup>87</sup> (by providing, for example, technical support to legislative drafting);

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83 Ibid.

84 ORTS E.W., “Environmental Law with Chinese Characteristics”, *William and Mary Bill of Rights Journal*, Vol. 11, 2003, p. 566.

85 Ibid., pp. 566 - 567.

86 STERN R.E., *Environmental Litigation in China: A Study in Political Ambivalence*, Cambridge University Press, Cambridge and New York, 2013, p. 180.

87 Ibid, p. 180.

- Financial support to plaintiffs and public interest lawyers (“*directly funding litigation*”)<sup>88</sup>;
- Capacity building initiatives targeting Chinese lawyers (what Professor Stern calls “soft support”)<sup>89</sup>.

I must however emphasize that while these categories represent useful references to understand and describe cooperation initiatives, they do not tally with the terminology employed by the promoters of some of the cooperation projects which we shall examine over the course of this dissertation. In particular, programmes such as the EU-China Environmental Governance Programme employ a broader definition of “capacity-building initiatives”, which often encompasses projects designed to influence policymakers and to provide technical support in the drafting of laws. As we shall see in the course of this dissertation, while international organizations and institutions have relied mainly on capacity-building initiatives and technical support to legislative drafting in order to promote reform in the field of substantive environmental law and environmental governance, the same actors have not hesitated to fund litigation (mostly indirectly, through local NGOs and legal aid clinics) or to support institutional reform in order to ensure greater access to justice.

My analysis of the most influential legal cooperation projects shall proceed in lockstep with an inquiry on the legal transplants which may have been channeled through these projects and on the tensions caused by the introduction of foreign models whenever insufficient attention was paid to the pitfalls of legal translation<sup>90</sup> or to the existing legal and institutional framework.

The third chapter provides an overview of the substantive environmental law of the PRC, of the most significant cooperation projects and of their influence on the development of a comprehensive legal framework. As we shall see, this kind of analysis encounters a serious

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88 Ibid, p. 189. According to Rachel Stern, direct financial support to litigation is generally considered to be politically sensitive and few international actors engage in this kind of cooperation.

89 Ibid, p. 181.

90 On this subject, see TIMOTEO M., “Law and language: issues related to legal translation and interpretation of Chinese rules on tortious liability of environmental pollution”, *China-EU Law Journal*, Springer, 2015, Vol. 4, p. 128. On the challenges posed by legal translations, see also POZZO B., “Comparative Law and Language”, in BUSSANI M., MATTEI U. (edited by), *Cambridge Companion to Comparative Law*, Cambridge University Press, Cambridge UK, 2012, pp. 88 – 114; SACCO R., “Traduzione giuridica”, in *Digesto delle discipline privatistiche*, UTET, Turin, 2000; and POZZO B., “Traduzione giuridica”, in *Digesto delle discipline privatistiche*, UTET, Turin, 2013; GAMBARO A., “La proprietà nel common law anglo-americano”, in CANDIAN A., GAMBARO A., POZZO B., *Property, propriété, Eigentum: corso di diritto privato comparato*, Padua, 1992, pp. 3-35.

obstacle in the fact that “*legislation in China in general is not based upon one coherent systematic model, but occurs rather on an ad hoc basis, absorbing elements from all relevant systems and experiences*”<sup>91</sup>. However, while the eclecticism of the Chinese legislator and the often vague and programmatic nature of the laws can often conceal the influence of specific foreign models, it is not impossible to make informed guesses as to the impact which the technical support provided by certain international actors might have had on the work of the drafters.

As we shall see in the fourth chapter, it is considerably easier to measure the effectiveness of legal cooperation programmes in promoting environmental litigation in the PRC. This chapter provides an overview of some of the most comprehensive and fruitful examples of international legal cooperation, ranging from capacity building initiatives to the direct funding of litigation. I will then try to show how, over the last decade, international actors have relied on legal cooperation projects to ensure access to justice for environmental tort victims (promoting the reform of tort liability rules and of the basic Environmental Protection Law, empowering stakeholders and providing training for lawyers and judges).

In the fifth chapter, after a brief overview of the well-established public enforcement model, I will try to show how legal cooperation projects have encouraged the drive to reform environmental governance which has been gaining momentum over the last few years. As we shall see, due to the inadequacy of public enforcement of environmental legislation in the PRC, legal cooperation initiatives have sought to promote environmental liability insurance schemes, corporate social responsibility, contractual requirements, property rights (which represent the basis for the recent experiments with emission trading<sup>92</sup>) and private law instruments (such as nuisance or tort liability) as regulatory tools. In their efforts to reshape environmental governance in China and to carve out a bigger role for private enforcement, international governmental and non-governmental actors have relied heavily on capacity building initiatives.

It is important to emphasize that the focus on private enforcement of environmental rules which characterized many of the legal cooperation initiatives with the PRC over the last

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91 OTTO J.M., “Conclusion: A Comparativist’s Outlook on Law-Making in China”, in OTTO J.M., POLAK M.V., CHEN J., LI Y. (edited by), *Law-Making in the People’s Republic of China*, Kluwer Law International, The Hague, 2000, p. 230

92 “As regards emissions trading, the economic rationale lies in the allocation of property rights on the use of the environment as a way to solve the overexploitation of environmental assets”, DE CENDRA DE LARRAGAN J., “Regulatory dilemmas in EC Environmental Law: the ongoing conflicts between competitiveness and the environment”, in CAFAGGI F., MUIR WATT H. (edited by), *The regulatory function of European private law*, Edward Elgar, 2009, p. 122.

few years, far from being exclusively a reaction to lax public enforcement in China, is in line with the international debate on these issues<sup>93</sup>. Indeed, in spite of its shortcomings, private environmental enforcement is today one of the most fruitful fields of legal

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93 “[P]rivate law techniques have become elements of innovative regulatory strategies. [C]ontract has been used to impose environmental obligations on particular landowners and even industries. Likewise, property rights have been used as the basis for emission trading schemes”, FISHER E., LANGE B., SCOTFORD E., *Environmental law: text, cases & materials*, Oxford University Press, 2013, p. 246. According to Professor Barbara Pozzo, the revisiting of traditional private law remedies (e.g. nuisance suits and tortious liability rules) in order to tackle environmental problems was a key aspect of an experience shared by both common law and civil law systems. The private law instruments which proved most useful, in light of their points of contact with environmental protection, include the torts of nuisance, trespass, negligence, strict liability as well as the “riparian rights”. See POZZO B., “The concept of sustainability and the protection of the environment between private and public law”, in TIMOTEO M. (edited by), *Towards a smart development. A legal and economic inquiry into the perspectives of EU-China cooperation*, Bononia University Press, Bologna, July 2016, pp. 111 – 144; and POZZO B., “Strumenti privatistici a tutela dell’ambiente”, *Digesto delle Discipline Privatistiche – Aggiornamento*, UTET, Turin 2003, pp. 93 – 101. See also BRENNAN T.A., “Environmental Torts”, *Vanderbilt Law Review*, Vol. 46, January 1993, pp. 1- 73; ALCORN W.B., “Liability theories for toxic torts”, *Natural Resources and the Environment*, Vol. 3, 1998, p. 3; RABIN R., “Environmental Liability and the Tort System”, *Houston Law Review*, Vol. 24, p. 27. Civil liability rules today represent an irreplaceable policy tool to prevent and remedy pollution, together with traditional “command and control” regulatory techniques, contractual and voluntary commitments and market-based instruments (see DEGL’INNOCENTI F., “I criteri di imputazione della responsabilità da danno ambientale”, *Contratto e impresa*, Vol. 3, 2013, p. 741). “Il ricorso a strumenti e discipline di diritto comune in funzione di tutela ambientale (in primis art. 844 e 2043 c.c.) è sempre più assiduo, come testimonia la dottrina civilistica da oltre trent’anni [...] Il carattere trasversale del diritto ambientale, ben posto in evidenza dalla Corte costituzionale, si traduce in modi differenziati di tutela delle utilità prodotte dal bene ambiente e richiede l’individuazione di una normativa applicabile particolarmente complessa, che trova la propria giustificazione, all’interno dell’unitario sistema ordinamentale, nei principi generali costituzionali e comunitari, e spazia dal diritto internazionale al diritto comunitario, dal diritto costituzionale al diritto amministrativo, dal diritto penale al diritto tributario e, non ultimo, al diritto civile. L’antico discrimen tra diritto pubblico e il diritto privato è sempre più labile, proprio per la presenza di materie, come quella ambientale [...] a cavallo tra le due discipline [...]”, CORRIERO V., “Garanzie reali e personali in funzione di tutela ambientale”, in *Rassegna di diritto civile*, Edizioni scientifiche italiane, Naples, 2012, pp. 43 - 45. See also DI GIOVANNI F., *Strumenti privatistici e tutela dell’ambiente*, CEDAM, Turin, 1982; GAMBARO A., POZZO B., “La responsabilità civile per danni all’ambiente nella recente legislazione italiana: alcune note di comparazione giuridica e analisi economica”, in MATTEI U., PULITINI F. (edited by), *Consumatore, ambiente, concorrenza. Analisi economica del diritto*, Milan, 1994, pp. 47 – 66; and PENNASILICO M. (edited by), *Manuale di diritto civile dell’ambiente*, Edizioni scientifiche italiane, Naples, 2014. “Environmental law has quietly transformed from a positive law field deeply rooted in administrative law to one that is also heavily rooted in private law and private governance. After two decades (1970 – 1990) of remarkable activity, more than two decades have now passed without a major federal environmental statute (1991 – 2012). [...] Federal regulatory activity and state and local measures have filled some of the gap, but private governance efforts – the pursuit of public ends through private standards, monitoring, enforcement and dispute resolution – now play an important role. Corporations report that their toxics use is regulated more by private supply chain contract requirements than the federal toxics statute”, VANDENBERGH M.P., “Private environmental governance”, *Cornell Law Review*, Vol. 99, 2013, p. 129. See also LATHAM M., SCHWARTZ V.E., APPEL C.E., “The intersection of tort and environmental law: where the twain should meet and depart”, *Fordham Law Review*, Vol. 80, p. 751.



cooperation between the developed and the developing world<sup>94</sup>, and in countries like China already fulfils many of the enforcement duties traditionally reserved to administrative environmental regulation<sup>95</sup>.

As we shall see in the course of this dissertation (and in particular in the fourth and fifth chapters), the international organizations and bodies which have been supporting international legal cooperation programmes in the field of environmental protection appear to have recognized that in a developing country like China, “*individual enforcement of basic legal rights to private property, contracts and freedom from wrongful bodily harm*”<sup>96</sup> is an essential governance tool and that investments in this field might also have a positive impact on the environmental governance framework as a whole<sup>97</sup>.

Finally, in the sixth chapter I draw some conclusions as regards the effectiveness of legal cooperation as a tool to influence policy and channel foreign legal models into the Chinese legal system and I examine some of the challenges which lay ahead after the adoption, in April 2016, of a new law on the “Management of foreign Non-Governmental Organizations’ Activities within Mainland China”<sup>98</sup>.

In the course of my analysis I will also focus on the evidence available with regard to legal transplants in the field of environmental law and on the role which cooperation programmes and international organizations can play as catalysts for the exchange of ideas and for the transmission of foreign legal and institutional models.

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94 The emergence of private enforcement is also due to the perceived lack of progress in struggle to build a global environmental governance system. “*Although the shift away from public governance is not as stark in some other countries, comparable developments have occurred at the international level. Despite a remarkable number of conferences, pronouncements, and treaties, few significant binding environmental requirements have emerged at the international level. International efforts to prevent depletion of major fisheries and tropical deforestation have failed. On climate change, the sweeping rhetoric of the 1992 United Nations Framework Convention on Climate Change (UNFCCC) has given way to the disappointments of Kyoto and Copenhagen [...] The notion that a comprehensive international agreement will not be possible in time to achieve widely acknowledged temperature targets is gaining momentum among scholars and policymakers*”, VANDENBERGH M.P., Op.cit., pp. 132 - 133.

95 VANDENBERGH M.P., Op.cit., p. 133.

96 ORTS E.W., Op.cit., p. 560.

97 “*As the Chinese legal system develops, recognition of the importance of these kinds of rights in environmental protection may provide a mutually reinforcing dynamic. Solving environmental problems by strengthening the legal protection of basic rights reinforces the legal system, and a stronger legal system is better able to protect and enforce legal rights effectively. In other words, strengthening the Chinese legal system, including citizen access to it, can potentially create a “virtuous circle” with respect to public pressure and monitoring for environmental protection*”, ORTS E.W., Op.cit., p. 560.

98 中华人民共和国境外非政府组织境内活动管理法 (zhōng huá rén mín gòng hé guó jìng wài fēi zhèng fǔ zǔ zhī jìng nèi huó dòng guǎn lǐ fǎ).

# Chapter 2. Environmental protection and legal reform in China

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## 2.1. INTRODUCTION: CHINA’S ENVIRONMENTAL CRISIS

While the staggering economic growth experienced by the PRC over the last decades has lifted tens of millions of its citizens out of poverty, the environmental damage caused by the fast-paced process of industrialization has been considerable. Today, China is the largest producer of greenhouse gas and carbon emissions in the world and air quality has become a major public health concern<sup>99</sup>, while environmental degradation has been linked with public health problems (such as birth defects and a rising cancer rate in the most heavily polluted areas), catastrophic flooding<sup>100</sup>, mass migration and large scale desertification (especially in the northern half of the country)<sup>101</sup>.

In particular, rising levels of air and water pollution are today a major concern for a growing number of Chinese citizens. The progressive degradation of air quality (especially in the main urban areas) is largely due to the country's heavy reliance on coal for energy

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99 “China is responsible for a third of the planet's greenhouse gas output and has sixteen of the world's twenty most polluted cities. Life expectancy in the north has decreased by 5.5 years due to air pollution and severe water contamination and scarcity have compounded land deterioration problems”, XU B., *China's Environmental Crisis*, Council on Foreign Relations, 25<sup>th</sup> April 2014, [last accessed on 31<sup>st</sup> October 2015] available at: <http://www.cfr.org/china/chinas-environmental-crisis/p12608>.

100 “In 1998, the Yangtze River flooded, killing more than three thousand people, destroying five million homes and inundating fifty-two million acres of land. The economic losses were estimated at more than \$20 billion. The culprit: two decades of rampant deforestation and destruction of wetlands”, ECONOMY E., *The River runs Black : The Environmental Challenge to China's Future* , Cornell University Press 2005, p. 9.

101 ECONOMY E., Op.cit. Pan Yue, former Vice Minister in charge of the State Environmental Protection Administration of the PRC stated in an interview that “in the future [...] we will need to resettle 186 million residents from 22 provinces and cities’. The rest of the country, however, can absorb only 33 million people. That means China will have more than 150 million environmental refugees”, BYRNES S., “Person of the year: the man making China green”, *New Statesman*, 18<sup>th</sup> December 2006 [last accessed on 23<sup>rd</sup> June 2016], available at: <http://www.newstatesman.com/node/195683>.

production. According to one of the most comprehensive scientific study carried out on the state of air pollution in China, over a period of one year, 92% of the population of the PRC experienced unhealthy levels of PM 2.5. (i.e. particulate matter which is less than 2.5  $\mu\text{m}$  in diameter, one of the main causes of several respiratory diseases) for 120 hours or more and 38% of the population experienced average concentrations of PM 2.5 which would be considered unhealthy by the US Environmental Protection Agency<sup>102</sup>. According to this study, air pollution may be a contributing factor to at least 1.6 million deaths in China each year<sup>103</sup>, while already in 2002 dangerous levels of air pollution had been identified as the main cause of the acid rains which affected a growing number of Chinese cities<sup>104</sup>. More recently, international observers and the Chinese media have argued that the scarcity of drinkable water may represent - in the long term - an even more daunting problem than air pollution<sup>105</sup>, since due to chemical contamination as much as 80 percent of fresh water from underground wells in regions which are, effectively, the bread basket of China may not be fit for human consumption or even for agricultural use<sup>106</sup>.

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- 102 ROHDE R.A., MULLER R.A., *Air Pollution in China: Mapping of Concentrations and Sources*, PLoS ONE 10(8), 2015, [last accessed on 19<sup>th</sup> March 2016] available at: <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0135749>. For a more cautiously optimistic analysis (at least as regards China's long-term prospects) see also VENNEMO H., AUNAN K., LINDHJEM H., SEIP H.M., "Environmental Pollution in China: Status and Trends", *Review of Environmental and Economic Policy*, Vol. 3, 2009, pp. 209-230.
- 103 "Using prefecture level population and pollution data along with national average death rates for the five modeled diseases, we calculate that 1.6 million deaths / year can be attributed to PM2.5 air pollution under the WHO model [95% confidence: 0.7 to 2.2 million deaths/year]. This is equivalent to 4 thousand deaths / day or 17% of all deaths in China", ROHDE R.A., MULLER R.A., Op.cit. According to one of the authors of this study, "breathing Beijing's air is the equivalent of smoking almost 40 cigarettes a day", see The Economist, "Mapping the invisible scourge", Vol. 416, Number 8951, 15<sup>th</sup> August 2015, p. 52. Pan Yue, who in 2006 was in charge of SEPA, warned that "in Beijing alone [...] 70 to 80 per cent of all deadly cancer cases are related to the environment", BYRNES S., "Person of the year: the man making China green", *New Statesman*, 18<sup>th</sup> December 2006 [last accessed on 23<sup>rd</sup> June 2016], available at: <http://www.newstatesman.com/node/195683>. The economic impact of air pollution is equally considerable. Indeed, "the health costs of air and water pollution in China account for an estimated 4.3 per cent of the nation's GDP. Moreover, 16 of the world's 20 most polluted cities are in China. Pollution in Beijing is six times higher than in New York City", LEAL-ARCAS R., "The role of the European Union and China in Global Climate Change Negotiations: A critical analysis", *Journal of European Integration History*, Vol. 18, Issue 1/2012, p. 71.
- 104 WANG Canfa, "Chinese Environmental Law Enforcement: Current Deficiencies and Suggested Reforms", in *Vermont Journal of Environmental Law*, Vol. 8, 2007, p. 165.
- 105 BUCKLEY C., PIAO V., "Rural Water, Not City Smog, May Be China's Pollution Nightmare", *New York Times*, 11<sup>th</sup> April 2016.
- 106 Moreover, "the latest study found that 32.9 percent of wells tested across areas mostly in Northern and Central China had Grade 4 quality water, meaning that it was fit only for industrial uses, *National Business Daily* said. An additional 47.3 percent of wells were even worse, Grade 5. The contaminants included manganese, fluoride and triazoles, a set of compounds used in fungicides. In some areas, there was pollution caused by heavy metals", BUCKLEY C., PIAO V., "Rural Water, Not City Smog, May Be

Aside from the extremely serious consequences for human health and quality of life, there is moreover strong evidence that environmental degradation and air and water pollution may be seriously undermining economic growth. Indeed, according to the World Bank, the costs of environmental pollution for the PRC could amount to approximately 9% of the Gross National Income<sup>107</sup>. With remarkable outspokenness, Pan Yue, the then Vice-Minister in charge of the PRC's State Environmental Protection Administration ("SEPA"), stated in 2006 that China's economic miracle "*will end soon because the environment can no longer keep pace*" and claimed that the environmental damage has cost the PRC between 8 and 15% of GDP per year, "[w]hich means [...] that China has lost almost everything it has gained since the late 1970s due to pollution"<sup>108</sup>.

Moreover, environmental pollution has been directly linked with a sharp increase in civil unrest over the last decades and very often the opening of new industrial plants has been greeted by riots and violence<sup>109</sup>. In some of the most extreme instances, even direct intervention of public authorities and extensive media campaigns have been unable to dispel the fears of the populations affected by new industrial projects or to address the grievances of pollution victims<sup>110</sup>. The Chinese government has therefore adopted several very significant measures to tackle the environmental crisis and to curb this new wave of

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China's Pollution Nightmare", *New York Times*, 11<sup>th</sup> April 2016.

- 107 World Bank, Supporting Report 3, *Seizing the opportunity of Green Development in China*, March 2013 [last accessed on 31<sup>st</sup> October 2015], available at: <http://www.worldbank.org/content/dam/Worldbank/document/SR3—229-292.pdf>. See also World Bank, State Environmental Protection Administration of the PRC, *Cost of Pollution in China: economic estimates of physical damages*, 2007, [last accessed on 23<sup>rd</sup> June 2016], available at: [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/03/30/000090341\\_20070330141612/Rendered/PDF/392360CHA0Cost1of1Pollution01PUBLIC1.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/03/30/000090341_20070330141612/Rendered/PDF/392360CHA0Cost1of1Pollution01PUBLIC1.pdf). However, according to some authors the true economic cost of environmental degradation may well be impossible to calculate: "natural disasters provoked by destruction of the environment regularly inflict heavy losses on the economy, varying between perhaps 3 and 5 per cent of GDP each year. In 1998 the flooding of the Yangtze, and of the Songhua and Nen River region in the far north-east, cost the country some 250 to 300 billion yuan. The bill for other kinds of ecological damage – deforestation, soil erosion, desertification of grasslands, shrinking of rivers and lakes – is harder to estimate. But it is clear that much cultivated land is dwindling, mineral reserves are being depleted, and many resources wasted (recycling rates are very low). If all these costs were put together, it is possible they would amount to as much as a tenth of China's GDP – that is, more than its recent annual increase in value. Economic growth is being undermined by environmental damage", HU A., "Equity and Efficiency", in WANG CHAOHUA (edited by), *One China, Many Paths*, Verso, London-New York, 2005, pp. 222 – 223.
- 108 BYRNES S., "Person of the year: the man making China green", *New Statesman*, 18<sup>th</sup> December 2006 [last accessed on 23<sup>rd</sup> June 2016], available at: <http://www.newstatesman.com/node/195683>.
- 109 WATTS J., "Further anti-pollution riots break out in China", *The Guardian*, 2<sup>nd</sup> September 2009.
- 110 The Economist, "Volatile atmosphere, Environmental protest in China", 4<sup>th</sup> April 2014, [accessed on 31<sup>st</sup> October 2015] available at: <http://www.economist.com/blogs/analects/2014/04/environmental-protest-china>.

rural unrest (which according to some authors might be a true “*life or death issue*” for the government<sup>111</sup>). However, so far legislative and administrative measures have fallen short of their targets whilst the environmental crisis has – if anything – worsened.

This failure may be attributed, at least in part, to some features of the Chinese framework of governance. Public authority in the PRC is apportioned between different layers of government, and over the last decades central authorities have frequently intervened to redress some of the imbalances caused by the policies pushed forward by provincial authorities in the pursuit of local growth<sup>112</sup>. This pattern has also characterised public policy in the field of environmental protection and international observers such as Elizabeth Economy have emphasized the “patchwork” nature of environmental law and governance in China, which is to a large extent the consequence of the devolution of power to provincial and local officials with insufficient oversight from central authorities<sup>113</sup>. However, this system of governance, characterized by the interplay between central control and regional particularism, was not born with the PRC and over the centuries found its pithiest description in the popular adage “*heaven is high and the emperor is far away*” (天高皇帝遠; tiān gāo, huángdì yuán).

Finally, a factor which may have exacerbated the environmental crisis is the extraordinary demographic growth experienced over the last century by China, which today has in excess of 1.300.000 inhabitants. Not even the highly controversial one-child policy enforced by the Chinese authorities for almost 25 years<sup>114</sup> (and officially abandoned only on 1<sup>st</sup> January 2016 in favour of a two-child policy<sup>115</sup>) has been able to reverse or even to contain in any significant way the growing demographic pressure.

The seriousness of the current environmental crisis and the ineffectiveness of the measures

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111 WALTER A., ZHANG X. (edited by), *East Asian Capitalism. Diversity, Continuity and Change*, Oxford University Press, Oxford 2012, p. 163.

112 “*The characterization of State control suggests a single monolithic authority, but China is perhaps better understood as having two types of State control: central and local. They both privilege banking and control over finance, but they have different motivations. Beijing seeks to maintain the CCP's control via economic growth and social stability. Local officials seek promotion and pursue local growth often at the expense of national welfare causing central CCP leaders to find ways to contain the costs*”, WALTER A., ZHANG X. Op.cit., p. 177.

113 ECONOMY E. Op. cit.

114 SKALLA N.M., “China’s One-Child Policy: Illegal Children and the Family Planning Law”, *Brooklyn Journal of International Law*, Vol. 30, 2004, pp. 329 – 363.; HESKETH T., LI L., ZHU W., “The effect of China’s One-Child Family Policy after 25 years”, *New England Journal of Medicine*, September 2005, pp. 1171-1176.

115 XINHUA, “Top legislature amends law to allow all couples to have two children”, 27<sup>th</sup> December 2015, [last accessed on 30<sup>th</sup> June 2016] available at: [http://news.xinhuanet.com/english/2015-12/27/c\\_134955448.htm](http://news.xinhuanet.com/english/2015-12/27/c_134955448.htm).

adopted by public authorities have even led some authors to question the value attached by Chinese culture to the environment. Indeed, while the blame for the environmental crisis which China is now facing is generally laid on Maoist policies such as the Great Leap Forward and on the rapid industrialization prompted by the economic reforms enacted under Deng Xiaoping, some authors have found these policies to be in line with what they consider an ancient and deeply rooted Chinese attitude towards nature. These authors have observed that “*whereas Chinese may have loved individual trees, they hated forests*”<sup>116</sup>, and that “[t]here is little in China's environmental history to suggest a unique or exceptional regard for the environment”<sup>117</sup>. Others have emphasized that at different times over its long history Imperial China carried out deforestation and the destruction of wildlife habitats on a massive scale<sup>118</sup> and with little concern for the sustainability of these practices or for the damage inflicted on the environment. While these positions have the merit of emphasizing the continuity between certain policies enacted during and after the Mao era and more ancient practices, they seem to be rather ungenerous and appear to leave out other aspects of Chinese culture which had a profound influence on environmental policy and legislation and which still resonate today.

## 2.2. TRADITIONAL CHINESE CULTURE AND ENVIRONMENTAL PROTECTION

Chinese society has been moulded (perhaps to a greater extent than other cultures around the world) by the geography of the land in which it developed and by the unique problems

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116 McELWEE C.R., *Environmental Law in China. Mitigating Risk and Ensuring Compliance*, Oxford University Press, New York, 2011, p. 18.

117 McELWEE C.R., *Op.it*, p. 18. In his analysis of the relationship between traditional Chinese culture and the environment, McElwee quotes a statement made by Liang Congjie (梁从诫), the architectural historian who established in 1994 the first environmental NGO officially recognized by the Chinese government, “Friends of Nature” (自然之友; *Zi Rán Zhī Yǒu*). According to Liang Congjie “*the more I learn, the more I see traditional culture is so unfriendly to nature*” (see McELWEE, *Op. Cit.*, p. 18). “*An uneasy relationship between man and nature has been a constant feature of Chinese history, with the former relentlessly seeking to achieve mastery over the latter in an anthropocentric fashion. Imperial-era excesses, present both during periods of conflict and those of the ensuing reconstruction, have carefully been documented by environmental scholars. Ecological degradation escalated to unprecedented levels in the course of communist transformation, as Mao embarked time and again on ideologically and personally-inspired campaigns predicated on the assumption that natural constraints can be circumvented by human ingenuity. Modest variations may be discerned over time, but the post-1978 picture is consistent with the overall traditional pattern*”, from MUSHKAT R., “Implementing Environmental Law in Transitional Settings: The Chinese Experience”, *Southern California Interdisciplinary Law Journal*, Vol. 18, p. 45, 2008, p. 47.

118 SHAPIRO J., *Mao's War against Nature: Politics and the Environment in Revolutionary China*, Studies in Environment and History – Cambridge University Press 2001, p. 196.

posed by a growing demographic pressure<sup>119</sup>. In turn, the Chinese appear to have modified their landscape much more radically than most other cultures in order to bend it to their needs. In an economy which for millennia relied largely on labour-intensive agriculture for its subsistence, the proper ordering of society was vital, not only in order to marshal the workforce, but also to regulate the relationship between man and nature and to domesticate the landscape.

### 2.2.1. Chinese culture and the relationship between Man and Nature

It has been observed that Chinese farming was “*more, or much more intensive in its use of land than most European farming*”<sup>120</sup> and required, since the very beginning of Chinese civilization, the constant use of fertilizers to keep the soil productive<sup>121</sup> and a careful management of the rivers and of the water resources of China<sup>122</sup> (often achieved at considerable cost in both human and financial terms). The emphasis laid on the correct management of the natural world has led some authors to contextualize the environmental degradation which doubtlessly accompanied the development of the Chinese civilization:

*“The Chinese farmer has probably modified his landscape, through terracing,*

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119 MESKILL J. (edited by), *An Introduction to Chinese Civilization*, Columbia University Press, New York, 1973, p. 520.

120 ELVIN M., *The Retreat of the Elephants: An Environmental History of China*, Yale University Press, New Haven, 2004, p. 461. In his book, Mark Elvin examines the profound effects of human activity on the environment in China, which included the disappearance of megafauna (the “retreat of the elephants” following the destruction their ancient habitat, which stretched as far as Northern China). Elvin offers a particularly compelling analysis of the role which the State played in Chinese environmental history.

121 ELVIN M., Op.cit, p. 461.

122 “*The extent of unavoidable hydraulic maintenance work, including not only irrigation with its multiple channels, barrages, reservoirs and sluices, but also the huge flood-protection levees and seawalls, plus canals for transport, was much greater in China than in the West*”, ELVIN M., *The Retreat of the Elephants: An Environmental History of China*, Yale University Press, New Haven, 2004, p. 460. The same author reports the observations the German agronomist Wilhelm Wagner, who argued (at the beginning of the twentieth century) that “*without water-control systems to facilitate drainage, many of the most productive parts of China would [...] revert to being ‘fever-ridden and uninhabitable swamps*” (from ELVIN M., Op.cit, p. 469). Other authors have emphasized the role which the needs of water management played in the development of State power and of a large bureaucracy in China: “*Karl Wittfogel l’a souligné: depuis l’Antiquité, les travaux hydrauliques vont de pair avec le développement de la civilisation chinoise. Ils ont nécessité une société très structurée, une bureaucratie puissante et un pouvoir centralisé autoritaire dont la principale fonction était de dominer la nature. On peut donc considérer le contrôle des eaux comme une manifestation du pouvoir du gouvernement, adressée à son peuple et au monde*”, PADOVANI F., *Les effets sociopolitiques des migrations forcées en Chine liées aux grands travaux hydrauliques. L’exemple du barrage des trois gorges*, Les Etudes du CERI - n° 103 – April 2004, Centre d’études et de recherches internationales, Sciences Po Paris, [last accessed on 17<sup>th</sup> April 2016] available at: <http://www.sciencespo.fr/ceri/sites/sciencespo.fr/ceri/files/etude103.pdf>.

*irrigation, deforestation and other techniques to a greater extent than agricultural man has done elsewhere, but he also tended his fields with greater care, seeing himself as a steward or even a servant of nature, and with an eye for the welfare of future generations. Man and nature were seen ideally as cooperating in harmony, because man adjusted to natural conditions as any agriculturist must, rather than attempting to conquer or ignore them. Harmony through adjustment and through the acknowledgement of limits was thus a familiar theme common to both Chinese society and Chinese land use, and in both a connection may be traced to the agrarian base of Chinese civilization”<sup>123</sup>.*

This particular view of the complementary relationship between man and nature found some of its highest expressions in the Daoist and Buddhist philosophies. In particular, much has been written about the particular concern for the protection of the natural world which runs through the Daoist tradition, while some authors have even found an overtly conservationist intent in many of the precepts contained in ancient Daoist texts<sup>124</sup> and in the works attributed to Laozi (老子)<sup>125</sup>.

The relationship between man and nature also played a central role in Chinese art and literature. In an essay on landscape painting, the Northern Song painter Guo Xi (郭熙, c. 1020 – 1090 AD) expressed in very lyrical terms the importance the natural world in Chinese culture:

*“Why does a virtuous man take delight in landscapes? It is for these reasons: that in a rustic retreat he may nourish his nature; that amid the carefree play of streams and rocks, he may take delight; that he may constantly meet the country fishermen, woodcutters and hermits and see the soaring of the cranes and hear the crying of the monkeys. The din of the dusty world and the locked-in-ness of human habitation are what human nature habitually abhors; while on the contrary haze, mist, and the haunting spirits of the mountains are what human*

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123 MESKILL J. Op.cit., p. 520.

124 James Miller examined some of the rules of conduct set out in the “One Hundred and Eighty Precepts”, finding in several of them what we might consider a “conservationist” intent. In particular, some of these precepts concern the protection of forested areas, of water reserves (“you should not throw poisonous substances into lakes rivers, and seas”), of marshes and wetlands (“you should not dry up wet marshes”), of wildlife (“you should not in winter dig up hibernating animals and insects”, “you should not use cages to trap birds and [other] animals”). See MILLER J., “Daoism and Nature”, in SELINE H. (edited by), *Nature across Cultures: Views of Nature and Environment in non-Western Cultures*, Springer 2003, pp. 404 – 405.

125 Laozi is a 6<sup>th</sup> century philosopher, considered the founder of philosophical Daoism.



*nature seeks and yet can rarely find?”<sup>126</sup>*

I have quoted this passage in its entirety not only to demonstrate the important role which the natural world played in Chinese art, but also as an example of the syncretism which has always characterised this culture. Indeed, in this brief passage, Guo Xi employs Confucian categories, such as that of the “virtuous man” or *jūnzǐ* (君子)<sup>127</sup>, to expound what is an essentially Daoist and Buddhist doctrine<sup>128</sup>. In particular, the image of the humanized “dusty world” (set in sharp contrast with the natural world) is fraught with religious and philosophical significance within the Buddhist tradition<sup>129</sup> and has no parallels in Confucian philosophy.

From a legal point of view, ancient sources such as the *Shǐjì* (史記), the records written by the grand court historian Sima Qian (c. 145 – 86 BC), and the *Guóyǔ* (國語)<sup>130</sup> make specific reference to precepts on wildlife and forest protection<sup>131</sup>. In particular, the following passage of the *Guóyǔ* shows a deep practical understanding of the functioning of an ecosystem, of land and soil degradation and of the potentially devastating effects of human activities on the environment:

*“Now if the mountain’s forests are overexploited, the forests at the foot of the mountains will be destroyed, the swamps will be exhausted, the people’s strength will be used up, and the fields will become devoid of crops and full of weeds. Resources will have been squandered. The gentleman (jūnzǐ) will continuously express shock and regret. Moreover, how will it be possible for there be any*

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126 GUO XI, *An essay on landscape painting*, 1935, p. 30, quoted in MESKILL J. (edited by), *An Introduction to Chinese Civilization*, Columbia University Press, New York, 1973, p. 448.

127 Literally “lord’s (君) son (子)”. It is a term employed by Confucius to describe the ideally upright and moral man, second only to the “sage” (聖; shèng). The virtues and conduct of the *jūnzǐ* are often contrasted with those of the *xiǎo rén* (小人), the “petty person”. These notions of *shèng* and *jūnzǐ* are employed within the Confucian tradition to describe different levels of human achievement and moral perfection.

128 Several authors have emphasized the close interaction between the three great philosophical traditions of Ancient China. “*Il en va également de tous les autres '-ismes' (taoïsme, bouddhisme, etc.) qui nous encombrant et nous empoisonnent l'existence au lieu de nous la faciliter: ces étiquettes, que nous croyons commodes, nous masquent les réalités qu'elles sont censées ordonner et nous empêchent de voir les constantes interactions et interpénétrations entre des ensembles qu'elles ont artificiellement compartimentés*”, CHENG A., *La Chine pense-t-elle?*, inaugural lecture at the Collège de France, 11 December 2008 [last accessed on 6<sup>th</sup> February 2016], available at: <http://books.openedition.org/cdf/170>. See also CHENG A., *Histoire de la pensée chinoise*, Points, Paris, 2014, *passim*.

129 See MESKILL J. (edited by), *An Introduction to Chinese Civilization*, Columbia University Press, New York, 1973, p. 448.

130 An historic record compiled between the 5<sup>th</sup> and 4<sup>th</sup> Century BC.

131 See EDMONDS R.L. (edited by), *Patterns of China's lost harmony: A survey of the country's environmental degradation and protection*, Routledge, London, 1994, p. 23.

*happiness?*<sup>132</sup>

The ancient records also show a deeply-rooted concern for the preservation of woods and forested areas<sup>133</sup> and for the proper management of rivers. In particular, during the Spring and Autumn Period (between the VIII and the V century BC), the inclusion of the stewardship of the natural world among the principal duties of the accomplished ruler found its pithiest expression by the author of the Guānzǐ (管子):

*“People who are of ruling quality (jǔn) but are not able to respectfully preserve the forests, rivers and marshes are not appropriate to become rulers”*<sup>134</sup>.

These references to the management of woodlands and rivers are a recurring theme within the Confucian philosophical tradition, and similar references to the protection of forests and of the fauna as the most important duties of the “ideal ruler” can also be found in the Xunzǐ (荀子), a work traditionally attributed to Xun Kuang (c. 310 – 235 BC), one of the most important philosophers of the Warring States period<sup>135</sup>.

While it cannot be denied that the rules of conduct advocated within these philosophical traditions did not always inform China's attitude towards nature, archaeological evidence suggests that their influence was certainly felt well beyond the cultural elite and had tangible, practical implications. It is also worth noting that there seems to be at least some anecdotal evidence of the positive role which the abiding influence of Daoist and Buddhist traditions still plays in the preservation of sacred mountains and other holy sites<sup>136</sup>.

### **2.2.2. Imperial statutes and conservationism: from the Qin to the Qing dynasty**

Evidence unearthed over the last decades shows that, contrary to popular belief, statutes “with demonstrable conservationist intent” existed and were widely enforced in imperial

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132 English translation from EDMONDS R.L. (edited by), *Patterns of China's lost harmony: A survey of the country's environmental degradation and protection*, Routledge, London, 1994, p. 24.

133 “The state of Zhèng had a serious drought. Tú Jǐ, Zhù Kuān and Shù Fū were sent to make sacrifices at Mulberry hill. They cut down wood but it did not rain. Zǐ Chǎn said, “If you make sacrifices in the mountains, you should plant a mountain forest, if you cut down trees, it is a great crime”, EDMONDS Op.cit, p. 24.

134 English translation from EDMONDS R.L. (edited by), Op.cit, p. 24.

135 SANFT C., “Environment and Law in Early Imperial China (Third Century BCE – First Century CE): Qin and Han Statutes Concerning Natural Resources”, *Environmental History*, Oxford University Press, Vol. 15, No. 4, October 2010, p. 713.

136 PALMER M., “Daoism, Confucianism and the Environment”, *Chinadialogue*, 15 November 2013, [last accessed on 7<sup>th</sup> February 2016] available at: <https://www.chinadialogue.net/books/6502-Daoism-Confucianism-and-the-environment/en>.

China as early as in the first century AD<sup>137</sup>. In particular, Charles Sanft has examined some of the “statutes on fields” which regulated the use of land and natural resources during the Qin (221 - 206 BC) and Han (206 BC – 220 AD) dynasties, showing that they did not simply regulate logging and damming of rivers, or limit hunting and fishing to certain months of the year, but they also explicitly banned certain practices (such as the killing of pregnant animals or the harvesting of bird’s nests) as excessively damaging for the environment. Moreover, some Han statutes even outlawed certain hunting techniques which were likely to cause unintended harm to forests or wildlife or were seen as overexploitation, such as the use of fire for hunting in forested areas.

The rules set out by the statutes on fields were designed on the basis of the annual cycle which characterizes most agricultural activities and show a distinctly “ritualistic” character<sup>138</sup>. Rituals (礼, Lǐ) played an important role within the legal system of imperial China, and for centuries its legal system was defined, to a large extent, by the dialectic and often antithetic relationship between statutory law (法, Fǎ) and Lǐ<sup>139</sup>.

While the school of thought today known as “legalism” (法家, Fǎ Jiā) advocated a society based on statutory law and on a system of rewards and punishments<sup>140</sup>, Confucianism emphasized the importance of rituals, ceremony and of the rules of conduct drawn from exemplary characters, considering written laws as unfit for “civilised” peoples<sup>141</sup>. In particular, historic or even semi-mythical figures from the Zhou dynasty, such as the Duke of Zhou (周公, Zhōu Gōng), figure prominently in Confucian doctrine and in the Lún Yǔ (论语, the work known in the West as the “Analects”) as role models for rulers and subjects. Moreover, Confucianism considered Lǐ to be not only the most important tool to create an ordered society, but also an element of the “*solidarity between the human and the*

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137 SANFT C., Op. cit., p. 702.

138 SANFT C., Op.cit. These rules were mostly enshrined in “monthly ordinances”, which listed specific practices allowed or banned during certain periods of the year. Such ordinances were likely fraught with ritualistic and even “cosmological” significance.

139 See CAVALIERI R., *La legge e il rito. Lineamenti di storia del diritto cinese*, Franco Angeli, Collana storica – Centro studi dell’Università di Pavia, 2011, *passim*.

140 “A major legalistic principle was that of the Two Handles, by which the ruler has to steer his subjects as he wished. The two handles were proportional rewards and harsh punishments”, in MESKILL J. (edited by), *An Introduction to Chinese Civilization*, Columbia University Press, New York, 1973, p. 21.

141 AJANI G., SERAFINO A., TIMOTEO M., *Diritto dell’Asia Orientale*, UTET Giuridica, 2007, p. 53. According to legend the notion of Fǎ may have been introduced in China by an ancient “barbarous” people, the Miao (see GAMBARO A., SACCO R., *Sistemi Giuridici Comparati*, 3rd Edition, UTET Giuridica 2011, p. 383; SACCO R., “Cina”, in *Digesto delle discipline privatistiche*, UTET, Turin, 1988, p. 361; CAVALIERI R., *La legge e il rito. Lineamenti di storia del diritto cinese*, Franco Angeli, Collana storica – Centro studi dell’Università di Pavia, 2011).

*natural world*<sup>142</sup>, of the “cosmic order” of which the social order constitutes a mere reflection<sup>143</sup>.

The process which has been variously described by legal doctrine as the “triumph” of the *Lǐ* over statutory law<sup>144</sup> or rather the “confucianization” of the law<sup>145</sup> had a profound influence over the development of the Chinese legal system. A distinctly Confucian influence can also be found in the emphasis on non-adversarial solutions to disputes<sup>146</sup> and on the preference for substantive rather than procedural justice<sup>147</sup>, which some authors consider hurdles in China’s “*long march toward the rule of law*”<sup>148</sup>.

While the “statutes of the fields” enacted under the Qin and Han dynasties show a clearly

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142 AJANI G., SERAFINO A., TIMOTEO M., *Diritto dell'Asia Orientale*, UTET Giuridica, 2007, p. 53.

143 “*La concezione cinese dell’ordine sociale si ricollega all’idea di un ordine cosmico basato su un’interazione fra cielo, terra e uomini. L’ordine è turbato, innanzitutto, se va perduta l’armonia che deve esistere fra l’uomo e la natura. Epidemie e cataclismi sanzioneranno la noncuranza umana dei cicli astrali e stagionali; se i governanti si allontaneranno da una regola di saggezza e probità, questa inosservanza metterà a repentaglio il buon ordine e la pace sociale*”, SACCO R., “Cina”, in *Digesto delle discipline privatistiche*, UTET, Turin, 1988, p. 361.

144 REYNAUD J., “*Réflexions sur la réception du droit étranger en Chine*”, *McGill Law Journal/Revue de droit de McGill*, Vol. 51, Montreal, 2006, pp. 601 – 609; and PEERENBOOM R., *China’s Long March toward Rule of Law*, Cambridge University Press, Cambridge, 2002.

145 AJANI G., SERAFINO A., TIMOTEO M., *Diritto dell'Asia Orientale*, UTET Giuridica, 2007, p. 57. See also CAVALIERI R., *La legge e il rito. Lineamenti di storia del diritto cinese*, Franco Angeli, Collana storica – Centro studi dell’Università di Pavia, 2011.

146 “*Le recours aux tribunaux est certes de plus en plus fréquent dans la Chine d’aujourd’hui. Néanmoins, pour diverses raisons d’ordre culturel, philosophique et historique, les procédures litigieuses ont traditionnellement été considérées avec un œil suspect dans l’Empire du milieu. Comme l’écrivait Wang Hui-tsu (1731-1807) : «Le litige est souvent à l’origine de troubles et maux [...] Une goutte d’encre rouge provenant d’une cour de justice équivaut à un millier de gouttes de sang parmi le peuple»*”, REYNAUD J., *Op.cit.*, p. 603. See also AJANI G., SERAFINO A., TIMOTEO M., *Diritto dell'Asia Orientale*, UTET Giuridica, 2007, p. 58; and PEERENBOOM R., *China’s Long March toward Rule of Law*, Cambridge University Press, Cambridge, 2002.

147 “[La philosophie confucéenne du “*li*”] a traditionnellement dominé le légisme et la philosophie du “*fa*”, courant selon lequel la règle de droit devrait être appliquée de façon impersonnelle, éliminant toute tendance au particularisme. Le triomphe du *li* sur le *fa* a fortement marqué l’évolution du droit en Chine et son influence continue de se faire sentir à ce jour. Fréquemment cité comme constituant un obstacle à la progression de la primauté du droit, ce phénomène est aussi associé à la préférence marquée, en Chine, pour une justice substantielle plutôt que procédurale. En effet, la logique du *li* étant historiquement basée sur les rites et sur les statuts individuels plutôt que sur la primauté du droit, elle tend à favoriser la résolution des conflits ‘en fonction des relations existant entre les parties et des règles de conduite appropriées aux circonstances de l’espèce’”, REYNAUD J., *Op.cit.*, p. 602. On the distinction between procedural and substantive justice or fairness see SEN A., *The Idea of Justice*, Harvard University Press, 2009, *passim*; and SOLUM L.B., “Procedural Justice”, *Southern California Law Review*, Vol. 78, 2004, pp. 183 – 190. However, Professor Sacco has emphasized that the influence of Confucian philosophy on Chinese society should not be overstated (see SACCO R., “Cina”, in *Digesto delle discipline privatistiche*, UTET, Turin, 1988, p. 364).

148 PEERENBOOM R., *China’s Long March toward Rule of Law*, Cambridge University Press, Cambridge, 2002. The notion of “rule of law” is generally translated as “*fǎ zhì*” (法治).

conservationist character<sup>149</sup> and a serious concern for the preservation of forests and animal populations, it is not clear to what extent they were actually enforced or to what extent did they achieve their objectives<sup>150</sup>. Historical records show that Chinese history has been characterized by the steadily increasing pressure of economic and demographic growth on the environment<sup>151</sup> and by repeated (albeit largely unsuccessful) attempts to counteract the consequent environmental degradation. However, it is not impossible to make some informed guesses as to the effectiveness of the environmental policies implemented under later dynasties. A description of the stringent environmental policies implemented in Qing China is offered by Professor Mark Elvin through references to the essays and diaries left by some of the Jesuit missionaries who travelled through China between the XVII and XVIII centuries<sup>152</sup>. These testimonies are extremely revealing since they provide a picture of environmental degradation and environmental policies in late-imperial China through the eyes of contemporary foreign observers who would have been to draw comparisons and distinctions between China and Europe. On the issue of deforestation, which, as we have seen, was a constant concern in China even before the Qin statutes on the fields, one of these European missionaries observed that:

*“The Chinese have an excellent understanding of the economic policing of the woods. One may not cut anything down without planting [a replacement]; and in the capital the owner does not have the right to decide what is to be done with the old construction timbers of a house. If they can still serve for building they must continue to be used for this purpose. There is not option to cut them into pieces”*<sup>153</sup>.

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149 *“The goal of these statutes can be called conservationist, in that they prevented and restricted use in the short term in order to sustain populations in the long term”*, SANFT C., Op. cit., p. 703.

150 Charles Sanft believes it is unlikely that these statutes had any significantly positive effect on the environment. He argues that these attempts were destined to fail in view of two “structural problems”: (i) most hunting restrictions concerned young animals and birds, which have low reproductive value; and (ii) by designing restrictions on the basis of an annual cycle, these were ineffective with regard to “multi-year growth patterns”, SANFT C., Op. cit., *passim*.

151 ELVIN M., *The Retreat of the Elephants: An Environmental History of China*, Yale University Press, New Haven, 2004, p. 454. “[...] *Provided we restrict ourselves to the agricultural cores of the two economies, it seems likely that in late-imperial China the pressure on the environment [...] was much higher than in Western Europe overall around the end of the eighteenth century, and fairly probably somewhat higher than in England and the Netherlands, though less unarguably so*”, ELVIN M., Op. cit., p. 460.

152 ELVIN M., Op. cit., p. 461. The author quotes *Missionnaires de Pékin, Mémoires concernant l’histoire, les sciences, les arts, les mœurs, les usages, & c. des Chinois*, Vol. 1, 2, 4, 5, 8, and 11, Nyon, Paris, 1776, 1777, 1779, 1780, 1782, and 1786.

153 ELVIN M., Op.cit. pp. 462 - 463.

What the Jesuit fathers are describing is a rather advanced, and apparently strictly enforced, system of (statutory, rather than customary) rules aimed at fostering a more “sustainable” economy at a time when natural resources were already barely sufficient to satisfy the needs of a growing population. However these missionaries also described very vividly the considerable strain put on the environment by the absence of crop rotation<sup>154</sup>, and the titanic efforts made to domesticate and reshape the landscape in order to increase food production<sup>155</sup>.

The relationship between man and nature in Chinese history has therefore always been considerably more complex than it is generally portrayed, and it would be wrong and ungenerous to characterize it as solely and systematically antagonistic. Moreover, the historical records we have examined show that the legal transplants which characterized the development of an environmental law framework in China since the late 1970s occurred within a culture and a legal tradition which had long recognized the need to protect the natural world.

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154 *“In France, the land rests every other year. In many places there are vast tracts under fallow. The countryside is broken up by woods, meadows, vineyards, parks and lodges for recreation, etc. Nothing of this sort could exist here [...]. Even if the land is exhausted by thirty-five centuries of harvests, it has to provide a new one every year to supply the urgent needs of a countless population. This excess of population [...] here increases the need for farming to the point of forcing the Chinese to do without the help of cattle and herds, because the land that would feed these latter is needed for feeding people. This is a great inconvenience as it deprives them of fertilizer for the soil, meat for the table, horses, and almost all the advantages that can be gained from herds. Were it not for the mountains and the wetlands China would be absolutely without the benefit of woods, and without venison and game. Let us add that it is the strength and application of human beings that meets all the costs of farming. More labor and more people are needed to obtain the same quantity of grain than are required elsewhere”*, ELVIN M., *Op. cit.*, p. 463. These testimonies further demonstrate that the economic situation of late-imperial China was extremely precarious, and characterized by a vicious circle which hindered economic growth and technological development. According to Professor Elvin, by the Qing era, China had fallen in what he called an *“high-level equilibrium trap”* which might partly explain why it was unable to match the West’s industrial and technological development. He believes that due to certain characteristics of the Chinese economy, including a significant demographic pressure which could not be matched by the growth of arable land, the surplus product available for generating demand above the level of subsistence was progressively reduced. Moreover a significant surplus of cheap labour (a direct consequence of overpopulation) tended to favour labour-intensive innovation, at the expense of capital-intensive enterprises. There was therefore no incentive for technological progress, which consequently stagnated. For an illustration of this theory see ELVIN M., *“The high-level equilibrium trap: the causes of the decline of invention in the traditional Chinese textile industries”*, in WILLMOTT W.E., *Economic Organization in Chinese Society*, Stanford University Press, 1972, pp. 137 – 172.

155 *“A hundred and twenty years of pace have so increased the population that the pressing need for survival has caused the plow to enter all those lands where there has been the slightest hope of a harvest. Hard work has outdone itself and gone so far as to create amphitheatres of harvests on the slopes of the mountains, to convert sunken marshes into rice-paddies, and to gather harvests even from the midst of the waters by means of inventions of which Europe has as yet not an inkling”*, ELVIN M., *Op. cit.*, p. 465.

## 2.3. LEGAL REFORM AND ENVIRONMENTAL POLICY IN THE PRC

The historical records we have examined in the previous paragraph show that the policies enacted during the Mao Era represented a sharper departure from the traditional attitude of the Chinese towards nature than has been generally recognized. The present paragraph provides therefore a diachronic overview of environmental law reform in the People's Republic of China, from the foundation of the Republic at the end of the Civil War to the 13<sup>th</sup> Five-Year Plan.

### 2.3.1. The Mao era: fighting against Heaven and Earth

The decades following the establishment of the PRC were characterized by what can be considered – at least in practical terms - an openly adversarial relationship with the environment<sup>156</sup>. Great emphasis was laid on large infrastructural works and economic policies which favoured overwhelmingly heavy industry with little or no concern for the environmental impact of these development strategies. According to Judith Shapiro, the environmental and economic policies of the PRC in the Mao era were deeply influenced by the Soviet model, in particular as regards the “*predisposition toward grandiose engineering projects intended to humble nature*”<sup>157</sup> and to hasten industrial development.

While the Mao era saw the abandonment of the ideal of establishing an harmonious relationship between man and nature<sup>158</sup>, the goal of the policies enacted over the two decades which followed the foundation of the PRC was ostensibly that of achieving material progress for the population. Industrial pollution was therefore simply seen as the price to pay to bend nature to the needs of the people<sup>159</sup>, or even ignored altogether. More than that, official doctrine rejected the very notion of a dichotomy between man and nature in a socialist society:

*“The aim of socialism was to satisfy the needs of the masses, so how could it*

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156 See SHAPIRO J., *Mao's War against Nature: Politics and the Environment in Revolutionary China*, Studies in Environment and History, Cambridge University Press 2001. “*What set the Mao era apart is that nature was portrayed as something to be defeated and replaced by a 'utopian idealism' defined as a landscape forcibly harnessed to meet the demands of a modern industrial/agricultural state*”, indeed “*Mao not only changed the intensity of the conflict with nature, he also attempted to change the conception of the ideal in Chinese culture; it wasn't the individual tree the Chinese should love, but the electric transmission line tower*”, McELWEE C.R., Op. cit., p. 19.

157 SHAPIRO J., *Mao's War against Nature: Politics and the Environment in Revolutionary China*, Studies in Environment and History, Cambridge University Press 2001, p. 200.

158 SHAPIRO J., Op.cit., p. 196.

159 McELWEE C.R., Op. cit., p. 20.

*damage the masses? It was only in a capitalist society, where capitalists received profit at the cost of environmental destruction regardless of the welfare of workers and peasants that environmental problems existed*<sup>160</sup>.

Therefore, according to the official line of the CCP, in a planned, command economy, where the overarching goal is ensuring the welfare of peasants and workers, there could be no tension or trade-off between economic development and environmental protection<sup>161</sup>. The socialist ideal of harnessing nature to serve the interests of society is echoed in many of the slogans of the Mao era, such as “*to struggle against the heavens is endless joy, to struggle against the earth is endless joy, to struggle for the people is endless joy*”<sup>162</sup>. These slogans resonated through much of the Party rhetoric over the following decades<sup>163</sup>, as Chinese peasants “*became the main force who fought against heaven and earth and tried to conquer and remake nature*”<sup>164</sup>..

Mao’s development strategy found its most significant expression in the Great Leap Forward (大跃进; dà yuè jìn), a far-reaching campaign, implemented in the 1950s, aimed at transforming the PRC into a major industrial power within a single generation. The strategy implemented by the State’s economic planners was to make up “*for a lack of capital in both industry and agriculture by fully mobilizing underemployed labour power*”<sup>165</sup>. The massive process of collectivization and industrialization entailed by the Great Leap Forward, which even called for the construction of “backyard furnaces”, operated by farmers, in order to boost steel production, had however extremely dire environmental consequences. Not only were these campaigns implemented without much concern for their environmental impact, but they were often carried out with complete

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160 BAO M. “The Evolution of Environmental Policy and its Impact in the People's Republic of China”, *Conservation and Society*, 2006, 4, p. 38.

161 McELWEE C.R., Op. cit., p. 20.

162 BAO M., Op. cit., p. 37. “*The notion that the face of the earth could be miraculously transformed through ideologically motivated determination was repeatedly translated into policy and action during the Mao years, and the natural environment was devastated through the efforts of millions of laborers*”, SHAPIRO J., Op.cit., p. 197.

163 In a 1997 speech, President Jiang Zemin borrowed this doctrine, reading it within the broader context of traditional Chinese culture: “*From old, the Chinese people have had a brave history of carrying out activities to conquer, open up and utilize nature. The legends, Jingwei Fills the Seas and The Foolish Old Man Who Removed the Mountains, and the story of Yu the Great harnessing the waters, express how, from ancient times, the Chinese people have had a strong struggle spirit of reforming nature*”, from SHAPIRO J., *Mao's War against Nature: Politics and the Environment in Revolutionary China*, Studies in Environment and History, Cambridge University Press 2001, p. 205.

164 BAO M., Op. cit., p. 51.

165 FAIRBANK J.K. (edited by), *The Cambridge History of China*, Cambridge University Press, Vol 14, 1987, p. 305. See also MESKILL J. Op. cit., p. 504.



disregard for technical or safety norms, in order to attain “*more, faster, better and more economical results*”<sup>166</sup>. Equally damaging for the environment was the so-called “Four Pests campaign”, the goal of which was the extermination of mosquitoes, flies, rats and sparrows (the latter were included since they ate grain seeds). This campaign – founded on a misunderstanding of the role which certain species play within their ecosystem or of their importance for agriculture - caused serious ecological imbalances and was soon abandoned.

The damaging effects of the drive to industrialize China within a single generation were further exacerbated by the policies and ideologies which prevailed during the Cultural Revolution, when being “red” became much more important than being an “expert”, and when the ability to toe the Party line took precedence over technical expertise<sup>167</sup>.

The Mao Era was also characterised by a growing tension between legality and political discretion, which produced what has been defined as the “paradox of socialist legality”, that is the recognition of the supremacy of Party policy over the law<sup>168</sup>. Periods characterized by a resurgence of “socialist legality” (namely the years between 1954 and 1957) were followed by a return to political discretion and a recrudescence of revolutionary excesses (particularly during the years of the Cultural Revolution, between 1966 and 1976)<sup>169</sup>. In the field of economic governance, Maoist China struggled to establish a stable legal system along the lines of the Soviet model and repeated attempts to draft a Civil Code (most notably, between 1954 and 1957 and again in 1962) and to assert some form of “socialist legality” were thwarted by the upheavals and revolutionary campaigns which periodically re-shaped Chinese society<sup>170</sup>.

For most of the Mao Era, legislation was therefore “*imprecise, exhortational, tentative*”

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166 FAIRBANK J.K. (edited by), *The Cambridge History of China*, Cambridge University Press, Vol 14, 1987, p. 305. “[...] *the Great Leap also saw the downgrading of technical expertise, as the Party cadres gained control of production in the name of mass participation and 'politics takes command' and pushed the campaign so ambitiously and fanatically that many basic technical constraints were neglected. The result was a gross misuse and misallocation of resources*”, MESKILL J. (edited by), *An Introduction to Chinese Civilization*, Columbia University Press, New York, 1973, p. 505.

167 “*Being 'red', mastering Marxism-Leninism and the thought of Mao Tse-tung, took priority over merely technical knowledge and skills, evoking the old standard of the Confucian gentleman, where devotion to a moral vision made him a man better qualified to govern than one who only thought about getting things done*”, MESKILL J. Op. cit., p. 323.

168 AJANI G., SERAFINO A., TIMOTEO M., *Diritto dell'Asia Orientale*, UTET Giuridica, 2007, p. 192.

169 AJANI G., SERAFINO A., TIMOTEO M., Op.cit. p. 198. The first three decades of the People’s Republic of China were characterized by what legal scholars have called “legal nihilism”, see HE W., *In the name of justice: striving for the rule of law in China*, Brookings Institution Press, 2012, p. xxxvii.

170 AJANI G., SERAFINO A., TIMOTEO M., Op.cit. p. 213.

and pervaded with sloganeering and programmatic statements<sup>171</sup>. The governance system of the PRC was also characterised by two of the main traits of Maoism, namely a tendency to leave greater leeway to provincial and local authorities and the emphasis on the need to encourage the initiative of party cadres at a local level. Mao's willingness to “decentralize” probably developed during the Sino-Japanese War and the subsequent civil war with the Guomindang, when the bases of operation of the Communist Party were scattered across China and generally unable to communicate with each other, and party cadres were often left to their own devices<sup>172</sup>. As it will be discussed further on, this drive towards decentralization had a deep and lingering impact on the environmental policies of the PRC.

### 2.3.2. Legal reform and environmental policy after Mao

In the decades following the death of Mao Zedong in 1976 and the downfall of the so-called “Gang of Four”, China has undergone one of the most dramatic transformations in its long history. The process of “reform and opening up” (改革开放, gǎi gé kāi fàng) began in the late 1970s with the “Four modernizations” of Chinese industry, science, agriculture and defence and over the following years, a series of measures approved by the National People’s Congress enacted the gradual decollectivization of agriculture<sup>173</sup> and promoted the inflow of foreign capital through the new “Special Economic Zones”<sup>174</sup>.

This massive wave of reforms upended the established relationship between ideology and economic development and between legality and political discretion, so that finally, under Deng’s pragmatic leadership, the law became a useful instrument to achieve the Party’s economic goals<sup>175</sup>. Deng’s influence can also be found in the 1982 Constitution of the PRC

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171 LUBMAN S. “Bird in a Cage: Chinese Law Reform after Twenty Years”, *Northwestern Journal of International Law & Business*, Issue 20, 1999, p. 384.

172 See COASE R., WANG N., *How China became capitalist*, Palgrave Macmillan, 2012, *passim*. See also MAO Z., *Selected Works of Mao Tse-tung*, Foreign Language Press, Beijing, Vol. 5, pp. 291 - 294.

173 See UNGER J., “The decollectivization of the Chinese countryside: a survey of twenty-eight villages”, *Pacific Affairs*, Vol. 58, No. 4, Winter 1985, pp. 585 – 606.

174 See FENWICK A., “Evaluating China’s Special Economic Zones”, Vol. 2, Issue 2, *Berkeley Journal of International Law*, 1984, pp. 376 – 397; CHEN Jianfu, *Chinese law, towards an understanding of Chinese Law, its nature and development*, Kluwer Law International, The Hague, 1999, pp. 320 – 321; ZOU K., *China’s legal reform, towards the rule of law*, Martinus Nijhoff Publishers, Leiden – Boston, 2006, Ch. 4.

175 CHEN J., *Chinese law: context and transformation*, Martinus Nijhoff Publishers, Leiden - Boston, 2008, Ch. 2; AJANI G., SERAFINO A., TIMOTEO M., *Op.cit.* p. 301; CAVALIERI R., “Il diritto nella Cina socialista e post-socialista”, in SAMARANI G., SCARPARI M., *La Cina (III). Verso la modernità*, Einaudi, Turin, pp. 443 – 503; LUBMAN S.B., *Bird in a cage: legal reform in China after Mao*, Stanford University Press, 2002.

which recognized, under Article 5, the principle that no law or administrative measure should contravene a constitutional provision<sup>176</sup>. While this provision represents a momentous step for the development of the Chinese legal system, its influence was however greatly reduced by the fact that the main interpreter and enforcer of the Constitution is the Standing Committee of the National People's Congress (which entails that the ultimate arbiter of the constitutionality of the laws is the *de facto* legislator itself)<sup>177</sup>. It is however important to understand that in the PRC the Constitution has historically represented “*a statement of current policy*”<sup>178</sup>, rather than a set of rules governing the activities of the State institutions<sup>179</sup>. However, a constitutional reform generally signals a major policy shift, and the new direction taken by the Chinese Communist Party in the 1980s finds its most concise expression under Article 14 of the 1982 Constitution:

*“The State continuously raises labour productivity, improves economic results and develops the productive forces by enhancing the enthusiasm of the working people, raising the level of their technical skill, disseminating advanced science and technology, improving the systems of economic administration and enterprise operation and management, instituting the socialist system of responsibility in various forms and improving the organization of work”*<sup>180</sup>.

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176 AJANI G., SERAFINO A., TIMOTEO M., Op.cit. p. 305.

177 “Article 5, paragraph 2 of the 1982 Constitution placed the Constitution at the pinnacle of the legal hierarchy in the PRC and thus theoretically the laws enacted by the NPC should not contravene the Constitution. However, in reality the NPC can enact any laws it wishes in disregard of the spirit and letter of the Constitution. This is because the Constitution has given the power to interpret the Constitution to the NPC's Standing Committee (Article 67, paragraph 1). It is not to be expected that this subordinate organ would interpret a law enacted by its parent organ, i.e. the NPC as ‘unconstitutional’”, CHIU H., “The 1982 Chinese Constitution and the Rule of Law”, *Occasional Papers*, No. 4, School of Law of the University of Maryland, 1985, p.11. Chiu's analysis has the merit of shedding light over the most significant shortcoming of the 1982 Constitution. However, it seems to misrepresent the actual power relationships between the NPC and its Standing Committee.

178 JONES W.C., “The Constitution of the People's Republic of China”, *Washington University Law Review*, Vol. 63, Issue 14, 1985, p. 711; LUBMAN S. “Bird in a Cage: Chinese Law Reform after Twenty Years”, *Northwestern Journal of International Law & Business*, Issue 20, 1999, p. 385.

179 “What is true of the 1982 constitution was also true of its predecessors. The written constitution was not the place to start if one wanted to know what the government of China was really like. One might say that the written constitution had little to do with the actual constitution, that is, the real structure of government. Though it should be said that the 1975 and 1978 constitutions were a little closer to reality than the rest, because they both emphasized the importance of the Communist Party. In other respects, however, they shared the remoteness from reality of their fellows”, JONES W.C., “The Constitution of the People's Republic of China”, *Washington University Law Review*, Vol. 63, Issue 14, 1985, p. 711. See also AJANI G., SERAFINO A., TIMOTEO M., Op.cit. p. 305.

180 1982 Constitution of the People's Republic of China, [last accessed on 30<sup>th</sup> July 2016] English

Equally significant is the description of the PRC as a “*socialist State under the people’s democratic dictatorship led by the working class and based on the alliance of workers and peasants*” provided by Article 1, which has been seen by some as the official abandonment of class struggle as the top priority of the CCP<sup>181</sup>.

Under the leadership of Deng Xiaoping and his successors, the PRC underwent a sea change, transforming its command economy into what has been dubbed a “*socialist market economy*” (社会主义市场经济, *shè huì zhǔ yì shì chǎng jīng jì*)<sup>182</sup>, as the State loosened its grip on the economy and progressively dismantled the welfare system put in place after the Revolution (the so-called “iron rice bowl” which had been for more than thirty years a key element of the social compact between the State and the Chinese people)<sup>183</sup>. This social and economic transformation was accompanied by an unprecedented transfer of powers from Beijing to the provincial and local authorities, which significantly diminished the ability of the central government to rein in measures adopted by local officials which may have disruptive effects on the national economy or on the environment<sup>184</sup>. The 1980s and early 1990s saw therefore the dismantlement of what was widely considered an efficient, if overly centralized, administration in favour of a far more chaotic decentralized system of government. However, the fragmentation of the decision-making process and the

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translation available at: [http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content\\_1372963.htm](http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content_1372963.htm).

181 LI X. FANG Q., *Modern Chinese Legal Reform: New Perspectives*, University Press of Kentucky, 2013, p. 87; McELWEE C.R., Op. cit., Ch. 2.

182 “*The establishment of a socialist market economy means to enable the market to establish itself as the foundation of the economy under the State’s macroeconomic control*”, GAO S., *Two decades of reform in China*, World Scientific, Singapore, 1999, p. 42. “*The concept of a socialist market economy implies an economy in which the market mechanism governs economic interactions but ownership over the most important means of production remains in the hands of the public sector or the collectivity, thus preserving the socialist character of the society*”, MEHRAN H., QUINTYN M., NORDMAN T., LAURENS B., “Monetary and Exchange System Reforms in China”, International Monetary Fund, Occasional Paper n. 141, September 1996, p. 1. “*Though the term ‘socialist market economy’ was never well defined, it clearly reflected the ideological thinking of [the] Chinese communist government: on the one hand, the country must stay with [...] socialism where [...] public ownership (or state ownership) remains a dominant force; and on the other hand, in order to make the country strong, its economic development shall be driven more by market force[s] than by the government plans*”, ZHANG M., *Chinese Contract Law, Theory and Practice*, Martinus Nijhoff Publishers, Leiden/Boston, 2006, p. 45.

183 “*In the eighties, workers’ rights were steadily eroded as the bureaucracy started to impose ‘scientific management’ in state-owned factories – in effect, capitalist-style work-discipline – and to break the ‘iron rice-bowl’ of secure employment*”, WANG D., LI M., WANG C., “A dialogue on the future of China”, in WANG C. (edited by), *One China, Many Paths*, Verso, London-New York, 2005, p. 314. See also ECONOMY E., *The River runs Black : The Environmental Challenge to China's Future*, Cornell University Press 2005, p. 16.

184 ECONOMY E., Op.cit., p. 16.

transfer of significant legislative and regulatory powers to local authorities did have the positive effect of encouraging experimentation by local officials and agencies and the abandonment of policies which no longer found any justification in the reality on the ground<sup>185</sup>. Moreover, China progressively “*embraced technological assistance, policy advice and financial support from the international community*”<sup>186</sup>, introducing into its legal system models and institutions borrowed from a wide variety of sources<sup>187</sup>. In particular, the reform process (which has proceeded at a faster pace after China’s accession to the World Trade Organization), has been profoundly influenced by Western legal models and traditions<sup>188</sup>.

In the field of private law, the underpinnings of the legal system which was gradually built on the wake of Deng’s reforms were provided by the 1986 General Principles of Law (“GPL”) of the PRC. This measure was the result of an evolutionary process which had begun at least thirty years before, with the earliest attempts to draft a civil code relying on the Soviet model as a blueprint. According to Article 2 of the General Principles of Law the purpose of the civil law of the PRC (of which the GPL are the linchpin) is to “*adjust property relationships and personal relationships between civil subjects with equal status, that is, between citizens, between legal persons and between citizens and legal persons*”<sup>189</sup>. The GPL represent therefore a “*truncated civil code*”<sup>190</sup>, disciplining only certain matters and leaving several fundamental questions (such as the boundaries of administrative power where individual rights and interests are involved) largely unanswered<sup>191</sup>.

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185 LUBMAN S. “Bird in a Cage: Chinese Law Reform after Twenty Years”, *Northwestern Journal of International Law & Business*, Issue 20, 1999, pp. 385.

186 ECONOMY E., *Op.cit.*, p. 16.

187 REYNAUD J., “Réflexions sur la réception du droit étranger en Chine”, *McGill Law Journal/Revue de droit de McGill*, Vol. 51, Montréal, 2006, pp. 601 – 609; TIMOTEO M., *Circolazione di modelli e riforma giuridiche: il caso est-asiatico*, Libreria Bonomo Editrice, Bologna 2005.

188 See OTTO J.M., “Conclusion: A Comparativist’s Outlook on Law-Making in China”, in OTTO J.M., POLAK M.V., CHEN J., LI Y. (edited by), *Law-Making in the People’s Republic of China*, *Kluwer Law International*, The Hague, 2000, pp. 215 – 234; PIQUET H., *La Chine au Carrefour des traditions juridiques*, Bruylant, Brussels, 2005, p. 12; PEERENBOOM R., “Toward a methodology for successful legal transplants”, *The Chinese Journal of Comparative Law*, Vol. 1, No. 11, 2013, pp. 19 – 20; REYNAUD J., “Réflexions sur la réception du droit étranger en Chine”, *McGill Law Journal/Revue de droit de McGill*, Vol. 51, Montréal, 2006, pp. 601 – 609.

189 General Principles of Law of the PRC, [last accessed on 30<sup>th</sup> July 2016] Chinese text and English translation available at: <http://www.wipo.int/wipolex/en/details.jsp?id=6595>.

190 LUBMAN S. “Bird in a Cage: Chinese Law Reform after Twenty Years”, *Northwestern Journal of International Law & Business*, Issue 20, 1999, p. 386.

191 See TONG R., “The General Principles of Law of the PRC: its birth, characteristics and role”, *Law and Contemporary Problems*, Issue 52, Spring 1989, Duke University, p. 158; and AJANI G., SERAFINO

The ambiguity of the GPL was probably intentional, since the significant degree of discretionality left to public authorities reflects an economic system and a society where the Chinese Communist Party still plays a guiding role<sup>192</sup>. In particular, one of the most important issues addressed by the GPL was that of property rights. With this measure, the Chinese lawmakers recognized the existence of three main categories of property (already foreshadowed by the 1982 Constitution): i) State property, sacred and inviolable and “owned by the whole people”<sup>193</sup>; ii) the property of collective organizations, which “shall be owned collectively by the working masses”<sup>194</sup>; and iii) each citizen’s personal property<sup>195</sup>. The GPL even contain, under Article 81, an important (if largely programmatic) reference to the rational use of natural resources:

*“State-owned forests, mountains, grasslands, unreclaimed land, beaches, water surfaces and other natural resources may be used according to law by units under ownership by the whole people; or they may also be lawfully assigned for use by units under collective ownership. The State shall protect the usufruct of those resources, and the usufructuary shall be obliged to manage, protect and properly use them. State-owned mineral resources may be mined according to law by units under ownership by the whole people and units under collective ownership; citizens may also lawfully mine such resources. The State shall protect lawful mining rights. The right of citizens and collectives to lawfully contract for the management of forests, mountains, grasslands, unreclaimed land, beaches and water surfaces what are owned by the collectives or owned by the State but used by the collectives shall be protected by law. The rights and obligations of the two contracting parties shall be stipulated in the contract in accordance with the law”.*

This provision is particularly interesting since it shows very clearly that in 1986 the Chinese lawmakers were still hesitant to recognize the possibility to transfer property of public resources to private parties. It will be recalled that State property is “sacred and inviolable” and that pursuant Article 73 of the GPL “no organization or individual shall be allowed to seize, encroach upon, privately divide, retain or destroy it”. Thus, in order to

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A., TIMOTEO M., Op.cit. p. 308.

192 CAVALIERI R., “Tendenze del diritto commerciale cinese dopo Tiananmen”, *Mondo Cinese*, Vol. 153, 2014, p. 101.

193 Article 73 of the General Principles of Law of the PRC.

194 Article 74 of the General Principles of Law of the PRC. Under Article 74, the property of collective organizations shall include “land, forests, mountains, grasslands, unreclaimed land, beaches and other areas that are stipulated by law to be under collective ownership”.

195 Article 75 of the General Principles of Law of the PRC.

establish the right of private parties to exploit public land or resources, the GPL employed – quite controversially - the notion of usufruct<sup>196</sup>. While it has been pointed out that by definition it is not possible to enjoy usufruct over depletable natural resources<sup>197</sup>, the rather unartful phrasing of Article 81 did open the door for private enterprise in several important fields. This compromise solution was however abandoned with the 2004 amendments to the Constitution of the PRC, which today recognizes that “*citizens' lawful private property is inviolable*”<sup>198</sup> and shall be protected by the State, and that “*individual, private and other non-public economies that exist within the limits prescribed by law are major components of the socialist market economy*”<sup>199</sup>.

In 2007 the National People’s Congress adopted, amid considerable controversy, a comprehensive Property Law along the lines of the 2004 constitutional amendments. International legal cooperation appears to have had a role in the drafting of the 2007 Property Law, since the Gesellschaft für internationale Zusammenarbeit (“GIZ”) and the Max Planck Institute for Comparative and International Private Law contributed to conferences held in Beijing and Chengdu to discuss the drafting of the new law<sup>200</sup>.

In the field of contract law, the system built around the 1981 Economic Contract Law, the 1985 Foreign Economic Contract Law, the Law on Technology Transfer Contracts (the so-called “tripod”) was replaced in 1999 by the unified Contract Law of the PRC, which recognized the fundamental principles of equal standing of the parties<sup>201</sup>, of fairness<sup>202</sup> and good faith<sup>203</sup> and the right to enter into a contract voluntarily<sup>204</sup>.

The 1980s saw the privatization of a large number of state-owned enterprises and an

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196 Pursuant to Article 578 of the French Code Civil, “*l’usufruit est le droit de jouir des choses dont un autre a la propriété, comme le propriétaire lui-même, mais à la charge d’en conserver la substance*”. This provision translates the definition generally attributed to the Roman jurist Paulus: “*usus fructus est ius alienis rebus utendi fruendi salva rerum substantia*” (Digest, 7,1,1).

197 See AJANI G., SERAFINO A., TIMOTEO M., Op.cit. p. 313.

198 Article 13 of the Constitution of the PRC.

199 Article 11 of the Constitution of the PRC.

200 Max Planck Institute for Comparative and International Private Law – Hamburg, *Legal consultation of Chinese lawmakers*, [last accessed on 8<sup>th</sup> September 2016] available at: [http://www.mpipriv.de/en/pub/research/foreign\\_law\\_regional\\_centres/china/cooperationen\\_and\\_acatausch.cfm](http://www.mpipriv.de/en/pub/research/foreign_law_regional_centres/china/cooperationen_and_acatausch.cfm).

201 Article 3 of the Contract Law of the PRC states that “*contract parties enjoy equal legal standing and neither party may impose its will on the other party*”. The full text of the Contract Law of the People’s Republic of China, 1999, [last accessed on 30<sup>th</sup> July 2016] is available at: <http://www.lawinfochina.com/>.

202 Article 5 of the Contract Law of the PRC.

203 Article 6 of the Contract Law of the PRC.

204 Article 4 of the Contract Law of the PRC.

unprecedented growth of the private sector, spurred by the gradual creation of a legal system more suited to a fledgling market economy<sup>205</sup>. The economic and legal reforms championed by Deng Xiaoping were largely vindicated when they delivered a 9% average annual GDP growth rate and a considerable rise in wages, which raised hundreds of millions of people out of poverty. However, as we have already seen, the drive to transform China took a heavy toll on the environment<sup>206</sup>, triggering a process of environmental degradation which might be very difficult to reverse. Chinese officials have tried to underplay the environmental costs of economic development, claiming that the PRC is largely following the example set by the developed world: “grow first, clean up later”<sup>207</sup> (a policy which has earned the moniker “pollute first, clean up later”<sup>208</sup>).

In spite of the strong emphasis laid on economic development, the first timid steps to redress some of the worst damages caused by industrialization were taken in the early 1970s, in the last years of Mao’s rule. These early measures were prompted, as it happened elsewhere, by a series of catastrophic environmental disasters which shook public opinion<sup>209</sup>. The first environmental disaster to gain public attention occurred in 1972, when several people reported symptoms of severe food poisoning after eating fish caught from the Guanting reservoir, in Hebei Province. The investigations carried out by the public authorities found that the fish was contaminated due to industrial pollution, but it took almost ten years of work and constant monitoring to reduce significantly the levels of pollution in the Guanting reservoir<sup>210</sup>.

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205 See COASE R., WANG N., *How China became capitalist*, Palgrave Macmillan, 2012, *passim*. See also LUBMAN S. “Bird in a Cage: Chinese Law Reform after Twenty Years”, *Northwestern Journal of International Law & Business*, Issue 20, 1999, p. 386.

206 “No effort [...] was made to account for the costs [which economic] reform levied on the environment, and natural resources remained priced far below their replacement costs in order to encourage continued rapid economic development. China’s leaders were well aware that they were trading environmental health for economic growth. The maxim ‘First development, then environment’ was a common refrain throughout the 1980s and much of the 1990s”, ECONOMY E., *The River runs Black : The Environmental Challenge to China's Future* , Cornell University Press, 2005, p. 18.

207 The Economist, “The East is Grey”, 10<sup>th</sup> August 2013, [last accessed on 10<sup>th</sup> December 2016] available at: <http://www.economist.com/news/briefing/21583245-china-worlds-worst-polluter-largest-investor-green-energy-its-rise-will-have>.

208 AZADI H., VERHEIJKE G., WITLOX F., “Pollute First, Clean Up Later?”, *Global and Planetary Change*, Vol 78, Issue 3-4, 2011, pp. 77-82; LO S., “China’s Environment After the Olympics”, *Ecology Law Currents*, Vol. 35, 2008, pp. 100 – 106.

209 “This incident is often described as China's equivalent of the Minamata disaster in Japan or the Cuyahoga river fire in the United States – a catalytic event that demonstrated the need for more concerted actions to check further damage to the environment”, McELWEE C.R., *Op. cit.*, p. 22.

210 See McELWEE C.R., *Op. cit.*, p. 22; BAO M. “The Evolution of Environmental Policy and its Impact in the People's Republic of China”, *Conservation and Society*, 2006, 4, p. 38.



The Guanting disaster was followed by the massive death of sea life in the Bay of Dalian due to industrial pollution and by the appearance of the Minamata syndrome (a neurological disease caused by severe mercury poisoning) among the people living along the banks of the Songhua River in China's North-East, one of the country's most industrialized areas<sup>211</sup>. The extensive investigation carried out by government officials later revealed that the mercury contamination of the Songhua River had been caused by the chemical waste dumped into its waters by the Jilin Petrochemical Company. The Songhua disaster was the true damascene moment, since it prompted the implementation of the first pollution control project in the history of the People's Republic of China.

After the Guanting incident, the Chinese leadership began to pay close attention to environmental problems, which slowly began to enter the public discourse. This shift in public policy was recognized by the then Premier of the PRC, Zhou Enlai, who stated, after a series of meetings with American and Japanese journalists, that:

*“Industrial pollution is a fresh question. If industrialisation begins, this question becomes more and more serious. Now pollution is becoming the biggest problem in the world”*<sup>212</sup>.

From its inception, Chinese environmental policy was deeply influenced by the debate which was under way in Japan and in the West and the first visible sign of the PRC's commitment to environmental protection was the participation of a large Chinese delegation to United Nations Conference on the Human Environment held in Stockholm in 1972. The Chinese delegates played a key role in the Conference, requesting the appointment of a Working Group to redraft the final Declaration and taking the initiative in suggesting amendments. The PRC's insistence *“to the last minute [...] on the adoption of some of its ten major proposals”*<sup>213</sup> opened the way to a hail of amendments which threatened to unravel the Conference. Only after lengthy discussions, and on the very last day of the Conference, a consensus was reached on the text of the Declaration<sup>214</sup>. It is however worth noting that with regard to certain principles of the Declaration, the Chinese delegation called for a more incisive wording than that suggested by Western countries.

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211 BAO M., Op. cit., p. 38.

212 BAO M., Op. cit., p. 38.

213 SOHN L.B., “The Stockholm Declaration on the Human Environment”, *The Harvard International Law Journal*, Vol. 14, No. 3, Summer 1973, p. 430.

214 *“The representative of China pointed out that the Declaration was 'a marked improvement on the original draft and reflected some of the reasonable demands of the developing countries', but his delegation continued to have reservations with regard to some of the principles it embodied”*, SOHN L.B., Op.cit, p. 432.

One example is Principle 22, which in its final version states that:

*“States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.”*<sup>215</sup>

The Working Group rejected a Chinese amendment which would have added that *“the victim State has the right to demand compensation from the pollutor-country which has discharged or dumped at will toxic substances, thereby seriously polluting and poisoning the environment of other States”*<sup>216</sup>. During the Conference, some of the Chinese delegates took the view that global environmental policies had been designed largely to suit the interests of the developed countries at the expense of the developing world (which could ill-afford to implement stricter environmental standards)<sup>217</sup>. This view was shared by many of the delegates from the developing world, who emphasized that while it was not their intention to repeat the most serious mistakes made by the developed countries, their priority remained economic development<sup>218</sup>. The developed world on the other hand advocated *“development strategies which integrally incorporated environmental considerations and used resources more effectively”*<sup>219</sup>.

The Conference adopted a basic Declaration containing a set of *“common principles to inspire and guide the people of the world in the preservation and enhancement of the human environment”*<sup>220</sup>, an Action Plan and a Resolution. Even though the PRC delegation did not sign the final Declaration (due to reservations regarding the choice of language,

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215 Moreover, pursuant to Principle 21 of the Stockholm Declaration, *“States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”*. The same precept was reiterated, almost verbatim, in Principle 2 of the 1992 Rio Declaration.

216 SOHN L.B., “The Stockholm Declaration on the Human Environment”, *The Harvard International Law Journal*, Vol. 14, No. 3, Summer 1973, p. 495.

217 CLAY R., “China: the next environmental superpower”, *Environmental Health Perspectives*, September 2002, Vol. 110, pp. A524 – A527; McELWEE C.R., *Op. cit.*, p. 23.

218 GALIZZI P., “From Stockholm to New York, via Rio and Johannesburg: Has the Environment Lost its Way on the Global Agenda?”, *Fordham International Law Journal*, Vol. 29, 2005, p. 962. This stark difference between the agendas of the developed and developing world emerged again during the 1992 Earth Summit in Rio, see MACEKURA S.J., *Of limits and growth. The rise of global sustainable development in the Twentieth Century*, Cambridge University Press, New York, 2015, p. 264.

219 GALIZZI P., *Op.cit.*, p. 962.

220 Preamble of the Declaration of the United Nations Conference on the Human Environment of 16<sup>th</sup> June 1972.

which carefully avoided any overtly political statement)<sup>221</sup>, the concerns vented by China and the developing world had a deep influence on the final wording of these instruments. Domestically, the first tangible sign of China's commitment to environmental protection was the National Environmental Protection Conference held in Beijing in 1973. The Conference was held under the auspices of Premier Zhou Enlai, who had argued publicly that a socialist command-economy would have been better able to address environmental pollution, in the absence of “obstacles” such as private ownership of the means of production and the profit-motive<sup>222</sup>. The National Environmental Protection Conference issued some guiding principles and a committee was entrusted with the task of drafting a Ten - Year Program to tackle pollution<sup>223</sup>. In 1973, the State Council also issued the first pieces of environmental regulation, requiring industrial plants to be designed so as to maximize water conservation and imposing limits on waste discharge by industries<sup>224</sup>. Moreover, for the very first time the improvement of water quality was included among the objectives of the Five-Year Plan<sup>225</sup>.

It should not be surprising that the first piece of environmental legislation enacted by the PRC concerned specifically water conservation, since water management has been a constant concern in China from the earliest imperial times (as shown by the Qin and Han statutes on the fields). The importance of water management for a civilization which developed between the Yangtze and Yellow River valleys even found a mythological foundation in the figure of Yu the Great, the semi-mythical ruler who first introduced flood control measures, “harnessing the waters”<sup>226</sup>. It is also significant that the first, tentative, measures in the field of environmental protection were adopted in the wake of the Stockholm Conference, since, as we shall see, international law and international cooperation had a profound influence over the development of the Chinese environmental law framework.

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221 CAI S., VOIGTS M., “The development of China’s environmental diplomacy”, *Pacific Rim Law & Policy Journal*, Vol. 3, Spec. Ed. 1993, p. S22.

222 BAO M., Op. cit., p. 38.

223 BAO M., Op. cit., p. 38; McELWEE C.R., Op. cit., p. 23.

224 The Standards for Industrial Wastewater, Air Emissions and Solid waste issued by the State Planning Commission, the Ministry of Health and the State Basic Construction Commission, see BAO M., Op. cit., p. 38. See also McELWEE, Op. cit., p. 23.

225 McELWEE C.R., Op. cit., p. 23.

226 The figure of Yu the Great found great resonance in the public discourse, especially while the Three Gorges Dam project was under discussion. See PADOVANI F., “Les effets sociopolitiques des migrations forcées en Chine liées aux grands travaux hydrauliques. L'exemple du barrage des trois gorges”, *Les Etudes du CERI* - n° 103 – April 2004 , Centre d'études et de recherches internationales, Sciences Po Paris, p. 3.

The years between 1973 and 1978 saw little progress towards the development of an environmental law framework, apart for the creation of two administrative offices tasked with coordinating environmental planning, the Leading Group of Environmental Protection in the State Council (the “LGEPC”) and the Office of the LGEPC. The practical impact of these newly formed bodies was however very limited, since the LGEPC met only twice before it was abolished in 1984<sup>227</sup> and lacked adequate funding and the power to issue binding directives.

These firsts concrete steps on the part of the central government were however accompanied by a spate of initiatives on the part of provincial and local authorities, which included the creation the so-called “three wastes offices”<sup>228</sup>, whose task was to monitor waste gas, waste water and waste residues. A pivotal moment in the environmental history of China was the adoption by the National People's Congress of a new Constitution (宪法, Xiàn Fǎ) in 1978. Article 26 of the 1978 Constitution provided that:

*“The State protects and improves the living environment (生活环境, shēng huó huán jìng) and the ecological environment (生态环境, shēng tài huán jìng) and prevents and remedies pollution and other public hazards.*

*The State organizes and promotes afforestation (造林, zào lín) and the protection of forests”<sup>229</sup>.*

On the wake of the constitutional reform came the first comprehensive piece of legislation, the Environmental Protection Law, approved in 1978 on a “Trial Implementation” basis. In 1984, a second National Environmental Protection Conference was convened, to discuss grievances concerning the shortcomings of the environmental planning authorities and the state of the environment in China (perceived by many to be deteriorating in spite of the reforms championed by the central government)<sup>230</sup>. In the same year, the State Council set up an Environmental Protection Commission (“EPCSC”) which replaced the LGEPC and saw the participation of several ministries and administrative bodies. The executive office

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227 See ECONOMY E., *The River runs Black : The Environmental Challenge to China's Future* , Cornell University Press 2005, p. 95. See also McELWEE C.R., Op. cit., p. 24.

228 ECONOMY E., *The River runs Black : The Environmental Challenge to China's Future* , Cornell University Press 2005, p. 95.

229 “第二十六条。国家保护和改善生活环境和生态环境，防治污染和其他公害。国家组织和鼓励植树造林，保护林木。”(Dì èr shí liù tiáo. Guó jiā bǎo hù hé gǎi shàn shēng huó huán jìng hé shēng tài huán jìng. Fáng zhì wū rǎn hé qí tā gōng hài. Guó jiā zǔ zhī hé gǔ lì zhí shù zào lín bǎo hù lín mù). The text of the 1978 Constitution of the People's Republic of China, [last accessed on 30<sup>th</sup> April 2016] is available at: [http://www.gov.cn/gongbao/content/2004/content\\_62714.htm](http://www.gov.cn/gongbao/content/2004/content_62714.htm).

230 McELWEE C.R., Op. cit., p. 26.

of the EPCSC was the newly-founded National Environmental Protection Agency (“NEPA”), which wielded with considerable power, including the power to issue binding directives to the local Environmental Protection Bureaus<sup>231</sup>. The resources and autonomy of NEPA were progressively increased over the following years, increasing considerably its influence.

While in the 1980s public policy was largely defined by the focus on economic development, this decade also saw the adoption of several environmental measures. The Chinese Government included measures requiring companies to limit their environmental footprints even in the legislation which led to the creation of the Special Economic Zones, certain<sup>232</sup>. Another turning point was the adoption of the Environmental Protection Law (without the “trial” designation) in 1989, a piece of legislation designed around the principles of coordination between different central and local authorities, prevention, enhancement of environmental management and polluters’ liability<sup>233</sup>. In the same year, a Chinese delegation attended the conference held in London by the United Nations Environmental Program on the depletion of the ozone layer and in that venue the PRC (with strong support from other developing countries, including India) proposed the creation of an international fund to provide financial and technological assistance to the developing world in order to counter ozone depletion without compromising economic growth<sup>234</sup>.

On 25<sup>th</sup> March 1994, the State Council (国务院, Guó Wù Yuàn), the chief administrative authority of the PRC, adopted a White Paper on Population, Environment and Development in the 21<sup>st</sup> Century<sup>235</sup>, to provide guidance to all branches of government (both in Beijing and at a local level) in developing a sustainable economy. In this White Paper, the State Council spelled out for the very first time the need to boost education on environmental issues and increase awareness among the population in order to promote compliance of environmental rules. In this respect, the White Paper confirmed the government’s commitment to meet some of the challenges outlined in the Agenda 21, the non-binding UN action plan made public at the Earth Summit held in Rio de Janeiro in

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231 McELWEE C.R., Op. cit., p. 26.

232 CAI S., VOIGTS M., “The development of China’s environmental diplomacy”, *Pacific Rim Law & Policy Journal*, Vol. 3, Spec. Ed. 1993, p. S22.

233 ECONOMY E., *The River runs Black : The Environmental Challenge to China's Future* , Cornell University Press 2005, p. 97.

234 From CAI S., VOIGTS M., Op.cit., p. S24.

235 McELWEE C.R., Op. Cit., p. 27.

1992. The UN Agenda 21 emphasized the fundamental role which education and capacity building, play in the creation of a sustainable economy:

*“Education, including formal education, public awareness and training should be recognized as a process by which human beings and societies can reach their fullest potential. Education is critical for promoting sustainable development and improving the capacity of the people to address environment and development issues. [...] Both formal and non-formal education are indispensable to changing people's attitudes so that they have the capacity to assess and address their sustainable development concerns. It is also critical for achieving environmental and ethical awareness, values and attitudes, skills and behaviour consistent with sustainable development and for effective public participation in decision-making”*<sup>236</sup> .

Unsurprisingly, the development of the basic framework of environmental protection rules in China was influenced and encouraged by international initiatives. Indeed, the resulting measures appear to have been shaped to a significant extent by the dialectic exchange between international measures and national political concerns and legal traditions.

The Earth Summit of 1992 represented also an important occasion for the PRC to showcase its commitment in the field of environmental protection and to take a leading role within the developing world<sup>237</sup>. In that venue, PRC Premier Li Peng contributed to the work of the Earth Summit by delivering a speech in which he advocated stricter controls, at an international level, on environmentally harmful activities<sup>238</sup>. However, somewhat contradictorily, Premier Li Peng also reiterated the leitmotiv that environmental protection should not hinder the economic growth of the developing world nor curtail national sovereignty<sup>239</sup>.

The early 1990s were also characterised by the growing role of cooperation between Chinese authorities and international public and non-governmental actors. In particular, in 1992 NEPA actively contributed to the drafting of the United Nations Development

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236 United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3 to 14 June 1992, Agenda 21, [last accessed on 1<sup>st</sup> May 2016], available at: <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>.

237 The early 1990s showed an unprecedented commitment in the field of environmental protection, since “in 1990 alone China sent over 120 environmental groups abroad and received foreign delegations from over 50 countries”, CAI S., VOIGTS M., “The development of China’s environmental diplomacy”, *Pacific Rim Law & Policy Journal*, Vol. 3, Spec. Ed. 1993, p. S24.

238 CAI S., VOIGTS M., Op.cit., p. S17.

239 CAI S., VOIGTS M., Op.cit., p. S17.

Program report on recommended policies to counter ozone depletion, within the framework of the 1987 Montreal Protocol and began a productive collaboration with the US Environmental Protection Agency (EPA) aimed at reducing methane emissions from coal mining activities<sup>240</sup>. In the same year, the NEPA received two grants from the Global Environment Facility to conduct research on the environmental impact of coal-bed methane and to study policies which might control or reduce greenhouse gas emissions<sup>241</sup>. China's NEPA and the EPA also cooperated in providing technical assistance to Chinese manufacturers, helping them find economically viable alternatives to chlorofluorocarbon (one of the chemical compounds which contributed to the depletion of the ozone layer)<sup>242</sup>. In 1992, the decisive importance of environmental protection for the prosperity and the political stability of the country became all too evident when the waters of one of China's great rivers turned black. The Huai river runs through four provinces and represents the geographic and cultural boundary between Northern and Southern China. Moreover, the basin of the Huai River (a relatively affluent area, boasting a per capita income which is significantly higher than the national average<sup>243</sup>), is one of the agricultural heartlands of China and lies at the very centre of what is considered to be the cradle of the Chinese civilisation. The almost 150 million people who live in the valley rely heavily on the river to satisfy their domestic, agricultural and industrial water requirements<sup>244</sup>. The conduct of the Chinese authorities before and after the environmental disaster which struck the Huai River has attracted strong criticism both at home and abroad, and has been brought as an illustration of the shortcomings of the Chinese environmental governance framework<sup>245</sup>. The valley had benefited greatly from Deng's economic reforms and a great number of small and medium industrial plants (mostly paper mills and chemical factories) was set up along the banks of the River Huai. In order to maximize profits, many of these industrial plants choose to dispose of chemical waste circumventing State regulations or simply dumping it into the river. While the public was generally aware of the problem, the

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240 Panel on Global Climate Change Policies in China, *China and Global Change: opportunities for collaboration*, National Academy Press, 1992, p. 42.

241 Panel on Global Climate Change Policies in China, *China and Global Change: opportunities for collaboration*, National Academy Press, 1992, p. 42.

242 Panel on Global Climate Change Policies in China, *China and Global Change: opportunities for collaboration*, National Academy Press, 1992, p. 42.

243 ECONOMY E., *The River runs Black: The Environmental Challenge to China's Future*, Cornell University Press 2005, p. 2.

244 See ECONOMY E., *The River runs Black: The Environmental Challenge to China's Future*, Cornell University Press 2005.

245 See ECONOMY E., *Op.cit., passim*.

measures adopted by the central government to avert another environmental disaster (which included the establishment of the Huai River Valley Bureau of Water Resources Protection, later replaced by the Leading Group on Water Resources Protection for the Huai River Basin) were undermined by the lack of sufficient funds and enforcement powers<sup>246</sup>.

The situation of the Huai River came to a head in 1994 when the chemical waste dumped by some of the industrial plant operating on its banks triggered a chemical reaction<sup>247</sup> which turned the waters of the river black. Thousands of tons of fish were lost, industrial plants all along the banks of the river were shut down and thousands of people fell ill and hundreds of thousands of households had no access to clean drinking water for several months, while the central government struggled to bring social unrest under control. While the closure of hundreds of industrial plants brought the situation under control, little was done to address the root causes of the disaster, which lay mainly in the inadequacy of the legal framework and of the governance mechanisms<sup>248</sup>.

Indeed, only five years after the Huai River disaster, in 1999, six people in the city of Fuyang (in Anhui Province) died due to exposure to polluted water<sup>249</sup>. Apparently the local population had been complaining for months about the severe pollution of the city's water supply, alerted by the foul smell and the fumes emanating from the local rivers and sewage. This new environmental disaster prompted considerable outrage, since only a few months earlier Fuyang had been included among China's ten "Clean Industry Cities"<sup>250</sup>.

Subsequent investigation showed that the city of Fuyang had managed to obtain a clean bill of health from the environmental inspectors by shutting down industrial plants before the

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246 "After the first pollution disaster in 1974, the Chinese leadership in Beijing established the Huai River Valley Bureau of Water Resources Protection and the Huai River Commission of the Ministry of Water Resources. These offices had no funding and no real authority, however, and as the region developed economically, the environment deteriorated rapidly. As one official from China's central environmental agency, the National Environmental Protection Agency (NEPA) described the situation, 'Economic development has just occurred blindly' [...] [B]y 1990, to cut costs and realize greater profits, fewer than half of the factories in the valley were operating their waste disposal systems, and only 25 percent of treated wastewater met state standards. Sensing impending disaster, the Bureau of Water Resources Protection pressed local officials to close down or retrofit some of the most egregious polluters", ECONOMY E., *The River runs Black: The Environmental Challenge to China's Future*, Cornell University Press 2005, p.3.

247 The waste dumped into the river was "a toxic mix of ammonia and nitrogen compounds, potassium permanganate, and phenols" (ECONOMY E., Op. cit., p. 4).

248 McELWEE C.R., Op. cit., p. 27.

249 ECONOMY E., Op. cit., p. 6.

250 ECONOMY E., Op. cit., p. 6.



inspections (of which they had been pre-emptively informed)<sup>251</sup>. The city of Fuyang has yet to recover from the economic and environmental damage suffered due to the pollution of its water supply.

In 1996, on the wake of the first serious environmental disasters, another National Environmental Protection Conference was held, and the State Council identified a list of small highly-polluting categories of industrial plants which should have been shut down (the so-called “fifteen smalls”)<sup>252</sup>.

In 1998 the EPCSC was abolished, while the NEPA was raised to a ministerial-level agency and renamed the State Environmental Protection Administration (SEPA). Only two years after the disaster which struck the city of Fuyang, the Minister in charge of SEPA, Xie Zhenhua, claimed that the clean-up measures adopted by the central and local authorities had been so successful that “*water quality on the Huai River had reached the national III standard – suitable for drinking and fishing – and that 70 percent of the major tributaries had reached IV – suitable for industry and agriculture*”<sup>253</sup>. This rather optimistic assessment of the situation was however followed by another environmental disaster in the Huai River valley, when millions of cubic meters of contaminated water were released from water locks upriver unto the valley downstream, causing incalculable damage to fisheries and agricultural workers.

In 2005, China’s industrial North-East was blighted by another major chemical spill when a large petrochemical plant in Jilin province exploded, causing a leak of benzene into the Songhua River, a tributary of the river Amur and leaving the city of Harbin without water.

The chemical contamination affected the Chinese Provinces of Jilin and Heilongjiang and the Russian city of Khabarovsk and the handling of this latest incident by the Chinese authorities attracted serious criticism and caused a diplomatic incident with Russia. Amid the general uproar, several Chinese newspapers criticized the authorities for trying to conceal the true extent of the toxic spill after the explosion<sup>254</sup>.

Public outrage forced the Minister in charge of SEPA, Xie Zhenhua, to resign, though he

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251 ECONOMY E., Op. cit., p. 6.

252 McELWEE C.R., Op. cit., p. 28.

253 ECONOMY E., Op. cit., p. 8.

254 According to the Zhongguo Qingnian Bao (a Beijing newspaper), “*the initial reason for stopping the water supply was ‘comprehensive maintenance of municipal water-supply pipe network facilities’. Obviously, this was an unjustifiable lie. Under the momentum of increasing public suspicion and panic, a second more reasonable account, based on the true facts, came too late. Although the truth was revealed this time, the aftermath of the previous ‘lies’ persists and has reduced public trust in the government*”, from BBC News, “*Chinese newspapers condemn Harbin ‘lies’*”, 24<sup>th</sup> November 2005, [last accessed on 30<sup>th</sup> June 2016] available at: <http://news.bbc.co.uk/2/hi/asia-pacific/4465712.stm>.

continued to play an important part in China's environmental policy, leading the negotiating team for the PRC in the 2009 Copenhagen United Nations Climate Change Conference<sup>255</sup>. Perhaps in an attempt to improve its public image, in 2008 the Chinese government decided to raise SEPA to the highest national administrative level and renamed it the Ministry of Environmental Protection (“MEP”)<sup>256</sup>. Far from being a merely “cosmetic” measure, the elevation of SEPA significantly increased its standing and its enforcement and regulatory powers<sup>257</sup>.

To this day, and in spite of its ratification of the Kyoto Protocol, China continues to promote the view that global change should be addressed mainly by the developed world (which is largely responsible for the current levels of pollution) and refuses to accept internationally binding emission targets<sup>258</sup>. However, in the years following Copenhagen (2009) and the Cancun (2010) Climate Change Conferences, China has taken aggressive steps to combat climate change and to become a green-energy industrial power.

In 2010, China unveiled a five-year plan (2011- 2015) which for the very first time emphasized the need to restructure its industrial infrastructure and to build a lower carbon economy. China also began experimenting with emission-allowances trading and carbon taxes at a local level<sup>259</sup>, abandoning its earlier misgivings about these measures (and their impact on economic growth). Moreover, since significant investments in the field of renewable energy have allowed China to become one of the largest producers of wind and solar technology, the new green agenda has found vocal advocates also among the business community<sup>260</sup>. Since government and businesses appear to be of one mind on this issue, it should not come as a surprise that the last three years have been characterized by great strides towards the construction of a greener economy in China.

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255 On that occasion, Mr. Xie voiced China’s concern about a deal which might entail unacceptable burdens for the developing world. See LYNAS M., “China's fears of rich nations 'climate conspiracy' at Copenhagen revealed”, *the Guardian*, 11<sup>th</sup> February 2010, [accessed on 12<sup>th</sup> July 2015] available at: <http://www.theguardian.com/environment/2010/feb/11/chinese-thinktank-copenhagen-document>.

256 (中华人民共和国环境保护部 (zhōnghuá rénmin gònghéguó huán jìng bǎo hù bù). See McELWEE C.R., Op. cit., p. 29.

257 However, according to Roda Mushkat, the elevation of SEPA to ministerial rank, “*was strategically meaningful but did not amount to a regime shift*”, see MUSHKAT R., “Implementing Environmental Law in Transitional Settings: The Chinese Experience”, *Southern California Interdisciplinary Law Journal*, Vol. 18, 2008, p. 86. See also CAI S., WEN L., “Environmental reviews and case studies: latest developments in Chinese environmental law”, *Environmental Practice*, Cambridge University Press, Vol. 15, Issue 3, 2013, pp. 339 – 349.

258 LEAL-ARCAS R., “The role of the European Union and China in Global Climate Change Negotiations: A critical analysis”, *Journal of European Integration History*, Vol. 18, Issue 1/2012, p. 73.

259 LEAL-ARCAS R., *Ibid.*, p. 72.

260 LEAL-ARCAS R., *Ibid.*, p. 73.

In 2014, a new Environmental Protection Law<sup>261</sup> came into force, while the Chinese Government announced that the 13<sup>th</sup> Five-Year Plan (2016 – 2020) would include quantified environmental targets and specific strategies. At the UN Climate Change Conference held in Paris in December 2015, the PRC submitted a document in which it set out in detail its environmental targets:

*“Based on its national circumstances, development stage, sustainable development strategy and international responsibility, China has nationally determined its actions by 2030 as follows:*

- *To achieve the peaking of carbon dioxide emissions around 2030 and make best efforts to peak early;*
- *To lower carbon dioxide emissions per unit of GDP by 60% to 65% from the 2005 level;*
- *To increase the share of non-fossil fuels in primary energy consumption to around 20%; and*
- *To increase the forest stock volume by around 4,5 billion cubic meters on the 2005 level.”*<sup>262</sup>

The 13<sup>th</sup> Five-Year Plan includes some of the strategies which the Chinese government aims to implement in order to meet these targets, such as the development of a green finance market, the creation of a unified national carbon emissions trading market by 2017, the liberalisation of the oil, gas and electricity markets, measures to increase emissions reporting by businesses and significant investments for the overhaul of the transport network and the expansion of public transportation.

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261 (中华人民共和国环境保护法 (zhōng huá rén mín gòng hé guó huán jìng bǎo hù fǎ). The Chinese text of the law is available at: [http://www.gov.cn/zhengce/2014-04/25/content\\_2666434.htm](http://www.gov.cn/zhengce/2014-04/25/content_2666434.htm) [last accessed on 30<sup>th</sup> June 2016].

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*“根据自身国情、发展阶段、可持续发展战略和国际责任担当，中国确定了到2030年的自主行动目标：二氧化碳排放2030年左右达到峰值并争取尽早达峰；单位国内生产总值二氧化碳排放比2005年下降60%—65%，非化石能源占一次能源消费比重达到20%左右，森林蓄积量比2005年增加4.5亿立方米左右。”* The Intended Nationally Determined Contribution of the People’s Republic of China of 30<sup>th</sup> June 2015 submitted for the 2015 United Nations Climate Change Conference, [last accessed on 1<sup>st</sup> July 2016] is available at: <http://www4.unfccc.int/submissions/INDC/Published%20Documents/China/1/China's%20INDC%20-%20on%2030%20June%202015.pdf>. See also DUGGAN J., “China makes carbon pledge ahead of Paris Climate Change Summit”, *The Guardian*, 30<sup>th</sup> June 2015, [last accessed on 1<sup>st</sup> July 2016] available at: <https://www.theguardian.com/environment/2015/jun/30/china-carbon-emissions-2030-premier-li-keqiang-un-paris-climate-change-summit>.

**Chapter 3. Substantive environmental law and international legal cooperation**

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**3.1. INTRODUCTORY REMARKS**

In spite of popular beliefs about the current state of Chinese environmental law, since the constitutional reform in 1978 the People’s Republic of China has developed what has been characterized as an “*admirable set of environmental laws*”<sup>263</sup>. Chinese lawmakers were able to do so by borrowing freely from a wide variety of international sources and legal systems, relying of foreign expertise and models and past legal traditions in order to build a legal framework with Chinese characteristics. As we shall see, international legal cooperation played a key role in this decade-long process, by acting as a catalyst for the introduction of foreign legal models in the Chinese legal system.

**3.2. THE LEGAL FRAMEWORK**

The present paragraph provides a brief overview of the existing legal framework and of the hierarchy of the sources of law, focusing on the defining traits of Chinese environmental

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263 STALLEY P., *Foreign Firms, Investment and Environmental Regulation in the People’s Republic of China*, Stanford University Press, Stanford CA, 2010, p. 22. See also STERN R.E., *Environmental Litigation in China: A Study in Political Ambivalence*, Cambridge University Press, Cambridge and New York, 2013, p. 39. For an overview of the efforts made to establish an “environmental rule of law” in China, see also FERRIS R.J., ZHANG H., “Reaching out to the Rule of Law : China's continuing efforts to develop an effective Environmental Law Regime”, *William and Mary Bill of Rights Journal*, Vol. 11, 2003, pp. 569 – 602; and POZZO B., “Tutela ambientale e modelli giuridici. Il caso cinese”, *Rivista Giuridica dell’Ambiente*, Vol. 25, Issue 6, 2010, pp. 877 – 890.

law.

### 3.2.1. The Constitution of the People's Republic of China

The current Constitution of the PRC was adopted by the Fifth National People's Congress in 1982 and subsequently amended in 1988, 1993, 1999, 2004. The Constitution is formally the supreme law and “no laws or administrative or local regulations”<sup>264</sup> may contravene it, while the power to interpret, amend and enforce it resides exclusively with the National People's Congress and its Standing Committee<sup>265</sup>.

The legislative procedure is disciplined by the 2000 Legislation Law (adopted in the attempt to set up a “more orderly and open legislative system”<sup>266</sup>), which provides, under Article 7, that the “National People's Congress and its Standing Committee exercise the legislative power of the State”. While the NPC has exclusive competence over the “basic laws governing criminal offences, civil affairs the State organs and other matters” its Standing Committee can amend or enact laws which fall beyond the exclusive province of the NPC or even “partially supplement and amend laws enacted by the National People's Congress” when the NPC is not in session<sup>267</sup>.

Since under the current Constitution the arbiters of the constitutionality of the laws are the main legislative bodies themselves, it is easy to see why some authors have underplayed its importance within the Chinese legal system<sup>268</sup>. However, as we have explained, the

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264 Article 5 of the Constitution of the PRC states that “[...] No laws or administrative or local regulations may contravene the Constitution. All State organs, the armed forces, all political parties and public organizations and all enterprises and institutions must abide by the Constitution and other laws. All acts in violation of the Constitution or other laws must be investigated”. (一切法律、行政法规和地方性法规都不得同宪法相抵触。一切国家机关和武装力量、各政党和各社会团体、各企业事业组织都必须遵守宪法和法律。一切违反宪法和法律的行为，必须予以追究。Yī qiè fǎ lǜ, xíng zhèng fǎ guī hé dì fāng xíng fǎ guī dū bù dé tóng xiàn fǎ xiāng dǐ chù。Yī qiè guó jiā jī guān hé wǔ zhuāng lì liàng, gè zhèng dǎng hé gè shè huì tuán tǐ, gè qǐ yè shì yè zǔ zhī dū bì xū zūn shǒu xiàn fǎ hé fǎ lǜ。Yī qiè wéi fǎn xiàn fǎ hé fǎ lǜ de xíng wéi, bì xū yǔ yǐ zhuī jiū)。

265 It would appear that the widely advertised (and widely studied) *Qi Yuling* case (Judgment of the Supreme People's Court, *Qi Yuling v. Chen Xiaoqi*, Infringement of Citizen's Fundamental Rights of Receiving Education Under the Protection of the Constitution by Means of Infringing Right of Name, *Zuigao Renmin Rayuan Gongbao*, Gazette of the Supreme People's Court of the People's Republic of China, Vol. 5, 158, 2001) did not, in the end, represent China's *Marbury v. Madison* (See SHEN K. “Is it the beginning of the era of the rule of the Constitution? Reinterpreting China's ‘First Constitutional Case’”, *Pacific Rim law & Policy Journal*, Vol 12, No. 1, January 2003, pp. 199 – 232). To this day, in the PRC there is no effective judicial control of the constitutionality of the laws.

266 PALER L., “China's Legislation Law and the making of a more orderly and representative legislature system”, *The China Quarterly*, 2005, p. 302.

267 Article 7 of the 2000 Legislation Law of the PRC.

268 McELWEE C.R., *Op. cit.*, p. 56.

importance of constitutional provisions does not reside in their enforceability, but in their importance as public statements of the policies and strategic goals of the PRC (and therefore of the official Party line). While the effectiveness of the constraints imposed by the Constitution on the Chinese lawmakers may be doubtful, the supreme law of the PRC does recognize the duty of the State to ensure “*the rational use of natural resources and protect [...] rare animals and plants*”<sup>269</sup>, to protect and improve the environment in which people live and the ecological environment, to prevent and control pollution and other public hazards and to “*organize and encourage afforestation and the protection of forests*”<sup>270</sup>. Finally, under the current Constitution, “*all mineral resources, waters, forests, mountains, grasslands, unreclaimed land, beaches and other natural resources are owned by the State, that is, by the whole people, with the exception of the forests, mountains, grasslands, unreclaimed land and beaches that are owned by collectives as prescribed by law*”<sup>271</sup>.

### 3.2.2. The Environmental Protection Law

The main principles of Chinese environmental law were first set out by the Environmental Protection Law (Trial basis) of 1979, whose main goal was:

*“to ensure, during the construction of a modernised socialist state, the rational use of the natural environment, the prevention and elimination of environmental pollution and damage to ecosystems, in order to create a clean and favourable living and working environment, protect the health of the people and promote economic development”*<sup>272</sup>.

The 1979 Environmental Protection Law (Trial basis) was readopted, with some amendments, in 1989 to become the Environmental Protection Law, which remained in force until 2014. It is worth noting the emphasis - even in this very early formulation of the environmental goals of the PRC - on economic development and the awareness of the costs of environmental degradation for the economy, an emphasis which to this day characterizes the negotiating position of the PRC in every international forum.

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269 Article 9 of the of the Constitution of the PRC.

270 Article 26 of the of the Constitution of the PRC. Article 26 of the 1982 Constitution is identical to Article 26 of the 1978 Constitution.

271 Article 9 of the of the Constitution of the PRC.

272 Article 2, Environmental Protection Law (Trial basis) of 13 September 1979. The Chinese text and an English translation of the 1979 Environmental Protection Law (Trial basis) are available on the website of the University of Beijing, [last accessed on 3<sup>rd</sup> July 2016] at: <http://en.pkulaw.cn/display.aspx?cgid=44690&lib=law>.

The Environmental Protection Law (both in its Trial form and after its re-designation in 1989) provided a brief outline of the guiding principles of China's environmental policy, and the "seeds" of the sector-specific legislation implemented over the following decades<sup>273</sup>. In particular, Article 6 of the 1979 Environmental Protection Law ("EPL") introduced within the Chinese legal system the principles of precaution<sup>274</sup> and prevention and the "polluter-pays principle", providing that:

*"All enterprises and institutions must pay adequate attention to the prevention of pollution and damage to the environment when selecting their sites, and in designing, construction and production"*<sup>275</sup>.

The need to adopt adequate measures to prevent pollution (the "prevention principle") and to take environmental concerns into consideration from the earliest phases of policy development and at the inception of any industrial project (i.e. an environmental impact assessment) also found their way into sector-specific legislation concerning, in particular, the exploitation of natural resources and the emission of pollutants into the atmosphere<sup>276</sup>. Moreover, pursuant to the second paragraph of Article 6,

*"Units which have already caused pollution and other hazards to the environment shall, according to the principle of "whoever causes pollution shall be responsible for its elimination," make plans to actively eliminate them [...]"*<sup>277</sup>.

While after the 1989 re-designation, Article 6 of the Environmental Protection Law only included the reference to the "polluter-pays principle", the need for effective preventive measures resurfaces in various provisions of the 1989 EPL. The model borrowed by the Chinese lawmaker in the drafting of Article 6 of the 1979 Environmental Protection Law

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273 McELWEE C.R., Op. cit., p. 56.

274 The "precautionary principle was borrowed from German law ('Vorsorgeprinzip') into international treaties on atmospheric pollution", WIENER J.B., "Something borrowed for something blue: legal transplants and the evolution of global environmental law", *Ecology Law Quarterly*, Vol. 27, 2001, p. 1305. See also BOEHMER – CHRISTIANSEN S., "The precautionary principle in Germany – enabling government", in O'RIORDAN T., CAMERON J., *Interpreting the Precautionary Principle*, Routledge, London 1994, pp. 31 – 60.

275 "一切企业、事业单位的选址、设计、建设和生产，都必须充分注意防止对环境的污染和破坏。"(Yī qiè qǐ yè, shì yè dān wèi de xuǎn zhǐ, shè jì, jiàn shè hé shēng chǎn, dū bì xū chōng fèn zhù yì fǎng zhǐ duì huán jìng de wū rǎn hé pò huài).

276 McELWEE C.R., Op. cit., p. 56.

277 "已经对环境造成污染和其他公害的单位，应当按照降低污染能治理的原则，制定规划，积极治理 [...]" (yǐ jīng duì huán jìng zào chéng wū rǎn hé qí tā gōng hài de dān wèi, yīng dāng àn zhào shéi wū rǎn shéi zhì lǐ de yuán zé, zhì dìng guī huà, jī jí zhì lǐ). Article 6, Environmental Protection Law (Trial basis) of 13 September 1979.

can probably be found within the Guiding Principles published by the OECD in 1972<sup>278</sup> (since this principle did not feature in the 1972 Stockholm Declaration<sup>279</sup>). Recent scholarship has however identified other overarching principles in the EPL and in the earliest environmental legislation, which show distinctly “Chinese characteristics”.

According to Charles McElwee, the principle of “control through regulation” describes the local authorities’ duty to protect the environment within their jurisdiction through the development “*of a regulatory system that not only infuses all decision-making with an environmental component, but also attempts to guide and change behaviours to provide for greater environmental protection*”<sup>280</sup>.

The “three-synchronicities” (or “three simultaneous steps”) system is a management rule closely related to the environmental impact assessment process introduced by the 1979 EPL. It is a system which stems from the prevention principle, and which requires the design, the construction and the operation of any new industrial project to proceed in lockstep with the development of the pollution treatment facilities or the implementation of the procedures necessary to reduce the environmental impact of the project<sup>281</sup>. The original legal basis of the three-synchronicities system can be found in Article 6 of the 1979 EPL, which requires undertakings and institutions to pay attention to the environmental

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278 The OECD Guiding Principles provide that “[t]he principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so-called “Polluter-Pays Principle”. This principle means that the polluter should bear the expenses of carrying out the above-mentioned measures decided by public authorities to ensure that the environment is in an acceptable state. In other words, the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and/or consumption. Such measures should not be accompanied by subsidies that would create significant distortions in international trade and investment” (Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies, 26 May 1972 – C(72)128).

279 The polluter-pays principle was later recognized by the 1992 Rio Declaration, which provided that national authorities should “endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment” (Principle 16). See also VICHÁ O., “The Polluter-Pays Principle in OECD Recommendations and its application in International and EC/EU Law”, *Czech Yearbook of International Law*, Vol. 2, 2011, pp. 57 – 67.

280 McELWEE C.R., *Op. cit.*, p. 56.

281 See McELWEE C.R., *Op. cit.*, p. 57; and OECD, *Environment, Water Resources and Agricultural Policies. Lessons from China and OECD Countries*, 2006, p. 53. The report is available on the website of the OECD [last accessed on 3<sup>rd</sup> July 2016], at: <http://www.oecd.org/agriculture/agricultural-policies/39317522.pdf>. See also Hogan Lovells, *Clearing the Air on China’s New Environmental Protection Law*, May 2014, [last accessed on 3<sup>rd</sup> July 2016] available at: [http://www.hoganlovells.com/files/Uploads/Documents/China%20alert Clearing the Air on China s New Environmental Protection Law HKGLIB01\\_1106122.pdf](http://www.hoganlovells.com/files/Uploads/Documents/China%20alert%20Clearing%20the%20Air%20on%20China%20New%20Environmental%20Protection%20Law%20HKGLIB01_1106122.pdf).



implications of every project in the “*designing, construction and production*” (设计、建设和生产; shè jì, jiàn shè hé shēng chǎn) phases.

In 2014, after lengthy discussions and multiple drafts<sup>282</sup>, the Standing Committee of the National People’s Congress adopted the new Environmental Protection Law, which took effect on 1<sup>st</sup> January 2015<sup>283</sup> and which represents a significant step towards a higher level of environmental protection in China, addressing many of the shortcomings of the Chinese legal framework developed since 1979<sup>284</sup>. The law recognizes the right of citizens and legal persons to access information on environmental monitoring, environmental incidents and other environmental information gathered by public authorities<sup>285</sup>.

As we have seen, the opaqueness of the environmental governance framework and the failure to disclose – in a timely fashion – information essential to the public welfare had been strongly criticized by the Chinese press and by public opinion in the aftermath of the Songhua River chemical spill<sup>286</sup>. Therefore, it should not be surprising that one of the priorities of the Chinese lawmaker was to increase the transparency of the system and strengthen private enforcement mechanisms by exposing potential polluters to greater public scrutiny. Under the new law, heavy polluters will have to disclose information about the nature and the volume of the chemical substances emitted or discharged and about the measures adopted to limit the environmental impact of their operations<sup>287</sup>. Moreover, the 2014 EPL introduced the duty for the owners of construction and industrial projects which require environmental impact assessment to disclose comprehensive information to the public and the authorities and to consult the stakeholders<sup>288</sup>. However, the involvement of the public does not stop at the planning stage, since the public authorities which approve the environmental impact assessment must make public the full text of the environmental

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282 CARPENTER – GOLD D., “Castles made of sand: public-interest litigation and China’s new environmental protection law”, *Harvard Environmental Law Review*, Vol. 39, 2015, p. 264.

283 The Chinese text and an English translation of the 2014 Environmental Protection Law of the People’s Republic of China are available on the website of the University of Beijing [last accessed on 3<sup>rd</sup> July 2016] at: <http://en.pkulaw.cn/display.aspx?cgid=223979&lib=law>.

284 Hogan Lovells, “*Clearing the Air on China’s New Environmental Protection Law*”, May 2014.

285 Articles 53 and 54 of the 2014 Environmental Protection Law of the People’s Republic of China. See also MU Z., BU S., XUE B., “Environmental Legislation in China: Achievements, Challenges and Trends”, *Sustainability*, Vol. 6, 2014, pp. 8967 – 8979.

286 For an analysis of the legal implications of the accident and of the structural shortcomings which contributed to its occurrence, see WANG Canfa et al. “Pondering over the Incident of Songhua River Pollution from the Perspective of Environmental Law”, in FAURE M., SONG Y., *China and International Environmental Liability: Legal Remedies for Transboundary Pollution*, Edward Elgar Publishing 2008, pp. 291 - 303.

287 Article 55 of the 2014 Environmental Protection Law of the People’s Republic of China.

288 Article 56 of the 2014 Environmental Protection Law of the People’s Republic of China.

impact reports of the project (with the exception of documents containing commercial secrets or other confidential material)<sup>289</sup>.

The Chinese lawmakers also strengthened the coercive powers of the competent public authorities, introducing a sanction similar to the French *astreinte*, consisting in a penalty fee calculated on a daily basis and applied to the polluter which fails to comply with an order issued by a government authority<sup>290</sup>.

As we shall see in the next chapter, the 2014 EPL also did much to foster public interest litigation, by providing a firmer foundation for the *locus standi* of social and environmental organizations. Pursuant to Article 58 of the revised EPL, social organizations can qualify as plaintiffs in lawsuits concerning environmental pollution and ecological damage, provided that they are registered with a government civil affairs department and they have been engaged in public service activities in the field of environmental protection for five consecutive years without any recorded violation of the law<sup>291</sup>. Before the 2014 reform, the EPL did not explicitly recognize the *locus standi* of NGOs and environmental groups, effectively granting plaintiff status only to units and individuals<sup>292</sup>, but the final text of Article 58 of the 2014 EPL shows the influence of the criticism leveled against the revision of the Chinese Civil Procedure Law (CPL), which became effective in 2013<sup>293</sup>. Indeed, Article 55 of the CPL had recognized the legal standing of non-governmental organizations to bring actions for environmental damage in the interest of large numbers of consumers, but legal doctrine and the Supreme Court limited the *locus standi* granted by Article 55 of the CPL to the organizations which fulfilled several demanding requirements, such as possessing more than ten full-time technical and legal staff dealing with environmental issues<sup>294</sup>. Since most Chinese environmental non-governmental organizations have little or no legal and technical staff, this interpretation of the CPL rules on legal standing effectively stifled the development of public interest litigation and attracted considerable criticism. The more flexible requirements set out by the 2014 EPL will in all likelihood

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289 Article 56 of the 2014 Environmental Protection Law of the People's Republic of China.

290 Article 59 of the 2014 Environmental Protection Law of the People's Republic of China.

291 Article 58 of the 2014 Environmental Protection Law of the People's Republic of China. However, some authors have suggested that the registration requirement would still deny locus standi to several environmental NGOs. See LI J., "The revision of China Environmental Protection Law and Environmental Public Interest Litigation in China: Standing for ENGOS", in TIMOTEO M. (edited by) *Environmental Law Survey 2014*, Università di Bologna, December 2014, pp. 213, [last accessed on 17<sup>th</sup> July 2016] available at: [http://amsacta.unibo.it/4145/1/environmental\\_law\\_survey\\_2014.pdf](http://amsacta.unibo.it/4145/1/environmental_law_survey_2014.pdf).

292 See LI J., Op.cit, pp. 209 – 220.

293 LI J., Op.cit.

294 LI J., Op.cit., p. 211.

allow a greater number of environmental NGOs to qualify as plaintiffs in environmental litigation.

While - as we shall see in the next chapter – Chinese lawmakers, judges and scholars have drawn largely on the European experience in order to strengthen environmental (especially civil) litigation as an enforcement tool, access to justice remains an unsolved problem even in the European Union. In particular, in the implementation of the Aarhus Convention and of Directives 2003/35/EC<sup>295</sup> and 2004/35/EC (the so-called “Liability Directive”<sup>296</sup>), Germany granted *locus standi* to environmental NGOs and associations “*only insofar as such provisions are violated that confer subjective rights to individuals*”<sup>297</sup>, while EU courts have consistently refused standing to environmental NGOs which tried to challenge EU environmental measures and policies<sup>298</sup>.

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295 Directive 2003/35/EC amending Directive 85/337/EEC of 27 June 1985, on the assessment of the effects of certain public and private projects on the environment, OJ L 175, 5.7.1985, p. 40.

296 Pursuant to Article 12 of Directive 2004/35/EC, “*Natural or legal persons: [...] b) having a sufficient interest in environmental decision making relating to the damage or, alternatively, c) alleging the impairment of a right, where administrative procedural law of a Member State requires this as a precondition, shall be entitled to submit to the competent authority any observations relating to instances of environmental damage or an imminent threat of such damage of which they are aware and shall be entitled to request the competent authority to take action under this Directive. What constitutes a ‘sufficient interest’ and ‘impairment of a right’ shall be determined by the Member States. To this end, the interest of any non-governmental organization promoting environmental protection and meeting any requirements under national law shall be deemed sufficient for the purpose of subparagraph (b). Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (c)*”.

297 ROLLER G., “Locus standi for environmental NGOs in Germany: the (non) implementation of the Aarhus Convention by the Umweltrechtsbehelfsgesetz”, *Environmental Law Network International Review*, Issue 1, 2010, p. 33.

298 “*In general, it can be concluded that the European Courts seem to have ignored the requirements mandated by the [Aarhus] Convention, since they have interpreted the criteria laid down in Article 230 EC so strictly that they bar all environmental organizations from challenging acts relating to the environment which are not in compliance with European law. This interpretation by the European Courts of the requirement of individual concern provided for in Article 230 EC does not seem to comply with the requirements of Article 9(2) and (3) of the Aarhus Convention, since the consequences of applying the Plaumann test to environmental and health issues is that in effect no NGO is ever able to challenge an environmental measure before the European Courts*”, ELIANTONIO M., “Towards an ever dirtier Europe? The restrictive standing of environmental NGOs before the European courts and the Aarhus Convention”, *Croatian Yearbook of Environmental Law and Policy*, Vol. 7, 2011, p. 78. See also SCHOUKENS H., “Access to justice in environmental cases after the rulings of the Court of Justice of 13 January 2015. Kafka revisited?”, *Utrecht Journal of International and European Law*, Vol. 31, 2015, pp. 46 – 67. In particular, EU courts applied the “Plaumann doctrine”, which states that “*persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed*” (Case 25/62, *Plaumann & Co v Commission* [1963] ECR 95). As regards the application of the *Plaumann* test to the issue of the *locus standi* of

### 3.2.3. Sector-specific environmental legislation in the PRC

The 2014 revision came more than thirty years after the enactment (on a trial basis) of the Environmental Protection Law in 1979. This framework piece of legislation was promptly followed by a first generation of measures which included the Marine Environmental Protection Law in 1982, the Water Pollution prevention and Control Law in 1984 and the Forestry Law in 1984<sup>299</sup> and which have been significantly amended over the following decades.

Over time, the PRC built a broad framework of media specific and end-of-pipe environmental legislation on the basis of which it is possible to identify the priorities and main concerns of the Chinese lawmakers. Unsurprisingly, the first sector-specific measures concerned the protection of the rivers and oceans (an overriding concerns for Chinese rulers from the earliest imperial times, as we have seen).

One of the most significant features of both the 1982 Marine Pollution Law and the 1984 Water Pollution Law from their earliest drafting was the emphasis on the protection and improvement of the environment as a means to promote sustainable economic and social development<sup>300</sup>. Under the 1982 Marine Pollution Law all citizens have an obligation to protect the marine environment and have “*the right to supervise and expose the act of any unit or individual that causes pollution damage to the marine environment, as well as the act of any functionary engaged in marine environment supervision and control that constitutes a neglect of duty in violation of the law*”<sup>301</sup>. It is worth however emphasizing that this provision does not provide any kind of guarantee or protection to whistleblowers who may report a violation committed by their unit or by public officials. Furthermore, the Marine Pollution Law empowered central and local authorities to establish marine reserves<sup>302</sup> and introduced environmental impact statements requirements for major coastal construction projects<sup>303</sup>. Rather than adopting a “sustainable development” model, the

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environmental NGOs, see also Case C-321/95 P, *Stichting Greenpeace Council (Greenpeace International) and Others v Commission* [1998] ECR I-1651; Joined Cases T-236/04 and T-241/04 *European Environmental Bureau (EEB) and Stichting Natuur en Milieu v Commission* [2005] ECR II-04945; and Case T-91/07 *WWF-UK Ltd v Council* [2008] ECR II-81.

299 ALFORD W.P., LIEBMAN B. L., “Clean Air, Clear Processes? The Struggle over Air Pollution Law in the People’s Republic of China”, *Hastings Law Journal*, Vol. 52, Issue n. 3, March 2001, p. 703.

300 McELWEE C.R., Op. cit., p. 61.

301 Article 4 of the 1982 Marine Pollution Law of the People’s Republic of China.

302 Article 21 and 22 of the 1982 Marine Pollution Law of the People’s Republic of China.

303 WANG Canfa, “Chinese Environmental Law Enforcement: Current Deficiencies and Suggested Reforms”, in *Vermont Journal of Environmental Law*, Vol. 8, 2007, p. 184.

Marine Pollution Law addresses specific sources of pollution such as oil exploration and exploitation, discharge of chemicals and waste into the seas, discharge of waste by vessels and coastal construction projects<sup>304</sup>. Finally, Chapter IX of the 1982 Marine Pollution Law, grants to the competent authorities the power to impose fines for the illegal discharging of pollutants into the sea<sup>305</sup>, failure to declare or report the dumping of pollutants and failure to keep records of discharge of pollutants<sup>306</sup>.

The goal of the abovementioned 1984 Water Pollution Law is to “*prevent and control water pollution, protect and improve the environment, safeguard human health, ensure effective utilization of water resources and promote progress of the socialist modernization drive*”<sup>307</sup>. The 1984 Water Pollution Law not only set out the basic rules for the supervision, management and prevention of water pollution, but it also contains important provisions on civil liability for environmental damage, such as Article 55, which provides that the unit which has caused a water pollution hazard has a responsibility to eliminate it and compensate the units or individuals that suffered direct losses from the pollution. The same provision further states that:

*“A dispute over liability to make compensation or the amount of compensation may, at the request of the parties, be settled by the environmental protection department [...]. If a party refuses to accept the settlement decision, he may bring a suit to a People’s Court. The party may also bring a suit to a People’s Court directly”.*

A similar provision can be found under Article 36 of the 1987 Air Pollution Law, a broad, if rather vague, piece of legislation which empowered NEPA to set out national standards for air quality and the discharge of pollutants and required all potential polluters to include in their environmental impact reports an analysis of the impact on air quality of their projects<sup>308</sup>. Significantly, Article 2 of the Air Pollution Law stressed the need for effective planning in order to reduce atmospheric pollution and required “*the State Council and the local people’s governments at various levels*” to incorporate the protection of the atmosphere “*into the national economic and social development plans, make rational plans for the distribution of industry, strengthen scientific research on the prevention and control*

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304 Ibid., p. 184.

305 Article 73 of the 1982 Marine Pollution Law of the People’s Republic of China..

306 Article 74 of the 1982 Marine Pollution Law of the People’s Republic of China.

307 Article 1 of the 1984 Water Pollution Law of the People’s Republic of China.

308 ALFORD W.P., LIEBMAN B.L., “Clean Air, Clean Processes? The Struggle over Air Pollution Law in the People’s Republic of China”, *Hastings Law Journal*, Vol. 52, 2001, p. 703 ss., *passim*.

of atmospheric pollution”<sup>309</sup>. As we shall see throughout this dissertation, these programmatic statements are a recurring trait of Chinese environmental legislation.

Several legislative measures were aimed at protecting specific resources, such as the 1984 Forestry Law, the 1986 Fisheries Law, the 1986 Land Administration Law, the 1988 Wildlife Protection Law, the 2001 Prevention and Control of Desertification Law and the 1991 Water and Soil Conservation Law and in recent years the Chinese Ministry of Environmental Protection has directly intervened in the debate on the effectiveness of these legislative measures in preventing soil pollution and degradation. In particular, in 2014, the Chinese MEP and the French embassy in Beijing and the Fondation pour le droit continental organized a seminar on soil pollution remediation aimed at taking stock of the implementation of the existing regulatory and legal framework<sup>310</sup>.

One of the key issues when it comes to ensuring the protection of natural resources, is that of land ownership, since pursuant to the 1984 Forestry Law, China’s forests are State-owned, with the exception of the forested areas belonging to collective organizations<sup>311</sup>. The Forestry Laws classifies China’s forests into five main categories: i) “protection forests”, considered essential for water and soil conservation and for the protection of farmlands from sand and wind; ii) timber forests, reserved for timber production (this category includes bamboo groves, which represent a significant source of building material); iii) “economic forests”, dedicated to the production of fruits and raw materials for the manufacturing sector; iv) fuel forests; v) “special-purpose forests”, which may have some use for national defense, scientific experiments or environmental protection<sup>312</sup>.

Similarly, the goal of the 1985 Grasslands Law was to rationalize the exploitation of grasslands in order to protect biodiversity and prevent environmental degradation. Perhaps the most interesting provision in the 1985 Grasslands Law is Article 6, which seems to exemplify the Chinese lawmakers’ disfavour towards judicial solutions to disputes concerning land use or ownership:

*“Disputes over the right of ownership of grasslands or the right to use them*

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309 Article 2 of the 1987 Air Pollution Law of the People’s Republic of China. The Air Pollution Law of the People’s Republic of China, 1987, [last accessed on 30<sup>th</sup> September 2016] is available at: <http://www.lawinfochina.com/>.

310 Ambassade de France à Pékin, *Séminaire droit de l’environnement : la dépollution des sols*, November 2014, [last accessed on 4<sup>th</sup> September 2016] available at: <http://www.ambafrance-cn.org/Seminaire-sur-la-depollution-des-sols>.

311 Article 3 of the 1984 Forestry Law of the People’s Republic of China.

312 Article 4 of the 1984 Forestry Law of the People’s Republic of China. See also WANG Canfa, “Chinese Environmental Law Enforcement: Current Deficiencies and Suggested Reforms”, in *Vermont Journal of Environmental Law*, Vol. 8, 2007, pp. 187 – 188. See also McELWEE, Op.cit.

*shall be settled by the parties concerned through negotiation on the principle of mutual understanding and mutual accommodation in the interest of unity. If no agreement can be reached through such negotiation, the disputes shall be handled by the people's governments. [...] Disputes over the right to use grasslands that arise between individuals, between individuals and units under ownership by the whole people or between individuals and units under collective ownership shall be handled by the people's governments at the township or county level. If the parties concerned disagree with the decision made by the people's government, they may file a suit in a People's Court within one month after they have been informed of the decision”.*

This kind of heavy-handed State intervention in the management of the land also characterizes the 1986 Land Administration Law, which states that “*the State is to place a strict control on the usages of land*”, drafting “*general plans to set usages of land*”<sup>313</sup> and requires State authorities to closely monitor (and if necessary, avert) the conversion of cultivated land into non-cultivated land<sup>314</sup>. As we have seen in the second chapter of this dissertation, State interference with the usage of land is not a peculiar character of the economic model of the PRC but harkens back to imperial and even pre-imperial times, in one form or another.

Rather than concentrating on the protection of a resource, some measures, such as the 2003 Radioactive Pollution Law and the 1995 Solid Waste Law (which applied to the discharge of waste which was not already covered by the Marine Pollution and Water Pollution Laws), addressed specific sources of pollution. The purpose of the Radioactive Pollution Law is to “*prevent and control radioactive pollution, protect the environment, ensure human health, and promote the development and peaceful use of nuclear energy and technology*”<sup>315</sup> by requiring State authority to carry out their monitoring duties in compliance with the “*prevention principle*”<sup>316</sup>.

The 1995 Solid Waste Law provides a good illustration of some of the most significant shortcomings of legislative drafting in the PRC, since when it was adopted in 1995 by the Standing Committee of the NPC it included very stringent provisions aimed at reducing pollution throughout the production process. However, in its earliest formulation the Solid

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313 Article 4 of the 1986 Land Administration Law of the People's Republic of China.

314 See Articles 4 and 31 of the 1986 Land Administration Law of the People's Republic of China.

315 Article 1 of the 2003 Radioactive Pollution Law of the People's Republic of China.

316 Article 1 of the 2003 Radioactive Pollution Law of the People's Republic of China. See also WANG C., *Op.cit.*, p. 187.

Waste Law failed to address effectively certain issues, such as the recycling and safe disposal of used products<sup>317</sup>. According to Professor Wang Canfa, Chinese lawmakers lacked the “*necessary basic information detailing both the research on the pollution mechanism of solid wastes and the availability of disposal technology methods for solid waste*”<sup>318</sup>. Insufficient technical knowledge on the part of the drafters of the Solid Waste Law led to inadequate enforcement and to extremely low rates of waste disposal. Responding to the failure of the 1995 text, the Solid Waste Law was amended in 2004 on the basis of sounder technical research, expanding significantly producers’ liability<sup>319</sup>.

Most of the measures we have listed fall within the model of “end-of-pipe” regulation. Whereas cleaner production measures reduce “*resource use and/or pollution at the source by using cleaner products and production methods*”<sup>320</sup>, end-of-pipe measures tackle emissions through “add-on” measures, without changing the production processes or the technological and economic infrastructure.

While end-of-pipe measures may prove effective, economic doctrine has largely recognized that cleaner production measures are preferable for a wide variety reasons<sup>321</sup>. The Chinese legislator apparently recognized the limitations of the end-of-pipe approach and the years 2000s were characterized by a shift towards cleaner production measures, with the adoption of the 2002 Clean Production Law, the 2008 Circular Economy Law and the 2002 Environmental Impact Assessment Law<sup>322</sup>. This shift may have been prompted (or at the very least influenced) by legal cooperation between China and the West, which became much more intense over the first decade of the new millennium.

The PRC also took steps to protect scenic spots and landscapes and historical relics<sup>323</sup> and

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317 WANG Canfa, “Chinese Environmental Law Enforcement: Current Deficiencies and Suggested Reforms”, in *Vermont Journal of Environmental Law*, Vol. 8, 2007, p. 186.

318 *Ibid.*, p. 170.

319 *Ibid.*, p. 186.

320 FRONDEL M., HORBACH J., RENNINGS K., *End-of-Pipe or Cleaner Production? An empirical comparison of environmental innovation decisions across OECD countries*, Zentrum für Europäische Wirtschaftsforschung, Discussion paper No. 04-82, 2007, p. 1 [last accessed on 17<sup>th</sup> July 2016] available at: <http://ftp.zew.de/pub/zew-docs/dp/dp0482.pdf>.

321 “*End-of-pipe regulatory models are relatively effective at reducing pollutant loads if the number of pipes is constant or growing at a slow pace, but given China's rapid development, it became apparent that even if existing entities were in compliance with the original concentration-based discharge limitations (a clearly inapplicable assumption in China) the number of new polluting facilities being built would result in ever-increasing pollutant loads*”, McELWEE C.R., *Op.cit.* p. 54. See also FRONDEL M., HORBACH J., RENNINGS K., *Op. cit.*, p. 1.

322 McELWEE C.R., *Op. cit.*, pp. 64 – 65.

323 WANG Canfa, “Chinese Environmental Law Enforcement: Current Deficiencies and Suggested Reforms”, in *Vermont Journal of Environmental Law*, Vol. 8, 2007, p. 190.



to preserve biodiversity in China. In particular, in 1988 the NPC adopted the Wildlife Protection Law in order to “*protect and save species which are rare or near extinction*”<sup>324</sup> and to preserve the ecological balance, while specific measures for the protection of terrestrial and aquatic wildlife were adopted in 1992 and 1993, respectively<sup>325</sup>.

In order to ensure compliance with the environmental protection laws, in 1997 the Chinese legislator amended the Criminal Law of the PRC, introducing under Chapter VI, Section VI the crimes of illegal discharge of toxic or radioactive waste, illegal import of solid waste<sup>326</sup>, illegal capture, purchase or sale of protected wildlife<sup>327</sup>, illegal occupation of cultivated land<sup>328</sup>, illegal mining<sup>329</sup>, illegal logging or destruction of forested areas<sup>330</sup>.

Finally, with the Tort Law adopted in 2009<sup>331</sup> the Chinese lawmakers redrew the rules on environmental liability, shifting the burden of proof as regards causation from the pollution victim to the defendant<sup>332</sup> and introducing a strict liability rule<sup>333</sup>. As we shall see in greater detail in the next chapter, the new liability rules introduced by the 2009 Tort Law have been profoundly influenced by German and Japanese legal models and by the Principles of European Tort Law<sup>334</sup>. Moreover, there is good reason to suggest that the Sino-German legal cooperation programme, managed by the Deutsche Gesellschaft für Technische Zusammenarbeit, may have contributed to the promotion of the German model in the field of civil liability by providing training to more than 9,000 judicial officials and distributing specialized literature and training material<sup>335</sup>.

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324 Article 1 of the 1988 Wildlife Protection Law of the People’s Republic of China.

325 WANG C., *Op. cit.*, p. 191. See also YUN M., *Conservation and recreation in protected areas, A comparative legal analysis of environmental conflict resolution in the United States and China*, Routledge, London and New York, 2016.

326 Article 338 of the Criminal Law of the People’s Republic of China.

327 Article 341 of the Criminal Law of the People’s Republic of China.

328 Article 342 of the Criminal Law of the People’s Republic of China.

329 Article 343 of the Criminal Law of the People’s Republic of China.

330 Articles 344 and 345 of the Criminal Law of the People’s Republic of China. See also WANG C. *Op. cit.*, p. 163; and McELWEE *Op. cit.*, p. 249.

331 (中华人民共和国侵权责任法; zhōng huá rén mín gòng hé guó qīn quán zé rèn fǎ).

332 Article 66 of the 2009 Tort Law of the People’s Republic of China.

333 Article 65 of the 2009 Tort Law of the People’s Republic of China.

334 See TIMOTEO M., “Sustainability of Legal Transplants and Legal Borrowings in Chinese Rules on Environmental Liability”, in WANG C., FEI A., TIMOTEO M. (edited by), *Legislative and Judicial Remedies for Environmental Torts Victims. A study in the framework of EU-China Cooperation*, Bononia University Press, Bologna 2013, pp. 273 – 276; and TIMOTEO M., ZHOU J., “Channeling Foreign Law Models into Domestic Legislation: A First Inquiry on the Making of the Chinese Environmental Protection Laws”, in SCAFFARDI L., LUPO N., (edited by), *Comparative Law in Legislative Drafting*, London, International Publishing Eleven, 2014, pp. 285-296.

335 Gesellschaft für Technische Zusammenarbeit, *Sino-german legal cooperation programme*, [last accessed on 4<sup>th</sup> September 2016] available at: <https://www.giz.de/en/worldwide/15590.html>.

### 3.2.4. Local regulation in the field of environmental protection

As we have seen, the PRC has a decentralized legal system, where local authorities hold most of the enforcement powers and have significant leeway in the way in which they use it. China is subdivided in twenty-three provinces (including the island of Taiwan, *de facto* controlled by the Republic of China), five autonomous regions, four provincial-level cities and two special administrative regions. Each of these sub-national political divisions is ruled by a local government and has its own local environmental protection bureau (local EPBs also exist at the prefecture and county levels), with significant regulatory and enforcement powers within its jurisdiction<sup>336</sup>.

However, in the field of environmental protection, local rulemaking frequently deviates from the parameters set by the central government, reflecting local realities and concerns (and responding to political pressure from local interest groups). Over the last decades, local governments have introduced recycling measures and pollution charges and standards beyond the minimum requirements set out by national legislation, often with the tacit encouragement of the national government<sup>337</sup>.

Local initiative is generally encouraged from Beijing, since “pilot projects” carried out at a local level can be extremely important to gain experience and test (without taking too many risks) the viability and effectiveness of measures which might be taken up by the national government at a later stage<sup>338</sup>. It is worth remembering that the opening up of the PRC to foreign investments had been tested in a few selected cities with the establishment of the Special Economic Zones. Moreover, as we shall see in greater detail in the next chapters, some of the most ambitious legal cooperation programmes in the field of environmental protection have been implemented by foreign organizations and interest groups in cooperation with local (generally provincial) authorities in the PRC. Perhaps the most well-known example of cooperation between local Chinese authorities and an international actor is the “EGP – Guizhou Project”<sup>339</sup> (part of the EU – China

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336 See McELWEE, *Op. cit.*, p. 113; as well as the Chapter IV of the Legislation Law of the People’s Republic of China, 2000, [last accessed on 16<sup>th</sup> September 2016] available at: <http://www.lawinfochina.com/>.

337 See Organisation for Economic Co-operation and Development (OECD), “*Environmental compliance and Enforcement in China, An assessment of current practices and ways forward*”, December 2006 [last accessed on 26<sup>th</sup> July 2016] available at: <https://www.oecd.org/env/outreach/37867511.pdf>.

338 See McELWEE, *Op. cit.*, p. 118.

339 EU-China Environmental Governance Programme, *Documentation from EGP-Guizhou events*, [last accessed on 13<sup>th</sup> August 2016] available at: <http://www.egp-guizhou.com/documentationofevents.4.4dd97c213ed2e2e70149f.html>; see also EU-China Environmental Governance Programme, *Improving access to environmental justice to protect people’s*

Environmental Governance Programme), which provided funding and support to several pilot projects in the field of access to justice and public participation.

However, experiments at a local level are in general quite closely monitored by the Ministry of Environmental Protection and by the Standing Committee of the NPC, especially where it is necessary to interpret national legislation. In order to ensure a certain degree of consistency in the environmental governance of the PRC, Chinese lawmakers and administration have also established a “responsibility system”, which includes the setting of targets for local authorities and the negotiation of ad hoc agreements between different offices<sup>340</sup>.

### 3.2.5. The legal status of international environmental treaties in the PRC

The PRC is a party to several international environmental treaties, including the 1997 Kyoto Protocol, the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (so-called “Washington Convention”), the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the 1985 Vienna Convention of the Protection of the Ozone Layer, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, the 1992 United Nations Framework Convention on Climate Change and the 1992 Convention on Biological Diversity<sup>341</sup>.

Even though international environmental treaties play an important role in Chinese policy, their position within the Chinese legal system and among the sources of law is not easy to define. The Constitution of the PRC does not automatically incorporate international law into the domestic legal system (the so-called “monistic” theory, developed, among others, by Hans Kelsen<sup>342</sup>), nor does it necessarily require the translation of international treaties into municipal law (the “dualistic” approach)<sup>343</sup> for them to be effective. However, since the PRC has signed the 1969 Vienna Convention on the Law of Treaties, it cannot “invoke

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*rights in Guizhou Province*, [last accessed on 13<sup>th</sup> August 2016] available at: <http://www.egp-guizhou.com/abouttheproject.4.50367b6c13a6fda01521d13.html>.

340 See WANG A.L., “The search for sustainable legitimacy: environmental law and bureaucracy in China”, *Harvard Environmental Law Review*, Vol. 37, 2013, pp. 365 – 440; and McELWEE, Op. cit., p. 118.

341 For a full list, see WANG Canfa, “Chinese Environmental Law Enforcement: Current Deficiencies and Suggested Reforms”, in *Vermont Journal of Environmental Law*, Vol. 8, 2007, p. 163.

342 RIGAUX F., “Hans Kelsen on International Law”, *European Journal of International Law*, Vol. 9, 1998, pp. 325 – 343.

343 XUE H., JIN Q., “International Treaties in the Chinese Domestic Legal System”, *Chinese Journal of International Law*, Vol. 2, 2009, p. 305. On the origins and the distinction between the monistic and dualistic approaches, see also BOAS G., *Public International Law*, Edward Elgar, 2013, pp. 120 – 122.

*the provisions of internal law as justification for its failure to perform a treaty*”<sup>344</sup>.

While the 2000 Legislation Law of the PRC does not specify the position of international treaties within the hierarchy of the sources of law, “*it is generally accepted that treaties concluded between governmental departments should not contravene higher-level laws and treaties concluded between governments or States should not contravene the Constitution or basic laws, unless the legislature has made appropriate amendments to the Constitution or the relevant laws*”<sup>345</sup>.

Legal doctrine<sup>346</sup> has identified three main ways to implement treaty provisions in the Chinese legal system. Agreements between Chinese ministerial departments and their foreign counterparts, which pursuant to the 1990 Treaty Procedure Law should be considered international treaties<sup>347</sup>, can be implemented by adopting the necessary administrative measures, without the need for the adoption of any legislative measures by the NPC or its Standing Committee<sup>348</sup>. More often, treaties require the adoption of specific legislation or the amendment of existing domestic law for their implementation<sup>349</sup>, along the line of the “dualistic” approach. Finally, treaty provisions may be directly applicable thanks to a reference to the treaty itself made by national legislation<sup>350</sup>. Sometimes these references can take the form of rules of conflict, along the lines of Article 189 of the 1982 Civil Procedure Law, which states – with reference to cases concerning foreign parties – that “*if an international treaty concluded or acceded to by the People’s Republic of China contains provisions that differ from provisions of this Law, the provisions of the international treaty shall apply, except those on which China has made reservations*”<sup>351</sup>. Similar provisions can be found under Article 238 of the Civil Procedure Law and Article 142 of the General Principles of Civil Law, as well as in several pieces of legislation which regulate specific matters, such as the 1982 Trademark Law and the 1984 Patent Law.

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344 Article 27 of the 1969 Vienna Convention on the law of treaties.

345 XUE H., JIN Q., “International Treaties in the Chinese Domestic Legal System”, *Chinese Journal of International Law*, Vol .2, 2009, p. 302.

346 McELWEE C.R., Op. cit., p. 68; XUE H., JIN Q., Op. cit., p. 305.

347 XUE H., JIN Q., Op. cit., p. 301.

348 “*For instance, it could be said that China effectuated provisions of the Kyoto Protocol by adopting regulations that established a Designated National Authority (DNA) and set out procedures for gaining host country approvals for Clean Development Mechanism (CDM) projects*”, McELWEE C.R., Op. cit., p. 68.

349 By way of example, “*China has repealed, abrogated, revised, enacted and promulgated more than 3000 domestic laws, administrative regulations and administrative orders to ensure compliance with WTO rules*” upon its accession to the World Trade Organization (from XUE H., JIN Q., Op. cit., p. 308).

350 McELWEE C.R., Op. cit., p. 68.

351 XUE H., JIN Q., Op. cit., p. 303.

A rule of conflict regulating the position of international environmental treaties within the Chinese legal system can be found under Article 46 of the 1989 Environmental Protection Law, which provides that:

*“If an international treaty regarding environmental protection concluded or acceded to by the People’s Republic of China contains provisions differing from those contained in the laws of the People’s Republic of China, the provisions of the international treaty shall apply, with the exception of the provisions on which the People’s Republic of China has made reservations”*<sup>352</sup>.

An identical provision can be found in the 1982 Marine Pollution Law<sup>353</sup> and in the 1995 Solid Waste Law (as amended in 2004)<sup>354</sup>. The main limitation of these provisions is that while they can solve conflicts which may arise between domestic law and treaty provisions, they cannot be invoked to implement treaty provisions which are not explicitly in conflict with domestic law. As to the position of treaty provisions within the hierarchy of the sources of law, legal doctrine generally holds that they must have the same rank of the domestic provisions which make reference to them<sup>355</sup>.

Chinese case law has applied in several instances the kind of rules of conflict set out by Article 189 of the 1982 Civil Procedure Law and 46 of the 1989 Environmental Protection Law in order to give effect to international treaties in the PRC<sup>356</sup>. Moreover, in order to ensure the correct implementation of provisions of the treaties ratified by the PRC, the Supreme People’s Court issued (legally binding) judicial directives to provide guidance to

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“中华人民共和国缔结或者参加的与环境保护有关的国际条约，同中华人民共和国的法律有不同规定的，适用国际条约的规定，但中华人民共和国声明保留的条款除外。” (“Zhōng huá rén mín gòng hé guó dì jié huò zhě cān jiā de yú huán jīng bǎo hù yǒu guān de guó jì tiáo yuē tóng zhōng huá rén mín gòng hé guó de fǎ lǜ yǒu bù tóng guī dìng de shì yòng guó jì tiáo yuē de guī dìng dàn zhōng huá rén mín gòng hé guó shēng míng bǎo liú de tiáo kuǎn chú wài”). The Chinese text and an English translation of the 1989 Environmental Protection Law of the People’s Republic of China, [last accessed on 24th July 2016] are available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=1208&CGid>. A similar provision can be found under Article 97 of the 1982 Marine Environmental Protection Law. See also, on this subject, QIN T. (edited by), *Research Handbook on Chinese Environmental Law*. Edward Elgar, 2015, p. 410.

353 Pursuant to Article 97 of the 1982 Marine Pollution Law “where an International treaty regarding marine environment protection concluded or acceded to by the People’s Republic of China contains provisions differing from those contained in this Law, the provisions of the International treaty shall apply; however the provisions about which the People’s Republic of China has declared reservations shall be excepted”.

354 Article 90 of the 1995 Solid Waste Law of the People’s Republic of China.

355 McELWEE C.R., Op. cit., p. 69.

356 E.g. in the Judgment of the People’s Court of the Pudong New Area of Shanghai, *Abdul Waheed v. China Eastern Airlines*, Pu Min Yi Chu No. 12164, 2005 (from XUE H., JIN Q., Op. cit., p. 311).

lower courts<sup>357</sup>.

### 3.3. THE CONTRIBUTION OF INTERNATIONAL LEGAL COOPERATION: A LEGAL FRAMEWORK CHARACTERIZED BY GROWING CONTAMINATION

We shall now examine the role which international legal cooperation played in the development of substantive environmental law in the People's Republic of China through a wide array of projects, most of which took the form of technical support to legislative drafting.

The United States has played a leading role in the field of legal cooperation with the PRC, especially in the earlier phases of the reform process, through projects funded by the U.S. federal government and through a growing number of non-governmental players such as the Ford Foundation and the American Bar Association.

The Ford Foundation<sup>358</sup> is a New York-based private foundation established in 1936 by Henry and Edsel Ford with a long-standing commitment to the development of the rule of law in the People's Republic of China. Today the Ford Foundation is one of the leading sources of funding in the field of international legal cooperation with the PRC, having spent between 1988 and 2011 around 275 million dollars in grants<sup>359</sup> which allowed a considerable number of Chinese scholars, officials and lawyers to study at U.S. universities and research institutions. Beginning in 1992, the Ford Foundation implemented various initiatives “*designed to enhance the law-drafting competence*”<sup>360</sup> of the State Council's Legislative Affairs Bureau (法制办公室; fǎ zhì bàn gōng shì) and of local lawmakers and regulators<sup>361</sup>. Moreover, the Ford Foundation encouraged and funded research “*addressing basic legal issues from a comparative perspective*”<sup>362</sup>, which had the considerable merit of exposing scholars and lawmakers to foreign models and legal theories at a very delicate juncture of the reform and “opening up” process. Moreover, over the years, the Legislative

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357 See XUE H., JIN Q., Op. cit., p. 314.

358 Their website can be found at: <https://www.fordfoundation.org/> [last accessed on 13<sup>th</sup> August 2016].

359 LUM T., *U.S. Assistance Programs in China*, Congressional Research Service 7-5700, December 2014, [last accessed on 13<sup>th</sup> August 2016], available at: <https://www.fas.org/sgp/crs/row/RS22663.pdf>.

360 DELISLE J., “Lex Americana? United States Legal Assistance, American Legal Models and Legal Change in Post- Communist World and Beyond”, *University of Pennsylvania Journal of International Economic Law*, Vol 20, No. 2, 1999, p. 217.

361 SCHULTE – KULKMANN N., HEILMANN S., *U.S. – China Legal Cooperation – Part III: an overview of private American-Chinese cooperation programmes*, *Chinapolitik*, China Analysis 44, June 2005, p. 34, [last accessed on 28<sup>th</sup> November 2016] available at: [http://www.chinapolitik.de/files/no\\_44.pdf](http://www.chinapolitik.de/files/no_44.pdf).

362 DELISLE J., *Ibid.*, p. 219.

Affairs Bureau received additional training and advice from the United Nations Development Programme on legislative drafting and policymaking<sup>363</sup>.

While it is difficult to measure the effects of these initiatives, there can be little doubt that the technical support to legislative drafting provided by the Ford Foundation “*exerted a certain impact on the migration of legal norms and concepts, both through individual Chinese legal scholars as well as through institutional networks*”<sup>364</sup>. In particular, some authors have argued that the “*improvements in the area of Administrative law which, for example, enable citizens to sue the government and to claim compensation for improper government action*” largely mirror western models which “*have been introduced into the Chinese legislative process due to the influence of Chinese scholars educated in the U.S.*”<sup>365</sup>. According to some authors, through its early work of the Ford Foundation has demonstrated that Chinese scholars involved in cooperation programmes can exert some influence on the drafting of environmental legislation, since “*their advice is frequently sought by central Chinese legislative drafting institutions*”<sup>366</sup>. The importance of technical support to the drafting of legislation remains to this day a priority for many international organizations, since Chinese environmental laws still suffer from a “*drafting style that prefers general clauses and non-technical language*”<sup>367</sup>.

In the wake of the Ford Foundation, a growing number of actors, both “*collective actors – such as national governments, non-governmental organizations, business and partisan organizations, professional communities, international organizations and academic institutes – and individual actors – Chinese and Western legal experts, judges, lawyers, legislative staff, administrative personnel, scholars and students*”<sup>368</sup> crowded the scene of international legal cooperation. Moreover, in the early 2000 academic institutions such as

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363 In particular, the UNDP provided guidance to the Legislative Affairs Bureau on “*how to factor institutional, policy, and political environments into law-drafting, and how U.S. law has addressed administrative procedure in ways that might be instructive (but not prescriptive) for drafters of loosely analogous Chinese legislation*”, DELISLE J., *Ibid.*, p. 218.

364 SCHULTE – KULKMANN N., HEILMANN S., *Op.cit.*, p. 39.

365 SCHULTE – KULKMANN N., HEILMANN S., *Op.cit.*, p. 39.

366 SCHULTE – KULKMANN N., HEILMANN S., *Op.cit.*, p. 47.

367 TIMOTEO M., “Law and language: issues related to legal translation and interpretation of Chinese rules on tortious liability of environmental pollution”, *China-EU Law Journal*, Springer, 2015, Vol. 4, p. 128. p. 126. On this subject, see also AJANI G., “Legal change and institutional reforms”, *Ret tog tolerance. Festkrift til Helge Johan Thue*. Glydendal Norsk Forlag, Oslo 2007, pp. 473–497.

368 See TIMOTEO M., “Sustainability of Legal Transplants and Legal Borrowings in Chinese Rules on Environmental Liability”, in WANG C., FEI A., TIMOTEO M. (edited by), *Legislative and Judicial Remedies for Environmental Torts Victims. A study in the framework of EU-China Cooperation*, Bononia University Press, Bologna 2013, p. 273.

the Yale Law School China Law Center stepped in, providing advice and technical support on the drafting of the Administrative Licensing Law and of the Administrative Litigation Law<sup>369</sup>. The U.S. – Asia Law Institute was also a key player in the early days of international legal cooperation with China, having funded and promoted several projects in collaboration with the Supreme People’s Court and having contributed in very tangible ways to the reform and professionalization of the judiciary<sup>370</sup>.

However, the most comprehensive and far-reaching project in the field of technical assistance to the drafting of environmental legislation was certainly the China Environmental Governance Programme enacted by the American Bar Association. In early 2002 the ABA launched a series of training initiatives focused on three large Chinese cities (Wuhan, Shenyang and Chifeng), which were able to bring into the fold institutional actors such as SEPA and a large number of NGOs, professional associations and local stakeholders<sup>371</sup>. As a follow on, ABA actively “supported the Shenyang municipal government in drafting the first municipal public participation legislation” and provided advice to the authorities in Wuhan “on the feasibility of regional Internet databases on environmental information”<sup>372</sup>.

If U.S. institutions and organizations were instrumental in clearing the path for future cooperation projects and in creating a receptive cultural environment in the PRC, their European counterparts have been quick to follow their example. In particular, European governments have not been slow to realize that “the availability of American legal material has considerably facilitated the migration of legal norms and concepts and hence significantly influenced the development of the Chinese legal system”<sup>373</sup>. Therefore, “in order to secure a certain influence for the continental European civil law system and in particular the German legal system”<sup>374</sup>, German authorities began to invest heavily in the translation of German legal literature, thus setting an example that other European countries might follow.

In 2011 the French Government organized a seminar to promote the codification of Chinese environmental law, presenting French environmental legislation as an example to

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369 SCHULTE – KULKMANN N., HEILMANN S., Op.cit., p. 28.

370 See NOVARETTI S. Op. cit. p. 115.

371 SCHULTE – KULKMANN N., HEILMANN S., Op.cit., p. 18.

372 SCHULTE – KULKMANN N., HEILMANN S., Op.cit., p. 18.

373 SCHULTE – KULKMANN N., HEILMANN S., Op.cit., p. 39.

374 SCHULTE – KULKMANN N., HEILMANN S., Op.cit., p. 39.



be followed<sup>375</sup>. During the seminar, French experts (such as Prof. Gilles Martin, the former president of the *commission d'expertise* entrusted with the drafting of the French *Code de l'environnement*) offered an overview of the French codification experience<sup>376</sup> and of the practical implementation of the French Code by the courts<sup>377</sup>. The outcomes of this seminar include the publication a document outlining the possible advantages of the codification of environmental law in China (in terms of consistency of the legal framework, increased public awareness and greater access to justice) and of a draft summary of the prospective Chinese Environmental Code<sup>378</sup>. In the lead-up phase to this conference, the Fondation pour le droit continental (in collaboration with the French Embassy in Beijing) published in 2012 a brief French – Chinese dictionary of the most important terms in the field of environmental law<sup>379</sup>, while the French Embassy in China and the Chinese Ministry of Environmental Protection produced a translation of the First Book of the *Code de l'environnement*. The translation of the remaining books of the *Code de l'environnement* is currently under way, thanks to the financial support provided by various private entities. The ostensible goal pursued by the French government through this spate of initiatives was to promote French environmental legislation as a model for the development of a comprehensive environmental law framework in the PRC<sup>380</sup>.

While it remains to be seen whether the translation of the *Code* will represent a useful tool for Chinese lawmakers, there is reason to doubt the usefulness of the French – Chinese environmental law dictionary as a reference for the translation of French law into Chinese. As a matter of fact, this work seems to pay scant attention to the connotations of the

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375 Ambassade de France à Pékin, *Séminaire sur la codification du droit de l'environnement*, July 2011, [last accessed on 4<sup>th</sup> September 2016] available at: <http://www.ambafrance-cn.org/Seminaire-sur-la-codification-du-droit-de-l-environnement-Pekin-22-au-24-avril>.

376 MARTIN G., *Le code français de l'environnement*, presentation, June 2011 [last accessed on 4<sup>th</sup> September 2016] available at: [http://www.ambafrance-cn.org/IMG/pdf/presentation\\_de\\_gilles\\_martin\\_juin\\_2011.pdf](http://www.ambafrance-cn.org/IMG/pdf/presentation_de_gilles_martin_juin_2011.pdf).

377 CLEMENT M., *Pratique du code de l'environnement français par le juge*, Presentation, June 2011 [last accessed on 4<sup>th</sup> September 2016] available at: [http://www.ambafrance-cn.org/IMG/pdf/presentation\\_marc\\_clement\\_juin\\_2011.pdf](http://www.ambafrance-cn.org/IMG/pdf/presentation_marc_clement_juin_2011.pdf).

378 Ambassade de France à Pékin, *Séminaire sur la codification du droit de l'environnement*, July 2011, [last accessed on 4<sup>th</sup> September 2016] available at: <http://www.ambafrance-cn.org/Seminaire-sur-la-codification-du-droit-de-l-environnement-Pekin-22-au-24-avril>.

379 Ambassade de France à Pékin, *Lexique français-chinois sur le droit de l'environnement*, March 2010, [last accessed on 4<sup>th</sup> September 2016] available at: [http://www.ambafrance-cn.org/IMG/pdf/lexique\\_droit\\_de\\_l\\_environnement-2\\_ok\\_denis.pdf](http://www.ambafrance-cn.org/IMG/pdf/lexique_droit_de_l_environnement-2_ok_denis.pdf).

380 Ambassade de France à Pékin, *Traduction du code de l'environnement*, February 2012, [last accessed on 4<sup>th</sup> September 2016] available at: <http://www.ambafrance-cn.org/NOUVEL-ARTICLE-Traduction-du-Code-de-l-environnement>.

Chinese and French terms it employs, their correspondence within the taxonomies of their respective legal systems or the correspondence of their legal implications<sup>381</sup>. The dictionary in question provides translations of terms such as “*principe de prévention*” (“先预防原则 xian yu fang yuan ze”), “*accès à l’information*” (“信息获取 xin xi huo qu”), “*dommage causé à l’environnement*” (“对环境的损害, dui huan jing de sun hai”) and “*droit des tiers*” (“第三方权利 di san fang quan li”)<sup>382</sup> without providing a word of context or any explanation as to the connotations which these French legal concepts have acquired over the years. This is not a trivial oversight, since (as we shall see in the next chapter) there is no statutory definition of environmental damage in the Chinese legal system<sup>383</sup>, just as there is no consistent discipline on the right to access environmental information in the PRC (but rather a patchwork of provisions contained in separate texts).

Moreover, it is hardly possible to translate the *principe de prévention* into an equivalent Chinese expression without a significant loss of meaning<sup>384</sup>, since the boundaries of this concept are considerably broader than it is the case under Chinese law. Indeed, the prevention principle outlined by Article L110-1, II, 2° of the *Code de l’environnement*<sup>385</sup> is

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381 “As a matter of fact, legal concepts, in their circulation across legal systems, can undergo a process of stratification and diversification of meanings. This is particularly true in the case of China, where legal discourses are enriched (and made more complicated) by the huge circulation of legal models and the increasingly complex amalgam of patterns coming from other systems, where original traits of the borrowed models are mixed up through a selective activity led by legal scholars. This situation blurs the distinctions between concepts and categories and renders the game of the correspondences more difficult”, TIMOTEO M., “Law and language: issues related to legal translation and interpretation of Chinese rules on tortious liability of environmental pollution”, *China-EU Law Journal*, Springer, 2015, Vol. 4, p. 128. On the challenges posed by legal translations, see also SACCO R., “Lingua e Diritto”, *Ars Interpretandi*, 2000, pp. 117 - 134; POZZO B., “Comparative Law and Language”, in BUSSANI M., MATTEI U. (edited by), *Cambridge Companion to Comparative Law*, Cambridge University Press, Cambridge UK, 2012, pp. 88 – 114. For an overview of some of the linguistic challenges posed by the study of Chinese law see CAO D., *Chinese Law. A Language Perspective*, Ashgate, Aldershot, 2004.

382 Ambassade de France à Pékin, *Lexique français-chinois sur le droit de l’environnement*, March 2010, [last accessed on 4<sup>th</sup> September 2016] available at: [http://www.ambafrance-cn.org/IMG/pdf/lexique\\_droit\\_de\\_l\\_environnement-2\\_ok\\_denis.pdf](http://www.ambafrance-cn.org/IMG/pdf/lexique_droit_de_l_environnement-2_ok_denis.pdf).

383 EU-China Environmental Governance Programme, EGP-Guizhou, *Environmental Tort. A comparison of environmental tort and access to justice in China and Sweden*, p. 12 [last accessed on 13<sup>th</sup> August 2016] available at: <http://www.egp-guizhou.com/download/18.36f3359214d517c6a58281/1432197738596/4.+Environmental+tort+comparison+Sweden+and+China.ENG+%282013%29.pdf>.

384 For a brief overview of the problem of “loss of meaning” or semantic loss and the intricacies and pitfalls of interlingual translation see JAKOBSON R., “On Linguistic Aspects of Translation”, in BROWER R.A. (edited by), *On Translation*, Harvard University Press, Cambridge MA., 1959, pp. 232–239; and LIU L.H., *Tokens of Exchange: the Problem of Translation in Global Circulations*, Duke University Press, 2000.

385 The provision in question reads as follows: “*Le principe d’action préventive et de correction, par*

more strictly related to the environmental impact assessment process than the principle described by Article 6 of the 2014 EPL and would also encompass the Chinese “three-synchronicities” system. This significant nuance is completely lost in the translation, due to the decontextualization of the *principe de prévention*. The limitations of the the French – Chinese environmental law dictionary are however hardly surprising, since “*the level of attention to problems of translations affecting processes of legal borrowings is usually not very high, both from the promoting and the receiving sides of the borrowings*”<sup>386</sup>.

While the Chinese lawmaker has not opted for the codification of environmental legislation, the influence of the French model can perhaps be found in the 2014 Environmental Protection Law, with its greater emphasis on information disclosure and public participation (which is the subject of Chapter I, Title II of the First Book of the *Code de l'environnement*). However, as we have seen the regulation of the various sources of pollution and the protection of natural resources in the PRC is still entrusted to sector-specific legislation.

In spite of the direct involvement of national governments and of some positive results, the initiatives promoted by the French and German governments pale in comparison to the efforts made by U.S. actors such as the Ford Foundation, which through the CLEEC (U.S. – China Committee for Legal Education Exchange) project alone endowed “*eight major Chinese university law libraries with comprehensive American legal material in print as well as in electronic form*”<sup>387</sup>. However, if the initiatives enacted by the Ford Foundation and other American organizations were generally marked by a strong emphasis on US law, they worked against a background that had been greatly influenced by civil law models<sup>388</sup>.

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*priorité à la source, des atteintes à l'environnement, en utilisant les meilleures techniques disponibles à un coût économiquement acceptable. Ce principe implique d'éviter les atteintes à la biodiversité et aux services qu'elle fournit ; à défaut, d'en réduire la portée ; enfin, en dernier lieu, de compenser les atteintes qui n'ont pu être évitées ni réduites, en tenant compte des espèces, des habitats naturels et des fonctions écologiques affectées”.*

386 TIMOTEO M., “Law and language: issues related to legal translation and interpretation of Chinese rules on tortious liability of environmental pollution”, *China-EU Law Journal*, Springer, 2015, Vol. 4, p. 126.

387 SCHULTE – KULKMANN N., HEILMANN S., Op.cit., p. 39.

388 MERRYMAN J.H., PEREZ PERDOMO R., *The Civil Law Traditions: an introduction to the legal systems of Europe and Latin America*, Stanford University press, 3<sup>rd</sup> Edition, 2007, p. 4. We however seen how Chinese legal reforms developed “*on an ad hoc basis, absorbing elements from all relevant systems and experiences, irrespective of whether [these] are Chinese or non –Chinese, sino-marxist or western-capitalist, and civil law or common law*”, OTTO J.M., “Conclusion: A Comparativist’s Outlook on Law-Making in China”, in OTTO J.M., POLAK M.V., CHEN J., LI Y. (edited by), *Law-Making in the People’s Republic of China*, Kluwer Law International, The Hague, 2000, p. 230; REYNAUD J., Op.cit., pp. 601 – 609.

The massive influx of common law texts and doctrines through the channel of international legal cooperation has contributed to the development of a legal framework characterized by considerable contamination and by the amalgam of foreign models. While, as we have seen, syncretism has always been one of the defining traits of Chinese culture, the juxtaposition of rules and doctrines drawn from different legal traditions might pose significant challenges for judges, lawyers and officials. If this kind of contamination has not yet led to serious interpretative problems, this is probably due to lax enforcement of some of these novel principles, rather than to the ability of Chinese officials and judges to navigate their way through a complex legal framework.

The guiding principles of environmental law in China were drawn from a variety international environmental conventions and European and U.S. sources<sup>389</sup>. While the work of the Gesellschaft für Technische Zusammenarbeit or the efforts of U.S. organizations and institutions may have channeled legal models such as the polluter-pays and the prevention principles as well as the principles enshrined in the Aarhus Convention (all of which had a

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389 These are the fundamental principles in the field of environmental protection across the world (e.g. under Article 191 of the Treaty on the functioning of the European Union, “*Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay*”). Pursuant to Article L110-1, II, 3° of the French *Code de l’environnement*, the polluter-pays principles entails that “*les frais résultant des mesures de prévention, de réduction de la pollution et de lutte contre celle-ci doivent être supportés par le pollueur*”. “*The origins of [the polluter-pays principle] are in close connection with the economic aspects of environmental protection. This connection primarily concerns the inclusion of environmental costs in the development of businesses and the economy at large. The allocation of these costs is an incentive for polluters to reduce pollution and – above all – to seek new methods for polluting less*”, POZZO B., “*Environmental Protection in EU Law*”, in TIMOTEO M. (edited by), *Environmental Law in action. EU and China perspectives*, Bononia University Press, 2012, p. 275. See also GAINES S.E., “*The polluter-pays principle: from economic equity to environmental ethos*”, *Texas International Law Journal*, Vol 26, Issue 3., pp. 463 – 496. Pursuant to Paragraph 7 of the Preamble of the 1990 International Convention on Oil Pollution Preparedness, Response and Cooperation, the polluter pays principle is a “*general principle of international environmental law*”. A general formulation of the precautionary principle can be found under Principle 15 of the 1992 Rio Declaration, which provides (under the current formulation) that “*in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation*”. Alternative formulations of the precautionary principle can be found in the preamble of the 1992 Convention on Biological Diversity and in Article 3 of the 1992 Climate Change Convention. Before its introduction in the EU Treaties, the principle of preventive action had been recognized in Directive 82/501/EC (“*Seveso I*”), see also POZZO B., *Ibid.*, p. 274. Moreover, the European Court of Justice has adopted a precautionary approach in several cases where environmental risks also posed a threat for human health, see Cases C-157/96, *the Queen v. Ministry of Agriculture, Fisheries and Food* [1998], ECR I-02211 and C-180/96, *United Kingdom v. Commission of the EC* [1998], ECR I-02265.

profound influence on both the 1989 and the 2014 formulation of the EPL), it is difficult to trace how these models found their way into Chinese law. In particular, while the influence of capacity building is likely to be considerable (as we shall see with greater detail in the next chapter), its impact is very difficult to measure. However, by examining the focus of the main cooperation projects and the recent reforms enacted by the PRC it is possible to make informed guesses as to the impact of these projects.

For example, a discernible influence of French legal models can be found in the new text of the Air Pollution Law<sup>390</sup>, which came into force on 1<sup>st</sup> January 2016. This piece of legislation represents a significant step forward towards the improvement of air quality in China's major city and seems to have been influenced by a cooperation project funded by the French government and aimed at providing support for the study and the revision of the Chinese Air Pollution Law<sup>391</sup>. In particular, the new Air Pollution Law emphasizes the importance of fiscal and tax policy instruments to encourage the use of cleaner motor vehicles and vessels<sup>392</sup>, following the example of the French model of *fiscalité environnementale*.

While there is little hard data available as to the implementation of this law, this particular legal transplant appears liable to cause significant problems for two orders of reasons. Firstly, the Air Pollution Law does not seem to take into due consideration the serious limitations of the existing legal process and administrative infrastructure, even though lax enforcement of the fiscal measures required by the new Air Pollution Law might undermine their effectiveness in combating pollution. Secondly, the Chinese lawmakers appear to have overlooked the potential mismatch between these fiscal measures and the emissions trading system currently being implemented at a local level. In light of the recently unveiled plans to set up a nation-wide emissions trading scheme<sup>393</sup>, this might prove to be a fatal oversight.

In an effort to strengthen the coercive powers of the enforcement agencies, Chinese

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390 Law of the People's Republic of China on the Prevention and Control of Atmospheric Pollution, adopted on 29<sup>th</sup> August 2015. An English translation of this law, produced with funding provided by the EU – China Environmental Governance Programme [last accessed on 4<sup>th</sup> September 2016] is available at: <http://www.cciced.net/encciced/newscenter/zcrd/201509/P020150929334955260183.pdf>.

391 Ambassade de France à Pékin, *Présentation générale de la coopération dans le domaine du droit de l'environnement*, July 2011, [last accessed on 4<sup>th</sup> September 2016] available at: <http://www.ambafrance-cn.org/NOUVEL-ARTICLE-Presentation-generale-de-la-cooperation-dans-le-domaine-du-droit-de-l-environnement>.

392 Article 50 of the 2015 Air Pollution Law of the People's Republic of China.

393 LI J., "Pollution Emission Trading: a possible solution to China's enforcement obstacles in fighting against air pollution?", *UCLA Journal of Environmental Law*, Vol. 34, 2016, p. 71.

lawmakers have also included in the new Environmental Protection Law a mechanism which closely resembles the *astreinte*, consisting in a penalty fee calculated on a daily basis and applied to the polluter which fails to comply with an order issued by a government authority<sup>394</sup>. The goal of the lawmakers was to remedy one of the most significant shortcomings of the existing enforcement regime, i.e. the fact that the costs of compliance with environmental rules are – on average – significantly higher than the possible fines<sup>395</sup>. The striking similarities between this provision and Article L541-3 of the *Code de l'environnement*<sup>396</sup> suggest that the legal cooperation projects implemented by the French governments may have had at least some influence on the drafters of the Environmental Protection Law.

Over the last decade, European technical assistance to the drafting of legislation has largely focused on the 2009 Tort Law and the 2014 Environmental Protection Law. In particular, the Swedish Environmental Research Institute collaborated directly with the drafters of the EPL in the attempt to influence the reform of legal standing rules<sup>397</sup>, while the Sino-

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394 Article 59 of the 2014 Environmental Protection Law of the People's Republic of China provides that: *“where an enterprise, public institution or other producer or business operator is fined due to illegal discharge of pollutants, and is ordered to make correction, if the said entity refuses to make correction, the administrative organ that makes the punishment decision pursuant to the law may impose the fine thereon consecutively on a daily basis according to the original amount of the fine, starting from the second day of the date of ordered correction. The fine prescribed in the preceding paragraph shall, pursuant to relevant laws and regulations, be enforced in accordance with considerations of operating cost of pollution prevention and control facilities, direct loss or illegal gains caused by such violation”*.

395 VELLA M.W., HE L., “China begins enforcing newly amended Environmental Protection Law”, *Jones Day*, January 2016, [last accessed on 3<sup>rd</sup> December 2016] available at: <http://www.jonesday.com/china-begins-enforcing-newly-amended-environmental-protection-law-01-21-2016/>.

396 Pursuant to Article L541-3 of the Code de l'environnement : *“Lorsque des déchets sont abandonnés, déposés ou gérés contrairement aux prescriptions du présent chapitre et des règlements pris pour leur application, l'autorité titulaire du pouvoir de police compétente avise le producteur ou détenteur de déchets des faits qui lui sont reprochés ainsi que des sanctions qu'il encourt et, après l'avoir informé de la possibilité de présenter ses observations, écrites ou orales, dans un délai d'un mois, le cas échéant assisté par un conseil ou représenté par un mandataire de son choix, peut le mettre en demeure d'effectuer les opérations nécessaires au respect de cette réglementation dans un délai déterminé. Au terme de cette procédure, si la personne concernée n'a pas obtempéré à cette injonction dans le délai imparti par la mise en demeure, l'autorité titulaire du pouvoir de police compétente peut, par une décision motivée qui indique les voies et délais de recours : [...] 4° Ordonner le versement d'une astreinte journalière au plus égale à 1 500 € courant à compter d'une date fixée par la décision jusqu'à ce qu'il ait été satisfait aux mesures prescrites par la mise en demeure. Le montant maximal de l'astreinte mise en recouvrement ne peut être supérieur au montant maximal de l'amende applicable pour l'infraction considérée”*. See also Organization for Economic Co-operation and Development, *Ensuring Environmental Compliance: trends and best practices*, 2009, p. 121, [last accessed on 2<sup>nd</sup> December 2016] available at: <http://www19.iadb.org/intal/intalcdi/PE/2009/03570.pdf>.

397 EU – China Environmental Governance Programme, *EGP-Guizhou: Improving access to environmental justice to protect people's rights in Guizhou province, Project background, objectives and outcomes* [last accessed on 16<sup>th</sup> October 2016] available at: <http://www.ecegp.com/files/6/EGP->

German Legal Cooperation Programme (under the aegis of the German Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung) has been advising the Legislative Affairs Office of the State Council on the drafting of administrative and environmental legislation<sup>398</sup>, including the 2009 Tort Law. In light of the close connection of these pieces of legislation with the issue of environmental justice we shall delve into these topics in the next chapter.

The 2014 EPL has also been profoundly influenced by U.S. models, in particular as regards the provision on whistleblower protection. While other pieces of legislation have established a citizen's duty to report violations of environmental law, Article 57 of the new EPL provides that informants who report illegal activities resulting in pollution or the authorities' failure to intervene shall be protected by the authorities receiving the report<sup>399</sup>. Moreover, in order to encourage whistleblowers, after the entry into force of the new EPL the Beijing EPB has announced its intention to offer a monetary reward to any subject who reports violations of environmental rules<sup>400</sup>. Whistleblower protection might prove to be a useful tool to improve the effectiveness of the public enforcement mechanisms, and it would be reasonable to suggest that the wording of Article 57 of the 2014 EPL might have been influenced by the U.S. whistleblower protection rules. However, while the American Comprehensive Environmental Response Compensation and Liability Act of 1980 prohibits any discrimination against employees who might have reported illegal activities<sup>401</sup>, Article 57 of the EPL is considerably more vague as to the kind of guarantees on which whistleblowers might reasonably rely.

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[GUIZHOU%20Result%20Sheet%202015.pdf](#).

398 Sino-German Legal Cooperation Programme, *Introduction and impacts*, [last accessed on 3<sup>rd</sup> December 2016] available at: <https://rechtskooperation-china.org/en/>.

399 Article 57 of the 2014 Environmental Protection Law of the People's Republic of China provides that: *"Citizens, legal persons and other organizations shall be entitled to report and complain environmental pollution and ecological damage activities of any units and individuals to competent environmental protection administrations or other departments with environmental supervision responsibilities. In the event the local people's government and its environmental protection administrations or any other relevant departments fail to fulfill their responsibilities in accordance with the law, any citizen, legal person or other organizations have the right to report it to the competent higher level governments or the supervisory department according to law. The authorities receiving the report shall keep confidential the relevant information of the informant, and protect the legitimate rights and interests of the informant"*.

400 VELLA M.W. HE L., "China begins enforcing newly amended Environmental Protection Law", *Jones Day*, [last accessed on 3<sup>rd</sup> December 2016] available at: <http://www.jonesday.com/china-begins-enforcing-newly-amended-environmental-protection-law-01-21-2016/>.

401 HIMABUKURO J.O., WHITAKER L.P., *Whistleblower Protections Under Federal Law: An Overview*, Congressional Research Service Report, 13<sup>th</sup> September 2012 [last accessed on 3<sup>rd</sup> December 2016] available at: <https://fas.org/sgp/crs/misc/R42727.pdf>.

The “legal empowerment strategy” implemented by the Ford Foundation in the attempt to ensure that even the most disadvantaged sections of society have access to justice and have a say in the policymaking process<sup>402</sup> has also left its mark in the 2014 EPL. In particular, with typical programmatic tones, Article 9 states that the government (both at the national and at the local level) should do its utmost in order to raise awareness among the population and to promote compliance<sup>403</sup>.

There is also reason to believe that the 2002 Environmental Impact Assessment Law may have been influenced by the 1970 (U.S.) National Environmental Policy Act. The most significant similarities between these texts reside in their goals (the promotion of “*harmonious development of the economy, society and environment*”<sup>404</sup>), their requirements and their emphasis on public participation<sup>405</sup>. The most likely conduits of the U.S. environmental assessment model were the cooperation programme set up between the Chinese Ministry of Environmental Protection and the Environmental Protection Agency in the late 1980s and the initiatives implemented by the United Nations Environmental Programme.

However, the influence of U.S. model is also evident in sector-specific legislation. In particular, it can be reasonably argued that in the drafting of the 1982 Marine Pollution Law the Chinese legislator may have borrowed from the US legal system the “effects doctrine” and applied it to the field of environmental law. Article 2 of the 1982 Marine Pollution Law states that the provisions of the law shall also apply to the discharge of harmful substances and waste done beyond the sea areas which fall under the jurisdiction of the PRC if the discharge has damaging effects over the sea areas which do fall under its

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402 See GOLUB S., *Beyond rule of law orthodoxy. The legal empowerment alternative*, Carnegie Endowment Working Papers, Issue 41, 2003, p. 25, [last accessed on 11<sup>th</sup> August 2016] available at: <http://carnegieendowment.org/files/wp41.pdf>.

403 Article 9 of the 2014 Environmental Protection Law of the People’s Republic of China provides that: “*The people’s governments at various levels shall strengthen environmental protection publicity and dissemination, encourage self-governing grassroots organizations, social organizations and environmental protection volunteers to carry out the publicity of environmental protection laws, regulations and knowledge, so as to facilitate a favorable atmosphere for environmental protection. Educational departments and schools shall incorporate environmental protection knowledge into the curriculum of school education so as to cultivate the environmental protection awareness among students. News media shall carry out the publicity of environmental protection laws, regulations and knowledge, and facilitate the exercise of public supervision on environmental violation activities*”.

404 Article 1, 2002 Environmental Impact Assessment Law of the People’s Republic of China.

405 MOORMAN J.L., ZHANG G., “Promoting and strengthening public participation in China’s environmental impact assessment process: comparing China’s EIA Law and U.S. NEPA”, *Vermont Journal of Environmental Law*, Vol. 8, 2007, pp. 281 – 335.



jurisdiction<sup>406</sup>. This provisions presents some striking similarities with the “effects doctrine” (a sobriquet which describes the extraterritorial application of domestic legislation), which found its earliest application in the federal courts of the United States<sup>407</sup>. In the landmark *Alcoa* ruling, the US Second Circuit Court of Appeals recognized the extraterritorial application of the Sherman Act<sup>408</sup>, arguing that according to settled case-law “any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends [...]”<sup>409</sup>. This view has not however enjoyed the same success in Europe, where EU courts have carefully avoided to take a clear stance on the effects doctrine<sup>410</sup>.

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406 Pursuant to Article 2, “*This Law shall also apply to pollution to the sea areas under the jurisdiction of the People's Republic of China originating from areas beyond the sea areas under the jurisdiction of the People's Republic of China*”. See also McELWEE C.R., Op. cit., p. 61.

407 However, some scholars have argued that an earlier formulation of the “effects doctrine” - in the field of criminal law - can be found in the *Lotus* judgment of the Permanent Court of International Justice (judgment of 7th September 1927 in the *Case of the S.S 'Lotus'*, PCIJ 1927, Series A, No 10, p. 25). In this ruling, the PCIJ argued that “*far from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited to certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable*”. See also IRELAND-PIPER D., “Prosecution of extraterritorial criminal doctrine and abuse of rights doctrine”, *Utrecht Law Review*, Vol. 9, Issue 4, September 2013, pp. 68 – 89; and MAIER H.G., “Jurisdictional Rules in Customary International Law”, in MEESSEN K.M. (edited by) *Extraterritorial Jurisdiction in Theory and Practice*, Kluwer Law International, London – The Hague – Boston, 1996, pp. 66 - 67. Others scholars have however questioned the conclusions reached by the PCIJ and the implications of the “*Lotus principle*” (see in particular EBOLI V., PIERINI J.-P., *The Enrica Lexie Case and the limits of extraterritorial jurisdiction of India*, Centro di documentazione europea - Università di Catania - Online Working Paper, March 2012, Issue 39, [last accessed on 10<sup>th</sup> December 2016] available at: [http://www.cde.unict.it/sites/default/files/39\\_2012.pdf](http://www.cde.unict.it/sites/default/files/39_2012.pdf)).

408 Sherman Antitrust Act, July 2<sup>nd</sup>, 1890, ch. 647, 26 Stat. 209. 15 U.S.C. §§ 1-7.

409 *United States v. Alcoa*, 48 F 2d 416 (2d Circ. 1945). See, on this subject, LAYTON. A., PARRY. A., “Extraterritorial jurisdiction- European responses”, *Houston Journal of International Law*, Vol. 26, Issue 2, Winter 2004, pp. 309 - 322. See also ALONGI F., “The EU Emission Trading Scheme and its possible consequences for airlines”, European Air Law Association Prize 2011, unpublished, [last accessed on 1<sup>st</sup> September 2016], available at: <http://eala.aero/wp-content/uploads/2014/05/Emission-Trading-Scheme-Francesco-Alongi.pdf>.

410 “*In both the Dyestuffs [Case 48/69, 14 July 1972, Imperial Chemical Industries Ltd. v. Commission, (1972) ECR 00619] and Wood Pulp [Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C- 129/85, 31 March 1993, A. Ahlström Osakeyhtiö and others v Commission, (1993) ECR I-01307] cases the question of whether EC law should recognize the effects doctrine was argued at length, but the ECJ was able to avoid a pronouncement upon the issue since jurisdiction could be taken on other bases*”, WHISH R., *Competition Law*, Oxford University Press, Sixth Edition, 2009, p. 478. However, in the *Gencor* case, the Court of First Instance confirmed the jurisdiction of the Commission and upheld the applicability of the EC Merger Regulation to a merger between two South African companies, arguing that the application of the Merger Regulation “*is justified under public international*

It would be reasonable to assume that the “effects doctrine” may have been channeled in the Chinese legal system through the exchange programmes organized by the Ford Foundation and by the United Nations Development Programme (which tended to promote common law and U.S. models and legal theories). However, if the decision of the PRC to include conducts which took place abroad into the scope of its environmental protection shows the influence of U.S. models, it is nonetheless fully consistent with some of the policies advocated by Chinese diplomacy on the international stage. Indeed, we have already seen that the Chinese delegates at the 1972 Stockholm Conference had tabled an amendment to the Declaration which would have recognized the right of any State to demand compensation for the damage caused by the discharge of toxic waste by other States<sup>411</sup>.

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*law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community” (Case T-102/96, Gencor v. Commission, [1999] ECR II-753, §90). It is worth however emphasizing that even in Gencor, the Court of First Instance did not explicitly apply the effects doctrine (see WHISH R., Op.cit. p. 478).*

411 See *supra* and SOHN L.B., “The Stockholm Declaration on the Human Environment”, *The Harvard International Law Journal*, Vol. 14, No. 3, Summer 1973, p. 495.

## Chapter 4. Environmental litigation in China and the role of international legal cooperation

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### 4.1. INTRODUCTORY REMARKS

In the present chapter I will examine the current state of environmental litigation in the People’s Republic of China, outlining its legal basis and presenting an overview of its application by the courts. I will then focus on the role which international legal cooperation, “soft support” and legal transplants played in the evolution of environmental litigation in China, presenting an overview of the most significant projects carried out over the last decades. An analysis of the realities of private environmental enforcement and of its main challenges (e.g. access to justice, training of judges and lawyers and the issue of *locus standi* for interest groups) is particularly important in a country like China, where corruption and political ingerence often make administrative enforcement ineffective and where actual progress has often fallen short of the official rhetoric<sup>412</sup>. For this very reason, over the last two decades foreign governmental and non-governmental players have invested far more in the field of access to justice than in any other environmental issue in the PRC.

Environmental litigation is a category which encompasses a broad variety of legal

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412 For a comprehensive analysis of the state of the art, see STERN R.E., “On the Frontlines: Making Decisions in Chinese Civil Environmental Lawsuits”, *Law & Policy*, Vol. 32, 2010, p. 80; STERN R.E., *Environmental Litigation in China: A Study in Political Ambivalence*, Cambridge University Press, Cambridge and New York, 2013. For an overview of the historic enforcement problems see also BACHNER B., “Regulating Pollution in the People's Republic of China: an Analysis of the Enforcement of Environmental Law”, *Colorado Journal of International Environmental Law and Policy*, Vol. 7, 1996, p. 373 - 408.

remedies, including “civil actions based on tort, contract or property law, criminal prosecutions, public interest litigation, or enforcement of constitutional rights”<sup>413</sup>. Moreover, environmental litigation is generally understood to include lawsuits brought against public authorities to overturn administrative decisions.

The importance of access to justice as a tool to protect the environmental rights of the individuals has been recognized, at the international level, by both the 1992 Rio Declaration<sup>414</sup> and by the 1998 Aarhus Convention<sup>415</sup>. However, the effective use of environmental justice as an enforcement tool raises several questions concerning the *locus standi* of the plaintiff, *forum non conveniens*, causation, statutes of limitations, jurisdiction and burden of proof, which have found different solutions across different jurisdictions worldwide.

With regard to *locus standi*, in some jurisdictions rules of procedures dictate that a plaintiff must have a direct, personal interest in the outcome of a case (such as an injury for which he or she is seeking redress), that would single her or him out of the general public. In other words, and according to the definition set out by Wesley Newcomb Hohfeld, the legal or natural person bringing suit should be seeking a determination that she or he has a right, a privilege, an immunity or a power<sup>416</sup>. Legal doctrine generally describes the ongoing debate on *locus standi* by employing the dichotomy between the “Hohfeldian plaintiff” and “ideological plaintiffs asserting the public interest”<sup>417</sup>.

Some jurisdictions have tried to grant standing to a greater number of possible plaintiffs by adopting a more flexible definition of injury caused by pollution or of direct and personal

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413 SHELTON D., KISS A., *Judicial Handbook on Environmental Law*, United Nations Environment Programme, 2005, p. 43 [last accessed on 5<sup>th</sup> August 2015] available at: <http://www.unep.org/delc/Portals/119/publications/Judicial-Handbook-Environmental-Law.pdf>.

414 Pursuant to Principle 10 of the 1992 Rio Declaration, “environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided”.

415 Article 9 (see *infra*). While the Convention on access to information, public participation in decision making and access to justice in environmental matters signed in Aarhus on 25<sup>th</sup> June 1998 applies primarily to Europe, its influence on international environmental law and on the environmental protection regimes of countries around the world has been significant.

416 HOHFELD W.N., “Fundamental legal conceptions as applied in judicial reasoning”, *Yale Law Journal*, 1917, Vol. 23, pp. 710 – 770, *passim*; JAFFE L.L., “The citizen as a litigant in public actions: the non-Hohfeldian or ideological plaintiff”, *University of Pennsylvania Law Review*, 1968, p. 1033.

417 COPLAN K.S., “Ideological plaintiffs, administrative lawmaking, standing and the petition clause”, *Maine Law Review*, Vol. 61, 2009, pp. 378 – 466; JAFFE L.L., *Op.cit.*, pp. 1033 – 1047.

interest in the case<sup>418</sup>, while other countries, like the United States<sup>419</sup> and Canada<sup>420</sup>, allow class actions to be brought when pollution has caused harm to several individuals. However environmental class actions have often proven difficult to bring to court and largely ineffective when the remedy sought is reparation of the pollution damage or injunctive relief and not money damages<sup>421</sup>. Some jurisdictions, such as India<sup>422</sup>, have allowed the development of public interest litigation and granted *locus standi* to NGOs and public interest groups as well as directly affected individuals. In the landmark *Judge's Transfer Case*<sup>423</sup>, the Indian Supreme Court held that “*even where no specific legal injury had been suffered, any concerned citizen may sue to check the damage to the public interest and to uphold the rule of law*”<sup>424</sup>.

One of the most significant obstacles in successfully bringing a civil action based on environmental torts is establishing causation and proving the identity of the polluter and the damage, since the default rule in most jurisdictions is that the burden of proof in civil

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418 The US Supreme Court held that a group of graduate students (“Students Challenging Regulatory Agency Procedures”) had standing to sue the federal government, since “*standing is not confined to those who show economic harm, as ‘[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society’*”, US Supreme Court, *SCRAP et al. v. United States*, 412, U.S. 669 (1973). A French court adopted a similarly broad definition of sufficient interest (recognizing the *locus standi* of associations promoting local tourism and environmental protection in a case concerning the authorization to build a waste disposal plant) in the case *Union touristique Les Amis de la Nature et al.* (Tribunal administratif de Rouen, 8 June 1993, R.J.E. 1994/1, p. 61), arguing that “*eu égard à leur objet social, tel que défini dans leurs statuts respectifs, les associations ‘Union touristique Les Amis de la Nature’ et ‘Pourquoi-pas Le Havre?’ justifient d’un intérêt suffisant leur donnant qualité pour contester l’arrêté préfectoral susvisé en date du 28 juin 1991*”. In a case concerning wildlife protection, the High Court of Kenya was able to extend locus standi to the plaintiff by extending property rights over the land to the local fauna (Case 2059/1996, *Abdikadir Sheika Hassan et al. v. Kenya Wildlife Service*). See also SHELTON D., KISS A., *Judicial Handbook on Environmental Law*, United Nations Environment Programme, 2005, p. 42.

419 ADLER V.O., “The viability of class actions in environmental litigation”, *Ecology Law Quarterly*, Vol. 2, Issue 3, June 1972, pp. 533 – 570; LAMM R.D., DAVISON S.A.G., “Environmental class actions seeking damages: the need for environmental class action suits”, *Mineral Law Institute*, Issue 16, 1971, pp. 59 – 105.

420 BOWAL P., “Environmental Class Actions for Historical Contamination: *Smith v. Inco Limited*”, *Journal of Environmental Law and Practice*, Vol. 24, 2013, pp. 295 – 319.

421 COOPER ALEXANDER J., “An introduction to class action procedure in the United States”, paper presented at the conference Debate over Group Litigation in Comparative Perspective, Geneva, Switzerland, 21<sup>st</sup> July 2000, [last accessed on 1<sup>st</sup> August 2016] available at : <https://www.law.duke.edu/grouplit/papers/classactionalexander.pdf>.

422 SHELTON D., KISS A., Op.cit., p. 45.

423 AIR 1982, SC 149. In this ruling, the Indian Supreme Court argued that “*it is only by liberalising the rule of locus standi that it is possible to effectively police the corridors of power and prevent violations of law*” (§18).

424 CHOUDHRY S., KHOSLA M., MEHTA P.B., *The Oxford Handbook on the Indian Constitution*, Oxford University Press, 2016, p. 671.

actions falls on the plaintiff<sup>425</sup>. However, claimants acting on tort (e.g. in nuisance<sup>426</sup> or trespass<sup>427</sup> suits, under the strict liability regime established by the *Rylands* doctrine<sup>428</sup>, or

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425 E.g. Article 9 of the French Code de procédure civile (“*il incombe à chaque partie de prouver conformément à la loi les faits nécessaires au succès de sa prétention*”), Article 2697 of the Italian Civil Code (“*chi vuol far valere un diritto in giudizio deve provare i fatti che ne costituiscono il fondamento*”). In 2005, the US Supreme Court held that when statutes are silent on the allocation of the burden of proof, “*we therefore begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims. McCormick §337, at 412 (‘The burdens of pleading and proof with regard to most facts have and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure or proof or persuasion’); C. Mueller & L. Kirkpatrick, Evidence §3.1, p. 104 (3d ed. 2003) (‘Perhaps the broadest and most accepted idea is that the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims’)*” (*Schaffer v. West* 04-698 U.S. 49 [2005] 377 F.3d 449). With regard to China, some authors lamented (even after the entry into force of the new Tort Law) that “*it is unnecessarily difficult for plaintiffs to get their lawsuits accepted by environmental courts because the required burden of proof regarding causation is so onerous*” (see HUANG H., SMITH J., *Reducing atmospheric lead emissions from stationary point sources in China: looking at U.S. regulatory history to inform Chinese policymakers*, Policy Report, US Aid Asia - Vermont Law School, [last accessed on 11<sup>th</sup> December 2016] available at: [http://www-assets.vermontlaw.edu/Assets/us-asia-partnerships/collaborative-research-projects/JRP\\_JimSmith.pdf](http://www.assets.vermontlaw.edu/Assets/us-asia-partnerships/collaborative-research-projects/JRP_JimSmith.pdf)).

426 “*Nuisance is defined as ‘anything which is injurious to health, indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property’*” NELSON SMITH, G. III, “*Nuisance and trespass claims in environmental litigation: legislative inaction and common law confusion*” *Santa Clara Law Review*, Vol. 36, 1995, p. 49. The *Aldred’ case* (1610) is generally considered to be the first instance in which nuisance was invoked in an environmental matter. On that occasion, the court held that no man has the right “*to maintain a structure upon his own land, which, by reason of disgusting smells, loud or unusual noises, thick smoke, noxious vapors, the jarring of machinery or the unwarrantable collection of flies, renders the occupancy of adjoining property dangerous, intolerable or even uncomfortable to its tenants*” (*Aldred’s Case* (1610) 9 Co Rep 57b). See also PROSSER W.S., “*Private action for public nuisance*”, *Virginia Law Review*, Vol. 52, No. 6, October 1966, pp. 997 – 1027. “*Private nuisance [...] involves an unreasonable interference with another’s right to the private use and enjoyment of land. Common examples are building a structure that obstructs a neighbor’s view, emitting loud noises or foul odors, or conducting obnoxious or unlawful activities on adjacent property. Such activities affecting a possessory interest in land may also, very logically, implicate environmental interests, for example, polluting the air or releasing hazardous substances on land. The remedy available here is generally tort damages, although abatement is also possible*”, from LATHAM M., SCHWARTZ V.E., APPEL C.E., “*The intersection of tort and environmental law: where the twain should meet and depart*”, *Fordham Law Review*, Vol. 80, p. 751. For an overview of tort liability rules in different jurisdictions, see also CERINI D., *Casi e materiali di diritto privato comparato. La responsabilità civile*, Giappichelli, Turin 2008.

427 “*Trespass, actionable without proof of damage, is any direct, physical and voluntary intrusion onto the plaintiff’s land, including the discharge of some substance on that land*”, BOWAL P., “*Environmental Class Actions for Historical Contamination: Smith v. Inco Limited*”, *Journal of Environmental Law and Practice*, Vol. 24, p. 299.

428 In its judgment on *Rylands v Fletcher* (1868 UKHL 1) the House of Lords established a form of strict liability tort, which, in the words of Justice Blackburn, provides that “*the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape*”. See also BOWAL P., *Op.cit.*, p. 299; and CANDIAN A., GAMBARO A., *Casi e materiali per un corso di diritto privato comparato*, 2015, p. 9.

on the basis of *troubles de voisinage*<sup>429</sup> in France and *nachbarliches Gemeinschaftsverhältnis* in Germany<sup>430</sup>) may find it particularly difficult to establish a causal link between the conduct of the polluter and the harm allegedly suffered, especially when the source of the pollution and the place where the damage occurred are far apart or when the effects of the pollution manifest themselves years after the event<sup>431</sup>. Moreover, if the pollution is the result of the combined activities of several subjects it may be difficult or even impossible to ascertain the identity of the polluters<sup>432</sup> or to apportion liability. It may be equally difficult to identify the source of pollution when environmental damage is the result of the combination of different substances which may be relatively harmless in isolation but potentially harmful when combined<sup>433</sup>.

In some jurisdictions, lawmakers have tried to tip the scale in favour of environmental victims by making it easier for plaintiffs to meet the required standards of proof in the presence of a violation of environmental laws. However, even in those countries it is generally necessary to establish a causal link between the violation of environmental rules and the harm suffered by the plaintiff in order to obtain money damages<sup>434</sup>.

The need to establish causation raises the additional questions of the value of scientific evidence presented before the court<sup>435</sup>, of the reliability of the experts heard by the court (who may have been selected and hired by the parties) and of the nature of the decision

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429 For an overview of the French debate on the possibility to rely on the notion of "*troubles de voisinage*" to protect environmental resources, see POZZO B., "The concept of sustainability and the protection of the environment between private and public law", in TIMOTEO M. (edited by), *Towards a smart development. A legal and economic inquiry into the perspectives of EU-China cooperation*, Bononia University Press, Bologna, July 2016, pp. 114 - 115; NICOLAS M.F., "La Protection du Voisinage", *Revue Trimestrielle de Droit Civil*, 1976, p. 675; and BLAISE J.-B., "Responsabilité et obligations coutumières dans les rapports de voisinage", *Revue Trimestrielle de Droit Civil*, 1965, p. 275.

430 See POZZO B., "The concept of sustainability and the protection of the environment between private and public law", in TIMOTEO M. (edited by), *Towards a smart development. A legal and economic inquiry into the perspectives of EU-China cooperation*, Bononia University Press, Bologna, July 2016, pp. 116 - 117.; and KLEINDIENST B., *Der Privatrechtliche Immissionenschutz Nach § 906 BGB*, J.C.B. Mohr (Paul Siebeck), Tübingen, 1964.

431 SHELTON D., KISS A., Op.cit., pp. 45-46.

432 "For example, gas emissions from motor vehicles are harmful, including the fumes of each individual automobile. Yet it is difficult to apply rules of responsibility and demand reparations from each driver because the numbers are too great and the effects produced by each unit are relatively limited", SHELTON D., KISS A., Op.cit., p. 45.

433 SHELTON D., KISS A., Op.cit., p. 45.

434 SHELTON D., KISS A., Op.cit., p. 45.

435 "Some factors have been identified as assisting in a determination about the value of scientific evidence: 1) can the scientific theory or technique be tested? 2) has the theory or technique been subject to peer review and publication? 3) is there a known or potential rate of error? 4) has the theory or technique widespread acceptance or only minimum support within the scientific community? 5) is the theory or technique both reliable and credible?", SHELTON D., KISS A., Op.cit., p. 51.

required from the judge (who may have to rule on the reliability of expert opinions and scientific theories without possessing the necessary expertise). On this issue, legal doctrine has emphasized that “*scientific evidence is often the centerpiece of an environmental case, as it can be the most powerful evidence of a defendant’s conduct and its effects*”<sup>436</sup> but that it can also be highly controversial, especially in light of the “*high degree of deference*” shown by courts towards expert witnesses and the difficulties encountered by lawyers dealing with highly complex scientific issues<sup>437</sup>. Since the main purpose of civil environmental litigation is to allocate liability for the damage<sup>438</sup> and to determine whether the claimant should receive compensation, decisions on causation based on scientific evidence very often represent true “*policy judgments about which party should bear the responsibility for causal uncertainty and which party is in the best position to learn more about and absorb or spread the costs of the risks*”<sup>439</sup>. In the field of environmental tort litigation, the findings of the judges can therefore amount to policy decisions, which at times may even be at odds with official government policies or with the stated intention of the lawmakers.

#### **4.2. ENVIRONMENTAL LITIGATION IN THE PEOPLE’S REPUBLIC OF CHINA**

According to the Supreme People’s Court, in 2010 PRC courts heard around 12,000 pollution compensation cases<sup>440</sup>, a significant proportion of which may have been brought by the classes of society which benefited the least from China’s economic miracle: peasants and industrial workers<sup>441</sup>. While according to Wang Canfa the number of environmental lawsuits heard by Chinese court over the last few years accounts for only 2% of all environmental disputes<sup>442</sup>, most sources agree that the number of cases has been

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436 SALI K., “Scientific evidence in environmental litigation”, *Natural Resources & Environment*, Vol. 30, Issue 3, Winter 2016, p. 1 [last accessed on 6<sup>th</sup> August 2016] available at: [http://www.americanbar.org/content/dam/aba/publications/natural\\_resources\\_environment/Winter%202016/NRE\\_v030n03\\_feat06\\_Sali.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/natural_resources_environment/Winter%202016/NRE_v030n03_feat06_Sali.authcheckdam.pdf).

437 SALI K., Op. cit, p. 1.

438 See POZZO B., *Danno ambientale e imputazione della responsabilità – Esperienze giuridiche a confronto*, Giuffrè, Milano 1996.

439 McLEOD – KILMURRAY H., “Placing and displacing science: science and the gates of judicial power in environmental cases”, *University of Ottawa Law & Technology Journal*, 2009, p. 46.

440 STERN R.E., *Environmental Litigation in China: A Study in Political Ambivalence*, Cambridge University Press, Cambridge and New York, 2013, p. 9.

441 STERN R.E., Op.cit., p. 10.

442 WANG C. CHEN Y., “On the establishment and function of the specialized entities for environmental justice in China” in TIMOTEO M. (edited by), *Environmental Law in Action. EU and China perspectives*, Bononia University Press, Bologna 2012, p. 218.



growing steadily and that today environmental litigation plays a central role in the enforcement of environmental law<sup>443</sup>.

#### 4.2.1. The Judiciary in the People's Republic of China

The organization, the duties and the role of the judiciary in the PRC are disciplined by the Constitution, the 1979 Organic Law of the People's Courts (amended in 1983, 1986 and 2006)<sup>444</sup> and the 1991 Civil Procedure Law (as amended in 2012)<sup>445</sup>. The Chinese court system includes four level of "ordinary" courts: the Grassroot or Basic People's Courts (基层人民法院; jīcéng rénmin fǎyuàn), the Intermediate People's Courts (中级人民法院; zhōngjí rénmin fǎyuàn), the Higher People's Courts (高级人民法院; gāojí rénmin fǎyuàn) and the Supreme People's Court in Beijing (最高人民法院; zuìgāo rénmin fǎyuàn)<sup>446</sup>.

While Basic People's Courts generally adjudicate at first instance both civil and criminal cases, some matters are excluded from their jurisdiction (e.g. criminal cases concerning crimes punished with life imprisonment or the death penalty and civil cases involving foreign parties). Moreover, Basic Courts may request that particularly complex or important cases be heard by higher courts. Intermediate Courts hear appeals brought against Basic Courts judgments and adjudicate at first instance major cases dealing with foreign parties and serious crimes, while similarly Higher People's Courts can hear at first instance the cases assigned to it by law and appeals brought against judgments handed down by Intermediate Courts<sup>447</sup>. The PRC has also established specialized courts which deal with specific matters, such as the Maritime Courts (海事法院; hǎishì fǎyuàn),

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443 It is worth noting that case-law is not considered to be a source of law in the legal system of the PRC, since pursuant to Article 7 of the Civil Procedure Law of the PRC "*in trying civil cases, the people's courts must base themselves on facts and take the law as the criterion*". See also TIMOTEO M., *La difesa di marchi e brevetti in Cina – Percorsi normativi in un sistema in transizione*, Giappichelli Editore, Torino 2010, p. 41. See also EU-China Environmental Governance Programme, *Policy Report: Judges' training in Environmental Law – Recommendations on capacity building for the judiciary in environmental adjudication*, 2015, p. 18 [last accessed on 13<sup>th</sup> August 2016] available at: [http://www.ecegp.com/files/4/GIZ%20JUDGES\\_Policy%20Report%20-%20Judges'%20Training%20in%20Environmental%20Law%202015.pdf](http://www.ecegp.com/files/4/GIZ%20JUDGES_Policy%20Report%20-%20Judges'%20Training%20in%20Environmental%20Law%202015.pdf).

444 (中华人民共和国人民法院组织法; zhōng huá rén mín gòng hé guó rén mín fǎ yuàn zǔ zhī fǎ), [last accessed on 6<sup>th</sup> August 2016] available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=12836&CGid=>.

445 MUGELLI C., *Indipendenza e professionalità del giudice in Cina*, Firenze University Press 2012, p. 46.

446 See CHEN A.H., *An introduction to the legal system of the People's Republic of China*, LexisNexis, Hong Kong, (Fourth Edition) 2011, p. 180; LUBMAN S. "Bird in a Cage: Chinese Law Reform after Twenty Years", *Northwestern Journal of International Law & Business*, Issue 20, 1999, pp. 383 – 424.

447 For a brief overview of the court system of the People's Republic of China, see the website of the Harvard Law School Library, *People's Republic of China legal research*, [last accessed on 6<sup>th</sup> August 2016] available at: <http://guides.library.harvard.edu/chineselegalresearch>.

Railway Courts (铁路法院; tiělù fǎyuàn), Forestry Courts (森林法院; sēnlín fǎyuàn) and Military Courts (军事法庭; jūnshì fǎtíng).

Under Article 10 of the 1979 Organic Law, People's Courts “*adopt the collegial system in the administration of justice*”, therefore, with the exception of minor civil or criminal matters, all cases are tried by a panel of judges. Each court is divided into sections (庭; tíng) which deal with specific matters, such as civil, commercial, administrative or criminal cases<sup>448</sup>.

The independence of the judiciary is enshrined in Article 126 of the Constitution of the People's Republic of China, which provides that:

*“the people's courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals”.*

However, this formal statement of independence loses much of its significance when read in light of Article 127 of the Constitution, which states that the “*Supreme People's Court supervises the administration of justice by the local people's courts at different levels*” and that “*people's courts at higher levels supervise the administration of justice by those at lower levels*”<sup>449</sup>. Moreover, the Supreme People's Court is in turn answerable to the National People's Congress and its Standing Committee, while local courts at different levels “*are responsible to the organs of state power which created them*”<sup>450</sup>. These provisions describe a court system which is not only hierarchically organized, but largely subservient to both national and local political authorities, who can appoint and remove judges, determine their careers and control court budgets<sup>451</sup>. Moreover, politically sensitive lawsuits are often handled by special adjudication committees (审判委员会; shěnpàn wěiyuánhui), whose members are selected by the Chinese Communist Party<sup>452</sup>.

The absence of separation of powers in the PRC and numerous episodes of political

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448 MUGELLI C., Op.cit., p. 49.

449 This supervisory role of the Supreme People's Court, known as shěnpàn jiāndū (审判 监督) is quite different from the ordinary appeal, although it can be exercised over specific decisions (see MUGELLI C., Op.cit., p. 118).

450 Article 128 of the Constitution of the People's Republic of China.

451 CARPENTER – GOLD D., “Castles made of sand: public-interest litigation and China's new environmental protection law”, *Harvard Environmental Law Review*, Vol. 39, 2015, p. 246; for a comprehensive analysis of the issue of the independence of Chinese judges see MUGELLI C., Op.cit.

452 Pursuant to Article 11 of the Organic Law of the People's Courts. “*People's courts at all levels shall set up judicial committees which shall practice democratic centralism. The task of the judicial committees shall be to sum up judicial experience and to discuss important or difficult cases and other issues relating to the judicial work*”.

ingerence in judicial proceedings and outright corruption of judges have led some commentators to question the autonomy of the judiciary in China<sup>453</sup>.

However, it would be wrong to assume therefore that Chinese judges cannot enjoy considerable autonomy in their daily work and their decision making and legal reasoning cannot diverge from the official Party policy<sup>454</sup>. Indeed, while politically sensitive cases are generally decided by officials appointed by local authorities, often acting on the basis of the instructions received from higher courts officials, “*Chinese courts handle hundreds of thousands of civil cases each year (4,7 million in 2004), and only a small percentage is important enough to warrant external attention*”<sup>455</sup>. Moreover, some authors have observed<sup>456</sup> that while adjudication committees appear to be particularly active in criminal cases, in the field of civil litigation the assignment of cases to the *shěnpàn wěiyuánhui* appears to be a practice more honoured in the breach than in the observance.

The Mao Era had seen the effective dismantlement of the Chinese court system, and since the late 1970s the reform of the judiciary has been one of the priorities of the Chinese lawmakers. Probably the greatest challenge was to improve the professionalism of Chinese judges, since before the 1983 reform the Organic Law of the People’s Courts considered eligible to be appointed as a judge in the PRC any citizen enjoying full political rights who was at least twenty-three year old. Only after 1983 the Organic Law required judges to have a sufficient knowledge of the law, and only in 2001 a four-year law degree in law (or relevant work experience) was included among the legal requirements to be allowed to sit the national examinations to become a judge (司法考试; *sīfǎ kǎoshì*)<sup>457</sup>. These reforms have been vigorously supported by international (governmental and non-governmental)

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453 See NOVARETTI S., *Le ragioni del pubblico. Le “azioni nel pubblico interesse” in Cina*, Edizioni Scientifiche Italiane, Naples 2012. “*When law is officially subordinated to the State, party values permeate courts and judges naturally think like apparatchiks. Directions are usually unnecessary when the vast majority of judges are CCP members and all judges are well-steeped in Party priorities*”, STERN R.E., “On the Frontlines: Making Decisions in Chinese Civil Environmental Lawsuits”, *Law & Policy*, Vol. 32, 2010, p. 82.

454 Much has been written about judicial autonomy in single-party states in general and in the People’s Republic of China in particular. While judges may not have much leeway in politically sensitive cases, it is nonetheless true that “*even when law fundamentally serves the State, the degree of extralegal interference and judicial attention to legal texts depends on regime, court and type of case*” (see STERN R.E., *Ibid.*, p. 81).

455 STERN R.E., *Ibid.*, p. 81.

456 See HE X., “Black hole of responsibility: the adjudication committee’s role in the Chinese court”, *Law & Society Review*, Vol. 46, Issue 4, December 2012, pp. 681 - 712.

457 TIMOTEO M., *La difesa di marchi e brevetti in Cina – Percorsi normativi in un sistema in transizione*, Giappichelli Editore, Torino 2010, p. 42. See also LIU S., “Beyond global convergence: conflicts of legitimacy in a Chinese lower court”, *Law & Social Inquiry*, Vol. 31, Issue 1, 2006, pp. 75 – 106.

actors and donor agencies such as the Ford Foundation, through numerous legal cooperation projects<sup>458</sup> aimed at promoting the adoption of Western models as regards the training of judges and the establishment of some degree of judicial independence.

The limited scope of the reforms enacted by Chinese legislators has often been brought as evidence of the transitional nature of the Chinese legal system and is still cited as one of the main hurdles to the establishment of the rule of law in the PRC<sup>459</sup>. Moreover, a visible sign of the lack of trust in the court system is the survival of traditional informal means of seeking justice, such as the “xìnfāng” (信訪; literally: “letters and visits”), the petitioning of administrative and political authorities<sup>460</sup>.

However, as has been authoritatively pointed out by Randall Peerenboom, some of the criticism leveled against the judiciary of the PRC might betray an insufficient understanding of the complexity of the issue of judicial independence within single party States<sup>461</sup>. Indeed, in spite of the shortcomings of the reforms carried out by the Chinese legislator and of the lingering problems of judicial corruption and insufficient legal expertise (both among judges and among lawyers), it would be difficult to deny that “*increasing judicial activism has been prevalent in the Chinese legal system ever since the early 1980s*”<sup>462</sup> and that courts have often shown considerable autonomy from the official Party policies in interpreting and applying the law. Moreover, in its latest five-year reform plan (2014 – 2018), the Supreme People’s Court has announced its intention to simplify and streamline the filing and handling of cases and to increase the transparency of the court

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458 TIMOTEO M., *Ibid.*, p. 42; DE LISLE J., “Lex Americana? United States Legal Assistance, American Legal Models and Legal Change in Post- Communist World and Beyond”, *University of Pennsylvania Journal of International Economic Law*, Vol 20, No. 2, 1999, pp. 179 - 308.

459 PEERENBOM R., “*Judicial independence in China: common myths and unfounded assumptions*”, La Trobe Law School Legal Studies Research Paper No. 2008/11, September 2008 [last accessed on 6<sup>th</sup> August 2016] available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1283179](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1283179).

460 “*Available Chinese statistics suggest that citizen use of petitioning practices and xinfang bureaus far exceeds that of formal legal channels. According to the director of the national xinfang bureau, the State Bureau for Letters and Calls, letters and visits to Party and government xinfang bureaus at the county level and higher totaled 8,640,040 for the first nine months of 2002, corresponding with an annual rate of 11.5 million per year.12 In comparison, the entire Chinese judiciary handles six million legal cases annually*”, MINZNER C.F., “Xifang: an alternative to formal Chinese legal institutions”, *Stanford Journal of International Law*, Vol. 42, 2006, p. 105. See also YANG T., MOSER A., “Environmental Tort Litigation in China”, *Environmental Law Reporter*, Vol. 41, Washington DC, October 2011, p. 10-898; and NOVARETTI S., *Op.cit.*

461 PEERENBOM R., *Ibid.*

462 WANG Chenguang, “Law-making functions of the Chinese courts: judicial activism in a country of rapid social changes”, *Frontiers of Law in China*, Vol. 1, 2006, pp. 524 – 549.

system and the accountability of the judges<sup>463</sup>.

#### 4.2.2. Environmental Civil Litigation in the PRC

To the surprise of many, in recent years Chinese courts have been able to foster innovation in the field of environmental law, broadening access to means of redress for victims of environmental damage and presenting private enforcement as a viable solution for some of the shortcomings of the Chinese environmental protection framework<sup>464</sup>.

The legal basis of environmental litigation developed over time in a piecemeal fashion and is today contained in several legislative texts. Pursuant to Article 124 of the General Principles of Civil Law,

*"any person who pollutes the environment and causes damages to others in violation of State provisions for environmental protection and the prevention of pollution shall bear civil liability in accordance with the law"*<sup>465</sup>.

It is worth noting that pursuant to this provision a violation of the environmental laws of the People's Republic of China was a condition to bring a civil action against the polluter<sup>466</sup>. Moreover, under Article 41 of the 1989 Environmental Protection Law:

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463 EU-China Environmental Governance Programme, *Policy Report: Judges' training in Environmental Law – Recommendations on capacity building for the judiciary in environmental adjudication*, 2015, p. 13 [last accessed on 13<sup>th</sup> August 2016] available at: [http://www.ecegp.com/files/4/GIZ%20JUDGES\\_Policy%20Report%20-%20Judges'%20Training%20in%20Environmental%20Law%202015.pdf](http://www.ecegp.com/files/4/GIZ%20JUDGES_Policy%20Report%20-%20Judges'%20Training%20in%20Environmental%20Law%202015.pdf).

464 *"The zone of legal innovation, in which judges push and expand the boundaries of the law, lies halfway between rough justice and legalism and overlaps both. In well-established, independent legal systems, legal creativity often corresponds to what Nonet and Selznick [...] call responsive law. Judges base decisions not just on a legalistic reading of rules but also on substantive concerns about justice. Law is flexible, political, and potentially unstable because judicial interpretation offers a way to change the very substance of the law itself [...]. Yet legal creativity is deeper and hardier than responsive law. A close reading of Chinese civil environmental cases shows a dollop of innovation where we would least expect to see it: in a one-party state inculcated in a civil law tradition of judges as "expert clerk[s]" (Merryman 1985: 36). Even in relatively inhospitable environments, there can be room for new inferences and interpretations"*, STERN R.E., "On the Frontlines: Making Decisions in Chinese Civil Environmental Lawsuits", *Law & Policy*, Vol. 32, 2010, p. 84. See also WAN E., "Establishing an environmental public interest litigation system and promoting the building of an ecological civilization", *Chinese Law and Government*, Vol. 43, Issue 6, 2010, pp. 30 – 40. For an in-depth analysis of the failures of the existing enforcement mechanisms, also XU G., FAURE M., "Explaining the failure of environmental law in China", *Columbia Journal of Asian Law*, Vol. 29, Issue 2, Spring 2016, pp. 1 – 99.

465 Article 106 of the General Principles of Civil Law identifies two types of civil liability: i) liability for breach of contract or failure to fulfill other obligations; and ii) liability for the encroachment upon State, collective or private property. See also POZZO B., WANG L., "Liability for Environmental Pollution within the Framework of the New Chinese Tort Law", *European Review of Private Law*, Vol. 19, Issue 1, 2011, p. 87.

466 See also FAURE M.G., LIU J., "Compensation for environmental damage in China: theory and practice", *Pace Environmental Law Review*, Vol. 31, Issue 1, Winter 2014, p. 231.

*“A unit that has caused an environmental pollution hazard shall have the obligation to eliminate it and make compensation to the unit or individual that suffered direct losses. A dispute over the liability to make compensation or the amount of compensation may, at the request of the parties, be settled by the competent department of environmental protection administration or another department invested by law with power to conduct environmental supervision and management. If a party refuses to accept the decision on the settlement, it may bring a suit before a people's court. The party may also directly bring a suit before the people's court. If environmental pollution losses result solely from irresistible natural disasters which cannot be averted even after the prompt adoption of reasonable measures, the party concerned shall be exempted from liability”.*

By avoiding any reference to a violation of environmental legislation, this provision has been read as a recognition of the principle of strict liability or liability without fault<sup>467</sup>. On this subject, it is worth noticing that the use of “strict liability” and “liability without fault” as interchangeable expressions has led to some serious misunderstandings, which stand as a reminder of the importance of language in the transplant of legal models<sup>468</sup>.

Moreover, in 2001 the Supreme People’s Court issued some Regulations regarding

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467 FAURE M.G., LIU J., *Ibid.*, p. 231. “If liability is based on ‘fault’ (wrong doing) the plaintiff must prove that the perpetrator acted with intent or that he/she acted negligently or without due care. No intention to violate a duty of care or a norm and no negligence need be shown in a case to prevail”, whereas “if liability is ‘strict’, fault need not be established. No intention to violate a duty of care or a norm and no negligence need be shown in a case to prevail”, United Nations Environment Programme, *Training Manual on International Environmental Law*, November 2007, p. 57, [last accessed on 18<sup>th</sup> August 2016] available at: [http://www.unep.org/environmentalgovernance/Portals/8/documents/training\\_Manual.pdf](http://www.unep.org/environmentalgovernance/Portals/8/documents/training_Manual.pdf). See also WANG A., “The role of law in environmental protection in China: recent developments”, *Vermont Journal of Environmental law*, Vol. 8, 2006, p. 208.

468 “Another example [of the blurring of the distinctions between concepts and categories] can be found in the use of the concepts of strict liability and no-fault liability as equivalent expressions in comments on the Chinese tort law. Once again, in the absence of any statutory definitions, some Chinese scholars who are the main actors in inter-doctrinal legal transplants and in the last few years have widely drawn on common law and civil law models, introduced a number of differentiations between the two expressions, giving rise to several debates and to conceptual and legal distinctions that entail some difficulties in reconstructing the boundaries of the concepts”, TIMOTEO M., “Law and language: issues related to legal translation and interpretation of Chinese rules on tortious liability of environmental pollution”, *China-EU Law Journal*, Springer, 2015, Vol. 4, pp. 128 - 129; and POZZO B. “Liability for environmental harm: the uncertain path of legal transplants and legal translation between China and Europe”, in Timoteo M. (edited by) *Environmental law in action. EU and Chinese Perspectives*, Bononia University Press, Bologna, 2010, pp 299–313.

evidence for civil lawsuits<sup>469</sup> which held that “*if the litigation of environmental damage compensation is caused by the environmental pollution, then the injurer shall bear the burden of proof of the statutory exemptions and the fact that there is no causation between his act and the damages*”<sup>470</sup>. The 2001 Regulations the Supreme People’s Court recognized the general principle that in order to obtain redress the injured party must only demonstrate the injury and the damage suffered due to the polluter’s conduct<sup>471</sup>. Finally, the principle of strict liability – and the polluter-pays-principle - found explicit recognition in the 2009 Tort Law, which states that “*where any harm is caused by environmental pollution, the polluter shall assume the tort liability*”<sup>472</sup>. Moreover, the Tort Law shifted the burden of proof from the claimant to the alleged polluter, stating, under Article 66, that:

“*Where any dispute arises over an environmental pollution, the polluter shall assume the burden to prove that it should not be liable or its liability could be mitigated under certain circumstances as provided for by law or to prove that there is no causation between its conduct and the harm.*”

Pursuant to the 2009 Tort Law if environmental pollution is caused by two or more polluters, the degree of liability of each tortfeasor should be determined in light of the type of the pollutant, the volume of the emission and any other relevant factor<sup>473</sup>. Finally, where the pollution is the fault of a third party, the victim may seek compensation from either the polluter or the third party (while in turn the polluter is entitled to be reimbursed by the third party<sup>474</sup>).

While the provisions of 2009 Tort Law concerning environmental liability are, to some

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469 (最高人民法院关于民事诉讼证据的若干规定; zuì gāo rén mín fǎ yuàn guān yú mǐn shì sù sòng zhèng jù de ruò gān guī dīng), [last accessed on 9<sup>th</sup> August 2016] original Chinese text and English translation available at: <http://hk.lexiscn.com/law/law-chinese-2-38083.html>.

470 From WANG Canfa, “Chinese Environmental Law Enforcement: Current Deficiencies and Suggested Reforms”, in *Vermont Journal of Environmental Law*, Vol. 8, 2007, p. 163; See also WANG A., “The role of law in environmental protection in China: recent developments”, *Vermont Journal of Environmental law*, Vol. 8, 2006, p. 209.

471 WANG Canfa, *Ibid.*, p. 163; TIMOTEO M., “Sustainability of Legal Transplants and Legal Borrowings in Chinese Rules on Environmental Liability”, in WANG C., FEI A., TIMOTEO M. (edited by), *Legislative and Judicial Remedies for Environmental Torts Victims. A study in the framework of EU-China Cooperation*, Bononia University Press, Bologna 2013, p. 273.

472 Article 65 of the 2009 Tort Law of the People’s Republic of China (中华人民共和国侵权责任法; zhōng huá rén mín gòng hé guó qīn quán zé rèn fǎ). See also POZZO B., WANG L., “Liability for Environmental Pollution within the Framework of the New Chinese Tort Law”, *European Review of Private Law*, Vol. 19, No. 1-2011, pp. 87-99.

473 Article 67 of the 2009 Tort Law of the People’s Republic of China.

474 Article 68 of the 2009 Tort Law of the People’s Republic of China.

extent, “*merely a summary of existing rules*”<sup>475</sup> (since the Environmental Protection Law had already introduced a strict liability rule), they had the merit of removing the ambiguity which surrounded the legal basis of civil liability actions and of promoting the role of civil litigation as a means of enforcement. To this day, due to the public’s mistrust towards the court system, the first remedy sought by those who have suffered injuries due to environmental pollution is the intervention of the local environmental protection bureau (EPB) or of the local political authorities, often by means of back channels such as the *xìnfāng*<sup>476</sup>. However, when public enforcement and informal petitioning fail (an all too common occurrence), a growing number of Chinese citizens today decides to bring claims in tort against polluters or to challenge administrative decisions. It has also been observed that “*in both tort case and administrative action, the most common form of redress is a payment for damages or fines*”, since due to the difficulty of ensuring compliance “*it is rare for a court to require environmental remediation or behavioral change from a polluter*”<sup>477</sup>. Chinese judges therefore tend to “*treat pollution cases as private economic disputes, solvable via negotiated monetary settlement*”<sup>478</sup>, rather than as cases brought in the public interest.

This is perhaps the most significant difference between the Chinese and the EU environmental liability regimes. While the linchpin of the European environmental liability regime is Directive 2004/35/EC (so-called “Environmental Liability Directive”), which is “*basically a public law instrument whose elements, nevertheless are combined with some distinctive concepts of the civil liability system*”<sup>479</sup>, the Chinese environmental liability

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475 FAURE M.G., LIU J., “Compensation for environmental damage in China: theory and practice”, *Pace Environmental Law Review*, Vol. 31, Issue 1, Winter 2014, pp. 231 - 232.

476 See YANG T., MOSER A., “Environmental Tort Litigation in China”, 41 *Environmental Law Reporter*, Washington DC, October 2011, p. 10-898.

477 YANG T., MOSER A., *Op.cit.*, pp. 10-896 – 10-897. However, at least in principle the 2009 Tort Law provides that the tortfeasor may be ordered to i) bring the infringement to an end; ii) remove any obstruction; iii) remove the danger; iv) return property; v) restore goods and places to their original status; vi) pay compensation for the losses; vii) offer an apology; viii) eliminate the consequences of the tort and restore the reputation of the victim (see Article 15). See also FAURE M.G., LIU J., “Compensation for environmental damage in China: theory and practice”, *Pace Environmental Law Review*, Vol. 31, Issue 1, Winter 2014, p. 240.

478 Whereas, “*nonmonetary claims such as a request for an apology, moving a factory or recognizing herdsman’s land rights are usually ignored*”, STERN R.E., “On the Frontlines: Making Decisions in Chinese Civil Environmental Lawsuits”, *Law & Policy*, Vol. 32, 2010, p. 80.

479 See VERRI B., “The 2004/35/EC on Environmental Liability Directive: pursuing the harmonization of environmental legislations within the EU Member States”, in WANG C., FEI A., TIMOTEO M. (edited by), *Legislative and Judicial Remedies for Environmental Torts Victims. A study in the framework of EU-China Cooperation*, Bononia University Press, Bologna 2013, p. 284. On the Liability Directive see also BERGKAMP L., GOLDSMITH B., *The EU Environmental Liability Directive, A Commentary*,



regime relies to a greater extent on private law instruments which focus on the protection of the rights and interests of individuals vis-à-vis other private parties. However, over time, and in part due to inadequate public enforcement, interest groups and even the Chinese government came to see civil litigation as a tool which could be used to protect natural resources and the public good. In turn, greater government involvement strengthened the effectiveness of environmental litigation (which, as we have seen, rarely leads to remedying the damage caused by pollution), creating a compensation regime which according to some authors could be described as “*a combined civil and administrative system*”<sup>480</sup> (where however due to lax public enforcement the private law instrument is often the only remedy available to pollution victims). The growing importance of private enforcement in the PRC should not however blind us to the fact that traditional civil liability rules represent a blunt tool to protect the environment and cannot replace effective public enforcement.

A typical industrial pollution lawsuit which worked its way through the courts and received considerable attention from national and international media<sup>481</sup> and from legal scholars<sup>482</sup> was the *Zhang Changjian et al. v. Fujian Rongping Chemicals* case<sup>483</sup>. The case concerned a chromium leak from a chemical plant in Pingnan county, in the coastal Fujian province, which according to a local physician, Doctor Zhang Changjian, was to blame for rising cancer rates and the death of fish and falling rice production in the area. Doctor Zhang’s petitions to local Party leaders and to the local Environmental Protection Bureau went unheeded and as a last resort the villagers sought the assistance of the Center for Legal Assistance to Pollution Victims (CLAPV)<sup>484</sup>, a legal-aid office and environmental group founded by Professor Wang Canfa at the China University of Political Science and Law. In

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Oxford University Press, 2013, p. 38; and POZZO B. (edited by), *La nuova direttiva sulla responsabilità ambientale in materia di prevenzione e ripartizione del danno ambientale*, Giuffrè, Rome 2005. Moreover, pursuant to recital 14 of Directive 2004/35/EC, the Directive “*does not apply to cases of personal injury, to damage to private property or to any economic loss and does not affect any right regarding these types of damages*”.

480 FAURE M.G., LIU J., *Ibid.*, p. 230.

481 OSTER S., FONG M., “In Booming China, A Doctor Battles A Polluting Factory”, *The Wall Street Journal*, 19<sup>th</sup> July 2006 [last accessed on 9<sup>th</sup> August 2016] available at: <http://www.wsj.com/articles/SB115325157476810126>.

482 STERN R.E., *Environmental Litigation in China: A Study in Political Ambivalence*, Cambridge University Press, Cambridge and New York, 2013, p. 73.

483 The judgment of the Ningde Intermediate People’s Court of 15<sup>th</sup> April 2005 in the case *Zhang Changjian et al. v. Fujian Rongping Chemicals* [last accessed on 9<sup>th</sup> August 2016] is available at: <http://leo.informea.org/court-decision/xiping-chemical-plant-also-known-more-1700-villagers-pingnan-fujian-v-fujian-rongping>.

484 (污染受害者法律帮助中心; wū rǎn shòu hài zhě fǎ lǚ bāng zhù zhōng xīn).

spite of considerable opposition from local authorities (who saw the Rongping plant as a major source of revenue for the county), in 2002 around 1,700 citizens brought an action against the company which owned the plant before the Ningde Intermediate People's Court. The plaintiffs requested a court order to clean up the area and avoid further pollution and the payment of 10,3 million RMB as compensation for the economic damages suffered and an additional 3 million RMB for the emotional damages<sup>485</sup>.

Perhaps due to the politically sensitive nature of the case, in 2005 the Intermediate People's Court ordered the defendant to bring the infringement to an end (with what has been called a "*vague, unenforceable pronouncement*"<sup>486</sup>) and to pay a mere 249,000 RMB to the plaintiffs.

However, this ruling represented a victory of sorts, since the first instance court did ascertain the causal link between the pollution and the damage suffered by the plaintiffs, shifting the burden of proof to the defendant. Rachel Stern has pointed out that the outcome of the case may have been influenced by the fact that "*one of the judges was a graduate of CLAPV's environmental law training program in Beijing*"<sup>487</sup>, and had therefore the basic skills required to correctly interpret and apply the rules of causality.

Even though the judgment of the Ningde Intermediate Court was later confirmed on appeal by the Fujian High Court ( which doubled the sums awarded to the plaintiffs), the victory of the residents of Pignan county in what became one of the most celebrated and controversial court cases in China's environmental history was marred by the modest compensation awarded and by the ineffectiveness of the injunction to stop the infringement (since pollution from the Rongping chemical plant remains a problem for the residents to this day)<sup>488</sup>.

A somewhat more encouraging precedent is offered by an earlier tort case brought by ninety-seven families living near the Shilian River Reservoir, in Jiangsu province, against the owners of paper mill and of a chemical plant<sup>489</sup>. The plaintiffs (who relied largely on fishing for their livelihoods) claimed that the massive death of fish in the reservoir had

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485 STERN R.E., *Environmental Litigation in China: A Study in Political Ambivalence*, Cambridge University Press, Cambridge and New York, 2013, p. 76.

486 STERN R.E., *Op.cit.*, p. 76.

487 STERN R.E., *Op.cit.*, p. 77.

488 STERN R.E., *Op.cit.*, p. 78.

489 *Ninety-seven Families in Shiliang River Reservoir of Jiangsu Province v. Two Factories in Limnu County of Shandong Province* (September 2003), from WANG Canfa, "Chinese Environmental Law Enforcement: Current Deficiencies and Suggested Reforms", in *Vermont Journal of Environmental Law*, Vol. 8, 2007, p. 179.

been caused by the illegal dumping of sewage water into the water supply by the Linmu County Paper Mill and by the Linmu Chemical Plant. In this case, the Intermediate People's Court of Lianyungang, in Jiangsu province, found the defendants jointly liable for the damage suffered by the plaintiffs and awarded to the latter about 5 million RMB as compensation. While the ruling was confirmed on appeal by the High People's Court of Jiangsu province, the plaintiffs were able to obtain the compensation awarded to them only after several months and with the assistance of the CLAPV<sup>490</sup>. According to Wang Canfa, in this case, at least, the compensation awarded to the plaintiffs proved to be sufficiently high to deter the defendants from committing further infringements<sup>491</sup>.

Legal doctrine has emphasized that the main obstacles encountered by underprivileged or marginalized groups in their attempts to obtain justice are generally of a procedural, rather than substantial, nature<sup>492</sup>. According to both international observers and Chinese lawyers the hurdles which plaintiffs have to overcome when bringing tort claims to court include excessively high filing fees, the difficulty of obtaining competent legal representation and of finding lawyers with sufficient knowledge and experience in the field of environmental law<sup>493</sup>. In particular, insufficient knowledge of environmental law among legal professional in China is a serious problem, since even after the entry into force of some of the legislative measures we have examined some judges simply ignored the strict liability rule or the fact that the burden of proof lies on the defendants<sup>494</sup>. Moreover, Rachel Stern has observed that Chinese judges are prone to use "discretion" (酌情; *zhuó qíng*) to justify decisions which effectively contradict the letter of the law, citing principles like the polluter's ability to pay<sup>495</sup> or lack of due diligence on the part of the pollution victim<sup>496</sup>, which may find little or no justification in the facts of the case or in the applicable laws.

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490 WANG Canfa, *Ibid.*, p. 179.

491 WANG Canfa, *Ibid.*, p. 179.

492 GLOPPEN S., *Public interest litigation, social rights and social policy*, Arusha Conference – New Frontiers of Social Policy, Conference Paper of 12<sup>th</sup> December 2005, [last accessed on 9<sup>th</sup> August 2016] available at: <http://siteresources.worldbank.org/INTRANETSOCIALDEVELOPMENT/Resources/Gloppen.rev.3.pdf>; See also NOVARETTI S., *Op.cit.*

493 YANG T., MOSER A., *Op.cit.*, pp. 10-898.

494 STERN R.E., "On the Frontlines: Making Decisions in Chinese Civil Environmental Lawsuits", *Law & Policy*, Vol. 32, 2010, p. 85.

495 *Chen Rexia v. Yin Hongzia*, Anhui chunzhou Intermediate Court, Civil Division No. 120 (2004), cited in STERN R.E., "On the Frontlines: Making Decisions in Chinese Civil Environmental Lawsuits", *Law & Policy*, Vol. 32, 2010, p. 139.

496 *Ningbo Beilunqu Baifengshang Yangdianhua Yichang et al. v. Wang Shouxiang*, Zhejiang Ningbo Intermediate Court, Civil Division, No. 440 (2002), cited in STERN R.E., *Ibid.*, p. 139.

These rulings seem to reinforce the paternalistic image of a magistrate engaged in “didactic conciliation”<sup>497</sup>, who employs judicial discretion to ensure that both the polluter and the pollution victim bear some of the costs of the environmental damage. However, in some instances the significant degree of autonomy allowed to the judges by the uncertainty of the legislative framework or by the ambivalence of the political authorities, has been used to favour the interests of the victims of environmental damages<sup>498</sup>. Besides, even when the 2009 Tort Law is correctly applied and the victims of environmental torts can rely on the support of environmental NGOs and public authorities<sup>499</sup>, the difficulties encountered in proving damages can be insurmountable<sup>500</sup>.

As we have seen, one of China’s most respected environmental NGO is the Center for Legal Assistance to Pollution Victims, which over the last decades has done much to advance civil and public interest litigation in the field of environmental law. However, as of today the number of active environmental NGOs in China is still (relatively) small<sup>501</sup>.

Finally, it is often extremely difficult to provide evidence of polluting activities, since companies generally employ a broad variety of tactics to hide malfeasance from

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497 AJANI G., SERAFINO A., TIMOTEO M., Op.cit. p. 68. According to Max Weber, “[the] Chinese judge, a typical patrimonial judge, discharged business in thoroughly patriarchal fashion. That is, insofar as he was given leeway by sacred tradition he precisely did not adjudicate according to formal rules and without regard to persons. Just the reverse [...] he judged persons according to their concrete qualities and in terms of the concrete situation, or according to equity and the appropriateness of the concrete result”, WEBER M., *The Religion of China: Confucianism and Taoism*, Free Press, Glencoe IL, 1951, p. 149. See also TRUBEK D.M., “Max Weber on Law and the Rise of Capitalism”, *Wisconsin Law Review*, Vol. 3, 1972, p. 724. On the role which mediation and alternative dispute resolution plays in the PRC, see also TIMOTEO M., “Le controversie fuori dalle corti: il caso cinese”, in *L'altra giustizia. I metodi alternativi di soluzione delle controversie nel diritto comparato*, Giuffrè, Milan 2007, pp. 301 – 315.

498 Rachel Stern reports that “in a Hebei environmental hearing I attended in January 2008, judges allowed a representative from the Beijing-based Center for Legal Assistance to Pollution Victims (CLAPV) to both sit with the plaintiff’s counsel and to give a speech, even though the nongovernmental organization (NGO) had no official role in the courtroom. The representative used the speech to frame the dispute (“this is a typical water pollution case”) and lend prestige to the plaintiff’s cause”, STERN R.E., “On the Frontlines: Making Decisions in Chinese Civil Environmental Lawsuits”, *Law & Policy*, Vol. 32, 2010, p. 88.

499 YANG T., MOSER A., Op.cit., pp. 10-898. Moreover, far from helping the plaintiff’s case, often local authorities actively hinder it, for political or economic reasons.

500 FAURE M.G., LIU J., “Compensation for environmental damage in China: theory and practice”, *Pace Environmental Law Review*, Vol. 31, Issue 1, Winter 2014.

501 “In China, environmental NGOs (eNGOs) are still in their early stages of development. In 1978, the China Society for Environmental Sciences established the first eNGO in China. Finally in the 1990s, eNGOs began to develop more rapidly. Reports indicate that there were 2768 eNGOs in China in 2005, and the number grew to 3539 in 2008”, FAURE M.G., LIU J., Op.cit., p. 255.

environmental bureaus or from the public<sup>502</sup>. As we have seen, environmental cases often hinge on causation, and the extremely technical nature of some of the evidence around which cases turn may be daunting for legal professionals. Judges and lawyers with little or no experience in environmental matters, and unable to evaluate the evidence or to employ independent expert opinions<sup>503</sup>, have therefore on occasion developed their own criteria to determine liability or simply relied on unscientific assessments<sup>504</sup>. According to Wang Canfa, in several instances Chinese judges have even refused to hear environmental lawsuits which were not “follow-on actions”, based on prior decisions of the competent environmental authorities. These – potentially very dangerous – conclusions were drawn by Chinese courts on the basis of an erroneous interpretation of Article 41 of the Environmental Protection Law<sup>505</sup>.

The difference which a panel of expert and specialized judges can make as to the outcome of an environmental civil dispute was amply demonstrated in the *Sun Youli et al. v. Qian'an Number One Paper Mill et al.* case<sup>506</sup>, when a group of fish farmers from Hebei province brought an action against the owners of several industrial plants for the damage caused by the dumping of toxic waste into a local river. The success of the plaintiffs' action probably owed much to their lawyers' decision to bring the action before the Tianjin Maritime Court, a move which allowed them to “*remove the administrative interference that accompanies local protectionism, bring the advantage of specialized courts and expert judges into play, increase the efficiency of the case and guarantee justice*”<sup>507</sup>. Moreover, one of the lawyers who assisted the plaintiffs had worked for an Environmental Protection

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502 “In one case studied, a company added a substance to the water that made it impossible to detect that the original pollution had created a hydrogen ion concentration (pH) level that exceeded the relevant water quality standards there. In another case, even a report by a local EPB attesting to the existence of indoor pollution was deemed insufficient evidence, because the court ruled that it lacked details about ‘the scope of the pollution’”, YANG T., MOSER A., “Environmental Tort Litigation in China”, 41 *Environmental Law Reporter*, Washington DC, October 2011, p. 10-898.

503 STERN R.E., “On the Frontlines: Making Decisions in Chinese Civil Environmental Lawsuits”, *Law & Policy*, Vol. 32, 2010, p. 86.

504 “A Shanghai court, for example, sided with a plaintiff in a 2004 light pollution case because the brightness ‘exceeded what a normal person can stand’. Or, in a 2001 case in Hebei, the defense argued that noise and vibrations from a railroad could not possibly cause cracks in neighboring house. According to the defense, the plaintiff’s claim was not even worth discussing because ‘there’s no need to prove common sense’”, STERN R.E., *Ibid.*, p. 90.

505 WANG C. CHEN Y., “On the establishment and function of the specialized entities for environmental justice in China” in TIMOTEO M. (edited by), *Environmental Law in Action. EU and China perspectives*, Bononia University Press, Bologna 2012, p. 222.

506 The case was reported and examined in STERN R.E., *Environmental Litigation in China: A Study in Political Ambivalence*, Cambridge University Press, Cambridge and New York, 2013, p. 78.

507 STERN R.E., *Ibid.*, p. 80.

Bureau and understood what records they would have been able to obtain from public authorities<sup>508</sup>. The plaintiffs were able to demonstrate causation between the pollution of the river and the damages they had suffered by producing a report drafted by local fishery bureaus and in April 2002 the Tianjin Maritime Court ruled in favour of the plaintiffs and quantified the damages on the basis of an appraisal carried out by a local office of the Ministry of Agriculture (awarding 13,6 million RMB to the plaintiffs). Significantly, the Tianjin Maritime Court, applied the 2001 Regulations of the Supreme People's Court and held the defendants jointly liable for the pollution damage<sup>509</sup>. Even though the ruling was partially overturned on appeal by the Tianjin High Court, which almost halved the compensation awarded to the plaintiffs, this precedent played an important role in encouraging environmental tort litigation and was largely seen as a success by the legal community<sup>510</sup>.

While actions in tort brought by pollution victims have received considerable attention from the media and have led to promising developments in the field of private enforcement, environmental public interest litigation (环境公益诉讼; huán jìng gōng yì sù sòng) promoted by NGOs (民间组织, mínjiān zǔzhī) and interest groups has seen more limited success. Until recently, the main obstacle to public interest litigation was Article 108 of the 1991 Civil Procedure Law of the People's Republic of China, which stated that:

*“The following conditions must be met when a lawsuit is brought:*

- 1) the plaintiff must be a citizen, legal person or any other organization that has a direct interest (直接利害关系; zhí jiē lì hài guān xi) in the case;*
- 2) there must be a definite defendant;*
- 3) there must be specific claim or claims, facts, and cause or causes for the suit;*  
*and*
- 4) the suit must be within the scope of acceptance for civil actions by the people's courts and under the jurisdiction of the people's court where the suit is entertainer”.*

If the requirement concerning *locus standi* is not satisfied, the court must reject the claim with a ruling which should – at least in principle – be motivated<sup>511</sup>. The direct interest

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508 For a complete account of the trial, see STERN R.E., *Ibid.*

509 STERN R.E., *Ibid.*, p. 81.

510 STERN R.E., *Ibid.*, p. 83.

511 FAURE M.G., LIU J., “Compensation for environmental damage in China: theory and practice”, *Pace Environmental Law Review*, Vol. 31, Issue 1, Winter 2014, p. 242.

requirement represented for decades the main obstacle to the development of public interest litigation in China<sup>512</sup>, since environmental NGOs and interest groups could only assist the plaintiffs, providing legal counsel or technical support, without taking directly part in the proceedings or bringing actions on behalf of pollution victims<sup>513</sup>.

Due to the restrictions posed on access to court by the rules of procedure, until recently public authorities and People's Procuratorates (人民检察院; *rénmín jiǎncháyuàn*) have been the driving force in the field of environmental litigation, often bringing actions before the courts to seek compensation for ecological damage<sup>514</sup>. A study carried out by the Center of Environmental Resources and Energy Law and by the Environmental Law Clinic at Sun Yat-Sen University on water pollution public interest litigation handled by the Guangzhou Maritime Court (in Guangdong Province) showed that these cases (which generally involve oil spills) are “usually initiated by administrative authorities, prosecutors, and a small number of non-governmental organizations”<sup>515</sup>. The study also showed that in most cases the plaintiff's standing was contested by the defendants or examined *ex officio* by the court.

In one of the cases examined by the researchers of Sun Yat-Sen University<sup>516</sup> the Guangzhou Maritime Court recognized the standing of the People's Procuratorate, arguing that territorial waters belong to the nation and that when water resources are polluted the State is entitled to claim compensation from the polluter. Therefore, the possibility to bring an action on behalf of the State when State property has been infringed upon falls well within the purview of the People's Procuratorate, as a legal supervisory body<sup>517</sup>.

#### 4.2.3. China's Environmental Courts

The creation of specialized environmental courts is perhaps the most tangible signal of the growing importance of civil and administrative litigation as an enforcement tool in the

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512 CARPENTER – GOLD D., “Castles made of sand: public-interest litigation and China's new environmental protection law”, *Harvard Environmental Law Review*, Vol. 39, 2015, p. 258. A comprehensive analysis of the development of public interest litigation can be found in NOVARETTI S., *Op.cit.*

513 CARPENTER – GOLD D., *Ibid.*, p. 258.

514 FAURE M.G., LIU J., *Op.cit.*, p. 296.

515 LI Z., “Analysis of the practice of water pollution public interest litigation: based on cases handled by the Guangzhou Maritime Court”, *Vermont Journal of Environmental Law*, Vol. 13, 2012, p. 798.

516 (广州市海珠区人民检察院诉陈忠明水域污染损害赔偿纠纷案) Judgment of the Guangzhou Maritime Court, *People's Procuratorate of Haizhu, District of Guangzhou Municipality v. Zhong-Ming Chen*, No. 382, 2008, from LI Z. *Op.cit.*, p. 802.

517 LI Z., *Op.cit.*, p. 803. For an analysis of the issue of the legal standing of the People's Procuratorates in public interest litigation see also NOVARETTI S. *Op. cit.*

People's Republic of China<sup>518</sup>. In an attempt to remedy the shortcomings of public enforcement (generally considered to be extremely ineffective) and to “give teeth to China's environmental legislation”<sup>519</sup>, over the last decades the judiciary has been given a more central role to play. As we shall see, international legal cooperation played a key role in the establishment of China's environmental courts.

One of the forerunners of this drive was the United Nations Environment Programme (UNEP), which in 1996 set up the “Global Judges Programme”<sup>520</sup>, recognizing “*the central role the judiciary plays in promoting environmental governance*”<sup>521</sup>. The goal of this project, partly funded by the governments of Norway, Belgium and the Netherlands, was to strengthen the role of the judiciary “*in securing environmental governance, adherence to the rule of law and the effective implementation of national environmental policies, laws and regulations including the national level implementation of multilateral environmental agreements*”<sup>522</sup>. To this end, between 1996 and 2002 UNEP organized, in collaboration with the International Union for Conservation of Nature, a series of symposia on “sustainable development and the role of the law” which saw the participation of senior judges from 60 countries and from several international courts and tribunals<sup>523</sup>.

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518 For a general overview of environmental dispute resolution procedures in the PRC, see ZHAO Y., “Environmental Dispute Resolution in China”, *Journal of Environmental Law*, Vol. 16, 2004, pp. 157 – 192. On the new environmental courts, see: ZHANG M. ZHANG B., “Specialized environmental courts in China: status quo, challenges and responses”, *Journal of Energy & Natural Resources Law*, 2012, pp. 361 - 390; STERN R., “The Political Logic of China's New Environmental Courts”, *The China Journal*, Issue 72, 2014, pp. 53 – 74; WANG Canfa CHEN Y., “On the establishment and function of the specialized entities for environmental justice in China” in TIMOTEO M. (edited by), *Environmental Law in Action. EU and China perspectives*, Bononia University Press, Bologna 2012, p. 218 et seq.

519 LIU J., “Environmental justice with Chinese characteristics: recent developments in using environmental public interest litigation to strengthen access to environmental justice”, *Florida A&M University Law Review*, Vol. 7, Issue 2, 2015, p. 242. On the political rationale behind the establishment of specialized courts, see also STERN R., “The Political Logic of China's New Environmental Courts”, *The China Journal*, Issue 72, 2014, pp. 53 – 74.

520 United Nations Environment Programme, *Judges Programme*, [last accessed on 30<sup>th</sup> August 2016] available at: <http://www.unep.org/delc/judgesprogramme>.

521 KURUKULASURIYA L., POWELL K.A., “History of environmental courts and UNEP's role”, *Journal of Court Innovation*, 2010, p. 270.

522 Ibid.

523 “Participants at these regional symposia made presentations discussing their home countries' national environmental legal systems in an attempt to exchange viewpoints, knowledge, and experience in order to promote further development and implementation of environmental law in each region. Participants reviewed the role of the courts in promoting the rule of law in the area of sustainable development, discussed recent trends in the development of environmental jurisprudence, and examined contemporary developments and important judgments, in the fields of both national and international environmental law”, KURUKULASURIYA L., POWELL K.A., Op.cit, p. 271. See also United Nations Environment Programme, *The global judges symposium on sustainable development and the role of the*



The People's Republic of China was represented (among others) by Justice Zhang Jun, Vice President of the Supreme People's Court, who contributed to the symposium held in Johannesburg in August 2002 by providing an overview of the progress made by the PRC in the field of environmental protection. In his speech, Justice Zhang Jun described the role which the Chinese judiciary plays in the enforcement of environmental law and made a specific reference to the ruling of the Tianjin Maritime Court on the *Sun Youli et al. v. Qian'an Number One Paper Mill et al.* case, which he considered to be a true milestone in the road to establish an environmental rule of law in China<sup>524</sup>.

The judges gathered at the 2002 Johannesburg Global Judges Symposium (which took place only a few days before the World Summit on Sustainable Development), issued a statement (known as the "Johannesburg Principles on the role of law and sustainable development")<sup>525</sup>. According to these Principles, "*collaboration among members of the Judiciary and others engaged in the judicial process within and across regions is essential to achieve a significant improvement in compliance with, implementation, development and enforcement of environmental law*"<sup>526</sup>. The UNEP therefore implemented several projects aimed at improving "*the capacity of those involved in the process of promoting, implementing, developing and enforcing environmental law, such as judges, prosecutors, legislators and others, to carry out their functions on a well-informed basis, equipped with the necessary skills, information and material*" and at improving "*public participation in environmental decision-making, access to justice for the settlement of environmental disputes and the defense and enforcement of environmental rights, and public access to relevant information*"<sup>527</sup>. Moreover, UNEP produced a handbook on environmental law<sup>528</sup> designed to provide judges with "*information on international and comparative environmental law and references to relevant cases*"<sup>529</sup>. Training material on environmental

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law, [last accessed on 30<sup>th</sup> August 2016] available at: <http://www.unep.org/delc/judgesprogramme/GlobalJudgesSymposium/tabid/106158/Default.aspx>.

524 ZHANG J., *Environmental protection and legal system construction in China*, August 2002, Contribution to the UNEP symposium held on 18 – 20<sup>th</sup> August 2002, [last accessed on 30<sup>th</sup> August 2016] available at: <http://www.unep.org/delc/Portals/119/publications/Speeches/CHINA.pdf>.

525 United Nations Environment Programme, *Global Judges Programme*, 2005 [last accessed on 30<sup>th</sup> August 2016] available at: <http://www.unep.org/delc/Portals/119/publications/unep-global-judges-programme.pdf>.

526 United Nations Environment Programme, *Global Judges Programme*, 2005, p. 16.

527 United Nations Environment Programme, *Global Judges Programme*, 2005, p. 17.

528 SHELTON D., KISS A., *Judicial Handbook on Environmental Law*, United Nations Environment Programme, 2005, [last accessed on 5<sup>th</sup> August 2015] available at: <http://www.unep.org/delc/Portals/119/publications/Judicial-Handbook-Environmental-Law.pdf>.

529 SHELTON D., KISS A., *Op.cit.*, p. III.

law (dealing with a wide range of issues, including locus standi, assessment of evidence, remedies and case management)<sup>530</sup> was made available to judges and prosecutors.

As we shall see in the course of this dissertation, the Johannesburg Principles and the initiatives implemented by UNEP represent the blueprint for many of the judicial capacity-building projects set up over the last decade<sup>531</sup>.

One of the most topical issues discussed at the UNEP symposia was the effectiveness of specialized environmental courts in the countries which had established them<sup>532</sup>, a debate which apparently had a significant impact on the Chinese delegation. Important support for the establishment of specialized environmental courts also came from the (U.S. – based) International Judicial Institute for Environmental Adjudication, which over the years has organized and funded several capacity-building projects for judicial officials in the PRC<sup>533</sup>. Through these projects, Chinese judges and lawmakers acquired a wealth of information which proved extremely valuable when the PRC began to experiment with its own environmental courts.

While the earliest attempts to set up specialized environmental courts at a local level date back to 1989, the first environmental courts (the Guiyang Intermediate Court and the Qingzhen Basic Court<sup>534</sup>, in Guizhou Province) became operational only in 2007<sup>535</sup>. It is worth emphasizing that while the Guiyang Intermediate Court was initially empowered by

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530 United Nations Environment Programme, *Judicial training modules on environmental law*, [last accessed on 30<sup>th</sup> August 2016] available at: <http://www.unep.org/delc/JudicialTrainingModulesEnvironmentalLaw/tabid/102283/Default.aspx>.

531 KURUKULASURIYA L., POWELL K.A., Op.cit.

532 “*Court administration of environmental claims affords a wealth of comparative law experiences, little of which as yet has been studied. Topics which usefully could be studie[d] would include: (a) under what circumstances do specialized environmental courts (such as Australia or Brazil) work best, and what procedures guide specialized chambers of supreme courts (such as Greece) or international tribunals (such as the International Court of Justice), and do their rulings effectively guide judicial decision-making by other courts; (b) what levels of administrative, financial, and informational support does courts require for effective adjudication of environmental disputes (including the use of special masters or panel of independent expert scientific consultants or assessors); (c) Under what circumstances are alternative dispute settlement methods, such as mediation or arbitration, most useful in resolving environmental disputes*”, ROBINSON N.A., *Contribution to the UNEP symposium held in Nairobi on 31<sup>st</sup> January 2003*, [last accessed on 30<sup>th</sup> August 2016] available at: <http://weavingaweb.org/pdfdocuments/UNEPjudgesStatementNairobiJan2003.pdf>.

533 International Judicial Institute for Environmental Adjudication, Pace University, “History and purpose”, [last accessed on 6<sup>th</sup> September 2016] available at: <http://www.law.pace.edu/history-and-purpose>.

534 See GUI T., “China’s first environmental court: a seven-year winning streak for public interest cases”, *Chinadialogue*, 9<sup>th</sup> July 2014, [last accessed on 10<sup>th</sup> August 2016] available at: <https://www.chinadialogue.net/article/show/single/en/7116-China-s-first-environmental-court-a-seven-year-winning-streak-for-public-interest-cases>.

535 CARPENTER – GOLD D., “Castles made of sand: public-interest litigation and China’s new environmental protection law”, *Harvard Environmental Law Review*, Vol. 39, 2015, p. 259.

the provincial People's Congress to handle exclusively environmental cases brought by administrative agencies, its jurisdiction was later extended to public interest cases brought by environmental NGOs and other interest groups<sup>536</sup>.

The expansion of *locus standi* to public interest groups through the rules of procedures of the new courts was extremely controversial, and according to some authors explicitly contradicted official government policy and Article 108 of the Civil Procedure Law of the PRC<sup>537</sup>. However, as we have seen it is not rare for the central government to allow social, economic and institutional “experiments” to be carried out at a local level, even in the absence (or in violation) of national laws and guidelines. The provinces of Jiangsu and Yunnan promptly followed suit, taking steps to create specialized environmental courts and to foster the development of environmental tort and public interest litigation. Both the Intermediate People's Courts of Kunming (in Yunnan Province) and Wuxi<sup>538</sup> (in Jiangsu Province) authorized People's Procuratorates and interest groups to bring actions in the public interest, and the Kunming Intermediate Court went so far as to set up a fund to finance environmental lawsuits brought in the interest of the public<sup>539</sup>. This spate of reforms delivered its first tangible result in 2010, when the Guiyang Intermediate Court ruled on what became the “*first successful environmental civil public interest case brought by an environmental NGO*”<sup>540</sup>. The case *All-China Environment Federation et al. v. Dingpa Paper Mill* was a typical water pollution case, which was adjudicated by the court after carefully reviewing the evidence provided by the parties and an expert report (commissioned by the court itself) on the pollution levels of the Nanming river<sup>541</sup>.

Perhaps spurred by its initial success, the “green court movement”<sup>542</sup> spread rapidly across

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536 “Article 23 of the Guiyang Municipal regulations specifically provides that the procuratorates, environmental authorities, and environmental non-governmental organizations (NGOs) have standing to bring suit”, WANG A.L., GAO J., “Environmental courts and the development of environmental public interest litigation in China”, *Journal of Court Innovation*, 2010, Vol. 3, p. 45. See also CARPENTER – GOLD D., Op.cit., p. 259.

537 CARPENTER – GOLD D., Op.cit., p. 259.

538 The Wuxi Intermediate People's Court was the first environmental court to hear an environmental public interest case brought by an NGO (albeit a “government-organized NGO”): *All-China Environment Federation and Zhu Zhengmao v. Jiangyin Port Container Co.* The case was however settled before the verdict (see CARPENTER – GOLD D., Op.cit, pp. 259 – 260).

539 YANG T., MOSER A., “Environmental Tort Litigation in China”, 41 *Environmental Law Reporter*, Washington DC, October 2011, p. 10-899.

540 LIU J., “Environmental justice with Chinese characteristics: recent developments in using environmental public interest litigation to strengthen access to environmental justice”, *Florida A&M University Law Review*, Vol. 7, Issue 2, 2015, p. 246.

541 LIU J., Ibid., p. 247.

542 LIU J., Ibid., p. 242.

the country and led to the creation of dozens, if not hundreds of environmental courts, tribunals and panels<sup>543</sup>. Recent studies suggest that the distribution of the specialized environmental courts is “*very much bottom up, with the vast majority at the grassroots level (around 78,9%), with some at Intermediate Court (around 16,8%) and High Court (around 4,1%) level*”<sup>544</sup>. The favour found by these institutions across China clearly shows how deeply felt is the demand for specialized courts, able to adjudicate fairly and competently on matters which are today of the utmost importance for Chinese citizens (and which could not be effectively handled by the existing administrative authorities or through the “backdoor” channels still favored by a significant section of the population)<sup>545</sup>.

Legal doctrine, both in China and abroad, continued to question the validity of the provincial measures which granted *locus standi* to environmental NGOs<sup>546</sup>, but the Supreme People’s Court did not intervene to strike them down or to clarify the issue, thus allowing these local “experiments” to continue. However, as we shall see this matter may have become moot after the entry into force of the new Environmental Protection Law.

While different provinces have taken different approaches as regards the locus standi of NGOs, the reversal of the burden of proof (举证责任倒置; jǔzhèng zérèn dào zhì), the use of interim measures and filing fees<sup>547</sup>, there are some characteristics which are common to most environmental courts. These specialized courts have been generally established as separate divisions or sub-sections of Intermediate People’s Courts or as autonomous

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543 See STERN R.E., “The political logic of China’s new environmental courts”, *The China Journal*, July 2014, pp. 53 – 74. While some authors count less than one hundred “*specialized environmental courts, tribunals and panels*” (LIU J., *Op.cit.*, p. 242), according to other sources there are more than 370 environmental courts active today in the PRC (see EU-China Environmental Governance Programme, *Policy Report: Judges’ training in Environmental Law – Recommendations on capacity building for the judiciary in environmental adjudication*, p. 17 [last accessed on 13<sup>th</sup> August 2016] available at: [http://www.ecgep.com/files/4/GIZ%20JUDGES\\_Policy%20Report%20-%20Judges%20Training%20in%20Environmental%20Law%202015.pdf](http://www.ecgep.com/files/4/GIZ%20JUDGES_Policy%20Report%20-%20Judges%20Training%20in%20Environmental%20Law%202015.pdf)).

544 EU-China Environmental Governance Programme, *Policy Report: Judges’ training in Environmental Law – Recommendations on capacity building for the judiciary in environmental adjudication*, p. 17.

545 According to Wang Canfa, very few Chinese judges have received any training on environmental law, largely due to the fact that the environmental law courses offered by the law schools are generally optional and that there are few job opportunities for environmental law specialists (see WANG C. CHEN Y., “On the establishment and function of the specialized entities for environmental justice in China” in TIMOTEO M. (edited by), *Environmental Law in Action. EU and China perspectives*, Bononia University Press, Bologna 2012, pp. 220 – 221).

546 YANG T., MOSER A., “Environmental Tort Litigation in China”, 41 *Environmental Law Reporter*, Washington DC, October 2011, p. 10-899.

547 The most innovative and forward-looking measures were probably adopted in the province of Yunnan (which today can also boast the largest network of environmental courts in the country), see WANG A.L., GAO J., “Environmental courts and the development of environmental public interest litigation in China”, *Journal of Court Innovation*, Vol. 3, Issue 1, 2010, p. 47.

tribunals at grassroots level<sup>548</sup>, and contrary to common practice, environmental courts can generally hear civil, criminal and administrative cases<sup>549</sup>. However, so far the environmental cases heard by Chinese courts have been mostly civil or criminal in nature<sup>550</sup>.

As we shall see on several occasions throughout this analysis, due to lax public enforcement<sup>551</sup>, civil litigation and tort law represent today the most dynamic elements in the Chinese environmental governance framework and are possibly the most promising targets for organizations active in the field of international legal cooperation. However, the “hybrid” nature of many environmental cases (and indeed of environmental law in China and elsewhere), has lead Chinese judges to combine civil, criminal and administrative judicial procedures and technique in the so-called “three-in-one” system (三审合一; sānshěn héyī )<sup>552</sup>. Moreover, the obstacles historically encountered by plaintiffs in collecting the compensation awarded to them by the courts have led some provinces to grant to their environmental courts authority over the enforcement of their own judgments. Legal doctrine has identified several patterns in the practice of Chinese courts as regards the execution of their judgments, coming to the conclusion that it is generally difficult to “execute against a large and locally-important but cash-poor state owned enterprise in a poor province”<sup>553</sup> and that Chinese courts appear to be reluctant to execute judgments which could potentially put out of business the defendant<sup>554</sup>. The emphasis laid on

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548 Environmental courts in China “primarily consist of collegiate panels (合议庭, *heyiting*), with some [environmental courts] also functioning as actual tribunals (审判庭, *shenpanting*) and a smaller number of circuit courts (巡回庭)”, EU-China Environmental Governance Programme, *Policy Report: Judges’ training in Environmental Law – Recommendations on capacity building for the judiciary in environmental adjudication*, p. 17.

549 WANG A.L., GAO J., Op.cit., p. 47.

550 “Between 2002-2011, of the approximately 117,000 cases tried in total, around 81,000 were criminal, while approximately 19,000 were civil and only a little over 15,000 were administrative”, EU-China Environmental Governance Programme, *Policy Report: Judges’ training in Environmental Law – Recommendations on capacity building for the judiciary in environmental adjudication*, p. 20.

551 See, e.g., BEYER S., “Environmental Law and Policy in the People's Republic of China”, *Chinese Journal of International Law*, Vol. 5, 2006, pp. 185 - 211.

552 “Many [environmental courts] are thus comprised simply of collegiate panels consisting of judges from administrative, civil and criminal chambers. This model has been largely successful in its application by the more “mature” ECTs such as those in Wuxi (the pioneer of the model), Qiongzhen and Kunming, and has been incorporated into local judicial policy in provinces such as Jiangsu”, EU-China Environmental Governance Programme, *Policy Report: Judges’ training in Environmental Law – Recommendations on capacity building for the judiciary in environmental adjudication*, 2015, p. 19.

553 CLARKE D.C., “Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments”, *Columbia Journal of Asian Law*, Vol. 10, 1996, p. 80.

554 CLARKE D.C., Op.cit, p. 62.

“substantive justice”, often at the expense of “procedural justice” may have contributed to the delays and uncertainty which often characterize the execution of Chinese courts<sup>555</sup>.

Environmental courts might prove to be useful tools to encourage consistency in the application of environmental law and to ensure that environmental lawsuits are adjudicated by judges with sufficient knowledge of the applicable laws and technical expertise. Moreover, they have offered a chance to experiment with public interest litigation and to seek new solutions to China’s environmental crisis<sup>556</sup> and they have sparked a promising public debate over a wide variety of issues, such as the power of the court to issue the kind of interim measures generally reserved to administrative agencies and the possibility to allow the statements of expert witnesses as evidence<sup>557</sup>.

However, while the “bottom-up” and “activist”<sup>558</sup> approach to environmental enforcement embodied by these courts has been widely praised<sup>559</sup>, some authors have questioned their effectiveness<sup>560</sup>. In particular, while the number of environmental (especially civil) cases across the country has been steadily growing over the last decade, in several provinces the specialized environmental courts have remained almost inactive<sup>561</sup>. The disappointing

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555 Donald C. Clarke has emphasized “*the generally observed reluctance of the system to give teeth to rules respecting finality if it were ever to be at the cost of getting the right substantive result. In short, the system simply does not assign a high relative cost to delay and uncertainty. Both at the adjudicatory and the execution stage, defendants are given many more chances to make their case than a reading of the letter of the law would indicate. This reluctance to accept finality is part of a broader reluctance to allow any aspect of procedure to dictate a substantive result, a reluctance that finds expression throughout the legal system. It is inconceivable, for example, that a wrongdoer in China could escape punishment on a technicality. [...] It would be the duty of any court at any stage of the process to remedy unreasonableness or injustice whenever it found it*”, CLARKE D.C., *Op.cit.*, p. 83.

556 See GOELZ D.J., “China’s environmental problems: is a specialized court the solution?”, 18 *Pacific Rim Law & Policy Journal* 155, 2008, pp. 186 – 187; STERN R., “The Political Logic of China’s New Environmental Courts”, *The China Journal*, Issue 72, 2014, pp. 53 – 74.

557 ZHANG C., “Growing pains for China’s new environmental courts”, *Chinadialogue*, 17<sup>th</sup> June 2015, [last accessed on 10<sup>th</sup> August 2016] available at: <https://www.chinadialogue.net/article/show/single/en/7972-Growing-pains-for-China-s-new-environmental-courts>.

558 LIU J., “Environmental justice with Chinese characteristics: recent developments in using environmental public interest litigation to strengthen access to environmental justice”, *Florida A&M University Law Review*, Vol. 7, Issue 2, 2015, p. 242.

559 WANG C. CHEN Y., “On the establishment and function of the specialized entities for environmental justice in China” in TIMOTEO M. (edited by), *Environmental Law in Action. EU and China perspectives*, Bononia University Press, Bologna 2012, p. 230.

560 WANG A.L., GAO J., “*Op.cit.*”, pp. 47 - 48. For an analysis of the merits of bottom-up reform of the Chinese judiciary see also LIEBMAN B., “China’s Courts: Restricted Reform”, *China Quarterly*, Vol. 191, 2008, pp. 620 – 638.

561 “[I]n the year 2014, no environmental cases were resolved in 14 of the 20 provinces with [environmental courts or tribunals] then in operation”, EU-China Environmental Governance Programme, *Policy Report: Judges’ training in Environmental Law – Recommendations on capacity building for the*

performance of environmental courts in certain provinces is largely attributable to the geographic imbalance in the number of environmental cases across China. Recent statistics show that:

“[the] provinces of Fujian and Hainan, as well as the Chongqing municipality, had a disproportionate number of environmental cases, accounting for 57,9%, 16,1% and 8,2% respectively. By contrast, over 13 provinces, autonomous regions and municipalities had no environmental cases [in 2013]”<sup>562</sup>.

Moreover, the lack of judges with sufficient training in the field of environmental law may have been a serious obstacle to the promotion of environmental justice and environmental courts in the PRC.

As we shall see, the Supreme People’s Court and the Chinese government have tried to address this problem by establishing training programmes, often with the help of international legal cooperation programmes such as the EU-China Environmental Governance Programme<sup>563</sup> and by publishing guidelines<sup>564</sup> and best practices. Finally, the capacity-building initiatives implemented by UNEP represent important opportunities for China’s environmental courts to exchange judicial procedures and experiences with other jurisdictions and to strengthen environmental adjudication<sup>565</sup>.

#### 4.3. THE CONTRIBUTION OF INTERNATIONAL LEGAL COOPERATION

We shall now examine the contribution provided by international legal cooperation to the development of environmental litigation in China. Over the years, the scope of the programmes implemented by governments and NGOs, academic institutions and

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*judiciary in environmental adjudication*, 2015, p. 18.

562 EU-China Environmental Governance Programme, *Policy Report: Judges’ training in Environmental Law – Recommendations on capacity building for the judiciary in environmental adjudication*, 2015, p. 20.

563 ZHANG C., *Op.cit.*

564 In particular, the Supreme People’s Court “issued several guiding documents on environmental law in the months following release of the revised [Environmental Protection Law]. This includes 9 Typical Cases on Environmental Protection issued shortly after the release of the new EPL; a judicial interpretation on Civil [environmental public interest litigation] in late 2014 [...], as well as [an] Opinion on holistic strengthening of environmental adjudication as a judicial guarantee for promoting ecological civilization” (关于全面加强环境资源审判工作为推进生态文明建设提供有力司法保障的意见 [...]), issued in June 2014, [to coincide with] the establishment of the environmental and natural resources tribunal at the SPC level”, EU-China Environmental Governance Programme, *Policy Report: Judges’ training in Environmental Law – Recommendations on capacity building for the judiciary in environmental adjudication*, 2015, p. 13.

565 ROBINSON N.A., “Ensuring access to justice through environmental courts”, *Pace Environmental Law Review*, Vol. 29, 2012, p. 373.

international organizations of various denominations<sup>566</sup> has been growing constantly and today the landscape of legal cooperation with China includes training programmes for Chinese lawyers and judges, funding opportunities for environmental NGOs and numerous pilot projects both at a local and at a national level.

#### **4.3.1. Legal cooperation in the field of access to justice and environmental litigation**

The ideological underpinning for many of the legal cooperation projects aimed at promoting environmental litigation in the PRC is the belief that judicial activism and greater judicial attention to certain rights and principles, if adequately supported, could lead to stricter enforcement of environmental laws in practice and contribute to the creation of an environmental rule of law in China<sup>567</sup>. The importance of “*rights-advocacy organizations, willing and able lawyers, financial aid of various types, and, in some countries, governmental rights-enforcement agencies*”<sup>568</sup> as sources of support for litigation in the public interest, famously expounded by Charles Epp in his comparative study of judicial activism, resonates in many of the cooperation programmes implemented over the last two decades in the PRC.

##### **4.3.1.1. U.S. and Canadian programmes**

The United States, both through NGOs and through programmes managed by the federal government, has been particularly active in promoting the transplant of laws, practices and ideas and in fostering reforms which reflect a certain American worldview<sup>569</sup> and – in certain instances – “*broader imperatives of U.S. foreign policy*”<sup>570</sup>. A document which provides significant insight into some of the main features and goals of legal cooperation between China and the United States in the field of environmental law is a statement

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566 See TIMOTEO M., “Sustainability of Legal Transplants and Legal Borrowings in Chinese Rules on Environmental Liability”, in WANG C., FEI A., TIMOTEO M. (edited by), *Legislative and Judicial Remedies for Environmental Torts Victims. A study in the framework of EU-China Cooperation*, Bononia University Press, Bologna 2013, p. 273.

567 See also CARPI A., “Climate Change and Clean Energy in the EU-China Perspective”, in TIMOTEO M. (edited by), *Environmental Law in Action. EU and China Perspectives*, Bononia University Press, Bologna, 2012, pp. 59 - 77.

568 EPP C., *The rights revolution: lawyers activists and Supreme Courts in comparative perspective*, University of Chicago Press, 1998, p. 19. See also STERN R.E., “On the Frontlines: Making Decisions in Chinese Civil Environmental Lawsuits”, *Law & Policy*, Vol. 32, 2010, p. 185.

569 CAROTHERS T., *Aiding democracy abroad, the learning curve*, Carnegie Endowment for International Peace, 1999, p. 212; ALFORD W.P., “Exporting the Pursuit of Happiness”, *Harvard Law Review* Vol. 113, May 2000, p. 1677.

570 DELISLE J., “Lex Americana? United States Legal Assistance, American Legal Models and Legal Change in Post- Communist World and Beyond”, Vol 20, No. 2 *University of Pennsylvania Journal of International Economic Law*, 1999, p. 180.



released by Brian Rohan, associate director of the Asia Law Initiative of the American Bar Association (“ABA”)<sup>571</sup>. The projects implemented by ABA in the People’s Republic of China were largely aimed at enhancing access to the courts, strengthening impartiality and capacity of Chinese lawyers and judges and creating “*legal norms by which citizens can defend their legal rights and demand government transparency*”<sup>572</sup>. The focus of these projects was therefore on fostering environmental litigation<sup>573</sup> and building a “*culture in which citizens know their rights, are empowered to assert them, and have a reasonable expectation of fair and impartial resolution*”<sup>574</sup>. The programmes implemented and funded by ABA were aimed at government officials (especially at a local level and in some of the areas more affected by environmental degradation) as well as “*public-spirited lawyers and academics pursuing reform agendas*”<sup>575</sup>. ABA’s flagship programme, the “China Environmental Governance Project”, launched in 2002 and funded by the U.S. State Department, included a series of training programmes on environmental law, “*focusing on those aspects of law where citizens have substantive and procedural rights vis-a-vis government*”<sup>576</sup>, followed by a series of educational events and activities, where the participants would have had a chance to apply the notions they had learnt and to better understand their practical implications.

The project laid great emphasis on the development of legal advocacy as a defense for citizens’ rights, since in ABA’s view legal advocates should play a vital role in providing training and guidance to all stakeholders, representing the public through the official channels and acting as “watchdogs”<sup>577</sup>. Moreover, an important step of the programme

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571 ROHAN B., *Clearing the Air: the human rights and legal dimensions of China’s environmental dilemma*, statement of 27<sup>th</sup> January 2003 before the Congressional/Executive Commission on China Issues Roundtable, [last accessed on 10<sup>th</sup> August 2016] available at: <http://www.cecc.gov/sites/chinacommission.house.gov/files/documents/roundtables/2003/CECC%20Roundtable%20Testimony%20-%20Brian%20Rohan%20-%201.27.03.pdf>.

572 ROHAN B., Op.cit.

573 “ABA- Asia pursues these aims through trainings, practical skills-building programs and demonstration projects that highlight rights fundamental to citizens’ relationship with government. These rights include access to governmental information, transparent and participatory decision-making and standing of citizens to challenge governmental action”, ROHAN B., Op.cit.

574 ROHAN B., Op.cit.

575 ROHAN B., Op.cit.

576 ROHAN B., Op.cit.

577 An overview of the results and of the initiatives organized within the framework of ABA’s China Environmental Governance Project is available in MOORE A., WARREN A., “*Legal advocacy in environmental public participation in China: raising the stakes and strengthening stakeholders*”, Woodrow Wilson Center, China Environment Series papers, 2006, p. 17, [last accessed on 11<sup>th</sup> August 2016] available at: [https://www.wilsoncenter.org/sites/default/files/CEF\\_Feature.1.pdf](https://www.wilsoncenter.org/sites/default/files/CEF_Feature.1.pdf).

involved the discussion and assessment (by a panel of Chinese and international experts and by local stakeholders) of a draft municipal law on public participation prepared by the Environmental Protection Bureau of Shenyang (in Laoning Province). These discussions offered to the participants a chance to acquire experience in the field of legislative drafting and even resulted in some changes being made to the draft law. The feedback from the Chinese professionals and organizations involved in the project was favourable, and the Shenyang EPB even envisioned the enactment (with the support of ABA) of training events to teach citizens how to assert the rights granted to them by the law and to promote compliance with environmental rules<sup>578</sup>. ABA seems to attribute the success of the “China Environmental Governance Project” to its ability to appeal to China’s “*reform-minded community*” and to the prestige which the involvement in a project organized by “*an influential professional association with great credibility and substantive resources*” brought to its participants<sup>579</sup>. It is however clear that the ABA does not see the reform and implementation of environmental law in China as a goal in itself:

“ [...] *ABA's Rule of Law and Environmental Governance Project in China pursues aims far broader than simply the perfection of the Chinese environmental law system. The environment is the wedge issue, the Trojan Horse, by which the ABA is working with the legal reform community in China to advance cutting edge concepts of rule of law, governance, and transparency. Environmental law is unique among legal disciplines, in that its fundamental precepts are effective procedural interactions between citizens and government, transparency of information, and citizens' legal ability to challenge acts of government. Significantly, environmental law issues typically affect large numbers of ordinary citizens in direct, tangible ways. Thus, it is an ideal vehicle by which to enhance the relationship between the citizen and the state*”<sup>580</sup>.

The fostering of effective legal advocacy and the promotion of civil and administrative environmental litigation are therefore seen as the key to introduce legal models and ideas which might one day spread through the Chinese legal system, reaching “*those areas, such as labor rights or human rights, where sensitivities continue to run so deeply that open, on the ground programming of the kind undertaken in this project is not currently feasible*”<sup>581</sup>.

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578 ROHAN B., Op.cit.

579 ROHAN B., Op.cit.

580 ROHAN B., Op.cit.

581 ROHAN B., Op.cit.

The United Nations have also been extremely active in the field of international legal cooperation with China, through the UN Development Programme (UNDP)<sup>582</sup>. While the UNDP obviously operates within the framework of the UN, the United States is by far the single largest financial contributor to the programme<sup>583</sup> and Jacques DeLisle has persuasively argued that its consultants “*relied heavily on American law materials as references and sources of comparative insight*”<sup>584</sup> in their work. Therefore, while (as we shall see) the UNDP has occasionally promoted the adoption of models drawn from the civil law tradition, due to the emphasis laid on common law models and to the similarities between the programmes implemented by the UNDP and those implemented by U.S. institutions and organizations we shall examine them in the present paragraph.

UNDP established a partnership with the (government-sponsored) All-China Environment Federation (ACEF) to promote the development of public interest litigation in China by providing training to lawyers<sup>585</sup> and legal aid to selected plaintiffs and by endorsing the reform of China’s rule of procedure to extend *locus standi* to environmental NGOs. Perhaps in part owing to the work of UNDP, both at a local and at a national level, in 2012 the Civil Procedure Law of the PRC was amended to allow “*relevant bodies and organizations prescribed by the law [to] bring a suit to the people’s courts against such acts as environmental pollution, harm of consumer’s legitimate interests and rights and*

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582 United Nations Development Programme, *Protect the environmental rights and justice of the public*, 2011 [last accessed on 11<sup>th</sup> August 2016] available at: [http://www.cn.undp.org/content/china/en/home/operations/projects/democratic\\_governance/protect-the-environmental-rights-and-justice-of-the-public.html](http://www.cn.undp.org/content/china/en/home/operations/projects/democratic_governance/protect-the-environmental-rights-and-justice-of-the-public.html).

583 United Nations Development Programme, *Contributors to regular resources*, [last accessed on 11<sup>th</sup> December 2016] available at: <http://www.undp.org/content/undp/en/home/ourwork/funding/top-contributors/core-donors.html>.

584 DELISLE J., Op.cit., p. 203.

585 “[...] *the project has conducted a series of publicity and education activities, including a survey on public opinion towards the protection of environmental rights, public exhibitions and consulting services, and distribution of 11,000 books and pamphlets to lawyers, judges, pollution victims and some of China’s environmental NGO’s. The ACEF also held seminars for legislators from the National People’s Congress (NPC) and lawyers, judges, and officials from the Legal Affairs Department of the Ministry of Environmental Protection. Crucially, these seminars covered topics such as environmental tribunals, environmental public interest litigation and China’s Environmental Protection Law, Civil Procedural Law and Administrative Procedural Law. With UNDP’s help to recruit global expertise and provide research on international best practices, training has also been provided to public interest lawyers on public participation and protecting the public’s environmental rights, and civil litigation and environmental public interest litigation*”, United Nations Development Programme, *Environmental justice: working together to protect the environment*, [last accessed on 11<sup>th</sup> August 2016] available at: [http://www.cn.undp.org/content/china/en/home/ourwork/democraticgovernance/successstories/environmental-justice--working-together-to-protect-the-enviromental-justice.html](http://www.cn.undp.org/content/china/en/home/ourwork/democraticgovernance/successstories/environmental-justice--working-together-to-protect-the-enviromental-justice--working-together-to-protect-the-enviromental-justice.html).

*other acts that undermine the public interest*<sup>586</sup>. As part of the UNDP project, a Handbook on the Protection of the Environmental Rights of the Public was produced and “dozens of TV programmes have been made and broadcasted, contributing to the raising of environmental awareness of the public in China”<sup>587</sup>. UNDP also supported the All-China Environmental Federation in bringing a public interest action against a local EPB to obtain the disclosure of environmental data and provided legal aid to almost 2,000 pollution victims in 22 different civil and administrative cases (mostly concerning water pollution) as well as training in environmental tort law for dozens of lawyers<sup>588</sup>. Moreover, financial and technical assistance from UNDP allowed ACEF to file a public interest lawsuit against a polluting firm (a textile plant) before the Wuhan Maritime Court, a controversy which received considerable attention from the media and prompted the intervention of local authorities to prevent further pollution<sup>589</sup>.

The direct involvement of the UNDP in specific pollution cases plays “an increasingly important role in helping the ACEF build its litigation skills and draw attention to the crucial role that [civil society organizations] can play in protecting environmental rights”<sup>590</sup>. Moreover, UNDP cooperated with ACEF in drafting an opinion paper on the need to establish specialized environmental courts and on the measures which should be taken to ensure their effectiveness<sup>591</sup>. Other important contributions provided by UNDP in its ongoing effort to foster environmental litigation in China are the periodic reports and

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586 Article 55 of the Civil Procedure Law of the PRC (中华人民共和国民事诉讼法; zhōng huá rén mín gòng hé guó mín shì sù sòng fǎ), as amended in 2012.

587 United Nations Development Programme, *Protect the environmental rights and justice of the public*, 2011 [last accessed on 11<sup>th</sup> August 2016] available at: [http://www.cn.undp.org/content/china/en/home/operations/projects/democratic\\_governance/protect-the-environmental-rights-and-justice-of-the-public.html](http://www.cn.undp.org/content/china/en/home/operations/projects/democratic_governance/protect-the-environmental-rights-and-justice-of-the-public.html).

588 United Nations Development Programme, *Ibid.* See also United Nations Democracy Fund, *Protect the environmental rights and justice of the public*, Project Report, 2009, [last accessed on 11<sup>th</sup> August 2016] available at: <http://www.cn.undp.org/content/dam/china/img/demgov/Prodocs/UNDP-CH-DG-ProdDoc-ProtectEnvironmentalRightsJusticeo%20thePublic.pdf>. For a full account of the project outputs and outcomes see also United Nations Democracy Fund, 4<sup>th</sup> Round Project, *Protect the environmental rights and justice of the public – Evaluation Report*, 2013 [last accessed on 12<sup>th</sup> August 2016] available at: [http://www.un.org/democracyfund/sites/www.un.org.democracyfund/files/UDF-CPR-09-320\\_ER.pdf](http://www.un.org/democracyfund/sites/www.un.org.democracyfund/files/UDF-CPR-09-320_ER.pdf).

589 United Nations Development Programme, *Environmental justice: working together to protect the environment*, [last accessed on 11<sup>th</sup> August 2016] available at: <http://www.cn.undp.org/content/china/en/home/ourwork/democraticgovernance/successstories/environmental-justice--working-together-to-protect-the-environment.html>.

590 United Nations Development Programme, *Environmental justice: working together to protect the environment*.

591 United Nations Democracy Fund, “*Protect the environmental rights and justice of the public*”, Project Report, 2009.

commentaries on the progress made by legal reform in the field of environmental protection<sup>592</sup> and the annual Rule of Law Roundtable, organized in partnership with the Ford Foundation and attended by representatives of professional associations, civil society organizations and the academia. The Roundtable offers a unique forum to discuss the role which Chinese lawyers play in promoting the rule of law and ensuring access to justice, to take stock of recent developments and outline future strategies<sup>593</sup>.

The growing professionalization of the legal profession in China, prompted by the 1996 Lawyers Law<sup>594</sup>, has been accompanied by a wide debate not only at a national but also at the international level and the UNDP has attempted to monitor and to influence this debate by publishing annual reports on the state of China's judicial reforms<sup>595</sup>. Finally, UNDP has recently organized, together with the China Biodiversity Conservation and Green Development Foundation, a stakeholder consultation on the possibility to build a "Platform of Common Knowledge for Environmental Rule of Law"<sup>596</sup>. The goal of this project is to pool the collective experience and best practices acquired by environmental NGOs, scholars, scientists and public interest lawyers from all over China and to make them

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592 After the adoption of the new Environmental Protection Law by the National People's Congress, UNDP published a brief report outlining the main obstacles to development of environmental public interest litigation in the PRC, such as the fact that most NGOs would not enjoy locus standi under Article 58 of the EPL since they do not have "*the actual technical, financial, human and managerial capacity*" to handle environmental cases. Moreover, local protectionism and the political influence of many polluting firms may restrict access to court for environmental victims. Finally, due to difficulty of assessing and quantifying environmental damages, courts may refuse to hear environmental cases. See United Nations Democracy Fund, *Rule of law and access to justice*, UN Development Programme China, issue brief, May 2015, [last accessed on 11<sup>th</sup> August 2016] available at: <http://www.cn.undp.org/content/dam/china/docs/Publications/UNDP-CH-ISSUE%20BRIEF%20on%20EPIL.pdf>.

593 United Nations Development Programme, *UNDP co-hosts 2016 annual Rule of Law Roundtable and launches annual report on China's judicial reform*, 14<sup>th</sup> June 2016 [last accessed on 11<sup>th</sup> August 2016] available at: <http://www.cn.undp.org/content/china/en/home/presscenter/articles/2016/06/14/undp-co-hosts-2016-annual-rule-of-law-roundtable-and-launches-annual-report-on-china-s-judicial-reform/>

594 (中华人民共和国律师法; zhōng huá rén mín gòng hé guó lǜ shī fǎ).

595 United Nations Development Programme, *Annual Report on China's Judicial Reform 2015*, published on 10<sup>th</sup> June 2016, [last accessed on 12<sup>th</sup> August 2016] available at: [http://www.cn.undp.org/content/china/en/home/library/democratic\\_governance/annual-report-on-china-s-judicial-reform-2015.html](http://www.cn.undp.org/content/china/en/home/library/democratic_governance/annual-report-on-china-s-judicial-reform-2015.html).

596 United Nations Development Programme, *Making environmental law work: UNDP organizes consultation to test proposal for a platform of common knowledge*, 22<sup>nd</sup> June 2016, [last accessed on 12<sup>th</sup> August 2016] available at: <http://www.cn.undp.org/content/china/en/home/presscenter/articles/2016/06/22/making-environmental-law-work-undp-co-organises-consultation-to-test-proposal-for-a-platform-for-public-participation-in-environmental-rule-of-law.html>.

available and readily accessible for citizens<sup>597</sup>.

According to UNDP's main technical advisor for this project, Professor Dan Guttman (an American lawyer and Professor at Johns Hopkins University), this platform, which is currently still in the planning stage, draws on an "*analysis of the US model of strengthening in-house capacity and collaboration between differing stakeholders*" and on the EU model of "*building multiple levels of networks among ENGOs*"<sup>598</sup>. In the implementation of these legal cooperation programmes, both the ABA and the UNDP relied heavily on the experience acquired by the Ford Foundation since the 1980s.

In 1988, the Ford Foundation was the first foreign non-governmental organization to set up offices in mainland China<sup>599</sup> and to start a legal cooperation programme with the Chinese Academy of Social Sciences (中国社会科学院; zhōng guó shè huì kē xué yuàn), an academic organization which acts under the supervision of the State Council of the PRC. Between 1983 and 1995 the largest legal cooperation project implemented by the Ford Foundation was the U.S. – China Committee for Legal Education Exchange (CLEEC), a sponsorship programme allowed hundreds of Chinese lawyers and scholars to study and do research in foreign (mostly American) law schools. The programme, which focused on seven of the most respected universities and law schools of the PRC, was also partly financed by the Luce Foundation and by the U.S. Information Agency, and for over a decade was very effective in exposing Chinese scholars and professionals to the influence of foreign legal models and ideas<sup>600</sup>. While it is difficult to ascertain whether the CLEEC actually managed to create a "*critical mass*" of foreign-trained lawyers and scholars which might set up, after their return to China, a "*mutually supportive intellectual*

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597 "*Under the new Environmental Protection Law, it is estimated that between 300-700 organizations might now technically qualify as plaintiffs for environmental public interest litigation (EPIL). However, to date fewer than 10 environmental NGOs (ENGOs) have the technical, financial and human resource capacity to bring litigation themselves. A public platform is therefore proposed as one step to meet the capacity challenges*", United Nations Development Programme, "*Making environmental law work: UNDP organizes consultation to test proposal for a platform of common knowledge*", published on 22<sup>nd</sup> June 2016.

598 United Nations Development Programme, "*Making environmental law work: UNDP organizes consultation to test proposal for a platform of common knowledge*", published on 22<sup>nd</sup> June 2016.

599 McCUTCHEON A., "Contributing to legal reform in China", pp. 159 – 196, in McCLYMONT M., GOLUB S. (edited by), *Many Roads to Justice*, The Ford Foundation, 2000, [last accessed on 11<sup>th</sup> August 2016] available at: <http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/ManyRoadstoJustice.pdf>.

600 McCUTCHEON A., Op.cit., p. 167. See also LUBMAN S.B., *Bird in a cage: legal reform in China after Mao*, Stanford University Press, 2002, p. 153.

*environment*”<sup>601</sup>, it is not possible to deny that this project had a profound impact on many Chinese scholars<sup>602</sup> (and possibly even on Chinese lawmakers). Moreover, in 1988 the Ford Foundation began to offer grants to allow Chinese judges to study abroad as part of a “training of trainers” project aimed at increasing the professionalism of the judiciary<sup>603</sup>.

Even before the CLEEC programme was discontinued due to lack of funding in 1995, the focus of the Ford Foundation’s work in the PRC had shifted from the development of a modern legal system (using Western models as a blueprint), to “*providing Chinese with access to an expanded range of ways of thinking about and using law to protect rights and promote effective, responsive governance*”<sup>604</sup>. After 1995, the Ford Foundation devoted much of its efforts on court reform and the training of judges and on “law-in-action”, which Aubrey McCutcheon defines as follows:

*“The area of work known as law-in-action has built on the Foundation’s 1993 work to support the delivery of legal services and to improve the implementation of laws in China. It now includes efforts to strengthen citizens’ awareness of law as a means to justice, demonstrate how the legal system can be used to protect rights, give practical experience to lawyers and students, and strengthen the ability of the legal system to deliver justice”*<sup>605</sup>.

The “law-in-action” activities of the Ford Foundation include funding of “*legal services, test case litigation, community legal education, and local and International comparative research to devise solutions, new laws or revisions*”<sup>606</sup>. It is important to emphasize that while the U.S. legal system and the common law tradition are certainly the main points of reference for the work of the Ford Foundation, other legal systems and models are also

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601 McCUTCHEON A., Op.cit., p. 167. In other words, McCutcheon suggests that the training of lawyers and scholars might have a “multiplier” effect, once a certain tipping point is reached.

602 “*What can certainly be concluded, [...] is that the project enabled some of China’s most important current and future legal actors to gain critical new insights. Professor He Jiahong of People’s University in Beijing credits CLEEC with increasing his critical reasoning and inspiring subtle changes in his thinking about law. Professor and Senior Judge Wan E’xiang explains that his exposure to public interest law projects through CLEEC inspired his development of the Centre for the Protection of the Rights of the Socially Vulnerable (Wuhan Centre), which operates from Wuhan University. At Wuhan University, more than ten CLEEC alumni are now the backbone of the University law faculty*”, McCUTCHEON A., Op.cit., p. 169.

603 McCUTCHEON A., Op.cit., p. 174. However, Aubrey McCutcheon also emphasizes that since the early 1995 the focus of the training provided to Chinese judges has shifted from teaching substantive law to “*fostering professional values and legal skills*” (p. 174).

604 McCUTCHEON A., Op.cit., p. 166.

605 McCUTCHEON A., Op.cit., p. 179.

606 McCUTCHEON A., Op.cit., p. 179.

taken into consideration<sup>607</sup>.

One of the main beneficiaries (and aid recipient) of the Ford Foundation's "law-in-action" project is another government-backed organization, the China Centre for Legal Aid (CCLA)<sup>608</sup>, which carries out several research and training activities on behalf of the Chinese Ministry of Justice and coordinates the legal aid work required from each Chinese lawyer in order to obtain the renewal of her or his annual license to practice. The Ford Foundation has also supported the Administrative Law Research Group (全国人大委员会法制工作委员会行政立法研究组; quán guó rén dà wěi yuán huì fǎ zhì gōng zuò wěi yuán huì xíng zhèng lì fǎ yán jiū zǔ), another organization with strong ties to the Chinese government<sup>609</sup>. The most important product of this partnership was the first draft of what became the 1994 State Compensation Law of the PRC<sup>610</sup>, a law which for the first time recognized the right of an injured citizen to obtain compensation from the State if a State body or a functionary exercised their powers unlawfully, infringing upon the rights and interests of the citizen and causing losses or damages as a result<sup>611</sup>.

The Ford Foundation continues to promote judicial reform in the PRC by supporting pilot projects within the Chinese judiciary, providing valuable research on the functioning of the courts (especially in the rural areas where a majority of the Chinese population still lives), encouraging the establishment of judges' professional associations and providing training programmes (such as the judicial training programme offered by the South Central University of Political Science and Law in Wuhan)<sup>612</sup>. In particular, the Foundation has provided grants to promote reform of the rules on trial procedure, judicial appointments and court budgets. Within the framework of its "legal empowerment strategy"<sup>613</sup>, the Ford

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607 "Opportunities were created for government officials and their academic advisors to study legislative approaches in a variety of countries with different legal systems, including Australia, France, Germany, India, Japan, Thailand, and the United States.", McCUTCHEON A., Op.cit., p. 170. See also NOVARETTI S., Op.cit. However, it is worth noticing that while some of the training programmes funded by the Ford Foundation were characterized by a comparative outlook, most of the academic exchanges took place with U.S. universities and involved introductory courses to U.S. Law.

608 (中华共和国司法部法律援助中心; zhōng huá gòng hé guó sī fǎ bù fǎ lǚ yuán zhù zhōng xīn).

609 McCUTCHEON A., Op.cit., p. 171.

610 (中华人民共和国国家赔偿法; zhōng huá rén mín gòng hé guó guó jiā péi cháng fǎ).

611 Article 2 of the 1994 State Compensation Law of the People's Republic of China.

612 McCUTCHEON A., Op.cit., p. 174.

613 "Legal empowerment is the use of legal services and related development activities to increase disadvantaged populations' control over their lives. It is consistent with a more general concept used by the World Bank: 'In its broadest sense, empowerment is the expansion of freedom of choice and action.' The distinguishing feature of legal empowerment is that it involves the use of any of a diverse array of legal services for the poor to help advance those freedoms", from GOLUB S., "Beyond rule of law



Foundation has also championed the establishment in 1992 of one of China's first legal aid centres in Wuhan, specialized in providing legal assistance and ensuring access to justice for some of the most marginalized sections of society (such as senior citizens and women)<sup>614</sup> and for the inhabitants of the rural areas who are bearing the brunt of the environmental crisis.

Following the example of the Wuhan Centre, over the following decades several Universities and Law Schools across China set up their own legal clinics to provide vital assistance to the disenfranchised and to allow their students to gain valuable practical experience. One of these legal aid organizations, the Center for Legal Assistance of Pollution Victims, was a major recipient of financial support from the Ford Foundation<sup>615</sup>. In its own publications the Ford Foundation tried to draw some conclusions from its decades of work in China and to outline the valuable lessons learnt:

- In the long term, grants and training programmes aimed at scholars and at the teaching community can have an impact on legal reform.
- Grant programmes are most effective when they are aimed at scholars affiliated to the government or with direct access to lawmakers.
- Judicial training programmes can have an impact even beyond the substantive legal notions taught, by promoting judicial independence and professionalism.
- To be effective, judicial training must be accompanied by a parallel effort to educate the public on their rights under the law.
- Legal aid programmes and legal clinics can play a vital role not only by ensuring access to justice for marginalized sections of society but also by collecting valuable information on the practical implementation and the effectiveness of laws<sup>616</sup>.

One further lesson that we can draw from an analysis of the work of the Ford Foundation and of other transnational advocacy organizations is that legal cooperation in China seems to be most effective when foreign NGOs interface with the government or with government-backed local actors. As pointed out by Rachel Stern, “*in a strong, illiberal*

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*orthodoxy. The legal empowerment alternative*”, Carnegie Endowment Working Papers, Issue 41, 2003, p. 25, [last accessed on 11<sup>th</sup> August 2016] available at: <http://carnegieendowment.org/files/wp41.pdf>. See also NOVARETTI S., Op.cit., pp. 119 – 121.

614 McCUTCHEON A., Op.cit., p. 184.

615 According to Rachel Stern, between 2000 and 2008 the CLAPV received around 880,000 USD from the Ford Foundation (see STERN R.E. *Environmental Litigation in China. A study in political ambivalence*, Cambridge University Press, New York, 2013, p. 183).

616 McCUTCHEON A., Op.cit., pp. 186 – 189.

*state, officials are impossible to ignore*”<sup>617</sup>.

The Canadian Bar Association (CBA) has also been extremely active in the People’s Republic of China, working in close collaboration with the All-China Lawyers Association to provide training to Chinese lawyers, organize study tours and workshops<sup>618</sup>. The CBA provided funding for two separate projects aimed at ensuring access to justice for marginalized groups (such as migrant workers), which included training courses in pilot provinces and workshops on Canadian best practices and drew largely on the experience acquired by Canadian lawyers and officials in providing legal aid to Canada’s aboriginal communities<sup>619</sup>.

A strong emphasis on the training of lawyers and judges also characterizes the projects funded by the National Resources Defense Council (NRDC), which is trying to foster environmental public interest litigation in China by exposing local experts to foreign legal models and ideas<sup>620</sup>. Over the years, the NRDC has collaborated with the Center for Legal Assistance of Pollution Victims to publish the first “*citizen’s guide in China on how to use the law to protect environmental rights*”<sup>621</sup>. Significant funding for legal aid and awareness programmes ran by Chinese environmental NGOs also came from the Global Greengrants Fund<sup>622</sup> (which has provided, between 2000 and 2006, “*173 small grants (ranging from \$200 to \$4,000) to grassroots environmental groups and student environmental associations at universities in China*”<sup>623</sup>), ECOLOGIA (ECOlogists Linked for Organizing Grassroots Initiatives and Action)<sup>624</sup> and the Rockefeller Brothers Fund<sup>625</sup>.

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617 STERN R.E. *Environmental Litigation in China. A study in political ambivalence*, Cambridge University Press, New York, 2013, p. 182.

618 Canadian Bar Association, *Capacity building with the Chinese Bar*, [last accessed on 8<sup>th</sup> September 2016] available at: <http://www.cba.org/CBA-International-Initiatives/Our-Projects/Past-Projects/China/Capacity-Building-with-the-Chinese-Bar>.

619 Canadian Bar Association, *Rule of law: legal aid for marginalized groups in China*, [last accessed on 8<sup>th</sup> September 2016] available at: <http://www.cba.org/CBA-International-Initiatives/Our-Projects/Past-Projects/China/Rule-of-Law-Legal-Aid-for-Marginalized-Groups-in-C>.

620 Natural Resources Defense Council, *NRDC Builds Public Capacity: Involving china’s people is Essential for Effective Environmental Enforcement*, April 2007, [last accessed on 13<sup>th</sup> August 2016], available at: <https://www.nrdc.org/sites/default/files/capacity.pdf>.

621 Natural Resources Defense Council, *Working with environmental organizations*, [last accessed on 13<sup>th</sup> August 2016], available at: [http://www.nrdc.cn/english/E\\_our\\_program\\_mon.php?id=991&cid=182](http://www.nrdc.cn/english/E_our_program_mon.php?id=991&cid=182).

622 A list of the grantees of the Global Greengrants Fund in the PRC is available at: [https://www.greengrants.org/programs/search/?region\[\]=Asia&country\[\]=China](https://www.greengrants.org/programs/search/?region[]=Asia&country[]=China) [last accessed on 13<sup>th</sup> August 2016].

623 STARKE L. (edited by), *State of the World 2006, Special focus: China and India*, The Worldwatch Institute, WW Norton & Co., New York and London, 2006, p. 164.

624 STARKE L., Op.cit., p. 164.

625 GUO S., GUO B. (edited by), *Thirty Years of China-U.S. Relations. Analytical approaches and*

As regards legal cooperation between academic institutions, one of the most active players was the Vermont Law School, which in 2006 started the U.S. – China Partnership for Environmental Law<sup>626</sup> with crucial support from the U.S. Agency for International Development<sup>627</sup> and in collaboration with SunYat-Sen University, the Southwest Forestry University, the China Environment Forum at the Woodrow Wilson International Center for Scholars, Renmin University of China and the Center for Legal Assistance to Pollution Victims. This programme (which has since been renamed “U.S. – Asia Partnership for Environmental Law”) has provided training to thousands of Chinese lawyers and scholars in the field of environmental law and environmental justice and has supported several research projects between U.S. and Chinese law students<sup>628</sup>.

Since the year 2000, the U.S. government has made available almost 50 million dollars<sup>629</sup> to fund rule of law and environmental protection programmes in the People’s Republic of China. Most of this money was spent to set up training programmes for Chinese lawyers (provided through the All-China Lawyers’ Association), to promote the creation of legal aid schemes and to strengthen public participation in environmental governance<sup>630</sup>. Quite unexpectedly, in 2012, the U.S. government decided to cut funding for environmental programmes in the PRC, with few limited exceptions<sup>631</sup>.

#### **4.3.1.2. European programmes**

While U.S. organizations and institutions certainly opened the way in the field of legal cooperation with the PRC, their European counterparts have not been slow to follow in their trail. There are however significant financial and strategic differences between the European and the U.S. experiences. In particular, up until the end of the 2000s U.S. projects have been considerably better funded, and only over the last decade European actors have been able to match their American “rivals” in terms of spending<sup>632</sup>. Moreover,

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*contemporary issues*, Lexington Books 2010, p. 223; STERN R.E. *Environmental Litigation in China. A study in political ambivalence*, Cambridge University Press, New York, 2013, p. 186.

626 The website of the U.S. – China Partnership for Environmental Law (today the U.S. – Asia Partnership for Environmental Law) is available at: <http://www.vermontlaw.edu/academics/centers-and-programs/us-asia> [last accessed on 13<sup>th</sup> August 2016].

627 LUM. T., *U.S. Assistance Programs in China*, Congressional Research Service 7-5700, December 2014, [last accessed on 13<sup>th</sup> August 2016], available at: <https://www.fas.org/sgp/crs/row/RS22663.pdf>.

628 An online library of the research papers produced within the framework of the U.S. – China Partnership for Environmental Law is available at: <http://www.vermontlaw.edu/academics/centers-and-programs/us-asia/publications/joint-research-project-papers> [last accessed on 13<sup>th</sup> August 2016].

629 LUM. T., Op. cit., p. 14.

630 LUM. T., Op. cit., pp. 10 – 11.

631 See LUM. T., Op. cit., pp. 10 – 11.

632 See SCHULTE – KULKMANN N., HEILMANN S., *U.S. – China Legal Cooperation – Part III: an*

while U.S. players have focused on capacity-building projects without setting specific goals or roadmaps, the European Union has strived to organize its project in a single, uniform framework, employing capacity-building and public awareness initiatives to bring about institutional and systemic change. The more focused approach adopted by the EU and by European governments and NGOs may reflect the need to allocate limited funds in the most efficient way.

In 2008, several European universities, in collaboration with the China University of Political Science and Law, established the China – EU School of Law, a higher education institution which offers professional training for judges, lawyers and civil servants<sup>633</sup>. The China – EU School of Law, whose main goal is to encourage academic exchanges and expose Chinese professionals to European legal models and experiences, today offers double degrees and training courses to Chinese professionals on a wide range of subjects, including European environmental law, European private law<sup>634</sup> and has recently published (in collaboration with the University of Bologna) two volumes on environmental litigation and environmental justice in China and the EU<sup>635</sup>.

However, the single largest environmental legal cooperation programme undertaken by the European Union has been the EU – China Environmental Governance Programme (“EGP Programme”; 中欧环境治理项目; zhōng ōu huán jìng zhì lǐ xiàng mù), a 15 million euro project implemented in cooperation with the Ministries of Commerce and of Environmental Protection of the PRC<sup>636</sup>. The goal of this programme, which ran from December 2010 until December 2015, was to strengthen environmental governance in the PRC pursuant to the principles enshrined in the Aarhus Convention<sup>637</sup>, and in particular to

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*overview of private American-Chinese cooperation programmes, Chinapolitik, China Analysis 44, June 2005, [last accessed on 28<sup>th</sup> November 2016] available at: [http://www.chinapolitik.de/files/no\\_44.pdf](http://www.chinapolitik.de/files/no_44.pdf); and EU-China Environmental Governance Programme, Knowledge Base, [last accessed on 3<sup>rd</sup> December 2016] available at: <http://www.ecegp.com/english/knowledge/knowledge.asp>.*

633 The website of the China – EU School of Law can be found at: <http://en.cesl.edu.cn/index.htm> [last accessed on 6<sup>th</sup> September 2016].

634 China – EU School of Law, *Professional training*, [last accessed on 13<sup>th</sup> August 2016] available at: [http://en.cesl.edu.cn/Professional\\_Training1.htm](http://en.cesl.edu.cn/Professional_Training1.htm).

635 WANG Canfa, FEI A., TIMOTEO M. (edited by), *Legislative and Judicial Remedies for Environmental Torts Victims. A study in the framework of EU-China Cooperation*, Bononia University Press, Bologna 2013; TIMOTEO M. (edited by), *Environmental Law in Action. EU and China Perspectives*, Bononia University Press, Bologna, 2012.

636 EU-China Environmental Governance Programme, *Presentation*, [last accessed on 13<sup>th</sup> August 2016] available at: <http://www.ecegp.com/english/aboutus/aboutus.asp>. See also European Commission, *EU-China Environmental Governance Programme*, [last accessed on 13<sup>th</sup> August 2016] available at: [http://ec.europa.eu/europeaid/case-studies/eu-china-environmental-governance-programme\\_en](http://ec.europa.eu/europeaid/case-studies/eu-china-environmental-governance-programme_en).

637 Convention on access to information, public participation in decision-making and access to justice in

enhance public access to environmental data, public participation to policymaking, to ensure access to justice for pollution victims and to promote corporate environmental responsibility. The programme included a series of partnership projects with legal government authorities and NGOs, and in particular with the Center for Legal Assistance of Pollution Victims<sup>638</sup> (an organization which, over the years, has organized several training courses and conference on environmental law issues<sup>639</sup>).

The collaboration with the CLAPV produced a considerable number of research reports, essays, case studies as well as handbooks for the training of Chinese judges<sup>640</sup>. Moreover, between 2012 and 2014, and with funding from the EGP Programme, the University of Bologna and the CLAPV published two surveys on the recent developments in the field of environmental law in China and in the EU<sup>641</sup>. This research was characterized by its comparative outlook and focused on a wide range of issues of administrative, international, criminal and private law, without trying to promote European legal models and policies as ready-made solutions for China's environmental problems, but rather examining them within the legal systems which had produced them.

The partnership between the CLAPV and the University of Bologna included the implementation of a series of capacity building initiatives<sup>642</sup> aimed at promoting the development of an "environmental rule of law" by ensuring effective access to justice and fostering environmental public interest litigation. To this end, the CLAPV and the University of Bologna provided training for about 160 judges and prosecutors in Western China and organized two one-week long training courses on environmental law between

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environmental matters, Aarhus, Denmark, 25<sup>th</sup> June 1998. Under Article 9 of the Aarhus Convention, "[...] each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment. [These procedures] shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. [...] Decisions of courts, and whenever possible of other bodies, shall be publicly accessible".

638 CLAPV-UNIBO-China-EU, *Presentation*, [last accessed on 13<sup>th</sup> August 2016] available at: [http://web.cupl.edu.cn/html/clapv/clapv\\_2402/clapv\\_2402.html](http://web.cupl.edu.cn/html/clapv/clapv_2402/clapv_2402.html).

639 CLAPV, *Training strengthens environmental law in China*, [last accessed on 13<sup>th</sup> August 2016] available at: [http://www.clapv.org/english\\_lvshi/meitibaodao\\_content.asp?id=31&title=Media&titlecontent=meitibaodao\\_list&lei1=107](http://www.clapv.org/english_lvshi/meitibaodao_content.asp?id=31&title=Media&titlecontent=meitibaodao_list&lei1=107).

640 CLAPV-UNIBO-China-EU, *Estimated results*, [last accessed on 13<sup>th</sup> August 2016] available at: [http://web.cupl.edu.cn/html/clapv/clapv\\_2422/clapv\\_2422.html](http://web.cupl.edu.cn/html/clapv/clapv_2422/clapv_2422.html).

641 CLAPV-UNIBO-China-EU, *Published results*, [last accessed on 14<sup>th</sup> August 2016] available at: [http://web.cupl.edu.cn/html/clapv/clapv\\_2423/clapv\\_2423.html](http://web.cupl.edu.cn/html/clapv/clapv_2423/clapv_2423.html).

642 EU-China Environmental Governance Programme, *CLAPV: Capacity building of environmental justice and guarding environmental rights in Western China*, [last accessed on 4<sup>th</sup> September 2016] available at: <http://www.ecegp.com/files/6/CLAPV%20Result%20Sheet%202015.pdf>.

2013 and 2014 to allow Chinese and European experts to exchange views and experiences<sup>643</sup>. As we shall see, the fostering of transnational epistemic communities has been one of the main goals of the EU – China Environmental Governance Programme.

Moreover, the parties to this cooperation project provided technical support for the establishment of two specialized environmental tribunals in Yunnan Province and organized two international conferences on environmental tort liability and public interest litigation in Beijing and Kunming (in June 2013 and June 2014, respectively). A study tour was also organized to allow Chinese judges and public prosecutors to meet European judges and acquire first-hand experience of the European court system. The cooperation between the CLAPV and the University of Bologna produced a list of policy recommendations submitted to the Supreme People’s Court, many of which “*were reflected in the draft Judicial Interpretation of the Environmental Tort Liability*”<sup>644</sup> which came into effect in 2015.

At a local level, the most significant outcome of the EGP programme was the “EGP – Guizhou Project”<sup>645</sup>, aimed at improving citizens’ awareness of their environmental rights and access to justice in Guizhou Province (where China’s first environmental courts had been established). The main beneficiaries of the Guizhou Project (which involved partnerships with the All-China Environmental Federation and with the IVL Swedish Environmental Research Institute) were stakeholders and local pollution victims, as well as public officials and environmental lawyers. In particular, “*capacity building activities were [...] offered to local as well as nation-wide non-governmental organizations in order to empower them and provide them with EU experiences and techniques in the protection of environmental justice*”<sup>646</sup>. Moreover, through the Guizhou Project the EU hoped to improve knowledge of environmental law and environmental issues among local judges and judicial officials, in order to increase the effectiveness of the court system and the

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643 Ibid.

644 EU-China Environmental Governance Programme, *CLAPV: Capacity building of environmental justice and guarding environmental rights in Western China*. The policy recommendations mentioned the need to increase legal certainty in the field of environmental damage assessment (by adopting a specific law or clear compensation mechanisms, which could include a liability insurance system), to create a public interest litigation system and provide legal aid to pollution victims.

645 EU-China Environmental Governance Programme, *Documentation from EGP-Guizhou events*, [last accessed on 13<sup>th</sup> August 2016] available at: <http://www.egp-guizhou.com/documentationofevents.4.4dd97c213ed2e2e70149f.html>; see also EU-China Environmental Governance Programme, *Improving access to environmental justice to protect people’s rights in Guizhou Province*.

646 EU-China Environmental Governance Programme, *Improving access to environmental justice to protect people’s rights in Guizhou Province*.

professionalization of the judiciary.

The long term goal of the project was to set an example at a local level that could be replicated nation-wide and to “*provide input to central level policy-making in China*”<sup>647</sup>. To this end, the parties involved in the project disseminated among local officials a considerable amount of research and information material<sup>648</sup> and produced a handbook to explain to the general public how to protect one’s environmental rights<sup>649</sup>. The material distributed also included training handbooks on the scientific aspects of environmental policy (in a form which would be accessible for readers without a scientific background)<sup>650</sup>. The most significant feature of the Guizhou Project seems to be its multifaceted nature. The project was in fact a complex framework project aimed at promoting the creation of specialized courts, training judges and lawyers and at ensuring the success of the initiative by spreading awareness.

Under the umbrella of the EGP-Guizhou Programme, several organizations and institutions provided training on environmental negotiation techniques, to improve the way in which government officials, judges and lawyers interface with stakeholders and with the general public when dealing with environmental disputes. Study tours were organized, bringing

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647 Ibid.

648 EU-China Environmental Governance Programme, *EGP-Guizhou project materials*, [last accessed on 13<sup>th</sup> August 2016] available at: <http://www.egp-guizhou.com/projectmaterials.4.3d71f8313d6a4ffc7933f0.html>. “A TV-program was broadcasted [through the] *Guizhou Remote Education Cable System*, covering most of Guizhou; an instructive cartoon on environmental rights protection was uploaded [on] popular social media platforms and stakeholders’ websites, gaining recognition from [Ministry of Environmental Protection] officials; about 4000 rural and city folk watched a mini-drama on environmental rights and about 300 persons, including representatives of relevant governmental departments, attended seminars. Two simplified handbooks on environmental rights were produced and circulated among key target groups, *The Digital Handbook for Environmental Rights Protection in Guizhou* was made available on the Guizhou EPB website; and over 30 articles were published [on] 140 [instances on] major websites”, EU-China Environmental Governance Programme, *Local partnership projects: results and achievements*, p. 21 [last accessed on 18<sup>th</sup> August 2016] available at: <http://www.ecegp.com/files/1/EGP%20Local%20Partnership%20Projects%20Results%20and%20Achievements%202015.pdf>.

649 EU-China Environmental Governance Programme, *EGP-Guizhou handbook “Do you know how to protect your environmental rights?”*, [last accessed on 13<sup>th</sup> August 2016] available at: <http://www.egp-guizhou.com/projectevents/projectevents/doyouknowhowtoprotectyourenvironmentalrights.5.41ba7c1514a956c967d1475.html>.

650 EU-China Environmental Governance Programme, *EGP-Guizhou handbook “Basic Environmental Science Training Material”*, November 2013 [last accessed on 16<sup>th</sup> August 2016] available at: <http://www.egp-guizhou.com/download/18.21d4e98614280ba6d9e53b1/1409060162993/Environmental+Knowledge+Training+Material+FINAL+ENG.pdf>. The focus of this handbook was on the air, water and soil pollutions and included some of the problems which public officials, lawyers and judges most often have to deal with in Guizhou.

Chinese judges and officials in contact with their Swedish counterparts and allowing them to “discuss the issue of access to environmental justice together with European stakeholders, get insight to the European experiences on environmental justice and compare and discuss the different legal systems”<sup>651</sup>.

During these high-level exchanges, Chinese lawyers and officials attended seminars on the principles and the implementation of the Aarhus Convention<sup>652</sup>, on the Swedish Environmental Code<sup>653</sup>, on environmental litigation and the judiciary in Sweden<sup>654</sup>, and on the international projects implemented by one of Sweden’s most influential environmental NGOs, the Swedish Society for Nature Conservation<sup>655</sup>. It is worth emphasizing the importance of the cooperation between Sweden and the PRC, given that the former can

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651 EU-China Environmental Governance Programme, *EGP-Guizhou Activity visibility report*, October 2013 [last accessed on 16<sup>th</sup> August 2016] available at: [http://www.egp-guizhou.com/download/18.372c2b801403903d27530b3/1381406025076/3\\_IVL\\_Guizhou\\_Activity+Visibility+Report+20130923-26.pdf](http://www.egp-guizhou.com/download/18.372c2b801403903d27530b3/1381406025076/3_IVL_Guizhou_Activity+Visibility+Report+20130923-26.pdf).

652 EU-China Environmental Governance Programme, *Access to Justice in Environmental Matters, The Aarhus Convention 1998 - 2013*, Lecture given by Prof. Jan Darpö (Uppsala University) September 2013 [last accessed on 16<sup>th</sup> August 2016] available at: [http://www.egp-guizhou.com/download/18.372c2b801403903d2752fb7/1381306001400/4.+Prof.+Jan+Darpö%C3%B6\\_Aarhus+Convention.pdf](http://www.egp-guizhou.com/download/18.372c2b801403903d2752fb7/1381306001400/4.+Prof.+Jan+Darpö%C3%B6_Aarhus+Convention.pdf).

653 EU-China Environmental Governance Programme, *Swedish Environmental Code*, Lecture given by Camilla Lindholm (Swedish Environmental Protection Agency) September 2013 [last accessed on 16<sup>th</sup> August 2016] available at: [http://www.egp-guizhou.com/download/18.372c2b801403903d2752fb5/1381305981353/3.+Ms.+Camilla+Lindholm\\_Swedish+Environmental+Code.pdf](http://www.egp-guizhou.com/download/18.372c2b801403903d2752fb5/1381305981353/3.+Ms.+Camilla+Lindholm_Swedish+Environmental+Code.pdf).

654 EU-China Environmental Governance Programme, *The Swedish Environmental Code and Environmental Courts*, Lecture given by Prof. Gabriel Michanek (Uppsala University) September 2013 [last accessed on 16<sup>th</sup> August 2016] available at: [http://www.egp-guizhou.com/download/18.372c2b801403903d2752fb9/1381306012616/5.+Prof.+Gabriel+Michanek\\_Environmental+Codes+and+courts.pdf](http://www.egp-guizhou.com/download/18.372c2b801403903d2752fb9/1381306012616/5.+Prof.+Gabriel+Michanek_Environmental+Codes+and+courts.pdf); EU-China Environmental Governance Programme, *The experiences of the Swedish land and environmental Court of Appeal*, Lecture given by Åsa Marklund Andersson (Judge at the Court of Appeal) and Bengt Jonsson (Technical Judge) September 2013 [last accessed on 16<sup>th</sup> August 2016] available at: [http://www.egp-guizhou.com/download/18.372c2b801403903d2752fc0/1381306070757/8.+Ms.+%C3%85sa+Marklund\\_The+Land+and+Environmental+Court+of+Appeal.pdf](http://www.egp-guizhou.com/download/18.372c2b801403903d2752fc0/1381306070757/8.+Ms.+%C3%85sa+Marklund_The+Land+and+Environmental+Court+of+Appeal.pdf); EU-China Environmental Governance Programme, *Land and Environment Court at Nacka District Court*, Lecture given by Anders Lillienau and Jan-Olof Arvidsson (Judges) January 2015 [last accessed on 16<sup>th</sup> August 2016] available at: [http://www.egp-guizhou.com/download/18.41ba7c1514a956c967d1548/1424866415821/3.+Eur+tour+2\\_Nacka+Land+and+Environmental+Court\\_CN.pdf](http://www.egp-guizhou.com/download/18.41ba7c1514a956c967d1548/1424866415821/3.+Eur+tour+2_Nacka+Land+and+Environmental+Court_CN.pdf).

655 EU-China Environmental Governance Programme, *SSNC Global Programme*, Lecture given by Andreas Prevodnik (Swedish Society for Nature Conservation) September 2013 [last accessed on 16<sup>th</sup> August 2016] available at: [http://www.egp-guizhou.com/download/18.372c2b801403903d2752fc4/1381306100569/10.+Mr.+Andreas+Prevodnik\\_Swedish+Society+For+Nature+Conservation.pdf](http://www.egp-guizhou.com/download/18.372c2b801403903d2752fc4/1381306100569/10.+Mr.+Andreas+Prevodnik_Swedish+Society+For+Nature+Conservation.pdf). Other seminars and workshops offered precious insight on the role which environmental NGOs may play in ensuring access to court to pollution victims and in holding administrative authorities accountable to the public.



boast one of the most advanced systems of environmental courts in Europe (specialized courts can also be found also in Austria and Finland<sup>656</sup>), while the latter is currently trying to establish its own specialized courts.

Since, as we have seen, environmental cases generally turn on causation and on the plaintiff's ability to prove the damage suffered, many of these training events and a considerable amount of the training material focused on the issue of evidence collection and on environmental damage assessment, presenting case studies and examples drawn from the European experience<sup>657</sup>. Finally, awareness-raising seminars on environmental litigation and access to justice were organized in Guiyang, inviting villagers and local stakeholders to attend them. One of the most significant products of the EGP - Guizhou Project was a collection of best practices for Chinese environmental courts<sup>658</sup>. Brining to bear the experience acquired by the environmental courts of Guizhou, the Chinese and European experts involved in the EGP – Guizhou Programme were able to provide some guidelines to allow local judges to avoid some of the pitfalls involved in environmental litigation. According to these best practices, even before the pollution victim has filed a lawsuit against the polluter or against local authorities, environmental courts should:

- Intervene when environmental pollution has been reported in order to “nip it in the bud”. Local environmental courts should prompt the competent administrative authorities to adopt all necessary measures to limit – and if possible, remedy – pollution, “*abandoning the passive tradition of awaiting litigation*”<sup>659</sup>.
- Establish an effective partnership with the local Environmental Protection Bureaus, since “*as a judicial organ, the court cannot [ensure the effective] protection [of]*

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656 In 1994 the Austrian Bundesverfassung was amended to allow the establishment of the Umweltsenat, which handles controversies concerning environmental permits and impact assessments (see MADNER V., “The Austrian environmental senate”, *Journal of Court Innovation*, Vol. 3, 2010, pp. 23 – 35). In Finland, the Administrative Court of Vaasa specializes in controversies concerning environmental impact and water permits (see ANKER H.T., NILSSON A., “The role of courts in environmental law – Nordic perspectives”, *Journal of Court Innovation*, Vol. 3, 2010, p. 114). In Finland and Austria (as in Sweden), environmental courts therefore handle (mostly) administrative cases.

657 EU-China Environmental Governance Programme, *Advanced EDA Tools in a European Case*, Lecture given by Johan Strandberg, December 2014 [last accessed on 16<sup>th</sup> August 2016] available at: <http://www.egp-guizhou.com/download/18.1acdfdc8146d949da6d5be1/1418224205521/2-EDA+workshop+ppt2+3+dec+2014+Johan+Strandberg-EN.pdf>.

658 EU-China Environmental Governance Programme, *EGP-Guizhou best practice of ecological court in promoting environmental justice*, March 2015 [last accessed on 13<sup>th</sup> August 2016] available at: <http://www.egp-guizhou.com/download/18.36f3359214d517c6a5827a/1432197627726/4.+Guizhou+Best+Practice+of+Ecological+Court+in+Promoting+Environmental+Justice+ENG+%282015%29.pdf>.

659 *Ibid.*, p. 5.

*public environmental rights and interests [all by] itself*<sup>660</sup>.

- Coordinate their efforts with other judicial authorities to actively crack down on environmental crime.

Moreover, after an action has been brought before an environmental court, judges should:

- Rely of the expertise of the Advisory Committee of Environmental Judgments set up by the Intermediate People's court of Guiyang in order to “*ensure [that] the environmental judgment is open, fair and just and the judicial power is exercised in a transparent way*”<sup>661</sup> and according to the law and the best scientific knowledge available.
- Adjudicate on the basis of expert testimony, whenever this kind of evidence is available. It is worth noting that the drafters of the best practices were clearly mindful of the fact that most parties involved in environmental disputes in rural China cannot always find (or cannot afford to hire) reliable experts.
- Make full use of interim measures and “temporary restraining orders” to avoid that further damage is caused by pollution before the court has had a chance to rule on the merits of the case.

Interestingly, the EGP-Guizhou best practices suggest the implementation of a “return visit system” and of a “third-party supervision system”<sup>662</sup> to ensure the enforcement of the judgment and monitor the polluted site “*in order to avoid recurrence of the pollution*”<sup>663</sup>. Another important outcome of the EGP –Guizhou Programme was a comparative study of environmental tort legislation and practice and access to justice in Sweden and in the People's Republic of China<sup>664</sup>. The results of this analysis are extremely interesting (if perhaps not very artfully expressed) and deserve to be quoted in full:

*“The conclusion, when comparing the Swedish and Chinese environmental tort*

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660 Ibid., p. 5.

661 Ibid., p. 5.

662 The EGP-Guizhou documents database includes the “Guizhou Best Practices on third-party supervision”, see EU-China Environmental Governance Programme, *EGP-Guizhou Policy Synthesis Report – improving access to environmental justice to protect people's environmental rights in Guizhou province*, Appendix 7, 2015 [last accessed on 13<sup>th</sup> August 2016] available at: <http://www.egp-guizhou.com/download/18.36f3359214d517c6a58272/1432196982915/4.+Policy+Synthesis+Report+ENG+%28updated+2015%29.pdf>

663 Ibid., p. 8.

664 EU-China Environmental Governance Programme, EGP-Guizhou, *Environmental Tort. A comparison of environmental tort and access to justice in China and Sweden*, 2013 [last accessed on 13<sup>th</sup> August 2016] available at: <http://www.egp-guizhou.com/download/18.36f3359214d517c6a58281/1432197738596/4.+Environmental+tort+comparison+Sweden+and+China+ENG+%282013%29.pdf>.

*legislation, is that its outputs and outcomes are very different. In China, for example, it is important for the [pollution victim] to proceed in court when an environmental damage has occurred to get compensation, while the reverse order prevail[s] in Sweden due to the vast insurance system. Moreover, in contrast to Sweden, environmental tort cases often fill an important role for environmental protection in China, especially when the official[s] lack in their supervision”<sup>665</sup>.*

The comparative research carried out by the experts involved in the project therefore appears to confirm the view that the significant progress achieved in the field of environmental tort litigation over the last decade is attributable – at least in some measure - to the apathy of the administrative enforcement authorities, especially in rural China. This study also offers some suggestions in order to improve environmental justice in China, emphasizing in particular the need to reduce the “*gap between the written environmental law and its application, implementation and enforcement*”<sup>666</sup> determined by the lack of properly trained judges and judicial staff.

As we have already seen, judges unfamiliar with Chinese environmental law may fail to apply the principle of the reversal of the burden of proof set out by Article 66 of the Tort Law of the PRC or may not apply the strict liability principle enshrined in Article 65<sup>667</sup>.

Moreover, this research showed that in both China and in Sweden, judges had struggled with the absence of a statutory definition of environmental damage<sup>668</sup>, reaching however significantly different conclusions:

*“One material improvement would be to introduce a legal definition of “environmental damage” in both the Chinese and the Swedish system, since there is no legal definition today. This fact has to some extent made the scope of*

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665 Ibid. p. 7.

666 Ibid. p. 7.

667 “Another common misinterpretation of the law is that the tort action must be illegal in order for the plaintiff to even present a claim in court. That is not an accurate interpretation of the law according to article 65 in Tort Law [which provides that] “where any harm is caused by environmental pollution, the polluter shall assume the tort liability.” According to this [provision] tort liability is strict for the polluter, whether the tort action was illegal or not. In some situations there are other regulations (such as EPL and GPCL) that may be applicable in parallel to Tort Law when an environmental damage has occurred. When two different regulations are applicable over the same situation, mistakes can easily be made if one does not know about the Rule of *Lex Specialis*”, Ibid. p. 8. See also TIMOTEO M., “Law and language: issues related to legal translation and interpretation of Chinese rules on tortious liability of environmental pollution”, *China –EU Law Journal*, Springer, 2015, Vol. 4, pp. 126 – 127.

668 However, Swedish judges and lawyers would appear to be able to rely on the definition of “environmental damage” provided by Article 2 of Directive 2004/35/EC.

*“environmental damage” unclear. A clarification is as important for the public as for the authorities. However it is clear that proper ecological damage (with no connection to any anthropogenic interests) are not covered by tort liability in China. In Sweden, however, the situation is different. Through “the wolverine case”<sup>669</sup> the state has been granted a kind of tort compensation for ecological damages, even if the Supreme Court classified the injury as a financial loss. [...] A legal definition of “environmental damage” would be a positive clarification of current law in both Chinese and Swedish law”<sup>670</sup>.*

While different legal systems have developed their own definitions of environmental harm or natural resource damage, according to the definition formulated by the UNEP in 1998 environmental damage is a change that has a measurable adverse impact on a specific environment or on any of its components, including its value and its ability to support an acceptable quality of life and a viable ecological balance<sup>671</sup>.

Legal systems which do not have specific rules on liability for environmental damage generally rely solely on the general principles governing civil liability. However, in spite of the reform of the Tort Law and of the Environmental Protection Law, Chinese tort law appears to be still ill-equipped to deal with damage done to the ecosystem.

The main policy recommendations emerged from the EGP-Guizhou Programme are

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669 While the Swedish Environmental Code does not recognize the State’s right to seek compensation for damage done to the environment *per se*, in a case involving the unlawful suppression of two wolverines, the Swedish Supreme Court ruled (NJA 1995, p. 249) that harm caused to protected species fell within the definition of environmental damage. Interestingly, *“the Court categorized the harm at issue as a hybrid between non-economic and economic damage”* (from BOWMAN M., BOYLE A., *Environmental Damage in International and Comparative Law*, Oxford University Press, 2002, p. 240).

670 EU-China Environmental Governance Programme, EGP-Guizhou, *Environmental Tort. A comparison of environmental tort and access to justice in China and Sweden*, p. 12.

671 See HARDMAN REIS T., *Compensation for environmental damages under international law: the role of the international judge*, Wolters Kluwer, 2011, p. 64. According to the UNEP, *“the term “environmental damage” means an adverse or negative effect on the environment that: (a) is measurable taking into account scientifically established baselines recognized by a public authority that take into account any other human-induced variation and natural variation; (b) is significant, which is to be determined on the basis of factors such as: (i) Long-term or permanent change, to be understood as change that may not be redressed through natural recovery within a reasonable period of time; (ii) Extent of the qualitative or quantitative changes that adversely or negatively affect the environment; (iii) Reduction or loss of the ability of the environment to provide goods and services, either of a permanent nature or on a temporary basis; (iv) Extent of any adverse or negative effect or impact on human health; (v) Aesthetic, scientific and recreational value of parks, wilderness areas and other lands”*, United Nations Environment Programme, *Draft guidelines for the development of domestic legislation on liability, response action and compensation for damage caused by activities dangerous to the environment*, 3<sup>rd</sup> December 2009, UNEP/GCSS.XI/8/Add.1, Guideline 3.

outlined in the final report published in 2015<sup>672</sup>. In order to promote environmental public interest litigation, Chinese policymakers should:

- Extend *locus standi* to a broader range of individuals and governmental and non-governmental organizations<sup>673</sup>.
- Significantly expand legal aid programmes to ensure that groups and individuals which are today marginalized due to the lack of financial resources are able to protect their rights and interests in court<sup>674</sup>.
- Amend Article 40 of the (1989) Environmental Protection Law, to bring it in line with the existing legislation governing administrative proceedings<sup>675</sup>.

Great emphasis is also laid on the need to coordinate the work of administrative authorities and public interest lawyers and to improve the professional level of these latter. To this end, an important measure would be the establishment of a freely accessible database of Chinese environmental legislation and case-law<sup>676</sup>. The report also recommends the adoption of decisive measures to:

- Encourage and support Chinese environmental NGOs.
- Provide capacity-building training to environmental NGOs and promote the creation of “*experience sharing platform[s]*”<sup>677</sup>.
- Involve environmental NGOs in policy-making and environmental management.

Finally, environmental courts should “*pertinently introduce*” foreign judicial techniques and experience on causation and environmental damage assessment<sup>678</sup>.

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672 EU-China Environmental Governance Programme, *EGP-Guizhou Policy Synthesis Report – improving access to environmental justice to protect people’s environmental rights in Guizhou province*.

673 Ibid. p. 5.

674 Ibid. p. 5.

675 “Article 40 of the [1989 Environmental Protection] Law states that any party who refuses administrative [sanction] may apply for reconsideration to the organ at a higher level within 15 days after receiving notification of the decision; and [if the applicant disagrees with the decision of the higher administrative authority, it] may file a lawsuit to a people’s court within 15 days after receiving notification of the reconsideration decision [...]. Alternatively, the party can directly file a lawsuit to a people’s court within 15 days after receiving notification of the [sanction]. The Administrative Reconsideration Law limits the reconsideration application deadline of a party involved to be 60 days, while the Administrative Procedure Law to be three months. In accordance with the [1989 Environmental Protection] Law, the party involved shall lose the right of action 15 days later upon receipt of the punishment notification, but can apply for reconsideration [within] 60 days after the receipt. This is completely contrary to the basic principle of judicial power superior to executive power.” Ibid. p. 5. When the report was published the new Environmental Protection Law (which does not contain a similar provision) had however already entered into force.

676 Ibid. p. 6.

677 Ibid. p. 16.

678 Ibid. p. 17.

The last project developed within the EGP EU - China framework which we will examine in the present chapter is the “*Development of training curricula and organization of training courses for judges in Environmental Law in Shaanxi, Guangzi and Gansu*” (hereinafter referred to as the “EGP Judges’ Training Project”). The goal of this far-reaching project, carried out in collaboration with the Deutsche Gesellschaft für Technische Zusammenarbeit<sup>679</sup> and across three provinces, was to improve the judges’ ability to handle environmental cases “*as part of [the] broader goal to promote environmental justice in China, leveraging EU experiences*”<sup>680</sup>. The training programme saw the participation of over three hundred Chinese judges over two years<sup>681</sup> in a “train the trainers” project<sup>682</sup>.

This novel approach - pioneered by the UNEP – has been extremely successful in the field of international legal cooperation, and is based on the assumption that “*judicial capacity-building is best undertaken by judges and for judges*”<sup>683</sup>. In order to adapt the curriculum to the actual needs of the participants, the organizers carried out a preliminary assessment of their theoretical and practical skills by distributing questionnaires and interviewing judicial officials<sup>684</sup>. The preliminary survey showed that while most of the judges interviewed had a good understanding of basic environmental civil liability rules (such as the strict liability rule<sup>685</sup>), there was still considerable confusion as regards causation, the allocation of the burden of proof and the quantification of environmental damages<sup>686</sup>.

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679 JIAO M., “China, Germany to train judges in environmental law”, *China.org*, April 2014, [last accessed on 13<sup>th</sup> August 2016] available at: [http://china.org.cn/environment/2014-04/25/content\\_32206756.htm](http://china.org.cn/environment/2014-04/25/content_32206756.htm).

680 EU-China Environmental Governance Programme, *Policy Report: Judges’ training in Environmental Law – Recommendations on capacity building for the judiciary in environmental adjudication*, 2015, p. 7.

681 JIAO M., *Op.cit.*

682 EU-China Environmental Governance Programme, *Policy Report: Judges’ training in Environmental Law – Recommendations on capacity building for the judiciary in environmental adjudication*, 2015,.

683 ROBINSON N.A., “Ensuring access to justice through environmental courts”, *Pace Environmental Law Review*, Vol. 29, 2012, p. 374.

684 “*Surveys distributed to judges raised targeted questions in the civil, administrative and criminal areas of environmental law, including on civil public interest litigation, administrative negligence, causation and burden of proof, fault and liability, judges’ understanding of environmental crime, types and number of environmental cases tried in local courts [...]*”, EU-China Environmental Governance Programme, *Policy Report: Judges’ training in Environmental Law – Recommendations on capacity building for the judiciary in environmental adjudication*, 2015, p. 30.

685 “*The vast majority [of interviewees] supported the notion that a polluting enterprise should assume liability for damages caused by pollution within-permit, and a majority believed that non-fault liability should be applied in environmental tort cases*”, *Ibid.* p. 54. According to this survey, between 63 and 87% of the judges interviewed believed that in environmental cases the court should apply strict or non-fault liability (see *Ibid.* p. 44).

686 *Ibid.*, p. 35. Between 46 and 57% of the judges interviewed stated that the best way to establish

However, the survey showed that a majority of the judges (about 60%) interviewed would agree to hear public interest lawsuits brought by environmental NGOs, provided they had clear standing under Article 58 of the 2014 Environmental Protection Law<sup>687</sup>. While the majority of the environmental cases heard by the participants was of a criminal nature, Chinese judicial officials expect the number of tort cases to increase over the coming years (just as the number of administrative cases has recently begun to decline)<sup>688</sup>.

Asked about the effectiveness of administrative and criminal rules, the judges generally agreed that they represented important enforcement tools. The officials interviewed generally held that the value of criminal enforcement could be increased by introducing harsher penalties, while administrative enforcement and administrative environmental litigation was often undermined by “*interference from the outside*” or by the inactivity of administrative authorities<sup>689</sup>. While many of the judges interviewed seemed to doubt the practical usefulness of the guidelines and of the list of typical environmental cases published by the Supreme People’s Court<sup>690</sup>, there was considerable interest for EU environmental legislation and case-law. In particular, the interviewees expressed the wish to learn more about EU environmental liability rules, tort law and civil public interest litigation<sup>691</sup>.

The EGP Judges’ Training Project provided important policy recommendations to Chinese judicial authorities and regulators on the role which judicial interpretations of the Supreme People’s Courts can play and on how to make capacity building programmes more effective<sup>692</sup>. Moreover, the Judges’ Training Programme provided training to hundreds of judges and lawyers and produced a curriculum (which focused mainly on EU legislation and experience) which could be used as a template for analogous capacity-building initiatives in the future<sup>693</sup>. In order to promote EU judicial experience as a model for Chinese courts, the EGP even published the Chinese translations of seven significant

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causation in environmental tort cases is to rely on the assessment of a third party (see *Ibid.* p. 45).

687 *Ibid.*, pp. 42 – 43.

688 *Ibid.*, pp. 34 and 44 – 45.

689 EU-China Environmental Governance Programme, *Policy Report: Judges’ training in Environmental Law – Recommendations on capacity building for the judiciary in environmental adjudication*, 2015, p. 46.

690 *Ibid.*, pp. 13 and 50.

691 *Ibid.*, p. 52.

692 *Ibid.*, p. 64.

693 EU-China Environmental Governance Programme, *Local partnership projects: results and achievements*, 2015, p. 21 [last accessed on 18<sup>th</sup> August 2016] available at: <http://www.ecegp.com/files/1/EGP%20Local%20Partnership%20Projects%20Results%20and%20Achievements%202015.pdf>.

rulings of the European Court of Justice and of various German courts<sup>694</sup> concerning air quality plans, environmental impact assessments and environmental permits. While these judgments provide a useful example of the European judicial drafting style, their highly technical nature might make them unsuitable for capacity-building projects aimed at Chinese judges with only limited knowledge of the EU institutional and legal framework. Another international player which invested significantly in “access to justice” projects is the Danish Institute for Human Rights<sup>695</sup>. Since the 1990s, the Institute has provided funding for the Xiamen Green Cross Association, a Chinese environmental NGO committed to the promotion of sustainable development “*through increased public participation by means of aiding enterprises, communities and individuals recognize the right to a clean and healthy environment and the importance of the law in environmental protection*”<sup>696</sup>. The aim of the Danish Institute for Human Rights and of its Chinese partners (such as the Environmental Advocacy Network) is to increase the ability of migrant workers and other marginalized groups to “*claim their rights*”<sup>697</sup>.

As we have seen, over the years a significant number of international cooperation projects has been implemented in the field of environmental litigation and access to justice. Cooperation initiatives in the field of environmental protection, broadly speaking, have been favourably received by the Chinese legal community. In particular, Chinese professionals have been eager to seize opportunities to specialize in a promising field of practice (for lawyers in China, training opportunities are few and far between, especially in rural areas), to meet potential clients and to create useful professional networks<sup>698</sup>. Moreover, Chinese lawyers seem to view the training events organized by influential and well-known international bodies as valuable opportunities to acquire prestige and validation within their professional communities<sup>699</sup>.

Another factor which may have contributed to the success of legal cooperation in the field of environmental justice is the remarkable expansion of the activities of local

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694 EU-China Environmental Governance Programme, *Translated European Court Cases*, [last accessed on 11<sup>th</sup> December 2016] available at: <http://www.ecegp.com/english/knowledge/Section-7.asp>.

695 Their website is available at: <http://www.humanrights.dk/> [last accessed on 13<sup>th</sup> August 2016].

696 The Danish Institute for Human Rights in China, *Country Briefing*, 2015 [last accessed on 13<sup>th</sup> August 2016], available at: [http://www.humanrights.dk/sites/humanrights.dk/files/country\\_notes/8\\_china\\_country\\_note\\_june\\_2015.pdf](http://www.humanrights.dk/sites/humanrights.dk/files/country_notes/8_china_country_note_june_2015.pdf).

697 The Danish Institute for Human Rights in China, *Country Briefing*, 2015.

698 STERN R.E., *Environmental Litigation in China: A Study in Political Ambivalence*, Cambridge University Press, Cambridge and New York, 2013, p. 193.

699 ROHAN B., *Op.cit.*



environmental NGOs (such as Friends of Nature and Green Earth Volunteers)<sup>700</sup>, paired with their desire to obtain additional funding, expertise, visibility and recognition<sup>701</sup>.

In spite of the growth of local environmental NGOs (both in terms of expertise and capacity and in terms of sheer numbers), the Chinese public authorities remain almost unavoidable partners and intermediaries for foreign organizations. The central role which the Chinese government plays in these cooperation projects reflects one of the peculiarities of public interest litigation in the PRC, and namely the fact that its development was not only tolerated, but actively encouraged by the State. While in other developing countries, such as India, public interest litigation developed as an answer to the inactivity of the legislator or against the grain of State policies (and often thanks to the activism of the courts<sup>702</sup> or in the wake of mass protest movements<sup>703</sup>), in China the development of public interest litigation was actively promoted and directed by the government<sup>704</sup>. These partnerships with public authorities obviously influence the activities of both international organizations and local NGOs, which generally prefer to steer clear of politically sensitive subjects<sup>705</sup>.

While the number of training initiatives and exchange programmes in the field of environmental justice has increased steadily over the years, it is not easy to measure the effectiveness of these initiatives. It is particularly difficult to draw a direct causal

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700 CHEN Jie, “The NGO Community in China, expanding linkages with transnational civil society and their democratic implications”, *China Perspectives*, Vol. 68, November 2006. [last accessed on 11<sup>th</sup> September 2016] available at: <https://chinaperspectives.revues.org/3083>.

701 “*Julia Greenwood Bentley has posited three motivations that prompt Chinese NGOs to seek foreign support and four motivations that lead foreigners to provide support and four motivations that lead foreigners to provide that support. The Chinese seek ‘recognition and legitimacy, funding of a magnituded unavailable domestically, and the opportunity to learn from international experience’.* Foreigners have come to see a healthy civil society as a central component of the ‘socio-economic development’ they hope to assist, they seek to help those who are ‘marginalized by the modernization process’, they hope to ‘foster democracy’ and they simply see opportunities in ‘the enormous volume of international aid currently being funneled to China’”, WHEELER N., *The role of American NGOs in China’s modernization, invited influence*, Routledge, 2013, p. 116.

702 See FAURE M., RAJA A.V., “Effectiveness of environmental public interest litigation in India: determining the key variables”, *Fordham Environmental Law Journal*, Vol. 21, 2010, pp. 292 – 293.

703 For an overview of one of the most influential protest movements in India, see GUHA R., *The Unquiet Woods: Ecological change and peasant resistance in the Himalaya*, University of California Press, 2000.

704 See NOVARETTI S., *Le ragioni del pubblico. Le “azioni nel pubblico interesse” in Cina*, Edizioni Scientifiche Italiane, Napoli 2012.

705 STERN R.E., *Environmental Litigation in China: A Study in Political Ambivalence*, Cambridge University Press, Cambridge and New York, 2013, p. 190; GREENWOOD BENTLEY J., “Survival strategies for civil society organizations in China”, *International Journal of Not-for-profit Law*, Vol. 6, Issue 2, February 2004, [last accessed on 11<sup>th</sup> September 2016] available at: [http://www.icnl.org/research/journal/vol6iss2/art\\_1.htm](http://www.icnl.org/research/journal/vol6iss2/art_1.htm).

connection between the legal cooperation initiatives we have examined and the rise of environmental litigation in the PRC<sup>706</sup>, since capacity-building programmes are by definition incremental and long term investments and both foreign actors and local NGOs tend to overplay (for various reasons) the successes of these initiatives.

However, a clear lesson can be learned from the survey carried out for the EGP Judges' Training Programme, which showed that in certain provinces the new environmental courts have remained largely idle<sup>707</sup>, and from the field research carried out by Rachel Stern, who showed (albeit on the basis of a small pool of respondents) that few of the lawyers who attended one of the training programmes organized by the CLAPV actually handled environmental cases over the following years<sup>708</sup>.

If we compare these results with the significant growth of environmental litigation registered in other provinces (where pollution victims appear to be more willing to defend their rights in court), it becomes clear that programmes which focus on the “demand side” of the access to justice problem (by educating the public on their rights under the law and supporting pollution victims) seem to be more effective than those which focus exclusively on the “supply side” (by promoting institutional reform and providing training for lawyers and judges). It is not surprising that it should be so, since, as we have seen, in China environmental litigation has largely developed on the basis of a top-down approach, and on the basis of government policies (rather than against them).

#### **4.3.2. Legal transplants and access to justice**

Aside from providing training and guidance to Chinese lawyers and officials and support to pollution victims, foreign actors and NGOs have actively tried to influence the legislative process, with some success. Conversely, Chinese lawmakers have relied heavily on foreign models and practices for the drafting of domestic legislation, often carrying out extensive research before tabling new texts<sup>709</sup>. While this kind of comparative study is often carried

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706 STERN R.E., *Ibid.*, p. 197.

707 EU-China Environmental Governance Programme, *Policy Report: Judges' training in Environmental Law – Recommendations on capacity building for the judiciary in environmental adjudication*, 2015, p. 18 [last accessed on 13<sup>th</sup> August 2016] available at: [http://www.ecegp.com/files/4/GIZ%20JUDGES\\_Policy%20Report%20-%20Judges%20Training%20in%20Environmental%20Law%202015.pdf](http://www.ecegp.com/files/4/GIZ%20JUDGES_Policy%20Report%20-%20Judges%20Training%20in%20Environmental%20Law%202015.pdf).

708 STERN R.E., *Environmental Litigation in China: A Study in Political Ambivalence*, Cambridge University Press, Cambridge and New York, 2013, p. 197.

709 See TIMOTEO M., “Sustainability of Legal Transplants and Legal Borrowings in Chinese Rules on Environmental Liability”, in WANG C., FEI A., TIMOTEO M. (edited by), *Legislative and Judicial Remedies for Environmental Torts Victims. A study in the framework of EU-China Cooperation*, Bononia University Press, Bologna 2013, p. 273.

out with the support of institutional bodies such as the Legislative Affairs Office (国务院法制办公室; guówùyuàn fǎzhì bàngōngshì) set up by the State Council, Chinese lawmakers increasingly interact with a wide array of foreign (often non-governmental) actors<sup>710</sup>.

In the field of environmental justice, international legal cooperation programmes played a key role in promoting foreign legal models which had a profound influence on two recent legislative reforms: the 2009 Tort Law and the 2014 Environmental Protection Law. As we have seen (*supra*, §4.1.2), in 2009 the Chinese legislator redrew the fundamental environmental tort liability rules<sup>711</sup>. In particular, the new Tort Law provides, under Article 65, that “*where any harm is caused by environmental pollution, the polluter shall assume the tort liability*”. While the polluter-pays-principle had already been recognized by the Environmental Protection Law in its 1979 trial form, the 2009 reform made it the linchpin of the tort liability regime.

The influence of foreign models is however much more evident in the other provisions concerning environmental liability introduced by the new Tort Law. As we have seen, Article 66 of the Tort Law provides that in environmental pollution disputes the polluter shall bear the burden to prove that she or he is not liable, that there is no causal link between her or his conduct and the environmental damage or that there are mitigating circumstances.

While the 2008 reform of the Water Pollution Law<sup>712</sup> included a provision very similar to Article 66, its introduction in the Tort Law greatly extended the scope of this principle.

Legal doctrine has found the inspiration for this shift of the burden of proof from the plaintiff to the defendant in the “precautionary principle”, or *Vorsorgeprinzip*, which

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710 “*The landscape of legal transplants in China’s law reform era has become more and more crowded by several actors; they are both collective actors – such as national governments, non-governmental organizations and academic institutes – and individual actors – Chinese and Western legal experts, judges, lawyers, legislative staff, administrative personnel, scholars and students*”, TIMOTEO M., *Ibid*, p. 273. See also PEERENBOOM R., “*Toward a methodology for successful legal transplants*”, *The Chinese Journal of Comparative Law*, Vol. 1, No. 11, 2013, pp. 19 – 20.

711 See POZZO B., WANG L., “*Liability for Environmental Pollution within the Framework of the New Chinese Tort Law*”, *European Review of Private Law*, Vol. 19, No. 1-2011, pp. 87-99; and YANG T., MOSER A., “*Environmental Tort Litigation in China*”, *Environmental Law Reporter*, Washington DC, Vol. 41, October 2011, pp. 10-897 – 10-898.

712 Pursuant to Article 87 of the revised Water Pollution Law of the People’s Republic of China, “*For an action of damage due to a water pollution accident, the party discharging pollutants shall assume the burden of proof for legally prescribed exemptions and the nonexistence of relation of cause and effect between its act and the harmful consequences thereof*”.

originated in Germany<sup>713</sup>. Indeed, under the German Umwelthaftungsgesetz (§6) if in a specific case a plant is inherently suited to cause the damage at issue, there is a (rebuttable) presumption that the pollution damage was actually caused by said plant<sup>714</sup>. While a similar shift in the burden of proof has been on occasion applied by Japanese courts<sup>715</sup>, the considerable resources and effort invested over the years by the Deutsche Gesellschaft für Technische Zusammenarbeit to promote the German civil liability model suggest that Article 66 might be (at least in part) a product of the Sino-German legal cooperation projects.

However, in borrowing from the German model, the Legislative Affairs Commission (LAC) of the Standing Committee of the NPC appears to have paid scant attention to the linguistic problems raised by legal transplants. Recent legal doctrine has showed that in its overview of the foreign statutory models of Article 66 of the Tort Law<sup>716</sup> the LAC included a rather unartful translation of the abovementioned Article 6 of the German Umwelthaftungsgesetz, which rendered the expression “inherently suited” (in German: *geeignet*) with the verb 能够 (*nénggòu*), which means, more generically, “to be able to”<sup>717</sup>.

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713 See WIENER J.B., “Something borrowed for something blue: legal transplants and the evolution of global environmental law”, *Ecology Law Quarterly*, Vol. 27, 2001, p. 1305. See also BOEHMER – CHRISTIANSEN S., “The precautionary principle in Germany – enabling government”, in O’RIORDAN T., CAMERON J., *Interpreting the Precautionary Principle*, Routledge, London 1994, pp. 31 – 60; TIMOTEO M., “Sustainability of Legal Transplants and Legal Borrowings in Chinese Rules on Environmental Liability”, in WANG C., FEI A., TIMOTEO M. (edited by), *Legislative and Judicial Remedies for Environmental Torts Victims. A study in the framework of EU-China Cooperation*, Bononia University Press, Bologna 2013, p. 274; TIMOTEO M., “Legal transplants and the Chinese legal process: the case of circulation of the rules on civil liability for environmental harm from Europe to China”, in TIMOTEO M. (edited by), *Towards a smart development. A legal and economic inquiry into the perspectives of EU-China cooperation*, Bononia University Press, Bologna, July 2016, pp. 145 - 154.

714 “*Ist eine Anlage nach den Gegebenheiten des Einzelfalles geeignet, den entstandenen Schaden zu verursachen, so wird vermutet, daß der Schaden durch diese Anlage verursacht ist*”, Umwelthaftungsgesetz (§6), [last accessed on 9<sup>th</sup> October 2016] available at: <https://www.gesetze-im-internet.de/bundesrecht/umwelthg/gesamt.pdf>. However, the shift in the burden of proof shall not apply when the facility in question has been “*properly operated*”.

715 See TIMOTEO M., “Sustainability of Legal Transplants and Legal Borrowings in Chinese Rules on Environmental Liability”, in WANG C., FEI A., TIMOTEO M. (edited by), *Legislative and Judicial Remedies for Environmental Torts Victims. A study in the framework of EU-China Cooperation*, Bononia University Press, Bologna 2013, p. 275.

716 全国人大法工委民法室编 (quánguó réndà fǎgōngwěi mínfǎshìbiān), (2010) 中华人民共和国侵权责任法: 条文说明、立法理由及相关规定, (The Civil law office of the Legislative commission of the Standing Committee of NPC, Explanations, legislative basis and related provisions of Chinese tort liability law, 2010) Peking University Press, Beijing.

717 TIMOTEO M., “Law and language: issues related to legal translation and interpretation of Chinese rules on tortious liability of environmental pollution”, *China-EU Law Journal*, Springer, 2015, Vol. 4, p. 128.

This is not a trivial mistake, since Article 6 is one of the most significant (as well as controversial)<sup>718</sup> provisions of the German Umwelthaftungsgesetz and by rendering the notion of *geeignet* with a generic term this translation grossly misrepresents the scope of application of the legal presumption.

Some scholars have also identified the influence of European legal models in Articles 67 and 68 of the Tort Law of the People's Republic of China<sup>719</sup>. Article 67 provides that if the damage is caused by multiple polluters the degree of liability of each of the tortfeasors shall be determined on the basis of the type of the pollutant, of the volume of emission and of other specific circumstances. This provision shows significant similarities to Article 9.102 (2) of the Principles of European Tort Law, which states that, in the presence of joint liability, "*the amount of the contribution [of each tortfeasor] shall be what is considered just in the light of the relative responsibility for the damage of the persons liable, having regard to their respective degrees of fault and to any other matters which are relevant to establish or reduce their liability*". It is worth noticing that the European Group on Tort Law has published a Chinese translation of the Principles of European Tort Law<sup>720</sup>, which may have greatly simplified the comparative research carried out by the Chinese lawmakers.

Finally, Article 68 of the Tort Law, which provides that where the environmental damage is the consequence of the fault of a third party the victim may bring an action against either the third party or the polluter (which in turn shall be entitled to be held harmless by the third party) shows the influence of the EU Environmental Liability Directive (Directive 2004/35/CE). While the Environmental Liability Directive does "*not give private parties a right of compensation as a consequence of environmental damage*"<sup>721</sup>, Article 8 of the Directive draws a liability system very similar to the one which emerges from Article 68 of the Tort Law of the PRC<sup>722</sup>.

Another recent reform which had been advocated for years by international NGOs and state actors alike was the broadening of the overly strict *locus standi* requirements. As we have seen, the Civil Procedure Law of the People's Republic of China was amended in

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718 See MARKESINIS B., UNBERATH H., *The German Law of Torts, A Comparative Treatise*, Hart Publishing, 4<sup>th</sup> Edition, 2002, p. 744.

719 TIMOTEO M., *Op.cit.*, pp. 275 – 6; POZZO B., WANG L., "Liability for Environmental Pollution within the Framework of the New Chinese Tort Law", *European Review of Private Law*, Vol. 19, No. 1-2011, pp. 87-99.

720 Available at: <http://www.egtl.org/> [last accessed on 9<sup>th</sup> October 2016].

721 Article 3.3, Directive 2004/35/CE.

722 See TIMOTEO M., *Op.cit.*, p. 275.

2012 and under its new formulation Article 55 granted to “*relevant bodies and organizations prescribed by law*” the right to bring suits before the courts to protect the rights of consumers, pollution victims and in general against any act which may undermine the public interest<sup>723</sup>. While the Civil Procedure Law contained the first explicit acknowledgement – on the part of the Chinese legislator – of the role of public interest litigation, Article 119 set out strict requirements as regards legal standing<sup>724</sup>. Therefore, it should not be surprising that even after the entry into force of the 2012 Civil Procedure Law several cases brought by environmental NGOs were dismissed due to lack of *locus standi*<sup>725</sup>.

While the effects of the reform of the CPL on environmental public interest litigation were becoming apparent, the NPC was discussing the draft of the new Environmental Protection Law. During the discussions which led to the adoption of the new EPL in 2014, Chinese lawmakers appear to have been greatly influenced by both internal and external pressure to broaden legal standing to environmental NGOs. In particular, within the framework of the EU – China EGP, the Swedish Environmental Research Institute championed the reform of legal standing rules, collaborating directly with the EPL drafting team<sup>726</sup>. Moreover, when the Chinese government launched a public consultation on the draft text of the EPL in 2013, the Swedish Environmental Research Institute and the All China Environment Federation put forward some very cogent arguments against the strict qualification requirements introduced by the drafters, which would have deprived of standing a large number of NGOs and associations. According to the policy recommendations drafted within the EU- China EGP project the new EPL should have included the following provision:

*“Against any actions violating the environmental protection law, polluting the environment, damaging the ecosystem and the public interests of the society, social organizations which are legally established, with the aim to protect [the] environment, can bring public interest litigation [before] the people’s courts and*

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723 CARPENTER – GOLD D., “Castles made of sand: public-interest litigation and China’s new environmental protection law”, *Harvard Environmental Law Review*, Vol. 39, 2015, pp. 263 - 264.

724 In particular, pursuant to Article 119 of the 2012 Civil Procedure Law, in order to file a lawsuit before a Chinese court, the plaintiff must be a citizen, legal person or an organization having a direct interest in the case.

725 CARPENTER – GOLD D., *Op.cit.*, p. 264.

726 EU – China Environmental Governance Programme, *EGP-Guizhou: Improving access to environmental justice to protect people’s rights in Guizhou province, Project background, objectives and outcomes* [last accessed on 16<sup>th</sup> October 2016] available at: <http://www.ecegp.com/files/6/EGP-GUIZHOU%20Result%20Sheet%202015.pdf>.

*request [the suspension of the activities] violating environmental law, and for environmental remediation or compensation for environmental damage*<sup>727</sup>.

Notwithstanding the considerable pressure from both domestic and foreign NGOs, the final text of the EPL limited standing to those organizations which could fulfill certain requirements. Pursuant to Article 58 of the new Environmental Protection Law, social organizations and NGOs are able to file lawsuits concerning environmental pollution and ecological damage before the people's courts, provided that they fulfill two conditions: (i) they must be registered before a government civil affairs department; (ii) they must have been engaged in the defense of the public interest on environmental issues for at least five consecutive years, without any recorded violation of the law<sup>728</sup>.

The goal of the legislator was clearly to reduce the arbitrary powers of the courts, which had adopted a very strict interpretation of the notion of "direct interest in the case" (a necessary requirement to claim standing pursuant to Article 119 of the Civil Procedure Law), often dismissing cases brought by NGOs with little or no justification<sup>729</sup>. It is however important to emphasize that the wording of Article 58 of the 2014 EPL still allows a great degree of latitude to any judicial interpreter (in particular, the notion of "violation of the law" seems overly broad and may lead to abuses). Moreover, registration before the competent authorities (which generally requires significant human and financial resources) might be well beyond the means of many Chinese NGOs, especially in the rural areas where environmental NGOs are most important<sup>730</sup>.

After the entry into force of the new EPL, the Supreme People's Court issued a judicial interpretation on environmental public interest litigation. This interpretation established that "*civil environmental public interest cases [on] first instance fall under the jurisdiction*

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727 EU – China Environmental Governance Programme, *Policy recommendation expanding the qualification scope of the plaintiffs for environmental public interest litigation in Environmental Protection Law (Draft Amendment)*, 推动贵州环境司法发展 维护贵州公众环境权益 (tuī dòng guì zhōu huán jìng sī fǎ fā zhǎn wéi hù guì zhōu gōng zhòng huán jìng quán yì), Improving access to environmental justice to protect people's environmental rights in Guizhou Province, 2014 [last accessed on 16<sup>th</sup> October 2016] available at: [http://www.egp-guizhou.com/download/18.796f360314545397f4f1375/1397740562871/3\\_IVL\\_Guizhou\\_policy+recom-mendation\\_PIL\\_ENG.pdf](http://www.egp-guizhou.com/download/18.796f360314545397f4f1375/1397740562871/3_IVL_Guizhou_policy+recom-mendation_PIL_ENG.pdf).

728 Article 58 of the 2014 Environmental Protection Law of the People's Republic of China.

729 CARPENTER – GOLD D., *Op.cit.*, p. 264.

730 CARPENTER – GOLD D., *Op.cit.*, p. 266; FINAMORE B., "How China's Top Court is Encouraging More Lawsuits Against Polluters", *Natural Resources Defense Council*, 26<sup>th</sup> January 2015, [last accessed on 16<sup>th</sup> October 2016] available at: [http://www.egp-guizhou.com/download/18.796f360314545397f4f1375/1397740562871/3\\_IVL\\_Guizhou\\_policy+recom-mendation\\_PIL\\_ENG.pdf](http://www.egp-guizhou.com/download/18.796f360314545397f4f1375/1397740562871/3_IVL_Guizhou_policy+recom-mendation_PIL_ENG.pdf).

of the Intermediate People's Court for the area where the polluting conduct or destruction of the ecology occurred, where its harmful consequences occurred, or where the defendant is located"<sup>731</sup>. The judicial interpretation of the SPC recommended the adoption of injunctive relief measures and provided robust guidance to lower courts in the assessment of evidence and on the allocation of the costs of litigation<sup>732</sup>.

In October 2015, the Nanping Intermediate People's Court ruled in favour of the plaintiffs in the first public interest lawsuit brought after the entry into force of the new EPL. The Nanping Court ruled that Friends of Nature and Fujian Green Home, two environmental NGOs, had legal standing pursuant to Article 58 of the EPL<sup>733</sup>. Research carried out over the last two years suggests that the 2014 EPL had a measurably positive impact on the effectiveness of enforcement practices and has opened the door to several public interest lawsuits brought by local NGOs such as the All China Environment Federation and Friends of Nature<sup>734</sup>.

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731 For an English translation of the judicial interpretation of the SPC (carried out with funding provided by the EU – China Environmental Governance Programme) see: *The Supreme People's Court Interpretation on Several Issues Regarding the Application of Law in Public Interest Environmental Civil Litigation*, January 2015 [last accessed on 16<sup>th</sup> October 2016] available at: <http://www.ecegp.com/files/1/SPC%20interpretations%20in%20application%20of%20law%20in%20civil%20environmental%20PIL%20cases%202015.pdf>; see also BOURDEAU K., SCHULSON D., "Citizen suits under China's revised Environmental Protection Law: a watershed moment in Chinese environmental litigation?", Beveridge & Diamond, 9<sup>th</sup> March 2016, [last accessed on 16<sup>th</sup> October 2016] available at: <http://www.bdlaw.com/news-1863.html>.

732 *The Supreme People's Court Interpretation on Several Issues Regarding the Application of Law in Public Interest Environmental Civil Litigation*, January 2015. See also CARPENTER – GOLD D., "Castles made of sand: public-interest litigation and China's new environmental protection law", *Harvard Environmental Law Review*, Vol. 39, 2015, pp. 270 – 271.

733 BOURDEAU K., SCHULSON D., "Citizen suits under China's revised Environmental Protection Law: a watershed moment in Chinese environmental litigation?", Beveridge & Diamond, 9<sup>th</sup> March 2016, [last accessed on 16<sup>th</sup> October 2016] available at: <http://www.bdlaw.com/news-1863.html>. See also EU-China Environmental Governance Programme, *Policy Report: Judges' training in Environmental Law – Recommendations on capacity building for the judiciary in environmental adjudication*, 2015, p. 10 [last accessed on 13<sup>th</sup> August 2016] available at: [http://www.ecegp.com/files/4/GIZ%20JUDGES\\_Policy%20Report%20-%20Judges'%20Training%20in%20Environmental%20Law%202015.pdf](http://www.ecegp.com/files/4/GIZ%20JUDGES_Policy%20Report%20-%20Judges'%20Training%20in%20Environmental%20Law%202015.pdf).

734 EU-China Environmental Governance Programme, *Policy Report: Judges' training in Environmental Law – Recommendations on capacity building for the judiciary in environmental adjudication*, 2015, p. 10.



## **Chapter 5. Reshaping environmental governance: the role of international legal cooperation**

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### **5.1. THE PUBLIC ENFORCEMENT MODEL IN THE PRC**

Until recently, environmental governance in China relied overwhelmingly on public enforcement and on the action of political and administrative authorities. It is therefore worth describing, briefly, the local political and administrative bodies entrusted with the enforcement of environmental rules and with the implementation of environmental policies in the People's Republic of China.

Each Local People's Congress (LPC) is, to some extent, a National People's Congress writ small<sup>735</sup>. According to the Constitution, LPCs are the local organs of state power in the provinces and in all the lower political subdivisions of the country (including prefectures and counties)<sup>736</sup>. LPCs above the county level are characterized by a more complex organization and appoint their own standing committees<sup>737</sup>. The role of LPC is to ensure the application of the Constitution, of the national laws and administrative regulations within their respective jurisdictions<sup>738</sup>, to adopt local regulations and resolutions to promote local economic development<sup>739</sup> and to appoint and remove governors and mayors<sup>740</sup>. Moreover, through local regulations and directives, LPC provide guidance to local Environmental Protection Bureaus and wield considerable influence in the field of environmental governance and enforcement<sup>741</sup>.

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735 See McELWEE C.R., *Op. cit.*, p. 110.

736 Articles 95 and 96 of the Constitution of the People's Republic of China.

737 Articles 95 and 96 of the Constitution of the People's Republic of China.

738 Article 99 of the Constitution of the People's Republic of China.

739 Article 100 of the Constitution of the People's Republic of China.

740 Article 101 of the Constitution of the People's Republic of China.

741 As pointed out by McELWEE C.R., *Op. cit.*, p. 111. On the issue of public environmental governance in

Local People's Governments (LPGs) are the executive branch of State power within the provinces, counties, districts and towns<sup>742</sup>, responsible for the enactment of both national laws and local regulations within their jurisdictions. LPGs also appoint and remove functionaries and the heads of administrative authorities<sup>743</sup>, including the local Environmental Protection Bureaus<sup>744</sup>. Pursuant to Article 6 of the 2014 Environmental Protection Law,

*“Local People's Governments at various levels shall be responsible for the quality of the environment within areas under their jurisdictions”.*

The 2014 EPL further requires LPGs to take effective action in order to:

*“improve environmental quality according to environmental protection goals and governance tasks”*<sup>745</sup>.

Finally, Environmental Protection Bureaus constitute the level of governance which is closest to the stakeholders and the industrial plants. Their numerous duties include the enforcement of both national and local environmental rules and the adoption of environmental standards. Moreover, EPBs monitor industrial facilities to ensure compliance with environmental rules, issue permits and collect pollution allowance fees, review environmental impact assessments and have the power to inflict fines for infringements of environmental laws and standards<sup>746</sup>. Since EPBs are hierarchically organized (so that EPBs at the province level provide guidance and instructions to EPBs at lower levels) and must rely on LPGs (which also appoint the heads of EPBs) for funding, there are serious concerns about the independence and autonomy of these bureaus<sup>747</sup>.

International legal cooperation programmes contributed significantly to the development and the functioning of the governance framework we have outlined. In particular, the Ford Foundation has actively supported the work of the Administrative Law Research Group<sup>748</sup>, while the cooperation between the U.S. Environmental Protection Agency and the Ministry of Environmental Protection of the PRC dates back to the 1980s. However, over the years

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the PRC, see also LO C.W.-H., TANG S. (edited by), *Institutions, regulatory styles, society and environmental governance in China*, Routledge, New York, 2014.

742 Article 105 of the Constitution of the People's Republic of China.

743 Article 107 of the Constitution of the People's Republic of China.

744 McELWEE C.R., Op. cit., p. 113.

745 Article 28 of the 2014 Environmental Protection Law of the People's Republic of China.

746 LO C.W.-H., TANG S., Op. cit.; and McELWEE C.R., Op. cit., pp. 114 - 115.

747 McELWEE C.R., Op. cit., pp. 115 - 116.

748 McCUTCHEON A., Op. cit., p. 171.

the shortcomings of this governance framework have become painfully evident<sup>749</sup>. In particular, political ingerence, unclear rules as regards the jurisdiction of local offices and Ministries and the shortage of skilled personnel appear to have undermined the effectiveness of the traditional models of public enforcement and command-and-control regulation. Perhaps for this reason, over the last decade the focus of legal cooperation has shifted toward private law (especially liability insurance and contracts) and market-based governance tools, on the need to promote voluntary compliance and sustainable production processes<sup>750</sup>. In the present chapter, I will therefore describe the main legislative and regulatory tools employed over the last decade to reshape the environmental governance framework of the PRC, focusing in particular on the contribution of international legal cooperation.

## 5.2. EMISSIONS TRADING AND INTERNATIONAL LEGAL COOPERATION

From its inception, the cooperation between China and the West in the common effort to tackle climate change has been fraught with difficulties, most of them attributable to the significant financial and commercial interests at stake. However, in spite of the often adversarial nature of these exchanges, the Chinese authorities may have experienced a damascene moment with regard to the role which market-based instruments can play in reducing emissions. Moreover, there is reason to believe that international legal cooperation was instrumental in prompting this major shift in Chinese policy.

The ideological underpinning of market-based measures aimed at reducing pollution is the need to internalized externalities, i.e. production costs which are not transmitted through prices but are instead borne by society as a whole. In particular, by charging polluters for the right to discharge specific substances into the environment, the legislator is effectively creating property rights which can be traded and allocated among private parties. The main reasons of the success of these schemes are their ability to fit into both new-Keynesian and Neoclassical economic models<sup>751</sup> and their flexibility, since they allow regulators to set

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749 On this subject, see MA X., ORTOLANO L., *Environmental regulation in China, Institutions, enforcement and compliance*, Rowman and Littlefield Publishers, Lanham, 2000.

750 Li J. has argued that, “generally speaking, China lacks a workable legal system to enforce its environmental laws and policies” and that moreover Chinese authorities might not be willing to enforce the new Environmental Protection Law due to the possible economic consequences for state-owned enterprises (see LI J., “Pollution Emission Trading: a possible solution to China’s enforcement obstacles in fighting against air pollution?”, *UCLA Journal of Environmental Law*, Vol. 34, 2016, pp. 65 - 66).

751 The so-called “tragedy of the commons” describes a situation in which different economic actors, operating rationally and independently according to their own self-interest, will ultimately deplete a

acceptable levels of pollutions with greater accuracy than traditional fiscal instruments (such as carbon taxes)<sup>752</sup>. The main difference between command-and-control models and emission trading schemes is that while the former rely on “public law proprietary rights” over resources, the latter rely on both public and private property rights and on the creation

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shared limited resource. This dilemma applies to the challenges posed by pollution, where “*it is not a question of taking something out of the commons, but of putting something in -sewage, or chemical, radioactive, and heat wastes into water; noxious and dangerous fumes into the air, and distracting and unpleasant advertising signs into the line of sight. [...] The rational man finds that his share of the cost of the wastes he discharges into the commons is less than the cost of purifying his wastes before releasing them. Since this is true for everyone, we are locked into a system of ‘fouling our own nest’, so long as we behave only as independent, rational, free-enterprises*”, HARDING G., “The Tragedy of the commons”, *Science*, Vol. 162, 13<sup>th</sup> December 1968, pp. 1243-1245. Ronald Coase has proposed a solution to the dilemma of the commons based on the “property approach”. Coase argued that a free market will solve by itself any externality arising from air pollution unless property rights are incomplete or the transaction costs are excessively high. According to this model, once pollution property rights are assigned a free market will achieve the most efficient solution to the externality, see COASE R., “The problem of social cost”, *The Journal of Law and Economics*, October 1960, Vol. III, pp. 1- 44. According to Professor Carol Rose, the environmental problem is inherently a problem of the commons. She suggests four strategies to address this problem: (1) Do nothing, i.e. leaving resources for open access; (2) Keep out i.e., excluding the newcomers and limiting the use of resources to insiders; (3) Right way, i.e. regulating the use of resources, such as limiting the amount of an individual’s uses of a resource; and (4) Property, i.e., granting property rights in resources and even allowing the right holders to trade such rights. Traditional environmental regulation, including air pollution regulation, mainly reflects the Right way approach, which is the so-called command-and-control approach. Market-based environmental regulation is mainly based on the Property approach. It has been widely argued that the market-based approach is the more effective and cost-efficient way to address modern environmental problems, such as the air pollution problem”, LI J., “Pollution Emission Trading: a possible solution to China’s enforcement obstacles in fighting against air pollution?”, *UCLA Journal of Environmental Law*, Vol. 34, 2016, p. 72. In his landmark work “Road to Serfdom” even Friedrich Von Hayek suggested the possibility of government intervention to remedy externalities (see VON HAYEK F., *Road to Serfdom*, Routledge, London and New York, 2006, p. 40). See also STIGLITZ J., “Managing globalization”, *International Herald Tribune*, New York, 11<sup>th</sup> October 2006; GAMBARO A., “Emissions trading tra aspetti pubblicistici e profili privatistici”, *Contratto e Impresa/Europa*, Vol. 2, 2005, pp. 855 – 888; and POZZO B., “The concept of sustainability and the protection of the environment between private and public law”, in TIMOTEO M. (edited by), *Towards a smart development. A legal and economic inquiry into the perspectives of EU-China cooperation*, Bononia University Press, Bologna, July 2016, pp. 111 - 144. For an overview of the lessons learned from the U.S. and E.U. emissions trading schemes, see TIETENBERG T., “The Tradable –Permits Approach to Protecting the Commons: Lessons for Climate Change”, *Oxford Review of Economic Policy*, Vol. 19, Issue 3, 2003, pp. 400 – 419; MEIDINGER E.E., “Private environmental regulation, human rights and community”, *Buffalo Environmental Law Journal*, vol. 7, 1999 – 2000, pp. 140 - 143; and SCHMALENSEE R., STAVINS R., *Lessons learned from three decades of experience with cap-and-trade*, Harvard Kennedy School Working Paper No. 069, [last accessed on 10<sup>th</sup> December 2016] available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2691635](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2691635). See also ALONGI F., “The Emission Trading Scheme and its possible consequences for airlines”, European Air Law Association Prize 2012, unpublished, pp 4 – 5, [last accessed on 20<sup>th</sup> November 2016] available at: <http://eala.aero/wp-content/uploads/2014/05/Emission-Trading-Scheme-Francesco-Alongi.pdf>.

752 However, some critics have argued that emissions trading schemes can “*cause unnecessary economic damage because the price of permits can be volatile*” and that carbon taxes might be more effective in encouraging green innovation (see *The Economist*, “Doffing the Cap”, 14<sup>th</sup> June 2007).

of markets for environmental goods and services<sup>753</sup>. One of the most significant experiments with emissions trading (implemented when the evidence on their effectiveness was still murky) was the U.S. SO<sub>2</sub> Allowance Trading System, set up by the 1990 Clean Air Act Amendment in the attempt to tackle the problem of acid rains (which are largely caused by excessive levels of sulfur dioxide and nitrogen oxide in the atmosphere). The success enjoyed by this programme did much to promote emissions trading schemes as a tool to solve the problem of air pollution<sup>754</sup>.

The United Nations Framework Convention on Climate Change (UNFCCC)<sup>755</sup>, which entered into force in March 1994, required its signatories to take steps to reduce greenhouse gas emissions “*at a level that would prevent dangerous anthropogenic interference with the climate system*”<sup>756</sup>. A further round of negotiations led to the adoption, in 1997, of the Kyoto Protocol, which expanded some of the commitments set out by the UNFCCC “*taking into account [the] common but differentiated responsibilities [of the signatories] and their specific national and regional development priorities, objectives and circumstances*”<sup>757</sup>. Under this “differentiated responsibilities” system, the EU (then the European Community) and the countries listed in the Annex I to the UNFCCC<sup>758</sup> agreed to a series of binding targets for the reduction of greenhouse gas

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753 See POZZO B., “The concept of sustainability and the protection of the environment between private and public law”, in TIMOTEO M. (edited by), *Towards a smart development. A legal and economic inquiry into the perspectives of EU-China cooperation*, Bononia University Press, Bologna, July 2016, pp. 111 – 144; POZZO B., “Modelli proprietari e tutela dell’ambiente”, *Rivista critica del diritto privato*, XV, Vol. 1, 1997, pp. 133 – 145; JACOMETTI V., “Rivalutazione degli strumenti proprietari a tutela dell’ambiente: tradable pollution rights e emissions trading”, *Rivista giuridica dell’ambiente*, 2003, Issue 2, pp. 275-309.

754 CHAN G., STAVINS R., STOWE R., SWEENEY R., *The SO<sub>2</sub> Allowance Trading System and the Clean Air Act Amendments of 1990: Reflections on twenty years of policy innovation*, Harvard Kennedy School – Working Paper, January 2012, [last accessed on 10<sup>th</sup> December 2016] available at: [https://www.hks.harvard.edu/m-rcbg/heep/papers/SO2-Brief\\_digital\\_final.pdf](https://www.hks.harvard.edu/m-rcbg/heep/papers/SO2-Brief_digital_final.pdf); LI J., “Pollution Emission Trading: a possible solution to China’s enforcement obstacles in fighting against air pollution?”, *UCLA Journal of Environmental Law*, Vol. 34, 2016, pp. 77 – 78.

755 The text of the United Nations Framework Convention on Climate Change is available (in all the working languages of the UN, including Chinese) at: <http://unfccc.int/2860.php> [last accessed on 20<sup>th</sup> November 2016].

756 Article 2 of the 1992 United Nations Framework Convention on Climate Change.

757 Article 10 of the Kyoto Protocol to the 1992 United Nations Framework Convention on Climate Change. The text of the Protocol is available at: <https://unfccc.int/resource/docs/convkp/kpeng.pdf> [last accessed on 20<sup>th</sup> November 2016].

758 A full list of “Annex I countries” is available on the website of the UNFCCC: [http://unfccc.int/parties\\_and\\_observers/parties/annex\\_i/items/2774.php](http://unfccc.int/parties_and_observers/parties/annex_i/items/2774.php) [last accessed on 20<sup>th</sup> November 2016].

emissions<sup>759</sup>.

The Protocol outlined three “flexibility mechanisms”<sup>760</sup> which the parties could implement in order to achieve the emissions reductions they had agreed to: the Joint Implementation<sup>761</sup>, the Clean Development Mechanism<sup>762</sup> and the trading of Assigned Amount Units<sup>763</sup>. The Kyoto Protocol entered into force on 16<sup>th</sup> February 2005 and its first “commitment period” ran between 2008 and 2012<sup>764</sup>. Under the Kyoto Protocol, the European Union committed itself to deliver a 8% reduction of greenhouse gas emissions (from the 1990 levels) between 2008 and 2012 and a further 20% reduction by 2020<sup>765</sup>. Therefore, “*in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner*”<sup>766</sup>, the EU established in 2003 a greenhouse gas emissions trading scheme which remains to this day the largest in the world<sup>767</sup>.

The EU Emissions Trading Scheme was set up by Directive 2003/87/EC<sup>768</sup> (the so-called

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759 Pursuant to Article 3 of the Kyoto Protocol, “*The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012*”.

760 For an analysis of the Joint Implementation and Clean Development Mechanism, see FREESTONE D., STRECK C. (edited by), *Legal Aspects of Implementing the Kyoto Protocol Mechanisms: Making Kyoto Work*, Oxford University Press, Oxford, 2005, pp. 3 - 622. For an overview of the measures adopted around the world to address climate change after Kyoto, see CAMERON P.D., ZILLMAN D., *Kyoto: From Principles to Practice*, Kluwer Law International, The Hague, 2001, pp. 2 – 414.

761 Article 6 of the Kyoto Protocol to the 1992 United Nations Framework Convention on Climate Change.

762 Article 12 of the Kyoto Protocol to the 1992 United Nations Framework Convention on Climate Change.

763 Article 17 of the Kyoto Protocol to the 1992 United Nations Framework Convention on Climate Change.

764 For an overview of the debate which accompanied the entry into force of the Kyoto Protocol, see DOUMA W., MASSAI L., MONTINI M. (edited by), *The Kyoto Protocol and Beyond*, TMC Asser Press, The Hague, 2007, pp. 2 -262.

765 The new targets are set out in the Doha Amendment to the Kyoto Protocol. The text of the amendment is available at: [http://unfccc.int/files/kyoto\\_protocol/application/pdf/kp\\_doha\\_amendment\\_english.pdf](http://unfccc.int/files/kyoto_protocol/application/pdf/kp_doha_amendment_english.pdf) [last accessed on 20<sup>th</sup> November 2016]. See also the reduction agreed to through the Copenhagen Accord: United Nations Framework Convention on Climate Change, Appendix I - Quantified economy-wide emissions targets for 2020, [last accessed on 4<sup>th</sup> December 2016] available at: [http://unfccc.int/meetings/copenhagen\\_dec\\_2009/items/5264.php](http://unfccc.int/meetings/copenhagen_dec_2009/items/5264.php).

766 Article 1 of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003, OJ L 275, 25.10.2003, p. 32–46.

767 The Kyoto Protocol envisaged the possibility to implement emissions trading schemes in order to meet the reduction targets. Indeed, pursuant to Article 17 of the Kyoto Protocol, “*the Parties included in Annex B may participate in emissions trading for the purposes of fulfilling their commitments under Article 3. Any such trading shall be supplemental to domestic actions for the purpose of meeting quantified emission limitation and reduction commitments under that Article*”.

768 Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a

“ETS Directive”), was designed to be implemented in three phases. During the first phase (between 2005 and 2007), characterized (according to the European Commission itself) by a “learning by doing” approach, the scheme applied only to CO<sub>2</sub> emissions from energy-intensive industries and almost all allowances<sup>769</sup> were assigned for free<sup>770</sup>. While the pilot phase allowed national authorities to set up an infrastructure to monitor and enforce compliance, between 2005 and 2007 the scheme was ineffective due to the number of allowances issued (which significantly exceeded the actual emission levels)<sup>771</sup>.

The second phase of the EU ETS, which was set to coincide with the first commitment period of the Kyoto Protocol (2008 – 2012), saw a sharp reduction in the number of allowances issued, the inclusion of emissions of nitrous oxide in the scheme, the doubling of the monetary penalty for non-compliance and the creation of a Union registry of the allowances<sup>772</sup>. Moreover, during the second phase of the ETS several countries began to experiment with the auctioning of allowances<sup>773</sup>. The results of the second phase of the ETS were however equally disappointing, since the economic downturn suffered by the EU economy after 2008 led to a sharp reduction of industrial production and emissions and consequently to another surplus of allowances<sup>774</sup>. Finally, Directive 2008/101/EC included (starting in 2012) the civil aviation sector within the scope of the ETS, a move which prompted an immediate and strong reaction from this industry<sup>775</sup>.

The ETS is today in its third phase (2013 – 2020), which has seen the inclusion in the scheme of emissions of perfluorocarbons from aluminum production as well as the

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scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275, 25.10.2003, p. 32 – 46.

769 An allowance amounts to the authorization to “*emit one tonne of carbon dioxide equivalent during a specified period*”, see Article 3 of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003, OJ L 275, 25.10.2003, p. 32 – 46.

770 European Commission, *The EU Emissions Trading System, Phases 1 and 2 (2005-2012)*, [last accessed on 10<sup>th</sup> December 2016] available at: [https://ec.europa.eu/clima/policies/ets/pre2013\\_en](https://ec.europa.eu/clima/policies/ets/pre2013_en).

771 Therefore, “*with supply significantly exceeding demand, in 2007 the price of allowances fell to zero*”, European Commission, *The EU Emissions Trading System, Phases 1 and 2 (2005-2012)*, [last accessed on 10<sup>th</sup> December 2016] available at: [https://ec.europa.eu/clima/policies/ets/pre2013\\_en](https://ec.europa.eu/clima/policies/ets/pre2013_en).

772 European Commission, *The EU Emissions Trading System, Phases 1 and 2 (2005-2012)*, [last accessed on 10<sup>th</sup> December 2016] available at: [https://ec.europa.eu/clima/policies/ets/pre2013\\_en](https://ec.europa.eu/clima/policies/ets/pre2013_en).

773 Ibid.

774 Ibid.

775 Directive 2008/101/EC of the European Parliament and of the Council of 19th November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, OJ L 8/3, 13.01.2009. See also HAVEL B., MULLIGAN J.Q., “The Triumph of Politics: Reflections on the Judgment of the Court of Justice of the European Union Validating the Inclusion on Non-EU Airlines in the Emissions Trading Scheme”, *Air and Space Law*, Wolters Kluwer, Vol. 37, Issue 1, 2012, pp. 3 – 33.

introduction of a single EU-wide cap on emissions<sup>776</sup>. In the current phase of the scheme auctioning has replaced free allocation as the default method for the assignment of allowances. While it is obviously too soon to draw any conclusions as to the effectiveness of the ETS in its third phase, according to the European Commission the ETS “*emissions from installations in the scheme are falling as intended*”<sup>777</sup>. Moreover, in order to meet the new commitments undertaken by the EU in the run-up phase to the Paris Agreement<sup>778</sup> and to deliver (by 2030) a 43% reduction in the emissions covered by the ETS, the European Commission has tabled a legislative proposal for the revision of the scheme (“phase 4”)<sup>779</sup>. In spite of the optimism which has characterized the beginning of its third phase, the ETS has been a particularly controversial project and much has been written about its effectiveness, its implementation<sup>780</sup> and the legal nature of the emission allowances<sup>781</sup>.

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776 European Commission, The EU Emissions Trading System (EU ETS), [last accessed on 3<sup>rd</sup> December 2016] available at: [http://ec.europa.eu/clima/policies/ets\\_en](http://ec.europa.eu/clima/policies/ets_en).

777 European Commission, The EU Emissions Trading System (EU ETS), [last accessed on 3<sup>rd</sup> December 2016] available at: [http://ec.europa.eu/clima/policies/ets\\_en](http://ec.europa.eu/clima/policies/ets_en). See also European Commission, “*Implementing the Paris Agreement Progress of the EU towards the at least -40% target*”, Progress Report, November 2016, [last accessed on 10<sup>th</sup> December 2016] available at: [https://ec.europa.eu/clima/sites/clima/files/eu\\_progress\\_report\\_2016\\_en.pdf](https://ec.europa.eu/clima/sites/clima/files/eu_progress_report_2016_en.pdf).

778 The text of the Paris Agreement (signed on 22<sup>nd</sup> April 2016) is available at: [http://unfccc.int/paris\\_agreement/items/9485.php](http://unfccc.int/paris_agreement/items/9485.php) [last accessed on 20<sup>th</sup> November 2016]. In its Intended Nationally Determined Contribution, the EU and its Member States “*committed to a binding target of an at least 40% domestic reduction in greenhouse gas emissions by 2030 compared to 1990*” (see the Intended Nationally Determined Contribution of the EU of 6<sup>th</sup> March 2015, [last accessed on 9<sup>th</sup> December 2016] available at: [https://ec.europa.eu/clima/sites/clima/files/docs/2015030601\\_eu\\_indc\\_en.pdf](https://ec.europa.eu/clima/sites/clima/files/docs/2015030601_eu_indc_en.pdf)).

779 European Commission, “*Implementing the Paris Agreement Progress of the EU towards the at least -40% target*”, Progress Report, November 2016, [last accessed on 10<sup>th</sup> December 2016] available at: [https://ec.europa.eu/clima/sites/clima/files/eu\\_progress\\_report\\_2016\\_en.pdf](https://ec.europa.eu/clima/sites/clima/files/eu_progress_report_2016_en.pdf).

780 The legal and economic literature on the EU Emissions Trading Scheme is extensive. This is a (by no means comprehensive) list of some of the most significant works on the subject: POZZO B. (edited by), *Il nuovo sistema di emission trading comunitario, dalla Direttiva 2003/87/CE alle novità previste dalla Direttiva 2009/29/CE*, Giuffrè Editore, Rome, 2010 pp. VII-166; POZZO B. (edited by), *La nuova direttiva sullo scambio di quote di emissione – La prima attuazione europea dei meccanismi previsti dal Protocollo di Kyoto*, Giuffrè, Milan 2003; BOGOJEVIC S., *Emissions Trading Schemes: Markets, States and the Law*, Hart Publishing, Oxford and Portland, 2013, pp. 1 – 207; DELBEKE J. (edited by), *EU Environmental Law, Vol IV - The EU Greenhouse Gas Emissions Trading Scheme*, Claeys & Casteels, Leuven, 2006, pp. i- 436; ANTONEN K., MEHLING M., UPSTON-HOOPER K., ‘Breathing Life into the Carbon Market: Legal Frameworks of Emissions Trading in Europe’, in *European Energy and Environmental Law Review*, Vol. 16, 2007, pp. 96–115; FAURE M., PEETERS M. (edited by), *Climate Change and European Emissions Trading: Lessons for Theory and Practice*, Edward Elgar, Cheltenham - Northampton, 2008, pp. 3 – 411; BOURBON-SECLÉ C., ‘Legal Aspects of Climate Change in Europe: Is the European Union Emission Trading Scheme Greater than the Sum of the Parts? Part 1’, in *Journal of International Banking Law and Regulation*, Vol. 23, 2008, p. 252 – 266; DE SEPIBUS J., *The European Trading Scheme Put to the Test of State Aid*, NCCR Working Paper 34/2007, [last accessed on 15<sup>th</sup> June 2011] available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1088716](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1088716); SKJÆRSETH



Moreover, during the second phase of the scheme the application of the ETS to the aviation industry, and in particular to non-EU carriers, became a bone of contention between the EU and several foreign governments, including the People's Republic of China. The situation came to a head in 2011, when the governments of Russia, Saudi Arabia and China accused the EU of violating their sovereign rights by requiring foreign carriers to surrender allowances with regard to flights over third countries' airspace and over the high seas and even threatened to retaliate with a trade war<sup>782</sup>.

From a legal point of view, the debate was put to rest by the European Court of Justice in the landmark *ATA* ruling<sup>783</sup>. In the case in question, the Air Transport Association of America and three U.S. airlines had challenged the validity of the application of the ETS “to those parts of flights [...] which take place outside the airspace of EU Member States”<sup>784</sup> before the High Court of Justice of England and Wales, which in turn referred the question to the ECJ for a preliminary ruling. With a ruling which has been strongly criticized even in academic circles<sup>785</sup>, the European Court of Justice upheld the applicability of the scheme to the flights in question. However, facing mounting criticism from foreign government and from the aviation industry, on 22<sup>nd</sup> November 2012 the EU Commissioner for Climate Action Connie Hedegaard announced the Commission's decision to “stop the clock” of the ETS, “when it comes to enforcement of the inclusion of

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J.B., WETTESTAD J., “Fixing the EU Emissions Trading System? Understanding the Post-2012 Changes”, *Global Environmental Politics*, Vol. 10 No. 4, November 2010, pp. 101-123. For a comprehensive analysis of this scheme characterized by a more comparative approach, see in particular JACOMETTI V., *Lo Scambio delle quote di emissione – Analisi di un nuovo strumento di tutela ambientale in prospettiva comparatistica*, Giuffrè - Università dell'Insubria, 2010.

781 See GORZELAK K., “The legal nature of emissions allowances following the creation of a Union registry and adoption of MiFID II – are they transferable securities now?”, *Capital Markets Law Journal*, Vol. 9, No. 4, October 2014, pp. 373 – 387; and MANEA S., *Instrumentalising property: an analysis of the rights in the EU emissions trading system*, London School of Economics, London, PhD thesis, 2013, [last accessed on 20<sup>th</sup> November 2016] available at: [http://etheses.lse.ac.uk/719/1/Manea\\_Instrumentalising\\_property\\_2013.pdf](http://etheses.lse.ac.uk/719/1/Manea_Instrumentalising_property_2013.pdf).

782 MILMO D., HARVEY F., “China threatens trade war over EU emissions trading scheme”, *The Guardian*, 6<sup>th</sup> June 2011, [last accessed on 3<sup>rd</sup> December 2016] available at: <https://www.theguardian.com/environment/2011/jun/06/china-trade-war-emissions-trading-airlines>.

783 Case C-366/10, *Air Transport Association of America and Others v. UK Secretary of State for Energy and Climate Change*, [2012] ECR 49/12.

784 §45, Case C-366/10, *Air Transport Association of America and Others v. UK Secretary of State for Energy and Climate Change*, [2012] ECR 49/12. In particular, the plaintiffs claimed that the application of the ETS to parts of flights taking place outside EU airspace contravened customary international law as well as the 1944 Chicago Convention on International Civil Aviation.

785 For an overview of the criticism leveled against the ECJ's ruling in the *ATA* case, see HAVEL B., MULLIGAN J.Q., *Op.cit.*, pp. 3 – 33.

aviation in the EU ETS to and from non-European countries”<sup>786</sup>. While the EU has pressured the International Civil Aviation Organization (IATA) to develop an alternative plan to curb greenhouse gas emissions in the aviation sector, these efforts have yet to bear fruit<sup>787</sup>.

Even if the confrontation between the EU and the People’s Republic of China on the application of the ETS to the latter’s national carriers was at times characterized by harsh tones, China’s opposition did not appear to be based on ideological grounds, but rather on the need to protect a strategic industry. Indeed, when the international debate on the application of the ETS to non-EU carriers threatened to escalate into a “trade war” the European Union and the PRC had already a history of friendly (and fruitful) cooperation in the field of emissions trading.

The first experiment with emissions trading implemented in the PRC was the sewage water emissions trading scheme implemented by the city of Shanghai in 1987, drawing on U.S. experiences<sup>788</sup>. In 1991, the PRC began to issue pollution permits in several cities and by the mid-1990s there were several pilot projects under way. The sudden popularity of these schemes in the 1990s owed much to the success of the U.S. SO<sub>2</sub> Allowance Trading System and to the technical support provided by international (mostly American) organizations. The most significant cooperation project at this stage was the partnership between the Environmental Defense Fund and the Beijing Environment and Development Institute (a local NGO), which provided invaluable assistance in the development of sulfur dioxide emissions trading schemes in the cities of Nantong (in Jiangsu Province) and Benxi (in Liaoning Province)<sup>789</sup>. The success of these schemes apparently “*inspired SEPA and industrial ministries in China*”<sup>790</sup> to lend their support similar pilot projects.

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786 European Commission, Press Release, “Stopping the clock of ETS and aviation emissions following last week’s International Civil Aviation Organisation (ICAO) Council”, 12<sup>th</sup> November 2012, [last accessed on 10<sup>th</sup> December 2016] available at: [http://europa.eu/rapid/press-release\\_MEMO-12-854\\_en.htm](http://europa.eu/rapid/press-release_MEMO-12-854_en.htm). As of today, “*in the aviation sector [...] the EU ETS applies only to flights between airports located in the European Economic Area*”, see European Commission, The EU Emissions Trading System (EU ETS), [last accessed on 3<sup>rd</sup> December 2016] available at: [http://ec.europa.eu/clima/policies/ets\\_en](http://ec.europa.eu/clima/policies/ets_en).

787 FIORETTI J., “Airline industry backs global emissions trading scheme –IAG”, *Reuters*, 17<sup>th</sup> June 2015, [last accessed on 3<sup>rd</sup> December 2016] available at: <http://www.reuters.com/article/eu-airlines-ets-idUSL5N0Z32UM20150617>.

788 LI J., Op.cit, p. 83.

789 STARKE L. (edited by), *State of the World 2006, Special focus: China and India*, The Worldwatch Institute, WW Norton & Co., New York and London, 2006, p. 164.

790 STARKE L. Op.cit, p. 164. Moreover, during the Ninth Five Year Plan period (1996-2000) the central government “*expanded the implementation of the pollution emission permits*” across the country (see LI J., Op.cit., p. 84).

Consequently, in 2002, the PRC started pilot schemes for the trading of SO<sub>2</sub> emissions in seven provinces and cities which by 2007 had been extended to eleven provinces and to other polluting substances (such as carbon dioxide, nitrogen dioxide, nitric oxide and ammonia nitrogen)<sup>791</sup>. Finally, in 2014 the central government announced its intention to set up by 2017 a nationwide emission trading scheme which should bring together the various pilot projects and established unified rules and – in all probability – a nationwide register<sup>792</sup>. To this end, the State Council issued guidelines for the promotion of emission trading across the country<sup>793</sup>. However, by making a direct reference (under paragraph 7 of the guidelines) to both a fixed price and an auctioning system for the allocation of allowances, the State Council seem to have left the door open for significant government interference in the market for these pollution rights.

There is precious little reliable information about the effectiveness of these schemes, however even commentators who tend to believe that emission trading “*will not be a major driver of emission reductions in the immediate future*” recognize that “*these pilot [project] are an important capacity-building mechanism for the government, companies and third parties to test relevant methodologies and procedures*”<sup>794</sup>. In the absence of unified rules on the allocation and trading of allowances local regulators have designed their own guidelines, which generally rely on both the “grandfathering” (i.e. the allocation of

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791 JARVIS H., WEI X., “Comparative analysis of air pollution trading in the United States and China”, *Environmental Law Institute, News & Analysis*, Vol. 36, 2006, pp. 10234 -10250; LI J., Op.cit, p. 84. On the Chinese attempts to establish a carbon market, see also WANG X., *Red China going green: Emergence and current development of carbon emissions trading in the world's largest carbon emitter*, Columbia Law School Working Paper, June 2013, Academic Commons, [last accessed on 16<sup>th</sup> December 2016] available at: <http://dx.doi.org/10.7916/D8FQ9VSC>; SHEN Y., “Moving steadily or great leap forward? The emerging carbon market in China”, *Deakin Law Review*, Vol 18, Issue 2, 2013, pp. 233 – 270; and SHEN Y., *China's way to carbon emission reduction: the choice of regulatory instruments and its legal challenges*, Energy and Environmental Law and Policy Series, Kluwer Law International, 2015.

792 LI J., Op.cit, p. 71.

793 国务院 办公厅关于进一步推进排污权有偿使用和交易试点工作的指导意见 (guó wù yuàn bàn gōng tīng guān yú jìn yī bù tuī jìn pái wū quán yǒu cháng shǐ yòng hé jiāo yì shì diǎn gōng zuò de zhǐ dǎo yì jiàn) PRC State Council Office, Guidelines for the promotion of Pilot Emission Trading Programmes, 2014, [last accessed on 13<sup>th</sup> December 2016] available at: [http://www.mof.gov.cn/zhengwuxinxi/zhengcefabu/201408/t20140825\\_1130901.htm](http://www.mof.gov.cn/zhengwuxinxi/zhengcefabu/201408/t20140825_1130901.htm).

794 SONG R., *Inside China's Emissions Trading Scheme: First Steps and the Road Ahead*, World Resources Institute, 28<sup>th</sup> August 2013, [accessed on 9<sup>th</sup> December 2016], available at: <http://www.wri.org/blog/inside-china%E2%80%99s-emissions-trading-scheme-first-steps-and-road-ahead>. On the challenges which stand in the way of the establishment of a nationwide emission trading scheme, see BO M., *Emissions, Pollutants and Environmental Policy in China. Designing a national emissions trading system*, Routledge, London and New York, 2013, pp. 3 – 224.

allowances on the basis of past emissions) and the “purchase” approach<sup>795</sup> and apply to both direct and indirect emission sources<sup>796</sup>. Moreover, while some local governments established dedicated platforms for the trading of allowances, elsewhere environmental agencies are still the unavoidable middleman in any transaction<sup>797</sup>.

While these schemes had the merit of creating an institutional framework (albeit at a local level) for the trading of allowances and of introducing local businesses to this kind of market-based mechanisms<sup>798</sup>, these pilot projects have been unable to deliver significant emission reductions. Independent analysts have suggested that the cause of these failures was the emission of a number of allowances which was actually higher than the amount of emissions<sup>799</sup>. Just as had happened in the first phase of the EU ETS, excess supply of allowances on the market drove down the price of the allowances, thus removing any incentive for polluters to reduce their emissions. Moreover, according to Li Jiangfeng, with the notable exception of the Zhejiang emission trading scheme (which accounts for “*nearly two thirds of the total transaction amount during the [2007 – 2014] period*”<sup>800</sup>), there was very little participation in the scheme and most transaction took place between the local authorities and the emitters (i.e. there are virtually no secondary markets for the allowances<sup>801</sup>).

While these disappointing results might be – at least in part – the consequence of contradictory guidelines, inadequate monitoring systems and excessively high emission caps, the lack of effective (administrative and judicial) enforcement mechanisms is the main reason for concern<sup>802</sup>. Indeed, while market-based instruments do not require the kind

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795 LI J., Op.cit, p. 86.

796 EY, “*Understanding China’s Emissions Trading Schemes and Emissions Reporting*”, [last accessed on 20<sup>th</sup> November 2016] available at: [http://www.ey.com/Publication/vwLUAssets/EY-Understanding-Chinas-Emissions-Trading-Schemes-and-Emissions-Reporting/\\$FILE/EY-Understanding-Chinas-ETS-and-Emissions-Reporting.pdf](http://www.ey.com/Publication/vwLUAssets/EY-Understanding-Chinas-Emissions-Trading-Schemes-and-Emissions-Reporting/$FILE/EY-Understanding-Chinas-ETS-and-Emissions-Reporting.pdf).

797 LI J., Op.cit, p. 87.

798 LI J., Op.cit, p. 89.

799 DARBY M., *Low prices raise concerns for China carbon market*, Climate Home, 29<sup>th</sup> January 2016, [last accessed on 11<sup>th</sup> December 2016] available at: <http://www.climatechangenews.com/2016/01/29/low-prices-raise-concerns-for-china-carbon-market/>.

800 LI J., Op.cit, p. 91.

801 LI J., Op.cit, p. 91.

802 See BO M., *Emissions, Pollutants and Environmental Policy in China. Designing a national emissions trading system*, Routledge, London and New York, 2013, Ch. 2. Li Jiangfang has however argued that “*the current pilot emission trading programs still possess the features of a command-and-control program in the sense that the government exerts too much control over the trading market, and the market participants are not really engaging in free trade of their emission rights*” (LI J., Op.cit, p. 87). According to both Bo Miao and Li Jiangfang, it seems that Chinese regulators are excessively involved in the trading of allowances (thus stifling private enterprise) but not sufficiently committed to ensuring

of pervasive government intervention which characterizes the traditional “command-and-control” models, in the absence of public enforcement businesses do not have any incentive in participating in the scheme.

In spite of these setbacks, the Chinese government appears to be determined to push forward its climate agenda and in particular its plan to set up a nationwide emission trading scheme. In this endeavour, Chinese policymakers can rely on the full-throated support of the EU, which has provided over the years significant technical assistance in the implementation of the climate policies of the PRC. In particular, the EU and the PRC have issued a series of joint statements (in 2005, 2010 and 2015) on the need to meet the challenges of climate change<sup>803</sup> and have also created a “*political framework to further strengthen the cooperation between EU and China*”, which includes the EU-China CDM Facilitation Project<sup>804</sup>. The aggressive promotion, on the part of the EU, of its own brand of climate policies suggests that the Union might be already a “normative power” on climate change<sup>805</sup>.

This kind of political pressure at the inter-governmental level has been accompanied by the implementation of significant cooperation initiatives within the framework of the EU – China Environmental Governance Programme. In particular, through the IBIS-Shanxi project, the EU provided technical support the SO<sub>2</sub> emission trading scheme set up in Shanxi Province by developing an “*impact-based environmental index and labelling*

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the enforcement of the rules of the game.

803 Council of the European Union, *EU-China joint statement on climate change*, 29<sup>th</sup> June 2015 [last accessed on 20<sup>th</sup> November 2016] available at: <http://www.consilium.europa.eu/en/press/press-releases/2015/06/29-eu-china-climate-statement/>.

804 European Commission, *EU-China CDM Facilitation Project*, 2005, [last accessed on 20<sup>th</sup> November 2016] available at: [http://ec.europa.eu/europeaid/documents/case-studies/china\\_environment\\_cdm-facilitation-project\\_en.pdf](http://ec.europa.eu/europeaid/documents/case-studies/china_environment_cdm-facilitation-project_en.pdf). See also DE MATTEIS P., “EU- China Cooperation in the field of energy, environment and climate change”, *Journal of Contemporary European Research*, Vol. 6, Issue 4, 2010, pp. 449 – 477; TORNEY D., “The EU’s engagement with China on climate change: lessons from the EU-China partnership on climate change”, *EU-China Observer*, College of Europe, Issue 3, 2012 [last accessed on 20<sup>th</sup> November 2016] available at: [https://www.academia.edu/2164223/The\\_EU\\_s\\_Engagement\\_with\\_China\\_on\\_Climate\\_Change\\_Lessons\\_from\\_the\\_EU-China\\_Partnership\\_on\\_Climate\\_Change](https://www.academia.edu/2164223/The_EU_s_Engagement_with_China_on_Climate_Change_Lessons_from_the_EU-China_Partnership_on_Climate_Change); and European Commission, *Working with China on the environment, The role of the European Commission*, 2009, [last accessed on 20<sup>th</sup> November 2016] available at: [http://www.pedz.uni-mannheim.de/daten/edz-bn/gdf/09/KH3009330ENC\\_002.pdf](http://www.pedz.uni-mannheim.de/daten/edz-bn/gdf/09/KH3009330ENC_002.pdf). However, this kind of cooperation has also seen the direct participation of some Member States, see JACOMETTI V., “Le politiche cinesi per la lotta al cambiamento climatico e la cooperazione Italia-Cina”, *Rivista giuridica dell’ambiente*, Issue 6, 2010, pp. 903 - 922.

805 YAN S., *Europe as a normative power on climate change? The EU’s engagement with China*, 27<sup>th</sup> May 2015, [last accessed on 20<sup>th</sup> November 2016] available at: <http://www.e-ir.info/2015/05/27/europe-as-a-normative-power-on-climate-change-the-eus-engagement-with-china/>.

system”<sup>806</sup>. The project was coordinated by the Norwegian Institute for Air Research<sup>807</sup>, which acted in partnership with the Shanxi Emission trading Center, the Shanxi Environmental Information Center and the Czestochowa University of Technology<sup>808</sup>.

The first step of the project was to send questionnaires to more than 300 industries in order to obtain data for the development of the Shanxi environmental label and to gauge the “willingness of the enterprises to be involved in emission trading, evaluate the Corporate Social Responsibility (CSR) of enterprises, as well as their willingness to improve their image among the public”<sup>809</sup>. Having correctly identified lack of participation as one of the main causes for the failure of past pilot project, the IBIS-Shanxi project sought to address this problem by promoting voluntary participation in the emission scheme and by increasing public awareness through the introduction of carbon emission labels<sup>810</sup>. The project included capacity building exercises aimed at explaining the working of the emission trading scheme to selected private enterprises and at helping them to develop cleaner production processes<sup>811</sup>.

The EU has recently announced its intention to follow up on the EU EGP by stepping up its collaboration with the PRC with a new 10 million euro cooperation initiative. The goal of the new project, which should kick off in 2017, is to provide technical assistance in the establishment of a nationwide carbon market in China<sup>812</sup>. Moreover, the Center for Climate Strategies (a European NGO) has published a comparative study of emerging carbon markets which sheds light into the shortcomings of the existing voluntary emission trading and certification schemes<sup>813</sup> and of the obstacles which stand in the way of the

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806 EU-China Environmental Governance Programme, *Impact-based environmental index and labeling system to support SO2 emission trading in Shanxi province*, [last accessed on 3<sup>rd</sup> December 2016] available at: <http://shanxi-ibis.info/>.

807 The website of the Norsk Institutt for luftforskning [last accessed on 11<sup>th</sup> December 2016] is available at: <http://www.nilu.no/forsiden/tabid/41/language/en-gb/default.aspx>.

808 EU-China Environmental Governance Programme, *Impact-based environmental index and labeling system to support SO2 emission trading in Shanxi province*, [last accessed on 3<sup>rd</sup> December 2016] available at: <http://shanxi-ibis.info/>.

809 Ibid.

810 On the role which environmental or carbon labelling can play in inducing firms to participate in emission trading scheme and in promoting compliance in the PRC, see VANDENBERG M.P., “Climate Change: the China Problem”, *Southern California Law Review*, Vol. 81, 2008, pp. 904 – 957.

811 EU-China Environmental Governance Programme, *Impact-based environmental index and labeling system to support SO2 emission trading in Shanxi province*, [last accessed on 3<sup>rd</sup> December 2016] available at: <http://shanxi-ibis.info/>.

812 European Commission, *EU steps up cooperation on emissions trading with China: new €10 million project announced*, 28<sup>th</sup> June 2016, [last accessed on 3<sup>rd</sup> December 2016] available at: [http://ec.europa.eu/clima/news/articles/news\\_2016062801\\_en](http://ec.europa.eu/clima/news/articles/news_2016062801_en).

813 “Voluntary emission trading on CO2 has taken place during the 11<sup>th</sup> FYP (2006 – 2010) period in

establishment of a nationwide trading mechanism in the PRC<sup>814</sup>. In particular, this report suggests that due to the lack of a solid legal and administrative infrastructure, “*active engagement of local stakeholders to build capacity and transfer best practices will be critical to ensure that the emerging Chinese carbon market achieves its environmental objectives and meets international standards*”<sup>815</sup>.

While legal cooperation with the EU has largely overshadowed similar American initiatives, the United States is still closely involved with the Chinese experiments with emission trading through the intergovernmental cooperation framework<sup>816</sup> and in particular through the collaboration between the EPA and the Chinese Ministry of Environmental Protection in the development of sulfur dioxide emissions trading mechanisms<sup>817</sup>. Moreover, the Environmental Law Institute has carried out extensive research on the lessons which the PRC could learn from the U.S. SO<sub>2</sub> emission trading mechanisms<sup>818</sup>.

We have seen that in order to overcome the limitations of the traditional command-and-control governance model and of administrative enforcement Chinese policymaker have turned towards emissions trading, a scheme which (from an economic standpoint) relies on the allocation of property rights to solve negative externalities<sup>819</sup>. However, that same lack of effective enforcement seems to be the main reason for the failure of some of the pilot trading schemes implemented at a local level. Cooperation projects such as the EU EGP

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*China. A few standards have been published in order to formalize the voluntary emission reduction exchange (Panda standard, Chinaver, etc). Other provinces and cities not chosen for pilot ETS have also implemented certain voluntary emission trading. In general, the lack of infrastructures and [of incentives for ] firms are major reasons of a poor market performance”, TUERK A., MEHLING M., KLINSKY S., WANG X., *Emerging Carbon Markets: Experiences, Trends, and Challenges*, Climate Strategies, Working Paper, January 2013, [last accessed on 13<sup>th</sup> December 2016] available at: <http://climatestrategies.org/about-us/>.*

814 “*As these systems are elaborated and implemented, policy makers will face substantial challenges due to lacking experience with market-based instruments and the sophisticated requirements in terms of emissions data, administrative capacity, and solid regulatory structures needed for a robust trading system*”, TUERK A., MEHLING M., KLINSKY S., WANG X., Op.cit.

815 Ibid.

816 United States Department of State, U.S. - China Ten-Year framework for cooperation on energy and environment, [last accessed on 20<sup>th</sup> November 2016] available at: <http://www.state.gov/e/oes/eqt/tenyearframework/>.

817 United States Environmental Protection Agency, EPA Collaboration with China, [last accessed on 13<sup>th</sup> December 2016] available at: <https://www.epa.gov/international-cooperation/epa-collaboration-china#highlights>.

818 See JARVIS H., WEI X., “Comparative analysis of air pollution trading in the United States and China”, *Environmental Law Institute, News & Analysis*, Vol. 36, 2006, pp. 10234 -10250.

819 DE CENDRA DE LARRAGAN J., “Regulatory dilemmas in EC Environmental Law: the ongoing conflicts between competitiveness and the environment”, in CAFAGGI F., MUIR WATT H. (edited by), *The regulatory function of European private law*, Edward Elgar, 2009, p. 122.

can therefore play an important role to ensure the success of the planned nationwide emission trading scheme by offering capacity building initiatives targeting judges and public officials (to strengthen judicial and administrative enforcement) as well as private enterprises (to promote voluntary compliance<sup>820</sup>).

### 5.3. THE ENGAGEMENT OF THE PRIVATE SECTOR IN ENVIRONMENTAL GOVERNANCE

As we have seen in the previous chapters, since the late 2000s the number of cooperation projects aimed at strengthening administrative and judicial enforcement in China has risen significantly. However, this traditional approach has been recently overshadowed (at least in part) by a growing policy discourse which seems to favour greater engagement of the private sector as a possible solution for environmental governance problems<sup>821</sup>, especially in the developing world. This discourse had a profound influence on the work of some of the most active players in the field of legal cooperation with the People's Republic of China, and has led to the enactment of several interesting initiatives under the aegis of the EU-China EGP and of UNEP.

The theoretical premise behind private environmental governance is the belief that “*environmental preferences are expressed in private market decisions, [more often than through] voting or lobbying*”<sup>822</sup> and that therefore “*the pursuit of public ends through private standards, monitoring, enforcement, and dispute resolution*”<sup>823</sup> have an important role to play. Indeed, according to recent research industry standards and voluntary certification systems, contractual requirements and private inspections carried out along

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820 For an overview of the state of the art as regards voluntary compliance to environmental rules in the PRC (in particular as regards emission trading and “green procurement”), see GUO P., *Voluntary Corporate Environmental Behaviour (China)*, December 2012, EU-China Environmental Governance Programme, [last accessed on 14<sup>th</sup> December 2016] available at: <http://www.ecegp.com/files/3/Study%205%20China%20Vol.%20-%20Voluntary%20Corporate%20Environmental%20Behaviour%202012.pdf>.

821 For an overview of the ongoing debate, see VANDENBERGH M.P., “Private environmental governance”, *Cornell Law Review*, Vol. 99, 2013, pp. 129 – 200; VANDENBERGH M.P., “The implications of private environmental governance”, *Cornell Law Review*, Vol. 99, 2014, pp. 117 – 139; MEIDINGER E.E., “Private environmental regulation, human rights and community”, *Buffalo Environmental Law Journal*, vol. 7, 1999 – 2000, pp. 123 – 237; BABCOCK H.M., “Corporate environmental social responsibility: corporate ‘greenwashing’ or a corporate culture game changer?”, *Fordham Environmental Law Review*, Vol. 21, 2010, pp. 1-78.

822 VANDENBERGH M.P., “Private environmental governance”, *Cornell Law Review*, Vol. 99, 2013, p. 129. In the same article, Vandenberg clarifies that “*the common feature of the activities that I characterize as private environmental governance is the development and enforcement by private parties of requirements designed to achieve traditionally governmental ends*” (see p. 147).

823 Ibid. See also KOTZE’ L.J., *Global environmental governance, Law and regulation for the 21<sup>st</sup> century*, Edward Elgar, Cheltenham UK, 2012, pp. 207 – 209.



the supply chain are often much more effective than public enforcement mechanisms<sup>824</sup>. The added value of private enforcement mechanisms resides not only in the fact that they are significantly better funded than most public enforcement agencies, but also in the fact that other private undertakings operating along the same supply chain are in a much better position to verify compliance and to enforce industry standards<sup>825</sup>. Environmental standards and certification requirements, environmental insurance requirements, environmental management systems and corporate social responsibility rules are today a fixture in commercial agreements in several industries<sup>826</sup>. While in some cases private environmental governance can take on functions normally performed by public authorities or may “*change or even displace*” government programmes<sup>827</sup>, more often lawmakers and regulators must intervene to set minimum environmental standards which can “*stimulate or provide the floor for private market responses*”<sup>828</sup>.

While at the present stage private environmental governance in the People’s Republic of China is not sufficiently developed to fill at least some of the “gaps” in the public enforcement framework, its importance has been openly recognized by the Chinese government and by international players.

### **5.3.1. Environmental Corporate Social Responsibility**

The Gesellschaft für internationale Zusammenarbeit has been particularly active in the promotion of environmental CSR in the People’s Republic of China through several awareness raising and capacity building initiatives, mostly within the framework of the EU-China EGP. For example, the Sino-German Corporate Social Responsibility Project

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824 “*Many corporations have adopted environmental management systems not because of government requirements but because their supply contracts require them to comply with a private standard [...] Roughly fourteen percent of the temperate forests around the world (nine percent of all productive forests) and seven percent of all fish caught for human consumptions are subject to private certification systems that establish and enforce private management standards or increase the enforcement of government standards*”, VANDENBERGH M.P., “Private environmental governance”, *Cornell Law Review*, Vol. 99, 2013, pp. 136 – 137. On this subject, see also FALKNER R., “Private environmental governance and international relations: exploring the links”, *Global Environmental Politics*, MIT Press, Vol. 3, Issue 2, May 2003, pp. 72 – 87. On the subject of international contracts (from both a common law and a civil law perspective) see FERRARI F., M. TORSELLO, *International Sales Law – CISG in a Nutshell*, West Publishing, St Paul, 2014; and FRIGNANI A., TORSELLO M., *Il contratto internazionale*, CEDAM, Padua 2010.

825 MEIDINGER E.E., Op.cit., p. 125.

826 VANDENBERGH M.P., “Private environmental governance”, *Cornell Law Review*, Vol. 99, 2013, p. 158.

827 MEIDINGER E.E., Op.cit, p. 125.

828 VANDENBERGH M.P., “Private environmental governance”, *Cornell Law Review*, Vol. 99, 2013, p. 136. See also VANDENBERGH M.P., “The emergence of private environmental governance”, *Environmental Law Reporter*, Vol. 44, Issue 2, 2014, pp. 10125 – 10135.

organized a training event held on 28<sup>th</sup> June 2013 which focused on CSR and corporate environmental information disclosure in Linfen, Shanxi. According to the organizers, the seminar saw the participation of representatives from 123 different companies as well as 53 officials from the local small and medium enterprises bureau and was followed by a larger event on 25<sup>th</sup> July 2013 (attended by 247 representatives from 160 companies)<sup>829</sup>.

Professor Rolf Dietmar, project director of the Gesellschaft für internationale Zusammenarbeit also edited a report, published on the website of the EU-China EGP, which offers an overview of CSR policies in seven EU Member States, as well as in Australia, Norway and the United States<sup>830</sup>. In particular, the report shows how environmental CSR and corporate reporting of environmentally-sensitive information developed through the interplay of “mandatory” as well as “voluntary measures”<sup>831</sup>. While the report presents an even-handed assessment of the CSR policies adopted in different countries and does not contain explicit policy recommendations, it would not be unreasonable to suggest that it lays greater emphasis on the kind of mandatory CSR reporting which prevails in countries such as France, Denmark, Netherlands, Sweden and, to a lesser extent, in Germany.

Between 2007 and 2014, the Gesellschaft für internationale Zusammenarbeit has organized dozens of workshops and training events which targeted both corporations and public officials. Some of these projects even involved awards for “CSR champions” and pilot companies and workshops to promote environmentally sustainable practices<sup>832</sup>. Moreover, the Sino-German Corporate Social Responsibility Project has published an impressive list

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829 EU-China Environmental Governance Programme, 项目工作简报 (xiàngmù gōngzuò jiǎnbào) (it is a bilingual report on the latest initiatives), September 2013, [last accessed on 13<sup>th</sup> December 2016] available at: [http://shanxi-ibis.info/Portals/5/Documents/EGP%20newsletter\\_3%20\(09-2013\).pdf](http://shanxi-ibis.info/Portals/5/Documents/EGP%20newsletter_3%20(09-2013).pdf).

830 DIETMAR R. (edited by), *Study report on Policies on Corporate Social Responsibility and Corporate Environmental Information Disclosure in Selected Countries*, EU-China Environmental Governance Programme, January 2013, [last accessed on 10<sup>th</sup> December 2016] available at: [http://www.chinacsproject.org/Uploads/%7BB2EED875-1948-4767-A688-20B361C07338%7D\\_Study\\_Policies-on-CSR\\_CEID-in-Selected-Countries\\_GIZ-CSR\\_Final.pdf](http://www.chinacsproject.org/Uploads/%7BB2EED875-1948-4767-A688-20B361C07338%7D_Study_Policies-on-CSR_CEID-in-Selected-Countries_GIZ-CSR_Final.pdf).

831 According to Prof. Dieter, it seems that almost any CSR policy is better than none, since “*in all cases, implemented policies correlate with higher numbers of CSR, sustainability and environmental reporting. Therefore, even though the nature of the policies differs across country sample, they show a success in raising the number of CSR reports and of information on CSR and environmental information being published in annual reports*”, DIETMAR R. (edited by), *Study report on Policies on Corporate Social Responsibility and Corporate Environmental Information Disclosure in Selected Countries*, EU-China Environmental Governance Programme, January 2013, p. 54.

832 For a full list of the capacity-building initiatives, see Sino-German Corporate Social Responsibility Project, *Events*, [last accessed on 13<sup>th</sup> December 2016] available at: [http://www.chinacsproject.org/Events/Event\\_List\\_EN.asp?LstFlt\\_D1=2013](http://www.chinacsproject.org/Events/Event_List_EN.asp?LstFlt_D1=2013).

of case studies which provides useful insight on its efforts to promote of CSR and sustainable business practices in the PRC<sup>833</sup>. These cases concern specific Chinese companies which cooperated with the GIZ in order to develop environmental CSR policies and to the environmental impact of their activities. With the help of the GIZ, small and medium enterprises were able to adopt ethical codes of conduct, to develop effective techniques for the management of hazardous waste and toxic substances<sup>834</sup>, to implement “*environment-oriented cost management techniques*”<sup>835</sup> and to enact procedures to recycle and re-use industrial waste<sup>836</sup>. Moreover, in some of these cases sustainable practices and environmental concerns were embedded in contractual requirements<sup>837</sup>, which might contribute to the development of (privately enforceable) industry standards. In one case, the support provided by GIZ even allowed a pharmaceutical company to set up a private verification and enforcement mechanism, which included periodical audits and inspections of the premises of its suppliers<sup>838</sup>. While the Japan International Cooperation Agency had already organized training events to promote greener production practices among Chinese

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833 Sino-German Corporate Social Responsibility Project, List of case studies, [last accessed on 13<sup>th</sup> December 2016] available at: [http://www.chinacsproject.org/Cases/CaseStudy\\_List\\_EN.asp](http://www.chinacsproject.org/Cases/CaseStudy_List_EN.asp).

834 Sino-German Corporate Social Responsibility Project, Case study: Hazardous Waste and Toxic Substances Management, *Ningbo Fotile Kitchen Ware Co. Ltd.*, [last accessed on 13<sup>th</sup> December 2016] available at: [http://www.chinacsproject.org/Uploads/%7B599CCFA0-3F78-42D1-8025-22928516EE3C%7D\\_Case\\_Study\\_Zhejiang\\_Fotile\\_CSR.pdf](http://www.chinacsproject.org/Uploads/%7B599CCFA0-3F78-42D1-8025-22928516EE3C%7D_Case_Study_Zhejiang_Fotile_CSR.pdf).

835 Sino-German Corporate Social Responsibility Project, Case study: Increasing Energy and Resource Efficiency, *Zhejiang Zhonghui Fur & Leather Co. Ltd.* [last accessed on 13<sup>th</sup> December 2016] available at: [http://www.chinacsproject.org/Uploads/%7BC7537137-2D98-4660-8A7C-DA51DC7622D5%7D\\_Case\\_Study\\_Zhejiang\\_Zhonghui\\_EoCM.pdf](http://www.chinacsproject.org/Uploads/%7BC7537137-2D98-4660-8A7C-DA51DC7622D5%7D_Case_Study_Zhejiang_Zhonghui_EoCM.pdf).

836 Sino-German Corporate Social Responsibility Project, Case study: Hazardous Waste and Toxic Substances Management, *Zhejiang Huahai Pharmaceuticals Co. Ltd.* [last accessed on 13<sup>th</sup> December 2016] available at: [http://www.chinacsproject.org/Uploads/%7B7A1F4554-BBCC-4390-ACDA-5E2C3820E600%7D\\_Case\\_Study\\_Huahai\\_HWM.pdf](http://www.chinacsproject.org/Uploads/%7B7A1F4554-BBCC-4390-ACDA-5E2C3820E600%7D_Case_Study_Huahai_HWM.pdf).

837 Sino-German Corporate Social Responsibility Project, Case study: CSR Strategy Implementation, *Zhejiang Hisun Pharmaceutical Co. Ltd.* [last accessed on 13<sup>th</sup> December 2016] available at: [http://www.chinacsproject.org/Uploads/%7BC7537137-2D98-4660-8A7C-DA51DC7622D5%7D\\_Case\\_Study\\_Zhejiang\\_Zhonghui\\_EoCM.pdf](http://www.chinacsproject.org/Uploads/%7BC7537137-2D98-4660-8A7C-DA51DC7622D5%7D_Case_Study_Zhejiang_Zhonghui_EoCM.pdf).

838 “As a first step, the company set up a professional CSR auditing team that included 12 auditors. These auditors were trained to perform routine audits and assessments of suppliers during the year 2009. Issues related to labour such as working hours, child labour, discrimination and contract-signing were added to the Supplier Environment Health & Safety (EHS) Assessment Questionnaire. Follow-up on-site audits and assessments were conducted based on the supplier’s fundamental EHS risks and performance. From May to November 2009, the company used the new Assessment Questionnaire consistently and conducted on-site audits of over 60 suppliers. These included 12 key strategic suppliers that underwent the EHS audits successfully [...]. HISUN also developed a plan to conduct on-site CSR audits of other 12 key strategic suppliers during the year 2010”, Sino-German Corporate Social Responsibility Project, Case study: CSR Strategy Implementation, *Zhejiang Hisun Pharmaceutical Co. Ltd.* Op.cit.

corporations in the early 2000s<sup>839</sup>, the projects implemented by GIZ are today the most advanced in the field of environmental CSR.

### 5.3.2. Corporate environmental information disclosure

In the course of this dissertation we have outlined several statutory rules and cooperation initiatives which sought to promote access to information in order to pave the way for public participation and even for environmental litigation. While EPBs have the power to collect environmental information and to carry out inspections, without accurate reporting from corporations and potential polluters public enforcement is very likely to prove ineffective. For this very reason, the EU-China EGP implemented a project which aimed at improving corporate environmental information disclosure in the provinces of Zhejiang and Shanxi through the promotion of CSR (so-called “CEID” project)<sup>840</sup>.

To this end, the Deutsche Gesellschaft für Internationale Zusammenarbeit and its Chinese partners (the Zhejiang Research Institute of Industrial Economy and the Shanxi SME Promotion Association<sup>841</sup>) examined the existing environmental information disclosure policies (at a national level and in the provinces of Zhejiang and Shanxi) and the legislation which has tried to address this issue. While this very compelling study is already out of date (after the adoption of the new Environmental Protection Law), it still provides a useful overview of the rules on environmental information disclosure set out by the 2002 Cleaner Production Promotion Law (the first law which required the disclosure of corporate environmental information)<sup>842</sup> and by several measures adopted by SEPA.

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839 For example, on 9<sup>th</sup> March 2001 the JICA had organized a seminar to present “*the experiences acquired by Japanese companies in the 1970s in tackling environment improvement issues with the aim to promote individual environment projects and to improve China's efforts related to environmental issues*”, see Japan International Cooperation Agency, *Japan-China Environmental Improvement Seminar Takes Place In Beijing*, 9th March 2001, [last accessed on 16th December 2016], available at: [https://www.jica.go.jp/english/news/jbic\\_archive/english/base/release/others/2000/A11/nr51s.html](https://www.jica.go.jp/english/news/jbic_archive/english/base/release/others/2000/A11/nr51s.html).

840 EU-China Environmental Governance Programme, *Improving corporate environmental information disclosure in Zhejiang and Shanxi Province through the promotion of corporate social responsibility*, [last accessed on 13<sup>th</sup> December 2016] available at: [http://euceid.chinacsproject.org/index\\_EN.asp](http://euceid.chinacsproject.org/index_EN.asp).

841 EU-China Environmental Governance Programme, *CEID, Implementation Partners*, [last accessed on 13<sup>th</sup> December 2016] available at: [http://euceid.chinacsproject.org/Partners/Implementation\\_Partners\\_EN.asp](http://euceid.chinacsproject.org/Partners/Implementation_Partners_EN.asp).

842 “Article 31 of the Cleaner Production Promotion Law of China [...] regulates that enterprises [included in] the serious pollution enterprise list should disclose the pollutants’ discharge information and [submit to] public supervision” while “article 41 of this law stipulates that enterprises which violate Article 31 by failing to disclose pollutant emission/discharge data, will be penalized with monetary fines amounting to RMB 100,000”, EU-China Environmental Governance Programme, *Policies and Practice of Corporate Environmental Information Disclosure in China*, May 2013, p. 6 [last accessed on 14<sup>th</sup> December 2016] available at:

The report published by the project partners showed that while on the one hand guidelines on voluntary disclosure are very vague (allowing corporations to decide what to disclose), while on the other hand mandatory disclosure rules still apply to an excessively narrow set of information<sup>843</sup>. Moreover, the effectiveness of mandatory disclosure rules is seriously undermined by insufficient monitoring from the EPBs and by fines which are – in most cases – too low to deter infringements<sup>844</sup>. The CEID project also revealed that while some progress has been made, in 2013 “*more than 63 EPBs, encompassing nearly 90% of the authorities*” have yet to disclose the lists of the local enterprises whose pollution levels exceeded the statutory thresholds<sup>845</sup>. These alarming results show that little progress has been made since corporate disclosure requirements were first introduced<sup>846</sup> and that corporate disclosure in China is still the exception, rather than the rule.

The project partners put forward several policy recommendations to overcome the “*disclosure bottleneck*”<sup>847</sup> which is currently hindering effective access to environmental information. Their suggestions included:

- The amendment of the Constitution of the PRC, which should “lay the legal foundation” by outlining environmental rights and the right to access environmental information.
- The revision of the Environmental Protection Law, which should “*reflect both public environmental rights and corporate reporting responsibilities accordingly*”<sup>848</sup>.
- The adoption of a specific law on corporate environmental information disclosure should be drafted to provide guidance with regard to mandatory reporting.

While some of these suggestions may have fallen on deaf ears, the work of the Deutsche Gesellschaft für Internationale Zusammenarbeit and its Chinese partners may have had an

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<http://euceid.chinacsproject.org/Uploads/ Study CEIDinChina English Final 20130815.pdf>.

843 According to the report, the requirements are so vague that “*the information disclosed by enterprises may be incomplete, useless or even false*”, EU-China Environmental Governance Programme, *Policies and Practice of Corporate Environmental Information Disclosure in China*, May 2013, p. 11.

844 EU-China Environmental Governance Programme, *Policies and Practice of Corporate Environmental Information Disclosure in China*, May 2013, p. 12.

845 EU-China Environmental Governance Programme, *Policies and Practice of Corporate Environmental Information Disclosure in China*, May 2013, p. 20.

846 See also GUO P., *Corporate environmental reporting and disclosure in China*, June 2005, CSR-Asia, [last accessed on 14<sup>th</sup> December 2016] available at: <http://www.csr-asia.com/upload/environmentalreporting.pdf>.

847 EU-China Environmental Governance Programme, *Policies and Practice of Corporate Environmental Information Disclosure in China*, May 2013, p. 43.

848 EU-China Environmental Governance Programme, *Policies and Practice of Corporate Environmental Information Disclosure in China*, May 2013, p. 43.

impact, since several provisions in the 2014 Environmental Protection Law address the issue of access to environmental information<sup>849</sup>. In particular, pursuant to Article 55 of the 2014 EPL:

*“Key pollutant-discharging units shall truthfully disclose the names of their major pollutants, the ways of emission, the emission concentration and total volume, the standard- exceeding emission status, as well as the construction and operation of pollution prevention and control facilities, so as to be subject to social supervision”.*

While this provision provides a solid legal foundation for stricter rules on mandatory disclosure, due to the shortcomings of public enforcement voluntary compliance and voluntary disclosure of environmental information might yet prove to be the real game-changers in the field of access to information in the PRC. Therefore, it should not come as a surprise that the implementing partners of the CEID project laid considerable emphasis of the need to promote aggressively environmental education and awareness among the public<sup>850</sup>, one of the key strategies of the EU-China EGP.

### **5.3.3. Environmental liability insurance**

Over the last decade, environmental liability insurance has received considerable attention from both scholars and international organizations, who see in it a useful tool to mitigate and manage environmental risk, promote environmental litigation<sup>851</sup> and even promote

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849 See Article 53, 54 and 55 of the 2014 Environmental Protection Law of the People’s Republic of China.

850 EU-China Environmental Governance Programme, *Policies and Practice of Corporate Environmental Information Disclosure in China*, p. 45.

851 HE Q., “Mitigation of climate change risks and regulation by insurance: a feasible proposal for China”, *Boston College Environmental Affairs Law Review*, Vol. 43, Issue 2, pp. 319 – 343; Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, *China - Insurance instruments for adaptation to Climate Change*, [accessed on 15<sup>th</sup> November 2013] available at: <http://www.giz.de/en/worldwide/15573.html>. On the issue of pollution liability insurance, see also POZZO B., *Danno ambientale e imputazione della responsabilità: esperienze giuridiche a confronto*, Giuffrè, Rome 1996; POZZO B., “La responsabilità per danni all’ambiente in Germania e i connessi problemi di assicurabilità del rischio ambientale: il progetto per una nuova polizza r.c.”, *Diritto ed Economia dell’Assicurazione*, 1994, pp. 3 – 25; KATZMAN, M., “Pollution liability insurance and catastrophic environmental risk”, *Journal of Risk and Insurance*, 1988, pp. 89-90; MIELENHAUSEN T.C., “Insurance Coverage for Environmental and Toxic Tort Claims” *William Mitchell Law Review*, Vol. 17, Issue 4, 1991, pp. 945 – 1019. “*Environmental pollution liability insurance covers the economic compensation liabilities arising from the personal injuries, fatalities or property losses caused to third persons by corporate pollution incidents. Originating from the developed countries of Europe and North America, environmental pollution liability insurance has become a major means for the social pooling of environmental damage compensation liabilities. As a market-based environmental risk governance mechanism, environmental pollution liability insurance plays an important role in*

compliance, by influencing the behavior of policyholders<sup>852</sup>. However, while Article 52 of the 2014 EPL provides (rather laconically) that “*the State encourages participation in environmental pollution liability insurance*”, environmental liability insurance in the PRC is still in its infancy.

The EGP-Guizhou Project offered to the Swedish Environmental Research Institute a chance to examine the main obstacles which today stand in the way of the development of a modern environmental liability insurance market in the PRC. According to the report drafted for the EGP-Guizhou Project, while the SEPA and the China Insurance Regulatory Commission (in 2007) and later the Ministry of Environmental Protection (in 2013) have issued road-maps for the establishment of an insurance system and encouraged the implementation of pilot projects on compulsory environmental liability insurance at a local level (especially in the chemical sector), the results have been disappointing<sup>853</sup>. In the case of Guizhou Province, the compulsory insurance scheme set up in 2012 was not favourably received by the private sector and compliance was low. It seems that – just as was the case for the pilot emissions trading schemes – insurance companies were unable to set a price on environmental damage. In other words, in the absence of dependable environmental risk assessment techniques and reliable information on the costs of pollution (and consequently

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*preventing the emission of pollutants and perfecting [the] environmental pollution damage compensation system*”, United Nations Environmental Programme/The People’s Bank of China, *Establishing China’s Green Financial System – Detailed Recommendations 12: create a compulsory green insurance system*, 2015, p. 2 [last accessed on 14<sup>th</sup> December 2016] available at: <https://www.cbd.int/financial/privatesector/china-Green%20Task%20Force%20Report.pdf>. For an overview of the legal framework as regards insurance, see CANDIAN A., “Il diritto delle assicurazioni e le sue fonti”, in AJANI G., GAMBARO A., GRAZIADEI M., SACCO R., VIGORITI V., WAELBROECK M. (edited by), *Studi in onore di Aldo Frignani. Nuovi orizzonti del diritto comparato europeo e transnazionale*, Jovene Editore, Naples 2011, pp. 793 – 802; CANDIAN A., “Temi e problemi di diritto comparato dei mercati assicurativi e finanziari: una prima ricognizione”, ANTONIOLLI L., BENACCHIO G.A., TONIATTI R. (edited by), *Le nuove frontiere della comparazione. Atti del I Convengno Nazionale della SIRD*, Milan, 5-6-7 May 2011, 2012, pp. 327 – 334; and CERINI D., *Insurance law in Italy*, Kluwer Law International, 2012.

852 For example by preventing “*excessive or misguided investments in polluting projects, enhanc[ing] the ex-ante and interim management of environmental pollution risks and enhanc[ing] corporate capabilities to prevent and avoid environmental pollution incidents*”, United Nations Environmental Programme/The People’s Bank of China, *Establishing China’s Green Financial System – Detailed Recommendations 12: create a compulsory green insurance system*, 2015, p. 3.

853 EU-China Environmental Governance Programme, *EGP-Guizhou Best Practice of Environmental Damage Assessment Institutions*, March 2015 [last accessed on 13<sup>th</sup> August 2016] available at: [http://www.egp-guizhou.com/download/18.36f3359214d517c6a58278/1432197593266/4.+Guizhou+Practice+of+EDA+Institutions\\_ENG+\(2015\).pdf](http://www.egp-guizhou.com/download/18.36f3359214d517c6a58278/1432197593266/4.+Guizhou+Practice+of+EDA+Institutions_ENG+(2015).pdf). See also United Nations Environmental Programme/The People’s Bank of China, *Establishing China’s Green Financial System – Detailed Recommendations 12: create a compulsory green insurance system*, 2015, p. 4.

on the potential liabilities of their policyholders), insurers were unable to calculate accurately premium rates<sup>854</sup>.

Another recent study funded by the UNEP and by the People's Bank of China reached very similar conclusions and set out some detailed policy recommendations. According to the report of the "Green Finance Task Force" set up by UNEP (which included eminent economists and the executives of major Chinese corporations), compulsory insurance schemes lack "*vigorous legal support*", since "*despite the inclusion of liability insurance in the Environmental protection Law, the requirement for insurance stays at the level of 'encouragement'*"<sup>855</sup>. Moreover, the Task Force emphasized the importance of private enforcement and the need to promote environmental civil litigation, since due to "*inadequate law enforcement against tort and the low cost of violations, many companies are not motivated to participate in insurance*"<sup>856</sup>. Finally, it would be necessary to put in place effective incentive mechanisms, in the form of fiscal subsidies and tax exemptions.

In the present chapter, we have examined the role which international legal cooperation has played in the development of market-based environmental governance mechanisms, of environmental CSR and in the promotion of corporate environmental information disclosure. While it has been rightly observed that private environmental governance cannot replace public governance, nonetheless "*it appears to be filling gaps and complementing public governance in some cases and [...] competing with it in others*"<sup>857</sup>. In a country like China, where inadequate public enforcement has often made environmental law ineffective, private environmental governance is likely to play a greater role in the future, and international cooperation initiatives can contribute in a very meaningful way to its development.

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854 "*The reason [for this failure] was that standards for the insurance were not established and no guidance was provided for the pricing of insurance products and the compensation for damage. [...] The lack of environmental risk assessment methods [raises] difficulties [for] the identification and the [quantification] of environmental risks. And the [significant differences between different] industries and companies also makes it hard for insurance companies to price the insurance products*", EU-China Environmental Governance Programme, *EGP-Guizhou Best Practice of Environmental Damage Assessment Institutions*, March 2015.

855 United Nations Environmental Programme/The People's Bank of China, *Establishing China's Green Financial System – Detailed Recommendations 12: create a compulsory green insurance system*, 2015, p. 4.

856 United Nations Environmental Programme/The People's Bank of China, *Establishing China's Green Financial System – Detailed Recommendations 12: create a compulsory green insurance system*, 2015, p. 5.

857 VANDENBERGH M.P., "The implications of private environmental governance", *Cornell Law Review*, Vol. 99, 2014, pp. 119 – 120. ; MEIDINGER E.E., *Op.cit.*, p. 125.



## **Chapter 6. Conclusions: legal cooperation and a new approach to modernization**

The landscape of environmental legal cooperation with the People's Republic of China has changed considerably over the last fifteen years. As we have seen, while until the early 2000s this field was largely dominated by American actors and was characterized by a large number of small, uncoordinated projects, since then the focus has largely shifted towards broader, more complex, frameworks of cooperation (such as the EU-China Environmental Governance Programme), and non-American institutions and organizations have come to play a more central role.

While the PRC was still trying to build an environmental law framework almost from scratch, after the legal nihilism of the Mao Era<sup>858</sup>, foreign institutions and organizations invested considerably on technical support in the drafting of laws. However, the latest generation of cooperation initiatives has largely focused on the enforcement problem, while international NGOs and foreign governments have shifted their efforts towards building capacity among legal professionals and public officials and increasing awareness among the public. These capacity building initiatives have been favourably received by the Chinese legal community<sup>859</sup>, and in particular by lawyers desirous to acquire the kind of prestige which events organized by well-known international bodies can bestow and to acquire skills which might give them an edge in a very competitive market<sup>860</sup>. However, we have already examined the difficulties which one inevitably encounters in trying to assess the impact of these cooperation projects<sup>861</sup> or even in defining what would constitute “success”.

Nonetheless, European models had a significant influence in the drafting of environmental legislation in the PRC (especially as regards the fundamental principles and, more recently, the tort liability rules), while U.S. models held sway with regard to environmental impact assessment rules and to the extraterritorial application of environmental law. We have also seen that while – in some instances - cooperation projects have been able to change the “law on the books”, the lack of qualified legal professionals means that new rules are slow

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858 HE W., *In the name of justice: striving for the rule of law in China*, Brookings Institution Press, 2012, p. xxxvii.

859 ROHAN B., *Op.cit.*

860 STERN R.E., *Environmental Litigation in China: A Study in Political Ambivalence*, Cambridge University Press, Cambridge and New York, 2013, p. 193.

861 STERN R.E., *Ibid.*, p. 197.

to trickle down into the “law in action”<sup>862</sup>.

Moreover, we have seen how the capacity-building and technical assistance projects implemented by both European and American institutions seem to have downplayed (if not neglected) the challenges posed by legal translation. Indeed, Chinese lawmakers often rely on incorrect or even misleading translations of foreign legislation<sup>863</sup>, while international organizations and even foreign governments<sup>864</sup> tend to pay scant attention to the connotations of the legal terms they employ. However, the translation of a significant number of legal texts undertaken by German<sup>865</sup> and French<sup>866</sup> actors (which is currently underway) may bring the problems of legal translation to the fore.

The EU-China Environmental Governance Programme has also contributed significantly to the introduction of the principles of the Aarhus Convention in the Chinese public discourse and has been largely successful in promoting a reform of the rules on locus standi which could turn environmental litigation into a key governance tool. Indeed, the most significant lesson which can be drawn from the EU-China EGP is that judicial enforcement and private environmental governance are likely to play a decisive role in future and may offset some of the shortcomings of the public enforcement mechanisms. Moreover, in light of the recent efforts to establish a nationwide emissions trading scheme<sup>867</sup> and to create an environmental liability insurance market<sup>868</sup>, the capacity building initiatives of international governmental and non-governmental actors are likely to focus much more on these market-based governance mechanisms.

Some of the actors involved in recent cooperation projects have suggested that the success of market-based tools and private governance mechanisms relies – to a significant extent – on the possibility to build a critical mass of participants (e.g., the minimum number of

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862 See EU-China Environmental Governance Programme, *Policy Report: Judges’ training in Environmental Law – Recommendations on capacity building for the judiciary in environmental adjudication*, 2015, p. 35; and TIMOTEO M., “Law and language: issues related to legal translation and interpretation of Chinese rules on tortious liability of environmental pollution”, *China –EU Law Journal*, Springer, 2015, Vol. 4, pp. 126 – 127.

863 See TIMOTEO M., *Ibid.*, p. 128.

864 Ambassade de France à Pékin, *Lexique français-chinois sur le droit de l’environnement*, March 2010, [last accessed on 4<sup>th</sup> September 2016] available at: [http://www.ambafrance-cn.org/IMG/pdf/lexique\\_droit\\_de\\_l\\_environnement-2\\_ok\\_denis.pdf](http://www.ambafrance-cn.org/IMG/pdf/lexique_droit_de_l_environnement-2_ok_denis.pdf).

865 SCHULTE – KULKMANN N., HEILMANN S., *Op.cit.*, p. 39.

866 Ambassade de France à Pékin, *Traduction du code de l’environnement*, February 2012, [last accessed on 4<sup>th</sup> September 2016] available at: <http://www.ambafrance-cn.org/NOUVEL-ARTICLE-Traduction-du-Code-de-l-environnement>.

867 See TUERK A., MEHLING M., KLINSKY S., WANG X., *Op.cit.*

868 United Nations Environmental Programme/The People’s Bank of China, *Establishing China’s Green Financial System – Detailed Recommendations 12: create a compulsory green insurance system*, 2015.

policyholders necessary to make environmental liability insurance economically viable<sup>869</sup>) or of foreign-trained lawyers and scholars<sup>870</sup>. Likewise, environmental corporate social responsibility and corporate environmental information disclosure can become useful governance tools only if their advocates are able to build a minimum level of voluntary compliance and public awareness. The kind of capacity building and public awareness initiatives which international cooperation projects have specialized in could help a great deal in reaching the tipping point and in triggering the kind of virtuous circles and network effects which can ensure the success of private governance schemes, especially at a local level (where ambitious pilot projects are generally carried out, before they can be “taken national”).

While it would be impossible to deny that international legal cooperation has played an important role in the development of an environmental law framework in the PRC, the popularity of some of these cooperation initiatives among legal scholars – especially in the United States<sup>871</sup> – has suffered somewhat due to their association with “law and development” theories. In particular, Professor John Ohnesorge has argued that law and development theories “*play an important role in the work of major bilateral development assistance providers such as the United States Agency for International Development [...], Germany’s Gemeinschaft für Internationale Zusammenarbeit [since 2010, the Gesellschaft für Internationale Zusammenarbeit] and the Japan International Cooperation Agency*”<sup>872</sup>. These theories, which have suffered some reversals of fortune over the last fifty years<sup>873</sup>, focus on the relationship between legal reform and economic and social development. According to David Trubek, the theoretical justification for what are commonly referred to as “law and development theories” can be found in the work of Henry Sumner Maine,

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869 United Nations Environmental Programme/The People’s Bank of China, *Establishing China’s Green Financial System – Detailed Recommendations 12: create a compulsory green insurance system*, 2015, p. 5.

870 McCUTCHEON A., Op.cit., p. 167.

871 TAMANAHA B.Z., “The Primacy of Society and the Failure of Law and Development”, Washington University School of Law, 2<sup>nd</sup> October 2009, Working Paper No. 10-03-02.

872 OHNESORGE J.K.M., Op.cit.

873 Some authors emphasize the lack of internal coherence in the field of law and development. In particular, Brian Tamanaha has lamented the “*billions of dollars [...] spent on law and development (or ‘rule of law’) projects around the world in the past two decades, focusing on judicial reform, legal training, constitution and code writing, legal transplantation, anti-corruption efforts and more*” and has provocatively (if not altogether fairly) suggested that “*law and development work is better seen [...] as an agglomeration of projects perpetuated by motivated actors supported by funding*” (TAMANAHA B.Z., Op.cit., p. 2 et seq.).

Émile Durkheim and Max Weber<sup>874</sup>. Moreover, these theories appear to have been profoundly influenced by the connection between institutional reform and economic development drawn by Douglass North<sup>875</sup>. The key question which law and development theories seek to answer is whether legal reform can be relied upon as a tool to “modernize” a country (i.e. to promote social change and economic development), or if legal reform can only solidify a change in social behavior once the latter has already taken place<sup>876</sup>. After several decades of eclipse (especially in the United States<sup>877</sup>), the last ten years have seen a “renewed interest in bringing law to bear in the struggle for development”<sup>878</sup>.

However, even scholars who hold that law and development theories can provide useful guidance for development strategies have warned against the risk of believing that “*the rule of law might itself be a development strategy*” which could substitute “*perplexing political and economic choices*”<sup>879</sup> and against the “formalistic” approach to which some

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874 “In the 19<sup>th</sup> century, thinkers such as Maine, Durkheim and Weber, who studied the emergence of industrial civilization, considered law a major factor in the processes they examined and, accordingly, made significant contributions to our knowledge about the social role of law”, TRUBEK D.M., “Max Weber on Law and the Rise of Capitalism”, *Wisconsin Law Review*, Vol. 3, 1972, p. 720. See also LINNAN D. K. (edited by), *Legitimacy, Legal Development and Change: Law and Modernization Reconsidered*, Routledge, London and New York, 2012, pp. 1 – 474; HALEY J.O., TAKENAKA T., *Legal innovations in Asia: judicial lawmaking and the influence of comparative law*, Edward Elgar, 2014, p. 152.

875 “Institutions are the humanly devised constraints that structure political, economic and social interaction. They consist of both informal constraints (sanctions, taboos, customs, traditions and codes of conduct) and formal rules (constitutions laws, property rights)”, NORTH D.C., “Institutions”, *Journal of Economic Perspectives*, Winter 1991, p. 97; FAUNDEZ J., “Douglass North’s theory of institutions: lessons for law and development”, *Hague Journal on the Rule of Law*, Vol. 8, Issue 2, 2016, pp. 373 – 419; OHNESORGE J.K.M., Op.cit, p. 288.

876 LINNAN D. K. (edited by), Op.cit, pp. 1 – 474. In his work , Max Weber gave a positive answer to this question. “In his economic sociology, Weber stressed the importance for capitalist development of two aspects of law: (1) its relative degree of calculability, and (2) its capacity to develop substantive provisions – principally those relating to freedom of contract- necessary to the functioning of the market system. The former reason was the more important of the two. Weber asserted that capitalism required a highly calculable normative order. His survey of types of law indicated that only modern, rational law, or logically formal rationality, could provide the necessary calculability. Legalism supported the development of capitalism by providing a stable and predictable atmosphere; capitalism encouraged legalism because the bourgeoisie were aware of their own need for this type of governmental structure”, TRUBEK D.M., Op.cit, p. 740. See also KENNEDY D., “Laws and Development”, in HATCHARD J., PERRY-KESSARIS A., *Law and Development: facing complexity in the 21<sup>st</sup> Century*, Cavendish Publishing Ltd., London- Portland, 2003, pp. 17 – 26.; HUNTINGTON S.P., “The Change to Change: Modernization, Development and Politics”, *Comparative Politics*, Vol. 3, Issue 3, April 1971, pp. 283 – 322.

877 TRUBEK D.M., GALANTER M., “Scholars in self-estrangement: some reflections on the crisis in law and development studies in the United States”, *Wisconsin Law Review*, Issue 4, 1974, pp. 1062 – 1102.

878 KENNEDY D., Op.cit, p. 17; GINSBURG T., “The future of law and development”, *Northwestern University Law Review Colloquy*, Vol. 104, 2009, pp. 164 – 173.

879 KENNEDY D., Op.cit, p. 17.

cooperation projects have been prone in the past<sup>880</sup>. In particular, Professor Ohnesorge has argued that organizations active in the field of law and development (and international legal cooperation) tend to act on the assumption that “*modernized legal institutions, staffed by modernized people, would produce reliably modern outcomes*” (where – according to this author - “modern” means consistent with the prevailing Western theories and ideals)<sup>881</sup>. The ever-present danger of falling into an excessively formalistic pattern of intervention is demonstrated by the (remarkably candid) admissions of a USAID official, who stated that “*although we have long paid lip service to the importance of cultural differences and what we used to refer to as ‘social soundness analysis’, we have more often assumed that introducing change based on our own experience will result in a similar outcome in a developing-country environment, where different institutions prevail. And we are very often disappointed with the results*”<sup>882</sup>, According to John Ohnesorge, legal assistance should establish its priorities on the basis of the actual need of the aid recipients<sup>883</sup> and should “*consist of presenting legal reform issues as we actually think about them ourselves, as ridden with tradeoffs, so that where a legal systems falls on a particular dimension is important, and not whether property rights are secure, or some other abstraction*”<sup>884</sup>.

My analysis of recent cooperation projects in the field of environmental law suggests that several of the most recent initiatives already reflect this new (and sounder) approach to modernization. In particular, most of the initiatives of the EU-China Environmental Governance Programme and of the Sino-German legal cooperation project have proceeded in lockstep with local projects and with the domestic reform agenda. Indeed, Chinese actors (both at a local and at a national level) not only took part in the implementation of

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880 OHNESORGE J.K.M., “Developing development theory: law and development orthodoxies and the Northeast Asian experience”, *University of Pennsylvania Journal of International Economic Law*, Vol. 28, Issue 2., 2007, pp. 241- 242.

881 OHNESORGE J.K.M., Op.cit, p. 301.

882 CONLY J., “Comments on Douglass North’s ‘Understanding the Process of Economic Change’”, Forum Series on the role of institutions in promoting economic growth, Mercatus Center of George Mason University, 24<sup>th</sup> June 2003, quoted in OHNESORGE J.K.M., “Developing development theory: law and development orthodoxies and the Northeast Asian experience”, *University of Pennsylvania Journal of International Economic Law*, Vol. 28, Issue 2., 2007, p. 285.

883 “*For example, countries with relatively clean, competent bureaucracies might decide not to devote as many resources to administrative law reform, while countries with strong science education and a desire to foster domestic industry, such as China today, might choose to postpone heavy investment in intellectual property protection until such protection is demanded by local IP owners*”, OHNESORGE J.K.M., Op.cit, p. 302.

884 OHNESORGE J.K.M., Op.cit, p. 302.

every initiatives, but also contributed to defining the objectives and the priorities of the cooperation projects. Moreover, when the GIZ or the foreign partners to the EU-China EGP tried to promote legal transplants or institutional reform they did so by providing a broad context and detailed information on the outcome of similar reforms in the developed world and by clearly outlining the tradeoffs and the challenges posed by these foreign legal models. In light of the positive outcome of the EU-Chine EGP and of its favourable reception in China, there is reason to believe that these early experiments with a new approach to modernization will also inform future projects in the field of environmental legal cooperation with the People's Republic of China.

However, only a few months ago the NPC adopted a new piece of legislation which may have momentous consequences for the future of legal cooperation: the new law on the "Management of foreign Non-Governmental Organizations' Activities within Mainland China"<sup>885</sup>. The new law prevents foreign NGOs from engaging in or funding political or for-profit activities in the PRC<sup>886</sup>, empowers the public security authorities to supervise their activities<sup>887</sup> and introduces strict registration requirements<sup>888</sup>. While, as we have seen, few foreign NGOs operate within the PRC without a State-backed partner, the new law has raised serious concerns about the degree of autonomy which foreign organizations will be able to enjoy and about the future of the most controversial cooperation programmes<sup>889</sup>. However, in light of the official commitment of the Chinese government to launch, before the end of 2017, a nationwide emissions trading scheme and to strengthen the enforcement of environmental legislation, the new NGOs Law is not likely to hinder future cooperation projects in the field of environmental law. Indeed, at the present stage, the central government remains the main driving force behind the reform of the environmental legislation of the People's Republic of China.

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885 中华人民共和国境外非政府组织境内活动管理法 (zhōng huá rén mín gòng hé guó jìng wài fēi zhèng fǔ zǔ zhī jìng nèi huó dòng guǎn lǐ fǎ) 2016, bilingual text [last accessed on 16<sup>th</sup> December 2016] available on the website: <http://www.lawinfochina.com/>.

886 Article 5 of the 2016 Law on the Management of foreign Non-Governmental Organizations' Activities within Mainland China.

887 Article 7 of the 2016 Law on the Management of foreign Non-Governmental Organizations' Activities within Mainland China.

888 Article 9 and 12 of the 2016 Law on the Management of foreign Non-Governmental Organizations' Activities within Mainland China.

889 TING Y., "Overseas NGOs in China uneasy about new oversight law", *South China Morning Post*, 22<sup>nd</sup> October 2016, [last accessed on 18<sup>th</sup> December 2016] available at: <http://www.scmp.com/news/china/policies-politics/article/2039279/overseas-ngos-china-uneasy-about-new-oversight-law>.

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