

# COMMENTS

## Seeking Justice for Pollution Victims in China: Why China Should Amend the Tort Liability Law to Allow Punitive Damages in Environmental Tort Cases

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### I. INTRODUCTION

On July 16, 2010, an oil pipe exploded in Dalian, People's Republic of China (PRC), releasing oil into the nearby harbor and Yellow Sea.<sup>1</sup> The official report from the Chinese National Government was that 1500 tons (400,000 gallons) of oil was released.<sup>2</sup> Greenpeace China, however, estimated that it could have been as much as 60,000 tons of oil.<sup>3</sup> At least one person died during cleanup efforts, wildlife was severely damaged, and Chinese fishermen lost an estimated \$17 million USD in revenue because of contaminated waters.<sup>4</sup> Just one week earlier, on July 10, 2010,

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1. Raymond Li, *Fish Farmers Take Case to Beijing*, S. CHINA MORNING POST, Sept. 15, 2010, available at 2010 WLNR 18204675.

2. *Id.*

3. David Stanway, *China Oil Spill Could be 60,000 Metric Tons: Greenpeace*, REUTERS (July 30, 2010), <http://www.reuters.com/article/2010/07/30/us-china-dalian-oil-idUSTRE66T2LQ20100730>.

4. Dominique Doms, *China Oil Spill Good Example for U.S. Plaintiffs*, EXAMINER.COM (Sept. 17, 2010), <http://www.examiner.com/international-trade-in-national/china-oil-spill-good-example-for-us-plaintiffs>; see also Cara Anna, *China Oil Spill Doubles in Size, Called 'Severe Threat'*, MSNBC.COM (July 21, 2010), available at [http://www.msnbc.msn.com/id/38337393/ns/world\\_news-world\\_environment/t/china-oil-spill-doubles-size-called-severe-threat/](http://www.msnbc.msn.com/id/38337393/ns/world_news-world_environment/t/china-oil-spill-doubles-size-called-severe-threat/).

China's new Tort Liability Law (TLL) went into effect.<sup>5</sup> The National People's Congress's (NPC)<sup>6</sup> Standing Committee (SCNPC)<sup>7</sup> had passed the law on December 26, 2009.<sup>8</sup> Articles 65 through 68 of the TLL outline specific provisions regarding liability for environmental pollution.<sup>9</sup> The TLL is an important step because for the first time a law "explicitly and formally addresses liability for environmental pollution."<sup>10</sup> "Moreover, this codification clarif[ies] ambiguities and benefit[s] plaintiffs."<sup>11</sup>

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5. Zhōnghuá rénmin gònghéguó qīnquán zérèn fǎ (中华人民共和国侵权责任) [The Tort Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009) [hereinafter TLL], available at [http://www.gov.cn/flfg/2009-12/26/content\\_1497435.htm](http://www.gov.cn/flfg/2009-12/26/content_1497435.htm), translated in LAWINFOCHINA, <http://www.lawinfochina.com/Display.aspx?Lib=law&Id=7846&keyword>.

6. The National People's Congress (NPC) is China's primary national legislative body and functions as the "supreme organ of state power." JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 113 (2008) (citation omitted). The NPC meets only once per year for several weeks at a time and is composed of nearly 3000 deputies who are elected for five-year terms. *Id.* Jianfu Chen summarizes the NPC's role as follows:

The powers of the NPC are provided by Articles 62 and 63 of the Chinese Constitution, and include the powers to revise the Constitution and to supervise its implementation, to make fundamental laws, to appoint and remove top government officials (including all officials at the rank of minister), to examine and approve government budgets and economic and social development plans, and to supervise their implementation, and to exercise all other (undefined) supreme powers of the state. The structures, functions and operations of the NPC are governed by the Organic Law of the NPC (1982), the Procedural Rules of the NPC (1989), and the Law on Deputies of the NPC and the Local People's Congress (1992).

*Id.* at 114 (citation omitted).

7. The Standing Committee of the National People's Congress (SCNPC) is defined in the Chinese Constitution as the "permanent body of the NPC" and is granted "extensive powers." *Id.* at 115. The SCNPC is composed of 175 members and has the power to

interpret the Constitution and to supervise its implementation, to make laws and revise laws other than those that must be made by the NPC itself, to interpret laws, to examine and approve, when the NPC is not in session, partial adjustments to the plans for national economic and social development, and to the state budget that are necessitated during their implementation . . . .

*Id.*

8. Adam Moser & Tseming Yang, *Environmental Tort Litigation in China*, 41 ENVTL. L. REP. NEWS & ANALYSIS 10,895, 10,897 (2011).

9. TLL, *supra* note 5. Article 65 provides: "Where any harm is caused by environmental pollution, the polluter shall assume the tort liability." *Id.* Article 66 provides: "Where any dispute arises over an environmental pollution, the polluter shall assume the burden to prove that it should not be liable or its liability could be mitigated under certain circumstances as provided for by law or to prove that there is no causation between its conduct and the harm." *Id.* Article 67 provides: "Where the environmental pollution is caused by two or more polluters, the seriousness of liability of each polluter shall be determined according to the type of pollutant, volume of emission and other factors." *Id.* Article 68 provides: "Where any harm is caused by environmental pollution for 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." *Id.*

10. Moser & Tseming Yang, *supra* note 8, at 10,897.

11. *Id.*

By enacting the TLL, the SCNPC has made two bold policy statements. First, Article 1 of the General Provisions chapter sets forth the purpose of the TLL and states, “In order to protect the legitimate rights and interests of parties in civil relationships, clarify the tort liability, prevent and *punish* tortious conduct, and promote the social harmony and stability, this Law is formulated.”<sup>12</sup> Although China has followed the continental European civil law approach in the development of its laws,<sup>13</sup> the “punish” language in the TLL is a grand departure from one of the core principles of continental European civil tort law, where the purpose of tort law is to compensate a victim for his loss and to prevent future harm, but not to punish the violation.<sup>14</sup>

Second, in addition to holding the polluter strictly liable under Article 65, the SCNPC drafted the environmental tort liability articles as a precautionary statute.<sup>15</sup> Specifically, Article 66 states, “Where any dis-

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12. TLL, *supra* note 5, ch. 1, art. 1 (emphasis added). The term “punishment” in the statute is a translation of the Chinese term *zhicai* (制裁). It is worth noting that the term could also be translated as “sanction,” and it is most commonly seen in conjunction with economic implications such as United Nations sanctions. Nevertheless, either translation retains a punitive connotation, and for the purposes of this Comment, I will use the term “punishment.”

13. Helmut Koziol & Yan Zhu, *Background and Key Contents of the New Chinese Tort Liability Law*, 1 J. EUR. TORT L. 328, 329 (2010); see also George W. Conk, *A New Tort Code Emerges in China: An Introduction to the Discussion with a Translation of Chapter 8—Tort Liability, of the Official Discussion Draft of the Proposed Revised Civil Code of the People’s Republic of China*, 30 FORDHAM INT’L L.J. 935, 935 (2007); YAN ZHU, INTRODUCING EUROPEAN LAW IN CHINA—FROM A COMPARATIVE ASPECT (2008), available at <http://www.humboldt-foundation.de/pls/web/docs/F4279/zhu.pdf> (noting that China follows the civil law tradition and borrows heavily from European Continental Law, in particular Germany). Each case decision is based solely on the interpretation of the code and stands on its own. Andrew J. Green, *Tort Reform with Chinese Characteristics: Towards a “Harmonious Society” in the People’s Republic of China*, 10 SAN DIEGO INT’L L. J. 121, 143 (2008). Thus, unlike the Anglo-American common law tradition, case decisions do not have precedential value. *Id.*

14. Koziol & Yan Zhu, *supra* note 13, at 336. Specifically, Koziol & Zhu note:

[I]t seems very modern when [one] points out that tort law has a preventive function and aims to promote social harmony and stability. On the other hand, the rule deviates from common opinion in European civil law countries as it does not mention compensation as the main aim of tort law but stresses as a purpose of tort law the punishment of tortious acts.

*Id.* United States tort theory follows this same principle—that the purpose of tort law is to compensate a plaintiff in order to make him or her whole and prevent future harm, but not to *punish* the wrongdoer. W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS 6 (5th ed. 1984) (emphasis added).

15. The precautionary principle is designed to prevent harm in the face of scientific uncertainty. Robert V. Percival, *Who’s Afraid of the Precautionary Principle?*, 23 PACE ENVTL. L. REV. 21, 22, 24 (2006); see also *Ethyl Corp. v. EPA*, 541 F.2d 1, 28 (D.C. Cir. 1976). The court in *Ethyl* summed up the precautionary principle best when it described it as follows:

Where a statute is precautionary in nature, the evidence difficult to come by, uncertain, or conflicting because it is on the frontiers of scientific knowledge, the regulations designed to protect the public health, and the decision that of an expert administrator, we will not

pute arises over an environmental pollution, the *polluter shall assume the burden to prove* that it should not be liable or its liability could be mitigated under certain circumstances as provided for by law or to prove that there is no causation between its conduct and the harm.”<sup>16</sup> Thus, rather than placing the burden of proof on the plaintiff in environmental tort cases, the TLL shifts the burden of proof to the defendant. This burden shift is a significant departure from the general rule of Chinese law, which places the burden of proof on the plaintiff to prove causation of damages based on the defendant’s act.<sup>17</sup>

Although the SCNPC made a strong policy statement under Article 1 that the goal of the TLL includes *punishing* tortious conduct, it provided for punitive damages for only products liability causes of action that arise under Article 47 of the Product Liability chapter.<sup>18</sup> Punitive damages for environmental pollution torts were part of the discussions but were ultimately not included.<sup>19</sup> Thus, the TLL does not identify a mechanism to enforce this stated purpose of punishing tortious conduct for environmental pollution torts.

While burden shifting and strict liability will help citizens obtain redress for environmental pollution torts after they occur, the TLL can achieve its objectives of preventing environmental disasters and punishing wrong-doers only if punitive damages are included as a remedy. In this Comment, I argue that to be effective, the environmental pollution torts provision of the TLL should be amended to include a punitive damages remedy because the stated purpose of the TLL is to prevent and punish, but the SCNPC did not identify a mechanism to achieve this stated purpose. In addition to providing a monetary remedy as an *ex post facto* retributive measure, the awarding of punitive damages serves as an *ex ante* deterrent. Because punitive damages were developed in the Anglo-

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demand rigorous step-by-step proof of cause and effect. Such proof may be impossible to obtain if the precautionary purpose of the statute is to be served.

*Id.*

16. TLL, *supra* note 5, art. 66 (emphasis added).

17. Mingqin You & Ke Huang, *Annual Review of Chinese Environmental Law Developments: 2009*, 40 ENVTL. L. REP. NEWS & ANALYSIS 10,484, 10,485 (2010).

18. TLL, *supra* note 5, art. 47. Article 47 provides: “Where a manufacturer or seller knowing any defect of a product continues to manufacture or sell the product and the defect causes a death or any serious damage to the health of another person, the victim shall be entitled to require the corresponding punitive compensation.” *Id.*

19. Xu Hua (徐华), *Qīnquán zérèn fǎ cǎo'àn zhōng chéngfǎ xìng péicháng zhìdù yánjiū* (侵权责任法草案中惩罚性赔偿制度研究) [*Punitive Damages in the Draft Tort Law*], in *Qīnquán zérèn fǎlǜ zhìdù bǐjiào yánjiū* (侵权责任法律制度比较研究) [COMPARATIVE STUDIES IN TORT LAW] 70, 70–71 (Yóu Quànróng (游劲荣) ed. 2010). Also, prior to the enactment of the TLL, punitive damages were not available in environmental pollution compensation cases. Alex Wang, *The Role of Law in Environmental Protection in China: Recent Developments*, 8 VT. J. ENVTL. L. 195, 210 (2007).

American common law system, I base my analysis of punitive damages on U.S. tort theory and argue that China can draw from the U.S. experience in formulating a punitive damages scheme appropriate for torts caused by environmental pollution.

There are three assumptions that must be considered in this Comment. First, when referencing environmental torts where the underlying liability scheme is strict liability, I am referring only to torts caused by environmental pollution. In the American common law system, “environmental torts” fall broadly into two categories—products liability and abnormally dangerous activities.<sup>20</sup> The TLL separates environmental torts into three separate chapters: Chapter V, Product Liability; Chapter VIII, Liability for Environmental Pollution; and Chapter IX, Liability for Ultrahazardous Activity.<sup>21</sup> Thus, the focus of this Comment is on Chapter VIII, Liability for Environmental Pollution. Second, I premise this Comment on cases in which the polluter has violated environmental laws or regulations and is aware of those violations, but has continued to conduct activities that cause pollution. This Comment does not take into account cases in which a defendant has complied with environmental laws and regulations outside the TLL, but has nonetheless caused personal injuries due to polluting activities as this topic is beyond the scope of the arguments made here. Third, when making comparisons to U.S. tort law, I do not adhere to or distinguish between various modern tort theories.<sup>22</sup> In other words, my arguments do not fall into one specific category of modern American tort theory; rather, I pull salient ideas from multiple

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20. Nathan R. Hoffman, Comment, *The Feasibility of Applying Strict-Liability Principles to Carbon Capture and Storage*, 49 WASHBURN L. J. 527, 539 (2010). In the United States, the term environmental tort includes harms to a person, property, or the environment as a result of the “toxicity of a product, a substance, or a process.” GERALD W. BOSTON & M. STUART MADDEN, LAW OF ENVIRONMENTAL AND TOXIC TORTS 1 (2d ed. 2001). There are multiple theories of recovery for environmental torts, including negligence, strict liability for abnormally dangerous activities, trespass, and nuisance. *Id.* at 4. The theory of recovery at issue in this Comment is strict liability for abnormally dangerous activities. See RESTATEMENT (SECOND) OF TORTS § 519 (1977). In its official comment d, the American Law Institute states in part:

The defendant is held liable although he has exercised the utmost care to prevent the harm to the plaintiff that has ensued. The liability arises out of the abnormal danger of the activity itself, and the risk that it creates, of harm to those in the vicinity. It is founded upon a policy of the law that imposes upon anyone who for his own purposes creates an abnormal risk of harm to his neighbors, the responsibility of relieving against that harm when it does in fact occur. The defendant’s enterprise, in other words, is required to pay its way by compensating for the harm it causes, because of its special, abnormal and dangerous character.

*Id.* § 519, cmt. d.

21. TLL, *supra* note 5.

22. The various modern tort theories include the following: social justice theory, civil recourse, and law and economics. For an overview of the various tort theories, see Michael L. Rustad, *Torts as Public Wrongs*, 38 PEPP. L. REV. 433, 1–17 (2011).

theories because each theory provides viable arguments relevant to the punitive damages discussion.

This Comment proceeds in six parts. In Part II, I review China's environmental, public health, and economic crises. In Part III, I examine that while China has had environmental laws and tort laws on the books, the laws are not enforced because of ambiguities in the law and efforts to protect local industry. Additionally, the Chinese have not historically favored litigation as a means of resolving disputes. In Part IV, I argue that the TLL offers the possibility of fixing these problems through its aggressive liability structure implementing strict liability and burden shifting. In Part V, I propose that in order to fulfill the TLL's stated purpose of preventing and punishing tortious conduct, the TLL must be amended to include the imposition of punitive damages. Punitive damages are a great means of both empowering citizens and deterring environmental tortfeasors from future misconduct. Further, I respond to the principal counterarguments to my proposal. Finally, in Part VI, I conclude that imposing punitive damages is the appropriate mechanism to achieve the purpose set forth in the TLL. Punitive damages will not only provide a remedy for victims of environmental pollution torts but will also punish and deter polluters, thus having a net positive benefit on public health and the environment.

## II. CHINA'S ENVIRONMENTAL AND PUBLIC HEALTH CRISIS

China's economic boom has come at the expense of its environment.<sup>23</sup> China is at a crossroads, and the practical reality calls for aggressive reform. Some scholars argue that if China does not take aggressive measures, the consequences will be dire.<sup>24</sup> Because of the massive economic boom since the "reform and opening" (*gaige kaifang*),<sup>25</sup> China has

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23. Robert V. Percival, *The Challenge of Chinese Environmental Law*, 10 INT'L ENVTL. L. COMM. NEWSLETTER 4 (Int'l Env'tl. Law Comm., A.B.A. Section of Int'l Env'tl. Law), Aug. 2008, [http://www.abanet.org/environ/committees/intenviron/newsletter/aug08/IELC\\_Aug08.pdf](http://www.abanet.org/environ/committees/intenviron/newsletter/aug08/IELC_Aug08.pdf).

24. Alex Wang, *The Downside of Growth: Law, Policy, and China's Environmental Crisis*, in 2 PERSPECTIVES (Overseas Young Chinese Forum, 2000), available at [http://oycf.org/Perspectives2/8\\_103100/Contents.htm](http://oycf.org/Perspectives2/8_103100/Contents.htm).

25. *Id.* The term "reform and opening" refers to the new era of political and economic thought beginning in 1978, when China opened its doors to the rest of the world after being isolated in the previous regime under Mao. See Wang Guiguo, *The Legal System of China*, in CHINESE LAW 1, 2-3 (Wang Guiguo & John Mo eds., 1999). As Wang Guiguo notes, "Having been isolated from the rest of the world for several decades . . . China neither had the needed capital nor technology or management skills to revitalize its economy." *Id.* at 3. The initial reform policies were implemented between 1978 and 1984. JIANFU CHEN, *supra* note 6, at 55. The reform and opening is a politico-economic theory with pragmatic policies directed to attract foreign investment. Alex Wang, *supra* note 24, at 3. Included in the fabric of this political and economic reform was the "liberalization of legal thinking." JIANFU CHEN, *supra* note 6, at 55. Under the "Two-Hands Policy," the economy was to be developed on one hand, while the legal system was to be strengthened on the other. *Id.* at 51.

done in twenty years what it took the U.S. one hundred years to do.<sup>26</sup> Now, China faces environmental problems such as flooding, desertification, water scarcity, and massive deforestation.<sup>27</sup> Also, sixteen of the world's twenty most polluted cities are in China,<sup>28</sup> and 70% of China's lakes and rivers are polluted.<sup>29</sup> As noted by Alex Wang, China has followed the "pollute first, control later" model of development like now-developed countries<sup>30</sup> and "economic development has invariably prevailed."<sup>31</sup> The effect on the environment has been profound.

China's rapid economic growth has resulted in staggering damage to human health. For example, in 2007, the World Health Organization (WHO) estimated that 656,000 Chinese die annually as a result of air pollution.<sup>32</sup> In addition, the WHO estimated that 100,000 Chinese die each year from polluted drinking water.<sup>33</sup> Also, pesticides poison be-

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Under the reform and opening, "[n]o country has moved up the economic ladder as quickly as China." PHILLIP STALLEY, *FOREIGN FIRMS, INVESTMENT, AND ENVIRONMENTAL REGULATION IN THE PEOPLE'S REPUBLIC OF CHINA 1* (2010). A major thrust of the reform and opening has been for China to become open to foreign direct investment. *Id.* As noted by Stalley, "By 2007 China was receiving almost [\$]75 billion in FDI per year." *Id.* at 1-2.

26. Alex Wang, *supra* note 19, at 201. Additionally, Wang notes the following quote by the State Council in December 2005, when the State Council issued its *Decision on Implementation of Scientific Development and Strengthening of Environmental Protection*:

The environmental situation remains extremely grim. Although environmental protection in China had made positive progress, the grim environmental situation has not changed . . . . Developed countries experienced environmental problems in stages along their 100 year industrialization process. China has seen all of these problems appear in a concentrated 20 year period . . . . Environmental pollution and ecosystem destruction have caused enormous economic losses, harmed the health of the masses, and affected societal stability and environmental safety . . . .

At present, some places emphasize GDP growth and pay short shrift to environmental protection . . . . Environmental protection should be placed in a more significant strategic position.

*Id.*

27. ELIZABETH C. ECONOMY, *THE RIVER RUNS BLACK: THE ENVIRONMENTAL CHALLENGE TO CHINA'S FUTURE* 9-10 (2004).

28. Patti Goldman, *Public Interest Environmental Litigation in China: Lessons Learned from the U.S. Experience*, 8 VT. J. ENVTL. L. 251, 251 (2007).

29. *Id.* at 251 n.2. Additionally, a 2005 statistic showed that 360 million Chinese lacked access to safe drinking water. *Id.*

30. Alex Wang, *supra* note 19, at 198.

31. *Id.*

32. Percival, *supra* note 23, at 3.

33. *Id.* These are just a few statistics. Elizabeth Economy provides a snapshot of the public health crisis plaguing China. The following are a few of the examples that she provides: (1) citizens living in the Zhejiang region are five to eight times more likely to die from intestinal cancer because of microcystin toxins; (2) citizens living in the Binzhou village in the Shandong province suffer from "brittle and cracking bones" because of contaminated water; (3) liver and esophageal cancer rates among citizens living in the Baiyangdian area south of Beijing are three times higher because of contaminated water; (4) those living in the suburbs of Beijing are in danger of high mercury because of the high level of mercury in the rice; and (5) those living in the zinc mining area in southern China have higher rates of anemia and kidney and bone disorders because the rice and shellfish are

tween 53,311 and 123,000 Chinese annually.<sup>34</sup> The World Bank estimates that every year air pollution results in 6.8 million visits to the emergency room, 346,000 hospital admissions, and 178,000 premature deaths.<sup>35</sup> Alex Wang summed up China's public health crisis when he said the following:

The numbers here are so uniformly large that they become a bit numbing; the numbers are too abstract in their largeness. Anyone who has ever been to China can attest to the very tangible ways in which environmental pollution reduces quality of life—the dank atmospheric haze, the way the air hurts the lungs and eyes, the way white shirts turn brown after a day outside.<sup>36</sup>

Perhaps the most vivid story of the effects on human health is that of the Huai River. In the mid-1990s, numerous factories dumped their wastes directly into the river, producing a “toxic mix of ammonia and nitrogen compounds, potassium permanganate, and phenols” and causing massive contamination of the river.<sup>37</sup> There was such heavy pollution that the river turned black, thousands of people were treated for illnesses, and nearly 26 million pounds of fish were killed.<sup>38</sup> The water from the river flowed through irrigation channels.<sup>39</sup> The pollution of the Huai has created “cancer villages,” and in some villages, the cancer rate is as high as 1-in-100.<sup>40</sup>

In addition to the environmental and public health concerns, China also faces a growing economic crisis because of environmental degradation. For example, in 2003, there were eighty registered marine pollution incidences that polluted up to 90,262 hectares, causing an estimated loss of more than \$354 million USD.<sup>41</sup> In 1997, the World Bank estimated that total air and water pollution costs in China were \$54 billion annual-

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contaminated with cadmium. ECONOMY, *supra* note 27, at 84–85. Additionally, regarding the effects of poor air quality, Economy notes that “more than 60 percent of children in Shenzhen, 20 percent of children in Beijing, 50 percent of children in Shanghai, and 80 percent of children in Guangzhou were suffering from lead concentrations that exceeded levels considered safe by the WHO.” *Id.* Finally, Economy notes that the life expectancy for a traffic cop in Beijing is a mere forty years. *Id.*

34. ECONOMY, *supra* note 27, at 85.

35. Alex Wang, *supra* note 24, at 2.

36. *Id.*

37. ECONOMY, *supra* note 27, at 3–4.

38. *Id.*

39. *China from the Inside: Shifting Nature* (PBS television broadcast transcript 2006), available at <http://www.pbs.org/kqed/chinainside/pdf/pbschina-ep3.pdf>.

40. *Id.*

41. Wang Canfa, *Chinese Environmental Law Enforcement: Current Deficiencies and Suggested Reforms*, 8 VT. J. ENVTL. L. 159, 165 (2007).



ly—8% of China's GDP.<sup>42</sup> Even more shocking, the World Bank estimates that health costs resulting from exposure to particulates alone will triple to \$98 billion USD by the year 2020 unless aggressive action is taken.<sup>43</sup>

### III. CHINESE ENVIRONMENTAL LAWS HAVE NOT BEEN SUCCESSFUL

China has had environmental and tort laws on the books, but they have not achieved their stated goals, as shown by the ongoing stories of environmental and public health issues.<sup>44</sup> The laws have been ineffective because Chinese laws are often ambiguous, and there is a widespread history of local protectionism. In addition, the Chinese have not traditionally used litigation as a means to resolve disputes and are even encouraged by the government to mediate at the outset of a dispute rather than litigate in a court of law. Thus, polluters often are not challenged in a court of law.

In section A of this Part, I give a brief overview of China's environmental law system. In section B, I examine the problem of weak enforcement of environmental laws because of ambiguous legislation, weak administrative enforcement, and a weak court system. Finally, in section C, I review the historical preference for mediation in China.

#### *A. China's Environmental Law System*

China has an extensive set of environmental laws and regulations.<sup>45</sup> As noted by one scholar, "China's environmental protection regime . . . is comprised of approximately twenty laws, forty regulations, five hundred standards, and six hundred other legal norm-creating documents related to environmental protection and pollution control."<sup>46</sup> In addition,

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42. ECONOMY, *supra* note 27, at 88. Some experts opine that when the water and air pollution statistics are combined with the problem of resource shortages, the portion of GDP increases to 12%. *Id.*

43. *Id.* at 89–90.

44. See Qun Du, *The People's Republic of China*, in THE ROLE OF THE JUDICIARY IN ENVIRONMENTAL GOVERNANCE: COMPARATIVE PERSPECTIVES 411, 441–42 (Louis J. Kotzé & Alexander R. Paterson eds., 2009); see also Wang Canfa, *supra* note 41, at 164–79. In addition, other authors have argued for various legal reforms that could benefit environmental litigation as a whole. See, e.g., Goldman, *supra* note 28, at 258–69 (arguing that one of the greatest impacts in making positive changes to U.S. environmental litigation was the recognition of citizen standing resulting from the U.S. Supreme Court's decision in *Sierra Club v. Morton*, 405 U.S. 727 (1972), and that China could draw from the United States' experience); see also Green, *supra* note 13, at 152 (arguing that China should encourage class actions and that the adoption of contingency fees in civil litigation would encourage tort actions and give access to justice to more Chinese tort victims who would otherwise not be able to bring a suit because they cannot afford attorneys).

45. STALLEY, *supra* note 25, at 22.

46. *Id.* at 23.

there are approximately one thousand local environmental regulations.<sup>47</sup> Because China is a vast country, local governments tend to have a great deal of autonomy, which creates decentralization in law and policy.<sup>48</sup>

China adopted its first environmental laws in 1979.<sup>49</sup> It then passed the Law on Water Pollution Prevention and Control in 1984 and the Law on Prevention and Control of Atmospheric Pollution in 1987.<sup>50</sup> In 1989, China adopted the Environmental Protection Law, which is the “fundamental legislation” on environmental protection in China.<sup>51</sup> China initially followed U.S. models of environmental law.<sup>52</sup> But over time, China has leaned more heavily on the “precautionary principle” from the European approach.<sup>53</sup> The present progress in environmental law in China has been likened to what occurred in the United States in the 1970s.<sup>54</sup>

### B. The Problem of Weak Enforcement

The legal system in China has come under criticism “for its lack of transparency, ill-defined laws, weak enforcement capacity, and poorly trained advocates and judiciary.”<sup>55</sup> In addition, the Chinese have shown a historic preference for mediation,<sup>56</sup> and thus, more often than not, polluters do not have to defend themselves in court.

#### 1. Ambiguity in Legislation

The laws often read like policy statements.<sup>57</sup> Although China has extensive environmental laws on the books, the laws have been poorly

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47. Richard J. Ferris, Jr. & Hongjun Zhang, *Reaching out to the Rule of Law: China's Continuing Efforts to Develop an Effective Environmental Law Regime*, 11 WM. & MARY BILL RTS. J. 569, 586 (2003).

48. STALLEY, *supra* note 25, at 28.

49. Lin Feng, *Law on Environmental Protection*, in CHINESE LAW, *supra* note 25, at 557, 560 n.16; *see also* STALLEY, *supra* note 25, at 24 (showing historical chart of China's primary environmental protection laws).

50. STALLEY, *supra* note 25, at 3.

51. Lin Feng, *supra* note 49, at 560. This set of laws replaced the preexisting set of environmental laws. Percival, *supra* note 23, at 3.

52. Percival, *supra* note 23, at 3.

53. *Id.*

54. *Id.* at 6.

55. ECONOMY, *supra* note 27, at 101.

56. Stanley Lubman, *Bird in a Cage: Chinese Law Reform after Twenty Years*, 20 NW. J. INT'L. L. & BUS. 383, 387–88 (2000).

57. ECONOMY, *supra* note 27, at 101. Economy notes that “to many environmental protection officials and experts in both China and the West, most Chinese environmental protection laws are too broad, providing local officials with little guidance on implementation.” *Id.* As a specific example, Economy cites to China's Water Pollution Prevention and Control Law and excerpts a passage from an article by U.S. environmental law scholar John Nagle. There, Nagle states the following:

China's Water Pollution Prevention and Control Law states that “enterprises and other undertakings which cause serious water pollution must eliminate pollution within a stipu-

enforced both administratively and judicially.<sup>58</sup> Of the environmental claims that are brought to court, some are settled by administrative measures. Most claims, however, are not settled, resulting in “pollution victims suffering silently.”<sup>59</sup> Additionally, although some citizens complain to authorities, there is often no resolution.<sup>60</sup> In 2005 alone, authorities at the State Environmental Protection Agency (SEPA)<sup>61</sup> received more than 50,000 complaints.<sup>62</sup> But because of the lack of enforcement and because polluters are not hurt financially, there is no motivation for them to be in compliance, and they will continue to pollute.<sup>63</sup> Elizabeth Economy calls this “conscious exploitation.”<sup>64</sup>

## 2. Weak Administrative Enforcement

Although China has a “relatively well-crafted environmental legal system,”<sup>65</sup> there is a lack of administrative enforcement.<sup>66</sup> Indeed, “barely ten percent of China’s environmental laws and regulations are actually enforced.”<sup>67</sup> As noted in the previous section, the national agency empowered to administer environmental regulations is the Ministry of Environmental Protection (MEP) (formerly SEPA).<sup>68</sup> The MEP has been de-

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lated time.” What constitutes “serious” water pollution is not self-evident, nor is the meaning of “enterprises and other undertakings.” . . . 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 procedures for establishing effluent limitations and water quality standards and through the permit process. Additionally, the Clean Water Act compels any point source to obtain a permit stating the exact amount of each substance that may be discharged into water.

*Id.*

58. Wang Canfa, *supra* note 41, at 174.

59. Yuhong Zhao, *Environmental Dispute Resolution in China*, 16 J. ENVTL. L. 157, 174 (2004).

60. *Id.*

61. SEPA is China’s State Environmental Protection Agency and serves a regulatory function much like the U.S. Environmental Protection Agency. STALLEY, *supra* note 25, at 28. In 2008, SEPA was elevated to ministry status and is now known as the Ministry of Environmental Protection (MEP). *Id.*

62. Wang Canfa, *supra* note 41, at 167.

63. *Id.* at 167–68.

64. ECONOMY, *supra* note 27, at 102.

65. CHARLES L. MCELWEE, ENVIRONMENTAL LAW IN CHINA: MITIGATING RISK AND ENSURING COMPLIANCE 30 (2011).

66. Wang Canfa, *supra* note 41, at 173.

67. Elizabeth Economy, *The Great Leap Backward?*, FOREIGN AFFAIRS, Sept./Oct. 2007, at 51.

68. MCELWEE, *supra* note 65, at 82–85. The MEP was originally established as the National Environmental Protection Agency (NEPA) and had subministry level status. Alex Wang, *supra* note 19, at 199 n.11. It was subsequently renamed the State Environmental Protection Agency (SEPA), elevated and placed just under the State Council. *Id.* In 2008, it was renamed the Ministry of Environmental Protection (MEP) and elevated again to ministry status. *Id.* Many see this promotion as a

scribed as a “relatively weak agency.”<sup>69</sup> The MEP is ineffective because it is a tiny organization. As of 2007, the MEP (then SEPA) had only 219 full-time professional staff in Beijing and approximately 2000 staff scattered in other parts of the country for a population of several billion,<sup>70</sup> thus making it nearly impossible to regulate and monitor industry.

Because the MEP is tiny, enforcement in China is left to the local Environmental Protections Bureaus (EPBs), which are understaffed and also subordinate to local government.<sup>71</sup> Benjamin van Rooij argues that the “root of enforcement problems lies with the institutional arrangement” that gives environmental enforcement authority to the local governments.<sup>72</sup> The EPBs “lack authority, administrative rank, and financial and human resources.”<sup>73</sup> In addition, local officials place economic interests above environmental pollution enforcement.<sup>74</sup> In some rural communities, the local factory may be the primary source of tax revenue.<sup>75</sup> Thus, at the local level, environmental protection is regarded as an obstacle.

Another problem that leads to weak enforcement is that the fines that administrative agencies may impose are “very limited.”<sup>76</sup> As former SEPA director Zhang Kunmin recently noted in an interview, it is like a “game of cat and mouse.”<sup>77</sup> Polluters know when regulators are going to show up and turn on the pollution control equipment.<sup>78</sup> But once the regulators are gone, they turn off the equipment and continue to pollute.<sup>79</sup>

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strong statement by China in favor of the environment. STALLEY, *supra* note 25, at 28. For an organizational chart showing the structure of the environmental protection system in China, see *id.* at 31.

69. Alex Wang, *supra* note 19, at 199 n.11.

70. By contrast, in 2007, the U.S. Environmental Protection Agency (U.S. EPA) had nearly 18,000 total employees across the country. *Id.* at 199 n.12. The U.S. EPA had a staff of almost 9000 in Washington, D.C. alone. Economy, *supra* note 67, at 51.

71. MCELWEE, *supra* note 65, at 89–90.

72. Benjamin van Rooij & Carlos Wing-Hung Lo, *Fragile Convergence: Understanding Variation in the Enforcement of China's Industrial Pollution Law*, 32 LAW & POL'Y 14, 15 (2010).

73. *Id.*

74. *Id.* Economy notes:

Local governments also turn a blind eye to serious pollution problems out of self-interest. Officials sometimes have a direct financial stake in factories or personal relationships with their owners. And the local environmental protection bureaus tasked with guarding against such corruption must report to the local governments, making them easy targets for political pressure.

Economy, *supra* note 67, at 52.

75. Rachel E. Stern, *From Dispute to Decision: Suing Polluters in China*, 206 CHINA Q. 294, 298 (2011).

76. Meng Si, *Seeking Damages*, CHINA DIALOGUE (July 21, 2011), <http://www.chinadialogue.net/article/show/single/en/4422-Seeking-damages>.

77. *Id.*

78. *Id.*

79. *Id.*

Zhang also notes that the fines for environmental pollution are not severe enough. Specifically, Zhang laments:

With limited fines and low compensation, breaking the law is often cheaper than following it, and that further emboldens some irresponsible firms.

. . . .

. . . That's what happens when polluters don't pay an appropriate price for the damage they cause and neither criminal or civil punishments follow. The costs of breaking the law are too low.<sup>80</sup>

Thus, Chinese citizens often do not find recourse using administrative means because of the lack of enforcement.

### 3. Weak Court System

China has four levels of courts: Basic Courts, Intermediate Courts, Provincial High Courts, and the Supreme People's Court.<sup>81</sup> The judiciary has long been criticized as being ineffective and "institutionally weak."<sup>82</sup> A longstanding problem with the judiciary is its lack of training.<sup>83</sup> For example, prior to 2002, judges were not required to have a Bachelor's degree.<sup>84</sup> Additionally, prior to 2005, less than 50% of Chinese judges had university degrees.<sup>85</sup>

Another longstanding problem with the judiciary is that it protects local industry. That is, local judges are often unwilling to enter a judgment against a local company that provides substantial economic benefits to the local community.<sup>86</sup> Additionally, because national laws tend to be broad and ambiguous,<sup>87</sup> local judges find loopholes that benefit local industry.<sup>88</sup> The problem of local protectionism is of such concern that the Supreme People's Court even noted this issue as part of its analysis in a

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80. *Id.*

81. RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 283 (2002).

82. *Id.* at 281. Peerenboom states, "Rule of law requires a judiciary that is independent, competent, and enjoys sufficient powers to resolve disputes fairly and impartially. China's judiciary falls short on each of these three dimensions." *Id.* at 280. Peerenboom also explains that "[a]s in some civil law countries, the courts are supposed to apply the law rather than make it or even interpret it." *Id.* at 281.

83. See Benjamin Liebman, *China's Courts: Restricted Reform*, 21 COLUM. J. ASIAN L. 1, 10–18.

84. *Id.* at 12.

85. *Id.*

86. *Id.* at 16.

87. See *supra* notes 57–58 and accompanying text.

88. ECONOMY, *supra* note 27, at 102–03.

March 2010 high-court decision.<sup>89</sup> In the context of environmental pollution cases, the courts have not met the standards expected by the citizens.<sup>90</sup>

Although the judiciary has been rife with problems, the Chinese government has taken measures to improve it.<sup>91</sup> In 2001, the Supreme People's Court announced its "century theme" to achieve "Impartiality and Efficiency" in the people's courts.<sup>92</sup> In March 2002, the President of the Supreme People's Court announced at the Annual Conference of the National People's Congress that the people's courts would continue the ongoing judicial reform under the theme of impartiality and efficiency.<sup>93</sup> Over the past decade, "court reform" has been a major priority in China.<sup>94</sup> China now requires new judges to pass the national bar exam.<sup>95</sup> Between 2000 and 2005, however, the bar passage rate by judges was a mere 10%.<sup>96</sup> Thus, while China has focused on improving the judiciary, the courts are still seen as ineffective.<sup>97</sup>

### C. Mediation in China

Mediation is relevant to the discussion of enforcement of environmental laws in China because the focus on prelitigation mediation does not force polluters to defend themselves in court. Mediation, an intricate system with multiple tiers,<sup>98</sup> has traditionally been the preferred means for resolving most civil disputes in China.<sup>99</sup> The roots of seeking media-

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89. In *Zhao Ziwen v. Pan Riyang*, No. 17 [2010] Civil Division I, Final, a property infringement case, the Supreme People's Court concluded that a civil or commercial trial in which the amount in controversy is more than 50 million yuan (7.86 million USD) should be held outside the local courts to avoid local protectionism. *Zhào zìwén yǔ pān rìyáng cáichǎn qīnquán jiūfēn àn* (赵子文与潘日阳财产权纠纷案) [*Zhao Ziwen v. Pan Riyang*], 2010 Mǐn yī zhōng zì 17 ((2010)民一终字第17号), translated in LAWINFOCHINA (2010), available at <http://www.lawinfochina.com/display.aspx?id=806&lib=case&SearchKeyword=Zhaoziwen&SearchCKeyword=> (considering disputes over property Infringement).

90. Qun Du, *supra* note 44, at 440 ("The role of the people's courts in environmental civil tort justice has lagged behind the public's expectation of what it should or could be . . . [I]t seems fair to conclude that the judiciary requires more time and experience . . .").

91. Mo Zhang & Paul J. Zwier, *Burden of Proof: Developments in Modern Chinese Evidence Rules*, 10 TULSA J. COMP. & INT'L L. 419, 419 (2003).

92. *Id.*

93. *Id.*

94. Liebman, *supra* note 83, at 9.

95. *Id.* at 13.

96. *Id.*

97. See PEERENBOOM, *supra* note 81, at 280–82.

98. Yuhong Zhao, *supra* note 59, at 158–73. Mediation is the primary method of resolving disputes in China. *Id.* at 161. Zhao explains that the levels of mediation fall into the following categories: people's mediation; administrative mediation; judicial mediation; and extra-judicial mediation. *Id.* at 158–73.

99. Lubman, *supra* note 56, at 387.

tion over litigation are deeply rooted in Confucianism,<sup>100</sup> and historically, the Chinese have had a preference for “informal and non-adversarial means of dispute resolution.”<sup>101</sup> Indeed, there is a Chinese proverb that states, “It is better to die of starvation than to become a thief; it is better to be vexed to death than to bring a lawsuit.”<sup>102</sup> In addition, as noted by American legal scholar and American Law Institute member George Conk, “The Chinese approach departs from our often atomistic view of rights that emphasizes rights as either sword or shield, rather than as organically linked with responsibilities.”<sup>103</sup>

Although mediation has historically been the preferred method of dispute resolution in China, litigation statistics over the past two decades show that the Chinese are embracing the rule of law and are now litigating in significantly greater numbers.<sup>104</sup> One author explains that between 1990 and 2002, there was a 144% increase from 1.8 million civil cases to 4.4 million cases.<sup>105</sup> As the Chinese embrace the rule of law and environmental tort victims bring additional claims, there will be more pressure on the judiciary to render justice and to refrain from local protectionism.

#### IV. THE TLL IS A PRECAUTIONARY STATUTE AND ITS STATED PURPOSE IS TO “PREVENT AND PUNISH” TORTIOUS CONDUCT

With its aggressive strict liability and burden-shifting approach, the enactment of the TLL is an important step in the development of law in China. First, the TLL is the final set of laws after the Law of Contract and Law of Property in China’s development of a Civil Code.<sup>106</sup> Second, the TLL is an additional recognition of individual civil rights for Chinese

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100. Stanley Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CAL. L. REV. 1284, 1290 (1967); see also J. Robert F. Utter, *Dispute Resolution in China*, 62 WASH. L. REV. 383, 385 (1987) (describing “jang” in China, which translates to “yielding” and leads to compromise between the parties); Yuhong Zhao, *supra* note 59, at 161. Zhao explains, “The Confucian tradition emphasizes moral values and moral instructions as a basis for guiding behavior and maintaining social order. Law is not seen as a proper mechanism to shape human behaviour.” *Id.* In addition to this cultural reason for the Chinese preferring mediation over litigation, Zhao also offers that “the formal legal system has long been viewed by the Chinese Communist Party as a means to implement state policy, not for articulating and guaranteeing the individual’s rights.” *Id.*

101. ZHENG RUNGAO, ADR IN P.R. CHINA (2002), available at [http://www.softic.or.jp/symposium/open\\_materials/11th/en/RZheng.pdf](http://www.softic.or.jp/symposium/open_materials/11th/en/RZheng.pdf).

102. Jerome Alan Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201, 1201 (1966).

103. Conk, *supra* note 13, at 940.

104. Yuhong Zhao, *supra* note 59, at 174.

105. Green, *supra* note 13, at 147–48.

106. Mingqin You & Ke Huang, *supra* note 17, at 10,485.

citizens.<sup>107</sup> Third, using tort law to protect the environment has been a hot topic for many years in China.<sup>108</sup>

Without a stronger enforcement mechanism, however, the TLL could fall into the same traps as past laws. Within the framework of environmental tort litigation, punitive damages could play a vital role. In section A of this Part, I give a brief overview of the TLL. In section B, I discuss the importance of the burden-shift provision in Article 66 of the Liability for Environmental Pollution chapter. In section C, I examine the prevention and punishment language in the introduction to the TLL.

### A. Brief Overview of the TLL

The TLL consists of ninety-two articles broken into twelve chapters.<sup>109</sup> Article 1 of the General Provisions chapter sets forth the purpose of the law,<sup>110</sup> and Article 15 of the Constituting Liability and Methods of Assuming Liability chapter sets forth the various remedies that can be sought.<sup>111</sup> The provisions for Liability for Environmental Pollution are outlined in Articles 65 through 68 under Chapter VIII.<sup>112</sup> Specifically, Article 65 provides that the environmental pollution tortfeasor will be held strictly liable.<sup>113</sup> Article 66 provides that the burden of proof is on the defendant rather than the plaintiff.<sup>114</sup> Article 67 provides for joint and several liability if there is more than one polluter.<sup>115</sup> And Article 68 pro-

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107. *Long-awaited Civil Rights Law Gets Nod*, LAWINFOCHINA (Dec. 29, 2009) (P.R.C.), available at [http://www.lawinfochina.com/News/News\\_Detail.asp?Id=7880](http://www.lawinfochina.com/News/News_Detail.asp?Id=7880) (last visited Feb. 13, 2011). When the TLL was enacted, Wu Bannuo, the Chairman of the NPCSC noted that the law was significant in “protecting civil rights and people’s interests, preventing and punishing infringement acts, reducing conflicts, and promoting social stability.” *Id.* Additionally, Chinese lawmaker Hu Zhengpeng noted, “It is one of the key laws within China’s legal framework of civil rights protection, reflecting a people-oriented society.” *Draft Tort to Protect Civil Rights*, LAWINFOCHINA (Dec. 29, 2009) (P.R.C.), available at [http://www.lawinfochina.com/News/News\\_Detail.asp?Id=7878](http://www.lawinfochina.com/News/News_Detail.asp?Id=7878) (last visited Feb. 13, 2011).

108. Mingqin You & Ke Huang, *supra* note 17, at 10,485.

109. TLL, *supra* note 5. The TLL chapters are as follows: Chapter I, General Provisions; Chapter II, Constituting Liability and Methods of Assuming Liability; Chapter III, Circumstances to Waive Liability and Mitigate Liability; Chapter IV, Special Provisions on Tortfeasors; Chapter V, Product Liability; Chapter VI, Liability for Motor Vehicle Traffic Accident; Chapter VII, Liability for Medical Malpractice; Chapter VIII, Liability for Environmental Pollution; Chapter IX, Liability for Ultrahazardous Activity; Chapter X, Liability for Harm Caused by Domestic Animal; Chapter XI, Liability for Harm Caused by Object; and Chapter XII, Supplementary Provision.

110. *Id.*

111. *Id.* The remedies are set forth in Article 15 and consist of the following: (1) cessation of infringement; (2) removal of obstruction; (3) elimination of danger; (4) return of property; (5) restoration to the original status; (6) compensation for losses; (7) apology; and (8) elimination of consequences and restoration of reputation. *Id.* The remedy of punitive damages is not mentioned. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*



vides that if a third party is at fault for the release of pollutants from a facility, then the injured party may bring an action against the third party or the facility.<sup>116</sup> Additionally, the facility may bring an indemnity action against the third party.<sup>117</sup>

Chinese environmental law scholar Yang Sujian argues that the new tort law resolves the prior conflict between provisions on environmental tort liability provided by General Principles of Civil Law Article 124 and Environmental Protection Law Article 41.<sup>118</sup> Specifically, Yang argues that Article 124 of the General Principles of Civil Law and Article 41 of the Environmental Protection Law were seemingly at odds.<sup>119</sup> While both laws provided recourse for victims of environmental torts, the laws differed on who had the burden of proof.<sup>120</sup> Article 65 of the newly enacted TLL is consistent with the first paragraph of Article 41 of the Environmental Protection Law and resolves this apparent conflict in that it shifts the burden of proof to the polluter in environmental tort cases.<sup>121</sup> Next, Yang submits that Article 65 clarifies that a polluter can be found liable in tort even if it does not violate a separate environmental law or regulation as long as it causes harm.<sup>122</sup> Thus, Yang argues that it should be easier for plaintiffs to bring tort claims for harms resulting from environmental pollution.<sup>123</sup>

### *B. Shifting Burden of Proof Under Article 66*

Shifting the burden of proof from the plaintiff to the defendant is based on the precautionary principle, a western European model of environmental policy that is used to protect health and the environment when there is uncertainty about cause and effect.<sup>124</sup> It originates from the early

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116. *Id.*

117. *Id.*

118. Yang Sujian, “Qīnquán zérèn fǎ” duì huánjīng sùsòng yǒu hé zuòyòng? (《侵权责任法》对环境诉讼有何作用?) [How Does Tort Liability Law Affect Environmental Proceedings?], (Env’t & Natural Res. Law Research Inst. of China, Univ. of Political Sci. & Law), Jan. 7, 2010 (on file with author). Article 124 of the General Principles of Civil Law (enacted in 1986) provides the following: “Any person who pollutes the environment and causes damage to others in violation of state provisions for environmental protection and the prevention of pollution shall be subject to civil liability in accordance with the law.” *Id.* The first paragraph of Article 41 of the Environmental Protection Law (enacted in 1989) provides: “A unit that has caused an environmental pollution hazard shall have the obligation to eliminate it and make compensation to the unit or individual that suffered direct losses.” *Id.*

119. *Id.*

120. *Id.*

121. *Id.*; see also Moser & Tseming Yang, *supra* note 8, at 10,897.

122. *Id.*

123. *Id.*

124. Joel Tickner et al., THE PRECAUTIONARY PRINCIPLE IN ACTION: A HANDBOOK (1st ed. 1998), available at <http://www.biotech-info.net/handbook.pdf>.

1970s and is based on the German principle of *Vorsorge*, which means foresight.<sup>125</sup> The basic rationale of the precautionary principle is that “[t]hose who have the power, control, and resources to act and prevent harm should bear that responsibility.”<sup>126</sup> Additionally, the precautionary principle encourages governments to address issues concerning human health and the environment in advance of science proving the causal link.<sup>127</sup>

The TLL legislation is not the first time that China has used the burden-shifting principle. This principle is noted in Article 86 of China’s Solid Waste Pollution Control Law,<sup>128</sup> enacted in 1996 and amended in 2004, as well as in Article 87 of the Water Pollution Control Law, enacted in 1984 and amended in 1996 and 2008.<sup>129</sup> Because it is difficult to prove causation in environmental tort cases, this shift alleviates pressure on victims and places a heavy burden on defendants.<sup>130</sup> Robert Percival, a leading American environmental law scholar, argues that the common law liability for environmental torts is “too crude a vehicle to compensate those exposed to environmental hazards”<sup>131</sup> and that China’s burden-shifting mechanism is a way to overcome the “causation conundrum,” which is a major hurdle in environmental tort law cases.<sup>132</sup>

### C. *The Purpose of the TLL Under Article 1 is to “Prevent and Punish”*

Article 1 of the General Provisions chapter of the TLL states that in addition to promoting “social harmony and stability,” the purpose of the TLL is to “prevent and punish tortious conduct.”<sup>133</sup> The TLL does not specifically address this purpose or reference back to Article 1 within the specific articles that follow the General Provisions chapter.<sup>134</sup> Additionally, the SCNPC did not provide any notes or comments regarding the TLL legislation.<sup>135</sup> Thus, a critical issue going forward is that courts do not have a mechanism to enforce the punishment purpose set forth in Article 1 of the General Provisions.

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125. *Id.*; see also Percival, *supra* note 15, at 23.

126. Tickner et al., *supra* note 124, at 4.

127. Monique Lee Hawthorne, Comment, *Confronting Toxic Work Exposure in China: The Precautionary Principle and Burden Shifting*, 37 ENVTL. L. 151, 167 (2007).

128. Robert V. Percival, *Liability for Environmental Harm and Emerging Global Environmental Law*, 25 MD. J. INT’L L. 37, 43–44 (2010).

129. *Id.*

130. *Id.*

131. *Id.* at 42.

132. *Id.* at 45.

133. TLL, *supra* note 5, art. 1.

134. *Id.*

135. Koziol & Yan Zhu, *supra* note 13, at 337.

V. CHINA SHOULD AMEND THE TLL TO ALLOW FOR THE REMEDY OF PUNITIVE DAMAGES IN ENVIRONMENTAL POLLUTION CASES

In this Part, I argue that China should amend the TLL to add a punitive damages remedy for environmental pollution torts cases in which the polluter has knowledge that its activities does not meet environmental regulations yet continues to pollute. In section A, I provide an introduction to the proposal. In section B, I argue that the SCNPC should use Article 47 in the Products Liability section as its guide because Article 47 addresses the “punish” language set forth in the purpose section of the TLL and provides an ex ante deterrent mechanism that is more effective than compensatory damages alone. In section C, I provide support for this proposal by arguing the following: (1) adding punitive damages would fix the lack of continuity between the stated purpose of the TLL and the environmental torts chapter; (2) the availability of criminal sanctions as punishment in previous environmental laws has not sufficiently punished and deterred polluters; (3) allowing the remedy of punitive damages will encourage litigation and serve as a check on corporate polluters; and (4) amending the already-existing TLL with a punitive damages provision for environmental pollution torts would be more efficient and more cost-effective than starting from scratch and drafting an environmental compensation law. In section D, I recognize the potential rebuttal arguments and respond to each.

*A. Introduction to Proposal*

Punitive damages are an effective means of empowering individual citizens by punishing and deterring tortious actors.<sup>136</sup> Also, punitive damages are not mutually exclusive with strict liability systems.<sup>137</sup> Although the SCNPC relied heavily on continental European law in drafting the TLL,<sup>138</sup> the punishment language detailed in the General Provisions falls under the Anglo-American tradition.<sup>139</sup> While Article 47 under the Products Liability chapter expressly gives victims the right to claim punitive damages in a products liability tort action,<sup>140</sup> Articles 65 through

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136. Rustad, *supra* note 22, at 461.

137. David G. Owen, *Punitive Damages in Products Liability Litigation*, 54 MICH. L. REV. 1258, 1258–60 (1975); see also James D. Ghiardi & John J. Kircher, *Punitive Damage Recovery in Products Liability Cases*, 65 MARQ. L. REV. 1, 61–82 (1981) (analyzing when punitive damages should be awarded in strict liability cases).

138. See *supra* note 13.

139. Helmut Koziol, *Punitive Damages: Admission into the Seventh Legal Heaven or Eternal Damnation? Comparative Report and Conclusions*, in PUNITIVE DAMAGE: COMMON LAW AND CIVIL LAW PERSPECTIVES 275, 275–80 (2009).

140. TLL, *supra* note 5. Article 47 provides: “Where a manufacturer or seller knowing any defect of a product continues to manufacture or sell the product and the defect causes a death or any

68 of the Liability for Environmental Pollution chapter are silent regarding punitive damages.<sup>141</sup> Article 15, the remedies provision under the General Provisions chapter, is also silent regarding punitive damages.<sup>142</sup>

Helmut Koziol and Yan Zhu are critical of the punishment language in the TLL.<sup>143</sup> Specifically, Koziol and Zhu argue that punitive damages should not be awarded where the underlying theory of liability is strict liability and that “[m]entioning the goal of punishment increases the risk of accepting punitive damages . . . .”<sup>144</sup> I take the opposite position and argue that the remedy of punitive damages is an appropriate tool and propose that because the TLL does not identify a mechanism to fulfill the punishment purpose of the TLL, the SCNPC should clarify the TLL’s purpose and amend the TLL to allow for punitive damages for environmental pollution torts.

*B. The SCNPC Should Amend the TLL to Include Punitive Damages as a Remedy for Environmental Pollution Torts*

The SCNPC should amend the TLL to address how the prevention and punishment language in the General Provisions corresponds to the environmental tort liability articles.<sup>145</sup> In clarifying how the prevention and punishment provision should apply to the environmental tort liability articles, the amendment by the SCNPC should apply the language from Article 47 of the Products Liability chapter to the language of the Liability for Environmental Pollution chapter because the underlying liability scheme—strict liability—is the same.<sup>146</sup>

As to the punitive damages remedy, Article 47 provides the following: “Where a manufacturer or seller *knowing* any defect of a product *continues* to manufacture or sell the product and the defect causes a death or any serious damage to the health of another person, the victim shall be entitled to require the corresponding punitive compensation.”<sup>147</sup> Thus, a

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serious damage to the health of another person, the victim shall be entitled to require the corresponding punitive compensation.” *Id.* art. 47.

141. *Id.*

142. *Id.* art. 15.

143. Koziol & Yan Zhu, *supra* note 13, at 336.

144. *Id.*

145. Alternatively, the SCNPC or the Supreme People’s Court should consider issuing an interpretation regarding how the language of prevention and punishment in the general provision should correspond to the environmental tort liability provisions in Articles 65 through 68. For an overview of interpretive authority in China, see JIANFU CHEN, *supra* note 6, at 198–201. Because China follows the Civil Law Tradition and major judicial opinions do not carry precedential weight, the Supreme People’s Court often releases statements to advise the lower courts how certain laws should be interpreted.

146. *See* TLL, *supra* note 5, art. 47, Product Liability (“Where a defective product causes any harm to another person, the manufacturer shall assume the tort liability.”).

147. *See* TLL, *supra* note 5 (emphasis added).

manufacturer's knowledge plus a failure to act allows for the imposition of punitive damages.<sup>148</sup>

This equation is similar to how the courts in the U.S. have interpreted the failure to act, which gives rise to the imposition of punitive damages in strict liability cases.<sup>149</sup> In determining whether there is liability for punitive damages in tort actions under U.S. law, American legal scholar Gerald W. Boston has stated,

[T]he essential tests boil down to two basic groupings: (1) punitive liability based on express malice, ill will, or intent to cause harm to the plaintiff; and (2) recklessness, the creation of a high probability of harm to others when the defendant knows or has reason to know of the risk and remains consciously or flagrantly indifferent to the risk.<sup>150</sup>

Boston has further noted that for strict liability cases, the appropriate grouping is the second. The "knowledge" plus "continuance" formula set forth in the TLL Article 47 aligns most closely with the "consciously . . . indifferent" language of Boston's second set of criteria.

Imposing punitive damages will encourage attorneys and citizens to bring more lawsuits. The fear of litigation and the potential for punitive damages will give citizens a voice, punish polluters, and deter future polluting activities.<sup>151</sup>

### *C. Support for Proposal*

#### 1. Lack of Continuity in Statutory Language

A lack of continuity exists between the stated purpose of the law to "prevent and punish" and the specific guiding statutory language in the Liability for Environmental Pollution Torts chapter: the TLL as written does not provide a mechanism to punish and deter polluters. This lack of continuity between the stated purpose of the law and the specific articles fulfilling that purpose is representative of what leading Chinese environmental expert and advocate Professor Wang Canfa (Professor Wang) calls "superficial" legislation.<sup>152</sup> Professor Wang notes that Chinese leg-

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148. *Id.*

149. GERALD W. BOSTON, PUNITIVE DAMAGES IN TORT LAW, Part II, ch. 19, 25 (1993).

150. *Id.* at 25.

151. Rustad, *supra* note 22, at 461. Rustad argues that tort law "serves a public purpose beyond those of the immediate parties to the lawsuit." *Id.* He further argues, "[O]nly punitive damages can establish that 'tort does not pay' by hitting the rich and powerful in the bank account." *Id.*

152. Wang Canfa, *supra* note 41, at 170.

islation is sometimes “presented in an attempt to meet international trends and results in superficial influence.”<sup>153</sup> He further states,

[W]ith this frivolous legislation comes an emphasis on substantial, subject-driven legislation, ignoring the needed procedural and implementation mechanisms. There are many substantial environmental laws in China with inadequate procedural laws. These laws contain many general provisions with a few liability provisions, *incorporating small fines that do not deter violations*.<sup>154</sup>

From this statement, Professor Wang recognizes that the environmental laws in China lack an appropriate deterrent mechanism.

## 2. Criminal Sanctions Have Not Adequately Punished and Deterred

In 1997, China amended its criminal law and made major changes in its special provisions.<sup>155</sup> Articles 338 to 346 define environmental crimes,<sup>156</sup> and of particular importance in the context of environmental pollution by industrial facilities are Articles 338 and 339. Article 338 covers violations for the “discharge, dumping, or treating of radioactive waste . . . toxic substances, or other hazardous waste on land or into the water bodies or the atmosphere.”<sup>157</sup>

Article 339 covers violations for dumping, storing, or processing solid waste from abroad in China in violation of state regulations.<sup>158</sup>

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153. *Id.*

154. *Id.* (internal citations omitted & emphasis added).

155. Gu Minkang, *Criminal Law, in CHINESE LAW*, *supra* note 25, at 606.

156. MCELWEE, *supra* note 65, at 249–51. Specifically, Article 338 provides:

Whoever releases, dumps, or disposes of radioactive wastes, wastes containing pathogen of contagious diseases, and toxic materials or other dangerous wastes into land, water, and the atmosphere in violation of state stipulations, causing major environmental pollution accidents, heavy losses to public and private property, or grave consequences of personal deaths and injuries shall be sentenced to not more than three years of fixed-term imprisonment or criminal detention, and may in addition or exclusively be sentenced to a fine; and in exceptionally serious consequences, not less than three years and not more than seven years of fixed-term imprisonment, and a fine.

Zhōnghuá rénmín gònghéguó xíngfǎ (中华人民共和国刑法) [Criminal Law of the People’s Republic of China] (promulgated by the Nat’l People’s Cong., July 1, 1979, amended Mar. 14, 1997, effective Oct. 10, 1997), art. 338 [hereinafter Chinese Criminal Law], *translated in LAWINFOCHINA, available at* [www.lawinfochina.com/display.aspx?lib=law&id=354](http://www.lawinfochina.com/display.aspx?lib=law&id=354).

157. Gu Minkang, *supra* note 155, at 631.

158. *Id.*; MCELWEE, *supra* note 65, at 249. Specifically, Article 339 provides:

Those who dump, store or process solid waste from abroad in the country in violation of state regulations are to be sentenced to not more than five years of fixed-term imprisonment or criminal detention, and in addition be sentenced to a fine. Those whose acts cause serious environmental pollution and major damages to public or private properties or seriously endanger people’s health are to be punished by sentence of not less than five years and not more than 10 years of fixed-term imprisonment, and in addition be sentenced to a fine. Those whose acts have especially serious consequences are to be sen-

Criminal fines or imprisonment are available depending on the severity of the crime.<sup>159</sup> In addition, in 2006, the Supreme People's Court issued an interpretation "setting a relatively low threshold for the application of Articles 338 and 339 in the case of 'major environmental pollution accidents.'"<sup>160</sup>

But Articles 338 and 339 have been inadequate in punishing and deterring polluters. Professor Wang notes that for the years 1998 to 2002, for example, of the 387 serious environmental accidents deserving criminal punishment, less than twenty cases were prosecuted.<sup>161</sup> Thus, if the laws providing punishment for environmental crimes are not working and the purpose of the TLL is to prevent and punish tortious conduct, the imposition of punitive damages in environmental tort litigation could provide a viable alternative for punishing polluters.

### 3. Punitive Damages Will Encourage Litigation

Bringing a lawsuit is costly.<sup>162</sup> Additionally, many pollution victims are unaware of their rights.<sup>163</sup> To help overcome these hurdles, punitive damages in environmental pollution cases should be allowed to incentivize citizens to bring lawsuits against polluters.

Chinese legal scholar Yuhong Zhao argues that civil environmental litigation serves an essential function in the dispute resolution process and has three positive effects.<sup>164</sup> First, it helps improve environmental law-making. Zhao notes that legislation is "at best imprecise" and "often contain[s] ambiguities, irreconcilable provisions and indefinite standards."<sup>165</sup> Significantly, Zhao offers that "litigation produces far more

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tenced to more than 10 years of fixed-term imprisonment, and in addition be sentenced to a fine.

Chinese Criminal Law, *supra* note 156, art. 339.

159. MCELWEE, *supra* note 65, at 249.

160. *Id.* at 250.

161. Wang Canfa, *supra* note 41, at 168. Additionally, Stalley notes that "to date it is still uncommon for enterprise managers or government officials to be brought up on criminal charges for environmental incidents." STALLEY, *supra* note 25, at 37. *But see* MCELWEE, *supra* note 65, at 252 (noting that "[t]he pace of criminal prosecution has quickened considerably . . . in recent years").

162. Yan Weijun (闫卫军), È lùn wōguó qīnquán zérèn fǎ yīnrù chéngfǎ xíng péicháng zhìdù de bìyào xìng (略论我国侵权责任法引入惩罚性赔偿制度的必要性) [*On the Importance of Introducing Punitive Damages into our Tort Law System*], in Qīnquán zérèn fǎlǜ zhìdù bǐjiào yánjiū (侵权责任法律制度比较研究) [COMPARATIVE STUDIES IN TORT LAW], 66, 69 (Yóu Quànróng (游功荣) ed., 2010).

163. Chen Danyan (陈丹艳), Qiǎn tán zài wōguó qīnquán fǎ zhōng shèlì chéngfǎ xíng péicháng zhìdù (浅谈在我国侵权法中设立惩罚性赔偿制) [*On the Establishment of Punitive Damages in our Tort Law*], in Qīnquán zérèn fǎlǜ zhìdù bǐjiào yánjiū (侵权责任法律制度比较研究) [COMPARATIVE STUDIES IN TORT LAW], 80, 80 (Yóu Quànróng (游功荣) ed., 2010).

164. Yuhong Zhao, *supra* note 59, at 174.

165. *Id.*

significant impact than conciliation or mediation on the society as a whole, but especially on policy makers, by exposing openly and substantively the defects or problems of existing environmental law and its implementation.”<sup>166</sup> Alex Wang echoes Zhao and offers that lawsuits “put the spotlight on gaps in legislation and drive legal reform.”<sup>167</sup>

Second, litigation “creates ripple effects that help rais[e] public awareness.”<sup>168</sup> When the media reports stories of pollution victims being compensated through the judicial process, other victims will pursue litigation because they are then aware of their environmental rights.<sup>169</sup>

Third, litigation puts pressure on the polluting industry. Zhao argues that until the costs can be shifted from the victims of pollution to the polluters through litigation, the industry will not take pollution prevention seriously.<sup>170</sup> Specifically, Zhao states that most in the industry are “not serious about the consequence of their polluting activities because the current legal mechanisms do not seem to hold them fully liable for the pollution caused and the resultant loss suffered by the victims.”<sup>171</sup> Within the framework of litigation, allowing for the remedy of punitive damages would encourage more citizens to bring suits, thus holding industry accountable for pollution prevention and regulating corporate behavior.<sup>172</sup>

Moreover, litigation gives the masses a voice: it provides an outlet for people to seek redress for harms caused and helps alleviate the potential for social unrest. Environmental problems have led to greater social unrest, which has been an issue of concern in China. According to Alex Wang, there were 50,000 disputes over environmental issues in 2005 alone.<sup>173</sup> Additionally, “[f]rom 2001 to 2005, Chinese environmental authorities received more than 2.53 million letters and 430,000 visits from 597,000 petitioners seeking environmental redress.”<sup>174</sup> In certain cases, citizens have taken to the streets and some protests have turned violent.<sup>175</sup> For example, in 2005, in the Zhejiang Province, some 30,000 to 40,000 villagers “swarmed 13 chemical plants, broke windows and overturned buses, attacked government officials, and torched police cars.”<sup>176</sup>

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166. *Id.*

167. Alex Wang, *Green Litigation in China Today*, CHINA DIALOGUE (July 18, 2011), <http://www.chinadialogue.net/article/show/single/en/4413>.

168. Yuhong Zhao, *supra* note 59, at 174–75.

169. *Id.* at 175.

170. *Id.*

171. *Id.*

172. Xu Hua, *supra* note 19, at 71.

173. Alex Wang, *supra* note 19, at 200.

174. *Id.*

175. Economy, *supra* note 67, at 48.

176. *Id.*



In addition to making tort victims whole for harm suffered, environmental tort litigation achieves a broader social goal of impacting the behavior of polluters by putting pressure on them to cease polluting activities or to innovate with new technologies that lessen harm to human health. The pressure from litigation ultimately has a net positive impact on the environment. Thus, environmental tort litigation not only achieves China's purpose of recognizing individual rights but it also has a positive impact on the environment.

Litigation statistics show that Chinese citizens are litigating in greater numbers. Specifically, the number of environmental tort claims has been increasing 25% each year.<sup>177</sup> These statistics show that the Chinese want to use litigation as a tool to seek redress for environmental wrongs.

#### 4. Efficiency of Amending the TLL

It would be costly and inefficient to require the SCNPC to draft entirely new procedures that implement more effective deterrent mechanisms. But amending the TLL to allow for punitive damages in environmental pollution cases would give judges a straightforward mechanism in which to administer justice to victims of environmental pollution. There has been discussion among legal scholars in China to legislate a specific environmental compensation law.<sup>178</sup> That process, however, could take years. Former MEP leader Zhang claims that it would take ten years to draft an environmental compensation law.<sup>179</sup> Furthermore, when polluters are punished and have to pay punitive damages, they will be deterred from polluting in the future and will be forced to innovate in order to curb future pollution. Ultimately, imposing punitive damages will provide a remedy for victims of environmental pollution torts and also improve the environment.

#### *D. Response to Potential Counterarguments Against Allowing Punitive Damages in Strict Liability Cases*

The majority of legal theorists, in both continental Europe and the U.S., speak against allowing punitive damages in cases of strict liability.<sup>180</sup> Specifically, the punishment and prevention language of the gener-

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177. Qun Du, *supra* note 44, at 428.

178. Meng Si, *supra* note 76.

179. *Id.* As further proof that it could take upwards of a decade to draft an environmental compensation law, it took the NPC eight years to draft the TLL. See *Long-awaited Civil Rights Law Gets Nod*, *supra* note 107; see also *Draft Tort to Protect Civil Rights*, *supra* note 107.

180. Koziol, *supra* note 139, at 308 (arguing that "pure strict liability should not be accepted under the law of punitive damages" because in comparison to U.S. law, for example, the imposition

al provisions in the TLL raised concerns from Helmut Koziol and Yan Zhu. In their article, *Background and Key Contents of the New Chinese Tort Liability Law*, Koziol and Yan Zhu warned that the general provisions should have emphasized that “compensation should be the basic aim of tort law in order to avoid potential misunderstanding and controversies”<sup>181</sup> and that “[m]entioning the goal of punishment increases the risk of accepting punitive damages and this should be avoided as quite a number of weighty arguments speak out against them.”<sup>182</sup> In particular, they spoke against punitive damages where there is a strict liability scheme.<sup>183</sup>

The primary theoretical argument against allowing punitive damages in a strict liability claim is that strict liability and punitive damages are “incompatible.”<sup>184</sup> Central to the incompatibility argument is the notion that imposing punitive damages is not appropriate because the theory of strict liability is not fault-based.<sup>185</sup> Opponents argue that while misbehavior is not a prerequisite to the finding of guilt under strict liability, the imposition of punitive damages relies on the guilty party’s misbehavior; thus, punitive damages as a remedy for tortious conduct fits more squarely under negligence principles.<sup>186</sup>

But American legal scholar David G. Owen rebuts the incompatibility argument and argues that punitive damages are an appropriate legal tool in strict liability tort cases, especially in the case of intentional or reckless conduct.<sup>187</sup> While he writes in the context of products liability litigation, he readily notes that this rationale can be applied to other causes of action, including nuisance, trespass to land, and ultra-hazardous activities. Owen’s thesis is that strict liability deals appropriately with the “innocent” manufacturer because “liability is imposed even though the manufacturer has exercised due care.”<sup>188</sup> He also argues

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of punitive damages is predicated on culpability, intent, or recklessness); *see also* Mark A. Geistfeld, *Punitive Damages, Retribution, and Due Process*, 81 S. CAL. L. REV. 263, 273–74 (2008) (arguing that unlike fault-based principles, strict liability does not “specify how safely the duty-holder should behave,” and thus, punitive damages should not be afforded); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 879 (1998) (arguing that damages should equal harm under strict liability and thus a punitive damage award would over-compensate); W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285, 310 (1998) (arguing that “compensatory damages alone provide adequate deterrence”).

181. Koziol & Yan Zhu, *supra* note 13, at 336.

182. *Id.*

183. *Id.*

184. Owen, *supra* note 137, at 1268–70.

185. Koziol & Yan Zhu, *supra* note 13, at 337.

186. *Id.*

187. Owen, *supra* note 137, at 1258–60.

188. *Id.* at 1259.

that “the principles of strict liability are ill-equipped to deal with problems at the other end of the culpability scale” when the manufacturer is intentional or reckless regarding consumer safety.<sup>189</sup> Owen argues that the appropriate legal tool to combat this second scenario is the punitive damages remedy.<sup>190</sup>

To support his thesis, Owen offers two primary supporting points. First, he argues that strict liability tort theory is not a delimiting factor on other remedies that might be available if the manufacturer is shown to have acted with aggravated fault.<sup>191</sup> Second, Owen argues that the incompatibility argument is premised on the faulty assumption that the claim for punitive damages must be established by facts “identical to those supporting the underlying claim for compensatory damages.”<sup>192</sup> Gerald Boston echoes Owen’s arguments, submitting that “[t]he reason why punitive damages are recoverable in strict liability cases is because the availability of punitive damages does not turn on the essential character or nature of the underlying tort.”<sup>193</sup>

Additionally, in contrast to what legal theorists have opined, U.S. courts have generally upheld punitive damage awards in the context of strict products liability cases.<sup>194</sup> Indeed, Boston argues that in the context of products liability “the majority of courts have held that punitive damages may be recovered when the plaintiff’s underlying claim is founded on strict liability.”<sup>195</sup> Courts have also upheld punitive damages in environmental pollution cases in which strict liability is the underlying theory of liability.<sup>196</sup>

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189. *Id.*

190. *Id.* at 1269.

191. *Id.*

192. *Id.*

193. BOSTON, *supra* note 149, at 24–25.

194. *Id.*; *see, e.g.*, Masaki v. General Motors Corp., 780 P.2d 566, 572–73 (Haw. 1989) (“We see no reason why punitive damages may not also be properly awarded in a products liability action based on the underlying theory of strict liability where the plaintiff proves the requisite aggravating conduct on the part of the defendant. Although strict liability dispenses with the need to prove fault in order to find the defendant liable, it does not preclude consideration of the defendant’s aggravating conduct for the purpose of assessing punitive damages . . . . Thus, we find no logical or conceptual difficulty in allowing a claim for punitive damages in a products liability action based on strict liability.”); *see also* Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 710–11, 713–15 (1967) (holding that defendant was strictly liable in tort because it failed to properly warn of its product’s dangerous effect and that punitive damages were available to plaintiff because defendant’s conduct “showed an utter disregard of possible injury to others” but continued to market and sell its product); Fischer v. Johns-Manville Corp., 103 N.J. 643, 655 (1986) (“Despite their differences—one [strict liability] going to the theory of liability, the other [punitive damages] bearing on the form and extent of relief—they are not mutually exclusive nor even incompatible.”).

195. BOSTON, *supra* note 149, at 23.

196. *See, e.g.*, Atlas Chem. Indus., Inc. v. Anderson, 514 S.W.2d 309, 316 (Tex. Civ. App. 1974), *aff’d*, 524 S.W.2d 681 (Tex. 1975) (concluding that strict liability was the appropriate liability

The Oklahoma Supreme Court, in *Thiry v. Armstrong World Industries*, an asbestos case, summarized this argument best:

Punitive damages may be assessed against the manufacturer of a product injuring the plaintiff if the injury is attributable to conduct that reflects reckless disregard for the public safety. "Reckless disregard" is not to be confused with inadvertent conduct. To meet this standard the manufacturer must either be aware of, or culpably indifferent to, an unnecessary risk of injury. Awareness should be imputed to a company to the extent that its employee[s] possess such information. Knowing of this risk, the manufacturer must also fail to determine the gravity of the danger or fail to reduce the risk to an acceptable minimal level. "Disregard for the public safety" reflects a basic disrespect for the interests of others.<sup>197</sup>

Thus, a company's failure to act when it has knowledge that its risky activities will cause harm is the critical factor in allowing punitive damages in strict liability actions.

Second, opponents argue that imposing punitive damages unjustifiably awards the plaintiff with a windfall.<sup>198</sup> This argument goes as follows: if a company is forced to pay exemplary damages above and beyond compensatory damages to one plaintiff, then subsequent plaintiffs will not be compensated for their injuries.<sup>199</sup>

China, however, could identify a creative solution to overcome what some perceive as a windfall. First, it could take the punitive award and create a trust for restoration or compensation. Second, since enforcement at the administrative level has been criticized as ineffective,

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ty theory and that punitive damages were available because the pollutants were intentionally discharged when the defendant dumped industrial waste on sixty acres of plaintiff's land). Significantly, the court noted:

We . . . believe the public policy of this State to be that however laudable an industry may be, its owners or managers are still subject to the rule that its industry or its property cannot be so used as to inflict injury to the property of its neighbors . . . . We know of no acceptable rule of jurisprudence which permits those engaged in important and desirable enterprises to injure with impunity those who are engaged in enterprises of lesser economic significance.

*Id.*; see also *Exxon v. Yarema*, 516 A.2d 990, 1006 (Md. Ct. Spec. App. 1986) (holding that defendant was strictly liable and upholding the resulting punitive damage award because it created an abnormally dangerous activity when it placed large underground gasoline tanks in close proximity to drinking wells of private residences); *Branch v. Western Petroleum, Inc.*, 657 P.2d 267, 277-78 (Utah 1982) (holding that defendant was strictly liable in a water pollution case and that the punitive damage award given to plaintiff property owners was appropriate because defendant acted with "reckless indifference and disregard of the law" when it continued to discharge waste water that damaged plaintiffs' property).

<sup>197</sup> *Thiry v. Armstrong World Indus.*, 661 P.2d 515, 518-19 (Okla. 1983) (internal citations omitted).

<sup>198</sup> Koziol & Yan Zhu, *supra* note 13, at 337.

<sup>199</sup> *Id.*

China could give the punitive award to the MEP or EPBs to assist with administrative enforcement of environmental regulations.

Third, opponents argue that under strict liability, the plaintiff has already been made whole by compensatory damages. Mitchell Polinsky and Steven Shavell argue that under strict liability, damages should equal harm, and thus, punitive damages are inappropriate because they over-compensate.<sup>200</sup> Specifically, they opine that “various socially undesirable consequences will result” if a defendant does not pay damages that are equal to the harm that the defendant has caused.<sup>201</sup> Damages should equal harm caused because potential injurers will, in theory, have socially correct incentives to take precautions.<sup>202</sup>

But Polinsky and Shavell’s examples and explanations fail to recognize the special harm in environmental pollution cases. Specifically, their argument does not take into account the effects of pollution on natural resources and the significant costs that result from pollution—both for remedial efforts and public health problems. Missing in their calculation are the permanent costs to human health and the environment. Additionally, as noted earlier in this Comment, China faces an extraordinary financial burden to deal with environmental harms.<sup>203</sup>

Fourth, legal theorists and commentators argue that punitive damages allow for runaway awards that could bankrupt a particular industrial defendant. This argument is of particular importance in the context of China because China has generally placed economic development ahead of the environment with a “pollute now, pay later” mentality.<sup>204</sup>

China, however, could resolve this issue by instituting a cap with a single-digit ratio, similar to how the U.S. Supreme Court has shaped limits on punitive damage awards in the U.S.<sup>205</sup> The idea of caps was discussed during the legislative process of the TLL.<sup>206</sup> Xu Hua argues that punitive damages should equal double the compensatory damages.<sup>207</sup>

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200. Polinsky & Shavell, *supra* note 180, at 877–83.

201. *Id.* at 878.

202. *Id.* at 879.

203. *See supra* text accompanying notes 41–43.

204. STALLEY, *supra* note 25, at 38–40.

205. In *BMW of North Dakota, Inc. v. Gore*, 517 U.S. 559 (1997), the Court held that punitive damage awards should be subject to three guideposts: (1) degree of reprehensibility; (2) the ratio of the amount of the punitive damage award to the damage suffered; and (3) consideration of civil penalties that could be enforced for the defendant’s conduct. Subsequent to *Gore*, in *State Farm Mutual Auto Insurance v. Campbell*, 538 U.S. 408 (2003), the Court built on the *Gore* decision and held that punitive damages awards should be only in a single-digit ratio to the compensatory damages awarded. In *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), the Court affirmed its holding in *State Farm* by limiting the damages in the context of environmental tort action to a single-digit ratio.

206. Xu Hua, *supra* note 19, at 73.

207. *Id.*

Moreover, all trials in China are bench trials.<sup>208</sup> Thus, the fear of runaway punitive damage awards by over-sympathetic juries would not be a concern in China.

Finally, American legal scholar Kip Viscusi argues that punitive damages do not have a deterrent effect and do not accomplish the goal of efficient deterrence in environmental and safety cases.<sup>209</sup> Specifically, punitive damages are not needed for deterrence, and compensatory damages are generally adequate for deterrence.<sup>210</sup> Government regulation provides additional incentives for safety.<sup>211</sup>

But Viscusi recognizes an exception to his argument, noting that punitive damages can be effective deterrent measures when there are enforcement errors.<sup>212</sup> The enforcement error exception is of particular relevance to China. As noted earlier in this Comment, the principle problem in China's environmental protection regime is the lack of enforcement of environmental statutes.<sup>213</sup> Although a complex set of environmental laws exist, they are not properly enforced.<sup>214</sup>

Because of the poor implementation and enforcement of other environmental legislation, tort law could be used as a means to benefit Chinese society. An amendment is a simpler, straightforward way of giving local judges the tools they need to administer justice. Not only will the administration of justice remedy victims of tort but it will also have a positive impact on the environment.

In sum, China must consider amending the TLL to address the punishment and prevention purpose in the general provisions of the TLL. If industry fears the imposition of punitive and preventative measures, it will be less inclined to pollute. Not only will this decrease in pollution improve human health but it will also have a residual effect on the environment as a whole. Additionally, by addressing environmental concerns, China will benefit economically in the long run because future costs associated with environmental harm will decrease.

## VI. CONCLUSION

By enacting the TLL, the SCNPC has put into place national laws for victims of environmental torts to seek recovery. The TLL is an aggressively written statute because it implements strict liability and bur-

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208. JIANFU CHEN, *supra* note 6, at 151.

209. *See generally* Viscusi, *supra* note 180, at 288–90.

210. *Id.* at 310.

211. *Id.* at 317.

212. *Id.* at 311–12.

213. *See* Wang Canfa, *supra* note 41, at 164–73.

214. *See supra* Part III.

den shifting and its stated purpose is to prevent and punish tortious conduct. But as currently written, the TLL does not provide a mechanism to achieve its stated purpose to punish. In order to achieve this stated purpose, the SCNPC should amend the TLL to include the remedy of punitive damages in environmental pollution cases. In drafting the amendment, the SCNPC should model the punitive damages remedy on Article 47 of the Product Liability chapter because the “knowledge” plus “continuance” formula set forth in Article 47 reflects the appropriate punishment mechanism that also can be applied to environmental pollution cases.

The recent Dalian oil spill is an example of how Chinese citizens seeking compensation for environmental torts still have to overcome barriers to justice even though the SCNPC has enacted laws to protect them. Claims for damages related to the spill face political, administrative, and legal challenges.<sup>215</sup> In September 2010, two months after the spill, a Beijing attorney noted in an interview that China has provisions in place for compensation for environmental torts.<sup>216</sup> He went on to state the following: “Our state-owned companies are spoiled over and over again by the government. They unabashedly transfer huge environmental costs to society . . . Ordinary people are like a small skiff in the ocean against the aircraft carrier PetroChina.”<sup>217</sup>

The ultimate success of the TLL depends on the use of the punitive damages remedy. While China has made great strides toward using the law to control harmful behaviors and empower citizens, the SCNPC could make an even stronger statement by amending the TLL to include the remedy of punitive damages for environmental pollution torts. As noted previously in this Comment, one of the major reasons that China faces an environmental and public health crisis is that environmental laws and regulations are not properly enforced. Polluters who ignore laws and regulations must be held accountable. By amending the TLL, the SCNPC could meet its goal of punishing polluters by allowing for punitive damages in cases in which the polluter has knowledge of its polluting activities but continues to pollute and disregards the harm created to others. Ultimately, allowing punitive damages in environmental pollution cases under the TLL is one step that could have a major impact in providing justice for victims of environmental pollution torts.

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215. Zhang Ruidan, *Oil Spill and a Brick Wall: Fishing Companies Imperiled by the July Disaster Have Made No Progress in Challenging 'Aircraft Carrier' PetroChina*, CAIXIN ONLINE (Sept. 16, 2010), available at <http://english.caixin.cn/2010-09-16/100181926.html>.

216. *Id.*

217. *Id.*