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# THE MISSING CHINESE ENVIRONMENTAL LAW STATUTORY INTERPRETATION CASES

JOHN COPELAND NAGLE\*

## I INTRODUCTION

Environmental law and theories of statutory interpretation have developed side by side in the United States during the past twenty-five years. Many of the leading environmental law cases are also statutory interpretation cases. *Tennessee Valley Authority v. Hill*<sup>1</sup>—holding that the Endangered Species Act prevented the completion of the \$100 million Tellico Dam—is a classic environmental law case and it is also a classic statutory interpretation case, often cited as Exhibit A for a plain meaning approach to reading statutes. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>2</sup>—allowing the Environmental Protection Agency to employ a “bubble” approach under the Clean Air Act—is another famous environmental law case, yet *Chevron* is even better known as the case which established a deferential standard for judicial review of agency interpretations of statutes. The list of cases that are significant both to U.S. environmental law and to U.S. statutory interpretation guidelines is much longer, as a glance through any casebook on either legislation or environmental law demonstrates.<sup>3</sup>

China is different. There is no *Yangzi River Authority v. Hill*. There is no *Chevron v. Natural Resources Defense Coun-*

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<sup>1</sup> 437 U.S. 153 (1978).

<sup>2</sup> 467 U.S. 837 (1984).

<sup>3</sup> Compare PETER S. MENELL & RICHARD B. STEWART, ENVIRONMENTAL LAW & POLICY (1994) with WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (2d ed. 1995).

*cil*—Chevron conducts operations in China, but there are few private environmental organizations in China, let alone an organization likely to sue the government. Indeed, a search for *any* case disputing the meaning of a Chinese environmental statute would probably not be fruitful. China has enacted many environmental statutes, often patterned after foreign laws such as those in the United States, but there are no Chinese environmental law statutory interpretation cases.

This article examines why there are no such cases, and what we may learn from that fact. I am indebted to the work of Professor Stewart, whose engaging article in this symposium issue combines three of my own seemingly distinct interests: environmental law, statutory interpretation, and China. Professor Stewart's international reputation in environmental law speaks for itself, and the Chinese government can only profit from his advice as they seek to build their own environmental law institutions. Perhaps Professor Stewart is correct that his knowledge about environmental law and about China exceeds his expertise in statutory interpretation, though I suspect that he is far too modest in describing his own familiarity with the interpretation of statutes. I hope to complement Professor Stewart's contribution to this Symposium with some thoughts developed from my own work in statutory interpretation, and from my own experience studying environmental law and China.

In Part II, I begin with an overview of the environmental problems facing China, the evolving role of law in China, and the environmental statutes enacted by China in recent years. Part III examines why cases disputing the meaning of environmental statutes are so rare in China. Drawing from Professor Stewart's observations about Chinese environmental law, I explain that many of the reasons that such disputes do not occur in China concern the structure of the Chinese government, the pressures against enforcement of environmental laws, the nature of the Chinese economy, and the Chinese tradition of resolving disputes without litigation. These reasons offer lessons to both China and the United States about the nature of environmental law and statutory interpretation. China needs to develop methods to enforce its environmental laws more aggressively; the United States needs to find other ways besides litigation to resolve many environmental disputes. The statutory interpretation rules applied by

each nation can help determine whether either goal will be achieved.

## II

### THE ENVIRONMENT AND LAW IN CHINA

#### A. *The Environment in China*

China's environmental problems are well documented.<sup>4</sup> Water pollution is especially bad. The number of cities suffering from serious water shortages is three hundred and growing. The fresh water that does exist is often polluted by untreated industrial and municipal discharges so that more than half of China's major towns lack water that is safe to drink. Rivers, lakes, and coastal areas all face contamination from a variety of sources. Broader water ecosystems have deteriorated as a result of reclamation projects, unchecked pesticide and fertilizer use, and erosion.<sup>5</sup>

The air in many Chinese cities is dangerous to breathe. According to a leading Chinese environmental official, "China has the world's highest degree of urban air pollution and the greatest number of heavily polluted cities," with only five of China's five hundred cities enjoying clean air.<sup>6</sup> The primary culprit is coal, which is the fuel of choice throughout China for the generation of energy. Coal has many harmful environmental consequences that cost China hundreds of billions of dollars annually, yet the problem promises to worsen as the Chinese economy explodes while efforts to replace coal with cleaner forms of energy appear to be years away from success.<sup>7</sup> Particulate pollution affects

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<sup>4</sup> Much of the information that follows is contained in the paper prepared by the Chinese government in 1994 to implement the international AGENDA 21 agreement. See CHINA'S AGENDA 21: WHITE PAPER ON CHINA'S POPULATION, ENVIRONMENT, AND DEVELOPMENT IN THE 21ST CENTURY (1994) [hereinafter AGENDA 21]. For other general descriptions of the state of the Chinese environment, see HE BOCHUAN, CHINA ON THE EDGE (1991); VACLAV SMIL, CHINA'S ENVIRONMENTAL CRISIS (1993); Charles A. Radin, *With China's 'Miracle' Pollution Surges*, BOSTON GLOBE, Jan. 2, 1995, at 47.

<sup>5</sup> AGENDA 21, *supra* note 4, at 68, 88, 144. For a general description of the state of China's water resources, see AGENDA 21, *supra* note 4, at 143-45.

<sup>6</sup> *China's Top Conservationist Warns of Pollution*, GLOBAL WARMING NETWORK ONLINE TODAY, Apr. 21, 1995, available in WESTLAW, 1995 WL 2265687, at \*1 (quoting Qu Geping, former director of China's National Environmental Protection Agency).

<sup>7</sup> See AGENDA 21, *supra* note 4, at 68, 203; Sheila Tefft, *Fueling Pollution*, SOUTH CHINA MORNING POST, Sept. 22, 1995, at 23; Patrick E. Tyler, *China's*

nearly every city in China, especially northern cities and during the winter. Emissions of sulfur dioxide produce acid rain that has contaminated forests, soil, and crops in southern China and has also produced harmful effects in Japan.<sup>8</sup> These problems, in addition to the rapid increase in the number of cars that are unequipped with modern pollution controls, make the task for China to control its air pollution daunting.<sup>9</sup>

China produces 600 million tons of industrial solid wastes, 100 tons of municipal solid wastes, and thirty million tons of hazardous wastes annually. Few of the wastes are treated and disposed in an environmentally responsible fashion. Such wastes contaminate the water and the land when they are in landfills, and the wastes that are directly deposited into the water produce even more devastating results. China has estimated the economic losses attributable to solid wastes at nearly four billion dollars annually.<sup>10</sup>

Desertification has rendered about eight percent of the land in China unusable. Half of the desertification has resulted from water erosion, affecting 1.79 million square kilometers at a cumulative rate of five billion tons of soil annually. Thousands of kilometers of highways and railroads are blocked by sedimentation. Such desertification presents a disproportionate problem for poor areas: seventy-eight percent of the 200 poorest counties in China suffer from desertification.<sup>11</sup>

Wildlife suffers due to the burgeoning human pollution and loss of habitat. Over 100,000 species of animals and nearly 33,000 plant species exist in diverse ecosystems ranking China eighth in the world and first in the northern hemisphere in biodiversity. However, fifteen to twenty percent of those species are threatened, a proportion higher than the world average of ten to fifteen percent. Forests, as well, are disappearing at an alarming

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*Inevitable Dilemma: Coal Equals Growth*, N.Y. TIMES, Nov. 29, 1995, at A1, A8.

<sup>8</sup> See Radin, *supra* note 4, at 47 (noting that the Japanese government is providing loans to reduce acid rain produced in China because half of the sulfuric acid found in the Japanese environment originates in China).

<sup>9</sup> For a general discussion of air pollution in China, see AGENDA 21, *supra* note 4, at 203.

<sup>10</sup> AGENDA 21, *supra* note 4, at 214 (estimating annual economic losses of total thirty billion yuan).

<sup>11</sup> AGENDA 21, *supra* note 4, at 180.

rate, further reducing the habitat needed by wildlife (including the famous pandas) to survive.<sup>12</sup>

Other environmental problems exist as well. Marine resources suffer from pollution and "an out of control fishing industry."<sup>13</sup> The degradation of agricultural land continues as fertilizer and pesticides pollute the land and as land is over-used.<sup>14</sup> Noise levels in urban areas are very high.<sup>15</sup> Combined with the continued growth of China's economy and its population, the stresses on the Chinese environment have profoundly and adversely affected the quality of life in China.

These problems now have the attention of the Chinese government. Historically, the Chinese culture has regarded nature with great respect, though Chinese practice did not always adhere to Chinese philosophy.<sup>16</sup> Communist philosophy was less sympathetic to environmental concerns, viewing them as an exclusively western, "capitalist" problem, or conversely as evidence of China's own economic progress. China failed to recognize the severity of its environmental situation until the early 1960s. By the start of the Cultural Revolution in 1966 the severity of pollution levels and other environmental problems in China could no longer be ignored. The United Nations Conference on the Environment held in Stockholm in 1972 marked the first time that China played a prominent role in international environmental issues. China's environmental progress halted during the Gang of Four era ending in the mid-1970s, but environmental concerns

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<sup>12</sup> AGENDA 21, *supra* note 4, at 171, 173. The problems faced by China's pandas are further documented in GEORGE SCHALLER, *THE LAST PANDA* (1993).

<sup>13</sup> AGENDA 21, *supra* note 4, at 159.

<sup>14</sup> AGENDA 21, *supra* note 4, at 97, 105.

<sup>15</sup> Wang Xi & Robert F. Blomquist, *The Developing Environmental Law and Policy of the People's Republic of China: An Introduction and Appraisal*, 5 *GEO. INT'L ENVIL. L. REV.* 25, 34 (1992).

<sup>16</sup> China's environmental ethics are described in LESTER ROSS & MITCHELL A. SILK, *ENVIRONMENTAL LAW AND POLICY IN THE PEOPLE'S REPUBLIC OF CHINA* (1987); Baruch Boxer, *China's Environmental Prospects*, 29 *ASIAN SURV.* 669, 679-80 (1989); Bruce L. Ottley & Charles C. Valauskas, *China's Developing Environmental Law: Policies, Practices and Legislation*, 6 *B.C. INT'L & COMP. L. REV.* 81, 84-85 (1983); Christopher Tracy, *Listening for Sounds of Fallen Trees: The Principles of Forests and Lessons from Germany and China*, 3 *J. INT'L L. & PRAC.* 469, 493-94 (1994); Wang & Blomquist, *supra* note 15, at 27; A. Dan Tarlock, Book Review, 30 *HARV. INT'L L.J.* 557, 560-61 (1989).

continued to gain greater attention with Deng Xiaoping's ascent to power in 1977.<sup>17</sup>

Chinese leaders now characterize the environment as a top priority. Speaking in Rio de Janeiro in 1992, Premier Li Peng told the United Nations Conference on Environment and Development that China had made environmental protection "one of our basic state policies" and had made "unremitting efforts towards this end."<sup>18</sup> China has invested billions of dollars for environmental causes, and it has received billions more from other countries and international organizations such as the World Bank.<sup>19</sup> China continues to educate its people about environmental issues. These efforts have convinced 99% of the Chinese people that environmental pollution and ecological destruction are at least "fairly serious" issues,<sup>20</sup> but all agree that more environmental education needs to be done.

### B. Law in China

"In the four thousand years of traditional Chinese civilization, the concept and practice of law have never played a role as

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<sup>17</sup> The history of China's steps toward environmental consciousness during the Communist era is recounted in detail in Ottley & Valauskas, *supra* note 16, at 94-109. See also Ross & Silk, *supra* note 16, at 2-4; Cai Shouqiu & Mark Voigts, *The Development of China's Environmental Diplomacy*, 3 PAC. RIM L. & POL'Y J. S-17, S-19 to S-23 (1993); Wang & Blomquist, *supra* note 15, at 28-29; Boxer, *supra* note 16, at 680-83.

<sup>18</sup> AGENDA 21, *supra* note 4, at 3. For other expressions of the priority that the Chinese leadership places on environmental issues, see Ross & Silk, *supra* note 16, at 36-37 (reprinting article written by Li Peng); Wang & Blomquist, *supra* note 15, at 35-36 (listing the goals of China's Eighth Five Year Plan approved by the National People's Congress in 1991).

<sup>19</sup> See CHINA NEWS, *China to Carry Out "Cross-Century Green Project"* (published Nov. 7, 1995) <<http://www.chinanews.com/cns/news/9511/07/110704aa.eng>> (citing Xie Zhenhua, Director of China's National Environmental Protection Agency, describing China's plan to invest 150 billion RMB on environmental projects by the end of the century); Agnes Shanley, *China Sets a New Agenda*, 102 CHEMICAL ENGINEERING 30 (1995) (stating that China will spend over \$35 billion on environmental projects during the next five years); Wang & Blomquist, *supra* note 15, at 30 (indicating that the Chinese government invested 47 billion yuan in environmental protection from the mid-1980s through 1990); Marcus W. Brauchli, *China's Surging Industry Takes Toll on Environment*, ASIAN WALL ST. J., July 26, 1994, at A1 (noting that the World Bank now spends \$500 million annually on environmental projects in China).

<sup>20</sup> Wang & Blomquist, *supra* note 15, at 32 (citing a 1990 poll conducted by the Central People's Broadcasting Station and the China Institute of Social Surveys).

significant as they have occupied in western history.”<sup>21</sup> In the second century BCE, Confucianism, which emphasized classical education and moral consciousness within a structured, societal framework to promote social harmony, succeeded Legalism, which relied on formal legal codes to enforce social order, as the official state philosophy of the Han dynasty (206 BCE - 219 CE).<sup>22</sup> This transition produced a unique tension in Chinese society, for the “rule of man” of Confucianism is philosophically antithetical to the “rule of law” espoused by Legalism. Numerous legal codes existed throughout the Chinese dynastic era, but legislation did not play a central role in Chinese society or even in Chinese law. Likewise, the legal code developed by Nationalist leaders in the early 1930s was infrequently enforced as a result of the inability of the Nationalist Party to achieve governing control over large segments of China.<sup>23</sup>

In order to effect the transition from New Democracy to Communism during 1949-1953, the Communist Party engaged in a brutal campaign to persecute “class enemies.” Though this period was marked by a blatant disregard of the many substantive and procedural protections associated with prosecutions, the Communist Party began to lay the groundwork for a system of laws modeled after Stalin’s “socialist legality.”<sup>24</sup> This framework, however, alternately gained and lost acceptance as China endured numerous upheavals such as the Cultural Revolution. When Mao Zedong died in 1976, the Gang of Four lost their effort to assume control of the government, and Deng Xiaoping consolidated his authority soon thereafter. Deng began an aggressive effort to bring China into the community of nations, to develop the Chinese economy, and to change China’s view of the law. He actively promoted the creation of a legal system

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21 ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA 16 (1992). For another recent overview of Chinese law, see CARLOS W.H. LO, CHINA’S LEGAL AWAKENING: LEGAL THEORY AND CRIMINAL JUSTICE IN DENG’S ERA (1995).

22 See CHEN, *supra* note 21, at 8-11; Otley & Valauskas, *supra* note 16, at 86-87.

23 CHEN, *supra* note 21, at 22.

24 See CHEN, *supra* note 21, at 24-27. See generally Lon L. Fuller, *Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Theory*, 47 MICH. L. REV. 1157 (1949) (criticizing the Pashukanis’ belief that law is inherently bourgeois and operates only to protect capitalism, arguing instead that Stalin’s ‘socialist legality’ correctly recognizes that a “state without justice [and laws] is impossible . . .”).



modeled in part after western systems, albeit with unique socialist and Chinese characteristics. Beginning in 1978, the People's Congress enacted numerous new statutes, the study and practice of law became acceptable, and the open ideological battle between the "rule of law" and the "rule of men" resulted in the apparent victory of law.<sup>25</sup>

China has enacted hundreds of new statutes since 1978. These statutes represent a significant change in the Chinese view of law: historically, most legal norms were unwritten and undefined, and written law was consulted only as a last resort.<sup>26</sup> China has codified legal norms since 1978 in order to eliminate the arbitrariness condemned in most western legal systems and to produce the predictability offered by definite legal rules.

Success in this realm, however, has eluded China because of the complex, overlapping bureaucracy, which promulgates and interprets legislation.<sup>27</sup> The National People's Congress (NPC) writes "basic laws" affecting the whole of society, including criminal and civil laws defining the structure of the government. In addition, the Standing Committee of the NPC was empowered by the 1982 *Zhonghua Renmin Gongheguo Xianfa* (the Constitution of the People's Republic of China) to promulgate legislation.<sup>28</sup> The State Council—the executive branch of the central government—can issue administrative regulations and rules pursuant to broad enabling statutes enacted by the NPC.<sup>29</sup> Finally, local People's Congresses are authorized to enact regulations in

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<sup>25</sup> These legal developments are described in detail in CHEN, *supra* note 21, at 24-38; LO, *supra* note 21, at 17-68; Wu Jianfan, *Building China's Legal System*, in CHINA'S LEGAL DEVELOPMENT 5-14 (John R. Oldham ed., 1986). For a more general history of China since 1948, see JONATHAN D. SPENCE, *THE SEARCH FOR MODERN CHINA* 514-747 (1990).

<sup>26</sup> Ottley & Valauskas, *supra* note 16, at 86.

<sup>27</sup> The best explanation of China's legislative process is provided by Perry Keller, *Legislation in the People's Republic of China*, 23 U. BRIT. COLUM. L. REV. 653 (1989). For other descriptions, see CHEN, *supra* note 21, at 77-95; Wang Wei Min, *A Few Problems in Environmental Protection Legislation in China*, in Proceedings of the Sino-American Conference on Environmental Law 189-91 (Natural Resources Law Center, University of Colorado School of Law ed., 1989).

<sup>28</sup> See CHEN, *supra* note 21, at 80-82; Keller, *supra* note 27, at 661. The duties of the NPC and the procedures it follows are described in CHEN, *supra* note 21, at 55-59.

<sup>29</sup> See CHEN, *supra* note 21, at 83-85; Keller, *supra* note 27, at 669-73. Departments of the State Council can issue rules as well, although the status of those rules as legislation is not as clearly established. See Keller, *supra* note 27, at 673-75.

order to provide additional enforcement mechanisms for statutes promulgated at the national level.<sup>30</sup>

China has also created a complicated administrative and judicial bureaucracy to implement its statutes. Administrative power is exercised by the State Council and countless departments throughout the country. Judicial power rests with three kinds of people's courts—local, special, and supreme.<sup>31</sup> The Supreme People's Court serves as the highest court in China and oversees the work of the other courts.<sup>32</sup>

Chinese courts, however, operate in a somewhat less formal manner than courts in the United States, due in part to their relatively recent history as well as to an apparently deliberate effort to make the justice system more accessible to the people. While this comparatively informal structure has led to some anomalous results,<sup>33</sup> Chinese courts manifest their commitment to accessibility by holding trials in the locale where the disputed event occurred; by encouraging mutually agreeable settlements instead of issuing judicial verdicts; by educating citizens as well as adjudicating; and by using colloquial in lieu of formal language in their published decisions.<sup>34</sup> In short, they are not as easily distinguished from administrative agencies as courts are in the United States.

Furthermore, China has developed a nuanced system of "legislative," "judicial," and "administrative" statutory interpretation. Under the Constitution, the NPC Standing Committee has the power to interpret national laws.<sup>35</sup> A resolution enacted by the Standing Committee divides that interpretive authority among several governmental institutions.<sup>36</sup> The Standing Committee conducts "legislative" interpretation in determining the plain language meaning of a statute. Legislative interpretation

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<sup>30</sup> See CHEN, *supra* note 21, at 85-88; Keller, *supra* note 27, at 680-81.

<sup>31</sup> See CHEN, *supra* note 21, at 107-12; Wang & Blomquist, *supra* note 15, at 73.

<sup>32</sup> See generally *China's Supreme People's Court Report*, BBC, Mar. 29, 1995, available in LEXIS, Nexis Library, BBC World Summary File.

<sup>33</sup> For example, while the Chinese Constitution and the Organic Law of the People's Courts are committed to the principle of open trials, some courts have construed these provisions to mean only that notice of the pending trial must be posted. CHEN, *supra* note 21, at 112-15.

<sup>34</sup> CHEN, *supra* note 21, at 112-15.

<sup>35</sup> XIANFA art. 67, cl. 4 (1982).

<sup>36</sup> Resolution of the Standing Committee of the NPC Concerning the Strengthening of Legal Interpretative Work (1981).

also includes the power to amend or supplement legislation, thereby obscuring the distinction between interpreting legislation and enacting it.<sup>37</sup> The Supreme People's Court and the Supreme People's Procuratorate (the State's prosecutor) conduct "judicial" interpretation, *i.e.*, interpretation of the law as applied in specific cases, which merely clarifies the original intent of the statute. Though lower courts lack the formal power to interpret national laws, such interpretation is recognized as inevitable in some cases. Finally, the State Council conducts "administrative" interpretation—answering any other questions about the specific application of the law. Administrative interpretations are binding on other governmental agencies and on the public, but not on the courts.<sup>38</sup>

The Standing Committee issues few legislative interpretations in practice, and most of those that do occur are announced in press interviews, notices, and other informal statements.<sup>39</sup> Likewise, few self-described administrative interpretations occur though there are many instances where the State Council's statutory interpretation is implicit in an agency's choice of action.<sup>40</sup> By contrast, the Supreme People's Court, which "has emerged as the leading state authority on the interpretation of national laws," routinely issues published opinions on individual cases that interpret statutes so broadly that they resemble legislative interpretations.<sup>41</sup> As in other civil law systems, such opinions generally do not serve as formal sources of law, although prior decisions appear to enjoy some precedential value in China. More commonly, judicial statutory interpretation is implicit in general interpretive statements, answers to questions posed by

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<sup>37</sup> See CHEN, *supra* note 21, at 95-96; Keller, *supra* note 27, at 666 (citing Zhao Bingshi & Wang Yong, *A Discussion of the Supreme Judicial Interpretation of Criminal Law*, 1 FAXUE YANJIU 61 (1988)).

<sup>38</sup> See CHEN, *supra* note 21, at 96-102; Keller, *supra* note 27, at 666-68, 679-80.

<sup>39</sup> CHEN, *supra* note 21, at 96; Keller, *supra* note 27, at 666-67.

<sup>40</sup> CHEN, *supra* note 21, at 97.

<sup>41</sup> CHEN, *supra* note 21, at 97-102; Keller, *supra* note 27, at 667-68. See also Z.Y. James Fang & David K.Y. Tang, *The Wholly Foreign-Owned Enterprise Law: Defining the Legislative History and Interpreting the Statute*, 2 J. CHINESE L. 153, 154 (1988) ("Chinese statutes are not likely to be interpreted formalistically by the courts; they are, instead, applied as a guide to mediated and negotiated dispute settlement."). But see Walter Gellhorn, *China's Quest for Legal Modernity*, 1 J. CHINESE L. 1, 22 (1987) (asserting that Chinese courts are "unassertive" and that "[t]hey infrequently interpret statutes at all, let alone inventively").

lower courts in particular cases, or even policy announcements regarding the implementation of a statute issued jointly by administrative and legislative bodies.<sup>42</sup> The courts, however, are unlikely to interpret administrative and local regulations.<sup>43</sup>

### C. *Environmental Law in China*

Chinese environmental law has evolved along with the entire body of Chinese law. Prior to 1978, lack of interest in both the environment and the law resulted in a dearth of progress in environmental law.<sup>44</sup> The People's Congress approved the Law on Environmental Protection—China's first general environmental statute—on a provisional basis in 1978, and passed a permanent version of the statute in 1989.<sup>45</sup> China began including environmental goals in its five year plans in 1980.<sup>46</sup> Several provisions regarding environmental protection were added to China's constitution in 1982.<sup>47</sup> China has since enacted a series of environmental statutes addressing air, water and marine pollution, the protection of forests and endangered species, and other issues. There is one significant exception; China has yet to enact a hazardous waste statute, but such action may be imminent.<sup>48</sup>

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<sup>42</sup> CHEN, *supra* note 21, at 98-100; Keller, *supra* note 27, at 668.

<sup>43</sup> CHEN, *supra* note 21, at 97-98.

<sup>44</sup> The oldest Chinese environmental law appears to be a decree issued during the Yin Dynasty (1600-1100 BCE) which provided that "whoever abandons trash or dust on [the] road will be punished by cutting off his hand." Wang & Blomquist, *supra* note 15, at 37 (quoting HAN FEI ZI JISHI, COLLECTION AND ANNOTATION OF WORKS OF HAN FEI ZI 541 (1974)). For other examples of Chinese statutes addressing environmental issues prior to 1978, see Ross & SILK *supra* note 16, at 1, 3, 65-66; Wang & Blomquist, *supra* note 15, at 37-40.

<sup>45</sup> See Environmental Protection Law of the People's Republic of China (for trial implementation) (1979), reprinted in Ross & SILK, *supra* note 16, at 285-90.

<sup>46</sup> See Wang & Blomquist, *supra* note 15, at 29 & n.9 (quoting Chapter XXXV of the Sixth Five-Year Plan covering the period from 1981 through 1985).

<sup>47</sup> XIANFA art. 9 (1982) (providing for state ownership of natural resources, ensuring state protection of natural resources, and prohibiting appropriation of or damage to natural resources); XIANFA art. 26 (1982) ("The State protects and improves the living environment and the ecological environment, and prevents and remedies pollution and other public hazards."). These and other relevant constitutional provisions are discussed in Wang & Blomquist, *supra* note 15, at 30, 44; Yang Chun-Xi et al., *China's Treatment of Crimes Against the Environment: Using Criminal Sanctions to Fight Environmental Degradation in the PRC*, 8 J. CHINESE L. 145, 152-53 (1994).

<sup>48</sup> See generally Shanley, *supra* note 19. For lists of China's environmental statutes, see Jin Rui Lin & Liu Wen, *Environmental Policy and Legislation in*

The central government has also promulgated regulations to implement a number of the national environmental statutes, and provinces and local governments have enacted their own environmental statutes.<sup>49</sup> As of 1994, China had enacted twelve national statutes, twenty national administrative regulations, over six hundred local laws and regulations, and three hundred other norms regulating the environment.<sup>50</sup>

China has created a sweeping bureaucracy to implement these environmental statutes. The National Environmental Protection Agency (NEPA) has broad duties to promulgate and enforce environmental standards and to oversee and report on progress in meeting environmental goals.<sup>51</sup> Other central government departments must consider environmental concerns when fulfilling their responsibilities.<sup>52</sup> Provincial and local environmental protection agencies enforce the statutes within their jurisdictions.<sup>53</sup>

There are three enforcement mechanisms available to ensure compliance with the environmental statutes. The vast majority of such enforcement proceedings occur at the administrative level.<sup>54</sup> Administrative proceedings may be brought by NEPA or certain other agencies against violators of environmental statutes. Alternately, the government (and conceivably a private party) may institute a civil action in court. Finally, criminal sanctions may be imposed by a court in some environmental cases.<sup>55</sup> Despite these mechanisms, actual

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*China*, in PROCEEDINGS OF THE SINO-AMERICAN CONFERENCE ON ENVIRONMENTAL LAW 166-67 (Natural Resources Law Center, University of Colorado School of Law ed., 1989); Wang & Blomquist, *supra* note 15, at 48. Many of the statutes are reprinted in Ross & Silk, *supra* note 16, at 285-424.

<sup>49</sup> For a description of the relationship between these sources of law, see Wang, *supra* note 27, at 185-86; Wang & Blomquist, *supra* note 15, at 43-49.

<sup>50</sup> AGENDA 21, *supra* note 4, at 15; *China: "Landmark" New Regulations on Natural Reserves Announced*, BBC, Nov. 22, 1994, available in LEXIS, Nexis Library, BBC World Summary File.

<sup>51</sup> See Wang & Blomquist, *supra* note 15, at 32.

<sup>52</sup> Wang & Blomquist, *supra* note 15, at 73.

<sup>53</sup> Wang & Blomquist, *supra* note 15, at 73.

<sup>54</sup> See *infra* text accompanying note 78.

<sup>55</sup> These enforcement mechanisms are described in greater detail in CHENG ZHENG-KANG, A BRIEF INTRODUCTION TO ENVIRONMENTAL LAW IN CHINA 30-35 (1986); Ma Xiang Cong, *Enforcement of Environmental Laws in China*, in PROCEEDINGS OF THE SINO-AMERICAN CONFERENCE ON ENVIRONMENTAL LAW 277-81 (Natural Resources Law Center, University of Colorado School of Law ed., 1989); Ross & Silk, *supra* note 16, at 245-49 (reprinting an article by

enforcement of China's environmental statutes remains weak.<sup>56</sup>

### III

#### WHY THERE ARE NO CHINESE ENVIRONMENTAL LAW STATUTORY INTERPRETATION CASES

As described in Part II above, China is in the process of adopting a western-style legal system with western-style statutes, including environmental statutes. Moreover, China possesses an administrative structure to enforce those laws, and its courts are gaining more power to do so as well. Still, unlike their western counterparts, Chinese cases that hinge on the disputed meaning of an environmental statute are few and far between. Professor Stewart has identified several reasons why this is so. I wish to consider the reasons he has listed, as well as submit other reasons for the absence of any statutory interpretation cases in Chinese environmental law.

##### A. *Lack of Separation of Governmental Powers in China*

China's governmental powers are separated in theory, but not in practice. Indeed, China's governmental powers are not fully separated from the Communist Party. This intertwining of governmental powers among different parts of the government and the Party deters statutory interpretation cases in several ways.

##### 1. *Existence of a One-Party System*

The Communist Party rules China. To be sure, the Chinese Constitution permits other political parties, and beginning in the 1980s the Communist Party moved to separate itself from the official functioning of the state.<sup>57</sup> Nonetheless, the Communist Party retains all actual governmental power. The events of June 1989 in Tiananmen Square eliminate any doubt about the willingness of the Communist Party to share real power with other

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Wang Yinghuai, a Chinese judge, outlining the judicial procedures for the disposition of environmental cases); Wang & Blomquist, *supra* note 15, at 72-73.

<sup>56</sup> See *infra* part III.B.

<sup>57</sup> These efforts are described in detail in Lo, *supra* note 21, at 271-74 and Keller, *supra* note 27, at 656.

political parties.<sup>58</sup> The power of the state is thus still inextricably intertwined with that of the Communist Party.<sup>59</sup>

The Communist Party essentially dictates the content and nature of Chinese law. At one point, the commonly accepted view in China was that Communist Party policy and Chinese law were coextensive. That view has come into disfavor as Chinese academics, with tacit support from Deng, have expressed support for a legal system in which law possesses independent force, so that the rule of men (to wit, the leaders of the Communist Party) is giving way to the rule of law.<sup>60</sup> Although Party and government officials are now at least nominally subject to the law,<sup>61</sup> the transformation to the rule of law is not complete. Examples of Party influence on the legal process abound, during both the creation and the implementation of Chinese law.<sup>62</sup> The problem is particularly acute in environmental cases, where Party intervention may be needed to assure local enforcement of the law but where such intervention robs the law of its independent force.<sup>63</sup>

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<sup>58</sup> See Keller, *supra* note 27, at 657 ("The Chinese political crisis of 1989 may well result in a revision of the policy of separating Party and state functions and a re-assertion of Party authority over the daily administration of the legal system.").

<sup>59</sup> ROSS & SILK, *supra* note 16, at 10-11; Hikota Koguchi, *Some Observations About "Judicial Independence" in Post-Mao China*, 7 B.C. THIRD WORLD L.J. 195, 195, 199, 202, 206, 208-09 (1987); Frankie Fook-Lun Leung, *Some Observations on Socialist Legality of the People's Republic of China*, 17 CAL. W. INT'L L.J. 102, 109-10 (1987); Liu Nanping, "Judicial Review" in China: A Comparative Perspective, 14 REV. SOCIALIST L. 241, 251-52 (1988).

<sup>60</sup> For different perspectives on the degree to which China has moved from the rule of men to the rule of law, see generally LO, *supra* note 21; John C. Nagle, *The Rule of Law in Mainland China*, 14 AM. ASIAN REV. 147 (1996).

<sup>61</sup> See An Instruction of the Central Committee of the Chinese Communist Party Concerning the Full Implementation of the Criminal Law and the Law of Criminal Procedure, *reprinted and translated in* Koguchi, *supra* note 59, at 251 ("[F]rom the Party Central Committee on down to organizations on the most basic level, and from the Chairman of the CCP to the individual Party member, all of them should, without exception, conform to the law.").

<sup>62</sup> Professor Lo lists many such examples, along with counterexamples where the law has prevailed against party officials. LO, *supra* note 21, at 39, 75. Another powerful illustration involves the death penalty: the president of the Supreme People's Court has acknowledged the Party's primary jurisdiction over cases involving capital punishment, the criminal code notwithstanding. See Koguchi, *supra* note 59, at 199, 206 ("[T]he court was, and is, required to seek instructions from the Party in handling important or difficult cases."); Liu, *supra* note 59, at 251 ("The obvious fact is that the Chinese Communist Party has the last word in every decision, if it so desires.").

<sup>63</sup> See ROSS & SILK, *supra* note 16, at 11; see also Boxer, *supra* note 16, at 683 ("Party authority still reigns supreme in China, and major pollution and

As Dan Tarlock theorizes, “[a]ll law, but especially law which strengthens the legal power of the individual against the state, as much of western environmental law does, is destabilizing to authoritarian regimes.”<sup>64</sup> China continues to be controlled by state and Party officials instead of by the “rule of law” and individual rights.

The Communist Party’s power over the legal system extends to Chinese statutory law. Statutes are needed as an alternative to allowing individual government (or Party) officials to decide what is or is not acceptable conduct.<sup>65</sup> While the Party lacks the formal constitutional power to enact legislation, it initiates the process of drafting new statutes, including new environmental statutes.<sup>66</sup> The Party also influences the interpretation of statutes once they are enacted.

The Communist Party’s continuing influence provides one explanation for the lack of disputes as to the meaning of Chinese environmental statutes. The old notion that the Party’s will is tantamount to the law’s command still lingers today. It may be difficult to challenge the government’s interpretation of a statute even if that statute’s apparent meaning clashes with the reading espoused by the Party. The Party’s influence on statutory interpretation is often indirect, and the Party’s will is most likely to manifest itself in statutory interpretation through other features of the Chinese governmental structure.

## 2. *Absence of an Independent Judiciary*

The Chinese Constitution provides for a judiciary that is independent from the other branches of government.<sup>67</sup> That formal independence is tempered in reality by a variety of constraints on the power of Chinese courts. Chinese judges are

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resource cases are resolved politically at high levels where disputes over trade-offs between economic and environmental costs are usually resolved in favor of economic production interests.”).

<sup>64</sup> Tarlock, *supra* note 16, at 560.

<sup>65</sup> Ross & Silk, *supra* note 16, at 5.

<sup>66</sup> See Leung, *supra* note 59, at 109; Richard B. Stewart, Speech at the *New York University Environmental Law Journal Annual Banquet* (Mar. 27, 1995) in 5 N.Y.U. ENVTL. L.J. 562 (1996).

<sup>67</sup> XIANFA art. 126 (1982) (“People’s courts shall exercise their authority independently according to the law and shall not be interfered with by an administrative organ, organization, or individual.”).



poorly trained and held in low regard in society.<sup>68</sup> The National People's Congress selects the justices who serve on the Supreme Judicial Court.<sup>69</sup> Once chosen, a justice can serve no more than two consecutive terms,<sup>70</sup> and may be removed by the legislature at any time without cause.<sup>71</sup>

Chinese judges are subject to extensive influence from the legislature and executive departments. Professor Stewart and many other observers have characterized the judiciary as beholden to the Party.<sup>72</sup> The once commonly held belief that "[a]ll important judicial matters should be decided by the Party organization, including not only problems of political ideology or policy, but also concrete cases" is exemplified by a 1958 article entitled "Refute Jia Qian's Anti-Party Nonsense about 'Independent Adjudication.'" <sup>73</sup> The Chinese attitude toward the judiciary has changed greatly since 1958,<sup>74</sup> but dispute continues over the actual independence of the judiciary.

Contrast China with the United States. The American judiciary is independent and powerful. Courts invalidate statutes enacted by Congress and the President as unconstitutional; they hold that regulations promulgated by executive agencies are unauthorized by statute; they overturn specific administrative enforcement decisions; and they reverse criminal convictions. However, the independence of U.S. courts is not unlimited: Congress can curtail the jurisdiction or reduce the budget of the federal courts, and Presidents have long relied on their appointment

<sup>68</sup> The judges' lack of training is described in Lo, *supra* note 21, at 136-37; Koguchi, *supra* note 59, at 201. The low status of the judiciary is described in Stewart, *supra* note 66, at 557; *see also* Koguchi, *supra* note 59, at 202.

<sup>69</sup> *See* XIANFA art. 62, cl. 7 (1982) (providing for the election of the Chief Justice by the National People's Congress); XIANFA art. 67, cl. 11 (1982) (providing for the appointment of other justices by the Standing Committee of the National People's Congress).

<sup>70</sup> XIANFA art. 124 (1982).

<sup>71</sup> *See* Leung, *supra* note 59, at 108 n.36 (describing how Articles 62, 63, and 67 of the Constitution allow the National People's Congress to remove justices at will).

<sup>72</sup> *See, e.g.,* Ross & Silk, *supra* note 16, at 209; Koguchi, *supra* note 59, at 195-97, 200; Leung, *supra* note 59, at 110; Stewart, *supra* note 66, at 557.

<sup>73</sup> Koguchi, *supra* note 59, at 196 (quoting Feng Ruoquan, *Refute Jia Qian's Anti-Party Nonsense About 'Independent Adjudication,'* 1 ZHENGFA YANJIU 20 (1958)).

<sup>74</sup> *See, e.g.,* *China's Supreme People's Court Report*, *supra* note 32, at 11 (claiming that "courts persisted in exercising judicial authority independently and according to the law, and resolutely opposed and resisted the influence of local and departmental protectionism and other interference").

power to shape the judiciary's collective view. Many state judges are subject to the additional influence of popular election. Those constraints, however, only work as crude and often ineffective mechanisms for the political branches of the government to control the courts in the United States.

The independence and authority of the U.S. judiciary encourages parties to seek formal adjudication of conflicts, including environmental disputes. Private parties frequently challenge the environmental policies of executive agencies knowing that the courts enjoy the authority to overrule illegal executive conduct. For example, court decisions invalidating numerous proposed executive actions have blocked repeated efforts to craft a political compromise between environmental and timber interests in the Pacific Northwest.<sup>75</sup> Challenges to governmental action often involve a dispute concerning the meaning of the statute that provides the government with regulatory authority, or defines the scope of illegal private conduct.

Many environmental statutes vest the federal courts of appeals with original jurisdiction to decide whether agency regulations properly interpret the statute they are designed to implement.<sup>76</sup> Likewise, environmental statutes grant the federal courts jurisdiction to hear challenges to administrative enforcement actions;<sup>77</sup> those cases often present, as well, disputes regarding statutory construction. Much U.S. environmental law, therefore, presupposes an independent judiciary that will not hesitate to rule that the executive has misinterpreted its charge.

### 3. *The Primacy of Executive Authority*

The absence of Chinese environmental statutory interpretation cases is also due in part to the fact that China offers few opportunities for individuals to challenge agency resolution of environmental disputes in the courts. The vast majority of such

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<sup>75</sup> See MENELL & STEWART, *supra* note 3, at 1145-80.

<sup>76</sup> See, e.g., 42 U.S.C. § 7607(b)(1) (1994) (directing that petitions for review of EPA rules and regulations implementing the Clean Air Act (CAA) must be filed in the D.C. Circuit); 42 U.S.C. § 6976(a)(1) (1994) (petitions for review of EPA rules and regulations implementing the Resource Conservation and Recovery Act (RCRA) must be filed in the D.C. Circuit).

<sup>77</sup> See, e.g., 42 U.S.C. § 7607(b)(1) (1994) (directing that petitions for review of EPA orders implementing the CAA must be filed in the federal circuit courts of appeals); 42 U.S.C. § 6976(b) (1994) (petitions for review of EPA permit and interim authorization decisions under RCRA must be filed in the federal circuit courts of appeals).

conflicts in China are resolved administratively. Lester Ross and Mitchell Silk explained that

[i]n keeping with both traditional and communist Chinese culture, violations of law and civil disputes are usually handled outside of court. Environmental protection officials claim that over 90 percent of their actions are accepted by the parties concerned, although they concede that their decisions take account of factors like the ability to pay fines or make restitution and also that political realities temper their independence. Of the remainder, the overwhelming majority are resolved through semiformal mediation involving the regulator, the polluter(s), and the victim(s).<sup>78</sup>

The situation in the United States is dramatically different, with many environmental disputes entering the courts each year.

In this area, the interpretive rules followed by each country are determinative. In the United States, the environmental statutes enacted by Congress routinely empower the implementing agency to issue regulations interpreting the general command of the statute in particular situations.<sup>79</sup> The Supreme Court in *Chevron* instructed federal courts to defer to any reasonable agency interpretation of an ambiguous statute.<sup>80</sup> The knowledge that the courts are reluctant to overturn an agency's interpretation of a statute should operate as a disincentive to affected parties wishing to contest that interpretation in court. Whether or not *Chevron* has actually had such an effect is subject to empirical debate,<sup>81</sup> but a likely explanation for continued litigation in a

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<sup>78</sup> ROSS & SILK, *supra* note 16, at 243; accord Joseph R. Profaizer, Note, *Economic Development and Environmental Law in China's Special Economic Zones*, 28 TEX. INT'L L.J. 319, 341 (1993) (noting that "the judiciary rarely participates in environmental enforcement" and that "civil enforcement has been limited primarily to administrative and civil actions, if the authorities take any action at all against polluters"). For example, Ross and Silk observed that "only two or three dozen of the 1,600 pollution-related conflicts that occur in Chongqing in a year are resolved in the courts." ROSS & SILK, *supra* note 16, at 7.

<sup>79</sup> See *supra* part I. The Comprehensive Environmental Recovery, Compensation, and Liability Act (CERCLA) constitutes the most notable exception. See *Kelley v. EPA*, 25 F.3d 1088 (D.C. Cir.) (holding that EPA lacks the power to issue regulations defining the scope of lender liability under CERCLA), *cert. denied*, 115 S. Ct. 900 (1995).

<sup>80</sup> 467 U.S. 837 (1984).

<sup>81</sup> See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984; Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invi-*

world governed by *Chevron* is that the courts are more willing to question agency statutory interpretations than *Chevron* would suggest.

Chinese environmental statutes also delegate the power to develop detailed regulatory schemes to administrative agencies (albeit subject to the approval of the State Council).<sup>82</sup> But China goes further than the United States in that it vests an even greater amount of interpretive authority in administrative agencies. As one Chinese professor explained:

Under the Chinese legal system, judges in China have either no power to make law or no authority to interpret the law at their own will. The interpretation of law is the responsibility of the National Congress and the State Supreme Court. In most administrative laws including environmental law, there are specific provisions which state that the National Congress delegated its power to interpret law to the executive organizations in charge of enforcement.<sup>83</sup>

Administrative interpretations of a statute are not binding on a court, but courts will seek to avoid conflicting interpretations by consulting the appropriate legislative committee or administrative agency before interpreting a statute.<sup>84</sup> Additionally, Chinese courts "must refer all questions of interpretation to the authorized administrative body for interpretation."<sup>85</sup> Thus, if an environmental dispute does reach the courts, Chinese judges will not overturn the agency's interpretation of the applicable statute.

Although *Chevron* does affect statutory interpretation, it does not produce nearly as much deference to the Environmental Protection Agency's (EPA) (or any other agency's) interpretation of U.S. environmental laws as that observed in the Chinese system. Only if Congress enacted a statute withdrawing the juris-

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*tation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995). For a study of *Chevron*'s relevance to tax cases, see John F. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the Chevron Era*, 64 GEO. WASH. L. REV. 35 (1995).

<sup>82</sup> See, e.g., Water Pollution Prevention and Control Law, art. 45 (1984), reprinted in ROSS & SILK, *supra* note 16, at 312; Forestry Law, art. 40 (1984), reprinted in ROSS & SILK, *supra* note 16, at 349; Marine Environmental Protection Law, art. 47 (1982), reprinted in ROSS & SILK, *supra* note 16, at 318-19.

<sup>83</sup> CHENG, *supra* note 55, at 2-3; accord Keller, *supra* note 27, at 653 (observing that "interpretation of law is, in most cases, the preserve of administrative authorities rather than of the courts").

<sup>84</sup> See Keller, *supra* note 27, at 668, 679.

<sup>85</sup> Keller, *supra* note 27, at 679-80 (citing the author's unpublished interview with an official of the Supreme People's Court).

diction of the federal courts to reject EPA's interpretation of a statute, or if the courts extended *Chevron* so that *all* agency statutory interpretations must be sustained, would the United States achieve a position comparable to China's.

### B. *The Lack of Enforcement of Chinese Environmental Statutes*

The way in which Chinese environmental statutes are enforced—or not enforced—further explains the paucity of cases interpreting Chinese environmental statutes. Lester Ross and Mitchell Silk have identified four primary ways in which China enforces its environmental policies: exhortational campaigns, administrative regulations and controls, economic incentives, and legal sanctions.<sup>86</sup> Often, however, China either fails to enforce its environmental policies in particular circumstances, or does not enforce them at all. This failure to enforce environmental statutes reduces the need to interpret them, as the lack of cases indicates.

#### 1. *Failure of the Chinese Government to Enforce Environmental Statutes*

The Chinese government's inability to enforce its own environmental statutes is attributable to several factors. In China, the implementation of national environmental policies rests largely on ill equipped or unmotivated local officials who often fail to zealously enforce environmental regulations.<sup>87</sup> Many local officials, through lack of training, remain unaware of environmental issues or are ignorant of statutory environmental requirements. Where some local officials are merely disinterested in environmental matters,<sup>88</sup> others exploit their enforcement powers for personal gain.<sup>89</sup> Regardless of their level of environmental awareness or concern, almost all local officials must balance

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<sup>86</sup> Ross & SILK, *supra* note 16, at 207-09

<sup>87</sup> See Wang & Blomquist, *supra* note 15, at 64 (noting that some local officials have ignored or circumvented environmental impact assessment requirements). The enforcement problem is not limited to environmental statutes. See Keller, *supra* note 27, at 653-54 ("The implementation of the law often depends on the cooperation of local officials who lack sufficient interest or resources to put complex legislation into effect.")

<sup>88</sup> See Ross & SILK, *supra* note 16, at 11 ("Chinese environmental officials repeatedly complain that their policies do not receive adequate support from local officials, many of whom fail to take violations of the law seriously . . .").

<sup>89</sup> See Stewart, *supra* note 66, at 564.

the costs of environmental enforcement with the demands of rapid economic development.<sup>90</sup> Local officials also control the funding of local courts, thereby holding a potent weapon against judges who would be more willing to enforce the law despite adverse economic consequences.<sup>91</sup> Moreover, some judges give low priority to environmental cases,<sup>92</sup> even absent pressure from local officials.

Even when the will to enforce the law exists, the resources needed to do so may be lacking. China, like many other less developed nations, takes the position that western nations should bear the brunt of the economic burden of achieving environmental goals.<sup>93</sup> Foreign countries and international organizations such as the World Bank have invested billions of dollars in environmental projects in China.<sup>94</sup> The Chinese government has preferred to pursue international assistance with the development of environmental technology rather than to promulgate stringent environmental regulations with which China's fledgling industries will be ill-equipped to comply. But technology is not a substitute for enforcement. As Professor Stewart notes, even the most advanced environmental technology serves no purpose if industries continue to avoid the use of new equipment due to its expense.<sup>95</sup> Similarly, the lack of enforcement resources cannot

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<sup>90</sup> See Profaizer, *supra* note 78, at nn. 124-25; Stewart, *supra* note 66, at 564 (observing that a municipality or a local official often has a direct economic stake in a particular enterprise); Benjamin Kang Lin, *China Says Efforts to Curb Pollution Pay Off*, Reuters, Nov. 14, 1994, available in LEXIS, Nexis Library, Reuters World Service File.

<sup>91</sup> Keller, *supra* note 27, at 682.

<sup>92</sup> See Ma, *supra* note 55, at 280.

<sup>93</sup> See Cai & Voigts, *supra* note 17, at S-33 to S-35 (explaining why "developed countries should bear the majority of the financial burden of cleaning up the global environment"); China, *UNDP Host Meeting on China's Agenda*, Xinhua News Agency July 7, 1994, available in LEXIS, Nexis Library, Xinhua File (Chinese official indicating that China expects financial support and technology transfers to achieve its environmental goals). China recognizes, however, that it needs to increase its own investment in environmental protection. See Ma, *supra* note 55, at 273; Wang & Blomquist, *supra* note 15, at 53 n.140 (citing study concluding that China spends 0.7% of its national income on environmental protection, whereas at least 1.5% is needed to fully address the problem).

<sup>94</sup> See *supra* text accompanying note 19.

<sup>95</sup> Stewart, *supra* note 66, at 563; accord Wang & Blomquist, *supra* note 15, at 66 (confirming that "pollution control devices are sometimes dismantled or taken out of use because of operating costs or operational difficulties").

continue to justify the willful disregard of environmental statutes.<sup>96</sup>

This is not to say that the Chinese government *never* enforces its environmental statutes. The government now places a high priority on environmental issues,<sup>97</sup> and the need to improve enforcement has been acknowledged. Stricter environmental enforcement is becoming more common: in 1979, an equipment operator at a chemical plant was sentenced to two years imprisonment for allowing twenty-eight tons of liquid cyanide to escape into an adjacent river;<sup>98</sup> the Hunan Province Environmental Protection Bureau vetoed thirteen petitions to upgrade businesses in 1989 and 1990 because of their poor environmental performances;<sup>99</sup> a number of factories have been shut down because of their pollution;<sup>100</sup> and poachers have even been executed for killing endangered pandas.<sup>101</sup> The Chinese government trumpets such examples, and it is increasing its attention to environmental enforcement. But such aggressive action remains the exception, not the rule.

Whatever the reason for the government's failure to enforce its environmental statutes, the result is a dearth of statutory interpretation. The meaning of a statute becomes an issue only when two or more parties initiate a dispute about the statute, and therefore there are no such disputes absent attempts to enforce that statute. Thus, the number of environmental law statutory interpretation cases can be expected to correlate with the amount of government enforcement of the environmental statutes, which is quite low overall.

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<sup>96</sup> An example of the problems which result from the lack of enforcement resources occurred in 1991 when complaints about a chemical factory's air pollution resulted in the factory deciding to move *closer* to the affected residents because the local government lacked the funds to move the factory to a safer location. Wang & Blomquist, *supra* note 15, at 60.

<sup>97</sup> See, e.g., AGENDA 21, *supra* note 4, at 18.

<sup>98</sup> The official report of that case is reprinted in Ross & Silk, *supra* note 16, at 250-58.

<sup>99</sup> Wang & Blomquist, *supra* note 15, at 63.

<sup>100</sup> See, e.g., Profaizer, *supra* note 78, at 353.

<sup>101</sup> Pan Wenshi, *New Hope for China's Pandas*, 187 NAT'L GEOGRAPHIC 100, 105 (1995). For other examples of China's enforcement of its environmental laws, see Ross & Silk, *supra* note 16, at 268-81; Ottley & Valauskas, *supra* note 16, at 108, 125-26; Wang & Blomquist, *supra* note 15, at 57, 74-75 & nn.279, 282, 284-86.

## 2. *Obstacles to Private Enforcement of Chinese Environmental Statutes*

Private citizens, organizations, and businesses face enormous difficulties in bringing environmental cases to court in China. While Chinese citizens have the formal right to bring environmental disputes—including environmental disputes with the government—into court,<sup>102</sup> instances of such suits are quite rare.<sup>103</sup> Further hampering the ability to sue is the absence of any Chinese analog to the tort of nuisance or other common law actions whereby those adversely affected by pollution can seek relief.<sup>104</sup>

Since all U.S. environmental statutes contain provisions authorizing citizen suits, the United States has had many cases interpreting environmental statutes. The ability of private parties to initiate environmental litigation precludes the government agencies charged with implementing environmental statutes from enjoying a monopoly over statutory interpretation. In the United States, a private citizen can act to enforce an environmental statute even when the government has determined that the statute does not apply to the circumstances. This is not true in China.

Citizen suits also allow private parties in the United States to use environmental statutes to block projects that have been proposed or approved by the government, whereas Chinese citizens have no such right. This contrast is best illustrated by two dams: the Tellico Dam in Tennessee and the Three Gorges Dam in China. The Tennessee Valley Authority, a federal agency, interpreted the Endangered Species Act as inapplicable to the

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<sup>102</sup> NEPA Article 8 apparently grants all citizens “the right to supervise, accuse and bring law suits against units or individuals who cause pollution and damage to the environment,” see Ma, *supra* note 55, at 276 (quoting the statute), although another translation excludes the right to bring law suits, see Ross & Silk, *supra* note 16, at 77-78 (quoting NEPA as creating “the right to supervise, inform against, and accuse any departments or individuals of causing environmental pollution and damage”). See also Wang & Blomquist, *supra* 15, at 73 (“Citizens may bring cases, including environmental cases, before the courts according to the rules set by the Civil Procedure Law.”).

<sup>103</sup> See Stewart, *supra* note 66, at 558 (“Rarely does anybody sue the government as such. In some cases lower officials have been sued, but that is exceptional.”)

<sup>104</sup> See Orlley & Valauskas, *supra* note 16, at 89 (noting the historic absence of common law nuisance suits in China). But see Ma, *supra* note 55, at 281 (describing environmental disputes as “actually civil tort disputes”).



completion of the Tellico Dam. A citizen suit brought by local opponents of the project resulted in the Supreme Court holding otherwise.<sup>105</sup> In contrast, the Chinese government presses forward with the construction of the Three Gorges Dam despite both local and worldwide concern about its environmental ramifications.<sup>106</sup> Chinese citizens were afforded a number of opportunities to register their concerns about the project,<sup>107</sup> but the Chinese courts have yet to be presented with a case suggesting that construction of the dam would violate China's environmental statutes. This is so even though one can easily construct an argument parallel to the successful U.S. argument in *TVA v. Hill*: a State Council circular orders that "[a]ll economic activities that affect the breeding and survival of endangered wildlife in their main nesting area should be banned,"<sup>108</sup> and the Three Gorges Dam is expected to render many species extinct.<sup>109</sup> But the difficulty in and ramifications of a citizens suit bringing the issue into court precludes any statutory interpretation, despite the broad substantive coverage of the regulation.

### 3. *Lack of Economic Incentive to Challenge Administrative Interpretations of Chinese Environmental Statutes*

Even if a party faces a government enforcement action for violation of a Chinese environmental statute, the relatively mild penalties for violation of those statutes often discourage protracted and expensive court cases contesting the government's interpretation. Mere disagreement with the interpretation of a statute will not result in a contested case unless the adversely affected party will suffer consequences exceeding the cost of litigation; in China many parties who disagree with the government's interpretation of an environmental statute will choose to pay the nominal fine instead. Effluent fees are often smaller than the cost of complying with the statute, and violators can

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<sup>105</sup> *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

<sup>106</sup> See, e.g., Sandra Burton, *Taming the River Wild*, TIME, Dec. 19, 1994, at 62; David Dahmen, *Yangtze Dam Could Be Catastrophic, Warns Author*, Inter Press Serv., Apr. 21, 1995, available in WESTLAW, 1995 WL 2260592.

<sup>107</sup> See Wang & Blomquist, *supra* note 15, at 57.

<sup>108</sup> State Council Circular on the Stringent Protection of Endangered Wildlife § 6 (1983), reprinted in ROSS & SILK, *supra* note 16, at 384.

<sup>109</sup> See Marian E. Sullivan, Note, *The Three Gorges Dam Project: The Need for a Comprehensive Assessment*, 8 GEO. INT'L ENVTL. L. REV. 109, 120 (1995) (describing wildlife threatened by the dam).

generally recover what fees they do pay in order to purchase the equipment required to meet statutory standards in the future.<sup>110</sup> Likewise, some violators of China's endangered species legislation have escaped with fines of less than two dollars.<sup>111</sup> Indeed, some Chinese environmental statutes have failed to provide for *any* penalties, thus precluding any enforcement of the underlying substantive requirements.<sup>112</sup> The incentives to contest the statute's directives are therefore negligible.<sup>113</sup>

Contrast that situation with the U.S. system for allocating allowances to emit sulfur dioxide under the Clean Air Act's new acid rain effluent trading scheme. Congress drafted nearly thirty different formulae to be used in determining the initial allocation of emission allowances, a single, non-recurrent event. But because the financial consequences of receiving more allowances often reached millions of dollars, numerous affected parties sued to challenge EPA's interpretation of statutory provisions that could only apply to a handful of utilities and which would only apply once.<sup>114</sup> Those cases would have no future effect in defining the contours of the regulatory scheme, but the affected parties brought them anyway because of the enormous financial stakes.

### C. *The Nature of China's Economy*

China aspires to become a "socialist market economy."<sup>115</sup> At present, the market component is far more obvious than the socialist component. Two features of China's economy provide

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<sup>110</sup> See Jin & Liu, *supra* note 48, at 175; Ross & Silk, *supra* note 16, at 208. But see Shanley, *supra* note 19, at 30 (indicating that 200,000 Chinese plants had paid \$2.3 billion in pollution fines since the late 1980s); Wang & Blomquist, *supra* note 15, at 70-71.

<sup>111</sup> Ye Mingzhao, *Legal Protection of Wild Fauna and Flora*, 20 ENVTL. POL'Y & L. 216, 219 (1990).

<sup>112</sup> Josephine Ma, *Environment Law Breakers to Face Prison*, SOUTH CHINA MORNING POST, Aug. 12, 1994, at 9 (quoting Xie Zhenhua, the director of NEPA, as stating that no one had been charged for violating certain environmental statutes because no penalties were specified in the statutes).

<sup>113</sup> There are indications, however, that China is becoming more willing to include harsher sanctions in its environmental statutes and actually to impose such sanctions. See Wang & Bloomquist, *supra* note 15, at 74 (listing possible sanctions for violating the 1989 Environmental Protection Law).

<sup>114</sup> See *Indianapolis Power & Light Co. v. EPA*, 58 F.3d 643 (D.C. Cir. 1995); *Alabama Power Co. v. EPA*, 40 F.3d 450 (D.C. Cir. 1994); *Madison Gas & Elec. Co. v. EPA*, 25 F.3d 526 (7th Cir. 1994).

<sup>115</sup> AGENDA 21, *supra* note 4, at 23.

additional explanation for the dearth of cases interpreting Chinese environmental statutes. First, the government is losing control over economic activity throughout China. This is especially true in the special economic zones, and in southern and interior provinces far from the attention of Beijing. Second, the government owns and operates large sectors of China's economy, and it is difficult to enforce the law against state-owned entities. As a result of these features, businesses that are subject to the strictures of China's environmental laws often operate without fear that environmental regulations will be enforced. This problem relates to the general difficulties regarding the enforcement of Chinese environmental statutes described above, yet the special characteristics of China's economy merit separate attention.

1. *Lack of Governmental Control Over the Growing Private Economy*

The sheer size and rapid growth of China's economy present a serious challenge for any government regulation of private business, including environmental regulation. Since the early 1980's, China has deliberately encouraged private economic activity. The government established several special economic zones (SEZs), most notably in southern coastal areas, to relax traditional state control and to stimulate private and foreign investment. As the SEZs flourished, the economies of interior provinces also began to grow.

The results have been phenomenal. China's gross national product has increased at nearly ten percent annually in recent years.<sup>116</sup> China is expected to have the largest economy in the world by the early twenty-first century.<sup>117</sup> Such spectacular economic growth illustrates the need for comprehensive environmental laws. Moreover, much of the recent economic growth has occurred in industries that pose substantial environmental chal-

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<sup>116</sup> See Cai & Voigts, *supra* note 17, at S-26 (stating that China's GNP grew at an average of 8.8% annually between 1981 and 1991); *Anhui Delegation Heads for US, Canada Seeking Investment*, Xinhua News Agency, Nov. 28, 1995, available in LEXIS, Nexis Library, Xinhua File (stating that China's GNP is expected to grow 10% in 1995); *National Assembly Address; Jiang Reviews Chinese Reforms*, BBC, Nov. 20, 1995, available in LEXIS, Nexis Library, BBC World Summary File (stating that China's GNP grew at an average of 9.8% per annum from 1979 to 1994).

<sup>117</sup> Hamish McRae, *A Seismic Shift to the East; Economics*, THE INDEPENDENT, Nov. 5, 1995, available in LEXIS, Nexis Library, Independent File, at \*4.

lenges: energy, manufacturing, transportation, and mining. Even the small township and village businesses promoted by the government are, in Professor Stewart's words, "enormously polluting ventures."<sup>118</sup>

The government has struggled to retain control over the explosive growth in private economic activity. Black markets thrive even as legal business enterprises ignore or are oblivious to developing legal requirements concerning securities, labor, safety, and numerous other issues. The problem is particularly acute with respect to environmental regulation because of the traditionally lax regulations, which have only recently given priority to environmental concerns over economic development. As noted above, local governments face numerous obstacles in enforcing local and national environmental rules. Initially there was no environmental regulation of the SEZs; only now are such controls being developed.<sup>119</sup> The central government is aware of these problems, but so far it has been unable to exercise effective environmental control in many regions.

Perhaps the most dramatic example of ineffective environmental control is that of the mining industry. A recent *New York Times* article described "[a] frenzied and chaotic gold rush . . . under way across vast expanses of rural China, where newly wealthy 'gold lords' and the peasants who toil and fight for them are challenging the authority of the state."<sup>120</sup> The attraction of striking it rich has lured some of the 130 million "surplus labor" rural workers, who normally earn \$120 annually, in the same way that gold lured thousands to western U.S. states in the middle of the previous century. Anarchy prevails in many rural areas where the central and local governments have lost functional

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<sup>118</sup> Stewart, *supra* note 66, at 563. See also AGENDA 21, *supra* note 4, at 103 (agreeing that village and township enterprises cause serious environmental damage); accord Chan Wai-Fong, *Economic Growth Leaves a Dirty Trail*, SOUTH CHINA MORNING POST, Nov. 29, 1994, at 11 (Chinese environmental officials complaining that township enterprises had become "a major headache" because of the environmental problems they create).

<sup>119</sup> See also ROSS & SILK, *supra* note 16, at 267; Cai & Voigts, *supra* note 17, at S-27 to S-28. See generally Profaizer, *supra* note 78 (describing the environmental laws applicable in SEZs). For a case study of environmental controls in the Shenzhen SEZ, see K.C. Lam, *Environmental Protection in the Shenzhen Special Economic Zone: Achievements, Problems, and Implications*, in CHINA'S SPECIAL ECONOMIC ZONES: POLICIES, PROBLEMS AND PROSPECTS 65-83 (Y.C. Jao & C.K. Leung eds., 1986).

<sup>120</sup> Patrick E. Tyler, *Gold Hunters, Defying Beijing, Mine Vast Areas of Rural China*, N.Y. TIMES, July 17, 1995, at A1.

governing authority to the private miners who have fought pitched battles for prime mining land. Environmental controls have fared no better than basic criminal law enforcement. For example, "[o]ne mining camp was dumping tons of sediment into a tributary of the Yellow River within sight of police patrols and near a large highway sign that proclaimed the river a 'land and river erosion protected area.'"<sup>121</sup>

The situation created where a lack of resources and the structure of the legal system itself operate to curtail environmental enforcement resembles problems in the arena of statutory interpretation. Businesses that operate outside of government control have no need to, and therefore do not, interpret environmental statutes. Additionally, the government is occupied by the pressing need to establish an enforceable legal framework within which businesses outside of government control may operate. Thus, the finer points of statutory interpretation are pushed aside. Cases involving statutory interpretation presuppose a controversy between two or more parties about the meaning of a statute in a particular circumstance. Such controversies do not arise when a segment of the economy operates outside the effective reach of the law.

## 2. *Difficulty of Enforcing Chinese Environmental Statutes Against State-Run Enterprises*

The large sectors of China's economy that are owned and operated by the state present a different challenge for environmental regulation. Before the 1980s, China contended that environmental problems were unique to market economies. The environmental devastation of the former Soviet Union conclusively disproved that hypothesis,<sup>122</sup> and China's leaders now recognize that entities run by the government itself can be primary causes of pollution and other environmental problems. Statutes are therefore needed "in order to compel other state institutions to modify their customary forms of behavior involving the discharge of untreated wastes and other acts recently defined as socially undesirable."<sup>123</sup>

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<sup>121</sup> *Id.*

<sup>122</sup> One of the most graphic depictions of the abysmal environmental conditions in the former Soviet Union is found in Mike Edwards, *Pollution in the Former U.S.S.R.: Lethal Legacy*, 186 NAT'L GEOGRAPHIC 70 (1994).

<sup>123</sup> ROSS & SILK, *supra* note 16, at 5.

Here the dilemma faced by China is similar to that faced by the United States: how can the government regulate itself? In the United States, the activities of the federal government, especially those related to military production, cause some of the most pressing environmental problems. In response, the United States has worked to institutionalize environmental requirements into the normal government decision-making process by extending the reach of federal environmental statutes to the actions of government agencies.<sup>124</sup> China is taking many similar steps. The Environmental Protection Law requires all Chinese agencies to consider the environmental effects of their actions.<sup>125</sup> The “three at the same time” principle requires the government to attend to environmental issues at each stage of a development project.<sup>126</sup>

Chinese leaders have sought to encourage governmental officials to comply with such requirements by stressing the importance of environmental protection. But if a Chinese governmental agency does not comply with an applicable environmental statute, it is extremely unlikely that the agency’s statutory violation will be reviewed by a court. In the United States, the availability of citizen suits provides one mechanism by which disputes about the government’s compliance with an environmental statute—and the accompanying disputes about the meaning of an environmental statute—may be brought into court. As noted above in Part II, section C, China lacks a comparable procedure.<sup>127</sup>

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<sup>124</sup> See, e.g., 33 U.S.C. § 1323(a) (1994) (directing federal facilities to comply with all federal, state, and local water pollution requirements); 42 U.S.C. § 9620(a)(1) (1994) (subjecting federal facilities to the requirements of CERCLA).

<sup>125</sup> Environmental Protection Law of the People’s Republic of China, art. 5 (1979) (“[Government] at all levels must effectively protect the environment. While formulating national economic development plans, overall arrangements for environmental protection and improvement shall be made, and such protection and improvements shall be carried out conscientiously and in an organized manner.”), reprinted in ROSS & SILK, *supra* note 16, at 285.

<sup>126</sup> Environmental Protection Law of the People’s Republic of China, art. 6 (“Facilities for preventing pollution and other hazards to the public must be designed, built, and put into operation simultaneously with the principal project.”) (emphasis added), reprinted in ROSS & SILK, *supra* note 16, at 286. For an overview of the “three at the same time” principle and its application, see Wang & Blomquist, *supra* note 15, at 65-67.

<sup>127</sup> See *supra* Part II.B.

Moreover, China does not permit its environmental protection agencies to sue other governmental agencies that have allegedly violated an environmental statute in their zeal to pursue a development project. In this respect, however, China is like the United States, where separation of powers may prevent one organ of government from suing another. U.S. parties have yet to succeed in persuading any governmental agency to sue one of its counterparts.<sup>128</sup> EPA has had to rely on expanded administrative powers and on executive orders that command other agencies to consider various environmental concerns.<sup>129</sup> Nonetheless, the dispute continues in the environmental context, where environmentalists and others often press to give EPA authority to sue other departments for violating environmental laws. EPA has also called for the imposition of fines or stipulated penalties on other agencies that violate environmental laws.<sup>130</sup> If the government were able to sue itself, there might be many more cases contesting the meaning of environmental statutes.

#### D. *The Nature of Chinese Environmental Statutes*

Most of China's environmental statutes are written in general language. Consider the Environmental Protection Law, which was designed "only to outline China's basic policies on environmental matters."<sup>131</sup> It commands that "[t]he waters of rivers, lakes, seas, and reservoirs must be protected and a good quality of water maintained,"<sup>132</sup> and it requires that "[e]ffective measures . . . be taken to eliminate smoke and dust from all smoke-emitting equipment, industrial kilns and furnaces, motor-driven vehicles, and boats and ships."<sup>133</sup> The use of general language suggests that statutes still perform a rhetorical role in China, offering direction to those whose activities implicate the environmental issues described in the statute, but not necessarily

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<sup>128</sup> See Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893 (1991); Note, *Judicial Resolution of Inter-Agency Legal Disputes*, 89 YALE L.J. 1595 (1980).

<sup>129</sup> See, e.g., Exec. Order No. 12898, 59 Fed. Reg. 7629 (1994) (requiring federal agencies to consider the effects of their actions on environmental justice).

<sup>130</sup> See S. REP. NO. 67, 102d Cong., 1st Sess., 4 (1991) (observing that "penalties serve as a powerful deterrent to noncompliance" by federal facilities).

<sup>131</sup> Ottley & Valauskas, *supra* note 16, at 113.

<sup>132</sup> Environmental Protection Law of the People's Republic of China, art. 11 (1979), *reprinted in* ROSS & SILK, *supra* note 16, at 286.

<sup>133</sup> Environmental Protection Law of the People's Republic of China, art. 19 (1979), *reprinted in* ROSS & SILK, *supra* note 16, at 287.

anticipating litigation over the application of the statute in particular cases.<sup>134</sup> The "provisional" nature of some important Chinese environmental statutes further discourages a series of cases that may define more precisely the applicable commands.<sup>135</sup>

By contrast, many U.S. environmental statutes are excruciatingly detailed. The complexity of the Clean Air Act,<sup>136</sup> for example, resulted from a struggle between a host of competing interests—environmentalists and industry, states and the federal government, eastern states with highly sulfurous coal and western states with much cleaner coal, midwestern states with heavy industry and eastern states experiencing the effects of acid rain—that were mediated at the time by a Democratic Congress and a Republican President. The specific statutory language embodies the numerous compromises that were necessary to produce a bill agreeable to the various interests. As a result, the 1990 Clean Air Act amendments virtually invite litigation if the government fails to implement them to the letter.<sup>137</sup>

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<sup>134</sup> See Ottley & Valauskas, *supra* note 16, at 122 (describing both the law on Environmental Protection and a state council decision affirming it as "a policy statement rather than a set of comprehensive rules"); Profaizer, *supra* note 78, at 335 (contending that "vague national guidelines make it difficult for local authorities to enforce the laws"); Stewart, *supra* note 66, at 565; Yang, *supra* note 47, at 181 (explaining how criminal environmental sanctions could be "more persuasive by their mere presence than by their use, more valuable as additional means of exhortation than as grounds for prosecution"). Professor Ma made a similar point when he observed that the enforcement of Chinese environmental statutes is difficult because those statutes "are not completed and corresponding legal regulations are not fully established." Ma, *supra* note 55, at 283. See also Keller, *supra* note 27, at 653 (noting that "China's fundamental statutes are often drafted in general or abstract form" so that their implementation depends on additional central and regional legislation). Another possible explanation for China's use of general language is that "Chinese codes and other legislation are deliberately written in simple language so that their interpretation can be made by minimally educated judges or bureaucrats." Leung, *supra* note 59, at 106.

<sup>135</sup> The "provisional" designation "does not mean that it has less legal force than one which has not been so qualified; it only indicates the intention that the enactment is of an experimental nature and will probably be revised in due course on the basis of experience gained in the course of implementation." CHEN, *supra* note 21, at 90. See also Ross & Silk, *supra* note 16, at 11 (listing environmental statutes that were still "in process" as of 1987); Leung, *supra* note 59, at 107 (attributing the use of provisional statutes to a desire "to maintain flexibility in order to implement the policies of the State or Communist Party").

<sup>136</sup> 42 U.S.C. §§ 7401-7671q.

<sup>137</sup> Stewart, *supra* note 66, at 559-60 ("[W]e now see deadlines and entitlements deliberately written into legislative mandates, to be invoked by litigants



Environmental statutes that do not fit the national paradigm exist in both countries. Increasingly, the detail in some Chinese environmental statutes rivals that of many U.S. environmental statutes.<sup>138</sup> On the other hand, key provisions in some U.S. environmental statutes are written in extremely general language. For example, CERCLA's liability scheme encompasses "owners," "operators," and those who "arrange . . . for disposal . . . of hazardous substances"—categories that have spawned considerable litigation to determine which parties satisfy the statutory definition and which do not.<sup>139</sup>

But the existence of general environmental statutes in China versus specific statutes in the United States suggests that China should have *more* statutory interpretation disputes than the United States, not fewer. For example, China's Water Pollution Prevention and Control Law provides that "[e]nterprises and other undertakings which cause serious water pollution must eliminate pollution within a stipulated time."<sup>140</sup> What constitutes "serious" water pollution is not self-evident,<sup>141</sup> nor is the meaning of "enterprises and other undertakings." Does that include farms and other nonpoint sources of pollution? Does "eliminating pollution" require that all wastes be eliminated, or only those that harm the environment? The U.S. Clean Water Act, by contrast, specifies in much greater detail the type and amount of pollution that particular sources may emit through the procedures for establishing effluent limitations and water quality standards and through the permit process.<sup>142</sup> Additionally, the Clean Water Act compels any point source to obtain a permit stating

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to propel a reluctant executive forward."). The statutory deadlines mentioned by Professor Stewart constitute the clearest example of provisions inviting suits against the government, but the use of specific language to define the substantive reach of the statute has a similar effect both in challenges to agency regulations implementing the statute and in disputes between private parties.

<sup>138</sup> See Cai & Voigts, *supra* note 17, at S-18 (suggesting that "China's environmental laws usually include strict, detailed standards").

<sup>139</sup> 42 U.S.C. 9607(a) (1994). See generally John C. Nagle, *CERCLA, Causation, and Responsibility*, 78 MINN. L. REV. 1493 (1994) (describing cases arising under CERCLA's liability scheme).

<sup>140</sup> Water Pollution Prevention and Control Law, art. 38 (1984), reprinted in Ross & SILK, *supra* note 16, at 311.

<sup>141</sup> See Ross & SILK, *supra* note 16, at 232 (noting the difficulties in determining what constitutes "serious" pollution).

<sup>142</sup> See Federal Water Pollution Control Act §§ 301-02, 307, 33 U.S.C. §§ 1311-12, 1317 (1994) (effluent limitations); Federal Water Pollution Control Act §§ 303-303(a), 33 U.S.C. §§ 1313-1313(a) (1994) (water quality standards).

the exact amount of each substance that may be discharged into the water.<sup>143</sup>

A further explanation as to why the United States continues to see countless cases involving the interpretation of its environmental statutes lies in the process of statutory interpretation. Parties will contest a statute's meaning—even its apparently plain meaning—in at least two related situations. First, where courts have demonstrated a willingness to interpret statutes contrary to the apparent statutory language, parties will argue that their case is one in which the court should do so again.<sup>144</sup> Second, if the context in which the statute applies has effectively changed so that parties are adversely affected as a result, then the affected parties will seek to have the court recognize such changes in its interpretation of the statute. In other words, if the courts allow the meaning of statutes to evolve over time, as numerous theories of statutory interpretation now propose,<sup>145</sup> then the number of statutory interpretation cases will always increase because there is always a chance that the court will reinterpret the statute.

The task of interpreting a statute never ends, regardless of one's theory of statutory interpretation. The plain meaning of a statute may apply in situations that the drafters of the statute did not anticipate. Professor Stewart's example of the Refuse Act of 1899 shows how one statutory provision—prohibiting the discharge of “any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state”—that was aimed at impediments to

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<sup>143</sup> See Federal Water Pollution Control Act §§ 401-05, 33 U.S.C. §§ 1341-45 (1994) (permit procedures).

<sup>144</sup> Cases famous for their refusal to heed the plain statutory language include *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (interpreting Title VII of the Civil Rights Act to permit voluntary affirmative action programs), and *Rector of Holy Trinity Church v. United States*, 143 U.S. 457 (1892) (reading an 1885 act to allow a New York City church to arrange to bring an English pastor to work in the United States).

<sup>145</sup> See, e.g., GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989). I respond to these theories in my review of Professor Eskridge's book, John C. Nagle, *Newt Gingrich, Dynamic Statutory Interpreter*, 143 U. PA. L. REV. 2209 (1995).

navigation could be used in environmental cases seventy years after Congress enacted the statute.<sup>146</sup>

One more feature of Chinese environmental statutes operates to discourage cases challenging their implementation: many statutes are not published. This is especially true of regional and local legislation, which foreign entities often discover only after local authorities claim that it has been violated.<sup>147</sup> Challenging the government's interpretation of such "secret" legislation presents a formidable challenge to unknowing violators. Moreover, the ability of local authorities to disclose such statutes only when it is convenient for them to do so enables them to attempt enforcement only in clear cases where they are most likely to prevail.

#### E. *Reliance on Alternative Methods of Dispute Resolution in China*

Another reason that there are few environmental statutory interpretation cases in China is that there are relatively few cases of any kind that reach the Chinese courts. China has a long history of resolving disputes outside of court. That history continues today when environmental concerns collide with economic development or other goals. Environmental disputes are usually subjected to mediation, administrative arbitration proceedings, and judicial efforts to craft a settlement before a final court judgment is pronounced.<sup>148</sup> Furthermore, the Chinese have used exhortational campaigns and sponsored huge voluntary public works programs to address environmental issues, and the Chinese people have achieved notable environmental accomplishments by publicly pressuring polluters.<sup>149</sup> The Chinese

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<sup>146</sup> Stewart, *supra* note 66, at 559. See also WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 253-54 (2d ed. 1994) (referring to the Refuse Act's prohibition as being written in "primitive absolutes"). The true name of the Refuse Act is the Rivers and Harbors Appropriations Act of 1899, 30 Stat. 1151 (1899).

<sup>147</sup> See Keller, *supra* note 27, at 683; Leung, *supra* note 59, at 108.

<sup>148</sup> See, e.g., Ma, *supra* note 55, at 278; Ross & SILK, *supra* note 16, at 7-8, 243, 247-48; see also Yang, *supra* note 47, at 179 (noting that "[e]nvironmental protection officials claim that over 90 percent of their actions are accepted by the parties concerned").

<sup>149</sup> The exhortational campaigns are described in Ross & SILK, *supra* note 16, at 15-20, 243; Ottley & Valauskas, *supra* note 16, at 92-93; Ross & SILK, *supra* note 16, at 105 n.195 (giving examples of 90,000 people removing 400,000 tons of sediment from a polluted river in a week and the construction of a sewage diversion project by local residents); Stewart, *supra* note 66, at 566 (noting that

government has even advocated an expansion of the role of the media in exposing both violations of environmental law and the inadequacy of sanctions for such violations.<sup>150</sup> China views education as being on par with enforcement in importance as a means of achieving environmental goals.<sup>151</sup> China turns to the law only when all else fails, and it yields a judicial decision implementing the law only if other efforts to resolve a case prove unsuccessful. The recent push to modernize the legal system and to promote the enforcement of Chinese environmental statutes co-exists with this long tradition of resolving disputes outside of court.

The United States turns to the courts much more readily to resolve environmental disputes. This is due in part to the fact that many people in the United States rely on litigation to solve almost every type of dispute, and in part to the fact that the sophisticated court system makes litigation more palatable. It is true that the example set by societies like China looks increasingly attractive as an alternative to litigation, including environmental litigation where CERCLA cases may involve hundreds of parties. Nonetheless, environmental disputes are still far more likely to result in judicial decisions in the United States than in China.

#### F. *Alternative Vehicles for Announcing Judicial Interpretations of Environmental Statutes*

The remaining explanations for the lack of Chinese environmental statutory interpretation cases are more mundane. There may be many more such cases decided by the courts than are documented, but the exact number would be hard to establish. Chinese courts do not write detailed opinions explaining their decisions as frequently as courts write such opinions in the United States.<sup>152</sup> Even when a court does produce a detailed

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“[a]lready there have been many instances where public protests have shut down polluting factories.”)

<sup>150</sup> AGENDA 21, *supra* note 4, at 21.

<sup>151</sup> AGENDA 21, *supra* note 4, at 19 (calling for increased public education about environmental laws); *Strengthens Environmental Protection*, Xinhua News Agency Feb. 3, 1993, available in LEXIS, Nexis Library, Xinhua File (quoting Qu Geping, director of NEPA, as stating that “education is as important as enforcement in protecting the national environment”).

<sup>152</sup> See Keller, *supra* note 27, at 686 (“For the Western observer, the most important deficiency is surely the large body of laws and interpretations of laws which remain publicly unavailable.”); Xia Chen, *Maritime Oil Pollution in the*

written opinion, the opinion often goes unreported. Judicial precedents do not enjoy the same status as law in China as they do in the United States. It is thus conceivable that there are more cases interpreting Chinese environmental statutes than are readily available. But, for all of the reasons discussed above, this is highly unlikely.

Another explanation for the lack of cases interpreting environmental statutes is that Chinese courts publish other types of documents explaining how they interpret a statute.<sup>153</sup> For example, the Transportation Division of the Supreme People's Court recently held a workshop addressing the interpretation of the statutes of limitations contained in the Maritime Code, including the statute of limitation for bringing oil pollution claims. The conclusions were not contained in an official judicial interpretation of the statute and thus are not entitled to binding effect, but it appears likely that the judges involved will follow the agreed approach.<sup>154</sup> If this occurred frequently in China, it could explain the dearth of judicial decisions interpreting China's environmental statutes, but there is no indication that the courts have employed that device to clarify the ambiguities in other Chinese environmental statutes.

#### IV

#### LESSONS FOR CHINA AND THE UNITED STATES

The absence of cases interpreting China's environmental statutes is not necessarily detrimental. Such cases are not themselves a social good. Nonetheless, the reasons why China has so few environmental law statutory interpretation cases and why the United States has so many offer several lessons for each country, and for theories of statutory interpretation.

China needs to enforce its environmental statutes. It needs stronger enforcement mechanisms, stronger sanctions for violators, and the political will to enforce its statutes. The Chinese government also needs to gain control over the economy

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*People's Republic of China: The Legal Framework of the Liability and Compensation Scheme*, 6 U.S.F. MAR. L.J. 449, 453-454 (1994). The Supreme People's Court does publish an official quarterly gazette that contains its cases and a selection of lower court cases. See Keller, *supra* note 27, at 669 n.71.

<sup>153</sup> See Keller, *supra* note 27, at 669.

<sup>154</sup> The workshop is described in Mark Morrison & Luo Hai, *China Clouds Issue Over Time Extensions on Marine Claims*, Reuters, Aug. 2, 1995, available in LEXIS, Nexis Library, Reuters Textline Translated Sources File.

throughout the country. China is already doing many of these things and is working toward the others, but the tension between economic development and environmental progress makes each step toward stricter environmental enforcement difficult. Nor can Chinese courts be expected to mediate between the political branches in environmental cases any time soon. As China continues to train its judges, familiarize all governmental officials with the requirements of environmental statutes, and educate the public about environmental issues, the country's suffocating pollution and ecological destruction will diminish accordingly.

The United States needs to recognize that there are other ways to achieve environmental goals aside from litigation. The push for increased reliance on alternative dispute resolution in U.S. environmental cases indicates an awareness that the traditional Chinese approach to resolving societal conflicts has its virtues. The United States also needs to develop new ways to promote voluntary compliance with environmental statutes, such as the environmental audits now encouraged by numerous state statutes.<sup>155</sup> China's emphasis on environmental education merits attention in the United States as well. The overwhelming consensus that supported the United States' environmental statutes when they were first enacted in the early 1970s has dissolved into bitter political, regional, and partisan disputes between assorted economic and environmental interests. Perhaps the best environmental statutes and the best enforcement structure in the world are of minimal utility if the public no longer supports their implementation.

China's story also offers lessons for statutory interpretation. Professor Stewart guesses that "[a] complete collection of articles on statutory interpretation in China would not fill more than twenty pages at the back of an *N.Y.U. Environmental Law Journal*,"<sup>156</sup> and he is not far off.<sup>157</sup> Statutory interpretation simply has not been important in China. The evidence that does exist shows that China follows a different system of statutory interpretation than the United States. One professor cautions that

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<sup>155</sup> See, e.g., CAL. HEALTH & SAFETY CODE § 25570 (Deering 1995); IND. CODE ANN. § 13-10-3-1 (Burns 1995); ILL. ANN. STAT. ch. 415, para. 13 (Smith-Hurd 1996).

<sup>156</sup> Stewart, *supra* note 66, at 566.

<sup>157</sup> The only English discussions of statutory interpretation in China that I have found are in CHEN, *supra* note 21, at 95, and Keller, *supra* note 27, at 666-69, 679-80, 684-85.

China's approach may seem "peculiar" to western observers "because the concept of 'interpretation' adopted is quite different from that accepted in common law or even civil law jurisdictions, and because the system is clearly inconsistent with the principle of separations of powers, judicial interpretation and the rule of law as understood in many countries in the contemporary world."<sup>158</sup> That China gives all three branches of government and the Communist Party a role in the interpretation of statutes, allows interpretations that ignore legislative intent; encourages the courts to consult the legislature and administrative agencies to reach a consensus interpretation; and grants little authority to prior judicial interpretations.<sup>159</sup> Support for these characteristics of China's system can be found in the works of U.S. statutory interpretation theorists who advocate widely shared interpretive authority, reject original intent as the touchstone for statutory interpretation, consult contemporary values as reflected in the preferences of the legislature and the executive, and reject *stare decisis* in statutory cases.<sup>160</sup> Numerous judicial decisions reflect these beliefs. Therefore, despite the lack of Chinese environmental law cases, the end results of statutory interpretation in the United States may not be as different from those in China as one might suspect.

## V

### CONCLUSION

China faces enormous environmental challenges during the coming decades. China's rapid economic development and its continued population growth mean that it will have to improve its environmental performance. China's leadership is acutely aware of this. For the past fifteen years, it has worked to instill an environmental ethic necessary to promote a more sustainable development. China has also enacted numerous environmental statutes—legislation that would have been unthinkable only a few years ago—and has worked to create a legal system capable of implementing them. The absence of cases interpreting those environmental laws demonstrates that China has not yet succeeded, but it is moving in the right direction.

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<sup>158</sup> CHEN, *supra* note 21, at 95.

<sup>159</sup> See *supra* Part II.B.

<sup>160</sup> See, e.g., John C. Nagle, *Corrections Day*, 43 UCLA L. REV. 1267, 1286-87 (1996); Nagle, *supra* note 145, at 2218-20.

The United States faces many environmental challenges as well. One of those challenges may be that of preserving the environmental laws that Congress enacted with such overwhelming support only twenty-five years ago. Those laws are undoubtedly important, but the Chinese example shows that statutes will not solve environmental problems if a country lacks the institutions and the will to enforce them. The institutions exist in the United States, but public support for the application of environmental laws is mixed. Strict enforcement under such circumstances will inevitably lead to conflict.

Statutory interpretation may seem esoteric in light of such practical concerns, but it is not. A more flexible, dynamic approach to interpreting environmental statutes would tend to ameliorate the current political controversy, permitting application of the statutes in a manner that satisfies Congress, EPA, other executive agencies, and the public at large. That approach may facilitate the application of the statutes in difficult circumstances, but it is unlikely to be fully satisfactory to those who support the statutes as written and those who want to rewrite the statutes. Conversely, a more formal, textualist approach to interpreting environmental statutes will create more controversy as the statutes produce unpopular results, but in so doing it will also frame the issues for legislative reconsideration of the law. The choice between interpretive approaches, therefore, will influence whether the courts, Congress, or EPA face the most pressure to update environmental statutes and to correct provisions that are now viewed as statutory mistakes.<sup>161</sup> One way or another, the environmental law of the United States will change—and so will that of China. What that change will look like will be revealed in the nature of the disputes about the interpretation of each country's environmental statutes.

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<sup>161</sup> See generally Nagle, *supra* note 160.