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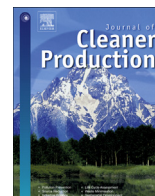
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Regional restrictions on environmental impact assessment approval in China: the legitimacy of environmental authoritarianism



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ABSTRACT

The poor enforcement and effectiveness of environmental impact assessment (EIA) on construction and investment projects in China has long been blamed for not preventing environmental pollution and degradation. At the same time, freezing EIA approval of all new projects in an administrative region, introduced in 2006 as a punishment for failing to meet regional environmental quality targets, has been regarded as an innovative administrative instrument used by higher level environmental authorities on local governments. But it also raised controversies. Applying an environmental authoritarianism perspective, this study analyzed the legitimacy and environmental effectiveness of freezing EIA approval procedures by reviewing all 25 national cases and 12 provincial cases of so-called EIA Restrictions Targeting Regions between 1 December 2006 and 31 December 2013. The results show that such an environmental authoritarian measure is to some extent environmentally effective but lacks legality and transparency towards and participation of third parties, and hence falls short in legitimacy. Legal foundations and wider third party participation are essential for the long term effectiveness of this policy and its transfer to other countries.

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1. Introduction

In most industrializing and industrialized countries many environmental policy and governance instruments are aimed at emission control of individual point sources. The environmental licenses/permits, emission standards and environmental impact assessments (EIA) of new industrial investments are some of the most successful instruments in regulating emissions of polluting industries. Through these instruments companies that do not behave according to the set emission requirements face sanctions, ultimately resulting in losing their license to produce. But for a region, in the end it is the total amount of emissions of all polluting sources and the total resulting ambient environmental quality that counts. An increasing number of countries, including China, faces problems in protecting and safeguarding regional environmental quality, as the sum of individual polluting companies that produce according to emissions requirements might result in ambient

environmental quality above standards. Individual polluters can then not be held responsible for the overall deterioration of ambient (air and water) quality in a region, and governmental authorities often lack instruments to intervene.

Since 2007 the Chinese Ministry of Environmental Protection (MEP) has developed and implemented a new and unprecedented strategy to cope with this problem of ambient environmental quality exceeding ambient environmental standards in a specific region. If an administrative region (usually a county) does not fulfill environmental quality requirements as formulated in prevailing standards or not enforce EIA law or other pollution prevention and control regulations, all new EIA application documents (including EIA reports, statements and registration forms) on (expanding or new) economic projects with significant environmental impacts in that region are not taken into consideration by the relevant authorities (often the MEP or a provincial Environmental Protection Bureau (EPB)). That means that these new investment projects will not be judged against the pertaining emissions standards and construction of new or expanding of existing economic activities cannot start (as no EIA will be handed out, a requirement for starting a construction project with potentially severe

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environmental impact). In China this new policy is called Environmental Impact Assessment Restriction Targeting Regions (EIARTR, *Quyū Xiānpǐ*). Such a suspension of approval of EIA in a region puts significant pressure on local authorities prioritizing local economic development. Lifting the restriction to take EIA into consideration is put conditional to improvement of local ambient (air and/or water) quality or recovery from severe environmental damage.

This new measure to safeguard regional environmental quality is not without discussion (Zhu and Moser, 2014). Questions have been raised regarding the legitimacy and environmental effectiveness of these measures, especially by local authorities confronted with these suspensions of EIA approval. Can individual companies planning to invest being refrained from decision-making on their environmental impact assessment following behavior of other companies? In addition, EIA has always been seen as an instrument that involves third parties in decision making on new economic investments with potential environmental impacts. In China, EIA has become one of the first policies with experiments on public hearings, be it with mixed experiences (Tang et al., 2005; Zhao, 2010; Li et al., 2012; Johnson, 2013). But the EIA restriction targeting regions does not seem to allow for any third party participation, a setback in China's germinating attempts in participatory environmental policy making and implementation. This article reviews this new Chinese policy of EIARTR and investigates its legitimacy and environmental effectiveness. The next section discusses democracy and authoritarianism and develops a framework for assessing the legitimacy of China's EIARTR. With the historical background of EIARTR provided in Section 3, Section 4 assesses the legality, environmental effectiveness, transparency and third party engagement in EIARTR. Section 5 concludes with suggestions for improving the legitimacy of EIARTR.

2. Environmental democracy, environmental authoritarianism and China's EIA

2.1. Environmental governance: democracy and authoritarianism

First developed and applied in the context of liberal-democratic political systems (the US in 1970s and later in European countries), EIA has always been strongly related to notions of information disclosure and public participation in environmental decision-making. In these industrialized countries EIA has been a crucial instrument to include environmental considerations more fully into decision-making on economic projects and plans. At the same time, EIA was considered as part of democratic decision-making on future projects and plans, as all information necessary for decision-making was collected and disclosed and the public could participate and be involved in discussing the environmental challenges of such future developments (Stewart and Sinclair, 2007; O'Faircheallaigh, 2010). Stewart and Sinclair (2007), for instance, have pointed at a wide range of benefits of EIA, including the involvement of local communities at an early stage of decision making; the access to scientific and local knowledge and the sharing of environmental information; the role of EIA as a vehicle for individual and community empowerment; and hence its contribution to a more equal distribution of power in society. Because of these features EIA has become widely institutionalized in most western democracies.

In many developing and transitional economies EIA has been introduced much later and/or enforced to a lesser extent. In China, for instance, although EIA was mentioned already in the Environmental Protection Law 1979, EIA had not become one of the major policy instruments in environmental governance for projects until 1998, following the *Regulations on the Environmental Protection*

Administration of Construction Projects by the State Council, and for planning until 2003, when the *Law on Environmental Impact Assessment* was enacted (Zhu, 2011). Also here, EIA was introduced with the promises of both including the environment better and more fully into decision making on major projects and plans, and contributing to environmental information disclosure and public participation. Quite a few scholars explored the environmental effectiveness of EIA in China from the perspective of public participation and more democratic decision-making, to assess whether EIA empowers the environmental and community interests and groups that are too often ignored in China's infrastructure and investment projects and plans (e.g. Tang et al., 1997; Yang, 2008; Zhao, 2010; Li et al., 2012; Johnson, 2013; He et al., 2014). Regardless of often reported failures of EIA to live after these promises in the practice of China's policy making, the fundamental idea and design of EIA has remained, in China as well as in many other countries.

The idea that a close correlation exists between better environmental decision-making and more public participation and information disclosure is not restricted to EIA. In comparative environmental politics a long tradition exist of studying more generally the relation between regime type and the performance of environmental governance (e.g. Josephson, 2004; Buitenzorgy and Mol, 2010; Gilley, 2012). Quite some scholars have argued, with theoretical and empirical arguments, that democratic political systems show a better performance in environmental governance compared to less democratic systems, due to the former's high information flow and meaningful public participation in policy making processes (Payne, 1995; Barrett and Graddy, 2000; Farzin and Bond, 2006; Winslow, 2005; Humphrey, 2007). More recently, under conditions of a more severe environmental crisis, the better environmental performance of liberal democracies has come under attack. Some scholars have argued that politicians in liberal democracies focus on short-term developmental goals at the cost of solving long term environmental problems such as climate change (e.g. Midlarsky, 1998; Shearman and Smith, 2007). Others have asserted that public participation can endanger sound environmental policy making when lay people lack the capability to handle complex information and technical knowledge (Lawrence, 2003), and that transparency is not always facilitating better environmental performance (Mol, 2010; Gupta and Mason, 2014). The concept of environmental authoritarianism was recently coined to bring together these doubts on democracy as a favorable and capable environmental decision-making and governance model (Shearman and Smith, 2007; Beeson, 2010).¹ Authoritarian governance might be the result or consequence of severe environmental degradation as 'political elites come to privilege regime maintenance and internal stability over political liberalization.' (Beeson, 2010: 276). By the same token, a central undemocratic state may prove to be essential for major responses to the growing, complex and global environmental challenges. Especially in East and Southeast Asia, where the authoritarian tradition is deeply embedded in the cultural, social and political systems, environmental authoritarianism might be more likely to prevail, to form an (effective) answer to mounting environmental challenges. Beeson (2010) uses China's birth control policy as an example how authoritarian rule has contributed to environmental mitigation. But

¹ Gilley (2012: 288) uses a similar concept of "authoritarian environmentalism" to describe the 'public policy model that concentrates authority in a few executive agencies manned by capable and uncorrupt elites seeking to improve environmental outcomes. Public participation is limited to a narrow cadre of scientific and technocratic elites while others are expected to participate only in state-led mobilization for the purposes of implementation.'

Eaton and Kostka (2014) found that the high turnover of Chinese local leaders, which is the authoritarian way of China's Communist Party to reward local cadres for faithful implementation of central policies, hinders stringent environmental policy outcome as officials with a short time horizon follow a quick and low quality implementation approach.

The debate on environmental authoritarianism versus environmental democracy has mostly taken place at the level of political systems. However, here it will be used at a much more tangible level of a concrete policy instrument recently developed and applied in China, the so-called EIARTR. As will be illustrated and argued below, China's EIARTR can be interpreted as an environmental policy modification that moves away from the long-time structural affinity within EIA between environmental interest representation and democracy, and towards the affinity between environmental interest representation and authoritarian rule.

2.2. Assessing environmental authoritarianism in EIA

As can be distilled from the literature, authoritarian forms of environmental governance are often challenged against two sets of, partly interdependent, criteria. First, authoritarianism is challenged against criteria of legitimacy, especially because the alternative model—environmental democracy—is often considered to have high levels of legitimacy. Second, and equal to environmental democracy, environmental authoritarianism is challenged against criteria of environmental effectiveness: does it effectively contribute to mitigation of environmental problems?

The two criteria are not independent as high levels of environmental effectiveness might result in more legitimacy. In contrast to environmental democracy, environmental authoritarianism derives its legitimacy mainly from its effectiveness in protecting the environment, and less so from procedural forms of public involvement, participation and transparency in environmental governance. Moreover, environmental authoritarianism doesn't always come with the rule of law, as the implementation and enforcement of stringent environmental measures can follow from political decisions by elites. Hence, in assessing China's EIARTR a broad definition of legitimacy will be applied, where legitimacy is understood as the product of legality of the measure, the environmental effectiveness of the measure, and transparency and public participation and involvement in designing and operating the measure.

The original data and information on the included EIARTR cases were disclosed on the website of the Ministry of Environmental Protection of the People's Republic of China (MEP) (<http://www.zhb.gov.cn/>) until December 31, 2013, and on the websites of the provincial level EPBs until September 1st, 2013. We selected Luzhou in Sichuan Province for an in-depth analysis, as it was the first EIARTR case nationally (December 2006). Information on the Luzhou case was obtained through fieldwork in Luzhou during July 2012 by the first author. An in-depth interview with the director of Luzhou EPB, and two focused workshops with representatives from the local EPB, the Work Safety Supervision Bureau, the Court, the legislation office of Luzhou municipal government, the Statistics Bureau, the Development and Reform Commission, and the Industrial and Information Bureau. At the central level, officials from the Legal Office and the Environmental Supervision and Investigation Bureau of MEP were interviewed. The Bureau of Environmental Supervision and Investigation of MEP assisted in our review of the 25 central government level EIARTR cases and have published the overview data set on all cases on their website.

3. EIA restriction in China

EIA Restriction Targeting Regions is an administrative measure taken by Chinese state or provincial level environmental protection administration departments to suspend approval of all EIA documents on construction and investment projects in an administrative region, except for pollution prevention, recycling and ecological restoration projects. From the cases of EIARTR that have been reported it proves that the state or provincial environmental protection administration issues such an administrative measure for an entire administrative region when the implementation rate of the environmental impact assessment is low; the three simultaneous system² is not fully implemented; the reduction targets for total amount of major pollutant emissions are not completed in time and according to schedule; the total amount of pollutants is higher than ambient environmental control indicators and/or standards; serious environmental pollution accidents happen (too) many times; and/or the potential environmental risk is considered too high.

3.1. The background of EIA restriction targeting regions

There have been two main reasons behind the development of EIA restriction: the poor functioning of EIA Law implementation and the difficulties of national and provincial environmental protection administrations to control total ambient environmental quality in a region.

For a long time, local industrial development in China has been driven primarily by local, departmental and private interests and has too often ignored the national policies that emphasize environmental protection, resource conservation, human health, adjustment of the economic structure and transformation of economic growth pattern. Hence iron and steel, metallurgy, electric power, chemical and other energy and resource intensive and highly polluting industries have been expanding rapidly and largely uncontrolled, without much restrictions regarding their impacts on the local and regional environment (e.g. He et al., 2014). At the same time, national and provincial authorities faced the task to manage regional ambient environmental quality, which is often endangered by the sum of economic activities in an area.

The current EIA Law was adopted by the 30th session of the Standing Committee of the 9th National People's Congress on 28 October 2002, and took effect on 1 September 2003. This legislation on the contents and procedures of EIA marked the maturity of the system of environmental impact assessments. In China "EIA refers to the methods and institutions for analyzing, predicting and appraising the impacts resulting from human activities after programs and construction projects (e.g. infrastructure construction projects, technological transformation projects and regional development construction projects), so as to propose countermeasures for preventing or mitigating the unfavorable impacts and minimizing the adverse effects" (Zhu, 2011: 85). Environmental law scholars in China generally consider EIA one of the main embodiments of the prevention principle, and an instrument to optimize the industrial structure through implementing energy conservation and emissions reduction (e.g. Zhu, 2011).

However, in practice, the EIA Law in China does not always work well. Often, construction and investment projects start before receiving EIA approval. For example, during the so-called "EIA

² The three simultaneous principle "... requires that the design, construction, and operation of any required pollution control technologies or systems must be completed at the same time as the design, construction, and operation of the balance of the project components." (McElwee, 2011: 57; see also Wang, 2012: 32).

storm” in 2005, 30 construction projects were stopped by the former State Environmental Protection Administration (SEPA, since 2008 the Ministry of Environmental Protection), all of which failed to carry out an EIA as the law requires.³ Pan Yue, then the deputy director-general of the former SEPA, admitted that projects which were stopped in the past because they had no EIA often resumed after completing the formalities but subsequently used a variety of tactics to delay or refuse implementing environmental protection measures.⁴ And according to a survey of environmental protection administrative department staff at provincial and lower levels in 2007 (Wang, 2011), nearly 40% of the respondents believed that in their own administrative area over 40% of the companies that need an EIA receive it only after construction started, a so-called post-EIA. “Sichuan EPA staff admitted that in the province 50% of the projects do not have an EIA, 30% of the projects have post-EIA and only 20% of the projects have an EIA according to the rules. Almost all EIAs of Shuangliu County of Sichuan province are post-EIAs.” (Wang, 2011: 85). Hence, EIA Law enforcement has shown limited effectiveness in China.

The year 2006 proved to be quite severe for China’s environmental situation. During that year 161 serious environmental pollution accidents took place; environmental complaints of citizens increased to 60 million, 30% higher than in 2005; and the energy and pollution emission reduction targets of the State Council for 2006 (4% and 2% below 2005, respectively) were not achieved. Environmental issues were also widely believed to become a major bottleneck for China’s economic and social development. In 2006 alone SEPA stopped 163 projects which affected the environment, using EIA procedures. The investment of these high energy consumption and pollution projects, mostly in steel, thermal power and petrochemical industries, involved investments of RMB 7700 billion (USD 1266 billion).

In addition to these problems with implementing EIA for individual projects and plans, state and provincial environmental protection authorities faced also difficulties with managing total environmental pollution and ambient environmental quality in an area. While individual industrial or construction projects might fulfill legal requirements on emissions, the total emissions in a region could still run out of control and exceed ambient environmental quality standards or targets. In order to maintain authority and macro-control of ambient environmental quality and curb blind expansion of high energy consuming and high polluting industries, the State Council issued on 3 December 2005 the Decision of Carrying out Scientific Development and Strengthening Environmental Protection of State Council (State Council document no. 39, 2005). The twenty-first paragraph of this document points at the need to strictly implement EIA and the ‘three simultaneous’ system and even to suspend approval of construction projects with major pollutant discharges and impact on ecology in areas/regions where the total pollutant amount exceeds the standards and policy indicators, results in severe ecological destruction, or where ecological restoration tasks have not been completed. This formed the first official document that mentioned the possibility of suspension of EIA approval for an entire region; hence a collective punishment instead of punishing only one company or project.

³ See Wang Ling (2005), State Environmental Protection Administration Whips Up the EIA Storm—Interview with Pan Yue, the deputy director-general of SEPA, *Economic Daily*, January 21, 2005.

⁴ See SEPA news release on *State Environmental Protection Administration announces 112.3 billion valued environmentally illegal projects, first time using EIARTTR to stop highly polluted industry*. http://www.mep.gov.cn/gkml/hbb/qt/200910/t20091023_180045.htm, accessed October 1, 2012.

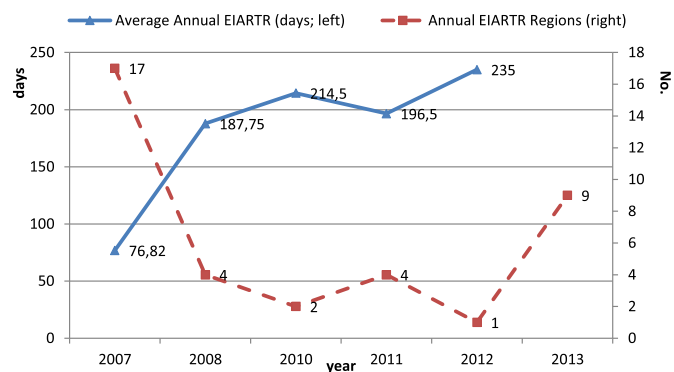


Fig. 1. Average annual EIARTTR (in days, left axis) and annual number of regions affected by EIARTTR (right axis) by national environmental authorities, 2007 till 2013.

3.2. The historical use of EIA restriction

The first environmental protection administration to use measures to restrict EIA approval for a region was the Sichuan Provincial Environmental Protection Bureau (Sichuan EPB), who decided on 26 December 2006, on a regional restriction of approval of the environmental impact assessments in Luzhou City. On November 15 of that year a diesel oil spill pollution incident occurred in Luzhou power plant, which caused the Luzhou urban waterworks to stop intake of water and affected water provisioning of parts of Chongqing. The SEPA identified the event as an extremely serious and large environmental pollution accident.⁵ On the basis of Article 3 of the Decision on Further Strengthening Environmental Protection of the Sichuan Provincial Party Committee and Sichuan Provincial People’s Government (Sichuan Communist Party Committee Document no. 38, 2004), Sichuan EPB decided on December 26 to suspend EIA approval to all new construction projects, except pollution management projects (Sichuan EPB Document no. 873, 2006). In China’s history, this has been the first use of the EIARTTR. On 20 February 2007, on the basis of the *Notice on Relieving Restrictions on Luzhou’s New Construction Projects of Sichuan Environmental Protection Bureau* (Sichuan EPB Document no. 43, 2006), Sichuan EPB lifted the regional restriction on EIA approval in Luzhou.

On 10 January 2007, in carrying out environmental pollution control policies and ensuring rapid and healthy development of the national economy, and following the Decision of Carrying out Scientific Development and Strengthening Environmental Protection of State Council, the former SEPA applied for the first time EIA regional restriction. These EIARTTRs were triggered by severe violations of EIA Law and/or “three simultaneous” requirements by 82 major projects with a total investment of RMB 112.3 billion (USD 18.5 billion). These projects were from 12 industrial sectors including iron and steel, metallurgy, power generation and chemical industries. Four administrative regions (Tangshan in Hebei, Luliang in Shanxi, Laiwu in Shandong and Liupanshui in Guizhou) were directly sanctioned with EIA restrictions. Since the four major power generation groups addressed had operations in different provinces, in total administrative regions in 22 provinces and municipalities (under direct administration of the State Council) were affected. According to Pan Yue, since 10 January 2007 when SEPA enforced the first EIA restrictions, SEPA strictly supervised and

⁵ See SEPA (2006), “Notice on Investigation of Responsible Individuals for Chuanann Power Co. Ltd, Luzhou Plant Gas-leakage Accident on November 15”, Environmental Supervision document No.432006.

Table 1
EIARTR related provincial level governmental documents.

Province/ municipality	Issuing bodies	Document title	Issuing time	Legally binding	Features
Sichuan	Sichuan Communist Party Committee; Sichuan government	“Decision on strengthening environmental protection work”	December, 2006	no	Stipulates restriction conditions, duration and measures.
Shandong	Shandong Environmental Protection Bureau	“Opinions on further implementation of EIA and three simultaneous system”	July, 2007	no	Stipulates conditions, implementing bodies and measures
Hubei	Hubei Environmental Protection Bureau	“Circular Regarding EIA Restriction on Construction Projects”	August, 2007	no	Stipulates restriction conditions, decision making bodies, lifting conditions
Hebei	Hebei Environmental Protection Bureau	“Measures for Environmental Supervision and EIARTR (trial)”	November, 2007	no	Stipulates restriction conditions, decision-making procedure, lifting procedure, information disclosure
Guangxi	Guangxi Environmental Protection Bureau; Guangxi Construction Department	“Measures for regional restrictions on EIAs of construction projects (trial)”	August, 2008	no	Stipulates decision making bodies, decision making procedures, duration, lifting procedure, information disclosure
Anhui	Anhui Environmental Protection Bureau	“Environmental supervision and EIARTR measures (trial)”	August, 2008	no	Stipulates restriction conditions, decision-making bodies, supervision procedure, lifting procedure, information disclosure
Henan	Henan Environmental Protection Bureau	“Construction project EIA restriction management measures (trial)”	June, 2009	no	Stipulates restriction conditions, decision-making bodies, decision-making procedure, duration, lifting procedure, information disclosure
Zhejiang	Zhejiang Environmental Protection Bureau	“Circular on strengthening construction project EIAs, pollution reduction and EIARTR”	October, 2009	no	Stipulates restriction conditions, decision-making bodies, lifting procedures.
Shanxi	Shanxi Standing Committee of Communist Party Committee	“Decree on pollution reduction in Shanxi”	September, 2010	Yes	Stipulated restriction conditions and measures
Chongqing	Chongqing Municipal Government	“EIARTR implementation measures for environmental protection”	June, 2011	Yes	Stipulates conditions, decision-making bodies and procedures, supervision, lifting procedure and bodies, information disclosure.

urged the targeted regions and the four power groups to amend their projects. And EPBs at all levels carried out hundreds of on-site inspections of the 82 projects in more than 20 provinces. This ensured the implementation and rectification of EIA. Through the elimination and rectification of some illegal projects, sulfur dioxide emissions were expected to reduce by more than 19 million tons per year.⁶

Between January 2007 and December 2013 environmental administration authorities of the State Council decided on 25 batches of EIA Restrictions targeting 37 regions (see Fig. 1⁷ and Table 1). The mean restriction time for suspending EIA approval was 90 days and the average number of restriction days 125.5; the shortest restriction time (in Shandong Laiwu) was 34 days and the longest restriction time was applied in Anhui Anqing (281 days). The annual average restriction time steeply increased over the years, with all cases in 2007 having a restriction time below 90 days. Besides the national environmental authority (SEPA/MEP), also provincial environmental authorities applied EIA Restriction Targeting Regions. Between December 2006 and December 2013 22 provincial-level administrative regions were targeted in 12 provincial decisions on batches of regional restriction on EIA approval in 8 provincial areas (Sichuan Province, Shandong Province, Henan Province, Zhejiang Province, Jiangsu Province, Liaoning Province, Xinjiang Uyghur Autonomous Region and Guizhou Province). This means that no more than 25% of the provincial-level environmental protection administrations in mainland China applied EIARTR. Henan Province decided three times on regional restriction on EIA approval, Zhejiang and Jiangsu Province each two times and the others each one time. Provincial level restriction time varied more widely compared to the national level decisions, between 62 days

(Luzhou Sichuan province) and 424 days (Shilong District, Pingdingshan, Henan Province). The average provincial level restriction period was a little over 188 days.

4. Legitimacy of EIA restrictions targeting regions

The legitimacy of EIARTR can be assessed by analyzing its legal basis, its effectiveness in preventing or reducing environmental impacts (environmental effectiveness), and the transparency and possibilities for public involvement and engagement in EIA restrictions.

4.1. Legal basis

The provincial EPBs and the former SEPA started late 2006 and in 2007 with the application of EIA Restriction Targeting Regions without a clear legal basis. Only on 5 June, 2008, the MEP issued a draft *Management Measures for Environmental Impact Assessment Restriction Targeting Regions* (trial) to recruit comments (MEP document no. 283, 2008). But this attempt to constitute a sound legal basis for the EIARTR failed and up till now this legal document was never approved by the MEP. At present there are two major articles that can form a legal basis for EIARTR. Paragraph 4 of Article 18 of the *Water Pollution Prevention and Control Law of the People's Republic of China* (2008 Revision) provides that “For areas where the total discharge of important water pollutants is larger than the prescribed level, the administrative department of environmental protection of the related People's government shall suspend the examination and approval of the environmental impact assessment documents of construction projects which increase the total discharge of important water pollutants.” Furthermore, Article 30 of the *2009 Regulation on Environmental Impact Assessment of Planning* by the State Council provides that “If the total discharge volume of major pollutants in the area for the execution of a plan exceeds the state or local indicator for the control of total discharge volume, the plan preparation organ shall suspend examining and approving any environmental impact assessment document on a

⁶ See SEPA news on *Lifting EIA Restrictions on Luliang, Liupanshui and Huadian Group, lessons learned for the future effort*, http://www.mep.gov.cn/gkml/hbb/qt/200910/t20091023_180066.htm, accessed on October 1, 2012.

⁷ The average days of EIARTR over 2013 cannot be counted yet, as for some regions the restrictions of EIA have not been lifted per 1 January 2014. For one of the two 2013 batches, covering 3 regions, the average number of days was 102.

new construction project which will increase the total discharged volume of major pollutants in the aforesaid area for the execution of the plan.” Except for these two articles, it is difficult to find a clear legal basis for EIARTR.

However, these two articles mention but do not define and concretely regulate the application of EIARTR. The two articles do not refer to the scope of the application, the applicable conditions, the procedure to start these EIA restrictions, the subject of applicable decisions, the applicable time limit, the administrative enforcement measures, the conditions for lifting the restriction, the assessment procedure of acceptance, the procedures for lifting restriction, who can/should decide on lifting the restriction, the disclosure of information and the participation of the public, and oversight measures and liability rules of EIARTR. Therefore, in practice the application of administrative measures on regional restrictions of EIA approval not only lacks detailed procedural law, but also lacks the necessary and effective legal oversight. For example, as for revocation of EIARTR in restricted regions, lack of clear substantial requirements and procedural rules leads to chaos in timing when the subject who should decide to examine the steps leading to revocation has no guidelines. Sometimes the decision-maker already decided on revocation even before the subjects did submit a formal application.⁸ Aforementioned practices do not conform to administrative principles of a modern country under the rule of law. Any administrative action by the government should meet a set of substantial and formal requirements to start the procedure, but these are absent in the case of EIARTR.

In many provincial-level administrative regions, the environmental protection administrative departments or local governments laid down policy documents in referring to the aforementioned draft *Management Measures for Environmental Impact Assessment Restriction Targeting Regions* (trial), which do not have legal binding force. According to a review of the official websites of all provincial level governments for the period of December 2006–July 2014, there were 10 provincial level governments who issued EIARTR related documents, of which only the *Regulation for Reducing Pollutants Emissions in Shanxi (2010)* and the *EIARTR implementation measures for environmental protection (2011)* have legal binding force, while the others are only internal guiding documents (see Table 1). For example, in 2007 Hebei EPB pioneered (following the draft of this MEP document) with *Provisional Measures of Environmental Protection Supervision and Regional Restriction on EIA Approvals*. These provisional measures specify the scope, decision making procedure, conditions and procedure for lifting restrictions. It also stipulates the types of regions that are subject to EIA restriction, among which those that failed to complete a determined reduction target; areas of serious ecological damage or where ecological restoration tasks have not been completed; areas that have seriously threatened environmentally sensitive downstream waters; areas with coal-fired power plants that have not implemented or completed on schedule sulfur dioxide pollution control projects set by the state; or areas that did not fulfill implementation of sewage treatment facilities according to the legal conditions. The provincial document also details the specific scope of application of provincial level regional restriction on EIA approval, the decision-making process, the conditions for lifting the restriction and the procedure.⁹

As for local legislation that is legally binding, only Shanxi Province enacted a rule referring to EIARTR, valid only within Shanxi Province. On 29 September 2010, the Standing Committee of the 11th Shanxi People's Congress approved the *Regulation for Reducing Pollutants Emissions in Shanxi*, which took effect on 1 January 2011. Article 11 provides that environmental protection departments above country level shall not examine and approve environmental impact assessment documents on new pollutant-emission construction projects in the following circumstances: when the area fails to reach the environmental objectives in the key supervision zone; when the governmental authorities fail to close down outdated production facilities; or when established urban sewage treatment facilities are not ran or operated stably. Similarly, Chongqing Municipal Government issued *EIARTR implementation measures for environmental protection* in 2011, which specifies the scope, procedures and information disclosure of EIARTR.

The MEP never stopped trying to pass a legal document by the National People's Congress in which EIARTR would find a formal legal basis. One of these attempts is the recent amendment/revision of the *Environmental Protection Law*. In August 2012, the 11th National People's Congress (NPC) Standing Committee deliberated the draft *Environmental Protection Law Amendment* for the first time, and published it for public consultation and advice on NPC's website. In a dramatic move to change the draft amended law, two months after its public release MEP posted *Comments and Suggestions on the Draft EPL Amendment* on its website¹⁰, containing 34 arguments against the 2012 draft amendment, which was followed by further deliberations in the NPC in 2013 (He et al., 2013; Zhang et al., 2013). One of the new EIARTR related articles added into the deliberation through the intervention of MEP is that “for key regions and watersheds that have exceeded quota of total emission control of national major pollutants, the competent departments of environmental protection administration under the State Council and governments of provinces, autonomous regions and municipalities directly under the Central Government shall suspend the approval of environmental impact assessment documents of construction projects involving increase of total emission of major pollutants.”¹¹ By the end of 2013 the *Environmental Protection Law Revision*¹² still had the above EIARTR related new article. In April 2014, shortly before the *Environmental Protection Law Revision* was submitted to NPC Standing Committee for the fourth (and final) reading, MEP suggested to add “regions that fail to meet the prescribed national ambient quality standards” for EIARTR with an aim to increase the objectivity of the indicators that would decide the applicability of EIARTR in a region. This suggested article was finally included in the new *Environmental Protection Law 2014* (Article 44.2), which, for the first time, provides a legal principle for EIARTR. With the coming into force of the Law on January 1, 2015, the legitimacy and effectiveness of EIARTR will depend on how concrete accompanying regulations and measures will be further formulated and detailed, for instance through revising the current *EIA Law 2008*.

Besides the absence of a sound legal basis there is another legal problem with the EIARTR. All attempts to formulate a legal basis of EIARTR point to the problem of regional emissions exceeding ambient air and water quality standards. However, out of the 25

⁸ For example, in the case of EIARTR in Luzhou of Sichuan Province, the Luzhou Municipal Government just reported their rectification progress to Sichuan EPB, instead of submitting an administrative application for revocation of EIARTR.

⁹ See Hebei pioneers in institutionalizing EIARTR with the trial implementation of measures, <http://www.law-star.com/cacnew/200711/65009655.htm>, accessed on October 1, 2012.

¹⁰ MEP document no. 284, 2012, http://www.mep.gov.cn/gkml/hbb/bh/201210/t20121031_240778.htm, accessed 27 December 2013.

¹¹ See for an English translation on the various proposed revisions: <http://www.wageningenur.nl/en/show/First-and-second-revision-drafts-of-the-1989-Environmental-Protection-Law.htm>, accessed 28 December 2013.

¹² The NPC Standing Committee approved the change of legislation plan from *Environmental Protection Law Amendment to Environmental Protection Law Revision* in October 2013.

national cases and 12 provincial cases of EIA only in 2 national cases (in Zhejiang Wenzhou; and in one decision targeting waste water treatment in six provinces: Inner Mongolia Bayannur, Henan Puyang, Hubei Xiangyang, Guangdong Jieyang, Hainan Dongfang, Gansu Weiwu) respectively 1 provincial case (in Zhejiang) restrictions were applied because of excessive total regional air and/or water emission or ambient quality standards. In all other cases of EIARTR some urgency situation, environmental accident, or low percentage of approved EIAs formed the reason for applying these restrictive measures. Hence, the measure is hardly used for the target for which it was originally meant, but rather as a measure to combat general environmental misbehavior in a region.

4.2. Environmental effectiveness

Legitimacy of EIARTR can be enhanced when these measures are environmentally effective. While it is impossible to execute a sound and causal environmental effectiveness analysis of the EIA restriction measures, anecdotal evidence—based on interviews, media reports and (in) formal documents up till now—does point to several (indirect) environmental effects of these measures. Six arguments for environmental effectiveness of EIARTR will be assessed here.

First, EIARTR has forced local leaders to attach importance to environmental protection and has changed their behavior with respect to implementation of environmental measures. EIARTR has touched on the core interest of these local leaders (that is: economic development in their region) and this has enhanced priority given to environmental targets and standards. This measure often also came with changed power balances between the different local governmental agencies, often in favor of environmental protection bureaus. For instance, after EIA approval was restricted by Sichuan provincial EPB in 2006, Luzhou municipal government established an environmental targets-based assessment system to hold administrative and party leaders responsible for not meeting environmental targets (Luzhou EPB document no. 177, 2006). This enhanced the power of the local EPB vis-à-vis their economic counterparts. According to Pan Yue, the then deputy director-general of SEPA, “the three-month EIARTR in 2007 achieved much more than any previous enforcement campaign of EIA. It not only solved some serious environmental problems left over by history, but also forced local governments to change the track of development and accelerated the industrial transformation towards sustainable development”.¹³

Second, in the regions affected by EIA restriction the capacity of local environmental (or rather: EIA) law enforcement staff was strengthened and enhanced, and the environmental budget of the local EPB was increased (both for staff and monitoring equipment). For instance, in the case of Luzhou the municipal government immediately approved the additional employment of 4 EPB staff and planned to appoint an additional 10 staff members to enhance environmental investigation and supervision, which did materialize. At the same time, budgets for both operation and equipment were increased (Luzhou EPB document no. 177, 2006).

Third, EIARTR did temporarily stop industrial investment in polluting industries and projects, but it is unclear what the longer term environmental effects have been. After lifting the restrictions industrial investment and output often increased more than before, but it is unclear whether this industrial output was of a different,

less polluting, nature. For instance, the EIA restrictions in Luzhou lasted for two months (26 December 2006 to 26 February 2007), and came together with a major set-back in industrial investments, and even a small set back in industrial output growth during these months. But during the two months after that period, industrial investment was higher than before the restrictions, as was industrial output growth.¹⁴ However, it is not possible to relate these changes in industrial investment and output causally to changes in environmental performance.

Fourth, some environmental targets were achieved to a certain extent through applying EIARTR, especially when the EIA restriction aimed at major environmental accidents in the region. For instance, MEP imposed the EIA restriction to Huzhou municipality in 2011 following a major lead pollution accident. MEP required Zhejiang provincial EPB to ensure that Huzhou government investigated and punished the responsible enterprises and scrutinized all enterprises involved in heavy metals. Enterprises that did not have an EIA or did not implement the EIA adequately had to stop operations. And the most severe environmental pollution problems with most complaints had to be addressed before the set deadline and the responsible persons had to be punished (MEP document no.584, 2011). In MEP's notice to Zhejiang provincial EPB on lifting the restriction, MEP argued that based on the on-site investigations and checks by both of them, MEP trusted that Huzhou had met the required conditions for lifting the restriction. Hence, this would indeed point at a significant environmental improvement and an effective instrument to obtain such improvements (MEP document no. 1267, 2011).

Fifth, one could also imagine that frequent application of EIARTR may result in a preventive effect towards local and provincial governments. The possibility of being targeted for EIA restrictions in their jurisdiction might lead local leaders to take action to prevent a condition where EIA restriction could be enforced upon them. It is rather difficult to prove such a preventive effect and no such indications have been found yet. A sound legal basis of these measures, implementation of transparency, apply a longer time period and more experience with EIARTR makes such preventive behavior of local environmental authorities more likely.

Finally, up till now application and thus environmental effectiveness of such EIA restriction measures obviously has been limited. There exist numerous situations in China where ambient environmental standards or total emissions in a region have been exceeded, but where EIA restrictions were not applied. A most notable and well-known case would be Beijing air pollution by for instance power companies and Beijing ambient air quality. For political reasons it is highly unlikely that EIA restrictions will be easily applied in such a situation/region, which severely limits the environmental effectiveness of the measure.

4.3. Transparency and public participation

Legitimacy of EIARTR can be enhanced through transparency and if third parties are informed and can be involved in decision-making on these restrictions and their revocation. But up till now transparency and third party participation in EIA restrictions have been very limited.

Setting restrictions on EIA approval for a region is not a very transparent process. There is only one announcement by the MEP or the provincial EPB regarding the criteria that need to be fulfilled in order for the EIA restriction to be lifted. Notices on EIA restrictions are not disclosed systematically at one and the same

¹³ See SEPA (2007), Lvliang Liupanshui and Huadian Corporation lastly relieved from restriction, SEPA will draw lessons from the past and seek for more, http://www.mep.gov.cn/gkml/hbb/qt/200910/t20091023_180066.htm, accessed 1 October 2012.

¹⁴ This information was provided by Luzhou Municipal Statistics Bureau.

place (e.g. on one place at the MEP website) or by one division of MEP. This all makes it very difficult for third parties to gain knowledge of EIA restriction announcements and of the criteria that are used for their revocation.

Moreover, lifting the EIA restriction is not very transparent and often the criteria formulated and applied for lifting the restriction are very general and not specified. Most likely, a lower level EPB of the region affected by EIA restriction will (have to) submit a detailed document to the higher level environmental authority specifying the fulfillment of the conditions and criteria, but these documents are not disclosed to third parties or the public. In some cases, the time between installment and lifting the EIA restrictions has been very short, which poses doubts whether the shortcomings that resulted in the EIA restriction could actually be overcome on such short notice. There is no third party that can review the procedure and the decision to lift the restrictions.

There is also a sense of measuring with different standards. The MEP is the leading organization within the Chinese government with respect to advocating open information and transparency as far as lower level environmental authorities and industrial polluters are concerned (e.g. Mol et al., 2011). The Ministry has also installed detailed guidelines regarding what information should be put in project EIA reports and which parts should be disclosed. And it has installed the possibility for the public to ask for a public hearing on a project EIA, where the public should be asked and heard regarding its opinion on the environmental consequences of the project alternatives. But all these measures of transparency and public involvement are not included in the case of EIARTR. There is no possibility for a public hearing on EIA restrictions, third parties cannot ask for an EIA restriction, and hardly any information on EIA restriction is disclosed to third parties, the media or the public. Hence, it seems that MEP asks others to disclose environmental information but does not disclose environmental information when MEP itself is the subject of decision-making.

This limited transparency and possibilities for third party involvement and participation reduce not only the EIARTR legitimacy (and thus support), but also enhance the possibilities of other governmental actors to block continuation of EIARTR, for instance through acceptance of a sound legal basis for this measure. While regarding several other radical environmental protection measures MEP has sought the support and countervailing powers of civil society to overcome intra-governmental opponents, with respect to EIARTR such societal backing is absent. The difficulty of inserting a sound legal basis for EIA restrictions during the revision process of the *Environmental Protection Law* provides evidence of these intra-governmental opponents against EIARTR.

5. Conclusion

The current form in which the measure of EIA restrictions has been established in China can be interpreted as a typical example of environmental authoritarianism, with its strengths and flaws. The measure can be considered environmental effective to a certain extent (as far as it can be assessed), although not always for the purpose it was designed: improving total regional environmental quality up to standard. But more importantly EIARTR lacks legitimacy with respect to a sound legal basis, transparency and possibilities for third party involvement. While overall China's environmental policy shows an increase in the rule of law, experiments with third party involvement and the furthering of transparency (Kostka and Mol, 2013), with respect to EIARTR this is not (yet) the case. On the short term this might not endanger environmental effectiveness of EIA restrictions, but on the longer term this lack of legitimacy might very well undermine the environmental effectiveness of this measure, and can even fire back to the

wider legitimacy, credibility and trust in China's environmental policies and institutions, including its MEP (He et al., 2012).

Hence, several recommendations can be formulated to revise EIARTR in order to make it fit for the long term. First, a sound legal basis should be formulated for this measure, with better and more detailed procedures on its application and on lifting of the restrictions. If this does not take place the EIA restrictions deprive the rights of projects that behave according to all rules and regulations. Second, transparency and information disclosure should be enhanced regarding the basis of setting restrictions as well as lifting restrictions, so that those affected by the measures (companies) and those potentially affected by the lifting of the restrictions (local communities, environmental NGOs) can be informed and involved. Third, a possibility should be created for third parties to ask for EIA restrictions or ask for the lifting of restrictions, empowering and involving those living in polluted regions with better possibilities to improve their quality of life. Fourth, regional restrictions in EIA approval should be applied only and consistently for those situations it was meant to be (as formulated in the draft legal basis): regions where total emission and ambient environmental quality requirements are not met. Applying such a measure for all kinds of other environmental misbehavior enhances the arbitrariness of and objections against its use.

Only with these changes EIARTR can function not only as an innovative, but also as a legitimate, environmental policy instrument in China, and can thus serve as a best practice to be transferred to other countries.

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