

# Annual Review of Chinese Environmental Law Developments: 2009

by Mingqing You and Ke Huang

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## I. International Activities

During 2009, China's primary work on environmental law concerned international law on climate change before and during the United Nations (U.N.) Climate Change Conference 2009 in Copenhagen (Copenhagen Conference).

Leading into the Copenhagen Conference, China engaged in a series of activities to build consensus with other nations, particularly through bilateral dialogues with the United States. During President Barack Obama's visit to China in November 2009, officials of China and the United States engaged in high-level negotiations on climate change, energy, and other environmental topics. The result of such negotiations was embodied in the U.S.-China Joint Statement, especially the part entitled "Climate Change, Energy, and Environment."<sup>1</sup>

Both China and the United States recognized the need to address climate change and transition to a low-carbon economy. Both sides agreed on the importance of actively furthering the full, effective, and sustained implementation of the U.N. Framework Convention on Climate Change in accordance with the Bali Action Plan. Both resolved to take significant mitigation actions and recognized the important role that their countries play in promoting a sustainable outcome that will strengthen the world's ability to combat climate change. Both agreed that mitigation should be based on the principle of common but differentiated responsibilities and respective capabilities, including emission reduction targets of developed countries and nationally appropriate mitigation actions of developing countries.

During President Obama's visit, China and the United States also agreed on the U.S.-China Memorandum of

Understanding to Enhance Cooperation on Climate Change, Energy, and Environment<sup>2</sup>; a new U.S.-China Energy Efficiency Action Plan<sup>3</sup> under the Ten-Year Framework on Energy and Environment Cooperation<sup>4</sup>; the Protocol Between the Department of Energy of the United States of America and the Ministry of Science and Technology and the National Energy Administration of the People's Republic of China on a Clean Energy Research Center<sup>5</sup>; a U.S.-China Electric Vehicles Initiative<sup>6</sup>; the Memorandum of Cooperation Between the Environmental Protection Agency of the United States and the National Development and Reform Commission of China to Build Capacity to Address Climate Change<sup>7</sup>; the U.S.-China Renewable Energy Partnership<sup>8</sup>; and the U.S.-China Energy Cooperation Program,<sup>9</sup> among other agreements. These agreements reveal the willingness of both countries to cooperate in environmental protection and energy security and also reveal their strong desire to further economic development while protecting the environment.

Although both countries indicated their willingness to address climate change, diplomatic niceties did not bridge

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1. Press Release, White House Office of the Press Sec'y, U.S.-China Joint Statement (Nov. 17, 2009), [available at http://www.whitehouse.gov/the-press-office/us-china-joint-statement](http://www.whitehouse.gov/the-press-office/us-china-joint-statement).

2. U.S.-China Memorandum of Understanding to Enhance Cooperation on Climate Change (July 28, 2009), [available at http://www.state.gov/r/pa/prs/ps/2009/july/126592.htm](http://www.state.gov/r/pa/prs/ps/2009/july/126592.htm).

3. Press Release, White House Office of the Press Sec'y, FACT SHEET: U.S.-China Energy Efficiency Action Plan (Nov. 17, 2009), [available at http://www.energy.gov/news2009/documents2009/US-China\\_Fact\\_Sheet\\_Efficiency\\_Action\\_Plan.pdf](http://www.energy.gov/news2009/documents2009/US-China_Fact_Sheet_Efficiency_Action_Plan.pdf).

4. U.S. Department of the Treasury Press Room, U.S.-China Joint Fact Sheet: Ten-Year Framework for Energy and Environment Cooperation (Dec. 4, 2008), [available at http://www.ustreas.gov/press/releases/hp1311.htm](http://www.ustreas.gov/press/releases/hp1311.htm).

5. White House Office of the Press Sec'y, FACT SHEET: U.S.-China Clean Energy Research Center (Nov. 17, 2009), [available at http://www.energy.gov/news2009/documents2009/US-China\\_Fact\\_Sheet\\_CERC.pdf](http://www.energy.gov/news2009/documents2009/US-China_Fact_Sheet_CERC.pdf).

6. White House Office of the Press Sec'y, FACT SHEET: U.S.-China Electric Vehicles Initiative (Nov. 17, 2009), [available at http://www.energy.gov/news2009/documents2009/US-China\\_Fact\\_Sheet\\_Electric\\_Vehicles.pdf](http://www.energy.gov/news2009/documents2009/US-China_Fact_Sheet_Electric_Vehicles.pdf).

7. Memorandum of Cooperation Between the Environmental Protection Agency of the United States and the National Development and Reform Commission of China to Build Capacity to Address Climate Change (Nov. 17, 2009), [available at http://www.epa.gov/international/regions/Asia/china/2009-moc.pdf](http://www.epa.gov/international/regions/Asia/china/2009-moc.pdf).

8. White House Office of the Press Sec'y, FACT SHEET: U.S.-China Renewable Energy Partnership (Nov. 17, 2009), [available at http://www.energy.gov/news2009/documents2009/US-China\\_Fact\\_Sheet\\_Renewable\\_Energy.pdf](http://www.energy.gov/news2009/documents2009/US-China_Fact_Sheet_Renewable_Energy.pdf).

9. See U.S.-China Clean Energy Announcements, [at http://www.energy.gov/news2009/8292.htm](http://www.energy.gov/news2009/8292.htm).

the gap, and both countries fell short of the expectations of the international environmental community in the Copenhagen Conference. During the Copenhagen Conference, China fought on behalf of developing countries, in particular for financial aid to developing countries and the preferential treatment under the principle of common but differentiated responsibilities. However, China also refused to make the mitigation actions of developing countries internationally reportable, measurable, and verifiable. The effort of China and other developed countries met with strong opposition from developed countries. The result is that the “[d]elivery of reductions and financing by developed countries will be measured, reported and verified in accordance with existing and any further guidelines” while “[m]itigation actions taken by Non-Annex I Parties will be subject to their domestic measurement, reporting and verification.”<sup>10</sup> These disagreements between China and the United States contributed to the lack of further achievements at the Copenhagen Conference.

Besides global issues, China also actively sought regional environmental cooperation. China, Japan, and Korea explored environmental cooperation during the Second China-Japan-Republic of Korea Summit Meeting held on October 10, 2009, in Beijing. The three countries issued the Joint Statement on Sustainable Development Among the People’s Republic of China, Japan, and the Republic of Korea.<sup>11</sup> The three countries resolved to strengthen cooperation in the spirit of seeking mutual benefit and win-win results, particularly for developing green economies. This is also in accord with China’s promise to reduce carbon intensity and develop a low-carbon economy before and during the Copenhagen Conference.

## II. Tort Law

Using tort law to protect the environment has been a hot topic for many years in China, and the debate reached its climax when the National People’s Congress (NPC) deliberated the Law of the People’s Republic of China on Tort Liabilities.<sup>12</sup>

This law warrants careful study for many reasons. It is a major step for the development of civil law after the adoption of the Contract Law in 1999 and the Property Law in 2007. Considering its great significance for environmental protection, the Law of Torts makes specific provisions on liability for environmental pollution in Chapter Eight, entitled

“Liability for Environmental Pollution.” To sum up the rules in Chapter One, entitled “General Provisions,” and Chapter Eight, the rules on liability for environmental pollution are mainly as follows:

The general rule on torts caused by environmental pollution, as provided by Article 65, is that the polluter shall be liable for torts if the pollution causes damages. This provision does not expressly mention a requirement of fault, which is usually necessary to establish the liability of tortfeasors. Considering the seriousness of industrial pollution and the difference between industrial pollution and pollution caused by daily life, the law differentiates industrial pollution and pollution caused by daily life and provides that fault is not necessary to establish the liability of industrial pollution but necessary to establish the liability of pollution caused by daily life.

As to causation between environmental pollution and damages, Article 66 of the Law of Torts provides that where any dispute arises over an environmental pollution, the polluter shall assume the burden to prove either that it should not be liable or that its liability could be mitigated under certain circumstances as provided for by the law, or to prove that there is no causation between its conduct and the harm. This rule is the so-called reversed burden of proof. The general rule of Chinese law is that the plaintiff has the burden to prove the causation between his damages and the defendant’s act. Considering the difficulty of proving the causation between environmental pollution and damages, the law reversed the burden and requires the defendant to disprove the causation.

On many occasions, more than one polluter discharges the same kind or different kinds of pollutants to the same place and causes damages to victims. It is often very hard to prove which particular polluter caused damages to the victim. Courts also had much difficulty to hear such cases. Considering these problems, Article 67 provides that where two or more polluters cause environmental pollution, the proportion of liability of each polluter shall be determined according to the type of pollutant, volume of emission, and other factors. This rule means different polluters are severally liable but not jointly liable. As they are not jointly liable, the victim will have more difficulty getting compensation, because he will not be able to recover all compensation from the wealthier polluters.

The Law on Tort Liabilities also provides third-person liability for environmental pollution. Article 68 provides that where any harm is caused by environmental pollution through the fault of a third party, the victim may require compensation from either the polluter or the third party. After making compensation, the polluter shall be entitled to be reimbursed by the third party.

10. Copenhagen Accord (Dec. 18, 2009), available at <http://www.unfccc.int/resource/docs/2009/cop15/eng/107.pdf>.

11. Press Release, Ministry of Foreign Affairs of the P.R.C., Joint Statement on Sustainable Development Among the People’s Republic of China, Japan, and the Republic of Korea (Oct. 10, 2009), available at <http://www.fmprc.gov.cn/eng/zxxx/t620737.htm>.

12. The Law of the People’s Republic of China on Tort Liabilities (adopted by the Standing Comm. Nat’l People’s Cong., Dec. 26, 2009, effective July 1, 2010), available at [http://www.gov.cn/fbg/2009-12/26/content\\_1497435.htm](http://www.gov.cn/fbg/2009-12/26/content_1497435.htm) (Chinese version) and <http://www.cnnlaw.com/show.asp?id=663> (unofficial English translation).

### III. Protection of Islands

The Standing Committee of the National People's Congress adopted the Law of the People's Republic of China on Island Protection on December 26, which will be effective as of March 1, 2010.<sup>13</sup>

This law assumes environmental protection as a key purpose but also takes economic development into consideration. The law classifies islands into two categories: inhabited islands; and uninhabited islands. For inhabited islands, the law emphasizes both economic development and environmental protection. For uninhabited islands, the law solely emphasizes environmental protection.

As to administrative authorities, this law also treats inhabited and uninhabited islands differently. As there are economic and social development problems with inhabited islands, the administrative authorities of them are vested in both the State Oceanic Administration and its local subsidiaries and other governmental departments. However, the protection of uninhabited islands is mainly within the authority of the State Oceanic Administration and its local subsidiaries.

This law adopts the usual environmental regulatory tools such as data-gathering, environmental impact assessment, zoning and planning, and permitting. It does innovate in terms of regulatory tools, but it does make these tools applicable to islands, especially uninhabited islands.

In fact, the protection of uninhabited islands is one of the key issues for this law. As they are uninhabited, private ownership is not suitable for them. Although the state owns these uninhabited islands, according to the constitution, it in fact did not effectively exercise its ownership for a long time, which led to misuse and depletion of natural resources by individuals and companies. The adoption of this law is expected to improve the environmental protection of these islands.

### IV. Energy Law

China revised the Law of the People's Republic of China on Renewable Energy on December 26, 2009.<sup>14</sup> This law

was originally adopted by the Standing Committee of the National People's Congress in 2005.<sup>15</sup>

The purpose of this revision is mainly to balance the interests of the producers and distributors of electricity. Because the state policy gives preferential treatment to electricity produced from renewable resources, the distributor of electricity may find that it suffers a loss if it purchases renewable electricity and has to make more investment in response to the instability of renewable electricity.

This law continues to encourage the development of renewable energy. An important regulatory tool is to require the National Grid to purchase all the electricity generated by legally established renewable power plants.

As the price of renewable electricity is usually higher than hydroelectricity, the distributor may suffer a loss if it purchases renewable electricity without any government subsidy. To address this problem, the revision establishes a subsidy mechanism. The revision provides that if the price determined for the renewable electricity is higher than the average price of regular electricity, the difference shall be compensated by the renewable energy surcharge collected nationwide.

### V. Conclusion

Generally speaking, this year's legislation work is significant, particularly the adoption of the Law on Tort Liabilities, as the tort law is the last major work for the adoption of a comprehensive civil code. After years of intensive legislation work, China has gradually established a relatively comprehensive environmental law system. Environmental legislation and rulemaking for the coming years are expected to concentrate on environmental taxes, encouraging a low-carbon economy, energy, and climate change. The Standing Committee of the NPC may further revise the Law on the Prevention and Control of Air Pollution in the coming years to reduce the emission of greenhouse gases. The State Council may also adopt or revise implementing regulations for the development of a low-carbon economy.

13. The Island Protection Law of the People's Republic of China (adopted by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective Mar. 1, 2010), available at [http://www.gov.cn/jfjg/2009-12/26/content\\_1497461.htm](http://www.gov.cn/jfjg/2009-12/26/content_1497461.htm) (Chinese version) and <http://www1.lawinfochina.com/Law/Display.asp?Id=7851> (unofficial English translation).

14. See Decision of the Standing Committee of the National People's Congress on Amending the Law of the People's Republic of China on Renewable Energy (adopted by the Standing Comm. Nat'l People's Cong., Dec. 29, 2009, effective Apr. 1, 2010), available at [http://www.gov.cn/jfjg/2009-12/26/content\\_1497462.htm](http://www.gov.cn/jfjg/2009-12/26/content_1497462.htm) (Chinese version) and <http://www1.lawinfochina.com/Law/Display.asp?Id=7880> (unofficial English translation).

15. The Law of the People's Republic of China on Renewable Energy (adopted by the Standing Comm. Nat'l People's Cong., Feb. 28, 2005, effective Jan. 1, 2006), ST. COUNCIL GAZ., Issue 11, Serial No. 1154, available at [http://www.gov.cn/gongbao/content/2005/content\\_63180.htm](http://www.gov.cn/gongbao/content/2005/content_63180.htm) (Chinese version) and <http://www1.lawinfochina.com/Law/Display.asp?Id=7880> (unofficial English translation).