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Regulating land and pollution in China : lawmaking, compliance, and enforcement : theory and cases

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Regulating Land and Pollution in China

*Lawmaking, Compliance, and Enforcement;
Theory and Cases*

Benjamin van Rooij



Leiden University Press

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Regulating Land and Pollution in China
Lawmaking, Compliance and Enforcement;
Theory and Cases

PROEFSCHRIFT

ter verkrijging van
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in 1973

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Overige leden van de promotiecommissie:

Prof. dr. R.A. Kagan
Prof. dr. W.J.M. Voermans
Dr. A.W. Bedner
Dr. W. Huisman

to my parents

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Abbreviations

APPCL	Air Pollution Prevention and Control Law
CCP	Chinese Communist Party
CCP-CC	Central Committee of the Chinese Communist Party
DMB	Dianchi Management Bureau
DPR	Dianchi Protection Rules
EP	Environmental Protection
EPA	Environmental Protection Agency
EPB	Environmental Protection Bureau
FAO	Food and Agriculture Organization
FPC	Fucun Paper Company
FSS	Fluor Sodium Sillicate
FTC	Federal Trade Commission
GPH	Guaranteeing Public Health
JCBC	Jiacun Cardboard Box Company
KMEPB	Kunming Environmental Protection Bureau
KMREP	Kunming Municipal Management Rules on Environmental Pollution Prevention and Control for Restaurants and Food Business
KMSLB	Knuming State Land Resources Bureau
LAO	NPC Standing Committee Legal Affairs Office
LMA	Land Management Act
MNLR	Ministry of National Land Resources
NCFC	Ningshi Chemical Fertilizer Company
NEPA	National Environmental Protection Agency
NPC	National People's Congress
NPC-EP Committee	National People's Congress Environmental and Resource Protection Committee
NPC-SC	NPC Standing Committee
OSHA	Occupational Safety and Health Administration
PDF	Pollution Discharge Fees
PEDF	Pollution Excessive Discharge Fees
PRC	People's Republic of China

PROPER	Program for Pollution Control, Evaluation and Rating
RMB	<i>Renminbi</i> (National Currency of China)
SEPA	State Environmental Protection Agency
SIS	Strict Inspections and Sanctions
SLB	State Land Resources Bureau
SOE	State Owned Enterprise
TRI	Toxics Release Inventory
TVA	Tennessee Valley Authority
TVE	Township and Village Enterprises
US	United States
VC	Village Committee
WPPCL	Water Pollution Prevention and Control Law
YNEPR	Yunnan Provincial Environmental Protection Regulations
YPC	Yunzhi Paper (also Yunzhi)

Introduction

1. Legal Change at Lake Dianchi

Legislative and Enforcement Efforts to protect Natural Resources in Kunming

Attempts to Strengthen the Legal Protection of China's Natural Resources

Long before development opportunities arrived, Lake Dianchi, located right below Kunming city¹ in the South West of China, had been rich in natural resources. "The lake's water was pure and clean. We would swim there and even wash our clothes," an old woman in Jiacun² village, bordering the eastern side of the lake explains.³ In addition to clean water, local farmers, though not rich, used to have plenty of fertile land.

Since the last two decades, development brought change, for better and for worse. The inhabitants of this peri-urban region—like many Chinese—have been able to share in the prosperity rapid industrialization and rural urbanization brought. Farmers switched to off-farm jobs in the new industries. On the more developed eastern side of the lake, farmers even turned to real estate development, building second houses while leasing their old ones to newly arrived migrants. In addition, villages have earned income by renting out farmland for enterprise construction. Lake Dianchi thus witnessed its inhabitants transform from relative rural poverty to an initial stage of peri-urban riches.

Economic development had its price; it was disastrous for the lake catchment's natural resources. A combination of industrial pollution, municipal waste discharge, soil erosion and various kinds of non-point pollution from chemical fertilizer, solid waste and pesticides used in horticulture severely eutrophied the lake's water.⁴ In addition, the numerous new paper and chemical fertilizer factories polluted the lake catchment's rivers and the region's air. Finally, arable land, once an abundant resource, also suffered from development. Kunming's unstoppable expansion ate-up whole villages, while in those villages left intact, the farmers' own housing craze combined with the construction of village enterprises and new

¹ Kunming is the provincial capital of Yunnan Province, located in the southwest of China. Kunming now has approximately 4 million inhabitants, 2 million of which live around the lake area. Yunnan province has about 44 million inhabitants. Kunming city covers both an urban area, the city proper, as well as a peri-urban area, which includes the whole of Lake Dianchi.

² All local placenames, personal names and company names have been replaced with fictitious names whenever the identity of informants was at stake and when possible.

³ Based on an interview in Jiacun Village, Kunming, Summer 2004

⁴ Y. Liu et al., "Policy and Research Efforts for Agricultural Non-point Source Pollution in Yunnan Dianchi Watershed," *Enrich Conference, Qinghua University* 26-27 September (2002).

highways caused the amount of arable land to decrease even further, to the extent that some villages lost most of their land.

Lake Dianchi is but one of the many localities in China where development has adversely affected natural resources.⁵ Throughout the country, economic development in combination with urbanization and industrialization has led to natural resource degradation. Most of China's larger cities suffer from serious air quality problems. The country's major lakes and rivers have been severely polluted and accidents involving highly toxic spills such as those at the Tuojiang River in 2004 and the Songhua River in 2005 keep on recurring. A World Bank study on air pollution found in 2005 that 16 of the world's most polluted cities were in China.⁶ Furthermore, the country's arable land continues to decline, in part because of urban and rural construction, but also because of land transformation to stop further soil erosion.⁷ Such erosion led to serious desertification causing severe water shortages throughout Northern China and sand storms reaching all the way to South-Korea.

China's main approach to stop resource loss has been through using the legal system. Initial legislation made in the 1980s was vague and weak, and therefore unable to protect natural resources. China's legal reconstruction and the country's special circumstances were an important reason for why China's original natural resource protection laws had been vague and weak. Lacking legal experience and faced with an enormous and rapidly changing society, during the early days of reform (in the 1980s and early 1990s), Deng Xiaoping's credo "*mo shitou guo he*" (crossing the river by

⁵ T. Cannon, ed., *China's Economic Growth, The Impact on Regions, Migration and the Environment* (London: Macmillan Press LTD, 2000), E. Economy, *Environmental Scarcities, State Capacity, Civil Violence, The Case of China* (Cambridge: Cambridge University Press, 1997), R.L. Edmonds, *Patterns of China's Lost Harmony* (London: Routledge, 1994), R.L. Edmonds, "Studies on China's Environment," in *Managing the Chinese Environment*, ed. R L Edmonds (Oxford: Oxford University Press, 1998 (reprinted in 2000)), R.L. Edmonds, "China's Land Resources, Environment and Agricultural Production," *China Quarterly* 156, no. December (1998), A.R. Jahiel, "The Contradictory Impact of Reform on Environmental Protection in China," *China Quarterly* 149 (1997), T.M. Johnson, *Clear Water, Blue Skies: China's Environment in the New Century* (Washington, D.C.: World Bank, 1997), M.B. McElroy, C.P. Nielsen, and P. Lydon, eds., *Energizing China, Reconciling Environmental Protection and Economic Growth* (Cambridge (Massachusetts): Harvard University Press, 1998), V. Smil, *China's Environmental Crisis: an inquiry into the limits of national development* (Armonk, N.Y.: M.E. Sharpe, 1993), V. Smil, "China's Agricultural Land," *China Quarterly* 158, no. June (1999), V. Smil, *China's Past, China's Future, Energy, Food, Environment* (New York: Routledge Curzon, 2004), E.B. Vermeer, "Industrial Pollution in China and Remedial Policies," in *Managing the Chinese Environment*, ed. R L Edmonds (London: Routledge, 1998 (reprinted in 2000)).

⁶ J. Watts, "Satellite data reveals Beijing as air pollution capital of world," *The Guardian*, October 31 2005.

⁷ Z. Feng et al., "Grain-for-green policy and its impacts on grain supply in West China," *Land Use Policy* 22 (2005).

feeling the stones) had been central for China's legal development. Following a "piece meal approach", the country at first used an incremental method of lawmaking.⁸ This meant that the country first established abstract general laws, which could later be specified in easily changeable administrative regulations. As legislation was the result of extensive bargaining between various stakeholders, for natural resource protection this meant watered-down legislation, sacrificing environmental for economic and social concerns.

After 1995, national leadership started to believe that by strengthening anti-pollution and land legislation, mainly made in the 1980s, it would better be able to control resource loss.⁹ Their belief was based on reports by scholars and policymakers blaming the ongoing deterioration of natural resources on the existing legislation.¹⁰ Thus, for natural resource protection law, the piecemeal approach and the bargaining practices were partly abandoned in the mid-1990s. In 1998, the amended Land Management Act established a strict arable land protection system limiting the conversion of arable land into non-arable use. In similar fashion, pollution laws were amended and new laws introduced. While the amended 1995 Air Pollution Prevention and Control Law failed to realize most of the ambitious legislative proposals of environmentalists, the amended 1996 Water Pollution Prevention and Control Law and 2000 Air Pollution Prevention and Control Law and the 2002 Environmental Impact Assessment Law did introduce stricter and more specific norms to protect the nation from pollution.

Around the same time, apart from blaming legislation, scholarship and policymakers also attributed ongoing resource loss in places such as

⁸ J. Chen, *Chinese Law, Towards an Understanding of Chinese Law, Its Nature and Development* (The Hague: Kluwer Law International, 1999).

⁹ See for example: NPC-SC Legal Affairs Office, ed., *Zhonghua Renmin Gongheguo Tudi Guanlifa Shiyi (Commentary on the PRC Land Management Act)* (Beijing: Falü Chubanshe, 1998). NPC Legal Committee, "Guanyu Zhonghua Renmin Gongheguo Daqi Wuran Fangzhi Fa Xiuding Caoan Xiugai Qingkuang de Huibao (Report on the Changes to the Draft Amendment to the PRC Air Pollution Prevention and Control Law)," in *Zhonghua Renmin Gongheguo Da Qi Wuran Fangzhi Fa Shiyi (Commentary to the PRC Air Pollution Prevention and Control Law)*, ed. NPC-SC Legal Affairs Office (Beijing: Falü Chubanshe, 2001). NPC Legal Committee, "Guanyu Zhonghua Renmin Gongheguo Daqi Wuran Fangzhi Fa Xiuding Caoan Shenji Jieguo de Baogao (Report on the Results of Review of the the Draft Amendment to the PRC Air Pollution Prevention and Control Law)," in *Zhonghua Renmin Gongheguo Da Qi Wuran Fangzhi Fa Shiyi (Commentary to the PRC Air Pollution Prevention and Control Law)*, ed. NPC-SC Legal Affairs Office (Beijing: Falü Chubanshe, 2001).

¹⁰ M. Li, "China's Compliance with WTO Requirements Will Improve the Efficiency and Effective Implementation of Environmental Laws in China," *Temple International and Comparative Law Journal* 18 (2004). 165, W.P. Alford and Y. Shen, "Limits of the Law in Addressing China's Environmental Dilemma," in *Energizing China, Reconciling Environmental Protection and Economic Growth*, ed. M B McElroy, C P Nielsen, and P Lydon (Cambridge (Massachusetts): Harvard University Press, 1998). 134, E.W. Orts, "Environmental Law With Chinese Characteristics," *William and Mary Bill of Rights Journal* 11 (2003). 561

Lake Dianchi to weak enforcement.¹¹ Weak enforcement—whether of natural resource protection law, or any other locally unfavorable national legislation—was caused by “*difang baohu zhuyi*” (local protectionism), scholars and policy-makers held. Local protectionism meant that local governments let their own local interests prevail over national concerns. Local governments were able to exercise such protectionism through their control over the budgets and personnel management of their local bureaucracies—including courts, procurates, police and administrative departments such as land bureaus, industrial bureaus and environmental protection bureaus.¹²

After 1995, in order to overcome the local protectionist influence on law enforcement, China’s leadership decided to strengthen central control over local inspections and sanctions for violations. Accordingly, in a seemingly Maoist fashion, China organized national political campaigns aimed to enhance the enforcement of natural resource protection law. Since 1996, there have been continuous rounds of campaigns for arable land protection law enforcement and for pollution law enforcement.¹³ These efforts were similar to political legal campaigns Beijing has organized against other illegal practices caused by weak enforcement such as drug trafficking, corruption, pirated goods and illegal internet cafes.¹⁴

Since the second half of the 1990s, China’s central level leadership has thus changed the existing legislation and organized law enforcement campaigns to control or at least slow down the ongoing deterioration of natural resources at places such as Lake Dianchi. The question is what these changes have accomplished at the local level. Can these changes prevent a future with shortages of water to drink, air to breathe and arable land for food to eat? To what extent have stricter norms been better able to prevent the local conversion of arable land or control local air and water pollution? Have legal enforcement campaigns been able to overcome local protectionism and served as a sufficient deterrent to end ongoing local violations and prevent violations occurring in the future? In order to find an answer to these questions, this research seeks to know what influence China’s post-1995 legislative changes and law enforcement campaigns have had on compliance with natural resource protection law at Lake Dianchi.

¹¹ For an overview of this literature, see Chapter 13.

¹² Ibid.

¹³ See Chapter 14.

¹⁴ For an overview see B. Van Rooij, “China’s War on Graft: Politico-Legal Campaigns Against Corruption in China and Their Similarities to the Legal Reactions to Crisis in the U.S.,” *Pacific Rim Law and Policy Journal* 14, no. 2 (2005). See also Chapter 14.

Western and non-Western Regulatory Law

China's legal attempt to stop natural resource degradation at places such as Lake Dianchi is an example—drawn from a non-Western, transitional, developing legal system—of the functioning of command and control regulation. Command and control regulation (from now on “regulatory law¹⁵”) is (mostly administrative) law that the state uses to change economic behavior (mostly of businesses or corporations, and mostly behavior deemed harmful to citizens), first by setting norms for desired behavior—lawmaking—and second by detecting violations and issuing sanctions against those who break such norms in order to stop occurring violations and prevent violation in the future—law enforcement¹⁶. If regulatory law is successful such lawmaking and law enforcement lead to behavioral changes because the targeted actors will abide by the norms—compliance.¹⁷

Regulatory Law in Western Countries

Regulatory law has gained importance during the past century. In the West, it has been an essential element of the welfare state¹⁸ for shielding its citizens from the dangers of the “risk society”.¹⁹ It has become the Western state's choice instrument to protect citizens from harm, whether it is from environmental degradation, occupational health hazards, unfair competition, securities fraud, fire or unsafe housing construction, to name but a few examples.²⁰ Not surprisingly in the West, there have been many studies on the formation and functioning of regulatory legal regimes. There is now a significant and detailed body of literature on the main processes of regulatory law²¹—lawmaking²², enforcement²³ and compliance²⁴—as well as on how

¹⁵ We use this term following Gray and Scholtz. See W. Gray and J.T. Scholtz, "Does Regulatory Enforcement Work? A Panel Analysis of OSHA Enforcement," *Law & Society Review* 27, no. 1 (1993).

¹⁶ Here we follow socio-legal and law and economics authors See Ibid, N. Gunningham, P. Grabosky, and D. Sinclair, *Smart Regulation, Designing Environmental Policy* (Oxford: Oxford University Press, 1998). J. Black, "Critical Reflections on Regulation," *LSE, CARR Discussion Paper Series* (2002).

¹⁷ While, of course, the law is more than an instrument aiming to attain certain goals or even to attain compliance, this book primarily uses an instrumental approach to law.

¹⁸ G. Teubner, "The Transformation of Law in the Welfare State," in *Dilemmas of Law in the Welfare State*, ed. G Teubner (Berlin: Walter de Gruyter, 1985).

¹⁹ U. Beck, *Risk Society: Towards a New Modernity* (London: Sage Publications, 1992).

²⁰ For an overview of the rise of protective regulation in the US. See E. Bardach and R.A. Kagan, *Going by the Book, The Problem of Regulatory Unreasonableness* (Philadelphia: Temple University Press, 1982). Chapter 2

²¹ The dissemination, the invocation, the application and the adjudication are important aspects of regulatory law. Due to limitations the present research does not discuss these aspects in detail, nor their theoretical backgrounds.

²² For an overview of the literature see Chapter 2.

such processes have influenced one another, for example looking at the impact of enforcement on compliance²⁵, or, to a lesser extent the relation between norm formulation and enforcement, and norm formation and compliance.²⁶ In the West, studies on the interrelationships between all three main regulatory processes—the content of the legislation/the process of lawmaking, the process of enforcement and compliance with such legislation—have been limited. Notable exceptions include Bardach and Kagan’s study of regulatory unreasonableness²⁷, Hutter’s study of compliance with Britain’s environmental and occupational health regulations²⁸, and Gunningham et al. studies of chemical and agricultural industries²⁹.

Studies on regulatory law in the West have changed in focus and content over the years. Studies on US regulation are illustrative. In the earliest studies from the 1950s until the 1970s the fear of “capture” was dominant. Bernstein’s study on independent commissions—the main agencies implementing regulatory law in the US at the time—found that in many instances regulators became captured by the industry they regulated.³⁰ Following increased attention for this phenomenon, especially when interest groups called for strong action against such capture after large catastrophes attributed to weak regulation, the US initiated reforms towards stronger regulatory legislation and institutions, limiting discretionary powers, increasing the legislation’s level of demand and enhancing enforcement powers. Thus, “the regulatory state” gained strength in America. By the early 1980s when the economy declined somewhat, the debate changed; now fear of over-regulation became dominant. Bardach and Kagan’s work on regulatory unreasonableness is illustrative, demonstrating how the regulatory state had at times gone too far and become unreasonable and therefore less effective.³¹ This led to regulatory reform and attempts at deregulation. Soon

²³ For an overview of the literature see Chapter 12.

²⁴ For an overview of the literature see Chapter 6.

²⁵ For an overview of the literature see Chapter 12.

²⁶ Bardach and Kagan, *Going by the Book, The Problem of Regulatory Unreasonableness*. B.M. Hutter, "Regulation: Standard Setting and Enforcement," *Law & Society Review* 27, no. 1 (1993). N. Shover, D.A. Clelland, and J. Lynxwiler, *Enforcement or Negotiation: Constructing a Regulatory Bureaucracy* (Albany: State University of New York Press, 1986).

²⁷ Bardach and Kagan, *Going by the Book, The Problem of Regulatory Unreasonableness*.

²⁸ B.M. Hutter, *The Reasonable Arm of the Law? The Law Enforcement Procedures of Environmental Health Officers* (Oxford: Clarendon Press, 1988). B.M. Hutter, *Compliance: Regulation and Environment* (Oxford: Clarendon Press, 1997).

²⁹ Gunningham, Grabosky, and Sinclair, *Smart Regulation, Designing Environmental Policy*.

³⁰ M.H. Bernstein, *Regulating Business by Independent Commission* (Westport (Connecticut): Greenwood Press, 1955 (reprinted in 1977)).

³¹ Bardach and Kagan, *Going by the Book, The Problem of Regulatory Unreasonableness*.

US scholars debated the effects of regulatory reform.³² In addition, many of the assumptions about the effects of regulatory law and its optimal functioning—that had been fueling the ongoing debates—became objects of empirical studies. Such American empirical research looked at what style and what type of command and control regulation could have the most effect on compliance behavior.³³ Finally, since the 1990s, the experiences with unreasonable regulation and deregulation led to a questioning of command and control type regulation. This led to debates about alternatives to command and control regulation, including self-regulation, or incentive based or private regulation alternatives.³⁴ In such debates, some proponents argued that command and control regulation is not obsolete and has under certain circumstances been successful.³⁵ In addition scholars have argued that alternatives depend on command and control regulation and cannot be successful without a functioning system of inspections and enforcement.³⁶ Gunningham's work argues for the right mix of command and control and alternative instruments.³⁷

³² B.D. Wood, "Principals, Bureaucrats, and Responsiveness in Clean Air Enforcement," *American Political Science Review* 82, no. 1 (1988). B.D. Wood and R.W. Waterman, "The Dynamics of Political Control of the Bureaucracy," *American Political Science Review* 85, no. 3 (1991). B.D. Wood and R.W. Waterman, *Bureaucratic Dynamics, The Role of The Bureaucracy in a Democracy* (Boulder: Westview Press, 1994).

³³ J.T. Scholz, "Cooperation, Deterrence and the ecology of regulatory enforcement," *Law & Society Review* 18 (1984). R.A. Kagan, N. Gunningham, and D. Thornton, "Explaining Corporate Environmental Performance: How does regulation matter?" *Law & Society Review* 37, no. 1 (2003). J.T. Scholz, "Cooperative regulatory enforcement and the politics of administrative effectiveness," *American Political Science Review* 85 (1991). D. Thornton, N. Gunningham, and R.A. Kagan, "General Deterrence and Corporate Environmental Behavior," *Law & Policy* 27, no. 2 (2005).

³⁴ For an overview of such decentered approaches see Gunningham, Grabosky, and Sinclair, *Smart Regulation, Designing Environmental Policy*, Black, "Critical Reflections on Regulation." See also D. Sinclair, "Self-Regulation Versus Command and Control? Beyond False Dichotomies," *Law & Policy* 19, no. 4 (1997). M. Aalders, "Self-Regulation and Compliance with Environmental Law from a Global Perspective," in *Towards Integrated Environmental Law in Indonesia*, ed. N Niessen and A Bedner (Leiden: CNWS, 2003). See also Gunningham, Grabosky, and Sinclair, *Smart Regulation, Designing Environmental Policy*. T. Tietenberg, "Disclosure Strategies for Pollution Control," *Environmental and resource Economics* 11, no. 3-4 (1998).

³⁵ Gunningham, Grabosky, and Sinclair, *Smart Regulation, Designing Environmental Policy*. 42-45

³⁶ A. Blackman, "Informal Sector Pollution Control: What Policy Options Do We Have?" *World Development* 28, no. 12 (2000). Gunningham, Grabosky, and Sinclair, *Smart Regulation, Designing Environmental Policy*. 54, 58-9, 72

³⁷ Gunningham, Grabosky, and Sinclair, *Smart Regulation, Designing Environmental Policy*. 91

Regulatory Law in Non-Western Countries

In non-Western countries³⁸, over the last decades, following ambitious nation-building efforts³⁹ and development policies aiming at large scale social-economic issues such as corruption, environmental degradation, unsafe working conditions, low tax collection, regulatory law has become more important. In these countries, it has played an important role to change behavior for attaining the goals of development, including security, prosperity, social justice, sustainability and health.⁴⁰ There is now also a large body of literature on regulatory law in non-Western countries. Examples are studies about environmental regulation, corruption control regulation, tax regulation and occupational health and child labor regulation.⁴¹ Unfortunately, there has not yet been an overview of these studies, comparable to the overview articles published in the West.⁴² Consequently, the large body of literature on regulatory law in non-Western countries remains largely case-based and not very helpful when searching for generalities.

Within the studies accessed for this research,⁴³ some generalities can be discerned nevertheless. Non-Western studies about compliance and law enforcement have looked at how to enhance enforcement in a context of weak institutions and corruption. In most of the literature, existing state

³⁸ For the sake of clarity non-Western countries here include what have been called developing, transitional, Southern, or non-Western countries, but also countries with developing legal or participatory systems. From now on this book will use the term non-Western to summarize these different types of countries. With this, we literally mean countries that are different from the economically developed, countries in Northern-America, Western-Europe, Australia and New-Zealand, with a tradition of democratic participation, rule of law and market based economies. Non-Western countries mean developing and transitional countries that score low on one or more of the social, economic and governance indicators: including per capita gdp, gini index, life expectancy, child mortality, literacy, corruption perception, to name some. There is no clear demarcation between non-Western and Western, however the distinction is made because most existing theoretical studies of regulatory law are about countries that make part of clearly Western countries, while the present study here is clearly one done in a clearly non-Western context, in terms of economic development, democracy and rule of law tradition.

³⁹ A. Allott, *The Limits of Law* (London: Butterworths, 1980).

⁴⁰ J.M. Otto, "Real Legal Certainty in Developing Countries: a Missing Link between Law, Social Reality and Development" (paper presented at the Conference on Implementation of Law in China, Copenhagen, 24-5 May 2004). J.M. Otto, *Some Introductory Remarks on Law, Governance and Development* (Leiden: Van Vollenhoven Institute, 2005).

⁴¹ Examples are mentioned in more detail in Chapter 2, 6, 12 and 16.

⁴² For example Bardach and Kagan, *Going by the Book, The Problem of Regulatory Unreasonableness*. Gunningham, Grabosky, and Sinclair, *Smart Regulation, Designing Environmental Policy*. R.A. Kagan, "Regulatory Enforcement," in *Handbook of Regulation and Administrative Law*, ed. D H Rosenbloom and R D Schwartz (New York: Marcel Dekker, 1994). K. Hawkins and J.M. Thomas, eds., *Enforcing Regulation* (Boston: Kluwer-Nijhoff Publishing, 1984).

⁴³ See examples named above and the studies quoted in Chapter 2, 6 and 12.

enforcement mechanisms are deemed to be weak due to lack in financial, technical and human resources and political support. In addition, the problem of corruption is in most studies named as a dominant obstacle towards successful enforcement.⁴⁴

An important theme in the literature has been to understand why regulated actors have complied with the law even when state enforcement was weak. Here especially the studies on pollution regulation in Colombia, Bangladesh, the Philippines, India, China, Mexico and Brazil are important.⁴⁵ These studies have emphasized the importance of alternative regulatory instruments such as financial instruments⁴⁶, public disclosure mechanisms⁴⁷, and informal community based enforcement mechanisms⁴⁸ play when formal enforcement is weak.⁴⁹

The World Bank has proposed that there is a new model for regulation in developing countries, which strongly emphasizes the use of flexible and informal (non-state) control mechanisms that work better in a context of weak state institutions. As such, similar to Western regulation, non-Western regulation witnesses a trend towards alternatives to Command and Control regulation.⁵⁰ However, also similar to Western scholarship emphasizing alternatives, the World Bank's new model has been questioned by those emphasizing that alternatives only work under certain conditions and that they often require the traditional command and control structure of inspections and enforcement.⁵¹

⁴⁴ For literature on these points see Chapter 12.

⁴⁵ For an overview see World Bank, *Greening Industry, New Roles for Communities, Markets and Governments* (Oxford: Oxford University Press, 2000).

⁴⁶ For an analysis finding that financial instruments work see Ibid. Chapter 2, for a critical analysis of the success of charges in Colombia and China see A. Blackman, "Colombia's Discharge Fee Program: Incentives for Pollutors or Regulators?" *Resources for the Future Discussion Paper* 05-31 (2005), A. Blackman, "Economic Incentives to Control Water Pollution in Developing Countries, How Well Has Colombia's Wastewater Discharge Fee Program Worked and Why?" *Resources*, no. Spring (2006), A. Blackman and W. Harrington, "The Use of Economic Incentives in Developing Countries: Lessons from International Experience with Industrial Air Pollution," *Journal of Environment and Development* 9, no. 1 (2000).

⁴⁷ For an overview see World Bank, *Greening Industry, New Roles for Communities, Markets and Governments*. Chapter 3, Public Disclosure is based on the work of Tietenberg, see Tietenberg, "Disclosure Strategies for Pollution Control."

⁴⁸ World Bank, *Greening Industry, New Roles for Communities, Markets and Governments*. 59-60, R. Cribb, "The Politics of Pollution Control in Indonesia," *Asian Survey* 30, no. 12 (1990).

⁴⁹ World Bank, *Greening Industry, New Roles for Communities, Markets and Governments*.

⁵⁰ Ibid.

⁵¹ Here the work of Blackman is especially important. See Blackman, "Informal Sector Pollution Control: What Policy Options Do We Have?", Blackman, "Colombia's Discharge Fee Program: Incentives for Pollutors or Regulators?", Blackman, "Economic Incentives to Control Water Pollution in Developing Countries, How Well Has Colombia's Wastewater Discharge Fee Program Worked and Why?", A. Blackman and W. Harrington, "Using

Where in the West the quest for alternatives to command and control regulation was partly caused by concern about unreasonableness, in studies on non-Western regulation such concern is not explicitly mentioned. There are some exceptions. Fjeldstad and Semboja's study about tax collection in Tanzania has for example shown that unreasonably strict tax enforcement does not lead to more tax collection law compliance.⁵² Another exception is Abuodha and Bowles's study on Kenyan overregulation and deregulation efforts.⁵³

The present study of natural resource protection regulation in China is made with explicit reference to the large body of literature about regulatory law in Western and non-Western countries. First, the existing literature has served to analyze and structure the data collected. Second, the existing literature is used as a comparative body of knowledge that helps to deepen the understanding of how regulatory change has affected compliance at Lake Dianchi. Third, a comparison between the existing Western and non-Western literature and Lake Dianchi hopes to demonstrate some of the commonalities and differences between regulatory law in different contexts that help further the theoretical understanding thereof.

Main Research Questions

This book analyzes how changes in natural protection legislation and enforcement procedures have affected compliance with such laws at Lake Dianchi. Its objective is thus to make a case study of how regulatory law functions and changes in a locality in China.

The exact object of study is limited based on several choices. First, the book studies the formation and functioning of two sets of regulations: arable land protection law and pollution prevention and control law (focusing on air and water pollution). Second, it studies how changes in the content of legislation and the processes of lawmaking and law enforcement

Alternative Regulatory Instruments to Control Fixed Point Air Pollution in Developing Countries: Lessons from International Experience," *Resources for the Future Discussion Paper* 98-21 (1998)., Blackman and Harrington, "The Use of Economic Incentives in Developing Countries: Lessons from International Experience with Industrial Air Pollution." See also for example Aalders, Marius. "Self-Regulation and Compliance with Environmental Law from a Global Perspective." In *Towards Integrated Environmental Law in Indonesia*, edited by N. Niessen and A. Bedner, 21-37. Leiden: CNWS, 2003. A. Lucas and A. Djati, *The Dog is Dead so Throw it in the River, Environmental Politics and Water Pollution in Indonesia* (Clayton: Monash Asia Institute, 2000).

⁵² O.-H. Fjeldstad and J. Semboja, "Why People Pay Taxes: The Case of the Development Levy in Tanzania," *World Development* 29, no. 12 (2001).

⁵³ C. Abuodha and R. Bowles, "Enterprise Compliance with Local Authority Regulation in Kenya: a comparison of institutional and efficiency analysis perspectives," *Africa Insight* 31, no. 1 (2001).

have affected compliance behavior and have attributed to the goals of these laws. Third, it studies such compliance behavior and law enforcement at Lake Dianchi in Yunnan province—here defined as the lake's catchment area.⁵⁴

Thus, the main and first research question is: *To what extent, how, and why have post-1995 changes in the norms in the law and the processes of lawmaking and the processes of law enforcement influenced compliance with arable land protection and water and air pollution prevention and control legislation at Lake Dianchi, and attributed to the realization of the goals of said laws?*

In order to understand the extent to which the content of legislation, the process of lawmaking and the process of law enforcement, and not other factors, have influenced compliance and attributed to the realization of the goals of the laws, a separate, broader analysis of compliance behavior will be made. Such an analysis is to look broadly at why regulated actors have complied with natural resource protection laws or why such actors have violated them. For this, the second empirical question is central. *What other factors influence compliance with and violation of said laws at Lake Dianchi?*

The purpose of this research goes beyond Lake Dianchi. The present study hopes to contribute to existing knowledge and insights about the formation and functioning of regulatory law in China as well as in comparison with other developing non-Western and developed Western contexts. This book first aims to contribute to the body of knowledge about lawmaking, compliance and enforcement of natural resource protection law and generally of regulatory law in China. Second, it aims to contribute to existing studies of regulatory lawmaking, compliance and enforcement from other, Western and non-Western contexts. For these purposes, the third question is added: *What new insights (for China and theory) do the answers to the questions posed above provide about lawmaking, compliance and enforcement (both as separate and as interrelated processes)?*

Three Perspectives of Analysis and Methodologies

This book analyses three legal processes: lawmaking, compliance and enforcement. Studying these processes in an integrated manner presents significant challenges, especially in a context such as the Chinese. Given the wide approach this research has, focusing not on one but on three legal processes, limitation is necessary. In addition, local research on how law functions in China is sensitive and further limits the amount of data that can be obtained. In response to such broad focus and the given limitations, this study has made choices about what data to gather for each of the three legal processes. These choices have led to three perspectives of analysis, each with

⁵⁴ Which includes its main tributaries such as the Tanglang river.

its own choice on what data is to be used to study one of the three legal processes and what frameworks are used to structure and analyze the data gathered.

First Perspective: The Implementability of Legislation and its relation to the Process of Lawmaking

The first perspective, developed in Part I of the book, studies how changes in existing legislation have taken place and how in theory these changes affect compliance, enforcement and help contribute to achieving the law's formal goals. It focuses on the content and lawmaking process of four recent Chinese natural resource protection laws: the 1996 Water Pollution Prevention and Control Law, the 1998 Land Management Act, the 2000 Air Pollution and Control Law and the 2002 Environmental Impact Assessment Law.

First, it analyses how such changes have come about by looking at the processes of lawmaking. It uses data from legislative histories of the relevant national natural resource protection laws, edited by the National People's Congress Standing Committee Legal Affairs Committee and published by the *Falü Chubanshe* (Law Publishing House).⁵⁵ Based on such legislative histories, it analyses the debates between the various stakeholders involved in the drafting process, focusing on the level of participation and rationality in this process.

Second, it analyses to what extent changes made in these laws can be expected to affect compliance behavior and enforcement processes. For this analysis, the study uses an analytical framework based on existing theories about the quality of legislation. Here a set of characteristics for "implementable" legislation in terms of compliance and enforcement is used, including the law's adequacy, certainty, feasibility and adaptability. In addition, the first perspective analyses the implementability of local laws and regulations. The analysis of such local legislation concerns the role local level legislation and rules, provincial as well as village level, play in making national legislation more implementable at the local level in Peri-Urban Kunming.

⁵⁵ See for example NPC-SC Legal Affairs Office, ed., *Zhonghua Renmin Gongheguo Tudi Guanli fa Shiyi* (Commentary on the PRC Land Management Act). NPC-SC Legal Affairs Office, "Gesheng, Zizhiqu, Zhixiashi he Zhongyang Youguan Bumen Dui Huanjing Yingxiang Pingjia Fa Caoan Shenyi de Yijiang (Provincial, Autonomous Regions and Provincial Level Cities and Central Level Ministries Opinions on the Draft PRC EIA Law)," in *Zhonghua Renmin Gongheguo Huanjing Yingxiang Pingjia Fa Shiyi*, ed. N S L A Committee (Beijing: Falü Chubanshe, 2003). NPC-SC Legal Affairs Office, "Ge Difang He Zhongyang Youguan Bumen Dui Daqi Wuran Fangzhi Fa (Xiuding Caoan) de Yijian (Opinions by Local and Central Relevant Departments on the Air Pollution Prevention and Control Law Draft Amendment)," in *Zhonghua Renmin Gongheguo Da Qi Wuran Fangzhi Fa Shiyi* (Commentary to the PRC Air Pollution Prevention and Control Law), ed. NPC-SC Legal Affairs Office (Beijing: Falü Chubanshe, 2001).

The first part of the analytical framework for the first perspective consists of ideas about how the process of lawmaking affects the content of the legislation, based on public administration theories on policymaking and insights from case studies of the lawmaking process. It recognizes three types of lawmaking processes in terms of the level of participation, ranging from full pluralistic, to limited corporatist, to exclusive elitist models.⁵⁶ Second it characterizes different types of rationalities in the lawmaking process, ranging from full rationality, to bounded rationality, to coincidental rationality to symbolic rationality.⁵⁷ The second part of the first perspective's analytical framework uses a set of criteria of implementable legislation in order to evaluate changes made in the law. The framework consists of four characteristics of implementable legislation: adequacy, legal certainty, adaptability and feasibility.⁵⁸

Second Perspective: Compliance in Relation to Legislation, Enforcement and the Wider Social, Economic, Political and Cultural Contexts

The second perspective, described in Part II of the book, studies compliance and violation at Lake Dianchi. It is based on data gathered during a year of fieldwork when eighteen cases of compliant and deviant behavior were studied. The eighteen cases include studies about rural construction—such as housing, industries but also schools and temples, and studies of polluting enterprises—paper industry, chemical fertilizer industry, steel industry, restaurants and chemical plants. The fieldwork data were gathered through interviews with the norm addressees as well as informants living in their vicinity or working at relevant enforcement institutions, carried out in three villages and at several enterprises and enforcement bureaus. The data thus obtained were used, in some cases combined with other published sources, to relate how and why compliance or violation took place.

Part II of the book contains a collection of stories detailing the reception of Beijing's norms at Lake Dianchi, describing how and why compliance or violation occurred. Findings in each case study are first structured and analyzed for each case individually, based on an analytical framework. Subsequently, conclusions to the case study chapters (7-10) and the conclusion of Part II (Chapter 11) will structure and analyze the combined findings of these cases.

The analytical framework, detailed in Chapter 6, used to structure and analyze these cases is based both on existing studies on compliance and violation from organizational criminology, economics, and sociology of

⁵⁶ For an overview of this literature, see Chapter 2.

⁵⁷ Ibid.

⁵⁸ Ibid.

law.⁵⁹ As an introduction to this framework, first, a distinction is made between rational choice, moral and competence reasons for norm conformity.⁶⁰ The analytical framework itself distinguishes factors related to the regulated actor itself (internal variables) as well as factors related to the actor's wider context (external variables). The internal variables include the regulated actor's manner of cost benefit measurement, ethical norms, social responsiveness, resources and organizational size. External variables include the influences from the regulatory, the economic, the social, and the political contexts.⁶¹

Third Perspective: Understanding Enforcement's Effects on Compliance

The third perspective, as detailed in Part III, studies how the state has reacted against violations of law. It studies how state law enforcement has been organized for said laws in Peri-Urban Kunming. Based on findings in Part II it addresses the question why enforcement has had the influence on compliance behavior it had. The third perspective uses data based on interviews with enforcement officials in three related enforcement structures (Environmental Protection Bureaus, Land Bureaus and the Dianchi Management Bureau) combined with interviews in villages and with companies. In addition, the study uses nationwide comparative data about environmental enforcement and EPB structures to place Lake Dianchi's enforcement within a more comparative analysis. Finally, the study uses reports on enforcement campaigns, both from policy makers as well as newspapers.

The third perspective differentiates between regular enforcement and campaign enforcement. First in Chapter 13 it analyzes regular enforcement. Structuring the data gathered based on the analytical framework described below, it looks at how the existing patterns of inspections and sanctions can be explained in the absence of campaigns. It analyzes the internal bureau structures, the way in which the bureau can control its agents, the bureau and its agents' relations with the violator, and the type of violation, and the legal, political, social and economic contexts in which enforcement bureaus operate. A separate chapter in Part III is dedicated to campaign-type enforcement (Chapter 14). This chapter analyzes

⁵⁹ For an overview of this literature, see Chapter 6.

⁶⁰ R.A. Kagan and J.T. Scholz, "The "Criminology of the Corporation" and Regulatory Enforcement Strategies," in *Regulatory Enforcement*, ed. K Hawkins and J M Thomas (Boston: Kluwer-Nijhoff Publishing, 1984).

⁶¹ N. Gunningham, R.A. Kagan, and D. Thornton, *Shades of Green, Business Regulation and Environment* (Stanford: Stanford University Press, 2003). W. Huisman, *Tussen Winst en Moraal, Achtergronden van Regelnaleving en Regelovertreding door Ondernemingen (Between Profit and Morality, The Backgrounds to Enterprise Compliance and Violation)* (Den Haag: Boom Juridische Uitgevers, 2001). World Bank, *Greening Industry, New Roles for Communities, Markets and Governments*.

the influence political campaigns to enhance arable land and pollution enforcement have had on enforcement work and compliance in China and Kunming in particular.

The analytical framework used here is based on studies about administrative behavior from the field of public administration and socio-legal, political science and economic studies about enforcement work in particular.⁶² First, the framework distinguishes styles of enforcement, distinguishing deterrence and cooperative styles.⁶³ Second, the framework uses a set of factors to study how enforcement work takes place in practices looking at the organizational structure of the enforcement bureau, how agents have used the discretion the bureau allows them, the relationship between agent/agency and regulated actor, the type of violation, and the influence from the political and social contexts.⁶⁴

Choice of Fieldwork Locations

Local fieldwork is a central source of data for this research. Ideally the choice of research locations should be representative of the field that is studied, in this case Lake Dianchi. Due to limitations in access, the choice in locations could not always be controlled.

The first choice concerned the three villages around Lake Dianchi. Based on extensive preparation through multiple trips to possible research locations in the vicinity of Lake Dianchi a choice was made for villages located in three townships. At the time, I was looking for a village with a significant amount of polluting industry, because in such a village both problems of land loss and pollution should exist. Second, I was looking at villages at different sides of the lake, ideally one on the richer flat eastern shore, and one in the mountainous more remote and poorer western shore of lake Dianchi. In this manner, I selected Baocun village in Kouxiang Township, Pucun Village in Maxiang Township, both in Dianxi district on the western side of the lake, and Jiacun village and Fucun village in Jiacun Township, in Diandong district on the eastern side of the lake. Through my contacts with Yunnan University, the district governments superior to these townships were contacted and they were able to arrange meetings with leaders of two of the three townships. In Kouxiang township local leaders, after several copious meals and long drinking sessions, enthusiastically agreed to introduce me to Baocun village, which I had selected for its large chemical fertilizer industry and its remote and rural character. Without asking, they also introduced me to Licun village, a Hui minority Muslim community,

⁶² For a complete overview of the literature see Chapter 12.

⁶³ A.J. Reiss, "Selecting Strategies of Social Control over Organizational Life," in *Enforcing Regulation*, ed. K Hawkins and J M Thomas (Boston: Kluwer Nijhoff Publishing, 1984).

⁶⁴ For an overview of the literature and this framework, see Chapter 12.

located close to Kouxiang Town itself. In Jiacun Township things were a little bit more difficult. At first, the Jiacun government arranged for a meeting with the leadership of Fucun village. Quite unexpectedly, this former model village, with a significant amount of rural enterprises, refused to let me do research there, even though I had all the approvals from the provincial and also the Township governments, for which I had had to wait three months. Fortunately, Jiacun village was a little easier and after a long session and I was finally able to convince them of my honest intentions was allowed to start fieldwork there. Although the choice of villages was limited, the chosen villages, because of their different economic and geographical setting do offer a relatively representative picture of villages around Lake Dianchi.

The second choice concerned which enterprises to interview. This choice, perhaps more than any, was not a real choice but one of pursuing all available options. Lake Dianchi's enterprises were generally not excited about speaking with a foreign researcher about their compliance and violation behavior. Even when neutral approaches not involving any question about the law or about possible problems were used, many companies proved to be extremely hesitant, or they refused to talk with me at all. In the end, the enterprises that have ended up in this book were either small scale enterprises that I was able to approach through village contacts, or they were larger enterprises where I was lucky enough to have been able to make contact through the network of colleague researchers from Yunnan University. Because of the differences in size, ownership, location and product, the enterprises finally contacted ended up representing the most important enterprises at the lake.

The third choice involved the regulatory officials I approached. Three regulatory agencies at the municipal level in Kunming form the core institutions for arable land protection and pollution prevention and control regulation: the environmental protection bureau (EPB), the state land resources bureau and the Dianchi Management Bureau. The choice to interview these three bureaus was an easy one, as these were the main enforcement agencies for the topic studied. Within these three bureaus I focused on agents working in the enforcement departments, and second on staff working in the personnel and law departments. Getting access to the local district land bureaus and EPBs proved to be more difficult and in the end I was only able to interview two township level land offices (one in Kouxiang and one in Jiacun Township) and one district environmental protection bureau in Ningshi. Access to the Diandong and Dianxi district EPBs was impossible because of the national media attention for Dianxi EPBs failure to curb the pollution at the Tanglang River (see Chapter 10).

Research Limitations

Doing fieldwork in the field of law in China is not easy. In the course of this study, gaining access was a battle, every interview conducted a victory, and every piece of data obtained a treasure. Due to the country's strict protection of governmental information, its relative inexperience with foreign researchers and the dominance of an idealized version of reality, getting to speak with the right people and getting trustworthy answers instead of what informants believe they should tell you, has been difficult. With all the sensitivity surrounding the legal system, and especially land and pollution regulation, the difficulties have only been worse.

In sum, access was difficult and had a significant influence on the research methods and research outcomes. It should be stated, however, that in order to do the kind of research this project aimed to do, a certain degree of such influence should be expected and accepted. It is impossible to carry out sensitive social scientific research in China without sacrificing in terms of validity and representativeness. This makes that this study is explorative in nature. It has tried to bring together as much local data about the working of the law and the attempts at legal change as possible. It has structured these data using analytical frameworks, however due to the exploratory nature of the research a true testing of existing theories in a local setting, as some other studies have done, has not been possible.

Instead, it has attempted to generalize the case findings for answering the main questions about the effects of lawmaking and enforcement on compliance at Lake Dianchi. The generalizations thus made, it should be noted though, are based on a limited number of cases, some of which may not be fully representative of the Lake Dianchi area, even though such representativeness was strived for when selecting field sights. When collecting data in the field, and also when analyzing the data and using the data for this book, I have tried as much as possible to verify whether generalizations made, based on these data, hold true for Lake Dianchi. For this, triangulation has been important, especially through discussing my findings with other Kunmingnese researchers and local citizens whose knowledge was much broader of course than mine.

Research Experiences: Getting the Data

The long road to data collection started several years before I went to do fieldwork in Kunming in 2004. It all began in 2000, when I met with State Environmental Protection Agency (SEPA) officials in Beijing to prepare a Dutch sponsored workshop on environmental law enforcement. Through these initial contacts, I was able to make my first interviews about

environmental law enforcement.⁶⁵ At the time, I hoped that such national level contacts might help me secure local access to EPBs. Hope became disappointment when my contacts in Beijing informed me that although they were willing to help me with introductions to Sichuan EPBs, they believed such introductions would not make me a welcome guest. On the contrary, they believed, that the local staff members would only talk with me out of duty, but all the time fearing I had only come to check upon them for SEPA. Therefore, I initially decided to go to Sichuan without any form of formal access. In 2001, I spent six weeks creating a local network around the provincial level EPB, partly helped through Sichuan University contacts. Through this network, I gradually learned whom I should approach within the provincial EPB and what sensitivities I should avoid at first. After I had successfully made my first contact in November 2001, I was able to interview staff of all provincial EPB sub-departments relevant for my research. However, when I returned in 2002 to carry out interviews at lower levels I soon ran into trouble because the provincial level contacts proved to be powerless in introducing me to these lower level EPBs. In the end, the Chengdu (Sichuan's capital) municipal EPB even asked me for a formal letter from SEPA in Beijing forcing them to cooperate with my research. After I had obtained such letter, their cooperation was highly formal and no more than the minimum required of them.

Because of this, I had to move my research to another city. In the meantime, I had been approached by a delegation from Yunnan province. This delegation consisted of local lawmakers visiting the Netherlands on a mission about environmental regulation. I had been unable to meet them while in the Netherlands, but in 2003 I decided to visit them in Kunming. I was welcomed by the mission head, the vice chair of the Yunnan Provincial People's Congress and an influential local leader. With his support I met several other lawmakers and went on a short research mission to Qujing city, Yunnan's second city. Mr. Wu also arranged that I did a lecture at Yunnan University. Here I met with the vice-dean and CCP party secretary of the faculty of law. Because of the high level support I had received and also because we shared an interests in socio-legal research the vice-dean decided to support my research in exchange for a guest lecture series on anthropology of law.

In 2004, I thus returned to Kunming to start a twelve-month period of fieldwork in Kunming and teach a eighteen week course on legal anthropology. Before I arrived, Yunnan University had arranged a significant

⁶⁵ Resulting in B. Van Rooij, "Implementing Chinese Environmental Law through Enforcement, the *Shivu Xiao* and *Shuangge Dabiao* Campaigns," in *The Implementation of Law in the People's Republic of China*, ed. J. Chen, Y. Li, and J. M. Otto (The Hague: Kluwer Law International, 2002a).

amount of paperwork, including a document, which stated that I was a State Council approved foreign expert. I assumed that these papers would be sufficient to start my research upon arrival. Unfortunately, this proved to be wrong. Two weeks after arriving in Kunming, I was told that one document was missing, a so-called fieldwork permit, which is a local requirement Yunnan Province has for foreign researchers. In the end, this permit took another three months, during which I was not allowed to do any interviews neither in villages nor with governments or enterprises. The only thing I could do was to wait patiently and work hard to prepare my research by evaluating suitable fieldwork villages and by focusing on my teaching burden.

In the meantime, I was introduced to Liu Xiaomin, a local lawyer and law lecturer at Yunnan University, who was to become my fieldwork collaborator. Using my research questions and experience from Beijing and Sichuan, and his local contacts, knowledge, experience and car, we soon set off to inspect possible research sites. After my research permit was finally granted after three months, in April 2004, we still had to wait to establish initial contacts through which we would be able to reach our target institutions and informants. With all Chinese holidays and with the local rural elections ongoing, this proved to take another six weeks. By the end of May 2004, by using Liu Xiaomin's and some other Yunnan University lecturer's contacts I was slowly able to reach the chosen informants. In this period, I decided to start the research at the grass-roots level in the three villages, and to leave the research with the regulatory agencies and the enterprises for a later time.

In June 2004, we could finally go to our three fieldwork villages. Having a fieldwork permit did not solve all my problems, however. All three villages and the township level governments that had granted us access to the villages, had refused me to live in the villages. They did so through a formalistic interpretation of China's hotel regulations, which require foreigners to stay in especially approved hotels only, which of course do not exist in these villages. This meant that the only way to get to my research sites was in Liu Xiaomin's car. Every time we went we either had to fight our way through an hour of arduous traffic on the east side of the lake, or worse through two hours of dangerous mountain roads when going to the two villages located on the western side. Distance thus kept access difficult.

From the start, I learned to accept these limitations and tried to use my available time in the three villages as best as possible. The limitations did have consequences: without living in the villages, I was not able to gain the in-depth trust of the villagers at large. What I did gain was the trust of the village leadership, with whom I had numerous meetings from June until December. During these meetings, I gradually learned how to discern fact from fiction, truth from outright lies. I did so by talking with as many

different Village Committee members as possible, and by talking the most with those who seemed more cooperative and less afraid to touch upon what actually was going on. At the same time, I tried to check their stories with villagers outside of these local elites, and later with local enterprises and regulatory agencies. I got the information from the villagers during the many informal conversations I had in the village, when I met people during lunch or just drinking tea with them and on several occasions had long conversations just by going to farmers when sitting in front of their homes. My usual approach started with general and non-sensitive questions in order to gain trust but also to understand the general context of each village. In this manner, I learned about village economy, its history, its population and its current politics. Then I moved to questions related to conflict resolution, mediation, land use practices, housing and infrastructure. Finally, after having gained sufficient trust I started long interviews with village cadre and villagers on issues relating to construction on arable land and the pollution of local enterprises.

By the end of summer, I was able to have basic information about local land and pollution practices in all three villages. At this time, I used my Yunnan University network again to get access to the three regulatory agencies mentioned above. As I had done extensive work on EPBs in prior research in Sichuan and Beijing, my understanding of the EPB enforcement work was much more advanced than that of the State Land Resource Bureau or the Dianchi Management Bureau. Although I was able to do several long interviews with relevant staff members in the latter two agencies, my most in-depth understanding of regulatory enforcement remained related to the EPB. My experience in interviewing enforcement officials has taught me a number of lessons. First, time is much more limited than during grassroots interviews. In general, I cannot take more than one hour of each official interviewed. During this one hour, I must try to gain trust but also try to get new data, which means significant probing. The second lesson is to mind the sensitivities of informants. Over the years I have learned slowly what kind of questions are too sensitive to be answered. I first learned this when informants did not answer or through their answer seemed to indicate not to understand the question. Prior, lacking sufficient experience, I would press again for an answer, only to receive a similar response again. Especially for regulatory agents sensitivities are crucial and if pressed to talk about them too soon or too often the interview relationship can come at peril. A new lesson I learned in this respect was that being too good at talking about sensitive subjects can also backfire. This happened with one informant with whom I had gained so much trust that he spoke freely about a number of ongoing cases. When I spoke with him again during a consecutive interview, he suddenly stopped, looked at me in a completely different manner and told

me that he could not tell me anything further and I should contact a different department. Later I understood that at the time he must have realized how much he had unknowingly told me and had been shocked to the point of refusing any further cooperation. A third lesson has been to show my informants what I know already. This proved to be especially helpful as I could use both my three prior years of EPB interview experience as well as my fieldwork knowledge about what was going on in the villages. Whereas normally informants mainly speak about their work in abstract terms, not wanting to give examples or cases, my informed probing led them to comment on what I told them helping me build the cases further.

By August 2004, I had originally planned to start interviews with enterprises about their pollution compliance behavior. In order to gain access I had informed all my contacts, both in the villages, as well as in Yunnan University and the various agencies I had talked with. Getting the access proved to be the most cumbersome experience I had had until then. In the end, I had to tone down my expectations and be happy to be able to interview the modest amount I was finally able to. I was able to interview the Ningshi enterprises (see Chapter 8 and 10) through contacts in the Ningshi Procurate. The enterprises in Baocun village and Jiacun village I was able to interview through contacts with village leadership. The remaining enterprises, I was able to get information about indirectly either through Liu Xiaomin or former employees, or through the regulatory agencies I worked with. In terms of the validity and representativeness of the data the lack of enterprise interviews is a problem that I am the first to admit. Still, it is a problem that cannot be solved and because of the wide spread of people interviewed for this study I still believe that it presents sufficient data to discuss the pollution problems around Lake Dianchi.

During the final months of my stay in Yunnan, I used my last interviews to check facts and recheck some of the statements made during earlier interviews. At this time, the structure of this book became clear and I was able to bring the final structure with me during these last rounds of talks. In this manner, I tried to get all the data still missing to complete the work.

Given the obstacles to doing empirical research on the local functioning of the Chinese legal system, it is no surprise that there has been little empirical work in this area. By partly overcoming these obstacles, the present work offers new explorative data that expands and deepens the understanding of the development of the world's largest legal system. The data as structured, analyzed and presented in this book are hoped to further the development of a rule of law, and a functioning system of natural resource protection regulation in particular, which benefits China as a whole as well as local people in places such as Lake Dianchi.

Part I

Legislation and Lawmaking

2. Law in the Books

Process of Lawmaking and Implementability of Legislation, Theory and China

Introduction

China has tried to curb arable land loss and pollution at places like Lake Dianchi by creating a framework of natural resource protection legislation to protect arable land, water and air. This framework was first established during the 1980s and has been revised in the second half of the 1990s. The original legislation was not stringent, rather vague and lacked detail. Consequently, the earlier legislation had little impact and economic growth continued to adversely pressure natural resources.¹ Proponents of stronger natural resource protection hoped that by amending legislation and introducing stricter and more specific norms, natural resource deterioration could be decreased.² Thus, in the second half of the 1990s these environmental stakeholders attempted to amend the existing laws and introduce new pieces of legislation. At first, their attempts to introduce stricter norms for the 1995 Air Pollution Prevention and Control Law largely failed at the bargaining table. However, since 1996, environmental stakeholders became more successful and were able to introduce stricter and more specific norms in the 1996 Water Pollution Prevention and Control Law 1998 Land Management Act, the 2000 Air Pollution and Prevention Control and the 2002 Environmental Impact Assessment Law.

The present study analyzes the effect such legislative changes have had on compliance behavior. This part of the book (Part I) first analyses how such changes have come about and how they have affected the quality of the legislation. For this analysis, the study uses an analytical framework about the process of lawmaking, focusing on the level of participation and the types of rationality and their effects on the content of the legislation made. Second, it analyses to what extent changes made in these laws—in combination with existing local norms—can in theory be expected to affect compliance behavior and enforcement processes and final goal attainment (in other

¹ Li, "China's Compliance with WTO Requirements Will Improve the Efficiency and Effective Implementation of Environmental Laws in China." Alford and Shen, "Limits of the Law in Addressing China's Environmental Dilemma.", Orts, "Environmental Law With Chinese Characteristics."

² See for instance NPC-SC Legal Affairs Office, ed., *Zhonghua Renmin Gongheguo Tudi Guanliji Shiye* (Commentary on the PRC Land Management Act). NPC Legal Committee, "Guanyu Zhonghua Renmin Gongheguo Daqi Wuran Fangzhi Fa Xiuding Caoan Shenyi Jieguo de Baogao (Report on the Results of Review of the the Draft Amendment to the PRC Air Pollution Prevention and Control Law)."

words how does it affect the law's "implementability"³). For this analysis, the study uses an analytical framework, which comprises of a set of characteristics of "implementable" legislation including the law's adequacy, legal certainty, feasibility and adaptability.

The present chapter introduces these frameworks and provides a short overview of how laws are made in China and how this has affected their quality.

The Process of Lawmaking: Participation and Rationality

How the law is made influences what is in the law, and thus affects the quality of legislation and its implementability.⁴ In the legal and even the socio-legal literature, the study of the process of lawmaking has received little more attention than in the "how a bill becomes a law" kind of introductions detailing how on paper the lawmaking process should work. Although there are case studies about how the lawmaking processes of certain laws took place such as Berman's famous study of the US lawmaking process of civil rights legislation,⁵ theorizing analyses of how the process of lawmaking actually works are quite rare.⁶ Seidman et al.'s socio-legal observations on different drafting processes are an important example.⁷ Another example is Otto et al.'s work on lawmaking in a context of development, theorizing about the process of lawmaking by comparing lawmaking with policymaking, about which process there exists a blossoming field of study.⁸ Here we further expand on their work and we introduce theories about the process of lawmaking by combining socio-legal insights with insights from public administration and political science about policymaking.⁹

³ As state application of law, even though it is an important part of implementation and also affects compliance, has not been part of this study it will not be further discussed in this chapter.

⁴ C.J.M. Schuyt, *Tussen Macht en Moraal, Over de Plaats Van het Recht in Verzorgingsstaat en Democratie (Between Power and Morality, on the Place of Law in the Welfare State and Democracy)* (Alphen a/d Rijn: Samson, 1983). 174

⁵ D. Berman, M., *A Bill Becomes a Law, Congress Enacts Civil Rights Legislation* (New York: Macmillan Company, 1966 (Second Edition)).

⁶ B.Z. Tamanaha, "A Pragmatic Approach to Legislative Theory for Developing Countries," in *Making Development Work, Legislative Reform for Institutional Transformation and Good Governance*, ed. A Seidman, R B Seidman, and T W Wälde (The Hague: Kluwer Law International, 1999).

⁷ A. Seidman, R.B. Seidman, and N. Abeyesekere, *Legislative Drafting for Democratic Social Change, a manual for drafters* (The Hague: Kluwer Law International, 2001).

⁸ J.M. Otto, S. Stoter, and J. Arnscheidt, "Using Legislative Theory to Improve Law and Development Projects," *Regelmaat* 2004, no. 4 (2004).

⁹ Although there have been some studies on lawmaking, for most information we must borrow from public administration. This field has made an in-depth analysis of how governments make policy that is to a large extent applicable to law making. From here onwards we will use policy-making theory to describe lawmaking without referring to policy every time.

The Lawmaking Process

The lawmaking process involves several stages and different actors. Most lawmaking processes start with the identification of a legislative need, often in the form of the identification of a social problem that is to be addressed in legislation. Such identification may come in the form of a policy decision, made by bureaucrats or politicians, however it may also come from interest groups who then try to involve politicians or bureaucrats. Once the legislative need has been identified, its proponents will try to get drafters involved.

In general, there are two types of drafters, specialists working as bureaucrats in the bureaucracy most closely related to the policy area involved, or general legal specialists working in a general legal department such as the Ministry of Justice or a parliamentary committee.¹⁰ Once a draft has been made, it will be submitted to the formal legislative procedure and will be decided upon by the relevant politicians and other stakeholders involved, depending on the political system. Thus, the lawmaking process involves a whole range of different “legislators”: drafters, politicians, bureaucrats, and stakeholders. Second, the lawmaking process consists of communications between such legislators in which complex social issues are translated into policy and then into legislative norms.

Lawmaking is a political process, of which the present study focuses in particular on its participation and rationality. Understanding the process of lawmaking involves understanding the manner in which the various actors involved are included or excluded in the process and second how the complexity of the social problem and their communication about regulating such problem influences the final legal text.

Participation

The type of participation defines power relations in lawmaking and has a large impact on the lawmaking process and the resulting type of legislation.¹¹ In the participation approaches to lawmaking there are two main ideas. Following Dahl, the first is the ideal-typical situation of pluralistic participation, meaning that the lawmaking process is the result of a fully open participation in which all stakeholders are heard whether powerful or not.¹² In the ideal-typical full participation setting, participation is reflected in

¹⁰ For this difference in drafters and differences between the French and the British system see Seidman, Seidman, and Abeyesekere, *Legislative Drafting for Democratic Social Change, a manual for drafters*.

¹¹ For this paragraph and the next we have been influenced by Otto, Stoter, and Arnscheidt, “Using Legislative Theory to Improve Law and Development Projects.”

¹² This idea is best represented in R.A. Dahl, *Who Governs? Democracy and Power in an American City* (New Haven: Yale University Press, 1961 (reissued in 1963)), quoted through W. Parsons,

the final legislation and leads to a representation of a variety of interests. Participation can take place at the various stages of the lawmaking process: during the policy formulation, during the drafting itself or during the formal deliberation on the draft. Under this ideal type of public decision-making, lawmaking is bottom-up.

Baldwin has noted that the problem with truly pluralistic legislation is that the larger the legal system and the scope of application of the law in question, the more stakeholders will participate and in general,¹³ the more watered down and less stringent and more abstract the law will become if it is to fully represent all interests.¹⁴ Such legislative process will therefore be well equipped to reflect as many different interests as possible in the law. However, participation leads to a negotiated law, which is watered down and may have weak and vague norms that are less well equipped to attain the goals that the law was originally intended for.

In non-Western contexts, where democracy and participation have been limited, the pluralist approach to lawmaking has remained more of an ideal than in most Western countries. However, there also participation can lead to watered down legislation. Brazil's law no. 9605, the Crimes Against the Environment Act, is an illustration. As Benjamin writes, "the draft lost several of its original provisions thanks to pressures from an extremely powerful lobby that rallied together industrialists, mining concerns, timber companies and ranchers."¹⁵

On the other end of the spectrum is the elite model under which the legislation is the result of decision making by a single individual or a small group of powerful persons.¹⁶ Elite lawmaking mostly influences the policy formulation and the draft deliberation phases of the lawmaking process and will have less impact on the drafting itself, which requires legal experts. Low participation and a top-down approach characterize elite law making. Because such lawmaking does not have to consider a large amount of interests, it can directly reflect the goals the elite wishes to achieve. Similar to the elitist model is the corporatist model, under which a select group of powerful stakeholders negotiate over the draft legislation until an agreement

Public Policy, An Introduction to the Theory and Practice of Policy Analysis (Cheltenham, UK Lyme, US: Edward Elgar, 1995 (reprinted in 1997)). 134

¹³ Pluralistic lawmaking does not necessarily lead to more abstract legislation. The exception is the specific compromise between different interest groups. For example about fines for pollution, after extensive bargaining the height of the fines may change but this does not affect the level of abstraction.

¹⁴ R. Baldwin, *Rules and Government* (Oxford: Clarendon Press, 1995). 167

¹⁵ A.H.V. Benjamin, *Criminal Law and the Protection of the Environment in Brazil* (INECE, 1998 [cited]); available from <http://www.inece.org/5thvol1/5thTOC.htm>. 229

¹⁶ Parsons, *Public Policy, An Introduction to the Theory and Practice of Policy Analysis*. 248-9 Allott, *The Limits of Law*.

is struck.¹⁷ Just as elite lawmaking, corporate lawmaking is top-down, as a small group of actors makes rules for society. Especially in non-Western contexts, with the prevalent influence of strong family ties and traditional forms of authorities, elites or corporatist groups may dominate lawmaking institutions, even when they such institutions formally adhere to pluralist principles.¹⁸ While elitist—and to a lesser extent corporatist—laws may be highly goal oriented, drafted as closely to the goals the legislators want attained, and thus may seem to be effective on paper, the lack of participation may mean that the law may lack support from relevant interests groups and second that there is a lower chance that it fits actual circumstances on the ground. This may mean that there will be less compliance and that enforcement becomes more difficult.

Rationality

The process of lawmaking is also defined by the level of rationality of the legislative decision making process.¹⁹ Rationality approaches differ in terms of how well planned and rational legislation can be made. In the ideal-typical situation, as found in Weber's work, legislation is the product of a well-prepared rational process that incorporates all relevant information and makes legislation based on such information.²⁰ The more information is processed in the policy formulation and preparation of lawmaking, the better the balance between the goals of the law and the various interests in society.

An example of how such rational lawmaking should work ideally is Seidman et al.'s work on legislative drafting, made especially for drafters from developing countries. This work proposes that the drafters who are to translate a policy decision into legislation should study both legislative techniques as well as social science research methods.²¹ Second, Seidman and Seidman propose that within the preparation of legislation, research about compliance behavior of the regulated actor (or "role occupant" as they call it)

¹⁷ Otto, Stoter, and Arnscheidt, "Using Legislative Theory to Improve Law and Development Projects.", P.C. Schmitter, "Still the century of corporatism?" *Review of Politics* 36 (1974). 93-4

¹⁸ Riggs has described how this happens, when there are overlapping traditional and modern structures causing a normative heterogeneity in institutions, causing formalism, a gap between the formal processes and the actual workings of the institution. See F.W. Riggs, *Administration in Developing Countries, The Theory of the Prismatic Society* (Boston: Houghton Mifflin Company, 1964).

¹⁹ Here we have also been influenced by Public Administration. See Parsons, *Public Policy, An Introduction to the Theory and Practice of Policy Analysis*. For an overview of the literature on policy making models related to rationality.

²⁰ M. Rheinstein, *Max Weber on Law in Economy and Society* (New York: Simon and Schuster, 1954). xlii-iii

²¹ A. Seidman and R.B. Seidman, *State and Law in the Development Process* (New York: St. Martin's Press, 1994). 14-5

is essential and should form the basis for the policy analysis, the draft made and the final norms legislated.²²

In reality, lawmaking is never able to attain the ideal of full rationality. With his "bounded rationality" Simon demonstrated that human rationality is limited and human beings are not able to fully rationally process the complexity of contemporary society in a single rational decision making process.²³ In response to Simon's bounded rationality, Lindblom has shown that administrative decision-making, and thus legislative decision-making, is incremental.²⁴ Incremental decisions are made based on negotiation and trial and error. When applied to lawmaking, this means that legislation cannot arise out of a coherent rationally well thought out plan. The first problem is that many of the social issues legislation tries to address are so complex that the causal relation between problem and cause, and especially cause and cure cannot be easily ascertained.²⁵ Second, the translation of policy into legal draft is not purely a technical translation, but will affect the social impact of the law, in ways unknown to the drafter.²⁶ Most drafters lack sufficient knowledge about the underlying policies and the effects they may have on society. Seidman and Seidman believe they can solve this problem by training drafters in social science methodology. The feasibility of this in practice is questionable, however. Tamanaha has argued that drafters lack time and capacity to be trained in such techniques and even if they are will not be able to use them directly in their work.²⁷ This is especially an acute problem in non-Western countries where there is a lack of institutional capacity, a lack of well trained lawyers and social scientists, and a wide gap between the two, where society itself is highly complex and heterogeneous, and where the

²² Seidman, Seidman, and Abeyesekere, *Legislative Drafting for Democratic Social Change, a manual for drafters*.

²³ H. Simon, *Administrative Behavior* (New York: Free Press, 1957). 79 Quoted through Parsons, *Public Policy, An Introduction to the Theory and Practice of Policy Analysis*. 273-281

²⁴ C. Lindblom, "The Science of Muddling Through," *Public Administration Review* 19 (1959). Quoted through Parsons, *Public Policy, An Introduction to the Theory and Practice of Policy Analysis*. 284-287

²⁵ Tamanaha, "A Pragmatic Approach to Legislative Theory for Developing Countries." M. Edelman, "The Construction and Uses of Social Problems," *University of Miami Law Review* 42, no. September (1987). Bardach and Kagan, *Going by the Book, The Problem of Regulatory Unreasonableness*. 58-9, Schuyt, *Tussen Macht en Moraal, Over de Plaats Van het Recht in Verzorgingsstaat en Democratie (Between Power and Morality, On the Place of Law in the Welfare State and Democracy)*.

²⁶ Seidman, Seidman, and Abeyesekere, *Legislative Drafting for Democratic Social Change, a manual for drafters*.

²⁷ Tamanaha, "A Pragmatic Approach to Legislative Theory for Developing Countries."

alternative of importing laws through legal transplantation²⁸ is tempting and often done.

Coincidence is dominant in another line of thought about the rationality of public decision-making coincidence. Proponents of this idea, the so-called "Garbage Can" model, have largely given up on rational decision making in policy and lawmaking. They do not believe that policymaking and lawmaking occur in chronological cycles involving the identification of problems, causes and solutions.²⁹ They believe that lawmaking is highly coincidental and that streams of problems find streams of solutions by accident.³⁰ Berman's analysis of the US Civil Rights Act lawmaking processes in 1960 and 1964 shows for example how coincidences involving large race riots, the murder of Kennedy and Johnson's own background in relation to race relations influenced Congress to enact a strong new Civil Rights Act in 1964, not yet possible in 1960.³¹

Finally, in the symbolic decision making perspective, policy makers, and thus also lawmakers, care about a different rationality than the rationality aimed at achieving an effective implementation. Scholars including Aubert, Edelman, Stone and Snelle, have argued that a political rationality may inform public decision-making and that such a rationality is based on the direct interests of the politicians involved rather than the effective solution to a certain policy problem for which the policy or in our case the legislation is made.³² In the same manner, Veerman has detailed how legislation, rather than a mere instrumental function of solving a certain social issue³³, can have

²⁸ Y. Dezelay and B. Garth, "The Import and Export of Law and Legal Institutions: International Strategies in National Palace Wars," in *Adapting Legal Cultures*, ed. D Nelken and J Feest (Oxford: Hart Publishing, 2001), Seidman and Seidman, *State and Law in the Development Process*, A. Watson, *Legal Transplants: An Approach to Comparative Law* (Athens & London: University of Georgia Press, 1993).

²⁹ This point is most clearly made by Edelman. See Edelman, "The Construction and Uses of Social Problems." M. Edelman, *Constructing the Political Spectacle* (Chicago: University of Chicago Press, 1988).

³⁰ J. Kingdon, *Agendas, Alternatives and Public Policies* (Boston: Little, Brown, 1984). 119, 151, 174 M. Cohen, J. March, and J. Olsen, "A Garbage Can Model of Organizational Choice," *Administrative Science Quarterly* 17 (1972). quoted through Parsons, *Public Policy, An Introduction to the Theory and Practice of Policy Analysis*. 192-194

³¹ Berman, *A Bill Becomes a Law, Congress Enacts Civil Rights Legislation*.

³² M. Edelman, *The Symbolic Uses of Politics* (Urbana: University of Illinois Press, 1964). Edelman, "The Construction and Uses of Social Problems." Edelman, *Constructing the Political Spectacle*. D. Stone, *Policy Paradox, The Art of Political Decision Making* (New York: Norton & Company, 1997). I. Snellen, *Boeiend geboeid (Captivated Captured) (Inaugural Lecture University of Tilburg)* (Tilburg: University of Tilburg, 1987). V. Aubert, "Social Functions of Legislation," *Acta Sociologica* 10 (1967).

³³ G.J. Veerman, *De Wet als Zinsbegoochelingsstoestel, Over Kwaliteit van Wetgeving (The Law as Spell-Machine for the Senses, On the Quality of Legislation) (Inaugural Lecture)* (Maastricht: University of Maastricht, 2004).

political goals such signaling a Minister's decisiveness, or serving to get a social issue off the agenda, or to let certain important constituents express their values in law.³⁴ The common denominator of these symbolic approaches to lawmaking is that they do not care about the implementation of law, or even on purpose do not wish that the law is implemented.³⁵ The symbolic perspective does not aim at implementation, and in its rationality, attaining a high level of compliance and enforcement is not important.

In conclusion, the lawmaking process has a profound effect on the quality of legislation, whether because of its manner of participation or its type of rationality. The next section will look at such quality in detail and provide an analytical framework for assessing legislation's level of positive influence on compliance and enforcement.

Quality of Legislation: Implementability

What kind of legislation is better able to achieve its official goals and what kind of legal norms lead to more compliance and more effective enforcement? In other words, what constitutes "implementable"³⁶ legislation? So far, there has been little scholarly work looking specifically at the implementability of legislation³⁷ but rather at the quality of the law in the books in general.³⁸ As Rubin wrote in 1989, when discussing the rise of what he calls the "administrative state" in the U.S. where regulatory law and its statutes became increasingly dominant:

³⁴ This has often been called the symbolic perspective. Compare with Aubert, "Social Functions of Legislation."

³⁵ For this see Cohn who uses the term "pastiche lawmaking" to describe rules that have been made not to be implemented. M. Cohn, "Fuzzy Legality in Regulation: The Legislative Mandate Revisited," *Law & Policy* 23, no. 4 (2001).

³⁶ Our concept of implementable is limited. We merely look at whether the norms in the could possibly lead to compliance, enforcement and goal attainment. In this research we do not look at the role of application of law by state institutions such as permit granters or EIA evaluators. Such application institutions do however affect the implementability of legislation, its compliance and its enforcement. Due to limitations, application will not be discussed here though.

³⁷ Few studies have linked the quality of legislation to its implementability. Here we make an attempt, mainly based on studies of the enforceability of law derived from a framework made by Jong. See P. Jong, *Handhaafbaar milieurecht (Enforceable Environmental Law)* (Deventer: W.E.J. Tjeenk Willink, 1997). For an overview of his framework and its relation to the quality of legislation in terms of enforceability see B. Van Rooij, "The Enforceability of Chinese Water Pollution Regulations, What Room for Improvement?" *China Perspectives*, no. 43 (2002b).

³⁸ Schuyt confirms this in 1983. See Schuyt, *Tussen Macht en Moraal, Over de Plaats Van het Recht in Verzorgingsstaat en Democratie (Between Power and Morality, on the Place of Law in the Welfare State and Democracy)*.

"We have no adequate theory, no general account of how such statutes should be designed and what makes them effective or ineffective, desirable or undesirable."³⁹

The existing theories about the quality of legislation and implementable legislation, while retaining some overlap, can roughly be divided as follows: First there are the legal theorists writing about the quality of legislation from a rule of law or general jurisprudence point of view including Fuller⁴⁰ and Hart⁴¹. Second are the socio-legal scholars writing about the quality of legislation in terms of its ability to achieve social change, including Seidman and Seidman⁴², Bardach and Kagan⁴³, Jong⁴⁴ and Griffiths⁴⁵. Third are practitioners, often civil servants working in legislative or enforcement departments of state institutions who have made policy documents about the quality of legislation and the enforceability of legislation, including policy makers from the Dutch Ministry of Justice⁴⁶, the US EPA⁴⁷ and the European Union⁴⁸. Fourth is research by legal scholars about these governmental standards for legislative quality, including for example from the Netherlands, research by Klosse et al.⁴⁹, Voermans et al.⁵⁰,

³⁹ E.L. Rubin, "Law and Legislation in the Administrative State," *Columbia Law Review* 89, no. 3 (1989). 369

⁴⁰ L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1976).

⁴¹ H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

⁴² Seidman and Seidman, *State and Law in the Development Process*. Seidman, Seidman, and Abeyesekere, *Legislative Drafting for Democratic Social Change, a manual for drafters*. R. Seidman and A. Seidman, "Using Reason and Experience to Draft Country-Specific Laws," in *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance*, ed. A. Seidman, R. B. Seidman, and T. Walde (London: Kluwer Law International, 1999). R.B. Seidman, "Justifying Legislation: A Pragmatic, Institutional Approach to the Memorandum of Law, Legislative Theory and Practical Reason," *Harvard Journal on Legislation* 29, no. 1 (1992).

⁴³ Bardach and Kagan, *Going by the Book, The Problem of Regulatory Unreasonableness*.

⁴⁴ Jong, *Handhaafbaar milieurecht (Enforceable Environmental Law)*.

⁴⁵ J. Griffiths, "The Social Working of Legal Rules," *Journal of Legal Pluralism*, no. 48 (2003).

⁴⁶ Netherlands Ministry of Justice, *Legislation in Perspective, A policy plan for the further development and implementation of the general legislative policy, aimed at improving the constitutional and administrative quality of government policy*. (The Hague: Netherlands Ministry of Justice, 1991).

⁴⁷ C.E. Wasserman, "Principles of Environmental Enforcement" (paper presented at the International Conference on Environmental Enforcement, Budapest, Hungary, September 22-55, 1992 1992).

⁴⁸ For an overview of European policy on legislative quality see N.E. Bracke, *Voorwaarden voor Goede EG-Wetgeving, Een Onderzoek naar de kwaliteit van Europese wetgeving (Requirements for Good European Community Legislation, Research about the Quality of European Legislation)* (Den Haag: SDU Uitgevers, 1996).

⁴⁹ S. Klosse et al., *Op Zoek Naar Kwaliteit, Een onderzoek naar de toepassing en operationalisering van wetgevingskwaliteitseisen (Searching for Quality, Research on the application and operationalization of requirements for legislative quality)* (Den Haag: SDU Uitgevers, 2003).

Veerman⁵¹ and Bracke.⁵² Apart from these studies focusing directly on the quality of legislation, there is much to learn about the expected effects of legislation on compliance and enforcement from socio-legal and economic studies of these two phenomena.⁵³

This section will present a framework for analyzing whether legislation has a positive effect on compliance and enforcement and will help the law to attain its goals (in other words whether it is implementable) based on the existing studies mentioned above. Drawing from such studies, this analytical framework comprises of four characteristics of implementable legislation: adequacy, feasibility, legal certainty and adaptability. The more these four characteristics are present in legislation, the higher the chances are that it is implementable.⁵⁴

Adequacy

Regulatory law is about changing existing behavior. It does so by introducing norms and sanctions to punish those who break the law. Such norms and sanctions should be adequate that when fully complied with or when fully enforced the desired social change is as much achieved as possible. Adequacy is thus a first characteristic of implementable legislation.

A first aspect of adequacy is the adequate translation of the law's formal goals⁵⁵ into its substantive legal norms.⁵⁶ Evaluating the level of adequacy of substantive norms involves a thought experiment: if the law is

⁵⁰ W. Voermans et al., *Quality, Implementation and Enforcement, A Study into the Quality of EC rules and the impact on the implementation and enforcement within the Netherlands* (Leiden University, 2000 [cited 25 July 2006]); available from http://www.law.leidenuniv.nl/general/img/qualityreport_tcm11-5332.pdf.

⁵¹ Veerman, *De Wet als Zinsbegoochelingstoestel, Over Kwaliteit van Wetgeving (The Law as Spell-Machine for the Senses, On the Quality of Legislation)* (Inaugural Lecture).

⁵² Bracke, *Voorwaarden voor Goede EG-Wetgeving, Een Onderzoek naar de kwaliteit van Europese wetgeving (Requirements for Good European Community Legislation, Research about the Quality of European Legislation)*.

⁵³ These studies will be discussed in more detail in Chapter 6, for compliance and Chapter 12 for enforcement. However we have used them as much as possible here as well.

⁵⁴ This is not to say that legislation that does not meet these criteria is not implementable. First of all the level of repression and harsh enforcement may make that some laws, even though they are unacceptable and thus unfeasible and non-adaptable and not even certain, may still be enforced so strictly that they attain compliance. An example is China's one child policy, which was not certain, as there was no official legislation for it until 2002, and the norms were not acceptable for many rural Chinese. Still due to harsh local level enforcement the law has created some of the desired social change.

⁵⁵ An important aspect here is whether the law's goals are clear and unambiguous, which may often not be the case. For this point see Klosse et al., *Op Zoek Naar Kwaliteit, Een onderzoek naar de toepassing en operationalisering van wetgevingskwaliteitseisen (Searching for Quality, Research on the application and operationalization of requirements for legislative quality)*. 9-11

⁵⁶ Ibid. 8-9

fully complied with, to what extent does it contribute to the behavioral change desired? Legislation can better achieve its goals if the substantive norms in the law are sufficiently stringent⁵⁷ and the scope of application wide enough.⁵⁸

An example of a law that is insufficiently stringent would be a discharge pollution fee system where the level of the fee is set at a lower level than the costs of abatement. Compliance with such law will not lead to the desired behavioral outcome, less pollution, as most regulated factories will pay a fee instead cleaning up. An example where the scope of application of the law's norms is too limited making the law inadequate is the Indian Child Labour Act's failure to regulate family-run businesses or businesses supported by government training programs. As this act fails to address child labor in the most important sector in which it takes place—the informal sector—compliance with the act, if it would ever be attained, would not significantly help to decrease the amount of child labor.⁵⁹

Adequacy, secondly, means that the law's sanctions should be sufficiently compelling to induce compliance in case there are violations. In what has been termed "deterrence" literature⁶⁰, scholarship has argued that the law can only change behavior if the combination of the penalty for violation of law, combined with the detection probability is high enough, in the sense that it is higher than the benefits of violation of law, the regulated actor will comply with the law.⁶¹ Following this perspective, adequate legislation has strict sanctions⁶² depending on the level of detection probability and the possible benefits of violating the law.

Brazil's 1940 Criminal Code environmental provisions are an example of inadequate sanctions. These provisions treat actions harming

⁵⁷ Stringency, or strictness, here means the extent to which the desired behavior as proscribed in the law is different from existing behavior. The more different, the stricter a norm is.

⁵⁸ Jong, *Handhaafbaar milieurecht (Enforceable Environmental Law)*. 76-9 and Netherlands Ministry of Justice, *Legislation in Perspective, A policy plan for the further development and implementation of the general legislative policy, aimed at improving the constitutional and administrative quality of government policy*. 21 Veerman, *De Wet als Zinsbegoochelingsstoestel, Over Kwaliteit van Wetgeving (The Law as Spell-Machine for the Senses, On the Quality of Legislation) (Inaugural Lecture)*.

⁵⁹ R.K. Agarwal, "The Barefoot Lawyers: Prosecuting Child Labour in the Supreme Court of India," *Arizona Journal of International and Comparative Law* 21, no. 2 (2004). 683

⁶⁰ For more about this school of thought see Chapter 12.

⁶¹ The original proposition for this thought was introduced by Bentham, in the 20th century this line of research was restarted by Becker. See J. Bentham, "An Introduction to the Principles and Morals of Legislation," in *The Utilitarians* (Rept. Garden City: Anchor Books, 1789 (Reprinted in 1973)). G.S. Becker, "Crime and Punishment, An Economic Approach," *Journal of Political Economy* 76 (1968).

⁶² Even though deterrence theory has been debated by those calling for a more adaptable form of law enforcement, most authors agree that even a adaptable enforcement style requires the possibility of using strict sanctions. For more see below under adaptability and Chapter 12.

flora as misdemeanors with only minor sanctions, “whether the offender has cleared one or 100,000 hectares of native forest.”⁶³ With the enormous profits that can be made from logging or the development of cash crops on cleared tropical forestland, minor sanctions are unlikely to serve as a deterrent.

Feasibility

The second aspect of good legislation, feasibility, is in many ways opposite to adequacy as it focuses not on the aspirations of the legislator but on the norm addressees’ and enforcement agents’ possibilities and willingness to comply with the law or enforce it.

Feasibility first means that legislation should demand behavioral changes that the norm addressee is able carry out, both financially, physically and technically.⁶⁴ Laws that demand a behavioral change that is too expensive or complex will have a lower chance of being complied with.

One example of an unfeasible norm for the regulated actor is the Tanzanian Wildlife Act from 1974. This act aimed to protect wildlife in game reserves, but while doing so greatly inhibited the people living in such reserves, to such an extent that violations were widespread. Masilingi wrote: “Hunting permitted under the law does not recognize traditional weapons such as spears, arrows and bows, yet local people cannot afford to acquire guns. Furthermore, walking in National Parks is not allowed, only motor vehicles are permitted. But many local people cannot afford to buy cars to visit national parks. Therefore compliance with the law becomes very difficult because local people are mainly hunters who use dogs and traditional weapons for hunting which is prohibited under the law.”⁶⁵

A second aspect of feasibility, as used here, is that the norms in the law should be as acceptable and reasonable to the regulated actor as possible.⁶⁶ Unreasonable or unacceptable norms may lead to resistance and

⁶³ Benjamin, *Criminal Law and the Protection of the Environment in Brazil* ([cited]. 228

⁶⁴ Here we have been influenced by Coleman’s analysis of norm deviation which argues that violation requires both opportunity and motivation. Here in reverse we argue the same applies to compliance. For more on this point see Chapter 6. See J.W. Coleman, “Toward an Integrated Theory of White-Collar Crime,” *American Journal of Sociology* 93, no. 2 (1987). See also Huisman, *Tussen Winst en Moraal, Achtergronden van Regelnaleving en Regelovertreding door Ondernemingen (Between Profit and Morality, The Backgrounds to Enterprise Compliance and Violation)*. Kagan and Scholz, “The “Criminology of the Corporation” and Regulatory Enforcement Strategies.”

⁶⁵ W.M.K. Masilingi, *Social-Economic Problems Experienced in Compliance and Enforcement in Tanzania* (1996 [cited 13 September 2006]); available from <http://www.inece.org/3rdvol2/masilingi.pdf>. 68

⁶⁶ In this sense, the concept of feasibility is closely related to the Dutch and European quality standards of subsidiarity and proportionality. See Klosse et al., *Op Zoek Naar Kwaliteit, Een*

less voluntary compliance.⁶⁷ Legal norms that demand behavior that is too different from the existing practices and are contrary to existing cultural and moral values are bound to be unfeasible and thus not implementable.⁶⁸ An example is how the 1974 Tanzanian Wildlife Act demands that local people in the game reserves must first ask written permission from the reserve director when seeking herbs. The important cultural notion of secrecy that is part of the traditional healers' value system makes such a request not acceptable.⁶⁹ Similarly, the Act's legal prohibition of visits to ancestral graveyards within the reserve territory is not easily accepted, to say the least.⁷⁰ The complexity of value systems, especially in multi-ethnic, poly-normativist,⁷¹ non-Western countries, challenges lawmakers when trying to draft acceptable and thus feasible norms.

Feasible legislation further means that law enforcement is possible⁷². Norms that demand too much from the existing enforcement machinery will have a smaller chance of being applied and enforced. There are restrictions to what an enforcement bureau can do, due to limited information, capacity, and authority.⁷³ The workload of enforcement agencies and the difficulty of doing such work are to some extent defined by the norms they have to enforce. First, laws whose norms place too great a demand on the regulated actor will lead to a high amount of violations, increasing the agency's workload. In addition, norms with a greater scope of application also increase enforcement tasks.

A second, more practical aspect of legislation that is feasible for enforcement concerns the verifiability (and provability) of the behavior regulated.⁷⁴ Compliance of some norms is easier verifiable than of others, depending on the detectability of the regulated behavior.⁷⁵ Air pollution

onderzoek naar de toepassing en operationalisering van wetgevingskwaliteitseisen (Searching for Quality, Research on the application and operationalization of requirements for legislative quality). 11-13

⁶⁷ K. Hawkins, *Environment and Enforcement, Regulation and the Social Definition of Pollution* (Oxford: Clarendon Press, 1984). 32, Wasserman, "Principles of Environmental Enforcement". 32 Schuyt, *Tussen Macht en Moraal, Over de Plaats Van het Recht in Verzorgingsstaat en Democratie (Between Power and Morality, on the Place of Law in the Welfare State and Democracy)*. 181, Kagan and Scholz, "The 'Criminology of the Corporation' and Regulatory Enforcement Strategies." For more on this see Chapter 6.

⁶⁸ Schuyt, *Tussen Macht en Moraal, Over de Plaats Van het Recht in Verzorgingsstaat en Democratie (Between Power and Morality, on the Place of Law in the Welfare State and Democracy)*. 182-3

⁶⁹ Masilingi, *Social-Economic Problems Experienced in Compliance and Enforcement in Tanzania* 68

⁷⁰ Ibid. 69

⁷¹ Riggs, *Administration in Developing Countries, The Theory of the Prismatic Society*.

⁷² What is written here about enforcement institutions also applies to institutions that apply the law, such as permit agencies or EIA bureaus. Because application of law is outside of the scope of this study it is not further addressed here.

⁷³ For more see Chapter 12

⁷⁴ For this see Jong, *Handhaafbaar milieurecht (Enforceable Environmental Law)*.

⁷⁵ Kagan, "Regulatory Enforcement." 396-7

violations can for example be detected visually from a rather long distance, whereas water pollution, especially non-point source violations are difficult to trace back to the polluting source if there are multiple possible violators in the vicinity. For developing countries, whose enforcement agencies often lack resources to carry out sufficient inspections, and where infrastructure is often lacking, making some regulated actors difficult to visit, concerns about the enforcement feasibility of legislation are especially important.

In sum, the first two characteristics of good legislation in terms of compliance and enforcement stand largely opposed. Adequate legislation requires strict rules with a large scope of application, while feasible legislation has rules that are less stringent and with a limited scope of application as they should be possible, acceptable and practical.⁷⁶ Implementable legislation balances both characteristics and makes balanced norms in terms of the right level of strictness, scope of application and practicality for enforcement.

Certainty

The third aspect of good legislation in terms of compliance and enforcement is the law's certainty. Certainty, meaning that there is as little misunderstanding about what rules mean, is a standard part of most studies of legislative quality. Legal rules should be as certain as possible and vagueness and ambiguity in legal drafts should be avoided.⁷⁷ The importance of certainty is no surprise as legal certainty and its related predictability are essential in the influential rule of law doctrine.⁷⁸ Furthermore, certainty is also closely related to legality, also an important legal doctrine⁷⁹, as

⁷⁶ In the Dutch quality requirements for legislation, the term efficiency has been used to weigh the costs and benefits of legislation. Furthermore the requirement of subsidiarity and proportionality are used to seek a balance between the goals of the law and its wider effects on society, here covered in adequacy and feasibility. See Klosse et al., *Op Zoek Naar Kwaliteit, Een onderzoek naar de toepassing en operationalisering van wetgevingskwaliteitseisen* (Searching for Quality, Research on the application and operationalization of requirements for legislative quality). 9, 11-13

⁷⁷ G.C. Thornton, *Legislative Drafting* (London: Butterworths, 1987). 56 Seidman, Seidman, and Abeysekere, *Legislative Drafting for Democratic Social Change, a manual for drafters*. 255 Fuller, *The Morality of Law*. 38-9, 63, 65, 79 F.A. Hayek, *The Political Idea of the Rule of Law* (Cairo: National Bank of Egypt, 1955). 34 quoted though B.Z. Tamanaha, *On the Rule of Law History, Politics, Theory* (Cambridge: Cambridge University Press, 2004). 66, for studies specifically about environmental legislation see: Hawkins, *Environment and Enforcement, Regulation and the Social Definition of Pollution*. 32 Wasserman, "Principles of Environmental Enforcement". 52 Baldwin, *Rules and Government*. 177 analyzing I. Ehrlich and R. Posner, "An Economic Analysis of Legal Rulemaking," *Journal of Legal Studies* 3 (1974).

⁷⁸ Fuller, *The Morality of Law*. 38-9, 63, 65, 79 Seidman, Seidman, and Abeysekere, *Legislative Drafting for Democratic Social Change, a manual for drafters*. 255 Hayek, *The Political Idea of the Rule of Law*. 34 quoted though Tamanaha, *On the Rule of Law History, Politics, Theory*. 66,

⁷⁹ Fuller, *The Morality of Law*. Veerman, *De Wet als Zinsbegoochelingstoestel, Over Kwaliteit van Wetgeving* (The Law as Spell-Machine for the Senses, On the Quality of Legislation) (Inaugural Lecture). Voermans et al., *Quality, Implementation and Enforcement, A Study into the Quality of EC rules and the*

contradictory rules, or rules that are not in accordance with higher-level rules do not have a clear status and therefore offer less certainty. But what does certainty mean for compliance and enforcement?

For compliance, certain law is beneficial as it is more predictable and allows people to know what is expected of them in advance.⁸⁰ Knowing and understanding a rule is a first requirement for complying with a rule.⁸¹ Rules that are too complex for the regulated actor to understand will lead to less compliance. Similarly, vague rules which offer no guidance as to what the norm addressee is to do, will also have a lower chance of achieving compliance. Contradictory rules are the most extreme example as they do propose contradictory models of conduct.⁸² Another aspect of certainty for compliance is that clearer and more specific rules serve better to limit the desired behavioral change within the goals of the law. Whereas there can be no debate about what compliance with a specific norm will accomplish, it is uncertain what compliance with a vague norm will achieve. Legal certainty is thus important for guaranteeing that legislation achieves what it set out to do.⁸³

Certainty is also important for law enforcement. First, because, clearer rules, both substantive norms, as well as norms on enforcement procedures, help to limit agent discretion. As Seidman et al. write: "When the laws speak vaguely or ambiguously, even honest officials fall back on

impact on the implementation and enforcement within the Netherlands ([cited]. Klosse et al., *Op Zoek Naar Kwaliteit, Een onderzoek naar de toepassing en operationalisering van wetgevingskwaliteitseisen* (*Searching for Quality, Research on the application and operationalization of requirements for legislative quality*). Bracke, *Voorwaarden voor Goede EG-Wetgeving, Een Onderzoek naar de kwaliteit van Europese wetgeving* (*Requirements for Good European Community Legislation, Research about the Quality of European Legislation*).

⁸⁰ Seidman, Seidman, and Abeysekere, *Legislative Drafting for Democratic Social Change, a manual for drafters*. 255

⁸¹ Huisman, *Tussen Winst en Moraal, Achtergronden van Regelgeving en Regelovertreding door Ondernemingen* (*Between Profit and Morality, The Backgrounds to Enterprise Compliance and Violation*), W. Voermans, "Weten van Wetgeving (Knowing the Law)," *Regelmaat* 2004, no. 5 (2004). 156, Kagan and Scholz, "The 'Criminology of the Corporation' and Regulatory Enforcement Strategies." . Dutch Ministry of Justice Law Enforcement Expertise Centre. *The Table of Eleven, A Versatile Tool* (2004 [cited 31 July 2005]); available from http://www.sam.gov.lv/images/modules/items/PDF/item_618_NL_The_table_of_Eleven.pdf.

⁸² In developing countries knowledge and understanding of the law is extra challenging. Literacy rates are generally lower, as is the level of education. The difference between the written elite's national language and the local vernaculars only exacerbates the problem. With a weak state and a weak infrastructure dissemination of rules to the regulated actor poses a significant effort, which cannot be taken for granted as it would be in smaller developed countries such as the Netherlands.

⁸³ Seidman, Seidman, and Abeysekere, *Legislative Drafting for Democratic Social Change, a manual for drafters*. 255

personal values and attitudes, and dishonest ones, their material interests: development and good governance cannot survive in this environment; kleptocracy takes over.”⁸⁴ Less discretion can help prevent capture-like⁸⁵ or corruptive practices,⁸⁶ which may especially problematic in non-Western contexts and should be a major concern for lawmakers there. Second, certainty also helps law enforcement because it makes it easier to ascertain and prove whether behavior is in compliance or violation of the law.⁸⁷

Legal certainty demands rules that are as specific as possible. Seidman et. al. have made a comprehensive study of how to make such precise legal rules. Their “manual for drafters” provides legislators with a list of do-s and don’t-s for more precise legislation that includes avoiding vague and ambiguous words and modifiers.⁸⁸ However, there are limitations to attaining such certainty. Legal philosopher Hart has taught that vagueness, even if we wanted to, can never be avoided completely because of language’s limited ability to offer precision.⁸⁹ But even if one could make a language that attained full certainty, absolute legal certainty would not be a wise option, because of the uncertainty and unpredictability inherent to social reality.

Adaptability

Implementation of law involves interpreting the law to a specific situation, in this research either by the regulated actor, or by the enforcement agent. Such interpretation requires norms to be adaptable to different circumstances. Adaptability is thus the fourth characteristic of implementable legislation.

There are several reasons why adaptability is likely to increase compliance. First, norms that are not adaptable to actual and future circumstances may lead to situations where they are difficult to comply with or unreasonable. The more complex the situation that is regulated and the more limited the resources for preparation a lawmaker has, and the less participation there is in the lawmaking process, the higher the chances are that the laws made without sufficient room for interpretation do not take such circumstances into account. Adaptable rules are especially important in non-Western countries⁹⁰, which may on the one hand be characterized by

⁸⁴ Ibid. 257

⁸⁵ Berman, *A Bill Becomes a Law, Congress Enacts Civil Rights Legislation*.

⁸⁶ Klitgaard makes this point linking corruption with discretion. See R. Klitgaard, *Controlling Corruption* (Berkeley: University of California Press, 1988).

⁸⁷ Bardach and Kagan, *Going by the Book, The Problem of Regulatory Unreasonableness*. 35, Jong, *Handhaafbaar milieurecht (Enforceable Environmental Law)*.

⁸⁸ Seidman, Seidman, and Abeyesekere, *Legislative Drafting for Democratic Social Change, a manual for drafters*. 262-3, 266-7, 277

⁸⁹ Hart, *The Concept of Law*. 124-5

⁹⁰ But not exclusively. Witteveen has argued that in the Netherlands the use of open worded norms has become more important given the increased complexity of society and the

weak legislative institutions and limited participation and on the other by complex social circumstances involving multi-ethnicity, overlapping normative systems and rapid changes due to the development process.

Adaptability is also likely good for compliance because adaptable, more openly worded norms allow the regulated actor, to find the most cost-efficient way of complying with the law. Bardach and Kagan's discussion of air pollution regulation for copper smelters in the US is illustrative. They argue for more adaptable regulation when stating that even for the 16 major copper smelters in operation in 1982, "a single government prescribed control technology, such as acid plants or sulfur dioxide liquefiers—machinery that can cost millions of dollars—has worked well in some plants but has proved useless in others."⁹¹ Following the same argumentation scholarship has argued for goal-oriented pollution control instruments instead of detailed regulation that proscribes certain abatement methods.⁹² The World Bank, for instance, strongly favors the use of pollution charges, which it argues have been successfully used in Colombia and the Philippines.⁹³

Furthermore, even if a lawmaker would know about all complexities of a social phenomenon, understanding its causes and cures, regulating such phenomenon in all complexity while maintaining clear and specific rules would be unworkable. Bardach and Kagan make this point clearly when discussing occupational health regulation in the US, quoting an inspector: "We regulate worker safety and health in almost five million workplaces. They are extremely varied. If we had rules that were exactly suited to each hazard and each situation in every one of those workplaces, the inspector's manual would have to be transported in a truck."⁹⁴ One can imagine what

impossibility of legislators to fully oversee such complex processes. Dutch legislators have resorted to what he calls communicative legislation, which although highly aspirational, allows for considerable interpretation and thus debate about the law's norms. W. Witteveen, "Turning to Communication to Study Legislation," in *Social and Symbolic Effects of Legislation Under the Rule of Law*, ed. N. Zeegers, W. Witteveen, and B. v. Klink (Lewiston: Edwin Mellen Press, 2005).

⁹¹ Bardach and Kagan, *Going by the Book, The Problem of Regulatory Unreasonableness*. 35

⁹² Gunningham, Grabosky, and Sinclair, *Smart Regulation, Designing Environmental Policy*. Blackman, "Informal Sector Pollution Control: What Policy Options Do We Have?"

⁹³ World Bank, *Greening Industry, New Roles for Communities, Markets and Governments*. 37-44 For some doubt about this success see Blackman, "Colombia's Discharge Fee Program: Incentives for Polluters or Regulators?", Blackman, "Economic Incentives to Control Water Pollution in Developing Countries, How Well Has Colombia's Wastewater Discharge Fee Program Worked and Why?"

⁹⁴ Bardach and Kagan, *Going by the Book, The Problem of Regulatory Unreasonableness*. 5

such an enormous amount of rules would mean for compliance. One way⁹⁵ to solve this problem is by making more abstract, open, adaptable rules that leave room for interpretation both to the norm addressee as well as to the law enforcer, without having to make a separate specific legal norm for each situation.

For enforcement, adaptable legislation offers enforcement agents the freedom of decision-making they need to engage in effective enforcement action. In the study of enforcement, rigid enforcement strategies have been increasingly questioned.⁹⁶ Most scholars now agree that successful enforcement is about attempting to achieve compliance first through cooperation and non-repressive mechanisms, and only when those fail, to fall back on strict sanctions and deterrent methods.⁹⁷ Achieving cooperation means that enforcement agents need the freedom sometimes not to use sanctions for certain violations, or to use only minor sanctions. In addition, attaining compliance requires understanding the regulated actor and adapting the type of enforcement sanction to the regulated actors' circumstances and behavior, which necessitates adaptable norms.⁹⁸ Minimum sanction statutes, especially using minima that are relatively stringent, may obstruct such cooperative enforcement, and in fact may cause regulatory unreasonableness.

To achieve adaptable legislation, legal rules should be more abstract and open norms should be used⁹⁹. Such open norms can better represent the complex interests of society, and furthermore they can be interpreted to fit different cases. Adaptable, abstract law is thus well geared to strike a balance between different interests, allowing such balance to be struck during the implementation process. However, the problem is that abstract legislation offers no control over the expected outcomes because it enables a high level of discretion to both the regulated actor and the enforcement agent. Thus we

⁹⁵ Another way is simplifying the rules while maintaining certainty and have clear and specific rules that will be unreasonable and unfeasible for many other situations. As Bardach and Kagan suggest has happened during the 1970s in the US. Ibid. 5

⁹⁶ M. Aalders, "Moving Beyond Command and Control: Reflexivity in the regulation of occupational safety and health and the environment," *Law & Policy* 19 (1997). K. Kuperan, "Blue Water Crime: Deterrence, Legitimacy, and Compliance in Fisheries," *Law & Society Review* 32, no. 2 (1998). 309, J. Braithwaite and T. Makkai, "Testing an Expected Utility Model of Corporate Deterrence," *Law & Society Review* 25, no. 1 (1991). Kagan and Scholz, "The 'Criminology of the Corporation' and Regulatory Enforcement Strategies."

⁹⁷ See Chapter 12

⁹⁸ Kagan and Scholz, "The 'Criminology of the Corporation' and Regulatory Enforcement Strategies." Huisman, *Tussen Winst en Moraal, Achtergronden van Regelgeving en Regelovertrading door Ondernemingen* (Between Profit and Morality, The Backgrounds to Enterprise Compliance and Violation).

⁹⁹ Luhmann makes this point, see G. Teubner, "Substantive and Reflexive Elements in Modern Law," *Law and Society Review* 17, no. 2 (1983). 244 See also Hart, *The Concept of Law*: 125-7

find that good legislation, in terms of its implementability, is characterized both by legal certainty and adaptability¹⁰⁰: Legal certainty to control the outcomes of the implementation process and adaptability to apply the law to the complexities of social reality and to balance different interests in the law that are necessary to maintain the law's feasibility and adequacy. Alternatively, following Hart we can say that certainty and adaptability are "the Scylla and Charybdis of juristic theory; they are great exaggerations...and the truth lies between them."¹⁰¹

In sum, adequacy, feasibility, certainty and adaptability are characteristics of implementable legislation.¹⁰² As these four characteristics are partly contradictory legislation that scores high on all four accounts is difficult to make. In many cases, a balance between adequacy and feasibility and between certainty and adaptability must be sought.¹⁰³ For adequacy and feasibility the balance is largely found on the continuum of the law's level of behavioral change sought, or in other words its strictness, which includes its scope of application: the stricter or more demanding the more adequate but less feasible. For certainty and adaptability, the balance is largely found on the continuum of the level of abstraction of the rules: the more abstract the more adaptable and the less certain.

Communicative Effects of Legislation

So far, the analysis above has been based on an idea of direct instrumentality. It has looked at what direct effects the norms in the law are expected to have on compliance, enforcement and goal attainment. Another way to look at the quality of legislation is by looking at its indirect effects on society through its

¹⁰⁰ Here we have been influenced by Jong's concept of enforceability which also makes certainty and adaptability central. See Jong, *Handhaafbaar milieurecht (Enforceable Environmental Law)*. For more about the concept of enforceability see Van Rooij, "The Enforceability of Chinese Water Pollution Regulations, What Room for Improvement?"

¹⁰¹ Hart, *The Concept of Law*. 144

¹⁰² Even unimplementable legislation can lead to compliance and effective enforcement. This is however due to other circumstances outside of the law. An example is a highly repressive state where unfeasible norms are strictly enforced, with disregard of local acceptance. China's one child policy is a good example of such a situation where an uncertain, and unfeasible norm was according to some scholars strongly enforced and led to a behavioral change. Here the repressiveness of the enforcement was central.

¹⁰³ Klosse's study on Dutch legislative quality requirements has paid attention to the tensions between these requirements. Similarly Bardach and Kagan have indicated tensions between the four requirements as described above. See Klosse et al., *Op Zoek Naar Kwaliteit, Een onderzoek naar de toepassing en operationalisering van wetgevingskwaliteitseisen (Searching for Quality, Research on the application and operationalization of requirements for legislative quality)*. 264-6, Bardach and Kagan, *Going by the Book, The Problem of Regulatory Unreasonableness*.

communicative workings.¹⁰⁴ Dutch scholars have developed ideas of how law can influence society in indirect ways through what they call the “communicative” approach to law. The idea behind this is that legislation can “articulate community values in such a way as to prompt discussion, interpretation and lawmaking in the community itself.”¹⁰⁵ Under this approach, social behavior, including that of the regulated actor, may be influenced by the language, the thoughts and the symbolism of the law. This includes for example the law’s influence on society through its cognitive function, offering a “vocabulary for thinking and speaking which provides a specific access to reality.”¹⁰⁶ It also includes the law’s symbolic function where agreement on aspirational norms forms a symbol, which even though not enforceable, may influence citizen behavior. Similarly, the communicative approach to law argues that norm addressees have sometimes, even unconsciously, internalized the norms contained in the law.¹⁰⁷ All of this means that even when the direct instrumental characteristics for implementable legislation are not there and even when enforcement is lacking, a law, which has a significant amount of communicative and symbolic qualities may still achieve compliance.¹⁰⁸

Law Making in China: Top-Down, From Abstract and Weak to Specific and Strict

How has China fared in terms of implementable legislation? A cursory glance at some of the literature tells us, not too well. China’s post-reform lawmaking has often been characterized as vague¹⁰⁹, contradictory¹¹⁰ and

¹⁰⁴ B.v. Klink, "An effective-historical view on the symbolic working of law," in *Social and Symbolic Effects of Legislation Under the Rule of Law*, ed. N Zeegers, W Witteveen, and B v Klink (Lewiston: Edwin Mellen Press, 2005). Witteveen, "Turning to Communication to Study Legislation." J. Griffiths, "An introduction in eight propositions to the social working approach to legislation," in *Social and Symbolic Effects of Legislation Under the Rule of Law*, ed. N Zeegers, W Witteveen, and B v Klink (Lewiston: Edwin Mellen Press, 2005), Griffiths, "The Social Working of Legal Rules."

¹⁰⁵ Witteveen, "Turning to Communication to Study Legislation."

¹⁰⁶ Ibid. 31

¹⁰⁷ M. Galanter, "The Perplexities of Legal Effectiveness," in *Social and Symbolic Effects of Legislation under the Rule of Law*, ed. N Zeegers, W Witteveen, and B v Klink (Lewiston: Edwin Mellen Press, 2005). xvii

¹⁰⁸ The present study does not specifically research the communicative effects of legislation, simply because understanding such subtle causalities is beyond the limited data that has been available for this work. This is not to say that communicative effects are not important. Whenever such effects are apparent, they will of course be mentioned.

¹⁰⁹ R. Peerenboom, *China's Long March toward the Rule of Law* (Cambridge: Cambridge University Press, 2002).251, P.H. Corne, *Foreign Investment in China, The Administrative Legal System* (Hong Kong: Hong Kong University Press, 1997)., S.S. Cho, "Continuing Economic Reform in the People's Republic of China: Bankruptcy Legislation Leads the Way," *Hastings International and Comparative Law Review* 19 (1996).750, V.M.-Y. Hung, "China's WTO

weak.¹¹¹ Legislation in China has been made in this manner partly due to a legislative strategy adopted to cope with the challenges China faced after 1978 and partly because of changes in China's political system. Recently there have been trends that suggest change, however. The question is whether the changes lead to legislation that is more implementable. The cases of natural resource protection lawmaking discussed further on in Part I (see Chapter 3 and 4) are examples of these new trends and should be studied against the background of the recent history of lawmaking in China and its recent changes.

After Mao, China came to face the enormous legislative challenge of how to reestablish the world's largest legal system. When Deng started reform in 1978, there was not much to start with. Decades of revolution and internal struggle had left China literally lawless.¹¹² The country had internal CCP norms instead of legislation, policy instead of law.¹¹³ China was in a hurry and the first legislation was largely made in a top-down manner, through legal transplantation¹¹⁴ from abroad, or by translating policy into legislation.¹¹⁵ While China set to make new legislation, the country started to

Commitment on the Independent Judicial Review: Impact on Legal And Political Reform," *American Journal of Comparative Law* 52 (2004). 101-2, J.M. Otto and Y. Li, "An Overview of Law-Making in China," in *Law-Making in the People's Republic of China*, ed. J M Otto, et al. (The Hague: Kluwer Law International, 2000).¹¹ P. Keller, "The National People's Congress and the Making of National Law," in *Lawmaking in the People's Republic of China*, ed. J M Otto, et al. (The Hague: Kluwer Law International, 2000).

¹¹⁰ Chen, *Chinese Law, Towards an Understanding of Chinese Law, Its Nature and Development*. 119. Peerenboom, *China's Long March toward the Rule of Law*. 256-262 Here we will not discuss inconsistency in detail because it falls outside of the scope of the present study.

¹¹¹ Corne, *Foreign Investment in China, The Administrative Legal System*.

¹¹² Chen, *Chinese Law, Towards an Understanding of Chinese Law, Its Nature and Development*. 40

¹¹³ H. Von Senger, "Ideology and Law-making," in *Lawmaking in the People's Republic of China*, ed. J M Otto, et al. (The Hague: Kluwer Law International, 2000)., Chen, *Chinese Law, Towards an Understanding of Chinese Law, Its Nature and Development*. 40

¹¹⁴ L. Su, "Bianfa, Fazhi ji Bentu Ziyuan (Change of law, Rule of law and its Native Resources)," *Zhongwai Faxue* 5, no. 1 (1996)., A.H.Y. Chen, "Socialist Law, Civil Law, Common Law, and the Classification of Contemporary Chinese Law," in *Lawmaking in the People's Republic of China*, ed. J M Otto, et al. (The Hague: Kluwer Law International, 2000)., Chen, *Chinese Law, Towards an Understanding of Chinese Law, Its Nature and Development*. 49-55 For studies on the concept of legal transplants see R. Cotterrell, "Is there a logic of legal transplants?" in *Adapting Legal Cultures*, ed. D Nelken and J Feest (Oxford: Hart Publishing, 2001), L.M. Friedman, "Some Comments on Cotterrell and Legal Transplants," in *Adapting Legal Cultures*, ed. D Nelken and J Feest (Oxford: Hart Publishing, 2001), D. Nelken, "Towards a Sociology of Legal Adaptation," in *Adapting Legal Cultures*, ed. D Nelken and J Feest (Oxford: Hart Publishing, 2001), Seidman and Seidman, *State and Law in the Development Process*, Watson, *Legal Transplants: An Approach to Comparative Law*.

¹¹⁵ Peerenboom, *China's Long March toward the Rule of Law*. 247 Chen, *Chinese Law, Towards an Understanding of Chinese Law, Its Nature and Development*. 42 Our analysis in this paragraph is again focused on lawmaking in its relation to implementation and implementability. As such it is somewhat different from existing studies of Chinese lawmaking that have focused on the

transform fast under reform. China's leadership was aware of the great challenge it faced when deciding to make new legislation for a large unitary country with great regional differences and that was rapidly changing. Furthermore, China lacked experience with law and lawmaking because of the preceding revolutionary period.¹¹⁶

To meet these challenges China adopted the so-called "piece meal" approach to legislation.¹¹⁷ The piece meal approach meant that first abstract general rules were made that could later be specified in lower level, mainly administrative legislation. It also meant that sometimes, legislation was first adopted on a trial basis and only later by the end of the 1980s and in the 1990s was changed into regular legislation.¹¹⁸ Another aspect of the piece meal approach was that national legislation should not be too strict in order to enable local adaptation in local legislation.¹¹⁹ This was done, because in China's unitary legal system, local law may only be as strict as or stricter than national law.¹²⁰ Thus, the piece-meal approach meant that legislation was highly abstract and not too strict, making it adaptable and feasible, but also uncertain and inadequate.¹²¹

The corporatist and incrementalist process of lawmaking in post-Mao China further enhanced the law's vagueness and weakness. Whereas pre-reform CCP policy was largely an elitist affair¹²², under Deng politics became bargaining, between national power holders and provinces and between different national ministries.¹²³ Because of the bargaining, national lawmaking also became corporatist and incremental.¹²⁴ The various parties involved in the drafting process only enacted new legislation after a

role of the party on the lawmaking process Peerenboom, *China's Long March toward the Rule of Law*, M.S. Tanner, *The Politics of Lawmaking in China* (Oxford: Clarendon Press, 1999). lawmaking and rule of law development Peerenboom, *China's Long March toward the Rule of Law*.¹¹⁶ Peerenboom, *China's Long March toward the Rule of Law*.²⁴⁹

¹¹⁷ Chen, *Chinese Law, Towards an Understanding of Chinese Law, Its Nature and Development*. 42-3, Otto and Li, "An Overview of Law-Making in China." 11, P. Keller, "Sources of Order in Chinese Law," *American Journal of Comparative Law* 42 (1994). 730-1, A.H.Y. Chen, *An Introduction to the Legal System of the PRC* (Singapore: Butterworths Asia, 1992). 33, J. Chen, "Coming Full Circle: Law Making in the PRC From a Historical Perspective," in *Law-Making in the People's Republic of China*, ed. J M Otto, et al. (New York: Kluwer Law International, 2000). 32-4

¹¹⁸ Peerenboom, *China's Long March toward the Rule of Law*. 255

¹¹⁹ Ibid. 249

¹²⁰ Constitution § 100

¹²¹ In the literature China's legislative vagueness is also attributed to a legal culture of adaptability. See S.B. Lubman, *Bird in a Cage: Legal Reform in China after Mao* (Stanford: Stanford University Press, 1999). 147

¹²² Tanner, *The Politics of Lawmaking in China*. 18

¹²³ S.L. Shirk, *The Political Logic of Economic Reform in China* (Berkeley: University of California Press, 1993).

¹²⁴ Tanner, *The Politics of Lawmaking in China*. 22-8, 47

compromise on the main issues of contention was reached. The result was a compromise: more abstract or watered-down, weaker legislation.

Lawmaking in China is largely a top-down process. Unlike the continental civil law countries in Europe, Chinese legislators have hardly made legislation by means of codification of existing norms. Instead, most new legislation has been based on foreign models¹²⁵ or on policy made in to legislation.¹²⁶ Furthermore, China still lacks an institutionalized system through which societal norms can move bottom-up to become part of the national legal system. Adjudication does not have any legal effect outside of the case in question.¹²⁷ This is in contrast with Western Europe's continental legal systems where case law gradually has become an important source of law, indispensable for developing national doctrines of interpreting vagueness and ambiguity in national legislation.¹²⁸ Because of the lack of case law, legislation needs more specific rules to attain certainty, because any room for interpretation leaves virtual full discretion to those applying the law, instead of the legal doctrines that have developed through case law in civil law systems of Western Europe. Lacking such a system of case law China's legislator will have to make clearer, more specific legislation.¹²⁹ However, in a country as large as China and lacking a pluralist political system top-down lawmaking that still reflects different interests and is feasible with local circumstances is extremely difficult. Lacking a bottom-up system, Chinese legislators have to anticipate what happens at the bottom level and in future circumstances. The obstructed vertical information flow that characterizes a non-pluralist political system makes this very difficult, while the rapid changes in China's reform society add further complexity.

While the piecemeal approach, bargaining and top-down process have been apt descriptions of lawmaking in reform China, recently there

¹²⁵ Chen, "Socialist Law, Civil Law, Common Law, and the Classification of Contemporary Chinese Law.", Su, "Bianfa, Fazhi ji Bentu Ziyuan (Change of law, Rule of law and its Native Resources)."

¹²⁶ A possible exception is the new Civil Code, for which both local norms as well as foreign models are studied.

¹²⁷ H. Von Senger, *Einführung in das chinesische Recht* (München: Verlag C.H. Beck, 1994)., H. Dong, *On Judicial Interpretation (Sifa Jieshi Lun)*, chin ed. (Beijing: Chinese University of Politics and Law Press, 1999)., Z. Zhang, "Zhongguo de Falü Jieshi Zhidu (China's System of Legal Interpretation)," in *Falü Jieshi Wenti (Issues of Legal Interpretation)*, ed. Z. Liang (Beijing: Falü Chubanshe, 1998).

¹²⁸ This issue has been analyzed in more detailed in another article, see B. Van Rooij, "Falü de Weidu, Cong Kongjianshang Jiedu Falü Shibai (Law's Dimension, Understanding Legal Failure Spatially) (Translated by Yao Yan)," *Sixiang Zhanxian (Thinking)*, no. 4 (2004).

¹²⁹ This point we have analyzed in more detail elsewhere: Ibid. China has got a system of legislative or judicial interpretation of law

have been trends that seem to indicate changes.¹³⁰ First, the necessity for the piece-meal approach has decreased over the last decade. Since China adopted the market economy in 1992, reform has matured and slowed to a more regular phase with less dramatic structural changes for society. Consequently, society and law could become more stable as they could now adapt to reform.¹³¹ Furthermore, China has gained sufficient experience with lawmaking and establishing a legal system to make more stable less experimental legislation. Second, China has come under pressure to make more specific and stricter legislation in order to enhance legal certainty and the adequacy of some of its laws. Part of the pressure has come from within with leaders complaining about weak legislation or vague rules and Chinese scholars criticizing the piece meal approach¹³², and part from outside, for instance through China's international obligations under the WTO¹³³ or from international scholarship¹³⁴.

China's adoption of the *Yifa Zhiguo* (Ruling the Country on the Basis of Law) principle has been an important part of this development.¹³⁵ This principle, which was laid down in the constitution in 1999, demands that legislation serves as a basis for government. Following this, China has now enacted the Law on Lawmaking to ameliorate its legislation. Furthermore, since the late 1990s legislation has become increasingly specific. Examples

¹³⁰ In a comprehensive study of various types and processes of lawmaking in China a first indication of such changes was noted by several authors. See J.M. Otto, "Conclusion: A Comparativist's Outlook on Law-Making in China," in *Law-Making in the People's Republic of China*, ed. J M Otto, et al. (The Hague: Kluwer Law International, 2000). 222

¹³¹ For this point and the importance of the 1992 socialist market economy policy for the development of law in China see Chen. Chen, *Chinese Law, Towards an Understanding of Chinese Law, Its Nature and Development*. 43-45

¹³² For some examples see Ibid. 45 note 82 and 83

¹³³ See for example Li, "China's Compliance with WTO Requirements Will Improve the Efficiency and Effective Implementation of Environmental Laws in China." J. Cao, "WTO and the Rule of Law in China," *Temple International and Comparative Law Journal* 16 (2002). 381, Hung, "China's WTO Commitment on the Independent Judicial Review: Impact on Legal And Political Reform." 115. J. Wang, "The Rule of Law in China: A Realistic View of the Jurisprudence, the Impact of the WTO, and the Prospects for Future Development," *Singapore Journal of Legal Studies* 2004 (2004).376, P.B. Potter, "The Legal Implications of China's Accession to the WTO," *China Quarterly* 167 (2001). P.B. Potter, "Law-making in the PRC: The case of Contracts," in *Lawmaking in the People's Republic of China*, ed. J M Otto, et al. (The Hague: Kluwer Law International, 2000). In contrast, some scholars have questioned the WTO's impact on the quality of legislation in China, see for example: L. Wilson, "Investors Beware: The WTO will not Cure all ills with China," *Columbia Business Law Review* 2003 (2003). 1020, D.C. Clarke, "China's Legal System and the WTO: Prospects for Compliance," *Washington University Global Studies Law Review* 2 (2003). 111

¹³⁴ A prime example of criticism of the vagueness and contradictory nature of lawmaking in China is Corne's work. See Corne, *Foreign Investment in China, The Administrative Legal System*.

¹³⁵ For an overview of how this principle developed see R.C. Keith and Z. Lin, *Law and Justice in China's New Marketplace* (New York: Palgrave, 2001).27-39

are the 1996 and 1997 Criminal Procedure Law and Criminal Law amendments¹³⁶ and the 1999 Contract Law¹³⁷. Former notoriously weak legislation has also become stricter. Environmental law provides ample examples with the 2000 Air Pollution Prevention and Control Law and the 2002 Environmental Impact Assessment Law.

An important aspect of China's legislative system is local legislation, which forms an important source of law. Local legislation could theoretically provide a specific, yet more legitimate alternative to the overly specific national legislation. Does China not have as many local regulations as it has different dialects?¹³⁸ Indeed, lawmaking in China has a decentralized dimension.¹³⁹ Provinces have the authority to make local rules and regulations¹⁴⁰, and at times, they have delegated this authority to the municipal and district level. Even township and villages have their own little laws, the *cunqiuminyue*, or the village statutes; these are an old form of writing down local taboos and customs, which under communism have become a means of communicating party norms. Under Chinese law, local regulation may only exist if it is in accordance with higher legislation or if no higher legislation exists.¹⁴¹ Because localities are highly independent, there have been instances where local legislation is in blatant conflict with increasingly specific national law.¹⁴² In other cases, which will be discussed in more detail here for the Dianchi Lake area, local regulation is not much more than a copy of national legislation and therefore it hardly adopts national norms to local circumstances.

The following chapters will look in more detail at how the process of lawmaking in China has influenced its implementability and how changes in natural resource protection law have affected the law's quality in terms of compliance and enforcement. First, Chapter 3 portrays the 1998 Land Management Act amendment and then Chapter 4 studies the lawmaking processes of the 1996 Water Pollution Prevention and Control Law, the 2000 Air Pollution Prevention and Control Law and the 2002 Environmental Impact Assessment Law. Both chapters also analyze the implementability of relevant local legislation.

¹³⁶ Ending analogy based substantive criminal law and instituting the *nullum crimen sine lege* principle instead led to more specific legislation. See Ibid.207-213

¹³⁷ Potter, "Law-making in the PRC: The case of Contracts."

¹³⁸ Lubman, *Bird in a Cage: Legal Reform in China after Mao*. 142

¹³⁹ For a brief overview of the local legislative system see: C. Sun, "Local Law-making in China," in *Lawmaking in the People's Republic of China*, ed. J M Otto, et al. (The Hague: Kluwer Law International, 2000).

¹⁴⁰ Constitution §100, Law on Lawmaking §64, 73

¹⁴¹ Constitution § 100 and Law on Lawmaking § 64, 73

¹⁴² Corne, *Foreign Investment in China, The Administrative Legal System*. Peerenboom, *China's Long March toward the Rule of Law*. 256

3. Bargaining on the Land Bill

How Central Concerns for Food Security Lead to Stricter Legislation

Introduction

In 1994, Lester Brown predicted that China would soon face food shortages.¹ The country's rapidly growing population got richer and urbanized and started to eat more food of a higher order in the food chain and thus more land was needed while actually the urbanization and industrialization had only cost land.² Soon, Brown predicted, China would have to import amounts of food not available at the global food market.³ Central in his analysis is the causal relationship between food security and arable land protection. In 1996, China's prime minister, Li Peng was to join the international World Food Summit organized by the FAO in Rome. In preparation for the meeting and in response to mounting international pressure following Brown's widely quoted publication, Li Peng asked his subordinates to prepare a detailed study on China's land reserves. When such report was presented, it became apparent that China's arable land reserves had indeed decreased at an alarming rate.⁴ During the FAO World Food Security Conference held in Rome, November 1996, Li Peng announced that China would solve food problems based on self-supporting policy and her own resources.⁵ This series of incidents marked a major change in China's land legislation, leading to a new land law with strict and specific norms to prevent and stop further arable land loss.

History has made Chinese leaders aware of the importance and challenges of food security and the protection of arable land. Famine has plagued China for centuries. Faced with one of the lowest amounts of per capita arable land and the largest absolute population in the world, the risk of food shortage has been real. In the last major famine during the Great Leap

¹ L.R. Brown, "Who Will Feed China?" *World Watch*, no. September/October (1994). This paragraph is based on Brown's book on the topic, see L.R. Brown, *Who Will Feed China? Wake-Up Call for a Small Planet* (New York: W.W.Norton & Company, Inc., 1995). Smil made a similar but more nuanced warning, see Smil, *China's Environmental Crisis: an inquiry into the limits of national development*. 53-7, 140-9. For criticism on Brown's use of Chinese data and his analysis in general see Smil, *China's Past, China's Future, Energy, Food, Environment*.

² Brown, "Who Will Feed China?"

³ For criticism on Brown's use of Chinese data and his analysis in general see Smil, *China's Past, China's Future, Energy, Food, Environment*.

⁴ Based on an interview with a Chinese land management expert closely involved with land related lawmaking. April 2005.

⁵ SEPA, *Progress Report of Trade Liberalization in the Agriculture Sector and the Environment with Specific Focus on the Rice Sector in China* (UNEP, 2003 [cited July 25 2006]); available from <http://www.unep.ch/etb/events/Events2003/pdf/FinalDraftofChinaStudy.pdf>.

Forward (1957-1960), the largest in world history⁶, an estimated 30 million Chinese perished. Ever since, food security has been a priority of China's leaders. After the great leap, China's hunger for arable land incurred a destruction of nature, as forests on mountain slopes were cut to make rice paddies, and lakes were converted to arable land.⁷ Still arable land continued to decline, especially since Deng's reform program started in 1978, industrialization and urbanization converted arable land to construction use. In an effort to control the loss of arable land, China adopted the Land Management Act in 1986. When even after that, arable land loss continued in the early nineties, China's central leadership, likely under the influence of Brown's warning and Li Peng's study, became convinced it had to strengthen its existing legal and institutional structures for the management of land resources. The amendments to the 1986 Land Law took place in 1998 and led to a stricter and more specific law, geared towards a better protection of China's arable land.⁸

The present research is about the impact of changes in China's natural resource protection legislation, lawmaking and enforcement processes on compliance with such legislation. (See Chapter 1) Here a part of this question is addressed, by looking at the manner arable land protection legislation has been changed and how this change has possibly affected the law's implementability (i.e. its chances for achieving compliance, effective enforcement and goal attainment). Based on the analytical frameworks on the process and quality of legislation introduced in Chapter 2, it will describe the debates about proposed amendments related to arable land protection and analyze what the effect has been of those debates on the quality of the legislation finally adopted. In addition, this chapter analyzes the implementability of Yunnan provincial, municipal and village legislation about arable land protection from Yunnan province.

⁶ Smil, *China's Past, China's Future, Energy, Food, Environment*.

⁷ J. Shapiro, *Mao's war against nature: politics and the environment in revolutionary China* (Cambridge: Cambridge University Press, 2001).

⁸ Arable land protection was not the only issue regulated in the 1998 amendment. The lawmakers also took the opportunity to codify existing land ownership and land tenure policy into legislation. In the early phase of reform at the local level, there had been experiments with different types of land tenure for households in order to boost production. The Household Responsibility System unified such experiments under one policy, choosing some local practices over others and establishing a system of 15-year land use rights for households. Under influence of institutional economics, believing that land tenure security will lead to an increase in productivity and investment in land there was a need to expand the existing policies in the land legislation. Y. Yang, *Zhongguo Nongdiquan Jiben Wenti, Zhongguo Jiti nongdi quanli tixi de xingcheng yu tuozhan* (Fundamental Problems of Rural Land Rights in China, The Formation and Development of Collective Rural Land Rights) (Beijing: Zhongguo Haiguan Chubanshe, 2003).

The Chronology of the Lawmaking Procedure of the 1998 Land Management Act Amendment

Faced with the fact that since the 1986 LMA had been adopted an average of 10 million mu of arable land was still lost annually until 1995,⁹ China's highest leaders, the CCP Central Committee and the State Council, sought changes. They blamed ongoing arable land loss to local malpractices. Such malpractices had continued despite the fact that the national Land Management Law and legal institutions for implementation of the arable protection legislation had been in place for more than ten years.¹⁰ In 1997, in order to deal with this problem the CCP Central Committee and State Council issued a notice demanding the strengthening of macro level management of land resources.¹¹ This notice initiate an amendment to the LMA.

On 11 April 1998, the National People's Congress Environmental and Resource Protection (NPC-EP) Committee¹² submitted a draft proposal for an amendment to the 1986 Land Management Law.¹³ Two weeks later, on 29 April, the NPC Standing Committee Legal Affairs Office (LAO) published a first draft of the amendment to the Land Management Act.¹⁴ This publication quoted the State Council, emphasizing the importance of this amendment for "the basic position of agriculture, the interests of China's 900 million farmers, and the children and grandchildren of the Chinese people."¹⁵ After this, in May and June 1998, the NPC Legal Committee, the NPC-EP Committee, the NPC Agriculture and Village Committee and LAO, jointly organized several work meetings and research sessions.¹⁶ During the work meetings relevant departments, political parties¹⁷

⁹ NPC-SC Legal Affairs Office, "Shiyi (Commentary)," in *Zhonghua Renmin Gongheguo Tudi Guanlifa Shiyi (Commentary on the Prc Land Management Act)*, ed. NPC-SC Legal Affairs Office (Beijing: Falü Chubanshe, 1998). 33

¹⁰ Ibid. 33-34

¹¹ Ibid. 34

¹² Asian Development Bank, *Reform of Environmental and Land Legislation in the People's Republic of China* (Manilla: ADB, 2000). 98

¹³ State Council, "Zhonghua Renmin Gongheguo Tudiguanlifa (Xiuding Caoan) ((Draft Amendment of the) PRC Land Management Act)," in *Zhonghua Renmin Gongheguo Tudi Guanlifa Shiyi (Commentary on the Prc Land Management Act)*, ed. NPC-SC Legal Affairs Office (Beijing: Falü Chubanshe, 1998).

¹⁴ NPC-SC Bureau, "Guanyu Gongbu Tudiguanlifa (Xiuding Caoan) Zhengqiu Yijian de Tongzhi (Notice on Seeking Suggestions on the Draft Amendment to the Published Land Management Act)," in *Zhonghua Renmin Gongheguo Tudi Guanlifa Shiyi (Commentary on the Prc Land Management Act)*, ed. NPC-SC Legal Affairs Office (Beijing: Falü Chubanshe, 1998). 310

¹⁵ Ibid. 310

¹⁶ NPC Legal Committee, "Guanyu Zhonghuarenmingongheguotudiguanlifa (Xiuding Caoan) Chubu Shenyi Qingkuang de Huibao (Report on the First Review of the PRC Land Management Act Draft Amendment)," in *Zhonghua Renmin Gongheguo Tudi Guanlifa Shiyi*

and mass organizations were asked to comment on the draft law. Also in May and June 1998, 31 provinces, and 47 central departments provided their comments and suggestions. LAO further received 611 letters with suggestions of citizens on the published legal draft.

After receiving the initial input, the NPC Legal Committee organized three conferences, also in June, to discuss the various comments. Based on this it made first suggestions for changing the initial draft,¹⁸ summarized in its Report on the Initial Review of the Draft Amendment to the PRC Land Management Act of 6 June 1998.¹⁹ Two months later, on 17 August, 1998, the NPC Legal Committee issued a report in which it summarized its findings based on a input from all provinces, 25 large cities, 52 central departments, 173 letters from local work units, and another 502 letters from citizens, of which one was signed by 836 people. Finally, on 28 August 1998 the Legal Committee reported its suggestions for revising the initial draft to the NPC Standing Committee (NPC-SC)²⁰, which adopted the law on 29 August 1998, with a total of 141 votes cast, 139 in favor, 2 withheld, and none against.²¹ The law became effective for implementation as of 1 January 1999.²²

The organization of the amendment procedure shows that although many were allowed to provide comments and input, only one organ, the NPC Legal Committee had the authority to channel these inputs into the final draft to be presented to the NPC-SC for final approval.

(*Commentary on the PRC Land Management Act*), ed. NPC-SC Legal Affairs Office (Beijing: Falü Chubanshe, 1998). 311

¹⁷ China has a limited amount of political parties that are allowed to exist by the dominant CCP. These parties mainly have a consultative function for government policies.

¹⁸ NPC Legal Committee, "Guanyu Zhonghuarenmingongheguotudiguanlifa (Xiuding Caoan) Chubu Shenyi Qingkuang de Huibao (Report on the First Review of the PRC Land Management Act Draft Amendment)." 311

¹⁹ Ibid.

²⁰ W. Wang, "Guanyu Gaodeng Jiaoyufa (Caoan Xin Xiugai Gao he Tudiguanlifa (Xiuding Caoan Xiugai Gao) Xiugai Yijian de Baogao (Report on Suggested Changes to the New Changed Amendment to the Higher Education Law and the Changed Draft Amendment of the Land Management Act)," in *Zhonghua Renmin Gongheguo Tudi Guanlifa Shiyi (Commentary on the PRC Land Management Act)*, ed. NPC-SC Legal Affairs Office (Beijing: Falü Chubanshe, 1998).

²¹ Y. Bian, "Tudi Guanli de Jiben Guifan (Basic Norms of Land Management)," in *Zhonghua Renmin Gongheguo Tudi Guanlifa Shiyi (Commentary on the PRC Land Management Act)*, ed. NPC-SC Legal Affairs Office (Beijing: Falü Chubanshe, 1998). 1

²² We do not have sources however of how the first draft was made and what ministries participated and negotiated with the first drafters. As we will see later for the Air Pollution and Control Law, the initial bargaining stage is extremely important. See Tanner, *The Politics of Lawmaking in China*. 211-222

How Debates on the Land Management Act 1998 have affected its Implementability

The opinions voiced during the various meetings and conferences, and the many letters about the draft amendment to the LMA, raised several points of concern about the intended changes. These concerns had different influences on the final LMA, as the NPC Legal Committee followed some suggestions while ignoring others. In the end this influenced the LMA's implementability.

Land Use Classification System

The Land Use Classification System is one of the LMA's systems to protect arable land. It defines different types of land use: agricultural use, construction use and not used.²³ This classification forms the basis for the LMA's other systems of arable land protection that limit conversion of arable to non-arable use. The idea is that land is assigned a classification of agricultural use, construction use or unused in the land use planning made at the district and township level, based on general planning at higher levels of administration. The original State Council draft contained no provisions as to how this classification was to be made.²⁴ This evoked criticism from many of the actors asked to review the draft. Five central level departments, including the Forestry Department, the Public Railways Department, the Department of Transportation, the Ministry of Construction, and the State Council Office of Institutional Reform, asked for example:

“But, what is “land used for agriculture”, “land used for construction”, and “unused land”? And how can land use change? The draft contains no specific regulation on this point. We suggest, therefore to make specific regulations on the land use management system.”²⁵

²³ Land Management Act 1998 § 4.2

²⁴ State Council, "Zhonghua Renmin Gongheguo Tudiguanlifa (Xiuding Caoan) ((Draft Amendment of the) PRC Land Management Act)." 294 § 4, 3

²⁵ NPC Legal Committee Economic Law Section, "Zhongyang you Guan Bumen, Qunzhong Tuanti dui Tudiguanlifa (Xiudingcaoan) de Yijian (Relevant Central Level Ministries and Mass Organizations Opinions on the Draft Amendment to the Land Management Act)," in *Zhonghua Renmin Gongheguo Tudi Guanlifa Shiyi (Commentary on the Prc Land Management Act)*, ed. NPC-SC Legal Affairs Office (Beijing: Falü Chubanshe, 1998). 335 For another example see NPC Legal Committee Economic Law Section, "Gesheng, Zizhiqu, Zhixiashi dui Tudiguanlifa Xiuding Caoan de Yijian (Provinces, Autonomous Regions and Provincial Level Cities Opinions on the Draft Amendment to the Land Management Act)," in *Zhonghua Renmin Gongheguo Tudi Guanlifa Shiyi (Commentary on the Prc Land Management Act)*, ed. NPC-SC Legal Affairs Office (Beijing: Falü Chubanshe, 1998). 374, where the Jiangxi, Sichuan, Chongqing,

In its first review report, the NPC Legal Committee recognized this problem noted in the various opinions on the draft law.²⁶ The committee found that the existing legislation was not specific enough and that it needed to be specified further. The committee changed the draft and added several sentences on the strict prohibition of converting agricultural land into construction land and added definitions of agricultural, construction and unused land,²⁷ which made it into the final law.²⁸

Thus, the law became more specific and certain. It seems the advocates of this particular change in the draft, which included central level ministries, and also the Legal Committee, believe that a more certain law will be more effective in protecting arable land. While as we saw in Chapter 2, certainty is certainly an important variable for achieving compliance and effective enforcement, certain regulation of complex practices, such as China's land use systems, may well have the opposite effect as it lacks adaptability, which may influence its feasibility.

Land Use Planning System

The new law establishes a top-down structure of land use planning that protects agricultural land.²⁹ This is done through provincial level general land use plans that guarantee the quantity of existing arable land.³⁰ Lower level plans must be in accordance with higher-level plans;³¹ this means that construction land use cannot exceed, and arable land is not allowed to be less, than that of higher level planning.³² These provisions were already part of the original draft amendment.³³ In order to further specify the implementation of the land use classification system, based on input about the draft, the NPC Legal Committee changed section 22 of the draft on land planning and detailed that at the township level the land plan should include a

Xinjiang, Guangdong, Hainan, Hubei, Guangxi, Shanghai and Henan all ask for more detailed regulation.

²⁶ NPC Legal Committee, "Guanyu Zhonghuarenmingongheguotudiguanlifa (Xiuding Caoan) Chubu Shenyi Qingkuang de Huibao (Report on the First Review of the PRC Land Management Act Draft Amendment)." 312- 313

²⁷ Ibid. 313

²⁸ Land Management Act 1998 § 4.2-3

²⁹ Land Management Act 1998 § 19.1

³⁰ Land Management Act 1998 § 18.3

³¹ Land Management Act 1998 § 18.2

³² Land Management Act 1998 § 18.2

³³ State Council, "Zhonghua Renmin Gongheguo Tudiguanlifa (Xiuding Caoan) ((Draft Amendment of the) PRC Land Management Act)." § 20 and 21

classification of agriculture, construction or unused of all plots of township land.³⁴

During the drafting progress there was concern that some provinces and large cities, undergoing rapid development and urban construction, would not be able to guarantee the total amount of farmland present.³⁵ It was proposed that provinces having difficulty to meet this target in their own territory could develop arable land elsewhere as compensation.³⁶ The NPC Legal Committee rejected this idea. It stated that a preliminary research had shown that the target was realistic and furthermore that it is difficult to inspect cross-territory arable land compensation.³⁷

The NPC Legal Committee exercised its considerable power, probably backed by the CCP central leadership, in order to safeguard what they believed to be the law's effectiveness in protecting macro level interests of arable land protection over local interests such as urban development. Although local governments were able to voice their opinion, they were not able to influence the final draft. As local concerns were thus not taken into account, adequacy and legal certainty were deemed more important than adaptability and feasibility.

Arable Land Conversion Balancing System

The new amended Land Management Act introduces a balancing system to safeguard arable land quantity. Under the principle of balancing the amount of arable land converted into construction land with the development of new agricultural land out of unused land the total amount of agricultural land is protected.³⁸ This system means that when arable land is converted into construction land, the company responsible for the conversion must develop a plot of unused land and develop it into arable land.³⁹ Provincial level

³⁴ Land Management Act 1998 § 22, 2

³⁵ NPC-SC Legal Affairs Office, "Shiyi (Commentary)." 88, NPC Legal Committee Economic Law Section, "Gesheng, Zizhiqu, Zhixiashi dui Tudiguanlifa Xiuding Caoan de Yijian (Provinces, Autonomous Regions and Provincial Level Cities Opinions on the Draft Amendment to the Land Management Act)." 374-5

³⁶ NPC Legal Committee Economic Law Section, "Gesheng, Zizhiqu, Zhixiashi dui Tudiguanlifa Xiuding Caoan de Yijian (Provinces, Autonomous Regions and Provincial Level Cities Opinions on the Draft Amendment to the Land Management Act)." 375

³⁷ NPC Legal Committee, "Guanyu Zhonghuarenmingongheguotudiguanlifa (Xiuding Caoan) Chubu Shenyi Qingkuang de Huibao (Report on the First Review of the PRC Land Management Act Draft Amendment)." 317

³⁸ Land Management Act 1998 § 31

³⁹ Land Management Act 1998 § 31 The basic norm addressee for the conversion compensation system is the land developer. Those who wish to use arable land for non-arable use, are the ones who must get approval and make land reclamation compensation. In the legislative commentary on the LMA this is further explained. See NPC-SC Legal Affairs

governments perform a central role in this arable land balancing system, as they must safeguard this balance at the provincial level.⁴⁰ Largely the land balancing system was part of the State Council draft.⁴¹ The draft article evoked the same criticism as the provision on the provincial guarantee on arable land quantity.⁴² The NPC Legal Committee stated:

“Some localities, experts and masses think that land resources reserves are limited and that these provisions are difficult to carry out, and that more arable land is converted for construction than unused land developed for agriculture. Nevertheless, there are also localities and masses that hold that if we do our best, these provisions can be realized. There are some localities who think with regard the “Compensating the Same Amount as Was Converted” that if a province has difficulty developing new arable land because of its own particular circumstances the State Council should allow it to develop land elsewhere.”

The NPC Legal Committee weighed the opinions on implementability and local exceptions, but found that land calculations had shown that the law is executable and there is sufficient unused land to be developed, and decided against changes in the law.⁴³ Again, local concerns were pushed aside at the center and a strict norm protecting macro level interests, with no exceptions, became national law. Here again certainty and adequacy were preferred over feasibility and adaptability.

Basic Arable Land Protection System

The basic arable land protection system establishes strict approval procedures for the conversion of basic farmland into construction land. Since 1988, China has experimented setting up a system of basic farmland

Office, "Shiyi (Commentary)." 109-114 Only in case the developer himself cannot compensate with land he will pay a fee to the local government who will in turn do it for him.

⁴⁰ Land Management Act 1998 § 33

⁴¹ State Council, "Zhonghua Renmin Gongheguo Tudiguanlifa (Xiuding Caoan) ((Draft Amendment of the) PRC Land Management Act)." 299-300

⁴² NPC Legal Committee, "Guanyu Zhonghuarenmingongheguotudiguanlifa (Xiuding Caoan) Chubu Shenyi Qingkuang de Huibao (Report on the First Review of the PRC Land Management Act Draft Amendment)." 317 NPC Legal Committee Economic Law Section, "Gesheng, Zizhiqu, Zhixiashi dui Tudiguanlifa Xiuding Caoan de Yijian (Provinces, Autonomous Regions and Provincial Level Cities Opinions on the Draft Amendment to the Land Management Act)." 375

⁴³ NPC Legal Committee, "Guanyu Zhonghuarenmingongheguotudiguanlifa (Xiuding Caoan) Chubu Shenyi Qingkuang de Huibao (Report on the First Review of the PRC Land Management Act Draft Amendment)." 317

protection⁴⁴. This system was made into law in 1992 and 1993,⁴⁵ and is incorporated into the 1998 LMA, which regulates that in order to convert basic farmland into construction land State Council approval is necessary.⁴⁶

The law provides that certain kinds of land are basic farmland: approved land producing cash crops such as wheat, cotton or (vegetable) oil, favorable land such as paddies, land producing staple crops and vegetables, experimental land used for scientific purposes, or other approved land. In each province, basic farmland must make up 80% of all arable land.⁴⁷

The original draft did not provide detail as to how Basic Farmland was designated. During the deliberations on the draft amendment, some commentators felt that this should be clarified to enhance the law's effectiveness in protecting arable land. The NPC Legal Committee supported this thesis and added further detail on this point to the draft, which made it into the final law.⁴⁸

Another point of debate in the drafting process was the percentage of Basic Arable Land that each province must have. Hunan and Hainan for example felt that the percentage should be higher, while Guangdong, Yunnan and Henan argued for lowering the amount to 70%.⁴⁹ Qinghai, Shanxi and Shaanxi argued for differentiation according to local circumstances, and Guangxi wanted a stricter mandatory norm and proposed to take out the words "in general"⁵⁰, which were still present in the draft text that read that provinces must in general have 80% basic farmland".⁵¹ Of these proposals, only the Guangxi idea of a stricter mandatory norm made into the final law.⁵²

Just as with the prior debates, here again, China's legislator chose a specific and also a strict rule to protect arable land over ideas for norms that could be adapted to different local circumstances. While parties were allowed

⁴⁴ NPC-SC Legal Affairs Office, "Shiyi (Commentary)." 115

⁴⁵ The system was regulated in the 1993 Agriculture Law and the 1994 State Council Basic Farmland Protection Regulations. See Ibid. 115

⁴⁶ Land Management Act § 45

⁴⁷ Land Management Act § 34

⁴⁸ Land Management Act § 32.2 which states that the District level land authorities together with the Agricultural Office carry out this task for Township level land.

⁴⁹ NPC Legal Committee Economic Law Section, "Gesheng, Zizhiqu, Zhixiashi dui Tudiguanlifa Xiuding Caoan de Yijian (Provinces, Autonomous Regions and Provincial Level Cities Opinions on the Draft Amendment to the Land Management Act)." 375-6

⁵⁰ Ibid. 376

⁵¹ State Council, "Zhonghua Renmin Gongheguo Tudiguanlifa (Xiuding Caoan) ((Draft Amendment of the) PRC Land Management Act)." 300

⁵² Wang, "Guanyu Gaodeng Jiaoyufa (Caoan Xin Xiugai Gao he Tudiguanlifa (Xiuding Caoan Xiugai Gao) Xiugai Yijian de Baogao (Report on Suggested Changes to the New Changed Amendment to the Higher Education Law and the Changed Draft Amendment of the Land Management Act)." 332

to raise their concern there was no real bargaining, as opinions that doubted the norm's local feasibility were discarded. This further reaffirms that the LMA lawmaking can be characterized as top-down and corporatist, and based on an idea that more adequate and certain law is of better quality even though it loses adaptability and feasibility.

Arable Land Conversion Approval System

The new law provides for a procedure for using arable land for construction. This procedure consists of four steps: first the approval for conversion of land use (from arable to construction)⁵³, second, in case collective land is used, the procedure for requisitioning collective land into state ownership⁵⁴, as construction is in general only permitted on state land, third --linked to the requisitioning-- a system of compensation for the loss of the land use rights for requisitioned land, and fourth the payment for the use of state land.

Since the LMA was amended, land use conversion approval works as follows. In case the land to be used to build upon is originally farmland, whether it is building on state owned land or collectively owned, first a procedure of approval for converting the land use must be completed.⁵⁵ Larger conversions must be approved by the provincial level authorities or even the State Council, based on current land use plans.⁵⁶ Batches of projects are decided at the level at which the land planning relevant for such projects was made, at least if such projects fall within the scope of such planning.⁵⁷ Authorities at city and district level decide on specific projects, which fall within the scope of relevant land use plans.⁵⁸ Projects that fall outside of the land planning are to be approved by the provincial authorities.⁵⁹

The amendment has recentralized some of the decision-making on land use conversion to the provincial and even the national level.⁶⁰ The original draft amendment was even more centralized as it prescribed that all land use conversion must be approved by the provincial government or higher.⁶¹ Some commentators, including NPC Legal Committee members, central level ministries and local governments, felt that this article in the draft was unrealistic and could not be implemented in practice. This time the

⁵³ Land Management Act § 44

⁵⁴ Land Management Act § 43

⁵⁵ Land Management Act § 44 and NPC-SC Legal Affairs Office, "Shiyi (Commentary)." 133-5

⁵⁶ Land Management Act § 44.2

⁵⁷ Land Management Act § 44.2

⁵⁸ Land Management Act § 44.2

⁵⁹ Land Management Act § 44.3

⁶⁰ NPC-SC Legal Affairs Office, "Shiyi (Commentary)." 135

⁶¹ State Council, "Zhonghua Renmin Gongheguo Tudiguanlifa (Xiuding Caoan) ((Draft Amendment of the) PRC Land Management Act)." 302 § 39

Legal Committee listened to their concerns and made a somehow watered-down version, which allows for approvals by lower level government in case the projects fall within the scope of relevant land use plans.⁶² Here, for the first time, we see that comments on the draft, in favor of local concerns are accepted and become part of the act. In contrast with the amendments detailed above, in this instance the Legal Committee did pay attention to the law's feasibility.

Collective Land Requisitioning Procedure

The 1998 LMA dictates that construction on collectively owned arable land is not allowed, except for rural housing, TVE premises and village public works such as schools.⁶³ After the land use conversion has been approved, before such land can be used for construction, it must first be requisitioned by the state and become state owned land.⁶⁴ The idea behind the ban on using collective land for construction projects is to enhance the control on arable land use, and to ensure that rural collective land is mostly used for collective and not for non-collective commercial usage.⁶⁵ The conversion procedure means that approval for basic farmland requisitioning and for large land requisitioning should be given by the State Council. Other requisitions must be approved by the provincial level government.⁶⁶

The requisitioning approval procedural is very centralized as it is the provincial level government or the State Council that must approve of all requisitioning requests. Since the amendment, lower level governments no longer have the right to approve of land requisitioning.⁶⁷ Furthermore, now all basic farmland requisitioning needs national level approval instead of provincial level approval for up to 500 Mu of basic farmland in the old law.⁶⁸

Commentators on the draft, including local governments from Hunan, Liaoning, Beijing, Jilin, Guangxi, Shanghai and Henan, felt that the land requisitioning approval procedure in the draft amendment was too centralized and would take away local powers of city level and district level governments and would be detrimental to the implementation of local land

⁶² NPC Legal Committee, "Guanyu Zhonghuarenmingongheguotudiguanlifa (Xiuding Caoan) Chubu Shenyi Qingkuang de Huibao (Report on the First Review of the PRC Land Management Act Draft Amendment)." 313-4

⁶³ Land Management Act § 43.1

⁶⁴ Land Management Act § 43.2 and 45-46

⁶⁵ NPC-SC Legal Affairs Office, "Shiyi (Commentary)." 132

⁶⁶ Land Management Act § 45

⁶⁷ NPC-SC Legal Affairs Office, "Shiyi (Commentary)." 140

⁶⁸ Ibid. 140

use planning.⁶⁹ They felt that the top-down system of land use planning was sufficient to control land protection and a centralized approval procedure was unnecessary.⁷⁰

While some provincial level governments offered compromise solutions to limit the approval by the State Council only to larger projects, the NPC Legal Committee did not take any of the concerns or suggestions into consideration and maintained the original draft that centralizes requisitioning approval to the provincial and national levels.⁷¹ This means that if only one Mu of basic collective owned farmland, which is to make up 80% of all farmland, is to be built upon State Council approval is needed. Here the final law, while adopting an adequate and certain norm, failed to find a balance allowing for sufficient feasibility and adaptability.

Compensation for Requisitioning Collective Land Procedure

The LMA regulates a system under which collectives and farmers whose land and land use rights have been expropriated for construction use must get compensation.⁷² The LMA provides for a standard of compensation 6-10 times the annual average output value of the three preceding years and a resettlement fee of 4-6 times average annual output.⁷³ The specific standards are determined at the provincial level.⁷⁴ Both Village Committees and farmers are to be consulted in the requisition compensation.⁷⁵ Compensation payment shall be made public, and the new act explicitly states that it is forbidden to embezzle or divert compensation funds.⁷⁶ During the law making process commentators, including local governments complained that the proposed compensation was too low, that the procedure lacked transparency, that a hearing for farmers should be instituted, and that payment of compensation should be done in public, finally some thought that monetary compensation is not sufficient and farmers should be helped in finding new employment.⁷⁷

⁶⁹ NPC Legal Committee Economic Law Section, "Gesheng, Zizhiqu, Zhixiashi dui Tudiguanlifa Xiuding Caoan de Yijian (Provinces, Autonomous Regions and Provincial Level Cities Opinions on the Draft Amendment to the Land Management Act)." 377

⁷⁰ Ibid. 377

⁷¹ NPC Legal Committee, "Guanyu Zhonghuarenmingongheguotudiguanlifa (Xiuding Caoan) Chubu Shenyi Qingkuang de Huibao (Report on the First Review of the PRC Land Management Act Draft Amendment)." 314

⁷² Land Management Act § 46-49

⁷³ Land Management Act § 47.1

⁷⁴ Land Management Act § 47.2

⁷⁵ Land Management Act § 48

⁷⁶ Land Management Act § 49

⁷⁷ NPC Legal Committee, "Guanyu Zhonghuarenmingongheguotudiguanlifa (Xiuding Caoan) Chubu Shenyi Qingkuang de Huibao (Report on the First Review of the PRC Land Management Act Draft Amendment)." 316

The NPC Legal Committee reacted, stating that the height of the compensation fee is a difficult issue and that circumstances vary from place to place. Therefore, the committee held, it is impossible to enhance the draft to cover all points raised with this regard.⁷⁸ The Committee did make suggestions for changing the draft to allow for more transparency by instituting a hearing, making payment of fees public, and a rule that local governments should do their best to help farmers who have lost their land to start enterprises. These suggestions made it into the final law.⁷⁹ Here we see again that China's national legislator realizes the challenge of regional differences and refrains from making legislation that is more specific on the actual amount of compensation. However, as we saw, where arable land protection was at stake such consideration was not influential.

Approval and Payment for Using State Owned and for Construction

The last step in the construction approval procedure is the approval and payment for using State owned land for construction. The unit carrying out the construction project must ask approval at the county level or higher land department,⁸⁰ and once approval for use has been granted and construction starts a land use fee is to be paid to the state.⁸¹ The LMA regulates that 30% of this fee goes to the central level government, to be used for protecting arable land, and 70% remains with the local government, also to be used for land cultivation.⁸² The original draft amendment had a different quota: 40% to the center and 60% to the local government.⁸³ This evoked criticism from local governments, who felt they should get more. Some governments, including Shaanxi, Xinjiang, Shanghai and Henan, proposed a 20-80 ratio. Xinjiang further proposed to make exceptions for minorities in border regions and other poor areas where the money should completely remain with the local government, while others argued for a adaptable rule to be set at the provincial level.

None of these suggestions made it into law, they did however influence the NPC Legal Committee to change the ratio from 40-60 to 30-70. Here the Legal Committee made a concession to local interests, however seen from the goal orientation of the law it was not over a major issue involving arable land protection.

⁷⁸ Ibid. 316

⁷⁹ Land Management Act § 48, 49, 50

⁸⁰ Land Management Act § 53

⁸¹ Land Management Act § 55 and relevant State Council Regulations.

⁸² Land Management Act § 55

⁸³ State Council, "Zhonghua Renmin Gongheguo Tudiguanlifa (Xiuding Caoan) ((Draft Amendment of the) PRC Land Management Act)." § 50.2

Construction on Collectively Owned Arable Land by the Collective

The LMA has special rules on farmers, TVEs and Village Collectives building housing, factory premises and public interest buildings, such as schools, on collectively owned land. For this kind of construction land requisition is not required⁸⁴ and only a land use conversion approval from the district level land authorities is necessary.⁸⁵ There are two important specific norms for construction on collectively owned land. The first stipulates that rural households can only use one plot of land to build a house that must conform provincial level standards.⁸⁶ Furthermore, households will not be allowed to build a second house after selling or renting their original house.⁸⁷ The LMA thus provides a highly specific norm on rural housing regardless of local circumstances.

This stipulation evoked some comments during the drafting process. Four provinces, Zhejiang, Jiangxi, Xinjiang and Henan, asked for a clearer definition of "household".⁸⁸ Henan province called for decentralization of rule making on rural housing.⁸⁹ Hunan province called for decentralizing the approval procedure for rural housing from the district to the township level.⁹⁰ Heilongjiang province stated that in their barren climate houses were a bit larger and often surpassed standard size, an exception should be made.⁹¹

The second norm on construction on collectively owned land is that such land may not be leased or rented out for (non-agricultural) construction purposes.⁹² Local governments voiced concern about this rule because prior

⁸⁴ Land Management Act § 43.1

⁸⁵ Land Management Act § 44, 59, 60, 62

⁸⁶ Land Management Act § 62.1

⁸⁷ Land Management Act § 62.3

⁸⁸ NPC Legal Committee Economic Law Section, "Gesheng, Zizhiqu, Zhixiashi dui Tudiguanlifa Xiuding Caoan de Yijian (Provinces, Autonomous Regions and Provincial Level Cities Opinions on the Draft Amendment to the Land Management Act)." 379 NPC Legal Committee Economic Law Section, "Zhejiang Sheng Youguan Danwei he Renyuan dui Tudiguanlifa Xiuding Caoan de Yi Jian (Zhejiang Province Opinions of Relevant Work Units and Personnel on the Draft Amendment of the Land Management Act)," in *Zhonghua Renmin Gongheguo Tudi Guanlifa Shiyi (Commentary on the PRC Land Management Act)*, ed. NPC-SC Legal Affairs Office (Beijing: Falü Chubanshe, 1998). 368

⁸⁹ NPC Legal Committee Economic Law Section, "Gesheng, Zizhiqu, Zhixiashi dui Tudiguanlifa Xiuding Caoan de Yijian (Provinces, Autonomous Regions and Provincial Level Cities Opinions on the Draft Amendment to the Land Management Act)." 379

⁹⁰ Ibid. 379

⁹¹ NPC Legal Committee Economic Law Section, "Heilongjiang Sheng Youguan Bumen he yixie Zhuanjia, Jiceng Danwei Dui Tudi Guanlifa (Xiudingcaoan) de Yijian (Heilongjiang Provincial Departments, Experts and Grass Roots Work Units Opinions on the Draft Amendment of the Land Management Act)," in *Zhonghua Renmin Gongheguo Tudi Guanlifa Shiyi (Commentary on the PRC Land Management Act)*, ed. NPC-SC Legal Affairs Office (Beijing: Falü Chubanshe, 1998). 360

⁹² Land Management Act § 63

to the amendment construction on collective land through lease or rent has been widespread and in accordance with the market economy.⁹³

The NPC Legal Committee was not impressed. It stated that the current draft norm on banning lease and renting out arable land for construction purposes was in line with the 1997 CCP policy on arable land protection and kept the draft norms unchanged in the law.⁹⁴ Thus, once again norms were kept strict and specific in order to protect China's arable land even though difficulties in local adaptation were apparent.

Local Legislation at the Provincial and Village Level in Yunnan: Selective Copying

For understanding the implementability of arable land protection law at Lake Dianchi, local legislation is also important. Here we will take a short look at two different types of local regulation relevant for the Dianchi lake area. The first is the Yunnan Provincial Regulations on Land Management. The second is village regulation from the three villages in which we conducted our fieldwork.

The Yunnan Land Management Regulations were adopted on 24 September 1999. They replaced the Yunnan Land Management Implementation Measures of 1994 and incorporated the 1998 Land Management Act regulations. Part of the law consists of specification and clarification of LMA norms. The Regulations thus specify the criteria for land use conversion, land requisitioning and land compensation procedures.⁹⁵ The Yunnan Regulations on these procedures are all in line with national legislation. On one point, the provincial Regulations help adapt national regulation to local circumstances. This is the rule that at the provincial level the total amount of arable land must stay unchanged. Yunnan has opted not to strictly copy this rule to lower levels. At prefectural and municipal levels below the provincial level the general rule is that local governments must ensure a balance of arable land, however, if they cannot develop enough new arable land to compensate land lost to construction, they are allowed to develop such land outside of their own jurisdiction. Here Yunnan does what local governments suggested for the national LMA, enhancing the adaptability of the arable land compensation system.⁹⁶

Concerning other issues, however, Yunnan strictly adheres to the letter of the national law. Article 16 for example specifies that all subordinate

⁹³ NPC Legal Committee, "Guanyu Zhonghuarenmingongheguotudiguanlifa (Xiuding Caoan) Chubu Shenyi Qingkuang de Huibao (Report on the First Review of the PRC Land Management Act Draft Amendment)." 318

⁹⁴ Ibid. 318

⁹⁵ Yunnan Land Management Regulations § 17-30

⁹⁶ Yunnan Land Management Regulations § 15

levels at the prefectural, municipal and district levels must ensure that 80% of all arable land is basic farmland. Here the provincial legislator has not made use of the possible leeway offered in national legislation, which only demands 80% at the provincial level but not down to the district levels. For large cities like Kunming, this rule is difficult to implement.⁹⁷

In addition, Yunnan provincial regulations do little except clarify some points while mainly copying most rules from the LMA. Some examples: articles 2, 3, 7, 8, 9, 13, 14, 16, 19, 20, 33, all more or less copied from the LMA. This is not surprising; the LMA while vague on some points (not related to arable land protection), is relatively specific on others, mainly those related to arable land protection. The law making process of the LMA has not been able to balance the interests into the law. Such a national law leaves local legislation little room except for clarification, and copying to make it at least look like a local law. So what is the role of such a provincial law? First, it does provide working procedures for the implementation, not yet regulated in the national law nor in the State Council Regulations. Secondly, and perhaps more important, such a law serves to bring the LMA to the local level. As the national law is copied in the provincial law, it reaches a local audience.⁹⁸

This dissemination of national law to the local through local legislation works different at the grassroots level. Village legislation does not have a formal role in China's legal system, but is influential because it is the law of the village; the only law most villagers own and the law they know best. All three villages where we have conducted fieldwork have issued their own village regulations (*cunqiuminyue*) and village self-government statutes (*Cunmin Zizhi Zhangcheng*), made by village leadership and approved by superior governments. The two villages located in Kouxiang Township, Licun and Baocun, have regulations and statutes that are the same. This shows that in two completely different villages, one a Muslim, Hui minority agrarian village and the other a Han Chinese part industrial, part rural village, the township government has dictated the village rules. Therefore, there is little truly local about their regulations.

All three village regulations and statutes contain provisions on land. Article 22 of the Baocun statutes and in art 16 of the Licun statute stipulates that the village "will strictly enforce land law, and based on village and town construction planning, will strictly deal with disorderly land occupation and building and housing construction without following the proper

⁹⁷ Based on interviews with Kunming Land Management Bureau December 2004

⁹⁸ In other parts of China, local land regulation has been reported to be in violation of national law as it is less strict in its provisions on arable land protection. See X.e.a. Chen, *Nongcun Tudi Falizhidu Yanjiu, Tianye Diaocha Jiedu* (Research in the Village Land Legal System, an Analysis on the Basis of Fieldwork) (Beijing: Zhongguo Zhengfa Daxue Chubanshe, 2003).43

procedures.”⁹⁹ Statutes provide detail about how such housing procedures work at the grassroots level, not specified in higher-level regulation. In Licun and Baocun, the statutes provide for an approval procedure for rural housing construction starting at the natural village (*xiaozu*),¹⁰⁰ and in Jiacun, there is more detail of a three-tier approval procedure including the natural village, VC and township governments.¹⁰¹

However, the village regulation provides nothing on two of the most important rules on building on collective land, the ban on more than one house per household and the ban on leasing out arable land for construction purposes. In this manner, the village (and perhaps the township government who is clearly the author of some of this legislation) has on purpose not taken these rules into its regulations because as we will see later violation of both rules is common practice in all three villages.

The fieldwork demonstrated the influence of the village regulations and statutes. All households have a copy, which cannot be said for the national land management act or for the Yunnan Land Management Regulations. This is the law in the village, and if the VC breaks a rule in this little booklet, the next day villagers will come to complain. Thus, the VC (and perhaps the township) has been careful what to put in the booklet and what not. In Jiacun, there is some detail about rebuilding houses, which are not allowed to be bigger than the old one, and should not have balconies or illegally occupy land.¹⁰² Furthermore, Jiacun prescribes that housing in old housing districts should be built according to history and in new housing areas the village planning should be followed.¹⁰³ While it has such detailed rules, it is silent about building two houses or about leasing land for non-arable purposes. In Licun and Baocun, the statute stipulates in general terms at the end of the section on land that it villagers should economically use land according to the LMA and that the VC has the right to punish them according to law, without specifying what the exact national norms for such economical use are.

Such selective reference to higher-level legislation is in fact a method of adapting national law to the local level, without officially making illegal legislation. If villagers have local legislation to read, why would they look for higher-level rules, especially if the higher level rules prohibit them to build houses. Village level law therefore can be a tool to disseminate higher level

⁹⁹ Licun Village Committee, Self Government Statute § 16, Baocun Village Committee, Self Government Statute § 22

¹⁰⁰ Licun Village Committee, Self Government Statute §17, Baocun Village Committee, Self Government Statute § 23

¹⁰¹ Jiacun Village Committee, Village Regulations § 38

¹⁰² Jiacun Village Committee, Village Regulations § 39

¹⁰³ Jiacun Village Committee, Village Regulations § 40

norms to the grassroots level, but if villages make statutes that do not include major norms relevant for their populations their selection will have the adverse effect, namely that the norm did not arrive in the village.

Conclusion

The LMA is an example of how the concern for arable land scarcity, a national, macro level concern, influences law making to regulate national over local interests. While most local actors involved in the drafting process recognize the national problem of arable land protection they have in several instances voiced concern over how overly centralized and strict rules fit their actual local circumstances. In most cases the NPC Legal Committee that, as we have seen, plays an important role in this drafting process, has been able to ignore such local criticism and has made a law that is centralized, specific and strict in order to protect arable land. The Legal Committee only appeased local concerns where they did not concern arable land protection norms, but other issues such as compensation or land use fee distribution. The LMA is a law that was made through power from the center, a power made possible because of a fear of famine, a fear of losing autonomy because of food imports, based on a belief in the causal relationship between food production and arable land loss. In addition, it was a law that is based on a belief that a more stricter and more specific law can also be more effective.

It is interesting to note how China's lawmaker, especially the NPC Legal Committee has mostly focused on the law's adequacy and its certainty, while neglecting clearly voiced concerns about feasibility and adaptability. It seems that the LMA lawmaking process is thus not based on an ideal rationality in which all such concerns are equally weighed, but instead is limited. A reason for this may be the sense of urgency China felt to show that it would deal with its arable land issue, as their promises at the 1996 World Food Summit demonstrated. Showing such ambition works better through making adequate and certain law, as it is law that looks strong and good on paper.

Based on what we have learned in theory (see Chapter 2) about the quality of legislation and reach its goals, we know that legislation that lacks feasibility and adaptability will have difficulty in creating compliance, enforcement and thus attaining its goals. We believe that China's LMA has many such unfeasible and inadaptably norms, most notably the norms on basic arable land conversion and non-agricultural construction on collective land. Local legislation has not been able to solve these problems as it has not really adapted the national level legislation to the local circumstances, largely because the national legislation did not leave any room for such adaptation.

4. Cleaning Up Pollution Legislation

From Bargaining to Stricter Norms

Introduction

In the late 1970s, China began to use law to combat pollution and protect its natural environment. Since then, it has established a system of environmental legislation and an institutional framework for implementation and enforcement. In 1979, the NPC promulgated the Environmental Protection Law (for trial use). Even though this law only had a temporary character, it would form the backbone of Chinese environmental law for the next ten years. During this period, the Chinese legislator enacted a first set of pollution related laws: the Marine Environmental Protection Law in 1982, the Water Pollution Prevention and Control Law in 1984 and the Air Pollution Prevention and Control Law in 1987. At the same time, China established its first nature conservation: the Forest Law in 1984, the Grasslands Law in 1985, and the Fishery Law in 1986 and in 1988 the Law on Protecting Wild Animals¹. The second period of Chinese environmental legislation started with the promulgation of the new Environmental Protection Law in 1989. The law no longer had a trial status, a sign that the Chinese legislator put more emphasis now on environmental protection type legislation. Soon after the 1989 EP Law a second active period of environmental drafting started. In 1995 the Law on the Solid Waste Pollution Prevention and Control and in 1996 the Law on Noise Pollution Prevention and Control were added to the sectoral pollution type laws. Nature conservation law was further developed with the 1994 State Council Regulations on Nature Conservation Areas and the 1996 State Council Regulations on the Protection of Wild Plants

By the second half of the 1990s, China had established a comprehensive system of pollution legislation. At this time, Chinese law used three main systems to prevent and control pollution,² all of which are still operational today. The first system was the Pollution Excessive Discharge Fee (PEDF) system. Under this system, polluters must pay a fee for the

¹ For a good study of this first period environmental law see L. Ross, *Environmental Policy in China* (Bloomington, Ind.: Indiana University Press, 1988), L. Ross and M.A. Silk, *Environmental Law and Policy in the People's Republic of China* (New York: Quorum, 1987).

² Other systems include: standards (quality and discharge), pollution registration and reporting, pollution accident reporting, abatement deadlines, and specific pollution norms. For an overview of these systems see: R. Jin, ed., *Environmental Law (Huanjing Faxue)* (Beijing: Beijing University Press, 1999). J. Wang, *Principles of Chinese Environmental Law (Zhongguo Huanjingfa Yuanli)* (Beijing: Beijing University Press, 2000).

pollution they discharge excessive of the Discharge Standards.³ The second system was the Environmental Impact Assessment (EIA), under which all construction projects that have an adverse impact on the environment must carry out one of three types of environmental impact assessment⁴. The third system was the Three Synchronizations System, which also concerned with construction projects. Under this system, the EP installations for these projects must be designed, built and put into operation at the same time that the original installations were designed, built and put into operation⁵. The systems were instituted in a command and control fashion, meaning that violation of any of the systems led administrative sanctions, and in very severe cases criminal punishment.

There was criticism of China's pollution legislation in the mid-1990s though. Environmental law was too weak and vague, policymakers and scholars held, and thus called for strengthening the existing legislative system.⁶ Around this time, major efforts were undertaken to improve the legislation. At first, such efforts were largely unsuccessful, as in 1995 ambitious proposed amendments to the Air Pollution Prevention and Control Law had not made into the final law. Since 1996, however, lawmakers started to create stricter and clearer legislation, amending the Water Pollution Prevention and Control Law in 1996, the Air Pollution

³ The system is regulated both in the integral Environmental Protection Law (art. 28), the sectoral Water Pollution and Prevention Law (art. 15) and in the special 1982 State Council Temporary Measures on the Levy of Pollution Discharge Fees.

⁴ This system is regulated both in the Environmental Protection Law art 13, all sectoral pollution laws and special regulations on EP for construction projects.

⁵ This system is regulated both in the Environmental Protection Law art 26, all sectoral pollution laws and special regulations on EP for construction projects.

⁶ Alford and Shen, "Limits of the Law in Addressing China's Environmental Dilemma." 417, H. Sun, "Controlling the Environmental Consequences of Power Development in the PRC," *Michigan Journal of International Law* 17, no. 4 (1996). 127, Z. Xie, "Bawo Lishi Jiyu, Qianghua Zhifa Jiandu, Zhazha Shishi Zuohao Wuran Kongzhi Gongzuo (Grasp the Historical Opportunity, Strengthen the Supervision of Law Enforcement, and Thoroughly Carry out the Job of Controlling Pollution)," *Environmental Work News Report*, no. 1 (1997). 4. Such critique has remained after 2000, see Z. Xie, "Shuli he Luoshi Kexue Fazhanguan Tuidong Huanbao Gongzuo Zai Xin Taijie (Establishing and Implementing a Scientific Development Doctrine to Promote Environmental Work onto a New Level)," *Huanbao Gongzuo Ziliao Xuan (Selected Materials on Environmental Protection Work)* 4, no. 4 (2004a). 13, Z. Xie, "Yi Ren Wei Ben Qiuzhen Wushi, Nuli Wancheng Zhongdian Liuyu 'Shiwu' Shuiwuran Fangzhi Renwu (With People as the Basis Being Pragmatic Based on Truth, Work Hard to Finish Work on the 'Fifteen' Water Prevention and Control Tasks in Key Catchment Areas)," *Huanbao Gongzuo Ziliao Xuan (Selected Materials on Environmental Protection Work)* 7, no. 7 (2004b). 8, J. Wang, "Vice Minister Wang Jirong's Speech at the National Environmental Inspection Work Summit," *Huanbao Gongzuo Ziliao Xuan (Selected Materials on Environmental Protection Work)* 8, no. 8 (2004). 5.

Prevention and Control Law in 2000 and making a new Environmental Impact Assessment Law in 2002.

This chapter is about the changes made in China's pollution legislation since the mid-1990s. Following the first perspective on our main research question (see Chapter 1), it aims to understand how changes in the process of lawmaking and the content of the legislation of these pollution laws can in theory affect the laws' impact on compliance, effective enforcement and goal attainment. Using the analytical frameworks on the processes of lawmaking and the quality of legislation (see Chapter 2), the next sections will look in detail at the lawmaking process of three pieces of pollution related legislation of the last decade: the 1996 Water Pollution Law, the 2000 Air Pollution Law amendments, and the 2002 EIA Law. Just as in Chapter 3, the analysis of China's national lawmaking processes and its effect on the laws' implementability is followed by an analysis the implementability of Yunnan's local legislation, which forms an important element of China's pollution regulation.

The 1996 Water Pollution Prevention and Control Law: Bargaining a Disappointing but Stricter Law

By 1993, it became apparent that the 1984 Water Pollution and Prevention Law⁷ was no longer satisfactory.⁸ The law was outdated; China had progressed into a market-economy and the rapid economic growth, industrialization and urbanization were no match for the weak controls offered in the existing water pollution legislation.⁹ In 1993, NEPA and the NPC-EP Committee carried out a joint investigation into the problems of implementing the 1984 law¹⁰ and in the same year, they started drafting an amendment.¹¹ The committee explained, when finishing the draft in 1995, that the changes in the existing law were "100% necessary".¹² It referred to the fact that since 1984, China's water environment had continued to

⁷ The 1984 law had been somewhat amended already in 1986.

⁸ Z. Qin, "Guanyu Zhonghua Renmin Gongheguo Shui Wuran Fangzhi Fa Xiuzheng An (Caoan) de Shuo Ming (Explanation on the PRC Proposed (Draft) Amendment to the Water Pollution Prevention and Control Law)," *NPC-SC Gazette* 1996 (1996). 355-356, Asian Development Bank, *Reform of Environmental and Land Legislation in the People's Republic of China*.⁹

⁹ Qin, "Guanyu Zhonghua Renmin Gongheguo Shui Wuran Fangzhi Fa Xiuzheng An (Caoan) de Shuo Ming (Explanation on the PRC Proposed (Draft) Amendment to the Water Pollution Prevention and Control Law)." 355

¹⁰ Asian Development Bank, *Reform of Environmental and Land Legislation in the People's Republic of China*. 12

¹¹ Qin, "Guanyu Zhonghua Renmin Gongheguo Shui Wuran Fangzhi Fa Xiuzheng An (Caoan) de Shuo Ming (Explanation on the PRC Proposed (Draft) Amendment to the Water Pollution Prevention and Control Law)." 356

¹² *Ibid.* 356

deteriorate and many of China's water catchments had become severely polluted.¹³ The committee stated that especially three major pollution disasters in 1994, including a widely reported pollution scandal at the Huai river, involving severe pollution from small enterprises, had shown the need for change.¹⁴ The committee also referred to pollution problems related to TVEs, drinking water safety, and urban water treatment facilities. In addition, it found that the transformation of China's economic governance and the development of a private sector further necessitated changes in the 1984 law. The NPC-EP committee also wanted to change the law in order to shift the strategy for pollution control away from end of pipe, point source, concentration based treatment approaches, to pollution prevention by decreasing pollution sources in the production process and total load based pollution control.¹⁵

The NPC-EP Committee spent nearly two years drafting the proposed amendment. During the drafting process, opposed stakeholders had been able to exert a significant amount of influence. They had done so before the final bill reached the NPC-SC where it would be submitted again to various stakeholders for further review and commenting, after which the NPC-SC finally voted it into law on 15 June 1996.

The first original draft proposals have never been published. Still there is information about their content through an Asian Development Bank (ADB) report about a technical legal assistance project to aid the NPC-EP committee and NEPA in drafting this law.¹⁶ In this project, ADB experts helped the committee members to identify the major issues in the 1984 law that needed amendment, and trained them to enhance their drafting skills to make the necessary draft amendments.¹⁷

The final draft that was to be presented for review to the NPC-SC in 1995 was a compromise because the most ambitious proposals were dropped after opposed stakeholders had criticized preliminary drafts. For instance, the original proposed amendment contained a comprehensive national and local system of pollution information disclosure.¹⁸ Another proposal that did not make the final bill was the norm requiring EIA, not only for individual construction projects, but also for new development areas.¹⁹ In addition, provisions strengthening enforcement sanctions and public participation, and initiating institutional reform towards more independent EPBs were all part

¹³ Ibid. 355

¹⁴ Ibid. 356

¹⁵ Ibid. 356

¹⁶ Asian Development Bank, *Reform of Environmental and Land Legislation in the People's Republic of China*.

¹⁷ Ibid. 5

¹⁸ Ibid. 77

¹⁹ Ibid. 77

of earlier proposals that were deleted or seriously watered-down in preliminary negotiations.²⁰ Not all draft proposals were lost in the preparation phase though. The final draft did introduce some important changes, most notably concerning the total load discharge permit system, rules phasing out old and small enterprises and strict specific discharge norms. After the draft was finalized it was presented to the NPC-SC, and the NPC Legal Committee initiated several rounds of review involving various central level ministries and provincial level governments and even enterprises.²¹

The Total Load Discharge Permit System

A first important change that made it into the final law was the total load discharge permit system. This system designates certain areas²² as total load areas. In these areas, total load plans are made in which the total goal amount of emission in this area and the way to realize this goal amount are regulated. Based on the plans emission quotas, are distributed to the polluting enterprises in the area. All enterprises in these areas must register for a permit. Only those that emit within the limit of the quota get a permit, others get a temporary permit²³.

The total load discharge permit system was what was left of the originally proposed mandatory permit system in the first draft WPPCL amendment.²⁴ The original drafters, guided by the ADB experts, held that the lack of such a system in the 1984 WPPCL was an important cause for implementation failure:²⁵

“The discussion in the project concluded that a system of discharge permits would significantly strengthen implementation and

²⁰ Ibid. 77

²¹ NPC Legal Committee, "Guanyu Zhonghua Renming Gongheguo Shui Wuran Fangzhi Fa Xiuzhengan Caoan Shenji Jiegou de Baogao (Report on the Results of Review of the Draft Amendment of the PRC Water Pollution Prevention and Control Law)," *NPC-SC Gazette* 1996 (1996). 358-361

²² These are areas in which enterprises meet the concentration based effluent standards but in which the quality standard is not met. This means that the total amount of pollution is higher than the quality standard. This is because enterprises dilute their emissions and thus meet the concentration based effluent standard but still emit too much for the area to meet the quality standard. Art 6 of the State Council Implementing Regulation of the Water Pollution Prevention and Control Law, 2000.

²³ The permit system has been regulated in the State Council Implementing Regulation of the Water Pollution Prevention and Control Law, 2000, art. 6-9 and in the 1988 NEPA Temporary Measures on the Management of the Water Pollution Discharge Permit.

²⁴ Asian Development Bank, *Reform of Environmental and Land Legislation in the People's Republic of China*. 77

²⁵ Ibid. 36-37

enforcement of water pollution regulation. Ideally, each point source discharge should have a permit establishing specified limitations on each of the pollutants of concern discharged by a source in more than trivial amounts....A permit...defines the source's legal obligations in objective and unambiguous terms. Based on monitoring data, government authorities, and the public can readily determine whether the source is in compliance."²⁶

The final draft bill failed to introduce such a comprehensive permit system, because opposing stakeholders "of certain commercial and industrial sectors" successfully blocked the original proposal to be submitted in the final bill.²⁷ As a substitute, the final draft introduced the total load discharge permit system, which would only apply to designated areas. During formal review of the final bill there was some debate about this system.

First, some proposed to centralize the system, which in the original draft was organized by the district government. Because of its importance, some NPC-SC members held that it should be regulated at a higher level: the provincial level government.²⁸ This proposal was adopted in the final law.²⁹ A second suggestion concerned the fairness of the total load discharge permit system. In the final draft the word "*xuke*", meaning permit had been used to indicate that enterprises that failed to meet the total load standards would not be allowed to operate. Some NPC-SC members thought this was unfair and commented that "to allow enterprises to exist, means allowing them to pollute".³⁰ They stated that the proposed law already forced enterprises to pay for the discharged pollution. They proposed to change the system so that enterprises that fail to meet the total load amounts, would be forced to undergo "checks and verifications" (*beding*) to make sure they would meet the total load standards.³¹ As this proposal was adopted into the final law³², the last bits of the permit system were eradicated from the law.³³

²⁶ Ibid. 37

²⁷ Ibid. 59

²⁸ NPC Legal Committee, "Guanyu Zhonghua Renming Gongheguo Shui Wuran Fangzhi Fa Xiuzhengan Caoan Shenyi Jieguo de Baogao (Report on the Results of Review of the Draft Amendment of the PRC Water Pollution Prevention and Control Law)." 359

²⁹ Water Pollution Prevention and Control Law § 16

³⁰ NPC Legal Committee, "Guanyu Zhonghua Renming Gongheguo Shui Wuran Fangzhi Fa Xiuzhengan Caoan Shenyi Jieguo de Baogao (Report on the Results of Review of the Draft Amendment of the PRC Water Pollution Prevention and Control Law)." 359

³¹ It was not until the 2000 State Council Regulations that the system was clarified. These regulations, when read jointly with old NEPA measures from 1988, further elaborated the total load discharge permit system. These lower level rules chose to use the word permit (*xuke*) again instead of *beding*, thus reintroducing a form of permit. See State Council WPPCL Implementing Regulations, 2000 § 10, for more detail see 1988 NEPA Temporary Measures on Water Discharge Permits § 16

After all the bargaining, both during the drafting and during the review of the final bill, there was little left of the originally proposed mandatory permit system. Instead, China had now adopted a norm that was less comprehensive and that left much unclear.³⁴ This had consequences for the law's implementability. First of all, the system lacked certainty. Its regulations were vague as there were no clear rules about how the system exactly works in national legislation or even in State Council regulations. The most detailed rules were to be found in temporary NEPA measures from 1988, but even these old rules lacked certainty.³⁵ A second problem was that the system lacks adequacy. The system provided temporary permits to enterprises failing to meet the standards and thus lacked the power of a real permit system in which enterprises need a permit for operation and can only get one when they are in compliance.³⁶ The third problem is that the total load discharge permits were managed by the provincial level, instead of the district level as was originally proposed. Total control permits were therefore less easily adaptable to circumstances at the local level.

It is a pity that a true mandatory permit system was not adopted. Such a permit system could have offered clarity to enterprises what is expected of them. It would be able to do so in an adaptable case-based way by making specific permits for specific enterprises, based on general norms. And thus it could offer a relatively feasible system for enterprises, as well as enforcement agents who work easier when there is a specific permit for an enterprise. The challenges of such a permit system would be to maintain adequacy through standard setting and to maintain feasibility in installing such a system which poses a considerable administrative burden to establish and manage.³⁷

Nevertheless, even the total load discharge permit system brings some improvement. It enhances adequacy, as in total load areas, enterprises are now governed based on the total amount of pollutants they discharge, instead of the pollution concentration. This means that enterprises can no longer comply with the law, simply by diluting their discharge and thus discharging significant amounts without violation.³⁸

³² Water Pollution Prevention and Control Law § 16

³³ NPC Legal Committee, "Guanyu Zhonghua Renming Gongheguo Shui Wuran Fangzhi Fa Xiuzhengan Caoan Shenji Jieguo de Baogao (Report on the Results of Review of the Draft Amendment of the PRC Water Pollution Prevention and Control Law)." 360

³⁴ See State Council WPPCL Implementing Regulations, 2000 § 10, for more detail see 1988 NEPA Temporary Measures on Water Discharge Permits § 16

³⁵ 1988 NEPA Temporary Measures on Water Discharge Permits

³⁶ State Council WPPCL Implementing Regulations § 10

³⁷ For some of these points see Asian Development Bank, *Reform of Environmental and Land Legislation in the People's Republic of China*. 36-8, 59

³⁸ Ibid.

Ban of Obsolete Technologies

The 1996 WPPCL further introduced a norm phasing out obsolete technology, aimed at tackling the severe pollution at TVEs and smaller factories.³⁹ Such a norm was warranted because of the severe pollution small enterprises, such as paper factories, cement mills and tanneries had been causing and the increased attention this had gotten in the media. While the norm was needed to deal with some of China's worst pollution, and was thus important for raising the law's adequacy, its feasibility is questionable. One can wonder what the effects on local economies and communities is of a rule abolishing certain small family owned or village owned enterprises that had been the driving forces of local economic growth and important for local livelihoods.

While the ban of obsolete technologies itself was never questioned during the review of the final bill, there was some debate on a related issue. This concerned the control of small polluting enterprises. In the final draft there had been a rule forcing small family owned enterprises to report their major pollutants and report about the measures they were taking to control such pollutants.⁴⁰ This rule would broaden the existing reporting system to also include tiny family operated enterprises (*geti gongshang*).

Some NPC-SC delegates found that such a rule would be difficult to implement. They stated: "China is a large country with many different circumstances. In some areas family enterprises just engage in food and beverage production, here they can easily be managed in the municipal sewage systems. In other areas, family businesses operate industrial enterprises such as tanneries or printing factories, with serious pollution for which there must be industrial waste water treatment installations." It was proposed to change the rule and let provincial governments decide what reporting requirements would be most suitable for their local family enterprises.⁴¹ In the final law, the reporting rule for family enterprises was dropped and instead an extra provision on heavily polluting family factories allowing provincial level governments to set up special regulation was added to the law.⁴²

It is interesting to note that there was thus a debate on a pollution reporting system with only a limited impact on local enterprises, while the strict norm phasing out enterprises with an extensive expected impact on

³⁹ Water Pollution Prevention and Control Law § 22, 23

⁴⁰ NPC Legal Committee, "Guanyu Zhonghua Renming Gongheguo Shui Wuran Fangzhi Fa Xiuzhengan Caoan Shenji Jieguo de Baogao (Report on the Results of Review of the Draft Amendment of the PRC Water Pollution Prevention and Control Law)." 360

⁴¹ Ibid. 360

⁴² Water Pollution Prevention and Control Law § 14 and 60.

local livelihoods was never, at least according to the sources consulted here, questioned.

Specific Discharge Prohibitions

Finally, the 1995 draft law contained a number of strict specific norms banning the discharging, dumping, burying and storing of certain substances in such a way that they can harm surface or ground water.⁴³ These norms are strict, specific and their scope of application is quite large. The norms prohibit any kind of discharge (etc.) of the substances mentioned in any body of water, no matter the concentration or total amount. Taken to the strict letter of such norm, there are bound to be many violations, as most human activities will violate such all-encompassing norms. As such these norms lack feasibility and adaptability, however well meant they were in terms of adequacy and certainty. According to the sources consulted here, the specific discharge norms were never criticized during the drafting and review process.

Norms Left Unchanged

Except for these changes,⁴⁴ the final draft WPPCL brought little new as it copied rules on PEDF⁴⁵, EIA,⁴⁶ and the Three Synchronizations⁴⁷ from existing legislation. Keeping the old provisions was not good for enhancing the law's implementability. The PEDF system lacked adequacy, because the charges to be paid had sometimes been lower than the costs for abatement and because the charges were concentration based instead of the total amount.⁴⁸ The EIA system, at least until the 2002 EIA Law was promulgated, lacked certainty. The WPPCL and the relevant State Council regulations⁴⁹ failed to provide clarity on its exact scope of application and procedures, allowing approval agents a wide discretion when evaluating EIA

⁴³ Water Pollution Prevention and Control Law § 29-34 and 41-42

⁴⁴ In addition other changes less relevant to the research here were also made: the draft amendment strengthened cross-provincial water quality management, § 10.2 and made concentrated urban sewage treatment mandatory, § 19. The draft law also instituted the possibility for provincial level governments to designate drinking water protection areas with strict pollution prohibitions, § 20, 27. It also introduced a provision on non-point source pollution demanding that agricultural bureaus take measures to prevent and control agricultural pollution, § 39.

⁴⁵ Water Pollution Prevention and Control Law § 14

⁴⁶ Water Pollution Prevention and Control Law § 13

⁴⁷ Water Pollution Prevention and Control Law § 13

⁴⁸ For an elaborate account see Van Rooij, "The Enforceability of Chinese Water Pollution Regulations, What Room for Improvement?"

⁴⁹ 1998 State Council Regulations on EP in Construction Projects

applications.⁵⁰ Similarly, until 2002, the WPPCL norms on Three Synchronizations, even when combined with the State Council Regulations, failed to provide clarity on major issues such as their scope of application.

As the WPPCL left these norms unchanged, it maintained implementability problems of the past. A reason that necessary changes were never proposed may have been that the NPC-EP committee had put all its money on the mandatory permit system, which if it had been successfully adopted would have solved some of the existing problems mentioned here.

WPPCL Findings

The history of the 1996 WPPCL amendment is complex. It shows first how important the bargaining during the drafting phase was. The WPPCL lost some of its most ambitious features at the drafting table. The NPC-EP Committee and NEPA drafters had sought extensive inputs from various opposed departments during the actual drafting process that forced the drafters to compromise⁵¹; consequently, the final proposal submitted to the NPC Legal Committee had already lost its teeth. Unlike the LMA, where the NPC Legal Committee was able to control the bargaining process in favor of macro-level interests, in this case, with insufficient support for the macro interests at stake, and perhaps also because stronger bargaining took place during the drafting phase, powerful ministries and provinces were able to prevent legislation they deemed too strict.⁵²

On the one hand, the lawmaking process of the WPPCL was in some aspects different from the LMA. To a certain extent, the WPPCL's lawmaking process followed China's piece-meal approach (see Chapter 2) much closer in the sense that the rules were made after extensive bargaining, in the end leading to quite vague weak rules that still needed further elaboration in implementing regulations. This is especially true for what happened with the original ideas for the permit system that never made the final draft and its substitute, the vague and limited total load discharge

⁵⁰ For an elaborate account see Van Rooij, "The Enforceability of Chinese Water Pollution Regulations, What Room for Improvement?"

⁵¹ Unfortunately such inputs and comments were not published, or at least in a form available for this research. They could only be consulted through a summary made by the NPC Legal Committee. See NPC Legal Committee, "Guanyu Zhonghua Renming Gongheguo Shui Wuran Fangzhi Fa Xiuzhengan Caoan Shenyi Jieguo de Baogao (Report on the Results of Review of the Draft Amendment of the PRC Water Pollution Prevention and Control Law)." 358-361

⁵² For the permit system the ADB writes cryptically that "The resistance to a permit system on the part of certain industrial and commercial sectors, was, however recognized. In addition EPAs (EPBs) generally lack the administrative resources necessary for applying the permit requirements to all sources." Asian Development Bank, *Reform of Environmental and Land Legislation in the People's Republic of China*. 59

permit system that were almost completely watered-down after the last formal deliberation.

At the same time, the WPPCL amendment signifies a trend towards stricter norms and single-interests lawmaking, similar to the LMA. Proponents of the new law had tried their best to install more comprehensive, more specific and stricter legal systems to control water pollution. Although, as we saw their most ambitious proposals failed at the bargaining table, environmentalist stakeholders were still successful in some aspects. The WPPCL introduced strict specific norms banning the discharging, dumping, burying and storing of certain substances in such a way that they can harm surface or ground water.⁵³ In addition, it introduced a total load system for heavily polluted areas in which enterprises were to meet certain discharge standards, based on the total amount of pollutants discharged instead of the easily cheatable concentration based standards of the past.⁵⁴ The WPPCL further prohibited the use of certain obsolete technologies and the establishment of new small heavily polluting enterprises,⁵⁵ about which there was no bargaining at all.⁵⁶

All of this has influenced the expected effect the WPPCL may have on compliance, enforcement and goal attainment. First, the WPPCL has several inadequate provisions, especially its norms on the total load discharge permit system and norms on PEDF⁵⁷. Second, the law also contains many vague and thus uncertain norms, most notably norms on EIA, Three Synchronizations and the total load discharge permit system.⁵⁸ Third, some of the laws' new stricter norms pay no attention to China's complex and different circumstances and may at times be unfeasible. This is especially true for the norms on small polluting enterprises and the strict prohibition on the discharge of certain substances.

The 2000 Air Pollution Prevention and Control Law: the Right Opportunity for Stricter Legislation

When the NPC-EP Committee and SEPA started another amendment in the late nineties, this time to the Air Pollution Control and Prevention Law ("APPCL"), they had learned from prior experiences.⁵⁹ The WPPCL 1996

⁵³ Water Pollution Prevention and Control Law § 29-34 and 41-42

⁵⁴ Water Pollution Prevention and Control Law § 16

⁵⁵ Water Pollution Prevention and Control Law § 22, 23

⁵⁶ At least in the documents available to us.

⁵⁷ For a more detailed analysis of PEDF see Van Rooij, "The Enforceability of Chinese Water Pollution Regulations, What Room for Improvement?"

⁵⁸ Ibid.

⁵⁹ Alford and Liebman argue that the 2000 Amendment was based on experience gained in the 1995 APPCL amendment. They do not discuss the impact of the WPPCL 1996 amendment. W.P. Alford and B.L. Liebman, "Clean Air, Clean Processes? The Struggle over

amendment had taught them that without sufficient central level support, powerful opponents could bargain major features out of draft legislation, even when it was still at the drafting table. Only a year before that, in 1995, the NPC-EP committee had suffered a similar legislative defeat at the hands of opposed stakeholders. This happened when the committee had presented an ambitious draft amendment to the 1987 Air Pollution Prevention and Control Law to the NPC-SC for review, without prior consultation of relevant departments and provincial level governments opposed to stronger legislation.⁶⁰ The submitted draft included a mandatory emission permit system, a total load control system and restrictions on high-sulfur coal use.⁶¹ The strategy of pushing a proposal for approval by the NPC-SC without prior deliberation with opposed stakeholders was unsuccessful as it backfired during the NPC-SC review and forced the NPC-EP committee to withdraw its most ambitious proposals in order to get enough backing to make the bill into law.⁶²

In the late nineties, a window of opportunity arose to make stricter and more comprehensive pollution regulation. As Alford and Liebman write, "overall consciousness about environmental problems, within the government and among the general population, increased significantly between 1995 and 1999".⁶³ Even some local governments, in particular Beijing, supported stronger air pollution measures.⁶⁴ In 1996, there had been a clear change in central government pollution policy. In this year, the State Council had issued a notice that strengthened pollution related enforcement and set strict targets for the end of 2000.⁶⁵ This notice signaled a change that made stricter legislation possible and that marked the beginning of pollution enforcement campaigns (see Chapter 16). Furthermore, by the late 1990s, China's air pollution problem gained extra attention when the World Resources Institute published a report stating that nine of the world's ten most polluted cities were in China⁶⁶, a fact also reported in the Chinese press⁶⁷. At this time of change, and with the disappointing 1995 law⁶⁸ and

Air Pollution Law in the People's Republic of China," *Hastings Law Journal* 52, no. March (2001). 745

⁶⁰ Ibid. 716-7

⁶¹ Ibid. 718-23

⁶² Ibid. 725

⁶³ Ibid. 219

⁶⁴ Ibid. 733-4

⁶⁵ State Council, "State Council Decision on Several Problems concerning Environmental Protection (Guowuyuan guanyu Huanjing Baohu ruogan Wenti de Jueding)," *Environmental Work News Report*, no. 8 (1996). 10-3

⁶⁶ Editorial, *China: 9 of the World's 10 Most Polluted Cities are in China* (29 January 1999 [cited 29 September 2006]); available from http://www.edic.net/news/news_story.asp?id=653.

⁶⁷ J. Bai, "Rang Women Changkuaide Huxi (Let us Breathe in Comfort)," *Renmin Ribao*, March 18 1999.

the failure of the State Council to make implementing regulations that could have remedied some of the deficiencies in the law itself, the NPC-EP committee decided to try amending the APPCL once again.⁶⁹ For the 2000 APPCL amendment, the committee sought opposed opinions during the drafting process⁷⁰; this was contrary to the 1995 amendment process, but like the strategy for the 1996 WPPCL amendment. Because this time, the NPC-EP committee was able to muster central level support for its proposal⁷¹, it was able to be more successful during the preliminary negotiations. Consequently the committee was able to get many of the failed proposals for the 1995 APPCL amendment incorporated into the 2000 law, including: a pollution emission permit system, a ban on emissions excessive of the standards, an emission fee system, and stricter and mandatory minimum sanctions for violations.

Total Load Emission Permits

The 2000 amendment called for the establishment of pollution emission permits within certain designated "total load" areas, similar to the WPPCL.⁷² In its explanation on the draft amendment the NPC-EP committee emphasized the importance of the total load permit system.⁷³ Originally, in an earlier draft law, SEPA and the NPC-EP Committee had tried again, this

⁶⁸ Alford and Shen, "Limits of the Law in Addressing China's Environmental Dilemma." 134-5

⁶⁹ In his explanation to the draft amendment the chairman of the NPC-EP Committee Qu Geping emphasized the necessity of the amendment by referring to the fact that China occupied seven positions on the list of ten worst air polluted cities in the world. Qu Geping (Director of the NPC-EP Committee), "Guanyu Zhonghua Renmin Gongheguo Daqi Wuran Fangzhi Fa Xiuding Caoan de Shuo Ming (Explanation to the Draft Amendment to the PRC Air Pollution Prevention and Control Law)," in *Zhonghua Renmin Gongheguo Da Qi Wuran Fangzhi Fa Shiyi (Commentary to the PRC Air Pollution Prevention and Control Law)*, ed. NPC-SC Legal Affairs Office (Beijing: Falü Chubanshe, 2001). 202-3

⁷⁰ Alford and Liebman, "Clean Air, Clean Processes? The Struggle over Air Pollution Law in the People's Republic of China." 745

⁷¹ Ibid. 747-8

⁷² Air Pollution Prevention and Control Law § 15.2 For an explanation of what these designated areas are we must look at the WPPCL implementing regulations: areas in which enterprises meet the concentration based effluent standards but in which the quality standard is not met. This means that the total amount of pollution is higher than the quality standard. This is because enterprises dilute their emissions and thus meet the concentration based effluent standard but still emit too much for the area to meet the quality standard. Art 6 of the State Council Implementing Regulation of the Water Pollution Prevention and Control Law, 2000.

⁷³ The committee quoted President Jiang Zemin: "History teaches that in order to safeguard environmental safety we must implement a control of the total amount of pollutants." See Qu Geping (Director of the NPC-EP Committee), "Guanyu Zhonghua Renmin Gongheguo Daqi Wuran Fangzhi Fa Xiuding Caoan de Shuo Ming (Explanation to the Draft Amendment to the PRC Air Pollution Prevention and Control Law)." 206-7

time for air pollution, to introduce a mandatory permit system, with a general scope of application and with detailed procedural regulations.⁷⁴ However, just as had happened with the WPPCL, they had had to withdraw this proposal while still at the drafting table⁷⁵, after powerful stakeholders strongly opposed to it.⁷⁶ As a substitute the drafters introduced the total load emission permit system.

When this weakened permit system in the final draft came up for review, opponents voiced further concerns. Some argued for first testing the total load discharge permit system in certain major cities including Beijing and Shanghai before implementing it nationally.⁷⁷ There was also concern that many of China's enterprises still did not meet the Pollution Excessive Discharge Fee ("PEDF") standards and would not be able to comply with the total load discharge permit system. In short, opponents believed that China was not ready.⁷⁸ They argued for a decentralized system under which provinces in which all enterprises meet the discharge standards can institute a total load permit system.⁷⁹ Others demanded more research on the feasibility of the new system.⁸⁰ Some NPC-SC delegates, proposed to insert the phrase "according to local circumstances" to the draft provisions, to make the system more adaptable to various circumstances.⁸¹ Finally, there was also criticism of the fact that the draft amendment let local EPBs implement the total load permit system; because of the economic and

⁷⁴ Ibid. 207, Alford and Liebman, "Clean Air, Clean Processes? The Struggle over Air Pollution Law in the People's Republic of China." 736

⁷⁵ Qu Geping (Director of the NPC-EP Committee), "Guanyu Zhonghua Renmin Gongheguo Daqi Wuran Fangzhi Fa Xiuding Caoan de Shuo Ming (Explanation to the Draft Amendment to the PRC Air Pollution Prevention and Control Law)." 207

⁷⁶ Ibid. 207, Alford and Liebman, "Clean Air, Clean Processes? The Struggle over Air Pollution Law in the People's Republic of China." 736

⁷⁷ NPC-SC Legal Affairs Office, "Ge Difang He Zhongyang Youguan Bumen Dui Daqi Wuran Fangzhi Fa (Xiuding Caoan) de Yijian (Opinions by Local and Central Relevant Departments on the Air Pollution Prevention and Control Law Draft Amendment)." 236

⁷⁸ Ibid. 236

⁷⁹ Ibid. 236

⁸⁰ NPC-SC, "Shenyi Daqi Wuran Fangzhi fa Xiuding Cao An Erci Shenyigao de Yijian (Opinions on the Second Review of the Air Pollution Prevention and Control Law Draft Amendment)," in *Zhonghua Renmin Gongheguo Da Qi Wuran Fangzhi Fa Shiyi (Commentary to the PRC Air Pollution Prevention and Control Law)*, ed. NPC-SC Legal Affairs Office (Beijing: Falü Chubanshe, 2001). 231, NPC-SC Legal Affairs Office, "Ge Difang He Zhongyang Youguan Bumen Dui Daqi Wuran Fangzhi Fa (Xiuding Caoan) de Yijian (Opinions by Local and Central Relevant Departments on the Air Pollution Prevention and Control Law Draft Amendment)." 236-7

⁸¹ NPC-SC, "Shenyi Daqi Wuran Fangzhi fa Xiuding Cao An Erci Shenyigao de Yijian (Opinions on the Second Review of the Air Pollution Prevention and Control Law Draft Amendment)." 231

environmental interests involved, some felt that the local government would be better suited to implement this system.⁸²

As in the 1998 LMA amendment, the NPC Legal Committee occupied a dominant position in the drafting process of the APPCL 2000 amendment. Based on the sources consulted, it seems that the Legal Committee had the power to decide whose suggestions to follow and whose to ignore. The committee stated that the system with its broad impact was very complex and economic and environmental concerns should be balanced in its implementation.⁸³ For this, the Legal Committee added a provision that "the State Council will issue specific measures on the most important aspect of total load air pollution system".⁸⁴ The committee also made local governments, instead of local EPBs, responsible for implementing the total load permit system.⁸⁵ However, the Legal Committee was less convinced by other concerns such as the need for patience and more research and decentralization. Thus, except for relatively minor changes, the committee maintained the final bill's total load permit provisions, which the NPC-SC voted into law.⁸⁶

The implementability of the APPCL total load permit system is in many ways similar to that of the WPPCL. Due to the extensive bargaining that took place during the drafting phase, which even the strong support for these norms during the formal deliberations could no longer alter, the APPCL permit system had already lost an important part of its adequacy. It no longer applied for all air polluting enterprises, but merely for certain designated areas. Although the text of the law was more ambitious and clearer than the final WPPCL version, using the clear word *xuke* (permit) instead of *heding* (checks and verifications), the related provisions on permits are nearly as vague as those in the 1996 WPPCL were. However, where the WPPCL soon got clarification in its State Council Implementing Regulations, the APPCL has had none.⁸⁷ Consequently, the 2000 APPCL contains a

⁸² NPC-SC Legal Affairs Office, "Ge Difang He Zhongyang Youguan Bumen Dui Daqi Wuran Fangzhi Fa (Xiuding Caoan) de Yijian (Opinions by Local and Central Relevant Departments on the Air Pollution Prevention and Control Law Draft Amendment)." 236, NPC-SC, "Shenyi Daqi Wuran Fangzhi fa Xiuding Cao An de Yijian (Opinions on the Review of the Air Pollution Prevention and Control Law Draft Amendment)," in *Zhonghua Renmin Gongheguo Da Qi Wuran Fangzhi Fa Shiyi (Commentary to the PRC Air Pollution Prevention and Control Law)*, ed. NPC-SC Legal Affairs Office (Beijing: Falü Chubanshe, 2001). 222

⁸³ NPC Legal Committee, "Guanyu Zhonghua Renmin Gongheguo Daqi Wuran Fangzhi Fa Xiuding Caoan Xiugai Qingkuang de Huibao (Report on the Changes to the Draft Amendment to the PRC Air Pollution Prevention and Control Law)." 212

⁸⁴ APCCCL § 15.1, Ibid. 212

⁸⁵ Ibid. 212

⁸⁶ Ibid. 212

⁸⁷ At least until 2004 at the time this research took place.

significant amount of uncertainty about the exact procedure for air pollution total load permits.

In sum, the 2000 APPCL's permit system brought some improvement in terms of adequacy, when compared to the 1995 APPCL, which lacked such a non-concentration based total load system. However, the adequacy was not improved as much as had been hoped for, while also leaving a significant amount of uncertainty.

Ban on Emissions Excessive of the Standards

One of the key features of the 2000 APPCL amendment is that emissions excessive of the standards have become illegal.⁸⁸ This new provision is significant, not only because it makes civil liability claims easier, but also because it makes excessive emissions, even though PEDF has been paid, punishable with a minimum punishment of 10,000 RMB and a maximum of up to 100,000 RMB.⁸⁹ In its explanation to the proposed amendment, the NPC-EP committee argued that excessive emission is illegal in most developed legal systems worldwide and that the 1996 State Council notice on pollution problems forces the legislator to take stronger measures to make enterprises comply with the standards.⁹⁰ The committee noted that when it gathered opinions of relevant departments during the drafting process, there was criticism of this proposal.⁹¹ However, according to the NPC-EP committee, most agreed that it was necessary to create clarity about the legal status of excessive emissions and none held that they should be legal.⁹² The committee stated that its proposed amendment would "strengthen enterprise management and speed up enterprise compliance with the emissions standards."⁹³ This time the committee held its ground and presented an unchanged proposal for formal review to the NPC-SC. During the review process, surprisingly, the provision on the illegal status of excessive discharge never came up for debate and made the final law unchanged.⁹⁴ Here the

⁸⁸ APPCL § 13

⁸⁹ APPCL § 48

⁹⁰ Qu Geping (Director of the NPC-EP Committee), "Guanyu Zhonghua Renmin Gongheguo Daqi Wuran Fangzhi Fa Xiuding Caoan de Shuo Ming (Explanation to the Draft Amendment to the PRC Air Pollution Prevention and Control Law)." 206

⁹¹ Ibid. 206

⁹² Ibid. 206

⁹³ Ibid. 206

⁹⁴ NPC Legal Committee, "Guanyu Zhonghua Renmin Gongheguo Daqi Wuran Fangzhi Fa Xiuding Caoan Shenyi Jieguo de Baogao (Report on the Results of Review of the the Draft Amendment to the PRC Air Pollution Prevention and Control Law).", NPC Legal Committee, "Guanyu Zhonghua Renmin Gongheguo Daqi Wuran Fangzhi Fa Xiuding Caoan Xiugai Qingkuang de Huibao (Report on the Changes to the Draft Amendment to the PRC Air Pollution Prevention and Control Law).", NPC-SC, "Shenyi Daqi Wuran Fangzhi fa Xiuding Cao An de Yijian (Opinions on the Review of the Air Pollution Prevention and Control Law

adaptability and feasibility was never questioned, even though in practice it seems that these rules will not always fit local circumstances, especially given the high minimum sanction requirements for minor violations.

Pollution Emission Fees

The amendment also regulated a new system of pollution emission fees. Whereas before, enterprises only paid fees for emissions excessive of the discharge standards, the 2000 amendment made fees for all emissions mandatory.⁹⁵ In its explanation to the draft amendment, the NPC-EP committee stated that with the illegal status of excessive emissions, the PEDF system had become redundant and a new fee system for all emissions had become necessary in order to stimulate emission reductions beyond the standard levels.⁹⁶ The NPC-EP Committee also explained that while drafting, it had consulted with relevant stakeholders, who voiced concern on the extra burden the new fee system would place on enterprises.⁹⁷ The committee convinced such stakeholders that the State Council would be able to incorporate their concerns, when setting the fee standards.⁹⁸ The draft amendment could therefore proceed, unchanged, for the final rounds of review. During this phase, opposed stakeholders once again voiced concerns about the new pollution emission discharge system. Some NPC-SC delegates said that they did not understand a system in which an enterprise must pay fees even though its emissions are within the standards:⁹⁹ "Controlling pollution and protecting the environment is good. However, China is a developing country with special circumstances. If we do not pay heed to such circumstances and place excessively high demands on enterprises that

Draft Amendment).", NPC-SC, "Shenyi Daqi Wuran Fangzhi fa Xiuding Cao An Erci Shenyigao de Yijian (Opinions on the Second Review of the Air Pollution Prevention and Control Law Draft Amendment).", NPC-SC Legal Affairs Office, "Ge Difang He Zhongyang Youguan Bumen Dui Daqi Wuran Fangzhi Fa (Xiuding Caoan) de Yijian (Opinions by Local and Central Relevant Departments on the Air Pollution Prevention and Control Law Draft Amendment).", NPC-SC Legal Affairs Office, " Zhongyang Youguan Bumen Dui Daqi Wuran Fangzhi Fa (Xiuding Caoan) de Yijian (Opinions by Relevant Central Departments on the Air Pollution Prevention and Control Law Draft Amendment)," in *Zhonghua Renmin Gongheguo Da Qi Wuran Fangzhi Fa Shiyi (Commentary to the PRC Air Pollution Prevention and Control Law)*, ed. NPC-SC Legal Affairs Office (Beijing: Falü Chubanshe, 2001).

⁹⁵ APPCL § 14

⁹⁶ Qu Geping (Director of the NPC-EP Committee), "Guanyu Zhonghua Renmin Gongheguo Daqi Wuran Fangzhi Fa Xiuding Caoan de Shuo Ming (Explanation to the Draft Amendment to the PRC Air Pollution Prevention and Control Law)." 207

⁹⁷ Ibid. 208

⁹⁸ Ibid. 208

⁹⁹ NPC-SC, "Shenyi Daqi Wuran Fangzhi fa Xiuding Cao An Erci Shenyigao de Yijian (Opinions on the Second Review of the Air Pollution Prevention and Control Law Draft Amendment)." 229

will greatly burden them, we can endanger their development.”¹⁰⁰ These delegates called for more research into the matter.¹⁰¹ Other stakeholders argued similarly that China’s enterprises would suffer too much from the extra burden of these new fees.¹⁰² They argued for maintaining the PEDF system, until enterprises were economically and technologically more developed.¹⁰³ Many stakeholders proposed that the State Council should provide further elaboration in special regulations, in order to keep the law itself abstract enough to be adaptable to different circumstances.¹⁰⁴ Other stakeholders feared that EPBs would start collecting fees at random, just to increase their limited funds.¹⁰⁵ Therefore they argued that the fees should only be used as funds for environmental protection enhancement at enterprises or that a tax system, collected by the financial department, should be instituted instead.¹⁰⁶ Others just demanded State Council procedural rules on fee collection and use to prevent misappropriation.¹⁰⁷ Some even proposed to delete the new discharge fee provisions and only strictly punish excessive discharge.¹⁰⁸

In response to the criticism on the draft amendment provisions on pollution emissions fees, the NPC Legal Committee made minor changes to the final draft, while maintaining the fee system as a whole.¹⁰⁹ The committee recognized the complexity of the new fee system and the necessity to take all, including environmental, technical, economic, and enterprise interests into

¹⁰⁰ Ibid. 229

¹⁰¹ Ibid. 229

¹⁰² NPC-SC Legal Affairs Office, "Ge Difang He Zhongyang Youguan Bumen Dui Daqi Wuran Fangzhi Fa (Xiuding Caoan) de Yijian (Opinions by Local and Central Relevant Departments on the Air Pollution Prevention and Control Law Draft Amendment)." 235

¹⁰³ Ibid. 236

¹⁰⁴ NPC-SC, "Shenyi Daqi Wuran Fangzhi fa Xiuding Cao An de Yijian (Opinions on the Review of the Air Pollution Prevention and Control Law Draft Amendment)." 222

¹⁰⁵ NPC-SC, "Shenyi Daqi Wuran Fangzhi fa Xiuding Cao An Erci Shenyigao de Yijian (Opinions on the Second Review of the Air Pollution Prevention and Control Law Draft Amendment)." 229

¹⁰⁶ NPC-SC, "Shenyi Daqi Wuran Fangzhi fa Xiuding Cao An de Yijian (Opinions on the Review of the Air Pollution Prevention and Control Law Draft Amendment)." 222, NPC-SC, "Shenyi Daqi Wuran Fangzhi fa Xiuding Cao An Erci Shenyigao de Yijian (Opinions on the Second Review of the Air Pollution Prevention and Control Law Draft Amendment)." 229

¹⁰⁷ NPC-SC Legal Affairs Office, "Ge Difang He Zhongyang Youguan Bumen Dui Daqi Wuran Fangzhi Fa (Xiuding Caoan) de Yijian (Opinions by Local and Central Relevant Departments on the Air Pollution Prevention and Control Law Draft Amendment)." 236

¹⁰⁸ NPC-SC, "Shenyi Daqi Wuran Fangzhi fa Xiuding Cao An Erci Shenyigao de Yijian (Opinions on the Second Review of the Air Pollution Prevention and Control Law Draft Amendment)." 230

¹⁰⁹ NPC Legal Committee, "Guanyu Zhonghua Renmin Gongheguo Daqi Wuran Fangzhi Fa Xiuding Caoan Xiugai Qingkuang de Huibao (Report on the Changes to the Draft Amendment to the PRC Air Pollution Prevention and Control Law)." 212

consideration.¹¹⁰ Furthermore, it affirmed the importance of preventing fee collection abuse.¹¹¹ To accommodate these issues, the committee installed two provisions. First, the provision that the State Council would make implementing regulations that help to adapt the system to China's circumstances and provide detail on fee collection procedure to prevent misuse. Second, it installed the provision that fees collected were to be turned over to the financial department and can only be used (for environmental protection) under strict supervision of the relevant audit department.¹¹² Again, the Legal Committee was selective; it accommodated some of the concerns, while ignoring those calling for delay, more research or outright annulment of the proposed fee system. Here again, adequacy and certainty were dominant, and adaptability and feasibility, equally important, were largely ignored.

Stricter and Mandatory Minimum Sanctions

The new APPCL incorporated a stronger, and to some extent mandatory, enforcement system that limited enforcement discretion. In its explanation to the draft amendment, the NPC-EP committee stated that the existing legislation was often regarded as a "weak law" lacking strong sanctions for violations.¹¹³ Thus, the amendment proposed stronger sanctions. The new law, for the first time, established mandatory minimum sanctions for certain violations, most notably those related to EIA¹¹⁴ and emissions excessive of standard levels.¹¹⁵ For both of these two types of violations, no matter what the circumstances were, a minimum sanction of 10,000 RMB should be issued.¹¹⁶

There was much debate about the new proposed sanctions. Although some stakeholders called for even stronger sanctions¹¹⁷, many opponents voiced concern about the excessive emphasis on punishment for violations. Opponents feared that the new strict sanction provisions would make enforcement too rigid and ill adaptable to special circumstances. As an

¹¹⁰ Ibid. 212

¹¹¹ Ibid. 212

¹¹² Ibid. 212

¹¹³ Qu Geping (Director of the NPC-EP Committee), "Guanyu Zhonghua Renmin Gongheguo Daqi Wuran Fangzhi Fa Xiuding Caoan de Shuo Ming (Explanation to the Draft Amendment to the PRC Air Pollution Prevention and Control Law)." 208

¹¹⁴ APPCL § 47 (The original draft already contained this provision)

¹¹⁵ APPCL § 48 (The original draft already contained this provision)

¹¹⁶ APPCL § 47, 48 (The original draft already contained these provisions)

¹¹⁷ NPC-SC, "Shenyi Daqi Wuran Fangzhi fa Xiuding Cao An de Yijian (Opinions on the Review of the Air Pollution Prevention and Control Law Draft Amendment)." 224, NPC-SC, "Shenyi Daqi Wuran Fangzhi fa Xiuding Cao An Erci Shenyigao de Yijian (Opinions on the Second Review of the Air Pollution Prevention and Control Law Draft Amendment)." 232

example, they argued that struggling state-owned and collective enterprises would have to make significant investments to comply with the new law and such compliance would take a long time. Opponents felt that in the meantime it is unfair to punish them extra strongly for violations.¹¹⁸ Others feared that stronger sanctions would only be beneficial to EPBs but not for environmental protection and would lead to abuse of authority.¹¹⁹ Opponents held that there should be less emphasis on sanctions and more on propaganda and education.¹²⁰ Moreover, they proposed that the specific sanction amounts should be deleted from the law and should be regulated later in State Council implementing regulations that are more flexible.¹²¹

The NPC Legal Committee never reacted to any of these concerns and just maintained the text as it was. Thus, the new APPCL is the first national environmental law in China that uses strict mandatory sanctions applicable to the most minor offences. The APPCL's mandatory minimum sanctions increase the law's adequacy and certainty, while decreasing its feasibility and adaptability.

2000 APPCL Findings

The main reason why the APPCL amendment in 2000 was more successful in installing stricter legal system geared to environmental protection than the 1995 APPCL amendments was that it was supported by central level stakeholders.¹²² This change became apparent with the 1996 State Council document on pollution, which paved the way for stricter enforcement, but also for stricter legislation, we know now.

In the lawmaking process, this new central level support was most clearly represented by the NPC Legal Committee, which exercised its considerable powers to ensure that the most important new proposals in the final bill made it into law.¹²³ It could only do so by ignoring some of the concerns voiced by opposed stakeholders. Just as with the LMA, the 2000 APPCL amendment did not consider the full complexity of the different

¹¹⁸ NPC-SC, "Shenyi Daqi Wuran Fangzhi fa Xiuding Cao An de Yijian (Opinions on the Review of the Air Pollution Prevention and Control Law Draft Amendment)." 224-5

¹¹⁹ Ibid. 225

¹²⁰ Ibid. 225

¹²¹ Ibid. 225, NPC-SC, "Shenyi Daqi Wuran Fangzhi fa Xiuding Cao An Erci Shenyigao de Yijian (Opinions on the Second Review of the Air Pollution Prevention and Control Law Draft Amendment)." 232

¹²² Alford and Liebman, "Clean Air, Clean Processes? The Struggle over Air Pollution Law in the People's Republic of China." 745

¹²³ Except for the amendments, relevant to the present research, discussed above, the 2000 APPCL amendment also brought stricter norms for energy use (§ 19), reducing high sulfur-content coal use (§20-31), automobile pollution emissions (§ 32-35), and for controlling and preventing waste gas, small particulate and odorous pollutants emissions (§36-45).

practices and interests involved. Even though many stakeholders were heard, the committee chose several times to let environmental interests prevail. As a result, China's APPCL took first steps to incorporate more specific and stricter rules. It must be noted though that the current APPCL still leaves much unclear. The best example is the total load permit system, for which in 2005 the State Council still has not issued implementing regulations. Overall, the changes made in the APPCL are not necessarily better for compliance, law enforcement and goal attainment. Especially their lack in feasibility combined with limited adaptability and uncertainty of some of the norms may be troublesome in practice.

The 2002 EIA Law: Little Bargaining leads to a more Comprehensive and somewhat Stricter Law

In 2002, China finally made a national law to regulate its EIA system. Prior, the EIA system, which also includes the Three Synchronizations, was mentioned only vaguely in the Environmental Protection Law (both the 1979 trial as well as the 1989 version) and the various sectoral pollution prevention and control laws. This legislation provided little detail and thus certainty. For this, Chinese environmental law depended on State Council Regulations issued in 1998,¹²⁴ which still left much unclear.¹²⁵ The window of opportunity for stricter environmental legislation that opened in 1996 with the State Council notice on pollution had opened wide enough in 2000 for the NPC-EP committee to try codifying the existing regulation into a true national law. By 2000, the drafters could count on the direct support of China's central level leaders who had called for enacting a new EIA law. The immediate cause for enacting a new law was to broaden the scope of applicability of the original EIA system. While it originally covered individual construction projects, the new law was to make EIA mandatory for all governmental strategic and regional planning. In 1998, China's president and CCP leader, Jiang Zemin, called for the establishment of such a "Planning EIA".¹²⁶ Then on April 2000 Li Peng, head of the NPC and an influential

¹²⁴ 1998 State Council Regulations on Environmental Protection Management at Construction Projects

¹²⁵ Van Rooij, "The Enforceability of Chinese Water Pollution Regulations, What Room for Improvement?" Later most was clarified in SEPA regulations. See SEPA 2001 Classified Directory for Environmental Protection Management of Construction Projects (Batch 1), February 17, 2001, (revised from the original version from 1999), which were then revised with the introduction of the 2002 EIA law, see SEPA 2002 Classified Directory for Environmental Protection Management of Construction Projects, SEPA 2002 No 14.

¹²⁶ Wang Tao (Vice Director of the NPC-EP Committee), "Guanyu Zhonghua Renmin Gongheguo Huanjing Yingxiang Pingjia Fa (Caoan) de Shuoming," in *Zhonghua Renmin Gongheguo Huanjing Yingxiang Pingjia Fa Shiyi*, ed. N S L A Committee (Beijing: Falü Chubanshe, 2003), 166

leader in the CCP, called on the NPC-EP Committee to start drafting the new EIA law.¹²⁷ The NPC-EP Committee was able to finish their draft by the end of 2000. Then the review procedure started which took until the end of 2002 before the NPC-SC voted the bill into law with 125 votes for and two abstaining votes.¹²⁸ The law that was finally introduced was largely based on existing regulation¹²⁹ and thus partly suffered from the same lack of adequacy and certainty as before.¹³⁰ However, it also brought new norms, which similar to amendments of the LMA and APPCL favored adequacy and certainty over feasibility and adaptability.

Planning EIA

The new law's most innovative and contested feature was the establishment of a mandatory Planning EIA under which new regional¹³¹ and special project planning¹³² must first be assessed for its impact on the environment before it is to be approved.¹³³ The original NPC-EP committee draft EIA Law had a somewhat broader language for the Planning EIA: it also covered policy.¹³⁴ Without an explanation, the legal committee decided to change the language, delete references to "policy", and just keep EIA for planning only.¹³⁵ Some NPC-SC delegates complained that the proposed law did not distinguish between EIA procedural requirements for different kinds of planning.¹³⁶ The NPC Legal Committee recognized their concern and

¹²⁷ Ibid. 166

¹²⁸ Ibid.

¹²⁹ 1998 State Council Regulations on Environmental Protection Management at Construction Projects

¹³⁰ For an overview of this see Van Rooij, "The Enforceability of Chinese Water Pollution Regulations, What Room for Improvement?"

¹³¹ This includes land use, regional, water-catchment, sea-area or development planning. EIA Law § 7.1.

¹³² This includes industrial, agricultural, husbandry, forestry, energy, hydraulic, transport, city and natural resource planning. EIA Law § 8.1.

¹³³ EIA Law § 3, 7.1, 8.1.

¹³⁴ Wang Tao (Vice Director of the NPC-EP Committee), "Guanyu Zhonghua Renmin Gongheguo Huanjing Yingxiang Pingjia Fa (Caoan) de Shuoming." 168

¹³⁵ NPC Legal Committee, "Guanyu Zhonghua Renmin Gonghe Guo Huanjing Yingxiang Pingjia Fa Caoan Shenyi Jieguo de Bao Gao (Report on the Results of Review of the Draft PRC EIA Law)," in *Zhonghua Renmin Gongheguo Huanjing Yingxiang Pingjia Fa Shiyi*, ed. NPC-SC Legal Affairs Office (Beijing: Falü Chubanshe, 2003). 173 Perhaps they did so after some stakeholders had criticized the definition of the scope of application of the law. NPC-SC Legal Affairs Office, "Gesheng, Zizhiqu, Zhixiashi he Zhongyang Youguan Bumen Dui Huanjing Yingxiang Pingjia Fa Caoan Shenyi de Yijiang (Provincial, Autonomous Regions and Provisional Level Cities and Central Level Ministries Opinions on the Draft PRC EIA Law)." 185

¹³⁶ NPC-SC Legal Affairs Office, "Gesheng, Zizhiqu, Zhixiashi he Zhongyang Youguan Bumen Dui Huanjing Yingxiang Pingjia Fa Caoan Shenyi de Yijiang (Provincial, Autonomous

changed the draft so that regional planning only needed to write an EIA as an integral part of the plan itself, while special planning, as defined in the law, required a full EIA that must also be approved.¹³⁷ Three central level departments, the Ministry of Construction, the Ministry of National Land Resources and the State Forestry Agency, argued that the new law should not be applicable to their particular planning, as had been proposed in the draft bill.¹³⁸ Their “turf” protecting rhetoric was ignored as the Legal Committee ignored their arguments and maintained the draft.¹³⁹ Further criticism came from some opponents who felt that it was too early to enact a Planning EIA and that China lacked sufficient experience with this system to make it into national law.¹⁴⁰ In the light of this, they even questioned the necessity of the new law in general, arguing that strengthening the existing regulations and their enforcement should be sufficient.¹⁴¹ Finally, the NPC Legal Committee, in its usual dominant role was able to ignore such criticism and maintain most of the original draft.¹⁴²

Ordinary Construction Projects

For ordinary construction projects, the 2002 EIA law incorporated the EIA regulations of the 1998 State Council Regulations for EP Management at Construction projects. In its explanation to the draft law, the NPC-EP Committee stated that the new law merely copied from the existing regulations on EIA at construction projects. Originally, the draft EIA law also contained rules on the Three Synchronizations system.¹⁴³ The committee had chosen to leave as much intact as possible in order to

Regions and Provisional Level Cities and Central Level Ministries Opinions on the Draft PRC EIA Law)." 185

¹³⁷ NPC Legal Committee, "Guanyu Zhonghua Renmin Gonghe Guo Huanjing Yingxiang Pingjia Fa Caoan Shenxi Jieguo de Bao Gao (Report on the Results of Review of the Draft PRC EIA Law)." 172-3 See also EIA Law § 7.2, 8.2, 10-12

¹³⁸ M.o.N.L.R. Ministry of Construction, State Forestry Agency, "Dui Huanjing Yingxiang Pingjia Fa Caoan Shenxi de Yijiang (Opinions on the Draft PRC EIA Law)," in *Zhonghua Renmin Gongheguo Huanjing Yingxiang Pingjia Fa Shiyi*, ed. N S L A Committee (Beijing: Falü Chubanshe, 2003). 179, 182

¹³⁹ NPC Legal Committee, "Guanyu Zhonghua Renmin Gonghe Guo Huanjing Yingxiang Pingjia Fa Caoan Shenxi Jieguo de Bao Gao (Report on the Results of Review of the Draft PRC EIA Law)." 173

¹⁴⁰ NPC-SC Legal Affairs Office, "Gesheng, Zizhiqu, Zhixiashi he Zhongyang Youguan Bumen Dui Huanjing Yingxiang Pingjia Fa Caoan Shenxi de Yijiang (Provincial, Autonomous Regions and Provisional Level Cities and Central Level Ministries Opinions on the Draft PRC EIA Law)." 184

¹⁴¹ Ibid. 184.

¹⁴² NPC Legal Committee, "Guanyu Zhonghua Renmin Gonghe Guo Huanjing Yingxiang Pingjia Fa Caoan Shenxi Jieguo de Bao Gao (Report on the Results of Review of the Draft PRC EIA Law)." 173

¹⁴³ See above

safeguard continuity of law and maintain existing compliance.¹⁴⁴ After stakeholders complained that the Three Synchronizations system was not part of an EIA, the Legal Committee deleted this section from the law.¹⁴⁵ Still other opponents argued against the new EIA law stating that the existing regulation was sufficient and still rather new; they advised against new legislation for the time being.¹⁴⁶ This last suggestion did not influence the NPC Legal Committee that, apart from deleting the section on the Three Synchronizations, kept the new EIA law intact maintaining its EIA provisions for ordinary construction projects.¹⁴⁷

Mandatory Minimum Sanctions

The new law introduced mandatory minimum sanctions for violations of EIA for construction projects.¹⁴⁸ Before, the existing State Council Regulations only contained a maximum fine of 100,000 RMB.¹⁴⁹ Now the law introduced fines with a maximum of 200,000 and a minimum of 50,000 RMB.¹⁵⁰ The original draft EIA law did not contain the mandatory minimum fines. The NPC Legal Committee decided to insert such minimum sanctions upon suggestions from central level stakeholders within the NPC-SC seeking to strengthen EIA enforcement.¹⁵¹ Amongst the various actors involved in the making of the new law there was no concern for the fact that EPB agents were now obliged to fine 50,000 RMB even for the smallest infractions of the law. For example if a farmer builds a new shed without filling out an EIA form, the EPB must issue a fine of 50,000 RMB, much more than many farmers earn a year. In this aspect the 2002 EIA law has clearly not paid attention to feasibility and adaptability. As argued in Chapter 2, minimum sanction requirements may seriously hamper enforcement work, making

¹⁴⁴ Wang Tao (Vice Director of the NPC-EP Committee), "Guanyu Zhonghua Renmin Gongheguo Huanjing Yingxiang Pingjia Fa (Caoan) de Shuoming," 171

¹⁴⁵ NPC Legal Committee, "Guanyu Zhonghua Renmin Gonghe Guo Huanjing Yingxiang Pingjia Fa Caoan Shenji Jieguo de Bao Gao (Report on the Results of Review of the Draft PRC EIA Law)," 173

¹⁴⁶ NPC-SC Legal Affairs Office, "Gesheng, Zizhiqu, Zhixiashi he Zhongyang Youguan Bumen Dui Huanjing Yingxiang Pingjia Fa Caoan Shenji de Yijiang (Provincial, Autonomous Regions and Provincial Level Cities and Central Level Ministries Opinions on the Draft PRC EIA Law)," 187

¹⁴⁷ NPC Legal Committee, "Guanyu Zhonghua Renmin Gonghe Guo Huanjing Yingxiang Pingjia Fa Caoan Shenji Jieguo de Bao Gao (Report on the Results of Review of the Draft PRC EIA Law)," 174

¹⁴⁸ EIA Law § 31.1

¹⁴⁹ State Council Regulations on EP Management at Construction Projects § 24

¹⁵⁰ EIA Law § 31.1

¹⁵¹ NPC Legal Committee, "Guanyu Zhonghua Renmin Gonghe Guo Huanjing Yingxiang Pingjia Fa Caoan Shenji Jieguo de Bao Gao (Report on the Results of Review of the Draft PRC EIA Law)," 174

enforcement either unreasonable or forcing agents to circumvent such mandatory minimum sanctions.

Findings EIA Law

The lawmaking process of 2002 EIA law thus further demonstrates how central level concerns for environmental protection have recently come to dominate recent lawmaking processes. Although there was considerable opposition to the law itself and some of its most important new features, the NPC Legal Committee supported it and brought it to enactment. The debates on the law's new features demonstrate that there was little true concern for the law's feasibility and adaptability. While this may have some effect on government planning, the worst norms in terms of feasibility and adaptability are the sanction minima which truly seem to be unworkable for local enforcement agents, especially when faced with minor violations by poor regulated actors.

Local Legislation: Yunnan EP Rules are Xeroxed, the Dianchi Protection Rules are rather Strict and Kunming makes its own restaurant rules

Thus, some of the stricter and more specific norms in China's post-1995 national pollution legislation lacks in terms of adaptability and feasibility. This section will analyze the implementability of Yunnan's local environmental legislation.

Yunnan Environmental Protection Regulations

Just as for arable land protection, Yunnan also has its own provincial regulations for environmental protection. The Yunnan Environmental Protection Regulations (YNEPR) were enacted on 25 November 1992, and amended on 2 December 1997. Also similar to land, the provincial regulations are largely no different from national level legislation existing around the time the law was adopted. The local regulations thus also function to disseminate national level legislation to the local level. The YNEPR provisions on PEDF¹⁵², EIA¹⁵³, 3T¹⁵⁴, limited time treatment¹⁵⁵, accidents reporting¹⁵⁶ and sanctions¹⁵⁷ are not substantially different from national law.¹⁵⁸ The provincial regulations do not provide detail on these

¹⁵² YNEPR § 40

¹⁵³ YNEPR § 36, 38, 39

¹⁵⁴ YNEPR § 37, 39.2

¹⁵⁵ YNEPR § 49

¹⁵⁶ YNEPR § 50

¹⁵⁷ YNEPR § 53-61

¹⁵⁸ Compare with 1989 EP Law, the 1995 APPCL and the 1996 WPPCL.

pollution systems, nor do they adapt the national law to local circumstances. There is a difference with land legislation though. While national arable land protection legislation left little room for local legislation, national pollution law (especially around 1997) is not overly specific, thus local regulation could have adapted it easier to local circumstances. In Yunnan, however, there is little truly local about the 1997 provincial environmental protection regulations.

It should be stated however that the YNEPR has some provisions that are different from national law of around 1997. Some are stricter than national law. For instance, the 1997 provincial regulations introduced a mandatory permit system for all enterprises discharging pollutants.¹⁵⁹ This system goes beyond national law that only mandated permits for water pollution in designated total load areas.¹⁶⁰

Other Yunnan provisions are less strict than national legislation. The YNEPR provides regulation for small, highly polluting enterprises including paper and pulp factories that are only allowed to continue operation after approval by the district level EPB.¹⁶¹ While this norm is not directly in violation of national law, the way it has been stated is certainly not what was meant in national policy and regulation that stipulates that heavily polluting enterprises of a certain size must be closed, no exceptions allowed.¹⁶² As the provision is currently worded, it opens up the way for allowing small polluting factories to continue operation, as long as they can meet the discharge standards. For a relatively poor province such as Yunnan, with extremely underdeveloped areas such as Nujiang and Jiaotong Prefectures, closing down small polluting business is not easy and this special rule enabling an exception is no surprise.

Dianchi Protection Regulations

Yunnan has made another important set of environmental protection regulations: the Dianchi Protection Regulations (DPR). These regulations were adopted originally in 1988 in recognition of the severe environmental degradation at Lake Dianchi. In 2001, the Kunming People's Congress amended them and the new rules became operational in 2002.

¹⁵⁹ YNEPR § 35

¹⁶⁰ WPPCL § 16

¹⁶¹ YNEPR § 43

¹⁶² See State Council, "The State Council Regulations concerning the strengthening of Environmental Management of Township and Village and Neighbourhood Enterprises (Guowuyuan Guanyu Jiaqiang Xiangzhen Jiedao Qiye Huanjing Guanli de Guiding)," (1984). and State Council, "State Council Decision on Several Problems concerning Environmental Protection (Guowuyuan guanyu Huanjing Baohu ruogan Wenti de Jueding)." 12

The amendment introduced a stronger institutional structure¹⁶³ (see Chapter 13) with stronger norms to combat pollution¹⁶⁴, lake conversion into land¹⁶⁵, and soil erosion¹⁶⁶. For a local law, the DPR is relatively strict. Where, for instance, national legislation fails to make water pollution discharges excessive of the standards illegal¹⁶⁷, the DPR prohibits such discharge into Lake Dianchi¹⁶⁸. Moreover, all enterprises in the area surrounding the lake must comply with standards and if they fail to do so within a limited period of time shall be ordered to halt production.¹⁶⁹ Here local legislation in Yunnan goes beyond national requirements. This is not surprising as Lake Dianchi is one of the spear points of national policy and there has been continued pressure from the centre¹⁷⁰ as well as an expressed willingness by provincial and municipal policy makers to ameliorate the situation.¹⁷¹ The DPR 2002 also introduced strict rules prohibiting the establishment of highly polluting enterprises including paper factories, chemical factories, and chemical fertilizer factories.¹⁷² The DPR also clearly prohibits *weibaizaotian* practices of converting the lake into land¹⁷³, as occurred on a large scale during the Cultural Revolution.¹⁷⁴ Similar to the 2000 APPCL and the 2002 EIA Law, the 2002 DPR introduces strict sanction provisions with mandatory minimum fines.¹⁷⁵ Although the DPR provides rather strict pollution and erosion control regulations, it should be noted that even this local law has directly copied many of its other norms from national law.¹⁷⁶

Similar to national legislation, there was also a legislative review procedure for the DPR. The debates about the DPR amendment demonstrate that there was little real bargaining between different interests

¹⁶³ DPR § 8-10

¹⁶⁴ DPR § 17.2, 19.2, 20, 21.2, 23, 20, 31, 33, 39, 40

¹⁶⁵ DPR § 15, 32

¹⁶⁶ DPR § 15, 24, 28, 29

¹⁶⁷ See WPPCL

¹⁶⁸ DPR 2002 § 17.2. It is punishable with a maximum fine of 100,000 RMB. DPR § 47

¹⁶⁹ DPR 2002 § 21.2

¹⁷⁰ State Council, "State Council Decision on Several Problems concerning Environmental Protection (Guowuyuan guanyu Huanjing Baohu ruogan Wenti de Jueding)."

¹⁷¹ Kunming People's Congress Committee on Urban and Town Construction and Environmental Protection, *Guanyu Dui Dianchi Baohu Tialoli Xiuding Caoan Shenyi de Yijian* (*Opinion on the Draft Amendment to the Dianchi Protection Regulations*) (22 November 2001 [cited 17 March 2004]); available from

<http://www.kmpg.gov.cn/renda/content.asp?ARTID=910&COLID=163..>

¹⁷² DPR § 19.3

¹⁷³ DPR § 15

¹⁷⁴ Shapiro, *Mao's war against nature: politics and the environment in revolutionary China*.

¹⁷⁵ DPR § 44-46

¹⁷⁶ See for example DPR § 19.1-2 on 3T, § 21.1 on EIA

groups or stakeholders.¹⁷⁷ On the contrary, all debate was geared towards enhancing an effective protection of Lake Dianchi, without apparent eye for economic concerns.¹⁷⁸ This is probably related to the fact that there has been a strong national emphasis on cleaning up lake Dianchi¹⁷⁹ and also that there has been local recognition of the need for protecting and restoring the lake.¹⁸⁰ The DPR lawmaking process and its contents do not seem to reflect other interests though and there is little known as to whether the economic welfare of the region was taken into account when the rules were made.

Kunming Municipal Management Rules on Environmental Pollution Prevention and Control for Restaurants and Food Business (KMREP)

In 2003, the Kunming government promulgated local rules for pollution prevention and control at local restaurants.¹⁸¹ Kunming's rapid urbanization and economic growth have led to a rapid development of restaurants in residential areas. With the increased prosperity, local residents have become more sensitive to disturbances from nearby eateries. In response to local complaints, Kunming has made local rules dealing especially with this problem. China's national lawmaker also recognized this issue, which it regulated in the 2000 APPCL.¹⁸² The Kunming rules provide detail as they contain strict requirements for new restaurants that were no longer allowed to be built underneath residential buildings.¹⁸³ Larger restaurants must carry out a full EIA, while smaller ones must carry out a less extensive form of EIA.¹⁸⁴ The rules also provide that existing restaurants must meet strict

¹⁷⁷ Kunming People's Congress Law Committee, *Guanyu Dui Dianchi Baohu Tialoli Xinding Caoan Shenji Jieguo de Baogao* (Report on the Results of Review on the Draft Amendment to the Dianchi Protection Regulations) (22 November 2001 [cited 17 March 2004]); available from <http://www.kmpg.gov.cn/renda/content.asp?ARTID=911&COLID=163>. Kunming People's Congress Committee on Urban and Town Construction and Environmental Protection, *Guanyu Dui Dianchi Baohu Tialoli Xinding Caoan Shenji de Yijian* (Opinion on the Draft Amendment to the Dianchi Protection Regulations) ([cited]).

¹⁷⁸ Kunming People's Congress Committee on Urban and Town Construction and Environmental Protection, *Guanyu Dui Dianchi Baohu Tialoli Xinding Caoan Shenji de Yijian* (Opinion on the Draft Amendment to the Dianchi Protection Regulations) ([cited]). Kunming People's Congress Law Committee, *Guanyu Dui Dianchi Baohu Tialoli Xinding Caoan Shenji Jieguo de Baogao* (Report on the Results of Review on the Draft Amendment to the Dianchi Protection Regulations) ([cited]).

¹⁷⁹ State Council, "State Council Decision on Several Problems concerning Environmental Protection (Guowuyuan guanyu Huanjing Baohu ruogan Wenti de Jueding)."

¹⁸⁰ Kunming People's Congress Committee on Urban and Town Construction and Environmental Protection, *Guanyu Dui Dianchi Baohu Tialoli Xinding Caoan Shenji de Yijian* (Opinion on the Draft Amendment to the Dianchi Protection Regulations) ([cited]).

¹⁸¹ Kunming Municipal Management Rules on Environmental Pollution Prevention and Control for Restaurants and Food Business (KMREP)

¹⁸² APPCL § 52, 56

¹⁸³ KMREP § 6

¹⁸⁴ KMREP § 7

requirements in order to maintain operation, including specific water, air and noise pollution installations.¹⁸⁵ Furthermore, Kunming restaurants must meet certain air, water and noise standards, dispose of its solid and liquid waste in a certain manner, pay emissions and discharge fees and refrain from using plastic boxes for takeaway, using highly polluting fuels and using phosphor containing cleaning products.¹⁸⁶ The Kunming rules introduce sanctions with a maximum of 100,000 RMB in fines or closure of the establishment.¹⁸⁷ There are even some mandatory minimum sanctions, but only of 500 RMB at most.

Although the Kunming local rules on restaurants may seem strict at first blush, comparing them to some of the national regulation shows that in fact they are not strict at all. As we saw, national law stipulates that enterprises that emit air pollutants above the standards must be fined a minimum of 10,000 RMB. This rule applies to restaurants.¹⁸⁸ In Kunming, we find however that restaurants that fail to meet the air pollution standards can be fined for a maximum of 5000 RMB¹⁸⁹, providing EPB agents with considerable discretion to adapt the law to local circumstances. An EPB agent explained to me that the local rules were partly meant to tackle Kunming's pollution problem, but also to adapt the unreasonably harsh APPCL to Kunming's local conditions. In sum, the KMREP is an example of how local rules adapt national legislation to local circumstances. They do so in an odd manner though, as by the letter of the law, the KMREP are in violation of the APPCL, which dictates a mandatory sanction minimum. The Kunming legislator has created what Cohn calls parallel arrangements that allow them to escape the stringency of the unfeasible national legislation.¹⁹⁰

Conclusion

The lawmaking processes of the three national pollution laws described above demonstrates complex changes. For pollution law we see first of all a shift in emphasis. While at first with the 1995 APPCL the introduction of ambitious norms was stopped by opposed stakeholders, with the 1996 WPPCL, 2000 APPCL and the 2002 EIA the laws' legislators resisted some of such opposition, creating some stricter and more specific norms while leaving others unchanged, vague and weak. In these cases, such resistance was possible because by 1996 and especially by 2000 there was a strong support for environmental protection within the central level leadership, for

¹⁸⁵ KMREP § 8, 11

¹⁸⁶ KMREP § 10

¹⁸⁷ KMREP § 11

¹⁸⁸ APPCL § 48

¹⁸⁹ KMREP § 11.2

¹⁹⁰ Cohn, "Fuzzy Legality in Regulation: The Legislative Mandate Revisited." 479

the first time clearly visible in the 1996 State Council policy document on strengthening pollution control. This support had come after a series of pollution incidents had increased attention for pollution control and forced China's leadership to show their willingness to address this problem in a strong manner.

The shift towards environmental protection was welcome and important. However, in some instances, generally it did not lead to better legislation. First, the new laws continued to contain a significant amount of weak and vague rules. In all three pollution laws studied in detail here, many of the older norms were largely maintained in the new legislation, which copied many norms from existing rules, inheriting their lack of certainty and adequacy. In addition, both the WPCCL and the APPCL never realized some of the most ambitious legislative proposals, a comprehensive permit system in particular, which were watered down in the drafting phase. Second, although stricter and more specific norms enhanced the law's adequacy and certainty, some of these new norms failed to acknowledge China's complexity and therefore are deficient in terms of feasibility and adaptability. This is especially so for the WPPCL's norms on small enterprises, the APPCL's norms prohibiting excessive emissions, and the APPCL and the EIA's high minimum penalty levels. Unfortunately, local regulation has not been able to remedy most of these problems, with the notable exception of Kunming's semi-legal rules on restaurant pollution circumventing the unfeasible sanction minima of the APCCL. Instead, the local DPR, made under the pressure of national policies directed to stop pollution at Lake Dianchi, has only exacerbated the lack of feasibility when making all discharges surpassing the standards illegal and ordering companies that continue to do so to be shut down. As with national legislation, the lawmaking processes for this norm in the DPR, never considered whether it would be feasible in terms of compliance and enforcement.

5. China's Legislative Challenges

Lawmaking and its Effects on Compliance, Enforcement and Goal Attainment

"We are men, not gods," Hart has reminded us in relation to the challenges of lawmaking.¹ Faced with the complexities of modern society, legislators should be humble in what they can hope to achieve. However, citizens place ever-greater demands on the state to protect their ever more differentiated interests and the state has turned to law as an instrument to protect different interests in society. Consequently, instead of humbleness we are now faced with great expectations of what law can do. This is not new. Roscoe Pound wrote in 1917 about the U.S.: "To-day we are almost willing to throw out our hard-worn justice according to law in order to bring speedy and vigorous application of new types of rules securing new interests."² Pound argued that people expect too much of law: "When men demand much of law, when they seek upon it to devolve the whole burden of social control...enforcement of law comes to involve many difficulties. Then few can comprehend the whole field of the law, nor can they do so at one glance." Today, as Bardach and Kagan, in their overview about the growth of protective regulation in the US have shown, the pressure for more and stricter legislation, covering more fields, and protecting more interests is no less than in Pound's time, it is far greater.³ Contemporary legislators are increasingly pressured not to listen to Hart's and Pound's warnings and to regulate more and stricter for increasingly complex situations. Since the second half of the 1990s, China is no different as it followed a path towards more specific and stricter legislation.

This study has analyzed how China changed its natural resource protection legislation in the second half of the 1990s. It has looked at how such changes have come about and how they have affected the law's quality in terms of implementability. In the lawmaking processes studied, a trend towards stricter and more specific legislation was apparent. The process of lawmaking changed; it became less characterized by China's piece meal approach⁴ of incrementalism and bargaining. With the 1998 LMA amendment, most local concerns about locally unfeasible draft stipulations were pushed aside to ensure a strong law to protect China's arable land resources. The history of pollution regulation shows that at first in 1995 with the APPCL amendment the lawmaking process involved a great amount of bargaining and resulted in water downed rather abstract and weak legislation.

¹ Hart, *The Concept of Law*. 124-5

² R. Pound, "The Limits of Effective Legal Action," *International Journal of Ethics* 27 (1917). 151

³ Bardach and Kagan, *Going by the Book, The Problem of Regulatory Unreasonableness*.

⁴ Chen, *Chinese Law, Towards an Understanding of Chinese Law, Its Nature and Development*.

With the 1996 WPPCL, and especially with the 2000 APPCL and the 2002 EIA Law this changed somewhat and environmentalist stakeholders were able to push through stricter and more specific legislation. Both changes came after a fundamental choice within China's national leadership to protect natural resources. Underlying both changes was the idea that stricter and more specific legislation would be more effective to stop ongoing resource abuses.⁵

So how have these changes affected the laws' implementability? In our analysis of the expected effects the new norms have on compliance, enforcement and goal attainment, we found neutral, positive, and negative results. First, the changes in the laws had neutral results as for some norms little was changed. This was especially so for pollution legislation, the 1995 APPCL and the 1996 WPPCL in particular. The extensive bargaining that still took place for these laws meant that ambitious legislative proposals such as a comprehensive permit system never made it into the final draft. In addition, all pollution laws, even the 2002 EIA law and the 2000 APPCL, retained some of the vague and weak legal systems, such as PEDF, and the 3T/EIA system from the 1980s legislation. As a result, in these matters the legislative change did not solve existing problems of adequacy and certainty.

On the positive side, the new natural resource protection legislation is more specific and provides legal certainty. Thus, it reduces discretion, which would seem to enhance its effect. Furthermore, the new legislation has also become stricter, making it better in terms of adequacy.

On the negative side, although the norms have become more specific and certain, such enhanced certainty and adequacy have come at a cost. For some of the provisions in the new legislation one can wonder whether they are adaptable enough to local circumstances. Good examples are the specific norms on basic arable land protection in the LMA, the specific norms prohibiting certain kinds of water discharges in the WPPCL, and the minimum sanctions requirements in the DPR, APPCL and the EIA Law. Moreover, for some of the new stricter rules the local feasibility has come at stake, a point sometimes noticed by dissenting opinions during the legislative process. Here examples include the norms on basic arable land protection and collective construction in the LMA, the norms on small polluting enterprises in the WPPCL, the norm on closing enterprises with a discharge above the standards in the DPR, and the minimum sanction requirements in the APPCL and the EIA law. Chapter 2 argued that implementable law must strike a balance between certainty and adaptability,

⁵ Few scholars oppose to this idea and emphasizes adaptability and feasibility. See for example S.P.S. Ho and G.C.S. Lin, "Non-Agricultural Land Use in Post-Reform China," *China Quarterly* 179, no. September (2004). 777

and between adequacy and feasibility. With the most specific and strictest new legal provisions, this balance seems to have been lost.

Making law that balances certainty and adaptability, and adequacy and feasibility is no easy feat, especially not in China. A first problem is knowing what is feasible and adequate in China. The country's size, its complexity and its speed of change make determining the costs and benefits (both financial and social) of a certain policy decision or of a certain law extremely difficult. Through the amendments of the natural resource protection legislation, China's legislator has attempted to include research on the effects of the law in the lawmaking processes.⁶ For the WPPCL for example, local research in Dalian city was carried out.⁷ One can wonder though what the experiences in a rather developed and rich city such as Dalian mean for other less developed parts of China. Seidman and Seidman propose that the process of lawmaking should include as much social scientific research as possible.⁸ Ideally, such research should look at the expected effects of the law, especially on the regulated actors and its compliance behavior. Apart from the difficulty of doing such research and involving it in the lawmaking process⁹, the question remains what to do if such research provides a complex picture of compliance behavior that cannot be directly translated into specific norms.

This raises the second problem of how to make good legislation in a context of complexity, even when such complexity can be understood. In other words, how can adequacy, feasibility, adaptability and certainty be balanced in a complex context? In China, this is closely related to the spatial dimension to law. In an ideal world, law would work like a map, as De Sousa Santos has taught us.¹⁰ The greater the scope of application the less detail law should provide, the more careful one should be with making strict rules. However, in a country as large as China this would mean that law would become so abstract and weak, as to be completely void of certainty and adequacy. Therefore, it is no surprise that large legal systems¹¹ such as China, but also like European and U.S. federal law, have been relatively specific and strict. Here, the dilemma that large legal systems face reveals itself: making

⁶ For an overview of such research see Asian Development Bank, *Reform of Environmental and Land Legislation in the People's Republic of China*.

⁷ Ibid. 83-88

⁸ Seidman and Seidman, "Using Reason and Experience to Draft Country-Specific Laws."

⁹ For this point see Tamanaha. Tamanaha, "A Pragmatic Approach to Legislative Theory for Developing Countries."

¹⁰ B. De Sousa Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law," *Journal of Law and Society* 14, no. 3 (1987).

¹¹ Obviously, the issue is the amount of complexity that a lawmaker is faced with, which is to a large extent related to the scope of application. Larger legal systems will have laws that have a larger scope of application.

legislation that fits local circumstances but that still is strong enough to have an impact. A country as large and complex as China, with a unitary legal system, that is largely top-down and lacks a system of case law, will face extreme difficulties making implementable law. There is a spatial logic to Chinese law making. The country's size, combined with its unitary system of governance, and its gap between central and local interests and fragmentation of local/functional power holders (see Chapter 13) make the legal system a one-size-shoe that must fit a zoo of different feet. This makes it nearly impossible to make laws that score well in terms of a combination of legal certainty and adaptability, adequacy and feasibility. In practice, we have seen that depending on the importance that China's national leadership accorded to environmental protection, China's natural resource legislation has actually developed along the lines of a dilemma. At first, it was abstract and weak because of extensive bargaining, but without much effect because it lacked direct control. Recently it has become more specific and stricter, based on narrow central functional interests and it was hoped that this would enhance its effectiveness. The question remains though whether a definition of outcomes is sufficient to create legislation that is effective in implementation while it is not adaptable to, and possibly not feasible under local circumstances.

A third problem is that lawmakers sometimes do not care for balancing adequacy, adaptability, feasibility and certainty. In several instances the NPC Legal Committee refused to pay heed to seemingly valid concerns about the local implementability of strict and specific norms because of their lack in feasibility and adaptability. Thus, although the committee could have known that proposed norms would be less implementable, in practice it still adopted them. An explanation¹² is that lawmakers preferred strict and specific norms to feasible and adaptable norms, no matter what their influence on actual implementability was, caring more instead about norms that looked and sounded effective. A series of incidents preceded the changes in lawmaking. For arable land, Brown's alarming report, Li Peng's preparation in participating in the FAO World Food Summit and the national investigation in land resources and Li Peng's promises while at the World Food Summit (see Chapter 3), which were again reported in China, seem to have started a national sense of urgency to stop arable land reductions. For pollution, a series of pollution accidents in 1994, the media attention for severe pollution at the Huai-river in 1994, the overall increased reporting on pollution and the increased environmental awareness, the strengthening of the NPC-EP committee and the issuing of the 1996 State

¹² Another explanation could be that lawmakers did not wish to have implementable legislation and made what Cohn calls "pastiche law". Cohn, "Fuzzy Legality in Regulation: The Legislative Mandate Revisited."

Council document on pollution control¹³, likely led to a similar sense of urgency to tackle China's worsening pollution. These events, especially because of their public character, likely made that China's lawmakers had to demonstrate their willingness to tackle the problems of land loss and pollution. Demonstrating such willingness stands opposed to adopting balanced rules that on paper seem weak and vague. In this manner, these incidents and the sense of urgency they seem to have caused affected the lawmaking process's rationality. The debates on the laws, especially with the 1998 LMA and the 2000 APPCL and the 2002 EIA were less based on a neutral, social scientific, analysis of what is best for the country as a whole or even on what works best to attain the goal of protecting natural resources, and more on an idea, not supported by scientific knowledge, and opposed by local stakeholders and practitioners, but rather popular conventional wisdom that more specific and stringent legislation clearly aiming at natural resource protection should be instituted. The rationality behind more specific and stricter legislation was one of showing that the problem was addressed in a strong manner, not addressing the problem in a realistic way.

Hence, a series of incidents, combined with a political commitment to show improvements, influenced how law is made in China, as it changed its nature from incremental bargaining to coincidental, garbage-can elitism. China's legislative reactions to incidents are not unique and are quite similar to studies from other countries. Western literature has demonstrated that disasters, electoral shifts, cases of legal failure covered in the media, or scandals can all incur a change in the lawmaking process.¹⁴ Bardach and Kagan provide some very telling examples¹⁵ from the United States. One example is a state fire marshal stating that his agency "sometimes intentionally waited until after a particularly dramatic fire to petition the state legislature to enact new fire code requirements and grant the agency more funds and greater powers."¹⁶ Another example is that after a tunnel exploded in California in 1971 killing 17 workers, a "highly publicized legislative investigation" resulted in new legislation introducing "automated enforcement actions."¹⁷ This type of lawmaking also occurred in non-Western contexts. In India, following the Bhopal incident in 1984, a series "of environmental acts, regulations and protocols followed."¹⁸ In Juárez,

¹³ See State Council, "State Council Decision on Several Problems concerning Environmental Protection (Guowuyuan guanyu Huanjing Baohu ruogan Wenti de Jueding)."

¹⁴ Here we have been influenced by Kagan's work on the political influences on enforcement. See for more in Chapter 12. Kagan, "Regulatory Enforcement."

¹⁵ Another well documented example is Berman's analysis of the 1960 and the 1964 making of the US Civil Rights act. See Berman, *A Bill Becomes a Law, Congress Enacts Civil Rights Legislation*.

¹⁶ Bardach and Kagan, *Going by the Book, The Problem of Regulatory Unreasonableness*. 23

¹⁷ Ibid.

¹⁸ Stuligross, "The Political Economy of Environmental Regulation in India." 398

Mexico, the election of a new mayor, following community protest against local pollution, led to new strict local rules banning polluting brick making practices.¹⁹ The tendency to introduce new stricter norms after a disaster was also apparent in Indonesia, following a large explosion at the Indorayon pulp mill in North Sumatra in November 1993, BAPEDAL Minister Sarwono declared that all new Indonesian paper mills would have to use elementary chlorine-free pulping technology.²⁰ Lawmaking can thus react to public incidents, which forces lawmakers to simplify, instead of dealing with a problem in its full complexity.

The analysis of the case of China made above, in Part I of this book, provides several insights about lawmaking in relation to compliance, enforcement and goal attainment. The first is that a framework on the quality of legislation is necessary to help analyze, prepare and thus make laws that have the expected effect once implemented. Although many studies exist on the quality of legislation, a framework of characteristics of implementable legislation does not exist and should be made and tested. The analysis of the existing literature has shown that such a framework should consist of at least four elements: adequacy, feasibility, certainty and adaptability. Second, the quality of lawmaking is closely related to the legislative process. The manner in which lawmaking is prepared, the rationality of such preparation, the drafting and the adoption debates and finally the manner in which stakeholders can participate all influence the final outcome and thus implementability of legislation. A third insight is that making laws that meet all four characteristics of implementability is difficult as they are partly opposed. Therefore, a balance should be sought. A fourth insight is that in a context of complexity finding such balance is not easy. We saw that complexity makes analyzing feasibility and adequacy extremely difficult. In addition, complexity poses an insurmountable contradiction between the four requirements. The more complex the more impossible it is to find a balance. Finally, when lawmaking is done as a reaction to a public incident, the sense of urgency such event creates precludes a full weighing of all complexity and all requirements. The fifth insight is closely related to this. In some cases, lawmakers do not care about social scientific observations about the implementability of legislation. Following incidents or shifts in power, lawmakers may care more for a political rationality showing their willingness to act rather than truly solving the problem at hand. The lesson this teaches is that lawmakers do not necessarily apply whatever scholarship theoretically

¹⁹ World Bank, *Greening Industry, New Roles for Communities, Markets and Governments*. 83, Blackman and Bannister, "Pollution Control in the Informal Sector: the Ciudad Juarez Brickmakers' Project."

²⁰ D.A. Sonnenfeld, "Social Movements, environment, and technology in Indonesia's pulp and paper industry," *Asia Pacific Viewpoint* 39, no. 1 (1998). 102

discovers about the quality of legislation, as they may be more influenced by a political rationality than a social scientific or economic one.²¹ In sum, the challenge in lawmaking is how to create a political environment and a legislative framework that incorporates knowledge about legislative quality and that can work together with legislative experts to create laws that are able to have control over outcomes without sacrificing the law's ability to adapt itself to the complex circumstances it may come to face.

²¹ Snellen, *Boeiend geboeid (Captivated Captured)* (Inaugural Lecture University of Tilburg).

Part II

Compliance and Violation

6. Why People Obey the Law

Regulatory Compliance and Violation, China and Theory

Introduction

Mrs. Li is happy: “I get 2000 RMB; the village collective pays me every year. Now that my husband has passed away, I have sold our land. I can no longer work on it.” She is sitting in her earthen, traditional house where she still lives, unlike many of her co-villagers. The others have built new second houses and get extra income from renting the old one. Mrs. Li’s annual stipend comes from collective profits of leasing village land to privately owned enterprises. She smiles: “I depend on this money.” She does not know that her pension comes from illegal funds. Over the years, Jiacun village has developed its main resource, arable land. It has converted large parts into construction land. As a result, the village and most villagers reap the rewards. However, the 1998 Land Management law strictly forbids some of the land practices carried out in Jiacun, such as families building a second house, or leasing out village land for construction of privately owned factories.¹ “Such laws are logical in Beijing, they want to protect national food security,” Mr. Zhang, one of the village leaders tells me, “but here we just want to develop, who are they to say we cannot.”²

A week later, on the other side of the lake, in Baocun village, Mr. Yang does not know what to do. “Look at my rice. You see, it is red.” He is standing in his rice paddy. Indeed about 60% of his rice kernels are not yellow, but red. A giant phosphor chemical fertilizer plant emits a white smoke and acidic smell, not 500 meters from where we stand. Mr. Yang shrugs and points at the factory. “I know it is their fault, but what can I do? We all depend on them, in many ways.” What Yang means is that all income in Baocun is directly (jobs in the factory) or indirectly (selling farm produce or renting houses to factory workers) related to the dirty giant in the middle of the village. The factory has paid for most infrastructure, has built a school and even pays compensation for pollution related damages, all be it much less than the actual losses. Furthermore, the factory forms an intricate part of the local phosphor economy that provides income for the whole county. It is no surprise that this factory and many others in the region have been able to violate pollution regulation through illegal discharges at night. “Sure, we know, why else would the factory employ more people in the evening than in the afternoon?” Mr. Yang says. Still he has never called the Environmental

¹ LMA §62.1 and 62.3

² Based on fieldwork interviews with villagers and village leadership in Jiacun village, 2004.

Protection Bureau; he knows that strict enforcement may save his rice, but not his livelihood.³

Mrs. Li and Mr. Yang's cases illustrate that law in action at Lake Dianchi is different from the law in the books made in Beijing. China's recent natural resource protection legislation was strengthened to accommodate increasing concerns for nationwide natural resource losses. The recently amended and enacted legislation focuses on national, long-term interests related to natural resource protection and little on short-term local interests related to local economic development. China's legislators seem to believe that more certain and stricter legislation, even if it does not fit local circumstances would be more effective in achieving its goals of protecting resources.⁴ This belief is questionable though. A low level of feasibility and adaptability so it seems will lead to less voluntary compliance and will make implementation costly and enforcement necessary.

Part II of this book continues the study of the influence changes in legislation and enforcement have had on compliance with land and pollution regulation at Lake Dianchi. It looks at why regulated actors have complied or violated the law and to what extent such compliance or violation was influenced by legislation and enforcement efforts. During a year of fieldwork around the lake, a rich collection of relevant data was gathered from which eighteen case studies of compliance and violation could be distilled. This part of the book first relates these case studies in as much detail as possible. The case studies have been further analyzed by structuring findings in each case, based on an analytical framework derived from studies of compliance behavior from elsewhere.

This chapter will introduce the analytical frameworks that are used in these analyses, introducing both existing studies on compliance with land and pollution regulation in China, as well as theories and studies on regulatory compliance from elsewhere.

Previous Studies: Compliance and Violation in China

Although understanding norm conformity is essential for improving the effects of legislation and enforcement, so far there have been surprisingly few empirical studies of compliance and violation behavior related to natural resource protection legislation in China. Both for arable land protection law and pollution control law there have been studies about why so much arable land has been lost or why pollution continues, but few of these studies have linked their findings with the existing legal norms. Furthermore, actual case

³ Based on fieldwork in Baocun village, interviews with villagers, and village leaders 2004.

⁴ Some scholars agree with them, see for example Ho and Lin who believe that the new LMA because of its strictness is better equipped to curb ongoing arable land loss. See Ho and Lin, "Non-Agricultural Land Use in Post-Reform China." 277

studies about the choices that the various regulate communities make about compliance and violation are rare.

Arable Land Protection

For arable land, scholars have tried to find out why so much arable land has been lost in China over the last years.⁵ Several scholars link arable land loss to general trends. For example, in their study of diminishing farmland in the 1990s Han and He state that population growth and real estate development were the most important factors for arable land loss in urban areas.⁶ Other scholars studying trends of arable land loss, including Guo, Zhang, Ho and Lin, argue that continuing arable land loss has been caused by economic development in general and its resulting urbanization and infrastructure development.⁷ In line with this are studies that argue that arable land loss is related to the market opportunities economic development has created.⁸ Thus, Li and Sun's study employing Geographical Information System analysis blames industrialization for arable land loss.⁹ Zhang contends that

⁵ Most do so however, without directly linking this to the LMA. In one study a direct link is made between the LMA's land conversion balancing system, LMA § 31, and the failure to protect arable land well. This study found that most arable land that is converted for non-arable use is of high quality, but the new arable land that is developed to balance it is of low quality. See J. Tang, "Dangqian Gengdi Baohu Gongzuop de Duice yu Jianyi (Current Policy Measures and Recommendations for Arable Land Protection Work)," *Zhongwai Fangdichan Daobao* 2003, no. 7 (2003). 17

⁶ S.S. Han and C.X. He, "Diminishing Farmland and urban development in China: 1993-1996," *GeoJournal* 49, no. 3 (1999). 257 In Chinese studies the link between arable land loss and population is also emphasized, see W. Liu, "Xibu Dakaifa de Gengdi Baohu Zhengce (Arable Land Protection Policy in the Western Development Campaign)," *Zhongguo Tudi Kexue* 15, no. 3 (2001). 10, X. Zhang, D. Xu, and Y. Wu, "Pinkun Xian Gengdi Baohu Silu Ji Duice (Ideas and Remedies about Protecting Arable Land in Poor Districts)," *Guotu Jingji* 2002, no. 9 (2002). 41 See also Ho and Lin, "Non-Agricultural Land Use in Post-Reform China." 762, 765-

⁷ W. Guo, "Woguo Chengshihua Fazhan Zhong de Gengdi Baohu (Protecting Arable Land in Urbanizing China)," *Chengxiang Jianshe* 2003, no. 5 (2003). T. Zhang, "Land Market Forces and the Government's Role in Sprawl," *Cities* 17, no. 2 (2000). Ho and Lin, "Non-Agricultural Land Use in Post-Reform China." 758, 763-4, also looking at secondary urban settlements and arable land loss at page 768 See also He, Ma, and Fan, "Muqian Woguo Gengdi Baohu Mianlin de Zhuyao Wenti Yu Duice (The Most Important Problems China Currently Faces for Arable land Protection and Their Policy Solutions)." 13, Chen, *Nongcun Tudi Falizhidu Yanjiu, Tianye Diaocha Jiedu (Research in the Village Land Legal System, an Analysis on the Basis of Fieldwork)*.38

⁸ S. Sargeson, "Subduing "The Rural House-building Craze": Attitudes Towards Housing Construction and Use Controls in Four Zhejiang Villages," *China Quarterly* 172, no. December (2002).929 She quotes the following sources that argue this: Y. Mao, "Nongcun Zhaijidi Guanli yu Gengdibaohu (The management of rural house sites and protection of farmland)," *Zhejiang Sheng Tudi Xuehui Huikan* 1998, no. 10 (1998).

⁹ X. Li and L. Sun, "Driving Forces of Arable Land Conversion in China," *ILASA Interim Report* IR-97-076/Sept (1997). 2

village development depends on converting arable land for construction, and that this is an unstoppable process ongoing both in richer and poorer villages.¹⁰ Other scholars link economic growth and market opportunities to the decentralized institutional arrangements (see Chapter 13) under which local governments could benefit from violating the arable land legislation.¹¹ Cai for example finds that as village cadres have deciding power in many land conversion issues they have had the opportunity for “predatory behavior” to profit from construction because there is a high degree of local autonomy.¹² Other examples are Skinner et alia’s and Zhang’s studies that hold that the *de facto* institutional devolution (See Chapter 13) gives local governments the opportunity to reinterpret national land protection legislation undermining its implementation and sustaining local economic growth while diminishing arable land.¹³ Ho and Lin argue that official land conversion procedure is not followed because of tax evasion and other benefits related to illegal land transfer.¹⁴ Their study further contends that illegal land loss has been caused by weak enforcement and short-term revenue attainment.¹⁵ Ho and Lin further link arable land loss with land tenure security, arguing that as long as there is no tenure security farmers will be less inclined to protect arable land.¹⁶ Several scholars agree that the

¹⁰ W. Zhang, "Nongcun Jianshe Yongdi Shiyong Quan Zhidu de Faxue Fenxi (A Legal Analysis of Village Land Construction Rights)," in *Nongcun Tudi Falüzhidu Yanjiu, Tianye Diaocha Jiedu (Research in the Village Land Legal System, an Analysis on the Basis of Fieldwork)*, ed. X e a Chen (Beijing: Zhongguo Zhengfa Daxue Chubanshe, 2003).236-8

¹¹ Sargeson, "Subduing "The Rural House-building Craze": Attitudes Towards Housing Construction and Use Controls in Four Zhejiang Villages."929, quoting J. Yan, "Nongmin Jianfang Yongdi Zhon de "Cunpi Xianxiang Toushi (The Phenomenon of 'village approval'for farmers'use of land for housing construction)," *Cunzhen Jianshe* 1999, no. 11 (1999).41 See also Y. Wang, "Gengdi Baohu Yu Zhengfu Zhineng de Xiangguanxing Fenxi (A Relational Analysis of Arable Land Protection and Governmental Powers)," *Nongye Jingji Wenti* 2004, no. 4 (2004). 57

¹² Y. Cai, "Collective Ownership or Cadres' Ownership? The Non-agricultural Use of Farmland in China," *China Quarterly* 175, no. September (2003).665 This view resonates with He et al., see He, Ma, and Fan, "Muqian Woguo Gengdi Baohu Mianlin de Zhuyao Wenti Yu Duice (The Most Important Problems China Currently Faces for Arable land Protection and Their Policy Solutions)." 13

¹³ M.W. Skinner, R.G. Kuhn, and A.E. Joseph, "Agricultural Land Protection in China: A Case Study of Local Governance in Zhejiang Province," *Land Use Policy* 18 (2001).329 Zhang, "Land Market Forces and the Government's Role in Sprawl."

¹⁴ S.P.S. Ho and G.C.S. Lin, "Emerging Land Markets in Rural and Urban China: Policies and Practices," *China Quarterly* 175, no. September (2003). 703-4

¹⁵ Han and He, "Diminishing Farmland and urban development in China: 1993-1996." 257 See also He, "Gengdi Baohu Ying Zuodao "Liu Ge Bixu" (The "Six Must Be Dones"of Arable Land Protection)."40

¹⁶ Ho and Lin, "Emerging Land Markets in Rural and Urban China: Policies and Practices." 703, see also Sargeson, "Subduing "The Rural House-building Craze": Attitudes Towards Housing Construction and Use Controls in Four Zhejiang Villages."quoting P. Ho, "Who

existing institutional structure further weakened enforcement, which is an important factor for explaining continuing arable land losses.¹⁷ Some scholars look at farmers' perceptions when explaining ongoing land loss. Sargeson argues that arable land loss due to rural housing construction is the result of "families' demographic and social aspirations".¹⁸ Another finding in Sargeson's study is that arable land loss continues because peasants perceive farming as unprofitable and secondly that farmers do not support the arable land conservation goals of the law.¹⁹ This resonates with Ceng's study about the protection of arable land in Xinjiang Autonomous Region that emphasizes the lack of public awareness as a main cause for continuing land loss.²⁰

In sum, these studies seek to explain arable land loss practice, offering both general factors related to trends external to the norm addressee, as well as specific factors closely related to the norm addressee. Unfortunately, few of them link their analyses with the existing legislative framework and with the regulated actors' reaction to the legislation.

Pollution Prevention and Control

For pollution control legislation in China, studies about compliance and violation behavior are also rare.²¹ There are many studies about pollution behavior though. Most studies focus on the polluter's external institutional environment. Of these studies, most scholars, including Bachner and Johnson link pollution with the legal system, arguing that it continues

Owens China's Land? Policies, Property Rights and Deliberate Institutional Ambiguity," *China Quarterly* 166, no. June (2001). G. Feder et al., "The Determinants of farm investment and residual construction in post-reform China," *Economic Development and Cultural Change* 42, no. 1 (1992). C. Shang, "Woguo Nongcun Tudi Zhidu Zhong Cunzai de Ruogan Wenti (Some Problems occurring in China's rural land System)," *Shantou Daxue Bao* 1998, no. 4 (1998). L. Zhu and Z. Jiang, "From Brigade to village community: the land tenure system and rural development in China," *Cambridge Journal of Economics* 17, no. 4 (1993).

¹⁷ Han and He, "Diminishing Farmland and urban development in China: 1993-1996." 257 See also T. He, "Gengdi Baohu Ying Zuodao 'Liu Ge Bixu' (The 'Six Must Be Dones' of Arable Land Protection)," *Zhongguo Tudi* 2004, no. 9 (2004).⁴⁰ He, Ma, and Fan, "Muqian Woguo Gengdi Baohu Mianlin de Zhuyao Wenti Yu Duice (The Most Important Problems China Currently Faces for Arable land Protection and Their Policy Solutions)." 13

¹⁸ Sargeson, "Subduing 'The Rural House-building Craze': Attitudes Towards Housing Construction and Use Controls in Four Zhejiang Villages." 931

¹⁹ Ibid. 954

²⁰ Q. Ceng, "Qianghua Gengdi Baohu Yishi, Cujin Gengdi Shuliang He Suliang de Tigao (Strengthening Arable Land Protection Awareness to Increase the Quantity and Quality of Arable Land)," *Xinjiang Nongye Keji* 1995, no. 4 (1995). 13

²¹ Ma and Ortolano, form a notable exception, as they truly make a study of compliance and violation behavior. X. Ma and L. Ortolano, *Environmental Regulation in China* (Landham: Rowman & Littlefield Publishing Group, 2000).

because of weak law enforcement.²² In addition, scholars, including Ma and Ortolano hold that pollution continues because of the law's weak incentives for pollution abatement²³, partly the result of vague legislation.²⁴ Most of the studies looking at the external context find fault with the decentralized environmental governance structure that has enabled local governments to choose short-term economic concerns over pollution control.²⁵ Zhang Lei's

²² Johnson, *Clear Water, Blue Skies: China's Environment in the New Century*. 60-1 C. Yang, J. Head, and S. Liu, "China's Treatment of Crimes Against the Environment: using criminal sanctions to fight environmental degradation in the PRC," *Journal of Chinese Law* 8, no. 2 (1994).677, B. Bachner, "Regulating Pollution in the People's Republic of China: An Analysis of the Enforcement of Environmental Law," *Colorado Journal of International Law and Policy* 7, no. 2 (1996).407, See also H. Sims, "One-fifth of the Sky: China's Environmental Stewardship," *World Development* 28, no. 7 (1999). 1235-6, L. Zhang, "Ecologizing Industrialization in Chinese Small Towns" (PhD Thesis defended at Wageningen University, 2002). 185, C.W.H. Lo, P.K.T. Yip, and K.C. Cheung, "The Regulatory Style of Environmental Governance in China: The Case of EIA in Shanghai," *Public Administration and Development* 20, no. December (2000). 314

²³ Ma and Ortolano, *Environmental Regulation in China*. 91-2, 111-2, Sun, "Controlling the Environmental Consequences of Power Development in the PRC."1046-7, Alford and Shen, "Limits of the Law in Addressing China's Environmental Dilemma." 137, Railton, "The Rhetoric and Reality of Water Quality Protection in China." 873. The World Bank found that in places where there was an effective levy pollution levels did decrease. See Johnson, *Clear Water, Blue Skies: China's Environment in the New Century*. 60 But another World Bank study did not find a correlation between pollution levy and compliance, see S. Dasgupta et al., "Industrial Environmental Performance in China, The Impact of Inspections," *World Bank Policy Research Working Paper* 2000, no. 2285 (2000). 3

²⁴ See Li, "China's Compliance with WTO Requirements Will Improve the Efficiency and Effective Implementation of Environmental Laws in China." 165, Alford and Shen, "Limits of the Law in Addressing China's Environmental Dilemma." 134, P. Howlett, "Striking the Right Balance: The Contrasting Ways in Which the United States and China Implement National Projects Affecting the Environment," *Missouri Environmental Law and Policy Review* 12 (2004).34, Orts, "Environmental Law With Chinese Characteristics." 561, Sims, "One-fifth of the Sky: China's Environmental Stewardship."1235, H. Wang and B. Liu, "Policymaking for Environmental Protection in China," in *Energizing China, Reconciling Environmental Protection and Economic Growth*, ed. M B McElroy, C P Nielsen, and P Lydon (Cambridge (Massachusetts): Harvard University Press, 1998). 400, T. Panayotou, "The Effectiveness and Efficiency of Environmental Policy in China," in *Energizing China, Reconciling Environmental Protection and Economic Growth*, ed. M B McElroy, C P Nielsen, and P Lydon (Cambridge (Massachusetts): Harvard University Press, 1998). 443-5, Jahiel, "The Contradictory Impact of Reform on Environmental Protection in China." 94. As we have seen in Section II, since 1996 there have been improvements in Chinese environmental law and the vagueness and weakness has decreased. In contrast with most studies, Ferris and Zhang have argued that low implementation is partly caused by the legislation's "aspirational character" and its impracticality. See R.J. Ferris and H. Zhang, "Reaching out to the Rule of Law: China's Continuing Efforts to Develop an Effective Environmental Law Regime," *William and Mary Bill of Rights Journal* 11 (2003). 599. As we will show below we agree with this point for certain cases.

²⁵ See Railton, "The Rhetoric and Reality of Water Quality Protection in China." 872, Sun, "Controlling the Environmental Consequences of Power Development in the PRC.", Johnson,

study contends that the role of township governments is important, once township officials become more inclined to environmental protection, smaller enterprises will clean up.²⁶ Another finding about the external context of pollution control is that the lack of public participation and local community pressure has correlated with continued pollution.²⁷

There are also studies that focus on the polluter itself. Several authors, including Johnson and Fryxell and Lo state that the type of industry affects pollution behavior, finding that larger plants comply better, and furthermore that state-owned enterprises do better than private firms do.²⁸ In contrast, Ma and Ortolano also look at the influence of ownership on compliance. Their research shows that TVEs comply better with the PEDF system, while for other norms both State Owned Enterprises (SOEs) and

Clear Water, Blue Skies: China's Environment in the New Century, Ma and Ortolano, *Environmental Regulation in China*, Howlett, "Striking the Right Balance: The Contrasting Ways in Which the United States and China Implement National Projects Affecting the Environment." 34, Ferris and Zhang, "Reaching out to the Rule of Law: China's Continuing Efforts to Develop an Effective Environmental Law Regime." 595, Zhang, "Ecologizing Industrialization in Chinese Small Towns".183-5. Jahiel, "The Contradictory Impact of Reform on Environmental Protection in China.", A.R. Jahiel, "The Organization of Environmental Protection in China," in *Managing the Chinese Environment*, ed. R L Edmonds (Oxford: Oxford University Press, 1998 (reprinted in 2000)). This issue is often called local protectionism and will be further discussed in Chapter 14 and 15. See also Tang et al.'s study that tries to link perceived enforcement effectiveness with enforcement style. This study found that external influences had a negative impact on the perceived effectiveness. S.-Y. Tang, C.W.H. Lo, and G.E. Fryxell, "Enforcement Styles, organizational commitment, and enforcement effectiveness: an empirical study of local environmental protection officials in urban China," *Environment and Planning* 35 (2003).75

²⁶ Zhang, "Ecologizing Industrialization in Chinese Small Towns".181-3

²⁷ Johnson, *Clear Water, Blue Skies: China's Environment in the New Century*. 61 In contrast, another World Bank study has found that citizen complaints can only help to control the most visible and social welfare related violations. See S. Dasgupta and D. Wheeler, *Citizen complaints as environmental indicators: evidence from China* (Washington: The World Bank, 1997). 15, S.-Y. Tang et al., "Institutional Constraints on Environmental Management in Urban China: Environmental Impact Assessment in Guangzhou and Shanghai," *China Quarterly*, no. 152 (1997), S.-Y. Tang, C.-p. Tang, and C.W.H. Lo, "Public Participation and Environmental Impact Assessment in Mainland China and Taiwan: Political Foundations of Environmental Management," *The Journal of Development Studies* 41, no. 1 (2005). Ferris and Zhang, "Reaching out to the Rule of Law: China's Continuing Efforts to Develop an Effective Environmental Law Regime."596-7

²⁸ Johnson, *Clear Water, Blue Skies: China's Environment in the New Century*. 62, Alford and Shen, "Limits of the Law in Addressing China's Environmental Dilemma." 137, G.E. Fryxell and C.W.H. Lo, "Organizational Membership and Environmental Ethics: A Comparison of Managers in State-owned Firms, Collectives Private Firms and Joint Ventures in China," *World Development* 29, no. 11 (2001).1941, 1953 Jahiel's study agrees with this finding that pollution fee compliance was much lower with TVEs than with larger SOEs. Jahiel, "The Contradictory Impact of Reform on Environmental Protection in China."88. Xu has argued similarly. See H. Xu, "Environmental Policy and Rural Industrial Development in China," *Human Ecology Review* 6, no. 2 (1999). 75

TVEs have violated the law but for different reasons, SOEs because of financial problems and TVEs for lack in environmental management capabilities.²⁹ In Fryxell and Lo's study of firm attitudes towards environmental protection, a surprising high amount of firm management environmental commitment is found. Furthermore, this study shows that firms have not been able to translate this commitment into action because of obstacles including the high costs of abatement and "doubts about the economic benefits of environmental awareness."³⁰ Zhang's study confirms their findings about financial concerns, as she argues that there is a correlation between better the firm's financial capability and its environmental protection.³¹ Ma and Ortolano also look at what they call "informal rules that affect compliance" and find that Chinese cultural values of *guanxi* (interpersonal networks), *mianzi* (face) and the Confucian emphasis on status (*zhengming*) has influenced compliance and violation behavior.³²

For pollution compliance and behavior, these studies have indicated external and internal factors. However, few of the studies, with the exception of Ma and Ortolano and Sinkule and Ortolano³³, have linked compliance and violation behavior to the content of the legislation and its relation to local interests and local attitudes about such legislation. This is a pity because understanding compliance is essential for making legislation that is more implementable and for enhancing enforcement.

Kagan and Scholz's Three Perspectives

As an introduction to the main analytical framework used to structure and analyze the case studies in subsequent chapters, Kagan and Scholz's general ideas on compliance and violation are important. Kagan and Scholz argue there are three general perspectives to study compliance and violation.³⁴ The first perspective stresses that behavior can be explained through rational choice theory and that the motivation for compliance and violation can be analyzed through a cost benefit analysis.³⁵ Under this perspective, when legislation brings more costs than benefits for the regulated actor there will be more violation and less voluntary compliance. The central assumption in this perspective is that compliance and violation behavior is rational and that it is based on the regulated actor's weighing of the perceived costs and

²⁹ Ma and Ortolano, *Environmental Regulation in China*. 144-9

³⁰ Fryxell and Lo, "Organizational Membership and Environmental Ethics: A Comparison of Managers in State-owned Firms, Collectives Private Firms and Joint Ventures in China." 1952

³¹ Zhang, "Ecologizing Industrialization in Chinese Small Towns". 93, 110

³² Ma and Ortolano, *Environmental Regulation in China*. 77-93

³³ See Ibid.

³⁴ Kagan and Scholz, "The "Criminology of the Corporation" and Regulatory Enforcement Strategies."

³⁵ Ibid. 69-70

benefits.³⁶ The rational choice perspective to organizational compliance and violation behavior can be operationalized into four types of costs and benefits as seen in the perspective of the organization: the costs related to compliance, the benefits related to compliance, the costs related to violation and the benefits of violation.³⁷ An emphasis on different costs and benefits leads to a different rational choice about compliance or violation.

There has been substantial criticism on the rational choice perspective to compliance and violation, first, by those who state that compliance behavior is not rational. Regulated actors suffer from irrationality. For regulated actors that are organizations, as many will be in case of regulatory law, irrationality may exist because of a sub-optimum internal management processes.³⁸ A second point of criticism is that rational-choice does not explain the high level of voluntary compliance with rules for which violation does not bring much costs because the level of enforcement is low.³⁹ Both points of criticism form the basis for the other two perspectives on compliance and violation in Kagan and Scholz's approach: moral standards and competence.

The second perspective Kagan and Scholz describe for explaining the motivation for compliance and violation is based on the moral values of the regulated actor.⁴⁰ This perspective views behavior as moral and understands compliance and violation as the result of parallel or contradicting moral values of the regulation and the norm addressee.⁴¹ This perspective focuses on moral interests rather than economic concerns, when actors do not agree with legislation based on moral grounds there will be a higher chance of violation. This perspective questions the assumption that compliance and violation are purely amoral rational cost-benefit processes. If

³⁶ A.M. Polinsky and S. Shavell, "Public Enforcement of Law," in *Encyclopedia of Law and Economics, Volume V. The Economics of Crime and Litigation*, ed. B. Bouckaert and G. De Geest (Cheltenham: Edward Elgar, 2000), 308.

³⁷ H.M. Klaassen, "Nalevingsgedrag; verschillen tussen burgers en bedrijven (Compliance Behavior, differences between citizens and companies)," *Justitiële Verkenningen*, no. 2 (1999), 52-3.

³⁸ In Chapter 3 we discussed theories of public decision making including Simon's bounded decision making and Cohen, March and Olsen's Garbage Can Model or Kingdon's policy streams all of which question an organization's ability to come to a full rational weighing of costs and benefits when making a decision. This also applies to the point made here. See Cohen, March, and Olsen, "A Garbage Can Model of Organizational Choice," Kingdon, *Agendas, Alternatives and Public Policies*, Simon, *Administrative Behavior*.

³⁹ Huisman, *Tussen Winst en Moraal, Achtergronden van Regelnaleving en Regelovertreiding door Ondernemingen (Between Profit and Morality, The Backgrounds to Enterprise Compliance and Violation)*.

⁴⁰ Kagan and Scholz, "The 'Criminology of the Corporation' and Regulatory Enforcement Strategies." 74

⁴¹ Ibid. 74-5 Huisman, *Tussen Winst en Moraal, Achtergronden van Regelnaleving en Regelovertreiding door Ondernemingen (Between Profit and Morality, The Backgrounds to Enterprise Compliance and Violation)*. 232

this were the case, the moral perspective asks, why is compliance with costly regulation so widespread?⁴² The moral perspective's answer is that there are many rules that concern moral interests that are important for the norm-addressee.⁴³ The moral perspective argues that unreasonable legislation allows actors to violate it and creates a slimmer chance for compliance.⁴⁴

Kagan and Scholz's third perspective focuses on the regulated actor's competence.⁴⁵ This perspective holds that violation and compliance should be analyzed in terms of the ability to comply or violate. It is different from the moral and the rational-choice perspective because it does not explain the motivation but the opportunity for compliance and violation.⁴⁶ As Huisman writes: "Violation of law (following this perspective) thus derives from not being able to comply instead of not being willing to."⁴⁷ Rules that require the impossible or rules that are difficult to comply with will lead to more violation and less or no compliance. So part of the ability to comply with the law comes from the law itself.

Kagan and Scholz's three perspectives offer a general approach to understanding why actors comply or violate the law. In order to structure and analyze the case-based data a more specific framework of analysis is needed however.

Internal Variables

As a further specification, compliance theories distinguish several important variables that help explain compliance and violation of regulatory law. These variables can be grouped according to how they are related to the regulated actor: internal variables and external variables. It should be noted though that such distinction is not absolute, there is some amount of overlap, and there are mutual influences between external and internal variables. Internal variables include the regulated actor's the manner of cost-benefit analysis, ethical norms, social responsiveness, amount of financial, and technical resources and size.

⁴² J. Braithwaite, *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989). 349

⁴³ Huisman, *Tussen Winst en Moraal, Achtergronden van Regelnaleving en Regelovertreding door Ondernemingen* (Between Profit and Morality, The Backgrounds to Enterprise Compliance and Violation). 234

⁴⁴ Kagan and Scholz, "The "Criminology of the Corporation" and Regulatory Enforcement Strategies." 75

⁴⁵ Ibid. 80-1

⁴⁶ For these terms see Coleman, "Toward an Integrated Theory of White-Collar Crime."

⁴⁷ Huisman, *Tussen Winst en Moraal, Achtergronden van Regelnaleving en Regelovertreding door Ondernemingen* (Between Profit and Morality, The Backgrounds to Enterprise Compliance and Violation).

Manner of Cost-Benefit Analysis

Different regulated actors have different ways of measuring costs and benefits relevant for the rational choice perspective of what motivates actors to comply with or break the law. These differences are firstly related to the regulated actor's (organizational) goals, by which costs and benefits are determined.⁴⁸ Measuring cost-benefits is not always financial. Not all regulated actors are profit oriented; especially public or social organizations will have non-profit goals, but even private firms have secondary goals not related to making money.⁴⁹ These regulated actors may not measure costs and benefits of compliance and violation in a financial manner, but based on other criteria such as social and public accomplishments instead.

Even for purely profit-oriented regulated actors there are differences in how costs and benefits are measured. Scholarship distinguishes the short-term perspective and the long-term perspective. Short-term oriented actors will violate a rule if this provides a direct benefit, without looking at the possible costs of violation in the long run. Long-term oriented actors will look at the total costs and benefits of their behavior in the long run, which are more likely to include the costs of violation such as having to pay for sanctions or image loss.⁵⁰ Another distinction is that between profit maximization and loss minimization. The former means that a regulated actor will violate the law if it brings any profit, and the latter means that violation will only occur if compliance leads to losses.⁵¹ Law and economics scholarship further distinguishes between risk preferring and risk averse actors; the latter can be influenced to comply with the law with less probable costs of violation than those preferring risks.⁵²

In a developmental context, there is a higher chance that poverty and the related need for daily survival pressure regulated actors into a short-term cost benefit perspective, which may negatively influence compliance of norms restricting income. This can even happen when such violations affect their long-term income security. An illustration is Auer et al.'s work on logging violations: "Poor people who live in and near forests also participate in illegal logging; many depend on it for their livelihood. In fact, these

⁴⁸ Again this is an insight also noted in Public Administration see J.Q. Wilson, *Bureaucracy, what government agencies do and why they do it* (New York: Basic Books, 1989)..

⁴⁹ Huisman, *Tussen Winst en Moraal, Achtergronden van Regelnaleving en Regelovertreding door Ondernemingen* (Between Profit and Morality, The Backgrounds to Enterprise Compliance and Violation). 144-5

⁵⁰ Ibid. 143

⁵¹ G. Slapper and S. Tombs, *Corporate Crime* (Harlow: Longman, 1999). 134

⁵² See Polinsky and Shavell, "Public Enforcement of Law."

artisanal scale illegal loggers hurt their own long-term interests by degrading the resource base they rely on.”⁵³

Ethical Norms of the Regulated Actor or its Organizational Management

A second internal variable for explaining regulatory compliance are the regulated actor's moral and ethical attitudes towards compliance.⁵⁴ For regulated actors that are organizations, especially the attitudes of their management are important. Kagan and Scholz have emphasized that the private law-abiding attitudes of managers of organizations also reflected upon their professional behavior in the organization.⁵⁵ Moreover, Clinard's study found that the ethical norms of management determined an organization's norm conformity.⁵⁶ A good non-Western illustration is Chege Kamau's study of environmental regulation in Kenya showing that companies with a pro-environmental and law-abiding attitude complied beyond existing norms, even when there were no regulatory or community pressures, while companies without such moral attitudes, directly discharged into the local environment, in violation of local norms.⁵⁷

In contexts where general non-compliance is widespread, violation of law, instead of law-abiding behavior may become the ethical norm. Such general non-compliance may exist especially in countries where the state and its legal system have a low level of legitimacy and acceptance. If most break the law, violation becomes acceptable and a culture of violation develops. Fjeldstad and Semboja's research about Tanzanian tax evasion, which found that those who had many peers that evaded taxes were also more likely to evade taxes themselves, is a case to this point.⁵⁸

Social Responsiveness

Another internal variable for explaining regulatory norm conformity concerns the degree of social responsiveness of organization-type regulated actors. The concept of social responsiveness comes from the Dutch

⁵³ M.R. Auer et al., "Forest Law Enforcement and Governance: Resolve Needed from All Sides," *Georgetown Public Policy Review* (2006 (Forthcoming)). 3

⁵⁴ Huisman, *Tussen Winst en Moraal, Achtergronden van Regelnaleving en Regelovertrekking door Ondernemingen (Between Profit and Morality, The Backgrounds to Enterprise Compliance and Violation)*. 263-4

⁵⁵ Kagan and Scholz, "The "Criminology of the Corporation" and Regulatory Enforcement Strategies." 76

⁵⁶ M.B. Clinnard, *Corporate Ethics and Crime; The Role of Middle Management* (Beverly Hills: Sage Publications, 1983). 35

⁵⁷ E. Chege Kamau, "Environmental Law and Self-Management by Industries in Kenya," *Journal of Environmental Law* 17 (2005).

⁵⁸ Fjeldstad and Semboja, "Why People Pay Taxes: The Case of the Development Levy in Tanzania."

criminologist Van de Bunt⁵⁹, but derives some of its ideas on the work of Braithwaite on responsiveness.⁶⁰ It indicates “an organization’s ability to respond to existing social expectations, without ignoring its own responsibilities to its social context.”⁶¹ Van de Bunt provides two aspects of social responsiveness. First is the cognitive aspect, which means that responsive organizations have “an adequate perception of the possible dangers the organization’s operation may have for its context and a good inventory of the different social interests.”⁶² Second, social responsive organizations act based on this knowledge and consider carefully what effects their operation may have on their social context.⁶³

According to Van de Bunt, unresponsive organizations will have a higher chance of violating the law.⁶⁴ He argues that organizations that are inwardly oriented underestimate the social consequences of violation, they are insufficiently aware of the interests that the norm protects and may even not be aware of the norms themselves. In addition if the regulated actor’s interests are strongly opposed to existing social concerns laid down in the law, unresponsive actors will be easier inclined to violation.⁶⁵ Finally, and this follows logically from Van de Bunt’s other points, unresponsive actors will be less susceptible to outside pressures either from social protest or state enforcement.

Socially responsive organizations can be distinguished by their openness to their external context. There are many variables to make such distinction, including the manner in which information is managed, the internal cohesion within the organization,⁶⁶ the extent to which the organization’s operation is visible to the outside world, the extent to which the organization depends on its social context for its operation⁶⁷, and the extent to which the social context can participate in the decision making of the organization.

Resources to Comply and Size of the Regulated Actor

Another internal variable is the regulated actor’s amount of resources to comply. Actors lacking the (financial, technical, informational and human)

⁵⁹ H.G. Van de Bunt, *Organisatiecriminaliteit (Organizational Crime)* (Arnhem: Gouda Quint, 1992).

⁶⁰ Braithwaite, *Crime, Shame and Reintegration*.

⁶¹ Van de Bunt, *Organisatiecriminaliteit (Organizational Crime)*. 19

⁶² Ibid. 20

⁶³ Ibid.

⁶⁴ Ibid. 21

⁶⁵ Ibid. 21

⁶⁶ Van de Bunt only mentions the first two. Ibid.

⁶⁷ Braithwaite makes this point. See Braithwaite, *Crime, Shame and Reintegration*. 136

resources necessary for compliance will be more likely to violate.⁶⁸ Compliance with regulatory law often costs money, however even if regulated actors have sufficient financial resources, they may still not be able to. Regulated actors may lack trained personnel to comply with norms demanding a high level of technical expertise; or they may not know or understand the law's norms. Dasgupta et al.'s study of pollution compliance in Mexico found for example that worker education contributes significantly to higher compliance rates.⁶⁹

For organizations, a regulated actor's ability to comply with the law is closely related to its size.⁷⁰ There has been some debate in the literature on regulatory law in the West about whether larger or smaller sized actors have a higher chance to comply. One strand of theory holds that larger organizations are more competent to comply with the law as they have more resources, which allows for investment in compliance and training specialized compliance personnel.⁷¹ Moreover, larger organizations are more motivated to comply with the law to protect their reputation.⁷² In contrast, several studies have demonstrated that larger organizations can use their resources and power to postpone compliance or even hide violation or to protect them against enforcement.⁷³ Especially large enterprises that are dominant employers—meaning that they are responsible for a significant amount of income in a given area—have a large amount of power when

⁶⁸ Huisman, *Tussen Winst en Moraal, Achtergronden van Regelnaleving en Regelovertreding door Ondernemingen* (Between Profit and Morality, The Backgrounds to Enterprise Compliance and Violation). 171

⁶⁹ World Bank, *Greening Industry, New Roles for Communities, Markets and Governments*. 91, S. Dasgupta, R.E.B. Lucas, and D. Wheeler, "Small Plants, Pollution and Poverty: New Evidence from Brazil and Mexico," *World Bank Policy Research Working Paper* (1998).

⁷⁰ Huisman, *Tussen Winst en Moraal, Achtergronden van Regelnaleving en Regelovertreding door Ondernemingen* (Between Profit and Morality, The Backgrounds to Enterprise Compliance and Violation). 225

⁷¹ S. Dasgupta, H. Hettige, and D. Wheeler, "What Improves Environmental Compliance? Evidence from Mexican Industry," *Journal of Environmental Economics and Management* 39 (2000). 59 M.M.J. Arts et al., "Bestuurlijke Risico's bij een beperkte toelating van afvalstoffenbedrijven (Administrative Risks of a Limited Authorization of Waste Disposal Companies)," *Publicatierieks Afvalstoffen, Ministerie van Vrom, Den Haag*, no. 43 (1998), J.F. DiMento, "Can Social Science Explain Organizational Noncompliance with Environmental Law?" *Journal of Social Issues* 45, no. 1 (1989). 70

⁷² DiMento, "Can Social Science Explain Organizational Noncompliance with Environmental Law?"

⁷³ D. Vaughan, *Controlling Unlawful Organizational Behavior: Social Structure and Corporate Misconduct* (Chicago: Chicago University Press, 1983). 139 and M. Punch, *Dirty Business: Exploring Corporate Misconduct, Analysis and Cases* (London: Sage Publications, 1996). 222, R.A.v.d. Peppel, *Naleving van milieurecht; Toepassing van beleidsinstrumenten op de Nederlandse Verfindustrie* (Compliance with environmental law, application of policy instruments to the Dutch paint industry) (Deventer: Kluwer, 1995). 285

confronted with local law enforcement agents or local communities, thus making it easier for them to violate the law.⁷⁴ Larger size also negatively influences compliance as larger organizations have less control over internal information flows and over individual conduct of employees.⁷⁵

Studies about pollution in non-Western countries have also found that size matters. A study in Brazil and Mexico found for example that small plants pollute more per unit of output than large plants, and because of their small size have more difficulty reducing pollution and complying with more stringent legislation. Frijns and Van Vliet bring similar findings for small industries in Kenya⁷⁶, as did Suligross's study of pollution control in India :

"Pollution abatement is a business expense. This cost can be substantial for the 90 percent of Indian industrial firms that employ twenty-five or fewer workers... If firms were forced to make an additional investment in new technologies, many would be forced out of business. This would lead to greater unemployment for all and, since most factory workers are low-wage earners, the hardest hit would be the poor."⁷⁷

Given the large amount and the economic importance of smaller, informal firms in non-Western countries, achieving regulatory compliance there will be extra challenging. A study by Wells, quoted by the World Bank found for example that in Mexico, only 4-6% of the smaller plants had the ability to monitor their own pollution.⁷⁸ In addition, the regulated actor's information about the law is bound to be lower in most non-Western developing countries with a low level of education and literacy rate, with differences between a variety of spoken vernaculars and the official written language, a large number of smaller regulated actors that need to be informed, and a weak legal system with weak mechanisms for legal dissemination.

⁷⁴ Kagan, Gunningham, and Thornton, "Explaining Corporate Environmental Performance: How does regulation matter?" 69, M. Huq and D. Wheeler, "Pollution Reduction Without Formal Regulation: Evidence From Bangladesh," *World Bank Policy Research Working Paper* 1993-39 (1993).

⁷⁵ Huisman, *Tussen Winst en Moraal, Achtergronden van Regelgeving en Regelovertrekking door Ondernemingen (Between Profit and Morality, The Backgrounds to Enterprise Compliance and Violation)*. 177, Kagan and Scholz, "The "Criminology of the Corporation" and Regulatory Enforcement Strategies."

⁷⁶ J. Frijns and B. Van Vliet, "Small-Scale Industry and Cleaner Production Strategies," *World Development* 27, no. 6 (1999): 967

⁷⁷ Stuligross, "The Political Economy of Environmental Regulation in India." 394

⁷⁸ R. Wells, *Prevención y Control de la Contaminación en la Industria Mexicana: Reporta de Una Encuesta* (Lexington: Lexington Group, 1996), World Bank, *Greening Industry, New Roles for Communities, Markets and Governments*. 91

External Variables

As important as variables internal to the regulated actor for norm conformity are external variables. Both Western as well as non-Western studies emphasize the importance of the regulatory, the social and the economic context.⁷⁹ In addition, some non-Western studies have added the political context, especially the will of politicians to attain compliance with legislation.⁸⁰ The external context is important, because here policy makers can try to make changes that may improve compliance. Existing studies agree that achieving higher compliance requires a convergence of the different external factors.⁸¹ There is debate however about how such a convergence can be achieved and which factors are dominant in attaining a convergence.⁸²

Regulatory Context

The regulatory context may influence actors to comply or violate the law. In most studies of regulatory law, the regulatory context is central. The regulatory context consists of legislation, application⁸³ and enforcement.⁸⁴

Legislation defines the objective costs and benefits of norm compliance and violation. The strictness of the norms influences how high the costs are for compliance, similarly the severity of the statutory enforcement sanctions influences the costs of non-compliance. Second, the norms in the law further influence how acceptable the law is to the regulated actor. Scholarship in the Netherlands has looked at how certain socially accepted behavior becomes prohibited in the law. These scholars have argued that mere prohibition of certain behavior in law does not mean that such prohibition has legitimacy.⁸⁵

⁷⁹ Gunningham, Kagan, and Thornton, *Shades of Green, Business Regulation and Environment*.

⁸⁰ World Bank, *Greening Industry, New Roles for Communities, Markets and Governments*. 147-8

⁸¹ Gunningham, Kagan, and Thornton, *Shades of Green, Business Regulation and Environment*, World Bank, *Greening Industry, New Roles for Communities, Markets and Governments*.

⁸² We will get back to this point in the conclusion of this book.

⁸³ As stated in the introduction this study does not look at the application of law, which of course is also an important aspect of the regulatory context.

⁸⁴ Gunningham, Kagan, and Thornton, *Shades of Green, Business Regulation and Environment*, Huisman, *Tussen Winst en Moraal, Achtergronden van Regelgeving en Regelovertreding door Ondernemingen (Between Profit and Morality, The Backgrounds to Enterprise Compliance and Violation)*, Kagan, Gunningham, and Thornton, "Explaining Corporate Environmental Performance: How does regulation matter?"

⁸⁵ The most important scholar that discusses this topic is Brants. See C.H. Brants and K.L.K. Brants, *De Sociale Constructie van Fraude (The Social Construction of Fraud)* (Arnhem: Gouda Quint, 1991). quoted in Huisman, *Tussen Winst en Moraal, Achtergronden van Regelgeving en Regelovertreding door Ondernemingen (Between Profit and Morality, The Backgrounds to Enterprise Compliance and Violation)*. 97-99

Application institutions are the second part of the regulatory context. Such institutions apply the norms in practice, other than those of adjudication and enforcement. It is to these institutions regulated actors must go to register, apply for a permit or submit an EIA report. If such institutions are not functioning well, either being too costly, too slow, or inaccessible, compliance will be more difficult.⁸⁶

Enforcement is a third part of the regulatory context. The quality of enforcement, in terms of the probability of detecting violations and the likeliness of initiating sanctions for violations, will determine the actual expected costs of norm violation, through the detection probability and the sanction height.⁸⁷ The regulatory context is thus important as it forms an important part of the cost benefit analysis, rational choice theorists believe, regulated actors will make when deciding on compliance or violation.

However, as Bardach and Kagan argued, unreasonable enforcement may similarly cause regulated actors to resist compliance even when faced with more costs than benefits.⁸⁸ This is also recognized in studies about non-Western countries such as Fjeldstad and Semboja's work on Tanzanian tax collection enforcement: "From the standard theory it would be expected that the more severe the sanctions perceived by taxpayers, the higher the compliance. The survey results seem to point in the opposite direction: The more severe the sanctions observed, the more widespread the tax resistance."⁸⁹

Economic context

The second external variable influencing compliance behavior is the economic context.⁹⁰ This context comprises of how market forces of supply and demand affect a regulated actor. The economic context influences the

⁸⁶ For an elaboration of this point see H. De Soto, *The Other Path: the Invisible Revolution in the Third World* (London: I.B. Tauris, 1992), H. De Soto, *The Mystery of Capital, Why Capitalism Triumphs in the West and Fails Everywhere else* (London: Black Swan, 2000).

⁸⁷ For this original idea see Bentham, "An Introduction to the Principles and Morals of Legislation.", see also Becker, "Crime and Punishment, An Economic Approach." For more on this deterrence approach to enforcement see Chapter 12. Dasgupta, Hettige, and Wheeler, "What Improves Environmental Compliance? Evidence from Mexican Industry." 61

⁸⁸ Bardach and Kagan, *Going by the Book, The Problem of Regulatory Unreasonableness*.

⁸⁹ Fjeldstad and Semboja, "Why People Pay Taxes: The Case of the Development Levy in Tanzania." 2068

⁹⁰ Here we again follow Gunningham et al. and also Huisman, with what they call the business licence and the business context. However, these authors discuss the business context instead of the economic context. We choose to use economic context instead because our study is broader than just profit-oriented enterprises. Gunningham, Kagan, and Thornton, *Shades of Green, Business Regulation and Environment*, Huisman, *Tussen Winst en Moraal, Achtergronden van Regelgeving en Regelovertrading door Ondernemingen (Between Profit and Morality, The Backgrounds to Enterprise Compliance and Violation)*. Chapter 9.

costs and benefits of compliance and violation. The economic context is very important, especially for profit-dependent actors. As Gunningham et al. write: "if a firm acts contrary to these economic license pressures, the consequences are often severe."⁹¹

First, the economic context influences the costs and benefits of violation. The market may create a demand for illegal products, making violation profitable. Conversely, lack of demand can make violation non-profitable and compliance the preferred option.

Secondly, the economic context influences the costs of compliance. Pollution law compliance, for example, largely depends on the costs of abatement. Blackman and Bannister's work on small brick makers in Juárez, Mexico found for example that when prices of propane equipment were lowered, small polluting brick makers started to comply with local regulation and to use the previously unaffordable clean propane gas as main fuel. Later when state subsidies for propane were cut, all brick makers resorted to polluting illegal scrap-fuels again, as the abatement costs were unfeasibly high.⁹² Similarly, Sonnenfeld demonstrates that Indonesian pulp mill's enhanced compliance is partly the result of their business environment, which provided good prices for advanced abatement technologies, especially from Nordic countries.⁹³

The economic context also influences how regulated actors look at costs and benefits. Actors that are doing well economically may be able to adopt a long-term perspective to such cost benefit analysis. Actors that are operating on the fringe of the market, may need to cut all costs possible, and as such operate on a day to day basis, fighting for survival. In criminology, this is called *strain*, which is understood as that actors who lack resources to attain their goals will be *strained* towards illegal means to achieve their aims. For organizations, the strain approach means that there is a tension between goals related to profit making and survival on the one hand, and compliance with the law on the other.⁹⁴ So while organizations that are doing well will not feel a strain towards violation, in times of pressure and especially if their

⁹¹ Gunningham, Kagan, and Thornton, *Shades of Green, Business Regulation and Environment*. 61

⁹² A. Blackman and G.J. Bannister, "Community Pressure and Clean Technology in the Informal Sector: An Econometric Analysis of the Adoption of Propane by Traditional Mexican Brickmakers," *Resources for the Future Discussion Paper* 97-16-REV (1998), Blackman and Bannister, "Pollution Control in the Informal Sector: the Ciudad Juarez Brickmakers' Project."

⁹³ Sonnenfeld, "Social Movements, environment, and technology in Indonesia's pulp and paper industry." 104

⁹⁴ Huisman, *Tussen Winst en Moraal, Achtergronden van Regelnaleving en Regelovertredding door Ondernemingen (Between Profit and Morality, The Backgrounds to Enterprise Compliance and Violation)*. 156

survival is threatened, may opt for illegal means. Huisman states: "Circumstances may erode the normative support for compliance."⁹⁵

Scholarship has also argued that the economic context may also provide a stimulus towards compliance. Research about stock market reactions to environmental news in the Philippines, Mexico, Canada and the US, finds that negative environmental news affects the stocks of the company involved.⁹⁶ Konar and Cohen find that firms who had experienced the greatest negative impact on stock prices did their best to reduce their pollution.⁹⁷ Based on this, the World Bank argues that the market can be an important influence towards compliance. The bank propagates public disclosure of compliance information, arguing that such information will help the market put more pressure on regulated actors that are in violation of the law.⁹⁸

Social Context

The third external variable is the social context of the regulated actor. This social context consists of the non-state organizations that may affect the regulated actor and those that may be affected by the regulated actor, including local communities, NGOs and the media. The social context's effect on compliance can be positive and negative.

⁹⁵ Ibid. 156

⁹⁶ J. Hamilton, "Pollution as News: Media and Stock Market Reactions to the Toxic Release Inventory Data," *Journal of Environmental Economics and Management* 28 (1995), P. Lanoie and B. Laplante, "Can Capital Markets Create Incentives for Pollution Control?" *World Bank Policy Research Working Paper* 1753 (1994), B. Laplante, P. Lanoie, and M. Roy, "The Market Response to Environmental Incidents in Canada: a theoretical and empirical analysis," *Southern Economic Journal* 60 (1997). For a more critical approach to the linkages between stock holders, investors and financial markets and regulated actors see Gunningham, Kagan, and Thornton, *Shades of Green, Business Regulation and Environment*. 63-5

⁹⁷ S. Konar and M. Cohen, "Information as Regulation: The effect of Community Right to Know Laws on Toxic Emissions," *Journal of Environmental Economics and Management* 32 (1997).

⁹⁸ World Bank, *Greening Industry, New Roles for Communities, Markets and Governments*. Tietenberg, "Disclosure Strategies for Pollution Control."

Studies about both Western⁹⁹, and non-Western countries¹⁰⁰ have found that the social context is a potent force, pressuring regulated actors to comply with the law, even when regulatory mechanisms were weak. Such studies have demonstrated that collective action by local communities and NGOs, especially when working together with the media can be very effective to make regulated actors comply with the law. There are many examples. An extreme one occurred in Jakarta in 1980 when local farmers burned a heavily polluting factory the regulatory context had failed to address.¹⁰¹ In order to help the social context play out its full potential as a secondary compliance watchdog, scholars and policy makers propagate the use of public disclosure mechanisms, such as PROPER (Program for Pollution Control, Evaluation and Rating) in Indonesia or the Toxics Release Inventory (TRI) in the US.¹⁰²

Violation accidents, such as big pollution spills, play an important role in initiating social pressure, and once initiated such accidents may be used to exert extra pressure. A severe pollution incident in Brazil in 1984, led for example to a "surge of social mobilization against pollution."¹⁰³ In Indonesia similarly accidents, such as a lagoon burst in 1988 and a boiler

⁹⁹ N.M. Levine, "Between Choice and Sacrifice: Constructions of Community Consent in Reactive Air Pollution Regulation," *Law & Society Review* 28, no. 5 (1994). Kagan, Gunningham, and Thornton, "Explaining Corporate Environmental Performance: How does regulation matter?" 68-73

¹⁰⁰ M. Carmen de Mello Lemos, "The Politics of Pollution Control in Brazil: State Actors and Social Movements Cleaning up Cubatão," *World Development* 26, no. 1 (1998), Chege Kamau, "Environmental Law and Self-Management by Industries in Kenya.", Cribb, "The Politics of Pollution Control in Indonesia.", Huq and Wheeler, "Pollution Reduction Without Formal Regulation: Evidence From Bangladesh.", D.A. Sonnenfeld, "Social Movements and Ecological Modernization: The Transformation of Pulp and Paper Manufacturing," *Development and Change* 33, no. 1-27 (2002), Sonnenfeld, "Social Movements, environment, and technology in Indonesia's pulp and paper industry.", World Bank, *Greening Industry, New Roles for Communities, Markets and Governments*. 237-8

¹⁰¹ Cribb, "The Politics of Pollution Control in Indonesia." 1132

¹⁰² S. Afsah, A. Blackman, and D. Ratunanda, "How do Public Disclosure Pollution Control Programs Work? Evidence from Indonesia," *Resources for the Future Discussion Paper* 00-44 (2000), S. Afsah, B. Laplante, and D. Wheeler, *Regulation In The Information Age: Indonesian Public Information Program For Environmental Management* (1997 [cited 14 September 2006]); available from <http://web.worldbank.org/servlets/ECR?contentMDK=20798617&sitePK=1909405>, J.G. Lopez, J. Sterner, and S. Afsah, "Public Disclosure of Industrial Pollution: The PROPER Approach for Indonesia?" *Resources for the Future Discussion Paper* 04-34 (2004), Tietenberg, "Disclosure Strategies for Pollution Control.", World Bank, *Greening Industry, New Roles for Communities, Markets and Governments*.

¹⁰³ Carmen de Mello Lemos, "The Politics of Pollution Control in Brazil: State Actors and Social Movements Cleaning up Cubatão." 82

explosion in 1993 both at the Indorayon paper mill, helped NGOs create more effective pressure on governments to end violations.¹⁰⁴

In some countries, the level of awareness about the effects of violations is too low to spark action until there has been a clear and visible sign of the effects such violations have. Resistance to industrial pollution, was only triggered in Kenya, for example, after the effects on personal health and economic welfare were clear, when in 1992 pollution discharges by Kel Chemicals in Thika revealed themselves in the "rusting and rotting of iron sheets of residential houses".¹⁰⁵

Local community pressure does not always happen though. Huq and Wheeler's study of Bangladesh demonstrates, for example, that local communities were only able to force chemical fertilizer plants to invest in cleaner production, in those cases where the community did not depend on such plants for their income.¹⁰⁶ In other words, if regulated actors are dominant employers, the local social context will be less inclined to act against violations of law.¹⁰⁷ In case of such dependency only a well-organized non-local social context, often involving NGOs or national media may be effective in creating pressure.

In addition, some groups have more success than others. Group income and level of education matter. Pargal et al.'s study on informal regulation in Indonesia and the US has found that richer communities are more effective in influencing regulated actors.¹⁰⁸ A related finding from Pargal and Wheeler's study of informal regulation in several developing countries, is that "plants in poor less educated areas are about 15.4 times more water pollution intensive than plants in affluent well educated areas."¹⁰⁹

Finally, in some cases the social context may even directly support violation of law. This happens when the norms in the law are not widely supported in society, when the law lacks local legitimacy. This occurs because either the norms themselves have little support, or worse because the legislator has a limited legitimacy¹¹⁰.

¹⁰⁴ Sonnenfeld, "Social Movements, environment, and technology in Indonesia's pulp and paper industry." 100-2

¹⁰⁵ Chege Kamau, "Environmental Law and Self-Management by Industries in Kenya." 239

¹⁰⁶ Huq and Wheeler, "Pollution Reduction Without Formal Regulation: Evidence From Bangladesh."

¹⁰⁷ Kagan, Gunningham, and Thornton, "Explaining Corporate Environmental Performance: How does regulation matter?" 69

¹⁰⁸ S. Pargal et al., "Formal and Informal Regulation of Industrial Pollution: Comparative Evidence from Indonesia and the United States," *The World Bank Economic Review* 11, no. 3 (1997).

¹⁰⁹ S. Pargal and D. Wheeler, "Informal Regulation of Industrial Pollution in Developing Countries: Evidence from Indonesia," *The Journal of Political Economy* 104, no. 6 (1996). 1325-6

¹¹⁰ For an example of this see Fjeldstad and Semboja, "Why People Pay Taxes: The Case of the Development Levy in Tanzania." 2069

Political Context

Scholarship's most common frameworks on how the external context influences compliance behavior mainly mention the three contexts above (regulatory, economic and social)¹¹¹. Studies about developing countries, however, often mention a third factor of influence, the political context, which consists of attitudes of political leaders and of the political system as a whole.¹¹² The political context may affect compliance behavior in a variety of ways, often indirect though, through its influence either on the regulatory or on the social context.

First, the political context affects compliance behavior through the level of support for achieving compliance by important national and local political leaders. Many studies indicate that a lack of political support has caused weak law enforcement and thus non-compliance. An example is how president Cardoso delayed the enforcement of a new strict environmental criminal law in Brazil in the late 1990s.¹¹³ Another example has been how pro-growth leadership in India condoned the construction of 212 dam projects, of which 90 percent failed to comply with environmental regulations.¹¹⁴

In addition, in some studies the change of leadership, from those unwilling to those willing to support the implementation of regulation, has led to much stronger enforcement and pressure on the social and economic context and thus to better compliance. An example is the leadership change in Juárez, Mexico, that led to lower prices for abatement costs for brick factories and to stronger enforcement action.¹¹⁵ Another example is how after 1982 the new governor of São Paulo, Franco Montoro played an important role in getting local industries in Cubatão, which had polluted that region for years, to start to clean up and comply with the law.¹¹⁶

The political system as a whole, is also important for compliance behavior. It is the political system, which allows for public participation, for

¹¹¹ See Gunningham, Kagan, and Thornton, *Shades of Green, Business Regulation and Environment*, World Bank, *Greening Industry, New Roles for Communities, Markets and Governments*.

¹¹² Benjamin, *Criminal Law and the Protection of the Environment in Brazil* ([cited), Carmen de Mello Lemos, "The Politics of Pollution Control in Brazil: State Actors and Social Movements Cleaning up Cubatão.", Stuligross, "The Political Economy of Environmental Regulation in India." 396-7

¹¹³ Benjamin, *Criminal Law and the Protection of the Environment in Brazil* ([cited).

¹¹⁴ Stuligross, "The Political Economy of Environmental Regulation in India." 397

¹¹⁵ Blackman and Bannister, "Community Pressure and Clean Technology in the Informal Sector: An Econometric Analysis of the Adoption of Propane by Traditional Mexican Brickmakers.", Blackman and Bannister, "Pollution Control in the Informal Sector: the Ciudad Juarez Brickmakers' Project."

¹¹⁶ Carmen de Mello Lemos, "The Politics of Pollution Control in Brazil: State Actors and Social Movements Cleaning up Cubatão." 76

the organizations of NGOs and for free media coverage. Undoubtedly, the social context can only flourish to its full potential of compliance watchdog if it is allowed a certain level of participation, organization and freedom of operation and direct influence on local governments in charge of enforcement through elections.

Outline of Part II

Proceeding chapters will present eighteen case studies of compliance and violation of land and pollution legislation at Lake Dianchi. These chapters will first discuss cases of compliance for land (Chapter 7) and then for pollution regulation (Chapter 8). Subsequent chapters on violation of land (Chapter 9) and pollution regulation (Chapter 10) will follow. In Chapter 11 we will make conclusions based on the case studies and their linkages to the previous studies and theories discussed here.

7. Lawful Construction

Land Compliance Cases From Kunming

Introduction

The 1998 LMA is ambitious as it sets strict and specific rules to safeguard China's arable land quantity. For land use at Lake Dianchi the most important rules are those concerning construction on collective land. The LMA stipulates that construction on such land is only allowed after a procedure involving use conversion, requisitioning, compensation and land use fee payment.¹ The law makes an exception for collective construction that is closely related to collective use.² First, it allows farmers to build housing,³ and secondly, public buildings such as schools, infrastructure, but also TVEs.⁴ For rural housing construction, the LMA specifies that rural households are not allowed to build more than one house.⁵ Second, the LMA provides with regard to rural construction that collectives are not allowed to lease land for non-collective construction purposes but instead must follow the normal procedure of first converting collective land into state owned land, which also includes paying proper compensation to farmers for losing their land.⁶ While violation is widespread⁷, in peri-urban Kunming there have also been noteworthy cases of compliance. Such compliance cases can help us understand under what circumstances the law has been successful in attaining its goals of arable land protection.

The present chapter analyzes why actors have complied with land legislation.⁸ The following sections will present five case studies on compliance with land regulation, each followed by a short sub-section structuring and analyzing the case findings.

Religious Construction in an Atheist Environment

In the most northern part of Jiacun village, a large gate opens to a courtyard.⁹ The gate's structure is traditional; a sign on top says Jingbaosi (Jingbao

¹ LMA § 43-50, 53, 55

² LMA § 43.1

³ LMA § 43.1

⁴ LMA § 43.1

⁵ LMA § 62.1

⁶ LMA § 62.3

⁷ For cases see Chapter 9. For data about China see Ho and Lin, "Emerging Land Markets in Rural and Urban China: Policies and Practices." 699

⁸ The data used here cover the period until June 2004. For the period between June 2004 and December 2004 see Chapter 14, which details the effects of 2004 enforcement campaigns.

⁹ This section is based on interviews conducted in 2004 with monks and construction workers at the Jingbaosi Temple and villagers and village leadership of Jiacun village.

Temple). Unlike other temples in China, this one is not finished. The gate's paint is fresh and new, and most of the buildings adjacent to the courtyard are still in their skeletal stages. An unpainted, magnificent Thousand-Arms-Guanyin statue guards the inside of the gate. The courtyard is about twenty meters wide and one hundred meters long. In the courtyard, an old tree was preserved from the original village temple that was demolished to make room for the new complex. The present courtyard ends in what is to become the Bell Tower, a structure especially made to house a large ceremonial bell. If this courtyard were the whole temple, its small size would suit Jiacun village; it would not be much bigger than the old temple that once stood at the same place. A graphic representation of what the whole Jingbao Temple, about ten times the size of the courtyard, is to become is displayed in the only finished structure at the courtyard. This picture tells the story of a monk with a dream of the past and a vision of Buddhism in China's future.

Hua Zhongze is a relatively young monk, he is only thirty-four but he is already the vice-secretary of Yunnan's Buddhist society and a member of the standing committee of China's national Buddhist association.¹⁰ A few years ago, he had a comfortable life, as one of the leading monks of Kunming's most important temple complex. He was also teaching Chinese Buddhism to young monks at the Buddhist school in Ningshi city together with teachers from the various Buddhist approaches still existing in China, including Tibetan and Dai Buddhists. However, Hua was not satisfied. The Kunming temple was too much of a tourist trap and had little to do with a pure approach to Chinese Buddhism that he longed for.¹¹ Moreover, the Buddhist school in Ningshi was a melting pot of completely different interpretations diluting his own approach to Chinese Buddhism. Mr. Hua was nostalgic for imperial times when his religion had flourished in China and in the area around Kunming.¹² In the Qing dynasty (1644-1911), the Kunming Diandong District area had had over two hundred temples that formed one religious network. At that time, these small temples had had their own land on which they grew crops for food and designated places for ceremonial cremation rites.¹³ In 2001, Hua gave up his life of comfort in the

¹⁰ Birnbaum has made an historical overview of Buddhist organizations and argues that the fact that leadership is often so young now is related to the period of religious persecution during the Mao period. R. Birnbaum, "Buddhist China at the Century's Turn," *China Quarterly* (2003).

¹¹ Such a pure approach does not include Daoist, Tibetan or other influences often found in other temples. See Ibid.

¹² The exception is the Taiping period, when many temples were destroyed in China. See Ibid.

¹³ Land was very important for temples because it guaranteed their independence. At the start of the Cultural Revolution in March 1966, Yunnan province made strict rules forbidding land

city and set out in search for a suitable place to rebuild a temple as they had existed in the past; a temple that would serve to teach Chinese Buddhism and not cater for tourists; a temple that could be self-sufficient with its own land for agriculture and ceremonies without entrance fees (*menpiao*)¹⁴. His quest was not easy; almost all local governments refused their cooperation. In one case, in Diandong Town, a remarkably well conserved old rural town with a large old temple, the government was only interested in restoring the temple if the Buddhists would collect high entrance fees. This refusal had brought Mr. Hua to Jiacun village where he found a completely run-down small temple that had long ceased to have a religious function. The temple had been built over two hundred years ago and it had once housed twenty permanent monks who lived off the land the temple had owned. In republican China (1911-1949), the temple was used to help China's modernization and it was partly converted into a school.¹⁵ During the Cultural Revolution, the temple lost all its religious functions and was used for grain storage while the school moved to a small building built on the temple grounds.¹⁶ When Mr. Hua first came to Jiacun in 2001, the Jingbaosi Temple was in ruins, only the tree in the central courtyard had weathered the storms of time.

The Jiacun village CCP-party leader Mr. Yang warmly welcomed Mr. Hua and unlike his colleagues in other villages and towns saw potential in his plans. He believed that a temple, even if it was purely for teaching and not for tourism, would bring benefits to the village. Such a temple, secretary Yang believed, would prevent social unrest and would create revenue through the visitors it would attract. Thus, a deal was struck and the party-secretary and monk Hua forged a bond built on pragmatic politics and religious-idealism. At first Yang was only willing to lease out the 4 Mu of land that the existing temple was built on, in order to start a pilot project of building the Bell Tower which would be part of the future temple complex. Hua was delighted and left Kunming city to set up a tent at the construction

use for supporting religious activities. See H. Wang, *Yunnan Fojiaoshi (The History of Buddhism in Yunnan)* (Kunming: Yunnan Meishu Chubanshe, 2001). 359

¹⁴ Most other temples that were rebuilt in the 1980s and 1990s had financed their reconstruction through collecting entrance fees from tourists and in this manner had grown rich, but lost their authenticity. See Ibid. 364-5

¹⁵ According to Wang's study of Yunnan's Buddhist history, this was not common practice. According to his study, the new republican government actively protected temples and even made rules to protect temples and their land through compulsory lease contracts with the surrounding villages. See Ibid. 334

¹⁶ Like many temples in China and Yunnan, the Cultural Revolution led to a destruction of the temple's religious treasures. There have been some cases where active monks and brave citizens were able to safeguard such treasures from the destructive hands of the red guards, but not in such a minor village temple as here. See Ibid. 260-1

site, facing mosquitoes in summer and the cold in winter. Soon the old temple was demolished and construction of the Bell Tower courtyard was under way.

When secretary Yang saw the progress Hua was making, he decided to sign an agreement for the full transfer of the use rights. According to the original planning, the temple would be 93 Mu, a large size to enable it to have its own land for agriculture. The whole complex itself would be about 70 Mu and would be built at the site where the current temple was located (four Mu) and on the surrounding arable land. Land in this part of the village is of inferior quality because it is too wet due to recurring floods from the three small rivers that cross it. Unlike other construction activities, such as enterprise construction, where the Jiacun Village Committee illegally leased arable land to the development firm, in the case of the temple the Buddhists wanted to follow the official procedure of the LMA. Monk Hua was well aware of the difficult position religious activities had in China, and especially after the Falungong,¹⁷ control has been strict. His organization therefore opted to follow the law as closely as possible. This proved to be extremely difficult.

The first part of the procedure consisted of conversion of the land use, from agricultural to construction.¹⁸ This was a cumbersome process involving many different bureaus including the State Land Resource Management Bureau, the Bureau for Religious Affairs, the Construction Bureau and even the Environmental Protection Bureau. Each bureau had its own complex procedures and its own fees. The involved bureaucrats seemed to know that this Buddhist organization had no option but to follow their demands to the letter. The EPB for example demanded 20,000 RMB for a “meeting with experts”, 10,000 RMB for “researching” the EIA report and another 20,000 RMB for the final approval of the EIA. All of this was done for a temple whose environmental impact was not expected to be more than that of several rural households combined. Next, the land had to be requisitioned (*Zhanyong*) by the state and converted from collectively owned into state owned.¹⁹ This procedure was originally initiated by signing the land transfer agreement with the VC. Then the project needed approval of all higher-level governments up to the provincial level. At first this was not difficult. However, in 2003, when the provincial level was finally to decide on approval, there had been an internal policy change requiring that the

¹⁷ P.B. Potter, “Belief in Control: Regulation of Religion in China,” *China Quarterly* 174, no. June (2003). Human Rights Watch, *Dangerous Mediation, China's Campaign Against Falungong* (New York: Human Rights Watch, 2002).

¹⁸ LMA § 44

¹⁹ LMA § 43

township government should co-sign the original land transfer agreement now only signed by the VC. In 2004, the temple was unable to persuade the township government to co-sign because this government held that the existing contract with the VC was sufficient.

All of the Buddhists' efforts to operate according to law have so far been in vain. They will continue to ask for the Township's cooperation, which they will probably eventually receive. Such cooperation will be costly though, as Mr. Hua's organization has had to pay 230,000 RMB to the District Land Bureau as a *huodongfei* (activity costs) to convince the Township to sign.

Pending the requisitioning approval, the Temple already compensated the collective farmers and land use right title-holders for the loss of their land use rights. For each Mu of the inferior quality arable land used a compensation of 200,000 RMB was paid, more than twice the amount that is usually paid for prime quality land in this area. Furthermore, the owners of two houses, which were located on the former temple premises and which were to be demolished for the construction, demanded 600,000 RMB in compensation. Monk Hua expressed his frustration to me during one of our conversations: "Their houses cost no more than 80,000 RMB to rebuild. They know we are powerless to refuse their demands, so they just ask what they like." This case was settled after long negotiations and the temple paid 300,000 RMB. The temple further helped pay for a new road from the highway to the temple that crosses Jiacun's most important industrial area.

Cynically enough the Buddhists' generous compensation did not prevent village unrest directed at the new temple. In 2001 villagers believed that the temple had taken more land than it had compensated for and organized protests against the temple and their own VC leadership. The protests came to a boiling point during the 2001 democratic VC elections in which a majority of the farmers elected a mentally disabled villager as their village leader to show their dissatisfaction about local land practices.²⁰

²⁰ Our findings here are in contrast with Pastor and Tan who argue that free elections can be a source of stability in the Village. In Jiacun and surrounding villages elections have been highly contentious and have been used to vent dissatisfaction. Periods of election are quite unstable and unruly here. Compare with R. Pastor and Q. Tan, "The Meaning of China's Village Elections," *China Quarterly* (2000). 511. Ordinarily, protests consist of petition letters or physical action, but as we see here election can also be used to protest. Compare with K.J. O'Brien and L. Li, "The Politics of Lodging Complaints in Rural China," *China Quarterly* (1995)., for an overview of how the village election system was set up in the 1980s and 1990s see K.J. O'Brien, "Villagers' Committees, Implementing Political Reform in China's Villages," *The Australian Journal of Chinese Affairs* 0, no. 32 (1994). Another case of election as a form of protest is described in Liu's study, see Y. Liu, "Consequences of Villager Committee Elections

The 2001 unrest originated from a misunderstanding about the amount of land to be used for the temple construction. In the original plans the Buddhists would use 93 Mu of land, the VC however was only able to get them 63 Mu of land. Farmers thought that the temple had gotten 93 Mu but only paid for 63 Mu, while actually the temple paid for 63 and so far has only received 40 Mu.

Mr. Hua could not fully realize his dream of a self-sufficient Temple²¹; he lacked sufficient land for agriculture and ceremonies. His only alternative was to look for another site on which to develop a temple mainly for agriculture and ceremonies to support the educational center in Jiacun. On the south side of Lake Dianchi in Jinxian District, he found a site located in mountainous land. The local VC had originally refused to cooperate, but now that Jingbaosi in Jiacun was under construction, they saw that they could trust Mr. Hua. Therefore, a second site was developed, this time an amazing 638 Mu located at a famous Buddhist location where a small temple used to be. Procedures at this site were also been problematic. The main issue here was compensation. As soon as local farmers knew of the development plans, they started to cultivate the mountain land that so far had lain barren. They also planted fruit trees that would yield extra compensation. Mr. Hua's frustration was evident when he checked the new construction site: "You see this apple tree here, it will cost me 200 RMB instead of the regular 50 RMB and then the farmers still take away the tree." According to Hua farmers are only after a quick profit but care little for the long-term development of their region that his temple can bring.²²

Mr. Hua is an idealist in a country of pragmatists. When asked about his compliance behavior and all the costs it brings him, Hua answered that the original law in Beijing is good, but once it arrives at the local level, it is subject to the dictates of local powerful leaders. "In Beijing the law is like a big river, but here we only get small drops," he sighed. His ideas of building a temple purely for religion and not for profit do not resonate well with policy makers. He is aware of this and it makes him cautious not to do anything that can adversely influence the little cooperation he has received.

in China, Better Local Governance or Consolidation of State Power," *China Perspectives* 31, no. September-October (2000).

²¹ Like temples had been in the Qing dynasty, see Birnbaum, "Buddhist China at the Century's Turn."

²² We can question whether the local peasant resistance in this case was "rightful", compare with K.J. O'Brien, "Rightful Resistance," *World Politics* 49, no. 1 (1996).

Findings

The Buddhist construction at Jiacun village is mostly a case of compliance with the LMA. The Buddhists rigorously abided by the LMA's complex and—in this case—costly procedures for land construction approval and compensation for farmers who have lost land and houses. Here, even though the law's many procedures for land conversion and compensation posed near unfeasible demands on the Buddhists, they still tried and almost completely succeeded to abide by them. So, what factors explain both accounts of law-abiding behavior?

Several external variables have influenced compliance in this case. A combination of the political, social and regulatory contexts affected compliance. The Buddhists' relation with external factors was dominated by the fact that their ideas for a purely religious temple were politically sensitive. This sensitivity made Hua and his organization more dependent on VC leadership, villagers, the township government and on various bureaus. A lack in cooperation with any of these actors would have made Hua's construction plans more difficult and perhaps impossible. Furthermore, because of the sensitivity, most of the actors Hua depended on for his construction seem to be extra careful and have operated strictly according to the law. Local governments, bureaus and local farmers further exploited the sensitivity by putting extra pressure on the Buddhists in order to extract as much money from them for compensating regulatory services or land use, often well beyond statutory amounts. All of this made that the Buddhists were left no choice but to try to comply with the law.²³ It is interesting to note that compliance in this case involved the interaction between multiple actors, not just the directly regulated actor. In this case compliance occurred without enforcement action from land regulators.

A second set of explanatory factors for compliance in this case are internal variables related to Hua and his Buddhist organization. First, Mr. Hua continued the project and strictly abided by the legal procedures even though the costs were considerable. In his eyes, such costs were subordinate to achieving his goal of a purely religious temple. This is an example of a moral consideration rather than a calculation of economic costs and benefits. Second, the sensitivity of religious practices also affected the social responsiveness of Hua's organization. The sensitivity made the Buddhist more careful when negotiating with governmental bureaus, governments and local farmers. Because of this, the Buddhists had to pay fees and compensation in excess of the statutory maxima. The Buddhist organization,

²³ Here we see both Coleman's opportunity concept and Kagan and Scholtz's competence and moral perspectives. See Chapter 6.

because of its dependence on local governments and local communities, was a socially responsive organization that was easily influenced by its environment. Third, Mr. Hua organization was able to pay fees and compensation because it had sufficient financial resources due to the support of its Buddhist followers.

Building a School Under Protest

In the center of Jiacun village, right between the market and the VC headquarters there is a primary school. It is not what one would expect in a village in southwestern China. The school is brand new, four stories high, with a large playground and its own gates facing a newly paved road. Every morning, afternoon and evening, the road is jammed with the bicycles of parents delivering or picking up their children. A cacophony of sounds fills the air as the village children, all wearing red scarves, excitedly greet their friends. Street vendors have set up small stands selling school items and snacks. This happy scene shows no signs of the fierce conflict about the land the school was built on, when villagers actively and violently protested against their leadership.

In many ways, the school's land conflict is related to the Jingbaosi temple construction in the far north side of the village. In the republican period, Jiacun village joined the country's modernization drive²⁴ as it converted part of the Jingbaosi temple into a school in the 1930s. Jiacun's children were educated in this run-down temple until the Cultural Revolution when the temple was converted into a grain storage facility and a school was built adjacent to the temple: a small two-story building constructed with cheap materials and without a courtyard or playgrounds, located in the far north of the village. At this time Jiacun was dependent on agriculture and most of the village consisted of arable land. By the late nineties, the existing school was far too small to accommodate the growing population and the building badly needed renovation. When the VC accepted Mr. Hua's proposal to build a new enlarged Jingbaosi Temple the decision was made to demolish the old school and build a new one. By this time Jiacun village had industrialized and Kunming city's urbanization had reached the outskirts of the village. Consequently arable land protection was not a priority and throughout the village former arable land was converted to build roads, houses and, of course, the temple complex. So far, new development had mainly occurred on the northwestern side of the town, next to the highway to Kunming, and in the center of town where the market was enlarged and three-story houses were built. This had created a gap between the village

²⁴ J.D. Spence, *The Search for Modern China* (New York: Norton, 1990).

center and the developed highway, a gap of arable land. Part of this gap had already been used to locate the new VC headquarters, but a large plot of land facing this was still used for farming. In 2001, the VC decided to use this land into for the new school. The VC wanted to invest in their future and believed that a large school with proper premises and playgrounds was necessary. Therefore 23 Mu of arable land was designated for development.

Construction for collective use is allowed for in the 1998 LMA. Unlike other construction, as in the case of the Jingbaosi temple, where a whole procedure for land use conversion, land requisitioning and land compensation had to be followed, in this case only compensation was at stake.²⁵ The school's planning started in 2001 and the VC involved various departments at higher levels for advice and necessary approvals including a construction permit and an EIA.

Almost a year later, in 2002, when all necessary approvals had been obtained, villagers suddenly rallied in protest against the school.²⁶ Some of the protesting villagers felt that building such a large school was not in their interests. The total costs of the school were about 8 million RMB and to be paid by the VC and all sub-villages collectively. They felt that the collective funds were wasted. Some farmers said for example that they did not have school-aged children and that the school should not be paid out of collective funds but by those villagers with school-going children.

Other villagers, mainly from sub-village three, protested against the amount of compensation offered for their land use rights over the land on which the school was to be built. The VC had offered to pay them 100.000 RMB per Mu of land for all 23 Mu. Just as with the farmland for the Jingbaosi temple, the land here was deficient, it often flooded and had been difficult to farm. The amount offered was generous by local standards under which about 80.000 RMB per Mu was usually paid for prime land. Moreover, the amount was well within the legal minimum compensation of about 18.000 RMB (six times the annual output of the three proceeding years, which cannot have been higher than the 3000 RMB a year farmers make on Jiacun prime land in sub-village number seven).²⁷ The villagers at sub-village three were dissatisfied with this amount because they thought it was unfair that other farmers in sub-village one had received 200.000 RMB per Mu

²⁵ LMA § 43

²⁶ Peasant protests have been common in post-Mao China. According to O'Brien and Li this due to the rapid development that provided local cadres with opportunities for misuse of public office and public funds, while the same development and dismantlement of the communes and the old class system raised farmers' awareness and access necessary for successful unrest. O'Brien and Li, "The Politics of Lodging Complaints in Rural China." 761-4

²⁷ LMA § 47.1

from the Jingbaosi temple construction project. At first, when the VC refused to pay more, the angry farmers turned to higher-levels of government. They wrote petitions (*shangfang*)²⁸ and the government sent teams to Jiacun to investigate the situation. Their petitions were in vain, as all higher-level government teams ruled in favor of the VC's school project and found that compensation was in order. At this time, the VC decided to start construction and the land was cleared and prepared for building the school. The villagers of number three did not give up; they tried to sabotage the project itself by cutting down the power-lines at the building site. When this did not help to stop the project, they turned on the VC itself.²⁹ One day, angry villagers surrounded the VC headquarters and blocked the gate so that no one could leave or enter. They even locked the only entrance to the building to force their demands on the village's democratically elected leadership. This act of social unrest forced the VC to negotiate with the villagers. It was clear from the start that their demands could not be fully met because it would set a precedent for high compensation, precluding other construction projects in the village. Elected village head Mr. Yang was able to forge a compromise: farmers would get 100,000 per Mu land and retain small plots of land outside the school premises where they could open shops.

The school was completed and has been in use. It houses about four hundred children, half locals and half from migrant families living in Jiacun and working in the local industry. Each student pays 100 Yuan a month in school fees. The large building is not used to capacity though. Students sit in large classes on the ground floor because the VC has not been able to attract sufficient teachers to form separate classes in the classrooms of the second, third and fourth floors.

Nevertheless, now that compensation claims have been settled, villagers are proud of their new school in the center of their village. The former protesters now have shops and live in the urban part of the village in between the school and the market. But, village leader Yang still gets angry when he thinks back about this conflict: "These farmers misuse their new democratic rights. They just look at their own short-term interests instead of what is good for the village community. The new VC Organization Law is awful because villagers do nothing but question and stall our planning

²⁸ This has been common practice in China, mainly for as a tool for powerless peasants to question unfavorable or illegal local policies but without questioning central level policy. See O'Brien and Li, "The Politics of Lodging Complaints in Rural China.", 759. For excellent examples read G. Chen and Y. Chun, *Zhongguo Nongmin Diaocha (Research on Peasants in China)* (Beijing: Renmin Wenxue Chubanshe, 2004).

²⁹ O'Brien has noted that protest in China is a question of forum shopping at as many for as possible. See O'Brien, "Rightful Resistance." 43

without fully considering its merits.” He sighs: “Democracy needs time and a lot of education.”³⁰

Findings

The Jiacun school construction is a case of beyond compliance with the LMA rules on compensation for arable land lost when converted for construction. In this case, the VC operated in compliance with arable protection legislation because it offered to pay a reasonable compensation for land used for construction well beyond the statutory minimum. The issue here was therefore not compliance, but the level of compliance.

Beyond compliance in this case occurred following pressure from the social context when villagers rallied in protest. The political context helped to enhance the pressures from local villagers. First, village democratization in Jiacun offered the villagers’ possibilities for participation and exerting pressure on their leadership.³¹ Second, generally speaking, superior governments exert strong pressure to guarantee village stability.³² When the farmers started their protests, the VC came under strong pressure to negotiate a solution. In this case, beyond-compliance occurred without state enforcement action.

Variables internal to the group of VC leaders were also influential. The VC evaluated costs and benefits of appeasing the farmers’ demands for a high compensation and thus an excessive type of compliance through a combination of short-term and long-term perspectives. The VC had to end unrest as soon as possible, while finishing the school construction it had started. On the other hand, it had to retain villagers’ support in the long run, while preventing to set a precedent for high land compensation. The combination of weighing these interests led to the compromise and the beyond compliance witnessed in this case. A second variable of influence here was the VC’s relative high level of social responsiveness, partly caused

³⁰ In his eyes, this is perhaps, twisting O’Brien’s words, a form of “unrightful resistance”. Compare with Ibid.

³¹ At least in Jiacun the election system seems to have this effect. In Licun village the situation is different and more “corporatist” with a group of families and friends keeping each other in power through control of resources and a network with township and county officials. The situation in Jiacun seems quite special because villagers have voiced active protest even though it is no longer purely agricultural and there are ample opportunities for non-local income. This is contrast with Oi and Roselle’s hypothesis that industrial and peri-urban villages should have less participation because farmers are less bound to the village. Compare with J.C. Oi and S. Rozelle, “Elections and Power: The Locus of Decision-Making in Chinese Villages,” *China Quarterly* (2000). 527-8

³² M. Edin, “State Capacity and Local Agent Control in China: CCP Cadre Management from a Township Perspective,” *China Quarterly* (2003).

by changes in the political system, which made that the VC was open to inputs from the local community.

Why Sub-village Seven Never Developed

It is only a five-minute walk, but it feels like twenty years back in time. The road from Jiacun's central sub-villages to sub-village number seven is like a funnel. In the center just near the market, it is still broad but when it reaches the outskirts of sub-village number five it is no more than a paved footpath next to the tiny Baoxiang River. It is at this point that one leaves the urbanized part of Jiacun and goes into the village's only remaining agricultural area. Where, before this point, the urbanized villagers are working on their cars, tending their shops or leisurely playing pool, after this point there are farmers busy cleaning their yellow *jiucai* (Chinese chive) crops or working hard in the fields. Gone also is the picture of large white tiled three-story houses that dominates central and northern Jiacun, in sub-village number seven many houses are still traditionally made of red earth. Unlike in the northwestern part of town there are no factories, instead there is arable land on both sides of the houses as far as the eye can see.

Sub-village Seven is the smallest of Jiacun's seven sub-villages and only has 196 inhabitants and 54 households. The villagers' main source of income is their arable land. Each household has 1.8 Mu of prime quality land on which most of them grow yellow *jiucai*. This crop, which is grown under sheets of plastic to filter out sunlight, is worth much more than the normal green type of *jiucai*, which is grown in areas of China with less favorable geographical conditions. *Jiucai* grows fast and farmers have several crops a year and can make up to 3500 RMB per Mu annually. This is more than three times as much as farmers in Kouxiang on the mountainous western side of the lake can make. For additional income, some of the male villagers have part-time employment in factories outside the village, while some of the women work in Jiacun's boxes factories.

By China's rural standards, Jiacun number seven is not poor, but its income is far lower than that of other Jiacun sub-villages. Sub-village five, for example, has converted parts of its arable land into construction. Consequently, the village has generated a profit from land rented out to factories which is equally distributed (2000 RMB per person a year) among all sub-village inhabitants. Furthermore, in number five sub-village many villagers own two houses, one to live in and one to rent to outsiders, which generates another 2000 RMB a year. Some of the inhabitants of the other sub-villages have been able to set up shops and small industries from which they reap the profits. But in number seven there is only *jiucai*.

Why has village seven not developed like the rest of Jiacun? Was it because the LMA clearly forbids the land development that has taken place in these other sub-villages? Number seven's leader, CCP secretary Yang says that the main problem is that this village lacks infrastructure. Cars cannot drive on the tiny road from Jiacun center to number seven, let alone trucks. Consequently, when the rest of the village developed and industrialized and urbanized, number seven lagged behind. The village was unable to attract investors to convert its arable land into factories. Because number seven did not participate in the industrialization, the villagers have remained dependent on agriculture here, even secretary Yang himself. While his fellow village leaders have become entrepreneurs busy with attending banquets and driving their Volkswagen Santanas to Karaoke parties, Mr. Yang sits in front of his house and washes his yellow *jincai* just like all the others here. The dependence on agriculture and the impossibility of attracting investors and non-local residents has meant that the land is worth more for agricultural use than for construction.³³ Therefore, villagers here have been keen to protect their arable land and have not built second houses. Instead many have continued to live in their old one or have built a replacement house without wasting arable land.

Secretary Yang explained that he hopes that one day there will be sufficient infrastructure. If that happens he assured he would follow the example of Jiacun's other sub-villages and lease arable land for enterprise construction and let farmers build second houses for extra income.

Findings

Jiacun sub-village number seven is a case of compliance with the LMA because unlike the other Jiacun sub-villages (see Chapter 9), number seven has not illegally rented out its land for industrial construction or illegally built second houses. In this case, the LMA's rules prohibiting extra housing construction and industrial construction on leased land were feasible, as compliance brought no costs and violation no benefits. Here compliance was the result of the lack of opportunity to violate the law, not of the will to abide by the law.

The economic context was characterized by a low demand for land for industry and housing due to Number Seven's weak infrastructure. As a result, the VC and local farmers never stood to benefit from breaking the law. The lack of opportunity to break the law also depended indirectly on the

³³ This finding is in agreement with research from Fujian province that emphasizes the relation between land use and the commercial value of such use. See D. Zhu, *Shehui Bianqian Zhong de Nongcun Tudi Zhidu (The Village Land System in Social Transformation)* (Xiamen: Xiamen Daxue Chubanshe, 2003). 232

political leadership in the neighboring village who refused to cooperate to build the necessary road. The regulatory context did not seem to be influential in number seven. Fear of enforcement measures and most probably knowledge about the existing legislation did not seem to play a role in number seven's compliance.

Compliance does not seem to be a result of moral values as regulated informants expressed a willingness to build extra houses or lease land if such an opportunity would arise one day. It seems that regulated actors have made a cost-benefit analysis based on the present costs and benefits of different types of land use, finding that arable land was just worth more for agriculture than for construction. A lack of resources here explains compliance, as Village 7 may have been able to develop the road it needed if it had had the capital to make the necessary investments to get the neighboring village to cooperate.

Living in Rural Kouxiang

Although there are three different roads from Kunming to Kouxiang Township, getting to Kouxiang is not easy.³⁴ The shortest route is to take the old road along the lake straight south from Kunming to Kouxiang Town, however this road badly needs repairs and in the rainy season cannot be used. Then there is the road through the mountains of Dianxi making a detour through Ningshi. This road is twice as long as the direct lake road, but part is motorway. After that it turns into a small mountain road that is often jammed and becomes dangerous with rain in summer. The third option is to take a complete detour on the highway on the east side of the lake to Jinxian district, this route is much longer and still requires a drive from Jinxian to Kouxiang on an old bumpy road that is not suitable for traffic when it rains. Kouxiang is a remote area even though physically it seems so close to Kunming.

Kouxiang's location has affected its development potential. Unlike Jiacun Township, which lies on flat land with good connections to Kunming and several other major cities in Yunnan province, Kouxiang is a backwater. If it had not been for its phosphor mines, which helped to develop a fertilizer industry, and for the fact that its remote location offered the benefit of attracting two military factories, this area would have remained completely underdeveloped. While there has been some industrialization, mainly large State Owned Enterprise (SOE) based, most villages in this area have remained agricultural. Unlike Diandong District villages such as Jiacun,

³⁴ This section is based on interviews with Kouxiang Township leadership, Licun and Baocun villagers and village leaders conducted in 2004.

Kouxiang Township never developed a thriving Township and Village Enterprise sector that led to rural industrialization and attracted many non-locals.

In Kouxiang's Licun and Baocun villages, housing is different from the developed parts of Jiacun Village. Many houses, especially in Baocun, are still made of red earth and the villages, as a whole look rural not urban. Only village leaders or their relatives have built stone houses, three stories high with the characteristic white tiles of China's rural modernization. Village households here only own one house and even the village leaders in Kouxiang do not own more than one house per household. Baocun's leader, party secretary Chen, for instance, has built a huge house on the place of his ancestral home. He has demolished his traditional house when he constructed a new one equipped with all modern comforts, where he lives with his wife, daughter and his own parents.

Kouxiang has instituted a village procedure for housing construction.³⁵ This procedure requires villagers who wish to build a new house to report their plans to their sub-village that then reports it to the VC, which then reports it to the township land bureau. This bureau checks whether the planned construction is within the total surface area of the existing construction. The villager then has to pay a deposit of 20 RMB per square meter for the planned construction which he loses if the actual building exceeds the planned amount. There have been minor infractions such as villagers building new houses without reporting or building houses which exceed the required surface area. Baocun or Licun do not have cases where villagers have built a whole second house and violated the LMA rules on rural housing. While there has thus been local regulation of housing construction, such regulation has been about the size of houses constructed, not the number of houses a household is allowed to construct. It is noteworthy that Kouxiang village regulation contains norms about the housing construction process but fails to provide that building a second house is prohibited.³⁶ Even though the village and superior level governments have not regulated second housing, villagers have still not built second houses.

A first reason for Kouxiang's compliance with the LMA housing regulations is that this area has little demand for extra housing. The non-local workers that are attracted mainly work in the *Huafei* chemical fertilizer plant in Baocun or in the military factories in Licun. For the most part these SOEs provide their own housing facilities to non-local workers on land that is not related to the village collectives. In Baocun, there are also migrant workers

³⁵ See Licun Village Self-Rule Statute § 17 and Baocun Village Self-Rule Statute § 23

³⁶ Ibid.

who work in the privately owned enterprises and even some contract farmers. For these few temporary workers there are some temporary shacks alongside the road to the factory. For the rest there is simply no demand for extra housing in Kouxiang. This means that building a second house does not bring the kind of extra revenue it does on the other side of Lake Dianchi in Jiacun.

Another reason for compliance with the LMA's ban on building more than one house per household is that in rural Kouxiang agriculture is an important source of income.³⁷ This is especially so in Baocun village in which 90% of the villagers depend partly on agriculture. In Huajiao and Shimaxiao, Baocun's sub-villages, in the mountains further away from the road and enterprises, very few people have a non-agricultural income. The remainder works on the land. In the past the state subsidized irrigation channels to build rice paddies there, but now that the subsidy has ended they mainly have to farm dry land. The land yields about 2000 RMB per Mu a year, while villagers have little over one Mu of land. In Licun, villagers have invested heavily in their land. They have been able to do so under the new land rights regime that grants them stable 30-year land use rights. They have invested in irrigation and in building plastic greenhouses. Farmers there have been producing crops for export, based on collective contracts signed by the VC on their behalf. Depending on the international prices, their income can be considerable; in 2004, tomatoes could earn them up to 6000 RMB a Mu. Arable land is thus still the main source of production in Kouxiang's villages. Village leadership and villagers alike are aware that its protection is a priority. Unless other sources of income can be produced to replace agriculture, the main source remains land. Baocun's CCP secretary Chen explains this point as follows: "Just like factories need machines, farmers need land." A villager from Licun agrees with him and believes that land means security: "Even if they pay me well for my land, I would rather keep it, money you can waste, but land guarantees food and income for your family."

Findings

Kouxiang's Licun and Baocun villages are cases of compliance with the LMA's rules on housing construction on collectively owned arable land. These villages have largely complied with these rules, as households have not illegally built second houses. In these villages, we can see that the regulated

³⁷ Here our findings correspond with Zhang et al. study that found that farmers will only wish to relinquish their land rights once opportunities for non-agricultural income have developed sufficiently. See Q.F. Zhang, Q. Ma, and X. Xu, "Development of Land Rental Markets in Rural Zhejiang: Growth of Off-Farm Jobs and Institution Building," *China Quarterly* 180, no. December (2004): 1050

actors are village households who have decided not to build extra housing, in contrast with many villagers in Jiacun on the other side of the lake.

Compliance is partly attributable to the villagers' external variables. The economic context with a low demand for extra housing kept the possible benefits of violation of law to a minimum. The economic context made the price of land used for agriculture higher than land used for construction. Second is the regulatory context. Lacking a market for housing, the LMA's ban on secondary housing was feasible in Kouxiang. While the local village regulatory framework kept a close check on the size of local housing projects, state law enforcement by the township land bureau or superior institutions on building second houses was absent.

An analysis of variables related to the villagers themselves shows that in the local cost benefit analysis, as it is influenced by the economic context, agriculture is central and arable land is precious. As a result, villagers' values about the importance of protecting arable land resonate well with the LMA. Farmers in Kouxiang believe that land is security and state that they would not give up such security for money, which farmers in the more developed Jiacun all have done without a problem. In addition, again due to the economic context, many villagers lack resources to allow them to break the law: most Kouxiang villagers are too poor to build a second house.

Converting Whole Villages

Yunnan Steelworks (*Yungang*) is Yunnan's largest factory and nothing short of impressive. It is not just a factory; it is a city.³⁸ This is an urban center complete with banks, restaurants, living areas, hospitals, schools and wedding ceremonies. The factory houses 150,000 workers about the same as the neighboring Ningshi City. Over the years, *Yungang* has grown quickly both in production output and in number of factory workers living on the premises. Growth has meant a need for arable land, both for building new steel production installations as well as for housing all workers and pensioners. In the past *Yungang* had a special department that managed real estate development and new construction. Since 1999, this section has been transformed into a limited liability company called the *Yungang* Real Estate Development Incorporated. This large development firm is now responsible for all of *Yungang* real estate development projects. It is one of China's 500 largest real estate firms with 3825 workers. About half of these workers are pensioners of whom the firm takes care. Apart from its activities for *Yungang*

³⁸ This section is based on interviews with Kunming Steel Corporation Real Estate Development Incorporated management and *Ningshi* City officials carried out in 2004.

itself the real estate firm also seeks outside work and follows a norm of 40% revenue from *Yungang* and 60% revenue from other projects.

Each time the steel factory expands, *Yungang* Real Estate arranges new land. Most of the land that is available for construction surrounding the factory is used for agriculture. Except for the northern side where the factory merges with Ningshi City, the factory is surrounded by traditional villages and their acres of corn, rice and lotus. *Yungang* Real Estate thus often has to use arable land for construction and deal with the provisions of the LMA on arable land protection and compensation for farmers' loss of land use rights.³⁹ Whereas many smaller enterprises have obtained arable land for construction through illegal leases in order to avoid the high costs the official procedure would entail⁴⁰, *Yungang* Real Estate has operated according to the book. According to management, this means that for each plot of land, the firm has applied for land use conversion, land requisitioning and then compensated the farmers involved. *Yungang* does not have to pay for the land once it has been requisitioned into state ownership because the state, here represented by Ningshi City, has delegated its land to *Yungang* to manage and to use without fee.

An important difference between land development at *Yungang* and that at smaller enterprises to be discussed in Chapter 9 is that *Yungang* needs a lot of land, so much that it only develops new construction sites by converting whole villages at a time. Instead of the usual compensation for land rights to individual farmers, the factory compensates these farmers by making them factory workers with full health and pension benefits.⁴¹ Old farmers join the factory's pension scheme directly and the children go to one of the factory schools. In this way, whole villages are incorporated into *Yungang*. Over the last few years, the factory has converted six villages in this manner.

Yungang's compliance is related to its scale of operations. Converting whole villages is impossible if this is not done properly. This requires executing the proper procedures. Second, it means sufficiently compensating the villagers for their transfer to the factory. If this is not done properly, there may be protests and unrest. One of *Yungang* Real Estate's managers, Mr. Wu, says that the last thing they want is trouble: "*Yungang* is a large factory; no it is more like a city. With so many people living and working here, and with so many old people that depend on us, maintaining stability is one of

³⁹ LMA § 46-49

⁴⁰ For examples see Chapter 9.

⁴¹ Compare with Cai who calls this "compensation through job allocation". See Cai, "Collective Ownership or Cadres' Ownership? The Non-agricultural Use of Farmland in China." 666

our primary objectives. Because of this when we develop new construction sites here we do so by the book.”

Findings

Yungang is a case of compliance with the LMA because the factory has acquired land for construction according to the law’s procedures. Again external and internal variables were important, the latter more than the former though. In the political context, *Yungang*’s relationship with the local government that allowed the factory to use state land freely, made compliance less costly. The social context had an indirect effect on *Yungang*’s compliance, as the company wanted to prevent unrest. Compliance in this case seemed to occur without state enforcement.

Yungang’s internal variables were very important for explaining compliance. First, the factory’s size and its economic success provide the factory with sufficient resources to comply with the LMA. The factory’s size further made it a long-term oriented organization. It rather invested in social stability and preventing trouble than jeopardizing its many workers and pensioners for a little extra profit through illegal land claims. Cost-benefit analyses at *Yungang* were therefore based on a long-term perspective. In addition, the enterprise seems to have developed a corporate culture of law abiding behavior and social responsiveness, which is special as the company did not depend directly on local communities.⁴²

Conclusion

Compliance with the LMA’s rules on arable land protection occurred at Lake Dianchi as a result of interrelated factors. It is important to note that of the cases studied here, in most cases of compliance (except *Yungang*) with the LMA’s strict bans on building on collective land, compliance resulted because the regulated actor could not violate the law, even if it had wanted to. To understand compliance, variables both external and internal to the regulated actor have been important.

The economic context played a role for understanding why some regulated actors were unable to break the law. Without a market for land needed for housing and industry, such violations were not feasible economically in Kouxiang and Jiacun Number Seven. The social context, more specifically protest by local villagers, was central for explaining beyond-compliance in the Jiacun temple and school cases, and fear of such social

⁴² In similar cases in larger, former State Owned Factories (SOEs) in Kouxiang we found similar results with regard to LMA compliance behavior. As we will see below the size of the company cannot fully explain compliance with pollution regulation.

context influenced *Yungang*'s compliance. In these cases, the political context had an indirect influence, mainly through the effect village democratization had on the social context, empowering some local communities to pressure their leadership. In the Jingbao temple case, the political context was important for understanding such impossibility, as it dictated the sensitivity that forced them into compliance. The regulatory context played a minor role in explaining compliance. While state enforcement of the LMA rules did not occur in any of the cases researched, legislation had some influence on compliance. First of all in all cases, the law's norms proved to be feasible. The law's norms banning certain types of collective construction were mainly feasible, meaning not too difficult to comply with and acceptable, as the opportunity for violation did not exist and compliance thus did not lead to lost income. The law's norms on land compensation were feasible as they were much lower than what was locally the norm for compensation.

In addition to these external variables, variables internal to the regulated actors, consisting of their main characteristics in terms of size, moral values, economic position, resources and organizational culture were also important for understanding compliance in these cases. However no singular lesson can be drawn about the internal variables, noting that both non-profit and profit organizations, large and small organizations, rich and poor, short-term and long-term oriented, have all complied with the law, depending on the exact circumstances of the case.

The present chapter provides conclusions in answer to the main research question about the impact of legislative and enforcement changes on compliance and goal attainment (arable land protection and compensation for arable land loss). As noted, first of all, changes in the law were in these cases not unfeasible. However, if the law had not been changed, most of the cases in compliance with the ban on housing and industry construction on leased land (except *Yungang*), would probably still have occurred, simply because violation was not economically possible. For compensation compliance, changes in the law may have had a symbolic impact, as the LMA regulates that land should be compensated, however the level of compensation in the law is far beneath that what local villagers wanted and got in the end. Law enforcement did not occur in the cases studied. It is for this reason that enforcement campaigns have been organized since 1997 for land violations. (See Chapter 14) However, such post-1995 changes in land law enforcement did not affect any of the compliance cases studied here.

8. Attempts at Abatement

Pollution Compliance Cases from Kunming

Introduction

Since the second half of the 1990s, although maintaining many weak and vague norms, China's legislators have passed increasingly stricter and more specific pollution prevention and control legislation. They did so hoping that stricter legislation would be more effective in stopping China's increasing pollution problem. The 1996 WPPCL introduced strict specific norms banning the discharging, dumping, burying and storing of certain substances in such a way that they can harm surface or ground water.¹ The WPPCL further prohibited the use of certain obsolete technologies and the establishment of new small heavily polluting enterprises.² The 2000 APPCL introduced a strict norm banning pollution emissions exceeding the standards.³ In addition, it introduced pollution fees for all emissions, not just for those excessive of the standards. Moreover, the APPCL set very strict sanction minima to punish violations of its rules.⁴ The 2002 EIA law also brought stricter and more comprehensive rules. First, it widened the scope of application of the EIA system to make EIA mandatory for governmental planning.⁵ More importantly for this research here, the EIA Law also established strict mandatory sanction minima for violations.⁶

Although pollution is still a serious problem at Lake Dianchi, and there are many violations of law (see Chapter 10), there are also cases where the regulated actor complies with pollution control legislation. In order to the effects of legislation and enforcement on such compliance, and in order to understand the reasons for compliance and violation at Lake Dianchi, this chapter will analyze cases where enterprises have complied with pollution regulation.

How Farmers Badgered a Chemical Fertilizer Plant for Compensation

Mrs. Li is honest⁷: "Anybody who says you can make fertilizer without pollution is lying."⁸ She sighs and looks me straight in the eyes. We are in

¹ Water Pollution Prevention and Control Law § 29-34 and 41-42

² Water Pollution Prevention and Control Law § 22, 23

³ Air Pollution Prevention and Control Law § 13

⁴ Air Pollution Prevention and Control Law § 47,48

⁵ EIA Law § 3, 7.1, 8.1.

⁶ EIA Law § 31.1

⁷ This section is based on interviews with NCFC management and *Ningshi* governmental officials.

Ningshi, only a few kilometers away from *Yungang*, in the hills that border the Tanglang River, upstream from Ningshi's natural protection area, the Ningshi Wenquan (Ningshi Hot Springs). Mrs. Li is the vice-director of the *Ningshi Chemical Fertilizer Company* (*NCFC*). Like many of the enterprises in the area southwest of Kunming her business depends on the phosphor mines that stretch from Jinxian District, through Kouxiang Township to Ningshi City. According to a Ningshi civil servant these mines harbor the largest phosphor reserve in Asia. *NCFC*'s location is well chosen, right next to one of the larger mines, with a road and railroad track for transport and adjacent to a river for water and a discharge location.

The factory's history represents China's post-1978 industrial development. Grasping the historical opportunities of Deng's reform program and the favorable local geographical conditions, local entrepreneurs established a small chemical fertilizer plant in 1984. It started as a privately owned company that had a crew of only ten people. As China's economy took off, so did the *NCFC*. Soon it became so big that it was transformed into a state-owned enterprise managed by Ningshi City. At its height, it employed 320 workers. However, in 2001 a SOE reform policy transformed ownership once again into private hands and established a corporate structure.⁹ In 2004, the factory had downsized to only 210 workers to become more cost-efficient. With the reform, *NCFC* also lost its state subsidies. Factory management is, however, positive as they believe that their new privatized status has had a positive effect on the company. "In the past the factory belonged to the state, which actually meant it belonged to everybody. Too many people, inside and outside the company, had decision-making power and management was difficult." Mrs. Li says about the past. "Cynically enough, with all those bosses, in those days, no one took responsibility for mismanagement or losses. They did not need to, as they could always go to the state for help." Now that state meddling and support

⁸ My interview with the *Ningshi* plant was special because of their willingness to discuss actual problems instead of merely giving socially desirable answers that the environment is so important. It seems that Fryxell and Lo's study has been influenced by factory managers responding in a socially desirable manner, which they also recognize. In my experience the level of environmental commitment of firm managers is only high if there is enough pressure on them to keep it high, either from the local population, the local government or the media. So my findings are somewhat different from Fryxell and Lo's survey based study. Compare with Fryxell and Lo, "Organizational Membership and Environmental Ethics: A Comparison of Managers in State-owned Firms, Collectives Private Firms and Joint Ventures in China." 1951-4

⁹ Such privatization is going on throughout China see Y. Lin and T. Zhu, "Ownership Restructuring in Chinese State Industry: AN Analysis of Evidence on Initial Organizational Changes," *China Quarterly* (2001).

has stopped the company leadership structure is leaner and management is more direct with shorter lines of decision-making.

The company's current situation is not all positive. *NCFC* still carries a burden from its state-owned past: pensioners. The factory must fully support 110 retired workers. Moreover, although the factory's recent downsizing has cut costs, its financial books still show no profit. The market is partly to blame, as the costs for raw materials have risen dramatically and business in the increasingly competitive market has been difficult. The factory has been placed under further pressure by incidental investments. Recently it has invested 30 million RMB to build its own vitriol plant to replace the low quality vitriol small companies had supplied. The factory also spent 3 million RMB to build an on-site water treatment facility to cleanse its wastewater, which used to be discharged directly into the Tanglang River. This environmental installation takes a staff of ten to operate it, which costs another 300,000 RMB a year. The environmental investments make *NCFC* a weak competitor. Mrs. Li explains this angrily: "Small companies do not care for the environment and do not invest in such installations. We can never compete with their prices. Such small companies have no pensioners to think of and can run more risks as they do not care for their future."

Indeed, *NCFC's* retired workers and its medium-large size have determined its long-term perspective. The company knows that if it is to exist in the future, it must make investments now, even though these do not bring direct profits. The long-term perspective is one reason why *NCFC* has invested in costly water treatment facilities and ended the illegal¹⁰, untreated discharge of pollutants into the Tanglang River. Installing the water treatment installations did little to reduce pollution-related costs such as PDF.¹¹ Factory management stated that PDF is calculated based on the total amount of fertilizer produced and not on the total amount of pollutants discharged or emitted. Factory management knows that pollution control is the future. If the factory is to remain in operation and support its retired and current workers it has to invest in pollution control or one day, like the outdated paper industry in the area, close down or be closed.

Another important reason why *NCFC* has invested heavily in compliance with pollution regulation is the factory's relationship with

¹⁰ WPPCL § 29, 32, 46, DPR 2002 § 17.1 and 21.2

¹¹ Thus, here the cost of fees was a minor influence on compliance behavior. This is similar to earlier findings by Sinkule and Ortolano. See J.B. Sinkule and L. Ortolano, *Implementing Environmental Policy in China* (Westport: Praeger, 1995). 143, Dasgupta et al., "Industrial Environmental Performance in China, The Impact of Inspections." 3, but in contrast with Wang and Wheeler's study, see H. Wang and D. Wheeler, "Endogenous Enforcement and Effectiveness of China's Pollution Levy System," *World Bank Policy Research Working Paper* May (2000). 20

neighboring farmers. Unlike farmers in Kouxiang, who as we will see later, are in many ways dependent on phosphor-related industry in their area, farmers in Ningshi do not depend directly on phosphor production. Ningshi City offers many opportunities for selling farm products, but also for non-agricultural work outside of the phosphor industry. Consequently, farmers will not lose much income if the phosphor industry is threatened through strict pollution control regulation. Over the years, such independent farmers have actively protested against *NCFC*'s pollution discharge by involving local EPBs and local media. Farmers have increased pressure by writing *shangfang* petition letters¹² to higher-level governments and by calling the EPB to come to inspect illegal discharges.

Farmers also sought less legitimate means to gain as much compensation as possible. According to factory management, in one case local farmers cut holes into the plants' main discharge pipes to make the dirty water stream onto their land to get extra money for their damages. Furthermore, farmers also started to grow *Biba* trees, a local kind of fruit tree that is extremely difficult to grow under the cleanest and best of circumstances. When the trees failed to grow, as could have been expected, farmers allegedly demanded another monetary reward for their losses. Factory management knew that if *NCFC* were to stay in operation in the future, it would have to come to terms with its neighbors. The factory's long-term perspective was thus partly the result of local pressure from neighboring farmers.¹³

After the factory built its water treatment installations, local protest did not subside. In April 2004, farmers believing that the *NCFC* was responsible for a large illegal pollution discharge into the Tanglang River and the surrounding farmland, called the local Yunnan News to report an illegal spill. The following day this provincial newspaper ran a large front-page article reporting that the *NCFC* had caused a large environmental disaster destroying the local environment and farmer's interests. The paper failed to verify the facts of the matter properly and blindly printed what local farmers had told them. It turned out that *NCFC* was not responsible. A nearly bankrupt neighboring enterprise's rusted installations had caused the accident. The newspaper article had a negative impact on *NCFC*. Angry Kunming citizens called factory management to demand an explanation. Some of their clients also voiced their concerns and *NCFC*'s reputation was damaged. Even after the Ningshi EPB had found that *NCFC* had not caused

¹² For more information on petitions see O'Brien and Li, "The Politics of Lodging Complaints in Rural China."

¹³ Here compliance are related to local community pressure. Our findings are in line with Johnson. See Johnson, *Clear Water, Blue Skies: China's Environment in the New Century*. 61

the spill, local farmers still surrounded the factory for three days, not letting anybody in or out.¹⁴ The police had to end the protest and rescue the terrified factory personnel. When factory management demanded that the newspaper print a rectification, the editor in chief flatly refused. I asked Mrs. Li why they did not go to court, she said, "The media is very powerful. If we would sue, their printed word could crush us long before the case would close."¹⁵

As far as is known, the factory is currently in compliance. In September 2004, the KMEPB completely checked the factory and found no violation. With extremely vigilant neighbors, illegal nightly discharges would be noticed and so far none have been reported. Furthermore, there are many fishponds in the direct vicinity of the factory. While in Baocun, see Chapter 10, all fishponds in a radius far wider than those around *NCFC* had died because of continued fertilizer related pollution, here local farmers continue to grow fish.

Findings

NCFC is a case of compliance with the law. The enterprise ended a violation of new discharge norms introduced by the WPPCL.¹⁶ In this case, the new stricter norms banning certain discharges in the WPPCL¹⁷ and perhaps even more so the strict local norms in the DPR banning discharges excessive of the norms and threatening to close enterprises that continue to fail to comply with the norms¹⁸, have been successful in initiating a change to decrease pollution

The social context, which here consisted of neighboring villagers and Kunming media, has made *NCFC* careful to break the law.¹⁹ An important lesson here, when compared with the *Huafei* case to be discussed

¹⁴ Here we see again a case of what seems to be "unrightful resistance" where farmers have tried to involve as many forms and for a of protest as possible, not shunning violence and involving the media. Compare with O'Brien, "Rightful Resistance."

¹⁵ In *Ningshi* there has been much protest, and this case is comparable to Jing's research in Gansu province where the pollution related health problems drove a local community to active protest against a local fertilizer plant. See J. Jing, "Environmental Protests in China," in *Chinese society: change, conflict and resistance*, ed. E Perry and M Selden (London: Routledge Curzon, 2004).

¹⁶ WPPCL § 29, 32, 46

¹⁷ The norms in this case are the 1996 Integrated Water Discharge Standard, GB 8978-96 and the 1995 Discharge Standard of Water Pollutants for Phosphate Fertilizer Industry, GB 15580-95.

¹⁸ DPR § 17.1 and 21.2

¹⁹ Sinkule and Ortolano also describe cases in which local pressure was an important motivation for compliance. See Sinkule and Ortolano, *Implementing Environmental Policy in China*.137-8

in Chapter 10, is that local farmers have rallied against the company because they do not depend on this factory as a main source of income.²⁰ The relation between the factory and local farmers is thus adversarial and not symbiotic, as it is between *Huafei* and Baocun village (see Chapter 10).

The influential social pressures may in part have been possible because of the legislative changes made. Had the new norms not existed, one can doubt whether the local citizens and the media would have been able to exert the kind of pressure that they had. In addition, if the pollution had not been made illegal by the new norms one can wonder whether the company had feared for its survival in the future. Although the regulatory context may thus indirectly explain compliance, it is interesting to note that state enforcement itself was less influential than pressure from the social context. Direct threat of sanctions did not occur, only the expectation that regulation would become stricter in the future played a role.

Internal variables of this chemical fertilizer plant are equally important for analyzing this case. First, *NCFC* is a factory that supports a large amount of workers and especially pensioners, similar to the case of *Yungang* in Chapter 7 (see also further in this chapter). This burden has made the factory risk averse and long-term oriented. Although *NCFC*'s compliance has put the company under a short-term competitive disadvantage with smaller companies that have not made such investments and operate in violation of the law (see Chapter 10), risk aversion and long-term orientation have made the company invest in environmental pollution installations, which in the future law enforcement will force them to get. For the *NCFC*, profit-maximization is not tantamount, instead stability and survival is important for supporting retired and existing workers. Because of *NCFC*'s size and its relative economic success²¹, the company has been able

²⁰ The local community thus had an important influence on compliance. Later we will see that when such local pressure does not exist the chances of violation are higher because state led enforcement alone has been too weak to create an incentive to comply. It is interesting to compare my findings here with Tang et al. work on public participation and EIA, which found that public pressure can impact enforcement and compliance, but its influence is limited by China's current non-democratic political system. See Tang et al., "Institutional Constraints on Environmental Management in Urban China: Environmental Impact Assessment in Guangzhou and Shanghai.", Tang, Tang, and Lo, "Public Participation and Environmental Impact Assessment in Mainland China and Taiwan: Political Foundations of Environmental Management." 23-4

²¹ Compare with Arts et al., "Bestuurlijke Risico's bij een beperkte toelating van afvalstoffenbedrijven (Administrative Risks of a Limited Authorization of Waste Disposal Companies)." DiMento, "Can Social Science Explain Organizational Noncompliance with Environmental Law?" 70

to pay for such compliance costs.²² Finally, *NCFC* has been forced to adopt a socially responsive organizational culture, which in this case was conducive towards compliance. Their environment has literally forced them to consider their concerns. This is mainly because the *NCFC* is more dependent on good relationships with their neighbors than that these neighbors depend on them.

From Paper to Boxes

Opened brown cardboard boxes with red hand-stamped print stand in neat rows to dry in the strong Yunnan sun.²³ The enterprise's small courtyard is so full of boxes that the owners have had to park their delivery vans on the street outside. Visitors must be careful not to topple the boxes like dominoes. This is Jiacun Cardboard Box Company (*JCBC*), one of Jiacun Village's many cardboard box-producing enterprises. Such cardboard box enterprises are what remain of the village's paper industry.

Prior to 1996, Jiacun Village had had a paper and pulp factory. This paper factory was a collectively owned TVE, established in 1982, which also comprised of two box factories. At its height, this small paper factory employed about 90 workers, all locals from the village. Like many small paper and pulp enterprises, Jiacun's paper factory was highly polluting. Its pollution was discharged untreated into Jiacun's Daqinghe River that streamed directly into Lake Dianchi. This paper factory and many others in the same district were largely responsible for Lake Dianchi's transformation from a clean vibrant sea in which people washed their clothes and went swimming, into a dead eutrophied pool full of blue algae.

By 1996 the Jiacun paper factory got into trouble. The increased competition in the paper market with the rapid growth of other paper factories in the region, combined with company mismanagement made the company incur increasing losses. Meanwhile, in 1996 China witnessed a major policy shift with regard to environmental protection. As Chapter 14 details, the State Council organized a nationwide campaign to close down small highly polluting enterprises, such as the small paper and pulp TVE in Jiacun.²⁴ Around the same time, such small highly polluting enterprises were

²² Here our findings resonate with earlier research by Johnson, Fryxell and Lo. Johnson, *Clear Water, Blue Skies: China's Environment in the New Century*. 62, Fryxell and Lo, "Organizational Membership and Environmental Ethics: A Comparison of Managers in State-owned Firms, Collectives Private Firms and Joint Ventures in China."

²³ This section is based on interviews with factory management, former workers, villagers and village leaders.

²⁴ State Council, "State Council Decision on Several Problems concerning Environmental Protection (Guowuyuan guanyu Huanjing Baohu ruogan Wenti de Jueding).", for an overview of the campaign see Chapter 16 and Van Rooij, "Implementing Chinese Environmental Law through Enforcement, the *Shimu Xiao* and *Shuangge Dabiao* Campaigns."

out-phased in the 1996 WPPCL amendment.²⁵ Around this period, Jiacun's only paper factory closed down. Some villagers and village leaders have said that it was closed down because of its pollution and as part of the campaign. Others, including former factory workers, stated that the plant had gone bankrupt and closed its own doors. Jiacun village leadership even stated that the campaigns only affected poor enterprises. In other villages in the vicinity, richer, similarly dirty enterprises could remain in operation to guarantee jobs and income.

When the paper factory ceased to exist, Jiacun was left with the TVE's clean components: the two cardboard boxes companies. In 2004 the box factories still existed. Making cardboard boxes has become one of Jiacun's main industrial activities. Paper box industry is important as its production complies with the new WPPCL and the new stricter 2002 Dianchi Protection Regulations.²⁶ Furthermore, making boxes is light unskilled work, which provides an income of about 12 RMB a day for many local women.

JCBC thus still exists but business has over the last years become increasingly difficult. Since 2003, the company has changed ownership, from collective to private.²⁷ The two current owners have been able to acquire the enterprise through a management buy-out under which they paid 350,000 RMB for the factory premises, installations, contracts and 50-year land rights. The factory currently employs thirty workers, all local women. The last years' profits have declined as the prices of paper have risen. When Jiacun still had its own paper production, paper cost only 500 RMB per ton. Now they must buy it from the more remote Yiliang paper company that sells paper at 1500 RMB per ton. The closer Fucun Company is too expensive, as it has started to ask 2000 RMB per ton, since moving its production facilities to the remote Minxian County. *JCBC's* owners have made additional investments of 1 million RMB for two delivery trucks, but so far they are unhappy with the returns of 900,000 RMB a year that leave them only a small profit. Mr. Yang, one of the owners, says, "When we were still a collective TVE no one really cared for losses or profits. But now we must pay for our losses ourselves, just like we can get to keep the profits."

²⁵ WPPCL § 23

²⁶ DPR § 17.1 and 21.2

²⁷ Many of Jiacun's enterprises were privatized recently some are now owned by locals and others by non-locals. The privatization of TVEs is a national trend, see H. Li and S. Rozelle, "Privatizing Rural China: Insider Privatization, Innovative Contracts and the Performance of Township Enterprises," *China Quarterly* (2003).

Findings

The transformation from paper and pulp to cardboard boxes production in Jiacun village has in fact been a transformation from violation to compliance. Had the company not closed down it would since the introduction of the WPPCL in 1996 (and later the DPR in 2002) have been in violation with these stricter rules, which ordered such companies to be abolished.²⁸ The compliance process was complex and consisted of closing down existing industry because of a change in policy and for economic reasons. It also consisted of maintaining components of the old industry that were clean and could not violate regulation. Because of the uncertainty as to why the paper factory closed down and became a box factory, the analysis of compliance is difficult here. Still, one can carefully discern various external and internal variables at play.

The increased competition in the economic context attributed to the company's increasingly bad performance and its possible bankruptcy and closure. The social context was not very influential. Even though the paper company had polluted the local environment, villagers had not rallied in protest, as villagers at *NCFC* had. A likely explanation is that the paper company had been an important local employer. Depending on what to believe, the regulatory context may have been influential, as the factory closed down around the time of an enforcement campaign.

Internal variables were also important in this case. First of all, years of mismanagement had bankrupted the paper factory. Such mismanagement had been caused by the fact that the company was collectively owned and management consisted of non-professional locals, none of which were personally responsible for factory losses. In addition the factory lacked the resources for compliance. Compliance with the law while continuing as a paper factory of this size would have been economically impossible. Thus, the paper factory's small size also influenced its transformation into a clean box factory.

Bankruptcy Compliance

It is a sad sight.²⁹ The factory's windows are broken. The workers are gone and the only person there is an old man who has ventured from the neighboring village onto the enterprise's premises. This is what is left of *Yunzhi* Paper Company (*Yunzhi*), once one of Yunnan's larger SOEs, one of

²⁸ Water Pollution Prevention and Control Law § 22, DPR § 17.1 and 21.2

²⁹ This section is based on interviews with former factory workers and friends of factory management. Furthermore, it is based on information provided on the YN EPB website and paper industry websites.

the largest paper producers in the region, located on the south west bank of Lake Dianchi right where the lake streams into the Tanglang river. What happened here is a story of Chinese enterprise reform with both tragic and positive consequences.

Yunzhi was Yunnan's first paper and pulp factory when it was established in 1940. By 1999 the factory was one of China top-100 largest paper factories and employed over 2000 employees. At that time its production volume was over 500,000 tons a year and its total capital was reported to be 300 million RMB. Around 1999 *Yunzhi*'s ownership structure was reformed from a state-owned into a privately owned corporation.³⁰ While in some companies, such as the *NCFC*, this transformation improved management, in the case of *Yunzhi* management only got worse. Soon it was no longer able to fully pay its employees. One former factory worker explained that at this time he only got 200 RMB a month in pay instead of the 800 RMB he was owed. Nevertheless, he continued to work. "They paid just enough to live off and finding another job is not easy," he said irately.

Meanwhile, the company had been seriously violating environmental law.³¹ Its environmental installations had been built in the 1970s and were inadequate to meet present day's standards. The Kunming city government that managed the factory thought that investments for new installations were unnecessary. The factory thus caused a considerable amount of pollution by discharging its wastewater into the Tanglang River. Farmers living in downstream Licun and Baocun still recall the incredible pollution. Once the *YPC* caused such severe pollution, that the *Yungang* Steel Factory had to halt production for several hours, as it could no longer use the water from the river. *Yungang* tried to claim compensation and involved the Kunming government in the negotiations. However, *Yungang* never saw a penny of the more than 10 million RMB it had suffered in damages. By this time, *YPC* would simply not have been able to afford it, even if it had been willing to. Around 2000, the Yunnan EPB placed *YPC* on a list of the thirty most polluting enterprises in the province. This brought increased pressure on the enterprise to install new EP installations to remain in operation.

In 2001, *Yunzhi* Paper went bankrupt when it could no longer pay its workers enough to keep production going. All of *YPC*'s 2000 workers were laid off. Although many workers had previously been farmers, they could not go back to agriculture because most had sold their land once they had landed the SOE job. The only thing the workers received was an incidental payment of 3000 RMB. However, *Yunzhi*'s demise ended years of extreme pollution

³⁰ A reform ongoing in China, see Lin and Zhu, "Ownership Restructuring in Chinese State Industry: AN Analysis of Evidence on Initial Organizational Changes."

³¹ WPPCL § 22, 29, 32 and probably § 35, 37.

and violations of law. Cynically enough *Yunzhi* only came in compliance after it had ceased to exist.

Findings

Yunzhi is a case of violation and a case of compliance because its bankruptcy ended years of violations of law.³² Compliance here was not an active choice of the regulated actor but born out of the impossibility to continue operation and thus violate the law. In *Yunzhi*'s case the stricter and more specific rules did not have an impact on ending the violation of law. Even though the new rules were introduced, clearly mandating the out-phasing of obsolete technology, *Yunzhi* remained in operation, supported by the local government that managed it until 1999. Compliance with the norms of the law would have meant making significant investments, which for such an old company as this one was not economically feasible. Compliance with the law's strict provisions on obsolete technology would have meant closing down the company, had it not gone bankrupt itself. Such closure, which here happened because of bankruptcy, we saw, seriously affected the company's 2000 workers. In the light of the importance of appeasing such workers and given the years of unpunished violations of law and the unsuccessful resistance by pollution victims, it is doubtful whether enforcement authorities would have used the law's new norms to close the company if it had done better economically and not bankrupted itself.

Yunzhi's bankruptcy, which marked its compliance, was closely related to changes in the country's economic and political contexts, which changed from command to market. The company was unable to adapt to the market forces and eventually closed down. Although, the social context, which consisted of local pollution victims, tried to exert pressure on the company, its efforts failed to improve compliance or even attempts at it. The regulatory external context in terms of law enforcement was also not influential for compliance, as years of violations could occur without enforcement reactions, and continued even after campaigns had been initiated (see Chapter 14). Such violations could likely continue unaddressed due to support from the local political context (see Chapter 13), as local governments valued *Yunzhi*'s role in the local economy.

Yunzhi's internal context explains the initial violation and the final compliance. For understanding the years of violations, *Yunzhi* is an example of a profit maximizing company caring more for the short-term income through violation of law than for long-term survival and compliance. In addition, we see that *Yunzhi* is a socially unresponsive company that is used

³² Mainly with the WPPCL § 22, 29, 32 and probably § 35, 37.

to polluting its environment and breaking the law. Even when its social context initiated action against *Yunzhi*, the factory continued to damage its immediate environment, without any apparent concern for its effects on the local population. In contrast with the *NCFC* and *Yungang*, *Yunzhi*, although it supports a significant amount of workers, has not invested in its future. This is perhaps so because the factory, after its restructuring did not have to support pensioners (similar to the *Huafei* case in Chapter 10 and different from *Yungang* and *NCFC* in Chapter 7 and 8). Also in contrast with *NCFC* and *Yungang*, *Yunzhi*'s large size was not beneficial for compliance.³³ For such a large company, surprisingly a short-term perspective was dominant and management failed to invest resources for clean production. In the end, the company lacked resources to pay its staff, let alone invest in the installations necessary for clean production. *Yunzhi*'s continued violations and its final compliance are closely related to its management, that failed for years to curb pollution, and also let the company's profits decline over the years causing the bankruptcy that ended the violations.

From Fucun to Minxian: A Costly Move towards Compliance

Fucun is a strange village. Long blocks of three story apartment buildings line the four-lane road to Kunming. People are dressed in the latest urban fashion. The village has a large high school and attracts students from the region. Moreover, Yunnan University and the Yunnan Academy of Arts have opened local departments here. Another strange thing is that the Village Committee's headquarters are larger than those of the Township government. Furthermore, the village leader's office is the most luxurious and spacious governmental office I have seen in all of China. In fact, Fucun is not an ordinary village. For years, it has been Yunnan's most important model village of successful rural development. Fucun owes its prosperity to the rapid development of TVEs that have formed the motor of the local economy. Fucun was able to use its collective surpluses to invest in small industries that prospered because of their fortunate location close to Kunming and close to the lake.³⁴

³³ This case is somewhat in contrast with other studies that find that larger and privately owned enterprises should do well. Compare with Johnson, *Clear Water, Blue Skies: China's Environment in the New Century*. 60-2 Compliance behavior is complex and not only related to the size or type of ownership or level of enforcement. For more see conclusions of this Part in Chapter 11.

³⁴ This section is based on interviews with a Fubao villager, Fubao village leadership, villagers from neighboring villages and Jiacun Township officials. It is also based on interviews with Kunming EPB personnel in charge of inspections and enforcement. Furthermore it is based on several visits to Fubao in 2004 and on several internet articles including: http://www.yn.xinhuanet.com/topic/2003-11/08/content_1170009.htm

Fucun's most important TVE was the Fucun Paper Company. This collectively owned factory was established in 1980 and used to be located right on the edge of Lake Dianchi. Until the late 1990s, this company was doing very well economically. It had grown to a moderate size and employed about 300 workers. By the late 1990s, it was the largest industrial employer in the village. However, *FPC*, like most other pulp-producing paper companies, had a major pollution problem. Its discharge flowed untreated into the Dianchi Lake causing serious harm to the lake's ecological system. Although the enterprise had invested in building water treatment systems, it often failed to use them in order to cut costs, and polluting discharges continued.

A law enforcement campaign that was part of national policy to clean up major polluters especially at targeted rivers and lakes, of which Lake Dianchi was one³⁵, brought an irreversible change for *FPC*. While the campaign originally planned to end pollution violations at medium and larger enterprises by the end of 2000, the 1999 Kunming World Horticultural Expo forced the Yunnan government to take action against pollution, earlier than the national campaign schedule demanded (see Chapter 14). Thus, in 1999 it was decided to carry out a "Zero Clean-Up" campaign targeted at 253 major polluting enterprises around Lake Dianchi. Fucun Paper was one of those enterprises and on the last day of the campaign, on 1 May 1999, a night inspection team found that the company was in violation and ordered it to close down. In fact, the EPB closed off the factory's premises with a Kunming governmental seal.

After years of being able to discharge pollution into Lake Dianchi illegally, *FPC* now faced a sudden strict enforcement action. The Kunming EPB used these circumstances and negotiated with Fucun Paper about moving its production away from Lake Dianchi. With the strict enforcement of 1999, *FPC* management could do nothing but give in and cooperate in moving the factory. The move was not an easy process. First, because it involved firing most of the locally employed staff, only the specialized management and engineers could maintain their jobs. Closure or moving location, it was clear from the start that this would affect Fucun's prosperity. A second problem was finding a suitable location that would welcome a medium sized collectively-owned enterprise with a pollution problem. With the help of the Kunming EPB, Minxian district northwest of Kunming agreed to support *FPC*'s move to their locality. Minxian is one of Kunming's poorer districts because mountains used to obstruct a direct route to the city. Minxian therefore never developed industry, neither TVEs such as in Jiacun and Fucun village, nor SOEs such as in Kouxiang Township. Minxian mainly

³⁵ State Council, "State Council Decision on Several Problems concerning Environmental Protection (Guowuyuan guanyu Huanjing Baohu ruogan Wenti de Jueding)."

depended on agriculture. After a new tunnel was built in the late 1990s Minxian was suddenly quite easy to reach from Kunming and from 2000 onwards it slowly attracted industrial development. Still Minxian is far less developed than other areas, and in 2000 it was more than willing to accommodate Fucun Paper's move to their district, especially because *FPC*'s plant in Minxian did have all the necessary EP installations.³⁶

Since *FPC* moved part of its production process to Minxian in 2000, the company's profits have started to decline. Although the Fucun part of *FPC* is now in compliance and only carries out the clean parts of the production process, compliance has not come cheap. *FPC*'s financial situation is now very poor and a bankruptcy is feared. The investments in new premises and the considerable costs related to the move may have been too much for the medium sized TVE. With the loss of its most important enterprise, Fucun's economic situation as a whole has rapidly deteriorated. The village has been unlucky because its new developmental direction, tourism, for which a resort was built at the lakeside right next to the now unused *FPC* premises, was hit hard by SARS in 2003 and had trouble recovering. Villagers were suddenly, after years of prosperity, so unhappy that they voiced their discontent during the 2004 VC elections. If Fucun was once a model of a TVE development based village, by 2004 surrounding villages pitied the poor Fucunese who had lost their industry, prosperity and even feared that their officials had stolen much of their collective funds.

Findings

FPC is a case of compliance as the old polluting part of the company located at the sensitive and strictly regulated shore of Lake Dianchi was moved into new premises with approved EP installations far away from the Lake Catchment. Compliance ended Fucun's violations of law.³⁷ Compliance did not come cheap at *FPC*. However, continued violation was in this case not an option, as the EPB had already sealed off the factory and entered negotiations to move it. For this case, it is difficult to say what the effect of the newer stricter norms of the post-1995 pollution laws was. On the one hand, Fucun had been in violation of the existing pollution laws before

³⁶ In such a remote location, one can wonder whether the *FPC* uses its installations or secretly discharges at night without the proper discharge treatment in order to cut costs as some other factories do in the region. See Chapter 10.

³⁷ Water Pollution Prevention and Control Law § 14.2, 29, 32, 35 and 37, 1998 State Council Regulations on Environmental Protection Management at Construction Projects § 16

stricter norms were introduced after 1996.³⁸ As such, one could argue that the new norms were not necessary, as violation was already established under the old laws. On the other hand, one could argue that the newer stricter norms have had a positive effect as they provided even clearer guidelines for establishing the fact that the factory was in violation. Such rules may have enabled the environmental authorities to have a stronger bargaining position with the company when closing it down and negotiating its resettlement.

For *FPC* the external regulatory context is influential for understanding compliance. The Fucun case remains special, because unlike other pollution cases, compliance occurred largely because of enforcement action aimed to make it comply with the law.³⁹ In other cases, like the *Yunzhi* and the Jiacun Paper companies, compliance was the result of bankruptcy or part bankruptcy combined with the threat of enforcement. Here it was the direct enforcement threat that made the company move. The external social context had not pressured the *FPC* to comply, probably because it was a TVE owned by the local community and managed local leaders and providing jobs and income for local villagers. Law enforcement affected this social context because it marked Fucun's economic decline, which had a significant impact on local livelihoods. Finally, the local political context was important. While the violations of the past were condoned by local governments, these governments were helpful in helping *FPC* move to Minxian ending such violations.

FPC's internal variables were also, but to a lesser extent, important for compliance. The company was too large to be closed down completely and too small to resist enforcement, as *Yunzhi* and others (see Chapter 13) did. Because of its direct link with Fucun village the company was socially responsive, however seemingly not in a way that fostered compliance with pollution law, but the opposite, leading to continued pollution in response to local needs for jobs and income. In addition, the company was doing economically well enough to prevent bankruptcy like *Yunzhi* and Jiacun, allowing it to move instead of close.

³⁸ The company did not use its approved water treatment installations and was thus in violation of the old WPPCL and the 1989 EP Law, which both contain the 3T system which mandates the use of EP installations.

³⁹ This is the only case in which we found that enforcement is important for compliance, as indicated in many earlier studies. See Johnson, *Clear Water, Blue Skies: China's Environment in the New Century*. 60, Yang, Head, and Liu, "China's Treatment of Crimes Against the Environment: using criminal sanctions to fight environmental degradation in the PRC." 677

How a Steel Giant Invested in Compliance

When asked to name examples of good compliance with pollution legislation, Kunming EPB personnel do not hesitate: “*Yungang*’s compliance record is excellent.” Of course it is difficult to be sure whether an enterprise the size of an ordinary city complies with all of China’s air, water, noise and solid waste pollution laws. However, the EPB informants’ honesty about violations at other factories and the many stories I had been told by informants living in the Ningshi area made me at least convinced that *Yungang* is a company that strives to comply with pollution law as it does with the LMA (as we saw in Chapter 7).⁴⁰

Yungang was established in 1939 as a small steel factory. Over the years it has grown to become one of China’s largest producers of steel and the single largest industrial enterprise of Yunnan province. *Yungang*’s steel production has always caused pollution, but it was not until the 1970s when China’s national leadership started to address environmental concerns that *Yungang* started in earnest to try to control its pollution. The abatement process was not easy and it was one of trial and error. At first, the enterprise took basic measures such as lengthening its smokestacks to diffuse air pollution over a larger area, and building small water treatment plants. Later, rigid measures were necessary because the existing steel production installations were not geared for clean production and new less polluting units had to replace them. Recently, for instance, new steel furnaces had to be installed when the factory converted from high sulfur content coal as to natural gas as a main source of heating. Environmental protection has not come cheap at *Yungang* and since 1972, and especially since the 1990s, it has spent 600 million RMB on pollution abatement. An important part of *Yungang*’s environmental investments is the company’s internal environmental protection bureau that employs a staff of 50 engineers.

According to *Yungang*’s head of the environmental protection bureau the increased costs of pollution have formed an important motivation for investing more in compliance. Unlike *NCFC*, whose PDF was calculated on the basis of production volume and did not change because of environmental investments, *Yungang*’s discharge fees were calculated on pollution volume and have been important for making *Yungang* comply with the law.⁴¹ Over the last years the steel factory has had to pay an annual

⁴⁰ This case is based on interviews with *Yungang* EP department personnel, district and municipal EPB personnel carried out in 2004. Moreover data was consulted in Kunming Kungang Inc. EP Department, *Yungang Huanjing Baohu 30 Nian Jinian Wenji (Collected Documents Commemorating 30 Years of Environmental Protection at Yungang)* (Kunming: Yungang Inc., 2002).

⁴¹ So here our findings resonate with Wang and Wheeler, but not with Dasgupta et al. and Sinkule and Ortolano. See Wang and Wheeler, “Endogenous Enforcement and Effectiveness

amount of around 3 million RMB in discharge fees. With the new Air Pollution Prevention and Control Law discharge fees have increased because companies must also pay for discharges within the standards based on the total load rather than the concentration amount.⁴² The difference in PDF payment between *Yungang* and *NCFC* (*Ningshi Chemical Fertilizer Company*) can be explained by the fact that the Kunming EPB, Yunnan EPB and even SEPA collect *Yungang's* fees, whereas for *NCFC* only the Ningshi EPB is in charge of fee collection.

Another reason for *Yungang's* environmental investments has been pressure from local inhabitants. First, the increased environmental awareness of people living in the Ningshi area has led to increased complaints about pollution problems. Every time one of *Yungang's* installations fails and the factory emits an irregular amount of dust particles or noise, citizens from the neighboring Ningshi city will immediately contact the authorities by telephone or through formal petitions. *Yungang* is forced to pay for all damages. The factory's size means that local citizens will easily assume that pollution is related to it, and furthermore that it can and should pay for any related damages.

The company's exemplary status has meant extra scrutiny from the Ningshi, Kunming and Yunnan EPBs. According to *Yungang* environmental management officials, enforcement agents pay extra attention to ensure that Yunnan's largest factory is in compliance. "They use us to set an example for smaller companies and therefore we feel extra pressure to meet the law to the letter," one official states.

Yungang's business partners have been less influential; it has felt little pressure to invest in the environment from their clients. Steel is not a consumer product and *Yungang's* clientele consists of businesses that need steel to make other products. Such buyers mainly care for price and quality but not about the impact such steel production has on the environment. According to *Yungang* environmental officials, only the international market emphasizes the environmental quality of their products. To engage in international business *Yungang* has recently applied for an ISO 14001 certification to guarantee that they sell "green steel".

Yungang's environmental management explains, their factory is the largest and one of the most successful in Yunnan. This has meant that the

of China's Pollution Levy System."3, Dasgupta et al., "Industrial Environmental Performance in China, The Impact of Inspections."3, Sinkule and Ortolano, *Implementing Environmental Policy in China*. 142. We can learn from this that there is great variation in how certain variables can influence compliance. In one region for one firm pollution levy is important, while for another it is not.

⁴² For an explanation of the difference see Chapter 4.

company has a strong obligation to work according to the law and to produce as cleanly as possible. Of course it is difficult to ascertain whether their words are pure propaganda or contain truth, but it is the only enterprise where I have been told this reason for compliance. During the talks at *Yungang* it became apparent that this large factory is not about short-term profits only, but rather looks to its future and that of its 150.000 employees and pensioners.⁴³ The long-term perspective dictates stability and norm conformity. Furthermore, because of this long-term perspective, the law's environmental protection is also in *Yungang's* interest, because it calculates environmental costs within its overall economic costs, a calculation that a short-term perspective would not make.⁴⁴

This demonstrates another important reason for compliance: competence. The steel factory has sufficient resources to enable it to adopt a long-term perspective that enables it to invest in environmental protection. Its survival is not directly threatened if it spends a significant amount on pollution control installations. Its abundant resources have made it possible to set up a large environmental staff of well-trained engineers without whom compliance would be impossible.⁴⁵

Findings

Yungang is a case of compliance with China's pollution law. The law's stricter rules affected the company's behavior, as *Yungang* has over the years made considerable investments to keep in compliance with the law. It could do so as the law's demands were feasible for this wealthy company. *Yungang's* compliance can be explained by a combination of external and internal contextual variables.

The political context is important, as various governments have paid extra attention to *Yungang's* because of its exemplary status. This affected the regulatory context, which even outside of campaigns has been quite influential. Regulatory agencies ensured compliance through effective fee collection and close regulation of the company. It is noteworthy that this is the only pollution case in which fees were of a significant influence towards compliance.⁴⁶ As such, the APPCL's new rules have had a positive effect on

⁴³ See also Chapter 7.

⁴⁴ Arts et al., "Bestuurlijke Risico's bij een beperkte toelating van afvalstoffenbedrijven (Administrative Risks of a Limited Authorization of Waste Disposal Companies).", DiMento, "Can Social Science Explain Organizational Noncompliance with Environmental Law?" 70

⁴⁵ Here we thus find that size is important, comparable with Johnson's findings. Johnson, *Clear Water, Blue Skies: China's Environment in the New Century*. 62

⁴⁶ Most of the literature has stated that fee levels are too low to make companies invest in compliance. For an overview of the literature see Van Rooij, "Implementing Chinese Environmental Law through Enforcement, the *Shimu Xiao* and *Shuangge Dabiao* Campaigns."

compliance and induced a continued behavioral change here. Similar to *NCFC*, the social context was important to make *Yungang* go by the book, as the factory feared unrest and damages if its pollution affected local citizens. The economic business context was less influential. Most of *Yungang*'s clients did not care for clean production.

Apart from these external contexts, compliance at *Yungang* is also related to internal variables. The factory's economic performance made that it had the resources, both financially and technical, to invest in compliance. Its number of personnel and pensioners made that it had a long-term perspective that led to such investments. The firm's exemplary status, combined with local and governmental pressures, made the company socially responsive and therefore more inclined to comply.

Conclusion

In these cases of compliance with pollution regulation, law-abiding behavior did not have single recurring causes, but rather, was case based and the result of interplay between different actors and factors.

In the cases discussed above variables external to the regulated actor played an important role and compliance involved more than the norm addressee alone. In two cases compliance occurred when companies were no longer able to stay in operation economically. In both cases, changes in the economic context, with increased market influences and competition were to blame. Until such economic disasters occurred, such violating companies had not been pressured by enforcement action, nor by action from local community or pollution victims. In two cases pressure from local citizens and in one case even the media against (alleged) violations of the law led to increased compliance, changes in national policy led to pressure forced the polluting industry into compliance. State enforcement pressure also had an influence. In one of the cases studied compliance was largely the result of enforcement, while in three other cases a more distinct threat of enforcement seemed of influence. At the same time, there was one case where violations could go unpunished for years and where compliance was in the end the result of other factors. Here the local political context was likely to blame, as local governments had condoned violations of pollution law for years in order to secure local livelihoods, until such protection was no longer useful when companies bankrupted or moved. However, in some cases the political context also provided an impetus for compliance through its influence on the economic context, emphasizing market forces and privatization, which in two cases attributed to bankruptcies.

Variables internal to the regulated actor were equally important. The size of companies does not provide a clear lesson about compliance. Some

larger companies did very well such as *Yungang* and *NCFC*, while others such as *Yunzhi* violated the law for years, and only stopped when bankruptcy forced them to. Smaller companies have had trouble complying with the law while remaining in regular operation. Fucun had to move its factory, while the Jiacun paper mill only complied after bankruptcy. Resources are important, the more resources the better. This is clearest for the case of *Yungang*. Lack of resources can lead to an indirect form of compliance through bankruptcy. An interesting finding is that especially companies with a large amount of pensioners such as *NCFC* and *Yungang*, thus companies that have retained an SOE-type structure or are still SOEs, care more for long-term survival than short-term benefits. Management attitudes were also important. Companies with bad management have violated the law, not caring about making investments to comply with it, while at the same time getting into trouble making profits and finally closing down because of bankruptcy. Finally, the company's level of social responsiveness was important, where socially responsive companies, such as *Yungang* and *NCFC* were more directly influenced by their social context to comply. In contrast, unresponsive companies such as *Yunzhi* proved to be difficult to influence and could violate for a long time. Social responsiveness was related to the firm's dependence on its context and the context's independence vis-à-vis the firm. It is important to note that social responsiveness need not always be good for compliance. In the case of Fucun Paper and JCBC Paper, the companies' close ties with the local community had in the past not stopped them from polluting the local environment, as at the time villagers likely cared more for jobs than clean water and did little to exert pressure to clean up.

For the main research question on the impact of changes in legislation and enforcement on compliance behavior there are also some conclusions. First, in two cases the post-1995 legislative changes had a possible impact on compliance. In the first case, the *NCFC* case the stricter norms of the law, both the WPPCL as well as the local DPR, may have helped farmers and media to organize protests against (alleged) violations of the law. A second case with a possible positive impact of the legislative changes, was the *Yungang* case where the stricter APPCL norms on PDF influenced management to invest in compliance. However, in several other cases compliance was not so much the result of changes in the law, but rather the impossibility to violate, following bankruptcies.

Changes in law enforcement had more of an impact for pollution cases than for land cases. While regular enforcement was largely unimportant for compliance, special enforcement campaigns, organized since 1996 (see Chapter 12) did have some effect. In Fucun, an enforcement campaign was

solely responsible for *FPC*'s compliance. In addition, campaign type enforcement may have been the proverbial last straw forcing JCBC into a compliant bankruptcy.

9. Kunming's Hunger for Land

Understanding Land Violation Cases

Introduction

Around Lake Dianchi, there is hardly a place without land violations. The LMA's goal of protecting arable land seems a hopeless ideal when faced with Kunming's rapid encroachment onto its rural surroundings. Driving around the lake catchment area one can see construction projects everywhere, as Kunming city expands around the lake into what city leaders hope one day will become an enlarged New Kunming (*xin kunming*) located not just north of the lake but surrounding it. New Kunming is just another step in Kunming's recent construction craze caused by the rapid urbanization and industrialization. This construction hype has led to a large pressure on arable land, the same arable land for the protection of which the new 1998 LMA has provided strict norms. Cynically enough most of the construction on existing arable land occurred after the 1998 LMA with its stricter norms had been adopted.

While some of the construction projects around the lake are in compliance with the law (Chapter 5), many are not, especially those on collectively owned land. Most of the village enterprise and housing construction around the lake is carried out in clear violation of the LMA's strict prohibitions on non-agricultural construction on leased collective land and the construction of a second house per rural household. The main reason for violation is that the lake catchment is a rapidly developing peri-urban area, which is far different from the purely rural area the law seems to have been made for. Especially in the most rapidly developing part, the eastern side of the lake, local village leaders and even most villagers do not share the lawmakers' concern for protecting arable land. Here locals seem more worried that full compliance with the law would bring development in their region to a halt, just when it is about to take off with the new New Kunming policy.

This chapter will look at why actors around Lake Dianchi have violated China's arable land protection legislation. It will present four case studies in which the reasons for violation of such legislation are analyzed in detail.

Jiacun's Construction Craze

In his office, Jiacun VC member Zhang shows a map of what his village used to look like in 1996. The map is too large to put on his desk; it covers almost his entire office floor. Looking at Jiacun's past, it is shocking to see how fast

it has changed. In 1996 the village consisted largely of arable land, with housing and only a few small enterprises that formed a thin strip in the middle, running north to south. Eight years later little arable land is left and most of the village consists of housing, enterprises, a market, a school and a temple. Only sub-village seven still has a considerable amount of arable land, while sub-villages three and four have completely lost theirs. All of these changes happened around the time of the LMA's amendment and in the years thereafter.

Jiacun Village, and most of Jiacun Township has a characteristic style of housing. Villages in this area have built entire neighborhoods of modern rows of two or three story stone houses based on planned unitary models. These streets give a strong urban impression as they lack the rural diversity that exists when each farmer can build as he sees fit. In Jiacun Village, the modern neighborhoods have dramatically changed large parts of town. The left side of the road from the market to the Jingbaosi Temple, for instance, now consists entirely of rows of white tiled houses built in two long parallel lines from north to south. Furthermore, Jiacun's sub-village number five has a new modern neighborhood of unitary planned houses. Village leadership proudly brought me to look at these planned construction areas. However, not all of Jiacun looks like this, the village still has a remarkably high number of older mostly earthen houses that represent what village life once looked like, complete with combined pigsties and lavatories.

The key to understanding Jiacun's two faces is that village households have built new houses while keeping their old one.¹ They have done so despite the fact that the LMA clearly forbids constructing more than one house per household.² One reason for building an extra house is that having two houses generates income. Villagers who own two houses get extra income by renting their old house to migrant workers who have come to live and work in Jiacun.³ In this manner, villagers have been able to get

¹ This has happened in many parts of China. See F. Tang, "Dangtu Chengwei "Tangshou de Shanyu" shi, Hubeisheng Jingzhou shi, Jianlixian Wangshizhen Nongdi Diaocha Baogao (When Land Becomes a Burning Potato, Research Report on Arable land from Wangshi Town in Jianli County, Jingzhou City in Hubei Province)," in *Nongcun Tudi Falizhidu Yanjiu, Tianye Diaocha Jiedu (Research in the Village Land Legal System, an Analysis on the Basis of Fieldwork)*, ed. X e a Chen (Beijing: Zhongguo Zhengfa Daxue Chubanshe, 2003).149 and Sargeson, "Subduing "The Rural House-building Craze": Attitudes Towards Housing Construction and Use Controls in Four Zhejiang Villages."

² LMA § 62.1

³ My study is different from Sargeson's study, which focused more on the influence of social status, which I did not research in depth at the time of fieldwork. Compare with Sargeson, "Subduing "The Rural House-building Craze": Attitudes Towards Housing Construction and Use Controls in Four Zhejiang Villages."

2000 RMB a year, more than half of what they used to be able to make toiling on their land.

Over the years, village and sub-village leadership has actively supported the illegal housing practices. All new construction is done according to well-prepared plans. Furthermore, the sub-village and the VC approve all housing construction. Even the Township government has been involved, because final approval for housing construction comes from the Township land bureau. However, none of these have enforced the law's norms on second houses. For the leadership involved, the illegal construction of secondary houses has been an important means to generate extra income for the local population. In the interviews conducted before June 2004, many leaders emphasized the income from rent as one of their development successes. It almost seemed as if local leadership did not know of article 62 of the LMA, or at least that they purposefully forgot about it because it obstructed local development opportunities. An indication for this is that the Jiacun VC was smart enough to keep the locally unfavorable LMA's housing provisions out of their village Self-Government Statute.

Meanwhile all parties involved have been happy with the ongoing illegal practices. As most villagers in Jiacun, except those in sub-village seven, depend on non-agricultural income, there has been little concern about the loss of arable land there.⁴ Whereas Kouxiang's farming villagers see land as a basic form of security, in Jiacun's developed sub-villages locals only care about the monetary profit the land can bring. In their eyes, arable land conversion is no problem as long as they can earn more once it is used for construction. As one villager stated, "It is all about compensation, if I get enough money for the arable land we lose, it is fine with me." This attitude is understandable in a village where a second house can raise more than half of what a hard-working farmer makes on his land.⁵ It is also not surprising that in sub-villages where there still is arable land, locals who no longer wish to work on it have rented it out to non-local laborers looking for extra income.

Wealth is another reason for housing violations. Jiacun's housing construction would never have happened if the villagers did not have sufficient income to build a new house. The modern three-story villas cost over 200,000 RMB to build, a sum that Jiacun's recent prosperity has enabled

⁴ Here my findings also resonate with Zhang et al. that find a correlation between growth of non-agricultural jobs and farmers no longer caring for their land rights. See Zhang, Ma, and Xu, "Development of Land Rental Markets in Rural Zhejiang: Growth of Off-Farm Jobs and Institution Building," 1050

⁵ In his case study in Fujian province, Zhu has argued similarly that the increased price of construction land has made many farmers care less for protecting arable land. The profits have become too high. See Zhu, *Shehui Bianqian Zhong de Nongcun Tudi Zhidu (The Village Land System in Social Transformation)*, 232

many to pay. The main reason for the village's new riches is the development of local industry, which also occurred in violation of the LMA.

Jiacun's industrial development took place in two phases. In the first phase, from the early 1980s until the late 1990s, Jiacun developed collectively owned TVEs. The most important enterprise at that time was the paper factory and two boxes factories. Then in the late 1990s industrial development really took off when Jiacun became connected to Kunming with the Diandong highway. During this period Jiacun designated a large plot of arable land at the northwestern part of the village, about 140 Mu, for industrial development. With the new road the value of this land shot up and soon the village was able to rent most of the land to new privately owned enterprises. The village now has about 230 enterprises employing 1400 workers. Except for paper boxes, Jiacun's factories mainly engage in food processing, plastic recycling, and electric cable production.

Prior to June 2004, none of Jiacun's enterprises had been built in accordance with the LMA. Enterprises had acquired the land for construction through leasing it from the sub-village that managed the land in question. This was in direct violation of the LMA that forbids leasing collectively owned farmland for construction to non-collective enterprises.⁶ The problem with the LMA's procedures is that the total sum enterprises have to pay is too high. They require use change approval, state requisitioning, compensation to farmers for loss of land rights and fee payment for using state land. By leasing it from the village collective the industry does not have to pay for requisitioning or for land use change approval; it only pays for land use. Instead of having to pay an enormous lump sum before starting up their business, by breaking the LMA and leasing land, enterprises only have to pay an annual amount.⁷ In a village such as Jiacun in which industrialization was only just starting in the late 1990s, the LMA's procedures were just too costly and would have made attracting investors extremely difficult, if not impossible. This illegal manner of promoting industry was therefore actively used by all local levels of government under the banner of "Promoting the Economy instead of Grain Production".

While enterprises benefited from cheap land in a good location close to Kunming, Jiacun village and its villagers got richer from the employment opportunities and land income. Thanks to the industrial development many villagers have been able to leave agriculture and find employment in the

⁶ LMA § 62.3

⁷ Ho and Lin's study that argues that tax evasion was important for explaining violation of the LMA. In Jiacun that such tax evasion was related to development opportunities. Compare Ho and Lin, "Emerging Land Markets in Rural and Urban China: Policies and Practices."

factories or set up their own service or trade businesses. The industrial land revenue has also been important for villagers because it has provided a steady income. The sub-villages that collect the land revenue distribute it equally among all collective members. In 2004 such *fenbong* (distributing the red) ranged from 1000 RMB to 2000 RMB a year in those sub-villages lucky enough to rent out their land to industry. An average household (of five persons) in sub-village number five that receives *fenbong* and rent from their second house therefore has a standard income, without doing any work, of 12000 RMB a year, without doing any work. This is twice as much as households make in sub-village number seven where a household has less than 2 Mu and can make 6000 RMB a year growing *jiucai*.

Jiacun's construction craze illustrates how little sense the LMA makes in rapidly urbanizing⁸ and industrializing localities. Villagers who have left farming and have become rich, no longer care for protecting arable land.⁹ Their private interests are to advance their families and they see that arable land has little to do with that.¹⁰ This contrasts with the ideas of China's legislators who made a law to protect arable land. Protecting arable land is a concern that affects all Chinese in the future; however, it is not a concern that affects all Chinese today. In truly rural areas, or at least mostly rural areas such as Kouxiang, villagers are still farmers and their everyday interests are still best served through protecting arable land. An important factor in Jiacun is that the village is located in a peri-urban area in which non-

⁸ For an overview of the urbanization process see G.C.S. Lin, "The Growth and Structural Change of Chinese cities: a contextual and geographical analysis," *Cities* 19, no. 5 (2002). R.C.K. Chan and S. Yao, "Urbanization and Sustainable metropolitan development in China: Patterns, problems and prospects," *GeoJournal* 49 (2000).

⁹ Compare with Sargeson, "Subduing 'The Rural House-building Craze': Attitudes Towards Housing Construction and Use Controls in Four Zhejiang Villages." My findings here are in contrast with findings from the past when rural taxes were still an important burden on peasants and a reason many of them did not wish to farm. In areas in which taxes were high, often rural and less industrial areas, richer villages with some industries had lower taxes so farmers kept their land and cared for it, while poorer villages had high tax burdens and peasants if they could left the land idle to find work elsewhere. In peri-urban Kunming rural tax levels have not been high the last ten years because of the abundant of industry related taxes there. Compare with X. Zhong, "Woguo Nongdi Falu Zhidu Yunxing Huanjing zhi Fenxi, Hubei Sheng Huangshishi Yangxinian Nongdi Diaocha Baogao (An Analysis of China's Land Law Operational Environment, A research Report On Farmland in Yangxin County in Huangshi City, Hubei Province," in *Nongcun Tudi Faluzhidu Yanjiu, Tianye Diaocha Jiedu (Research in the Village Land Legal System, an Analysis on the Basis of Fieldwork)*, ed. X e a Chen (Beijing: Zhongguo Zhengfa Daxue Chubanshe, 2003). 56

¹⁰ My findings here are similar to what Zhang has found and argued based on fieldwork elsewhere in China. See Zhang, "Nongcun Jianshe Yongdi Shiyong Quan Zhidu de Faxue Fenxi (A Legal Analysis of Village Land Construction Rights)." 238

agricultural opportunities for development are abundant¹¹, the LMA does not seem to fit such a peri-urban situation. Industrialization has changed the situation in Jiacun for all local actors involved: villagers, VCs, local governments, and enterprises benefit from violating the LMA's stringent arable land protection procedures.¹²

Findings

Jiacun's housing and enterprise construction is a case of violation of the LMA. The law's new stricter norms on collective construction proved to be unfeasible and not adaptable to Jiacun's circumstances. The law's new norms did not lead to less arable land loss in this case. Violation brought considerable benefits, and the costs of compliance would have been so high that they would have severely slowed local development. At the same time, violation was easy and costless as it was actively supported by all local actors. Creating compliance through enforcement in the present situation was equally unfeasible and unreasonable as it would mean to tear down private houses and to make enterprises pay for costly land conversion procedures, they could not easily or even not at all pay for (see Chapter 14).

It is noteworthy that the regulated actors here consist of multiple actors including VC leadership, sub-village leadership, enterprise management and villagers. The external context of these actors first comprises of the economic context. Rapid urbanization and industrialization throughout the country and in the region have changed the face of Jiacun village and have created a strong incentive to convert arable land into construction land.¹³ The regulatory context, which consists of the legislation and the regulatory agencies was not able to prevent or stop violations. The legislation was unable to create compliance due to its local unfeasibility, as it

¹¹ Ho and Lin have shown, arable land loss continues throughout China's peri-urban areas, both near large cities as well as near secondary urban centers. Ho and Lin, "Non-Agricultural Land Use in Post-Reform China." 765-8

¹² The situation in Jiacun is such that arable land development, if well compensated is in everybody's benefit, including the villagers. The distribution of land development profit has been quite equitable it seems. This is because villagers have been active in voicing their protests when compensation was too low in their eyes. Their *ex ante* actions have enabled a fair profit sharing system, similar to shareholding systems elsewhere in China. Compare with Cai, "Collective Ownership or Cadres' Ownership? The Non-agricultural Use of Farmland in China."

¹³ My findings here are different from Sargeson's research that focuses on family demographic structure and social aspirations. See Sargeson, "Subduing "The Rural House-building Craze": Attitudes Towards Housing Construction and Use Controls in Four Zhejiang Villages." Although I clearly found that development opportunities were a driving force in Jiacun's construction craze, had I directly asked about family demography and social aspirations I might have come up with different findings than presented here.

would have stopped development in Jiacun village. Regulatory agencies were unable to prevent violation due to a lack in enforcement action and especially agencies at township and district level because they have actively condoned illegal practices for years, understanding their necessity for local development. For this last aspect the local political context was important, local governments have condoned and supported the ongoing violations and have not spurred their agencies to enforce the law.

Internal variables of the regulated actors were also influential. Most important was the manner in which costs and benefits were weighed in Jiacun. All regulated actors viewed such costs and benefits in short-term financial variables. In their view, protecting arable land was not an important value of its own. Even farmers did not mind losing their land, if they were properly compensated. Because these values were opposed to those that have informed the LMA, violation was widespread. The normality of violation of law and the fact that it was actively condoned by higher levels of administration made that a culture of violation seems to have developed and no one cared for the legal norms. Here it is interesting to note that an increased social responsiveness of VCs, because of the democratization, does not lead to more compliance with the law, as the social context of the regulated actor was equally opposed to the law's norms. A comparison with Jiacun number seven (see Chapter 7) shows that the ability to attract enterprises and to build new houses was another internal variable for explaining violation. Jiacun could develop because of its favorable geographical and infrastructural location and this development enabled villagers to save funds for building extra houses. Here again as in the case of *Yungang* (see Chapter 7) internal and external variables had a mutual influence on each other, in this case reinforcing violations of law.

Why Farmers in Xiaocun attacked their Village Leaders

Xiaocun village lies in Yixiang Township south of the rapidly urbanizing Jiacun Township and just North of Gongxian District where Kunming's rapidly growing flower growing market is centered. Unlike its wealthy neighbors, Xiaocun's development has stalled somewhat. Villagers largely depend on agriculture; in contrast with Jiacun, the township has not attracted much industry. Nevertheless, things are about to change. Kunming is pushing ahead with its New Kunming plans to connect all of the countryside around Lake Dianchi into one large urban center. For Xiaocun citizens this means that a large highway will cross their land. With a road, development

will come, Jiacun Township teaches¹⁴. However, it also means that Xiaocun's farmers must sacrifice some of their precious arable land.¹⁵

Luckily, villagers were to receive compensation for such land losses, or at least were told they would. In 2003, the Kunming government struck a deal with the Diandong district government and the Yixiang Township government. In Xiaocun village, each villager was supposed to receive 50,000 RMB.

However, farmers never received this amount. When the deal reached the village, the farmers were told that they would get 40,000. The corrupt Township officials thought that they could fool the villagers and the Xiaocun VC leaders by keeping 10,000 for themselves. Xiaocun's farmers soon found out that the original deal had been 50,000,¹⁶ but could do nothing while the road construction went ahead according to plan.

On October 13, 2003, the construction project reached Xiaocun village. By this time, the villagers' anger about the compensation fraud had reached boiling point, especially since the Kunming government had not paid a penny of the 40,000 the township government had promised them. The construction workforce came prepared, accompanied by a 100 man strong police force. When they rolled their trucks into Xiaocun, the workers waved their copies of the LMA to the angry mob of villagers shouting that this project was legal and they had no right to obstruct it. Soon the first bricks flew through the air as the farmers took out their anger on the assembled police force and the road laborers. The police struck back hard and beat up the farmers, wounding about forty while arresting about ten of them.

Farmers, influenced by village politicians that opposed the current VC leadership, had been led to believe that their own VC had been involved in the compensation fraud. The farmers thought that the VC had struck a deal with the township to share the embezzled 10,000 RMB compensation money. Thus, after their battle with the police the villagers formed a mob surrounding the VC headquarters and finally beat up their democratically

¹⁴ See the difference between development in Jiacun number seven and the other sub-villages. Also compare development in Jiacun and in Kouxiang. See Chapter 7 and 8.

¹⁵ This whole section based on an interview with Zhu Xiaoyang, an anthropologist from Beijing University who has done extensive fieldwork in the region. He has published a book about this township which I have also consulted. For the rest I have verified what he told me through interviews in the neighboring Jiacun. Due to the continued sensitivity in Yixiang I have not carried out interviews there myself although I have been there on several bicycle trips. X. Zhu, *Zuoguo yu Chengfa, Xiaocun Gushi 1931-1997 (Crime and Punishment, Stories from Xiaocun 1931-1997)* (Tianjin: Tianjin Guji Chubanshe, 2003).

¹⁶ For a similar case see Cai, "Collective Ownership or Cadres' Ownership? The Non-agricultural Use of Farmland in China." 671

elected leadership. After this incident, the village leader feared for his life and resigned. Two months later, in December, tensions still ran high and the police patrolled the streets to maintain calm.

Xiaocun's compensation fraud is not remarkable in Diandong district, neither is the violent reaction to such fraudulent practices.¹⁷ In Jiacun village, as previously discussed, dissatisfaction with legal amounts of compensation had volatile results as in the case of the school construction. In this area, all land conflicts researched are related to monetary compensation and not loss of land per se. The Xiaocun case shows that township level governments believe they have the opportunity to profit from their uncontrolled position between VCs and higher-level governments. Township officials probably thought that no one would find out if they kept money for themselves. Under China's undemocratic system of government, citizens have difficulties checking upon township level or higher governments. Township-level appointed officials are well known to engage in corrupt practices. In Diandong district, that includes Jiacun and Yixiang Township, farmers are highly suspicious and pro-active. There is a lively gossip circuit about malpractices in neighboring villages or even townships. In any case of strong suspicion of wrongdoing angry farmers have involved

¹⁷ In fact, it is a common type of problem in China that farmers get too little compensation for land requisitioning. See Chen, *Nongcun Tudi Falizhidu Yanjiu, Tianye Diaocha Jiedu* (Research in the Village Land Legal System, an Analysis on the Basis of Fieldwork). 39, G. Xiao, "Woguo Nongcun Jiti Tudi Zhengyong Zhidu de Quexian jiqi wanshan (Problems and Solutions of China's Collective land requisitioning System)," in *Nongcun Tudi Falizhidu Yanjiu, Tianye Diaocha Jiedu* (Research in the Village Land Legal System, an Analysis on the Basis of Fieldwork), ed. Xie a Chen (Beijing: Zhongguo Zhengfa Daxue Chubanshe, 2003).257-9 Recently there have been widely reported cases of fights between villagers and the police sometimes ending in mass arrests, and even in the wounding and killing of civilians. Examples are the incidents in Hanyuan, in Sichuan, Taishi and Dongzhou in Guangdong, Dangxi in Shandong and many more. See for example Editorial, *The Shanwei (Dongzhou) Incident* (9 December 2005 [cited 12 January 2006]); available from http://www.zonaeuropa.com/20051209_1.htm. Editorial, *The GMRQ Investigative Report of the Shanwei (Dongzhou) Incident* (6 December 2005 [cited 12 January 2006]); available from http://www.zonaeuropa.com/20060112_1.htm. E. Lafranco, *China's hidden Hanyuan Incident* (25 November 2004 [cited 12 January 2006]); available from <http://washingtontimes.com/upi-breaking/20041124-031127-5324r.htm>. J. Wang, "The Pit is Full of Ashes," *China Rights Forum*, no. 1 (2005). P. Hu, "Taishi Village: a Sign of the Times," *China Rights Forum*, no. 4 (2005). W. Pu, "Peasants on the Verge," *China Rights Forum*, no. 2 (2005). L. Wing, "A Chronology of Unrest," *China Rights Forum*, no. 1 (2005). P.P. Pan, *Chinese Peasants Attacked in Land Dispute* (15 June 2005 [cited 17 January 2006]); available from <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/14/AR2005061401542.html>. For video footage of a recent violent clash in Shengyou see <http://www.washingtonpost.com/wpdyn/content/video/2005/06/14/VI2005061401932.html>

municipal or provincial governments through complaint petitions¹⁸ and in some cases even risen in violent protest. Farmers have had ways of finding out about corrupt practices and have used these extra-legal methods to protect their rights. The Xiaocun case also shows how gossip and fact can mix once village politics are involved, and those opposed to the current leadership turn suspicions into undeserved accusations. This case of land compensation fraud in Diandong district illustrates how a lack of transparency in China's bureaucratic system creates an opportunity for violation of law. The farmers' violent reaction to the violation shows that compensation is important for them and that in this aspect the LMA is feasible and has local legitimacy, at least with the farmers.¹⁹ This case also demonstrates that on the eastside of the lake, in Diandong, farmers are much more actively engaged in securing their rights than in Kouxiang, as we will see in subsequent cases. Finally, it illustrates how little trust there is between farmers and their elected village leadership.

Findings

Xiaocun is a case in which township officials broke the LMA's prohibitions about retaining compensation funds meant for villagers. In this case the strict rules the Legal Committee inserted into the draft LMA explicitly stating that it is forbidden to embezzle or divert compensation funds²⁰ were not successful in ending such practices. The changes in the LMA thus did not affect compliance behavior. Here violation continued because breaking the law could bring considerable benefits, while the regulated actors believed that such violation would go undetected without much cost.

In this case, the economic context explains the opportunity for such violation. Without urbanization and industrialization the road would never have been developed and therefore the compensation fund would never have come available for embezzlement. A weak regulatory context explains why township level officials of violation of law thought they could take the villagers money without punishment. As Chapter 13 details, land regulation authorities do not have enforcement tools to act against compensation violations. Here, the political context of weak democratic participation at the township level, combined with the relative autonomy of China's local governments is important, as there have been weak checks and balances on

¹⁸ Compare with O'Brien and Li, "The Politics of Lodging Complaints in Rural China."

¹⁹ Protest because of low compensation for land expropriation is common in China. See X. Guo, "Land Expropriation and Rural Conflicts in China," *China Quarterly* 166, no. June (2001). Cai, "Collective Ownership or Cadres' Ownership? The Non-agricultural Use of Farmland in China."

²⁰ Land Management Act § 49

Township level governments. The social context was finally influential as the farmers' protest brought this case to light. In the end, the massive social unrest, this and other such violations caused may eventually lead to stronger regulation of these malpractices, perhaps improving compliance.

The internal variables of the regulated actor, the Yixiang township government were also important. In this case a culture of corrupt practices seems to have existed amongst these township officials who believed they could embezzle the funds without a problem. Furthermore, it shows how a low level of accountability and thus social responsiveness here led to violation. Finally, it demonstrates that the township officials had the political and factual power to embezzle the money because of their social connections and their role in the land conversion procedure.

Developing Licun through Lease Contracts

In Kouxiang Township, the 2004 Licun VC elections installed a new generation of village cadre. This new group of leaders consisted of young villagers. The youngest of them, Mr. Ma was only 29 when he was elected to the highest post, village leader. Most of his fellow committee members were all around thirty. They were a tight bunch of friends, not just because they had grown up together, like all villagers. Their bond went deeper: it was a friendship built on bloodlines and family alliances that went back a generation. The change in leadership did not mean breaking with past power structures. Licun's new village head is the son one of the village's former village leaders, a leader who had ruled the village for over twenty years. One of the new vice village leaders, Mr. Liu was a younger brother of a former village chief who now has an important post in the township government. Furthermore, the village's most important post, that of CCP secretary was, of course, never democratically elected. The current secretary has been in power for a long time and his wife is family of Mr. Ma and Mr. Liu. Thus, the new VC and the existing CCP secretary represented a group of powerful families who have continued to control Licun despite village elections.²¹ This group of friends and families forms the dominant social power within Licun village. They are members of the CCP, proud owners of large houses,

²¹. There is limited participation in elections in the rural and isolated Licun and Baocun villages, while there has been more participation in the industrialized and peri-urban Jiacun. Here our findings contradict Oi and Rozelles hypotheses that villages that are more isolated and more rural have more participation because there is more at stake for villagers. From our data it seems that villagers in industrial and more developed villages close to the city are more independent of local power structures and thus have the ability to participate more actively and raise protest if they wish to. Compare with Oi and Rozelle, "Elections and Power: The Locus of Decision-Making in Chinese Villages." 529

Volkswagen Santanas and signs on their doors with long rows of gold stars indicating their party commitment and status. They have family and friends in the Township and even the District government.

The new leadership is ambitious and wants to develop Licun. The village has never had its own industry and has not profited extensively from the neighboring SOE arms factories. Licun could only benefit from the SOEs' few Arab customers that came to pray in their mosques or eat in their *qingzhen* (*halal*) restaurants. In order to promote development, Licun had started experiments with agricultural export contracts. In a true Chinese socialist market economy style, the leadership supported district investments in plastic greenhouses where farmers were to grow export-oriented crops that the VC sold through collective contracts with the export company of the Kunming Government's Agricultural Bureau.²² However, Licun's new leaders wanted more; they wanted to develop a service sector and small enterprises.

In order to develop local enterprises Licun had to convert arable land, just as villages on the other side of the lake in Diandong district had done. The leadership believed that 2004 was the right time to begin doing so, because the new highway would soon create a fast connection with Kunming which would certainly bring business opportunities to the area.

To develop Licun's land, leadership made use of lease contracts. The VC leased several plots of arable land from farmers, who had the land use rights. In violation of the statutory compensation minima²³, the farmers received 500 RMB per year per Mu for wet land and 300 RMB per year per Mu for dry land, a total of 12.000 or 7.200 for the remaining 24 years of land rights that farmers still had usage rights.²⁴ The VC then took this land and

²² Individual farmers were never signatories to these collective contracts so in case of conflict, if farmers suddenly decided to sell to another buyer, for example, as has happened outside of the Kouxiang area, the export company would find that it could do nothing against them. The reason for these collective contracts is that it saves the transaction costs of signing with each of the hundreds or thousands of small farmers by just signing with the VC. Farmers in some regions such as Kouxiang have duly followed the contracts signed by their VC as if they were still operating in a planned economy. The successful use of collective contracts in Licun shows that villagers here are less prone to insurgence and protest, or even breach of contracts that they are not party to, than in other areas.

²³ The legality of the compensation paid depends on the actual yield of the land taken. In Licun as we saw in Chapter 7 this yield can be up-to 6000 RMB/Mu for prime wet land on which tomatoes are grown in green-houses, and at lowest it is 2000 RMB/Mu for dry land. The LMA provides that at least 6 times the annual yield should be paid, which did not happen in this case where 7.200 RMB for dry land and 12.000 for prime wet land was paid. See LMA § 47.1

²⁴ This is much less than farmers get in Jiacun village. They either get 2000 RMB per person per year where land is illegally leased through the VC. Farmers in Jiacun often have about 0.3 Mu a person so the compensation is actually about 6000 a Mu per year. As we saw in cases

leased it to enterprises to construct premises on, for lump sums ranging from 80.000 to 90.000 per Mu. According to the VC leadership the enterprises would receive land contracts for *changqi* (long term), which actually meant indefinitely. "We did this, because the law does not allow transfer of ownership, but we actually wanted to sell the land itself to the firms." Licun's CCP secretary explained one day. He knew that what they did was in violation with the LMA. "If we had gone by the book we would never have been able to sell the land of the villages, all the costs of compensation and procedural fees to the land bureau would have raised the price to about 170.000 RMB per Mu and there is no company willing to pay that." This is the same story as in Jiacun and a similar problem exists in Baocun. Compliance with the law would have made the price of land too high to develop industry.

However, what happened in Licun is different from Jiacun and Baocun. The violation of the law was not legitimate among most villagers. The problem was not so much the loss of arable land in itself but rather the unreasonably low compensation for the arable land loss. Whereas Jiacun's villagers have received an annual *fenhong* amount that equally distributes the land related revenues, in Licun land revenue distribution was obscure. The total amount of compensation farmers got was, at most, 12.000 RMB per Mu, while the VC makes 90.000 RMB per Mu when leasing it to enterprises. The VC thus received 78.000 RMB per Mu and for the total 20 Mu of land so far converted made over 1.5 million RMB.²⁵ In contrast with Jiacun, in Licun it seems that not all villagers benefit from the land conversion. Farmers stated that they do not know how the 1.5 million is used. They did not believe the VC's explanation that the money is used in village development for roads and electricity projects. The farmers think that groups of family and friends who hold power over Licun use the money for their own personal benefit. They have no way of proving this and only voiced their anger private interviews with them. The men talked with stated that they have lost land in this manner and were not satisfied with the meager 7.200-12.000 RMB the VC paid them in compensation. They felt helpless as they could not refuse land requisitioning, nor could they protest. They say

where land is officially requisitioned, such as for the temple or for the school a sum of between 100.000 and 200.000 RMB is paid in total, which is about 5000-10.000 per year per Mu.

²⁵ This phenomenon of local governments or VCs making high profits on land deals has been widely reported. See for example C. Ding, "Policy and Praxis of land acquisition in China," *Land Use Policy* (2005 (article in press)). A. Subrahmanyam, "Land Use in China: the impact of the economic revolution," *China Law & Practice*, no. November (2004). P.N. Phan, "Enriching the Land or the Political Elite? Lessons from China on Democratization of the Urban Renewal Process," *Pacific Rim Law and Policy Journal* 14, no. June (2005).

that complaining to the Township is of no use because they are old friends with the VC. According to the unhappy farmers there is nowhere to go with their problems. Unlike Xiaocun's active protesters, Licun's farmers just accept the situation as a fact of life. Not even the new election system gives them hope, as they say it is dominated by the tight group of powerful Licun leaders who will be able to exclude anyone who threatens their dominion.

The case of Licun demonstrates two things. First, it shows once again that the LMA does not suit Lake Dianchi's urbanizing local circumstances.²⁶ If the VC had acted according to the LMA the price of land would have been so high that development would have been impossible. Second this case also illustrates that violation of law is related to local power relations. The VC's power is based on a network of family and friendship connections that go back at least two generations. The VC's power enabled the leadership to break the law without any apparent local protest. The institution of direct elections has not been able to change the existing power structure here.²⁷

Findings

Violation in Licun consisted of the illegal lease of collective arable land to enterprises, the sub-standard compensation of villagers for loss of their land, and possibly the embezzlement of compensation funds. Here the LMA's stricter rules banning collective land leasing for enterprise construction were again violated. The law's increased adequacy and certainty were not able to stop violations. Again, the benefit of such violation was much higher than its costs. An analysis of the external and internal variables is useful for understanding violation in this case.

As a first external variable, the economic context of urbanization provided the opportunity for the violations. Without such economic development land conversion would not have been beneficial at all, vice versa in the light of the development opportunity compliance with the law in terms of following the proper requisitioning procedures seems unfeasible as it would probably have meant that such development could not occur. The weak social context, which here consisted of powerless villagers, made the illegal and unsatisfactory compensation possible. Villagers did not organize themselves or do anything to resist the illegal land taking. The local political structure disempowered villagers when trying to find redress for VC wrongdoings. The villagers' powerlessness was largely related to the VC's

²⁶ In peri-urban contexts in China arable land loss has continued, see Ho and Lin, "Non-Agricultural Land Use in Post-Reform China." 765-68

²⁷ Thus, here elections have also not been able to foster stability and direct participation as some observers had hoped. Pastor and Tan, "The Meaning of China's Village Elections." 511

leadership's good relationship with the political and regulatory contexts, most notably the Kouxiang township government and its land office, which failed to act against any of the violations.

An analysis of internal variables demonstrates that the VC was a socially unresponsive organization that despite recent democratization reforms paid little attention to its villagers. This lack of responsiveness enabled it to blatantly violate the law and farmers' rights. During interviews, VC leadership did not express awareness of any moral issues in doing so. Moreover, the Licun VC operates on a short-term perspective, as it prefers making money today to long-term stability and slower development. Such short-term perspective explains the compensation abuses. Finally the VC's social capital and its connections have enabled it to remain in power and exert such power for personal gains.²⁸

Baocun's Industrial Land

As introduced in Chapter 7, Baocun village in Kouxiang Township is largely agricultural. Unlike Jiacun village, most farmers still depend on land as a main source of income. This has precluded households building new houses while keeping their old one to rent out. However, the total amount of arable land in the village has decreased somewhat over the last years when privately owned enterprises started to build factory premises on the outskirts of the village. Currently Baocun houses one large enterprise, the former SOE, *Huafei* Company (*Huafei*), and four privately owned enterprises. All of these engage in chemical production related to phosphor. Local entrepreneurs from the village have set up these companies which is not surprising because the village is located near very large phosphor mines.

One of the small companies is *Baohua*, a chemical factory located on the edge of Baita sub-village near *Huafei* on land bordering the phosphor-rich hills. *Baohua* is a family business run by father and son Zhang. The Zhangs established the company in 1997 as a small phosphor-mine. Since then, it has grown tremendously and business has moved from production of raw materials to processing such materials and making chemical fertilizer. The company even exports some of its fertilizer. At present, it has a staff of about 200 workers, mostly non-locals from neighboring provinces who are willing to do the heavy work. From its establishment the company has relied on co-operation with the village committee leadership. The company relied on their help to acquire the arable land it needed to establish its mining and factory installations. Part of the land the factory has been built on used to be

²⁸ For a comparable case see Cai, "Collective Ownership or Cadres' Ownership? The Non-agricultural Use of Farmland in China." 669-70

arable. The LMA provides that construction on collectively owned arable land is only possible after a complete procedure involving land use transformation, state requisitioning, land compensation and payment of land use fees to the state.²⁹ Originally, *Baohua* Company did not acquire its land in compliance with these stipulations. Like enterprises in Jiacun and Licun, this Baocun enterprise leased the land from the village. Zhang junior explained: "When we were just setting up the company we did not have the kind of capital to do it according to the procedure. If we had done that we would have had to pay one big lump sum ahead to compensate the farmers once and for all, on top of the state fees for land use transformation and land use." *Baohua* like many other starting companies used land for which it only had to pay an annual fee to the VC in compensation for the land the collective lost. At first, the VC could compensate farmers by giving them other collective land use rights on land (*jidong di*, flexible land) that the VC had set apart to carry out small land readjustments.³⁰ When the VC had used up all of its flexible land it just paid monetary compensation to the farmers. Over the last years, *Baohua* Company has tried to legalize part of its illegally rented land by acquiring land use rights through the official procedure. It has done so because it now has the funds, and because the official rights provide better collateral for bank loans. However, it still has not fully legalized its land and continues to use 60 Mu illegally through lease contracts with the VC.

The VC participated in this illegal land practice, as it enabled companies like *Baohua* to set up business in their village even though this practice violated the LMA. Furthermore, the township and district level land bureaus in charge of land law enforcement condoned this practice for years in Baocun. The VC knew that the costs of going by the book were high and if following the rules the village would not be able to attract starting companies as they would have been unable to pay for the expensive land procedures.³¹ Although the village's secretary repeatedly emphasized how important agriculture and arable land is in Baocun, this did not stop him breaking the law and decreasing the amount of arable land. As in Jiacun and Licun, Baocun's leadership and the township and district land officials allowed the illegal situation to occur because of the importance of industrial development, a development that in the end, especially with the new road

²⁹ LMA § 43-50, 62

³⁰ In Baocun when the land rights were issued to individual households part of the land remained in the hands of the collective to be used especially for compensating farmers who somehow lost their land.

³¹ Again here we see that tax evasion was a means of developing the local economy rather than an end in itself, in contrast with research by Ho and Lin, "Emerging Land Markets in Rural and Urban China: Policies and Practices."

from Kunming to Kouxiang, will help Baocun and the region to transform itself from agricultural to industrial production. Perhaps Baocun's leadership also had personal reasons, similar to Licun's leaders, for breaking the law. Although no direct proof of personal gain due to such illegal land transactions in Baocun was found, VC leadership has been closely connected with the owners of the local enterprises. The present CCP secretary of Baocun, the most influential leader, has worked for one of these enterprises for many years. The leadership's wealth is apparent, because they form a small group of people who have modern three story houses while most villagers live in old earthen homes. Thus violation of law involved both local enterprises, unable or unwilling to pay the formal fees, as well as local leadership and township land officers who actively cooperated in the practices or at least condoned them.

Findings

With the Baocun case, it becomes clear that in all three research villages (Jiacun, Baocun and Licun) the LMA has led to violations of law. Furthermore, in all these cases the law did not fit local circumstances that called for small-scale construction with minimum investments. In Baocun, as in Jiacun and Licun, enterprises could only start business in violation of the LMA, acquiring land through cheap leases rather than through the costly legal procedures. The benefits of breaking the law were much higher than the costs of such violation, which again without proper law enforcement did not amount to much.

The economic context of industrial development in the region provided the incentive to break the law, as without such development Baocun could never have attracted enterprises that wanted to build on their land. Furthermore, the opportunity to break the LMA existed because local land authorities at the township and the district level condoned the illegal practices for years. They were partly condoned because economic development was supported politically. In addition, like Licun, the regulatory authorities and the Township government were closely connected both socially as well as economically with Baocun village. Thus, the political and regulatory contexts were equally conducive to violation. The local social context here, which consists of local villagers, did not press the VC and the enterprises to comply with the law; most likely, because the violations here did not affect local villagers, who received reasonable compensation for land loss.

Internal variables of Baocun's VC and its enterprises were also important. First, the regulated actors cost benefit analysis favored direct economic development over the protection of arable land. The enterprises'

small size explains violation of law as the small companies initially lacked the resources to pay for the high fees of formal land conversions. The fact that *Baohua* later did legalize some of the illegally leased land, suggests that the impossibility of complying with the law fully from the start may indeed have been a motivation to violate the LMA.

Conclusion

In the land violations cases discussed in this chapter violation behavior depended on the circumstances of the case. Compared to the land compliance cases discussed in Chapter 7, the violation cases display more uniformity in the lessons they teach.

In three of the four cases³², the violation of the LMA was directly related to the fact that the law's strict stipulations on collective construction did not fit local circumstances.³³ The three villages in question could not have developed economically as they have, had they complied with the law.³⁴ As such the law's lack of feasibility and adaptability, as predicted in Part I, made that regulated actors did not want to comply with the law. Largely, this was because violation brought the benefits of development and came with minor or no costs.

To further understand violations, the external context of the different regulated actors is important. In contrast with the land compliance cases, the social, regulatory and economic contexts played a different role. The economic context created the opportunity to make benefits from violating the norm, instead of prohibiting it as happened in some of the compliance cases in Chapter 7. Rapid urbanization and industrialization created the opportunity to break the law by leasing out land to enterprises and using land for secondary housing to lease to non-local migrants.³⁵ Villages, village leaders, villagers, entrepreneurs and various local governments could grow richer from developing land for enterprises and houses. Consequently, unlike in some of the compliance cases described in

³² In the Xiaocun case which concerned compensation only and not arable land protection, compliance would not have affected local development.

³³ This is a problem that China is facing on a wider scale than discussed here, see Zhang, "Nongcun Jianshe Yongdi Shiyong Quan Zhidu de Faxue Fenxi (A Legal Analysis of Village Land Construction Rights)." 238

³⁴ Here our research corresponds with Guo, "Woguo Chengshihua Fazhan Zhong de Gengdi Baohu (Protecting Arable Land in Urbanizing China)." It shows further that while tax evasion was an important reason for illegal development of enterprises, such evasion was also necessary because the enterprises could not have started operation had the full fees for transformation been paid. Compare with Ho and Lin, "Emerging Land Markets in Rural and Urban China: Policies and Practices." 704.

³⁵ Our findings here also resonate with Guo's research. See Guo, "Woguo Chengshihua Fazhan Zhong de Gengdi Baohu (Protecting Arable Land in Urbanizing China)."

Chapter 7 and 8, the social, political and regulatory contexts were less or not at all aligned with the interests of the LMA's bans on industrial and housing construction on collective land. As a result, the regulated actors received little pressure from local communities to comply with the law. Quite contrary, such communities, as long as compensation was properly arranged, even stimulated and participated in violations. Similarly, state enforcement action, at least until the campaigns in 2004 (see Chapter 14), was absent. Without such external pressure the costs of violation were low, to non-existent.³⁶ In two cases, when compensation was involved, the LMA's rules on compensation were important for local communities. However, local communities were unable to use these rules to prevent or completely end the taking of their land without proper compensation. Here the political context was important. In both cases the local distribution of power, combined with the weak system of checks and balances made that regulated actors could act in relative autonomy, not having to care about the interests of local farmers, nor having to fear sanctions from superior governments or regulatory agencies.

Variables internal to the regulated actors were also important. In all cases, regulated actors, when measuring costs and benefits, strongly favored economic concerns over the protection of arable land. Similarly, in all cases local development was more important than ensuring the long-term food safety of the whole country. For violations of the LMA's ban on industrial construction on leased collective land, the lack of enterprise resources to pay for the costly legal procedures was an important reason for compliance. In two cases the regulated actor's ethical norms were definitely deficient as the actors willingly violated the law causing direct harm to local villagers whose land was taken without proper compensation. In both cases, the regulated actors, the VC in one and the Township government in the other, were socially unresponsive, as these actors were largely independent of their social, regulatory and political environment. In three cases, because of the law's unfeasible stipulations, violation had become so widespread among all local actors, including those at township and district level, that a culture of violation existed.

For the main question on the influences of legislation and enforcement on compliance (see Chapter 1) this Chapter provides several findings. First, the LMA rules on collective construction are not feasible and not flexible enough to be implemented in a peri-urban rapidly industrializing and urbanizing context. The interests of most local actors, not only the regulated actor, but also local communities and governments were opposed

³⁶ This is similar to what He argues, see He, "Gengdi Baohu Ying Zuodao 'Liu Ge Bixu' (The 'Six Must Be Dones' of Arable Land Protection)."

to such rules, making the chances for voluntary compliance low. Combined with Chapter 7, it becomes clear that these rules largely led to compliance for those actors that never had the opportunity to break them. In the villages where the opportunity for developing land for construction arose, the rules were violated. For rules on compensation, the analysis is somewhat different. Here some leaders were tempted to break the law, given the possible benefits. Local farmers tried to use these rules to protect their interests and get proper compensation by opposing violations, but failed due to local power constellations and weak checks and balances.

For both types of rules, collective construction or compensation, there has not been much law enforcement in the cases studied. Since 1997 the national government has tried to enhance arable land enforcement through campaigns, however at least until 2004, they did not affect the ongoing violations described in this chapter. It was not until the 2004 campaign that arable land enforcement action came to the villages. However, as Chapter 14 details, due to the significant impact expected from the proposed enforcement campaign by the end of this research in December 2004, it seemed unlikely that the proposed action would be carried out. The lack of state enforcement is important, especially for the collective construction rules, where only enforcement seems to be a way to create more compliance in a context where most local actors support violation.

10. Why Contamination Continues

Pollution Violation Cases from Kunming

Introduction

Although China has tried to improve its pollution prevention and control legislation and has produced stricter rules to combat industrial pollution, polluting practices at the local level have continued. Lake Dianchi is illustrative. On all sides of the lake there is industry, ranging from large SOEs, such as cement factories and chemical fertilizer plants, to small privately owned enterprises making plastic pots or chemicals. Coming closer to the factories one can see, smell and sometimes even hear their pollution. The village houses surrounding some of the cement factories and chemical fertilizer plants are white because of the small dust particles they have emitted, the small plastic pot plant is full of paint fumes, to which workers inside are continually exposed, the small chemical enterprises have discharge pipes through which their untreated still smoking hot industrial waste is directly dumped in the Tanglang River running from the lake up into the Ningshi Hot springs nature reserve.

While some of Kunming's enterprises comply with China's pollution laws and regulations (Chapter 8), many do not. At Lake Dianchi, there have been several types of violations of pollution regulation, ranging from chemical fertilizer plants not using their environmental installations and discharging at night when there are no inspections, to small inner-city restaurants operating without the proper noise and smell installations causing significant nuisance for the inner-city population. In some cases, the effects of the pollution violations have been dramatic: destroying local crops, sickening local water buffaloes and disrupting production at local enterprises because they can no longer use polluted water. Even in cases where pollution damage has been considerable, violation has not stopped. Unlike what some scholars believe¹, industrial pollution is far from controlled in Kunming and legislative and enforcement efforts have not been effective.

¹ The cases discussed in this Chapter show that although much effort has been invested in ending Dianchi Lake's industrial pollution, the problem has remained persistent, contrary to what some scholars have stated. Compare with Liu et al., "Policy and Research Efforts for Agricultural Non-point Source Pollution in Yunnan Dianchi Watershed." 349

Why Small Chemical Factories have continued to Pollute the Tanglang River

In October 2003, production at China's oldest hydraulic power plant, the Shilongba station built by Siemens in the 1930s, came to a grinding halt.² The large turbines that formed the centre of this small electricity station had corroded completely and could no longer function. For the fourth time in that year the Shilongba station had to change its expensive metal turbines, while normally only one such change a year had been necessary. In this manner, the station incurred damages of nearly 4 million RMB.

Management knew exactly what the problem was: not their turbines but the water that flowed through them. The water from the Tanglang River contained acid levels far beyond those allowed in China's water standards.³ This acidic water had caused the turbines to rust and break down. Factory management had even been able to trace the source of the acidic water; it had driven up-stream along the Tanglang until they found small factories that discharged acid smelling water directly into the river.

The hydraulic power station was not the only pollution victim. The factories' acidic discharge also reached Ningshi city and thus Yunnan's largest factory, the *Yungang* Steel Company. Here the acidic water halted production several times because the water from the Tanglang, normally used for in the steel manufacturing process, could no longer be used. *Yungang's* losses quickly rose to several million RMB. The factory's environmental management personnel also got in their cars to discover what had caused the pollution. Head of *Yungang's* environmental department Peng recalls: "When we found these small and dirty enterprises I felt so frustrated that I could not shut them down myself, as I am not an EPB agent." Even suing the companies for damages was of no use, because they lacked resources to pay for the large damages the company had suffered. "We could do nothing, but complain to the various local and municipal governmental authorities," Peng concluded.

In the meantime, pollution continued. The hydraulic power station and *Yungang* had been right: small chemical factories were responsible for sudden acidification of the Tanglang. These small factories were located in

² This section is based on national news reports and interviews with EPB personnel and Yungang factory. See L. Song and X. Zuo, "Yinshui Wuran Shebei Yanzhong Fushi Woguo Shouzu Shuidianzhan Tingchan (China's Oldest Water Power Station Closes Operation Because Pollution has Severely Corroded its Installations)," *Renmin Ribao, Hainan Ban (People's Daily, Overseas Edition)*, 23 December 2003., CCTV, "Jinri Shuofa" *Fushi de Beibou ("Talking of Law Today" Corrosion's Background)* (CCTV, 17 March 2004 2004 [cited 18 March 2004]); available from <http://202.108.249.200/news/society/20040317/100967.shtml>.

³ According to the water standards, the PH levels should be between 6 and 9 PH, while here they were below 6. See 1996 Integrated Water Discharge Standard, GB 8978-96 and the 1995 Discharge Standard of Water Pollutants for Phosphate Fertilizer Industry, GB 15580-95.

the north of Kouxiang Township, bordering Ningshi city. The factories produced Fluor Sodium Silicate (FSS) a necessary substance for the production of chemical fertilizer. Unfortunately the FSS production process is very polluting and manufacturing it in a clean manner in compliance with the law is very costly. In order to cut the costs larger chemical fertilizer companies, like the ones in Ningshi and *Huafei* in Baocun Village, have outsourced the manufacturing of this substance to these smaller companies that were willing and able to produce it without using the costly environmental installations. With a demand for cheap FSS, soon the northern less-inhabited area of Kouxiang witnessed the rapid development of small privately owned chemical factories. The factories were conveniently located near the river so that they could directly discharge wastewater. They were small-scale factories requiring little capital to set up and little to operate, about 300,000 RMB per enterprise. Currently there are eleven such enterprises in the Kouxiang/Ningshi region. Since 1999, enforcement campaigns have forced these enterprises to invest in environmental installations (see Chapter 14). However, the cost of operating these machines is almost half the initial investment of the whole enterprise. Consequently few of the enterprises use the environmental installations regularly and most only switch them on during EPB inspections (see Chapter 13). Because of the small scale of production and the considerable costs of environmental protection, operation in compliance with the law has never been economically feasible for these enterprises.

Even though such factories continually violated environmental law⁴, the local (township and district) government and the local district EPB failed to close down production⁵, not just as some would say for protection of tax income⁶, which is not considerable, or jobs related to these small enterprises⁷, which are also few. Rather, a sudden halting of the small enterprises would severely affect all phosphor related production and thus most livelihoods in the area. Local inhabitants form a chain of interdependencies: phosphor-mines depend on local resources and on local chemical factories; large chemical fertilizer plants depend on the mines, on smaller factories producing necessary side-products, and on local farmers who provide cheap labor; smaller chemical factories depend on the larger plants, on the mines, and on local labor; local farmers and laborers depend on jobs in the mines,

⁴ The enterprises violated the following sections: WPPCL § 14.2, 22, 23, 29, 35 and 37, DPR § 17.2 and 21.2.

⁵ Which the law demands in this case, see DPR § 21.2.

⁶ T. Saich, *Governance and Politics of China* (New York: Palgrave, 2001).152-163

⁷ S. Yao, "Huanjing Xingzheng Zhifa zhong Cunzaide Wenti he Duice (On the Problems and Countermeasures in Administrative Enforcement of Environmental Law)," *Environmental Protection*, no. 7 (1999).14, Bachner, "Regulating Pollution in the People's Republic of China: An Analysis of the Enforcement of Environmental Law." 16

plants and factories and on income related to selling their farm products to the industry workers; local governments at the township or district level and to some extent even city level, depend on the local industries for tax revenue and providing local livelihoods which help to maintain social stability, while the local industries need local governments and their bureaus, including the EPB, for regulatory support; local villages depend on the larger plants for their infrastructure and on all industries for land related revenues, while all factories need the village land to expand their production sites. The result is that most actors in the Kouxiang area directly or indirectly depend on phosphor related income. Most of them do not support strict enforcement of environmental regulation, as they fear that this will break the phosphor chain of interdependencies and adversely affect their interests.

Violation in this case could continue unpunished because there was no effective enforcement. First of all this was because enforcement agents recognized the important role these companies had in the local economy and thus refrained from the tough action the law demanded.⁸ However, even when the EPB, under pressure of national media decided to address these enterprises, it had difficulty finding evidence for violations. In late 2003 the Tanglang pollution case gained national media attention. Film crews and investigative reporters came from Beijing to report about the pollution case that had stopped China's oldest hydraulic station and Yunnan's largest factory.⁹ The pressure of their coverage, later influenced the Kunming EPB to target these companies as a priority during a national campaign. (See Chapter 14) Even with the extra efforts, aimed at finding evidence that would enable the municipal EPB to end to the violations, it took several months before the inspections were successful and evidence for violations was found. The problem with inspecting such small enterprises is their location. It is extremely difficult to reach this area at night, which gives the enterprises an opportunity to secretly discharge nocturnally, while complying with the law during daytime when inspections took place.¹⁰ Even after the EPB, had ordered the factories to halt production (in September 2004) violations continued. (See Chapter 14) By late 2004, driving past the factory premises one could still see the hot discharge flowing untreated into the Tanglang River.

⁸ DPR § 21.2 demands closure.

⁹ CCTV, "*Jinri Shuo*" *Fushi de Beibou* ("*Talking of Law Today*" *Corrosion's Background*) (Icited), Song and Zuo, "Yinshui Wuran Shebei Yanzhong Fushi Woguo Shouzu Shuidianzhan Tingchan (China's Oldest Water Power Station Closes Operation Because Pollution has Severely Corroded its Installations)."

¹⁰ For more detail, see Part III.

Findings

The case of these small polluting companies shows the importance of feasibility of the law for compliance and enforcement. Although the WPPCL and the DPR provided stricter norms with strict sanctions to end pollution at small enterprises, in practice such pollution continues in clear violation of the law. Such violation first originates from the fact that these companies cannot abide by these laws, as compliance is economically not feasible. In addition, more importantly, violation continues because enforcement is not feasible, because of its possible effect on the local economy and the difficulty of detecting violations in such remote areas.

The continuing severe pollution violations of small chemical factories in the Tanglang River area demonstrate that violation of law is not only related to the interests of these companies themselves. This case shows that such violation must be understood by looking at the role of these enterprises in the local and regional economic networks. In this case, violation has continued until a viable alternative for the companies' production is found, in order to safeguard local economic development.¹¹ As long as there are no real compliance alternatives for cheap FSS, or alternative sources of income that are not dependent on phosphor production, illegal production of this substance will not end.¹² In this aspect, the case is somewhat different from the paper compliance cases (see Chapter 8), where the local economy was not as dependent on it as a source of income and where, to some extent, alternatives were developed.

The economic context is important for explaining why the FSS companies started to violate pollution law in the first place. Larger enterprises wanted to cut costs and outsourced the dirty and costly FSS production to companies that could do so cheaply but not in a manner in compliance with the law. Thus, the initiative for violation came from the economic business environment. The social context, consisting of local farmers and inhabitants provides a double explanation. The direct social environment of villagers living in the vicinity of the FSS factories and those working or depending on the Phosphor industry most likely supported these companies as their livelihoods depended on them. However, those living further away and also some enterprises using the Tanglang's dirty water started to complain. Their complaints, after they were picked-up by national media, were in the end an important force for enforcement action taken later. Thus, the social environment both stimulates and restricts violation here.

¹¹ Wright also looks at alternative incomes when discussing how to tackle China's many mine accidents. See T. Wright, "The Political Economy of Coal Mine Disasters in China: 'Your Rice Bowl or Your Life'," *China Quarterly* (2004).

¹² Compare with Blackman's study of informal enterprises in Mexico, see Blackman, "Informal Sector Pollution Control: What Policy Options Do We Have?"

The regulatory and political contexts are also important. In this case, regulatory agencies only pressured the company following national political pressure, first in 1999 during a campaign and then later in 2004 again. Apart from this, local governments and their EPBs did not act against violations, partly because local leaders seemed to condone violations for their necessity for local development and partly because regulatory agents was unable to detect evidence for violations. While the campaign type pressure was able to make the companies invest in environmental equipment, the difficulty in maintaining such pressure explains why such installations have not been used and violation and pollution continued.

Variables internal to the FSS companies are equally important. First, the size of these companies explains their violations, as their small size makes compliance economically not feasible and secret illegal nightly discharges a necessity for survival. Furthermore, violation seems to be a morally accepted practice in these enterprises where violation and pollution are part of business. Finally, these small enterprises operate on a day to day basis, only making investments necessary for immediate survival and profit maximization but not for the long term.¹³

Chemical Fertilizer Industry in Baocun Village

Baocun is a picture of pollution.¹⁴ From miles away, *Huafei* Company's two enormous smokestacks can be seen to emit a white smoke over Kouxiang's mountainous landscape. First time visitors are surprised when nearing the chemical fertilizer factory that it is actually located in a tiny village. A cloud of white dust hovers above the factory's premises showing that not all air pollutants are emitted through the long smokestacks. As a result, the buildings in the village center have all turned white. The Village Committee headquarters is located right next to the factory and has windows facing the fertilizer plant. There is not much to see through the windows, as the factory's white dust particles have made them as white as snow. Opening a window, which the VC leadership never does because of the noise, shows how the village's agricultural land is, in part, located right below the industrial giant. Apart from *Huafei*, Baocun village also houses several smaller chemical

¹³ Here our findings resonate with Johnson's and Fryxell and Lo's studies that have found that larger sized and state owned enterprises generally do better in terms of compliance or care more for the environment. See Johnson, *Clear Water, Blue Skies: China's Environment in the New Century*. and Fryxell and Lo, "Organizational Membership and Environmental Ethics: A Comparison of Managers in State-owned Firms, Collectives Private Firms and Joint Ventures in China."

¹⁴ This section is based on interviews with Baocun villagers, village leaders, *Huafei* and other factories management and workers and EPB personnel, carried out in 2004.

enterprises including phosphor mines and small scale chemical fertilizer plants that have further enhanced the village's pollution problem.

It all started with the establishment of *Huafei* Company, or *Hunan Phosphor* as it was called before privatization. *Hunan Phosphor* was established as an SOE in 1973 in order to profit from the region's rich phosphor resources and produce chemical fertilizer. Over the years, the company grew steadily and continued to do so after it was converted to a privately owned company in 2001. The privately owned *Huafei* Company is now in the hands of three stockholders, themselves also former SOEs. *Huafei* is one of Yunnan's largest producers of phosphoric chemical fertilizer with an annual production of 1.8 million tons of fertilizer. The company's success has moved beyond China as it now exports fertilizer to other countries including Japan, Indonesia, Malaysia and India. *Huafei* has even established a joint venture with an American enterprise to develop a separate production plant, also located in Baocun village. Privatization at *Huafei* has enabled the company to cut out some of its past burdens. Unlike Ningshi Chemical Fertilizer and *Yungang* Steel, *Huafei* no longer supports pensioners, who have been entered into a privately administered social security system, and the company only needs to take care of its 2010 permanent staff. In 2004, the factory produced more than 1 billion RMB and made a profit of 120 million RMB. Its most important costs are raw materials, mainly phosphor stone, which is bought from local mines. *Huafei's* success has attracted small enterprises to the area. Baocun now has six privately owned chemical factories owned by wealthy villagers. These small enterprises could flourish in Baocun as they could profit from local village support (see above about land violations), the good location, with abundant phosphor reserves, a reasonable infrastructure and a local river for waste disposal, and the opportunity to work for the large *Huafei* Company. The local owners have become rich and influential with close ties to the village government.

The effect of the chemical fertilizer industry on the village environment has been serious. Local farmers first started to notice pollution effects when their water buffaloes became seriously ill in the mid-1980s. Since then, Baocun's farmers had to get rid of their cattle and work the land by other means. Soon, farmers like Mr. Yang (see introduction section of Chapter 6), also noticed that part of their rice turned red. Because of pollutants in the air and in the water, Baocun's best land, wet land close to the factory, could no longer grow healthy rice. About 60% of all rice grown near the factory had to be thrown away. In addition, crops further away from the factory in Baocun's more remote sub-villages were also affected. Depending on the direction of the wind, *Huafei* and the other factories' air pollutants diminished crops and destroyed fruit trees. The pollution also destroyed local fish production, when all of the fish in Baocun's fish ponds

located between the Tanglang River and the factory died out because of water pollutants.

Violation of law¹⁵ seemed apparent but until autumn 2004 the local industry was still registered as being in compliance.¹⁶ Villagers knew better. During the many trips to Baocun Village I gradually gained enough trust to hear about the ongoing problems. Where at first all trouble was denied, gradually I learned about the livestock diseases and the failed rice and fruit crops. Villagers talked about accidents. *Huafei* Company had for example constructed a disposal site for its *Phosphor Gypsum*, a white solid residue of the fertilizer production process. Instead of building this disposal site as far away from human settlement as possible, the company had let convenience prevail and had chosen a location near the factory but also right above one of Baocun's sub-villages. Ironically enough, the disposal site is now located right above Baocun's CCP secretary Chen's house. Standing on top of the roof of his impressive three-story villa, one can see the white mountain made of chemical waste right above. When I first met him, Chen assured me that this chemical dumpsite was safe and that there were no problems. Later, villagers told me that after heavy rains the mountain had leaked and chemical waste had seeped into their homes and onto their agricultural land. Villagers also told me about accidents at the smaller factories that affected their livelihood. One of them, Mr. Wang, developed a plot of land on the outskirts of the village, far away from *Huafei* and the privately owned enterprises. On his land he grows a variety of crops including corn, pumpkins and several kinds of fruits. Subsequent accidents at one of the privately owned enterprises destroyed part of his crop when the wind brought the pollutants all the way from the factory to his land. Even *Huafei* Company acknowledges that it knows about the dangers of living close to their factory, as it has located the factory's residential area far away from the production site, outside of Baocun in a neighboring village. In autumn 2004, during an annual enforcement campaign (see Chapter 14), the EPB finally caught up with local knowledge, when during a first nightly inspection it finally found that *Huafei* was secretly discharging without using its environmental installations in order to cut costs.¹⁷

¹⁵ WPPCL § 14.2, 29, 37, APPCL § 13, DPR § 17.1, the 1996 Integrated Water Discharge Standard, GB 8978-96 and the 1995 Discharge Standard of Water Pollutants for Phosphate Fertilizer Industry, GB 15580-95.

¹⁶ This is based on the Yunnan EPB website's data on compliance, issued in 2004. See http://www.ynepb.yn.gov.cn/html/wrkz/wrkz_szfdbpf1_1.htm

¹⁷ There are many cases where companies that have the proper equipment fail to use it. One example is the Kertas Bekasi Teguh paper factory in Indonesia which was at first "cited as a prime example of responsible pollution control" and it was later "discovered that the waste treatment works were only used when a government inspection was due." See Cribb, "The Politics of Pollution Control in Indonesia."1129

Villagers also understand why the local industry was so long still registered as being in compliance. "For me it is no surprise that *Huafei* has more production at night than during the day," one of the villagers told me. "During the day they have to use their costly environmental installations because the EPB may come down to inspect, while at night they can just produce cheaper without the environmental costs."¹⁸ Just as with the small FSS enterprises Baocun's industry has thus violated environmental law through secret discharges (*toupai*). It could do so because Baocun is not easy to reach at night and EPBs have hardly ever made evening or nightly visits here.¹⁹ Not surprisingly, *Huafei's* violation was detected during one such rare nocturnal inspections.

Baocun's environmental violations are more complex though. Contrary to Ningshi fertilizer plant (see above), the villagers of Baocun have rarely complained about local pollution and have never involved the local media to help them.²⁰ This is strange because the industry has clearly been responsible for considerable economic losses these farmers have suffered. Furthermore, these farmers have health concerns, seeing that the pollution affected large mammals such as their water buffaloes, but no one likes to talk or perhaps think too much about this.²¹

The difference between the farmers in Ningshi and Baocun is key to understanding the continued violation of law in the latter village. The main difference between these two groups of farmers is their dependency on local industry. Whereas Ningshi farmers are not dependent on the industry, the livelihoods of farmers in Baocun are in many ways linked to the industry located in their village. First, some of Baocun's villagers work in one of the enterprises. *Huafei* Company is the most important employer. It provides a

¹⁸ We have talked with *Huafei* about their environmental problems. They assured us that they are 100% committed to the environment and had invested heavily in clean production. Their answers reminded me of Fryxell and Lo's study in which the environmental commitment of China's enterprise managers was demonstrated. In this case, which I believe is not exceptional, the firm, which I knew had been breaking environmental law just to cut costs and with considerable harm for its surrounding villagers remained convinced of its own environmental stewardship. We agree with Fryxell and Lo's analysis that there are obstacles that block compliance, including high costs of clean production and doubts about the benefits of environmental investments. Compare with Fryxell and Lo, "Organizational Membership and Environmental Ethics: A Comparison of Managers in State-owned Firms, Collectives Private Firms and Joint Ventures in China." 1951-3

¹⁹ For more about this see Chapter 16.

²⁰ Compare also with research from other places in China peasant resistance etc and the case from Gansu and the recent pollution related revolt, Economy has also written about this I believe. Something missing here

²¹ Several villagers affirmed that they had such concerns when I directly asked about this, but they did not like my line of questioning much, neither did they voluntarily wish to speak about health problems related to the pollution.

total income of 3 million RMB a year to villagers doing heavy manual labor. Second, farmers mainly sell their farm products at the local markets where *Huafei's* wealthy employees buy their products. Therefore, even the agricultural income depends on the local industry. Third, the industry has provided the village with income related to illegal land leases (see above). Fourth, the village receives income from compensation related to pollution. The Baocun VC has signed a compensation agreement with *Huafei* Company through which the factory pays a set annual amount of 66,000 RMB in pollution damages to the sub-village closest by.²² As part of the agreement, *Huafei* Company has also built local roads and water irrigation systems.

Farmers in Baocun are aware of their dual relationship with the local industry and have been careful not to bite the hand that feeds them. Part of the reason why they have remained passive is also because ordinary farmers feel that they are powerless. Mr. Wang, for instance, said, "The enterprises here are good friends with the village leaders and have good connections with higher level governments. Complain would be useless." Indeed, Baocun's leadership has a close connection with the local industry. *Huafei* Company has let Baocun's leaders administer the 3 million RMB fund for paying for manual labor. It is not entirely clear how much the village leaders keep as management fees, but their houses and cars show that they earn well above village average income. Village leaders also have close ties to the small privately owned enterprises. Baocun's CCP secretary and VC chairman have both become rich from working for such small enterprises. Finally, local industry forms an important part of the phosphor chain (see above) that supports most of Kouxiang Township. As a result the township government and the Dianxi District government support these enterprises. Without them not only the livelihood of the village but of the whole area is threatened. Violation in Baocun is the opposite of compliance in Ningshi, a lack of local pressure to comply has enabled Baocun's industry to continue to pollute. The lack of local resistance²³ to pollution problems has meant that compliance only depends on EPB law enforcement which, as we saw, (and will see Chapter 16) is very difficult to apply when there is not enough support from local villagers and local governments.

²² Compensation does not cover the full costs though. Those who grow rice close to the factory get a compensation of 132 RMB per Mu land. However this does not cover the 60% loss of rice that per Mu amounts to about 1200 RMB.

²³ Our findings in this case are in contrast with Jing's study of peasant resistance to a chemical fertilizer plant in Gansu, which argues that health problems and local culture made peasants actively protest. In Baocun there were probably similar health problems, and a similar culture emphasizing reproduction, however there was no protest, as we have argued because the villagers were too dependent on the factory in their midst. Compare with Jing, "Environmental Protests in China." More comparative research is necessary to evaluate these contrasting findings.

Findings

An analysis of the influence of legislation and enforcement on non-compliance in this case yields several findings. First, *Huafei* Company could easily have complied with the law, but chose not to. The laws' norms²⁴, even though they had become stricter and more specific, were thus feasible for this company. Second, *Huafei* could and did break the norms of the law because enforcement was weak. Because of *Huafei*'s remote location and the dependency of local communities on *Huafei* and their close relationship with the local government, law enforcement agents had trouble finding out what was going on at *Huafei* and could not easily know about their nightly violations. In addition, *Huafei*'s importance for the local economies and its good governmental connections precluded strong enforcement action, even when violation was discovered. (see Chapter 13 and 14)

In contrast with NCFC's local community (see Chapter 8), *Huafei*'s social context, which consisted of the local community, was too dependent on income *Huafei* provided to protest strongly about ongoing violations and pollution. A second reason that Baocun's enterprises were able to violate the law without apparent problems was the weak regulatory context. Due to their remote location and the weak local checks and balances from the social context, Kunming's regulatory institutions were for a long time not able to detect ongoing violations. The political context was also important, as Baocun's chemical industry is supported by various local governments, as it is an essential part of the local phosphor production network.

To understand violation in this case, variables internal to the regulated actors are also important. *Huafei*, first, is a large company, but is in several aspects different from other large companies that were in compliance. One important aspect is that *Huafei* is fully privatized and it no longer needs to worry about supporting a large group of pensioners,²⁵ unlike the *Ningshi Chemical Fertilizer Company* (NCFC) and *Yungang Steel*. NCFC explicitly stated that it invested heavier in environmental protection because it emphasized long-term development instead of short-term profits. (Chapter 8) Perhaps because *Huafei* does not have this social responsibility, it looks less at stability and long-term profit rather than at cutting costs on an everyday basis. *Huafei* did not depend as much on its local environment as it depended on *Huafei*, creating the possibility for socially unresponsive behavior. For this, it is likely

²⁴ WPPCL § 14.2, 29, 37, APPCL § 13, DPR § 17.1, the 1996 Integrated Water Discharge Standard, GB 8978-96 and the 1995 Discharge Standard of Water Pollutants for Phosphate Fertilizer Industry, GB 15580-95.

²⁵ Here, our findings resonate with Johnson, Fryxell and Lo. See Fryxell and Lo, "Organizational Membership and Environmental Ethics: A Comparison of Managers in State-owned Firms, Collectives Private Firms and Joint Ventures in China.", Johnson, *Clear Water, Blue Skies: China's Environment in the New Century*.

that an emphasis on short-term profits and weak ethical standards of factory management were influential. The case of *Huafei* is extreme because the company did have the financial and technical resources to comply, but still chose not to. Whereas *Huafei* at least had the competence, Baocun's small enterprises may have been motivated to violate the law because they lacked these resources for compliance and violation was the only way to maintain business. Smaller enterprises have thus had to make a short-term cost benefit calculation similar to the FSS companies.

Why there are many minor EIA violations

Mr. Yu, enforcement agent at the Kunming EPB answers directly: "Apart from the heavily polluting violations, we are facing an enormous amount of small enterprises that continually break environmental law." He explains that he means the many small collectively and privately owned enterprises that have developed around Lake Dianchi since the 1980s. While some are very polluting, many of these enterprises have no or a very limited impact on the environment. A good example is the boxes factory in Jiacun (see Chapter 8), which has no pollution. Even enterprises that have a limited impact on the environment, the law dictates, should carry out certain procedures, such as a limited type of EIA.²⁶ For example, even Jiacun's temple construction project had to comply with EIA procedure, at considerable cost. While the temple construction project was pressured to operate exactly to the letter of the law (see Chapter 7), many other small enterprises Mr. Yu says have violated environmental law in various minor ways.²⁷ This is so despite the official numbers on compliance which lead us to believe that in 2003 compliance with EIA and 3T requirements has been at 99.7% and 96.2% in Yunnan province.²⁸

²⁶ EIA Law § 16.3, for the exact list of which activity should carry out which type of EIA see SEPA 2002 Classified Directory for Environmental Protection Management of Construction Projects, SEPA 2002 No 14.

²⁷ Several other enforcement agents both from Yunnan as well as from Sichuan have indicated the many violations of EIA laws. Our findings here are different from positive EIA compliance cases from the 1990s. See Sinkule and Ortolano, *Implementing Environmental Policy in China*. 105

²⁸ In previous years, the official data on compliance in Yunnan Province have recently recovered after a steep decline. The decline is probably because in 1999 rounds of strict inspections started in this province and many violations of EIA were found. (See Chapter 16) Based on SEPA, *Zhongguo Huanjing Tongji Nianbao 1998 (China Environmental Statistical Report 1998)* (Beijing: SEPA, 1999), SEPA, *Zhongguo Huanjing Tongji Nianbao 1999 (China Environmental Statistical Report 1999)* (Beijing: SEPA, 2000), SEPA, *Zhongguo Huanjing Tongji Nianbao 2000 (China Environmental Statistical Report 2000)* (Beijing: SEPA, 2001), SEPA, *Zhongguo Huanjing Tongji Nianbao 2001 (China Environmental Statistical Report 2001)* (Beijing: SEPA, 2002), SEPA, *Zhongguo Huanjing Tongji Nianbao 2002 (China Environmental Statistical Report 2002)* (Beijing: SEPA, 2003),

The discrepancy between Mr. Yu's statements based on everyday enforcement work and the official data is significant.²⁹ First there is the problem of official data collection in China in general, which with China's fragmented bureaucratic structure and weak vertical management (see Chapter 13), has been problematic.³⁰ Nevertheless, there is more to it; these data are based on what the EPB think is the number of construction projects in compliance with the law. It is based on the number of construction projects that the EPB knows of that are going on and for which an EIA has been requested. But the EPB has no way of knowing how many construction projects are ongoing beyond those that have been reported to them or those that they find during inspections. Furthermore, many project managers fail to report changes made to the construction made after it has been finished, as they are obliged to do. It is in the area of inspections where the problem of small violations such as EIA lies. As Chapter 13 details, environmental protection bureaus lack the personnel resources to inspect all possible violators of law, this is especially so for EIA and 3T law that is directed at a very wide group of possible violations. EPBs thus introduced a policy for making pro-active inspections, which they focus on major polluting enterprises, including the chemical factories discussed above.³¹ For small, less polluting enterprises, EPBs carry out few inspections and rely on reactive enforcement techniques based on citizen complaints, which will not occur when there is no ignorant nuisance to report.

The sheer number of possible violators makes detecting violation difficult and the chances of receiving a penalty for non-compliance low. In addition, the case of the temple construction in Jiacun shows that the costs of compliance can be considerable (see Chapter 7). Third, small enterprises do not necessarily know that they must report construction work to the EPB, especially clean companies such as the boxes factory (see Chapter 8) or non-industrial companies, especially service sector businesses such as real estate companies. According to the strict letter of the law, new service companies must also assess their impact on the environment, even though such impact may be limited to the toilet water. Not surprisingly, many new companies do not know this. Such enterprises will be able to break the law only if relevant departments do not cooperate with the EPB. Construction permits, for

SEPA, *Zhongguo Huanjing Tongji Nianbao 2003 (China Environment Statistical Report 2003)* (Beijing: SEPA, 2004).

²⁹ For a critical assessment of these overly positive data see Sinkule and Ortolano, *Implementing Environmental Policy in China*. 105, Vermeer, "Industrial Pollution in China and Remedial Policies." 235

³⁰ See Cai on official data and other sources Y. Cai, "Between State and Peasant: Local Cadres and Statistical Reporting in Rural China," *China Quarterly* (2000).

³¹ For a list of major polluters see:

http://www.ynepb.yn.gov.cn/html/wrkz/wrkz_szfdbpf1_1.htm

instance, should only be given in case the enterprise has obtained EIA approval;³² in practice there have been many instances where construction bureaus have given permission for construction without EIA approval. In such cases violation has only occurred because it was made possible by certain governmental actors.

Findings

At Lake Dianchi there are many minor violations of EIA law. The adoption of the EIA law in 2002 is partly to blame. The new law failed to address the wide scope of application of the original regulations. Instead, it even enlarged the amount of activities for which some form of EIA must be done. This has not only led to violations but also made enforcement difficult due to the large amount of possible violators. Enforcement agencies simply lack sufficient resources to enforce these kind of widely violated regulations and may not want to issue sanctions because of the strict minimum sanctions the 2002 EIA law prescribes. (See Chapter 4 and 13).

The regulatory context is thus an important external variable for explaining these minor violations. The political context has also been important. Local governments and their construction bureaus have approved of new construction projects even when the EIA applications had not been approved. There was limited pressure from the social context, likely because minor EIO violations normally do not lead to nuisance for people living in the area. The economic context, with the extreme economic growth has led to a tremendous growth of new construction projects, making the number of possible violators difficult to control.

Internal variables related to the violators also explain ongoing violations. First, a lack of information is important. Regulated actors whose operation is normally not expected to affect the environment, have a lower chance of knowing that they have to apply for an EIA nevertheless. Second, because violation of these rules is so widespread, there may be a culture of violation, meaning that enterprises do not see compliance of these rules as an important value.

Restaurants cause Air and Water Pollution

Like all Chinese, eating out is a favorite activity for many Kunmingnese.³³ Since the reform program started in 1978, restaurants have changed the face of Yunnan's capital. From the smallest outdoor *mixian* (rice noodle) stalls to the luxurious *huoguo* (hot-pot) dining halls, restaurants have flourished with

³² EIA Law § 25, 26

³³ This section is based on interviews with EPB personnel, interviews with Kunming residents and personal observation and conversations with restaurant owners.

the development of a new middle class with money to spend on food, tired of eating in collective cantinas, but no longer accustomed to cooking at home. In most areas of the city restaurants were built at the first floor level, right below housing on the floors above. From morning to late at night these places are packed serving delicious Yunnan dishes.

Although Kunming citizens could not live without the convenience of a wide array of options to dine out, recently some of them have complained about the nuisance the restaurants have caused. According to the Kunming EPB, since 2000 there has been a sharp increase in complaints about restaurant pollution. Of all pollution related complaints in 2003, 80% concerned restaurant nuisance.³⁴ At Yuanxi Road, Kunming's most popular street for student restaurants, a couple explained how their lives are affected by the restaurant below them. The *halal (qingzhen)* restaurant run by Hui Chinese is open from early in the morning serving breakfasts of noodles and rice noodles until late at night for full dinner. Throughout the day, but especially at peak hours around noon and in the early evening, the restaurant is packed with students drawn by the low prices and excellent quality of food. The couple that lives above the restaurant on the third floor suffers from the noise that the kitchen staff make when cooking in hot oil. The noise clearly penetrates the poorly insulated walls of their apartment. "At night there is so much noise that we cannot sleep, the sizzling oil just makes us crazy," the husband explains. It is not just the noise; the hot oil emits a smoke that rises up into the houses above. As a result the smell is unbearable, penetrating into the apartments located there. "It is disgusting, all our clothes smell of burnt oil, many of our friends ask what the smell is when they come here, and even when they see us," his wife adds.

Because of the complaints, the Kunming EPB and the Dianchi Management Bureau (DMB) have made restaurant environmental violation a priority in their enforcement work (see Chapter 13, 14). The local government has even made special rules to control the restaurant related pollution that form a specification of norms of the APPCL (see Chapter 4). However, violations continue. New restaurants are still opened underneath residential buildings, even though the new Kunming rules strictly prohibit this practice. Furthermore, few of Kunming's restaurants have the proper water pollution filters, to filter out oil residues that can cause harm to the city's sewers. Kunming's restaurants also rarely have the mandatory air pollution installations as prescribed in the APPCL and the new municipal rules. Just as in all of the cases described above, new stricter legislation, and even enforcement prioritization, has not led to compliance and widespread violation of law has continued.

³⁴ Based on an interview with KEPB staff, December 3, 2004

As in some of the cases discussed above, the reason for the continuing violation here is also that the law does not fit local circumstances. First, the new municipal norm prohibiting new restaurant construction underneath apartment buildings is unfeasible. Much of Kunming's city center developed in the 1980s and 1990s when housing quarters, shops, small businesses and restaurants were all located in long five story apartment blocks. While some people have moved out of the center into expensive "gated communities" purely residential without shops or restaurants, most of the people still live in the center where most of the restaurants are located. There simply is too much demand for food in the centre and the only place to build restaurants is underneath apartments. As the market fluctuates, people are always looking for the latest culinary fad; old businesses fail and new ones open. Under these circumstances the strict letter of the law makes no sense, and new restaurants have continued to open their doors even though they are located right below residential buildings.

For existing restaurants the law also places unreasonable demands. This is especially so for smaller eateries. According to EPB enforcement staff who understand the problems of the regulation, small restaurants have invested 10,000 RMB to start operation. The mandatory environmental installations will cost them more than half that amount: about 6000 RMB for an oil smoke installation with a smoke stack. Apart from the financial problem there is also a practical issue at stake here. Even if restaurants can pay for the installations, building them is not always possible. While citizens, who live right above the restaurant, complain about smoke penetrating their house, those living at the top floors do not wish to cooperate when the restaurant wishes to construct a smoke stack behind their apartment. Without such cooperation compliance is simply impossible.

Finally, there are many restaurants in Kunming, and violation is widespread. Enforcing the law has placed a considerable burden on the EPB and it is only able to carry out inspections at the largest restaurants or at those that have received considerable numbers of complaints. For all those other polluting eateries enforcement has remained weak and there is a slim chance of receiving a penalty for violation. Furthermore, the municipal rules have enabled the EPB to reduce fines to 200 RMB instead of the mandatory minimum of 10,000 of the APPCL³⁵. As a result, the costs of violation have remained low for most restaurants.³⁶

³⁵ APPCL § 48

³⁶ According to the EPB some were closed down in 2004, but in a neighborhood outside of the center in a street with considerable complaints. Interview with EPB staff December 3, 2004.

Findings

Many of Kunming's restaurants operate in violation of pollution law³⁷. Changes in national legislation and even local regulation did not lead to more compliance, on the contrary many cases are in violation of newer stricter norms recently introduced. Some of the changes made proved to be unfeasible and not adaptable to Kunming's context. Faced with such rules enforcement agents have had trouble enforcing the law, because when strictly enforced this would severely affect many of the city's restaurants. Variables external and internal to the regulated restaurants help to further understand violation.

The social context had some influence. Complaints from local citizens have led to an increased regulation of restaurants. The social context affected the political and regulatory contexts. This led to stricter regulation, even at the local level. Unfortunately the local rules did not pay enough importance to the feasibility of the proposed norms. It seems that a strong signal to control restaurant nuisance was more important than actually making norms that could be feasibly implemented. As a result, enforcement institutions have not acted strictly, as they understood the law's unsuitability to local circumstances. In addition, enforcement bureaus lack staff to inspect all possible violators. The economic context demands the existence of restaurants in the city center therefore creating a market in which violations of law are profitable. In this market there is not only demand for larger richer restaurant, but also for smaller eateries that cannot comply with the rules. Similarly, the market demands new restaurants in the center where they cannot be built in compliance with the law.

Many restaurants are too small to comply with the law as they lack sufficient resources for the necessary investments. Such small restaurants operate on a short-term profit oriented basis, which precludes making large investments. Although restaurants are by their nature open and socially responsive, they have not responded much to neighborhood complaints. This may be partly because in China, noise and smell nuisance have for a long time been morally acceptable, and may continue to be still in the eyes of restaurant owners and staff.

Conclusion

Pollution continues at Lake Dianchi, despite the stricter norms in the laws and despite efforts to enhance their enforcement. In the pollution cases analyzed above norm conformity was case based and there were different reasons why violation continues in each case.

³⁷ APPCL § 14, KMREP § 8, 11, DPR § 21.2

A first insight is that not just the regulated actor itself was involved in the non-compliance but that violation occurred through an interaction of the enterprise and its economic, social, political and regulatory contexts.

For the pollution violation cases, the social context was not successful in pressuring the regulated actor into compliance. In two of the four cases there has been little or no action from the local social context, in the case of *Huafei* because local villagers were dependent on the regulated actor and in the case of minor EIA violations because there had been little pollution. When the social context successfully rallied political support, this led to initial changes while failing to solve the pollution problem at hand. In case of the FSS companies social pressure led to stronger enforcement action, that in the end did not create compliance. Similarly, in case of the restaurant pollution community complaints led to stricter legislation, which due to its unfeasibility has been difficult to enforce.

Until the 2004 campaigns, the regulatory external context has not been successful at enforcing the laws in such a way that compliance resulted. For three of the four cases this was so because enforcement of norms was not locally supported. Lacking such support, and due to the remote locations, the many violators, limited enforcement personnel and the active cheating practices of some firms, detection of violations was difficult.

The political context had some effect. Some violations have been condoned by local governments, especially those of the FSS companies and *Huafei*. When political pressure increased, as happened during the enforcement campaigns or for the restaurant pollution legislation, there was more attention for violations, affecting existing legislation and enforcement. Village democratization did not affect rural pollution violations researched here. Local power in these cases was distributed in such a way that villagers felt they could do little against violations.

For this point, the economic context is important. Regulated actors that were dominant employers in the region were much more powerful when resisting their social, regulatory and political contexts. Enterprises that have been important for local livelihoods have been more difficult to regulate. The economic context had a second adverse influence. In two cases, FSS companies and restaurants could only deliver wanted products by breaking the existing legislation. Without alternative sources of income or production of locally necessary goods, local actors, including local governments, continued to condone and even support the ongoing violation.

Variables related to the internal context again offer mixed explanations for violation behavior. First, size mattered in individual cases, although it offers no yardstick for understanding violation. In three cases, the small size of some the enterprises involved helped continue violations. First, because the small size made compliance economically not feasible.

Second, because small enterprises lack the knowledge to comply. Third, because the large number of small violating enterprises makes them difficult to inspect regularly. However, the *Huafei* case demonstrates that large enterprises with sufficient resources and knowledge sometimes still violate the law, and have used their size to make inspections difficult and their power to keep complaints and sanctions to a minimum. All violating enterprises were privately-owned or privatized enterprises. However because the same applies to most compliant enterprises discussed in Chapter 8, this does not mean much. What is meaningful is that in contrast of the compliers, none of the violating enterprises had to support pensioners and thus worry about future survival. The cases discussed here further show a strong profit maximizing way of viewing costs and benefits and in some cases a clear risk seeking attitude of cutting legal corners in order to enhance profits.

So what effect did the legislative changes and enforcement efforts have on these violation cases? Legislative changes do not seem to have had a positive effect on the violations studied here. In all cases, the law lacked in terms of feasibility. First, in two cases it lacked feasibility because it demanded behavior that the regulated actor was not able to carry out while remaining in operation. In addition, in the same cases it lacked in feasibility because the norms were not acceptable locally, as local communities largely depended on such polluting activities for income or for consumption. Third, the norms lacked feasibility in terms of enforcement. In all cases, this was due to the fact that the costs of enforcing the norms were high, while in three cases enforcement was difficult because of the law's local opposition and the support that existed for violations. In reaction to weak regular law enforcement, China organized enforcement campaigns since 1996. While the campaigns had some effect on the compliance cases studied in Chapter 8, until 2004 campaigns left the violations described in this chapter unaddressed. When in 2004 campaigns finally addressed the FSS companies and *Huafei*, violations of law were detected. However, for *Huafei* a bargain was struck and only a limited sanction was issued, while the FSS companies were ordered to close down but resumed operation not a month later. (See Chapter 14) As such even the 2004 campaign, which did initiate a change, did not have a lasting effect on the violations described here.

11. Law and the Complexity of Reality

Why Actors Comply or Violate

Introduction

Law in practice is complex and diverse. Even around one lake, even in one village, the same rules led to different outcomes. In each case, determining factors were found in figurations of variables both internal and external to the regulated actor. Understanding compliance and violation behavior requires understanding the norm-addressee itself and in its social, economic, political and regulatory contexts, which unfortunately are not limited and therefore can never be fully studied. With unlimited research capacity, the analysis above would have been able to discover many more linkages explaining norm conformity that have remained obscure now. However, even with the limited analysis the present research has been able to make, it is clear how difficult it is to make singular observations about why the law led to compliance or violation in the Dianchi area. The relatively small and homogenous area of Lake Dianchi contained sufficient variation to allow for different outcomes in similar but different cases.

The study on compliance and violation at Lake Dianchi has been explorative. Although representativeness was strived for, the limited number of cases studied cannot fully reflect all regulatory compliance practices at the lake. In addition, the limited access and time, has precluded a full analysis of all variables that possibly influenced the cases. Recognizing these limitations and the explorative nature of this study, the present chapter will try to draw conclusions about the findings from the cases studied. First, it will present general observations about why actors complied with or violated the law at Lake Dianchi. In part, these findings will be compared with earlier studies about arable land loss and pollution in other parts of China. Second, it will discuss what effect the post-1995 legislative changes and efforts at enforcement have had on compliance. Third, it will compare the findings from Lake Dianchi with findings from studies about compliance and violation in Western and non-Western countries.

Why Compliance and Violation Occurred at Lake Dianchi

The data gathered during a year of fieldwork at Lake Dianchi was structured into eighteen case studies. The richness of the data makes it difficult to draw lessons that apply to all cases. Some findings may apply generally to some cases, while not applicable to others. Meanwhile interesting insights can be

derived sometimes from single cases, not repeated in others. Taking this in mind, the most important findings, in terms of their generality and the insights they bring will be presented here.

Economic Context

Compliance and violation of pollution and arable land law at Lake Dianchi were closely related to the economic context, which consisted of the market forces affecting the local economies.

A first finding is that the economic context sometimes influenced the opportunity to violate the law. In some of the land cases studied, in Sub-Village Number Seven in Jiacun, regulated actors could not violate the law as there was no demand for illegally constructed houses or enterprises. In some of the pollution cases studied, formerly polluting enterprises were no longer able to break the law when they faced bankruptcies, in part due to increased market forces and privatization.

A second finding is that in some of the cases studied the economic context made violation lucrative when there was a demand for illegal products. An example is the demand for illegal land conversion for enterprises and extra houses in Jiacun. Another example are the small FSS enterprises and the restaurants in Kunming for whose products, which could largely be made only in violation of pollution regulation, there was a high demand.

When there was a homogenous local economy with dominant employers or sources of income, the social, political and regulatory contexts became more dependent on such employers or sources of income. The study finds that when such employers or sources of income violated the law, social, political and regulatory actors were less willing or found it more difficult to address their violations. A good example is the difference between *NCFC's* independent and actively protesting farmers and *Huafu's* dependent and meek local population. Similarly, the lack of protest or political pressure on violations of housing and enterprise construction regulation in Jiacun was caused because income from these violating activities benefited most local villagers and governments, and land conversions had become an important local source of income.

The economic context sometimes affected the internal context of the regulated actor and especially how costs and benefits were weighed and the moral attitudes related to such weighing. Here the clearest example is the difference in how farmers deciding on building extra housing thought about protecting arable land between urbanizing Jiacun where land was not perceived to be important and the remote and rural Baocun where land was still seen as sacred and not built on for second houses.

Because of its influence on the opportunity to violate, the benefits of violation, and other external and internal variables, the economic context has been a central factor for explaining compliance and violation in many of the cases studied. The findings here resonate with existing studies about arable land loss from other parts of China, arguing that land loss and pollution continue due to economic growth, urbanization and industrialization.¹ However, studies about pollution in China have paid little attention to how the economic context is related to pollution. In addition, the fact that violating activities can be dominant local sources of income, which are more difficult to regulate, has not been recognized in the literature assessed here.²

Social Context

Compliance and violation at Lake Dianchi were also related to the social context, consisting of local communities living in the vicinity of the regulated actor or local and national media. First, pressure from the social context led in some cases to compliance. A good illustration are the beyond compliance cases concerning compensation for farmers who lost arable land for construction. In Jiacun village local protests led to higher compensation. Another illustration was *NCFC's* compliance with pollution law following local protest and media involvement.

A second, related, finding is that when there was no social pressure, the chances for violation increased. A good example of this point is the lack of local social protest about *Huafei's* continued violation of law, even though the company could easily have complied with the pollution standards. Other examples are the lack of protest in the land violation cases in Licun, Baocun and Jiacun.

Social protest in the cases studied mainly occurred when the social context opposed to the violations and when it was sufficiently independent of the regulated actor. Especially in the land violation cases in Jiacun and Baocun, local communities were never opposed to the violations, and sometimes even directly benefited from them. The dependence on regulated actors first of all concerned dominant employers. An example of this is *Huafei*, who dominates all local income in the Baocun region. Such dependence also existed in villages where most farmers had local jobs and were dependent on the VC leadership and where such VC leadership was well connected in the village as well as with superior governments. A good example of this is Licun, where local villagers did not protest against illegal land practices of their own VC.

¹ For an overview of sources see Chapter 6.

² Compare with Chapter 6.

In those cases where there was social pressure, such pressure was localized of a nimby³ type and not organized, without involving NGO-type organizations. An exception was the national media attention for the FSS pollution cases.

The findings on the social context are in line with research from other parts of China. Studies about pollution control have found that lack of community pressure correlates with continued pollution.⁴ China has been witnessing increased action against pollution though⁵ and similarly there have been many protests against low compensation for arable land loss⁶. As at Lake Dianchi, most of these protests are local though and national NGOs have played a limited role in helping victims of local pollution or arable land conversions defend their rights. The media has also played an increasing role in other parts of China, similar to what happened in the case of *NCFC* and the FSS companies. According to a 1998 survey, since 1995, the Chinese media have paid increasing attention to environmental concerns and have played an increasingly important role in getting polluters to comply.⁷

Political Context

The political context also played a role in compliance and violation at lake Dianchi, as the political system as a whole, local political institutional changes, local leaders, and local power configurations affected regulated actors and local communities.

A first finding is that local governments have played an important role in condoning violations that were an important part of the local economy. This happened in many of the land and pollution violation cases. Until late 2004, local governments, from township to provincial level, never urged their land bureaus to act against violations of the LMA in Jiacun for example. Local governments also condoned severe violations at *Yunzhi* and the FSS companies, even after receiving complaints. Without local governmental support law enforcement has in most cases been more difficult.

³ Not in my backyard. See J. Broadbent, *Environmental Politics in Japan, Networks of Power and Protest* (Cambridge: Cambridge University Press, 1998).

⁴ See Chapter 6

⁵ For an overview of recent pollution protests see A. Rothman, "Thirsty China, Its Key resource constraint is water," *CLSA Asia Pacific Markets*, no. Summer (2006). Compare also with Jing, Jun. "Environmental Protests in China."

⁶ For an overview see B. Van Rooij, "The Return of the Landlord, Chinese Land Acquisition Conflicts and Tenure Security illustrated by Peri-Urban Kunming," *Journal of Legal Pluralism* (forthcoming).

⁷ See Friends of Nature (Ziran zhi you), *Zhongguo Baozhi de huanjing yishi* (Survey of Environmental Reporting in Chinese Newspapers) (Beijing: Ziran Zhiyou, 1998), consulted through C.W.H. Lo and S.W. Leung, "Environmental Agency and Public Opinion in Guangzhou: The Limits of a Popular Approach to Environmental Governance," *China Quarterly* (2000). 682

A second finding is that the local power configuration prevented local villagers from protesting when violations damaged their interests in some of the cases studied. Such local power configurations were to a large extent related to China's political system under which local governments have a considerable amount of autonomy from superior authorities (see Chapter 13), while also lacking democratic participation and control by local citizens. Local power configurations were also related to local family and connections (*guanxi*) networks. An example is Licun, where the local configurations of power that connected leaders in the village with leaders at the township and district level, made protest even through elections difficult. Another example is Baocun where *Huafei* and the other local enterprises had close relationships with village and township leaders making protest extra difficult.

Village democratization had in some cases a positive effect on compliance while in others it had no effect. In the land cases in Jiacun, villagers actively used the increased room for participation rural democratization had given them, while in Licun such democratic powers were not used even though formally available. The reason for the difference is most likely the dependence of Licun farmers on their leaders and the strong power networks of such local leaders.

China's national political system has also been influential. As stated above, non-local NGOs did not play a role at Lake Dianchi and protest against violations only occurred on a local basis. A likely reason for this is that the state provides strict limitations on the organization of non-state interests groups, and as a result non-state groups working on sensitive issues have had trouble to organize in a manner that they have reach throughout the country.

National political support to act against violations can potentially help enhance compliance. Shifts in national policy led to enforcement campaigns, which, as we saw, influenced compliance in one and possibly two pollution cases, and may after 2004 have affected some of the land violation cases, especially enterprise construction violations (see Chapter 14).

Studies on pollution and arable land from other parts of China, have found some similar findings, most notably the impact of decentralized political structures on violations of law and local governments condoning violation.⁸ However, in the current literature there has been little attention for the effects of democratization, local power structures, political campaigns and the political limitations to organized protest on compliance and violation, or even the continuation of pollution and arable land loss.

⁸ See Chapter 6.

Regulatory Context: Enforcement

In most of the cases studied, compliance and violation occurred without enforcement action. There was only one compliance case (the FPC pollution case) where enforcement action formed the most important reason for compliance. In one case, the Jiacun Paper factory, enforcement may have directly led to compliance, depending on what to believe. In these two cases where enforcement likely led to compliance, such enforcement action was closely related to policy changes at the nation level (see Chapter 14); showing how such policy changes can influence local compliance behavior. For all other cases, the distinct threat of enforcement action may have had some influence (examples are the Temple case, *Yungang*, and *NCFC*) but such influence was likely subordinate to other factors, such as the inability to violate the law (due to a lack of development opportunities or bankruptcy) or non-state anti-violation action by local citizens.

At the same time, we also saw that in most violation cases enforcement was weak, at least until 2004 (see Chapter 14), making the costs of violation lower than the expected benefits. This teaches that while enforcement is not an important variable for explaining compliance, in the cases studied a lack of enforcement does correlate with violation behavior and increased enforcement may have an influence towards compliance.

Present studies about arable land loss and pollution in other parts of China have held similarly that these practices continued due to weak enforcement.⁹ However, none of the studies consulted have looked at what the effects of enforcement on compliance are.

Multiple Regulated Actors

The next finding is that compliance and violation in the cases at Lake Dianchi were often the result, not of the decision-making of a single regulated actor, but of several regulated actors that all had their own internal and external contexts.¹⁰ In most of the construction violation cases plural actors were responsible for the illegal activities in question: local villagers building houses, enterprises building factories, village leaders approving of original building plans, and township leaders approving of final building plans. For EIA violations, we saw the same: violations involved enterprises but also construction departments giving illegal construction permits. This shows that violation of law at Lake Dianchi may involve illegal application of law by official state organs. For finding ways to end violations it is important to recognize which actors are in which way involved in the illegal activities

⁹ See chapter 6.

¹⁰ The existing literature has paid little attention to this phenomenon, with the exception of Zhang. See Zhang, "Ecologizing Industrialization in Chinese Small Towns".183-5

and concentrate remedial action on the whole chain of violating actors incorporating their internal and external contexts. So far there has been little recognition of this point in the studies of pollution and arable land loss in other parts of China.¹¹

Size of the Regulated Actor

Except for the external variables and the fact that often multiple actors are involved, the cases analyzed here also brought forward findings related to the internal context of the regulated actor. The first variable is its size. For pollution cases, larger enterprises complied better with the law. They did so, first because they had the resources, and second because they were more focused on long-term interests than smaller firms. *Yungang* and *NCFC* are illustrative. However, in one case, the *Huafei* Company, a large enterprise with sufficient resources, shows the opposite. *Huafei's* size gave it the power to dominate local actors enabling it to violate the law undetected.

Small sized companies were in general more prone to violation. Some small companies, such as the FSS companies and restaurants were so small that compliance was economically not feasible and only violation of law or closure could result. Smaller sized companies also had a lower chance of being inspected because of their sheer number and the limited enforcement personnel. Finally, some smaller companies lacked the competence to comply with the law because they did not know the law, as we saw with EIA violations.

The findings here are largely similar to existing studies of pollution from other parts of China.¹² There has however been limited attention for bad apples such as *Huafei*, large companies that could and should easily comply with the law but that use their power to violate.

Manner of Cost Benefit Analysis

The manner in which the regulated actor viewed costs and benefits affected compliance and violation. First, there was a difference between attitudes that purely stressed economic goals and those that stressed non-economic values. Compliance in the temple construction project, for instance had little to do with direct economic gains of the various norm-addressees involved, especially not the Buddhist organization. In contrast are cases in which quick profit maximization led regulated actors towards violation, as happened for example in the FSS and *Huafei* pollution cases, and the Licun and Xiaocun construction case.

¹¹ See Chapter 6

¹² See Chapter 6.

Second, there was a difference between actors with a long-term perspective and those with a short-term outlook on costs and benefits. This was especially relevant for understanding differences in pollution cases. *Huafei* for example chose to violate the law because it put short-term cost saving over long-term stability, while *NCFC* and *Yungang* complied because they operated on a long-term perspective. In general, larger companies seem to have had the ability for long-term cost benefit decision making, simply because they had sufficient resources to do so. Smaller companies, or those under extreme strain, lacked such long-term perspective and violated the law in order to cut costs and stay in operation. However, while most larger companies operated on a long-term perspective, some did not. A possible explanation the data offer for this is that large companies that have a lot of pensioners (such as *Yungang* and *NCFC*) complied with the law out of a long-term perspective, while large firms that did not have such burden (such as *Huafei*) violated the law following a short-term cost benefit approach. For land cases, in most cases a local short and mid-term perspective prevailed among all norm addressees (including local governments and land bureaus), and none of the actors involved had the long-term interests of food security in mind that had influenced the original legislation (see Part II, Chapter 4).

Studies from other parts of China resonate some of the findings here. Such studies found for example that farmers in Zhejiang did not support arable land protection, especially as farming was seen as unprofitable. Studies about pollution found that enterprise management have a high amount of environmental commitment, which however did not translate into action because of economic business concerns.¹³ However, none of the pollution studies have looked at the influence of pensioners on compliance behavior.

Social Responsiveness and Moral Values

In several cases, the regulated actor's level of social responsiveness and its moral values played an important role for explaining compliance or violation behavior.

In several cases, socially responsive regulated actors complied with the law. Their responsiveness consisted of the level of participation of local communities—through democratization or other channels—as well as their leaderships' attitudes towards the social context. Examples are compliance cases with compensation rules in Jiacun and pollution compliance at *NCFC*.

Meanwhile socially unresponsive actors, in some of the cases studied, violated the law, not caring for what it did for local social concerns. Their unresponsiveness can be characterized by an independence from their social

¹³ Chapter 6

context, and a dependence of such context on them. In addition, management at such unresponsive actors did not take social concerns into account, so it seemed. *Huafei*, for example, knew that its pollution had a large negative impact on the surrounding village, and although it had the resources to stop violation, yet it chose to ignore the health concerns of the local villagers who were powerless to stop them. Another example are Licun village and Yixiang Township, where independent, powerful local leaders violated the LMA and exploited local villagers out of their rightful compensation.

Socially responsive actors did, however, also violate the law in some of the cases studied. This happened when socially responsive regulated actors became influenced by social concerns not aligned with the legislation involved. A good example was the illegal development of industry on leased land in Jiacun and Baocun, from which the local community also benefited.

As becomes clear from all of this, the moral values of the regulated actor or its leadership were important. It seems that in some compliance cases such as the Temple construction, *Yungang*, and *NCFC* regulated actors had values that were oriented to abiding the law. In some of the violation cases, regulated actors involved knew they were breaking the law, sometimes with significant social consequences, without necessity, but chose to do so nonetheless, and as such law abiding was not likely important for them. Examples are *Huafei*, Xiaocun and Licun. In certain cases, especially in the rural construction in Jiacun village, violation was so widespread that it had become the norm. The law's lack of feasibility and local legitimacy created a culture of violation that facilitated a wide support for continued violation. Getting compliance under these circumstances is extremely complicated.

Existing studies from other parts of China, as stated above, have looked at moral attitudes of regulated actors, finding that for land there was little support, at least in Zhejiang, for arable land protection, while for pollution environmental commitment did not lead to environmental protection because of economic concerns.¹⁴ However, none of the existing studies has looked at how the social responsiveness of an organization affects its compliance or violation. Neither have there been studies of general moral values and values about law-abiding behavior, all of which were only touched upon in the present study.

The Impact of Changes in Legislation

Within the overall reasons for compliance and violation, the present study is in particular interested in the effects of post-1995 changes in legislation and enforcement. Enforcement, this part of the book already noted, was largely

¹⁴ See Chapter 6

absent, both in violation and enforcement cases. Only in one case was law enforcement a direct cause for compliance. In this case, post 1995 changes in the form of a political campaign had initiated such enforcement. Part III will look in more detail at the effects of changes in enforcement on compliance. Here we will look in more detail about what effects the post-1995 changes in legislation have had on compliance and violation.

Changes in legislation did in several cases correlate with compliance. This could lead one to think that legislation had a positive impact on norm conforming behavior, different from what was hypothesized in Part I. A closer analysis of the compliance cases made in Chapters 7 and 8 demonstrates that this is not fully true. In most cases analyzed, compliance occurred not because the regulated actor conformed its existing behavior to the law, and also not because the regulated actor refrained from changing its existing norm-conforming behavior where it would have had the law not been made. First, there were several cases in which the existing behavior was allowed by the law, and as such there was no behavioral change because of the law. The cases of beyond-compliance with the LMA's rules on compensation and the *JCBC* box factory's compliance with pollution regulation are examples. In several other cases, the economic and internal contexts made it impossible to engage in the behavior prohibited by the law. This was especially so in the land compliance cases from Sub-Village Seven and Kouxiang. In other cases, the regulated actor could no longer break the law, as it had ceased to exist due to mismanagement and economic reasons, as we saw in several pollution compliance cases.

It is not all bad though. In some cases where the regulated actor was law abiding, with a long-term outlook on costs and benefits and where the social and political and regulatory contexts asserted pressure, the norms of the new laws influenced compliance behavior. The case of *Yungang* was one where the changed norms of the law influenced this law-abiding company to pollute less. Another example was *NCFC* where local citizens and the local media made the company abide by the laws new norms. A third possible example were the cases of beyond-compliance with land compensation rules which happened following strong social pressure in Jiacun. In those cases in which the social and political contexts played a dominant role in compliance, and the one or perhaps two cases where the regulatory context was dominant, the law's stricter and more specific rules may have made such pressure easier to assert. It is important to note that the possible, more indirect communicative influences of the law have not been studied here yet.¹⁵

¹⁵ Compare with Chapter 2.

Second, changes in the legislation correlate with violations of law. Here the analysis reveals a relation between changed norms and deviant behavior. The main problem with the law's new norms was their feasibility, which as we anticipated in Part I, was sometimes problematic in practice. Some of the norms prohibited behavior that was beneficial to most actors involved, not only the regulated actor, but also the social and political context. This was most clearly the case with the LMA's norms on collective construction¹⁶, especially in rapidly urbanizing contexts such as Jiacun village. For pollution, this was most apparent with the WPPCL¹⁷, the APPCL¹⁸, the DPR¹⁹ and the KMREP²⁰ when applied to small enterprises for whose products there is a high demand, such as the FSS companies and Kunming's restaurants. Compliance with such rules could only come at considerable or even insurmountable cost not only for the regulated actor but also for its contexts. As a result, violation of these rules was widespread and such rules were not, or less, invoked by the local communities, or used by local governments or enforced by their law enforcement agencies.

This brings us to the second problem of feasibility, the norms' unfeasibility in terms of enforcement. First, those rules which were contrary to existing behavior or widely accepted behavior, such as those just mentioned, but also the EIA rules with their wide scope of application, led to a large amount of violations. Detecting such violations and collecting evidence for them is costly and unfeasible given the limited enforcement capacity that exists in Kunming. (See Chapter 13) In addition, for those rules prohibiting widely condoned or even supported behavior, issuing strict sanctions especially those ending such behavior as some rules demand,²¹ forces enforcement officials to oppose not only to the regulated actor, but also to their social and political contexts, which is not easy to do.

Second, some of the rules were not adaptable enough to enforce in a manner that the circumstances of the cases could be taken into consideration. In these cases, enforcement agents were left with a near binary choice, enforcement to the letter of the law, or breaking the law and not enforce and adapt to circumstances. Examples are the LMA's rules on rural housing and construction on leased collective land, which leaves no room for interpretation and are not adaptable to Kunming's peri-urban context and thus not enforced. Other examples are the APPCL minimum sanction

¹⁶ LMA § 62.1, 62.3

¹⁷ WPPCL § 14.2, 22, 23, 29, 35, 37

¹⁸ APPCL § 13

¹⁹ DPR § 17.1, 21.2

²⁰ Kunming Municipal Management Rules on Environmental Pollution Prevention and Control for Restaurants and Food Business (KMREP) § 8, 11

²¹ WPPCL § 23, DPR § 21.2

requirements²² when applied to small restaurants, influencing enforcement agents to bend the law and follow the KMREP.²³

The third way in which rules were not feasible for enforcement was that they regulated behavior for which the existing enforcement institutions lacked the capacity to detect violations or collect evidence. This was especially troublesome for norms whose violations are not easily detectable. The best example of this were the water pollution norms, which at remoter enterprises, such as Kouxiang's FSS plants and *Huafei*, were difficult to inspect, especially because local enterprises had many ways of fooling inspection agents lacking resources to carry out frequent inspections. In addition some of these companies were dominant local sources of income

Comparative Findings

The present research on compliance behavior has used an analytical framework based on studies about compliance behavior from Western and non-Western countries. (See Chapter 6) When comparing the data collected at Lake Dianchi with these studies from Western and Non-western contexts, some further insights become clear.

A first finding was that external factors affect internal factors. In the study of cases at Lake Dianchi we saw this most clearly for the economic context and its effect on how costs and benefits are weighed by regulated actors. Similarly, external factors affected other external factors. At Lake Dianchi, the economic context was an important factor; changes in economic conditions can have a large effect on how the social, political and regulatory context reacts to non-compliance. Studies of Western and non-Western cases of compliance, mainly with pollution law have also noted the effects different external contexts have on one another. Gunningham et al. have called this convergence and have argued that compliance with pollution legislation requires a convergence from the social, economic and regulatory context.²⁴ Similarly, the World Bank's new model of pollution control for developmental contexts is based on a convergence of these contexts.²⁵

A second finding from Lake Dianchi was the important role the economic context played in this convergence, affecting the social, political, and regulatory contexts to play a strong role for compliance. This is in part contrary to what Gunningham et al. have shown happened with the regulation of paper industry in the West, where the regulatory context influenced the other contexts into a convergence that led to compliance.²⁶

²² APPCL § 48

²³ KMREP § 11.2

²⁴ Gunningham, Kagan, and Thornton, *Shades of Green, Business Regulation and Environment*.

²⁵ World Bank, *Greening Industry, New Roles for Communities, Markets and Governments*.

²⁶ Gunningham, Kagan, and Thornton, *Shades of Green, Business Regulation and Environment*.

However, studies from developing countries do show that economic contexts can be dominant and a cause for continued violation. One recorded example is the case of Mexican brick kilns that restarted violations after the market negatively affected the costs of abatement, and had weakened the pressure from the social, political and regulatory contexts.²⁷ A related way in which the economic context influences compliance is when the regulated actor is a dominant employer, we found in several cases at Lake Dianchi. The difficulty of regulating such dominant employers has been well recognized in existing studies from Western and non-Western countries.²⁸

A third finding from Lake Dianchi, clearly resonating findings from other countries is the importance of the social context. In part, our findings here are similar to recent findings from Kagan et al. demonstrating the strong push towards compliance social contexts can have.²⁹ In addition they reaffirm findings from Hettige et al. demonstrating the importance of informal networks have on compliance of polluting enterprises in their analysis of case studies from India, Indonesia and Bangladesh.³⁰ There is a difference though between these cases and the case of Lake Dianchi. China, at present does not have a lively civil society with organized interests groups supporting pollution victims and exerting direct pressure on polluting enterprises. Instead, China has its own type of social context, which very much in an ad-hoc manner and only when independent of the regulated actor and not hindered by the administrative context has been successful in exerting pressure towards compliance. Here China's special political context is important, which allows for much less participation and freedom of association even when compared to many non-Western countries.³¹ A second difference is that the social context in some of these cases actually supported violation and was an important reason why it continued. Here Lake Dianchi's economic context is important. This context is one of rapid development, offering opportunities for improved livelihoods for many, while exerting pressure on the environment. As a result of this, there have been cases in which the protection of natural resources was opposed to local interests, not just of the regulated actor but also of the wider social context it exists in.

²⁷ Blackman and Bannister, "Community Pressure and Clean Technology in the Informal Sector: An Econometric Analysis of the Adoption of Propane by Traditional Mexican Brickmakers."

²⁸ See Chapter 6

²⁹ Kagan, Gunningham, and Thornton, "Explaining Corporate Environmental Performance: How does regulation matter?" 10-11

³⁰ H. Hettige et al., "Determinants of Pollution Abatement in Developing Countries: Evidence from South and Southeast Asia," *World Development* 24, no. 12 (1996).

³¹ G. Hyden, J. Court, and K. Mease, *Making Sense of Governance, Empirical Evidence from Sixteen Developing Countries* (Boulder: Lynne Rienner Publishers, 2004).64

A fourth finding from Lake Dianchi is that in most cases larger enterprises performed better than smaller enterprises. While there has been some debate in the literature, this finding is largely recognized in other studies of pollution compliance from other countries.³² There has however not been much attention to the influence of pensioners on compliance behavior and this may be a new finding warranting more comparative study.

Fifth, social responsiveness helped explain compliance in several cases. Regulated actors that were more open to their context could be influenced better and in some cases this led to better compliance. However, in other cases, mostly land violations, open, responsive organizations such as the Jiacun VCs, responded to interests opposed to the law, as local communities stood to benefit from violating the law and leasing out arable land to enterprises. These types of cases show that social responsiveness does not always lead to compliance and less violation. Enhancing social responsiveness, does thus not necessarily mean that regulated actors will be less likely to violate the law, partly questioning suggestions made by Van de Bunt and Braithwaite.³³

Finally, the study of compliance and violation behavior at Lake Dianchi demonstrates how varied such behavior can be. Understanding compliance and violation required understanding a whole range of variables and their mutual interactions. Even a year of fieldwork proved to be very limited to make such a study in a relatively small area as Lake Dianchi. However, for achieving behavioral change through regulatory law understanding compliance behavior is essential, an understanding that the complexity of such behavior in practice severely limits.

³² See Chapter 6

³³ Van de Bunt, *Organisatiecriminaliteit (Organizational Crime)*. 23 Braithwaite, *Crime, Shame and Reintegration*. 144

Part IV

Enforcement and Political Campaigns

12. The Enforcement Gap

A Theoretical Approach to Regulatory Enforcement

Introduction

“Enforcement is difficult (*Zhifa Nan*),” Chinese say to vent their frustration about the law’s inability to achieve its ideals in practice. This deterministic statement from China portrays the powerlessness lawmakers may feel when their efforts to make “good” legislation fail to have the expected effect in practice because violations are not met with sanctions. As Sims writes about pollution law enforcement, “NEPA seldom can deploy the state’s tanks and planes in its battle to protect China’s environment. Instead, as a relatively junior agency, it often faces polluters with the barehanded bravado of a *kung fu* novice.”¹ The lack of natural resource protection law enforcement at Lake Dianchi is illustrative. In Part II of the book, enforcement only played a minor role in motivations for compliance and violation behavior. In most cases, law enforcement was weak or even absent. In the cases in which enforcement did play a role, it was largely campaign driven enforcement.

Enforcement is here defined as the state’s actions to detect violations, to stop them, and to prevent further violation from occurring in the future.² Compliance is thus the main goal of enforcement. Part III aims to look in more detail at how enforcement of natural resource protection law was organized at Lake Dianchi. It will analyze both regular enforcement work (Chapter 13) as well as the enforcement campaigns that have been organized since 1996 (Chapter 14). It aims to understand why enforcement had a limited effect on compliance at Lake Dianchi, and in addition analyze what role campaigns have had to boost regular enforcement.

Enforcement work at Lake Dianchi is studied by a combination of local interviews (with enforcement agents, village leadership, enterprise management, and other relevant local actors), with the use of local and national policy documents regarding enforcement work, and national reports with statistical data related to enforcement work comparing Yunnan province with others.

¹ Sims, “One-fifth of the Sky: China’s Environmental Stewardship.” 1227

² This definition recognizes the difference between general and specific deterrence/compliance noted in the literature. See K.R. Williams and R. Hawkins, “Perceptual Research on General Deterrence: A Critical View,” *Law & Society Review* 20, no. 4 (1986). S. Shavell, “Specific versus General Enforcement of Law,” *Journal of Political Economy* 99 (1991).

The data gathered will be structured and analyzed using an analytical framework based on existing studies on regulatory law enforcement, both from Western and non-Western countries. The present chapter introduces such a framework on enforcement. First, it will look at two general styles of regulatory law enforcement. Subsequent sections will then discuss in more detail what factors influence how law enforcement functions and how this may affect compliance.

Enforcement Styles

Scholars studying law enforcement in Western countries have noted that different legal and regulatory systems have particular ways to optimize limited enforcement resources to create maximum enforcement result. The literature distinguishes two different enforcement styles: deterrence and cooperation.³ Following, May and Winter, these two styles can be distinguished through two variables. First the level of formalism, ranging from strict rule adherence, to highly informal practices. Second the level of penalties, from stringent to non-stringent.⁴

The deterrence style is based on a rational choice approach to regulation (see Chapter 6). To change violation into compliance the norm addressee's costs of violation should be made higher than his costs of compliance.⁵ Deterrence thus tries to maximize both detection rate and the sanction level. Therefore, this type of enforcement is relatively stringent, favoring strict sanctions. The level of stringency in the deterrence style is dependent on the costs of compliance, and thus the strictness of sanctions is relative and may range from very strict to a little strict. Deterrence will also be formal. The reason is that deterrence aims to achieve higher detection rates and sanction levels by limiting the amount of discretion agencies and agents have when enforcing the law.⁶ The ideal-type is that deterrence enforcement agents go strictly by the book, without looking at the special circumstances of the violating actor in question. Thus, deterrence has been typified to place regulators in an adversarial role towards the regulated actor.

³ A.J. Reiss, "Selecting Strategies of Social Control over Organizational Life," in *Enforcing Regulation*, ed. K Hawkins and J M Thomas (Boston: Kluwer-Nijhoff Publishing, 1984).

⁴ P.J. May and S. Winter, "Regulatory Enforcement and Compliance: Examining Danish Agro-Environmental Policy," *Journal of Policy Analysis and Management* 18, no. 4 (1999).

⁵ This approach originates from the efficiency based optimum enforcement or regulatory economics which argues that optimum enforcement should not be based on compliance but on the general cost benefits of society. See Bentham, "An Introduction to the Principles and Morals of Legislation.", Becker, "Crime and Punishment, An Economic Approach." And Polinsky and Shavell, "Public Enforcement of Law."

⁶ N. Gunningham, "Negotiated Non-Compliance: A case study of regulatory failure," *Law & Policy* 9 (1987). Quoted through Kagan, "Regulatory Enforcement." 385

However, it recognizes that enforcement requires prioritization.⁷ For priority violations, those the agency's strategists believes should be addressed first, in order to create more compliance, the enforcement will be strict.

In contrast with deterrence, the cooperation enforcement style holds that in order to get sustained compliance the agent and the regulated actor should understand each other and together work towards compliance. Cooperation enforcement agents make the law's goals central not its letter. The issue in this type of enforcement is not whether a situation is in violation or not but rather how to get the regulated actor to come into compliance with the law and stay that way. For this, cooperation and mutual understanding are deemed crucial. Punishment is not the preferred method, instead persuasion and education, and only if these fail penalty. This style is thus characterized as relatively non-stringent to a little stringent. In contrast with deterrence, cooperation enforcement only succeeds if enforcement agents and agencies have considerable discretion. Such discretion is necessary to find workable solutions for sustainable compliance, in which the circumstances of the regulated actor play an important role. Without sufficient discretion, agents will not be able to cooperate with the violator in finding such solution. Hence, cooperation enforcement is informal.

Both styles have been criticized. Deterrence with its overly legalistic adherence to the law made in the books is not adaptable enough to the complexities of reality and thus does not lead to sustained compliance. Scholars have argued that it may lead to unreasonable situations in which the regulated actor is frustrated to the extent it no longer will comply.⁸ In addition, deterrence may not be feasible in practice because it requires comprehensive strict and specific legislation, expensive frequent governmental inspections to detect violations, most of which are difficult to find or find proof for, and the willingness of enforcement agents to act as "policemen" in an adversarial relationship with the regulated actor.⁹ Its economic paradigm, critics hold, is flawed, because compliance behavior is not merely rational-choice type, but can also be grounded in incompetence or moral objections.¹⁰ (See Chapter 7) Williams and Hawkins add that economic models of general deterrence have not incorporated how regulated actors actually perceive expectations about costs and benefits of norm

⁷ Kagan, "Regulatory Enforcement." 205, M.K. Sparrow, *The Regulatory craft: Controlling risks, solving problems, and managing compliance* (Washington: Brookings Institution Press, 2000).

⁸ Hawkins, *Environment and Enforcement, Regulation and the Social Definition of Pollution*.

⁹ Aalders, "Moving Beyond Command and Control: Reflexivity in the regulation of occupational safety and health and the environment." Aalders, "Self-Regulation and Compliance with Environmental Law from a Global Perspective."

¹⁰ Kagan and Scholz, "The 'Criminology of the Corporation' and Regulatory Enforcement Strategies.", Kuperan, "Blue Water Crime: Deterrence, Legitimacy, and Compliance in Fisheries." 309

conformity.¹¹ Furthermore, empirical studies also found, contrary to the non-empirical work of Bentham and Becker, that the correlation between compliance and harsh punishments coupled with high detection rates is not as strong as theorists hold.¹² Braithwaite and Makkai's empirical study testing deterrence theory's assumptions further found that there was no proof for the relation between compliance and "the certainty or severity of sanctioning."¹³ This study even found that deterrence styled enforcement did not even work better in cases in which compliance costs are low.¹⁴ A finding from a non-Western context here is Fjeldstad and Semboja's study of tax levy in Tanzania. This study found that strict enforcement rather than a deterrent had the opposite effect and caused widespread resistance and non-compliance.¹⁵

On the other hand, cooperation type enforcement has also been criticized. Critics have worried about how close ties between the regulator and the regulated can lead to lax compliance.¹⁶ Already in the 1950s, Bernstein's book on independent commissions raised this issue when discussing how agencies can become captured by their regulated actor.¹⁷ A recent study on agro-environmental law enforcement in Denmark by May and Winter, for example, discovered that cooperative enforcement was undermined by capture-like effects.¹⁸ Of course, we can add, especially for countries high on Transparency International's corruption perception index¹⁹,

¹¹ Williams and Hawkins, "Perceptual Research on General Deterrence: A Critical View." 547-8

¹² Gray and Scholz, "Does Regulatory Enforcement Work? A Panel Analysis of OSHA Enforcement." 178, R. Lempert, "Organizing for Deterrence: Lessons from a Study of Child Support," *Law & Society Review* 16, no. 4 (1981/1982). 516-7, 564, D. Nagin, "General Deterrence: A Review of the Empirical Evidence," in *Deterrence and Incapacitation: Estimating the Effect of Criminal Sanctions on Crime Rates*, ed. A. Blumstein, J. Cohen, and D. Nagin (Washington D.C.: National Academy of Sciences, 1978). Quoted through Gray and Scholz

¹³ Braithwaite and Makkai, "Testing an Expected Utility Model of Corporate Deterrence." 7 See also A.N. Doob and C.M. Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis," *Crime and Justice* 30 (2003). 143

¹⁴ Braithwaite and Makkai, "Testing an Expected Utility Model of Corporate Deterrence." 7

¹⁵ Fjeldstad and Semboja, "Why People Pay Taxes: The Case of the Development Levy in Tanzania." 2068

¹⁶ Gunningham, "Negotiated Non-Compliance: A case study of regulatory failure." Bardach and Kagan, *Going by the Book, The Problem of Regulatory Unreasonableness*. May and Winter, "Regulatory Enforcement and Compliance: Examining Danish Agro-Environmental Policy." 646

¹⁷ Bernstein, *Regulating Business by Independent Commission*.

¹⁸ May and Winter, "Regulatory Enforcement and Compliance: Examining Danish Agro-Environmental Policy." 646

¹⁹ Transparency International, *Frequently Asked Questions: TI Corruption Perceptions Index (CPI 2004)* (Transparency International, 22 10 2004 [cited 17 1 2005]); available from http://www.transparency.org/cpi/2004/cpi2004_faq.en.html, Transparency International, *Transparency International Corruption Perceptions Index 2003* (Transparency International, 22 10

that a high degree of discretion, as exists in compliance style enforcement, coupled with a monopoly on sanctions and issuing permits for sanctioned acts, can also have corruptive effects.²⁰ For non-Western countries, with their prevalent overlapping formal and informal structures,²¹ favoritism, cooptation, and corruption have been extra troublesome.²² Many studies of regulatory enforcement in such countries blame corruptive influences as one of the most important factors for weak enforcement.²³ Here Oposa's study of environmental enforcement in the Philippines is interesting. It details how certain cultural values have reinforced favoritism and undermined effective law enforcement.²⁴

Given the drawbacks of both deterrence and cooperative strategies, it is no surprise that recent scholarship and practitioners advocate a mixed, flexible enforcement style, with deterrence in some cases and compliance in others.²⁵ "Sanctions are imposed frequently enough to establish credibility of threat, but are usually withheld as long as violators work hard at coming into compliance." Kagan writes.²⁶ As May and Winter write, "coercion is a necessary ingredient" of a cooperative approach.²⁷ Braithwaite agrees with them that adhering to one style is not as good as flexible enforcement styles: "Both consistent punishment and consistent persuasion are foolish strategies."²⁸ Ayres and Braithwaite, describing an ideal-typical enforcement pyramid, conclude that successful enforcement requires that a full range of enforcement options, ranging from intrusive to lenient, from legal to informal, should be available. They write, "The bigger and more various the

2004 [cited 17 1 2005]); available from

<http://www.transparency.org/cpi/2003/cpi2003.en.html>.

²⁰ Klitgaard has summarized this point in a formula: Corruption = Monopoly + Discretion – Accountability, see Klitgaard, *Controlling Corruption*. 75, A. Ogas, "Corruption and Regulatory Structures," *Law & Policy* 26, no. 3 (2004): 341-2

²¹ Riggs, *Administration in Developing Countries, The Theory of the Prismatic Society*.

²² A good indicator of this is that non-Western developing countries feature high on the Corruption Perception index. See Transparency International, *Transparency International Corruption Perceptions Index 2003* ([cited]).

²³ J. McCarthy and Z. Zen, "Environmental Regulation in an age of regional autonomy: Managing Industrial Pollution in the Plantation Sector in North-Sumatra," ed. A Bedner and J McCarthy (2007 (Forthcoming)). A.A. Oposa, *A Socio-Cultural Approach to Environmental Law Compliance: A Philippine Scenario* (INECE, 1998 [cited 1 August 2005]); available from <http://www.inece.org/5thvol1/5thTOC.htm>. Auer et al., "Forest Law Enforcement and Governance: Resolve Needed from All Sides."

²⁴ Oposa, *A Socio-Cultural Approach to Environmental Law Compliance: A Philippine Scenario* ([cited]).

²⁵ Kagan, "Regulatory Enforcement." 387

²⁶ Ibid. 387, Referring to his earlier study in Bardach and Kagan, *Going by the Book, The Problem of Regulatory Unreasonableness*. Ch 5

²⁷ May and Winter, "Regulatory Enforcement and Compliance: Examining Danish Agro-Environmental Policy." 628

²⁸ J. Braithwaite, "Rewards and Regulation," *Journal of Law and Society* 29, no. 1 (2002). 19

sticks (sanctions), the greater the success regulators will achieve speaking softly”²⁹. Braithwaite believes that successful enforcement starts with informal and less intrusive enforcement options, such as persuasion and warnings, and should only when those fail try punitive options such as fines or even criminal prosecution.³⁰ Shavell, has argued that the greater the harm the higher the sanction should be, and that maximum sanctions should only be reserved for high harms.³¹ One of the reasons for withholding stricter sanctions is that they may be more costly to impose. Bentham and Becker have for example warned against using costly criminal incarceration other than for the most harmful offences.³² Enforcement agents from the US and the UK have stated that they reserve deterrence style enforcement through strict sanctions only for uncooperative actors.³³ Scholz’s study of the US Occupational Safety and Health Administration (OSHA) enforcement and Braithwaite’s study on US law enforcement at coalmines found that flexible enforcement is more effective in securing compliance than either full deterrence or cooperation styles of enforcement.³⁴

In studies of non-Western enforcement there has been less eye for mixed enforcement styles, as some scholars have advocated stronger deterrence type enforcement with limited agent discretion to prevent corruption³⁵, while other scholars have argued for a more cooperative style, with more informal, non-state law enforcement practices.³⁶ As an example of the latter, World Bank sponsored studies of pollution enforcement in developing countries advocate a new compliance type model of enforcement in which the environmental agency “becomes more like a mediator and less

²⁹ I. Ayres and J. Braithwaite, *Responsive Regulation* (New York: Oxford University Press, 1992). p. 19

³⁰ Braithwaite, "Rewards and Regulation." 20

³¹ Shavell, "Specific versus General Enforcement of Law." Quoted in Polinsky and Shavell, "Public Enforcement of Law." 320

³² Bentham, "An Introduction to the Principles and Morals of Legislation." 183, Becker, "Crime and Punishment, An Economic Approach." 193, quoted in Polinsky and Shavell, "Public Enforcement of Law." 310

³³ Hawkins, *Environment and Enforcement, Regulation and the Social Definition of Pollution*. Scholz, "Cooperative regulatory enforcement and the politics of administrative effectiveness." C.S. Russell, "Monitoring and enforcement," in *Public Policies for Environmental Protection*, ed. P Portney (Washington: Resources for the Future, 1990). quoted through Kagan, "Regulatory Enforcement." 387

³⁴ Scholz, "Cooperative regulatory enforcement and the politics of administrative effectiveness." 118,

³⁵ McCarthy and Zen, "Environmental Regulation in an age of regional autonomy: Managing Industrial Pollution in the Plantation Sector in North-Sumatra." Oposa, *A Socio-Cultural Approach to Environmental Law Compliance: A Philippine Scenario* ([cited]. Auer et al., "Forest Law Enforcement and Governance: Resolve Needed from All Sides."

³⁶ World Bank, *Greening Industry, New Roles for Communities, Markets and Governments*.

like a dictator.”³⁷ In the World Bank view, regulators then function through facilitating how social organizations, consumers, bankers and stockholders negotiate with the regulated actor to achieve compliance and better environmental performance.³⁸

What enforcement style is actually adopted in practice and how enforcement actually works depends on various variables, including the bureaucratic context, personal variables related to the agent, the type of violator and violation and pressure from the social and political contexts. Subsequent sections will introduce these variables. These contexts are similar to those in Part II, although here they are the contexts of the enforcement agent and not the regulated actor.

Bureau Structure

Understanding enforcement involves analyzing the bureaucratic context in which it takes place and understanding the interaction between such context and the individual enforcement agents. If the bureau in charge of enforcement work suffers from goal displacement, a lack of resources, weak internal management structures and enforcement procedures, enforcement will be problematic.³⁹ The interaction between the bureau and its enforcement agents is equally important and involves the question of how the bureau limits agent discretion in practice while allowing sufficient decision-making power to keep enforcement adapted to the circumstances of the case.

In the organizational perspective of enforcement, the enforcement agency's organizational goals are central. Enforcement will become difficult if the enforcement agency has to attain conflicting goals. This can first happen if the *primary goals* of the organization are conflicting. Such *primary goals* are those the organization formally tries to attain. They are laid down in legislation or in official policy documents.⁴⁰ Depending on the type of enforcement agency the official goals can vary between the general welfare of the local community (in case the agency is a local government or a police type organization) or a specific goal such as the protection of the environment (in case the agency is for example a specialized EP agency).

³⁷ Ibid.147-8

³⁸ Ibid.148

³⁹ For this list of factors we have been influenced by M.J. Esman, "The Elements of Institution Building," in *Institution Building and Development, from concepts to application*, ed. J.W.Eaton (Beverly Hills: Sage Publications, 1972), J.M. Otto, *Aan de voet van de Piramide, Overheidsinstellingen en plattelandsontwikkeling in Egypte: een onderzoek aan de basis* (1987), Wilson, *Bureaucracy, what government agencies do and why they do it*.

⁴⁰ Wilson, *Bureaucracy, what government agencies do and why they do it*. 129

Most organizations have multiple goals.⁴¹ If an enforcement agency, such as a local government, delegated with environmental law enforcement but also responsible for economic growth, has to attain conflicting primary goals enforcement will become difficult.

Apart from outright conflicting primary goals, agencies may also face what Merton calls "goal displacement."⁴² This occurs when organizations no longer pursue their primary goals, which should be compliance, but focus on, what Wilson names, *contextual goals* instead.⁴³ The best-known type of goal displacement is if an enforcement agency makes formal, procedural rules more important than the substantive outcomes to be achieved. This can happen in a deterrence style enforcement context in which the enforcement agency just enforces according to the letter of the law without regard for whether this has a positive effect on compliance. It can also occur when internal organizational procedures become so complex that the agency no longer gets to enforce the law, but instead ends up in vicious circles of formalistic meetings about how to enforce the law. Here the contextual goals of internal organizational management replace the formal goal of compliance.

A different kind of goal displacement occurs when an organization's existence becomes threatened, in most cases, because of a lack of funding. When this happens, organizations will shift from pursuing the primary goals, i.e. enforcement, to contextual goals of gaining sufficient resources to pay the staff employed. This happened for example with environmental regulatory agencies in North Sumatra, Indonesia, after decentralization, who lacked resources and became to depend on the industry they regulated, which led to corruption and agency capture.⁴⁴

The second variable of an enforcement organization is its resources. Enforcement bureaus can only enforce the law if they have sufficient resources to do so. Above we saw that resources form a structural constraint that explains why full enforcement is impossible. Furthermore, we saw that if an organization lacks resources it may shift its focus from enforcement to resource allocation. In enforcement work, the largest cost is personnel. A lack in financial resources often means having less enforcement personnel

⁴¹ H.G. Rainey, *Understanding & Managing Public Organizations* (San Francisco: Jossey-Bass Publishers, 1997). 127

⁴² R.K. Merton, "Bureaucratic Structure and Personality," in *Reader in Bureaucracy*, ed. R K Merton, et al. (New York: The Free Press of Glencoe, 1940 (reprinted 1952)).

⁴³ Wilson, *Bureaucracy, what government agencies do and why they do it*. 129

⁴⁴ McCarthy and Zen, "Environmental Regulation in an age of regional autonomy: Managing Industrial Pollution in the Plantation Sector in North-Sumatra." 24, See also Nolet's study on environmental enforcement in Latin America, which found that fines are important part of the agency's budget, which makes continued violations important. See G. Nolet, *Environmental Enforcement in Latin America and the Caribbean* (1998 [cited 14 September 2006]). 539

and less enforcement equipment. This mainly affects violation detection work. Organizations that lack resources will have less inspection agents and are forced to rely more on citizen complaints (a reactive detection style), rather than on carrying out their own regular inspections (pro-active detection style).⁴⁵ In addition agencies that have sufficient agents but lack cars or other detection equipment, will also not be able to achieve a high detection rate.

Kagan has argued that enforcement bureaus with insufficient staff may be inclined towards a deterrence enforcement style.⁴⁶ In the US, for example, the Environmental Protection Agency (EPA) reacted to 1982 budget cuts by more stringent enforcement action.⁴⁷ Kagan, however, also recognizes that budget constraints can lead to cooperative enforcement.⁴⁸ Lacking funding, stringent enforcement action becomes difficult because the costs for more severe sanction decisions are higher due to prosecution costs and the costs of collecting evidence.⁴⁹ As Lipsky has stated, without cooperation between street-level bureaucrats and their "clients" the costs for carrying out governmental policy will increase.⁵⁰ This applies to detecting violations. The regulated actor possesses resources needed for enforcement work, without which the costs of enforcement, especially detection of violations will become more costly. An environmental enforcement agent, for example, would have to spend additional enforcement resources in order to detect, let alone find evidence, for violations of law in complex industrial premises. Without the help of such industry, inspection agents could not enter such premises easily, and get to know to the same detail as the enterprise staff themselves.

Budget constraints are a well recognized problem in studies about non-Western countries. A lack of financial resources for personnel and equipment may exist.⁵¹ Such lack may exist when politicians have not

⁴⁵ Kagan, "Regulatory Enforcement.", Reiss, "Selecting Strategies of Social Control over Organizational Life."

⁴⁶ Kagan, "Regulatory Enforcement." 405

⁴⁷ Wood, "Principals, Bureaucrats, and Responsiveness in Clean Air Enforcement." Routinization as a result of budget constraints can also occur during the application of law phase. See Wilson, *Bureaucracy, what government agencies do and why they do it*. 74-5

⁴⁸ Kagan, "Regulatory Enforcement." 405

⁴⁹ Ibid. 405, quoting Hull's study of regulatory boards in California

⁵⁰ M. Lipsky, *Street Level Bureaucracy, Dilemmas of the Individual in Public Services* (New York: Russel Sage Foundation, 1980). 57

⁵¹ Stuligross, "The Political Economy of Environmental Regulation in India." 395 N. Darbinyan and H. Ashikyan, *The Role of Environmental Enforcement in the Republic of Armenia: Steps Toward Sustainable Development* (INECE, 2002 [cited 1 August 2005]); available from http://www.inece.org/conf/proceedings6th_2.html. 135, F. Grenade-Nurse, *Decentralized Agencies with Overlapping Jurisdictions, A Problem for Enforcement* (INECE, 1998 [cited August 1 2005]); available from <http://www.inece.org/5thvol1/5thTOC.htm>. 535, V. Ter-Nikoghosyan

provided sufficient budget and staff allocations to enforcement bureaus. In addition, budget constraints may originate from decentralization, as local governments have insufficient income to fund local enforcement agencies.⁵² An example is the Delhi Pollution Control Committee, which mainly depends for its resources on the city's budget. The Delhi bureau only has an annual budget of US\$ 450,000, which only allows it to recruit three senior environmental engineers, 25 junior environmental engineers and 12 assistant environmental engineers. As Tang et al. write: "Given the sheer magnitude of pollution activity in Delhi, such manpower falls short of what is needed for effective enforcement."⁵³ In such countries, there is often also a shortage of technical equipment, making pollution related enforcement especially difficult, as it requires sampling tools and laboratories to run tests. Lacking proper equipment enforcement is severely weakened. An example is how Chege-Kamau describes inspection work at a polluting Kenyan firm: "The company administrator...has never seen inspectors themselves carrying any equipment, but rather, they just 'go round, write their report and leave'".⁵⁴

Apart from the amount of financial resources, the quality of human resources is important. What type and what level of education do

and N. Karamian, *Armenian Bottleneck: Building Authorities and Public Groups Capacities for Environmental Enforcement* (INECE, 1998 [cited August 1 2005]); available from <http://www.inece.org/5thvol1/5thTOC.htm>. 86, 90, Masilingi, *Social-Economic Problems Experienced in Compliance and Enforcement in Tanzania* ([cited]). 70, Agarwal, "The Barefoot Lawyers: Prosecuting Child Labour in the Supreme Court of India." 686, M.J. McGuinness, "The Politics of Labor Regulation in North America: A Reconsideration of Labor Law Enforcement in Mexico," *University of Pennsylvania Journal of International Economic Law* 1, no. 1-40 (2000). 22, 24, N.J. Sama, *Criminal Law and Environment, Prosecutors, Inspectors and NGOs in Cameroon* (2005 [cited 13 September 2006]); available from <http://www.inece.org/conference/7/vol1/Sama.pdf#search=%22sama%20criminal%20law%20cameroon%20environment%22>. 6, S.C. Nonna, *The Environment and its Regulation in Argentina* (INECE, 2002 [cited 1 August 2005]); available from http://www.inece.org/conf/proceedings6th_2.html. 68, Nolet, *Environmental Enforcement in Latin America and the Caribbean* ([cited]). 536

⁵² Grenade-Nurse, *Decentralized Agencies with Overlapping Jurisdictions, A Problem for Enforcement* ([cited]). 535, Nolet, *Environmental Enforcement in Latin America and the Caribbean* ([cited]). 537, McCarthy and Zen, "Environmental Regulation in an age of regional autonomy: Managing Industrial Pollution in the Plantation Sector in North-Sumatra." 2, 15 McCarthy further states that decentralization in Indonesia brought other enforcement problems including lower status of enforcement officials, unclear authorities, difficulty in finding proper staff, less accountability surprisingly. For a good overview of the effects of decentralization and some critical comments see P. Oxhorn, "Unraveling the Puzzle of Decentralization," in *Decentralization, Democratic Governance and Civil Society in Comparative Perspective*, ed. P. Oxhorn, J S Tulchin, and A D Selce (Washington: Woodrow Wilson Center Press, 2004). 13-5

⁵³ S.-Y. Tang, V. Prakesh, and C.-p. Tang, "Local Enforcement of Pollution Control in Developing Countries: A Comparison of Guangzhou, Delhi and Taipei," *Journal of Public Policy* 18, no. 3 (1998). 273

⁵⁴ Chege Kamau, "Environmental Law and Self-Management by Industries in Kenya." 233

enforcement agents have? To what extent do they form a professionalized⁵⁵ group and how does this influence their enforcement work? Scholars have demonstrated how enforcement work of enforcement agents is influenced by their educational background and their type of professionalization.⁵⁶ Katzmann's study of the US Federal Trade Commission (FTC) found that FTC staff with a legal background worked more formalistic, focusing on cases with sufficient evidence, while FTC economists focused on those cases which would have the largest impact on price developments.⁵⁷ Wilson writes that FTC lawyers further looked at their career opportunities in the future, trying to be noticed as professional prosecutors to promote to jobs in politics or big law firms. Having a certain type of professionalized personnel can define how an enforcement agency functions.⁵⁸ Having many different types of professionals introduces heterogeneous values to enforcement work, which if not well checked can undermine its impact.⁵⁹ The lesson is that different types of educational backgrounds or professionalizations influence the way in which the bureau carries out enforcement work.⁶⁰ Hence it may also influence the enforcement style the agency or its agents adopt. As said, lawyers tend to be more legalistic and therefore deterrence oriented than non-legally trained economists and scientists. Another example is the US Tennessee Valley Authority's (TVA) lenient enforcement. Wilson summarizes research showing that the TVA was not captured by industry interests as suggested by Selznick⁶¹, but rather was captured internally by its scientific personnel that were less likely to use stringent and formal measures.⁶²

Staff education and professionalization may be extra troublesome in non-Western countries. In general, enforcement staff, especially at lower level and devolved agencies will be less educated and less specialized than similar staff in Western contexts.⁶³ In addition, professionalization in modern type bureaucracies in such countries may be based more on values related to

⁵⁵ For an overview of professionalization see generally: E. Freidson, *Professional Powers, A Study of the Institutionalization of Formal Knowledge* (Chicago: The University of Chicago Press, 1986).

⁵⁶ Kagan, "Regulatory Enforcement." 407

⁵⁷ R.A. Katzmann, *Regulatory Bureaucracy: The Federal Trade Commission and Antitrust Policy* (Cambridge, Mass.: MIT Press, 1980). Quoted through Wilson, *Bureaucracy, what government agencies do and why they do it*. 60

⁵⁸ For more examples see Kagan, "Regulatory Enforcement." 407

⁵⁹ Wilson, *Bureaucracy, what government agencies do and why they do it*.

⁶⁰ Ibid.

⁶¹ P. Selznick, *TVA and the Grassroots* (Berkeley: University of California Press, 1949).

⁶² Wilson, *Bureaucracy, what government agencies do and why they do it*. 73

⁶³ Sama, *Criminal Law and Environment, Prosecutors, Inspectors and NGOs in Cameroon* ([cited]. 6 Grenade-Nurse, *Decentralized Agencies with Overlapping Jurisdictions, A Problem for Enforcement* ([cited]. 534

the former colony the country was part of than those that exist in the country.⁶⁴ Because of this, there may be a polynormative structure in which the professionalized norms are very different from the existing local practices, that may be based on values related to family, ethnicity or other local groups.⁶⁵ In addition, the level of professionalization may be lower as the highly specialized professions working in enforcement agencies may have had a relatively short history. It is possible however to enhance and influence professionalization in a non-Western context. Quah's research has documented how in 1959 a reform led to a new type of professionalization within Singapore's civil service, abandoning the old colonial model for a modernized one. The reform was made possible through a combination of training, participation in civil projects, selective recruitment, retention and retirement and a new system of disciplinary control.⁶⁶

This brings us to the third organizational variable of enforcement bureaus, the internal organizational structure. The actual enforcement work in the bureau takes place through its personnel and a critical question in organizational studies of enforcement has been how organizations can get their staff to enforce in the manner that the bureau wants them to. Law enforcement work generally comprises of two activities, detecting violations, and deciding on appropriate sanctions for the violations found. In general, the detection takes place outside of the bureau and agents will have considerable freedom from the agency's rules when carrying out inspections. In many regulatory systems, agents even have the authority to make enforcement sanction decisions for minor infractions. Such sanctions are often minor, such as persuasion or informal warnings, and sometimes even small fines.

Enforcement agencies thus face the problem of how to control their agents while in the field. They have difficulty seeing the *outputs* of enforcement work,⁶⁷ especially for enforcement that takes place in remoter areas such as for examples forests.⁶⁸ Furthermore, enforcement organizations

⁶⁴ F. Heady, *Public Administration, A Comparative Perspective* (New York: Marcel Dekker, Inc., 1996), J.S.T. Quah, "Transforming the Singapore Civil Service for National Development," in *Democratization and Bureaucratic Neutrality*, ed. H K Asmerom and E Reis (Houndsmills, Basingstoke: Macmillan Press LTD, 1996).

⁶⁵ See for example Oposa, *A Socio-Cultural Approach to Environmental Law Compliance: A Philippine Scenario* ([cited]).

⁶⁶ Quah, "Transforming the Singapore Civil Service for National Development."

⁶⁷ Wilson, *Bureaucracy, what government agencies do and why they do it*. 158

⁶⁸ A. Contreras-Hermosilla, *Forest Law Enforcement* (2001 [cited 14 September 2006]); available from [http://lnweb18.worldbank.org/eap/eap.nsf/Attachments/FLEG_OB3/\\$File/OB+3+Overview+Paper+-+Arnoldo+Contreras-Hermosilla.pdf#search=%22forest%20law%20enforcement%20contreras%22](http://lnweb18.worldbank.org/eap/eap.nsf/Attachments/FLEG_OB3/$File/OB+3+Overview+Paper+-+Arnoldo+Contreras-Hermosilla.pdf#search=%22forest%20law%20enforcement%20contreras%22). 12, C.E.

may also not be able to see the *outcomes* of enforcement, or be able to measure the quality of such outcomes.⁶⁹ Enforcement work can only be measured in terms of compliance, but compliance is a complex process (See Part II) which is not easily linked back to enforcement action alone, moreover compliance itself is often not easily verified, and if so at a considerable cost. Without being able to see what enforcement agents do (outputs) and how what they do affects compliance (outcomes), enforcement agencies have difficulty in controlling agent discretion.⁷⁰ In order to cope with this problem, agencies may try to make enforcement work measurable in terms of number of inspections carried out or the number or height of sanctions issued.⁷¹ Attempts at making enforcement work measurable can easily lead to goal displacement as agents try to meet detection quota or fine quota, rather than sustaining compliance, which good enforcement should be about.⁷² The International Network for Environmental Compliance and Enforcement has established a working group on compliance and enforcement indicators. This network, which comprises of environmental enforcement agencies from most countries in the world, has tried to establish a method of making enforcement and compliance measurable. The documentation on their website teaches that *output* indicators on inspections and sanctions do not help to document compliance, instead this working group argues for *outcome* indicators. One example mentioned is the amount of industrial pollution reduced through enforcement action.⁷³ The problem here is still a lack in information. First, a bureau has difficulty knowing exactly what enforcement action was undertaken, or whether the data on the reduced pollutants is correct. It can only get such information at considerable enforcement costs. Second, establishing the causal relationship between enforcement action and pollutant reduction may not always be straightforward. In sum, measuring the quality of enforcement is difficult.

Palmer, "The Extent and Causes of Illegal Logging: An Analysis of a Major Cause of Tropical Deforestation in Indonesia," *CSEERGE Working Paper 2001* (2001).23

⁶⁹ Wilson, *Bureaucracy, what government agencies do and why they do it*. 158 Wilson calls organizations that cannot see the outputs and outcomes *coping* organizations. Actually Wilson believes that enforcement organizations can see the outputs but not the outcomes (p. 163). Enforcement research has however highlighted the problem of overseeing field agents, as we saw above.

⁷⁰ K. Hawkins, *Law as Last Resort, Prosecution Decision-Making in a Regulatory Agency* (Oxford: Oxford University Press, 2002). 63, 73

⁷¹ Lipsky, *Street Level Bureaucracy, Dilemmas of the Individual in Public Services*. 51 See also Kagan, "Regulatory Enforcement." 408

⁷² Lipsky gives the example of police officers who have been forced to meet arrest criteria and as a consequence start to look for easy arrests instead of pursuing priority cases necessary for combating crime and ensuring general safety. See Lipsky, *Street Level Bureaucracy, Dilemmas of the Individual in Public Services*. 51-3

⁷³ See the INECE website, <http://www.inece.org/forumsindicators.html>.

Still, organizations cannot preclude some form of measuring the quality of field enforcement work⁷⁴; such measures are necessary for using internal structures that provide incentives for good work and disincentives for bad work. Such measures include praise, criticism, promotions, demotions, bonuses, and even termination of employment for severe cases. Public administration scholars have demonstrated that public organizations are more restrained in their incentive and disincentive management mechanisms because of general rules that apply throughout the bureaucracy.⁷⁵ Therefore, enforcement agencies can only promote and reward proper enforcement behavior based on tight civil service personnel schemes that have not been made for the agents' particular tasks. In case of agent negligence demoting or discharging a governmentally employee will in most bureaucracies be especially cumbersome or even impossible.⁷⁶ Concluding, internal rewards and sanctions to influence proper enforcement behavior will be difficult to apply fairly because performance measures are difficult and, second, will not be as effective because they are dictated by bureaucratic rules.

The literature agrees that prioritization is an essential internal management tool for effective enforcement.⁷⁷ First, an agency needs to make policy about how to use its scarce resources for pro-active inspections. The agency needs to define what major and minor categories of violations are. Inspections should be reserved for the major categories only. This means that the agency makes a choice on what parts of the regulation to focus work on.⁷⁸ Second, the agency needs to prioritize in what regulated actors should be targeted. Scholars, including May and Winter⁷⁹, and Gray and Scholz⁸⁰ hold that this should be done by establishing which actors have the highest risk for major violations. Such identification can be done historically or

⁷⁴ Lipsky, *Street Level Bureaucracy, Dilemmas of the Individual in Public Services*. 52 Again we can refer to efforts made worldwide towards such indicators in the field of environmental law enforcement. See <http://www.inece.org/forumsindicators.html>.

⁷⁵ Wilson, *Bureaucracy, what government agencies do and why they do it*. Chapter 8, Lipsky, *Street Level Bureaucracy, Dilemmas of the Individual in Public Services*. 23-4 Rainey, *Understanding & Managing Public Organizations*. 74, 145, 189, 241-2,

⁷⁶ Kagan and Scholz, "The 'Criminology of the Corporation' and Regulatory Enforcement Strategies." 23-4, Wilson, *Bureaucracy, what government agencies do and why they do it*. 145

⁷⁷ May and Winter, "Regulatory Enforcement and Compliance: Examining Danish Agro-Environmental Policy." 629, Bardach and Kagan, *Going by the Book, The Problem of Regulatory Unreasonableness*. E. Helland, "The Enforcement of Pollution Control Laws: Inspections, Violations and Self-reporting," *The Review of Economics and Statistics* 80 (1998). 141

⁷⁸ Bardach and Kagan, *Going by the Book, The Problem of Regulatory Unreasonableness*.

⁷⁹ May and Winter, "Regulatory Enforcement and Compliance: Examining Danish Agro-Environmental Policy." 629

⁸⁰ W. Gray and J.T. Scholz, "Analyzing the Equity and Efficiency of OSHA enforcement," *Law & Policy* 13 (1991).

based on other methods, May and Winter write cryptically. They conclude that prioritization is important for enforcement effectiveness but it is difficult to establish the right priorities in advance.⁸¹ Prioritization forms the backbone of internal directions from the agency to the enforcement agent about how to carry out enforcement work.

In non-Western countries the strategy of targeting has been successfully used. In Rio de Janeiro, Brazil, the local pollution law enforcement agency developed a system of targeted enforcement in which polluters were assigned a letter (A, B or C) according to the severity of their pollution. The categories were based on extensive research which found that 60% of all local pollution could be controlled by controlling only 50 type A factories, while another 20 % of the pollution was attributable to 150 type B plants. The other thousands of type C plants only amounted to only 20% of the total pollution.⁸² Similarly successful (semi-)informal enforcement programs in Indonesia, Colombia, Bangladesh, the Philippines and Malaysia have used similar targeting techniques when setting up alternative regulatory systems such as pollution charges and public disclosure mechanisms.⁸³

Other mechanisms to enhance enforcement agents' accountability are internal review mechanisms, and external administrative law review procedures. Internal review mechanisms obviously also face the challenge of getting reliable information about agents' outputs and their work's outcomes. Meanwhile, external legal review will only occur if interested parties bring the case to a higher administrative agency (in case of legal administrative review) or to court (in case of administrative litigation). For enforcement sanctions that were too strict the punished party itself will likely do so. However, for cases in which enforcement was lax, external review only works if there are third party organizations that care for such enforcement action and that have legal standing to question such cases under administrative law. In formal review cases, the plaintiff will also face a lack of information about what agents did during their enforcement, and furthermore will face legal

⁸¹ May and Winter, "Regulatory Enforcement and Compliance: Examining Danish Agro-Environmental Policy." 629

⁸² World Bank, *Greening Industry, New Roles for Communities, Markets and Governments*.

⁸³ Afsah, Blackman, and Ratunanda, "How do Public Disclosure Pollution Control Programs Work? Evidence from Indonesia.", S. Afsah, B. Laplante, and N. Makarim, "Program-Based Pollution Control Management: The Indonesia Prokasih Program," *World Bank Policy Research Working Paper* 1602 (1995), Afsah, Laplante, and Wheeler, *Regulation In The Information Age: Indonesian Public Information Program For Environmental Management* (Icited), Blackman, "Colombia's Discharge Fee Program: Incentives for Polluters or Regulators?", A. Blackman, S. Afsah, and D. Ratunanda, "How do public disclosure control programs work? Evidence from Indonesia," *Human Ecology Review* 11, no. 3 (2004), Huq and Wheeler, "Pollution Reduction Without Formal Regulation: Evidence From Bangladesh.", World Bank, *Greening Industry, New Roles for Communities, Markets and Governments*. 41-4

problems because in most jurisdictions decisions about inspections and sanctions are granted a considerable amount of legal leeway.

In some non-Western countries, most notably India and to some extent Indonesia, NGOs and other social groups have tried to make use of litigation, and even public interest litigation, in a reaction to weak enforcement action. In India, courts have been open to this sort of action and have engaged in strong judicial activism, forcing the Central Pollution Control Board to close 168 factories in inner cities.⁸⁴

The only solution to deal with such lack of overview of enforcement outputs and outcomes is through creating a certain working environment that builds trust between agency and agents.⁸⁵ If an agency is able to achieve a certain organizational culture, or even a sense of mission, in the words of Wilson, its employees will be easier dedicated to the organizational goals.⁸⁶ This can be achieved through hiring a certain type of professionals, well adapted to the kind of enforcement needed, or by on the job professionalization through peer pressure and pairing experienced agents with those just out of school. Another way is by having a certain type of bureau leadership. Wood and Waterman's study of seven law enforcement agencies in the US has demonstrated how a change in bureau leadership can dramatically affect the whole organization, either towards less stringent enforcement as happened in the case of the Equal Employment Opportunity Commission's Reagan appointed chief enforcement leader,⁸⁷ or towards stricter enforcement which happened when all Reagan appointed leadership at the EPA was replaced by more pro-regulation leaders in 1983.⁸⁸ A change in leadership in the São Paulo state environmental enforcement bureau, led to a concentrated effort to control pollution in Cubatão, once described as "the most polluted city in the world", which led to controlling pollution at 288 of the 320 main pollution sources there.⁸⁹

Concluding, enforcement agencies face considerable difficulty in limiting the discretion of their agents, a difficulty that may make the organization start to pursue formalistic procedural goals of detection and sanction quota, rather than compliance.

⁸⁴ Stuligross, "The Political Economy of Environmental Regulation in India."398

⁸⁵ Wilson, *Bureaucracy, what government agencies do and why they do it*. Chapter 6 Lipsky, *Street Level Bureaucracy, Dilemmas of the Individual in Public Services*. 51-3

⁸⁶ Wilson, *Bureaucracy, what government agencies do and why they do it*. Chapter 6.

⁸⁷ Wood and Waterman, "The Dynamics of Political Control of the Bureaucracy."

⁸⁸ Ibid. 807, 819

⁸⁹ Carmen de Mello Lemos, "The Politics of Pollution Control in Brazil: State Actors and Social Movements Cleaning up Cubatão."76, 81

Agent Behavior: Coping with Cooperation, Corruption and Formalism

Hence, unless agencies employ strict detection and sanction quota, or are able to achieve a certain organizational culture, enforcement agents will have a large *de facto* discretionary power because the agency cannot directly verify their enforcement outputs and outcomes. The next level of analysis for understanding how enforcement works and why it may be difficult is then to know how enforcement agents use this relative freedom in their day-to-day enforcement work.⁹⁰ At this level, generalizations become even more difficult than those made in the preceding sections. Enforcement agents are individuals that deal with individual cases under different regulatory regimes in different bureaucratic settings in different parts of the world. Nevertheless, when read cautiously, some general remarks about how enforcement agents cope with their work can be made.

Enforcement agents, in my opinion, are wedged between a rock and a hard place. They have to enforce legislation, with insufficient resources compared to the number of violations present, dealing with a regulated actor they need to cooperate with in order to be able to enforce in the first place. Meanwhile, enforcement agents have to pursue the conflicting goals of their agency, or the rapidly shifting aims of the political context their agency exists in (see next section). Furthermore, their agency may force them to pursue measurable goals instead of compliance-oriented goals, or worse they are supposed to ensure real compliance, while they lack the variety of enforcement options and enforcement information necessary to get violators to comply. There has been surprisingly little research about how enforcement agents themselves deal with the discretion and restraints of carrying out enforcement work in practice.⁹¹

The literature teaches that enforcement agents develop strategies of coping with such situations.⁹² The best-documented strategy has been recorded in Hutter's study of enforcement agent behavior in the UK.⁹³ Her study shows that enforcement agents choose to make full use of their

⁹⁰ We follow May and Winter, emphasizing that enforcement analysis should distinguish the agency and the agent. See May and Winter, "Regulatory Enforcement and Compliance: Examining Danish Agro-Environmental Policy." 625-6

⁹¹ At least what was consulted here. A study not incorporated here is Lloyd-Bostock's psychological studies of enforcement behavior. See S. Lloyd-Bostock, "The Psychology of Routine Discretion: Accidents Screening by British Factory Inspectors," *Law & Policy* 14, no. 1 (1992).

⁹² Hawkins has elaborated a theoretical framework for individual decision making in a regulatory context, which is partly used here and in subsequent sections. See Hawkins, *Law as Last Resort, Prosecution Decision-Making in a Regulatory Agency*. Part IV

⁹³ Hutter, *Compliance: Regulation and Environment*. See also Hutter, *The Reasonable Arm of the Law? The Law Enforcement Procedures of Environmental Health Officers*.

discretion and even to some extent disregard the constraining legal and institutional rules, and carry out enforcement based on their interaction with the regulated actor. In Hutter's study, agents deal with their discretion by making their own definitions of what constitutes compliance.⁹⁴ They make their definitions based on variables including the costs of compliance for the regulated actor⁹⁵, the national and local economic circumstances⁹⁶, the financial state of the regulated actor, the risk of damages to general welfare⁹⁷, public concern⁹⁸, temporary changes in circumstances, and the regulated actor's commitment and ability to compliance.⁹⁹ Thus, for example, regulated enterprises that were in financial trouble would be treated with temporary lenience through a flexible definition of compliance.¹⁰⁰ Following this, the whole enforcement process is one in which the enforcement agent tries to balance the circumstances of the regulated actor with the aims of the law. In line with this approach, Hutter's study also found that when the law left little discretion to make their own definitions of compliance, inspection agents still distinguished between acceptable non-compliance and acceptable compliance.¹⁰¹ For acceptable non-compliance, which is also based on the set of factors just mentioned above, enforcement sanctions will be lenient, while for non-acceptable compliance, enforcement agents will try to exercise as much pressure as is possible to get the regulated actor to comply in the spirit of the law instead of just its letter. Conversely, industry engaging in what McBarnet and Whelan call "creative compliance"¹⁰², meaning that they are formally in compliance with the law's letter but not its spirit, can expect enforcement pressure even though there is no legal ground for it.

Using the term "enforcement career", Hutter has described how relations between the regulator and the regulated are long term. Individual sanction decisions in this type of micro-enforcement are seen as part of a long-term cooperative process towards compliance, and will be based on the existing relationship. Because the agent is in closer contact with the regulated actor, in this ideal type micro enforcement situation, he will have a better

⁹⁴ Hutter, *Compliance: Regulation and Environment*. Chapter 4

⁹⁵ Ibid. 85-6

⁹⁶ Ibid. 87

⁹⁷ Ibid. 93

⁹⁸ Ibid. 99

⁹⁹ Ibid. 160-1

¹⁰⁰ Ibid. 90

¹⁰¹ Ibid. 80-2

¹⁰² D. McBarnet, "Law, Policy and Legal Avoidance: Can Law Effectively Implement Egalitarian Policies," *Journal of Law and Society* 15 (1988). D. McBarnet and C. Whelan, "The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control," *Modern Law Review* 54 (1991).

understanding of why there is a violation and be able to adopt appropriate measures against the type of violation found (for more see below).

The danger of this cooperative type of micro enforcement style has been mentioned above; agents may come too close to the violating actor and sacrifice their enforcement work for their relationship with the regulated actor.¹⁰³ Close contact between regulated actor and enforcement agent may lead to favoritism, capture or outright corruption. A close relationship, combined with the high level of autonomy and the authority on sanction decisions and a low income¹⁰⁴ can easily tempt the enforcer to corruptive practices.¹⁰⁵ Corruptive practices can exist everywhere, but some societies may suffer more from them than others.¹⁰⁶ Agents working in contexts where corruption and favoritism based values are more pervasive have a higher chance of themselves engaging in corruptive practices. Oposa's study of environmental law enforcement in the Philippines provides a good description of how certain values can influence favoritism and corruption and undermine enforcement.¹⁰⁷ He describes how a low level, lowly paid enforcement agent goes to a factory for inspections. The agent is received by a well-educated manager who in the value system there demands a certain amount of *pagagalang* (respect). The two make "personal connections" by exchanging where they are from and how they are. Following the detection of a violation, the director makes a "request" invoking *pakikisama* (preserving good relations) to give them a break and let the matter go. If the agent chooses to grant the request, *utang na loob* (debt of gratitude) is created, a form of social capital the agent now has vis-à-vis the factory manager, which can be called in any time in the future. Similarly such favor seeking behavior may work indirectly through a third person, such as a local politician the manager is connected with who uses his political clout to get the agent to grant a favor of limited enforcement action.¹⁰⁸ Decentralization may worsen favoritism and corruption. Auer et al. argue for example that in Indonesia,

¹⁰³ Compare with Bernstein, *Regulating Business by Independent Commission*.

¹⁰⁴ Contreras-Hermosilla, *Forest Law Enforcement* ([cited]. 12

¹⁰⁵ Compare with Klitgaard, *Controlling Corruption*. This point is especially worrisome in some developing contexts. Oposa has given a colorful account of how lowly paid inspectors get influenced by the wealth and the status of factory management in the Philippines. Oposa, *A Socio-Cultural Approach to Environmental Law Compliance: A Philippine Scenario* ([cited].

¹⁰⁶ S.M. Lipset and G.S. Lenz, "Corruption, Culture and Markets," in *Culture Matters, How Values Shape Human Progress*, ed. L E Harrison and S P Huntington (New York: Basic Books, 2000).

¹⁰⁷ Another example can be found in McCarthy and Zen, "Environmental Regulation in an age of regional autonomy: Managing Industrial Pollution in the Plantation Sector in North-Sumatra."

¹⁰⁸ Oposa, *A Socio-Cultural Approach to Environmental Law Compliance: A Philippine Scenario* ([cited].

decentralization has worsened logging related corruption because the greater number of officials involved in law enforcement has made bribery cheaper, as there are "more points of contact and power is diffused."¹⁰⁹

In contrast with the cooperative strategy, or succumbing to favoritism, agents may also choose a formalistic approach.¹¹⁰ Lipsky's study of street level bureaucrats teaches that one way of handling the conflicts of lower level enforcement work is through rigid adherence to the legal and agency procedures, disregarding the original goal of law enforcement: compliance.¹¹¹ As we saw, this may happen when bureaus are pressed for resources and agents simply do not have the time to get to know the regulated actor and build the trust necessary for the cooperative approach.¹¹² Thus, individual agents may adopt a formal and rigid style focusing on numbers instead of content. This is more likely to happen if bureaus have set up schemes to measure enforcement outputs. Agents can then opt to only focus on attaining high scores in terms of these measures, without actually working on attaining compliance of the spirit of the law itself. In criminal law enforcement, this happens when policemen focus on easy arrests for minor offences, instead of going after more serious crime, in order to be noticed for their good enforcement work in terms of number of arrests.¹¹³ A major motivation for this type of agent behavior is risk aversion.¹¹⁴ Enforcement agents avoid risking problems with their agency because they strictly follow the law or agency targets. Furthermore, when agents only go after easy cases they have less trouble in dealing with the regulated actor. They can keep their distance and refrain from getting too involved between the conflicting interests of the law and those of targeted actors. The advantages for the agent are clear, he stays out of trouble and just produces his cases. For the quality of enforcement, which can only be measured in terms of compliance, results are bleaker. Enforcement agents will carry out quick and easy inspections to meet their quota; issuing sanction decisions for cases they can easily find evidence for, instead of those that have the most negative impact on compliance behavior in general.¹¹⁵

¹⁰⁹ Auer et al., "Forest Law Enforcement and Governance: Resolve Needed from All Sides." 3-4

¹¹⁰ While this style has been documented for the macro and meso level of analysis, describing how nations or bureaus can adopt deterrence style enforcement, details of how agents adopt this style in practice are fragmentary.

¹¹¹ Lipsky, *Street Level Bureaucracy, Dilemmas of the Individual in Public Services*. 50-52, 166

¹¹² Kagan, "Regulatory Enforcement." 404-5

¹¹³ Lipsky, *Street Level Bureaucracy, Dilemmas of the Individual in Public Services*. 50-1

¹¹⁴ Wilson, *Bureaucracy, what government agencies do and why they do it*. 69 following Merton, "Bureaucratic Structure and Personality."

¹¹⁵ Lipsky, *Street Level Bureaucracy, Dilemmas of the Individual in Public Services*.

Except for the conscious agent decision to enforce the law by the book, Hawkins has shown that even if there is considerable discretion, experienced enforcement agents may limit their own discretion unconsciously because they enforce by routine. Years of working experience influence enforcement agents to view new cases based on their decisions made in the past. Thus agents frame enforcement decisions within their own narrow historical experience based frames. Respondents in Hawkins' study have stated that contrary to the fact that they have a large amount of discretion in their work, in practice they do not feel it this way because of the strict routines they have developed over the years.¹¹⁶

Violator and Violation

Enforcement work is also influenced by variables related to the violator and violation. The existing literature has made a number of observations about the influence of violators and violations on enforcement work.

A first observation is that the type of violator is important. Public violators are more likely to be addressed more leniently than private ones, as it is difficult for the state to punish its own institutions. In addition, the chances for collusion and weak enforcement are higher if a public actor is involved.¹¹⁷ The type of business regulated is also important. If, for example, compliance is in the direct interest of the regulated industry, the enforcement agent tends to take a more cooperative approach. An example is chemical or oil industry, whose hazardous installations could in case of regulatory violations cause much harm to the industry itself.¹¹⁸

The regulated firm's costs of compliance form another variable. If costs of compliance are higher, Hutter's UK research has found, agents are more likely to use stringent measures.¹¹⁹ However, as Gunningham has argued, when compliance costs are so high that they threaten the viability of the firm in question, agents will refrain from strong sanctions, especially in "job-poor areas".¹²⁰ This is an important finding as it demonstrates that the economic context can affect the regulatory context (see Chapter 6). It demonstrates that dominant employers are more difficult to regulate and will be treated more leniently. This finding resonates with research about non-

¹¹⁶ See Hawkins, *Law as Last Resort, Prosecution Decision-Making in a Regulatory Agency*. 427-33

¹¹⁷ Sama, *Criminal Law and Environment, Prosecutors, Inspectors and NGOs in Cameroon* (Icited). 6

¹¹⁸ Hawkins, *Law as Last Resort, Prosecution Decision-Making in a Regulatory Agency*. 272

¹¹⁹ B.M. Hutter, "Variations in regulatory Enforcement Styles," *Law & Policy* 11 (1989). Quoted through Kagan, "Regulatory Enforcement."

¹²⁰ Kagan, "Regulatory Enforcement." 398 quoting Gunningham, "Negotiated Non-Compliance: A case study of regulatory failure."

Western countries where the economic survival of dominant employers precluded strong formal and informal enforcement action.¹²¹

The amount of trust enforcement agents have for regulated actors is also important. Trust is an essential aspect of the cooperative enforcement strategy and such trust is only possible if there is frequent contact between regulators and regulated. Shover et al's US nationwide comparison between east coast and west coast strip mining enforcement has demonstrated this point.¹²² The fact that the western part of the US has far fewer enforcement agents than the east coast enabled west coast agents to have frequent contacts with the mines and adopt a cooperative style. Grabovsky and Braithwaite's research about Australian regulatory enforcement and Hutter's study of UK environmental and health enforcement styles, have also demonstrated a correlation between frequency of contact and cooperative enforcement style.¹²³ Scholz has explained the influence of frequency of contacts using game theory. In his analysis, enforcement agents use a so called "tit-for-tat" strategy.¹²⁴ This means that agents will at first treat all actors cooperatively and without sanctions, as long as the regulated actor acts in a cooperative manner in return. Once the regulated actor betrays the trust thus established though, the enforcement agency will respond with strict sanctions. The flexible "tit-for-tat" enforcement strategy can only work if the enforcement agent is able to build such trust and verify whether the trust is validated. This can only happen if there is sufficient frequency in contact, Kagan has analyzed based on Scholz's work.¹²⁵ Thus, a lack of frequent interaction forces regulators to adopt a less cooperative style.

¹²¹ Blackman and Bannister, "Community Pressure and Clean Technology in the Informal Sector: An Econometric Analysis of the Adoption of Propane by Traditional Mexican Brickmakers.", Blackman and Bannister, "Pollution Control in the Informal Sector: the Ciudad Juarez Brickmakers' Project.", Huq and Wheeler, "Pollution Reduction Without Formal Regulation: Evidence From Bangladesh.", McCarthy and Zen, "Environmental Regulation in an age of regional autonomy: Managing Industrial Pollution in the Plantation Sector in North-Sumatra.", Stuligross, "The Political Economy of Environmental Regulation in India." 10

¹²² Shover, Clelland, and Lynxwiler, *Enforcement or Negotiation: Constructing a Regulatory Bureaucracy*, N. Shover, D.A. Clelland, and J. Lynxwiler, "Regional Variation in Regulatory Law enforcement: The Surface Mining Control and Reclamation Act," in *Enforcing Regulation*, ed. K Hawkins and J M Thomas (Boston: Kluwer-Nijhoff Publishing, 1984).

¹²³ P. Grabosky and J. Braithwaite, *Of Manners Gentle, Enforcement Strategies of Australian Business Regulatory Agencies* (Melbourne: Oxford University Press, 1986). Hutter, "Variations in regulatory Enforcement Styles." Hutter, *The Reasonable Arm of the Law? The Law Enforcement Procedures of Environmental Health Officers*.

¹²⁴ Scholz, "Cooperation, Deterrence and the ecology of regulatory enforcement." Scholz's work is itself again based on Axelrod's application of game theory to compliance. See R. Axelrod, "Effective Choice in the Prisoner's Dilemma," *Journal of Conflict Resolution* 24 (1980). R. Axelrod, *The Evolution of Cooperation* (New York: Basic Books, 1984).

¹²⁵ Kagan, "Regulatory Enforcement." 396

Closely related to trust are the attitudes of the regulated actor's staff and management towards compliance and the past record of compliance. The worse the attitudes of staff and management, and the worse the compliance track record the higher the chances for stricter and more deterrent enforcement styles would be.¹²⁶

Scholarship further found that the size of the regulated actor matters.¹²⁷ Shover's US strip mining enforcement research is again illustrative. East-coast strip mines were smaller and did not have the technical personnel necessary to attain compliance, while the owners sometimes did not even know the relevant regulations.¹²⁸ The result was an adversarial relationship resulting in deterrence type enforcement. Grabosky and Braithwaite's Australian research also supports the relation between small size and deterrence.¹²⁹ Stuligross's research of small firm environmental enforcement in India brings forth the same conclusion: smaller enterprises are more difficult for enforcement work. First they are less likely to be able to comply. And second enforcement action against smaller enterprises is less efficient, the same amount of enforcement work addresses much less pollution at a smaller firm than at a larger one.¹³⁰

The type of violation or the possible risk of violations obviously also influence enforcement work. Generally speaking, enforcement should and often will be stricter for more serious violations or activities with a higher risk of violation and damages.¹³¹ The seriousness of violations first depends on the amount of damage caused or possibly caused, and second on the number of complaints received as a result of such violation¹³². The expected damage of different types of violators has been used for targeting enforcement resources. Examples from non-Western contexts have demonstrated that more monitoring resources are spent on firms whose environmental impact is likely to be high.¹³³ This finding resonates with bureau approaches targeting their scarce resources for possible more serious violations.¹³⁴

¹²⁶ Hutter, *Compliance: Regulation and Environment*. 161-63

¹²⁷ Hawkins, *Law as Last Resort, Prosecution Decision-Making in a Regulatory Agency*. 268

¹²⁸ Shover, Clelland, and Lynxwiler, *Enforcement or Negotiation: Constructing a Regulatory Bureaucracy*. Shover, Clelland, and Lynxwiler, "Regional Variation in Regulatory Law enforcement: The Surface Mining Control and Reclamation Act."

¹²⁹ Grabosky and Braithwaite, *Of Manners Gentle, Enforcement Strategies of Australian Business Regulatory Agencies*.

¹³⁰ Stuligross, "The Political Economy of Environmental Regulation in India." 395

¹³¹ Hawkins, *Law as Last Resort, Prosecution Decision-Making in a Regulatory Agency*. 361-5,

¹³² Hutter, *Compliance: Regulation and Environment*. 127-51

¹³³ C. Dion, P. Lanoie, and B. Laplante, "Monitoring Environmental Standards, Do Local Conditions Matter?" *World Bank Policy Research Working Paper* 1701 (1997).

¹³⁴ World Bank, *Greening Industry, New Roles for Communities, Markets and Governments*.

Finally, the visibility of the violation is an influential variable on enforcement work. The more visible violations are, the easier it is for the regulator to know whether the regulated is in compliance and thus whether he can be trusted.¹³⁵ Thus, Kagan argues, if agents can easily verify compliance, they can gain the trust needed for a cooperation style without having to meet the regulated actor frequently.¹³⁶

The External Context of Enforcement: State Politicians and Public Support

Preceding sections demonstrated that there are contrasting views about the manner in which enforcement should take place. There are economic, bureaucratic and practical limitations to attaining such enforcement ideal in practice. So far, the external political and social contexts¹³⁷ of enforcement have not been discussed. These contexts are crucial for understanding the available enforcement resources and the choices made by enforcement agencies and agents in applying those in enforcement work.¹³⁸ The influence of the political and social contexts on enforcement has not attracted the scholarly attention one would expect. Scholz and Wei write, "case studies of enforcement agencies have tended to discount political influences over bureaucratic activities."¹³⁹ The present book aims to highlight how external political and social influences affect enforcement work. As noted above, the social and political contexts discussed here are similar but different from the social and political contexts in Part II, as they are the contexts of the enforcement agent, not the regulated actor.

¹³⁵ Compare with Auer et al., "Forest Law Enforcement and Governance: Resolve Needed from All Sides." 11

¹³⁶ Kagan, "Regulatory Enforcement." 397

¹³⁷ We did of course look briefly at the relationship between regulators and regulated and the influence of the type of violation. Here the external context indicates the actors outside of the enforcement agency, other than the individual regulated actor or the victim of the violation in question.

¹³⁸ Prior studies have suggested that the political context is more influential on enforcement agencies than on their individual agents. See C.W.H. Lo and G.E. Fryxell, "Enforcement Styles Among Environmental Protection Officials in China," *Journal of Public Policy* 23, no. 1 (2003): 84 summarizing Hawkins, *Environment and Enforcement, Regulation and the Social Definition of Pollution*. Kagan, "Regulatory Enforcement.", P.C. Yeager, "Industrial Water Pollution," in *Beyond the Law: crime in complex organizations*, ed. M Tonry and A J Resis Jr. (Chicago: University of Chicago Press, 1993). For this section we are heavily indebted to Kagan's summary of the literature and his clear analysis of the external processes at hand. See Kagan, "Regulatory Enforcement."

¹³⁹ J.T. Scholz and F.H. Wei, "Regulatory Enforcement in a Federalist System," *American Political Science Review* 80 (1986): 1251

Political Support and Constraints

The literature recognizes that external support, by elected politicians (or governmental politicians in non-democratic states)¹⁴⁰ is important.¹⁴¹ At first blush, external support may have a purely positive connotation because it can strengthen enforcement. Lo and Fryxell state, following Helland, Hunter and Waterman, that external support is necessary because it shapes "the legitimacy and power of enforcement officials".¹⁴² Kagan has argued that without such support enforcement bureaus and agents may adopt a risk averse, rigid formalistic style ("retreatism") replacing compliance with procedure.

In developing countries, governmental support is perhaps extra important, because enforcement institutions, especially environmental protection bureaus, tend to have less authority and public awareness about the importance of their work is likely less developed.¹⁴³ In such countries political support can greatly boost law enforcement, as for example in Juárez Mexico a newly elected mayor initiated a stern enforcement campaign to end the severe pollution of local informal brick factories.¹⁴⁴ Similarly in the 1980s, the governor of the state of São Paulo, Brazil was an important factor for stronger pollution control.¹⁴⁵ In contrast lack of support can be disastrous, as happened for example in Brazil in the mid 1990s when president Cardoso prevented stern enforcement action in the state of São Paulo, when he decided not to support a local strict enforcement campaign.¹⁴⁶

State politicians can also influence enforcement through making new legislation. Because the law forms the backbone of law enforcement, those in power to change the law can influence the law's enforcement. The law provides the substantial norms by which violation is judged and furthermore the procedural norms that govern the legal options and legal practices of enforcement. A good example is the law that the US Congress passed in June 1980 increasing the maximum penalty for nuclear regulation

¹⁴⁰ For the sake of simplicity we here use the term "state politicians" to describe elected politicians in democratic countries and governmental politicians in non-democratic states.

¹⁴¹ For an overview see Kagan, "Regulatory Enforcement.", see also Scholz and Wei, "Regulatory Enforcement in a Federalist System."

¹⁴² Lo and Fryxell, "Enforcement Styles Among Environmental Protection Officials in China." 88

¹⁴³ Ibid. 88, Grenade-Nurse, *Decentralized Agencies with Overlapping Jurisdictions, A Problem for Enforcement* ([cited]. 534

¹⁴⁴ World Bank, *Greening Industry, New Roles for Communities, Markets and Governments*.83, Blackman and Bannister, "Pollution Control in the Informal Sector: the Ciudad Juarez Brickmakers' Project."

¹⁴⁵ Carmen de Mello Lemos, "The Politics of Pollution Control in Brazil: State Actors and Social Movements Cleaning up Cubatão."76, 80

¹⁴⁶ Benjamin, *Criminal Law and the Protection of the Environment in Brazil* ([cited]. 231

violations from five thousand to a hundred thousand US dollars. This change led to a substantial increase in the Nuclear Regulatory Commission's enforcement activities.¹⁴⁷ Another example is that the new mayor in Juárez, Mexico initiated a change when he promulgated a local rule banning all dirty types of brick making and a rule forcing brick kilns to adopt propane fuels.¹⁴⁸ As a last illustration, in the late 1990s a new national law in Brazil was to be the basis of sterner enforcement action in the state of São Paulo, involving over 7000 enterprises, many of which would face severe economic consequences as their polluting behavior had been condoned for years.¹⁴⁹

External political support influences enforcement in a more complex manner than just through legislation or strengthening the legitimacy and authority of the agency and its agents though. The most important governmental support is financial: in most cases¹⁵⁰, the enforcement agency's resources are paid directly by an external governmental organization.¹⁵¹ Bardach and Kagan have studied how political authorities can set priorities favoring some enforcement agencies and neglecting others, when appropriating their budgets. Their study found for example that OSHA had a ratio of inspectors compared to sites to be inspected of 1:1515, while the US Nuclear Regulatory Commission had one of 1:6.¹⁵² Another example is Wood's study of the Reagan administration's impact on EPA enforcement. This study found that the administration's 1982 24% EPA budget cuts led to a decrease of 41% in monitoring activities and 69% in abatement actions.¹⁵³ Clearly, the authorities that decide on resource appropriation can make or break enforcement through their power over funding.

The external governmental context may also directly affect the appointment of bureau leadership. Through such appointments, political authorities can exercise direct influence through their protégées. Furthermore, they can determine which type of leader runs the agency, someone prone to formalism and stringency or one that will try to listen to concerns in the regulated actor. A famous example is how the Reagan

¹⁴⁷ Wood and Waterman, "The Dynamics of Political Control of the Bureaucracy." 811-2

¹⁴⁸ Blackman and Bannister, "Pollution Control in the Informal Sector: the Ciudad Juarez Brickmakers' Project."

¹⁴⁹ Benjamin, *Criminal Law and the Protection of the Environment in Brazil* ([cited]).

¹⁵⁰ This is not the case if a local government that collects and keep sits own taxes is itself the enforcement agency. This is for example the case for part of the Dutch environmental enforcement.

¹⁵¹ Moe for example explains how this works for the US independent commissions, which are paid through the presidential Office of Management and Budget. See T.M. Moe, "Regulatory Performance and Presidential Administration," *American Journal of Political Science* 26, no. 2 (1982). 201

¹⁵² Bardach and Kagan, *Going by the Book, The Problem of Regulatory Unreasonableness*. 161

¹⁵³ Wood, "Principals, Bureaucrats, and Responsiveness in Clean Air Enforcement." 218, 224, 226

administration tried to curb EPA's regulatory zeal in 1981 by appointing "an anti-environmentalist attorney" Ann Burford as EPA administrator and "a former paper industry lobbyist" Kathleen Bennett was made in charge of EPA's clean air division.¹⁵⁴ Another flagrant example is Reagan's meddling in the Equal Employment Opportunity Commission leadership, getting a known pro-corporation lawyer, Michael Connelly appointed as General Council, in charge of all litigation. Connelly soon announced that "he would no longer be pressing sexual harassment, age discrimination, equal pay, and class action suits."¹⁵⁵ Sure enough, enforcement action did reduce significantly. Finally Reagan's appointment of the conservative economist James Miller III to head the FTC in 1981 led to a 50% decrease in the commission's enforcement cases.¹⁵⁶ In a non-Western example, governor Montoro of São Paulo, appointed a pro-regulation environmental engineer as head of the environmental bureau in the highly polluted region of Cubatão, in the hope that under his direction strong industrial interests groups could be tempered.¹⁵⁷

Kagan has rightly pointed out that agency leaders are not mere puppets of their political masters.¹⁵⁸ Wood's study of the effects of the Reagan EPA appointments is illustrative. He found that contrary to what was expected, the new appointments at first led to an increase of air-pollution enforcement activities, probably because the existing bureaucracy attempted resistance against the meddling in their enforcement and until their budgets were cut in 1982 still had sufficient resources to do so.¹⁵⁹ The external governmental context is not restricted to political authorities directly in charge of agency funding or appointments. Some studies have demonstrated how local political influence affects national law enforcement programs. Scholz et al.'s studies of OSHA found for example that local politics affects federal law enforcement at the local level.¹⁶⁰ Similarly,

¹⁵⁴ Ibid. 216-7

¹⁵⁵ Wood and Waterman, "The Dynamics of Political Control of the Bureaucracy." 806-7

¹⁵⁶ Ibid. 810-1

¹⁵⁷ Carmen de Mello Lemos, "The Politics of Pollution Control in Brazil: State Actors and Social Movements Cleaning up Cubatão." 76

¹⁵⁸ Kagan, "Regulatory Enforcement." 406

¹⁵⁹ Wood, "Principals, Bureaucrats, and Responsiveness in Clean Air Enforcement." In a later study Wood and Waterman take back some of these findings when comparing EPA hazardous waste enforcement action during the time of the Reagan appointments and did find a significant correlation with enforcement action decreases and the appointments. See Wood and Waterman, "The Dynamics of Political Control of the Bureaucracy." 819

¹⁶⁰ J.T. Scholz, T.J. Tombly, and B. Headrick, "Street Level Political Controls over Federal Bureaucracy," *American Political Science Review* 85, no. 3 (1991). See also Scholz and Wei, "Regulatory Enforcement in a Federalist System." 1249

Gormley's analyses of childcare regulatory enforcement in the US also demonstrated the impact local politics has on enforcement.¹⁶¹

Social Support or Constraints

The social context, which consists of local communities directly affected by violations, or non-state interest groups, may also affect law enforcement. The first manner is through complaints by those directly affected. As we saw above complaints influence how an agency sees a violation, the more complaints the more serious such violation is taken.

Support for or pressure on enforcement may also come from non-state organizations, lobbying either for or against stricter enforcement.¹⁶² Organized public interest groups can cause stronger enforcement.¹⁶³ This mainly happens because such groups are able to organize complaints combined with lobbying pressure. Following Gallanter's observations of successful litigants, we could say that interest groups are "repeat players" rather than "one-shotters"¹⁶⁴ in terms of making complaints, and therefore their complaints have more effect. Scholz and Wei's study has for example demonstrated how a high level of organized labor correlates with stricter enforcement.¹⁶⁵ Furthermore, Frank and Lombness and Gunningham's studies found that lax enforcement happens when there are no organized groups of complainants.¹⁶⁶ Public interest groups can also cause less stringent enforcement. Originally the literature held that specialized enforcement bureaus would eventually succumb to the organized interests of their regulated actor, and become "captured".¹⁶⁷ Although later political and economic changes have made that capture is no longer inevitable,¹⁶⁸ anti-regulation lobby groups or strong pro-industry organizations can cause less

¹⁶¹ W.T. Gormley, "Regulatory Enforcement: Accommodation and conflict in Four States," *Public Administration Review* 57, no. 4 (1997). W.T. Gormley, "Regulatory Enforcement Styles," *Political Research Quarterly* 51, no. 2 (1998).

¹⁶² For an overview of the role of civil society organizations see B.M. Hutter and J. O'Mahony, "The Role of Civil Society Organizations in Regulating Business," *LSE, CARR Discussion Paper Series*, no. 26 (2004).

¹⁶³ Levine, "Between Choice and Sacrifice: Constructions of Community Consent in Reactive Air Pollution Regulation." 1039, Scholz and Wei, "Regulatory Enforcement in a Federalist System." 1252

¹⁶⁴ M. Galanter, "Why the 'Haves' come out ahead: Speculations on the limits of Legal Change," *Law and Society* 9, no. 1 (1974).

¹⁶⁵ Scholz and Wei, "Regulatory Enforcement in a Federalist System."

¹⁶⁶ N. Frank and M. Lombness, "Gaining Regulatory Compliance: Law Enforcement and Power in Interactionist Perspective," *Administration & Society* 20 (1988). Gunningham, "Negotiated Non-Compliance: A case study of regulatory failure."

¹⁶⁷ Bernstein, *Regulating Business by Independent Commission*.

¹⁶⁸ Wilson, *Bureaucracy, what government agencies do and why they do it*. 83-88

stringent enforcement.¹⁶⁹ For many types of regulatory law, but especially for natural resource protection law, developing countries may lack the interests groups or even the general public awareness necessary to influence stronger regulatory enforcement.¹⁷⁰

In non-Western countries, strong NGO-organized social action, sometimes even involving public interest litigation has had some success in improving law enforcement. In Juárez, Mexico, collective action, organized in part by NGOs, combined with the election of a new mayor led to a more concentrated enforcement effort.¹⁷¹ In Colombia, years of pollution went unchecked, until finally under the influence of community pressures, a reform was initiated under which a targeted system of pollution charges was enforced.¹⁷² Similarly in Cubatão, Brazil, local communities have tried to pressure agents to initiate stronger environmental enforcement against power local industries.¹⁷³ As noted, in India social groups have resorted to litigation to push for better environmental enforcement.¹⁷⁴ Similarly, Indonesian NGOs have tried to sue government officials for lax enforcement. Although losing the case, the court accepted standing for NGO-type social organizations.¹⁷⁵

Factors that Influence the Political and Social Contexts to Support or Constrain Enforcement

So what drives actors in the political and social contexts to support or constrain enforcement? There have only been a few studies about this important question. Kagan has provided an overview¹⁷⁶, showing that major changes in external influences are rooted in four variables.

¹⁶⁹ Kagan, "Regulatory Enforcement." 400 R.A. Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge, Mass.: Harvard University Press, 2002). Scholz, "Cooperative regulatory enforcement and the politics of administrative effectiveness."

¹⁷⁰ For an example see Ter-Nikoghosyan and Karamian, *Armenian Bottleneck: Building Authorities and Public Groups Capacities for Environmental Enforcement* ([cited]. 88, Grenade-Nurse, *Decentralized Agencies with Overlapping Jurisdictions, A Problem for Enforcement* ([cited]. 534 For a well documented exception see M.C. De Mello Lemos, "The Politics of Pollution Control in Brazil: State Actors and Social Movements Cleaning up Cubatão," *World Development* 26, no. 1 (1998).

¹⁷¹ Blackman and Bannister, "Community Pressure and Clean Technology in the Informal Sector: An Econometric Analysis of the Adoption of Propane by Traditional Mexican Brickmakers.", Blackman and Bannister, "Pollution Control in the Informal Sector: the Ciudad Juarez Brickmakers' Project."

¹⁷² World Bank, *Greening Industry, New Roles for Communities, Markets and Governments*.27, 37-40

¹⁷³ Carmen de Mello Lemos, "The Politics of Pollution Control in Brazil: State Actors and Social Movements Cleaning up Cubatão." 80-1

¹⁷⁴ Stuligross, "The Political Economy of Environmental Regulation in India." 398-9

¹⁷⁵ Sonnenfeld, "Social Movements, environment, and technology in Indonesia's pulp and paper industry."101 Cribb, "The Politics of Pollution Control in Indonesia."1134

¹⁷⁶ Kagan, "Regulatory Enforcement." 401-4

The first, and most important, variable are widely publicized catastrophes, scandals, or crises that have a relation to the agency. Such events can "trigger agency changing political intervention".¹⁷⁷ In general, catastrophes will lead to public and political outrage and demands for more formal and stringent enforcement.¹⁷⁸ Pro-enforcement interest groups are bound to take the opportunity such events offer for demanding action. Consequently, political authorities will respond by replacing leadership, demanding stricter legislation (see Part II) and vigorous enforcement.¹⁷⁹ Good examples from the Netherlands are the law enforcement campaigns that started after a fireworks factory exploded in Enschede in 2000 and after eleven teenagers got killed in a pub-fire in Volendam in 2001.

There are also examples from non-Western contexts. In 1984, a 700.000 litres gasoline leak, killing 10 people in the state of São Paulo, provided the local environmental enforcement authorities "ammunition to pressure the industries into compliance", which until then had been difficult due to strong resistance.¹⁸⁰ The Central Pollution Control Board, the main environmental enforcement institution in India, was created in 1986 as a reaction to the massive Bhopal accident.¹⁸¹ Observers in some countries wish they had an accident as this would initiate a change. Oposa writes about law enforcement in the Philippines for instance: "No thousands have died because of smoke or water pollution and neither has there been a Bhopal-like incident that creates the impetus for people and politicians to sit up and take serious cognizance of the industrial environmental issues."¹⁸²

Whether accidents actually lead to a solution for structural problems related to the enforcement and the legislation that is to be enforced is questionable. Following Cheit: "Accidents precipitate strong political pressures for regulatory change, but they provide little factual basis for making meaningful improvements."¹⁸³

¹⁷⁷ Ibid. 401

¹⁷⁸ Hutter, "Regulation: Standard Setting and Enforcement." 240, summarizing Cheit's work. See R.E. Cheit, *Setting Safety Standards: Regulation in the Public and Private Sectors* (Berkeley: University of California Press, 1990). Hawkins, *Law as Last Resort, Prosecution Decision-Making in a Regulatory Agency*. 49

¹⁷⁹ See for example Bardach and Kagan, *Going by the Book, The Problem of Regulatory Unreasonableness*, Wood, "Principals, Bureaucrats, and Responsiveness in Clean Air Enforcement." 219

¹⁸⁰ Carmen de Mello Lemos, "The Politics of Pollution Control in Brazil: State Actors and Social Movements Cleaning up Cubatão." 82

¹⁸¹ Stuligross, "The Political Economy of Environmental Regulation in India."

¹⁸² Oposa, *A Socio-Cultural Approach to Environmental Law Compliance: A Philippine Scenario* ([cited].

¹⁸³ Cheit, *Setting Safety Standards: Regulation in the Public and Private Sectors*. 75, quoted through Hutter, "Regulation: Standard Setting and Enforcement." 241

Apart from disasters, economic opportunity or economic crisis¹⁸⁴ may also influence political authorities to meddle in enforcement affairs.¹⁸⁵ In the UK, the development of off-shore oil drilling sparked politicians to urge for laxer worker safety enforcement.¹⁸⁶ Niemeijer's research about Dutch building regulations has demonstrated that enforcement was more lenient for projects deemed important by municipal politicians.¹⁸⁷ This also happened in India where states enforced environmental law leniently to attract investment.¹⁸⁸ Kagan notes that economic opportunity driven lax enforcement has only happened when opposition from influential public interest groups or other political actors was not expected.¹⁸⁹ As Hawkins reports, an economic crisis in the form of a recession also affects regulatory enforcement. The British Health and Safety Executive was forced to take a laxer enforcement stance facing a severe economic crisis in the 1980s.¹⁹⁰ The Indonesian economic crisis strongly affected environmental performance of firms, and likely affected enforcement.¹⁹¹ In Juárez, Mexico, the initial success made through stronger law enforcement, community pressure and the lower abatement prices for burning clean propane fuel in the highly polluting scrap-fuelled brick kilns was short lived. A local economic crisis erupted as the state subsidies for fuels, including propane were annulled. As a result, industry reverted back to dirtier fuels and stopped using propane, something which was condoned by local law enforcement agents.¹⁹²

Political controversy surrounding the enforcement agency or its enforcement work forms Kagan's third variable that may influence political actors to meddle with enforcement.¹⁹³ American scholarship again provides examples. Both President Carter and President Reagan reacted strongly against OSHA's deterrence styled enforcement, the first by demanding less

¹⁸⁴ Hawkins, *Law as Last Resort, Prosecution Decision-Making in a Regulatory Agency*. 119

¹⁸⁵ Kagan, "Regulatory Enforcement." 401

¹⁸⁶ W.G. Carson, *The Other Price of Britain's Oil: Safety and Control in the North Sea* (Oxford: Martin Robertson, 1982). This example was found and quoted through Kagan. See Kagan, "Regulatory Enforcement." 401

¹⁸⁷ B. Niemeijer, "Urban land-use and building control in the Netherlands: Flexible decisions in a rigid system," *Law & Policy* 11 (1989).

¹⁸⁸ S. Pargal, M. Mani, and M. Huq, "Inspections and Emissions in India, Puzzling Survey Evidence about Industrial Pollution," *World Bank Policy Research Working Paper*, no. 1810 (1997). 4

¹⁸⁹ Kagan, "Regulatory Enforcement." 402

¹⁹⁰ Hawkins, *Law as Last Resort, Prosecution Decision-Making in a Regulatory Agency*. 121-2

¹⁹¹ S. Afsah, *Impact of Financial Crisis on Industrial Growth and Environmental Performance in Indonesia* (1998 [cited 14 September 2006]); available from http://www.worldbank.org/NIPR/work_paper/shakeb/23-jul-98.pdf.

¹⁹² Blackman and Bannister, "Pollution Control in the Informal Sector: the Ciudad Juarez Brickmakers' Project."

¹⁹³ Kagan, "Regulatory Enforcement." 402

enforcement for minor infringements and the second by replacing OSHA's director.¹⁹⁴ Coal mining regulation witnessed a similar pattern, when members of Congress, Carter and Reagan subsequently meddled with what they believed was an overly legalistic enforcement style at the Office of Surface Mining.¹⁹⁵ Similarly, but this time with the opposite effect, President Reagan was forced to appoint new EPA leadership after Democrats in Congress had organized oversight hearings about the agency's lax law enforcement.¹⁹⁶ The EPA's director Burford, a known anti-environmentalist had to resign when "it was alleged that she was not only failing to execute the law but may also have been encouraging pollution sources to violate the law."¹⁹⁷ In a non-Western example, mentioned above, the governor of São Paulo appointed an environmental engineer as head of the local environmental enforcement agency in Cubatão after this agency had been criticized by local communities and attacked in the media for not taking a stern stance against pollution.¹⁹⁸

Electoral change forms Kagan's last variable for explaining why the external political context will meddle in enforcement affairs.¹⁹⁹ The clearest shifts are partisan. Changes from Labor to Conservatives, from Democrats to Republicans, or from Social-Democrats/Liberals to Christian-Democrats/Liberals may make the incumbent leaders wish to change the existing enforcement practices. In the US, for example, OSHA enforcement is more legalistic in Democrat controlled States.²⁰⁰ Another US example is the shift from the Democratic Carter Presidency to the Republican Reagan administration, which in an anti-regulation effort, as noted above, replaced EPA leadership, reorganized the agency and severely cut its budget.²⁰¹ Similarly, environmental law enforcement in the UK is stricter under Labor

¹⁹⁴ Scholz, Tombly, and Headrick, "Street Level Political Controls over Federal Bureaucracy." Scholz, "Cooperative regulatory enforcement and the politics of administrative effectiveness." This example was obtained through Kagan, see Kagan, "Regulatory Enforcement." 402.

¹⁹⁵ Shover, Clelland, and Lynxwiler, *Enforcement or Negotiation: Constructing a Regulatory Bureaucracy*. This example was obtained through Kagan, see Kagan, "Regulatory Enforcement." 402.

¹⁹⁶ Wood, "Principals, Bureaucrats, and Responsiveness in Clean Air Enforcement." Russell, "Monitoring and enforcement." Wood and Waterman, "The Dynamics of Political Control of the Bureaucracy."

¹⁹⁷ Wood, "Principals, Bureaucrats, and Responsiveness in Clean Air Enforcement." 219

¹⁹⁸ Carmen de Mello Lemos, "The Politics of Pollution Control in Brazil: State Actors and Social Movements Cleaning up Cubatão." 81

¹⁹⁹ Kagan, "Regulatory Enforcement." 402-4

²⁰⁰ Scholz and Wei, "Regulatory Enforcement in a Federalist System."

²⁰¹ Wood, "Principals, Bureaucrats, and Responsiveness in Clean Air Enforcement." Wood and Waterman, "The Dynamics of Political Control of the Bureaucracy." R.A. Harris and S.M. Milkis, *The Politics of Regulatory Change, A Tale of Two Agencies (Second Edition)*, Second ed. (Oxford: Oxford University Press, 1996).

than under Conservative governments.²⁰² As stated above even micro-level electoral shifts can make a difference.

Even in non-Western countries where democratic participation has been generally weaker, electoral shifts have affected enforcement. In Juárez, Mexico, citizens elected a new mayor mainly on the issue of controlling pollution, as former mayors had been too closely connected to some of the factories to initiate strong regulation. As noted above, the new mayor made cleaning up the city's pollution one of its prime policies, initiating stricter law enforcement.²⁰³ In Brazil, in 1982, Franco Montoro, the newly elected governor of São Paulo, sparked stricter enforcement action in Cubatão, detailed in examples above.²⁰⁴ Also in Brazil, but more than a decade later, president Cardoso, who, as we also saw above, had just tried to prevent stern environmental enforcement by delaying the coming into force of a new criminal environmental act for ten years, had to back down when elections came up and cut the deadline back to six years.²⁰⁵

The external social and especially the political contexts are of great influence on the cross-regulatory prioritization that takes place to distribute the state's limited enforcement resources. The result is that regulatory enforcement in general fluctuates between regular law enforcement and law enforcement following increased political attention.²⁰⁶ This makes that regulatory law enforcement is characterized by conjunctures of peak enforcement following major pro-regulation pressures after political events, regular enforcement during quiet times and weak enforcement during anti-regulation pressures arising out of electoral changes or economic opportunities.

Conclusion

The studies outlined above provide a list of variables that influence how regulatory enforcement works in practice and they provide a general typology of such work. The remainder of this part of the book will use these frameworks to structure and analyze data on natural resource law enforcement at Lake Dianchi. Chapter 13 will first look at why regular enforcement of environmental and arable land protection law has been so

²⁰² Hawkins, *Law as Last Resort, Prosecution Decision-Making in a Regulatory Agency*. 117-9, Hutter, "Variations in regulatory Enforcement Styles."

²⁰³ Blackman and Bannister, "Pollution Control in the Informal Sector: the Ciudad Juarez Brickmakers' Project."

²⁰⁴ Carmen de Mello Lemos, "The Politics of Pollution Control in Brazil: State Actors and Social Movements Cleaning up Cubatão." 76

²⁰⁵ Benjamin, *Criminal Law and the Protection of the Environment in Brazil* ([cited]). 231

²⁰⁶ This is comparable with Haines and Gurney's concept of regulatory conflict. See F. Haines and D. Gurney, "The Shadows of the Law: Contemporary Approaches to Regulation and the Problem of Regulatory Conflict," *Law & Policy* 25, no. 4 (2003).

difficult. It will discuss the functioning of the enforcement agency and its agents in relation with the regulated actor, complainants and the wider external political and social contexts. Chapter 14 will then look at how political events change regular law enforcement into law enforcement campaigns, again for both environmental and arable land protection law. Chapter 15 will bring forth the findings about regular and campaign enforcement, comparing them with existing studies from other Western and non-Western countries as outlined in this chapter.

13. Punishing Violations

Regular Enforcement in Kunming and China

Introduction

Jiacun's arable land was largely converted illegally for construction without enforcement reaction. Meanwhile, Licun's leadership could illegally profit from their farmers' land by leasing it to enterprises without legal repercussions. Right next door, the *Yunzhi* paper factory could break the law and pollute undisturbed for years, causing severe damages without having received significant fines or sanctions. Similarly, the small FSS factories at the Tanglang River continued their illegal discharges without paying for the consequences. Enforcement was also absent while the *Huafei* factory cut costs through its nightly discharges. Of the compliance cases, only the Fucun paper factory's forced move to compliance was the direct result of enforcement action. The enforcement pressure at Fucun was part of a national enforcement campaign (See Chapter 14) and not of the regular enforcement program. The present chapter is about why the regular enforcement, that takes place outside of the nationally organized enforcement campaigns has been so difficult.

Regular natural resource protection enforcement in Kunming is vested with three bureaus: the Environmental Protection Bureau (EPB) (at provincial, municipal and district levels), the State Land Management Bureau (SLB) (at provincial, municipal, district and township level), and the Dianchi Management Bureau (DMB) (at municipal, district and soon, also at township level). The present chapter will make an analysis of natural resource enforcement by these three bureaus in Kunming based on the theoretical and comparative insights from the literature discussed in Chapter 12. The study is based on data collected during interviews with enforcement bureaus staff, regulated actors and local communities. In addition, it uses data from studies about natural resource enforcement in other parts of China, as well as from policy reports and statistical yearbooks. The data we were able to collect for this Chapter are somewhat unbalanced as much more nationwide data was available about EPBs than about land bureaus.

After a short introduction to Yunnan's enforcement record compared with other parts of China, a section follows about the relation between the three enforcement bureaus and the local government. The next section will look at the internal bureaucratic context of the three enforcement bureaus in Kunming, looking at goals, resources and internal procedures. Finally a section describes law enforcement practice, detailing inspections, sanction decision making and review procedures, followed by a short conclusion.

Pollution Enforcement Performance Yunnan in Comparative Perspective

In order to make a general evaluation of enforcement performance in Kunming we would need data not readily available in China. First, we would need to know the total amount of violations. Then we would need data about the total amount of violations actually detected. And finally, we would need to know what type of sanctions have been issued for what type of violations. The problem, of course is, that in no legal system one is able to know how many violations there are in total. Second, in China data of the number of violations detected are not published. Third, the data on enforcement cases published provide no detail about what kind of sanctions have been issued for what kind of violations.

All we have is data on the total number of administrative sanctions for pollution violations issued by EPBs. These data are problematic in many ways. First, they are based on self-reporting within China's EPB bureaucracy, which means that they may not be fully valid.¹ Second, they do not differentiate between types of cases so they contain major water pollution cases, but also minor noise violations. Even when such limitations are considered, the data are still useful for discerning general trends and differences between provinces. Lacking other nationwide data, the present section will still use these data to get some idea of general trends in enforcement performance. These trends help to add a comparative dimension to our Kunming based fieldwork findings to be discussed in later sections.

Table 1 contains data on the total number of enforcement cases and the relative number of enforcement cases in relation to five main industrial pollution indicators. We use this enforcement/pollution ratio to compare enforcement performance across provinces. By using the five industrial pollution indicators as a relative variable, we can get closest to ascertaining the performance of enforcement in relation to the seriousness of the industrial pollution problem in each province. Table 1 contains data from all provinces and China total.

¹ All official data in China are to be doubted. Compare with M.F. Johnston and H. Li, "Estimating China's Urban Unemployment Rate: Background, Mechanics and an Alternative," *Journal of Contemporary China* 11, no. 31 (2002). C.A. Holtz, "'Fast Clear and Accurate': How reliable are Chinese Output and Economic Growth Statistics?" *China Quarterly* (2003).

Province	Pollution ²	Cases	Enf Ratio	Province	Pollution	Cases	Enf Ratio
Liaoning	182	31016	170,4	Shandong	334	3427	10,3
Fujian	78	4445	57,0	Hebei	331	2920	8,8
Shanghai	49	2295	46,8	Xizang	0,5	4	8,0
Heilongjiang	100	4319	43,2	Hunan	305	2211	7,2
Zhejiang	174	5928	34,1	Chongqing	255	1846	7,2
Tianjin	40	1193	29,8	Shaanxi	193	1394	7,2
Jiangsu	253	5782	22,9	Hainan	6	33	5,5
Henan	275	4900	17,8	Gansu	137	740	5,4
Hubei	153	2720	17,8	Xinjiang	163	872	5,3
Beijing	29	451	15,6	Neimenggu	260	980	3,8
China	6322	92818	14,7	Yunnan	198	533	2,7
Anhui	126	1811	14,4	Qinghai	23	61	2,7
Guangdong	225	3017	13,4	Guangxi	369	703	1,9
Sichuan	416	5038	12,1	Shanxi	903	1614	1,8
Jilin	69	827	12,0	Ningxia	70	101	1,4
Jiangxi	115	1193	10,4	Guizhou	427	444	1,0

Table 1 Pollution Enforcement Sanctions, Five Main Pollution Indicators and Sanction/Pollution Ratio³

The data show that Yunnan's pollution enforcement performance ranks among the lowest in China. The bottom of the enforcement/pollution ratio list is occupied by provinces located in the less developed areas of Western China. Based on this we can hypothesize that less developed areas have more trouble in enforcing environmental pollution law.⁴ Of course Part II already demonstrated how weak enforcement has been in Kunming, both pollution as well as land related enforcement. Subsequent sections will explain why enforcement has been troublesome in Kunming, addressing the correlation of underdevelopment and weak enforcement as well as other variables not covered in the data presented in Table 1.

² The pollution here refers to 10.000 tons of 5 main industrial pollution indicators (COD, Solid Waste, SO₂, Smoke and Dust).

³ SEPA, *Zhongguo Huanjing Tongji Nianbao 2003 (China Environment Statistical Report 2003)*.

⁴ Compare with Lo and Leung who argue that in less developed countries environmental enforcement bureaus have less authority and resources, which hampers their enforcement effectiveness. Lo and Leung, "Environmental Agency and Public Opinion in Guangzhou: The Limits of a Popular Approach to Environmental Governance." 681

The Fragmented Bureaucratic Set-up of Resource Protection Enforcement in Kunming: Why Local Protectionism Causes Weak Enforcement

The main reason for weak natural resource protection enforcement in China, most scholars agree, has been local protectionism, local governments protecting local political, economic and social interests while resisting non-local policies and laws⁵. Our findings are similar. In the *Huafei* and Tanglang cases, the Kouxiang Township and the Dianxi District governments have, until recently (see Chapter 14), not pressed their EPBs for stricter

⁵ For environmental enforcement see Railton, "The Rhetoric and Reality of Water Quality Protection in China." 872, Sun, "Controlling the Environmental Consequences of Power Development in the PRC.", Johnson, *Clear Water, Blue Skies: China's Environment in the New Century*. 1233, Ma and Ortolano, *Environmental Regulation in China*., Howlett, "Striking the Right Balance: The Contrasting Ways in Which the United States and China Implement National Projects Affecting the Environment." 34, Ferris and Zhang, "Reaching out to the Rule of Law: China's Continuing Efforts to Develop an Effective Environmental Law Regime." 595, Zhang, "Ecologizing Industrialization in Chinese Small Towns".183-5. Jahiel, "The Contradictory Impact of Reform on Environmental Protection in China.", Jahiel, "The Organization of Environmental Protection in China." Sinkule and Ortolano, *Implementing Environmental Policy in China*, Tang, Lo, and Fryxell, "Enforcement Styles, organizational commitment, and enforcement effectiveness: an empirical study of local environmental protection officials in urban China." Ma and Ortolano, *Environmental Regulation in China*. Li, "China's Compliance with WTO Requirements Will Improve the Efficiency and Effective Implementation of Environmental Laws in China." 166-7, Bachner, "Regulating Pollution in the People's Republic of China: An Analysis of the Enforcement of Environmental Law." 383, Tang et al., "Institutional Constraints on Environmental Management in Urban China: Environmental Impact Assessment in Guangzhou and Shanghai." 868-9, Lo and Leung, "Environmental Agency and Public Opinion in Guangzhou: The Limits of a Popular Approach to Environmental Governance.", K.E. Swanson, R.G. Kuhn, and W. Xu, "Environmental Policy Implementation in Rural China: A Case Study of Yuhang, Zhejiang," *Environmental Management* 27, no. 4 (2001). Lo and Fryxell, "Enforcement Styles Among Environmental Protection Officials in China." 107, Yao, "Huanjing Xingzheng Zhijia zhong Cunzaidi Wenti he Duice (On the Problems and Countermeasures in Administrative Enforcement of Environmental Law)." 14

For arable land protection enforcement see: Sargeson, "Subduing "The Rural House-building Craze": Attitudes Towards Housing Construction and Use Controls in Four Zhejiang Villages."929, quoting Yan, "Nongmin Jianfang Yongdi Zhong de "Cunpi Xianxiang Toushi (The Phenomenon of 'village approval'for farmers'use of land for housing construction)."41 See also Wang, "Gengdi Baohu Yu Zhengfu Zhineng de Xiangguanxing Fenxi (A Relational Analysis of Arable Land Protection and Governmental Powers)." 57 Ho and Lin, "Emerging Land Markets in Rural and Urban China: Policies and Practices." 705, H. Ye, "Zui Yangde de Gengdi Baohu Zhidu Shi Shenmo, Cong Bashi Nian de Tudi Guanlishi Kan Woguo Tudi Guanli Tizhi, Zhengce Fazhan Bianhua Yu Hexin Qushi (What is the Strictest System to Protect Arable Land, Looking at Developments, Changes and Core Trends in China's Land Management System and Policies from an Historical Perspective from the 1980s)," *Zhongguo Tudi* 2004, no. 1~2 (2004). 6

enforcement, and perhaps⁶ on the contrary have even prevented stricter EPB action. Furthermore, the highly visible, land violations in Jiacun happened right under the nose of the Township government headquarters. A reform was implemented in 2003, the Jiacun Township Land Bureau was directly funded and managed by the local government. Until this time, the land bureau never strictly inspected the LMA offences and a large proportion of Jiacun Township's arable land was illegally sacrificed for local development. The head of the Jiacun Land Management Bureau explains: "Before the reform, we were subordinate to the Township government, and mainly looked at the Township interests, most importantly social stability and economic growth."⁷ As we will see in the following sections, local protectionism affected enforcement both indirectly through the local governments influence on bureau resources, but also directly through its meddling in enforcement decision making protecting violators against the law. Before we look at how it has affected enforcement, we will first look at why local protectionism exists in China.

How is it possible that in a centrally administered party-state like China, local governments are able to oppose national legislation? The answer to this fundamental question is that reform has led to a fragmentation of governmental power,⁸ or as Cohen writes "contrary to American images of the PRC as a ruthlessly effective authoritarian regime whose writ runs from the Standing Committee of the Politburo in Beijing to the most remote hamlet, in many respects contemporary Chinese government resembles a series of feudal baronies more than a totalitarian dictatorship."⁹ In the early seventies, after the chaotic period of the Cultural Revolution (1966-1969),

⁶ Because of the sensitivity of the subject we have not been able to speak about these cases directly with the governments involved here. However, national newsreports have blamed the lack of enforcement in these cases on these local governments protecting their own interests. See CCTV, "*Jinri Shuofa*" *Fushi de Beibou* ("*Talking of Law Today*" *Corrosion's Background*) [cited]. Song and Zuo, "Yinshui Wuran Shebei Yanzhong Fushi Woguo Shouzu Shuidianzhan Tingchan (China's Oldest Water Power Station Closes Operation Because Pollution has Severely Corroded its Installations)."

⁷ Interview with Jiacun SLB official, 17 November 2004, Jiacun Township, Kunming

⁸ Lieberthal and Lampton have used the term "fragmented authoritarianism" to describe this phenomenon. See K. Lieberthal, "Introduction: The 'Fragmented Authoritarianism' Model and Its Limitations," in *Bureaucracy, Politics, and Decision Making in Post-Mao China*, ed. K. G. Lieberthal and D. M. Lampton (Berkeley: University of California Press, 1992). K. Lieberthal, *Governing China, From Revolution through Reform* (New York: W.W. Norton & Company, Inc., 1995). D. M. Lampton, ed., *Policy Implementation in post-Mao China* (Berkeley: University of California Press, 1987), K. Lieberthal and M. Oksenberg, *Policy Making in China, Leaders, Structures and Processes* (Princeton: Princeton University Press, 1988).

⁹ J. Cohen, *Statement to U.S.-China Economic and Security Review Commission Hearing on China Trade/Sectoral and WTO Issues* (14 June 2001 [cited]; available from <http://www.uscc.gov/textonly/transcriptstx/tescoh.htm>).

local level governments initiated a gradual process of change.¹⁰ In 1978 the state's new leadership took over the process and turned it into a reform program.¹¹ This brought a number of changes to China's governance structures, which increased the autonomy of governmental actors at all administrative levels.¹² First, economic reforms allowed the private sector to develop closely managed by local governments.¹³ This created local sources of production and revenue outside of the centrally controlled public sector.¹⁴ Second, a change in the fiscal system effectively decentralized tax revenue, shifting "powers away from central government agencies to those at lower levels."¹⁵ Third, the administrative entities went through a number of changes such as downsizing of the central state bureaucracy,¹⁶ partial separation of the party and the state,¹⁷ development of a professional less-ideological civil service system,¹⁸ and decentralization of leadership appointments.¹⁹ The professionalization of the bureaucracy, the decrease in ideological based appointments and the increase of local appointments²⁰ seem to have decreased the vertical CCP party cohesion throughout different

¹⁰ Saich, *Governance and Politics of China*. 52-6 L.T. White III, *Unstate power, Vol. 1, Local causes of China's economic reforms* (Armonk, NY: M.E. Sharp, 1998). 13

¹¹ Saich, *Governance and Politics of China*. 52-6, White III, *Unstate power, Vol. 1, Local causes of China's economic reforms*. 13

¹² Shirk has described how local governments were able to gain power during the reform because their cooperation was needed to support the changes made at the center. See S.L. Shirk, "The Chinese Political System and the Political Strategy of Economic Reform," in *Bureaucracy, Politics and Decision Making in Post-Mao China*, ed. K. G. Lieberthal and D. M. Lampton (Berkeley: University of California Press, 1992). Shirk, *The Political Logic of Economic Reform in China*.

¹³ S. Zheng, *Party vs. State in Post-1949 China, The Institutional Dilemma* (Cambridge: Cambridge University Press, 1997). 216

¹⁴ Saich, *Governance and Politics of China*. 52-54

¹⁵ Ibid. 152, Zheng, *Party vs. State in Post-1949 China, The Institutional Dilemma*. 216

¹⁶ Peerenboom, *China's Long March toward the Rule of Law*. 205

¹⁷ Zheng, *Party vs. State in Post-1949 China, The Institutional Dilemma*. 212-5

¹⁸ H.Y. Lee, "China's New Bureaucracy," in *State and Society in China, The Consequences of Reform*, ed. A. L. Rosenbaum (Boulder: Westview Press, 1992). 56, C.H. Tong, J.D. Straussman, and W.D. Broadnax, "Civil Service Reform in the People's Republic of China: case studies of early implementation," *Public Administration and Development* 19 (1999). 193-4 L.T. White III, *Unstate Power, Vol. 2, Local causes of China's intellectual and governmental reforms* (Armonk, NY: M.E. Sharp, 1998). 485

¹⁹ C. Li and D. Bachman, "Localism, Elitism and Immobilism: Elite Formation and Social change in Post-Mao China," *World Politics* 42, no. 1 (1989). 64, 87, J.P. Burns, "Chinese Nomenklatura System," *Problems of Communism* 36 (1987). 36-38, 40-41, H.S. Chan, "Cadre Personnel Management in China: The Nomenklatura System, 1990-1998," *China Quarterly* (2004).

²⁰ Li and Bachman, "Localism, Elitism and Immobilism: Elite Formation and Social change in Post-Mao China." 86,

levels of administration, creating local and departmental autonomy.²¹ Fourth, the central government set up a system of self-government at the rural grassroots in 1987.²² During the 1990s the officers at the self-government were increasingly elected democratically. In 1998 the new Organic Law on Village Committees further strengthened democratic elections at the village level. Even though the CCP party organization has remained central in village leadership, the system of self-government has led to a near autonomous grassroots structure of up to 900,000 villages.²³ In the past, governments at township level exercised direct vertical control over the village-level. Now villagers themselves choose their own leaders and villages are less vertically controlled. These four changes fragmented government power over different local governments and bureaux (fragmented authoritarianism),²⁴ creating a certain degree of local and departmental autonomy. Recent research has, however, revealed some exceptions: for priority policy, including population control, economic development, and social stability, the vertical and horizontal relationships can be strengthened through CCP party-responsibility systems and leadership bonus structures.²⁵ These systems motivate local leadership to achieve priority policy goals through job performance based incentives and sanctions.²⁶

As we saw, natural resource protection law enforcement is not vested with the local government itself but largely with three specialized bureaux, the EPB, SLB and the DMB. If these three bureaux have the authority to enforce national and local legislation, how have local governments been able to influence them? The answer to this question is that China's functional bureaucracies have become *defacto* decentralized with the reform's local autonomy. This means that most of the specialized

²¹ White III, *Unstateley Power*, Vol. 2, *Local causes of China's intellectual and governmental reforms*. 510-511

²² For an overview of this process see general: O'Brien, "Villagers' Committees, Implementing Political Reform in China's Villages." K.J. O'Brien and L. Li, "Accommodating "Democracy" in a One-Party State: Introducing Village Elections in China," *China Quarterly* 162, no. June (2000). T. Shi, "Village Committee Elections in China: Institutional Tactics for Democracy," *World Politics* 51, no. 3 (1999). M. Manion, "The Electoral Connection in the Chinese Countryside," *The American Political Science Review* 90, no. 4 (1996). Liu, "Consequences of Villager Committee Elections in China, Better Local Governance or Consolidation of State Power.", W. Xu, "Mutual Empowerment of State and Peasantry: Grassroots Democracy in Rural China," *Word Development* 35, no. 9 (1997).

²³ Ibid.

²⁴ Lieberthal, "Introduction: The "Fragmented Authoritarianism" Model and Its Limitations."

²⁵ See Edin, "State Capacity and Local Agent Control in China: CCP Cadre Management from a Township Perspective.", Y. Huang, "Central-Local relations in China During the reform Era: The Economic and Institutional Dimensions," *Word Development* 24, no. 4 (1996).

²⁶ Id.

departments at the local level are governed by the local government:²⁷ the local government pays for most of their resources (see next sections) and the local government is in charge of the appointment of leadership positions at these bureaus. Formally, there is a dual management structure, both for the EPBs and the SLBs. This means that these bureaus are subordinate both to the functional department at a higher level of administration, but also to the government at their own level of administration. In Kunming, the Kunming EPB is thus formally subordinate to the Yunnan Provincial EPB, but also to the Kunming Government. Similarly the Kunming SLB is subordinate to the provincial SLB and the provincial government. In practice, of these two “masters” the local government is the strongest, because it controls the bureau’s budget and leadership appointments (see next sections).²⁸ The Dianchi Management Bureau (DMB) is different: it is a local bureau, solely subordinate to the Kunming government and has the same rank of a city district. It is fully funded by the municipal government and not subordinate to any functional department.

The lack of vertical “reach” within China’s functional bureaucracy has been cause for concern.²⁹ Some have wondered whether the Chinese central government and its departments could still control the local bureaucracies.³⁰ In response to these concerns, in the 1990s, the central leadership embarked on experiments with partial recentralization. The first was to set up a parallel tax bureau structure of deconcentrated centrally funded and controlled bureaus in addition to the existing locally funded tax branches.³¹ Moreover, the ongoing failure to implement arable land protection law has caused central leadership to initiate a similar reform in the land management bureaus. In this reform, called the “vertical management reform”, the provincial level’s control over land management and enforcement is to be strengthened.³² The reform has just started, but from

²⁷ Saich, *Governance and Politics of China*. Lieberthal, *Governing China, From Revolution through Reform*.

²⁸ Most literature on environmental enforcement in China recognizes these issues. See for example Jahiel, “The Contradictory Impact of Reform on Environmental Protection in China.” Jahiel, “The Organization of Environmental Protection in China.” Sinkule and Ortolano, *Implementing Environmental Policy in China*. Ma and Ortolano, *Environmental Regulation in China*.

²⁹ S. Wang, “The Rise of the Regions: Fiscal Reform and the Decline of the Central State Capacity in China,” in *The Waning of the Communist State: Economic Origins of Political Decline in China and Hungary*, ed. A. G. Walder (Berkeley: University of California Press, 1995). S. Wang and A. Hu, *The Chinese Economy in Crisis: State Capacity and Tax Reform* (Boulder: Westview Press, 2001). White III, *Unstate power, Vol. 1, Local causes of China’s economic reforms*.

³⁰ Ibid.

³¹ Wang and Hu, *The Chinese Economy in Crisis: State Capacity and Tax Reform*. 228

³² In general see Ye, “Zui Yangde de Gengdi Baohu Zhidu Shi Shenmo, Cong Bashi Nian de Tudi Guanlishi Kan Woguo Tudi Guanli Tizhi, Zhengce Fazhan Bianhua Yu Hexin Qushi

Kunming we know that there the lowest levels of land management administration, city district level bureaus were converted into offices directly subordinate to the municipal level SLB, which will allocate their resources and appoint their personnel.³³ So at this moment, apart from this new reform, for all three bureaus we can still say that a combination of local autonomy of the local governments and their control over most local state bureaucracies has created the opportunity for local resistance to national legislation.

So why have local governments, from township to provincial levels, engaged in local protectionism? Surprisingly, most scholarship has ignored this important question. Our findings demonstrate that the answer is that there are conflicting interests between the formal goals of the laws involved (i.e. natural resource protection) and the social and economic interests in the local context. As we saw in Part I and II, China's central legislator has made legislation that is partly against local interests. The Land Management Act, for example, if strictly implemented, would limit local development opportunities in Kunming because it restricts construction of industries, roads and houses needed for growth. Furthermore, land development has been a major source of local government income³⁴. For environmental law this is the same. Some of the provisions in the WPPCL, APPCL, the EIA Act and the DPR, when fully implemented would have a negative effect on Kunming's phosphor industry or restaurant sector for example, and would thus affect local livelihoods. In Part II we saw, that local economic growth occurred in Kunming partly in violation of the LMA's arable land protection regulations. These regulations were not suitable for such a rapidly developing peri-urban context. Kunming's industrial growth was largely at odds with environmental protection. Industrial sectors such as phosphor production or the paper industry developed while environmental law was weak or weakly enforced. For the paper industry, once enforcement became stricter, the sector was nearly extinguished in peri-urban Kunming. Phosphor production, which forms the most important source of income in Kouxiang Township, continued while violating Beijing's pollution laws. Without alternatives, the local need for violating, but dominant sources of income has been so high

(What is the Strictest System to Protect Arable Land, Looking at Developments, Changes and Core Trends in China's Land Management System and Policies from an Historical Perspective from the 1980s)." 6

³³ Based on an interview with the Kunming SLB, Personnel Department 3 December 2004. This is also what the State Council Notice of 2004 orders SLBs to do. See S. Council, *Guowuyuan Guanyu Zuobao Shengji Yixia Guotuziyuan Guanli Tizhi Gaige Yonguan Wenti de Tongzhi* (State Council Notice on Solving Problems Related to the Management Reform of State Land Management Institutions Below the Provincial Level) (Chinalawinfo.com, 2004 [cited 20 September 2005 2005]); available from <http://law.chinalawinfo.com/newlaw2002/slc/SLC.asp?Db=chl&Gid=53188>.

³⁴ Ho and Lin, "Emerging Land Markets in Rural and Urban China: Policies and Practices."

that local governments and even local communities, if completely depended on such industries, condoned their violations. There seems to be a logic to local protectionism: without it Beijing's national legislation would adversely affect local livelihoods and dominant local sources of income.³⁵

Why do local governments care for short-term local development more than for the long-term interests of the national level resource protection legislation? In other words, how does the conflict of interests affect local governments? The answer to these questions is twofold. First, local policy prioritization is rooted in the local social, economic and political context. From this perspective the answer to why local governments care more for short-term local economic and social development than for the long-term interests of natural resource protection law is that local development provides local resources and legitimacy that help to strengthen their position. The local government itself stands to benefit directly from local short-term profits of locally owned³⁶ and/or taxed businesses.³⁷ In addition, such funds are necessary for maintaining the local bureaucracy on which a large part of the local government's power is based. Furthermore, and this point is less recognized in the literature, local development is necessary for guaranteeing support of local stakeholders, from farmers to entrepreneurs.³⁸ Such support, we believe, is essential for the operation of local government, even in a country where there is no direct open participation in the political arena.

China's vertical management system, which emphasizes economic growth and social stability, provides a second perspective for understanding local priority for short-term growth. Under this system, local governments

³⁵ Before we continue, we must admit though that the conflicts of interests have not been absolute in Kunming. This is clearest for environmental regulation. Now that Kunming has started to develop alternatives for its industrial sector, through the development of flower industry and service industries including tourism, protecting the environment actually fosters economic development. However, for those areas in which such alternatives have not (yet) developed the underlying conflict of interests remains a strong influence. The data presented in Table 1 provide support for this point. Similarly, our fieldwork findings support the hypothesis we made above based on the data in Table 1: economic underdevelopment correlates with weak natural resource protection enforcement in China.

³⁶ Although reforms have addressed this issue and have tried to separate enterprises from governments, old ties remain influential. Furthermore while the management has been separated, the ownership remains governmental and so do the profits or losses the enterprise makes. For the link between ownership and weak enforcement see S. Liu, "Obstacles of the Environmental Law Enforcement System and their Countermeasures (Huanjing Zhifa Tizhi Zhuangai ji qi Xiaochu Duice)," *Environmental Protection*, no. 1 (2000). 1

³⁷ Swanson et al. provide an example of how this has influenced enforcement action in rural Zhejiang. See Swanson, Kuhn, and Xu, "Environmental Policy Implementation in Rural China: A Case Study of Yuhang, Zhejiang." 486, 489

³⁸ Liu, "Obstacles of the Environmental Law Enforcement System and their Countermeasures (Huanjing Zhifa Tizhi Zhuangai ji qi Xiaochu Duice)." 1

are evaluated based on certain performance indicators. If they do well local leaders can get bonuses and promotions if they fail they may be fined.³⁹ In the evaluation system (*kaohē*), economic growth and social stability are always the two main yardsticks against which success or failure are measured.⁴⁰ The evaluation system is the exception to the rule that China's center has little vertical reach:⁴¹ for a limited amount of policy areas, including economic growth and social stability, the center does have control over localities by using this vertical management system. Thus, local governments, Kunming is no exception, are always evaluated based on their economic and social performance.⁴² Bureau leadership at both the Kunming EPB and the SLB have stated that such *kaohē* has made local governments look more at economic and social development instead of environmental and arable land protection.⁴³

In Kunming, as the case studies in Part II have shown, and as the following sections will further elaborate, preference for short-term local economic and social development has been apparent. Local governments, from township to municipal, have opted repeatedly to let enterprises and housing take priority over the protection of arable land, air and water. In sum, local governments may sometimes stand to benefit from a sub-optimum enforcement of natural resource protection law and they may use their power over enforcement bureaus to influence their enforcement. Subsequent sections will detail how exactly this works in practice and what other variables add to the existing problems.

How Internal Organizational Factors Influence Enforcement Agencies

Understanding why law enforcement has been so weak in Kunming and how this problem is related to local protectionism requires understanding the internal structures of the three bureaus, the EPB, SLB and DMB, and their relation to the local government introduced above. So far, most scholarship has failed to open up such law enforcement agencies' "black boxes" and to analyze law enforcement bureaus as complex organizations instead of as

³⁹ For more detail see B.K.P. Chou, "Implementing the Reform of Performance Appraisal in China's Civil Service," *China Information* XIX, no. 1 (2005). 45-7

⁴⁰ Huang, "Central-Local relations in China During the reform Era: The Economic and Institutional Dimensions." Edin, "State Capacity and Local Agent Control in China: CCP Cadre Management from a Township Perspective." For the link between this and weak enforcement see Liu, "Obstacles of the Environmental Law Enforcement System and their Countermeasures (Huanjing Zhifa Tizhi Zhuangai ji qi Xiaochu Duice)." 1

⁴¹ K.-y. Tsui and Y. Wang, "Between Seperate Stoves and a Single Menu: Fiscal Decentralization in China," *China Quarterly* (2004). 72, 75-76

⁴² Saich, *Governance and Politics of China*. 157-8

⁴³ Based on interviews with Kunming EPB and Kunming SLB officials autumn 2004.

singular actors.⁴⁴ This section will analyze the three enforcement bureaus in Kunming. First, it will look at goals and resources, and then it will look at the internal structure and internal management procedures.

Goals have become Displaced because of the Origin and Lack of Resources

Although all three bureaus' *primary goals*⁴⁵ bear a close relation to the goals of the LMA, the APPCL, the WPPCL and the Dianchi Management Regulations (as discussed in Part II), resource restrictions have caused goal displacement.

Primary goals look so good on paper. The Kunming EPB's newly published brochure on its internal functioning states: "The Kunming EPB was established in December 1979 and it is the city government's most important environmental department. Its main tasks are: 1 Implementing National Environmental Policy, Laws, Regulations, Administrative Decrees and Standards..."⁴⁶ The Kunming SLB's website is similar as it states that the Kunming land bureau's main task includes the "Dissemination and implementation of National, Provincial and Municipal State Land Management laws and regulation."⁴⁷ The Dianchi Management Bureau (DMB)'s website finally informs us that the bureau should "Propagate and Implement Relevant National laws and regulation and the Dianchi Protection Regulations and supervise the enforcement of the Dianchi management administrative enforcement unit."⁴⁸

In practice, the bureaus have trouble meeting their primary goals. The origin of bureaus' resources has caused goal displacement. The first manner in which the resources' origin influences goal displacement is because they come from the local government that cares for more than just natural resource protection.⁴⁹ This is the clearest for Kunming's local EPBs at district and perhaps even at the municipal level. As we saw above, EPBs are paid by the local government at their level of administration. Thus, the

⁴⁴ In contrast with this method of research, Seidman et al. warn that organizations should not be studied as if they were singular actors. See Seidman and Seidman, *State and Law in the Development Process*. A notable exception is Lo and Fryxell, "Enforcement Styles Among Environmental Protection Officials in China." and Sinkule and Ortolano, *Implementing Environmental Policy in China*.

⁴⁵ Wilson, *Bureaucracy, what government agencies do and why they do it*.

⁴⁶ Kunming Environmental Protection Bureau, *Zhengwu Kongkai Shouce (Publication Leaflet on Public Affairs)* (Kunming: Kunming Environmental Protection Bureau, 2003). 9

⁴⁷ <http://www.kmpg.gov.cn/kmland/intro.asp>

⁴⁸ <http://www.dianchi.gov.cn/docc/about.htm>

⁴⁹ Compare with Sinkule and Ortolano, *Implementing Environmental Policy in China*, Tang et al., "Institutional Constraints on Environmental Management in Urban China: Environmental Impact Assessment in Guangzhou and Shanghai." 868

Kunming EPB is funded by the Kunming government, and the Diandong and Dianxi District EPBs by the Diandong and Dianxi District governments. By controlling enforcement budgets, local governments have been able to exercise control over local regulatory agencies and engage in local protectionism. EPB officials have told me confidentially that the fact that their EPB gets all of its funds from the local government, has enabled this government to exercise considerable influence on their bureau. Officials at the land bureaus have told me a similar story. Township land offices, for example, used to be managed and funded directly by the township government. Under this structure, the land offices failed to play a pro-active role as agencies detecting and reporting illegal land practices. The township land office followed its township government closely, and made land management subordinate to local economic development and social stability.⁵⁰ As one SLB agent said: "The land office would be crazy to bite the hand that feeds it." Since the 2003 vertical management reform, the offices have become directly managed by the district SLB, however part of the staff is still paid locally. According to KMSLB staff, vertical management reforms have not yet been successful because they have failed to change funding structures fully.

A second reason why the origin of bureau resources may lead to goal displacement is that part of the bureau's resources is derived from continued violations of law. This problem is most apparent for EPBs. The Kunming EPB, for example, depends for 30% of its resources on pollution discharge fees. The bureau collects such fees as part of their work to implement national law. Fees are paid based on how much pollution enterprises discharge. EPBs are thus dependent on continued pollution, without which they are no longer able to pay for 30% of their staff.⁵¹ The Kunming SLB shows similar problems. Its enforcement department has a staff of 22, of which only 16 are paid for through regular funds.⁵² The problem is historical; when EPBs were established in the late 1970s and early 1980s, environmental protection was a novelty lacking strong local support. The newly established bureaus soon faced tasks they could never accomplish with the limited staff they had been assigned officially. EPBs nationwide have been creative in using the pollution fees, the 1979 EP law and later legislation allowed them to collect for paying extra staff. In Kunming regular

⁵⁰ Based on an interview with Jiacun Township Land Office, 17 November 2004.

⁵¹ See Ma and Ortolano for good examples from other regions in the 1990s and how this problem affected enforcement there. Ma and Ortolano, *Environmental Regulation in China*. 123-126 Compare with Sun, "Controlling the Environmental Consequences of Power Development in the PRC." 1028 He argues that not just fees but also regular enforcement fines form part of the normal bureau budget causes enforcement agents to favor violations over compliance.

⁵² Based on an interview with enforcement staff of the Kunming SLB.

EPB staff is now officially appointed (*bianzhi*) and paid for directly by the local government. Staff working at non-regular departments and part of the EPB material budget is paid through PDF fees. Cynically enough, the EPB's enforcement work is carried out by one of such non-regular service departments (*shiye danwei*), the inspection and processing department (*jianlisuo*). Enforcement agents therefore depend on continued violations, a clear case of conflicting primary and contextual goals.⁵³ This problem has received significant attention by scholars and practitioners.⁵⁴ A recent reform, partly applied through new regulation⁵⁵, fails to solve the fundamental contradiction though. The reform forces EPBs to transfer all fees collected to the local government's finance department. If the EPB wishes to use the fees for its own budget, it needs to apply with the finance department. Because most EPBs, like the KMEPB, are still significantly dependent on PDF funding, practice has remained much the same. The difference is that EPBs are now also dependent on the local government (through their dependency on the finance department) for the 30% of the budget they used to control themselves in the past. Of course, it is true that if the local government actively supports natural resource protection, such as in Guangzhou, the PDF reform can strengthen the EPB's financial condition.⁵⁶ However if the local government is more concerned with maintaining economic growth and social stability even if this is at odds with environmental protection, the results will be the exact opposite. Concluding, the reform has strengthened local protectionism, without changing existing EPB pollution dependency.⁵⁷

An absolute lack of resources has been another reason why the three bureaus have not always been able to do what their brochures or websites say they should do.⁵⁸ Excuse or not, the Kunming EPB's first reaction to the

⁵³ Except for pollution levies bureaus have also come to depend on consultancy work for enterprises, for example advice about EIA requirements. Often this work is conducted by semi-independent service units. Such units are linked with the bureau though and the bureau's funds are thus partly linked with the polluting enterprise. See Tang et al., "Institutional Constraints on Environmental Management in Urban China: Environmental Impact Assessment in Guangzhou and Shanghai." 871-2

⁵⁴ Ma and Ortolano, *Environmental Regulation in China*. Jahiel, "The Contradictory Impact of Reform on Environmental Protection in China." 96-98

⁵⁵ § 4 State Council Regulation on the Use of Pollution Discharge Fees, 2003

⁵⁶ C.W.H. Lo and S.-Y. Tang, "Institutional Reform, Economic Changes and Local Environmental Management," *Environmental Politics* (2006 (Forthcoming)).

⁵⁷ Here we are less positive than Lo and Tang. Compare with Ibid.

⁵⁸ Compare with Sinkule and Ortolano, *Implementing Environmental Policy in China*. 69, Jahiel, "The Organization of Environmental Protection in China." 59, Lo, Yip, and Cheung, "The Regulatory Style of Environmental Governance in China: The Case of EIA in Shanghai." 314, Swanson, Kuhn, and Xu, "Environmental Policy Implementation in Rural China: A Case Study of Yuhang, Zhejiang." 487

nationwide coverage of the Tanglang River pollution scandal (see Chapter 10), was that they lack the resource capacity to find violations of law.⁵⁹ Nationwide, an absolute staff shortage has limited the EPBs' violation detection capabilities.⁶⁰ Agents at the Kunming SLB and the DLB have also complained that their resources are insufficient compared to the bureau workload.⁶¹ We can analyze the bureau's resources first by looking at the financial resources. The best indicator of financial resources, while lacking data on the bureaus' budgets, is their number of staff. The best data available is that of EPB staff, as SEPA has published detailed figures on bureau staff nationwide. Table 2 below contains data for all of China's provinces, except Hainan and Tibet. The data are both absolute as well as in relation to the total amount of main pollution.

Province	Staff	Staff/Poll		Province	Staff	Staff/Poll
Jilin	4929	71,4		Shaanxi	5344	27,7
Henan	18396	66,9		Qinghai	620	27,0
Hubei	8401	54,9		Zhejiang	4575	26,3
Beijing	1517	52,3		China	156542	24,8
Liaoning	8739	48,0		Hunan	7128	23,4
Tianjin	1703	42,6		Gansu	2749	20,1
Fujian	3306	42,4		Yunnan	3259	16,5
Guangdong	9365	41,6		Xinjiang	2588	15,9
Shanghai	2038	41,6		Neimenggu	3626	13,9
Heilongjiang	3979	39,8		Sichuan	5728	13,8
Anhui	4769	37,8		Ningxia	670	9,6
Jiangsu	9074	35,9		Shanxi	8489	9,4
Hebei	11238	34,0		Guangxi	2910	7,9
Shandong	10887	32,6		Chongqing	1826	7,2
Jiangxi	3700	32,2		Guizhou	2074	4,9

Table 2 Number of EPB Staff and Staff in Relation to Five Main Pollution Indicators.⁶²

Yunnan EPB's staff pollution ratio is significantly lower than that of China, and as Table 2 demonstrates, is amongst the lowest of China in general. Table 2 shows that provinces below China's average staff/pollution ratio are all located in the less developed areas of Western China. Finally, if we read Table 2 together with the enforcement/pollution ratios in Table 1

⁵⁹ CCTV, "Jinri Shuofa" Fushi de Beibou ("Talking of Law Today" Corrosion's Background) (cited).

⁶⁰ Swanson, Kuhn, and Xu, "Environmental Policy Implementation in Rural China: A Case Study of Yuhang, Zhejiang." 488

⁶¹ Based on interviews with KMSLB and DMB staff.

⁶² SEPA, *Zhongguo Huanjing Tongji Nianbao 2003* (China Environment Statistical Report 2003).

we see that there is some sort of connection between the staff/pollution ratio and the enforcement/pollution ratio. Taking into account the untrustworthy nature of these data (see above) and the fact that enforcement is much too complicated to be analyzed in comparing a mere two variables, the data seem to indicate that there is a correlation between the staff/pollution ratio and the enforcement/pollution ratio. Thus, these data help to support our Kunming informants' statements that a lack of staff has caused sub-optimum enforcement.

The reason why the EPBs in poorer areas of China lack staff is obviously related to the ability and willingness of local governments to provide their funding. Local governments in less developed areas of China have not invested as much in their EPBs, perhaps because they lack such resources, or perhaps because they fear that strong EPBs would not be beneficial to local development or other local interests.

In Kunming, the municipal SLB enforcement division has been trying to get more staff and has applied for funding with their government to increase the officially assigned *bianzhi* staff. So far, without success though. In contrast with the understaffed EPB and SLB, the Kunming government has been generous in its recent funding of DMB staff, enlarging its total enforcement staff from 40 to 110 a near 300% increase.

However, the case of the DMB shows the next problem of funding: material budgets. Staff can only work if it has the equipment to do so. Natural resource protection law enforcement requires transportation. All three bureaus have complained that they lack cars to let their personnel carry out a maximum amount of inspections. The municipal level DMB, which has a relatively large amount of enforcement staff, 40 fully paid *bianzhi*, only has four cars.⁶³ Furthermore, it does not get sufficient funding to operate its cars. For each car assigned, it gets 12,000 RMB annually for insurance, repairs and gas. According to an informant: "This money is not nearly sufficient to use our cars on a daily basis, as we should for making the most effective use of the staff we have."⁶⁴ Of course, with only one car for every ten enforcement agents, the bureau cannot make full use of its staff no matter how much gas it has.

Of the three bureaus, the EPB seems to be most pressed for resources. The Kunming municipal EPB headquarters is located in one of the city's drabest areas in a run-down building that badly needs a paint job. Most offices lack computers, and the computers available are old. In stark contrast, the municipal SLB's staff is happy in its recently renovated building. Marble floors welcome visitors on the ground floor, and luxurious and

⁶³ Based on an interview with DMB enforcement staff, 17 September 2004.

⁶⁴ Based on an interview with DMB enforcement staff, 15 November 2004.

spacious offices are found on the floors above. All rooms visited had the newest computers and shining comfortable furniture. The DMB, similarly, has a new building with a modern architecture shaped like a laying arch made of glass. The offices, though small, are new and complete with computers.

Province	Staff Higher%	Staff Middle%	Staff Lower%	Province	Staff Higher%	Staff Middle%	Staff Lower%
Ningxia	12,4	21,0	66,6	China	4,7	14,7	80,6
Tianjin	11,3	17,1	71,6	Jiangxi	4,4	11,7	83,9
Beijing	10,6	27,4	62,0	Hubei	4,3	18,6	77,1
Heilongjiang	9,1	18,9	71,9	Neimenggu	4,2	17,8	78,0
Zhejiang	7,9	22,1	70,0	Sichuan	3,8	14,1	82,1
Shanghai	7,6	31,3	61,1	Xinjiang	3,8	13,2	83,0
Guangxi	7,0	25,2	67,9	Guizhou	3,7	12,6	83,7
Liaoning	6,3	17,3	76,3	Guangdong	3,4	14,4	82,2
Jilin	6,1	16,3	77,6	Hainan	3,3	9,7	87,0
Fujian	6,1	20,8	73,1	Hebei	3,2	8,4	88,4
Chongqing	5,6	17,0	77,3	Hunan	3,1	13,7	83,2
Yunnan	5,6	19,4	75,0	Gansu	2,4	9,0	88,7
Anhui	5,3	13,4	81,3	Shanxi	2,0	11,9	86,1
Shandong	5,2	14,5	80,3	Shaanxi	2,0	7,8	90,2
Jiangsu	5,0	22,3	72,7	Henan	1,4	6,7	91,9
Qinghai	5,0	21,6	73,4	Xizang	1,4	3,6	95,1

Table 3 Level of Staff Education at EPBs⁶⁵

All bureaus have had problems in attracting the right kind of staff. In the post-Cultural Revolution 1980s and early 1990s, China, and especially peripheral provinces such as Yunnan, did not have a high amount of university graduates at Bachelors (*benke*), let alone Masters (*suoshi*) level. The EPBs and the predecessors of the SLBs were established during this period. Therefore, they had to start by employing staff with a lower level of education, at most with professional two-year degrees (*dazhuan*) or several years of working experience.⁶⁶ Recently, staff educational standards have been raised, especially for enforcement personnel. First, all new staff must have passed the civil servants exam, for which a Bachelors education is compulsory. Enforcement agents also need an enforcement permit, which

⁶⁵ SEPA, *Zhongguo Huanjing Tongji Nianbao 2003* (China Environment Statistical Report 2003).

⁶⁶ Compare with Li, "China's Compliance with WTO Requirements Will Improve the Efficiency and Effective Implementation of Environmental Laws in China." 167, Tang et al., "Institutional Constraints on Environmental Management in Urban China: Environmental Impact Assessment in Guangzhou and Shanghai." 869

requires extra education.⁶⁷ The Kunming SLB, perhaps because it seems to have more status and authority than the EPB and the DLB, has recently been able to attract two new enforcement agents with a Masters degree. Meanwhile, the EPB, which seems to have the lowest status among the three bureaus, has had more trouble getting young well educated staff for starter positions. To provide a comparative overview Table 3 contains data on EPB staff levels of education. We see that provinces with a low enforcement ratio do not necessarily have fewer higher educated staff. Ningxia for example, scores low in terms of enforcement performance (See Table 1) but has the highest amount of higher and middle level educated staff (Table 3). Moreover, we see that Yunnan's EPB staff level of education is above country average. Perhaps this is so because the Yunnan EPBs have been established relatively late.

The bureaus have been dissatisfied with their recent recruitment though. One middle level manager at the DMB explains that their enforcement division wanted to recruit new agents, preferably males. "Enforcement work requires going into the field on inspections all day, we believe that male enforcement agents are better suited for this job than females." Cynically enough, female students score better on the civil servants exams and the bureau has been forced to hire seven female and only one male recruit recently.

Recent stricter requirements in administrative procedures further forced all three bureaus to favor recruits with a law degree. In the past, the bureaus did not recruit many lawyers. The EPB for example mainly had environmental scientists.⁶⁸ "Attracting law graduates is not easy though", one of my EPB informants explains, "Yunnan has no special courses in environmental law and most generally educated lawyers want to become solicitors, judges or prosecutors."⁶⁹

At this moment the three bureaus are in a transitional phase in which their enforcement staff is becoming a more homogenously professionalized group of legal specialists. Whether this influences enforcement practices remains to be seen.⁷⁰ In prior research in Sichuan, a municipal vice-director did explain to me that there is a big difference between enforcement staff with a non-environmental degree and staff with an environmental science education. The latter, in contrast with the former,

⁶⁷ Based on interviews with KMEPB, KMSLB and DMB enforcement and personnel staff, autumn 2004.

⁶⁸ Here the Kunming EPB is different from those in Zhejiang studied by Swanson et al. See Swanson, Kuhn, and Xu, "Environmental Policy Implementation in Rural China: A Case Study of Yuhang, Zhejiang." 487

⁶⁹ Based on an interview with two Kunming EPB managers, 22 October 2004.

⁷⁰ We saw in Chapter 12 that professionalization has had a big impact on enforcement in the US's FCC and TVA.

will enforce the law much more strictly while disregarding non-environmental concerns such as economic development and social stability.⁷¹

Internal Structure and Procedures provide Weak Incentives for Job Conformity

Weak personnel incentives and controls also help explain Kunming's enforcement performance. The internal structure and management procedures in all three bureaus are insufficient to ensure job conformity of enforcement agents. Consequently bureaus risk that their agents shirk their duties. Furthermore, the enforcement bureaus are largely centrally managed institutions in which the bureau's leadership has a final (direct or indirect) influence on almost all (except for their own positions) major personnel decisions. This has strengthened local protectionism, because local governments, through their power on appointing the bureau leadership, have a strong indirect influence on all bureau personnel decisions. This subsection will first discuss hiring personnel, then it will look at decisions on salaries and finally shortly at promotions.

In the decision-making on hiring staff, the bureau leadership and the local government exercise considerable influence. For lower, starter positions, all three bureaus hire externally, preferably recent graduates. The recruitment procedure starts by filing an application with the local government's Department of Personnel Affairs that will place an advertisement and let candidates do a civil service examination.⁷² As we saw, the bureaus are forced to take the candidates that score highest on the civil service exam. China's civil service system has aimed to professionalize the bureaucracies, requiring objective recruitment standards and eliminating advantageous opportunities for the well connected. Although one can be skeptical of how this ideal is realized in China's context of influential personal networks (*guanxi*),⁷³ the

⁷¹ Based on an interview with a vice-director of a municipal EPB in Sichuan Province, summer 2002.

⁷² For more information on the Chinese civil service system see: J.P. Burns, "The Civil Service System of the People's Republic of China" (paper presented at the Civil Service Systems in Comparative Perspective, Bloomington, Indiana, April 5-8, 1997 1997). and J.P. Burns, "Changing Environmental Impacts on Civil Service Systems: The Cases of China and Hong Kong," in *Handbook of Comparative Public Administration in the Asia-Pacific Basin*, ed. H Wong and H S Chan (New York: Marcel Dekker, Inc., 1999).

⁷³ Y. Bian, "*Guanxi* and the allocation of urban jobs in China," *China Quarterly* 140, no. December (1994), T. Gold, "After comradeship: personal relationships in China since the Cultural Revolution," *China Quarterly* 104, no. December (1985), D. Guthrie, "The Declining Significance of *Guanxi* in China's Economic Transition," *China Quarterly* 154 (1998), A.B. Kipnis, *Producing Guanxi* (Durham, NC: Duke University Press, 1997), P.B. Potter, "Guanxi and the PRC Legal System: From Contradiction to Complementarity," in *Developing Civil Society in China: From Rule by Law Toward Rule of Law*, ed. P B Potter and M W Dowdle (Washington, D.C.: The Woodrow Wilson International Center for Scholars, 2000), A.G. Walder, *Communist*

DLB's failure to recruit male enforcement agents also shows that the new objective standards cannot be discarded easily in practice.

For intermediate and higher functions (all those except the top leadership positions), the EPBs and the SLBs will try to find internal candidates. Finding a new EPB processing and inspection department (*jianlisuo*) head, for example, involves an internal procedure. First all bureau staff write down the name of a person they think is most apt to fill that position. Then the bureau leadership will make a final choice amongst the qualified candidates on this list. The appointment of the DMB head of enforcement is different, because the enforcement bureau is not subordinate to the DMB but directly to the Kunming government, which directly appoints the enforcement leadership.

All three bureaus have a rotational system for such intermediate positions, which means that all departmental leaders will have to change positions every two or three years. Such a rotational system has a significant impact on enforcement work. Every two or three years a new enforcement leader is appointed. Such a new leader does not necessarily have prior legal or enforcement working experience. Hence, the rotation of leadership prevents the development of a professionalized culture, as different leaders have different educational and working experience backgrounds. How this exactly affects law enforcement is not yet clear from the present research. Rotation may help to prevent capture of the whole enforcement department by the regulated actor, because new leadership has no prior connections with the regulated actors.⁷⁴ However, rotation may also lead to a constant lack of experienced leadership and to new leaders without sufficient understanding of the complexities of dealing with the regulated actor. Furthermore, new leaders may have more trouble establishing the trust of their enforcement agents needed to stimulate good job performance, or worse the knowledge necessary to verify and control their job performance.

The third type of position for which there exists a specific method of hiring is that of bureau director and vice-director. For this position, candidates can be from within the organization or they may be external, from another governmental department. The local government has the authority to decide on the appointment. It makes the decision by establishing a committee for recruitment, which consists of relevant governmental

Neo-Traditionalism: Work and Authority in Chinese Industry (Berkeley, CA: University of California Press, 1986), Y. Yan, *The Flow of Gifts: Reciprocity and Social Networks in a Chinese Village* (Palo Alto, CA: Stanford University Press, 1996), M. Yang, "Gifts, Favors, and Banquets: the Art of Social Relationships in China," *Ithaca, NY* Cornell University Press (1994), M. Yang, "The Resilience of *Guanxi* and its New Development: A Critique of Some New *Guanxi* Scholarship," *China Quarterly* 170, no. June (2002).

⁷⁴ Compare with Swanson, Kuhn, and Xu, "Environmental Policy Implementation in Rural China: A Case Study of Yuhang, Zhejiang," 489

leaders. In case of the EPB or the SLB, the decision is made after consultation with the superior functional department, the EPB or SLB at the higher level of administration. All leadership appointments must also be approved by the local CCP committee. Apart from the regular leadership, all three bureaus also have a CCP Party Secretary, who represents the CCP's highest authority within the organization. Such a secretary is nominated by all bureau CCP members and then chosen from the nominees by the local CCP Committee.⁷⁵ Through its leadership appointment the local government has a firm control over the three bureaus. Bureau leadership will show allegiance first and foremost to the leaders that have appointed him or her, especially because they also control the budget of the organization they manage. The allegiance to the local government is further strengthened because most career opportunities will also be controlled by the same government, in part through its use of the cadre management and the civil service evaluation systems (see below).

The second personnel management system is staff salaries. The salaries of staff are decided by the bureaus' personnel affairs department. The salary decisions are based on the personnel policy documents issued by the national Ministry of Personnel. The policy contains a detailed description of functions and appropriate salaries. For the SLB and the DMB for example, the basic salary ranges between 1000 and 2000 RMB/month.⁷⁶ In the past, bureaus would provide housing for their staff. With the *danwei* (work unit) reforms, staff must now get their own housing. However, the bureau provides subsidies for its employees, such as a beneficial loan to buy housing, which means that most employees have little or no living expenses to pay.⁷⁷ To get an idea of the total amount of benefits employees have, an average EPB staffer gets about 30.000 RMB a year, which includes the basic salary, health insurance, pension funds and rent subsidies.⁷⁸ The centrally dictated personnel rewards schemes have very flat scales that allow bureaus little in terms of job incentives through regular salaries. In the EPB for example, the difference between the bureau leader's salary and a starting recruit is only 7000 RMB on a yearly basis, 23% of the average income, and that for an extraordinary career, most never attain. Apart from this, the absolute amount of salary, while not low, is not high, especially considering the level of knowledge needed to carry out enforcement work. It is no understatement that the present salary system at the three bureaus provides staff no incentive

⁷⁵ Based on an interview with the Kunming EPB CCP party secretary, 22 October 2004.

⁷⁶ Based on an interview with the Kunming SLB enforcement agent, 26 October 2004 and DMB enforcement agents 15 November 2004.

⁷⁷ Based on an interview with DMB enforcement agents 15 November 2004, Kunming EPB personnel management staff, 22 October 2004.

⁷⁸ Based on an interview with Kunming EPB personnel management staff, 22 October 2004.

for surplus work performance. Salaries improve annually, while bigger raises only occur through promotions. Direct superiors can arrange for staff promotion by applying with the bureau leadership. In fact, the bureau's leadership has authority over all promotion decisions and thus exercises considerable power in personnel management affairs. As promotions only slightly affect income, they do not form strong incentives for good performance, it seems.

The third personnel management system is the staff evaluation system (*kaobe*), which forms the basis for bonuses, promotions and dismissals. Under this system all personnel is evaluated annually by their direct superiors. Based on the evaluation, bureau management decides on performance of the past year, ranging from outstanding (*youxin*), regular (*chengzhi*), to insufficient (*buchengchi*).⁷⁹ The system is used for deciding on bonuses and demotions. Staff members that score outstanding for three years in a row are eligible for a bonus, which depending on the bureau ranges from several hundred RMB to one thousand RMB. Meanwhile, bureau agents who get an insufficient score three times in a row are supposed to be dismissed. On paper, the personnel evaluation system seems a strong tool to stimulate job performance. In practice, its effects have been disappointing. EPB and SLB personnel officers have informed me that the bonuses are too low to make people work harder to get an outstanding grade.⁸⁰ Furthermore, three consecutive unsatisfactory evaluations rarely, if ever, occur.⁸¹ Perhaps the last is understandable because the superiors in charge of the evaluation system rotate every three years and therefore lack sufficient experience and knowledge to verify their staff's work. Furthermore, as we will see in the proceeding section, enforcement work mainly takes place outside of the bureau, where the superior cannot see what agents do. This gives agents a large amount of discretion, and an opportunity to self-report in a fashion that pleases their boss back at the office.⁸² Without sufficient experience, such a superior will easily be duped to believe agents were successful in their work. Furthermore success or failure of the work done is not easily measured because of the complex causal relationship between enforcement and compliance behavior (see Chapter 11).⁸³

⁷⁹ See Chou, "Implementing the Reform of Performance Appraisal in China's Civil Service." 51-2

⁸⁰ Based on an interview with the Kunming SLB personnel department, 3 December 2004, Kunming EPB personnel department 22 October 2004.

⁸¹ Ibid. Here Kunming is comparable to China in general. See Chou, "Implementing the Reform of Performance Appraisal in China's Civil Service." 52

⁸² For this point see also Lo and Fryxell, "Enforcement Styles Among Environmental Protection Officials in China." 106

⁸³ Lo and Fryxell have tried to analyze the way in which China's EPB officials define enforcement effectiveness and relate it to political and public support. However, they have

Concluding, Kunming's natural resource enforcement bureaus have problems stimulating staff job performance. The rewarding system is too low and too flat, evaluation is difficult because of the job rotation and the nature of enforcement work, and bonus and sanction systems fail because they offer too little incentive or disincentive. Moreover, personnel management, based on national policy guidelines, does not offer middle level management sufficient tools to control their agents. The strongest personnel management systems are directly controlled by the bureau's leadership, the local government and its personnel department. They decide on recruitment, and promotions. Thus, personnel management at these bureaus is centralized, which strengthens the local government's influence on the bureau and its enforcement work. The actual enforcement procedure in practice, as we will see in the next section, exacerbates the centralist bureau mechanisms, while also allowing significant agent discretion at the bottom of the organization.

Inspections: Resource Shortage and Local Protectionism Lead to Reactive and Cooperative Detection Practices

Enforcement work first of all comprises of detecting violations. All three natural resource protection bureaus carry out inspection work. Bureaus at the lowest level of administration, carry out most inspections. For the EPB this is the district level EPB⁸⁴, in our research the Diandong District, the Dianxi District and the Ningshi District EPBs. For the SLB, district level land bureaus used do most inspections; in our research, again the same districts are relevant. However, since the vertical management reforms, township level land bureaus have been delegated inspection authority. DMB inspection work is carried out by the district level Dianchi Management Offices, which are subordinate to the DMB and in the future the new township level Dianchi Management Stations may take over part of this work.

Municipal, provincial and national bureaus also carry out inspections, though. They do so in order to verify the work of subordinate agencies. This is necessary because local bureaus may shirk their inspection work when local interests are at stake. A good example is the Tanglang FSS pollution case. The original inspection authority for these small enterprises was vested with the Dianxi District EPB. When local complaints reached national media, and the reporters found that so far enforcement had been lax, the Kunming and even the Yunnan provincial EPBs immediately carried out their own

not tried to define what is effective enforcement and how it can be measured. Instead they have left the interpretations of such definitions to their respondents. See C.W.H. Lo and G.E. Fryxell, "Governmental and Societal Support for Environmental Enforcement in China: An Empirical Study of in Guangzhou," *Journal of Development Studies* 41, no. 4 (2005).

⁸⁴ Based on an interview with the Kunming EPB Processing and Inspection Department Vice Director, 10 September 2004.

inspections, fearing that the Dianxi EPB had shirked its work in order to protect local industry in the region. For arable land enforcement, the problem of local protectionism is also relevant.⁸⁵ In Jiacun Township for example, the newly reformed SLB Township office is worried about its new inspection responsibility. As one of the agents told me, "In the past our work was easy, we just did what our Township government wanted, but now we have to inspect for the District SLB and they do not want to consider our local conditions. We fear that there will be conflicts between our new superiors and our local leaders." The vertical management reform has not taken away the conflict of interests that lies at the heart of local protectionism so it seems. For arable land inspections, the vertical management reform is risky. It places great authority with the Township bureau that for years has been part of the Township government and still partly depends on it for funding.

Province	Complaints	Compl/Poll		Province	Complaints	Compl/Poll
Shanghai	76385	1558,9		Ningxia	4958	70,8
Beijing	12803	441,5		Jiangxi	7989	69,5
Tianjin	17384	434,6		Sichuan	27299	65,6
Guangdong	68800	305,8		Gansu	7903	57,7
Fujian	20763	266,2		Hebei	16868	51,0
Jiangsu	61459	242,9		Hunan	15155	49,7
Jilin	16379	237,4		Guangxi	17128	46,4
Zhejiang	39046	224,4		Xinjiang	6987	42,9
Chongqing	38707	151,8		Yunnan	8278	41,8
Liaoning	27520	151,2		Shaanxi	7882	40,8
Heilongjiang	13148	131,5		Neimenggu	7912	30,4
Hubei	18197	118,9		Henan	8267	30,1
Shandong	36291	108,7		Qinghai	398	17,3
China	611016	96,6		Guizhou	5022	11,8
Anhui	10315	81,9		Shanxi	5847	6,5

Table 4 Number of Pollution related Complaints and Complaints in Relation to Five Main Pollution Indicators⁸⁶

Kunming inspectors have first coped with their lack in human and material resources through reactive enforcement techniques.⁸⁷ This means

⁸⁵ For general examples from China see Ho and Lin, "Emerging Land Markets in Rural and Urban China: Policies and Practices." 694. They argue that the new LMA would solve the existing problems, our research however shows that a mere change of law in the books fails to affect law in action, at least not in Kunming.

⁸⁶ SEPA, *Zhongguo Huanjing Tongji Nianbao 2003* (China Environment Statistical Report 2003).

that they carry out inspections based on citizen complaints. Engaging the public in enforcement work helps to make efficient use of scarce enforcement resources.⁸⁸ Citizens become informal inspection staff, providing direct information about local violations not readily available to agents.⁸⁹ Furthermore, complaint driven inspections help the bureaus to focus on those violations that have the largest social impact. Nationwide data on pollution complaints, as portrayed in Table 4, on complaints shows that provinces with a large number of complaints in relation to pollution, also have more enforcement action (for this compare Table 4 with Table 1).

However, a reactive complaint driven inspection strategy is not without problems. Wheeler and Dasgupta's study of the impact of complaints on environmental enforcement in China demonstrates that complaints only help to detect the most visible violations and those with the greatest effect on general welfare.⁹⁰ Our research adds to their argument. In Part III we saw that Baocun's farmers were too dependent on local industry to complain about their pollution. As a result, *Huafei* could continue its nightly discharges undetected. For arable land violations in Jiacun Township, complaint driven detection strategies also do not work, as most local citizens stand to benefit from the illegal land practices in the village. The data in Table 4 show that for pollution there will be less complaints in the lesser developed areas of Western China, reaffirming the hypothesis that natural resource law enforcement is more difficult in a context of underdevelopment. In such a context, we can wonder whether more public participation in the implementation process would benefit natural resource protection.⁹¹

In recent years, Kunming's natural resource protection enforcement bureaus have started to prioritize their pro-active enforcement work. Pro-

⁸⁷ Based on interviews with the Kunming EPB Processing and Inspection Department Vice Director, 10 September 2004, the SLB Enforcement Department Director, 26 October 2004.

⁸⁸ Dasgupta et al.'s study also found a positive correlation between complaints and inspections. Dasgupta et al., "Industrial Environmental Performance in China, The Impact of Inspections." 3 See also Johnson, *Clear Water, Blue Skies: China's Environment in the New Century*. 61

⁸⁹ For an example where EPBs actually tried to make citizens informal inspection staff, see the Chapter 14.

⁹⁰ Dasgupta and Wheeler, *Citizen complaints as environmental indicators: evidence from China*, Dasgupta et al., "Industrial Environmental Performance in China, The Impact of Inspections."

⁹¹ Compare with Swanson, Kuhn, and Xu, "Environmental Policy Implementation in Rural China: A Case Study of Yuhang, Zhejiang.", Lo and Leung, "Environmental Agency and Public Opinion in Guangzhou: The Limits of a Popular Approach to Environmental Governance." 679, Lo, Yip, and Cheung, "The Regulatory Style of Environmental Governance in China: The Case of EIA in Shanghai." 313-4, Tang, Tang, and Lo, "Public Participation and Environmental Impact Assessment in Mainland China and Taiwan: Political Foundations of Environmental Management." 24

active enforcement means regular inspections at suspected sites of violations. For violations that are easily visible, such as illegal construction on arable land, air pollution or illegal land reclamation at Lake Dianchi, inspections can be carried out by driving through a certain area and observing any irregular activities. The SLB and the DMB have made schedules of areas to inspect by car.⁹² For less visible violations, such as illegal water pollution discharges, inspections need to get close to the source of the illegal activity. For water pollution, this means that EPBs need to carry out regular inspections inside factory premises. The bureaus' lack of resources has forced them to prioritize which sites to inspect. Prioritization has been most influential for pollution inspections by EPB agents. For these bureaus, it seems that prioritization started as a result of national short-term enforcement campaigns (see Chapter 14). The Kunming EPB, for example has made a list of key enterprises, which must be inspected at regular intervals once a month.⁹³ Recently, also in response to the campaigns, prioritization has been linked with complaints: inspection work is focused on those violations that generate most complaints. In Kunming's pollution enforcement work this has led to a shift away from large polluters, located in densely populated areas, to small polluters, mainly restaurants in the city center. The Kunming EPBs now spend considerable time and thus rare resources in checking minor violations at restaurants. Time thus spent is lost for detecting industrial pollution violations at remoter factories.⁹⁴

The problem with pro-active inspections at Lake Dianchi is that the frequency of inspections remains low and that enterprises seem to know when the inspecting teams will come. The absolute lack of enforcement resources keeps the detection probability for industrial pollution violations quite low, especially in remote areas, where resistance to inspections is easier.

In addition, our research has found that inspection work meets with considerable resistance and obstruction. First of all, even land inspections are resisted; the SLB's land enforcement inspections have met with resistance. Especially at larger construction sites, inspection agents are sometimes not let onto the premises and have to force their way in by getting police support. Such resistance is particularly cumbersome for pollution inspections. A good example is the *Huafei* factory, which as we saw in Chapter 10, could illegally discharge its pollution without detection. The factory was until late 2004 listed as being in compliance, although most citizens knew that the factory was discharging secretly (*toupai*) at night. *Huafei* did so to evade daytime

⁹² Based on an interview with the Kunming SLB Enforcement Department Director, 26 October 2004.

⁹³ Based on an interview with the Kunming EPB Processing and Inspection Department Vice Director, 10 September 2004.

⁹⁴ Based on interviews with Kunming EPB agents, autumn 2004.

inspections, as it knew well that nightly inspections were practically not feasible. The Dianxi District EPB, the Kunming and the Yunnan EPB are all located in Kunming city. All roads from Kunming to Baocun village, where *Huafei* is located are not easy to travel and very dangerous at night. Nightly discharges were therefore never detected during regular inspections. Furthermore, EPBs carry out few nightly inspections anyway because personnel costs are higher and there is a significant chance that factory management is not present to let agents into the factory.⁹⁵ Some miles further down the Tanglang River, the FSS companies have taken resistance a step further into full obstruction. (Chapter 10) “Those enterprises engage in a Guerilla Warfare with us”, a frustrated EPB inspection agent remarked. If before the media coverage, enforcement action never stopped the ongoing violations because of local protectionism, after the coverage the Kunming EPB made a real effort to detect their violations. They have even installed 24-hour discharge monitoring equipment at one of the smaller enterprises to prevent the possibility for secret nightly discharges.⁹⁶ This particular factory however, they found out later (see Chapter 14), was bold enough to build an extra illegal discharge pipe circumventing the full-time detection equipment.⁹⁷ Thus, it took months before the EPB was able to gather proof for violations. Circumvention of discharge pipes is a regular problem and SEPA even convened a national workshop for EPB agents on this topic.⁹⁸ Other smaller FSS factories simply closed shop when inspections came, only to open up again at a different location of the Tanglang River.⁹⁹

In other cases, the regulated factories have stalled inspection agents at their gates, while they sabotaged their electric installations in order to use a power-cut as an excuse for why the pollution installations were not in use. The vice director of the Kunming EPB inspection and processing department told me that an experienced officer who knows his way around the premises can easily show that the pollution installations were out of use

⁹⁵ Based on an interview with the Kunming EPB Processing and Inspection Department Vice Director, 27 September 2004.

⁹⁶ Based on an interview with the Kunming EPB Processing and Inspection Department Vice Director, 10 September 2004. This respondent told me that the EPB uses 300 such 24-hour installations. They are not very trustworthy, however and often falter and as we saw from the FSS factory case, can be tempered with. Another problem is that this equipment just measures the flow of discharge through the pipes but not what the flow contains. Based on interviews with DMB Enforcement Staff 17 September 2004 and Kunming EPB Inspection and Processing Department Vice-director, 27 September 2004.

⁹⁷ Based on an interview with the Kunming EPB Processing and Inspection Department Vice Director, 27 September 2004.

⁹⁸ Based on an interview with the Kunming EPB Processing and Inspection Department Vice Director, 27 September 2004.

⁹⁹ Based on an interview with the Kunming EPB Processing and Inspection Department Vice Director, 27 September 2004.

for a longer time than the power-cut. “You just go to the main pipe between the pollution installations and the main water discharge. You put your hand at the bottom of the pipe and you show the dust you find there to the factory manager.” The problem is that agents may have difficulty finding their way around complex factories without the help of factory staff or management. Inspections therefore cannot preclude some form of cooperation with the regulated actor.¹⁰⁰

Sanction Decision Making: Legal Options, Procedures, Practice, Review

Regular sanction decision-making at all three bureaus is cooperative: informal and non-stringent.¹⁰¹ In practice, enforcement agents have considerable discretion, which they use to consider the circumstances of the case and the various stakeholders. During this process, enforcement agents and violators engage in bargaining. The decision process further strengthens the role of bureau leadership, which has the final authority to decide on all but minor sanctions.

Legal Enforcement Options: Administrative Sanctions are Most Important, Minimum Fines are Too Strict

First, we will take a closer look at the legal options available for enforcement. According to the law, enforcement agents, at all three bureaus, have a range of sanction options to choose from for reacting to violations detected. The most important sanctions, in the sense that they are used most, are administrative penalties. The least stringent administrative penalties are the formal, written warning (*jinggao*)¹⁰² and the restitution of illegal profits¹⁰³. More stringent, depending on the height, are fines.¹⁰⁴ As we saw in Part II, the natural protection laws have two kinds of rules on fines. First are maximum fines. In national water pollution legislation for example, such

¹⁰⁰ Swanson et al. have analyzed this as part of what they call *guanxi*. Their work states that this is a Chinese phenomenon which means that social actors must cooperate. Through our comparative study in Chapter 12 we know that cooperation is a normal phenomenon in all enforcement work. Compare with Swanson, Kuhn, and Xu, "Environmental Policy Implementation in Rural China: A Case Study of Yuhang, Zhejiang," 488

¹⁰¹ For these terms see Chapter 12

¹⁰² Law on Administrative Sanctions § 8.1, for examples see SEPA Administrative Measures on Administrative Sanctions for Environmental Protection § 2.1, APPCL § 46, WPPCL § 46

¹⁰³ Law on Administrative Sanctions § 8.3, for examples see SEPA Administrative Measures on Administrative Sanctions for Environmental Protection § 2.3, LMA §73, EIA Law §49.2, APPCL § 47.2

¹⁰⁴ Law on Administrative Sanctions § 8.2, SEPA Administrative Measures on Administrative Sanctions for Environmental Protection § 2.2

maximum fines range from 2.000 RMB for minor pollution violations¹⁰⁵ to 1 million for violations causing major damage.¹⁰⁶ National land law prescribes relative maximum fines such as for example 50 per cent of the illegal profits made in the illegal land transaction (on top of the full restitution of such profits).¹⁰⁷ Maximum sanction provisions offer agents large legal discretion. Therefore, when lawmakers sought to strengthen the effectiveness of existing laws (see Part II), one measure they adopted was to limit the legal discretion about administrative fines. Consequently, some of the laws now also contain provisions with minimum and maximum sanctions. An example is the 50.000 RMB minimum and 200.000 maximum fine for general EIA violations,¹⁰⁸ the 10.000 RMB to 100.000 RMB fine range for air pollution violations,¹⁰⁹ or the 5 to 20 percent of illegally obtained profits fine for illegal rent of collective land.¹¹⁰ During the deliberations about minimum sanction in the APPCL amendment, local actors feared that such minima would be unfeasible in practice. (See part II) In Kunming, especially the 50.000 RMB minimum for general EIA violations has been unacceptable to enforcement agents. One informant told me, “We do not dare to even fine one fifth of such an amount, really it is unreasonable that the law demands that we do so. Companies in Kunming are under a lot of pressure, if we treat them this strictly we risk severe social consequences with all the workers involved.”¹¹¹

Local legislation, as we saw in Part I, also contains sanction provisions. According to the Law on Lawmaking and the Administrative Sanctions Law, sanctions in local legislation may not be more or less stringent than prescribed in national law.¹¹² While most local legislation’s fine provisions abide by this rule, Part I demonstrated that some of Kunming’s local legislation violates it. First of all, the Kunming Regulations on Restaurants and Environmental Protection (KMREP) prescribe a maximum fine of 5000 RMB for restaurants that fail to meet the pollution standards, even though the APPCL sets a minimum fine of 10.000 RMB for the same violation.¹¹³ Here, Kunming’s legislator has tried to soften China’s strict national enforcement minima on pollution violations by enacting its own local rules. However in other regulation, in the Dianchi Protection Rules (DPR), a provincial level law, we saw in Part I, the local legislator issued

¹⁰⁵ WPPCL Implementing Regulations § 39.6-7

¹⁰⁶ WPPCL Implementing Regulations § 43.2

¹⁰⁷ LMA § 73, LMA Implementing Regulations § 38

¹⁰⁸ EIA Law §31

¹⁰⁹ APPCL §47

¹¹⁰ LMA §81 and State Council LMA Implementing Regulations §39

¹¹¹ Based on an interview with a KMEPB enforcement agent 27 September 2004.

¹¹² Law on Lawmaking §64, 73, Law on Administrative Sanctions §31.2, Constitution §100

¹¹³ Compare APPCL § 48 and KMREP §11.2

sanctions with minimum sanction requirements.¹¹⁴ As such, these sanctions were stricter than those in the WPPCL, which never contained such statutory minima.

Apart from fines and warnings, Chinese administrative law provides several other, more stringent administrative penalties: ordering a halt to the illegal activity¹¹⁵, permit revocation¹¹⁶, closure of the violating enterprise¹¹⁷, and destruction of the illegally built premises¹¹⁸. While most sanctions are administered by the bureaus themselves, pollution sanction of permit revocation and closing of enterprises can only be ordered by local governments.¹¹⁹ Demolition of illegally built premises can only be executed after it has been approved in court.¹²⁰

Apart from the widely used administrative sanctions, Chinese resource protection law also offers criminal law enforcement options. For pollution law the Chinese Criminal Code has two relevant stipulations on criminal responsibility for severe environmental accidents and gross negligence by EPB personnel.¹²¹ Criminal law pollution enforcement is rare: between 2001 and 2003 there have only been seven cases of criminal prosecution following pollution accidents and three cases of EPB staff prosecution for gross negligence.¹²² Apart from the LMA stipulation, that embezzlement and misuse of compensation or other land related funds can be prosecuted under criminal law,¹²³ the criminal code also provides that the illegal conversion of arable land for construction is punishable with a maximum penalty of five years incarceration.¹²⁴

¹¹⁴ DPR § 44-46

¹¹⁵ Law on Administrative Sanctions §8.4, see for example APPCL §46, EIA Law §31,

¹¹⁶ Law on Administrative Sanctions §8.5

¹¹⁷ See for example APPCL § 49, 50, WPPCL §49, 50, 51, 52,

¹¹⁸ LMA §73, 76, 77

¹¹⁹ Permit revocation is a severe sanction which has the same consequences as closing the enterprise. Although the law has vested the authority for EP permit revocation with the EPBs, in practice it is the local government that decides on revocation, based on interviews with EPB agents in Kunming 2004, Sichuan 2001-2002, and SEPA staff, 2000. For the authority for ordering closures see EP Law §39, see also for example APPCL §49, 50, WPPCL §49, 50, 51, 52

¹²⁰ Based on an interview with the Kunming SLB, 8 December 2004.

¹²¹ Criminal Code § 338, 408

¹²² Based on SEPA, *Zhongguo Huanjing Tongji Nianbao 2001 (China Environment Statistical Report 2001)*, SEPA, *Zhongguo Huanjing Tongji Nianbao 2002 (China Environment Statistical Report 2002)*, SEPA, *Zhongguo Huanjing Tongji Nianbao 2003 (China Environment Statistical Report 2003)*. See also Yang, Head, and Liu, "China's Treatment of Crimes Against the Environment: using criminal sanctions to fight environmental degradation in the PRC." 677-8

¹²³ LMA § 79, which is to be prosecuted under Criminal Code §382, 384 (for government officials), 271, 272 (for non-government officials)

¹²⁴ Criminal Code § 342.

Regular Enforcement Procedures offer Discretion to Agents and Leadership and Strengthen Local Protectionism

Once violations are detected, the sanction decision-making procedure starts.¹²⁵ In this procedure, street-level agents and bureau leadership play a considerable role. There are two types of procedures¹²⁶, a simplified procedure for minor violations for which the agent fines up to 1000 RMB for legal persons, or 50 RMB for natural persons¹²⁷, or the normal procedure for all other cases.¹²⁸ The simple procedure takes place completely on-site during the inspections: after detecting minor violations, the inspecting team collects the evidence and decides on appropriate sanctions.

Collecting evidence is not easy.¹²⁹ It requires a certain amount of cooperation with the regulated actor. This is especially so at fenced sites such as large construction areas or factories. Furthermore, complex installations at larger factories can hide complex violations. Enforcement agents can only access such premises and find evidence for such violations with some sort of help from regulated actors. For pollution violations, evidence linking the damage to the violating act is not easy to find. Pollution can dilute over a large area and it is difficult to find proof establishing a relationship between its effects and its source.

Once back at the bureau, the agents submit the evidence together with a sanction report to the legal affairs department for verification. Because the simple procedure takes place in the field, the bureau cannot witness its agents' enforcement work, or its "outputs". Thus, the bureau has no way of knowing whether what the agents bring back to report is in accordance with what actually took place. Consequently, the simple procedure offers street level agents much discretion, which is exacerbated because of weak verification procedures (see below). A Sichuanese EPB vice-director once explained to me how his bureau deals with this problem: "When inspection agents come back from the field and have issued a minor sanction decision, I immediately interview them. I drill them about their decision and about the circumstances at the factory. I know most factories well, so I have a good understanding of what takes place there." The director did admit that real control is not possible: "Even if we find out that the decision made is too lax, we cannot change it for a stricter decision because

¹²⁵ Except where otherwise indicated, this paragraph is based on a series of interviews with enforcement agents at all three bureaus, carried out in autumn and winter of 2004 in Kunming.

¹²⁶ Law on Administrative Sanctions §33-43

¹²⁷ Law on Administrative Sanctions §33

¹²⁸ Law on Administrative Sanctions §36 For major violations, a more elaborate procedure, which includes hearings can also be followed. Law on Administrative Sanctions §42-43

¹²⁹ Compare with G. Liu, "Problems and Solutions in Environmental Administrative Punishment (Huanjing Xingzheng Chufa zhong Cunzaide Wenti yu Duice)," *Environmental Protection*, no. 4 (1999). 17

that would legally not be possible.”¹³⁰ What his and other bureaus try to do is set procedures for how work should be carried out to get some kind of control. First, agents should always work together to limit chances of collusion and to get two sides of the story. Second, bureaus set strict rules for accepting gifts in any form from the regulated enterprises. “They are not allowed to accept anything. The exception is lunch and diner, only when the factory is far away and they have to stay there until the evening. All other gifts are to be refused.” Although such rules make sense, the bureau has no way of knowing whether its agents, whose salaries are not considerable and whose future career prospects offer little extra reward, refrain from receiving kickbacks¹³¹ or other favors in practice.¹³²

Under the normal procedure, the inspection team also collects the evidence, but then returns to the bureau to prepare a sanction proposal, which they, together with the evidence, submit to the legal affairs department. The lawyers at this department then check the evidence and the legal basis of the sanction proposal made. If the evidence is insufficient the inspection team has to go back to try to collect more. Otherwise, the sanction proposal, as amended to the law, will be sent to the bureau’s leadership team that makes a final decision on the appropriate sanction. Such final decision can be based on the sanction proposal, however leaders are completely free to ignore the proposal made. We thus see that apart from the street-level agents, China’s regular enforcement practice also offers great decision making authority to the bureau leadership. This leadership, which is also in charge of the most important personnel decisions for the whole

¹³⁰ This because of the *ne bis in idem* rule, which prevents making a new stricter sanction decision for weak sanctions. Law on Administrative Sanctions §24

¹³¹ Corruption has increased considerably since reform see A. Wedeman, “The Intensification of Corruption in China,” *China Quarterly* (2004). 895, Van Rooij, “China’s War on Graft: Politico-Legal Campaigns Against Corruption in China and Their Similarities to the Legal Reactions to Crisis in the U.S.”

¹³² Based on an interview with a vice-director of a municipal EPB in Sichuan, summer 2002. The Kunming EPB follows a similar practice of checking on site enforcement sanctions right after agents come back to the bureau. Based on an interview with an enforcement agent KMEPB, 10 September 2004. Similarly the DMB also checks upon simple procedure enforcement decisions, based on an interview with DMB enforcement agents, 17 September 2004. Governmental officials have been worried about agents taking gifts and favors. See Wang, “Vice Minister Wang Jirong’s Speech at the National Environmental Inspection Work Summit.” 4, Xie, “Shuli he Luoshi Kexue Fazhanguan Tuidong Huanbao Gongzuo Zai Xin Taijie (Establishing and Implementing a Scientific Development Doctrine to Promote Environmental Work onto a New Level).” 14 Consequently SEPA officials have considered introducing stronger internal reporting and disciplinary systems. See Wang, “Vice Minister Wang Jirong’s Speech at the National Environmental Inspection Work Summit.” 5, and Xie, “Bawo Lishi Jiyu, Qianghua Zhifa Jiandu, Zhazha Shishi Zuohao Wuran Kongzhi Gongzuo (Grasp the Historical Opportunity, Strengthen the Supervision of Law Enforcement, and Thoroughly Carry out the Job of Controlling Pollution).” 4

bureau, makes final decisions for normal and major enforcement cases. Because there is a close relationship between the bureau leadership and the local government, local protectionism can therefore easily affect enforcement decision-making.

Sanctions in Practice: Nature of Damages, Type of Violator, Complaints and Social-Economic Context

So which cases receive what kind of enforcement? How does the nature of the violation and the violator affect the sanction issued? To what extent do enforcement agents and bureau leadership take local economic and social development into account? Based on the explorative data collected, it seems that the economic and social context and agent-violator relationship play a dominant role in the enforcement decision practice. Other factors such as the severity of the damage, the type of violator or the number of complaints seem to have a less clear impact on sanction decisions.

Severity of Damage has No Clear Influence on Sanction Decision

Let us first look at the severity of the damage caused by the violation. In the cases studied, there is no clear correlation between the severity of the damage and the sanction height. In Part II we saw several cases in which the damage was considerable but enforcement action lax. Most of these cases were pollution violations. First, the *Yunzhi*'s pollution violations caused considerable damage to local farmers, industries and the Tanglang river ecological system. In all its years of severe pollution no enforcement action was taken, until the factory went bankrupt. The current pollution of the FSS companies is no less severe and located in the same area. The FSS pollution did not receive enforcement action until there was prolonged national media attention and national pressure to deal with this case. (See Chapter 14) Regular enforcement never dealt with this case and only campaign induced inspections brought forth sufficient evidence for enforcement action, which again was part of the campaign and not of regular enforcement practice. (Chapter 14) Another example of severe damages and weak enforcement is the Kunming Porcelain Enamel Factory, not yet discussed in part II. Recently this once profitable enterprise has been facing hard times. The popularity of plastic and other cheaper and unbreakable products has decreased demand for the expensive porcelain bowls this factory makes. The factory's high costs, it supports 600 employees and another 3000 retirees from its former SOE days, have prevented the necessary investments in EP equipment. Consequently, the factory has been violating environmental standards continually the last years. Under the new APPCL¹³³, the factory,

¹³³ APPCL §19

with its outdated techniques, should have been closed, but until now it has continued to emit black smoke and cause serious environmental harm. So far, enforcement has been weak because the Kunming government has stopped the EPB from using strong enforcement action, and it has so far refused to close it down as it should and is authorized to do. EPB agents have confided that they understand local protectionism in this case, "This is as much an environmental as well as a social problem. If we would take stern action, or if the local government would decide to close the factory, social unrest would result. The workers have nowhere to go."¹³⁴ In these cases, there is no clear connection between the severity of pollution damages and the stringency of sanctions.¹³⁵

For land cases, there are similar findings. All of Jiacun's illegal land practices have led to considerable damage: most of the village arable land has been destroyed. Yet, this issue was not addressed in regular enforcement action. No houses or enterprises were ordered to be destroyed, and the whole issue remained unaddressed until a campaign started in 2004. (See Chapter 14) Meanwhile there have been cases of stricter punishment through regular enforcement. Some have been for minor damages. An example is that the Ningshi SLB together with the Ningshi government ordered the destruction of an illegally built second house in one of Ningshi's villages. The owner of the house was a handicapped farmer who had used his last savings to erect a second house in order to rent out the first for profits. Ningshi officers issued the strictest sanction, only to protect a couple of square meters of arable land. Another similar case, was the forced demolition of a new hotel in Jiacun Township. This hotel was built with the support of the local village committee and the Township land authorities, right at the edge of Lake Dianchi in a protected area of the watershed. In this area all land is to be protected and nothing is allowed to be built upon it. When the DMB discovered the illegal construction, it immediately ordered its removal. Agents at the DMB have told me that all construction in the protected area right next to the lake is dealt with strictly. In another case, the DMB issued a strict fine to the Yunnan Electrical Power Company when they illegally tried to reclaim 12,000 m² of land from the Northern-most, and smallest and most fragile part of the Dianchi Lake. The total fine for this big case was 700,000 RMB. Strict punishment remains the exception though, and it can occur both for major cases, as well as for cases with less damages. Thus, in most cases, there is no clear connection between the severity of damage and the strictness of the sanctions.

¹³⁴ Interview with KMEPB enforcement agents, 5 November 2004.

¹³⁵ Here are findings contradict Ma and Ortolano's case studies from other parts of China in the early 1990s. Ma and Ortolano, *Environmental Regulation in China*. 120-1

Relation Agent-Violator Influences Sanction, Type of Violator not clearly Influential

Prior research has emphasized that the relation between the enforcement bureau and the violator is crucial for understanding why enforcement sanctions have been weak. The explorative data in our research bring forth similar findings.

First, in the cases studied there is not a clear connection between the type of violator and the severity of the sanctions. Both large and small enterprises, state-owned, privatized and collective firms have not received strict regular sanctions for their pollution violations.¹³⁶ The tiny privately owned FSS companies, who seemingly lack the power to make use of strong personal relationships with the far away district EPB, have been treated as lax as the strong well-connected larger firms such as the former SOEs *Yunzhi* Paper and *Huafei*. For land violations similarly, we see that in peri-urban Kunming the SLB does not issue strict sanctions against powerless households just as it has not done against larger enterprises or local governments.

The exception seems to be that enforcement action against governmental bureaus was more difficult.¹³⁷ For land violations, for example, enforcement agents told me that punishing local governments for their illegal land practices is difficult.¹³⁸ However, as our case studies demonstrate, such local governments have not received more lenient treatment than illegal construction by private enterprises or even poor rural households with whom the officials colluded in the violations. Moreover, although many agents have told me that it is difficult to issue strict sanctions against governmental violators, sometimes bureaus still punish governmental departments strictly. In one case, the DMB, had to deal with a violation committed by the Kunming municipal Hygiene Department. This department had illegally brought public toilet discharge to a normal water treatment center instead of the costlier special treatment center designated for dealing with such waste. After complaints, inspections followed and evidence was collected, upon which Hygiene Department staff admitted the department's guilt and stated that the waste had been illegally dumped to cut costs. When the DMB enforcement agency started to prepare a sanction decision the local discharge regulations offered sanctions from a minimum

¹³⁶ Previous research has demonstrated that enterprises in financial troubles are treated more leniently. See Liu, "Obstacles of the Environmental Law Enforcement System and their Countermeasures (Huanjing Zhifa Tizhi Zhuangai ji qi Xiaochu Duice).", Ma and Ortolano, *Environmental Regulation in China*.

¹³⁷ Compare with He, "Gengdi Baohu Ying Zuodao 'Liu Ge Bixu' (The 'Six Must Be Dones' of Arable Land Protection)." 41, See also Liu, "Obstacles of the Environmental Law Enforcement System and their Countermeasures (Huanjing Zhifa Tizhi Zhuangai ji qi Xiaochu Duice)." 1

¹³⁸ Based on interviews with SLB staff 2004, Kunming.

of 5000 RMB to a maximum of 50,000 RMB. "When the Hygiene Department heard that the minimum was 5000, they demanded that we issue that sanction," a DMB agent explained. The Hygiene Department tried to exert all kinds of pressure, even through other departments to get the minimum fine.¹³⁹ The DMB did not budge under their pressure, but instead fined the maximum.

If the type of violator does not seem influential on enforcement decision making in the cases studied, the relationship with violators in general is. In Chapter 12, we saw that a cooperative enforcement style occurs when there are frequent agent-violator contacts and/or easily verifiable violations. Kunming's natural resource enforcement has had neither, but is still cooperative. A closer analysis of the relationship between the regulated actors and the enforcement agents can help us unravel this puzzle. One explanation, offered by Ma and Ortolano, is that *guanxi* personal networks underlie all bureau-violator relationships. This means that even when there is infrequent contact between the two, both actors are locked together in a network in which they have to cooperate in order to prevent loss of face or break reciprocal structures.¹⁴⁰ Here we find similarly that *guanxi* are important and that enforcement agents engage in cooperative enforcement because they have been afraid to upset relationships with regulated actors.¹⁴¹ We will call this "relational risk aversion".

Relational risk aversion characterizes enforcement decision-making in all three bureaus. Because natural resource protection has received little support in the past¹⁴² and at present still often conflicts with powerful stakeholders when it harms economic growth or social stability, enforcement bureaus and their agents lack authority¹⁴³ and are careful not to upset powerful stakeholders.¹⁴⁴ Regular enforcement practice at all three bureaus is

¹³⁹ Liu's research contains cases in which enterprises successfully forced the EPB to withdraw their enforcement decision or in which courts were forced to refrain from executing EPB sanction decisions. See Liu, "Obstacles of the Environmental Law Enforcement System and their Countermeasures (Huanjing Zhifa Tizhi Zhuangai ji qi Xiaochu Duice)." 1

¹⁴⁰ Ma and Ortolano, *Environmental Regulation in China*. 77-89

¹⁴¹ Of course, risk aversion has to do with relationships and also with something one could call "loss of face". We believe that the cultural approach Ma and Ortolano use obscures rather than clarifies matters.

¹⁴² Jahiel, "The Organization of Environmental Protection in China."

¹⁴³ Compare with Lo and Leung, "Environmental Agency and Public Opinion in Guangzhou: The Limits of a Popular Approach to Environmental Governance." 677, Sinkule and Ortolano, *Implementing Environmental Policy in China*. 189, Ma and Ortolano, *Environmental Regulation in China*. 62

¹⁴⁴ Lo and Fryxell support our point here when they write that the Guangzhou EPB which has had less support than the Dalian EPB has relied more on cooperative enforcement strategies. See Lo and Fryxell, "Enforcement Styles Among Environmental Protection Officials in China." 109 In another study both authors found that governmental support is

strongly influenced by such risk aversion, enforcement action should be strict enough that the bureau is not criticized for weak enforcement, but not too strong to upset the regulated actor and the local government. For sanction decision makers, whether agents or bureau leadership a psychology of risk aversion has led to bargained and explanatory cooperative enforcement. The director of one of the enforcement agencies explained to me that enforcement work is stressful. "This year I have punished 187 violation cases; I have made at least 187 enemies. Sometimes I am so worried about their repercussions that I cannot sleep at night."¹⁴⁵ He further explained how his agency deals with this problem: "Our motto now is, make friends from your enemies. We do so by explaining as much as possible why we have to issue sanctions and by offering our services for compliance." In the DMB's strict enforcement against the Public Hygiene Department case, this is exactly what the bureau did. Although it fined the department strictly, after execution of the fine, it immediately started a reconciliation process. In this process, the DMB enforcement agents invited hygiene officials to several dinners and tea sessions, during which they tried to explain their strict fines and limited options for leniency. The bureau agents have also offered their services to ensure future compliance.

Another DMB agent has provided further information about how enforcement agents deal with the risk of making enemies out of punished violators. "I play white face, red face (*bailian honglian*), or 'good cop, bad cop', as your American movies would call it," he told me just after I had seen him explain his enforcement decision to an employee of a violating firm. During this interview, I was fortunate enough to witness the whole conversation between agent and violator: half an hour earlier a man wearing a red construction helmet and dust and dirt stained clothes walked into the agent's office. He had an appointment to speak about the enforcement decision against his construction company that had violated the Kunming Urban Water Discharge Management Standards when building a large prestigious project in the center of town. The agent asked the man friendly to take a seat and explained why the bureau had decided to fine the violation. The first problem, the agent explained, was that the firm did not apply for the proper water discharge permit. The man immediately started his defense, "Our project is very important and the Kunming government wanted us to start as soon as possible, especially because many old houses were destroyed in preparation and the land must not lay barren. We had no time to apply for a

more influential than societal support for the perceived level of enforcement effectiveness. See Lo and Fryxell, "Governmental and Societal Support for Environmental Enforcement in China: An Empirical Study of in Guangzhou."

¹⁴⁵ Based on an interview with the Vice-director of the DMB Enforcement Agency, 15 November 2004.

permit. We have just applied for one now though..." The agent did not let him continue and explained the second violation: destroying and replacing existing sewage pipes without following the proper procedures and standards. Again, the man started a defense, this time that another government department had demanded that these pipes be replaced. Remaining calm, the agent tried to control the man's lengthy monologue, "You listen, I talk". It had no effect; the violator's representative kept on explaining how it was not their fault. The agent opened a file containing the evidence for this case and took out a document. "Here is your boss's testimony stating that replacing the sewage was illegal and wrong. Look here is his red thumb print." The agent continued that he understood the mitigating circumstances of the time pressure to complete the project. This dialogue of accusations and defenses went on several times, until the agent started to talk about the sanctions, "Construction without the proper discharge permit is punishable with a minimum of 1000 to a maximum of 10.000 RMB. The second problem, illegally replacing sewage pipes, is punishable with a fine of minimally 5000 RMB and a maximum of 50.000." Moreover, the agent explained, playing his trump card, "Your firm also committed a third violation installing sewage installations with a sub-standard capacity for absorbing sand, which can cause flooding. This is a serious offense, which we have punished in another case with a fine of 50.000." Thus, ended his 'bad cop' routine, as the agent would later explain to me. With a friendly smile, showing the 'good cop', the agents explained that because of the good cooperation so far, the first violation would be forgotten, especially because the firm had applied for a permit. "The third problem," the agent explained, "I am also willing to let go this once, since your firm is acting directly on orders of the Kunming government." The second violation, replacing sewage pipes remained though, and the agent explained that he had to fine this transgression because it could affect the whole sewage system. "However, I will not fine you at the maximum of 50.000 but only for 5.000 RMB," the agent finally said. "Thus", the agent clarified later to me, "I am able to make friends of enemies. First, they come here angry because we have fined them. Then I show them what we could have done and they leave feeling as if I have done them a favor." This case illustrates how bargaining arises out of risk aversion and second how this leads to laxer enforcement in which violations for which there are minimum sanction requirements are acquitted without sanctions. The full reason why this happens is more complex than mere risk aversion though.

Economic and Social Circumstances are crucial

Economic and social circumstances play a crucial role in the sanction decision-making process.¹⁴⁶ In most of the regular enforcement cases we studied, the decision not to enforce or enforce non-stringently concerned cases where compliance and strict sanctions might have a negative impact on local livelihoods and where violators were dominant employers.¹⁴⁷

The severest sanctions, closing an enterprise or ordering the destruction of a building, are rarely used in regular enforcement. The small FSS companies were never closed down in regular enforcement action, even though the problem had been clear for years (Chapter 10). The same applies to the *Yunzhi* paper factory, which needed a bankruptcy to end ongoing violations, while in fact a closure was warranted given the firm's lack of resources to transform to cleaner production (Chapter 8). Similarly, the Kunming Porcelain company has remained in operation, even though its pollution has been in such violation of law that closure is the only remedy, especially now that fines have never been paid and have not stimulated any cleaner production. For all these cases, enforcement agents have explained to me that local economic and social concerns prevented stern action.¹⁴⁸ For the FSS enterprises the fear is that their closure will ruin the whole phosphor production chain. (See Chapter 10) For the *Yunzhi* and Porcelain company the direct social consequences are large, both support a large number of workers and even pensioners, whose loss of income because of environmental protection would instigate much unrest. (See Chapter 10 and preceding sections)¹⁴⁹

Social concerns have also precluded the use of the strictest arable land protection sanction of forced demolitions. Except for the ordered

¹⁴⁶ Wang and Wheeler have already demonstrated that there is a correlation between the level of economic development and sanctions, compare with Wang and Wheeler, "Endogenous Enforcement and Effectiveness of China's Pollution Levy System." 20 Ma and Ortolano have demonstrated that EPBs in the 1990s were less strict for enterprises with financial difficulties. Ma and Ortolano, *Environmental Regulation in China*. 119 Compare also with Swanson et al's findings in rural Zhejiang in where enforcement was difficult due to economic constraints. See Swanson, Kuhn, and Xu, "Environmental Policy Implementation in Rural China: A Case Study of Yuhang, Zhejiang." 486

¹⁴⁷ Compare with Tang et al., "Institutional Constraints on Environmental Management in Urban China: Environmental Impact Assessment in Guangzhou and Shanghai." 869, who provide earlier examples from Guangzhou. See also Liu, "Obstacles of the Environmental Law Enforcement System and their Countermeasures (Huanjing Zhifa Tizhi Zhuangai ji qi Xiaochu Duice)." 1

¹⁴⁸ Based on interviews Kunming EPB staff, Autumn 2004, Kunming

¹⁴⁹ Here our analysis is in contrast with Ma and Ortolano's explanation that EPBs do not issue such strict sanctions because of fear of upsetting harmonious relationships. We believe that such risk aversion is in these cases first rooted in fear of upsetting the local economy and thus relationships with all local actors.

destruction of the farmer's house in Ningshi, the SLB never orders the forced demolition of illegal rural housing. "This would be too unreasonable," an agent explained to me, "these poor farmers have put their life's savings in these buildings and if we take that away from them unrest will erupt for sure."¹⁵⁰ The SLB agent further explained that their work is about maintaining social stability, as much as it is about protecting arable land.¹⁵¹ Thus a contextual goal influenced their primary goal of ensuring compliance. Fear of social instability has thus prevented SLBs to use their strongest instruments for punishing violations.

Social and economic concerns also seem to have prevented the bureaus to issue strict fines. In general, fines issued are only a fraction of the maximum allowed, or they are the minimum (in case there is a minimum sanction standard), or in some cases even such minimum is ignored. The minimum sanction of 50,000 RMB for general EIA violations is a good example. Enforcement agents do not issue fines at this minimum. "EIA violations are quite common, mostly at small enterprises. If we would abide by this minimum sanction the economic and social consequences would be too great," an agent told me. For restaurant violations, the same problem exists. According to the APPCL, restaurants without the proper smoke and smell installations should be fined with a minimum of 10,000 RMB. As we saw in Part II, Chapter 10, smaller restaurants, cannot afford the smoke installations, which cost 6000 RMB more than half of the initial investment of 10,000 RMB for the restaurant. However, they can also not afford to pay the APPCL fine minimum, which is about the same as the initial start-up capital. Agents know that if they follow the law's letter, many of Kunming's restaurants will face bankruptcy. Luckily, for this case, Kunming's legislation has made local legislation with lower sanctions (see Part II and the preceding section), enabling Kunming EPBs to issue sanctions while not damaging the local economy or instigating social unrest from hungry Kunmingnese or angry restaurateurs. Another example of weak fining because of economic and social concerns is the DMB sewage case, described above, we saw that the bureau chose not to issue sanctions for two quite major violations, one of which had a minimum sanction requirement. The bureau agent explained that the violations were an unfortunate but necessary part of Kunming's urbanization and should not be punished too strictly.

Review Procedures

Why have the bureaus been able to enforce leniently? Are there no consequences when the enforcement decision itself violates the law because

¹⁵⁰ Based on an interview with Kunming SLB staff, Autumn 2004, Kunming

¹⁵¹ Ibid.

violations detected are not met with the minimum sanctions the law demands? This brings us to the mechanisms for reviewing sanction decisions made. These review mechanisms have been too weak to control irregular enforcement decisions.

The three bureaus have two broad types of review mechanisms: internal and external. The internal review mechanisms consist of the checks and balances the bureau has set up internally to verify sanctions made. This first consists of the reports inspection agents must make after inspections and after issuing sanctions under the simple procedures. As we saw above, agency leadership will interview agents upon return from the field. Because the agents' work is difficult to verify, these post-enforcement interviews are not a strong method of knowing whether the law was properly applied. Even if, as sometimes does happen, the agency leadership finds that agents have not dealt strictly enough with the violation at hand, the *ne bis in idem* principle in the Law on Administrative Punishments, precludes issuing another stricter sanction decision for the same violation.¹⁵² In practice, bureau agents and their leaders know this rule, and I have not heard of instances where it has been broken. Apart from the internal checks for the simple procedure decisions, bureaus also check enforcement decisions of subordinate bureaus. This work is largely done by the legal affairs department, but may also be done by the Inspections and Processing Bureau (at the EPB) or the Enforcement Unit (at the SLB). Such vertical internal sanction review is as ineffective as that for simple sanctions. The first problem is that a real verification would mean that the superior bureau carries out new inspections, which is costly, especially because superior bureaus have less inspection staff than lower level bureaus. Second, the *ne bis in idem* rule here also prevents making a new stricter sanction decision for weak sanctions.

External review mechanisms have not been much more effective though. In external review mechanisms regulated actors or third parties, other than the enforcement agents or their superiors, initiate procedures to review or verify sanctions. One can wonder whether external review would help to enhance weak enforcement. Procedures initiated by the regulated actor will obviously only concern sanctions that are considered too strict; only review initiated by third parties will question weak sanctions. In some of the cases studied at Lake Dianchi, where local communities condoned and even supported violations, local actors are unlikely to initiate such action. Non-local public interest groups, such as NGOs, do not have standing under

¹⁵² Law on Administrative Sanctions §24

Chinese law to initiate administrative or legal review, unless their interests have been directly damaged by the decision in question.¹⁵³

There are two types of external review mechanisms: administrative review, and administrative litigation.¹⁵⁴ Administrative review is a legal procedure in which those affected by the enforcement decision can ask for a review of the original decision by the directly superior agency, either the bureau's local government or the bureau's vertical superior functional department at the next higher level of administration.¹⁵⁵ Administrative litigation is a concurrent option available to those that do not agree with sanction decisions. In this procedure, the applicant asks the court to review the case.¹⁵⁶ In China and in Kunming's local practice, enforcement agents have had little to fear from both these legal external review mechanisms.¹⁵⁷

China	1998	1999	2000	2001	2002	2003
Review %	0,7	0,5	0,4	0,4	0,3	0,3
Review Won %	55	58	44	66	67	66
Litigation %	1,6	0,8	1,1	1,0	1,0	0,6
Litigation Won %	93	95	95	98	96	95
Yunnan	1998	1999	2000	2001	2002	2003
Review %	1,5	6,1	0,7	10,7	0,9	0,9
Review Won %	0	71	0	83	50	80
Litigation %	0,5	0,9	1,6	6,8	1,3	0,9
Litigation Won %	0	100	100	100	100	100

Table 6. Administrative Review and Litigation EPB Enforcement Cases 1998-2003¹⁵⁸

¹⁵³ Law on Administrative Review § 2, Law on Administrative Litigation § 2, Supreme People's Court Interpretation of Certain Issues Regarding the Law on Administrative Litigation, 10 March 2000, § 23, 24

¹⁵⁴ There is also a third type, formal petitions, or *shangfang* in Chinese. We have not researched the impact of such petitions on enforcement. We do however acknowledge that citizens have been keen to write such petition letters when wrongly treated by their own government. See Chapter 9 and see also O'Brien, Kevin J., and Lianjiang Li. "The Politics of Lodging Complaints in Rural China."

¹⁵⁵ Law on Administrative Review § 2, 12, 13

¹⁵⁶ Law on Administrative Litigation § 2

¹⁵⁷ In contrast with our findings here, Tang's study shows that if pollutions victims would make use of collective administrative litigation suits for the most severe cases, their action could have a large impact. See Y.Y. Tang, "When Peasants Sue *En Masse*: Large-Scale Collective A.L.L. Suits in Rural China," *China: An International Journal* 3, no. 1 (2005). 24

¹⁵⁸ Won cases indicate EPB victories. SEPA, *Zhongguo Huanjing Tongji Nianbao 1998* (China Environmental Statistical Report 1998), SEPA, *Zhongguo Huanjing Tongji Nianbao 1999* (China Environmental Statistical Report 1999), SEPA, *Zhongguo Huanjing Tongji Nianbao 2000* (China Environment Statistical Report 2000), SEPA, *Zhongguo Huanjing Tongji Nianbao 2001* (China Environment Statistical Report 2001), SEPA, *Zhongguo Huanjing Tongji Nianbao 2002* (China

As historical data about pollution review cases in Table 6 demonstrate, both types of cases have been rare. Second, of the cases that were reviewed the majority was won by the decision-making bureau, this is especially true for administrative litigation cases, of which nationally EPBs have won more than 90 percent and in Yunnan in all but one year 100 percent.

The data in table six would lead us to believe that the legal review procedures do not influence enforcement decision making. The chances that there will be a case or that such a case is lost are just too low, one could say. Furthermore, most if not all cases of legal review will be initiated by the violator who thinks he has been punished too strictly, so the bureau has little to fear if it punishes too lightly, which we saw it does.

This analysis is partly in contrast with what we know about enforcement work. Although it is true that agents have at times issued irregular lenient fines, we also saw that the sanction decision-making process is carried out as much as possible according to the book. Agents in Yunnan, nowadays spend a lot of resources collecting the right evidence and the bureau makes sure that the sanction decisions made follow the law as close as possible.

Risk aversion can explain these contrasting phenomena. The three bureaus, like most Chinese bureaucracies, are afraid to lose a review or litigation case.¹⁵⁹ Even the slim chances of ending up with a case and losing it are sufficient to make bureaus emphasize legal procedures and evidence gathering. In the illegal sewer replacement case, the DMB agent kept on showing the evidence to the regulated actor, to show that starting review would not be beneficial. Apart from maintaining a working relation with the regulated actor, agents also worried about how to prevent review or administrative litigation. In the illegal public toilet discharge case, the violating Public Hygiene department did initiate administrative review against the DMB decision. After the Public Hygiene department lost this case, the DMB tried to explain their sanction decision over drinks and dinner, in order to prevent an administrative litigation procedure in court. When the DMB agents still feared the hygiene department would go to court, they threatened to make public that the department had been fined. The Hygiene

Environment Statistical Report 2002), SEPA, *Zhongguo Huanjing Tongji Nianbao 2003* (China Environment Statistical Report 2003).

¹⁵⁹ Pei Minxin's research has found similar findings and we have been influenced by his hypotheses. See M. Pei, "Citizens v. Mandarins: Administrative Litigation in China," *The China Quarterly* 152 (1997).

Department's fear of having the whole city know of its violation made it drop the litigation case.¹⁶⁰

If bureaus are so afraid of legal action and have learned to communicate in legal language, why do they still make irregular sanction decisions? The explanation is that bureaus quit following the letter of the law, so it seems, if the expected negative results of stern formal action will provide a more direct threat because economic or social concerns are at stake. If this is the case, bureaus will let the more eminent risk of criticism about a damaged economy or social stability prevails over worries about possible review or litigation.

Conclusion

Regular enforcement of natural resource protection law in China is difficult. In line with most scholarship, local protectionism is the root cause for enforcement difficulty. However, this study has gone a step further by trying to understand what has caused such local protectionism. It found that the conflict of interests between the law's formal goal of protecting natural resources and the locality's concern for local livelihoods was an important cause for protectionist practices. It is this conflict of interests that has influenced local governments to use the relative autonomy they have had since reform to adapt local law enforcement to local concerns. Therefore, the present research emphasizes that there is a reason for local protectionism and that unless that reason is addressed local protectionism's influence on weak enforcement will remain. Because the conflict of interests forms the heart of the problem, we do not believe that a mere recentralization of enforcement authority will solve it. Unfortunately, because the vertical management reform has only been initiated recently, we cannot yet support this hypothesis.

Local protectionism has adversely influenced enforcement. It has created weak institutions with conflicting goals, lacking resources and personnel structures with sufficient incentives for job conformity. This is

¹⁶⁰ There is another explanation for understanding why bureaus work according to legal procedure even though there is a slim chance that they are ever held legally accountable. The constant emphasis on the establishment of a legal system and a system based on law, even though often no more than hollow propaganda, has started to influence bureaus and their agents so it seems. Legal language is used throughout the bureaus even though the content of the law is not often followed to the letter. However because of all the constant training seminars and study sessions on new legislation, the formal language of the law seems to have started to influence enforcement work in practice, even if it is only that enforcement agents try to legitimize their sub-optimum enforcement within the legal framework they have learned for communication. Compare with the literature on the communicative working of law discussed in Chapter 2.

especially so for the EPBs who put local interests above those of the law. The enforcement procedures have further exacerbated the local protectionist influences, as they have given local governments and the bureau leadership they directly appointed a strong role in the sanction decision-making process. The risk aversion that characterizes law enforcement agents has been another important catalyst for the local protectionist influence on weak enforcement. Agents, fearing problems with strong local actors, have opted to enforce in a less strict and formal way than they are supposed to. The large amount of discretion regular enforcement procedure leaves agents in the field has enabled agents to adopt such cooperative enforcement styles.

Part of the enforcement problem is practical. In practice, limiting agent discretion has been difficult because of the complexity of measuring enforcement results and verifying enforcement action made in the field. Furthermore, for some types of complex violations such as pollution violations, agents can only detect the violation by cooperating with the regulated actor, especially in remote areas where the local population does not actively report secret discharges. The result of all this is that regular natural resource protection law enforcement in Kunming has been cooperative, informal and non-stringent.

14. Movements of Law

Political Legal Campaigns to Enhance Enforcement in Kunming and China

Introduction

The summer of 2004 witnessed changes in Kunming. In June 2004, we could no longer meet leadership in our three villages, as they were too busy in conferences with the district level government about the need to stop illegal land practices. What had been condoned and even actively promoted for years, now had to end. Before July 15, so the district government demanded, all illegal land practices had to be legalized. Even though village and township leadership saw that the legalization of illegal land practices would come at tremendous costs for local businesses and thus the local economy, this time they could not shirk their duties and allow violations to continue. In the following weeks village leaders were busy notifying illegal land users and persuading them to pay the costly legalization procedures. Around the same time, the Kunming EPB finally found evidence to fine the small FSS chemical factories that were discharging without installations and obstructing EPB inspections. Additionally, the EPB also found evidence of *Huafu's* illegal nightly discharges¹. Both violations were detected during extra nightly inspections the KEPB carried out in the summer of 2004.

The sudden land legalization and the extra pollution inspections did not occur by accident but were part of national political campaigns, one to enhance arable land protection, and the other to combat pollution. For land this was the third time that such a campaign was organized, the first was in 1997/1998 and the second in 2003. For environmental law, SEPA had tried over the last nine years or more to put campaign pressure on local governments and EPBs to enhance their enforcement.² First in 1996 the State Council together with SEPA initiated a campaign known as the *shimuxiao* (fifteen small), which was aimed at closing several types of severely polluting enterprises.

This chapter will analyze the effect these campaigns have had on enforcement. It will study how and why enforcement changes during these campaigns and how this affects compliance. This research again draws on data collected during fieldwork in Kunming, national reports and national statistics. First, a section introduces the general use of political-legal

¹ Based on interviews with Kunming EPB agents and enterprise managers.

² Other examples of such campaigns aimed at the legal system development are the "Strike Hard" campaigns, the anti-corruption campaigns and the legal education campaigns. For anti-corruption campaigns see (Ye 2002). For strike hard campaigns see (Tanner 1999; Hu 2002). For legal education campaigns see (Exner 1995). On pre-reform mass campaigns see (Bennet 1976).

campaigns in China. Subsequent sections detail land enforcement campaigns and pollution enforcement campaigns, followed by a conclusion.

Political-Legal Campaigns in China

Since the beginning of the post-Mao legal reform program, China's leadership has made use of political pressure to enhance its legal system. These political campaigns overcame local resistance (See Chapter 13)³ and achieved unusual success in implementing the law. For instance, in 2001 the police of Sichuan, China's largest province with nearly one hundred million residents, solved 6706 crimes and apprehended 19,446 people, in just six days.⁴ Furthermore, between 1986 and 1990, approximately 640 million people in China received education on its ten basic laws, including the constitution, criminal law, civil law, marriage law, and succession law.⁵ On August 13, 2003, forty-two million pirated CDs were destroyed throughout China.⁶ On June 26, 1996, the International Day against Drug Abuse and Illicit Trafficking designated by the United Nations General Assembly, it was reported that around 1.75 million people attended public rallies organized by the courts that convicted 1725 criminals for drug-related crimes.⁷

There have been two types of campaigns. The first one aims at enhancing law enforcement through command and control type methods. The most famous examples were the Strike Hard campaigns⁸ that imposed severe punishments upon criminals. These campaigns attracted international attention because of the large number of death penalties they brought—

³ See Van Rooij, "China's War on Graft: Politico-Legal Campaigns Against Corruption in China and Their Similarities to the Legal Reactions to Crisis in the U.S." Ho, "Who Owns China's Land? Policies, Property Rights and Deliberate Institutional Ambiguity." 394, Alford and Liebman, "Clean Air, Clean Processes? The Struggle over Air Pollution Law in the People's Republic of China." 109, Peerenboom, *China's Long March toward the Rule of Law*. 256-7, 314-15, Keller, "Sources of Order in Chinese Law." 733, D.C. Clarke, "Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments," *Columbia Journal of Asian Law* 10, no. 1 (1996). 41-9, Lubman, *Bird in a Cage: Legal Reform in China after Mao*. 302-4

⁴ Amnesty International, *China: 'Striking harder' than ever before* (ASA 17/022/2001) (6 July 2001 [cited 26 August 2003]); available from <http://web.amnesty.org/library/index/ENGASA170222001>.

⁵ C. Cai, "Dui 'Guanyu Shenru Kaizhan Fazhi Xuanchuan Jiaoyu de Jueyi (Caoan)' de Shuoming (Explanation to the (Draft) Opinion on Deepening and Developing Legal System Propaganda and Education)," *Zhonghua Renmin Gongheguo Guowuyuan Gongbao (Gazette of the PRC State Council)* 645, no. April 13 (1991).195

⁶ W. Liu, "Huge Haul of Discs Destroyed," *China Daily*, 13 August 2003.

⁷ Xinhua News Agency, "Over one million attend anti-drugs rallies," *Summary of World Broadcasts Asia Pacific*, 28 June 1996.

⁸ For an overview of the earlier strike hard campaigns, see generally H.M. Tanner, *Strike Hard! Anti-Crime Campaigns and Chinese Criminal Justice, 1979-1985* (Ithaca, NY: Cornell University, 1999).

especially the last one in 2001.⁹ So far there have been three large-scale Strike Hard campaigns—the first in 1983, the second in 1996, and the third in 2001. These campaigns focused on harsh punishment of severe crimes. At the same time there have been many smaller Strike Hard campaigns against specific types of crimes, such as drug-related crimes in 1991, illegal border-crossing in 1993, and car theft in 1998.¹⁰ There have also been campaigns similar to the Strike Hard campaigns, but directed towards other violations of law, not falling under ordinary crimes. For example, there were campaigns against the Falun Gong,¹¹ copyright violation campaigns,¹² campaigns against illegal internet cafés (after the explosion of an internet bar in 2002),¹³ and, finally, campaigns against environmental law violations.¹⁴

⁹ Amnesty International, *China: 'Striking harder' than ever before* ([cited], Amnesty International, *China: "Strike Hard" anti-crime campaign intensifies* (23 July 2002 [cited 27 July 2003]); available from <http://web.amnesty.org/library/Index/ENGASA170292002?open&of=ENG-CHN>, Amnesty International, *One Thousand Executed in "Strike Hard" Campaign Against Crime* (1996 [cited 27 July 2003]); available from <http://www.amnesty.it/news/1996/31707196.htm>, Amnesty International, *People's Republic of China, Serious Human Rights Violations and the Crackdown on Dissent Continue* (Amnesty International, 1 September 2002 [cited 27 July 2003]); available from <http://web.amnesty.org/library/index/ENGASA170472002>.

¹⁰ Supreme People's Court, "Zuigao Renminfayuan Guanyu Yangge Zhixing [Quanguo Renmin Daibiao da Hui Changwu Weiyuanhui Guanyu Jindu de Jueding] Yanzheng Dupin Fanzui Fenzi de Tongzhi (Supreme People's Court Notice on Strictly Implementing [the SCNPC Decision on Banning Drugs] and Strictly Punishing Drug Related Criminals)," *Gazette of the Supreme People's Court* 25 (1991).¹⁰ Supreme People's Court, "Zuigao Renminfayuan Guanyu Yanlidaji Toudu Fanzui Huodong de Tongzhi (Supreme People's Court Notice on Striking Hard Against Illegal Border Crossing)," *Gazette of the Supreme People's Court* 36 (1993).¹⁴⁷ Supreme People's Court et al., "Zuigao Renmin Fayuan Zuigao Jianchayuan Gonganbu Guojia Gongshang Xingzheng Guanliju Guanyu Yinfa [Guanyu Yifazhiguo Chachu Daoqie Qiangjie Jidongche Anjian de Guiding] de Tongzhi (SPC, SPP, PSB and SBIC notice on the issuing of [the Regulation on the Robbery and Theft of Motor-driven Vehicles])," *Gazette of the Supreme People's Court* 55 (1998).

¹¹ Human Rights Watch, *Dangerous Mediation, China's Campaign Against Falungong*, 21, 27-28, 34, 36, 40.

¹² Y. Wang, "Capital Succeeds in Crackdown on Crimes," *China Daily*, 1 December 2001, Xinhua News Agency, "Anti-pornography, anti-piracy campaign 'fruitful'," *Summary of World Broadcasts Asia Pacific*, 31 May 1996, Xinhua News Agency, "Authorities taking 'stern action' against copyright pirates," *Summary of World Broadcasts Asia Pacific*, 13 May 1996, Xinhua News Agency, "Beijing Police make 'largest-ever' illegal CD seizure," *Summary of World Broadcasts Asia Pacific*, 13 May 1996, Xinhua News Agency, "Police Ordered to Crack Down on Piracy of Copyrights," *Summary of World Broadcasts Asia Pacific*, 25 May 1996, Xinhua News Agency, "USA, China avert trade war over copyright," *Summary of World Broadcasts Asia Pacific*, 18 June 1996, J. Zhou, "Anti-counterfeit move threatens Silk Alley," *South China Morning Post*, 11 May 2001.

¹³ L. Tsui, "The Panopticon as the Antithesis of a Space of Freedom, Control and Regulation of the Internet in China," *China Information* 17, no. 2 (2003). 65, 71.

¹⁴ Van Rooij, "Implementing Chinese Environmental Law through Enforcement, the *Shinnu Xiao* and *Shuangge Dabiao* Campaigns." 169-177; B. Van Rooij, "Implementation of Chinese

The second type of politico-legal campaigns are campaigns directed towards either enhancing the legal system as a whole, or just the implementation of a single law through dissemination of legal knowledge and raising people's awareness. The most important campaign of this sort is the *Pufa* (legal dissemination) campaign, which aims to educate the Chinese public about various laws. This five-year campaign has been organized four times since 1986.¹⁵ It provides basic legal education to most Chinese. As early as 1989, one author noted that "[j]ust about every Chinese citizen has been involved with or exposed to this campaign."¹⁶ A special type of legal education and awareness campaign, the *Pufa* campaign implemented the 1987 Organic Law on Village Committees (OLVC, amended in 1998). During several campaign rounds, the Ministry of Civil Affairs publicized this law and raised public pressure to overcome the local cadres' resistance to its implementation.¹⁷

China's politico-legal campaigns share common characteristics. First, during campaigns top level leaders start to support the law.¹⁸ Whereas in

Environmental Law: Regular Enforcement and Political Campaigns," *Development and Change* 37, no. 1 (2006): 7-9.

¹⁵ For an overview of the earlier campaigns, see R.J. Troyer, "Publicizing New Laws: The Public Legal Education Campaign," in *Social Control in The People's Republic of China*, ed. R.J. Troyer, J.P. Clark, and D.G. Royek (New York: Praeger, 1989): 70-83; M. Exner, "Convergence of ideology and the law: the functions of the legal education campaign in building a Chinese legal system," *Issues and Studies*, no. August (1995): 68-102.

¹⁶ Troyer, "Publicizing New Laws: The Public Legal Education Campaign," 70.

¹⁷ J. Gu, "Yifa Zuohao Cunweihui Huanjie Xuanju (Tanyuan yu Sikao) (Implementing the Next Round of Village Committee Elections Based on Law (Causes and Ideas)," *People's Daily*, 10 April 2002, Ministry of Civil Affairs, *Xinban "Zhonghua renmin gongheguo cunmin weiyuanhui xuanju guizhang" jinri chubao* (Today We Publish a New edition of the "PRC Measures on Village Committee Elections") (Ministry of Civil Affairs, 29 November 2001 [cited 16 September 2003]); available from <http://www.mca.gov.cn/news/news2001112901.html>. For an overview of the literature on earlier campaigns and elections, see Liu, "Consequences of Villager Committee Elections in China, Better Local Governance or Consolidation of State Power.", Manion, "The Electoral Connection in the Chinese Countryside.", O'Brien, "Villagers' Committees, Implementing Political Reform in China's Villages.", O'Brien and Li, "Accommodating 'Democracy' in a One-Party State: Introducing Village Elections in China.", C. Shi, *Collective Democracy: Political and Legal Reform in China* (Hong Kong: Chinese University Press, 1999), Xu, "Mutual Empowerment of State and Peasantry: Grassroots Democracy in Rural China."

¹⁸ X. Deng, *Deng Xiaoping Wensuan Disan Juan* (Selected Works of Deng Xiaoping, Volume 3) (Beijing: Renmin Chubanshe, 1993): 33, Y. Meng, "Criminal Gangs Targeted in Strikes," *China Daily*, 24 November 2001, O'Brien and Li, "Accommodating 'Democracy' in a One-Party State: Introducing Village Elections in China.", Wen Wei Po newspaper, "Public Security Minister urges learning from Guangdong on serious crime cases," *Summary of World Broadcasts Asia Pacific*, 30 May 1996. Xinhua News Agency, "Luo Urges Continuation of 'Strike Hard' Campaign," *China Daily*, 20 July 2003, Xinhua News Agency, *President Hu Calls for Efforts in 'Strike Hard' Campaign* (Xinhua Wang online) (2003 [cited 28 July 2003]); available from <http://test.china.org.cn/english/China/68372.htm>. Gu, "Yifa Zuohao Cunweihui Huanjie Xuanju (Tanyuan yu Sikao) (Implementing the Next Round of Village Committee Elections

certain cases bureaucratic or local resistance would normally make implementation of the law impossible, the political pressure of the campaign ensures results, at least temporarily.¹⁹ Leadership and civil servant evaluation systems (*kaobe*) have been key to the campaigns' successes in implementation. The aims of the campaign (such as implementation of certain laws and regulations) become part of the policy priorities that form the basis on which bureaucratic leadership gets evaluated, rewarded and disciplined through the cadre responsibility and the civil service systems.²⁰

Second, in some cases, political power holders start the campaign by changing the existing legislation to allow for stricter enforcement.²¹ For example, during the first Strike Hard campaign in 1983, the Criminal Code was amended to allow for more "severe punishments, including the death sentence, on offenders who cause grave harm to public order."²² Another 1983 Strike Hard amendment was the suspension of the right to appeal a death sentence to the Supreme People's Court.²³ We can see that such campaigns thus bear a linkage with the ad-hoc-type lawmaking analyzed in Part II, Chapter 5.

Third, national policymakers choose which laws and which aspects of the laws are to be the focus of the campaign.²⁴ Campaigns thus provide

Based on Law (Causes and Ideas).", State Council, "State Council Decision on Several Problems concerning Environmental Protection (Guowuyuan guanyu Huanjing Baohu ruogan Wenti de Jueding)." Xinhua News Agency, "Police Ordered to Crack Down on Piracy of Copyrights.", Xinhua News Agency, "Politburo member Hu Jintao calls for broad participation in crime crackdown," *Summary of World Broadcasts Asia Pacific*, 6 May 1996. Van Rooij, "Implementing Chinese Environmental Law through Enforcement, the *Shinu Xiao* and *Shuangge Dabiao* Campaigns.", Wang, "Capital Succeeds in Crackdown on Crimes."170Van Rooij, "Implementation of Chinese Environmental Law: Regular Enforcement and Political Campaigns." 7, Troyer, "Publicizing New Laws: The Public Legal Education Campaign." 73.

¹⁹ For the clearest example, see Van Rooij, "Implementing Chinese Environmental Law through Enforcement, the *Shinu Xiao* and *Shuangge Dabiao* Campaigns."170Van Rooij, "Implementation of Chinese Environmental Law: Regular Enforcement and Political Campaigns." 7

²⁰ This assumption is based on the author's interviews with environmental enforcement agents conducted in Kunming in 2004. See also Edin, "State Capacity and Local Agent Control in China: CCP Cadre Management from a Township Perspective." 35, 52.

²¹ Z. An, "On Capital Punishment," *Beijing Review* 45, no. 7 (1983). 4, quoted in *Beijing Review Article Explains Capital Punishment*, BBC Summary of World Broadcasts: Asia-Pacific, Nov. 15, 1983, at K1; B.L. McCormick, *Political Reform in Post-Mao China, Democracy and Bureaucracy in a Leninist State* (Berkeley: University of California Press, 1990). 108-109, Potter, "Belief in Control: Regulation of Religion in China."317, 331.

²² An, "On Capital Punishment." 4.

²³ McCormick, *Political Reform in Post-Mao China, Democracy and Bureaucracy in a Leninist State*. 108-109.

²⁴ Meng, "Criminal Gangs Targeted in Strikes.", Supreme People's Court, "Zuigao Renminfayuan Bangongting Zhuanfa Guojia Shangjianju Gonganbu [Guanyu Yanli Daji Bufafenzi Weizao Bianzao Maimai Shangjian Danzheng Xingwei de Tongzhi] de Tongzhi

political choices on how to allocate the limited implementation resources. After making these choices, the central political leadership communicates it and orders uniform implementation throughout the campaign's target area.

The fourth aspect is that the campaigns provide a standard working procedure. Most campaigns begin by selecting their participants and preparing the main policy documents.²⁵ At the beginning of some campaigns, local officials evaluate the relevant local issues, and central level policymakers turn the issues into solution proposals on the basis of these evaluations.²⁶ Governmental officials involved in the campaign then initiate implementation throughout China. Finally, at every level of implementation, officials have to evaluate the progress and report to the higher level, and are sometimes inspected.²⁷ Some campaigns focus on learning from the best local practices.²⁸ They can be either major violation cases in enforcement

(Supreme People's Court Office Notice Transmitting the State Commodities Bureau and Public Security Bureau [Notice on Striking Hard Against Illegal Forging, Alteration or Sale of Commodity Documents])," *Gazette of the Supreme People's Court* 14 (1988), Van Rooij, "Implementing Chinese Environmental Law through Enforcement, the *Shiwu Xiao* and *Shuangge Dabiao* Campaigns." 170-7, Van Rooij, "Implementation of Chinese Environmental Law: Regular Enforcement and Political Campaigns." 7-9

²⁵ McCormick, *Political Reform in Post-Mao China, Democracy and Bureaucracy in a Leninist State*. 106, CCP CC Bureau and State Council Bureau, *Zhonggong Zhongyang Bangongting Guowuyuan Bangongting Fazhu Tongzhi Jin Yibu Zuohao Cunmin Weiyuanhui Huanjie Xuanju Gongzuo* (The CCP Central Committee Bureau and State Council Bureau issue a Notice on Strengthening the Implementation of the Upcoming Round of Village Committee Elections) (Ministry of Civil Affairs, 19 August 2002 [cited 16 September 2003]); available from <http://www.mca.gov.cn/news/news2002081901.html>, Gu, "Yifa Zuohao Cunweihui Huanjie Xuanju (Tanyuan yu Sikao) (Implementing the Next Round of Village Committee Elections Based on Law (Causes and Ideas)." Van Rooij, "Implementation of Chinese Environmental Law: Regular Enforcement and Political Campaigns." 709, H. Shi, "Quanguo 'Er Wu' Pufa Jingyan Jiaoliu Huiyi (Conference to Exchange Experiences With regard to the National Second Five Year Legal Dissemination Campaign)," *Falünianjian* 1994 (1994)..

²⁶ See, e.g., Van Rooij, "Implementation of Chinese Environmental Law: Regular Enforcement and Political Campaigns." 7-9.

²⁷ Van Rooij, "Implementing Chinese Environmental Law through Enforcement, the *Shiwu Xiao* and *Shuangge Dabiao* Campaigns.", Wang, "Capital Succeeds in Crackdown on Crimes." 175, Van Rooij, "Implementation of Chinese Environmental Law: Regular Enforcement and Political Campaigns." 7-9, Ministry of Civil Affairs, *Guanyu Choubai Zhaokai Quanguo Cunweihui Xuanju Qingkuang de Tongzhi* (Decision on Preparing for Convening a Meeting on the Circumstances of Village Committee Elections) (Ministry of Civil Affairs, 2002 [cited 16 September 2003]); available from <http://www.mca.gov.cn/news/news2002091102.html>, F. Yang, "Destroying 800,000 Illegal CDs," *Huaxi Dushi Bao*, 3 December 2001, Z. Yao, "Quanguo Renda Changweihui Jiancha 'Er Wu' Pufa Jueyi ZHixing Qingkuang (SCNPC Inspects the Implementation of Opinion on the Second Five Year Legal Dissemination)," *Falünianjian* 1996 (1996). 181

²⁸ O'Brien, "Villagers' Committees, Implementing Political Reform in China's Villages." 41, Wen Wei Po newspaper, "Public Security Minister urges learning from Guangdong on serious crime cases." 74, Y. Zou, "Guanyu 1986 Nian Guanche Shishi Quanguo Renda Changweihui [Zai Gongminzhong Jiben Puji Falü Changshi de Jueyi] Qingkuang de Baogao (Report on the

type campaigns, or exemplary cases in education and propaganda campaigns. An additional issue is public involvement. Most campaigns make use of the mass population to enhance their effectiveness.²⁹ They do this either directly through education or indirectly through telephone hotlines, which allow citizens to voice complaints about violations, as well as through the reports on campaign progress and publication of model cases.

Land Campaigns

Until 2004, Jiacun village had thrived from developing its land. Farmers built second houses, while earning income from leasing their old one. Enterprises leased collective land, while the collective benefited from job opportunities and land leases. All of this, as we saw in Chapter 9, was in violation of the LMA. In the past these violations were condoned; even encouraged and regular enforcement did nothing to stop them. As we saw in Chapter 13, this was the result of local concerns for economic and social stability, combined with local autonomy and risk aversion of the enforcement agents and agency. On July 15, 2004, Jiacun's illegal land practices were about to change. Local governments including Yunnan's provincial level, Kunming's municipal level, Diandong's district level, Jiacun's township level, Jiacun's village level and even Jiacun's seven sub-village levels became involved in a nationwide campaign to stop illegal land practices. What had been impossible in the past because of local resistance would now be done, so it seemed on July 15. Not just in Jiacun village, but also in Licun and Baocun where fewer, but similar violations of the LMA had been taking place. In fact, all of China's villages became involved in the national 2004 illegal land use campaign.

Circumstances of Implementation in 1986 of the SCNPC [Opinion on the Basic Dissemination of Legal Knowledge among the People]," *Falüinianjian* 1988 (1987). 675. For environmental enforcement campaigns, a local practice from Zhejiang province to involve local farmers as inspection agents was propagated as a preferred method in the 2002 campaign. Based on the author's personal correspondence with an anonymous official at the State Environmental Protection Agency (SEPA), Beijing, 2002.

²⁹O'Brien and Li, "The Politics of Lodging Complaints in Rural China." 482-483, BBC, *China 'outstrips world' on executions* (Asia Pacific) (BBC News, 6 July 2001 [cited 28 July 2003]); available from <http://news.bbc.co.uk/1/hi/world/asia-pacific/1425570.stm>. China Daily, "150 Heroic Citizens Rewarded," *China Daily*, 27 October 2001, Van Rooij, "Implementation of Chinese Environmental Law: Regular Enforcement and Political Campaigns." 8, CCP CC Bureau and State Council Bureau, *Zhonggong Zhongyang Bangongting Guowuyuan Bangongting Fazhu Tongzhi Jin Yibu Zuobao Cunmin Weiyuanhui Huanjie Xuanju Gongzuo* (The CCP Central Committee Bureau and State Council Bureau issue a Notice on Strengthening the Implementation of the Upcoming Round of Village Committee Elections) ([cited]. H. Shi, *Sinu Pufa Yinianjian* (The Fourth Five Year Legal Dissemination Campaign's First Year) (Zhongguo Pufa Wang, 2002 [cited 8 September 2003]); available from <http://www.legalinfo.gov.cn/joa/shifadongtai/sfdt2002050901.htm>.

1997 and 1998 Campaigns in Preparation of the LMA

The 2004 land campaign was a continuation of earlier political efforts to strengthen arable land protection law. One of the earlier examples occurred in 1997 when a round of political pressure to enhance arable land protection started. At the time, China's leadership felt a sense of urgency about the looming crisis about arable land loss and food shortages.³⁰ The crisis not only led to stronger legislation to protect such arable land (see Chapter 3), but it also caused two rounds of campaigning to protect land while the new law was being drafted. The campaigns, organized in 1997 and 1998, introduced strict arable protection norms through extra-legal policy documents to be implemented in a campaign type fashion.

On April 15, 1997, China's highest political and administrative institutions, the CCP Central Committee (CCP-CC) and the State Council issued a joint notice in order to strengthen arable land protection.³¹ In this notice, these powerful institutions recognized the importance of dealing with China's ongoing land loss:

“Land is a most valuable resource and capital. China is a country with a low per capita amount of arable land, which in general is of an inferior quality...Protecting arable land therefore means protecting our life support line.³² However, the last years, some localities have converted land at random, illegally approved land usage and wasted land resources...Consequently, the total amount of arable land has sharply declined. The loss of arable land not only affects food production and agricultural development, but also influences the whole national economic development and social stability.”³³

³⁰ See Chapter 3

³¹ CCP Central Committee and State Council, "Zhonggong Zhongyang, Guowuyuan Guanyu Jinyibu Jiaqiang Tudi Guanli Qieshi Baohu Gengdi de Tongzhi (CCP Central Committee and State Council Notice on Further Strengthening Land Management in order to Realize the Protection of Arable Land)," no. 11, 15 April 1997.

³² Here the notice quotes a well known saying the then CCP secretary and president Jiang Zemin has been using since the mid-nineties to express his concern for arable land loss and to emphasize the need for arable land protection. See for example Z. Lin, *Wai Zou Madai: Kaushiji de Weiken zhi Meng (Going into Madai, A Dream of Land Reclamation in the New Century)* (16 August 2004 [cited 15 September 2005]); available from http://www.fj.xinhua.org/news/2004-08/16/content_2693392.htm.

³³ CCP Central Committee and State Council, "Zhonggong Zhongyang, Guowuyuan Guanyu Jinyibu Jiaqiang Tudi Guanli Qieshi Baohu Gengdi de Tongzhi (CCP Central Committee and State Council Notice on Further Strengthening Land Management in order to Realize the Protection of Arable Land)."

The first campaign concern was to strengthen macro-level land management. The joint notice introduced several new norms, which later would become part of the new Land Management Act (See Chapter 3)³⁴. First, the total amount of arable land may only increase, and not decrease, while the quality of land must be improved. Second, all governments must strive to enhance land use effectiveness, introducing a land balancing system in which the amount of land to be used for construction must be replaced by newly developed arable land. According to the 1997 notice, all existing land plans must be changed in order to adopt these new principles.³⁵

The joint notice further issued a so-called “freeze” (*dongjie*) for all non-agricultural construction projects using arable land. The freeze was to start on 15 April 1997 and to continue for one year. The joint notice of 1997 allowed only two exceptions. First, important projects that still needed to use arable land should apply for permission from the State Council. Second, construction housing for middle and lower level income families and other already approved important national construction projects could still be carried out under the existing approval framework of the pre-1998 LMA.³⁶ One can only imagine the impact this strict construction freeze could have had in a country as rapidly growing as China if it had been fully implemented.

Another measure adopted in the CCP-CC and State Council notice concerned village construction. The notice emphasized strict adherence to village land planning, which should be based on using as little arable land for construction as possible and if arable land is used, the worst quality land should be used first. Furthermore, the 1997 land campaign introduced another new norm: rural households may only build one house. Here, the campaign again introduced a norm that would only become officially legal after the 1998 LMA amendment.³⁷ The notice also stated that Township and Village enterprises should not use arable land, or use it as little as possible. Furthermore, it stated, as later regulated in the new LMA³⁸, that collective

³⁴ Land Management Act §18, 19, 31, 33

³⁵ CCP Central Committee and State Council, "Zhonggong Zhongyang, Guowuyuan Guanyu Jinyibu Jiaqiang Tudi Guanli Qieshi Baohu Gengdi de Tongzhi (CCP Central Committee and State Council Notice on Further Strengthening Land Management in order to Realize the Protection of Arable Land)."

³⁶ Ibid.

³⁷ LMA § 62.1

³⁸ LMA § 63

land may not be rented out for non-agricultural activities.³⁹ Thus, the campaign further pre-introduced new norms.⁴⁰

Except for these new policy norms, the joint notice also introduced a work plan to enhance current law enforcement. Similar to other political-legal campaigns the 1997 land campaign aimed to improve enforcement by setting up a joint enforcement investigations group, consisting of the State Land Management Bureau (the predecessor of the Ministry of National Land Resources), the Ministry of Construction and the Supervision Ministry. This group was to supervise the enforcement campaign and deal strictly with any irregularities found during their supervision.⁴¹ The enforcement work itself consisted of an overall inspection of all construction projects since 1991, including rural housing. This inspection work had to have been finished before October 1997, so in just under six months, quite a task considering the amount of construction during the early 1990s in China. The ministries in charge had to report the results to the CCP-CC and the State Council, and all violations found had to be dealt with strictly, so the notice regulated.

In order to make the overall inspection and sanction work feasible, the 1997 enforcement work was focused on several issues. First inspections were to look at development zones (*kaiifaqu*), which have since the 1990s been responsible for a large amount of arable land loss. Second, the campaign focused on commercial housing and commercial projects such as golf courses. Third, illegal land transfers and leases, and other land transactions were priorities. Finally, the campaign focused on collective construction on arable land.

This first campaign to protect arable land ran for a year, with a half a year period solely focused on enhancing enforcement. The campaign set-up was quite broad. It mostly consisted of symbolic statements that the norms should be implemented stricter and that stricter norms should be introduced. Remarkably, the joint notice held little detail about how the central level ministries are to deal with local resistance, other than that local governments should be educated and that study sessions should be organized for relevant cadre.⁴²

Because it occurred long before 2004, we have no specific data from our villages about this campaign. It seems though that it had little lasting impact, because the land violations witnessed in 2004 had originated already

³⁹ CCP Central Committee and State Council, "Zhonggong Zhongyang, Guowuyuan Guanyu Jinyibu Jiaqiang Tudi Guanli Qieshi Baohu Gengdi de Tongzhi (CCP Central Committee and State Council Notice on Further Strengthening Land Management in order to Realize the Protection of Arable Land)."

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

in the middle of the 1990s. The fact that China embarked on a new campaign in 1998 shows that national leadership believed a continued effort was necessary.

In 1998, the CCP CC and the State Council issued another joint declaration, "the notice on continuing the freeze of non-agricultural construction on arable land."⁴³ The 1998 joint notice stated that although the 1997 campaign had caused positive changes, illegal land practices remained and arable land was still threatened:

"Since the 1997 notice...all localities have done their utmost to implement the one year freeze on non-agricultural construction projects using arable land... Since the 1997 national inspection, however, we know that lax and idle land use are still serious and that the control of non-arable use construction on arable land has been very difficult."⁴⁴

To deal with these problems, the 1998 joint notice started another period during which all projects involving non-arable construction on arable land had to be halted. This was done in preparation of the new Land Management Act, and thus the period of the 1998 land freeze was to be from March 29 1998, until January 1 1999, the first day that the LMA would become effective.

2003 Controlling and Overhauling the Land Market Campaign

Since 1999, China has organized yearly campaigns to deal with recurring land loss violations.⁴⁵ After 2002, the campaigns gained momentum as national leadership was shocked by a nationwide survey about arable land protection. The survey found that illegal land practices continued and were responsible for an ongoing reduction of arable land. It found that in 2002 there had been 140,254 cases of illegal land use involving a total of 14,872 hectares of arable land.⁴⁶ The amount of illegally used arable land had increased 50% compared

⁴³ CCP Central Committee and State Council, "Zhonggong Zhongyang, Guowuyuan Guanyu Jixu Dongjie Feinongye Jianshe Xiangmu Zhanyong Gengdi de Tongzhi (CCP Central Committee and State Council Notice on Continuing to Freeze Non-Agricultural Construction Projects using Arable Land)," no. 2, 29 March 1998.

⁴⁴ Ibid.

⁴⁵ Editorial, "2003-Tudi Zhengdun Fengbao (2003-A Land Overhaul Storm)," *Nanfang Zhoumo*, 8 January 2004.

⁴⁶ Editorial, "Quanguo Tudi Zhengdun Dapandian: Kaifaqu Quandi 3 Wanpingfang Gongli, Fang Guotuziyuanbu Tudi Liyong Guanlisi Fusizhang Shu Keyin (An inventory of the National Land Overhaul, 30,000 Square Kilometers of Development Zones, an interview with Shu Keyin, vice director of the Ministry of National Land Resources Department of Land Use Management)," *21 Shiji*, 18 November 2003.

to 2001.⁴⁷ Although illegal land use consisted largely of farmers building illegal housing,⁴⁸ most attention went to the illegal construction of development zones. Such zones were set up throughout peri-urban China in order to promote trade and technological development. In general, zones take a large amount of arable land located on the outskirts of cities and towns. According to a 2003 survey, China had erected over 5000 such commercial development projects occupying a total of about 3000 hectares.⁴⁹ The fact that land violations had continued despite the earlier campaigns and the introduction of the new law made China's top leadership called for immediate action.⁵⁰

On 20 February 2003, supported by prime-minister Wen Jiabao⁵¹, the CCP CC and the State Council⁵², the Ministry of National Land Resources (MNLN) organized a video conference to discuss the ongoing land violations and arable land loss. During this conference, MNLN announced it would start another round of campaigning to curb ongoing violations and arable land loss.⁵³ This new round called "*Jinyibu Zhili Zhengdun Tudi Shichang Zixu*" (Further Controlling and Overhauling the Land Market System) was set for half a year from February until July 2003.⁵⁴ On 22 February, MNLN issued a working plan detailing how the campaign was to be conducted.⁵⁵

⁴⁷ Ibid.

⁴⁸ Between 2000 until 2002 there have been 400,000 illegal land cases 320,000 of which were housing. See W. Wang and L. Zhou, "Quanguo Tudi Weifa Shijian Pinchu, Quandi Re Heyi Lu Jinbuzhi? Guanyu Difang Zhengfu Tudi Weifa Anjian de Diaocha yu Sikao (Throughout the Nation Land Violations Frequently Occur, Why has the Trend of Occupying Land been So Difficult to Stop? Research and Reflection about Local Government Land Violation Cases)," *Renmin Ribao*, 24 April 2004.

⁴⁹ Editorial, "Quanguo Tudi Zhengdun Dapandian: Kaifaqu Quandi 3 Wanpingfang Gongli, Fang Guotuziyuanbu Tudi Liyong Guanlisi Fusizhang Shu Keyin (An inventory of the National Land Overhaul, 30,000 Square Kilometers of Development Zones, an interview with Shu Keyin, vice director of the Ministry of National Land Resources Department of Land Use Management)."

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ministry of National Land Resources, "Guotuziyuanbu Guanyu Yinfu "Jinyibu Zhilizhengdun Tudi Shichang Zixu Gongzuo Fang an" de Tongzhi (Ministry of Land Resources Notice on Initiating "The Work Plan for Further Control and Overhaul of the Land Market System")," no. 49, 21 February 2003.

⁵³ Editorial, "2003-Tudi Zhengdun Fengbao (2003-A Land Overhaul Storm)."

⁵⁴ Ministry of National Land Resources, "Guotuziyuanbu Guanyu Yinfu "Jinyibu Zhilizhengdun Tudi Shichang Zixu Gongzuo Fang an" de Tongzhi (Ministry of Land Resources Notice on Initiating "The Work Plan for Further Control and Overhaul of the Land Market System")."

⁵⁵ Ibid.

The working plan outlined four campaign principles. First, *zichu weizhu*, which means that self-reporting is central. The document explains that in the 2003 campaign the work by lower level governments and land bureaus is essential. These bureaus are to make reports about their own work detailing the current situation and problems relating to land violations and their control. Higher-level departments are to verify these lower level reports.⁵⁶ The second campaign principle is called *tuchu zhongdian*, which loosely translated means focusing on priorities. For education work the priority is educating leadership and management institutions in the importance of protecting arable land. For inspection and enforcement work the campaign lists several priorities, which we will look at in more detail below.⁵⁷ The third campaign principle was *zhong xai zhenggai* or in English “emphasizing complete reform”. This means that in the campaign problems should be addressed by their roots and as much as possible structural reforms should be made to solve the underlying causes.⁵⁸ The fourth principle in the 2003 land campaign was the differential approach or *qubie duidai* in Chinese. This means that arable land loss problems that originate before the LMA was amended in 1999 should be dealt with more leniently than those that have occurred thereafter in violation of the new law. The working plan calls such pre-1999 issues “historical problems”, whose historical causes should be understood and respected in the campaign. Problems that keep on recurring despite enforcement and campaign efforts should be dealt with strictly, the working plan states. For such recurring cases the responsible leadership should be addressed and if necessary punished. Furthermore, in cases, which can be prosecuted criminally, the procurate and the police should be notified.⁵⁹

As we just saw, the 2003 Campaign prioritizes inspection and enforcement work. As all political legal campaigns, the 2003 Campaign uses prioritization in order to enhance enforcement efficiency. During the campaign, enforcement agents are to focus on several types of violations, which must receive extra attention. In this manner enforcement, which normally is informal, becomes more formalized. (Compare with Chapter 12) The first enforcement priority in 2003 was for development zones and other large construction projects such as universities and golf courses.⁶⁰ The choice for curbing development zones’ use of arable land is not surprising with all

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

the media attention there has been for such zones since early 2003.⁶¹ Shu Keyin, vice-director of the MNLR Department of Land Use Management, stated in a published interview that development zones are a priority first because they severely waste land resources, but also because such projects cause social tensions between local governments and land developers on the one hand and under-compensated landless farmers on the other.⁶² The second 2003 campaign priority concerned non-agricultural construction on collective land, without carrying out the full land conversion procedures.⁶³ Again, this is not a surprising choice, as national data and our own case studies from Kunming demonstrate such violations are widespread and have had a major impact on the decrease of arable land.⁶⁴ The third priority concerned illegal land transactions, mainly for commercial property in cities, which is transferred obscurely without proper advertisement in the market.⁶⁵ The fourth and last campaign priority in 2003 was law enforcement itself. Lax law enforcement was to be addressed and strictly punished.⁶⁶

The work-plan of the first 2003 land campaign outlined four periods. During the first period, from 20 February to 10 March, the work-plan itself had to be distributed through video conferences to all land bureaus at district level or higher. MNLR also stated that it would send such land bureaus the relevant study materials. At the same time, CCP leadership in all bureaus had

⁶¹ Editorial, "Quanguo Tudi Zhengdun Dapandian: Kaifagu Quandi 3 Wanpingfang Gongli, Fang Guotuziyuanbu Tudi Liyong Guanlisi Fusizhang Shu Keyin (An inventory of the National Land Overhaul, 30,000 Square Kilometers of Development Zones, an interview with Shu Keyin, vice director of the Ministry of National Land Resources Department of Land Use Management)." For a later example of national media attention for development zones see the following article in the highly influential *Nanfang Zhoumo*: Editorial, "'Bie Duo zou Wo de Maitian'" ("Do not Deprive me of my Wheat Fields"), *Nanfang Zhoumo*, 8 January 2004.

⁶² Editorial, "Quanguo Tudi Zhengdun Dapandian: Kaifagu Quandi 3 Wanpingfang Gongli, Fang Guotuziyuanbu Tudi Liyong Guanlisi Fusizhang Shu Keyin (An inventory of the National Land Overhaul, 30,000 Square Kilometers of Development Zones, an interview with Shu Keyin, vice director of the Ministry of National Land Resources Department of Land Use Management)."

⁶³ Ministry of National Land Resources, "Guotuziyuanbu Guanyu Yinfa 'Jinyibu Zhilizhengdun Tudi Shichang Zixu Gongzuo Fang an' de Tongzhi (Ministry of Land Resources Notice on Initiating 'The Work Plan for Further Control and Overhaul of the Land Market System')."

⁶⁴ See Chapter 9 and Wang and Zhou, "Quanguo Tudi Weifa Shijian Pinchu, Quandi Re Heyi Lu Jinbuzhi? Guanyu Difang Zhengfu Tudi Weifa Anjian de Diaocha yu Sikao (Throughout the Nation Land Violations Frequently Occur, Why has the Trend of Occupying Land been So Difficult to Stop? Research and Reflection about Local Government Land Violation Cases)."

⁶⁵ Ministry of National Land Resources, "Guotuziyuanbu Guanyu Yinfa 'Jinyibu Zhilizhengdun Tudi Shichang Zixu Gongzuo Fang an' de Tongzhi (Ministry of Land Resources Notice on Initiating 'The Work Plan for Further Control and Overhaul of the Land Market System')."

⁶⁶ Ibid.

to erect special campaign working groups, which should include bureau leadership and be located at the bureau's enforcement division. Finally during this first period all local departments had to make their own work-plan, which should be given to higher level departments.⁶⁷

During the second phase, from 11 March until 10 April, all land department personnel had to study the relevant campaign documents issued during the first phase. For this, study sessions had to be organized. During such sessions personnel were also to study the relevant existing legal and policy frameworks in order to understand the importance of protecting arable land and to know in detail what the existing norms are.

In the third phase, from 11 April to June 10, the actual enforcement work started. In these months, all departments had to start inspections to detect existing violations. For violations found, strict sanctions should be issued and measures to solve the issues through reforms should be adopted. As the working plan stated rather cryptically:

“For problems discovered during the control and overhaul (campaign), those that need to be put straight should be firmly straightened out, those that need correction should be actively corrected, those that should be punished should be punished, those that need to be exposed should be exposed publicly.”⁶⁸

The principal enforcement work was to be done by municipal and city land bureaus, while provincial level bureaus strictly verified their activities. This worked through a bottom-up vertical reporting system, during which all bureaus were to report their work to higher level authorities. In case provincial level departments found that enforcement was too lax they should intervene. At the same time, the 2003 Campaign work-plan demanded that each province should choose one large violation case to be strictly punished and exposed publicly.⁶⁹

In the fourth and last phase, from 11 June until 30 July, all bureaus had to summarize their work and provincial level bureaus had to verify the work lower level bureau self-reported to have carried out. The work-plan stipulated that provincial level land bureaus should at least verify five per cent of all lower level cases. Before 10 July all provinces were supposed to hand in their final reports to MNLR. In this final phase reporting campaign results was the main goal. According to the work-plan all such reports should

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid.

honestly address what problems still exist and to what extent they are related to internal issues and how such issues can be solved.⁷⁰

Because of China's SARS crisis⁷¹, the original working plan could not be carried out.⁷² In order to continue the arable land protection, the State Council organized another video conference on 31 July 2003, during which prime-minister Wen Jiabao emphasized that "*Tudi shi Minsheng zhi Ben*" (Land is the root for the people's livelihood).⁷³ The videoconference formed the start of a series of campaigns continuing the original 2003 Campaign, organized between June and December.⁷⁴ First, a special campaign against development zones was launched in June.⁷⁵ Then in October MNLRL issued a notice about the continuation of the original general land market campaign⁷⁶, which in November was followed by an urgent State Council notice calling for a stronger land campaign effort.⁷⁷

To what extent have the 2003 campaigns been able to enhance arable land protection law compliance? Were they successful in decreasing illegal land use and arable land loss? Nationwide data reported just after the campaigns late 2003 and early 2004 are positive. According to these reports, the campaign detected more than 170,000 illegal land use cases, of which 128,000 were punished.⁷⁸ Furthermore, during the campaign 732

⁷⁰ Ibid.

⁷¹ Editorial, "Quarterly Chronicle and Documentation (April-June 2003)," *China Quarterly*, no. 175 (2003): 862-867.

⁷² Editorial, "Quanguo Tudi Zhengdun Dapandian: Kaifagu Quandi 3 Wanpingfang Gongli, Fang Guotuziyuanbu Tudi Liyong Guanlisi Fusizhang Shu Keyin (An inventory of the National Land Overhaul, 30,000 Square Kilometers of Development Zones, an interview with Shu Keyin, vice director of the Ministry of National Land Resources Department of Land Use Management)."

⁷³ Editorial, "2003-Tudi Zhengdun Fengbao (2003-A Land Overhaul Storm)."

⁷⁴ For an overview see Editorial, "Quanguo Tudi Zhengdun Dapandian: Kaifagu Quandi 3 Wanpingfang Gongli, Fang Guotuziyuanbu Tudi Liyong Guanlisi Fusizhang Shu Keyin (An inventory of the National Land Overhaul, 30,000 Square Kilometers of Development Zones, an interview with Shu Keyin, vice director of the Ministry of National Land Resources Department of Land Use Management)." Editorial, "2003-Tudi Zhengdun Fengbao (2003-A Land Overhaul Storm)."

⁷⁵ State Council Bureau, "Guowu Yuan Bangongting Guanyu Qingli Zhengdun Gelei Kaifagu Jiaqiang Jianshe Yongdi Guanli de Tongzhi (State Council Bureau Notice on Regulating and Overhauling the All Development Zones in order to Strengthen the Management of Land Used for Construction)," 30 June 2003.

⁷⁶ Ministry of National Land Resources, "Jinyibu Zhili Zhengdun Tudi Shichang Zixu Jiancha Yanshou Fangan (Plan on Continuing the Inspection and Verification of the Control and Overhaul of the Land Market System (Campaign)), 13 October 2003.

⁷⁷ State Council, "Guanyu Jiaqiang Gongzuo Lidu Jianyibu Zhili Zhengdun Tudi Shichang Zixu de Jinji Tongzhi (Urgent Notice on Strengthening the Continued Control and Overhaul of the Land Market System)," *Guofa Mingdian*, No. 7, 3 November 2003.

⁷⁸ Editorial, "Gedi Jiajin Chachu Tudi Weifa Anjian Chachu Lidu Jiada (Throughout China Land Violations are More Urgently Punished with Greater Force)," *Renminrinbao Hainvaiban*, 25

governmental officials received internal disciplinary sanctions (*chufen*) for their involvement in these cases and 134 individuals were prosecuted under criminal law. Similarly national reports proudly announced that the campaign had been successful in curbing the illegal land use by development zones. Of the 5658 development zones, 2046 had been disbanded during the 2003 campaigns, over 35 per cent.⁷⁹ Furthermore, MNLR published nine model violation cases, five in November and four in December, it had detected and severely punished, just as the campaign had planned.⁸⁰

These national data are not the full story though. The validity of the data presented in the reports is as any data in China doubtful.⁸¹ An indication of this is found in our fieldwork. When we first started our research in Kunming in January 2004, the 2003 campaign had just ended. By that time, the 2003 campaign had not affected Jiacun, Licun and Baocun as the national reports would lead us to believe. All of the violations discussed in Chapter 9 were ongoing still in early 2004 and the 2003 campaigns had not stopped them or even addressed them in any way. Kouxiang Township's development zone provides a good example. Even though the 2003 campaign aimed to curb all further development of such zones, especially by township governments, the Kouxiang government proudly explained their development zone work in May 2004.

General Set-up of the 2004 Controlling and Overhauling the Land Market Campaign

In June 2004, I learned things had begun to change in Kunming. This change became clear when the director of the Kouxiang development zone was suddenly relieved of his tasks and made responsible solely of local enterprise development instead of the development zone itself. The zone itself had been dismantled and further development forbidden.⁸² The termination of Kouxiang's development zone marked the start of the 2004 land campaign, the first one that would directly influence our fieldwork area in peri-urban Kunming.

March 2004. For older reports see Editorial, *Guanyu Tudi Shichang Zixu Zhili Chengdun yonguan Qingkuang de Tongzhi* (Notice on the Circumstances of the Land Market System Control and Overhaul (Campaign)) (4 December 2003 [cited 20 September 2005]); available from http://www.landchina.com/query/content.ASP?Article_ID=475&TitleImage=subject.gif.

⁷⁹ Editorial, "Zhengdun Tudishichangzixu Feifa "Quandi" 738 Ren Bei Chanchu (Overhaul of the Land Market, 738 People have bEen Punished for Illegal Land Occupation)," *Beijing Chenbao*, 12 February 2003.

⁸⁰ Editorial, "2003-Tudi Zhengdun Fengbao (2003-A Land Overhaul Storm)."

⁸¹ The problem of positive bottom-up reporting is well known in China. A lack of accountability and transparency makes it difficult for higher levels to get trustworthy information from subordinate departments.

⁸² Based on an interview with Kunming SLB enforcement agents, 8 December 2004.

Late 2003, despite the positive reports, China's national leadership recognized that arable land violations remained problematic. At the time, Sun Wensheng, minister of MNLRL stated:

"There are many obstructing factors influencing the protection of national land resources and rational land use. Law enforcement supervision problems are still apparent...Some local land authorities have been lax and not enforced strictly. Some cadre have engaged in humanism, popularism or laxness and this has opened the door for illegal elements."⁸³

During the same meeting minister Sun announced a continuation of the national land campaign in 2004, "The public can expect to see more officials with their land allocations deeds exposed."⁸⁴ National leadership's support for continued land campaigns was probably further fueled in January 2004 when China's most influential newspaper, the *Nanfang Zhoumo*, published a special report on a large illegal land use case involving a golf course in Shandong province.⁸⁵ In his speech on 5 April, minister Sun Wensheng repeated his concern for arable land loss and the necessity for a continued effort to enhance enforcement.⁸⁶

All of this finally culminated in the State Council's urgent notice calling for a further "deepening" of the 2003 land campaign.⁸⁷ The notice announced a six month nationwide effort to enhance the implementation of the LMA in order to protect arable land and control disorderly land use practices.⁸⁸ Similar to previous campaigns, the 2004 notice prioritized work. First, it urged regulating illegal land practices in which arable land was used without proper permission, speculation cases where arable land had been converted for construction but the land was not used, and in general cases in which land use was changed illegally. Second the notice called for dealing with land authorities and local governments granting permission for land use

⁸³ Editorial, "2003-Tudi Zhengdun Fengbao (2003-A Land Overhaul Storm)."

⁸⁴ M. Tang, "Land Allocation Abuses Probed," *China Daily*, 29 December 2003.

⁸⁵ Editorial, ""Bie Duozou Wo de Maitian" ("Do not Deprive me of my Wheat Fields")."

⁸⁶ W. Sun, *Renzhen Guanche Luoshi Dangzhongyang Guoqiyuan Bushu Jianjue Jinzheng Zhengdizhong Qinhai Nongmin Liji Wenti (We Must Sincerely Implement the CCP Central Committee and State Council's Strong Commitment to Correct the Problem that Farmer's Interests are Harmed in Land Requisitioning)* (8 April 2004 [cited 15 September 2005]); available from <http://www.clr.cn/front/chinaResource/read/news-info2.asp?ID=40864>.

⁸⁷ State Council Bureau, "Guowuyuan Bangongting Guanyu Shenru Kaizhan Tudi Shichang Zhili Zhengdun Yangde Tudi Guanli de Jinji Tongzhi (State Council Bureau Notice on the Urgency of Deepening the Overhaul of the Land Market towards Stricter Land Management)," no. 20, 29 April 2004.

⁸⁸ *Ibid.*

in violation of existing land use planning. Third, the notice addressed the issue of misuse or disabuse of land compensation fees. (For an example see the case of Xiaocun in Chapter 9) Furthermore it called for amending farmer compensation problems in general, addressing the issue of farmers receiving too little compensation for land lost.⁸⁹ This priority is logical as compensation issued had started to instigate rural unrest throughout China. In Kunming as we saw in Chapter 9, farmers started to engage in violent confrontations with township and village governments when they felt they had been unduly compensated. Last, protecting basic arable land formed a special priority in the campaign, calling for nationwide inspections on basic farmland use and strict punishment for violations found.⁹⁰

The campaign also introduced a new norm, not found in the LMA or other legislation: it called for another land conversion freeze, echoing the 1997 and 1998 campaigns. This time, for the duration of the campaign, i.e. six months, in all of China arable land could not be converted to non-arable usage. Furthermore, in localities in which the campaign brought forward serious irregularities, the temporary land freeze could be continued until such problems had been solved, so the notice decreed.⁹¹ Thus, once again the land campaigns introduced extra-legal norms, not just any norm, but a very strict one.⁹² Finally the campaign aimed at aiding the introduction of the vertical management system for local land bureaus (see Chapter 13), which was introduced in a separate State Council notice just two months prior.⁹³

The State Council 2004 campaign notice offered little detail about how the work was to be carried out exactly. It only stated that the responsibility for the campaign work would be delegated to provincial level governments.⁹⁴ On May 15 2004, MNLR issued a working plan, detailing how various governments and land bureaus were to implement the campaign.⁹⁵ This working plan first introduced five main principles on the basis of which the work was to be done. Some of these were copied from the

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² One can wonder about the legal status of such norm. Compare with the Law on Lawmaking.

⁹³ S. Council, "Guowuyuan Guanyu Zuohao Shengji Yixia Guotu Ziyuan Guanlitizhi Gaige Youguan Wenti de Tongzhi (State Council Notice on Problems of Reforming the Sub-provincial Land Resource Management System)," No. 12, OPZOEKEN 2004.

⁹⁴ State Council Bureau, "Guowuyuan Bangongting Guanyu Shenru Kaizhan Tudi Shichang Zhili Zhengdun Yangde Tudi Guanli de Jinji Tongzhi (State Council Bureau Notice on the Urgency of Deepening the Overhaul of the Land Market towards Stricter Land Management)."

⁹⁵ Ministry of National Land Resources, "Guotu Ziyuanbu Guanyu Yinfu <Shenru Kaizhan Tudi Shichang Zhili Zhengdun Gongzuo Shishi Fangan> de Han (Ministry of National Land Resources Document on Distributing the Realization Plan on the Deepening of the Control and Overhaul of the Land Market (Campaign))," No. 154, 15 May 2004.

2003 campaign: *zicha weizhu* (self-reporting is central), meaning that each level of administration must self report problems and solutions related to the campaign⁹⁶, *tuchu zhongdian* (focusing on priorities)⁹⁷, which is the list of priorities mentioned in the State Council's urgent notice.⁹⁸ Others were new: *mingque zeren* (clear responsibilities), which meant that provincial level governments were made responsible, while specific tasks were delegated to different local departments (see below)⁹⁹, *gaobao jiehe* (accomplish integration)¹⁰⁰, indicating that this large general land campaign should be integrated with special smaller ongoing campaigns on for example development zones and arable land protection¹⁰¹, *jiaqiang ducha* (strengthening supervision), which the document explains means that all localities must make their own workplans to carry out the tasks of the campaign and to organize working groups with delegated campaign responsibilities related to inspecting and verifying work done.¹⁰²

The MNLR 2004 campaign document further detailed what departments should cooperate in which tasks. The 2004 campaign had sufficient support from powerful leaders in the CCP CC and the State Council, to enable a coordinated effort involving departments with much more resources and power than just the MNLR alone. For instance, for enforcement work against arable land use abuses, the first campaign priority¹⁰³, land bureaus cooperated with the all powerful Development and Reform Departments.¹⁰⁴ This cooperation guaranteed that extra force was allocated to enhance weak regular law enforcement. It shows that during the

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ State Council Bureau, "Guowuyuan Bangongting Guanyu Shenru Kaizhan Tudi Shichang Zhili Zhengdun Yangge Tudi Guanli de Jinji Tongzhi (State Council Bureau Notice on the Urgency of Deepening the Overhaul of the Land Market towards Stricter Land Management)."

⁹⁹ Ministry of National Land Resources, "Guotu Ziyuanbu Guanyu Yinfa <Shenru Kaizhan Tudi Shichang Zhili Zhengdun Gongzuo Shishi Fangan> de Han (Ministry of National Land Resources Document on Distributing the Realization Plan on the Deepening of the Control and Overhaul of the Land Market (Campaign))."

¹⁰⁰ Ibid.

¹⁰¹ REF

¹⁰² Ministry of National Land Resources, "Guotu Ziyuanbu Guanyu Yinfa <Shenru Kaizhan Tudi Shichang Zhili Zhengdun Gongzuo Shishi Fangan> de Han (Ministry of National Land Resources Document on Distributing the Realization Plan on the Deepening of the Control and Overhaul of the Land Market (Campaign))."

¹⁰³ State Council Bureau, "Guowuyuan Bangongting Guanyu Shenru Kaizhan Tudi Shichang Zhili Zhengdun Yangge Tudi Guanli de Jinji Tongzhi (State Council Bureau Notice on the Urgency of Deepening the Overhaul of the Land Market towards Stricter Land Management)."

¹⁰⁴ Ministry of National Land Resources, "Guotu Ziyuanbu Guanyu Yinfa <Shenru Kaizhan Tudi Shichang Zhili Zhengdun Gongzuo Shishi Fangan> de Han (Ministry of National Land Resources Document on Distributing the Realization Plan on the Deepening of the Control and Overhaul of the Land Market (Campaign))."

campaign the highest levels of power and even departments normally not concerned with arable land protection were involved in stopping ongoing violations. Letting non-land departments cooperate in the campaign was also practical. For illegal use of compensation fees, the land bureau lacked knowledge and access to information. Therefore, the campaign document provided that for this type of priority the land bureaus should cooperate with Finance Departments and Accounting Departments.¹⁰⁵

Similar to the 2003 campaign, work was divided in self-reporting and verification of such reports. Provincial level governments organized the self reporting of the existing problems and the solutions found. After that, national level departments including MNLR, the Development and Reform Commission, the Ministry of Construction, the Ministry of Finance, the Ministry of Agriculture, the Ministry of Accounting and the Ministry of Supervision (*Jiancha Bu*) examined and verified these self-made reports through inspection visits and hearings.¹⁰⁶

Apart from the above, the 2004 MNLR document provided little more detail about how work is to be carried out exactly. It only stated that in case violations are found a limit time should be given to address the problems, which if then still not solved should be punished strictly.¹⁰⁷ Furthermore the document stated that local governments should deal with problems within their jurisdiction. If governments failed to address their own land problems those in charge should be held responsible.¹⁰⁸ Finally, like before the campaign emphasized openness of enforcement: "public inspections, public punishment, public prosecution, public disclosure."¹⁰⁹ Again emphasizing that large violation cases should be punished swiftly under as much media attention as possible.

For more detail about how the 2004 campaign was set up, we are lucky that we have a district level internal document. In this Kunming, Diandong District document the Diandong District Government provided detail about how to implement the national campaign.¹¹⁰ In Diandong District the main focus was on one of the national campaign's priorities, the existing illegal land practices in which land had been used without following the proper procedures. It demanded that before July 15 all existing illegal land practices should be rectified through renewed land application procedures with the township level governments. All cases in which land had

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Diandong District Government, "Guanyu Zhengdun Tudi Shichang Zixu Wanshan Jianshe Yongdi Shouxu de Tonggao (Notice on Enhancing the Land Use Procedures for the Overhaul of the Land Market System (Campaign))," 22 June 2004.

been used without full land reclamation or land use conversion procedures, such procedures had to be carried out once again. In our fieldwork villages this mainly meant that enterprises which had illegally leased collectively owned land would have to apply for the full land reclamation and land use conversion and compensation procedures the LMA provides for.

The Diandong notice distinguished different circumstances. Recognizing that the problem had historical roots, years of weak enforcement and condoning illegal practices needed for local development, older violations were dealt with more leniently than recent transgressions. Illegal land practices that had existed from before the 1997 first land campaign, so the notice stated, only needed to reapply for the relevant procedures and pay all fees and compensations needed, while they could continue to use the land as they had done in the past. For violations that had originated during the 1997 and 1998 campaigns, Diandong was stricter. Illegal land users had to pay a fine and taxes on top of the land procedure and compensation fees before their land use was legalized. A third category of violations, those between 1 January 1999 and 30 November 2003, had to carry out applications again, pay fines and taxes and had to balance the arable land used with newly developed arable land according to the law. For violations since 30 November 2003, violators had to be punished strictly.¹¹¹ For those violations that did not meet the criteria of the Kunming Overall Land Use Plan or the Dianchi Management Regulations (see Chapter 4), land users should destroy the constructions made on the land and restore it to its original use, especially if it concerns basic arable land.

Campaign work, so the Diandong notice decreed should be carried out by Township level governments. They were responsible for preparing the legalization process, which meant they had to investigate existing land violations, initiate applications for reparation procedures for those violations that should be legalized and make overall reports about the current situation. The reports and applications had to be given to the Diandong district National Land Resource Bureau for verification and approval. All of this should have had to be finalized before July 15 the Diandong notice stated. After this date illegal land users could no longer apply for reparative procedures in order to legalize their current land practices.¹¹² Such practices would remain illegal and in the future be punished harshly, the decree stated.¹¹³ For this it introduced new enforcement measures including an enforcement information network and a system of regular on site inspections.¹¹⁴

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Ibid.

The Diandong notice on the 2004 campaign finally introduced mechanisms to ensure that local governments at the Township level cooperate fully in the campaign instead of resisting national law and policy as they had done in the past. The document does so by incorporating results made in the campaign in the general cadre evaluation system (*kaohu*) (See Chapter 13). If governments failed to do their best to carry out the campaign and let land violations continue the decree stated leadership will be held responsible.

What was the effect of all these paper documents? Did they change ongoing land practices in China and in peri-urban Kunming in particular? And if they had an impact why was that? What changed and what did not, and again why?

Results of the 2004 Land Campaign in Kunming

There is only one way of answering the questions posed in the preceding section: by looking at what has happened in practice. As we saw, one source of information are governmental reports about campaign achievements. Unfortunately, such reports present only part of what actually happens. We are fortunate that for the 2004 land campaigns we were able to witness ongoing changes in the three villages we worked in.

If all earlier campaigns failed to affect local practice in peri-urban Kunming, the 2004 campaign did bring changes. Soon after the national campaign documents had been issued, provincial, municipal, district and township level governments convened a meeting in which the higher level government plans were translated into local policy and plans of action, similar to the Diandong notice just described above. Soon, in late June even the VC and *xiaozu* (sub-village leadership) convened in order to discuss the changes at hand. At all levels the new land campaign was discussed by leaders far beyond those merely working on land issues.

In Kunming's peri-urban land practice there was one main issue this campaign tried to address. This was the illegal land leases to non-collectively owned enterprises. As we saw, the LMA forbids leasing collectively owned land for non-arable use practices such as privately owned enterprises. In all three villages, but in Jiacun in particular, such illegal lease cases are the norm, not the exception (See Chapter 9). The 2004 campaign wanted to legalize such land practices by forcing illegal land users to apply for reparative land use procedures. In the first meetings on how to implement the campaign in Kunming it was proposed to do so strictly: converting both the land ownership to the state and the land use right to the enterprise.¹¹⁵ The enterprise would then have to pay for all fees and land use costs. In

¹¹⁵ Based on an interview with Jiacun village leadership 14 July 2004

Diandong this led to protest by VCs fearing that they and their farmers would lose all land related income which would in this plan only be paid to the state. In this district the plans were amended in reaction to the village level concerns.¹¹⁶ Now, the land ownership would be converted to the state, but the land use right would remain with the sub-village, which could then continue to receive land lease income. Meanwhile in Dianxi district's Kouxiang township, in Baocun and Licun the campaign also started. In Baocun the campaign would affect about ten companies and about 100 Mu of land.¹¹⁷ In the discussions the Baocun VC had with their Township authorities, a similar approach as that in Jiacun was adopted: converting the land ownership to the state, while letting the sub-village exercise the land use right by leasing it to the enterprises.¹¹⁸ In Licun, finally the campaign would affect about 20 Mu of land, the land the VC had rented from farmers and rented out to enterprises with a considerable profit.¹¹⁹ The approach for implementing the campaign in Licun was different from Baocun and Jiacun, because Licun's land had been leased for one lump sum instead of annual leases (See Chapter 9). Because of this, Licun village did not mind losing its land use right; the village could not lose land income because the enterprises had already paid. Thus, in Licun the original model was followed: converting the ownership to the state and the land use right to the enterprise.¹²⁰

In all three villages, at first, campaign work proceeded smoothly. All villages were able to meet the original deadline of July 15th, before which they had to report the existing problems and present plans for legalization. Work became more troublesome when the issue of legalization costs came up. These first included fees due for ownership conversion, from state to collective land. This so-called land conversion fee (*zhengyong fei*) was not set at the start of the campaign. At first, different fee standards were rumored to be used ranging from 20.000 RMB/Mu for land practices existing since before 1999 in the remote Kouxiang township area¹²¹ to up to 80.000 RMB/Mu for recent land use practices in Jiacun township, near to Kunming.¹²² What was clear from the start was who was going to pay for it. Formally the VC or the sub-village would have to pay for land use conversion because they were the ones retaining the land use right (at least in Jiacun and Baocun). However, village leadership soon decided to let the final land users, the enterprises pay for such costs. The rationale was that the

¹¹⁶ Ibid.

¹¹⁷ Based on an Interview with Baocun village leadership 15 July 2004

¹¹⁸ Ibid.

¹¹⁹ Based on an Interview with Licun village leadership 10 August 2004

¹²⁰ Ibid.

¹²¹ Based on an Interview with Baocun leadership 15 July 2004

¹²² Based on an Interview with Jiacun village leadership 16 August 2004

village should not have to pay for the extra security the enterprise would get, so it seems. Or otherwise, sub-villages knew they would not be able to pay and instead of instigating social unrest with villagers decided to shift the burden to the enterprises. The issue of land fees remained unclear for months. Thus, the existing legal land practices were reported and registered and the enterprises were notified of the changes at hand. However, because the exact fees were not yet set, the actual legalization could not proceed.

Meanwhile, many feared that if the campaign would be implemented according to plan the local effects would be disastrous. First of all, enterprises complained that this sudden change of policy was unfair. One enterprise manager in Baocun told me that if this legalization had been announced a year in advance he might have been able to save to pay for it. Now, he told me, the 60 Mu of land he had illegally used might force him into bankruptcy. In Jiacun, VC leadership was also concerned. The village vice-CCP secretary, in charge of enterprise development, told me that many of the village's enterprises would not be able to pay the fees so far discussed due for the land legalization. Similarly, Jiacun's village head and secretary told me that the current campaign heavily suppressed the village's development potential. First, it would affect current enterprises, but second because of the enhanced enforcement of these unfavorable rules the village would have difficulty attracting new enterprises and developing its current area of unused land. Licun's leadership agreed and as their secretary said: "The policy is good but because of it we will no longer be able to develop our land in the future."¹²³

The campaign also affected housing practices, mainly in Jiacun village. As we saw in Chapter 9, many farmers had illegally built a new house while renting out their old one. As of June 2004, sub-village councils stopped approving construction of new houses other than those constructed on land where the old house used to stand. For villagers who had so far not benefited from building a second house, the sudden change in policy was very unfair. The sub-village council chairman of Jiacun sub-village number 2 showed me an application for a second house filed just weeks after the campaign had started: "This villager was angry when I told that with the campaign building a second house is no longer allowed. He said: 'Why should I not be able to get the 2000 *yuan* my neighbor gets from renting his second house?'"

Late November 2004 the legalization fees were finally set. The worst rumors were confirmed as the fees and land rents were high. First enterprises would have to pay a land conversion procedure fee (*banzhengfei*) of 80,000 per mu, to be paid to the land bureau. Second, enterprises had to pay a lump

¹²³ Based on an interview with Licun VC leadership 10 August 2004

sum for renting the land use right from the sub-village, which is set at 200,000 for a 50 years period.¹²⁴ In Jiacun village, which is in many aspects the richest of the three villages studied, more than two thirds of the enterprises were reported not to be able to pay these new fees and rents. By the end of this research in December 2004, it seemed unlikely therefore that the campaign would actually be implemented according to the letter. As one of the village leaders told me two months earlier: "If we want to maintain our current level of development and continue to develop in the future, we must and will find a way around the campaign."¹²⁵

The 2004 land campaign was a mixed success. On the positive side, one could argue that the campaign did affect local resistance to the implementation of the LMA. Local governments down to the lowest grassroots sub-village council participated actively in the campaign. Existing illegal land practices that had been condoned for years, and that weeks prior to the campaign leadership had told us were legal, were now recognized as violations and reported as such. Furthermore, during the campaign new land practices in violation of the law were temporarily halted, such as for example the ban on building second houses in Jiacun.

The success is probably due to the fact that the campaign results were weighed in the *kaobe* cadre management system. Informants working at the Jiacun Township land bureau confirmed the importance of incorporating the campaign into this internal evaluation system.¹²⁶

On the negative side, first the campaign brought a sudden change with unfair consequences for many. Enterprises suddenly had to pay enormous fees for land practices that had been condoned for years. Similarly, unlucky farmers who in the past had not been able to benefit from building a second house found out that as of June this option was no longer available to them. Another negative consequence of the campaign was its possible impact on local development. If implemented to its letter many enterprises will have to close, while because of the higher costs of start-up attracting new enterprises in the future will be difficult. In addition, the campaign as set-up and executed in Kunming did not pay sufficient attention to local circumstances and failed to achieve its original goal of land protection. In order to keep control over outcomes the campaign set targets with deadlines. Unfortunately, the targets set did not lead to arable land protection but only to legalizing existing illegal practices. Because of the rigid formal adherence to the targets, local governments were not allowed to adapt the campaign to

¹²⁴ Based on an interview with Jiacun VC leadership 23 November 2004

¹²⁵ Based on an interview with Jiacun VC leadership 16 September 2004, due to time limitations the present research does not cover the period after 23 November 2004 in Jiacun. Therefore we do not know what has happened after this date.

¹²⁶ Based on an interview with Jiacun Township land bureau management, 17 November 2004

their local circumstances with possible disastrous consequences. Finally, because of these problems, it is highly unlikely that the campaign, which fails to solve the underlying conflict of interests between arable land protection and local livelihoods, is able to achieve its legalization plans. As we saw, village leadership is confident that in the end they will find a way around the proposed measures, they must in order to save their local development. So while on paper progress will be reported for the short term, as it has been in the past, in the longer term the results made will evaporate as violations are likely to continue.

Pollution Campaigns

Since the mid-1990s China has also organized campaigns against environmental pollution violations. These campaigns focused and formalized environmental enforcement work. Through prioritized targets and short-term deadlines, the pollution campaigns were able to overcome local resistance and achieve unprecedented results. That is, if we believe the reports that have been issued after each campaign. Similar to the land campaigns, the results reported have not been sustained and relapses in violations have been common. As a result, environmental campaigns have become a recurring event, organized each spring and summer, each year with different targets and focuses.

This section looks at the pollution campaigns of 1996, 2000, 2001, 2002, 2003 and finally 2004 campaign. For the first five it mainly discusses how the campaigns were organized throughout China, while for the 2004 campaign it looks in more detail how the campaign affected local law enforcement and compliance in Kunming.

1996-2000 Small Polluting Enterprises and Large Polluter Campaigns

In 1996 China suddenly closed over 60,000 enterprises because of their pollution problems.¹²⁷ In December 2000 China's national media reported that nearly 100 per cent of the larger major polluting enterprises now met pollution standards.¹²⁸ These changes were not the result of changes in regular enforcement, but rather of a new State Council policy. Just months after the 4th conference on EP law¹²⁹ and in line with the 9th five year plan

¹²⁷ *China Environment Yearbook 1997 (Zhongguo Huanjing Nianjian 1997)*, (Beijing: China Environment Yearbook Press, 1998). 510

¹²⁸ See *China Environmental Newspaper* (Internet Edition), December 30, 2000.

¹²⁹ Documents of this conference have been published in NEPA (ed), *Compilation of Documents of the Fourth National Conference on Environmental Protection* (Beijing: China Environmental Sciences Press, 1996).

and China's long-term 2010 plan for EP,¹³⁰ the State Council issued a decision on strengthening the implementation of EP.¹³¹ This decision brought a landmark change in the enforcement of EP law in China, in particular, the promotion of the severest administrative sanction to counter industrial pollution: abatement deadlines, to be followed by the forced closure of polluting industries.

In its Decision, issued on August 3, 1996 the State Council stated that by 2000 all of China's pollution discharged from industrial pollution sources should meet State and local standards.¹³² The responsibility for achieving this goal was imposed on local governments.¹³³ The State Council also explained how this goal was to be met. The Notice stated that any polluting unit whose discharges exceeded the standards, should be given an abatement deadline by the local government at county level or higher.¹³⁴ Units that failed to meet this deadline should be ordered by the local government at county level or above to be closed, to halt production or to move their operation.¹³⁵ The Decision further ordered the direct closure of several types of small polluting enterprises before 30 September 1996. The latter policy is usually referred to as 'The 15 Small' ('*Shimu Xiao*') (here called "Small Enterprises") and the former policy of first setting abatement deadlines and then closing units that fail to meet them is part of the policy usually referred to as 'Twice Reaching the Standards' ('*Shuang Dabiao*') (here called "Large Polluter"). Under the policy of the *Shimu Xiao* all 15 types of small polluting enterprises were to be closed before September 30, 1996.¹³⁶ The 1996 Notice named the following types of enterprises: paper factories producing less than 5,000 tons a year, tanneries treating less than 30,000 hides a year, dye factories producing less than 500 tons a year; coking enterprises and sulfur smelting enterprises using obsolete technologies. All these were to be banned by local governments at district level and above. Enterprises using indigenous methods to smelt arsenic, mercury, lead-zinc or to refine oil and extract gold, enterprises using pesticides, bleach and dye, electroplating, and enterprises producing radioactive and asbestos products,

¹³⁰ NEPA, 'The National Ninth Five-Year State Plan for Environmental Protection and the Long-Term Targets for the Year 2010', (1996) (10) *Environmental Work News Report (Huanjing Gongzuo Tongxun)*, 3-26.

¹³¹ State Council, 'State Council Decision on Several Problems concerning Environmental Protection', (1996) (8) *Environmental Work News Report (Huanjing Gongzuo Tongxun)*, 10

¹³² Ibid.

¹³³ Ibid., 11.

¹³⁴ Ibid.

¹³⁵ Ibid., 11-12.

¹³⁶ Ibid., 12.

were all to be ordered to be closed and to stop production by the local governments at county level or above.¹³⁷

The second part of the 1996 State Council Decision concerned the *Shuang Dabiao* aimed at achieving that all of China's industrial enterprises meet the national and regional standards by 31 December 2000.¹³⁸ Unlike the Small Enterprises campaign, this one was directed at China's larger industrial enterprises. Many of these were still state owned, and prior to the campaign, these had not been targeted much by enforcement action.¹³⁹

The methods used to achieve this goal were twofold. First, the enterprises that failed to meet the standards were to be given an abatement deadline during which they were to control their pollution sources so that they would meet the standards.¹⁴⁰ Second, enterprises that still failed to meet the standards were to be closed down.¹⁴¹ The campaign gained momentum in 1999 after SEPA produced a detailed work schedule¹⁴² and when it became a focus of EP work in China. Even president Jiang Zemin called 1999 a crucial year for implementing this campaign.¹⁴³

¹³⁷ Ibid., 12.

¹³⁸ State Council, "State Council Decision on Several Problems concerning Environmental Protection (Guowuyuan guanyu Huanjing Baohu ruogan Wenti de Jueding)." The State Council policy has been further elaborated concerning the *Shuang Dabiao* in SEPA, "Guojia Huanbao Zongju guanyu Quanguo 2000 nian Gongye Wuranyuan Dabiao Paifang he Huanjing Baohu Zhongdian Chengshi Huanjing Gongnengqu Dabiao Gongzuo Fangan (SEPA Work Schedule so that All China's Industrial Pollution Sources Meet the Standards when Discharging and that the Environmental Protection Key Cities Meet the Standards in their Environmental Function Areas)," *Huanjing Gongzuo Tongxun (Environmental Work Report)*, no. 1 (1999).

¹³⁹ Sun, "Controlling the Environmental Consequences of Power Development in the PRC." 1027

¹⁴⁰ State Council, "State Council Decision on Several Problems concerning Environmental Protection (Guowuyuan guanyu Huanjing Baohu ruogan Wenti de Jueding)." 11-12.

¹⁴¹ SEPA, "Guojia Huanbao Zongju guanyu Quanguo 2000 nian Gongye Wuranyuan Dabiao Paifang he Huanjing Baohu Zhongdian Chengshi Huanjing Gongnengqu Dabiao Gongzuo Fangan (SEPA Work Schedule so that All China's Industrial Pollution Sources Meet the Standards when Discharging and that the Environmental Protection Key Cities Meet the Standards in their Environmental Function Areas)." 19. At the start of the campaign all industrial pollution sources had to register with the local EP authorities. Then the provincial EP authorities should have decided which of the registered pollution sources were key-polluting enterprises. EP authorities should have carried out regular inspections at these key-polluting enterprises, at other enterprises inspections could be selective. Special *Shuang Dabiao* leading groups should have been set up at central and local level. Furthermore, local governments should have incorporated the targets of the *Shuang Dabiao* in their socio-economic planning. See for all this Ibid., 19-20.

¹⁴² Ibid.

¹⁴³ SEPA, "Guojia Huanbao Zongju guanyu 1999 nian Gongye Wuranyuan Dabiao Paifang Gongzuo Fangan de Tongzhi (SEPA Notice on the 1999 Work Schedule so Industrial Pollution Sources Meet the Standards when Discharging)," *Huanjing Gongzuo Tongxun (Environmental Work Report)*, no. 5 (1999). 17

Both campaigns were reported as highly successful. For the Small Enterprises campaign within months after the decision was issued, some 60,000 small polluting enterprises were said to have been closed.¹⁴⁴ Wang Bingqian, Vice-Chairman of the Standing Committee of the National People's Congress put it this way:

It is rare in the history of the whole world that such a large number of businesses has been shut down in such a short period of time. Thanks to the adoption of such powerful measures against environmental pollution, conditions in the natural environment have not greatly deteriorated together with the rapid development and fast population growth.¹⁴⁵

For the 1996-2000 campaign to clean up large polluting enterprises, the media reports were equally positive. The final deadline for was December 31 2000.¹⁴⁶ From the reports in the newspapers it seems that most provinces met the deadline and that most of the industrial enterprises either cleaned up or were closed down.¹⁴⁷

The reported results are questionable though. First, during the campaigns, especially the 1996 Small Enterprises campaign, legal procedure was discarded to enhance the campaign's effectiveness. Similar to what we saw in the land campaigns, the campaign against small polluters brought sudden changes to illegal situations that had been condoned for years. Furthermore, enterprises were not given sufficient time and opportunity to exercise their legal remedies against such decisions.¹⁴⁸ During the campaign, legal procedures such as notifying the polluter of his remedies¹⁴⁹ were not

¹⁴⁴ *China Environment Yearbook 1997 (Zhongguo Huanjing Nianjian 1997)*. 510.

¹⁴⁵ S. Duan, "To Protect the Environment in Line with the Law and to Beautify the Homeland," *China Law*, no. 3 (1997). 53. Even president Jiang Zemin has commented on the success of the campaign, although he did add that enforcement of EP is still weak. Z. Jiang, "Jiang Zemin Zongshuji zai Zhongyang Jihuashengyu he Huanjingbaohu Gongzuotanhui shang jianghua Yaodian (Important Points from General Secretary Jiang Zemin's Speech on the Work Conference of the Central Committee Birth Planning and Environmental Protection)," *Environmental Work News Report (Huanjing Gongzuo Tongxun)*, no. 6 (1997). 3.

¹⁴⁶ Ibid. and SEPA, "Guojia Huanbao Zongju guanyu Quanguo 2000 nian Gongye Wuranyuan Dabiao Paifang he Huanjing Baohu Zhongdian Chengshi Huanjing Gongnengqu Dabiao Gongzuo Fangan (SEPA Work Schedule so that All China's Industrial Pollution Sources Meet the Standards when Discharging and that the Environmental Protection Key Cities Meet the Standards in their Environmental Function Areas)."19

¹⁴⁷ See *China Environmental Newspaper* (Internet Edition), December 30, 2000.

¹⁴⁸ For a more detailed analysis of this and an illustration of what happened see Van Rooij, "Implementing Chinese Environmental Law through Enforcement, the *Shiru Xiao* and *Shuangge Dabiao* Campaigns." For the illustrative case

¹⁴⁹ See Art 20 (5) of the (old) 1992 *Measures on Administrative Sanctions for Environmental Protection*.

duly followed.¹⁵⁰ Because the small enterprises involved in the 1996 Campaign were often just regional TVEs they had little way of knowing their remedies, certainly if they had not been informed of them. This might explain why the campaign was so successful in swiftly closing down so many enterprises. Success in terms of closed enterprises may have affected failure in promoting a rule of law based on legal procedure.

Second, we can question the validity of such data. As stated before, all official data reported in China are questionable. This applies especially to data gathered under top-down pressure. During the campaigns, the local governments and their EPBs were in charge of implementing the policies and reporting on successes made. Because the local governments controlled the local information about campaign results, they had the opportunity to report overly positive.¹⁵¹ For the 1996-2000 large polluters campaign, the data are also questionable because they are based on snapshots of compliance during irregular inspections. As we saw in Chapter 13, enterprises have been very skillful in letting EPBs believe that they are in compliance during daily inspections, while illegally discharging at night. Hence, for both campaigns, the superior authorities had difficulty verifying the local reports made. SEPA has therefore initiated supervisory inspections to verify the reported results. During their inspections, SEPA did come across some irregularities.¹⁵² Furthermore, SEPA has encountered considerable local obstruction to their verification work. Not being able to trust the local EPBs and governments, SEPA has had to use public hearings and telephone hotlines to get non-official information about the actual practices ongoing.¹⁵³

The reason why local governments have obstructed such inspections or have reported false results is crucial for understanding the true problem of the campaign. Local governments, as we saw in Chapter 13, have engaged in local protectionism to protect their local economy and social stability. However, during the campaign the local government and their EPBs come under a double pressure, first the local development and social stability, but second the pressure from the campaign, that as we saw in the land campaign is strong because it is part of the evaluation system. In order to deal with both pressures the local governments shirk their duties and once the campaign is over illegal practices important for local livelihoods and income return. Right after the Small Enterprises campaign ended, many closed

¹⁵⁰ Van Rooij, "Implementing Chinese Environmental Law through Enforcement, the *Shimu Xiao* and *Shuangge Dabiao* Campaigns."

¹⁵¹ For more detail about how this worked see Ibid.

¹⁵² Interview with SEPA official 17 December 2000, Beijing

¹⁵³ Interview with SEPA official 17 December 2000, Beijing

enterprises suddenly came back, or had moved to a different location.¹⁵⁴ In one case, a reporter found that a closed small paper factory had resumed operation right across from the main entrance of the local police station.¹⁵⁵ Similarly, in the months after the Large Enterprise campaign had ended national newspapers reported *fantan* (lit. returning bullets, meaning relapse) problems in which enterprises that had met the standards started sub-standard production again. The main problem has been that the 1996-2000 campaigns failed to address the underlying conflict of interests.

The campaigns were target oriented. By setting clear targets, it was hoped that the underlying goal of less pollution and more compliance would be achieved. In fact, this did lead to a more rigid formalized form of enforcement, in which agents had to achieve the strict campaign targets without being able to adapt enforcement to local practice. Instead of recognizing this issue, China tried to deal with the relapse problems by issuing further rounds of campaigns between 2001-2004.

The 2001-2004 Strict Inspections and Sanctions Campaigns Set-up

From 2001 to 2004, China organized subsequent nationwide pollution campaigns. In 2001 and 2002 campaigns were called "Strict Inspections and Sanctions" (SIS)¹⁵⁶ and in 2003 and 2004 "Guaranteeing Public Health" (GPH)¹⁵⁷. As before, the campaigns were enforcement strategies, involving work prioritization, backed by political power.

¹⁵⁴ NEPA, "The National Ninth Five-Year State Plan for Environmental Protection and the Long-Term Targets for the Year 2010 (Guojia Huanjing Baohu "Jiu Wu" Jihua he 2010 nian Yuanjing Mubiao)," *Environmental Work News Report*, no. 10 (1996). 11, J. Song, "Guowunweiyuan Songjian zai di erci Quanguo Huanjingfazhi Gongzuo uiyi shang de Jianghua (State Council Member Song Jian's Speech during the Second National Work Conference on Environmental Law)," *Environmental Work News Report (Huanjing Gongzuo Tongxun)*, no. 12 (1997). 4, Xie, "Bawo Lishi Jiyu, Qianghua Zhifa Jiandu, Zhazha Shishi Zuohao Wuran Kongzhi Gongzuo (Grasp the Historical Opportunity, Strengthen the Supervision of Law Enforcement, and Thoroughly Carry out the Job of Controlling Pollution)." 4

¹⁵⁵ *China Environment Newspaper* (Internet edition), 12 January 2001.

¹⁵⁶ Editorial, "Xie Zhenhua Juzhang zai Quanguo Kaizhan Yansuchachu Huanjing Weifa Xingwei Zhuanxiang Xingdong Dianshidianhua Huiyishang de Jianghua (Speech by Minister Xie Zhenhua at the Televised Conference of China's Strict Inspections and Sanctions Campaign against Environmental Violations)," *Huanjing Gongzuo Tongxun (Environmental Work Report)*, no. 283 (2001a), Editorial, "Yancha Huanjing Weifa Xingwei Weibui Shehui Daju Wending Guojia Huanbaozongju Bushu Xin yi Lun Yancha Xing Dong (Strict Inspections of Environmental Violations protect the overall Social Stability, SEPA deploys a new round of Strict Inspection Campaigns)," *China Environmental News (Internet Edition)*, May 29 2002a.

¹⁵⁷ SEPA et al., "Notice on Starting An Environmental Protection Campaign to Clean Up Illegally Polluting Enterprises in order to Guarantee Public Health (Guanyu Kaizhan Qingli Zhengdun Bufa Paiwu Qiye Baozhang Qunzhong Jiankang Huanbao Xingdong de Tongzhi)," *Huanjing Gongzuo Tongxun (Environmental Work Report)* 308, no. 9 (2003), SEPA et al., "Notice on Starting An Environmental Protection Campaign to Punish Illegally Polluting Enterprises

As before, and similar to other political-legal campaigns, the 2001-2004 pollution campaigns started by political speeches emphasizing the urgency of stricter enforcement in order to combat the worsening pollution problem and stop ongoing and recurring violations of the new stricter laws made. For instance in May 2001 SEPA's minister Xie Zhenhua initiated the 2001 campaign through a talk for a televised meeting of all higher level EPBs. He said:

(...)Environmental violations are still an acute problem. If acute measures are not taken this may actually mean that the results of the ninth five year plan will be endangered, as well as even the social stability and modernization as a whole(...)¹⁵⁸

A year later, on 28 May 2002, minister Xie held another speech during a televised meeting with the country's provincial and large municipal governments and EPBs. This time the campaign was linked directly to criticism by the State Council about China's weak environmental law enforcement ¹⁵⁹:

"(...)After last year's Strict Inspections and Sanctions special Campaign, which was conducted throughout the country between May and August, environmental violations were to a certain extent controlled. However, since this year the problem of environmental pollution created by the illegal emissions of certain industrial and mining enterprises is getting worse. This has left the masses extremely dissatisfied and in certain cases has had an influence on social stability (...) this time the emphasis of the campaign should be on inspections and sanctions for those environmental problems

in order to Guarantee Public Health (Guanyu Kaizhan Zhengzhi Weifa Paiwu Qiye Baozhang Qunzhong Jiankang Huanbao Xingdong de Tongzhi)," *Huanbao Gongzuo Ziliao Xuan (Selected Materials on Environmental Protection Work)* 6, no. 6 (2004).

¹⁵⁸ Editorial, "Xie Zhenhua Juzhang zai Quanguo Kaizhan Yansuchachu Huanjing Weifa Xingwei Zhuanxiang Xingdong Dianshidianhua Huiyishang de Jianghua (Speech by Minister Xie Zhenhua at the Televised Conference of China's Strict Inspections and Sanctions Campaign against Environmental Violations).", Editorial, "Yancha Huanjing Weifa Xingwei Weihu Shehui Daju Wending Guojia Huanbaozongju Bushu Xin yi Lun Yancha Xing Dong (Strict Inspections of Environmental Violations protect the overall Social Stability, SEPA deploys a new round of Strict Inspection Campaigns)."

¹⁵⁹ A SEPA informant stated that several provincial leaders were publicly criticized on national television early 2002 about these issues by premier Zhu Rongji. Interview SEPA informant, 31 May 2002.

about which the masses have strongly complained and which have an impact on social stability (...)"¹⁶⁰

The 2001-2004 campaigns ran each year from April to September. During this period several related departments, including EPBs, local governments, Supervision Departments and later also Justice Departments, cooperated to achieve the goals set in the campaign work schedule. At first, mainly in the 2001 SIS, the campaign was aimed to maintain prior results and to control the relapse in violations that became apparent several months after the original campaigns had ended in 1997 and early 2001¹⁶¹. For example, 30 per cent of the small enterprises closed during the 1996 campaign reopened and about 15 per cent of the larger enterprises supposed to operate according to standards, stopped using their EP installations after the campaign had ended in 2001.¹⁶²

The campaigns also maintained a regional focus on several severely polluted rivers and lakes, including Lake Dianchi in Kunming.¹⁶³ From 2002 onwards¹⁶⁴ and especially in the 2003 and 2004 GPH campaigns,¹⁶⁵ the emphasis shifted increasingly to violations the public complained most loudly about. Then, the 2003 SARS disaster narrowed the focus to public health and drinking-water safety. While the campaigns were originally set up top-down and unified for the whole country irrespective of regional differences, the last two years has changed somewhat. First, the 2003 campaign prescribed several regional priority issues that local governments

¹⁶⁰ Editorial, "Yancha Huanjing Weifa Xingwei Weibu Shehui Daju Wending Guojia Huanbaozongju Busbu Xin yi Lun Yancha Xing Dong (Strict Inspections of Environmental Violations protect the overall Social Stability, SEPA deploys a new round of Strict Inspection Campaigns)."

¹⁶¹ Editorial, "Xie Zhenhua Juzhang zai Quanguo Kaizhan Yansuchachu Huanjing Weifa Xingwei Zhuanxiang Xingdong Dianshidianhua Huiyishang de Jianghua (Speech by Minister Xie Zhenhua at the Televised Conference of China's Strict Inspections and Sanctions Campaign against Environmental Violations)." 2

¹⁶² Ibid.

¹⁶³ Ibid. 2, SEPA et al., "Notice on Starting An Environmental Protection Campaign to Punish Illegally Polluting Enterprises in order to Guarantee Public Health (Guanyu Kaizhan Zhengzhi Weifa Paiwu Qiye Baozhang Qunzhong Jiankang Huanbao Xingdong de Tongzhi)." 13

¹⁶⁴ Editorial, "Yancha Huanjing Weifa Xingwei Weibu Shehui Daju Wending Guojia Huanbaozongju Busbu Xin yi Lun Yancha Xing Dong (Strict Inspections of Environmental Violations protect the overall Social Stability, SEPA deploys a new round of Strict Inspection Campaigns)."

¹⁶⁵ SEPA et al., "Notice on Starting An Environmental Protection Campaign to Clean Up Illegally Polluting Enterprises in order to Guarantee Public Health (Guanyu Kaizhan Qingli Zhengdun Bufa Paiwu Qiye Baozhang Qunzhong Jiankang Huanbao Xingdong de Tongzhi).", SEPA et al., "Notice on Starting An Environmental Protection Campaign to Punish Illegally Polluting Enterprises in order to Guarantee Public Health (Guanyu Kaizhan Zhengzhi Weifa Paiwu Qiye Baozhang Qunzhong Jiankang Huanbao Xingdong de Tongzhi)."

were to solve.¹⁶⁶ In this manner, the campaign allowed for regional variation, although in a top-down prescribed way.

In 2004, local variation was allowed again and local departments were to summarize local problems and make them part of the campaign.¹⁶⁷ In Kunming the result was that the FSS production related pollution problem became one of the campaign's focal points.¹⁶⁸ With significant national media attention, the Kunming government, although it knew local interests were at stake, had to show that it was trying to solve the problem.

Campaign methods did not change drastically between 2001 and 2004. First, EPBs were to summarize the local issues related to ongoing national campaign targets. Then they were to establish work plans on how to deal with the issues at hand, mainly by setting out schemes of inspections at different kinds of violators.¹⁶⁹

Work also included participatory methods such as setting up a hotline to allow citizens to voice complaints or report violations.¹⁷⁰ This was especially emphasized since the 2002 campaign, when SEPA further propagated the use of mass media and participatory mechanisms to enhance

¹⁶⁶ SEPA et al., "Notice on Starting An Environmental Protection Campaign to Clean Up Illegally Polluting Enterprises in order to Guarantee Public Health (Guanyu Kaizhan Qingli Zhengdun Bufa Paiwu Qiye Baozhang Qunzhong Jiankang Huanbao Xingdong de Tongzhi)."

¹⁶⁷ SEPA et al., "Notice on Starting An Environmental Protection Campaign to Punish Illegally Polluting Enterprises in order to Guarantee Public Health (Guanyu Kaizhan Zhengzhi Weifa Paiwu Qiye Baozhang Qunzhong Jiankang Huanbao Xingdong de Tongzhi)."

¹⁶⁸ Based on interviews with Kunming and Ningshi EPB personnel, Autumn 2004. For more see Anning EPB, "Anningshi "Zhengzhi Weifa Paiwu Qiye Baozhang Qunzhong Jiankang" Huanbao Zhuanxiang Xingdong Gongzuo Zongjie (Summary of Anning City Work on the "Complete Control of Illegally Discharging enterprises in order to Safeguard Public Health" Environmental Campaign," *Internal Document* (2004).

¹⁶⁹ Editorial, "Xie Zhenhua Juzhang zai Quanguo Kaizhan Yansuchachu Huanjing Weifa Xingwei Zhuanxiang Xingdong Dianshidianhua Huiyishang de Jianghua (Speech by Minister Xie Zhenhua at the Televised Conference of China's Strict Inspections and Sanctions Campaign against Environmental Violations).", Editorial, "Yancha Huanjing Weifa Xingwei Weibu Shehui Daju Wending Guojia Huanbaozongju Bushu Xin yi Lun Yancha Xing Dong (Strict Inspections of Environmental Violations protect the overall Social Stability, SEPA deploys a new round of Strict Inspection Campaigns).", SEPA et al., "Notice on Starting An Environmental Protection Campaign to Clean Up Illegally Polluting Enterprises in order to Guarantee Public Health (Guanyu Kaizhan Qingli Zhengdun Bufa Paiwu Qiye Baozhang Qunzhong Jiankang Huanbao Xingdong de Tongzhi).", SEPA et al., "Notice on Starting An Environmental Protection Campaign to Punish Illegally Polluting Enterprises in order to Guarantee Public Health (Guanyu Kaizhan Zhengzhi Weifa Paiwu Qiye Baozhang Qunzhong Jiankang Huanbao Xingdong de Tongzhi)."

¹⁷⁰ Editorial, "Xie Zhenhua Juzhang zai Quanguo Kaizhan Yansuchachu Huanjing Weifa Xingwei Zhuanxiang Xingdong Dianshidianhua Huiyishang de Jianghua (Speech by Minister Xie Zhenhua at the Televised Conference of China's Strict Inspections and Sanctions Campaign against Environmental Violations)." 3

inspections and enforcement efforts.¹⁷¹ In the east of China, especially in Jiangsu, Zhejiang and Shanghai there have been experiments to use the citizens to detect violations of environmental law. The local EPBs there have offered rewards of up to 5000 RMB for true complaints about violations. The effect has been that an EPB with only limited inspection personnel can make use of a large number of local amateur inspection agents. In some cases, local people have driven on motor cycles around factories at night in the hope that they would find violations and could get the reward¹⁷². Since the 2002 SIS campaign, SEPA has made an emphasis on the use of such new techniques of participatory engagement in enforcement work.

The most important work consisted of enforcement itself. During the campaigns EPBs were to carry out inspections at priority sites as indicated by the ongoing campaign and to punish found violations strictly. They were also to close obsolete industries or factories with recurring violations. Finally in the last phase of the campaign results were to be summarized and reported to higher level EPBs¹⁷³ and since 2002 also be made public to the press.¹⁷⁴ The campaigns were not only directed at violators, but also aimed at the EPBs themselves. This has been so since the 2001 campaign when SEPA minister Xie emphasized that EPBs that fail in strongly enforcing environmental law should be held responsible. He clarified that in serious cases they should be punished using internal administrative sanctions (*chufen*) and in extreme cases should be prosecuted under criminal law¹⁷⁵. The campaign was also directed against corrupt EPB

¹⁷¹ Editorial, "Yancha Huanjing Weifa Xingwei Weibu Shehui Daju Wending Guojia Huanbaozongju Bushu Xin yi Lun Yancha Xing Dong (Strict Inspections of Environmental Violations protect the overall Social Stability, SEPA deploys a new round of Strict Inspection Campaigns)."

¹⁷² Interview with SEPA official, Beijing 30 5 2002

¹⁷³ Editorial, "Xie Zhenhua Juzhang zai Quanguo Kaizhan Yansuchachu Huanjing Weifa Xingwei Zhuanxiang Xingdong Dianshidianhua Huiyishang de Jianghua (Speech by Minister Xie Zhenhua at the Televised Conference of China's Strict Inspections and Sanctions Campaign against Environmental Violations).", Editorial, "Yancha Huanjing Weifa Xingwei Weibu Shehui Daju Wending Guojia Huanbaozongju Bushu Xin yi Lun Yancha Xing Dong (Strict Inspections of Environmental Violations protect the overall Social Stability, SEPA deploys a new round of Strict Inspection Campaigns).", SEPA et al., "Notice on Starting An Environmental Protection Campaign to Clean Up Illegally Polluting Enterprises in order to Guarantee Public Health (Guanyu Kaizhan Qingli Zhengdun Bufa Paiwu Qiye Baozhang Qunzhong Jiankang Huanbao Xingdong de Tongzhi).", SEPA et al., "Notice on Starting An Environmental Protection Campaign to Punish Illegally Polluting Enterprises in order to Guarantee Public Health (Guanyu Kaizhan Zhengzhi Weifa Paiwu Qiye Baozhang Qunzhong Jiankang Huanbao Xingdong de Tongzhi)."

¹⁷⁴ Editorial, "Yancha Huanjing Weifa Xingwei Weibu Shehui Daju Wending Guojia Huanbaozongju Bushu Xin yi Lun Yancha Xing Dong (Strict Inspections of Environmental Violations protect the overall Social Stability, SEPA deploys a new round of Strict Inspection Campaigns)." 4

¹⁷⁵ Chinese criminal law has one article, art 408 of the 1997 Criminal Code, which is dedicated to this crime. Editorial, "Xie Zhenhua Juzhang zai Quanguo Kaizhan Yansuchachu Huanjing Weifa

officials. Xie stated that corrupt officials must be cleaned out of the work force.¹⁷⁶

Campaign Results Nationwide: 2001-2004

If we believe the official reports, the 2001-2004 Campaigns have been quite successful in combating China's pollution problems. During the campaigns, extra inspections were carried out and stricter punishments were given to violations found.

For instance, SEPA reported in September 2001 that the 2001 SIS campaign had had the following results: 142,121 enterprises were inspected.¹⁷⁷ In 18,084 cases investigations for sanction decisions were initiated and 8,745 of these cases have been handled thus far. Of these cases handled, 2,435 Fifteen Small Enterprises who had been closed but reappeared were shut down once again. 1,283 (ordinary) enterprises were ordered to halt production and 4,937 enterprises were fined for their violations. The campaign also created results in punishing officials who did not fulfill their EP enforcement obligations. 54 officials received some sort of sanction: 5 district level government leaders, 39 leaders of local departments such as EPBs, Economic and Trade Departments and 10 leaders of Township and Village level administration.

A second example is SEPA's report that during the 2002 SIS campaign 316,000 enterprises were inspected. In 16,000 cases, sanction procedure was initiated. During this campaign 428 persons were found to be individually responsible for violations.¹⁷⁸ Of these 15 were employed in sub-national governments and 35 in sub-national government departments¹⁷⁹.

Another example is that the Environmental News reports in December 2004 that the 2004 GPH campaign inspected 470,000 enterprises, issuing sanctions for 23,000 cases, of which 5,031 were closed.¹⁸⁰

Xingwei Zhuangxiang Xingdong Dianshidianhua Huiyishang de Jianghua (Speech by Minister Xie Zhenhua at the Televised Conference of China's Strict Inspections and Sanctions Campaign against Environmental Violations)." 3

¹⁷⁶ Ibid. 3

¹⁷⁷ Editorial, "Zhuangxiang Chanchu Xingdong Chengxiao Xianzhu (The Special Inspections and Sanctions Campaign Achieves Remarkable Success)," *China Environmental News (Internet Edition)*, 26-9 2001b.

¹⁷⁸ Editorial, "Guojia Huanbaozongju Tongbao "Yancha" Shige Dianxing (SEPA Reports 10 Typical Cases of the Strict Inspections Campaign)," *China Environmental News (Internet Edition)*, 27-9 2002b.

¹⁷⁹ These data are based on an earlier report in China Environmental News, August 21 2002 (Internet Edition) in which the total of individuals held responsible was 417, so the number of officials held responsible may have been higher in September when the total number is 428.

¹⁸⁰ Editorial, "Zhengzhi Weifa Paifang Qiye Baozhang Qunzhongjiankang (Punish Enterprises that are Illegally Discharging in order to Safeguard Public Health)," *Environmental News*, 3 December 2004.

Finally, during prior fieldwork in Sichuan province we found that during campaigns punishment for violations found is much stricter: in most cases local EPBs suddenly start to issue the maximum fines, whereas normally they punish at only 30-40 per cent.¹⁸¹

Hence, it seems that the campaigns increased inspections and punishment of violations found.¹⁸² Below in Table 1 is an outline of the data published on the 2001-2003¹⁸³ campaigns.

	2001	2002	2003	2004
Sanctions	18.084	16.000	21.000	23.000
Inspections	142.121	316.000	496.000	470.000
Ratio	0,13	0,05	0,04	0,05

Table 1, Differences in campaign results 2001, 2002 and 2003. Number of Sanction Decisions Initiated made, number of Inspections carried out, Sanction/Inspection Ratio.¹⁸⁴

The data in Table 1 show that the campaigns were more successful in producing extra inspections than in generating extra punishments. While in 2001 in 13 per cent of the cases an inspection would lead to a sanction preparation, in 2004, this was only 5 per cent.

There can be two explanations. The first is that the ongoing campaigns have led to fewer violations and therefore inspections lead to less punishment. Another explanation seems more plausible though, given the ongoing reports of recurring violations and the fact that new campaigns continue to be organized. EPBs find it much easier to organize extra inspections than issuing extra punishments. The campaign pressure forced local governments to take action even though they did not always want to because of local interests. The easiest action they could take was to organize extra inspections. Only if they issued more sanctions would local interests come at stake. Furthermore, we also saw in Chapter 13 that inspections especially if carried out in the day-time in remoter areas are not always

¹⁸¹ Based on interviews with Sichuan EPB personnel, July-August 2002

¹⁸² As this is Chinese governmental information it is to be used with the greatest caution. We use it here as there is no other data available.

¹⁸³ For 2004 there is only partial data which shows that by July there had been 310.000 Inspections and 8000 cases, which would make a ratio of 0,03 cases for each inspection.

¹⁸⁴ Editorial, "*Guojia Huanbaozongju Tongbao 'Yancha' Shige Dianxing* (SEPA Reports 10 Typical Cases of the Strict Inspections Campaign).", Editorial, "*Zhengzhi Weifa Paifang Qiye Baozhang Qunzhongjiankang* (Punish Enterprises that are Illegally Discharging in order to Safeguard Public Health).", Editorial, "*Zhuanxiang Chanchu Xingdong Chengxiao Xianzhu* (The Special Inspections and Sanctions Campaign Achieves Remarkable Success).", Wang, "Vice Minister Wang Jirong's Speech at the National Environmental Inspection Work Summit."

effective in detecting violations or finding sufficient evidence to issue sanctions.

Similar to our findings about regional variation in environmental enforcement in Chapter 13, an analysis of regional variation in campaign outcomes also demonstrates that in less developed areas enforcement is more difficult. We have made such an analysis for the 2001 Campaign about which so far the most data have been reported. Table 2 portrays data from various provinces and cities. Although far from sufficient to make a valid and representative analysis¹⁸⁵, the data confirm a trend noticed earlier in Chapter 13.

	China	Sichuan	Ningxia	Anhui	Chongqing	Guangzhou	Xi'an	Shanxi	Liaoning	Jiangsu	Dalian	Nanjing
Inspections	142121	22498	1500	715	2000	5029	200	1200	7903	4000	2100	2449
Sanctions	18084	158	100	15	240	290	18	400	2306	800	333	350
Ratio	0,13	0,01	0,07	0,02	0,12	0,06	0,09	0,33	0,29	0,20	0,16	0,14

Table 2, 2001 SIS Results: Number of Inspections carried out, number of Sanction Decisions initiated, and Inspection/Sanction Ratio.¹⁸⁶

If we look at the ratio between the number of inspections carried out and the number of sanctions issued, we find that on average in the country for every 100 inspected enterprises 13 sanctions are prepared. On the one extreme we find Sichuan where less than 1 per cent of the inspections lead to sanctions¹⁸⁷. Except for Sichuan we also find that provinces such as Ningxia (7 per cent)¹⁸⁸, Anhui (2 per cent),¹⁸⁹ Chongqing (12 per cent)¹⁹⁰ and municipalities such as Guangzhou (6 per cent)¹⁹¹ and Xi'an (9 per cent) are below country average. On the other hand, we find the extreme of Shanxi where for every three inspections one sanction was prepared¹⁹². Other regions above country average (for which we have data) are: the provinces Liaoning (29 per cent)¹⁹³,

¹⁸⁵ This comparison can in no sense be taken as a representative or valid analysis of regional variation. Firstly the reports miss essential data for that. The reports mostly only mention the number of inspections carried out and the number of sanctions prepared. For a real analysis of the situation we would also need to know the number of violations detected upon inspections. A second problem with the data is that it comes from different reports from different times in the campaign. The analysis presented here is to give some sketch and explanation of how the campaign was carried out throughout the country.

¹⁸⁶ Sources: Reports in China Environmental News (Internet Edition) July 15, 27, August 10, 24, September 4, October 10 2001.

¹⁸⁷ based on a report in China Environmental News, August 10 2001 (Internet Edition)

¹⁸⁸ based on a report in China Environmental News, August 24 2001 (Internet Edition)

¹⁸⁹ based on a report in China Environmental News, July 15 2001 (Internet Edition)

¹⁹⁰ based on a report in China Environmental News, July 27 2001 (Internet Edition)

¹⁹¹ based on a report in China Environmental News, August 10 2001 (Internet Edition)

¹⁹² based on a report in China Environmental News, September 4 2001 (Internet Edition)

¹⁹³ based on a report in China Environmental News, July 15 2001 (Internet Edition)

Jiangsu (20 per cent)¹⁹⁴, and the municipalities Dalian (16 per cent)¹⁹⁵ and Nanjing (14 per cent)¹⁹⁶.

There seems to be some relation between the inspection/sanction ratio results and the relative level of development of the provinces described here. With the exception of Guangzhou—this is in the well-developed Guangdong province—all regions, whose ratio are below average, are in less developed areas of China¹⁹⁷. We may therefore cautiously conclude that in less developed regions the campaign has been more effective in promoting inspections but less effective in promoting sanctions.¹⁹⁸ An extra indication supporting this point was found during field research in Sichuan in the summer of 2002. Two vice-directors of two municipal EPBs of less developed areas of Sichuan indicated that strictly implementing the campaign was not always possible due to local underdevelopment. We already saw that with the 1996-2000 campaigns results were not sustained in areas where the industry closed down came back because of local protectionism. We will look closer at this point when discussing the campaign results of the 2004 campaign in Kunming in the next section.

Apart from results in terms of inspections and sanctions, the campaigns initiated other changes. The news reports about this campaign indicate that the campaign made use of public participation methods to enhance enforcement. Most reports contain some reference to the use of public complaints or hotline telephone numbers to help the inspections¹⁹⁹. For example in Jiangsu province, several journalists received a reward from the EPB for their research, which enhanced inspections and helped gather evidence.²⁰⁰ Another example is the publication of a list of enterprises that have severely violated EP law²⁰¹.

¹⁹⁴ based on a report in China Environmental News, July 15 2001 (Internet Edition)

¹⁹⁵ based on a report in China Environmental News, July 15 2001 (Internet Edition)

¹⁹⁶ based on a report in China Environmental News, October 10 2001 (Internet Edition)

¹⁹⁷ In 1999 Sichuan's per capita GDP was 4452 RMB, Ningxia's per capita GDP was 4473 RMB, Anhui's per capita GDP was 4707 RMB, Chongqing's per capita GDP was 4826 RMB and Shaanxi province of which Xian is the capital had a per capita GDP of 4101 RMB. All these provinces had a per capita that was lower than China's per capita GDP as a whole which was 65534 RMB. On the other hand all regions whose inspection sanctions ratio was lower than country average all (with the exception of Shanxi) had a per capita GDP higher than China's total per capita GDP: Liaoning (which includes Dalian) (10086 RMB) and Jiangsu (which includes Nanjing) (10665 RMB).

¹⁹⁸ Taking in mind the nature of the data, the lack of data and the exceptions found.

¹⁹⁹ See for example reports in China Environmental News, on June 22 (about Jilin), June 26 (about Liuzhou), July 5 (about Jiangsu), August 13 (about Qingdao), September 28 (about Shanxi) 2002 (Internet Edition)

²⁰⁰ See report in China Environmental News, July 5 2002 (Internet Edition)

²⁰¹ See report in China Environmental News, July 12 2002 (Internet Edition)

While campaigns have initiated temporary changes and caused more inspections, and perhaps may also initiate a changed mind set due to the involvement of the public, the simple fact that campaigns have become a recurrent event indicates their failure to produce sustained long-term compliance. After campaign pressure ends in many instances pollution violations have come back. As stated above this is because the campaign fails to solve the basic contradiction in such cases between local livelihoods and environmental protection. In the next section we will look closer at campaign results this time those of the 2004 campaign in our area of fieldwork: peri-urban Kunming.

Campaign Results in Kunming

In 1996, Kunming participated in the Small Enterprise campaign and made a list of 114 small polluting enterprises to target enforcement.²⁰² The list included paper factories, coking plants, and tanneries. For the coking plants the KMEPB was able to convince SEPA and the State Council that a temporary exception should be made because of their importance in the local economy²⁰³, which was granted because of Yunnan's overall economic situation.²⁰⁴ KMEPB informants told me that at first the Small Enterprises campaign was influential because national leadership participated and the pressure from Beijing was substantial. As a result, 10 per cent of the enterprises placed on the list were closed, while the others invested in better EP equipment so that they could resume production. Right after the campaign, the problem of recurring violations was severe. Many of the enterprises that had invested in installing new EP equipment failed to use it due to the high costs involved. (See Chapter 10 for this problem) Consequently, secret nightly discharges (*tonpai*) problems became common once the campaign had ended and could not be properly addressed through regular enforcement.²⁰⁵ (See Chapter 13)

The second campaign—*Shuang Dabiao* targeting large enterprises (1996–2000)—was also difficult to implement in Kunming. Nevertheless, Kunming was ambitious to complete the campaign a year ahead of schedule. This was because of Kunming's 1999 World Flower Expo (*shibohui*), which led to a rapid modernization of Kunming's city center. Kunming's leadership must have believed that cleaning existing sources of pollution should be part of the city's new floral image. In order to implement the Large Enterprises campaign before the end of 1999, Kunming organized *lingdian xingdong*, “Zero Clean Up” campaigns all around the Dianchi Lake catchment area. A

²⁰² Based on an Interview with KMEPB staff, Kunming 22 October 2004

²⁰³ Ibid.

²⁰⁴ Based on an interview with a SEPA official, Beijing 20 December 2000

²⁰⁵ Based on an Interview with KMEPB staff, Kunming 22 October 2004

final deadline for compliance was set for May first 1999. Before that date the YNEPB and the KMEPB coordinated a campaign enforcement effort against a list of 253 major polluters in the area. During the Zero Clean up all enterprises were inspected eight times.²⁰⁶ The campaign was an unprecedented environmental enforcement effort in the area. By the end of the campaign, 249 of the enterprises were reported to have met the standards, while four enterprises did not and had to be closed.²⁰⁷ Although first reported as a success, the campaign's effects did not last. Ever since the campaign, secret discharges have been common.

Since the 1999 Zero Clean Up, the YNEPB and KMEPB have continued to prioritize their enforcement on the enterprises originally targeted in this first campaign. The EPBs publish a list of major enterprises with details about enterprises' compliance behavior.²⁰⁸ For those in violation the list also shows what pollutant is sub-standard and how long the enterprise has for improvement. With the weak regular inspections, the list made is not accurate. *Huafei* enterprise for example (see Chapter 10) has been listed as in compliance, even though they had been secretly discharging. The problem is that the EPBs have difficulty detecting such violations through regular inspections. EPB informants are honest about these problems. In their analysis the problem is not merely a lack in inspection capability, but also the difficulty of addressing dominant employers. They have seen how much the Zero Clean Up affected the local economy in areas where enterprises were closed or strictly punished because of it.²⁰⁹

Until 2004, the direct results of these campaigns on the cases studied here were limited. In only one case, the *FPC*, did campaign enforcement directly lead to compliance (Chapter 8). Meanwhile in several other cases, pollution violations continued while campaigns were organized. Examples are the Kunming Porcelain company, *Yunzhi*, the FSS companies and *Huafei*, who continued violating pollution law while China organized campaigns from 1996-2004. It was not until the last campaign in 2004 that some of the cases studied were addressed, most notably the FSS companies and *Huafei*.

The 2004 GBH campaign in Kunming was similar to earlier efforts. In the campaign, priority offenses were targeted with strict sanctions, abatement deadlines and enforcement methods were widened to include public participation through complaint hotlines. The Tanglang River and the

²⁰⁶ X. Yang, "Yunnan Jiang Zhengqu Jinnian Shixian Dianchi Wuran Zhili (Yunnan Strives to Control Dianchi's Pollution this Year)," *Yunnan Ribao*, 28 February 2000.

²⁰⁷ Ibid.

²⁰⁸ REF

²⁰⁹ Based on an Interview with KMEPB staff, Kunming 22 October 2004

phosphor industry there became one of the campaign's priorities.²¹⁰ During the campaign, the EPBs cooperated with other governments departments in one coordinated effort against ongoing pollution problems. During the campaign at each level administration a special working group was erected which included top governmental leaders and leadership from all major departments including the EPB, the Development and Planning Bureau, the Supervision Bureau, the Industry and Trade Department, and the TVE Bureau, the Forestry Department.²¹¹ These working groups convened meetings to disseminate the upcoming campaign and study the relevant campaign documents and targets. In addition, these groups specified local targets, such as for example the Tanglang River pollution. During the campaign the EPBs organized extra inspections, especially during the night. In Ningshi, this is located in the Northern part of Kunming's Tanglang River catchment, 625 enforcement agents carried out inspections at 325 enterprises.²¹² Similar to other campaigns, in the 2004 GBH Kunming's EPBs also published model cases and a list of major polluters.²¹³ The Kunming local implementation of the national 2004 GBH campaign was in many aspects similar to earlier campaigns and to China's political-legal campaigns in general.

What effect did the 2004 campaign have on compliance behavior at Lake Dianchi? While in part of the cases studied, such as Kunming Porcelain, small EIA violations and restaurants, this last campaign brought little change, the 2004 campaign did seem to have an effect on *Huafei* and the FSS companies, both located at the Tanglang River. Before the 2004 campaign, even a year of increased national media attention had not made the FSS companies comply with the law. As noted in chapter 10 and 13, their importance for the local phosphor chain and their ability to discharge undetected at night had so far prevented strict enforcement action. The campaign lifted some of the existing local protectionism, as the relevant local Township and District governments were forced through cadre responsibility systems to partake in the work and were to be judged on the campaign results made²¹⁴. Furthermore, the municipal EPB initiated its own

²¹⁰ Anning EPB, "Anningshi "Zhengzhi Weifa Paiwu Qiye Baozhang Qunzhong Jiankang" Huanbao Zhuanxiang Xingdong Gongzuo Zongjie (Summary of Anning City Work on the "Complete Control of Illegally Discharging enterprises in order to Safeguard Public Health" Environmental Campaign."

²¹¹ Ibid.

²¹² Ibid.

²¹³ See for example Ibid. where the *Ningshi* EPB published a list of eight major cases they strictly punished.

²¹⁴ Based on interviews with Township leaders and EPB personnel. The idea to ask about the relation between cadre management and campaign success came from Edin, "State Capacity and Local Agent Control in China: CCP Cadre Management from a Township Perspective."

inspections in order to verify the Dianxi district level EPB's work and prevent it shirking its duties. Cars regularly set out from Kunming to the mountains where the factories were located. With the summer rain, the roads were bad and inspections could only be carried out during the day, while production and illegal discharge took place at night. For the small FSS companies, in which violation of law was known, and even filmed by the national media,²¹⁵ it still took nearly three months of inspections before, at night, enough evidence to make a case was found. After the EPB had collected the evidence, it fined the violating factories and ordered them to halt production²¹⁶.

Similarly, one of the campaign inspections in September 2004 discovered *Huafei's* illegal nightly discharges. The EPB issued a 50,000 RMB fine and told the company that it would publicize the violation and the sanction. *Huafei* management was upset as it feared losing its good name and perhaps even investments from their American partners, once word of their violations would get out. The EPB used the factory's anxiety to strike a deal. The EPB would not publicize the violation and sanction, in return for which the enterprise would set up its own FSS production and quit supporting the highly polluting, cheap, small-scale production.

The campaigns thus did have an effect on *Huafei* and the FSS companies. First violations that had so far gone undetected were discovered and evidence was found. Second, the violators were fined, some even ordered to halt production, while others had promised to change their production process.

However, it seems that even in these two cases the campaign effects could not be sustained. First of all, nearly two months later, weeks after the campaign had ended, the FSS factories resumed production, even in broad daylight²¹⁷. This is a clear indication not only that the FSS companies could continue business as usual once the campaign had ended, but also that *Huafei's* promise to start its own FSS production had not affected these companies. A second indication of the campaign's failure to maintain success was that *Huafei* did not seem to live up to its promise of cleaning up its

Another reason why local protectionism is overcome is that campaigns started to punish and sometimes even prosecute lax enforcement officials and thus brought extra pressure on local agents to carry out work according to plan Editorial, "*Guojia Huanbaozongju Tongbao 'Yancha' Shige Dianxing* (SEPA Reports 10 Typical Cases of the Strict Inspections Campaign).", Editorial, "*Zhuanxiang Chanchu Xingdong Chengxiao Xianzhu* (The Special Inspections and Sanctions Campaign Achieves Remarkable Success).", D. Huang, "Environmental Inspection Breach of Duty, EPB Director to Jail (Huanjing Jianguan Shizhi, Huanbaojuzhang Jin Jianyu)," *Huanjing Gongzuo Tongxun* (Environmental Work Report) 298, no. 11 (2002). 19-21

²¹⁵ CCTV, "*Jinri Shuofa*" *Fushi de Beibou* ("Talking of Law Today" *Corrosion's Background*) ([cited]).

²¹⁶ Based on interviews with Kunming EPB personnel.

²¹⁷ Based on personal observation, several times in November 2004

production process. Quite the contrary, the company initiated an expansion of its Phosphor Ammonium installations, enlarging production by 1.2 million tons a year. A SEPA investigation of projects with a possible effect on the environment, named *Huafei's* expansion as one of China's twenty worst new environmental hazards, stating that the company contained "hidden problems."²¹⁸

While we lack data to fully verify whether the campaigns have had a longer term result in Kunming, for the cases researched the results seem to be limited. Even when extra inspections led to more sanctions, this did not lead to sustained compliance. The problem seems to be that the pollution campaigns have not been able to find a sustained solution to the obstacles that hamper regular enforcement, and because of this, once the campaign ends such problems come back with all related consequences. Campaigns have been unable to address the causes for local protectionism, and neither have they been able to address the practical difficulties of pollution law enforcement, when lacking resources, support from local communities and facing uncooperative regulated actors that will do their best to exploit this situation. The failure to address the causes of local protectionism is especially important. As noted, many of the regulated companies are important sources of local income, and for this reason, local governments, regulators, and also some of the affected local communities have condoned their violations. Campaigns may be a temporary measure to overcome such local protectionism, but unless alternative sources of income are developed, it seems that once the campaigns end, violating sources of local income are bound to return.

On a positive note, more generally, the campaigns' use of public participation enhances public awareness for environmental protection. The involvement of the public, since the 2002 campaigns, may have created large expectations for change and thus a pressure on governments to deal with the problems citizens most care for. Even though in areas in which livelihoods are dependent on violation related sources, such as those in Western Kunming, this will have little impact, in many others it may.²¹⁹

Conclusion

Natural resource enforcement in China has been greatly influenced by national politics. National leadership has organized political legal campaigns in order to address the weak regular law enforcement of natural resource

²¹⁸ Based on a newspaper report, published April 6 2006. For guaranteeing *Huafei's* anonymity, the source is not mentioned here.

²¹⁹ Lo and Leung, "Environmental Agency and Public Opinion in Guangzhou: The Limits of a Popular Approach to Environmental Governance." Lo, Yip, and Cheung, "The Regulatory Style of Environmental Governance in China: The Case of EIA in Shanghai."

protection law. The natural resource campaigns are part of a wider phenomenon, political-legal campaigns, which China has organized for various fields of law since reform. The natural resource law enforcement campaigns share characteristics with the general political-legal campaigns: initiated after central political pressure, prioritizing certain violations, creating strict goals and mechanisms to verify and reward goal attainment, enhancing vertical top-down pressure to realize the campaign goals, involving the media and the public at large, all of this in order to overcome local resistance.

As a result of the campaigns, law enforcement has become more formalized and more stringent. Enforcement agents and agencies once they participate in the campaign have to meet simple campaign targets such as a number of inspections, sanctions and model cases. If they meet such targets, the campaign is a success. Thus, the formalization of campaign law enforcement makes enforcement effectiveness measurable and therefore it is easier to reduce agent discretion. If this goal-oriented type of measurement is used as a yardstick and if published data are to be believed, both types of campaigns were successful, they achieved their primary objectives, carrying out inspections, describing the present illegal situations and issuing strict sanctions. However, when one evaluates the campaigns based on whether they have caused sustained compliance with the law in question, the result is less positive. The campaigns were not able to create such compliance, mainly because the structural problems of law enforcement and most importantly the causes for local protectionism by the underlying conflict of interests between local economic and social development and the law's goal of protecting natural resources could not be solved in the rigid enforcement campaign.

15. Ad Hoc Law Enforcement

Insights about Regulatory Law Enforcement Strategies and the Influence of Political Power

The face of China's natural resource law enforcement changes as rapidly as *bianlian* (lit. "face changing") actors in Sichuan opera change masks. First, there is the face of regular law enforcement, which is characterized by risk aversion, weak punishment and cooperation with violators during informal enforcement procedures. Then from one day to the next, all of this changes when the face of campaign driven enforcement, which is formal, with limited discretion, with stringent sanctions and adversarial, comes on stage. These two faces of China's resource law enforcement are illustrative of the two styles of regulatory law enforcement recognized in the various international studies thereof (summarized in Chapter 12). First is cooperative-type law enforcement, characterized ideal-typically by large discretion for agents, informal relationships between agent and violator resulting in mutual understanding and negotiation towards compliance, but in its extreme weak enforcement and ongoing violations of law. Second is deterrence-type law enforcement, ideal-typically characterized by formal enforcement procedures limiting agent discretion, a strategy of severe punishments and little agent violator contacts, which in its most extreme form can lead to making punishment more important than compliance with continued violation and unreasonable enforcement, with great social and economic consequences as a possible result. The literature recognizes that both enforcement types are hyperboles that in their extreme forms do not work. The literature therefore argues for a balance between the two. Yet, at least in Chinese practice, we see that such a balance is not sought but instead enforcement fluctuates between the two types when it alternates between regular and campaign-type enforcement.

This part of the book has sought to understand how natural resource protection law enforcement is organized in China and at Lake Dianchi and to what extent and why it has contributed to achieving compliance. This concluding section will summarize the findings of this study, first about regular enforcement and then about campaign type enforcement. In addition, it will compare these findings from Lake Dianchi and China with studies about regulatory enforcement from Western and other non-Western countries.

Regular enforcement was difficult at Lake Dianchi. In none of the compliance cases studied in part II and introduced in Chapter 13, was regular enforcement an important factor influencing the regulated actor to comply with the law. In most of the violation cases studied, regular enforcement was

weak. Regular inspections had trouble detecting violations that had been ongoing for a long time, while for the violations detected, in none of the cases studied, were sanctions issued during regular enforcement.

A set of variables can help to explain why regular enforcement was so problematic at Lake Dianchi. First are variables related to the enforcement agency itself. The bureaus studied, lacked resources, or their resources came from sources related to the violating activity. Bureaus also lacked enforcement staff, as well as the right type of staff with technical training. Internal bureau personnel procedures offered weak incentives and controls for job conformity. Stimulating and controlling agents was thus difficult, especially since bureau management could not verify what happened during inspections, and the fact that the outcome of enforcement work was difficult to measure. Enforcement procedures in practice, finally offered agents and bureau leaders considerable freedom when deciding on sanctions. As a result of the weak personnel procedures and the enforcement procedures those deciding on sanctions had a large amount of discretion. When using this discretion agents seemed to be risk averse, trying to do their work in such a manner that they would not upset any of the relationships with their management, the regulated actor, local politicians, and higher level agencies.

A second set of variables hampering regular enforcement work are those related to the external context of the enforcement agency. The agency first of all was influenced by the regulated actor, who in several cases directly obstructed enforcement work. Even though in some of the cases there was a low level of trust between the agency and the regulated actor, risk averse enforcement agents still tried their best to maintain a good working relation with regulated actors. Second was the local social context. In many of the cases where regular enforcement was difficult, local communities depended largely on the violating activities, as major sources of income, or on some of the violators who had considerable power. For land, local communities supported and even engaged in violations, while for pollution some localities although suffering from pollution still failed to report it. The fact that the social context depended on violating activities had several consequences. First, there were fewer complaints about violations, making detection more difficult. Second, violation of law formed a source of local income, making it more difficult to deal with such violations stringently. Third is the local political context. Local governments were able to control natural resource law enforcement through their influence on agency budgets and the appointment of bureau leadership. Enforcement agents paid attention to local government concerns about economic growth and social stability in their regular sanction decisions.

As a result of these variables regular law enforcement had difficulty detecting violations, and once violations were discovered, issued non-stringent sanctions, while paying attention to the social and economic consequences of such sanctions. The result of this was that some violations could go on for years. Examples are the pollution violations at *Huafei*, *Yunzhi*, Kunming Porcelain, and the FSS companies, and the land violations at Jiacun, Baocun and Licun.

The study's findings are in many aspects similar to existing research about other parts of China.¹ Such studies have especially blamed "local protectionism", local governments protecting their own interests instead of enforcing national legislation. This study also found that local protectionism influenced regular law enforcement. Instead of just seeing this as an abject and corruptive phenomenon, the present study has sought to understand the causes of local institutions engaging in this practice. First, it finds that local protectionism was more widespread than existing studies lead to believe. It concerned more than just corrupt, self-interested local politicians. In some of the cases studied, strict law enforcement was not supported by a wide range of local actors, including local citizens, whose livelihoods depended directly or indirectly on ongoing violations. Second, it thus finds that local protectionism may have legitimate causes. Such protectionism has in some of the cases studied maintained local livelihoods and necessary local products, which if the law had been fully enforced would have come under pressure. The best examples are the violations of the LMA's prohibitions on housing and enterprise construction on collective arable land. Other examples are the protection of Kunming Porcelain, the FSS companies and local restaurants. Third, this study finds that local protectionism was at times a coping mechanism for risk averse law enforcement officials when lacking resources, having to enforce legislation with a wide scope of application, which was widely violated, and in addition facing powerful regulated actors opposed to the law, and receiving limited support from local communities and local governments.

As current scholarship holds, local protectionism is first caused by the high level of autonomy of local governments and their enforcement agents. This study however further finds that another important cause for local protectionism is the law's lack of local feasibility, both for regulated actors, local communities, local governments and enforcement officials. In the existing studies from other parts of China, few scholars have addressed this cause or recognized the possible legitimacy of local protectionism.

Meanwhile, regular enforcement has been weak, and the law's equally legitimate goals of protecting arable land and preventing and

¹ See Chapter 13

controlling pollution proved difficult to achieve. Thus, while local protectionism may at times be an understandable phenomenon helping to adapt the law to local circumstances, it has also undermined the law and obstructed natural resource protection.

Since 1996 Chinese leadership has recognized the danger of weak natural resource protection law enforcement. To deal with the existing weak enforcement, campaigns were organized. The campaigns were organized through political pressure from the center, using cadre evaluation systems to overcome local protectionism, making campaign targets into priority policy on the basis of which local leaders were to be evaluated. The campaigns made enforcement measurable, setting formalistic targets of numbers of inspections, strict sanctions and model cases. During the campaigns, local actors were thus less allowed and able to take local concerns into account.

Until 2004, the campaigns had little effect on ongoing violations studied at Lake Dianchi. Only in the case of *FPC* did a campaign directly end violations. Even in 2004, when land and pollution campaigns seemed to initiate a change in violation cases in Jiacun, Licun, Baocun, *Huafei*, and the FSS companies, the findings seem to indicate that these changes were to be short lived.

The reason why campaigns had difficulty causing sustainable compliance at Lake Dianchi was that they were not able to provide a structural solution to the obstacles of regular law enforcement. Once a campaign ended, the law's unfeasibility remained, as the bureaus lacked resources or support, local communities depended still on violating sources of income, violators were still powerful as dominant employers, and local governments still cared about maintaining economic growth and social stability, which some of the law's norms if fully enforced or complied with would endanger.

There are different ways to evaluate these campaigns. From a direct compliance perspective, as adopted mostly in this book, the campaigns were largely unsuccessful. While the campaigns mark a tougher stance on natural resource violations, the temporary toughness does not overcome structural problems as we saw and is unable to create compliance.

From a pragmatic perspective, the campaigns are the only way to deal with the existing violations, given China's present central-local relationships and the structural conflict of interests between short-term local livelihoods and long-term natural resource protection. Using campaigns offers an incremental tool to address the worst violations that the regular enforcement system fails to address.

From a symbolic perspective, the campaigns may be more successful than they seem at first blush. The campaigns may actually be a symbol of change, demonstrating that what was condoned for years must end. The

symbolic function of campaigns may be enhanced because of their increasing use of public participation mechanisms creating awareness for law enforcement and natural resource protection.²

From a rule of law perspective³, one could argue that the campaigns are dangerous as they may set a bad example instead of a positive symbol. The constant conjuncture of weak enforcement followed by strong campaign enforcement makes the legal system as a whole less consistent. During campaigns, campaign objectives are more important than legal procedure. In addition, the campaigns are law based on politics, instead of China's recent adoption of *Yifa Zhiguo*, governance based on law. Using campaigns to enforce normally non-enforced law may endanger the legal system as a whole and the beginning rule of law doctrine in China.⁴

A final perspective on the use of campaigns, is a political perspective. One can wonder why, although China is really losing land and pollution is damaging many interests, these problems have suddenly received so much attention. Perhaps the answer is that politicians truly wished to solve these problems and used the incidents to trigger changes not possible before. Moreover, more cynically and following Edelman⁵, stakeholders may have used the growing urgency about pollution and arable land loss to attain goals not directly related to them. For the cases described here and for all of China's political legal campaigns, this line of argumentation holds attraction, as most campaigns have been about enhancing the state's vertical reach into the local bureaucracy. Boosting the legal system through campaigns serves this purpose, and social problems such as pollution, food security, corruption, crime, religious practices, copyright piracy, and disabuse of village power, may all serve as fora for enhancing the center's vertical reach.

When comparing natural resource law enforcement at Lake Dianchi with studies of regulatory enforcement from other countries, both Western and non-Western, there are several findings.

² This perspective is influenced by the Dutch literature on symbolic or communicative effects of legislation. See Chapter 2.

³ With rule of law we here mean both in general the law's meaningful restraints on government action, as well as the thin formal rational rule of law conceptions which require that the law should provide clear unambiguous procedures, that should be applied in a consistent manner. Compare with Tamanaha, *On the Rule of Law History, Politics, Theory*. Peerenboom, *China's Long March toward the Rule of Law*. R. Kleinfeld, "Competing Definitions of the Rule of Law," in *Promoting the Rule of Law Abroad, In Search of Knowledge*, ed. T. Carothers (Washington D.C.: Carnegie Endowment for International Peace, 2006).

⁴ For debates on the development of a rule of law in China see Keith, *China's Struggle for the Rule of Law* (Basingstoke, Hampshire: Macmillan Press LTD, 1994). Keith and Lin, *Law and Justice in China's New Marketplace*, Peerenboom, *China's Long March toward the Rule of Law*.

⁵ Edelman, "The Construction and Uses of Social Problems." Edelman, *Constructing the Political Spectacle*.

First, the present study finds in the cases studied that extreme styles of law enforcement, either strongly cooperative and strongly deterrent did not cause sustainable compliance. This finding is supported largely in recent studies of regulatory enforcement in Western countries.⁶ These studies now advocate mixed styles in which elements of both are incorporated⁷; such mixture of styles has unfortunately not been used in China yet. Such mixed styles has not been recognized in studies about enforcement in China or other non-Western countries, of which some have advocated a deterrent style when facing corruption and weak institutions, while others have argued for a more cooperative style as deterrence is too costly in a weak bureaucracy. Based on Western studies and the explorative findings from China presented here, it seems a mixed enforcement style would be beneficial for non-Western context. Exactly what such a style means and how it is to be established in these contexts, where institutions may be weak and corruptive practices influential, is a question for further research.

Second, the study finds that at Lake Dianchi a combination of variables, both internal and external to the enforcement agency and the agent were responsible for how enforcement was carried out. The findings here are similar to existing studies. There are two noteworthy differences between Lake Dianchi and existing studies. First, law enforcement agents at Lake Dianchi, while lacking resources compared to their enforcement tasks, have still been relatively well off, in terms of personnel, education and equipment compared to other non-Western natural resource protection agencies, so it seems. Second, while in Western studies of law enforcement a lack of resources and a lack of trust with the regulated actor has led to more deterrent enforcement styles, in Lake Dianchi with limited resources and limited trust regular enforcement remained cooperative. It seems that the difference can be partly explained by the fact that Chinese agents have insisted that they wished to maintain a proper relationship with the regulated actor. In this sense Lake Dianchi may show similarities to other contexts where values of favoritism and informal networks are important, such as the Philippines.⁸

Third, in the Western literature, the relation between the type of law enforcement and the reasons for violation has been important for ensuring compliance. Kagan and Scholz have argued that different motivations of violation (ranging from rational choice, moral, or competence)⁹, enforcement should adopt a different strategy (ranging from deterrent, convincing, or

⁶ See Chapter 12

⁷ Ibid.

⁸ Compare with Oposa, *A Socio-Cultural Approach to Environmental Law Compliance: A Philippine Scenario* ([cited]).

⁹ See Chapter 6

teaching).¹⁰ Following their approach, which has received wide recognition in the literature¹¹, enforcement needs to be adapted to the reasons for compliance. The case of Lake Dianchi has demonstrated how difficult it is to understand the reasons for compliance (see Chapter 11). Adapting to such complexity is thus not easy. Even when the full complexity of norm-conform behavior is understood, it is not easy to make an enforcement policy that is well adapted to it. First, in order to adapt themselves to such complexity enforcement agents should be given a significant amount of discretion, perhaps so much that they are no longer controllable to enforce the law in a manner conducive to attaining the law's goals. Limiting agent discretion can however have the opposite effect, as demonstrated to some extent, in China's law enforcement campaigns, that enforcement action is not adapted to local circumstances and does not lead to sustained compliance. Second, if there is a wide gap between the goals of the law and local interests, as there was at Lake Dianchi, adapting law enforcement to both such goals and interests at the same time is difficult, leading easily to enforcement that is too stringent and unreasonable, and possibly with less compliance, or not stringent enough, also with limited compliance. It thus seems that law enforcement when faced with complex behavior and norms that are opposed to existing practices, similar to lawmaking has trouble balancing certainty (formality) and adaptability (informality), and balancing adequacy (stringency) and feasibility (non-stringency).

Fourth, China's law enforcement campaigns are an example of how regulatory law enforcement can become temporarily influenced by shifts in power in the external context of the regulatory agency. While the temporary political effects on the legal system seem to be a Chinese phenomenon, used in political-legal campaigns and based on a past where the main normative system was not legal but political, studies from other countries also demonstrate similar phenomena. As noted in Chapter 12, political and social contexts have asserted temporary pressure on regulatory law enforcement in other countries, following disasters, electoral change, economic opportunities, financial crises, or regulatory scandals. There have been many examples of how regulatory law enforcement suddenly changed as a result of a shift in power following an incident, especially if widely reported.¹² We believe that this phenomenon, which we will call "ad hoc enforcement" deserves further scholarly attention. Ad hoc enforcement seems to have the following characteristics: first, following an incident and/or shifts of power in the political or social context, law enforcement is changed quickly, breaking

¹⁰ Kagan and Scholz, "The "Criminology of the Corporation" and Regulatory Enforcement Strategies."

¹¹ See Chapter 6

¹² See Chapter 12

radically with existing practices; second, such changes are based on a political rationale of demonstrating change rather than a full analysis of what enforcement action is needed for achieving compliance; third, changes are temporal in nature; fourth, as a result of changing external pressures or periods of weak and strong pressure there may be conjunctures of enforcement changes; fifth, the reactive nature of ad hoc enforcement and the political rationale may make that it especially enhances extreme forms of cooperative or deterrent styles of enforcement, instead of the mixed style favored by scholars. As thus stated these characteristics apply to regulatory enforcement practices in cases such as the Chinese political legal campaigns, but also the Dutch reaction to disasters, or the US regulatory enforcement shifts when Reagan followed Carter, or regulatory changes in Mexico or Brazil following social pressures and electoral change.¹³

¹³ See Chapter 12

Conclusion

16. Regulating Land and Pollution

Conclusions about Lawmaking, Compliance and Enforcement

Introduction

In November 2005, a major toxic spill at a Petro-China chemical plant in the north-east of China severely polluted the Songhua River. As a result, Harbin city's 3.4 million residents were cut off from water supplies for five days. Local governments tried to cover up this disaster and SEPA's minister Mr. Xie Zhenhua had to leave office in the aftermath of the scandal that followed.¹ A month later, in Guangdong province, at least three people were killed in a violent clash when police opened fire at a mob of ten thousand angry villagers protesting against the construction of a wind power plant on their land without sufficient compensation.² These two recent cases have attracted worldwide attention to the fact that China's regulation of pollution and arable land remains a volatile challenge.

China has since the mid-1990s tried to ameliorate its natural resource protection legislation and enforcement. This book has tried to assess what effects these efforts to enhance the regulation of pollution and arable land had in local practice. It has looked at changes in legislation as well as changes in law enforcement, and how they have affected compliance and violation at Lake Dianchi. This conclusion starts with a short outline of the main findings of the three main parts of this book, before discussing what the combined findings are and how these bring forth new insights when compared with studies about such regulation in other parts of China and other countries.

The implementability of changes in legislation was discussed in Part I. As Chapter 5 summarized, the research found that the changes made were not expected to enhance the laws' implementability. Especially the feasibility and adaptability of some of the new stricter and more specific norms adopted were questionable. During deliberations on draft laws, opposed stakeholders had voiced concern about the fact that some of these norms did not fit local circumstances and would be difficult to implement. Largely, such concerns were ignored by the NPC Legal Committee that played a dominant role in the enactment of the final draft into law.

¹ Editorial, *China Plans huge river clean up* (30 March 2006 [cited 12 September 2006]); available from <http://news.bbc.co.uk/2/hi/asia-pacific/4860134.stm>.

² A. Ang, *Chinese Village Surrounded After Shootings* (Associated Press, December 9 2005 [cited 20 February 2006]); available from <http://sfgate.com/cgi-bin/article.cgi?f=/n/a/2005/12/09/international/i092407S20.DTL>.

Part II looked at why regulated actors at Lake Dianchi complied or violated land and pollution regulation. As summed up in Chapter 11, it found that variables, both external and internal to the regulated actor explained violation or compliance. The research found that regulated behavior was case based, and often the result of interactions between one or more regulated actors with their social, political, economic, and regulatory contexts. Among these contexts, especially the economic context was important as it affected how both regulated actors, as well as local communities, governments and enforcement agents looked at the law's norms and at compliance and violation.

Enforcement, both regular and campaign induced, was studied in Part III. As detailed in Chapter 15, it found that regular enforcement was problematic. Several factors, both related to the enforcement agency and agents themselves, as well as those regarding their relationship with the regulated actor, local communities and local governments and local social and economic circumstances. It found that local protectionism—local governments, their enforcement agents and also local communities letting local social and economic interests prevail over the goals of natural resource protection legislation—had a dominant negative impact on regular enforcement. It found that such local protectionism existed first, because of the conflict between some of the laws' norms and local social and economic interests and second, because of the relative autonomy local governments had when managing local law enforcement. Campaigns, which have been organized since 1996 to enhance natural resource protection law enforcement, were largely unsuccessful. While they may have been able to overcome local protectionism for a short period of time, they were unable to overcome the structural problems of regular law enforcement, which returned once campaigns ended.

The Effects of Changes in Legislation and Enforcement on Compliance at Lake Dianchi

Based on the findings presented in this book, it can be argued that the changes in legislation and enforcement have had a limited impact on compliance behavior at Lake Dianchi. This can be deduced from the data presented by asking what would have happened had the law not been changed and had enforcement campaigns not been organized.

For lawmaking, the answer to this question would be that a large part of the behavior observed would have been the same. There were many compliance cases in which violation was not profitable or possible, either because there was no demand for illegal products or because a bankruptcy

had ended the regulated actor's activities.³ Had the new norms not been introduced the results in these compliance cases would have been the same. It should be noted, however, that in some cases the new norms may have attributed to compliance. These were cases where compliance was the result of external pressure from local communities, the media, and in one case enforcement agents, who may have been able to use the law's stricter norms to assert stronger pressure.⁴

For violation cases, had the norms not been changed, behavior witnessed would have occurred just the same. In violation cases, the (illegal) behavior was profitable, while the costs associated with such behavior were low, as even with the law's new norms in place, local communities, local governments and enforcement agents condoned and sometimes even supported violations, largely because of the importance of the regulated actor or its illegal products for local livelihoods.⁵

Had law enforcement campaigns not been organized would behavior in the cases studied have been different? Only in one case, *FPC's* compliance⁶, the answer is clearly, yes. For all other cases, behavior would have remained largely the same, as campaigns had little lasting effect.⁷ Until 2004, in none of the other cases campaigns had any direct effect. For ongoing land violations in Jiacun, Baocun and Licun, campaigns in 2004 seemed to start to make a change, but as related in Chapter 14, it is very doubtful whether this change has been effected or sustained. Similarly, pollution violations at the FSS companies and *Huafei* were targeted in the 2004 campaign, but there are strong indications that by the end of 2004 existing violations continued. The direct long-term effect of the campaigns has thus been limited, mainly because the campaigns failed to solve structural regular law enforcement problems. It should be noted however, that campaigns may have influenced behavior indirectly, being symbols of change and by enhancing public awareness and participation.⁸

The conflict between the law's norms and local interests is a fundamental problem that existed at Lake Dianchi when long-term macro concerns for natural resource protection clashed with short-term micro concerns for income. Lawmaking and enforcement failed to find a balance between the goals of the law and law enforcement on the one hand, and the dominant local interests and circumstances of the cases of behavior such laws and enforcement were aiming to change, which were largely constituted

³ See Chapter 7, 8, 11

⁴ See Chapter 7, 8 and 11

⁵ See Chapter 9, 10, and 11

⁶ See Chapter 8

⁷ See Chapter 14 and 15

⁸ See Chapter 14, 15

by the local economic context, on the other. Legal efforts through changing legislation and enforcement were thus disappointing. The manner in which the law was changed and the law enforcement campaigns were organized seems to have exacerbated the contradiction; both were largely top-down processes in which there was little room for local concerns. Before the changes discussed here, lawmaking and enforcement were too accommodative to such dominant local circumstances and failed to initiate a change. Once changes had been made, lawmaking and enforcement largely failed to consider local circumstances, leading to unfeasible and inflexible norms and enforcement whose compliance could not be sustained.

Lake Dianchi's Conclusions about Lawmaking, Compliance and Enforcement in China

The findings presented in this book hold relevance beyond Lake Dianchi, even though the data collected are not representative for China. When comparing these data with studies about land and pollution regulation from other parts of the country, they suggest important trends and raise vital questions.

First are findings about lawmaking. The cases studied here indicate that China's legislator moves away from the piece meal approach to law⁹, making laws that are stricter and more specific, more focused on one interest instead of trying to accommodate many, less oriented at the adaptability to varied and changing circumstances and more at ensuring certainty. If this trend is true it may be beneficial for enhancing the law's certainty and adequacy, however if local variation and a wide array of interests are not incorporated, Chinese regulatory law may become difficult to implement. Here, China's top down legal and political system, which has few mechanisms for the bottom up formation of norms, such as a case law system, further exacerbates this danger.

The findings about why compliance and violation occurred at Lake Dianchi are largely similar to earlier studies about arable land loss and pollution.¹⁰ There were some noteworthy differences and new insights, however. First is the fact that existing studies about pollution violations have not looked at how important sources of local income have received less external pressure to comply with the law. They have not looked at the position of dominant employers, regulated actors who directly and indirectly provide a significant amount of income for people in a given locality.¹¹ Second, existing studies have generally not looked at how local power

⁹ Chen, *Chinese Law, Towards an Understanding of Chinese Law, Its Nature and Development*. See further Chapter 2 and 5.

¹⁰ See Chapter 5 and 11

¹¹ See Chapter 6

configurations affect compliance and violation of law. Neither has there been attention to how village democratization has influenced arable land and pollution cases. Third, while this study, similar to other studies, found that small regulated actors were more likely to violate pollution law, such studies did not address how large enterprises have been able to use their economic power to violate the law with little risk. Fourth, a new finding about compliance behavior is that in some case studies compliance could partly be explained by the fact that the company in question had to support pensioners.

For the enforcement of natural resource protection law the present study confirmed many findings from existing studies emphasizing that weak enforcement arises out of local protectionism, a lack of resources and close relationships between the enforcement agents and the regulated actors.¹² There are two main differences however between existing studies and the present findings. First, this study has sought to understand why local protectionism exists, finding that it occurs because local governments, enforcement agents, but also local communities have condoned the violation of norms that if complied with could affect dominant sources of local income. Second, this study has looked at the effect of political campaigns, a phenomenon not yet studied for natural resource protection law enforcement. Campaigns studied here are examples of Chinese political-legal campaigns. These campaigns have been used to enhance the implementation of law in China. Given the weak regular enforcement that exists in certain areas of law, such campaigns may be necessary to overcome local resistance. However, their effect may be limited as long as structural problems and power relations are not addressed. In addition, their political and ad hoc character stands opposed to a long-term process of rule of law formation.

Comparing China and other Countries

The lack of specific analytical frameworks developed for contexts such as those at Lake Dianchi forced us to resort to literature and theories derived from other countries, both Western and non-Western. Having used these analytical frameworks to study regulation at Lake Dianchi, new insights may be drawn by comparing the findings of this research with findings from Western and other non-Western studies. Such comparison, which is made in explicit recognition of similarities as well as differences, may help to broaden the existing Western theories to be adapted to non-Western contexts, as well as to see to which extent the findings here are unique for China and to which extent they can be found in other countries as well. Before we can discuss a comparison of our case of Lake Dianchi and the existing Western and non-

¹² See Chapter 15

Western studies, we need to clarify some of the differences between China and other countries.¹³

A first difference between China and the West is that in China the conflict of goals between protecting natural resources and ensuring livelihoods is much broader, deeper and more acute than in the West. China's economic circumstances are much different from Western, developed countries. A first fact is that the Chinese per capita GNI is much lower than that of for example the US, the UK, Australia or the Netherlands.¹⁴ In addition China still has a significant poverty problem with 16.6% of the population living from less than one US\$ a day in 2002 and 10 percent of children under 5 suffering from malnutrition.¹⁵ Second, rapid economic growth, which was much larger than that in said Western countries¹⁶, has since reform significantly helped to enhance China's low standards of living.¹⁷ Third, with this economic growth China has had a much faster rate of industrialization¹⁸ and urbanization¹⁹ than the West. Because of such industrialization and urbanization, China's already much pressured national resources have come under severe pressure from pollution and construction.²⁰ In China, there are thus strong linkages between poverty reduction, economic growth, industrialization and urbanization and natural resource pressure. Because many Chinese still remain poor and many that have left poverty are largely dependent on

¹³ The list of differences presented below is by no way exclusive and just contains some of the differences that are relevant for the present analysis and help to enable comparison.

¹⁴ In 2004 China had a per capita Gross National Income (GNI) of US\$ 1,290, while Australia had US\$ 26,900, the Netherlands had US\$ 31,700, the UK had US\$ 33,940, and the US had US\$ 41,400. World Bank, *Equity and Development, World Development Report 2006* (Washington: World Bank, 2006). 292-3

¹⁵ Ibid. 294

¹⁶ China had a GDP growth of 8.8% in 2003-4, while growth in the four above mentioned Western countries ranged from 1.2% in the Netherlands to 3.4% in the US. Ibid. 292-3

¹⁷ An indicator of this is that the percentage of children under five suffering from malnutrition has dropped from 17.4% to 10% between 1989-94 and the 2000-3 periods. Ibid. 294

¹⁸ China's Industry Value Added Growth grew from 11.1% in the 1980-1990 period to 14.1% in the 1990-1999 period. While in the same periods growth on the four Western countries mentioned above ranged from 2.5 to 3.7%. See World Bank, *Attacking Poverty, World Development Report, 2000-2001* (Washington: World Bank, 2001). 294-5

¹⁹ While until reform urbanization had been low, with about 18% of the population living in cities in 1960, in 1980 this number was still only 20%. By 1999, 31% of the Chinese lived in cities, or more than a 50% increase in twenty years, or a 2.5 % annual increase. Meanwhile in Western countries urbanization levels were already high and stable, ranging from 74% in 1980 to 77% in 1999 in the US to 88% in 1980 to 89% in 1999 in the Netherlands. See World Bank, *World Development Report 1983* (Washington: World Bank, 1983). and World Bank, *Attacking Poverty, World Development Report, 2000-2001*. 276-7

²⁰ See Chapter 3 and 4

ongoing economic growth related to destruction of natural resources²¹, measures to control natural resource destruction, which affect such growth²², will have a much stronger effect on the incomes of the people. In other words, the context of relative poverty, combined with a dependence on natural resource destroying sources of income, makes it difficult to control such resource losses without affecting local livelihoods in a much stronger way than in the West. These differences make that strict control of pollution and land use is stronger opposed to China's local economic and social circumstances than to Western countries where most theories on regulation were developed for.

In terms of poverty and low per-capita, China is similar to other non-Western countries²³. However, this does not mean that all non-Western countries suffer from the same conflict of interests as China. Compared to some non-Western, developing countries China has a high degree of industrialization and urbanization.²⁴ In addition, it has a high level of economic growth.²⁵ Non-Western countries without much growth or industrialization will have less difficulty balancing economy and environment, because such interests are less opposed. Here it seems that China is at a difficult point, as it has both growth based on natural resource exploitation and poverty.

A second difference is the limited amount of public participation allowed in China's political and legal system, which has only exacerbated the existing conflicts of interests. Whereas most Western countries have political systems, which allow for a great deal of participation from various interest groups and the population at large, China is a one party state where public participation is limited.²⁶ In this aspect, China is comparable to some, but not

²¹ At Lake Dianchi this is most clearly the case for construction on arable land and for income depended on small polluting enterprises, or older polluting enterprises without funds for proper environmental installations.

²² For construction on arable land the linkage is clear as there is no alternative when rural development, rural industrialization, or rural urbanization is concerned, this always costs arable land. Restricting such land use will restrict economic growth. For pollution the case is more complex. For some polluting companies pollution control can actually lead to more cost efficient production. As such, firms can seek "win-win" situations in which stricter environmental protection is profitable. While this has been noted in the West at for example pulp mills, in China the number of small heavily polluting factories, like the FSS plants, or the number of old heavily polluting factories like Yunfeng is substantial and for these types of plants abatement will bring considerable costs and in many cases mean closure. For a discussion on pulp plants in the West see Gunningham, Kagan, and Thornton, *Shades of Green, Business Regulation and Environment*. 60-72

²³ World Bank, *Equity and Development, World Development Report 2006*. 292-3

²⁴ Ibid. 294

²⁵ World Bank, *Attacking Poverty, World Development Report, 2000-2001*. 276-7

²⁶ Saich, *Governance and Politics of China. Zheng, Party vs. State in Post-1949 China, The Institutional Dilemma*.

all, non-Western countries.²⁷ Especially in a unitary state as large as China, with all its regional differences and its rapid changes, this complicates making policy that fits different interests and contexts in society. Here it is especially noteworthy that China's legal system is largely top-down and does not see local court decisions as a source of law, which could in theory have helped to make the unitary legal system more adaptable to local circumstances and changes.²⁸ In this aspect China is similar to some non-Western countries, mainly those with a continental legal system, such as Indonesia, Egypt or Senegal and different from others with a common law system, such as India or Ghana.

A third difference is the limited role of NGOs in China. China's political context has also affected its social context. Where in Western countries and some non-Western countries²⁹, the freedom of association is largely respected, in China such freedom is not apparent, groups have difficulty organizing themselves and such organization is only just starting.³⁰ For sensitive issues such as pollution control this has meant that only a limited amount of NGOs are active nationwide and have done so without direct conflict with the national state and with only limited conflict with local governments.³¹ At Lake Dianchi such NGOs were not active and most social action against natural resource losses has been of a non-organized *nimby* (not in my backyard) type.³² In this aspect, China is quite extreme; even in regimes which were quite repressive such as Indonesia's New Order, NGOs have been quite successful in mounting pressures to increase environmental compliance and enforcement.³³

A fourth difference is the relative inexperience of China with law and legal institutions. China's legal system has only been reestablished since 1978. As a result of decades of war, civil war and revolution since the 1940s, much of the existing legal system, legal institutions and even legal expertise were lost. China had to start from scratch.³⁴ It has had to focus on making

²⁷ For comparative data on the level of participation in several developing countries including China see Hyden, Court, and Mease, *Making Sense of Governance, Empirical Evidence from Sixteen Developing Countries*. 57-75, 65 in particular for data.

²⁸ See Chapter 2 and 5

²⁹ For a comparison in civil society between China and other non-Western countries see Hyden, Court, and Mease, *Making Sense of Governance, Empirical Evidence from Sixteen Developing Countries*. 64

³⁰ Saich, *Governance and Politics of China*. P. Ho, "Greening without conflict? Environmentalism, NGOs and Civil Society in China," *Development and Change* 32 (2001).

³¹ For an overview of such NGOs see Ho, "Greening without conflict? Environmentalism, NGOs and Civil Society in China."

³² Ibid. Compare with Broadbent, *Environmental Politics in Japan, Networks of Power and Protest*.

³³ Cribb, "The Politics of Pollution Control in Indonesia."

³⁴ For an overview of these processes see Peerenboom, *China's Long March toward the Rule of Law*. S.B. Lubman, ed., *China's Legal Reforms* (Oxford: Oxford University Press, 1996).

laws and building legal institutions, while lacking the experience to do so. Moreover, the world's largest unitary legal system had to be reconstructed in a rapidly changing society. This has had two effects. First legal institutions, including law enforcement bureaus and lawmakers lack capacity in terms of both financial resources as well as human resources. Second, law in China has thus been much closer related to politics and policy. As a result, the law has changed often adapting itself to new policies, but also to new social and economic circumstances or experiences from home or abroad.³⁵ Because of this the law, and especially the application and enforcement of law have suffered from discontinuity and lack of certainty. In this aspect, China is again similar and different from non-Western countries. Some countries, such as for example India and Pakistan have fostered a well developed legal system with a good legal profession, bench and legal education. Meanwhile, especially war torn conflict countries are facing legal vacuums much worse than that in China today and more comparable to the chaotic aftermath of the Cultural Revolution.

A fifth difference, also closely related to China's revolutionary history is the limited amount of professionalization within the country's bureaucracies and legal institutions. Whereas Western and some non-Western³⁶ countries have had clearly professionalized bureaucrats and legal staff including for example police officials, judges or forest inspectors, China's bureaucracy and legal institutions, especially those which were (re)instituted in the years after reform, had to recruit many former army officers, as the devastation of the years of revolution and especially the Cultural Revolution had left little of former professional bureaucrats and lawyers. Only since the 1990s, when a new civil service system was instituted and when China's reopened universities had trained significant amounts of specialists, bureaucracies have started to recruit specially trained civil servants.³⁷

A sixth difference between China and the West is the remarkable and widely condoned influence of informal networks on the daily operation of formal institutions.³⁸ In the literature, this has often been called *Guanxi*,

Lubman, *Bird in a Cage: Legal Reform in China after Mao*. Chen, *Chinese Law, Towards an Understanding of Chinese Law, Its Nature and Development*.

³⁵ This is what Chen has called the piece meal approach to law in China. See Chen, *Chinese Law, Towards an Understanding of Chinese Law, Its Nature and Development*.

³⁶ See for example Quah, "Transforming the Singapore Civil Service for National Development.", E.W. Weidner, ed., *Development Administration in Asia* (Durham N.C.: Duke University Press, 1970).

³⁷ Burns, "The Civil Service System of the People's Republic of China". Burns, "Changing Environmental Impacts on Civil Service Systems: The Cases of China and Hong Kong."

³⁸ See Potter, "Guanxi and the PRC Legal System: From Contradiction to Complementarity." Bian, "Guanxi and the allocation of urban jobs in China.", Yang, "Gifts, Favors, and Banquets:

which literally translated means “relationships”. *Guanxi* practices have at times made that personal favor exchange has dominated formal institutional rules. In this aspect, China seems similar to many non-Western societies³⁹. Because of this, China’s law enforcement institutions run a higher risk of capture-like and corruptive practices than similar Western institutions.⁴⁰

These six differences make the case of natural resource protection regulation at Lake Dianchi different from cases studied in the West, and partly similar to and partly different from non-Western countries.

Parallels and Differences in Debates about Regulatory Law in China and in other Countries

As outlined above, most scholars and policy-makers discussing China’s natural resource protection regulation believe that more stringent and certain legislation and enforcement would help to overcome existing problems of non-compliance.⁴¹ In their analyses many of the problems related to non-compliance have emerged because of weak legislation, weak enforcement institutions and the strong resistance local governments have been able to muster against such regulation.

The debates in China remind us of how scholarship and policymakers discussed regulation in the West in particular in the 1950s, 1960s and 1970s. In this period, they believed that society required new and stronger regulatory institutions to protect citizens from certain types of harm, such as environmental degradation and occupational safety. The original institutions proved to be too weak especially when trying to regulate powerful industry that could capture regulatory agencies. As a result, public interest groups and also politicians started to call for stricter regulation and enforcement, which was subsequently instituted by pro-regulation governments in the 1970s.

However, in the West by the late 1970s and early 1980s in a different economic and political climate a reappraisal was made of the effectiveness of such stringent and formalistic regulation, calling attention for regulatory unreasonableness and overregulation. In the end, such warnings led to extensive empirical studies of regulatory effectiveness and to

the Art of Social Relationships in China.”, Yang, “The Resilience of *Guanxi* and its New Development: A Critique of Some New *Guanxi* Scholarship.”

³⁹ See Chapter 12. There is an abundant literature about networks, patronage and clientalism. A good examples about how this affects enforcement is Oposa, *A Socio-Cultural Approach to Environmental Law Compliance: A Philippine Scenario* (Icited). For general studies see S.M. Lipset and G.S. Lenz, “Corruption, Culture and Markets.”, Riggs, F.W. *Administration in Developing Countries, The Theory of the Prismatic Society*.

⁴⁰ For data that show this point see Transparency International, *Transparency International Corruption Perceptions Index 2003* (Icited).

⁴¹ See Chapter 1, 2, 3, 4 and 13 and 14

searches for regulatory alternatives and forms of deregulation. In the West the flow of debates about regulatory law has led to a rather balanced, to a certain extent empirically based, approach about how to institute a command and control system of regulation that is able to create compliance and enhance enforcement. As we saw above, for lawmaking the balance between adequacy, certainty, feasibility and adaptability is central⁴², while for law enforcement a balance between pure deterrence and pure cooperative styles is the accepted model.⁴³

There are also similarities between China and debates about regulatory law in non-Western countries. First, similar to China, many of the studies on regulatory law in non-Western countries have focused on how to make legislation and law enforcement more effective when faced with limited political support, corruption and weak institutions.⁴⁴ In the literature on non-Western regulatory law, there has been little concern for unreasonableness, and more for capture-like practices undermining the effect of regulation, which given the circumstances is no surprise.⁴⁵

Similar to many studies about non-Western regulation and in contrast with Western studies, studies about regulatory law in China have not clearly focused on unreasonableness, or even feasibility and adaptability. Instead, approaches to Chinese regulation remain firmly rooted in the idea of coping with a lack of capacity and the danger of capture. Given current differences between China and the West, this is not surprising. China's regulatory institutions, in particular the natural resource protection institutions, have a limited capacity compared to Western lawmakers and enforcement bureaus. In addition, China has a context with a significant amount of corruptive and capture-like practices, especially in the context of *guanxi* and the transition from state-controlled to market oriented industries. For lawmaking, this has meant that Chinese lawmakers have focused more on adequacy and certainty and less on feasibility and adaptability. For law enforcement, this has led to campaigns with a temporary deterrence strategy using stringent and formal enforcement methods.

While in the context of limited capacity and fear of capture such methods seem warranted, and have been used also in the West in the 1970s, the present research has questioned their effectiveness. Due to the low level of feasibility, adaptability, and cooperation we argued above that the heavy emphasis on adequacy, certainty and deterrence in lawmaking and law enforcement policies has not led to a sustained compliance with the law and thus not to a successful protection of land, air and water at places such as

⁴² See Chapter 2

⁴³ See Chapter 12

⁴⁴ See Chapter 2 and 12

⁴⁵ See Chapter 2 and 12

Lake Dianchi. Thus, we hope that the study of regulation in China will pay more attention to regulatory unreasonableness.

In studies of both Western and non-Western regulatory law, alternatives to state regulation have been increasingly recommended.⁴⁶ Especially the World Bank's series of studies on pollution regulation in non-Western countries strongly advocates informal forms of regulation to overcome existing problems related to rigid and weak institutions in a developmental context.⁴⁷ These studies advocate alternative approaches involving civil society and the market through financial instruments, public disclosure and education programs. It has been recognized however, also by the World Bank, that such informal regulation cannot be a full alternative to state regulation, which often provides the information basis needed for informal regulation. In addition, some countries and contexts may be more adapted to informal mechanisms than others. In countries such as China with a limited civil society and transitional market, social and market-based mechanisms may not be as effective.

Thus a first comparative conclusion is that there are parallels between regulatory debates in contemporary China and debates in the 1960s and 1970s in the West and the 1990s about non-Western countries. A second conclusion is that while China's circumstances demand a focus on capacity building and control of capture, the feasibility and thus the reasonableness of the regulatory system should also be taken into account. As a third conclusion, we see that the contemporary Western debates are in certain aspects quite ahead of the situation in countries such as China, where a fear of capture and a lack in capacity is still very much an issue. Without solving these two, and setting up a basic system of command and control regulation, the development of alternative forms of regulation will be risky.⁴⁸ As such, the most recent debates about deregulation and alternatives to regulation in Western and non-Western countries, should be used with care when applying them to China, and only be done so while recognizing the Chinese context such as weak capacity, the enhanced danger of capture or corruption, the different economic context and the weak role civil society and the market play.

The Importance of the Economic Context to Understand Compliance

The study of Lake Dianchi found that the influences from the economic context were the most significant. It dominated all other external and

⁴⁶ See Chapter 1

⁴⁷ World Bank, *Greening Industry, New Roles for Communities, Markets and Governments*.

⁴⁸ Aalders also makes this point. See Aalders, "Self-Regulation and Compliance with Environmental Law from a Global Perspective."

internal factors in compliance and violation cases. In addition, it found that changes in lawmaking and law enforcement had little direct influence on compliance. There are some notable differences between our findings concerning the influence of the economic context and those in existing literature.

In existing Western studies, the economic context is also important⁴⁹, albeit not as important as our study here found. An important parallel between our study of Lake Dianchi and Western studies is the fact that regulating dominant employers is more difficult as many incomes depend on them.⁵⁰ In contrast with our findings, Western studies have found that even when compliance causes significant economic costs, regulation can still be successful in stopping pollution. Gunningham et al.'s study of beyond-compliance at pulp mills in several Western countries is important here. This study showed that these paper mills invested significantly in abatement, at considerable cost, in order to meet the increasingly stringent environmental standards. Their study analyzed firm behavior in these countries also by looking at the external contexts, focusing on the legal, economic/business and social contexts. Their study argues that tightening of the regulation has been a driver for changes in the economic and social contexts and as such, "regulation is the single most important driver for improved environmental performance."⁵¹ Both the general deterrence associated with the threat of governmental enforcement⁵², but also class action by citizens and advocacy groups using such stringent standards, as well as informal pressures from negative publicity and shaming have influenced firms in the West to comply with regulation.⁵³ Because of the pressure, the firms were forced to comply with the law despite economic constraints. Furthermore, the economic context would adapt to the new constraints, which would apply to all such firms. Gunningham et al.'s study thus portrays this process as a "convergence" of these three contexts, showing how stricter regulation in the legal context affects more pressure in the social context, which will be able to overcome restraints to compliance in the economic context.⁵⁴

⁴⁹ See for example Gunningham, Kagan, and Thornton, *Shades of Green, Business Regulation and Environment*, Huisman, *Tussen Winst en Moraal, Achtergronden van Regelgeving en Regelovertrading door Ondernemingen (Between Profit and Morality, The Backgrounds to Enterprise Compliance and Violation)*. 138 For more sources see Chapter 6

⁵⁰ Kagan, Gunningham, and Thornton, "Explaining Corporate Environmental Performance: How does regulation matter?" 69

⁵¹ Gunningham, Kagan, and Thornton, *Shades of Green, Business Regulation and Environment*. 45

⁵² General deterrence can work as against violations, but even in case most firms comply it is influential as reassurance when in compliance that others would receive punishment for violation and as reminder to check such compliance. See Thornton, Gunningham, and Kagan, "General Deterrence and Corporate Environmental Behavior."

⁵³ Gunningham, Kagan, and Thornton, *Shades of Green, Business Regulation and Environment*. 50

⁵⁴ *Ibid.* 139

The above-mentioned World Bank study of pollution regulation in non-Western countries also focuses on a convergence of the economic, the social and the regulatory context. This study argues that in some cases a combination of social, market and regulatory pressures have made polluting firms decrease their pollution.⁵⁵ There are different ways in which such convergences occur and with different outcomes, some in compliance but some in violation. One of the cases discussed in the World Bank study concerns the control of pollution of small brick factories in Juárez, Mexico. In this case, the continued pollution by scrap burning brick kilns caused so much nuisance that community pressure erupted. This led to elections and a new mayor who adopted stricter local rules and initiated punitive law enforcement. As a result of these pressures and also of a pollution education program, companies negotiated with suppliers of clean propane equipment for lower equipment prices and were able to adopt cleaner technology without closing down. In Juárez, thus a convergence started from the social context involving the political, the regulatory and the economic context made compliance and pollution abatement possible.⁵⁶ However, soon a convergence with the opposite effect occurred due to changes in the economic context. The annulment of state subsidies for propane gas in Mexico prices weakened community and regulatory pressures in Juárez. Fearing bankruptcies and unemployment, the community and business consensus supporting cleaner production evaporated, while the municipal government dropped its deterrent enforcement style.⁵⁷ We thus see that in non-Western contexts, if the situation is right, a convergence similar to the US, but starting from the social context can take place. However, such convergence depends highly on the economic context. If unemployment looms and jobs are on the line, community and regulatory pressures can easily dissipate.

The analysis of non-compliance cases at Lake Dianchi is also one of convergence albeit with a different effect than in Gunningham et al.'s study and more similar to how convergence ended in Juárez. Here the economic context dominated the convergence of the economic, social, regulatory and political contexts and as a result, more stringent regulation did in most cases not lead to more compliance.⁵⁸ The difference between the US and China here can be explained by a number of factors. First, as argued above, at Lake Dianchi the contradiction between local livelihoods and natural resource

⁵⁵ World Bank, *Greening Industry, New Roles for Communities, Markets and Governments*.

⁵⁶ Blackman and Bannister, "Pollution Control in the Informal Sector: the Ciudad Juarez Brickmakers' Project.", World Bank, *Greening Industry, New Roles for Communities, Markets and Governments*.

⁵⁷ Blackman and Bannister, "Pollution Control in the Informal Sector: the Ciudad Juarez Brickmakers' Project."

⁵⁸ See Chapter 11

protection was larger, especially than in the US. Strict enforcement of the laws' norms would in Kunming have led to a decrease of the already much more limited income of many, especially in those areas where there were no alternative sources of income not directly or indirectly related to natural resource loss. In the US study, the firms were able to comply with the increasingly stringent norms without having to close down or affect a significant amount of livelihoods.⁵⁹ Second, because of the contradiction between compliance and local livelihoods, and the homogeneous local economy in which violating behavior was a dominant source of income, local communities never invoked the laws' more stringent rules as happened in the US. Another reason this did not happen is that at Lake Dianchi, non-local and therefore independent, public interest groups have not played a dominant role due to the political context, which restricts the non-state organization of political interests. Here China is different from both the US, as well as many other non-Western countries. In addition, for arable land protection no such interest groups, even at the national level are identifiable, mainly because it is a rather abstract long-term national interest, rather than a public concern. Third, China's law enforcement machinery for natural resource protection is much less well equipped than that of Western countries, as it lacks resources, well trained personnel, efficient internal management and external review systems. The weakness of state enforcement is of course exacerbated by the lack of invocation of law by inhabitants or NGOs. In addition, agents have been unwilling to enforce the law stringently during regular enforcement work due to its local unfeasibility and unreasonableness. Fourth, as a hypothesis here not tested we believe that due to the years of weak natural resource protection law enforcement and the relative inconsistent nature of the legal system as a whole and the legal enforcement campaigns, the regulatory context offers much less of a general deterrent effect. Regulated actors in China have much less to fear from enforcement action, either governmental, from interest groups or informal. Specific actions in China against one violating actor therefore may have much less general effect in creating compliance than similar actions in the West. Fifth, many actors in China are not in compliance, whereas in the West, in the case of the pulp mills, most were. This has two results. First for those violating, ending violations at economic costs will put them at a disadvantaged position from those continuing violation. Second, this especially applies to polluting firms, when the majority is not in compliance

⁵⁹ Except for one pulp mill which experimented with extremely beyond compliance measures producing chloride free paper that was not marketable and in the end had to file for bankruptcy and lay off 240 workers. See Gunningham, Kagan, and Thornton, *Shades of Green, Business Regulation and Environment*. 61

the costs related to compliance have not yet become a normal part of business operations accepted within the economic context of the market.

From the above we can draw several conclusions. First compliance behavior comes forth out of a convergence of different contexts (economic, social, political and regulatory) and factors internal to the regulated actor. Second, in the West, scholarship demonstrated that for pollution control at pulp plants, the regulatory context dominates such convergence towards compliance. At Lake Dianchi, however a different convergence occurred, where the economic context was dominant and non-compliance resulted, largely similar to the final convergence that ended compliance in Juárez, Mexico. Third, an economic context where compliance is strongly opposed to local livelihoods of most citizens is the most important explanation for such a difference.⁶⁰ Fourth, general deterrence may be less influential on compliance behavior in weak regulatory contexts such as the Chinese. Fifth, because of all this, in contexts where compliance is strongly opposed to local livelihoods, similar to that at Lake Dianchi, the feasibility and adaptability of legislation and enforcement is important and the existing economic context should be taken into account when seeking solutions for existing problems.

The Importance of the Social Context for Compliance

The study of compliance behavior at Lake Dianchi found that the social context played an important role in some of the compliance cases. In one pollution case and in two land compensation cases local communities were able to exert sufficient pressure to make the regulated actors comply or even go beyond compliance.

The importance of the social context resonates with existing studies of compliance from elsewhere. Many Western studies, but also studies about non-Western countries now recognize the importance of the social context as a source of pressure that enhances compliance.⁶¹ A related finding has

⁶⁰ It is important to note that there are exceptions. China's one child policy is one such exception. Here a policy, which strongly affected local livelihoods and worse private behavior, was quite successfully implemented. While we cannot make a full analysis of differences and similarities here, a difference between the one child policy, on first glance, and natural resource protection regulation, lies in the full and consistent use of China's CCP political machinery towards its implementation. China could do so only at considerable costs and would not be able to do so for every policy area at every time. Instead for other areas it has resorted to campaigns which in an ad hoc manner try to achieve the same affect, but due to inconsistent application fail to sustain results made.

⁶¹ See for example Levine, "Between Choice and Sacrifice: Constructions of Community Consent in Reactive Air Pollution Regulation." Kagan, Gunningham, and Thornton, "Explaining Corporate Environmental Performance: How does regulation matter?" 68-73 Sonnenfeld, "Social Movements and Ecological Modernization: The Transformation of Pulp and Paper Manufacturing." Sonnenfeld, "Social Movements, environment, and technology in Indonesia's pulp and paper industry." World Bank, *Greening Industry, New Roles for Communities*,

been that regulated actors who are more open towards their social context, i.e. have a larger amount of social responsiveness, will be more inclined to compliance.⁶² Social contexts can exert pressure directly by addressing the regulated actor through legal or informal (collective) action; in addition, it may do so indirectly through pressure on lawmakers for stricter regulations and law enforcement bureaus for stricter enforcement. Studies from the West have emphasized that better organized communities, for example through labor unions or trade associations, are more successful in this respect.⁶³ Similarly, for developing countries, studies have emphasized the role social contexts can play to help achieve better compliance with natural resource protection laws, pollution in particular, even when the formal regulatory context was weak.⁶⁴ Hettige et al. study found that such activism only existed in communities with a certain level of education and income. From Huq and Wheeler's study of community pressure in Bangladesh, we can deduce that community pressure was only successful there when the regulated firm was not a dominant employer.⁶⁵ In addition, Pargal et al. and Pargal and Wheeler's studies demonstrate that in Indonesia and the US social pressure from richer and well-educated communities was much more effective.⁶⁶

In many of the cases studied at Lake Dianchi, there was little to no pressure from the local community. Above we already discussed some of the factors that may explain the difference between Lake Dianchi and studies from elsewhere: in most cases the violating activity is dominant for local income, and as a result local communities have been too dependent of such activity (either directly or indirectly), in addition non-local public interest groups were not active in the area, partly because under the political system topics such as pollution are too sensitive and China's NGOs have not often

Markets and Governments. Hettige et al., "Determinants of Pollution Abatement in Developing Countries: Evidence from South and Southeast Asia." R.S. Hartman, M. Huq, and D. Wheeler, "Why Paper Mills Clean Up, Determinants of Pollution Abatement in Four Asian Countries," *World Bank Policy Research Working Paper*, no. 1710 (1997).

⁶² Van de Bunt, *Organisatiecriminaliteit (Organizational Crime)*. Braithwaite, John. *Crime, Shame and Reintegration*.

⁶³ Levine, "Between Choice and Sacrifice: Constructions of Community Consent in Reactive Air Pollution Regulation." 1039, Bardach and Kagan, *Going by the Book, The Problem of Regulatory Unreasonableness*. Scholz and Wei, "Regulatory Enforcement in a Federalist System." Hawkins, *Environment and Enforcement, Regulation and the Social Definition of Pollution*.

⁶⁴ Hettige et al., "Determinants of Pollution Abatement in Developing Countries: Evidence from South and Southeast Asia." Carmen de Mello Lemos, "The Politics of Pollution Control in Brazil: State Actors and Social Movements Cleaning up Cubatão."

⁶⁵ Huq and Wheeler, "Pollution Reduction Without Formal Regulation: Evidence From Bangladesh."

⁶⁶ Pargal et al., "Formal and Informal Regulation of Industrial Pollution: Comparative Evidence from Indonesia and the United States.", Pargal and Wheeler, "Informal Regulation of Industrial Pollution in Developing Countries: Evidence from Indonesia."

directly confronted the state on these matters⁶⁷ or for arable land protection such NGOs just do not exist as it is not a public concern. Here we thus see that the economic context limits pressure from the local social context, in addition we see that the political context further inhibits pressure from the non-local social context. In some of the cases at Lake Dianchi, we saw that the social context supported violations as it stood to benefit directly from it. In these cases, the pressure of the social context thus enhances violation and regulated actors with a greater social responsiveness will be less inclined to compliance. For arable land regulation, when compensation was not the issue, we see that there were no direct victims of violations. As such arable land protection is more difficult as victimless violation⁶⁸ will not attract resistance from society.

A first conclusion drawn from this is that the social context can be an important driver towards compliance, more stringent legislation and enforcement. However, in contexts such as that of Lake Dianchi this will only happen if there is either a local community independent of the violating activity, educated, and organized enough to initiate action or a non-local independent and well-organized social organization, politically and legally able to pressure violators towards compliance. A second, related conclusion is that the social context influences the effect of social responsiveness on compliance. In contrast with existing studies claiming that higher social responsiveness leads to better compliance, Lake Dianchi demonstrates that in contexts in which the social context supports norm violation, higher social responsiveness leads to more non-compliance.

How Complexity Challenges Lawmaking and Law Enforcement

This study of Lake Dianchi has confirmed that successful lawmaking and law enforcement requires finding a balance between the goals of the law and law enforcement on the one hand, and the local interests and circumstances of the regulated actors and their economic and social contexts on the other.

As we saw, this idea is based in the Western literature. Our analysis of studies on the quality of legislation in terms of its effects on voluntary compliance, enforcement and goal attainment brought forward four variables that should be balanced: adequacy, certainty, feasibility and adaptability.⁶⁹ In addition, the analysis of enforcement strategies found that there is now wide

⁶⁷ A notable exception is the Beijing located Center for Legal Assistance to Pollution Victims, which has helped farmers initiate cases against companies. However this NGO has not yet successfully initiated public litigation cases and has not been active in the area of research. Ho, "Greening without conflict? Environmentalism, NGOs and Civil Society in China."

⁶⁸ Compare with Oposa, *A Socio-Cultural Approach to Environmental Law Compliance: A Philippine Scenario* ([cited].315

⁶⁹ See Chapter 2

agreement in the literature that a balance must be found between the formalistic and stringent approaches of deterrence, and the informal, less stringent approaches of compliance strategies, which accommodate for the specific local interests.⁷⁰ Studies about non-Western law enforcement have advocated both deterrence and cooperative styles, while as yet none of them has advised to search for the balance as proposed in Western studies.⁷¹

While in theory, there is thus some agreement about what is good regulation, the case of Lake Dianchi at least shows that attaining the proposed balance between different elements was difficult. For lawmaking, we saw that China's national legislation was originally quite feasible and flexible because of its weak and vague norms, but deficient in terms of adequacy and certainty and as such not able to attain its goals. After amendments some of the law's norms became stricter and more specific and thus more adequate and certain, however such norms lost their feasibility and adaptability which in the end led to a limited amount of voluntary compliance, little effective enforcement and a disappointing goal attainment. Similarly, we saw that regular enforcement was based on cooperation, wide agent discretion and a limited use of sanctions, which sustained many violations. Campaign-type enforcement, which was organized in reaction to weak regular enforcement, was adversarial, formalistic, with limited discretion and involving strict sanctions. In the end, such enforcement was, however, also not successful as it also lacked feasibility and adaptability. For both lawmaking and law enforcement we thus see that China's lawmaker has moved from one extreme form, where lawmaking and law enforcement followed the local interests of the regulated actor while disregarding its own long-term environmental goals, to the opposite, where the law's and law enforcement's goals were central, but there was no adaptation to the interests of the regulated actor. Why has it been so difficult to find a proper balance?

A first reason is that it is difficult to know what the right balance is, as this would require understanding of how far the law and its enforcement can go without becoming unfeasible or unreasonable for regulated actors. This requires sound empirical knowledge and understanding the regulated actor and its responses to lawmaking and law enforcement. For lawmaking, Seidman and Seidman have argued that good lawmaking should involve knowledge about the behavior of the regulated actor, if it wants to make rules that can successfully influence such behavior.⁷² Similarly, Kagan and Scholz have argued that successful enforcement needs to be adapted to the

⁷⁰ See Chapter 12

⁷¹ See Chapter 12

⁷² Seidman and Seidman, "Using Reason and Experience to Draft Country-Specific Laws."

reasons why the norm addressees comply or violate the law.⁷³ Tamanaha has warned, however, that finding out about such behavior is not easy, especially not for lawmakers in developing countries⁷⁴, and perhaps we should add here even law enforcers.

Our study of compliance and violation demonstrated that even around one lake the same rules led to different outcomes depending on a complex set of interacting variables both internal to the regulated actor as well as external. The complexity of even one lake pales compared to the complexity of a large country as China with a unitary legal system. National legislators and law enforcement strategists face the daunting and perhaps impossible task of understanding how the multitude of various regulated actors in different geographical, economic and cultural settings will respond to their rules and enforcement actions. The complexity of compliance and violation behavior therefore severely challenges the possibility of designing balanced laws and enforcement schemes, especially in a developing legal system.

However, the difficulty of finding a balance between the goals of the law and the interests of the regulated actor in various contexts is more fundamental than just the complexity of understanding the regulated actor. First, even if we would be able to understand the interests of regulated actors, the complexity of this information would pose a significant challenge for successful lawmaking and enforcement. For lawmaking, the problem is that if legislation is truly to be flexible to fit such a complexity of different interests in society, even if it was possible to know such interests, it would have to become abstract to the point of losing meaning. Only through abstraction can legislation leave sufficient room for interpretation in order to fit a range of different circumstances and interests. If the law is too abstract it loses its control over its outcomes. Abstract law is not able to guarantee that the implementation result is in line with the original goals of the law. Here lawmaking gets caught in a fundamental dilemma; either it is specific and certain, but cannot be adapted to the interests of the regulated actor and thus lacks adaptability and as a result feasibility, and thus fails to incur compliance; or it is abstract and thus flexible and feasible, but is not certain and therefore lacks in adequacy and fails to attain its own goals, even if fully complied with. For enforcement, the same applies. If the interests of the regulated actors are complex, it is not possible to design a singular enforcement strategy that would be successful at influencing compliance for all the different types of situations. In other words, faced with complexity, enforcement needs a certain amount of discretion, and it needs to be

⁷³ Kagan and Scholz, "The "Criminology of the Corporation" and Regulatory Enforcement Strategies."

⁷⁴ Tamanaha, "A Pragmatic Approach to Legislative Theory for Developing Countries."

informal.⁷⁵ Law enforcement is thus caught in the same dilemma as lawmaking. It either leaves sufficient discretion to agents to enforce the law in such a manner that it takes the reason for violation into account, but there is no guarantee that the enforcement agent will actually strive towards compliance. Alternatively, law enforcement is formal with limited discretion and a seeming control over outcomes, but without sustained compliance because the enforcement action does not fit the interests at hand or the reasons for violation. For social problems involving complex conflicts of interests balance between the two is thus not easily achieved.

The second fundamental dilemma concerns the complexity related to situations as those at Lake Dianchi where the goals of the law and the interests of the regulated actors are conflicting. In this situation, legislation and enforcement that accommodate such local interests will have a higher chance of not accomplishing the laws' goals. Vice versa, in a situation where the laws' goals and the local interests are strongly conflicting, lawmaking and enforcement that is goal oriented and fixed on achieving the goals of the law have a higher chance of being unfeasible locally and not lead to compliance.

The actual presence of both dilemmas explains why finding a proper balance is so hard. When the goals of the law are strongly opposed to local interests, a lack in legal adaptability and enforcement discretion, which will more easily occur in a context of a wide variety of local interests and contexts, immediately leads to a more unfeasible and unreasonable outcome, which adversely affects compliance. Conversely, too much adaptability and discretion, which a context of complexity demands, will in this type of situation easier lead to compliance and enforcement that does not help attain the goals of the law.

A first conclusion is that complexity challenges successful lawmaking and enforcement, which needs to balance the goals of the law with the interests of the regulated actor. A second conclusion is that such complexity is paramount in large countries such as China. A third conclusion is that in such a context of complexity, and often lacking empirical knowledge, it is difficult to understand the interests of the regulated actor, necessary to find the balance needed for good lawmaking and enforcement. A fourth conclusion is that even if the interests of the regulated actors can be understood, it is difficult to translate them into successful legislation and enforcement strategies because of the dilemma that adaptation to all such interests leads to such a high level of abstraction and discretion that goal attainment becomes limited. A fifth conclusion is that when the goals of the laws are strongly opposed to the interests of the regulated actor and its economic and social contexts, even if the interests are well understood

⁷⁵ This is in line with the cooperative or compliance theory of law enforcement, see Chapter 12.

accommodation to such interests will easier lead to failure to attain the laws' goals. A sixth conclusion is that a larger scope of application in the law and a larger degree of heterogeneity in society pose an extra challenge for finding such balance. A seventh conclusion is that legal systems that are largely top down, without for example case law as a source of law are extra challenged in offering certainty and adaptability. An eight conclusion is that complexity poses limits to legal certainty and the possibility to limit discretion of regulated actors or enforcement agents. A ninth conclusion is that the professionalization of bureaucracies and courts in Western countries and some non-Western countries⁷⁶ and their capacity to control enforcement without limiting discretion seems not to exist in contexts such as those at Lake Dianchi.

How Politics Influence Ad Hoc Lawmaking and Enforcement

From the mid-1990s onwards, China's natural resource protection lawmaking and law enforcement suddenly changed several times, from a weak, vague, cooperative and non-stringent to strict, specific and stringent. These changes made that the law and its enforcement became more oriented towards separate goals and less on the full complexity of the regulated issue at hand. Changes seemed to result from shifts in what powerful leaders deemed important. In addition, changes occurred to some extent as a reaction to incidents, and in a manner widely publicized. Political leaders seemed to want to show their commitment to deal with incidents in a strong manner. The changes witnessed here thus had a political rationale.⁷⁷

A comparison taught us that also in many other countries, Western and non-Western, legislation and law enforcement suddenly changed because of a political reaction to incidents or shifts in power. Examples were mentioned in chapters 2, 5, 12 and 15. In these cases, the political rationale to show willingness to change prevailed instead of a rationale in which the full complexity of the issue at hand could be weighed.

As an idea for further comparative research, we believe that these kinds of changes are a phenomenon, which we here choose to call "ad hoc law". Ad hoc law indicates large changes in lawmaking and law enforcement, based on a political rationale as a reaction to incidents and/or shifts in power, often temporal in nature, especially for enforcement. Ad hoc law is oriented on limited political goals, and may often lead to extreme forms of lawmaking and enforcement, highly adequate, certain, or deterrent or oppositely, highly feasible, adaptable and cooperative. Following incidents and shifts in power,

⁷⁶ A good example is Singapore, see Chapter 12.

⁷⁷ For this term see Snellen, *Boeiend geboeid (Captivated Captured) (Inaugural Lecture University of Tilburg)*.

one ad hoc change may follow another leading to regulatory conjunctures of different styles.

A general insight is that research about regulatory law should look more at how regulatory change occurs and what influence a political rationale has for such changes. For this, much can be learned from studies about penal populism⁷⁸ and symbolic politics⁷⁹.

Looking Ahead

Meanwhile natural resource loss continues at Lake Dianchi. Our analysis above may seem to indicate that legislation and enforcement remain powerless to stop the ongoing construction on arable land and the pollution of air and water at places like Lake Dianchi. Is there hope for amelioration in the future?

We believe there is, especially for pollution. For pollution, if China's economic growth continues and especially if the already expanding service sector grows more important and if the local economy diversifies, the local economic interests will change. First, there will be more non-polluting sources of income. This makes that more stringent action against heavily polluting enterprises will be more acceptable. Second, the diversified economy will also decrease the influence of dominant employers, especially if rather remote regions such as Kouxiang will be connected to Kunming through the planned highways. As a result more social pressure to clean-up similar to the *NCFC* case can be expected. Third, the ongoing professionalization, especially the recruitment of environmentalist enforcement agents will lead to more resistance to local protectionism within the enforcement bureaus. Fourth, this will be especially so when the then richer peri-urban dwellers around the lake, realize that their raised economic standard of living is affected by a polluted environment. Fifth, finally, increased enforcement and protest from local communities that thus result may in the end lead to a situation in which most comply with the law and the costs of compliance are no longer an exception but a rule also recognized by the markets that control the regulated firms. For land, unfortunately we cannot be as hopeful as it is expected that China's urbanization and industrialization continue and the goals of the law remain opposed to the interests of most living in peri-urban areas, who will less and less depend on agriculture as a source of income.

Meanwhile, a number of steps could be taken to ameliorate current problems of land and pollution legislation and enforcement. First, a quality

⁷⁸ J.V. Roberts et al., *Penal Populism and Public Opinion, Lessons from Five Countries* (Oxford: Oxford University Press, 2003).

⁷⁹ Stone, *Policy Paradox, The Art of Political Decision Making*. Edelman, "The Construction and Uses of Social Problems."

system for lawmaking should be introduced in which the implementability of a proposed law is extensively researched, incorporating empirical data about the expected behavior of the various regulated actors and about the costs of implementation. Second, case law should become a source of law, allowing for the bottom-up formation of norms, which can help to bridge certain contradictions between certainty and adaptability. Third, some of the most unfeasible and ill-adaptable norms should be reconsidered and changed.⁸⁰ In addition, for pollution an integrated permit system should be introduced, as such a system seems better able to balance adequacy, feasibility, certainty and adaptability. Fourth, law enforcement should become more based on a mixed style using both cooperative and deterrent approaches. For this Ayres and Braithwaite's enforcement pyramid is an important instrument.⁸¹ Fifth, condoning violations should be done explicitly. Sixth, law enforcement should continue to expand using public participation and public disclosure. Seventh, non-state environmental interest groups should be allowed more freedom to organize themselves. In addition, such groups should be given legal standing allowing them to initiate public interest litigation. Eighth, command and control regulation should be combined more with investments in alternative livelihoods.

It is hoped that these recommendations, combined with the insights drawn from the present study can enhance the law in developmental socio-legal systems as can be found around Lake Dianchi.

⁸⁰ These include LMA § 62.1, 62.3, WPPCL § 14.2, 22, 23, 29, 35, 27, APPCL § 13, 48, EIA Law § 31.1, DPR § 17.1, 21.2, KMREP § 8, 11.

⁸¹ Ayres and Braithwaite, *Responsive Regulation*. See Chapter 12.

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Samenvatting

De Regulering van Grond en Vervuiling in China

Inleiding

Het Dianchimeer ligt in het Zuidwesten van China, vlak onder Kunming, de hoofdstad van de provincie Yunnan. Sinds de jaren tachtig kon de bevolking rondom het meer profiteren van de welvaartsgroei die de lokale industrialisatie en urbanisatie met zich meebracht. De economische groei heeft echter ook negatieve gevolgen gehad, vooral voor de natuurlijke hulpbronnen in het gebied. Door de industrialisatie en urbanisatie is steeds meer landbouwgrond verloren gegaan aan bedrijfsterreinen, kantoorpanden en woningen. Daarnaast is het meer zelf, maar ook de belangrijkste rivieren en de lucht in de omgeving, aangetast door de vervuiling vanuit de vele kleine en grotere industrieën die zich daar hebben gevestigd.

Dit proefschrift gaat over de regulering van natuurlijke hulpbronnen in het Zuidwesten van China. Het bestudeert hoe China in reactie op een verlies van landbouwgrond en een sterke lucht- en watervervuiling, vanaf het midden van de jaren negentig nieuwe juridische maatregelen heeft genomen om de natuurlijke hulpbronnen te beschermen. De maatregelen bestonden enerzijds uit het amenderen en invoeren van nieuwe wetgeving, die deels striktere en specifiekere normen bevatte. Anderzijds richtten de Chinese beleidsmakers zich op het verbeteren van de handhaving door het organiseren van jaarlijkse handhavingscampagnes. Dit proefschrift bestudeert wat het effect van de aldus verbeterde wetgeving en handhaving is geweest op de naleving van recht ter bescherming van landbouwgrond en voorkoming en controle van vervuiling in het gebied rondom het Dianchi meer.

Deel I: Wetgeving: Proces en Kwaliteit

Deel I bestudeert hoe veranderingen in de wetgeving de implementeerbaarheid van de Chinese grond- en milieuwetgeving hebben beïnvloed. De vier hoofdstukken in dit deel (Hoofdstukken 2-5) bestuderen hoe een viertal wetten op het terrein van landbouwgrond en vervuiling in de tweede helft van de jaren negentig is veranderd. Ze bekijken hoe de debatten ten aanzien van de normen in deze wetten van invloed zijn geweest op de implementeerbaarheid van de wetgeving. Het analytisch raamwerk voor dit deel handelt over de manier waarop wetgeving tot stand komt en over de kwaliteit van wetgeving, met name voor wat betreft de kans dat wettelijke regels tot naleving, handhaving en doelverwezenlijking kunnen leiden ("implementeerbaarheid"). Wetgeving kenmerkt zich enerzijds door de mate

van participatie (van volledig pluralistisch tot elitair) en de mate van rationaliteit (van volledig rationeel, tot incrementeel, tot berustend op toeval). De mate en soort van participatie en rationaliteit beïnvloeden de inhoud van de wet en dus ook haar kwaliteit.

In deze studie wordt kwaliteit van wetgeving sterk instrumenteel benaderd vanuit het idee dat goede wetgeving tot naleving moet leiden, of in geval van overtreding in ieder geval tot goede handhaving die weer tot naleving leidt. Daarnaast moet deze naleving dusdanig zijn dat de doelen van de wet bewerkstelligd worden. Vanuit deze ideeën behandelt Hoofdstuk 2 een viertal kenmerken van implementeerbare wetgeving. Ten eerste de adequaatheid, hetgeen inhoudt dat de normen in de wet strikt genoeg en omvattend genoeg moeten zijn om de formele doelen van deze wet te bereiken. Ten tweede de haalbaarheid, hetgeen inhoudt dat naleving en handhaving van de wetgeving mogelijk, betaalbaar en acceptabel moeten zijn voor de normadressaat en de handhaver. Ten derde de zekerheid, hetgeen inhoudt dat regels in de wet zo duidelijk mogelijk moeten zijn en duidelijk maken wat van de normadressaat en de handhaver verwacht wordt. Ten vierde, de aanpasbaarheid van regels, hetgeen inhoudt dat normen ruimte laten aan de normadressaat en de handhaver om ze aan te passen aan de specifieke omstandigheden waarin het te beïnvloeden gedrag plaatsvindt. Indien wetgeving zo veel mogelijk aan deze vier kenmerken voldoet is er een grotere kans op een goede naleving, handhaving en het bereiken van de formele doelen.

Hoofdstuk 3, maakt op basis van het bovenbeschreven raamwerk een analyse van de totstandkoming en de implementeerbaarheid van een herziening van China's Wet op het Grondbeheer. Deze wet die dateerde uit 1986, werd in 1998 ingrijpend veranderd. Een van de belangrijkste redenen voor de wetswijziging was het versterken van de regels ter bescherming van landbouwgrond. Halverwege de jaren negentig was het belang van de bescherming van deze grond hoog op de agenda van de Chinese regering komen te staan. Dit was mede het gevolg van buitenlandse berichtgeving en interne rapportage die stelden dat de landbouwgrond verminderde en dat dit de voedselvoorziening van China op langere termijn zou schaden. In reactie hierop werd een wetsontwerp gemaakt dat de originele wet voorzag van strikte bepalingen die de teloorgang van landbouwgrond moesten tegengaan. Hierbij was een aantal bepalingen opvallend. Een voorbeeld vormen de bepalingen ten aanzien van "basislandbouwgrond", die op provinciaal niveau 80% van de grondoppervlakte moest bedragen. Voor conversie hiervan was goedkeuring van de centrale regering vereist. Een ander voorbeeld zijn de bepalingen ten aanzien van het verbod op bouwen op collectieve landbouwgrond. In het wetsontwerp was het verboden om bouwprojecten uit te voeren op collectieve grond indien deze een niet-collectief oogmerk

had. Daarnaast verbood het wetsontwerp boerengezinnen om een tweede huis te bouwen op collectieve grond.

Bij de behandeling van het wetsontwerp konden bepaalde daartoe uitgenodigde belanghebbenden, met name lokale overheden en centrale ministeries, hun mening geven over de voorgenomen wijzigingen. Op een aantal punten, waaronder de zojuist genoemde bepalingen, gaven deze belanghebbenden aan dat deze voorgenomen normen niet lokaal uitvoerbaar zouden zijn omdat ze niet pasten bij de lokale context. Daar waar hun kritiek direct ging over normen voor de bescherming van landbouwgrond, en bijvoorbeeld niet over de compensatie voor het verlies van grond, verwierp de commissie voor juridische zaken van het Nationaal Volkscongres hun bezwaren. De reden daarvoor was dat het Comité een zo strikt en specifiek mogelijke wet wilde omdat deze het meest geschikt was om de landbouwgrond te beschermen, zo dacht men.

De geringe mate van daadwerkelijke participatie (een mening geven die niet serieus werd meegewogen) en de geringe mate van rationaliteit (de feiten die betrekking konden hebben op de uitvoering van de wetgeving werden niet volledig meegewogen) tastten de implementeerbaarheid van de wet aan. Hoewel de wet door haar striktere en specifiekere normen goed scoort wat betreft adequaatheid en zekerheid, is voor een aantal normen de haalbaarheid en aanpasbaarheid gering. Het wetgevingsproces voor de nieuwe wet op grondbeheer vertoont een sterk ad hoc karakter. Het is gericht op een specifiek belang, de bescherming van landbouwgrond. Het gevoel van urgentie, gekoppeld aan het idee dat strike en specifieke wetgeving beter is, maakte dat niet de overige aspecten van grondgebruik werden meegewogen, zelfs waar lokale onuitvoerbaarheid door belanghebbenden werd genoemd, maar er slechts oog was voor het beschermen van landbouwgrond. Helaas lijkt door de geringe mate van implementeerbaarheid juist die bescherming in het gedrang te komen nu de wet niet tot naleving of goede handhaving zal leiden door gebrek aan haalbaarheid en aanpasbaarheid.

Hoofdstuk 4 behandelt vervuilingswetgeving. Het beschrijft hoe de Chinese wetgevers twee wetten, de Wet op Preventie en Controle van Watervervuiling en de Wet op Preventie en Controle van Luchtvervuiling, in 1996, respectievelijk 2000 hebben geamendeerd. En daarnaast hoe de nieuwe Wet op Milieueffectrapportage in 2002 werd ingevoerd. De discussies de voorbereiding van het wetsontwerp en de consultaties over het formele wetsontwerp bleken in een aantal opzichten anders dan de debatten over grondbeheer, en in andere opzichten hetzelfde. Voor milieuwetgeving hadden het Nationaal Bureau voor Milieubescherming en het de commissie voor milieubeheer van het Nationaal Volkscongres aanvankelijk een ambitieus eerste wetsvoorstel gemaakt. Hun ambitie kwam voort uit het feit

dat het milieu in China snel verslechterde zoals bleek uit een reeks incidenten. Bij deze wetten werden mogelijke belanghebbende tegenstanders, zoals lokale overheden en industriële ministeries, al vroeg, nog tijdens het voorbereiden van het ontwerp, betrokken. Door de sterke kritiek die er op een aantal van de voorgenomen bepalingen, met name het vergunningsstelsel in de lucht- en waterwetten, werd geleverd werden de uiteindelijke wetsvoorstellen aangepast. Voor een deel kenmerkte het wetgevingsproces zich dus door participatie van belanghebbenden, ook als deze tegen de voorgenomen wet waren.

Bepaalde ambitieuze milieunormen werden echter wel in het uiteindelijke wetsvoorstel opgenomen zoals de strikte regels ten aanzien van kleine vervuulende bedrijven en het strikte verbod op de lozing van bepaalde stoffen in de watervervuilingswet, het verbod op uitstoot boven de norm en de minimumsanctie bepalingen in de luchtvervuilingswet, en het grote werkingsgebied voor milieueffectrapportages en de strikte minimumsancties voor overtredingen in de milieueffectrapportagewet. Een aantal belanghebbenden uitte sterke kritiek op deze uiteindelijke wetsvoorstellen. De commissie voor juridische zaken schonk echter weinig aandacht aan deze bezwaren en voerde de wetsvoorstellen grotendeels ongewijzigd door. Bij de behandeling van het uiteindelijke wetsvoorstel, was er dus net als bij de wetgeving voor grondbeheer geen ruimte voor afwijkende meningen hierover en werden normen ingevoerd die mogelijk niet goed pasten bij lokale omstandigheden. Hierbij werd net als bij het debat over grond niet de overige aspecten van milieubescherming en lokale economische ontwikkeling in ogenschouw genomen.

De uiteindelijke milieuwetgeving is deels, doordat veel oude vage en niet strikte normen bleven bestaan, niet sterk implementeerbaar door gebrek aan zekerheid en adequaatheid. Aan de andere kant is de wetgeving minder implementeerbaar door dat sommige van de striktere nieuwe normen juist niet tot naleving en handhaving lijken te komen door een gebrek aan haalbaarheid en aanpasbaarheid aan de lokale context.

Hoofdstuk 5 komt met conclusies van Deel I. De totstandkomingsprocessen van de bovenbesproken wetten laten zien dat het wetgevingsproces in China langzaam verandert. Eerder kenmerkte Chinese wetgeving zich door abstracte en niet te strikte normen, die het resultaat waren van uitgebreide onderhandelingen tussen belanghebbende partij-organen, overheden en ministeries en die aanpasbaar waren aan de lokale en sterk verschillende en veranderende omstandigheden. Met name bij de wetgeving voor grondbeheer maar deels ook bij de vervuilingswetgeving is dit veranderd. De wetgeving is minder het gevolg van onderhandeling en aanpassing aan de verschillende belangen en meer gebaseerd op het idee dat zekerdere en striktere wetgeving beter werkt. Helaas lijkt dit voor een aantal

normen te ver te zijn doorgeschoten en problematisch is. De grootte van China, gecombineerd met een geünificeerd rechtssysteem draagt ertoe bij dat de wetgever bovendien moeite heeft om tegenstrijdige en complexe belangen te verenigen in implementeerbare wetgeving. Hierbij speelt mee dat jurisprudentie geen bron van recht is en de vorming van normen van boven naar beneden verloopt. Daarnaast lijkt het wetgevingsproces beïnvloed te zijn geraakt door een tunnelvisie, waarin alleen het milieubelang voorop stond en waarbij geen ruimte was voor afweging van andere belangen, die noodzakelijk zou zijn geweest voor de uitvoering van de wetgeving in de praktijk.

Deel II: Naleving en Overtreding

Deel II van het boek bestudeert in hoeverre en waarom deze wetgeving bij het Dianchimeer tot naleving of tot overtreding heeft geleid. Dit deel is gebaseerd op een achttiental case studies, verzameld tijdens een jaar van veldwerk in Kunming. Hoofdstukken 7 tot en met 10 beschrijven deze cases, en doen dat op basis van een in Hoofdstuk 6 besproken analytisch raamwerk. Dit raamwerk is opgebouwd uit ideeën over waarom mensen, en met name organisaties, waar het in milieuzaken om gaat, zich aan regels houden. Het raamwerk omvat variabelen gerelateerd aan de normadressaat (interne variabelen) en aan diens context (externe variabelen). Studies van regelnalevend gedrag in Westerse en niet-Westerse landen noemen een aantal interne variabelen waaronder de manier waarop kosten en baten worden gewogen, de ethische normen van het management binnen de organisatie, de organisatiecultuur, de hoeveelheid middelen en de grootte van de organisatie. Daarnaast laten deze studies zien dat de externe context van de addressaat relevant is en met name de regulerende, de economische, de maatschappelijke en de politieke contexten.

Hoofdstukken 7 tot en met 10 beschrijven de achttien gevalsstudies van regelnalevend en regelovertrekend gedrag dat plaats vond in een aantal dorpen en gebieden rondom het Dianchimeer. De analyse van deze gevallen, zoals samengevat in Hoofdstuk 11, laat zien dat de normen uit Beijing en de handhaving daarvan slechts in beperkte mate tot de beoogde verandering van gedrag hebben geleid rondom het meer.

Regelconform gedrag bestond voor een deel uit gevallen waar de normadressaat de regels niet kon of nooit had willen overtreden. Het gaat hier vooral om dorpen zoals Baocun waar boeren geen tweede huis bouwen simpelweg omdat er geen markt is voor huizen die ver van de weg en de stad liggen. Daarnaast gaat het om bedrijven die geen veroorzaken, of bedrijven die door een faillissement niet meer kunnen vervuilen, en dus niet als gevolg van de wetgeving of de handhaving daarvan.

Voor beide gevallen geldt dat de economische context ter plekke bepalend was voor normconformgedrag. De economische context was ook een belangrijke verklarende factor voor overtredingen, die voornamelijk daar plaatsvonden waar ze de mogelijkheid boden voor economische groei of noodzakelijk waren om lokale inkomsten te behouden. Dit is het duidelijkst bij de bouw van tweede huizen in Jiacun dorp, waar er een grote vraag naar was en voor de vervuiling door kunstmestbedrijven in Kouxiang township, die de motor van de economie daar vormen. Een groot deel van de bestudeerde overtredingen kon dan ook hieruit verklaard worden dat de regels uit Beijing indien volledig nageleefd lokaal tot onacceptabele economische gevolgen zouden leiden. Dit bevestigt de conclusies van deel I over de implementeerbaarheid.

Handhaving was zwak in de bestudeerde gevallen rond het Dianchi meer. Slechts in één geval had handhaving directe invloed op regelnaleving, het betrof hier een papierfabriek die tijdens een handhavingscampagne gedwongen werd te sluiten en te verhuizen naar een armer district ver weg van het meer. In geen van de bestudeerde gevallen van overtreding was er sprake geweest van handhavingsactie. Een zwakke handhaving lijkt dus een bijdrage te hebben geleverd aan de overtredingen die er bestonden, waarover meer in Deel III.

Een belangrijke reden dat sommige normadressaten zich ondanks zwakke handhaving toch conformeerden aan de wet of zelfs verder gingen dan de wet, was de druk vanuit de maatschappelijke context. Dit was in het bijzonder zichtbaar bij de compensatie, voor protesterende boeren die hun grond verloren voor de bouw van een tempel en een school in Jiacun dorp; die was hoger dan het wettelijk minimum. De maatschappelijke context was ook van grote invloed op normconform gedrag voor de NCFC kunstmestfabriek die deels door lokaal protest van boeren gedwongen werd tot milieu-investeringen. In beide gevallen kon de maatschappelijke context druk uitoefenen omdat deze niet afhankelijk was voor inkomsten uit de overtredende activiteit. Dit stond in tegenstelling tot de zwakke maatschappelijke druk in de dorpen Licun en Baocun, waar zonder deze druk en zonder deugdelijke handhaving normadressaaten ongestraft de wet konden overtreden. In een aantal gevallen was er weinig druk vanuit de lokale bevolking omdat juist die bevolking direct of indirect baat bij de overtreding had. De economische context had dus soms een afzwakkende werking op de maatschappelijke context.

De politieke context was indirect van belang. Lokale democratisering bracht in die dorpen waar de bevolking onafhankelijk was van hun leiders een extra pressiemiddel tegen onwenselijke praktijken van lokale bestuurders, met name waar het compensatie voor verlies van landbouwgrond betrof. In dorpen zoals Licun en Baocun waar de inkomsten

voornamelijk lokaal zijn en de dorpsleiders veel macht hebben, brachten verkiezingen weinig extra druk op de verkozen dorpsleiders. Daarnaast was de gehele politieke context van invloed doordat in China maatschappelijke organisaties sterk beperkt worden en er daarom in tegenstelling tot sommige andere landen niet een sterke milieubeweging is ontstaan die zich tegen lokale milieumisstanden verzet, ook al is er geen verzet van de lokale bevolking.

Regelnalevend en overtredend gedrag was tenslotte het gevolg van een reeks interne variabelen waaronder het feit dat sommige bedrijven veel gepensioneerden hadden, bedrijven niet de middelen hadden om zich aan de wet te houden, en sommige normadressaten een hoge mate van sociale responsiviteit hadden.

Deel III: Handhaving en Campagnes

Deel III gaat over de vraag hoe de staat overtredingen opspoort en ze bestraft. Het deel beschrijft waarom de reguliere handhaving zo zwak was en wat de invloed van handhavingscampagnes daarop is geweest. De uitgebreide literatuur over dit onderwerp, besproken in Hoofdstuk 12, richt zich met name op de vraag of juist afschrikkende, strikt formele, sterk bestraffende handhaving met een zo groot mogelijke pakkans en strafmaat werkt, dan wel de onderhandelende handhaving waarbij de handhaver de overtreder door samenwerking probeert tot naleving te bewegen. In recente literatuur lijkt er overeenstemming te bestaan dat een combinatie van beide benaderingen het meest effectief is. In de praktijk hangt het soort handhaving en ook of deze wel of niet effectief is van een aantal variabelen af. Ten eerste de organisatie van het handhavingsbureau en daarbij vooral de doelstellingen, middelen, interne organisatie en het leiderschap. Ook de manier waarop de individuele ambtenaar om gaat met de altijd aanwezige discretionaire bevoegdheid bepaalt de handhavingsaanpak en de effectiviteit. Naast het bureau en de ambtenaar wordt de handhaving ook bepaald door de soort normovertreder en de soort overtreding. Tenslotte, en daar ligt in dit boek meer de nadruk op dan in andere studies, wordt handhaving in de praktijk sterk beïnvloed door de externe politieke en maatschappelijke context waarin het bureau zich bevindt. Politici en belangengroeperingen hebben een sterke invloed op de handhavingsorganisatie. Een reeks van incidentele factoren, zoals rampen, schandalen, verkiezingen en economische mogelijkheden of juist crises, kunnen er voor zorgen dat de politieke of maatschappelijke context een verandering in de handhavingsorganisatie bewerkstelligt.

Hoofdstuk 13 bestudeert de reguliere handhaving door drie bureaus: het milieubureau (op stads- en districtsniveau), het bureau voor grondbeheer (op stads-, districts- en townshipniveau) en het Dianchi Bestuursbureau. Het

hoofdstuk maakt eerst een bestuurskundige analyse van de handhavingsorganisatie. De lokaal gefinancierde handhavingsbureaus hebben te weinig middelen en overheidssteun om tot effectieve handhaving over te gaan. De middelen en steun ontbreken omdat de bureaus lokaal gefinancierd worden en de geldende wetgeving deels strijdig is met lokale economische en sociale belangen. Het gebrek aan middelen heeft in de milieusector geleid tot *goal displacement*, namelijk dat de milieubureaus meer bezig zijn met inkomsten genereren dan met vervuiling tegen gaan. Het gebrek aan middelen zorgt er ook voor dat de handhavingsbureaus te weinig personeel hebben en ook moeite hebben het juiste personeel aan te trekken. Handhavingswerk wordt extra moeilijk door slappe interne mechanismen voor controle op handhavingsagenten, waardoor deze een grote discretionaire bevoegdheid hebben. Hierbij bleken met name de vanuit Beijing georganiseerde salariëring, de evaluatiesystemen en de moeilijkheid om het werk van de handhavingsagenten tijdens inspecties te overzien problematisch.

Vervolgens wordt de handhavingsprocedure in de praktijk bekeken. Hierbij blijkt dat het detecteren van overtredingen bijzonder lastig is. Ten eerste door het gebrek aan middelen, en ten tweede doordat de industrie, vooral dus bij milieurechtshandhaving, slecht meewerkt. De beslissing over sancties, zo blijkt, wordt met grote discretionaire bevoegdheid door de ambtenaar ter plekke, voor kleine sancties, of door het bureauhoofd, voor grote sancties, genomen. Bureaus voor grondbeheer leggen zelden sancties op, terwijl milieubureaus ook terughoudend zijn. Alleen het Dianchi Bestuursbureau is streng. Zowel bij de opsporing als bij de bestraffing blijken de relatie met de overtreder en vooral de sociaal-economische gevolgen van de sanctie een belangrijke invloed te hebben. Bij dit alles speelt risicoaversie van de handhavingsambtenaar een grote rol. Interne en externe mechanismen ter verificatie en controle van de deugdelijkheid en rechtmatigheid van opgelegde sancties hebben een geringe invloed op handhavingswerk.

Uit de analyse in Hoofdstuk 13 blijkt dat de reguliere handhaving, dat is alle handhaving naast de in Hoofdstuk 14 te bespreken handhavingscampagnes, sterk onderhandelend is. De lokale sociaal-economische context waarin de overtreding zich afspeelt vormt een obstakel voor strengere handhaving. In de bestaande studies van milieurechtshandhaving in China wordt dit “lokaal protectionisme” genoemd, wat een connotatie van afkeuring van dit soort praktijk inhoudt. Vanuit de bestaande analyse is de wetgeving uit Beijing goed maar werkt deze lokaal niet door de slappe handhaving omdat lokale overheden hun eigen belangen voorop stellen. De analyse in Hoofdstuk 13 probeert begrip te kweken voor de opstelling van handhavingsambtenaren. Het doet dit door te kijken naar de oorzaak van het protectionisme: de tegenstrijdige belangen tussen de wet

en de lokale maatschappelijke en economische context. Daar waar naleving van de wet van invloed is op de huidige economische ontwikkeling en waar bestaande en mogelijke inkomsten alleen maar mogelijk zijn in overtreding van de wet bestaat er weinig lokaal draagvlak voor de wet. De slappe reguliere handhaving heeft er dus in bepaalde gevallen, zeker niet in alle, voor gezorgd dat de toepassing van moeilijk haalbare en onacceptabele en niet flexibele bepalingen uit de nationale wet toch aan de lokale omstandigheden is aangepast door overtredingen te gedogen. Dit heeft echter wel gevolgen; indien dit zo door gaat zal uiteindelijk het milieu verder vervuilen en de landbouwgrond verder afnemen, met alle gevolgen van dien.

Hoofdstuk 14 analyseert hoe de Chinese machthebbers in Beijing geprobeerd hebben om de reguliere handhaving van recht ter bescherming van landbouwgrond en het milieu te versterken. Voor grond zijn er sinds 1997 campagnes georganiseerd. Aanvankelijk dienden de campagnes om strengere normen ten aanzien van grondgebruik af te dwingen zelfs al stonden deze nog niet in de wet. De noodzaak die ontstond midden jaren negentig om de landbouwgrond te beschermen vormde de basis voor dit soort van acties. In de campagnes in 1997 en 1998 werd een bevrozing van alle bouwprojecten op landbouwgrond afgekondigd, dit in voorbereiding op de inwerkingtreding van de nieuwe Wet op het Grondbeheer op 1 januari 1999. De aanvankelijke campagnes tot aan 2002 bleken echter niet in staat de oprukkende honger naar grond te stillen en in 2003 startte een nieuwe krachtigere campagne tegen illegale grondconversies. De campagne had de steun van de nationale politieke leiding in Beijing die na een onderzoek uit 2002 geschokt was door de enorme hoeveelheid landbouwgrond die weer verloren was gegaan door illegaal gebruik.

De strikte nationale campagne in 2003 had weinig effect bij het Dianchimeer, waar ten tijde van het veldwerk in 2004 alle in Deel II beschreven illegale grondgebruiken ongestoord plaats konden vinden. Pas met de campagne in de zomer van 2004 kwam daar verandering in toen door sterke druk vanuit het centrum ook de overheden in Kunming gedwongen werden de illegale praktijken, vooral wat betreft het industriële gebruik van collectieve grond, te beëindigen en bestaande overtreders te dwingen kostbare legalisatie procedures te doorlopen. Door de druk leken lokale overheden gedwongen te worden om een illegale, maar lokaal zeer noodzakelijke en alom geaccepteerde, praktijk aan te pakken. Dit zou, zo stelden dorpelingen, indien daadwerkelijk tot de letter uitgevoerd, kunnen leiden tot vele faillissementen van kleine bedrijven die niet het geld hebben voor de dure legalisatieprocedures.

Voor milieuovertredingen zijn er sinds 1996 campagnes georganiseerd. De eerste campagne richtte zich op kleine sterk vervuilende bedrijven, die verantwoordelijk waren voor een belangrijk, maar moeilijk te

reguleren deel van de vervuiling. De eerste campagnes ontstonden rond het negende vijfjarenplan dat reageerde op sterke vervuilingincidenten waarvoor soms ook veel kleine bedrijven verantwoordelijk waren geweest zoals bij de Huai rivier in 1994. De eerste campagne zorgde ervoor dat binnen een aantal maanden 60.000 kleine fabrieken werden gesloten. Een tweede campagne die liep van 1996 tot en met 1 januari 2000 richtte zich op de grotere vervuilers die tot het einde van de campagne kregen zich te confirmeren aan de milieunormen en anders moesten sluiten. Beide campagnes leken succesvol, althans volgens officiële berichtgeving. De successen konden echter niet geconsolideerd worden omdat al snel bleek dat veel industrie die gesloten was weer de poorten opende, of industrie die zich aan de normen hield deze later weer begon te overtreden. In reactie op berichten over dit soort overtredingen en om deze tegen te gaan, werden er vanaf 2001 jaarlijkse herhalingscampagnes met telkens weer nieuwe aandachtsgebieden en methodes georganiseerd. Geleidelijk werd daarbij meer gebruik gemaakt van publieke participatie, door bijvoorbeeld het instellen van klachtenlijnen en het belonen van succesvolle aangiften van overtredingen. In Kunming leidden de campagnes van 1996 tot en met 2003 slechts in één van de bestudeerde gevallen direct tot regelnaleving, zoals in Deel II behandeld. In twee andere gevallen, in het afgelegen Baocun en bij de Tanglang rivier, leidde pas de campagne van 2004 tot verandering na een lange tijd van overtredingen. Dit kwam omdat de Tanglang rivier na nationale media-aandacht een lokaal speerpunt in de campagne werd. Door de extra inspecties tijdens de campagne konden eindelijk de overtredingen waarover de media berichtten worden bewezen en kon er druk worden uitgeoefend op de betrokken bedrijven om zich aan de wet te gaan houden. Hoewel dit aanvankelijk een succes leek, bleek dat een aantal van de betrokken bedrijven een paar maanden na de campagne weer gewoon illegaal konden lozen.

Hoofdstuk 14 laat meer in het algemeen zien dat tijdens deze campagnes, handhaving verandert van coöperatief naar afschrikkend. Op basis van een sterk formalistisch schema worden handhavingsagenten gedwongen doelstellingen voor inspecties en sancties te halen. De druk van de campagnes is op korte termijn van grote invloed maar kan er niet geheel voor zorgen dat de regelnaleving ook op lange termijn behouden blijft, dit omdat het onderliggende belangenconflict niet wordt opgelost, maar eerder wordt vergroot.

Hoofdstuk 15 komt met de conclusies van Deel III over handhaving en campagnes. Een eerste analyse is dat vanuit het directe regelnalevend gedrag gezien de handhaving en de campagnes niet effectief zijn geweest. Deel III heeft laten zien dat handhaving zwak was doordat de lokaal georganiseerde handhaving richtte zich te veel naar de lokale belangen die op gespannen voet stonden met de wet, terwijl de campagne juist geen rekening

hield met deze lokale belangen en daardoor zodra de druk achter deze campagne over was invloed verloor en overtredingen terugkwamen. Door de afwisseling van extreme benaderingen van handhaving werd het door de literatuur gepropageerde gemengde model van samenwerking waar mogelijk en straf waar nodig niet bereikt. Tevens vormt de inconsistentie van de campagnes een probleem voor het bereiken van een algemeen afschrikkend effect en meer in het algemeen de opbouw van een rechtsstaat.

Er is ook een tweede, positievere analyse mogelijk die uit een minder nauw instrumenteel kader komt dan in dit boek voor het merendeel gebruikt. Reguliere handhaving leidde tot een aangepaste toepassing van niet passende wetgeving. Campagnehandhaving zorgde ervoor dat eens in de zo veel tijd de excessen die door de reguliere handhaving waren ontstaan werden aangepakt. Campagnehandhaving zorgde voor een tijdelijke verandering, overigens met maar beperkte waarneembare resultaten op langere termijn. Doordat de campagnes sterk gericht waren op het verhogen van rechtsbewustzijn en participatie door de lokale bevolking is het echter niet uitgesloten dat ze de teloorgang van China's natuurlijke hulpbronnen ook op langere termijn gunstig kunnen beïnvloeden.

Conclusie

De studie laat zien dat veranderingen in wetgeving en handhaving, in de bestudeerde gevallen, maar in geringe mate tot de gewenste gedragsverandering, een beter gebruik van de natuurlijke hulpbronnen, bij het Dianchimeer hebben geleid. De reden hiervoor is allereerst dat de wetgeving te weinig paste bij de lokale economische context van het meer, waar huisvesting en industriële bouw op landbouwgrond en vervuilende industrie een belangrijke inkomstenbron vormden. Doordat de wetgeving te ver afstaat van de lokale economische omstandigheden, is de druk vanuit de maatschappelijke context en de handhavingsinstanties op de normadressaat ook gering en kan overtreding met geringe kosten plaatsvinden. Handhavingscampagnes hebben dit wel tijdelijk kunnen verhelpen en tot eerste gedragsveranderingen kunnen leiden, maar omdat ze slechts een tijdelijk karakter hadden en ze niet de achterliggende oorzaken, de conflicterende belangen konden aanpakken, bleven de resultaten beperkt.

Een eerste conclusie is dat de regulering van landbouwgrond en vervuiling bij het Dianchimeer problematisch is doordat wetgeving en handhaving geen balans hebben weten te bewerkstelligen tussen de formele doelen van de wetgever en de lokale belangen ter plekke. Een tweede conclusie is dat regelnalevend en overtredend gedrag in hoge mate bleek te worden bepaald door convergerende invloeden van de economische, maatschappelijke, regulerende en politieke contexten, samen met variabelen die te maken hadden met de soort normadressaat in kwestie.

Een vergelijking tussen de bevindingen van deze lokale studie in Zuidwest China met studies uit andere landen levert een aantal inzichten op. Ten eerste laat het zien dat er parallellen en verschillen zijn in debatten over *regulatory law* zoals die elders plaatsvinden en in China. De parallellen bestaan uit de roep om slecht functionerende instituties door striktere regels en minder discretionaire bevoegdheden te binden aan de wet. Hier lijkt China op Westerse landen in de jaren zeventig en veel niet-Westerse landen tot de dag van vandaag. Waar in China echter weinig aandacht voor is en elders soms wel is de pasbaarheid en de redelijkheid van de wetgeving en de handhaving.

Een tweede punt van vergelijking is de invloed van de verschillende contexten op regelnalevend gedrag. Zowel over het Dianchimeer alsook over andere gevallen buiten China is betoogd dat een samengaan van externe factoren (economisch, regulerend, politiek en maatschappelijk) de normadressaat, afhankelijk van diens interne variabelen, kan beïnvloeden zich aan de wet te gaan houden of juist deze wet te overtreden. Verschil zit er in hoe dit werkt. Waar bij het Dianchimeer de economische context de andere externe contexten zo beïnvloedde dat overtreding en slechte handhaving volgde, was in sommige andere studies juist de regulerende of de maatschappelijke context dominant met naleving als gevolg. Wat Dianchi anders maakt is dat de tegenstelling tussen de normen uit de wet en de lokale economische context groter is en dat de maatschappelijke context afhankelijker is van overtredend gedrag.

Een derde punt van vergelijking betreft deze tegenstelling. De tegenstelling bij het Dianchimeer tussen lokale economische belangen en bescherming van natuurlijke hulpbronnen is dusdanig dat hij niet makkelijk door wetgeving en handhaving te overbruggen is. Voor een dergelijke situatie is het lastig om wetgeving te maken die zowel een bepaald nationaal belang beschermt zoals landbouwgrond of milieu, maar die ook lokaal zo passend is dat de implementatie gaat lukken. Het dilemma luidt aldus: hetzij de wetgeving is goed op papier en zou bij volledige naleving en handhaving tot het gewenste doel leiden, maar haalt dat niet in de praktijk doordat de wetgeving geen legitimiteit heeft, hetzij de wetgeving is lokaal legitiem maar leidt daardoor niet meer tot het gewenste resultaat op macroniveau.

Een laatste punt dat opvalt in de vergelijking met andere landen is dat zowel in China zoals bij het Dianchi meer, alsook elders de processen van wetgeving en handhaving soms last hebben van tunnelvisie en een “ad hoc” karakter. Dit houdt in dat wetgeving en handhaving zich sterk op één bepaald belang richten, zonder de complexiteit van de belangen als geheel in ogenschouw te willen nemen. Een dergelijke nauwe en versimpelde benadering treedt eerder op wanneer wetgeving en handhaving een reactie zijn op tijdelijke gebeurtenissen, zoals rampen, schandalen,

machtsverschuivingen of verkiezingen. Ad hoc wetgeving en handhaving kan een verandering van een bestaande situatie forceren. Tegelijkertijd is zulk ad hoc recht ook risicovol. Allereerst omdat de versimpelde aanpak moeilijker tot een daadwerkelijke oplossing van een maatschappelijk probleem zal leiden. Daarnaast dreigt het gevaar dat als recht verwordt tot een serie reacties op incidenten, de consistentie, de zekerheid en daarmee het vertrouwen in recht en de rechtstaat als geheel vermindert.

Deze studie biedt aldus een inzicht in de moeilijkheden waarmee China geconfronteerd wordt bij het maken van deugdelijke wetten en het organiseren van de handhaving daarvan. Vergelijking met andere landen en een blik op de toekomst biedt echter ook een perspectief op hoop. Specifieke verbeteringen zijn voornamelijk mogelijk op het terrein van de bestaande wetgeving waar een aantal niet-implementeerbare normen veranderd dient te worden. Daarnaast zijn bepaalde grotere veranderingen gewenst die evenwel moeilijker te bewerkstelligen zijn. Het gaat dan bijvoorbeeld om het instellen van een wetgevingskwaliteitssysteem, het erkennen van jurisprudentie als bron van recht, het verbreden van de mogelijkheden om lokale belangen nationaal en regionaal te organiseren, en het financieren van alternatieve bronnen van inkomsten in regio's waar de afhankelijkheid van illegale inkomsten groot is. De inzichten van deze studies kunnen een basis vormen voor deze en andere veranderingen. Empirische data over hoe wetgeving wordt gemaakt, hoe deze wordt nageleefd en gehandhaafd is essentieel voor het maken van verbeteringen.

Curriculum vitae

Benjamin van Rooij was born in Leiden, on November 17 1973. After having completed highschool (Rijnlands Lyceum in Oegsgeest) in 1991, he graduated in law at Leiden University in 1997. After that, he worked for a short period as a lawyer trainee at Clifford Chance and as legal counsel for De Koning and Renes Advocaten, both in Amsterdam. Meanwhile, he studied Chinese Languages and Cultures at Leiden University, graduating in 2000. Since then, he has been working at the Van Vollenhoven Institute at Leiden University. Apart from his work as a PhD researcher, he has also taught courses in Chinese Law, Law Governance and Development, Law and Culture, Anthropology of Law and Legal Systems Worldwide, both in Leiden as well as in Suriname and China. In addition, in 2002 he organized a Dutch training program for Chinese environmental law enforcement agents. In recent years, Benjamin van Rooij has been coordinating the Van Vollenhoven Institute's teaching program and China program. Presently, he works as an assistant professor at the law faculty of Leiden University.