

The International Comparative Legal Guide to:

# Environment Law 2009

A practical insight to cross-border Environment Law



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# China

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### 1 Environmental Policy and its Enforcement

#### 1.1 What is the basis of environmental policy in China and which agencies/bodies administer and enforce environmental law?

On a political level PRC environmental planning and policies are primarily shaped and determined by the Five-Year Social and Economic Development Plans, often referred to as “FYPs”, which are elaborated by the Chinese Communist Party and the Chinese government and approved by the National People’s Congress. These Five-Year Plans are supplemented by more specific Five-Year Environment Plans (FYEPs), which are further broken down into five-year sectoral plans in areas such as water management of key rivers and lakes, hazardous waste management or the reduction of air pollution in designated zones (“acid rain control zones” and “sulphur dioxide control zones”, for example).

China’s highest state body and only legislative house, the National People’s Congress (NPC), enacts statutory environmental laws, which governments at different levels are in charge of enforcing. The State Environmental Protection Administration (SEPA), often quoted as the PRC’s “environmental watchdog” is responsible for overall supervision and administration of environmental protection work.

Although SEPA’s status has changed a number of times over the years (from a lower-level bureau under the Ministry of Construction (1978) to an independent agency directly under the State Council (1987) and acting later as a government department (1998)), it was upgraded to ministry level in February 2008 and now serves as the new Ministry of Environmental Protection (MEP).

The actual implementation of environmental policies at the sub-national level is vested in the local Environmental Protection Bureaus (EPBs), which are in charge of monitoring industrial pollution discharge, site inspections, issuing discharge fees/fines and prosecution, *inter alia*.

Civil and criminal courts are also involved in the enforcement of environmental regulations (see question 4.1).

#### 1.2 What approach do such agencies/bodies take to the enforcement of environmental law?

Although China boasts a wide range of reasonably sophisticated environmental laws and regulations, their enforcement is far from efficient and unified, and it is generally felt that enforcement agencies fail to fully perform their mandate. Inconsistencies in enforcement are mainly due to three reasons: (1) the lack of coherence between regulations; (2) structural deficiencies in the overall environmental management system; and (3) general policy framework that favours

economic development over environmental concerns.

Recently, the PRC government acknowledged that environmental compliance and enforcement in China has serious shortcomings and the 11th FYP (2006-2010) marks a policy shift from a narrow approach purely based on GDP to a more sustainable economic development model. In this regard, the recently revised *Water Pollution Prevention and Control Law* (see question 12.1) is a step forward in initiating this change, as it lays the foundation for a national-level assessment mechanism for water protection, and water protection projects will be accounted for in the evaluation of local governments and their officials’ performances.

Enforcement of environmental laws through prosecution is scant: according to unofficial estimates in 60% to 70% of pollution cases victims are not successful in court.

#### 1.3 To what extent are public authorities required to provide environment-related information to interested persons (including members of the public)?

In 2007 SEPA (the former MEP) adopted *Trial Measures on the Disclosure of Environmental-Related Information* that will be effective as of May 1, 2008. These Measures provide that citizens and private companies are entitled to request environmentally-related information from public authorities, which in turn must make such information available within a set timeframe. The scope of disclosure is broad and includes environmental planning, statistics, discharge levels of major pollutants, as well as the type, volume and disposal of solid waste produced in medium to large cities. Public authorities are also required to adopt environmental emergency plans and disseminate information on administrative procedures (in levying fees and granting permits, for instance). Interestingly, they must also publish and update a list of companies whose emission of pollutants exceeds the national or local emission standards or which refuse to comply with injunctions or pay penalties for environmental wrongdoings.

The obligation to publicly disclose environmental-related information is reciprocally required from companies as regards excess discharges and information on the construction and operation of pollution treatment facilities and equipment.

### 2 Environmental Permits

#### 2.1 When is an environmental permit required, and may environmental permits be transferred from one person to another?

All plants/facilities that directly or indirectly discharge hazardous

or controlled substances are subject to the Discharge Permit System (DPS). Under this permit system, all discharging entities must declare and register any emission of pollutants with the local EPB shortly after the facility acceptance and any start of operations. The registration form includes quantity and regularity of emissions, as well as their concentration - and such information is to be regularly updated. The competent EPB then issues a permit with precise indications of discharge limits of pollutants (with reference to both volume and concentration) in an enterprise's wastewater/solid discharge and air emissions. Discharge fees vary according to the type of pollutant, although rebates are possible where reductions have been verified and sometimes postponed in practice.

Other types of environmental permits may have to be obtained. The disposal of radioactive waste, for instance, is subject to specific authorisation granted directly by the MEP, and an operating licence issued by the EPB (at county level or above) is necessary for the collection, storage, and disposal of solid hazardous waste.

As a general principle under Chinese law, discharge permits are location-specific and are granted *intuitu personae*, i.e. not transferable.

## 2.2 What rights are there to appeal against the decision of an environmental regulator not to grant an environmental permit or in respect of the conditions contained in an environmental permit?

If an applicant is denied a discharge permit, he may file a claim before the administrative division of the People's District Court within three months of the EPB's refusal. Once the EPB has issued a written notice to the applicant clearly stating what discharge thresholds apply for the issuance of a permit, the unsuccessful applicant may file for reconsideration within seven days. The EPB then has ten days to issue a final notice. If such second notice is still not positive, the applicant may file a claim before the People's District Court within fifteen days of the second notice.

## 2.3 Is it necessary to conduct environmental audits or environmental impact assessments for particularly polluting industries or other installations/projects?

China was one of the first developing countries to introduce environmental impact assessment (EIA) requirements for new construction or expansion projects. A trial statute was enacted and later followed by a piece of cornerstone legislation: the EIA Law, which came into force on September 1, 2003.

Pursuant to the EIA Law, any negative impact on the environment which may be caused by new expansion and renovation projects must be assessed by licensed agencies at the very early stages of the project. The contents and level of detail of EIA reports depends on the degree of estimated future environmental impact (a full report, a statement or registration form). The EIA is then submitted to either the provincial EPB or the MEP, depending on the underlying amount of investment and subsequent level of required government approval. In this regard, the *Regulations on classified examination and approval for environmental impact assessment documents of construction projects* effective since March 2009, provide that direct central level MEP approval is required for special construction projects (such as nuclear facilities) as well as for inter-provincial ones, *inter alia*.

Obtaining EIA approval is a necessary pre-requisite to securing building and operating permits. Any company that initiates construction works without having first secured EIA approval may be ordered to cease works immediately and/or pay fines within a range of RMB 50,000 to RMB 200,000 or more. In some provinces (for example, Heilongjiang), fines may be a percentage (between 1 and 3%) of the total investment amount of the project as a whole.

In addition, another consequence of non-compliance with EIA Law provision is possible restricted access to credit as a green credit policy was jointly adopted by SEPA (the former MEP), the Bank of China and the China Banking Regulatory Commission (CBRC) - see question 4.5.

As part of the 2008/2009 economic stimulus package, a green passage policy is adopted by local EPBs (speeding up the EIA approval and simplifying formalities in this process) for projects which contribute to energy conservation and pollution control, such as the upgrade of coal-fired boilers and industrial waste management.

## 2.4 What enforcement powers do environmental regulators have in connection with the violation of permits?

Chinese environmental regulators enforce regulations through administrative sanctions and their powers of prosecution. The MEP and local EPB may issue warnings, injunctions, fines (with escalation of fees in case of a persisting breach), and confiscate illegal gains. In serious cases, they may suspend or shut down plant operations and revoke the permit/licence.

In reality, administrative penalties are not severe enough to ensure environmental compliance. For example, the maximum fine for the most serious case of air pollution is RMB 500,000 (approximately US\$ 72,000), which might explain why the cost of an environmental breach is often considered less expensive than compliance itself. This issue has very recently been addressed for the first time with regards to water pollution (see question 12.1), but remains a persistent issue for other types of pollution.

# 3 Waste

## 3.1 How is waste defined and do certain categories of waste involve additional duties or controls?

Waste is a generic notion which is not defined in comprehensive terms in PRC laws. Instead, "waste" is often referred to as a product or substance which falls within certain categories listed in sector-specific State standards. "Hazardous waste", for instance, is referred to with regard to the list of reactive, toxic, corrosive *etcetera* substances in the *National Catalogue of Hazardous Waste* (1998). "Solid waste" is defined in the *Law on the Prevention and Control of Environmental Pollution caused by Solid Waste* promulgated in 2005 (the "Solid Waste Law"), and includes "electronic waste", further defined in the *Administrative Measures for the Prevention and Control of Environmental Pollution by Electronic Waste* (2007).

Specific categories of waste (including hazardous waste, radioactive waste, electronic waste, scrapped automobiles, packaging, *etcetera*) are subject to the duties and control provided in the relevant laws and regulations.

## 3.2 To what extent is a producer of waste allowed to store and/or dispose of it on the site where it was produced?

The Solid Waste Law clearly provides that companies that collect, store, transport, use or dispose of solid wastes are required to prevent leakage and scattering, and generally avoid non containment. This duty of care is particularly acute in the construction phase of facilities which discharge solid waste. The design, construction and commissioning of such facilities must be synchronised with that of the appropriate pollution storage and treatment facilities, failing which the main plant's start of operations will not be authorised. This requirement is known as the "three synchronisations" system (3S), and was first introduced in

China's central Environmental Protection Law of 1989 (EPL) and is specifically reinstated in the Solid Waste Law. Although 3S was to play an important role in stimulating investment in pollution abatement facilities at new factories, it is not strictly enforced in practice. Alternate solutions may be sought, and the plants which discharge solid/hazardous waste may entrust storage, treatment and disposal of such waste to licensed companies.

The actual disposal of waste always requires a licence. There are specific authorisations for incineration, secure landfill, physico-chemical process treatment (mainly for oily sludge), and for waste collection, recycling and recovering. Licences are issued in consideration of disposal technology and equipment, qualified manpower, etc. with no obligation to post financial guarantees or bonds to ensure that funds are available for the proper clean up works following site closure, for instance.

### 3.3 Do producers of waste retain any residual liability in respect of the waste where they have transferred it to another person for disposal/treatment off-site (for example, if the transferee/ultimate disposer goes bankrupt/disappears)?

Within the context of PRC legal framework, the basic principle is that companies that generate hazardous/solid waste must establish an integrated waste management system, as they are responsible for such waste from "cradle to grave". Where the storage, treatment or disposal of waste is contractually outsourced to a licensed recipient, the rule is that the producer's liability in connection with the transferred waste is discharged (unless untruthful statements on the nature of the waste were made, for instance).

Liabilities for untreated industrial solid waste usually adhere to the land where it is situated, and/or to the producing entity. The Solid Waste Law hence contains specific provisions on responsibilities for solid waste in situations where (i) there is a transfer of land use rights or (ii) the polluting entity is "altered", presumably in a context of an acquisition, a merger or a division. In the first case, the liability for the treatment of industrial waste extends to the transferee of the land use rights, except if the parties have agreed otherwise. The same principle applies where the polluting entity is restructured, merged or otherwise altered: liability for waste is passed onto the new entity (post-merger), unless the relevant parties stipulate otherwise. However, contractual agreements on the allocation of liability for industrial waste prevail only to the extent that they do not result in exempting all parties.

### 3.4 To what extent do waste producers have obligations regarding the take-back and recovery of their waste?

Waste collection is generally implemented by environment sanitation stations under the local EPBs. In the process, waste producers compliance with their obligations to sort out the recyclable waste and dispose of it in designated places in accordance with applicable standards is monitored.

Packaging wastes recovery is regulated in two ways:

- i. the *General Principles on Disposal and Utilization of Packaging Wastes* (GB/16716-1996); and
- ii. by a professional regulation - the *Tentative Administration Measures on Recycling and Reuse of Packaging Resources* - specifying what packaging materials shall be recycled and impelling packaging producers to participate in the recycling process.

Discarded automobiles recovery shall be done by duly qualified companies, pursuant to the *Administrative Measures on the Recovery*

*of Scrapped Automobiles* (2001) and their implementing rules.

The producers, importers and sellers of electronic or electrical products or equipments are due to establish a recovery system for the discarded products and equipments. Dismantling and disposal of electronic waste shall be conducted by companies duly qualified pursuant to the *Administrative Measures for the Prevention and Control of Environmental Pollution by Electronic Waste* (2007).

## 4 Liabilities

### 4.1 What types of liabilities can arise where there is a breach of environmental laws and/or permits, and what defences are typically available?

Breach of environmental laws or permits can give rise to civil and criminal liabilities, as well as to administrative fines. The EPL significantly provides for strict liability in cases of environmental pollution, whereby a plaintiff is not required to show any fault, negligence or omission on the part of the defendant. Civil claims may be brought either before the relevant administration body (most often the MEP or the local EPB) or a People's court. The statutory limit for legal action is three years from the time when the victim became or should have become aware of the loss, which differs from the general two year limit for civil actions.

According to the EPL, the *Criminal Law* (1997) and the Supreme People's Court's *Interpretation on Criminal Cases Involving Environmental Pollution* (2006), criminal liability may arise when major pollution accidents cause injuries and/or significant losses of public or private property. Sanctions range from fines to imprisonment for up to ten years.

With regards to possible defences, the EPL and a number of anti-pollution laws and regulations provide that no liability shall be incurred when the pollution results solely from "irresistible natural disasters" (i.e. *force-majeure*). It is also generally the case that liability may be limited or excluded when the victim itself or a third party is at fault, which is in line with the *General Principles of Civil Law* (1986).

### 4.2 Can an operator be liable for environmental damage notwithstanding that the polluting activity is operated within permit limits?

An operator is generally liable under the regulation on which a pollution permit is based if it causes environmental damage above or beyond the scope prescribed by such permit. However, the fact an operator pollutes within the permit boundaries does not prevent the competent Chinese authority from fining the operator under another applicable regulation which was not abided by (such as a regulation requiring the operator to apply for another pollution permit), nor does it prevent a Chinese judge from holding the operator liable for a damage to third parties under civil or criminal law.

### 4.3 Can directors and officers of corporations attract personal liabilities for environmental wrongdoing, and to what extent may they get insurance or rely on other indemnity protection in respect of such liabilities?

The managers or other officers or employees of Chinese companies may be held personally liable, either solely or jointly with the company, for acts performed on behalf of the company in the course of their functions. According to the *General Principles of Civil Law* and *Company Law*, personal liability shall be applied in cases of serious wrongdoings or conducts characterising illegal activities, and many laws and regulations of the PRC dealing with the duties

and obligations of organisations apply the responsibility (either civil, criminal or administrative) for their actions to the “person in charge” in such organisations. For instance, Article 38 of the EPL provides that in serious cases of environmental pollution, the person in charge shall be subject to administrative liability.

Applicable managerial liability insurance policies generally cover personal injuries and damages to property caused to third parties by environmental accidents, but the person in charge shall not obtain an insurance coverage if its acts constitute illegal behaviour or wilful misconduct.

#### 4.4 What are the different implications from an environmental liability perspective of a share sale on the one hand and an asset purchase on the other?

The main difference lies in the fact that the purchaser of an asset is less exposed to contingent or undisclosed liabilities. The purchaser of a polluting asset will therefore generally be liable only for pollution arising after the date of purchase. On the contrary, environmental liability will remain with the company in a transfer of shares.

#### 4.5 To what extent may lenders be liable for environmental wrongdoing and/or remediation costs?

The general rule is that lenders shall not be held liable for their borrowers’ environmental offences, save where they effectively control their borrower’s business, if they directly cause or participate in causing the damages, or in the event that they enforce a mortgage on a polluted piece of land.

Besides the direct risk of liability, lenders may incur indirect risks in term of rating or reputation due to the new “*green credit policy*” which was jointly adopted by SEPA (the former MEP), the Bank of China and the CBRC in July 2007, and related regulations, which state that banking institutions shall not provide credit support for construction projects that do not comply with environmental standards and shall take into account energy conservation and emission reduction in their credit policy.

## 5 Contaminated Land

### 5.1 What is the approach to liability for contamination (including historic contamination) of soil or groundwater?

The only texts that specifically refer to soil and groundwater contamination are the applicable environmental quality standards for soils and the *Circular on Earnestly Accomplishing Environmental Pollution Prevention Work in the Enterprise Relocation Process* (2004), which provides that before a plant handling or generating hazardous wastes is shut-down, it should submit site soil and groundwater contamination reports to the relevant local government authorities and develop a remediation programme based on the findings in the reports. This rule also applies where the land-use activity at the site of such type of facility is to be changed.

Contamination of land subjects the operator to liabilities under the generally applicable EPL, *General Principles of Civil Law and Criminal Law provisions*.

### 5.2 How is liability allocated where more than one person is responsible for the contamination?

Based on the *General Principles of Civil Law*, where two or more persons are responsible for land contamination, they should be jointly liable in proportion to the fault and damage caused by each of them.

This assessment is of a technical nature and is not specifically regulated.

### 5.3 If a programme of environmental remediation is ‘agreed’ with an environmental regulator can the regulator come back and require additional works or can a third party challenge the agreement?

Whenever a programme of remediation is agreed upon by the environmental regulator and a polluting entity, the environmental regulator shall monitor and assess the performance of such remediation. It is hence entitled to require that additional works be carried out, but only to the extent that such works are necessary to achieve the remediation objectives that had been agreed upon. Local regulations may also provide for specific rules in this regard, implementing the Circular on Earnestly Accomplishing Environmental Pollution Prevention Work in the Enterprise Relocation Process (see question 5.1).

Third party challenges would be possible by way of judicial review if it is demonstrated that the regulator’s decision to approve the programme was illegal, or that the programme itself is contrary to environmental laws, and if publicised measures are inadequate to protect the environment.

### 5.4 Does a person have a private right of action to seek contribution from a previous owner or occupier of contaminated land when that owner caused, in whole or in part, contamination; and to what extent is it possible for a polluter to transfer the risk of contaminated land liability to a purchaser?

According to the General Principles of Civil Law, liability is vested with the person who caused the damage, so that a subsequent owner (or occupier) of contaminated land may seek compensation from the previous owner who caused the contamination or knowingly permitted the presence of substance that caused the contamination. Nevertheless, given that no specific rules expressly govern the contamination of land and that the burden of proof is often complex in such cases, allocation of responsibility for land contamination is usually dealt with between the seller and the purchaser on a purely contractual basis. This usually translates into a series of representations and warranties given by the seller, tied in with an indemnification mechanism in case of breach. However, sellers frequently seek expressly to exclude liability for any pollution whatsoever (whether land contamination or otherwise) and to require the purchaser to rely on his own investigations.

### 5.5 Does the government have authority to obtain from polluter monetary damages for aesthetic harms to public assets, e.g., rivers?

There is currently no specific legal basis to obtain monetary damages for aesthetic harm to public assets. However, to some extent, according to the *Provisional Tentative Regulation on the Administration of Scenic Resorts* (1985), if scenic resorts are intentionally polluted, relevant authorities may enjoin adequate remedial measures and impose fines.

## 6 Powers of Regulators

### 6.1 What powers do environmental regulators have to require production of documents, take samples, conduct site inspections, interview employees, etc.?

The level of compliance by enterprises with pollution standards and

permits is checked by EPB inspectors who carry out regular inspections, and sometimes surprise site visits, without a warrant. Environmental regulators benefit from very broad information-gathering powers, and may require the production of documents (including technology and trade secret materials, to the extent necessary for compliance verifications), demand samples and interview employees.

## 7 Reporting / Disclosure Obligations

### 7.1 If pollution is found on a site, or discovered to be migrating off-site, must it be disclosed to an environmental regulator or potentially affected third parties?

In practice, reporting duties are contained in discharge permits or licences, which usually require the operator to supply the EPB with data on emissions/discharges on a regular basis and to inform the EPB of any accident without delay.

Under PRC law, there is no specific offence of omission to disclose such events, as various statutes (on medical waste management, atmospheric pollution, and the Solid Waste Law) merely provide that corporate entities or individuals have the right - not the obligation - to report pollution caused by medical/solid waste or atmospheric pollution, with the exception of the case of marine pollution. Indeed, any unit or individual that has caused or may cause marine pollution must immediately report the accident to the competent authority relevant State Administrative Department empowered to conduct marine environment supervision and control.

### 7.2 When and under what circumstances does a person have an affirmative obligation to investigate land for contamination?

As previously mentioned in question 5.1, there is no mandatory legal requirement to investigate land for contamination, and soil and groundwater contamination reports are required only by a SEPA (the former MEP), Circular (supplemented by local regulations) upon decommissioning of a site or prior to a change of activity at a site where hazardous wastes are handled or generated.

Although investigation for land contamination is not a positive obligation *per se* under the EIA Law, environmental impact reports for construction projects must incorporate an analysis of the groundwater and land properties of the area surrounding the project, which may incidentally identify soil contamination on the building site itself. Soil surveys and contamination remediation may also be a contractual condition for obtaining or transferring land use rights.

### 7.3 To what extent is it necessary to disclose environmental problems, e.g. by a seller to a prospective purchaser in the context of merger and/or takeover transactions?

There is no statutory requirement that requires a seller to expressly disclose environmental issues in the context of a merger or takeover transaction. Instead, environmental issues are dealt with in contractual terms and representations and warranties are usually required from the shareholders of the target company which may include environmental matters (see question 5.4).

## 8 General

### 8.1 Is it possible to use an environmental indemnity to limit exposure for actual or potential environment-related liabilities, and does making a payment to another person under an indemnity in respect of a matter (e.g. remediation) discharge the indemnifier's potential liability for that matter?

As already stated above in question 5.4, although sellers generally require purchasers to rely solely on their own investigation of assets, they may agree on indemnification to a contractually stipulated extent, should environmental liability be incurred following the transfer of ownership of assets to which environmental contingencies may be attached. These agreements on the allocation of environmental liabilities relating to, for instance, contaminated land, are valid and enforceable.

The payment of pollutant discharge fees can also be analysed as a means by which the polluter may remediate its harm to the environment.

### 8.2 Is it possible to shelter environmental liabilities off balance sheet, and can a company be dissolved in order to escape environmental liabilities?

Under the China GAAP, environmental liabilities are computed in the balance sheet. If such liabilities stem from a given contaminated asset/set of assets, transferring such assets to a special purpose vehicle will generally require the approval of the competent Chinese authorities. It is likely that in such a situation, the transaction would be seen as contradictory to the EPL provision (Article 34) prohibiting the transfer of polluting equipment to an enterprise lacking the capacity to prevent and treat such pollution and as harming the company's creditors' interests, and therefore it is likely that approval of such a transaction would be refused. In contrast, the transfer of assets to which mere contingencies are attached may be contemplated.

In case of liquidation, all the new vehicle's creditors must be notified and have the right to obtain payment upon realisation of the available assets.

### 8.3 Can a person who holds shares in a company be held liable for breaches of environmental law and/or pollution caused by the company, and can a parent company be sued in its national court for pollution caused by a foreign subsidiary/affiliate?

Pursuant to their limited liability status, Chinese companies shall be liable only on their assets, and shareholders are usually only liable up to the amount of capital they contributed. A shareholder may however become liable for the company's actions or omissions if (i) the company acted under a mandate contract on behalf of the shareholder, (ii) the shareholder intervened as "person in charge" (for example as manager) in the breach of environmental law or commission of an environmental damage, or (iii) the shareholder acted as guarantor of the company. In contrast, where the shareholder would actually be liable as agent, manager or guarantor, the shareholder may be held liable as shareholder if it is considered to have abused the independent status of corporate legal person and shareholders' limited liability in order to avoid debts and therefore damaged the interests of the company's creditors. Under such circumstances, the shareholder may be held jointly and severally liable for the company's debts, in accordance with Article 20 of the *Company Law* (2005).

Whether the parent company of a Chinese foreign-invested

enterprise may be tried in its jurisdiction for pollution committed in China by a subsidiary depends on the conflict of law provisions applicable in the parent company jurisdiction.

#### 8.4 Are there any laws to protect “whistle-blowers” who report environmental violations/matters?

There is no generally applicable law or regulation protecting whistle-blowers in China. However, Article 6 of the EPL, according to which all individuals are obliged to protect the environment and have the right to report on pollution events and acts damaging the environment, may be used as a defence in the case of litigation for breach of a confidentiality undertaking by an employee of a polluting enterprise.

#### 8.5 Are group or “class” actions available for pursuing environmental claims, and are penal or exemplary damages available?

The *Civil Procedure Law* (2007) sets out the possibility for several parties with the same or a similar cause of action to have their cases tried jointly. The competent court may issue a public notice stating the particulars of the case and claims and may request that any interested claimant registers with the court within a certain period of time. Following this procedure, the judgment or ruling shall apply to all claimants who have registered within the set period. These provisions on joint actions have already been applied in cases of environmental pollution and the *Water Pollution Prevention and Control Law* has recently introduced a specific joint action for victims of water pollution (see question 12.1).

Damages are set by professional judges in order to reflect reasonable compensation and generally do not include a punitive element.

## 9 Emissions Trading and Climate Change

### 9.1 What emissions trading schemes are in operation in China and how is the emissions trading market developing there?

The first Chinese emissions trading platform was set up on a trial-basis in Jiaxing, Zhejiang Province, on November 10, 2007 and was followed by similar initiatives in Beijing, Shanghai and Tianjin in 2008.

Greenhouse gas (GHG) emission reductions in China largely take the form of emission reduction credits (CERs) certified under the Kyoto Protocol Clean Development Mechanism (CDM). The CDM arrangement allows industrialised and economy-in-transition parties to the Kyoto Protocol, referred to as Annex I Parties, to acquire CERs originating from GHG emission reduction projects based in non-Annex I Parties (including China) to comply with their emission reduction commitments.

The *Measures for Operation and Management of Clean Development Mechanism Projects* (2005) are the implementation legal framework for China, setting out the procedure to be followed for the approval of a CDM project at the national level and the allocation of revenues from the sale of CERs between the Chinese government and the project sponsor. If the CDM Executive Board confirms the final verification report on GHG emission reduction obtained from the local Designated Operational Entity and subsequently issues CERs, it is specified that between 2% (emissions reduction projects listed in the encouraged category) to 65% (HFC and PFC emissions reductions projects) of the proceeds of sale of such CERs shall be remitted by the project owner to the Chinese government.

To date, while numerous CDM Projects have obtained approval from the National Development and Reform Commission, which is the

Chinese Designated National Authority, CERs have been issued by the CDM Executive Board for only a limited number of projects. Such CERs are mainly to be traded under the EU Emissions Trading Scheme. Other GHG emission reductions may lead to the issuance of verified emission credits in accordance with market-developed standards, to be traded on the voluntary carbon market.

## 10 Asbestos

### 10.1 Is China likely to follow the experience of the US in terms of asbestos litigation?

To date, there has been no precedent in China of class action for compensation for occupational disease related to asbestos. Significant difficulties involved in litigating asbestos-related injuries include the costs involved in litigation and almost non-existent legal aid systems.

A certain number of regulations do however indicate a concern about asbestos issues. Pursuant to the Regulations on *Work-Related Injury Insurances* (2003), workers who suffer health hazard from asbestosis are covered by work-related injury insurance, which is more protective than the standard medical insurance coverage. China has also signed the *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, but has still not ratified it. In conclusion, it is unlikely that China will follow the US model on this topic.

### 10.2 What are the duties of owners/occupiers of premises in relation to asbestos on site?

The *Rules on Occupational Safety of Asbestos Work* (2007) set forth the guidelines for prevention and protection against asbestos risk. Employers have a general obligation to prevent asbestos-related risks, as well as a duty to reduce the use of materials containing asbestos. In particular, they must: (a) fully disclose the risks linked to asbestos to employees; (b) place warning signs in a clear place; (c) install monitoring facilities; (d) prepare risk management systems; (e) develop a plan for prevention and protection and review it periodically; (f) provide appropriate safety equipment to exposed employees; (g) organise occupational safety training and examination; (h) introduce a system of occupational health; and (i) register the results of health examinations, and keep records for at least thirty years.

A pre-assessment report of occupational diseases is required for all expansion or reconstruction of existing enterprises, and the improvement or introduction of new technologies. If an enterprise entrusts the disposal of asbestos waste to another qualified entity, it must inform this entity of the risks and consequences of occupational diseases.

## 11 Environmental Insurance Liabilities

### 11.1 What types of environmental insurance are available in the market, and how big a role does environmental risks insurance play in China?

Some insurance companies based in China offer environmental liability insurance policies. The policies may cover liability for personal injury, the cost of cleaning-up the polluted site, unexpected and unintended loss caused by the pollution event and the defence costs in relation to proceedings following any accidental and sudden pollution. Liabilities incurred in relation to expected or intended pollution, fines, penalties or exemplary damages, underground

storage tanks, asbestos or lead are generally excluded. The extent of insurance coverage must be negotiated with the insurance company on a case-by-case basis, on the basis of an expert opinion from the insurance company on existing and potential risks.

Managers and other officers in charge of the company's business may subscribe to third-party claims insurance policies covering claims for personal injury or damage to property caused by environmental pollution. Under such policies, exemptions are generally applicable in the case of illegal behaviour or wilful misconduct.

The importance of developing environmental liability insurance policies in China was recently recognised in the *Guiding Opinions on Environmental Pollution Insurance*, issued by the SEPA (the former MEP) and China Insurance Regulatory Commission on December 4, 2007. This regulation promotes the development of the environmental insurance market under the local environmental protection and insurance authorities, from designated sites where pollution concerns are above average, from 2008 to 2015.

#### 11.2 What is the environmental insurance claims experience in China?

Judgements are generally not published, environmental insurance claims figures are kept confidential by insurers and the availability of environmental insurance policies is a new development on the market. At present it is impossible to assess the results of insurance claims in China.

## 12 Updates

### 12.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in Environment Law in China.

Despite its commitments to participate in global efforts to address climate change, restated in a white paper issued in October 2008, the Chinese government is adopting a conservative stance in the post-Kyoto protocol negotiation. It is not open to the application of legally binding emission quotas to China's polluting industries.

At the end of 2008 economic crisis context, which led *inter alia* to the emission rights market collapse, the Chinese authorities shifted their focus from climate change-related legal instruments to more traditional tools, developing China's tax burdens and incentives policies.

Under the corporate income tax reform (effective since January 2008), incentives were granted to any Chinese enterprise (either foreign-invested or not) (i) undertaking environmental protection or energy and water saving projects (income tax exemption for three years, followed by a fifty percent reduction for three more years), (ii) investing in environmental protection equipments (tax credit) or (iii) recycling goods through their production process (reduction of taxable income). On the other hand, reforms such as the increase of consumption tax on oil products (December 2008) show the government's willingness to implement the polluter-payer principle.

The Chinese government is now contemplating the possibility of setting-up an independent type of environmental tax which may be: (i) a pollution emission tax borne by the polluter (e.g. sulphur dioxide tax); (ii) a general environmental tax borne by the beneficiaries (e.g. environmental protection tax); or (iii) a polluting products tax to be borne by the user (e.g. energy tax). The implementation of such a proposal, which is under study, would probably prove particularly efficient as environmental tax provisions application is monitored by a strong tax administration.



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**Gide Loyrette Nouel A.A.R.P.I.** (GLN) is an international law firm that has been present in China since 1987. It was one of the first foreign law firms to be granted a licence from the Chinese Ministry of Justice to practice law in China. GLN's practice there is handled by a team of more than 110 people, including 70 western and Chinese lawyers, working from three offices in Beijing, Shanghai and Hong Kong. The China team offers its clients high quality services, combining solid legal knowledge and a highly commercial approach to their needs, across all sectors of business law.

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