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## Escaping Liability via Forum Non Conveniens: ConocoPhillips's Oil Spill in China

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ESCAPING LIABILITY VIA FORUM NON CONVENIENS: CONOCOPHILLIPS’S OIL  
SPILL IN CHINA

CHENGLIN LIU\*

*In 2011, a year after British Petroleum (BP)’s oil spill in the Gulf of Mexico, ConocoPhillips’s subsidiary in China caused a massive oil spill in the Bohai Sea. A group of fishermen suffered severe property damage as a result of the oil spill. After a failed attempt to have their complaint heard in a Chinese court, the fishermen sued ConocoPhillips in the United States District Court in Houston, Texas. It is very likely that the Houston District Court will deem the Chinese courts the more appropriate forum for this case and grant ConocoPhillips’s motion for forum non conveniens dismissal. This article argues that the Chinese courts are neither an available nor an adequate forum for mass tort cases involving environmental damage – particularly when the defendant is a multi-national corporation (MNC). In a forum non conveniens analysis of these cases, a superficial examination of Chinese law as written is insufficient, because the laws on the books in China are often disregarded due to political influence and fear of the negative impact of open trial on economic growth. This article further contends that U.S. courts should allow for a substantial examination of how these laws are implemented when deciding the adequacy of a Chinese forum. Finally, it is in the interest of U.S. courts to impose liability on U.S. corporations that inflict tortious acts in foreign countries.*

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## INTRODUCTION: A TALE OF TWO OIL SPILLS

In April 2010, the British Petroleum Company's Gulf oil spill received enormous attention around the world.<sup>1</sup> Journalists broadcast live images from underwater cameras that were monitoring the spill.<sup>2</sup> BP's stock price fell from over \$60 per share in April 2010 to \$27 in June,<sup>3</sup> presumably due to shareholders' concerns about the subsequent legal liability and cleanup costs. Under pressure, BP agreed to set up a \$20 billion compensation fund and promised to provide additional funds if that amount fell short of covering claims.<sup>4</sup> As of December 31, 2012, BP had spent over \$14 billion in operational response and cleanup costs.<sup>5</sup> In addition, on November 15, 2012, BP pleaded guilty to twelve felony counts and agreed to pay more than \$4 billion in criminal penalties.<sup>6</sup> The guilty plea prompted the Environmental Protection Agency (EPA) to temporarily suspend BP from entering into new contracts with the United States federal government.<sup>7</sup>

In June 2011, when a subsidiary of ConocoPhillips Company – based in Houston, Texas – caused an oil spill in the Bohai Sea in China, the company managed to conceal the spill for more than a month.<sup>8</sup> There were few reports of the spill in the American media.<sup>9</sup> Likely due to a

<sup>1</sup> See, e.g., Russell Gold et al., *Oil Spills Into Gulf After Rig Disaster*, WALL ST. J., Apr. 26, 2010, at A4; *Oil Rig Blaze off Louisiana Leaves at Least 11 Missing*, BBC NEWS (Apr. 21, 2010, 10:35 PM), <http://news.bbc.co.uk/2/hi/americas/8634874.stm>; Joshua Keating, *What Happens to the Oil After an Oil Spill?*, FOREIGN POL'Y (Apr. 27, 2010), [http://www.foreignpolicy.com/articles/2010/04/27/what\\_happens\\_to\\_the\\_oil\\_after\\_an\\_oil\\_spill](http://www.foreignpolicy.com/articles/2010/04/27/what_happens_to_the_oil_after_an_oil_spill).

<sup>2</sup> Lesa Jansen & Brianna Keilar, *Markey: Spillcam was Game-Changer in Disaster Response*, CNN (Apr. 20, 2011, 6:13 PM), <http://www.cnn.com/2011/POLITICS/04/20/markey.bp/index.html>.

<sup>3</sup> *Share Charts*, BRIT. PETROL., <http://www.bp.com/en/global/corporate/investors/investor-tools/share-charts.html> (last visited Oct. 21, 2013) (showing a closing share price of \$60.57 on Apr. 16, 2010, and \$27.67 on June 29, 2010).

<sup>4</sup> Robert J. Rhee, *A Financial Economic Theory of Punitive Damages*, 111 MICH. L. REV. 33, 72 (2012).

<sup>5</sup> *Deepwater Horizon Accident and Response*, BRIT. PETROL., <http://www.bp.com/en/global/corporate/gulf-of-mexico-restoration/deepwater-horizon-accident-and-response.html> (last visited Oct. 21, 2013).

<sup>6</sup> BP pleaded guilty to eleven counts of felony manslaughter and one count of felony obstruction of Congress. Press Release, U.S. Dep't Justice, BP Exploration and Production Inc. Agrees to Plead Guilty to Felony Manslaughter, Environmental Crimes and Obstruction of Congress Surrounding Deepwater Horizon Incident (Nov. 15, 2012) (on file with author), available at <http://www.justice.gov/opa/pr/2012/November/12-ag-1369.html>.

<sup>7</sup> Press Release, U.S. Env'tl. Prot. Agency, BP Temporarily Suspended from New Contracts with the Federal Government (Nov. 28, 2012) (on file with author), available at <http://www2.epa.gov/newsroom/news-releases> (follow "Releases by Date" hyperlink; then follow "2012" hyperlink; then follow "BP Temporarily Suspended..." hyperlink).

<sup>8</sup> Zhang Qi'an (张启安), *Zhonghaiyou he Kangfei Shexian Manbao Xinzeng Louyou Shigu* (中海油和康菲

lack of public awareness, the oil spill did not affect ConocoPhillips's stock market performance.<sup>10</sup> In July 2011, the Chinese State Oceanic Administration (SOA) classified 840 square kilometers of seawater as "Inferior Grade IV", because the oil concentration in the water was recorded as ranging between forty and eighty-six times greater than the historical background level.<sup>11</sup> Despite the SOA's finding, ConocoPhillips continued its operation, causing more oil to spill into the sea, and in August 2011, ConocoPhillips acknowledged that there were nine new oil spill sources.<sup>12</sup> By the company's own account, 115 cubic meters (700 barrels) of oil and 400 cubic meters (2,500 barrels) of mineral oil-based drilling mud were released into the seawater and onto the seabed.<sup>13</sup> While ConocoPhillips's estimate suggests that the Bohai Sea spill was far smaller than the BP oil spill in the Gulf of Mexico, no independent source has verified the amount of oil spilled.<sup>14</sup>

Chinese scientists have vigorously disputed ConocoPhillips's figures, and claim the impact of the spill actually could have exceeded that of BP's.<sup>15</sup> According to one expert, even if ConocoPhillips's estimate was accurate, the impact of the oil spill exceeded that of BP's in the Gulf because of the nature of the location where the spill occurred.<sup>16</sup> The Bohai Sea is twenty times smaller than the Gulf of Mexico and ten times shallower.<sup>17</sup> Because it is semi-closed, polluted water comes into contact with the Pacific Ocean at a low rate, and it takes longer for the concentration of oil and other contaminants to dilute.<sup>18</sup>

Even though the SOA did not release its own estimate, it declared ConocoPhillips's oil spill to be the most serious marine ecological incident to occur in China.<sup>19</sup> A year later,

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涉嫌瞒报新增漏油事故)[China National Offshore Corp. and ConocoPhillips Suspected to have Covered Up New Accidents of Oil Spill], SOHU CAIJING (搜狐财经) (Aug. 12, 2011, 12:49 PM), <http://business.sohu.com/20110812/n316194430.shtml>.

<sup>9</sup> A Lexis search using the terms "ConocoPhillips" and "Bohai" and "spill" reveals only nineteen articles published between the Los Angeles Times, The New York Times, the Wall Street Journal, and The Washington Post from July 6, 2011 through January 14, 2013.

<sup>10</sup> The oil spill was first noticed on June 4, 2011, with a new leak detected on June 17, 2011. Andrew Jacobs, *China Admits Extent of Spill from Oil Rig*, N.Y. TIMES, July 6, 2011, at A4. A Chinese microblogging site first reported the spill in late June 2011, and the state operator confirmed that a spill had occurred on July 1, 2011. *Id.* A review of ConocoPhillips's stock prices from this time shows a closing share price of \$55.15 on June 1, 2011, before the oil spill, \$58.51 on July 7, 2011, the day after the first news accounts of the spill in the major American newspapers, and \$51.81 on September 1, 2011, approximately two months after the spill was reported on in the media. *Stock Information*, CONOCOPHILLIPS Co., <http://www.conocophillips.com/investor-relations/stock-information/Pages/default.aspx> (last visited Oct. 28, 2013).

<sup>11</sup> Complaint at ¶ 20, *Cong v. ConocoPhillips Co.*, No. 4:12-cv-01976 (S.D. Tex. July 2, 2012).

<sup>12</sup> *Kangfei Chengren Faxian Jiuchu Xin Louyoudian (康菲承认发现九处新漏油点) [ConocoPhillips Admitted Nine More Sources of Oil Spill]*, WENHUI BAO (文汇报) (Aug. 22, 2011, 7:45 AM), <http://news.hexun.com/2011-08-22/132671033.html>.

<sup>13</sup> Complaint, *supra* note 11, at ¶ 25.

<sup>14</sup> *Zhuanjia Cheng Kangfei Yiyu Wuran Qiangdu Dayu Moxigewan Yiyu (专家称康菲溢油污染强度大于墨西哥湾溢油) [Experts Claimed ConocoPhillips's Oil Spill Caused More Damage than BP's Oil Spill in the Gulf of Mexico]*, ZHONGGUO QINGNIAN BAO (中国青年报) [CHINA YOUTH DAILY] (Sept. 16, 2011, 6:54 AM), <http://news.sina.com.cn/c/2011-09-16/065423164280.shtml>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Complaint, *supra* note 11, at ¶ 27.

ConocoPhillips agreed to pay Chinese authorities approximately \$300 million for cleanup and compensation,<sup>20</sup> but refused to compensate business owners whose properties were severely damaged by the oil spill.<sup>21</sup>

A group of fishermen filed a lawsuit against ConocoPhillips at Qingdao Maritime Court, claiming the oil spill seriously polluted the area where they raise aquaculture products.<sup>22</sup> Without giving any reason, the court effectively refused to hear the case by neither accepting nor rejecting the suit.<sup>23</sup> On July 2, 2012, 30 fishermen filed suit in the United States District Court located in Houston, Texas.<sup>24</sup> ConocoPhillips responded to the complaint with a motion to dismiss, arguing to the court that the claim should be dismissed based on forum non conveniens.<sup>25</sup> It is very likely that the court will grant ConocoPhillips's motion to dismiss, deeming the Chinese courts a convenient forum.<sup>26</sup> As a result, the Chinese fishermen will be left without any remedy for their losses, and ConocoPhillips will escape tort liability.<sup>27</sup>

In analyzing claims of forum non conveniens, U.S. courts hold very lenient standards regarding whether a foreign forum is both available and adequate.<sup>28</sup> Thus, a defendant who makes a motion for a forum non conveniens dismissal bears a light burden in proving that a foreign court is more appropriate than the U.S. court.<sup>29</sup> Typically, a superficial examination of the relevant foreign laws "on the books", or as they are recorded, satisfies the court.<sup>30</sup> In contrast, it is extremely difficult for the plaintiff to disprove a defendant's assertion that the foreign forum is adequate because the court does not allow an in-depth examination of how the laws are implemented in practice in the foreign forum.<sup>31</sup> Courts also often disregard the plaintiff's proof of general corruption and undue political influence in the foreign court.<sup>32</sup> The current construction of the forum non conveniens test creates a paradox for the plaintiff: to rebut the defendant's assertion, the plaintiff has to show specific evidence that the proposed foreign court will not provide due process in the case at issue before the trial takes place. How can the plaintiff prove something that has yet to occur? Clearly, the current interpretation of the forum non conveniens test favors the defendant to the detriment of the plaintiff.

In the case of ConocoPhillips's oil spill, the Qingdao Maritime Court – where the fishermen plaintiffs first filed their claims – tactfully refused to hear the case without issuing an official order.<sup>33</sup> Thus, it is impossible for the plaintiffs to show any specific evidence that the

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<sup>20</sup> Kenneth Rapoza, *ConocoPhillips Pays up \$297 Mln for China Oil Spill*, FORBES (Apr. 30, 2012, 10:24 PM), <http://www.forbes.com/sites/kenrapoza/2012/04/30/conocophillips-pays-up-297-mln-for-china-oil-spill>.

<sup>21</sup> Complaint, *supra* note 11, at ¶ 43.

<sup>22</sup> *Id.* at ¶¶ 11-12, 37, 46.

<sup>23</sup> *See id.* at ¶ 37.

<sup>24</sup> *Id.* at ¶ 1.

<sup>25</sup> Defendant's Motion to Dismiss at ¶ 1, *Cong v. ConocoPhillips Co.*, No. 4:12-cv-01976 (S.D. Tex. Sept. 24, 2012).

<sup>26</sup> *See analysis infra* Part I.

<sup>27</sup> *See analysis infra* Part II.

<sup>28</sup> *See analysis infra* Part II.

<sup>29</sup> *See analysis infra* Part II.

<sup>30</sup> *See analysis infra* Part II.

<sup>31</sup> *See analysis infra* Part II.

<sup>32</sup> *See analysis infra* Part II.

<sup>33</sup> Complaint, *supra* note 11, at ¶ 37.

Chinese court is incapable of conducting a fair trial because the trial has not begun. U.S. courts' lenient treatment of the forum non conveniens doctrine has the effect of shielding corporate defendants from tort liabilities in foreign countries. Consequently, plaintiffs are left without remedies because foreign forums are corrupt, bending to undue political influence for fear of the potential impact that an open trial might have on economic growth. In essence, with regard to the application of forum non conveniens doctrine, U.S. courts have focused on judicial expediency and overlooked fairness, the fundamental function of the judicial system.

This article argues that U.S. courts should strike a balance between plaintiffs' interests in access to justice and judicial efficiency concerns. Judicial efficiency is meaningless if the plaintiff is left without remedy in the proposed foreign forum. In determining whether a foreign forum is indeed an adequate alternative, courts should not confine themselves to only a superficial survey of the laws as recorded on the books in that forum. Instead, courts should extend their inquiry to examine how laws are implemented in the forum, since the laws in other countries, including China, are often not fully enforced as they are written.

Part I of this article explores the development and major flaws of the forum non conveniens doctrine. In addition, this section explains U.S. courts' compelling interest in adjudicating cases against U.S. corporations for tortious acts in foreign countries. Parts II and III provide a detailed analysis of why laws on the books in China are often disregarded. In conclusion, the article argues that China is neither an available nor an adequate forum for mass tort cases involving environmental damage, especially when a multi-national corporation is a defendant. The article further argues that the antiquated doctrine of forum non conveniens, which was created decades ago in an entirely different context, is out of step with the current globalized world.

## I. FORUM NON CONVENIENS

### A. *The Development of Forum Non Conveniens*

Forum non conveniens is a common law doctrine that allows a court to dismiss a case if an alternative forum is substantially more convenient or appropriate.<sup>34</sup> The Supreme Court first articulated the doctrine in 1947 in *Gulf Oil v. Gilbert*.<sup>35</sup> The plaintiff, a Virginia warehouse owner, suffered property damage as a result of a fire negligently set by the defendant, a Pennsylvania corporation that conducted business in both Virginia and New York.<sup>36</sup> Instead of suing the defendant in Virginia, the plaintiff brought an action in New York, where he believed the law was more favorable to him.<sup>37</sup> The district court for the Southern District of New York dismissed the action, finding Virginia to be a more appropriate forum.<sup>38</sup> Affirming the lower court's decision, the Supreme Court held that it was within the district court's discretion to dismiss an action on forum non conveniens grounds "even when jurisdiction is authorized by the

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<sup>34</sup> GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 347 (4th ed. 2007).

<sup>35</sup> See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-09 (1947).

<sup>36</sup> *Id.* at 502-03.

<sup>37</sup> Joel H. Samuels, *When is an Alternative Forum Available? Rethinking the Forum Non Conveniens Analysis*, 85 IND. L.J. 1059, 1063 (2010).

<sup>38</sup> *Gulf Oil*, 330 U.S. at 503.

letter of a general venue statute.”<sup>39</sup> Since the *Gulf Oil* decision, state courts have adopted the doctrine with some variations.<sup>40</sup>

The Supreme Court extended the doctrine to a case involving foreign parties in *Piper Aircraft* in 1981.<sup>41</sup> Several Scottish citizens and residents died in an airplane crash in Scotland.<sup>42</sup> Piper Aircraft (Piper), a corporation based in Pennsylvania, manufactured the airplane.<sup>43</sup> The decedents’ estates brought wrongful death claims against Piper in the United States, believing the U.S. laws would be more favorable to their position than those of Scotland.<sup>44</sup> The district court for the Middle District of Pennsylvania granted Piper’s motion to dismiss the action based on forum non conveniens.<sup>45</sup> The Supreme Court affirmed the district court’s opinion, favorably noting the district court’s evaluation of factors relevant to the forum non conveniens analysis.<sup>46</sup>

The forum non conveniens test involves a two-step analysis. In the first step, the court asks whether an alternative forum exists to resolve the dispute.<sup>47</sup> Once the court determines that an alternative foreign forum is available, the court evaluates the appropriateness of the alternative forum by balancing the costs and benefits of holding the trial in the United States as opposed to the alternative, foreign forum.<sup>48</sup> This balancing test requires the court to look to private and public interest factors relevant to the case to determine whether the defendant has overcome the presumption in favor of the plaintiff’s choice of forum.<sup>49</sup>

Private factors relevant to a forum non conveniens analysis include the residence of the parties and witnesses; the forum’s convenience to the litigants; access to physical evidence and other sources of proof; whether unwilling witnesses can be compelled to testify; the cost of bringing witnesses to trial; the enforceability of the judgment; and all other practical problems that impact the ease, speed, and expense of pursuing the suit.<sup>50</sup> Public factors to be considered include institutional concerns such as the local interest in the lawsuit; the court’s familiarity with the governing law; the burden on local courts and juries; congestion in the court; and the costs of resolving a dispute unrelated to a particular forum.<sup>51</sup>

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<sup>39</sup> BORN & RUTLEDGE, *supra* note 34, at 352 (discussing *Gulf Oil*, 330 U.S. at 504, 512).

<sup>40</sup> *Id.* at 354.

<sup>41</sup> See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

<sup>42</sup> *Id.* at 238-39.

<sup>43</sup> *Id.* at 239.

<sup>44</sup> *Id.* at 238.

<sup>45</sup> *Id.* at 241.

<sup>46</sup> See *Piper Aircraft*, 454 U.S. 235.

<sup>47</sup> *Id.* at 242.

<sup>48</sup> See *id.* at 255-61.

<sup>49</sup> See *id.*

<sup>50</sup> *Cybersitter, L.L.C. v. People’s Republic of China*, No. 2:10-cv-00038-JST (SH), 2010 WL 4909958, at \*5 (C.D. Cal. Nov. 18, 2010)

<sup>51</sup> *Id.* at \*7.

### B. Critiques of the Forum Non Conveniens Doctrine<sup>52</sup>

While the forum non conveniens doctrine has served various purposes over time, the overarching goal of the doctrine is to ensure access to justice.<sup>53</sup> Therefore, courts should not limit the plaintiff's choice of forum for the sake of convenience when doing so allows the defendant to escape or minimize his obligation via forum non conveniens dismissal. As Professor Edward Barrett promptly cautioned after the *Gulf Oil* decision, the forum non conveniens doctrine should not "become a powerful weapon in the hands of the defendant who is seeking to avoid his obligations."<sup>54</sup>

Courts have not yet struck a balance between judicial convenience and plaintiffs' access to justice. In fact, by applying a lenient standard to measure foreign judicial adequacy, courts have created what Whytock and Robertson call the "transnational access to justice gap".<sup>55</sup> A defendant who seeks a forum non conveniens dismissal often does not do so in an effort to pursue an appropriate forum for the litigation. Rather, the defendant's real purpose is to move out of the United States and into a foreign forum that has a more defense-friendly substantive doctrine, procedural rules, and litigation culture.<sup>56</sup> Although U.S. courts often question a foreign plaintiff's motive in shopping into forums in the United States,<sup>57</sup> they rarely conduct similar inquiries into a defendant's reverse forum shopping tactics.<sup>58</sup> Furthermore, defendants often take advantage of the ill-structured forum non conveniens test in U.S. courts to force plaintiffs to move the litigation to foreign countries.<sup>59</sup> As a result, numerous forum non conveniens dismissals have, in effect, left plaintiffs with no meaningful remedies while allowing tortious MNCs to escape liability overseas.<sup>60</sup>

The forum non conveniens doctrine has four major flaws. First, the standard for assessing the availability and adequacy of a foreign forum is too lenient. According to *Piper*, U.S.

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<sup>52</sup> A number of scholars argue that it is necessary to reform the forum non conveniens doctrine. See generally Michael Anderson, *Transnational Corporations and Environmental Damage: Is Tort Law the Answer?*, 41 WASHBURN L.J. 399 (2002); Edward L. Barrett, Jr., *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380 (1947); Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309 (2002); Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transitional Tort Actions*, 29 BERKELEY J. INT'L L. 456 (2011); Walter W. Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic*, 56 U. KAN. L. REV. 609 (2008); Michael M. Karayanni, Response, *The Case for a State Forum Non Conveniens Standard*, 90 TEX. L. REV.: SEE ALSO 224 (2012); Elizabeth T. Lear, *National Interests, Foreign Injuries, and Federal Forum Non Conveniens*, 41 U.C. DAVIS L. REV. 559 (2007); Samuels, *supra* note 37; Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444 (2011).

<sup>53</sup> See Whytock & Robertson, *supra* note 52, at 1454-55. Forum non conveniens has variously been seen as a way to prevent the plaintiff from inconveniencing the defendant, as providing the most convenient forum for the trial, and as a method for relieving the litigants or the court of an undue burden. *Id.* at 1454.

<sup>54</sup> Barrett, *supra* note 52, at 422.

<sup>55</sup> Whytock & Robertson, *supra* note 52, at 1474.

<sup>56</sup> Heiser, *supra* note 52, at 613.

<sup>57</sup> See, e.g., *Piper Aircraft*, 454 U.S. at 240, 242, 255-56.

<sup>58</sup> Heiser, *supra* note 52, at 613.

<sup>59</sup> See, e.g., *infra* note 128 (listing cases in which the defendant moved to have a case dismissed on forum non conveniens grounds, arguing that the Chinese courts were a more appropriate forum).

<sup>60</sup> See Heiser, *supra* note 52, at 609-10.



courts may deem an alternative foreign forum available if the defendant is subject to the foreign jurisdiction and is willing to waive jurisdictional defenses.<sup>61</sup> Because an alternative forum is only available under these circumstances, in practice, a defendant alleges *forum non conveniens* only if the defendant has already determined that litigation in a foreign court would be cheaper and easier than in a U.S. court. The determination of forum adequacy is also lenient, with some courts deeming a foreign forum “adequate if the defendants are amenable to service of process there, and if [the foreign forum] permits litigation of the subject matter of the dispute,”<sup>62</sup> which is a very low threshold.<sup>63</sup>

U.S. deference to foreign alternative forums may stem from “resist[ance to] policing or evaluating the tribunals of foreign nations.”<sup>64</sup> However, U.S. courts are often critical of foreign legal systems in other areas of law. For example, in deciding whether to enforce foreign judgment in the United States, courts conduct a much more cautious inquiry into the legitimacy of the foreign tribunal.<sup>65</sup> In these cases, courts specifically focus on whether there is substantial doubt about the integrity of the foreign court and whether the foreign proceedings are compatible with due process of law.<sup>66</sup> Unfortunately, none of these factors are seriously considered in *forum non conveniens* cases.

Second, the *forum non conveniens* doctrine lacks clarity and consistency. Riddled with confusion and contradiction, the *Piper* decision failed to offer lower courts clear guidance.<sup>67</sup> For example, the *Piper* Court stated that when a foreign forum is “so clearly inadequate or unsatisfactory that it is no remedy at all . . . the district court may conclude that dismissal would not be in the interests of justice.”<sup>68</sup> Yet the Court did not elaborate as to what would constitute an inadequate remedy. Loss of potential recovery or procedural advantages, such as the ability to proceed with class actions, contingent fee arrangements, or jury trials, will not prevent a court from granting a *forum non conveniens* dismissal.<sup>69</sup> Even proof of general corruption in the alternative forum is not likely to convince the court of inadequacy.<sup>70</sup> In addition, the *Piper* Court

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<sup>61</sup> *Piper Aircraft*, 454 U.S. at 254, n. 22; see also Davies, *supra* note 52, at 316. Defendants frequently consent to the jurisdiction of the foreign forum as a part of the *forum non conveniens* motion. Whytock & Robertson, *supra* note 52, at 1456-57.

<sup>62</sup> Huang v. Advanced Battery Technologies, Inc., No. 09CV8297(HB), 2010 WL 2143669, at \*5 (S.D.N.Y. May 26, 2010).

<sup>63</sup> 14D CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3828.3 (3d ed. 2007).

<sup>64</sup> *Id.*

<sup>65</sup> See Whytock & Robertson, *supra* note 52, at 1462-63.

<sup>66</sup> *Id.* at 1464.

<sup>67</sup> The Supreme Court noted,

[a]t the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternate forum. Ordinarily, this requirement will be satisfied when the defendant is ‘amenable to process’ in the other jurisdiction. In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied. Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute.

*Piper Aircraft*, 454 U.S. at 254, n. 22 (internal citation omitted).

<sup>68</sup> *Id.* at 254.

<sup>69</sup> WRIGHT, MILLER & COOPER, *supra* note 63, at § 3828.3.

<sup>70</sup> *Id.*

held a forum non conveniens dismissal was proper even if plaintiffs showed “that the substantive law that would be applied in the alternative forum is less favorable than that of the present forum.”<sup>71</sup> Had the court stood by this position, it would have provided greater certainty for determining future cases.<sup>72</sup> However, the Court obscured the would-be clear guidance by declaring, “We do not hold that the possibility of an unfavorable change in law should *never* be a relevant consideration in a forum non conveniens inquiry.”<sup>73</sup> The Court did not specify when a change of law could be considered. Due to its lack of clarity, the *Piper* test, which has been called the most ill-conceived doctrine in procedural law,<sup>74</sup> has created confusion and uncertainty in its application.

Third, without clear guidance from the Supreme Court, lower courts have struggled to apply the *Piper* test, often blurring the line between the test’s two prongs or bypassing the availability and adequacy test altogether.<sup>75</sup> When the *Piper* Court created the two-pronged test, it noted that “[a]t the outset of any forum non conveniens inquiry, the court must determine whether there exists an alternative forum.”<sup>76</sup> It appears that the Court made the first test the precondition for the second part of the inquiry on judicial convenience. This requirement is sensible because a balance of judicial convenience would be meaningless if no adequate alternative forum existed in foreign countries. When courts conduct a superficial availability and adequacy test or abandon the first prong of the test, the burden of proof for defendants substantially decreases and their chances of forum shopping out of the U.S. courts increases. After reviewing more than 1,500 cases since the *Piper* decision, Professor Samuels discovered that courts bypassed the availability prong in nearly one-fourth of the cases where motions for forum non conveniens dismissals were granted to defendants.<sup>77</sup> Another study shows defendants have a sixty-percent chance of winning forum non conveniens dismissals against foreign plaintiffs in the U.S. district courts.<sup>78</sup> This reality defies the presumption that courts should grant defendants forum non conveniens dismissals only as an exception, rather than as a rule.<sup>79</sup>

Fourth, the antiquated doctrine does not allow examinations of how laws are implemented in the foreign forum. When the U.S. Supreme Court first crafted the forum non conveniens doctrine in 1947, the People’s Republic of China (PRC) was not even in existence.<sup>80</sup> Trade between the United States and China at that time was negligible, investment in China by multi-national corporations was unheard of, and Chinese citizens filing trade-related lawsuits in U.S. courts against U.S. corporations were rare.<sup>81</sup> At that time, world trade activities were primarily concentrated among western countries that shared similar cultural roots and legal

<sup>71</sup> *Piper Aircraft*, 454 U.S. at 247.

<sup>72</sup> Samuels, *supra* note 52, at 1069.

<sup>73</sup> *Piper Aircraft*, 454 U.S. at 254.

<sup>74</sup> Kevin M. Clermont, *The Story of Piper: Fracturing the Foundation of Forum Non Conveniens*, in CIVIL PROCEDURE STORIES 193, 195 (Kevin M. Clermont, ed. 2004).

<sup>75</sup> See Samuels, *supra* note 52, at 1061.

<sup>76</sup> *Piper Aircraft*, 454 U.S. at 254, n.22.

<sup>77</sup> See Samuels, *supra* note 52, at 1077.

<sup>78</sup> Whytock & Robertson, *supra* note 52, at 1462.

<sup>79</sup> WRIGHT, MILLER & COOPER, *supra* note 63, at § 3828.2.

<sup>80</sup> See DANIEL K. CHOW, THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA 11-31 (2d ed. 2009) for a brief history of China.

<sup>81</sup> See AMERICA’S CHINA TRADE IN HISTORICAL PERSPECTIVE (Ernest R. May & John K. Fairbank eds., 1986) for a detailed account of the development of the trade relationship between the United States and China.

environments. Since then, China has become one of the largest trade partners of the United States.<sup>82</sup> Despite the world's increasing dependence on foreign investment and global trade, U.S. courts still adhere to the more than 60-year old forum non conveniens doctrine.

Because the forum non conveniens doctrine grew out of a case involving parties from two domestic states, it is illogical and unwise for the same doctrine to apply in an international context. The differences in legal systems between two countries are not comparable to those between two states. Nevertheless, the Supreme Court applied forum non conveniens in *Piper*, using a doctrine originally formulated for interstate jurisdictional issues in a case involving international jurisdictional issues. The analogy between *Gulf Oil* and *Piper* has proved farfetched because the forum non conveniens doctrine does not allow consideration of how foreign laws operate in practice. A superficial examination of foreign codes taken out of context is hardly sufficient to determine whether the foreign forum would grant a meaningful remedy to the plaintiff. Therefore, the lenient standards for the adequacy of the foreign forum are unlikely to ensure plaintiff's access to justice, the overarching goal of the forum non conveniens doctrine.

### C. U.S. Courts' Compelling Interest in Foreign Plaintiffs' Cases

Critics may argue that U.S. courts have no compelling interest in hearing the Chinese fishermen's suit because the oil spill took place far away in China. Why waste American taxpayers' money on foreign litigants challenging U.S. corporations? This type of argument may have been acceptable 60 years ago, but in the current globalized world, this narrow-minded view actually hurts American interests.

It is important to recognize how lawsuits brought by foreign victims against U.S. corporations can be directly beneficial to American consumers. For example, in the Ford-Firestone scandal, Ford may have been aware that defective tires were causing vehicles to roll over in the early 1990's, but the company did not issue a recall for those tires in the U.S. market until 2000.<sup>83</sup> Reports of tire failures reached Ford's Venezuelan operations as early as 1997,<sup>84</sup> and at least 47 traffic fatalities were linked to the tires.<sup>85</sup> Ford recalled and replaced the tires in Venezuela well before the same tires were recalled in the United States.<sup>86</sup> According to Professor Elizabeth Lear, it was more cost effective for Ford to delay a recall in the United States, despite knowing that its defective products posed a danger to American consumers.<sup>87</sup> If foreign victims had brought lawsuits in the U.S. courts earlier,<sup>88</sup> public awareness in the U.S. would have forced

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<sup>82</sup> In 2012, trade with China accounted for 14% of the United States' total trade. *Top Trading Partners: Year-to-Date – December 2012*, U.S. CENSUS BUREAU, <http://www.census.gov/foreign-trade/statistics/highlights/top/top1212yr.html> (last updated Aug. 4, 2013).

<sup>83</sup> Robert L. Simison et al., *Blowout: How the Tire Problem Turned Into a Crisis for Ford and Firestone*, WALL ST. J., Aug. 10, 2000, at A1.

<sup>84</sup> Timothy Aepfel et al., *Answers Still Elusive in Tire Crisis*, WALL ST. J., Sept. 15, 2000, at B1.

<sup>85</sup> Timothy Aepfel & Marc Lifsher, *Ford, Firestone Face Safety Concerns, Each Other*, WALL ST. J., May 24, 2001, at A3.

<sup>86</sup> Norihiko Shirouzu, *Ford, Firestone Deny There Was Coverup in Venezuela*, WALL ST. J., Sept. 1, 2000, at A3.

<sup>87</sup> Elizabeth T. Lear, *National Interests, Foreign Injuries, and Federal Forum Non Conveniens*, 41 U.C. DAVIS L. REV. 559, 576 (2007).

<sup>88</sup> A 2002 ruling by a U.S. District Court judge allowed as many as 140 lawsuits brought on behalf of foreign plaintiffs to proceed in U.S. courts. Bloomberg News, *Ford to Face Foreign Cases*, L.A. TIMES, Mar. 26, 2002, at

Ford to act much sooner and many American lives would have been saved.

In the case of ConocoPhillips, the company's presence in China is only one of its 30 worldwide operations.<sup>89</sup> ConocoPhillips conducts extensive operations in the contiguous United States<sup>90</sup> and Alaska.<sup>91</sup> The lack of incentive for ConocoPhillips to take enhanced safety measures puts American land and seawater at risk.

After BP's oil spill, the legal battles pressured BP to compensate victims, and persuaded the company to improve safety measures in deep water oil exploration.<sup>92</sup> In addition to paying criminal fines, BP agreed to further enhance the safety measures related to its "risk management processes, such as third-party auditing and verification, training, and well control equipment and processes such as blowout preventers and cementing."<sup>93</sup> BP also agreed to develop new technologies related to deepwater drilling safety.<sup>94</sup> In order to resume its production in the Gulf region, BP has made voluntary efforts that go beyond the federal regulatory requirements.<sup>95</sup> More than a year after the spill, BP won its first federal permit to resume operations in the Gulf of Mexico.<sup>96</sup>

In contrast, ConocoPhillips managed to cover up its accident in China for a month.<sup>97</sup> Without the pressure of litigation, ConocoPhillips has had no incentive to enhance its safety measures. Unlike BP, which provided numerous press releases detailing its measures to compensate victims and prevent further similar accidents, ConocoPhillips has offered limited information about its spill in the Bohai Sea in China.<sup>98</sup> This lack of incentive to improve safety measures and absence of more serious consequences for the damage caused by the ConocoPhillips spill means other areas where the company drills are at risk for similar damage.

In addition to the potential for environmental damage in the U.S., there is another crucial American interest that is often overlooked in regard to the ConocoPhillips oil spill. China is the third largest exporter of seafood to the U.S. market, making up 21% of the total seafood imported to the U.S. in 2007.<sup>99</sup> In fact, American consumers consume a significant quantity of the farmed

B3.

<sup>89</sup> *Who We Are*, CONOCOPHILLIPS, <http://www.conocophillips.com/who-we-are/Pages/default.aspx> (last visited Nov. 5, 2013).

<sup>90</sup> *See Lower 48 and Latin America: Fact Sheet – Summer 2013*, CONOCOPHILLIPS, [http://www.conocophillips.com/zmag/SMID\\_392\\_FactSheet-Lower48andLatinAmerica.html](http://www.conocophillips.com/zmag/SMID_392_FactSheet-Lower48andLatinAmerica.html) (last visited Nov. 5, 2013).

<sup>91</sup> *See About ConocoPhillips Alaska*, CONOCOPHILLIPS ALASKA, <http://alaska.conocophillips.com/EN/about/Pages/index.aspx> (last visited Nov. 5, 2013).

<sup>92</sup> The Associated Press, *BP Adopts New, Post-Spill Safety Standards for Gulf Drilling*, AL.COM (July 15, 2011, 10:11 AM), [http://blog.al.com/wire/2011/07/bp\\_adopts\\_new\\_post-spill\\_safet.html](http://blog.al.com/wire/2011/07/bp_adopts_new_post-spill_safet.html).

<sup>93</sup> Press Release, *BP Announces Resolution of All Criminal and Securities Claims by U.S. Government Against Company Relating to Deepwater Horizon Accident*, BRITISH PETROLEUM (Nov. 14, 2012), <http://www.bp.com/en/global/corporate/press/press-releases/bp-announces-resolution-of-all-criminal-and-securities-claims-by-u.s.-government-against-company-relating-to-deepwater-horizon-accident.html>.

<sup>94</sup> *Id.*

<sup>95</sup> James O'Toole, *BP to Resume Drilling in Gulf of Mexico*, CNN (Oct. 26, 2011, 7:18 PM), [http://money.cnn.com/2011/10/26/news/companies/bp\\_drill\\_gulf/index.htm](http://money.cnn.com/2011/10/26/news/companies/bp_drill_gulf/index.htm).

<sup>96</sup> *Id.*

<sup>97</sup> Zhang Qi'an (张启安), *supra* note 8.

<sup>98</sup> *Id.*

<sup>99</sup> Chenglin Liu, *The Obstacles of Outsourcing Imported Food Safety to China*, 43 CORNELL INT'L L.J. 249, 302 (2010).

seafood produced in the Bohai Sea.<sup>100</sup> Shandong Province, where the oil spill occurred, is still one of the two leading provinces that export seafood to the United States.<sup>101</sup> The Chinese fishermen sued ConocoPhillips in the U.S. courts because their aquaculture facilities and fish products were severely damaged by the oil spill and they could not continue to produce farmed seafood for export, mainly to the United States and Europe. It is unclear when these fishermen will resume production to the U.S. market or how much of the polluted seafood will end up on American consumers' tables. Since less than two percent of imported foods in the U.S. are physically inspected by the Food and Drug Administration (FDA),<sup>102</sup> the lingering effect of the ConocoPhillips oil spill on imported seafood from the Bohai Sea will likely remain a well-kept secret. While Americans may know enough to be leery about seafood from the Gulf of Mexico following the BP oil spill, few, if any, may know to take the same precautions when shopping for seafood imported from the Bohai Sea.

#### D. Political Interest Indicates Need for Court Action

Despite the reluctance of courts to examine the practical application of laws in foreign forums, the U.S. has taken a political interest in the application of regulations in other countries, including China.

When four American cyclists wore smog masks during the 2008 Olympics, the Chinese newspapers carried caustic commentaries accusing the American athletes of politicizing China's environmental issues and insulting the Olympic spirit.<sup>103</sup> To avoid confrontation, the U.S. Olympic Committee forced the athletes to issue an open apology to the Chinese hosts for the insulting behavior.<sup>104</sup>

In 2009, the U.S. Embassy in China began broadcasting Beijing air pollution reports

<sup>100</sup> Zhang Liang (张亮), *Kangfei Louyou Shigu Hou Jiannan Suopei: 10 Yiyuan Peichang Yuan Bugou* (康菲漏油事故后艰难索赔: 10亿元赔偿远不够) [Seeking Compensation After ConocoPhillips's Oil Spill: 1 billion RMB Is Far From Enough], ZHONGGUO JINGYING BAO (中国经营报) (Feb. 2, 2012, 11:25 PM), <http://finance.ifeng.com/news/corporate/20120203/5532769.shtml>.

<sup>101</sup> Shandong Penglai Shuichanpin Chukou Qian Bayue Chuanghui 8706 Wan Meiyuan (山东蓬莱水产品出口前八月创汇8706万美元) [Seafood Exportation in Shandong Penglai Reached \$87.06 Million During the First 8 Months of the Year], ZHONGGUO HAIXIAN WANG (中国海鲜网), <http://www.seafoodchina.com/ptzixun.aspx?id=8511> (last visited Sept. 15, 2013); Nongyebu: 2012 Nian Shanbannian Quanguo Shuichanpin Chukou Qingkuang (农业部: 2012年上半年全国水产品进出口情况) [Ministry of Agriculture's Report on Seafood Exportation During the First Half of 2012], ZHONGGUO SHUICHAN WANG (中国水产网) (Aug. 25, 2012, 9:20 AM), <http://www.zgsc123.com/index.php?m=content&c=index&a=show&catid=109&id=38461>.

<sup>102</sup> Brad Racino, *Flood of Food Imported to U.S., but Only 2 Percent Inspected*, NBC NEWS (Oct. 3, 2011, 7:57 AM), <http://www.nbcnews.com/id/44701433/#.UnnloaUkXwI>.

<sup>103</sup> Hebian Cuizhu (河边翠竹), *Meiguo Yundongyuan Dai Kouzhao Wuru le Shui?* (美国运动员戴口罩侮辱了谁?) [Who Was Insulted by the Mask-Wearing U.S. Athletes?], REMING WANG—QIANGGUO SHEQU (人民网—强国社区) (July 8, 2008, 7:36 AM), <http://www.people.com.cn/GB/32306/33232/7626530.html>; *Dai kouzhao can ao 'sai de meishi xingwei yishu lingren e'xin* (戴口罩参赛的美式行为艺术令人恶心) [Attending the Olympics with Face Masks: American Style Action Art Is Disgusting], RENMING NET (July 23, 2008), <http://ido.3mt.com.cn/Article/200807/show1040288c14p1.html>; *mei daipiao ao 'yunhui shang dai kouzhao, hensha hen wuliao* (美代表奥运会上戴口罩, 很傻很无聊) [American Facemask Wearing Athletes at the Olympics Are Silly and Senseless], QIANLONG NET (July 24, 2008, 8:31 AM), <http://review.qianlong.com/20060/2008/07/24/2540@4556364.htm>.

<sup>104</sup> Simon Hart, *Beijing Olympics: American Cyclists Apologize for 'Smog-Masks'*, THE TELEGRAPH (Aug. 6, 2008, 12:32 PM), <http://www.telegraph.co.uk/sport/olympics/2510204/Beijing-Olympics-American-cyclists-apologise-for-smog-masks.html>.

hourly through its Twitter account—@BeijingAir.<sup>105</sup> The Embassy's report often reveals air pollution levels that are far more serious than the official figures released by the Chinese government.<sup>106</sup> In November 2010, the Embassy labeled the air quality in Beijing as "crazy bad" when its monitors showed the PM 2.5 index<sup>107</sup> in Beijing as exceeding 500, 20 times higher than what is considered a safe level by the World Health Organization (WHO).<sup>108</sup> Even though the Embassy quickly deleted its undiplomatic labeling, the tweet had already upset some Chinese officials.<sup>109</sup> In June 2012, Mr. Wu, a deputy minister of the Chinese Environmental Protection Ministry, accused some foreign embassies of interfering with China's internal affairs and violating international treaties by releasing air quality reports.<sup>110</sup> Mr. Wu strongly defended the Chinese government's data and urged the foreign embassies to stop insulting the Chinese government by releasing pollution data.<sup>111</sup>

Despite Mr. Wu's criticism of the release of Chinese air quality reports by foreign embassies, the Chinese government seems to have reversed its stance and now allows air quality data to be released. Beijing began releasing PM 2.5 numbers in January 2012,<sup>112</sup> and 74 other cities promised to release PM 2.5 readings in 2013.<sup>113</sup> The Chinese government's remorse came only after the suffocating smog cloaked the sky and seriously disrupted daily life in Beijing.<sup>114</sup> The Chinese Academy of Social Sciences reported that in January 2013, Beijing and adjacent areas suffered five severe smog attacks and had only four clear days.<sup>115</sup> In some areas of Beijing,

<sup>105</sup> Jonathan Watts, *Twitter Gaffe: U.S. Embassy Announces 'Crazy Bad' Beijing Air Pollution*, THE GUARDIAN ENV'T BLOG (Nov. 19, 2010, 11:21 AM), <http://www.guardian.co.uk/environment/blog/2010/nov/19/crazy-bad-beijing-air-pollution>.

<sup>106</sup> See *id.*; Edward Wong, *On Scale of 0 to 500, Beijing Air Quality Tops 'Crazy Bad' at 755*, N.Y. TIMES, Jan. 13, 2013, at A16.

<sup>107</sup> The PM 2.5 index measures the amount of particulate matter (PM) in a cubic meter of air, specifically assessing the number of micrograms of fine particles measuring 2.5 microns or less in diameter within one cubic meter. PM 2.5 particles are considered particularly dangerous for their ability to enter the bronchioles of the lungs and interfere with gas exchange. *Air Quality and Health*, WORLD HEALTH ORG., <http://www.who.int/mediacentre/factsheets/fs313/en> (last visited Nov. 8, 2013).

<sup>108</sup> While the World Health Organization states that there is no PM 2.5 level below which no adverse health effects have been recorded, 25 micrograms per cubic meter is set as the "safe" guideline value for a 24-hour period. *Id.*

<sup>109</sup> See Wong, *supra* note 106.

<sup>110</sup> Huanbaobu: *Wang Zhuhua Shiguan Tingfa Zhongguo PM 2.5 Shuju* (环保部: 望驻华使馆停发中国PM2.5数) [Environmental Protection Ministry: Foreign Embassies in China Need to Stop Releasing Data Regarding PM 2.5], ZHONGGUO XINWEN WANG (中国新闻网) (June 5, 2012, 11:36 AM), <http://news.163.com/12/0605/11/8380EHL00014JB6.html>.

<sup>111</sup> *Id.*

<sup>112</sup> Wong, *supra* note 106.

<sup>113</sup> Jin Yu (金煜), *Kongqi Zhiliang Biaozhun Jinri "Shengji"* (空气质量标准今日“升级”) [Air Quality Standard Lifted Today], XIN JING BAO (新京报) [THE BEIJING NEWS] (Jan. 1, 2013, 3:00 AM), <http://www.chinanews.com/gn/2013/01-01/4451986.shtml>.

<sup>114</sup> Wumai Pinxi Beijing Yin "Kongqi Jiaoliu" Wuran Zhineng Tingtian Youming (雾霾频袭北京引“空气焦虑” 污染只能听天由命) [Feeling Quite Helpless: Beijing Suffers Frequent Smog Attacks, Prompting Anxieties Among the Public], XINHUA WANG (新华网) (Jan. 29, 2013, 8:22 AM), <http://env.people.com.cn/n/2013/0129/c1010-20356693.html>.

<sup>115</sup> Sun Zifa (孙自法), *Zhongkeyuan: Jingjinji Yiyue Gong Wuci Qiangmai Wuran Jin Sige Qingtian* (中科院: 京津冀1月共5次强霾污染仅4个晴天) [The Chinese Academy of Social Sciences: Five Strong Smog Attacks in Beijing and Its Surrounding Regions, Leaving Only 4 Clear Days in January], ZHONGGUO XINWEN WANG (中国新闻网)

the PM 2.5 index at the peak of the smoggiest days exceeded 1,000 micrograms per cubic meter<sup>116</sup> – 40 times the “safe” level set by the WHO.<sup>117</sup> Flights were suspended due to lack of visibility,<sup>118</sup> pedestrians wore thick masks to protect themselves against the fine dust,<sup>119</sup> and hospitals were filled with young children with respiratory illnesses caused by the air pollution.<sup>120</sup> China Central Television (CCTV) even referred to the illness caused by the air pollution as “Beijing cough”.<sup>121</sup> Dr. Zhong Nanshan, a national hero widely accredited for his contribution during the 2003 SARS crisis,<sup>122</sup> warned that the recent hazardous air pollution’s impact on human health could be even more serious than that of SARS.<sup>123</sup>

In response to public outcry, Premier Wen Jiabao openly urged the government to take actions to combat air pollution.<sup>124</sup> Mr. Wang Anshun, the newly appointed Beijing mayor, expressed serious concerns about the current environmental problems.<sup>125</sup> The Beijing government immediately took several emergency measures, including keeping one-third of government vehicles off the street, temporarily closing 103 polluting factories, and encouraging other enterprises to reduce emissions.<sup>126</sup> In addition, the government urged residents to take more public transportation and drive less.<sup>127</sup>

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(Feb. 3, 2013, 10:51 PM), <http://politics.people.com.cn/n/2013/0204/c70731-20417582.html>.

<sup>116</sup> Jin Yu (金煜), *Beijing Judi PM 2.5 Zhishu Ceng Chaoguo 1000 Shoufa Mai Chengse Yujing* (北京局地PM 2.5指数曾超1000 首发霾橙色预警) [PM 2.5 Index Exceeded 1,000 Points in Some Areas of Beijing City. Prompting Orange Health Alert on Smog Attacks], XIN JING BAO (新京报) [THE BEIJING NEWS] (Jan. 14, 2013, 2:59 AM), <http://news.sina.com.cn/c/2013-01-14/025926025433.shtml>.

<sup>117</sup> See *supra* note 108.

<sup>118</sup> *Beijing Duoge Kongqi Jiancedian PM 2.5 Nongdu Chao 900* (北京多个空气监测点PM 2.5浓度超900) [Many Air Quality Monitoring Sites in Beijing Reported PM 2.5 Index Exceeding 900], XIN JING BAO (新京报) [THE BEIJING NEWS] (Jan. 13, 2013, 2:42 AM), [http://www.360doc.com/content/13/0113/09/1120683\\_259858747.shtml](http://www.360doc.com/content/13/0113/09/1120683_259858747.shtml).

<sup>119</sup> *Id.*

<sup>120</sup> Guoji Zaixian (国际在线), *Beijing Dawu Yinfa Er'tong Yiyuan Baoman* (北京大雾引发儿童医院爆满) [Children's Hospital Was Full After the Smog Attacks in Beijing], YANG SHI (央视) [CHINA CENTRAL TELEVISION] (Jan. 15, 2013, 8:34 AM), [http://news.plznm.com/news\\_detail\\_112521.html](http://news.plznm.com/news_detail_112521.html).

<sup>121</sup> Yangshi Jizhe Zaijing Yin Wuran Mianbu Zhongzhang Zhu Ying 2 Nian Bingqing Huanjie (央视记者在京因污染面部肿胀 驻英2年病情缓解) [A CCTV Reporter's Face Swelled Up Due to Pollution in Beijing. Was Relieved After Stay in Britain for 2 Years], YANGSHI WANG (央视网) (Jan. 15, 2013, 7:09 AM), [http://news.xinhuanet.com/local/2013-01/15/c\\_114364711.htm](http://news.xinhuanet.com/local/2013-01/15/c_114364711.htm).

<sup>122</sup> For more information on the SARS outbreak and Dr. Zhong Nanshan, see generally CHENGLIN LIU, CHINESE LAW ON SARS 1 (7 Chinese Law Series 2004); Chenglin Liu, *Regulating SARS in China: Law As an Antidote?*, 4 WASH. U. GLOB. STUD. L. REV. 81 (2005).

<sup>123</sup> Zhong Nanshan Tan Daqi Wuran: Bi Feidian Kepa de Duo Renhe Ren Dou Pao Budiao (钟南山谈大雾霾污染: 比非典可怕得多 任何人都跑不掉) [Zhong Nanshan's Comment on Air Pollution: It Is More Horrible than SARS and Nobody Can Escape from It], YANG SHI (央视) [CCTV] (Jan. 31, 2013, 7:31 AM), [http://news.xinhuanet.com/fortune/2013-01/31/c\\_114561072.htm](http://news.xinhuanet.com/fortune/2013-01/31/c_114561072.htm).

<sup>124</sup> Aaron Back & Josh Chin, *Wen Urges Clean-Air Action As China's Skies Clog Again*, WALL ST. J., Jan. 30, 2013, at A8.

<sup>125</sup> Edward Wong, *Beijing Takes Steps to Fight Pollution as Problem Worsens*, N.Y. TIMES, Jan. 31, 2013, at A4.

<sup>126</sup> *Id.*

<sup>127</sup> Wayne Ma, *China's Air Pollution Problem: Whose Responsibility?*, WALL ST. J. CHINA REAL TIME REPORT (Jan. 30, 2013, 5:16 PM), <http://blogs.wsj.com/chinarealtime/2013/01/30/chinas-air-pollution-problem-whose-responsibility>.

It seems the foreign embassies' – particularly the U.S. Embassy's – publicity of Beijing's lax regulatory enforcement and deceptive reporting of environmental issues spurred the Chinese government into action. The reasoning behind this response is likely the same logic the government employed in choosing not to act when its environmental laws were violated in the past: absent outside pressure, protecting business interests in China outweighs protecting the environment. By broadcasting the dangerous air quality in Beijing, the U.S. embassy threatened China's business interests, leaving the government no choice but to clean up its act. This powerful political influence further demonstrates the need for the U.S. court system to adapt its decision-making process with regard to foreign plaintiffs and foreign alternative forums – not only for the protection of the foreign plaintiffs, but also for the safety of American consumers.

### *E. Chinese Plaintiffs in U.S. Courts*

Through extensive research, I was able to identify ten cases in U.S. courts – occurring between 1992 and 2012 – in which defendants filed motions to dismiss, arguing Chinese courts were more convenient alternatives to the U.S. courts.<sup>128</sup> In six of the ten cases, the courts granted defendants' motion for dismissal on forum non conveniens grounds.<sup>129</sup> In most of these cases, both plaintiffs and defendants sought Chinese law experts to testify on their behalf.<sup>130</sup> Experts

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<sup>128</sup> See *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007) (affirming the Third Circuit's grant of Chinese defendant's motion to dismiss on forum non conveniens grounds where Malaysian plaintiff brought action alleging fraudulent misrepresentation); *Tang v. Synutra Int'l Inc.*, 656 F.3d 242 (4th Cir. 2011) (affirming district court's order granting Maryland defendant's motion to dismiss on forum non conveniens grounds where Chinese consumers brought action seeking recovery for injuries allegedly sustained in China as a result of melamine-tainted infant formula that was produced by the defendant's subsidiary); *Sinotrans Container Lines Co. v. N. China Cargo Servs.* 380 F. App'x 588 (9th Cir. 2010) (upholding district court's denial of American defendant's motion to dismiss on forum non conveniens grounds where defendant failed to show an adequate alternative forum existed in China); *Cybersitter, L.L.C. v. People's Republic of China*, 805 F. Supp. 2d 958 (C.D. Cal. 2011) (denying Chinese defendant's motion to dismiss on forum non conveniens grounds where American corporation brought action alleging defendants had conspired to infringe the plaintiff's copyrighted computer software code); *Huang v. Advanced Battery Techs., Inc.*, No. 09 CV 8297 (HB), 2010 WL 2143669 (S.D.N.Y. May 26, 2010) (granting Delaware defendant's motion to dismiss on forum non conveniens ground where American plaintiff who resided primarily in China brought suit alleging breach of contract and a tort claim); *In re Compania Naviera Joanna S.A.*, 531 F. Supp. 2d 680 (D.S.C. 2007), *aff'd as modified sub nom. In re Compania Naviera Joanna S.A. v. Koninklijke Boskalis Westminster N.V.*, 569 F.3d 189 (4th Cir. 2009) (granting Dutch defendant's motion to dismiss on forum non conveniens grounds where Panamanian plaintiff's vessel collided with defendant's vessel in Chinese territorial waters); *Mintel Learning Tech., Inc. v. Beijing Kaidi Educ. & Tech. Dev. Co.*, No. C 06-7541 (PJH), 2007 WL 2288329 (N.D. Cal. Aug. 9, 2007) (denying Chinese defendant's motion to dismiss on forum non conveniens grounds where American plaintiff brought action alleging copyright infringement and other offenses); *BP Chemicals Ltd. v. Jiangsu Sopo Corp.*, 429 F. Supp. 2d 1179, 1183 (E.D. Mo. 2006) (denying Chinese defendant's motion to dismiss on forum non conveniens grounds, stating, "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."); *Lu v. Air China Int'l Corp.*, No. CV 92-1254 (RR), 1992 WL 453646 (E.D.N.Y. Dec. 16, 1992) (granting Chinese defendant's motion to dismiss on forum non conveniens grounds where plaintiff, a Chinese national, was injured disembarking from a flight that had originated in the United States); *Guimei v. Gen. Elec. Co.*, 91 Cal. Rptr. 3d 178 (Cal. Ct. App. 2009) (granting defendant's motion to dismiss on forum non conveniens grounds where Chinese relatives of plane crash victims brought suit against American manufacturer).

<sup>129</sup> See sources cited *supra* note 128.

<sup>130</sup> See, e.g., *Guimei*, 91 Cal. Rptr. 3d at 187-89 (noting that Randall Peerenboom, a professor at UCLA Law, and Jacques De Lisle, a professor at the University of Pennsylvania Law School, had submitted declarations on behalf of the defendants); *Lu*, 1992 WL 453646, at \*1 (noting that defendants had submitted an affidavit of an experienced Chinese attorney in support of their argument that China was both an available and an adequate forum).



arguing that China was an adequate forum rarely discussed how the laws and regulations were enforced in practice. Instead, they focused their testimonies primarily on a general survey of the relevant legal provisions as they are recorded on the books in the Chinese legal system.<sup>131</sup> This approach appears to be convincing to U.S. courts, as experts who have testified that Chinese courts lacked independence due to corruption or external influence have thus far failed to persuade the courts.<sup>132</sup>

Two recent cases illustrate how the loose requirements for adequacy under the forum non conveniens doctrine remain a major hurdle for foreign plaintiffs in gaining access to the U.S. judicial system. In *Tang v. Synutra*, one hundred Chinese parents brought an action in the District Court of Maryland against Synutra, a publicly traded Delaware corporation.<sup>133</sup> The parents alleged that Synutra's subsidiaries in China produced melamine-tainted milk powder, which caused severe injuries to their children.<sup>134</sup> Synutra filed a motion for dismissal on forum non conveniens grounds.<sup>135</sup> The contentious issue in this case was whether the Chinese court was an adequate alternative forum.<sup>136</sup> The plaintiffs argued that while the Chinese courts may be nominally available, in practice the courts failed to respond to suits brought by the aggrieved parents who did not accept government compensation for their injuries.<sup>137</sup>

Plaintiffs submitted evidence, as a means of proving that the Chinese court was an inadequate forum, that Beijing police had arrested one of the lawyers who had submitted a declaration in favor of American jurisdiction over the case.<sup>138</sup> The arrest was purportedly because the lawyer had taken on "sensitive cases" which disturbed social harmony.<sup>139</sup> In fact, shortly after news of the milk scandal came out, several Chinese volunteer lawyers were summoned to a meeting at the Beijing Bureau of Justice where they were ordered to withdraw from the tainted-milk cases.<sup>140</sup> Nevertheless, this seemingly strong evidence did not convince the U.S. court as to

<sup>131</sup> See, e.g., Declaration of Mingxing Qian, Exhibit 2 to Defendant's Memorandum in Support of Motion to Dismiss, *Tang v. Synutra Int'l Inc.*, No. 8:09-cv-00088-DKC, 2010 WL 1375373 (D. Md. Mar. 29, 2010) (providing only a general survey of Chinese law as written, with no insight into how the laws are enforced in practice).

<sup>132</sup> The plaintiffs in *Tang* submitted three separate declarations by lawyers and law professors in support of their position that the Chinese courts were not an adequate alternative forum. See Declaration of Jinglin Li, Exhibit 4 to Plaintiff's Memorandum in Opposition, *Tang v. Synutra Int'l Inc.*, No. 8:09-cv-00088-DKC, 2010 WL 1375373 (D. Md. Mar. 29, 2010); Declaration of Zhiyong Xu, Exhibit 5 to Plaintiff's Memorandum in Opposition, *Tang v. Synutra Int'l Inc.*, No. 8:09-cv-00088-DKC, 2010 WL 1375373 (D. Md. Mar. 29, 2010); Declaration of Pingan Tian, Exhibit 6 to Plaintiff's Memorandum in Opposition, *Tang v. Synutra Int'l Inc.*, No. 8:09-cv-00088 (DKC), 2010 WL 1375373 (D. Md. Mar. 29, 2010). As previously noted, the District Court in Maryland found plaintiff's arguments against the Chinese court system insufficient, and granted defendant's motion to dismiss on forum non conveniens grounds. See *Tang v. Synutra Int'l Inc.*, No. 8:09-cv-00088-DKC, 2010 WL 1375373, at \*8-12 (D. Md. Mar. 29, 2010).

<sup>133</sup> *Tang*, No. 8:09-cv-00088-DKC, 2010 WL 1375373, at \*1 (D. Md. Mar. 29, 2010).

<sup>134</sup> *Id.*

<sup>135</sup> See Defendant's Motion to Dismiss at ¶ 2, *Tang v. Synutra Int'l Inc.*, No. 8:09-cv-00088-DKC, 2010 WL 1375373 (D. Md. Mar. 29, 2010).

<sup>136</sup> See *Tang*, No. 8:09-cv-00088-DKC, 2010 WL 1375373, at \*2, \*3-12 (D. Md. Mar. 29, 2010).

<sup>137</sup> *Id.* at \*5.

<sup>138</sup> See Plaintiff's Notice of Recent Development at 1-2, *Tang v. Synutra Int'l Inc.*, No. 8:09-cv-00088-DKC, 2010 WL 1375373 (D. Md. Mar. 29, 2010); *Tang*, No. 8:09-cv-00088-DKC, 2010 WL 1375373, at \*2 (D. Md. Mar. 29, 2010).

<sup>139</sup> See Plaintiff's Notice, *supra* note 138, at 2.

<sup>140</sup> Declaration of Jinglin Li, Exhibit 4 to Plaintiff's Memorandum in Opposition at ¶ 5, *Tang v. Synutra Int'l Inc.*, No. 8:09-cv-00088-DKC, 2010 WL 1375373 (D. Md. Mar. 29, 2010).

the lack of an adequate alternative forum in China.

Furthermore, experts for the plaintiff, including Professor Tian Ping-an, offered strong testimony that Chinese courts use legal loopholes to deny cases without issuing formal decisions.<sup>141</sup> According to Professor Tian, a law professor at the Southwest University of Political Science and Law,<sup>142</sup> Chinese courts refused to formally accept or deny these cases within the seven-day window required by the Civil Procedure Law of China (CPL).<sup>143</sup> “As a result, tainted-milk victims were indefinitely stayed in the case-intake process and did not ever obtain access to the civil justice system in China.”<sup>144</sup>

Despite the Supreme People’s Court (SPC) order to adjudicate cases involving melamine-tainted milk, local people’s courts still used the same tactics to block access to the aggrieved parents.<sup>145</sup> Professor Tian commented that the defiance of the highest Chinese court’s order “reflected [the] deplorable reality” that local people’s courts disregarded written laws and bent civil procedures without justification.<sup>146</sup> Without a formal dismissal order issued by the trial court, the plaintiffs were unable to appeal to a higher court because their case was still technically pending before the trial court.<sup>147</sup> Professor Tian further averred that the families felt the government-backed compensation system was “extremely inadequate and unfair”.<sup>148</sup> In addition, the government compensation was subject to neither judicial nor administrative supervision, making it “fundamentally different from a legal remedy.”<sup>149</sup>

Professor Tian’s argument failed to persuade the court. Instead, it was Professor Qian’s testimony for the defense that moved the court to dismiss the case. In his affidavit, Professor Qian, a law professor at Peking University,<sup>150</sup> provided a classic law review-type survey of the Chinese law regarding civil litigation and remedies.<sup>151</sup> He did not offer any in-depth analysis of how these rules were enforced in practice or whether there were any hurdles for the aggrieved families seeking compensation.<sup>152</sup> The general tone of his declaration implied that China has a well-developed legal system with procedural safeguards comparable to that of the United States.<sup>153</sup> From Professor Qian’s perspective, the compensation system for parents of children injured by the melamine-tainted milk was “fair and reasonable”.<sup>154</sup> At the conclusion of his declaration, the Professor echoed the government’s assessment that most families accepted the

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<sup>141</sup> Declaration of Pingan Tian, Exhibit 6 to Plaintiff’s Memorandum in Opposition at ¶¶ 16-20, Tang v. Synutra Int’l Inc., No. 8:09-cv-00088-DKC, 2010 WL 1375373 (D. Md. Mar. 29, 2010).

<sup>142</sup> *Id.* at ¶ 1.

<sup>143</sup> *Id.* at ¶¶ 24, 25.

<sup>144</sup> *Id.* at ¶ 26.

<sup>145</sup> *Id.* at ¶¶ 27-35.

<sup>146</sup> *Id.* at ¶ 27.

<sup>147</sup> Declaration of Pingan Tian, *supra* note 141, at ¶¶ 18, 26.

<sup>148</sup> *Id.* at ¶ 46.

<sup>149</sup> *Id.* at ¶¶ 41, 44.

<sup>150</sup> Declaration of Mingxing Qian, Exhibit 2 to Defendant’s Memorandum in Support of Motion to Dismiss at 1, Tang v. Synutra Int’l Inc., No. 8:09-cv-00088-DKC, 2010 WL 1375373 (D. Md. Mar. 29, 2010).

<sup>151</sup> *See id.*

<sup>152</sup> *See id.*

<sup>153</sup> *See id.* at 1-13.

<sup>154</sup> Reply Declaration of Mingxing Qian, Exhibit to Defendant’s Reply to Response to Motion to Dismiss at ¶ 35, Tang v. Synutra Int’l Inc., No. 8:09-cv-00088-DKC, 2010 WL 1375373 (D. Md. Mar. 29, 2010).

government-backed compensation and the court system was ready to take cases filed by those who chose to opt out of the compensation plan.<sup>155</sup> Relying on Professor Qian's assessment, the U.S. court ruled that China provided an adequate forum for the aggrieved families' claims.<sup>156</sup>

In *Cybersitter, L.L.C. v. China*, the plaintiff, a U.S. corporation, filed an action in the Central District of California against the Chinese government and several Chinese companies, alleging they conspired to misappropriate the plaintiff's copyrighted software code.<sup>157</sup> Defendants argued that China was an adequate alternative forum and the court should dismiss the case based on forum non conveniens.<sup>158</sup> Professor Donald Clarke submitted a declaration on behalf of the plaintiff, reasoning that China was incapable of providing an adequate forum for the plaintiff.<sup>159</sup> Drawing on numerous sources from prominent Chinese law scholars, Professor Clarke formulated a compelling argument that Chinese courts lack independence because of corruption and external influence from the government.<sup>160</sup> Professor Clarke asserted, "When the government of China wishes to control the outcome of a judicial proceeding, it may easily do so."<sup>161</sup> He further stated, "Meaningful judicial independence does not exist in China; political authorities are capable of interfering in any lawsuit in which they may take an interest."<sup>162</sup> However, Professor Clarke's declaration did not impress the U.S. court; Judge Josephine Staton Tucker was rather direct in her determination, stating, "Clarke's declaration . . . [is] speculative and fail[s] to convince the Court that China would not provide an adequate alternative forum."<sup>163</sup>

The next section of this article uses China's environmental laws to examine the breadth of the inconsistencies between the laws as they are recorded in China and the laws as they are enforced. By ignoring this discrepancy, U.S. courts undermine the intended purpose of the forum non conveniens doctrine.

## II. THE DISPARITIES BETWEEN CHINESE LAWS ON THE BOOKS AND IN PRACTICE

Professor Randall Peerenboom, who has been mostly supportive of the position that China provides an adequate forum, has nonetheless acknowledged the disparities between laws on the books and the reality of their application. Comparing it to other legal systems, he admitted that while "there is always a gap in every system . . . the distance is wider in China than elsewhere."<sup>164</sup> Professor William Alford of Harvard Law School characterized new Chinese laws as bearing only

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<sup>155</sup> See Declaration of Mingxing Qian, *supra* note 150, at 14.

<sup>156</sup> Tang v. Synutra Int'l Inc., No. 8:09-cv-00088-DKC, 2010 WL 1375373, at \*8-12 (D. Md. Mar. 29, 2010).

<sup>157</sup> *Cybersitter L.L.C. v. People's Republic of China*, No. 2:10-cv-00038-JST (SH), 2010 WL 4909958, at \*1 (C.D. Cal. Nov. 18, 2010).

<sup>158</sup> *Id.* at \*3.

<sup>159</sup> Declaration of Donald C. Clarke in Support of Plaintiff's Opposition to Defendant's Motion to Dismiss at ¶ 11, *Cybersitter L.L.C. v. People's Republic of China*, No. 2:10-cv-00038-JST (SH), 2010 WL 4909958 (C.D. Cal. Nov. 18, 2010).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at ¶ 13.

<sup>163</sup> *Cybersitter*, 2010 WL 4909958, at \*5.

<sup>164</sup> Randall Peerenboom, *Seek Truth from Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC*, 49 AM. J. COMP. L. 249, 307 (2001).

a “faint relation to life”.<sup>165</sup> According to Professor Alford, the basic function of Chinese law is not the protection of rights, but the preservation of social order.<sup>166</sup> When the government believes written laws constrain it, the government does not alter its action to conform to the law; instead, it simply ignores the law.<sup>167</sup>

Western scholars are not the only ones critical of the Chinese legal system; scholars in China share the same view. Despite tight censorship and political pressures, several prominent scholars at top universities have openly expressed disappointment about the Chinese legal system. For example, one law professor at Tsinghua University recently pointed out that the most serious problem in China is not whether it has enacted laws, but whether the government is willing to abide by those laws.<sup>168</sup> He offered the following assessment of the Chinese legal system: “In order to maintain ‘social stability’, the Chinese government allows or encourages illegal means, which have caused enormous damage to the legal system. In doing so, the government in effect marches backward [to the lawless era prior to the reforms].”<sup>169</sup>

Thus, even the most exhaustive description of formal laws in no way reflects the true protection offered by Chinese laws. It is impossible to develop a real understanding of the Chinese legal system by only reading laws and rules “on the books”, or as they are recorded. One must examine how the laws are implemented in practice.<sup>170</sup> The following sections will therefore focus on the inconsistencies between China’s environmental laws on the books and the laws in practice, the variances in the procedural rules for filing suits in Chinese courts, and the practical obstructions that prevent tort plaintiffs from having their claims heard.

#### A. Laws on the Books

Like many other areas of Chinese Law, China’s environmental law framework took shape after 1978, when the country carried out open reform policies.<sup>171</sup> During this time, environmental protection gained so much prominence that it was written into the Constitution.<sup>172</sup> Article 26 reads: “The state protects and improves the environment in which people live and the ecological environment. It prevents and controls pollution and other public hazards. The state organizes and encourages afforestation and the protection of forests.”<sup>173</sup>

Since 1978, the People’s Congress has passed more than thirty pieces of legislation

<sup>165</sup> William P. Alford, “Seek Truth from Facts” – Especially When They Are Unpleasant: America’s Understanding of China’s Efforts at Law Reform, 8 UCLA PAC. BASIN L.J. 177, 183 (1990).

<sup>166</sup> See *id.* at 182.

<sup>167</sup> See *id.*

<sup>168</sup> Chen Dongxu, *Geming Qiaoqiao Kaishile, Dalu Sheng Wunian Gaige* [The Revolution Has Started and China Has Five Years to Reform], SHIJIE RIBAO (Nov. 29, 2012, 2:59 PM), [http://www.worldjournal.com/view/full\\_news/20973590/article](http://www.worldjournal.com/view/full_news/20973590/article).

<sup>169</sup> *Id.*

<sup>170</sup> See, e.g., Peter Navarro, *The Economics of the “China Price”*, 68 CHINA PERSPECTIVES 13, 18, 20 (2006) (discussing how companies in China frequently fail to follow the laws on the books, often viewing enforcement fines as a part of the price of doing business).

<sup>171</sup> For a timeline of significant events of China’s policy of reform, see *Major Events of China’s Policy of Reform, Opening Up*, 17<sup>TH</sup> NAT’L CONGRESS OF THE COMMUNIST PARTY OF CHINA (Oct. 17, 2007, 11:33 AM), <http://english.people.com.cn/90002/92169/92189/6284848.html>.

<sup>172</sup> See XIANFA art. 26 (1982).

<sup>173</sup> *Id.*

regarding environmental protection.<sup>174</sup> In addition, the State Council and its ministries have issued countless regulations, rules, and directives on environmental protection.<sup>175</sup> Through environmental litigation, the courts of China have also become involved in the development of the country's environmental laws.<sup>176</sup>

### 1. Environmental Protection Law

In 1989, the People's Congress enacted the Environmental Protection Law (EPL).<sup>177</sup> The EPL was "formulated for the purposes of protecting and improving people's environment and the ecological environment, preventing and controlling pollution and other public health hazards, safeguarding human health and facilitating the development of socialist modernization."<sup>178</sup> It created the China Environmental Protection Agency (CEPA), which is directly under the leadership of the State Council, China's central government.<sup>179</sup> The CEPA is responsible for the management of environmental protection work, including creating environmental protection standards and supervising provincial governments in implementing the EPL.<sup>180</sup>

The law requires local governments above the county level to create environmental protection agencies enforcing the EPL in their respective regions.<sup>181</sup> Specifically, Article 21 of the EPL requires governments in coastal cities to prevent marine pollution, in part by ensuring that offshore oil exploration and other industries operating on the coastline comply with the state standards.<sup>182</sup> Violating the EPL by, for example, covering up pollution, will lead to a variety of administrative penalties, such as warnings, fines, and injunctions.<sup>183</sup> Individuals who cause serious personal injuries or property damage will face criminal investigation.<sup>184</sup> Government officials who ignore their duty, abuse power, or bend the law for selfish ends are subject to administrative penalties, as well as criminal investigation.<sup>185</sup> The EPL also provides a legal basis for tort litigation – Article 41 requires individuals or corporations causing pollution to eliminate it and compensate those who suffered direct losses.<sup>186</sup>

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<sup>174</sup> Zhu Ningzhu, *China to Enhance Environmental Protection Legislation*, XINHUA (Mar. 4, 2013, 2:45 PM), [http://news.xinhuanet.com/english/china/2013-03/04/c\\_132206837.htm](http://news.xinhuanet.com/english/china/2013-03/04/c_132206837.htm).

<sup>175</sup> Alex Wang, *The Role of Law in Environmental Protection in China: Recent Developments*, 8 VT. J. ENVTL. L. 195, 202 (2007).

<sup>176</sup> See *id.* at 204-05.

<sup>177</sup> Environmental Protection Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 1989, effective Dec. 26, 1989) [hereinafter *Environmental Protection Law*].

<sup>178</sup> *Id.* art. 1.

<sup>179</sup> *Id.* art. 7.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* art. 21.

<sup>183</sup> Environmental Protection Law art. 39.

<sup>184</sup> *Id.* art. 43.

<sup>185</sup> *Id.* art. 45.

<sup>186</sup> *Id.* art. 41.

## 2. Marine Environment Protection Law

Enacted in 1982 and amended in 1999,<sup>187</sup> the Marine Protection Law (MPL) applies to offshore oil exploration and other activities conducted on the seawaters under the jurisdiction of China.<sup>188</sup> Since pollution is more difficult to track in the sea than on land, the first part of the MPL mandates a surveillance network and designates the State Marine Bureau (SMB) to conduct pollution monitoring.<sup>189</sup> The MPL requires the State Council to set a limit on the amount of pollutants that can be released into the sea.<sup>190</sup> In collaboration with the State Council, other administrative departments, and provincial governments, the SMB classifies seawater into different zones according to their primary use and conducts surveillance work in those zones according to different standards.<sup>191</sup>

The MPL requires the SMB to provide guidance and coordinate efforts to prevent marine pollution.<sup>192</sup> Under the MPL, whoever releases pollutants into the seawater must pay a fee to the State.<sup>193</sup> Additionally, individuals and corporations are required to use energy-efficient technology and equipment to prevent marine pollution.<sup>194</sup> When an individual or corporation discovers someone has caused marine pollution or that government officials have failed to fulfill their duties, the MPL allows for complaints to be filed with the government.<sup>195</sup>

Lawmakers were aware of the negative impact oil spills have on the marine environment. The MPL requires the SMB to draw up emergency plans on how to respond to oil spills during offshore oil exploration.<sup>196</sup> Furthermore, oil companies conducting offshore drilling must have their own emergency plans in case of an oil spill and must file their emergency plans with the SMB for approval.<sup>197</sup> Companies that fail to submit emergency plans will receive an administrative warning and face a deadline to complete the plans.<sup>198</sup> When marine pollution occurs, the SMB is responsible for conducting an investigation to assess the damage at the site of the incident.<sup>199</sup> One who causes pollution must immediately make a report to the SMB and cooperate with the investigation.<sup>200</sup> To minimize damage, the MPL also requires the polluter to communicate with those whose interests are potentially threatened by the pollution.<sup>201</sup>

Punishments for violation of the MPL range from administrative fines and injunctions to

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<sup>187</sup> Marine Environment Protection Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 23, 1982, revised by the Standing Comm. Nat'l People's Cong., Dec. 25, 1999, effective Apr. 1, 2000) [hereinafter Marine Protection Law].

<sup>188</sup> *See id.* art. 2.

<sup>189</sup> *Id.* art. 5.

<sup>190</sup> *Id.* art. 3.

<sup>191</sup> *Id.* art. 6-9.

<sup>192</sup> *Id.* art. 5.

<sup>193</sup> Marine Protection Law art. 11.

<sup>194</sup> *Id.* art. 13.

<sup>195</sup> *Id.* art. 4.

<sup>196</sup> *Id.* art. 18.

<sup>197</sup> *Id.* art. 54.

<sup>198</sup> *Id.* art. 89.

<sup>199</sup> Marine Protection Law art. 17.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

criminal penalties. For example, whoever fails to make a report of pollution is subject to an administrative fine of RMB 20,000 (\$3,200).<sup>202</sup> Failure to take immediate action to control pollution is punishable by administrative fines up to RMB 100,000 (\$16,000).<sup>203</sup> Corporations that conduct oil exploration in violation of the MPL face up to RMB 200,000 (\$32,000) in fines.<sup>204</sup> If the marine pollution has caused serious property damage or personal injuries, the responsible persons are subject to criminal penalties ranging from three to seven years imprisonment in addition to criminal fines.<sup>205</sup> Government officials who abuse power, neglect duties, or bend the laws to enrich themselves, thereby causing marine pollution, are subject to administrative penalties.<sup>206</sup> If the circumstances are serious, the officials are subject to criminal investigation.<sup>207</sup> Like the EPL, the MPL also requires that companies causing pollution clean up the pollution and compensate those who suffered losses.<sup>208</sup> If a third party causes the pollution, the third party bears the responsibility to eliminate the damage and compensate victims.<sup>209</sup>

### 3. Civil Liability

While the EPL and MPL focus on administrative or criminal sanctions on pollution causing enterprises, civil laws in China set forth the legal bases for pollution victims to seek compensation from the individuals or corporations that caused the pollution. For instance, Article 124 of the General Principles of Civil Law (GPCL) provides that any person who pollutes the environment and causes damage to others in violation of relevant environmental protection laws is civilly liable.<sup>210</sup>

Additionally, the Tort Liability Law (TLL), which took effect in 2010, devotes an entire chapter to the civil liabilities of polluting enterprises.<sup>211</sup> Article 65 echoes the GPCL by holding the polluter liable for any damage it causes.<sup>212</sup> Furthermore, Article 66 shifts the burden of proof on causation to the defendant:

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.<sup>213</sup>

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<sup>202</sup> *Id.* art. 73.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* art. 85.

<sup>205</sup> Criminal Law of the People's Republic of China (promulgated by the Nat'l People's Cong., July 1, 1979, amended by the Nat'l People's Cong., Mar. 14, 1997), art. 338.

<sup>206</sup> Marine Protection Law art. 94.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* art. 90.

<sup>209</sup> *Id.*

<sup>210</sup> General Principles of the Civil Law of the People's Republic of China (promulgated by Nat'l People's Congress, Apr. 12, 1986, effective Jan. 1, 1987), art. 124.

<sup>211</sup> See Tort Law of the People's Republic of China (promulgated by Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010), Ch. VIII.

<sup>212</sup> *Id.* art. 65.

<sup>213</sup> *Id.* art. 66.

In the event that two or more polluters are responsible, the liability will be apportioned among them according to the type and volume of emission each polluter contributed to the harm suffered by the victim.<sup>214</sup> If the pollution was negligently or intentionally caused by a third party, the victim can seek compensation from either the polluter or the third party, and the polluter who has paid compensation is entitled to recover from the third party.<sup>215</sup>

Since a pollution accident often affects a large number of people in similar ways, it is efficient for both the court and the multiple parties to resolve disputes through a single legal proceeding. Therefore, the Civil Procedure Law (CPL) allows a collective action (class action) if more than two parties are pursuing the same goal or if the lawsuits are of the same kind.<sup>216</sup> Subject to the consent of all parties involved, the court can try the cases in a joint legal proceeding.<sup>217</sup> If the number of claimants pursuing the same objective is not certain, the court can issue a public notice stating basic information, the objective of the litigation, and requesting that potential claimants sign up at the court within a fixed period of time.<sup>218</sup> Members of the class can select representatives to participate in the litigation.<sup>219</sup> If the members fail to select representatives, the court may designate representatives upon consultation with the members of the class.<sup>220</sup> The representatives cannot change or abandon the litigation or seek mediation unless authorized by the class.<sup>221</sup> The court's judgments or orders are effective for all of the claimants who have registered with the court, and the same judgments or orders are also binding on the claimants who have not yet registered with the court, but who have instituted legal proceedings during the period of limitation of the action.<sup>222</sup>

### B. Laws in Practice

In reality, regulators and polluters alike often disregard these well-written rules. Had the laws been taken seriously, environmental degradation in China would have been reversed or at least limited over the last several years; polluters and corrupt officials would have been severely punished according to the law. Instead, the laws have been widely disregarded, corporations have injured individuals and the environment, government officials have shielded these corporations from liability in order to protect the country's business interests, and the parties who have suffered are without practical means of legal recourse.

China's explosive economic growth has taken a heavy toll on its environment, largely because of a "pollute first, control later" development model.<sup>223</sup> In 2007, China became the

<sup>214</sup> *Id.* art. 67.

<sup>215</sup> *Id.* art. 68.

<sup>216</sup> Civil Procedure Law of the People's Republic of China (originally promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, amended by the Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Jan. 1, 2013), art. 52.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* art. 54.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> Civil Procedure Law art. 54.

<sup>223</sup> Wang, *supra* note 175, at 198, 200; see also, Yuhong Zhao, *Trade and Environment: Challenges After China's WTO Accession*, 32 COLUM. J. ENVTL. L. 41, 48-49 (2007) (demonstrating the correlation between trade growth and environmental pollution).



world's biggest emitter of carbon dioxide, overtaking the United States.<sup>224</sup> Amid the zealous pursuit of a high GDP, local leaders rarely consider the cost of environmental damage.<sup>225</sup> In some regions, local governments have stretched the development model to the extreme, claiming people would "rather be choked to death by pollution than be poor."<sup>226</sup>

Because of China's excessive dependence on pollution-generating industries for economic growth, large number of so-called "cancer villages", in which many villagers are struck with similar types of cancer, have emerged.<sup>227</sup> Studies show outdoor pollution contributes to between 300,000 and 400,000 premature deaths in China every year.<sup>228</sup> The number of deaths caused by pollution could exceed 500,000 within a decade.<sup>229</sup> It is estimated that air pollution alone has cost \$25 billion in health and loss of productivity costs.<sup>230</sup> In August 2009, more than 600 children living near a metal smelter house in Shaanxi Province were found to have high levels of heavy metals in their blood.<sup>231</sup> The pollution was so severe that over 150 children required hospitalization, and the incident prompted an angry protest.<sup>232</sup>

China's industrial revolution has also had catastrophic effects on its water systems. According to a joint study by the United Nations Development and Environment Program and the Chinese government, "only five percent of household sewage and seventeen percent of industrial waste are properly treated prior to discharge."<sup>233</sup> Approximately 3.7 billion tons of industrial waste and sewage are discharged daily into rivers, lakes, and coastal waters.<sup>234</sup> The Chinese Environmental Science Academy reported that 80 percent of the 200 lakes surveyed are no longer suitable for drinking because of industrial pollution.<sup>235</sup> In 2006, the State Environmental

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<sup>224</sup> Elisabeth Rosenthal, *China Increases Lead as Biggest Carbon Dioxide Emitter*, N.Y. TIMES (June 14, 2008), <http://www.nytimes.com/2008/06/14/world/asia/14china.html>.

<sup>225</sup> See Wang, *supra* note 175, at 198-99.

<sup>226</sup> Li Jia, Liu Junlu & Han Qing, *Wuran Xiyi: Wuran Qiye Zaixibu Weihe Buchoujia* (污染西移: 污染企业在西部为何不愁嫁) [*Polluting Factories are Moving to the Western Region of China: Why are They Well Received?*], XINHUA NEWS (Sept. 30, 2006, 7:43 PM), [http://news.xinhuanet.com/politics/2006-09/30/content\\_5158939.htm](http://news.xinhuanet.com/politics/2006-09/30/content_5158939.htm).

<sup>227</sup> Yu Cheng, *Yianhai Duoge Shengfen Chuxian Aizhengcun* (沿海多个省份出现癌症村) [*"Cancer Villages" Emerged along Coastal Regions*], NANFANG DUSHIBAO (Nov. 5, 2007, 4:50 PM), <http://news.163.com/07/11/05/16/3S14DUL600011SM9.html>.

<sup>228</sup> Nicholas D. Kristof, Op-Ed, *Where Breathing Is Deadly*, N.Y. TIMES (May 25, 2008), <http://www.nytimes.com/2008/05/25/opinion/25kristof.html>.

<sup>229</sup> Navarro, *supra* note 170, at 19.

<sup>230</sup> Srinu Sitaraman, *Regulating the Belching Dragon: Rule of Law, Politics of enforcement, and Pollution Prevention in Post-Mao Industrial China*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 267, 277 (2007). Sitaraman argues that "[t]he lack of strong centralized environmental administration and a deep-seated political unwillingness to disrupt economic growth, combined with corruption and local protectionism, has precluded China from fully complying with its international treaty obligations and enforcing its domestic environmental laws." *Id.* at 335.

<sup>231</sup> Ttodd, *Protestors Storm Plant After Children Are Poisoned*, FRANCE 24 (Aug. 17, 2009, 11:09 AM), <http://www.france24.com/en/node/4805375/france24-web-community>.

<sup>232</sup> *Id.*

<sup>233</sup> Sitaraman, *supra* note 230, at 280.

<sup>234</sup> FOOD & WATER WATCH, IMPORT ALERT: GOVERNMENT FAILS CONSUMERS, FALLS SHORT ON SEAFOOD INSPECTIONS 5 (2007).

<sup>235</sup> Li Jing, *Fu yingyang hua Weixie Woguo Hupo Shengtai An'quan* (富营养化威胁我国湖泊生态安全) [*Eutrophication Threatens Ecological Condition of Lakes in China*], CHINA DAILY (Mar., 31, 2009), [http://www.chinadaily.com.cn/zgrbjx/2009-03/31/content\\_9094308.htm](http://www.chinadaily.com.cn/zgrbjx/2009-03/31/content_9094308.htm).

Protection Agency revealed an even bleaker statistic: seven of the nine lakes under its surveillance were dangerous “to human skin on contact”.<sup>236</sup>

Despite the clear intent of Chinese legislation surrounding environmental protection, the laws and the related provisions for civil liability have been widely disregarded. The practical purpose of the Chinese legal system is to promote social harmony – a goal Chinese government officials often see as best served by protecting the interests of corporate businesses, which are commonly the parties responsible for environmental damage. These protective measures even go so far as to interfere with the legal process and bar plaintiff’s access to forums for adjudicating their claims. The following section explores why the laws are often disregarded in practice and why this makes China an inadequate forum for adjudicating cases involving MNCs and tort liability.

### III. REASONS FOR INADEQUACY

#### A. *Lax Enforcement on MNCs*

Because of its insatiable thirst for energy, which started with the country’s economic boom after it joined the World Trade Organization (WTO) in 2001,<sup>237</sup> China is seemingly unwilling to enforce its environmental laws on foreign oil companies. In 2005, China became the second largest importer of oil in the world, topped only by the United States.<sup>238</sup> Domestic automobile consumption and manufacturing for exports have further fueled the country’s increasing demand for energy.<sup>239</sup> In addition to relying on imported oil, China has made strenuous efforts to explore oil and gas reserves both on land and offshore.<sup>240</sup> In the 1990s, China began to allow foreign oil companies to enter both retail and oil exploration markets either in the form of joint ventures with Chinese oil companies or in the form of wholly owned enterprises.<sup>241</sup> The purpose of this Chinese policy was to learn advanced technology and management skills from foreign oil companies.<sup>242</sup> Currently, major multinational oil giants including British Petroleum, Exxon Mobile, Shell, Chevron, ConocoPhillips, and Total Fina Elf have a presence in China.<sup>243</sup>

ConocoPhillips began to collaborate with Chinese oil companies in 1994.<sup>244</sup> In the Bohai Bay, ConocoPhillips developed one of China’s largest offshore oilfields – Peng Lai 19-3<sup>245</sup> – which is at the center of the current litigation. In addition, ConocoPhillips has oil wells in the

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<sup>236</sup> Sun Xiaohua, *Ban Slapped on Polluting Cities, Zones*, CHINA DAILY (July 4, 2007, 6:40 AM), [http://www.chinaethnigroups.com/china/2007-07/04/content\\_909239.htm](http://www.chinaethnigroups.com/china/2007-07/04/content_909239.htm).

<sup>237</sup> See Zhao, *supra* note 223, at 42, 50.

<sup>238</sup> See Wesley N. Harris, *China Energy: A Crossroads Historiography*, 37 T. MARSHALL L. REV. 255, 273-74 (2012).

<sup>239</sup> *Id.*

<sup>240</sup> See *id.* at 280-81.

<sup>241</sup> Liu Jianping & Zhu He, *Guowai Da Shiyou Shihua Gongsi Jinjun Zhongguo Shichang Xianzhuang Yu Celue Fenxi* [An Analysis of the Current Status and Strategy of Foreign Petroleum and Petrochemical Giants in China], 19 SHIYOU HUAGONG JISHU JINGJI [PETROCHEMICAL TECH. & ECON.] 8, 8 (2003).

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Company Background*, CONOCOPHILLIPS CHINA, <http://www.conocophillips.com.cn/EN/about/background/Pages/index.aspx> (last visited Nov. 9, 2013).

<sup>245</sup> *Id.*

South China Sea and the Xinjiang Autonomous Region.<sup>246</sup> At the time of the oil spill, ConocoPhillips's China division was a wholly owned subsidiary of ConocoPhillips with more than six hundred employees and more than \$4.2 billion in capital invested.<sup>247</sup>

The cozy relationship between the Chinese government and MNCs are mutually beneficial: MNCs bring much needed energy and technology to China; in return, the Chinese government provides them with a much more favorable regulatory environment than what is available in the MNCs' home states. As a result, MNCs are more willing to invest in China than in their home states. Essentially, MNCs can export pollution-causing plants from their home states to China and other "pollution havens".<sup>248</sup> Dr. Lawrence Summers, from his position as the Chief Economist at the World Bank, once encouraged the migration of "dirty industries" to less developed countries.<sup>249</sup> In an internal memorandum to World Bank officials, Summers claimed:

The measurement of the costs of health-impairing pollution depends on the forgone earnings from increased morbidity and mortality. From this point of view a given amount of health-impairing pollution should be done in the country with the lowest cost, which will be the country with the lowest wages. I think the economic logic behind dumping a load of toxic waste in the lowest-wage country is impeccable and we should face up to that.<sup>250</sup>

Although scholars have repeatedly rebuffed Summers' unapologetic statement, China's appalling environmental records prove that Summers' assessment is rooted in reality. Since becoming a member of the WTO, China has become a magnet for foreign direct investment. Lax environmental regulation is one of the most important aspects persuading MNCs to invest in China.<sup>251</sup>

### *B. Local Protectionism*

Under the current system, local governments are responsible for enforcing environmental regulations.<sup>252</sup> However, local officials have no incentive to enforce laws that burden businesses and slow economic growth.<sup>253</sup> Current Chinese laws do not have any mechanism to counter deep-

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<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> See generally, Kevin R. Gray, *Foreign Direct Investment and Environmental Impacts – Is the Debate Over?*, 11 RECIEL 306, 307 (2002) ("Most literature on the subject reveals little empirical evidence that investors seek developing countries as pollution havens; however, there are a number of case studies suggesting otherwise.").

<sup>249</sup> *Let Them Eat Pollution*, THE ECONOMIST, Feb. 8, 1992, at 66 (reproducing, in part, an internal World Bank memorandum signed by Lawrence Summers).

<sup>250</sup> *Id.*

<sup>251</sup> See John Child & Terence Tsai, *The Dynamic Between Firms' Environmental Strategies and Institutional Constraints in Emerging Economies: Evidence from China and Taiwan*, 42 J. MGMT. STUD. 95, 105-06 (2005).

<sup>252</sup> See Environmental Protection Law art. 7.

<sup>253</sup> Wu Hangmin, *Difang Baohu Ling Huanjing Wuran Shigu Yifadaixing* (地方保护令环境污染事故以罚代刑) [*Instead of Criminal Prosecution, Local Governments Only Fine Enterprises that Cause Environmental Disasters*], LEGAL DAILY (June 21, 2013, 11:01 AM), <http://www.chinanews.com/fz/2013/06-21/4954605.shtml>.

rooted local protectionism.<sup>254</sup> Andrew Mertha and Ka Zeng observed that local protection is so strong that “it is practically impossible for the leadership in Beijing to maintain sustained and systematic monitoring across China, with the possible exception of a handful of key issues, because enforcement costs are prohibitive.”<sup>255</sup> Professors Liebman and Milhaupt agree, “[l]ocal protectionism is perhaps the single biggest problem undermining China’s efforts to strengthen its legal system, and the combination of devolved authority and local protectionism frequently leads to underenforcement.”<sup>256</sup>

It is complicated to explain how local protectionism became prevalent in China, a country best known for its command and control model.<sup>257</sup> According to China’s Constitution, interaction between central and local governments in China is directed by “democratic centralism”,<sup>258</sup> a principle requiring the subordination of local officials to central authorities.<sup>259</sup> However, the economic reforms championed by Mr. Deng Xiaoping have reshaped this framework. For example, decentralization has shifted important decision-making power from central to local governments<sup>260</sup> in order to maximize the economic growth potential of the provinces.<sup>261</sup> In doing so, the central government must depend on each local region to grow its economy in order to maintain the overall growth of the nation.<sup>262</sup>

<sup>254</sup> Liu Huisheng, *Zhongguo Zhongquan chushou “Yifa Zhiwu” Difang Baohu Loudong Re Zhengyi* (中国重拳出手“以法治污” 地方保护漏洞惹争议) [Local Protectionism Causes Controversy in the Crusade Against Environmental Pollution], TAKUNG PAO (June 26, 2013, 10:12 AM), <http://news.takungpao.com/mainland/focus/2013-06/1715374.html>.

<sup>255</sup> Stanley Lubman, *Looking for Law in China*, 20 COLUM. J. ASIAN L. 1, 77 (2006) (quoting Andrew C. Mertha & Ka Zeng, *Political Institutions, Resistance and China’s Harmonization with International Law*, 182 CHINA Q. 319, 328 (2005)).

<sup>256</sup> Benjamin L. Liebman & Curtis J. Milhaupt, Essay, *Reputational Sanctions in China’s Securities Market*, 108 COLUM. L. REV. 929, 982 (2008); see also, Eric Priest, *The Future of Music and Film Piracy in China*, 21 BERKELEY TECH. L.J. 795, 822 (2006) (“Local protectionism probably constitutes the largest obstacle to cracking down on piracy in China.”); Sitaraman, *supra* note 230, at 335 (“The lack of strong centralized environmental administration and a deep-seated political unwillingness to disrupt economic growth, combined with corruption and local protectionism, has precluded China from fully complying with its international treaty obligations and enforcing its domestic environmental laws.”).

<sup>257</sup> STEFAN HALPER, *THE BEIJING CONSENSUS: HOW CHINA’S AUTHORITARIAN MODEL WILL DOMINATE THE TWENTY-FIRST CENTURY* 122-23 (2010).

<sup>258</sup> XIANFA art. 3 (1982).

<sup>259</sup> See CHOW, *supra* note 80, at 83.

<sup>260</sup> See Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 NW. J. INT’L L. & BUS. 383, 395 (2000) (“The decentralization promoted by the economic reforms has also reinforced localism in China.”); Shun Yong Yeh, *Is China’s Development Path Sustainable? An Overview on the Legal and Policy Framework in Relation to Environmental Protection in China*, 2 ASIAN J. WTO & INT’L HEALTH L. & POL’Y 399, 423 (2007).

<sup>261</sup> Wuli (武力), *Xin Zhongguo Zhongyang Zhengfu Quyu Jingji Zhengce Yanbian De Lishi Fengxi* (新中国中央政府区域政策演变的历史分析) [An Analysis of the Development of China’s Policy on Local Economies], INST. ON HIST. OF COMMUNIST PARTY OF CHINA (Sept. 23, 2013, 3:30 PM), <http://www.zgdsw.org.cn/n/2013/0923/c219022-23005425.html>.

<sup>262</sup> For a discussion of recent economic growth among the Chinese provinces, see Li Xiuzhong (李秀中), *2010 Nian GDP Da Wanyi Shengfen Kuozhi 17 Ge, Zhongxibu Zengzhang Lingpao Quanguo* (2010年GDP达万亿省份扩至17个 中西部增长领跑全国) [In 2010, 17 Provinces Exceeded One Trillion Yuan in GDP with Central, West Provinces Leading the Overall Growth], IFENG NEWS (Jan. 31, 2011, 3:13 AM), <http://finance.ifeng.com/news/20110131/3354624.shtml>.

Nevertheless, decentralization should not be mistakenly assumed to return power to the local people. As in the pre-reform era, local leaders are appointed by the central government rather than elected by the local people.<sup>263</sup> Due to the central government's disproportionate preference for GDP and fast economic growth over environmental protection, the primary consideration in selecting local leaders is how well they develop local GDP.<sup>264</sup> Consequently, local leaders seeking reappointment and promotions make every effort to maintain high economic growth, even at the expense of environmental concerns.<sup>265</sup>

The central government is aware of environmental damage resulting from high economic growth.<sup>266</sup> At times, the central government has even considered including environmental protection ("green GDP") in the criteria for assessing local leaders; however, these ideas have never been taken seriously because "green GDP" is an elusive concept and very difficult to quantify.<sup>267</sup>

Local citizens' voices are routinely drowned out in the local leader selection process, even though local citizens are the ones most severely affected by environmental problems.<sup>268</sup> In many cases, the central government sends leaders to regions that they have never lived in.<sup>269</sup> This appointment process is referred to as "parachuting" – when the central government in Beijing appoints leaders to various provinces<sup>270</sup> without effectively consulting the residents of those provinces.<sup>271</sup> As a result, the appointed leaders are accountable to the central government, but not to the citizens they govern. When the central government's push for higher GDP is at odds with local residents' desire for a clean environment, the local leaders invariably choose to pursue economic growth over environmental protection.<sup>272</sup>

<sup>263</sup> See generally Xu Xianxiang & Wang Xianbin, *Renmingzhi xia de Guanyuan Jingji Zengzhang Xingwei* (任命制下的官员经济增长行为) [Growth Behavior in the Appointment Economy], 9 CHINA ECON. Q. 1447 (2010) (examining how the current appointment system promotes economic growth); Qi Zhifeng, *Zhongguo Renming Guanyuan Sibuzai Huibi Yuanji Zhuzheng* (中国任命官员似不再回避原籍主政) [China Authorities Seem to No Longer Avoid Appointing Officials in Their Own Hometowns], VOICE OF AMERICA (Mar. 27, 2007, 8:00 PM), <http://www.voachinese.com/content/a-21-w2007-03-28-voa48-63065167/1046327.html>.

<sup>264</sup> See Wuli, *supra* note 261; 283 *Chengshi Yangben Tongji: Fangjia Yu Guangwei Shengqian Zheng Xiangguan* (283城市样本统计：房价与官位升迁正相关) [A Survey Among 283 Cities Indicates Positive Correlation Between the Housing Price and Chances for Officials' Promotion], ZHENGZHOU WANBAO (Aug. 15, 2013, 8:38 AM), <http://house.focus.cn/news/2013-08-15/3806105.html> [hereinafter *City Survey*].

<sup>265</sup> Ran Ran, *Yalixing Tizhi xia de Zhengzhi Jili Yu Huanjing Zhili* (压力型体制下的政治激励与地方环境治理) [Political Stimulation and Local Environmental Protection], JINGJI SHEHUI TIZHI BUIAO (June 7, 2013), [http://www.cctb.net/llsj/llsz/201306/t20130607\\_39089.htm](http://www.cctb.net/llsj/llsz/201306/t20130607_39089.htm).

<sup>266</sup> See Lyse GDP Beizhi Tanhua Yixian (绿色GDP被指昙花一现) [Green GDP is a Short-lived Concept After All], ZHONGGUO HUANJINGBAO (Mar. 25, 2013, 10:53 AM), <http://www.chinanews.com/gn/2013/03-25/4672530.shtml>.

<sup>267</sup> *Id.*

<sup>268</sup> Zhang Qianfan, *Shangfang Tizhi De Genyuan Yu Chulu* (上访体制的根源与出路) [The Development of the Petition System and Solution], ZHENGMING (2012), [http://article.chinalawinfo.com/Article\\_Detail.asp?ArticleID=69879](http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=69879).

<sup>269</sup> See Zhifeng, *supra* note 263.

<sup>270</sup> Chen Gang & Li Shu, *Guanyuan Jiaoliu, Renqi, Yu Fanfubai* (官员交流、任期与反腐败) [Appointment of Officials and Corruption Prevention], 19 SHIJI JINGJI 120, 137 (2012).

<sup>271</sup> There has been no single case of a local people's congress disapproving the officials sent by the central government.

<sup>272</sup> See Ran, *supra* note 265.

To grow the local economy, local leaders seek to forge close ties with businesses in their communities.<sup>273</sup> Local governments rely on these businesses to grow GDP, a much-needed political credit for the leaders to retain their jobs or seek promotion.<sup>274</sup> In return, the local government uses its powers to reduce production costs for businesses by relaxing environmental regulations.<sup>275</sup> Consequently, when an environmental crisis occurs, local governments help businesses conceal the crisis by stifling media coverage of the problem or by directing local courts to ignore cases involving environmental damage claims.<sup>276</sup> Local governments also help businesses by limiting the actions environmental officials can take. In Anhui Province, the local government suspended six local CEPA officials because they conducted three environmental inspections of a particular factory within twenty days, claiming that frequent enforcement actions damaged the province's business-friendly image and hampered future investment in the region.<sup>277</sup>

Supported by local governments, businesses have routinely cut corners when investing in environmental protection equipment. For example, Sinopec, an influential state-owned oil company, brazenly forced the local CEPA to allow it to release pollutants into the atmosphere.<sup>278</sup> During a campaign to enforce environmental laws, the Guangdong EPA discovered that several Sinopec chemical factories had deliberately released chemical waste into the city's rainwater drainage system – despite an injunction prohibiting it from doing so from the CEPA.<sup>279</sup> A CEPA official openly complained that Sinopec utilized its political influence to block the CEPA's law enforcement actions.<sup>280</sup>

With no guarantee of enforcement, Chinese environmental laws – while well-intentioned – are without effect. Claims brought against corporations responsible for environmental damage

<sup>273</sup> See, e.g., Xi Jianrong, *Difang Zhengfu Guanyuan Beizhi Wei Wuran Qiye Baojia* (地方政府官员被指为污染企业保驾) [Local Officials Protect Local Polluting Enterprises], FAZHI RIBAO (Feb. 27, 2013, 8:00 AM), <http://leaders.people.com.cn/n/2013/0227/c58278-20612622.html>.

<sup>274</sup> See generally Xianxiang & Xianbin, *supra* note 263; *City Survey*, *supra* note 264.

<sup>275</sup> Lü Hongxia, *Huanbao Jixiao Kaohe Huoke Dapo Difang Baohu Zhuyi* (环保绩效考核或可打破地方保护主义) [Environmental Audits may Prevent Local Protectionism], HONG WANG (May 23, 2009, 12:08 AM), <http://hlj.rednet.cn/c/2009/05/23/1764928.htm>.

<sup>276</sup> See, e.g., Wang Qiang, *Zhongshi Huanbao De Guanyuan Yinhe Shengqian Nan?* (重视环保的官员因何升迁难?) [Why do Officials Who Care about Environmental Protection Rarely Get Promoted?], N.Y. TIMES CHINA (Apr. 15, 2013), <http://cn.nytimes.com/china/20130415/cc15wangqiang> (discussing local official who attempted to mislead the media regarding a potential environmental accident at a local factory).

<sup>277</sup> Wang Jin, *Zhongguo Huanjing Fazhi Weihe Shibai?* (中国环境法治为何失败?) [Why Has Environmental Law in China Failed?], CHINA DIALOGUE (Sept. 23, 2010), <http://www.chinadialogue.net/article/show/single/ch/3831--China-s-green-laws-are-useless>.

<sup>278</sup> *Guangdong Huanbaoting Guanyuan Paizhuo Nucheng Zhongshihua Yaoxie Difang Zhengfu* (广东环保厅官员拍桌怒称中石化要挟地方政府) [Guangdong Environmental Protection Agency Officials Angrily Accuse Sinopec of Forcing Local Government to Allow it to Discharge Pollutants], YANG SHI [CCTV] (Sept. 26, 2012, 11:35 AM), <http://money.163.com/12/0926/11/8CAUM48V002524SO.html>; Liu Yuhua (刘雨桦), *Zhongshihua San Xiashu Qiye bei Chachu Huanjing Wenti* (中石化三下属企业被查出环境问题) [Sinopec's Three Subsidiaries Found to Have Pollution Problem], NANFANG ZHOUMO WANG (南方周末网) [SOUTH WEEKLY] (Sept. 27, 2012, 3:08 PM), <http://www.infzm.com/content/81404>.

<sup>279</sup> See sources cited, *supra* note 278.

<sup>280</sup> *Guangdong Huanbaoting Guanyuan Paizhuo Nucheng Zhongshihua Yaoxie Difang Zhengfu* (广东环保厅官员拍桌怒称中石化要挟地方政府) [Guangdong Environmental Protection Agency Officials Angrily Accuse Sinopec of Forcing Local Government to Allow it to Discharge Pollutants], YANG SHI [CCTV] (Sept. 26, 2012, 11:35 AM), <http://money.163.com/12/0926/11/8CAUM48V002524SO.html>.

face resistance from both the courts and the government.

### C. *The Difficulties of Filing Cases in Chinese Courts*

After the ConocoPhillips oil spill, a group of fishermen filed complaints in Qingdao Maritime Court, which neither accepted nor rejected the case.<sup>281</sup> In fact, the court has failed to even respond to the fishermen's inquiries about their case status, and so the fishermen's case hangs in limbo.<sup>282</sup> The court's inaction is a violation of the CPL, which provides that a court must accept a case if the plaintiff has indicated a specific defendant, the dispute, and his claims against the defendant.<sup>283</sup> By not ruling on the lawsuit within the period of time required by law, the Maritime Court has tacitly rejected the fishermen's complaints and left them unable to appeal the case to the next level.<sup>284</sup>

In China, courts commonly remain silent in order to dismiss sensitive cases without giving official rejection orders,<sup>285</sup> an approach commonly referred to as putting "cases in drawers." Chinese courts have also refused to issue receipts for evidence provided to the court,<sup>286</sup> despite the requirement that they do so.<sup>287</sup> This may be due to fear that the plaintiffs will use the receipts as evidence to hold the court accountable. Perhaps due to these vagaries, studies have shown that less than one percent of all environmental cases in China are resolved through the court systems.<sup>288</sup>

Many factors are responsible for the difficulties complainants experience in bringing their cases to court – especially for those cases involving large groups alleging environmental damage. First, the ambiguity of legal provisions regarding case acceptance provides the courts with wide discretion to deny claims. According to Articles 119 and 123 of the CPL, courts should accept a case when the plaintiff alleges "specific claims, facts, and reasons".<sup>289</sup> Many courts have interpreted this as requiring plaintiffs to produce substantial evidence of a claim before the court decides whether to accept the case for review.<sup>290</sup> Thus, plaintiffs must produce persuasive evidence of their claim in order to convince the court to hear the case.<sup>291</sup> Some courts have even

<sup>281</sup> See *supra* note 23 and accompanying text.

<sup>282</sup> Complaint, *supra* note 11, at ¶ 47.

<sup>283</sup> Civil Procedure Law of the People's Republic of China (2012), arts. 119, 123.

<sup>284</sup> Complaint, *supra* note 11, at ¶ 47; see also Declaration of Pingan Tian, *supra* note 141, at ¶ 18 (discussing how a people's court failure to take action does not create an appealable action for the plaintiffs).

<sup>285</sup> See Ling Li, *Corruption in China's Courts*, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 196, 213 (Randall Peerenboom ed., 2010).

<sup>286</sup> *Id.*

<sup>287</sup> See SUPREME PEOPLE'S COURT, OPINIONS OF THE SUPREME PEOPLE'S COURT ON SEVERAL ISSUES CONCERNING THE APPLICATION OF THE CIVIL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA, art. 70 (July 14, 1992).

<sup>288</sup> Wang Shu (王姝), *Zhongguo Jinnianlai Huanjing Qunti Shijian Pinfa Nianjun Zengsu Da 29%* (中国近年来环境群体性事件频发年均增速达 29%) [Social Unrest Related to Environmental Pollution Increased by 29% Annually], XIN JING BAO (新京报) [THE BEIJING NEWS] (Oct. 27, 2012, 3:24 AM), <http://news.sohu.com/20121027/n355822896.shtml>.

<sup>289</sup> Civil Procedure Law of the People's Republic of China (2012), arts. 119, 123.

<sup>290</sup> See Adam Moser & Tseming Yang, *Environmental Tort Litigation in China*, 41 ENVTL. L. REP. 10895, 10897 (2010).

<sup>291</sup> See Yang Xiaomei (杨晓梅), *Huanjin Minshi Susong Li'an Xianzhuang he Yuanyin* (环境民事诉讼立案

required that plaintiffs demonstrate a causal link in the evidence before they will accept a case.<sup>292</sup> In short, courts will readily deny a plaintiff's claim for lack of substantial evidence without ever conducting a trial. In this light, it is clear that the heightened threshold for case acceptance has served to restrict citizens' rights to relief, especially considering the various methods utilized to prevent frustrated plaintiffs from appealing their cases to higher courts.

Another reason for the court's reluctance to hear environmental cases is the local government's undue influence over court proceedings. As previously discussed, local leaders face great pressure to grow their economies. In order to keep polluting companies happy and protect the economy, local leaders may instruct the court to reject legal challenges against these companies.<sup>293</sup> Like other government departments, the court is only a tool to safeguard economic development. Beholden to local government for funding and job retention,<sup>294</sup> the court would be remiss to rule in favor of pollution victims.

#### D. Lack of Judicial Independence

According to the Law on the Organization of the People's Courts, each court is to establish an adjudication committee composed of members selected by the president of the court and approved by the People's Congress.<sup>295</sup> The adjudication committee is usually composed of the president, chief judges in each chamber, and senior judges, who meet to discuss significant or difficult cases and trial issues.<sup>296</sup> In practice, however, the adjudication committee has shifted from discussing the outcome of cases it deems "significant" or "difficult" to deciding these cases.<sup>297</sup> As a result, the presiding judge does not issue a valid judgment without the approval of both the president and the adjudication committee.

The existence of the adjudication committee seriously threatens judicial independence for several reasons: First, the adjudication committee is comprised of the court president and the department heads within the court.<sup>298</sup> These members may be skillful administrators, but are not necessarily seasoned judges.<sup>299</sup> In fact, many members of the adjudication committee have never had formal legal education and are not career judges.<sup>300</sup> Although committee membership

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现状和原因) [*The Status Quo and Reasons of the Environmental Civil Litigation Filing*], 11 FAZHI JINGWEI (法制经纬) 15 (2008).

<sup>292</sup> See Moser & Yang, *supra* note 290, at 10897.

<sup>293</sup> See Jerome A. Cohen, *Reforming China's Civil Procedure: Judging the Courts*, 45 AM. J. COMP. LAW 793, 797-98 (1997) (describing the influence of the Communist Party on judicial decision making, and interference of the Party in matters that may have an effect on the economy).

<sup>294</sup> See *id.* at 800.

<sup>295</sup> Organic Law of the People's Court of the People's Republic of China (originally promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1979, and as amended by the Standing Comm. Nat'l People's Cong., Oct. 31, 2006, effective Jan. 1, 2007), art. 10.

<sup>296</sup> See *id.*; see also Cohen, *supra* note 293, at 798.

<sup>297</sup> See Cohen, *supra* note 293, at 799.

<sup>298</sup> See *supra* note 296 and accompanying text.

<sup>299</sup> See Cohen, *supra* note 293, at 799 (noting that some of the judges on the adjudication committees are "essentially bureaucrats").

<sup>300</sup> Quan Wu (全武), *Zailun Shenpan Weiyuanhui Zhidu Gaige (再论审判委员会制度改革)* [Revisit the Reform of the Adjudication Committee System], ZHONGGUO FAYAN WANG (中国法院网) (June 13, 2008, 2:35 PM), <http://old.chinacourt.org/html/article/200806/13/307185.shtml>.



signifies high social status, it cannot necessarily reflect one's legal qualifications.<sup>301</sup>

Next, even though the law provides that the adjudication committee should convene only for significant or difficult cases,<sup>302</sup> the law does not provide clear guidance as to the meaning of those criteria. The SPC has issued an interpretation of the Criminal Procedure Law that provides some guidance on the matter.<sup>303</sup> The interpretation suggests that difficult, complicated, or significant cases are those that would have "great social influence".<sup>304</sup> However, it is unclear what even this means. Since the scope of the adjudication committee is also poorly defined, courts often treat the committee as a core leader group in charge of overseeing trial work on a day-to-day basis.<sup>305</sup> In addition, to avoid political risk, the president of the court routinely seeks advice from government officials when deciding so-called significant or difficult cases, a practice that scholars believe seriously compromises the independence of the court.<sup>306</sup>

Furthermore, despite holding all adjudication committee meetings behind closed doors,<sup>307</sup> the committee's decisions are binding on affected parties.<sup>308</sup> Typically, the adjudication committee routinely convenes to discuss and decide a number of cases all in one meeting.<sup>309</sup> Before the meeting, members of the committee do not have time to review court documents, and the committee's decisions are largely based on the presiding judge's presentation at the meeting.<sup>310</sup> Without formal court proceedings and the presentation by lawyers from both sides, the presiding judge has wide discretion in deciding which aspects of the case he reports to the committee. Since all of the committee meeting records are kept in secret,<sup>311</sup> it is almost impossible for concerned parties to know whether the committee adequately discussed their issue and made a fair decision. In one case, a follow-up investigation revealed that the presiding judge misled the adjudication committee.<sup>312</sup> As a result, the committee made a wrong decision.<sup>313</sup>

The government also tends to resolve disputes that affect a large number of people in non-judicial proceedings, such as administrative review, arbitration, mediation, or government-led

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<sup>301</sup> *Id.*

<sup>302</sup> Law of the People's Republic of China on the Organization of the People's Courts (2006), art. 10.

<sup>303</sup> See SUPREME PEOPLE'S COURT, INTERPRETATIONS OF THE SUPREME PEOPLE'S COURT ON THE APPLICATION OF THE CRIMINAL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA, art. 178 (promulgated Dec. 20, 2012, effective Jan. 1, 2013).

<sup>304</sup> *Id.*

<sup>305</sup> See Xin He, *Black Hole of Responsibility: The Adjudication Committee's Role in a Chinese Court*, 46 L. & SOC. REV. 681, 691 (2012) (observing that in the Chinese province surveyed, it was the "policy of the court that almost all the criminal cases be reviewed by the [adjudication] committee").

<sup>306</sup> See Zhang Huihuang (张辉煌), *Qianyi Shenpan Weiyuanhui Zhidu de Cunyu Fei* (浅议审判委员会制度的存与废) [On Whether to Retain the Adjudication Committee System], FALÜ TUSHUGUAN (法律图书馆) (July 2, 2004), [http://www.law-lib.com/lw/lw\\_view.asp?no=3348](http://www.law-lib.com/lw/lw_view.asp?no=3348).

<sup>307</sup> See He, *supra* note 305, at 682.

<sup>308</sup> *Id.* at 688.

<sup>309</sup> See *id.*

<sup>310</sup> See *id.* at 694-95.

<sup>311</sup> See *id.* at 688.

<sup>312</sup> Cheng Yuihua (陈瑞华), *Ping Fayuan Shenpan Weiyuanhui Zhidu* (评法院审判委员会制度) [Comment on the Adjudication Committee System] 1 BEIDA FALÜ PINGLUN (北大法律评论) [PEKING U. L. REV.] 381, 389-90, 404-05 (1998).

<sup>313</sup> *Id.*

compensation mechanisms.<sup>314</sup> This keeps the impact of the cases to a minimum, thereby preserving social stability. Like in other emerging economies, courts in China are not ready to play a pivotal role in resolving these sensitive issues due to a lack of resources and political mandate.<sup>315</sup> In practice, both central and local governments in China have instructed courts not to take cases that could potentially provoke the public and threaten social stability.<sup>316</sup>

### E. Coerced Mediation

Even when the court decides to hear a plaintiff's claim, the plaintiff faces intense pressure from judges to settle with the defendant through judicial mediation.<sup>317</sup> Judicial mediation is, in essence, a court-led settlement process, the result of which is binding on both parties and enforceable by the court.<sup>318</sup>

Judicial mediation in civil cases started in the 1930s,<sup>319</sup> before the Chinese Communist Party took control of China. Since then, judicial mediation has become an important means of dispute resolution.<sup>320</sup> The CPL requires the People's Court to conduct voluntary mediation when trying civil cases.<sup>321</sup> Only when mediation fails will the court conduct a formal trial and render a judgment without delay.<sup>322</sup> To ensure fairness in mediation, the CPL mandates that the People's Court conduct mediation within the boundaries of the law and based on the volition of the parties.<sup>323</sup> While the CPL specifically prohibits coercion in the mediation process,<sup>324</sup> it falls short of prescribing sanctions for those who coerce parties into a settlement agreement. In practice, judges "educate" parties several times until an agreement is reached. Though the law leaves room for parties to challenge the mediation agreement,<sup>325</sup> a trial is unlikely to change the outcome because the judges leading the mediation will also preside over that same case,<sup>326</sup> and it is unlikely the judges will overrule themselves.

In recent years, judicial mediation has become a preferred method of resolving sensitive issues that could potentially trigger social unrest. The SPC has aggressively urged lower courts to use mediation as a primary means of dispute resolution. In June 2010, the SPC issued an

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<sup>314</sup> See Fu Yulin & Randall Peerenboom, *A New Analytical Framework for Understanding and Promoting Judicial Independence in China*, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION, *supra* note 285, at 112 (noting that "the government has steered socioeconomic suits away from the courts toward other mechanisms, such as administrative reconsideration, mediation, arbitration, public hearings, and the political process more generally . . .").

<sup>315</sup> *Id.* at 113.

<sup>316</sup> *Id.* at 112-13.

<sup>317</sup> Carl F. Minzner, *China's Turn Against Law*, 59 AM. J. COMP. L. 935, 945 (2011).

<sup>318</sup> Yuhong Zhao, *Environmental Dispute Resolution in China*, 16 J. ENVTL. L. 157, 170 (2004).

<sup>319</sup> *Id.*

<sup>320</sup> See Minzner, *supra* note 317, at 945.

<sup>321</sup> Civil Procedure Law of the People's Republic of China (2012), art. 9.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.* art. 96.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* art. 99.

<sup>326</sup> *Id.*

important notice to lower courts, requiring that mediation take priority over trial.<sup>327</sup> In its notice, the SPC stated:

We must firmly establish the principle of giving priority to mediation, which is the most efficient and highest quality trial.<sup>328</sup> Mediation is conducive to solving social problems, ending conflicts, repairing damaged personal relations between parties, achieving a harmonious society. Therefore, courts must recognize the important and unique role that mediation plays in dispute solution process. Courts must shift focus from trial to mediation, and ensure that mediation is the first choice of method in dealing with disputes.<sup>329</sup>

According to the SPC, sensitive cases involve a large number of parties, which can garnish public attention and affect social stability and harmony.<sup>330</sup> In sensitive cases, the SPC requires the court to use mediation as the primary means of resolution and to try cases only as a last resort.<sup>331</sup> In difficult cases or cases of significant influence, lower courts should coordinate and consult with the local branches of the Party, the People's Congress, and higher level administrative departments.<sup>332</sup> By requiring lower courts to reach out to other departments, the SPC clearly ignores the judicial independence mandated by the Constitution.<sup>333</sup>

#### F. Lack of Remedy and Mr. Zhao's Prosecution

In China, seeking compensation can be as dangerous as advocating for human rights. The two different pursuits often lead to the same result: loss of freedom. Mr. Zhao's case illustrates the uphill battle that Chinese tort victims face in seeking compensation for their injured relatives.

In September 2008, an infant died after consuming melamine-tainted baby formula made by the Sanlu Company (Sanlu).<sup>334</sup> An official report showed that six babies died and nearly 300,000 were injured from drinking the tainted milk.<sup>335</sup> More than 50,000 children were

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<sup>327</sup> Zuigao Renmin Fayuan Yinfu Guanyu Jinyibu Guanche "Tiaojie Youxian, Tiaopan Jiehe" Gongzuo Yuanze de Ruogan Yijian de Tongzhi (最高人民法院印发《关于进一步贯彻“调解优先，调判结合”工作原则的若干意见》的通知) [The Supreme People's Court Notice: Several Opinions on Further Carrying Out the Principle of "Mediation Being a Preferred Method and Fusing Trials with Mediation"] (promulgated by Supreme People's Court, June 7, 2010, effective June 7, 2010) [hereinafter SPC Notice on Mediation].

<sup>328</sup> This sentence sounds contradictory. Mediation is mediation. How can mediation be a high quality trial? It is clear that the SPC used a metaphor in the notice to emphasize the importance of mediation.

<sup>329</sup> SPC Notice on Mediation ¶ 2, translated by author.

<sup>330</sup> *Id.* at ¶ 4.

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at ¶ 6.

<sup>333</sup> XIANFA art. 126 (1982).

<sup>334</sup> See Loretta Chao, *Tainted-Milk Victims File Lawsuit in China's Highest Court*, WALL ST. J., Jan. 20, 2009, at A10.

<sup>335</sup> Wenti Naifen Zhi Woguo 29 Wan Ying'er Miniao Xitong Chuxian Yichang (问题奶粉致我国29万婴儿泌尿系统出现异常) [Over 290,000 Infants Suffered Urinary Abnormalities from Drinking the Tainted Milk], BEI QING WANG (北青网) (Dec. 2, 2008, 8:41 AM), <http://finance.people.com.cn/GB/1037/8444677.html>; see also Will Clem & Lilian Zhang, *Tainted Milk Feared to Have Killed Another Baby*, S. CHINA MORNING POST (Jan. 9, 2009, 12:00 AM), <http://www.scmp.com/article/666245/tainted-milk-feared-have-killed-another-baby>.

hospitalized for treatment.<sup>336</sup> The presence of melamine in the baby formula was by no means an accident, however. The crisis was caused by unscrupulous milk suppliers who, in an effort to cheat milk collectors, diluted raw milk with water.<sup>337</sup> Furthermore, it appears Sanlu may have added melamine to the already-contaminated milk in order to further increase profits.<sup>338</sup> Although government officials knew about the contaminated milk, the scandal was covered up for at least a month out of fear of disrupting the 2008 Beijing Olympics.<sup>339</sup> In an effort to quell public anger, the central government disciplined or removed several local leaders.<sup>340</sup>

A subsequent investigation found that at least twenty-two milk processors made and marketed melamine-tainted milk powder across the country.<sup>341</sup> The government required the twenty-two companies to compensate the victims by setting up a trust fund in the amount of RMB two billion (\$300 million). According to the official compensation plan, the milk companies offered RMB 200,000 (\$29,200) for the death of a child, RMB 30,000 (\$4,400) for children suffering kidney stones, and as little as RMB 2,000 (\$300) for children whose illnesses were less severe.<sup>342</sup> By accepting this compensation, though, families were required to give up their right to sue the milk companies.<sup>343</sup> The government did not consult the victims' families while drafting this compensation plan. As a result, many families rejected compensation because they deemed it too low and recognized that it did not address long-term health costs for the children continuing to battle illnesses caused by the melamine-tainted milk.<sup>344</sup>

Mr. Zhao set up a website called "Kidney Stone Babies" to coordinate victims' families seeking adequate compensation from the milk companies.<sup>345</sup> For his efforts, Mr. Zhao was prosecuted and sentenced in November 2010 to two and a half years in prison for disrupting social order.<sup>346</sup> The prosecutor charged Mr. Zhao with violating Article 293 of the Criminal Law of China by speaking to foreign reporters, shouting slogans, holding protest signs outside the Public Security Bureau's compound, organizing aggrieved families to petition the government, inciting

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<sup>336</sup> Andrew Jacobs, *China: Prison-Sentence for Parent in Tainted-Milk Case*, N.Y. TIMES (Nov. 10, 2010), <http://www.nytimes.com/2010/11/11/world/asia/11beijing.html>.

<sup>337</sup> To ensure the diluted milk could pass a quality check, the milk suppliers added melamine, a nitrogen-rich crystalline compound used for making plastics and other industrial products. Since milk quality control reviewers only test the nitrogen levels of raw milk, the diluted milk laced with melamine easily passed the test and continued on to Sanlu, the baby formula processor. *See id.*; Julie R. Ingelfinger, *Melamine and the Global Implications of Food Contamination*, 359 NEW ENG. J. MED. 2745, 2745-46 (2008).

<sup>338</sup> *See* David Barboza, *Squeezed by Milk Scandal, China's Dairy Farmers Say They Are Victims*, N.Y. TIMES, Oct. 4, 2008, at A5; *see also* Ingelfinger, *supra* note 337, at 2746 ("Before the current melamine disaster, the marked dilution of infant formula in China had resulted in marasmus in some infants, which led to government directives to increase the protein content of such preparations or risk severe penalties. Thus, it is possible that the adulteration was conceived in response to a well-intentioned government directive.").

<sup>339</sup> *See* Jacobs, *supra* note 336.

<sup>340</sup> *Formula for Disaster*, THE ECONOMIST (Sept. 18, 2008), <http://www.economist.com/node/12262271> (observing that the mayor of Shijiazhuang, where Sanlu is headquartered, had been removed from office).

<sup>341</sup> Jacobs, *supra* note 336.

<sup>342</sup> *See* Edward Wong, *Milk Scandal in China Yields Cash for Parents*, N.Y. TIMES, Jan. 17, 2009, at A10.

<sup>343</sup> *See* Edward Wong, *Lawsuits in China's Milk Scandal Unlikely to be Settled*, N.Y. TIMES (Oct. 16, 2008), <http://www.nytimes.com/2008/10/16/world/asia/16iht-milk.4.17026368.html>; Wong, *supra* note 342.

<sup>344</sup> *See* Wong, *supra* note 342.

<sup>345</sup> Jacobs, *supra* note 336.

<sup>346</sup> *Id.*

the public, and disturbing social harmony.<sup>347</sup> In 1997, the People's Congress amended the Criminal Law of China to add Article 293, which created the new crime of "picking quarrels, provoking trouble and thus undermining social order", which is punishable by up to five years imprisonment.<sup>348</sup> The purpose of the amendment was to deter public protest against the government and maintain social stability. Some commentators refer to Article 293 as a catchall clause under which any conduct the government deems improper can be prosecuted.<sup>349</sup> The misconduct listed in Article 293 includes "booing, hooting and making trouble in a public place, thus causing serious disturbance."<sup>350</sup> This served as the main legal basis for Mr. Zhao's prosecution and sentencing.<sup>351</sup>

Despite the government's tight control of the Internet, Zhao's sentence instantly triggered online debate about the fairness of the trial.<sup>352</sup> Usually, news reporting on criminal trials in China is brief and disdainful in describing the suspect's demeanor and reactions. Like never before, several mainstream reports vividly reported the trial with a great deal of sympathy for the suffering of the Zhao family. *Caixin*, a major magazine in China, published an article on the trial:

Since the milk scandal in 2008, aggrieved families have been on a tough road to defend their legitimate rights. Mr. Zhao, the "Kidney Baby's" dad, made no progress in seeking compensation, and has now been sentenced to two and a half years in prison on the charges of 'seriously disturbing social order'. The trial took place at Beijing Daxing District Court after Mr. Zhao lost his freedom over a year ago. Zhao's wife, Li Xuemei, was in shock after the result, claiming, "The sentence is the most inhuman judgment ever."

While the judge proclaimed the judgment, Zhao's five-year old son stood in the chilly wind, holding a sign and shouting, "I love Daddy! Daddy, come home!" Many onlookers, including news reporters on the scene, wept with tears. Zhao's son was diagnosed with a kidney stone five days after the scandal was revealed. His weight and height were below those of average children of the same age . . .<sup>353</sup>

Online comments following the article were overwhelmingly filled with anger and dismay.<sup>354</sup> Ironically, while Mr. Zhao was taken away to serve his prison term, at least six local

<sup>347</sup> See Jacobs, *supra* note 336; Dui Hua Found., *Injuring the Injured: the Case of Zhao Lianhai*, HUM. RTS. J. (Nov. 9, 2010), <http://www.duihuahrjournal.org/2010/11/injuring-injured-case-of-zhao-lianhai.html>.

<sup>348</sup> Criminal Law of the People's Republic of China (1997), art. 293, *translated by author*.

<sup>349</sup> See Dui Hua Found., *supra* note 347.

<sup>350</sup> Criminal Law of the People's Republic of China (1997), art. 293, *translated by author*.

<sup>351</sup> See Dui Hua Found., *supra* note 347.

<sup>352</sup> See, e.g., *id*.

<sup>353</sup> "Jieshi Baobao zhi Fu" Zhao Lianhai Huoxing ("结石宝宝之父"赵连海获刑) [Mr. Zhao Lianhai, "Kidney Stone Baby's" Father Sentenced], CAIXIN (Nov. 13, 2010), <http://magazine.caixin.com/2010-11-13/100198442.html>, *translated by author*.

<sup>354</sup> See Comments to *Jieshi Baobao zhi Fu* Zhao Lianhai Huoxing, *supra*, *translated by author*. Surprisingly, these comments have survived the tight censorship and are still online:

"Oh my God, is China a rule of law country? Where is justice?"

"Since ancient time, [corrupt] officials and crooked merchants are from the same family."

officials who helped to cover up the milk scandal regained their official posts or received promotions to higher positions.<sup>355</sup> Although there is no judicial hurdle preventing the government from prosecuting “stability threatening” individuals such as Zhao Lianhai, it is nevertheless difficult for tort victims to file a case in court.

#### IV. CONCLUSION

In this increasingly interdependent world, “pollution knows no boundaries”.<sup>356</sup> “A wrong to one is a wrong to another.”<sup>357</sup> In 2010, China’s air pollution contributed to twenty percent of ground-level pollution on the West Coast of the United States.<sup>358</sup> Additionally, the pollution resulting from the ConocoPhillips oil spill can directly affect seafood products imported to the United States from the affected area. Therefore, it is in the U.S. courts’ interest to impose liability on U.S. corporations that cause environmental damage in countries such as China, where injured parties have no avenue to justice. Keeping the fishermen’s case in the U.S. court system will uphold justice for the fishermen, protect the environment, and encourage safe practices from multinational corporations both at home and abroad.

However, the U.S. courts’ lenient treatment of the forum non conveniens doctrine has the effect of leaving plaintiffs without remedies for their injuries due to corruption and excessive political influence in foreign forums, resulting from the fear of the potential impact an open trial will have on economic growth. With regard to the application of the forum non conveniens doctrine, U.S. courts have focused on judicial expediency at the expense of plaintiffs’ interests. To remedy the flaws of the antiquated forum non conveniens doctrine, courts must allow examination of how laws are implemented in the defendant-preferred forum. Although a superficial examination of the Chinese legal system indicates that plaintiffs in these and similar cases have access to an adequate Chinese forum to adjudicate their claims, there is extensive evidence that these forums are inaccessible in practice. The reluctance of U.S. courts to give weight to these practical arguments works against the ends of justice for these plaintiffs, shields the defendants from tort liability, and hinders related American interests.

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“Law is only a tool to suppress ordinary people.”

“Don’t you know this is homonymous society building?”

“We live in a country where defending one’s rights is a crime.”

“These laws only serve corrupt officials. Who cares whether ordinary people live or die?”

“Wish judges drank melamine-laced milk every day!”

<sup>355</sup> Zhang Huanping (张焕平), *Sanlu Naifen Shijian Wenze Guanyuan Zhishao 6 Ren Fuchu huo bei Tiba* (三鹿奶粉事件问责官员至少6人复出或被提拔) [At Least Six Officials Dismissed in the Sanlu Milk Scandal Regained Their Posts or Even Were Promoted], CAIXIN WANG (财新网) (Sept. 13, 2012, 3:31 PM), <http://news.sohu.com/20120913/n353071821.shtml>.

<sup>356</sup> Darrin Magee, *China is My Backyard: China’s Environmental Degradation in a Global Context*, 12 GEO. J. INT’L AFF. 120, 120 (2011).

<sup>357</sup> *Green v. Gila Water Co.*, 225 P.2d 263, 265 (1930).

<sup>358</sup> Henry M. Paulson Jr., *How Cities Can Save China*, N.Y. TIMES, Dec. 5, 2012, at A31.