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Moratorium on EIA Approvals: China's New Environmental Law Enforcement Tool

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Moratorium on EIA Approvals: China’s New Environmental Law Enforcement Tool

ABSTRACT

This article reviews the moratoria on environmental impact assessment (EIA) approvals, a new environmental enforcement tool developed and taken by the State Environmental Protection Administration (SEPA) of China. Faced with escalating environmental problems, the central government adopted several laws, regulations, and policies to reduce pollution and conserve natural resources. However, the conflict between the central government and local governments frequently makes the actions of the central government less effective than desired. Since January 10, 2007, the SEPA has begun a daring and controversial measure, called the moratorium on EIA approvals, for the purpose of effectively enforcing environmental laws and regulations. This measure has achieved much success, but there is still much to do to improve this enforcement tool.

I. INTRODUCTION

On January 10, 2007, the State Environmental Protection Administration (SEPA) of China began to implement a daring and controversial administrative enforcement measure: moratoria on environmental impact assessments (EIA). The striking feature of this administrative enforcement measure is that once a moratorium is imposed, its effect is region-wide, enterprise group-wide, or industry-wide. That is to say, all EIA from the region, enterprise group, or industry concerned will be subject to the moratorium. To carry out any project, be it a new project or the modification or expansion of an existing project, it is a prerequisite to obtain approval of an EIA from the appropriate environmental protection authority. Therefore,
a moratorium on EIA approvals has great significance. This article analyzes the background, rationale, controversy, and possible fate of this measure.

According to the policy design, the EIA approval moratoria measure includes three types: region-wide, enterprise group-wide, and industry-wide. A region-wide moratorium means that if an enterprise seriously contravenes relevant environmental protection rules or if the region has exhausted its pollutant discharge limits set by the government, all EIA approval applications from the region concerned will be subject to a moratorium. An enterprise group-wide EIA approval moratorium means that if an enterprise seriously contravenes relevant environmental protection rules, all EIA approval applications from the enterprise group concerned will be subject to a moratorium. Similarly, an industry-wide EIA approval moratorium means that if an enterprise seriously contravenes relevant environmental protection rules, all EIA approval applications from the industry concerned will be subject to a moratorium. The only exceptions to these moratoria are recycling economy and environmental protection projects. Even if a moratorium is in place, the EIA application for a recycling economy or environmental protection project from the region, enterprise group, or industry concerned may still be approved by the environmental protection authorities.

Arguably there is a fourth type of EIA approval moratorium, the river basin-wide moratorium. Although the SEPA uses the term “river basin-wide moratorium,” an analysis of all these river basin-wide moratoria reveals that they are only effective in particular cities or counties, not the whole river basin concerned, as the term “river basin-wide moratorium” suggests. The reason that the SEPA called it a river basin-wide moratorium is likely because these moratoria were imposed to protect the whole basin against water pollution. Although the SEPA was clearly concerned with the protection of the whole river basin, the moratoria imposed were only effective in particular regions, be it a city or an industrial park. As the water protection of the whole river basin can only be achieved through region-wide moratoria and the literal meaning of “region” can include a river basin, this article takes the opinion that the so-called river basin-wide moratorium should not be treated as a separate type of moratorium.

Until now, the SEPA has not imposed industry-wide moratoria. However, the SEPA has imposed other types of moratoria. On January 10, 2007, the SEPA imposed four region-wide moratoria and four enterprise

group-wide moratoria. On July 3, 2007, the SEPA, under the category of river basin-wide moratorium, imposed EIA approval moratoria on six cities, two counties, and five industrial zones/parks.

II. BACKGROUND

The economic development movement of local governments has resulted in escalating environmental problems. The local governments' concern for economic development conflicts with the central government's greater concern for environmental protection.

A. Escalating Environmental Problems

Escalating environmental problems are forcing China to take strong environmental law enforcement measures. With the rapid economic growth in the past three decades, environmental pollution and resource degradation and depletion in China have become increasingly serious. The government has recognized the importance of taking effective environmental protection measures. However, environmental protection work still lags behind economic development. For example, during the Tenth Five-Year Plan period between 2000 and 2005, the annual average economic growth rate as measured by gross domestic product (GDP) was 9.5 percent, much higher than the target of seven percent, while environmental protection work fell short of its target. For the same period, the aggregate reduction targets of main pollutant discharge indicators, which are defined as sulfur dioxide ($SO_2$) and Chemical Oxygen Demand (COD), were both set at ten percent. However, actual achievement fell short of those targets. In fact, compared with the nationwide annual total discharge of sulfur dioxide of 19,950,000 metric tons in the year 2000, the nationwide annual total discharge...
discharge in 2005 was estimated to be 25,490,000 metric tons, a net increase of 27 percent. Although the nationwide annual total COD discharge in 2005 was estimated to be 14,130,000 metric tons, a decrease from the year 2000, the five-year aggregate decrease percentage was only two percent, much lower than the ten percent reduction target. 5

B. Local Governments’ Economic Development Movement

The design of the EIA approval moratorium has much to do with the economic development movement of local governments, as local governments’ eagerness to develop their economy is one of the primary causes of environmental pollution and natural resource degradation. This eagerness is the result of at least two considerations: to please the local people and to enhance the careers of governmental officials themselves. As far as the local governmental officials are concerned, the second consideration may have at least the same weight as the first consideration, if not more. This is because economic development, as measured by GDP, is a key determinant of whether local governmental officials, especially the heads of local governments, will be promoted. For this reason, local governments at all levels want to attract more investment, increase the GDP, and decrease the unemployment rate. For local governments, with some exceptions, environmental protection is not as important as economic development.

C. Conflict Between the Central Government and Local Governments

The conflict between the economic development movement of local governments and the environmental policy of the central government is the direct reason for issuing EIA approval moratoria. As far as environmental protection work is concerned, there are two main aspects of the conflict between the central government and local governments. The first is concerned with policy, as the national government is more concerned with environmental protection than local governments. The other is concerned with the power of the SEPA and local environmental protection bureaus. At the policy level, there is a conflict between the central government and the local governments on both environmental protection policy and macro-economic policy.

As to environmental protection policy, the central government has a much stronger determination to protect the environment. The central

government’s stronger commitment to environmental protection is pri-
marily demonstrated by its proposal and endorsement of the notion of
"resource-conserving and environment-friendly society," which will be
further discussed below.6 As this notion limits the economic development
capacity of local governments, there is a conflict between the national
government and local governments on environmental issues. In one sense,
this notion not only indicates China’s top leaders’ understanding and imple-
mentation of sustainable development, but also the central government’s
disfavor of the economic development movement of local governments.

As to macro-economy, the central government adopts a policy of
stable, healthy, and balanced development. The national government is
more concerned with long-term national development. This overall target
may conflict with the development of local governments.

The iron industry demonstrates the policy conflict between the
central government and local governments regarding environmental
protection, as well as macro-economy. Iron production not only consumes
much energy and resources, such as iron ore, it also leads to the discharge
of a large quantity of pollutants. At the national level, China has a large
surplus of iron production capacity. Therefore, at the national level, for
macro-economic regulation as well as for environmental protection, it is
unwise to establish new or expand existing iron mills. However, because
iron production contributes greatly to the local GDP and employment rate,
not all local governments follow the national government’s order to reduce
iron production. The expansion and development of iron mills are
sometimes consented to by local governments, although some projects did
not go through the statutory EIA process or did not strictly follow the EIA
procedure before coming into production.

The SEPA also established the moratoria because of the insufficient
power of local environmental protection bureaus. Although local environ-
mental protection bureaus and other relevant governmental agencies have
the duty to enforce environmental laws and regulations and ensure that
economic activities meet relevant environmental requirements, they face
great pressure from the local governments to which they belong and, as a
result, cannot always carry out laws and regulations to the letter. This is
mainly because of the position of local environmental protection bureaus in
the governmental framework. Local environmental protection bureaus are
the primary environmental law enforcement agency at the local level.
Vertically, they must follow the orders of environmental protection bureaus
at higher levels, ultimately the SEPA. Horizontally, they are working
departments of the relevant local government. As such, the budget and

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6. To facilitate understanding, this article briefly surveys the development of the notion of "resource-conserving and environment-friendly society" in Part IV, infra.
personnel affairs such as appointment, removal, and promotion are for the most part decided by the local government. The head of the local government largely determines who will be selected or retained as the head of the local environmental protection bureau. As such, the local environmental protection bureau does not have enough power to challenge the local government's economic development policy when it conflicts with environmental protection requirements. The local environmental protection bureau may not always be able to follow the orders and requirements of the environmental protection authorities at higher levels if the environmental protection authority at a higher level conflicts with the order or policy of the local government. The moratoria may indirectly help local environmental protection bureaus because, by imposing a moratorium, the SEPA relieves the burden of the local environmental protection bureau to reject environmentally unfriendly projects. It is against this background that EIA approval moratoria were imposed.

III. EIA PROCEDURE AND EFFECT OF MORATORIA IN CHINA

A. EIA Procedure

Environmental impact assessment has a central position in the management of the environmental impacts of projects and development plans. The statutory EIA requirement was first introduced in the 1979 Environmental Protection Law, which provides in Article 6 that, for new projects and modification or expansion of existing projects, the project design can only be made after the environmental protection agency and other governmental agencies have reviewed and approved the environmental impact assessment report. This requirement was retained by the

7. Environmental Protection Law (promulgated by the Standing Comm. Nat’l People’s Cong., 1979, final 1989), art. 6, available at http://www.gov.cn/ziliao/flfg/2005-08/05/content_20923.htm. Besides the environmental impact assessment, Article 6 also provides general environmental protection requirements for projects and production, the three-simultaneousness requirement, and pollutant discharge conduction. The full content of Article 6 is as follows:

The site selection, design, construction, and production of all enterprises and public institutions shall pay adequate attention to the prevention of environmental pollution and disruption. For new projects, modification projects, and expansion projects, the project design can only be made after the environmental protection agency and other governmental agencies have reviewed and approved the environmental impact assessment report; the facilities preventing pollution and other public hazards shall be designed, installed, and put into production simultaneously with the principal facility; the discharge of all hazardous materials shall meet the criteria set forth by the state.

Id.
legislature in Article 13 of the current 1989 Environmental Protection Law, which revised the 1979 law.\(^8\) To detail and implement the EIA requirement, the State Council, various ministries of the central government, and some local authorities also made subordinate rules.\(^9\) Finally, on October 28, 2002, the Standing Committee of the National People’s Congress passed the Environmental Impact Assessment Law of the People’s Republic of China (EIA Law), which is the current principal legislation governing EIA.\(^10\) One of the developments of the current EIA Law is that it not only provides EIA requirements for construction projects, but it also expands the EIA requirement to encompass development plans.\(^11\)

According to the EIA Law, every construction project shall undergo the EIA procedure.\(^12\) While the EIA Law does not provide a definition of “construction project,” in practice, all business entities are construction projects, from small restaurants to big chemical plants.

This does not mean, however, that all construction projects are subject to EIA procedures of the same level of complexity. The EIA Law classifies construction projects into three classes with different types of

\(^8\) Id. art. 13. The two paragraphs of Article 13 of the Environmental Protection Law of the People’s Republic of China provide the following:

Units constructing projects that cause pollution to the environment must observe the state provisions concerning environmental protection for such construction projects...

The environmental impact statement on a construction project must assess the pollution the projects is likely to produce and its impact on the environment and stipulate the preventive and curative measures; the statement shall, after initial examination by the authorities in charge of the construction project, be submitted by specified procedure to the competent department of environmental protection administration for approval. The department of planning shall not ratify the design plan descriptions of the construction project until after the environmental impact statement on the construction project is approved.

\(^9\) For example, the SEPA issued Construction Project Environmental Protection Management Procedure in 1990; the State Council issued Management Regulations on the Environmental Protection of Construction Projects in 1998.


\(^11\) Id. ch. 2, arts. 7-15.

\(^12\) Id. art. 16, para. 1, providing that the state makes classified administration on the environmental impact assessment of construction projects according to the degree of environmental impacts of the construction project concerned. This article of the EIA Law does not provide express exemptions, so it can be inferred that all construction projects are under one of the three classes of construction projects, as further discussed below.
requirements. For a construction project that may cause major environmental impacts, an EIA Statement shall be filed that will make a thorough analysis of the environmental impacts. For a construction project that may cause minor environmental impacts, an EIA Form shall be filed that will analyze the environmental impacts of the construction project or particular parts of the construction project. For a construction project that may cause negligible environmental impacts, only an Environmental Impact Registration Form shall be filed because this project does not warrant an EIA.

According to the EIA Law, the SEPA issues the classification guidelines and a list of each class of construction projects. An environmental impact statement is the most complicated and therefore most costly. An environmental impact report form is second in complexity and costs. Both an EIA report and environmental impact form shall be prepared by a duly qualified EIA service agency. The least complex is an environmental impact registration form, which may be filled in by the applicant himself. By classifying construction projects into three classes and providing different EIA requirements for each of them, the EIA Law imposes different burdens of EIA process on different projects.

EIA documentation is reviewed and approved by the SEPA and local environmental protection bureaus. The SEPA issued a rule on review and approval authority to ensure that important EIA documents are reviewed and approved by a higher-level environmental protection bureau, such as a provincial environmental protection bureau, or are directly handled by the SEPA itself.

After receiving EIA documentation, the appropriate local environmental protection bureau or the SEPA examines the documentation and decides whether to approve or reject the EIA application within statutory time limits. The EIA Law also provides that if there are major changes to the construction project's nature, scale, location, production

13. Id. art. 16, para. 1.
14. Id. art. 16, para. 2.
15. Id. art. 16, para. 3. The current guideline entitled "Classification Administration List for Environmental Impact Assessment of Construction Projects," with the annexed lists of construction projects, was issued by the SEPA on October 13, 2002 and was effective as of January 1, 2003.
16. Id. art. 17, providing the items to be addressed in the environmental impact statement.
17. Id. art. 20.
19. EIA Law, supra note 10, art. 22.
processes, or environmental protection measures, the EIA documentation shall be filed again. That is to say, the relevant applicant shall reapply for a new EIA approval. If a project is not implemented within five years after the approval date of the EIA documentation, the applicant shall apply for a re-examination of the EIA documentation. Compared with a re-filing of EIA documentations, a re-examination is much less stringent as the applicant does not need to have a new set of EIA documentation prepared.

The EIA Law provides that if the EIA documentation of a project has not been filed or has not been approved, the project shall not be implemented. Otherwise, certain penalties may be imposed by the relevant local environmental protection bureaus or the SEPA. If a re-filing or re-examination is required and this requirement has not been met, the construction project shall also be subject to certain penalties. In short, the EIA approval is a prerequisite for the lawful implementation of any construction project. The power to review and approve EIA documentation and to impose penalties is the most important power of the SEPA and local environmental bureaus. To impose a moratorium is the strongest way to wield this power.

B. Moratorium Decisions

As of this writing, the SEPA has wielded the weapon of EIA approval moratorium twice, on January 10, 2007 and on July 3, 2007. It is useful to examine these moratorium decisions.

On January 10, 2007, the SEPA imposed moratoria on four cities and four enterprise groups. The four cities are Tangshan of Hebei Province, Luliang of Shanxi Province, Liupanshui of Guizhou Province, and Laiwu of Shandong Province.

The Tangshan decision has two paragraphs. In the first paragraph, the SEPA said that it would take legal proceedings against Tangshan Coal Power Plant because it failed to apply for an environmental protection examination after it put into trial operation two coal power generator groups (2×300MW) and failed to shut down its 5×50MW small generator groups according to the conditions set forth in the EIA approval. In the second paragraph, the SEPA said that it would impose a moratorium on EIA approval of Tangshan because the total pollutant discharges of Tangshan had exceeded its total pollutant discharge control limits. The SEPA then provided that, "until Tangshan Coal Power Plant had made the
necessary corrections, all construction projects increasing the total pollutant discharges would be subject to a moratorium."

Similarly, the Luliang decision also has two paragraphs. The SEPA first provided in paragraph one that Luliang Coke Factory broke the law by failing to apply for environmental protection examination and by failing to complete relevant environmental protection facilities. The rest of the decision was almost identical to the Tangshan decision.

In the Liupanshui decision, the SEPA stated that the Faer Coal Power Plant failed to carry out the EIA procedure for its new 4×600MW project and that the Yemazhai Coal Power Plant failed to carry out the EIA procedure and failed to install sulfur elimination facilities for its 3×200MW technology innovation project. On July 15, 2005, the National Development and Reform Commission (NDRC), the Ministry of Land and Resources, the Ministry of Water Resources, and the SEPA jointly ordered the stop of these two projects. Despite the order, the projects continued. According to the Report on the Review and Supervision of New Projects jointly issued by six ministries and commissions including the SEPA on December 18, 2006, all local governments and governmental agencies shall strictly follow the rules on new projects and ensure that all new projects follow the EIA procedure. This Report provides that the state would suspend state investment in and impose EIA approval moratoria on the regions that failed to enforce these rules. As these two projects failed to go through the EIA procedure and follow other relevant environmental protection rules, the SEPA decided to impose an EIA approval moratorium on Liupanshui until the two plants made the necessary corrections.

The Laiwu decision was made on the same legal ground and reasoning. As Laiwu Steel Group did not carry out the EIA procedure for its cold rolled steel sheets project, the SEPA imposed the moratorium on Laiwu city on the same legal ground as in the Liupanshui decision.

The moratoria of these four cities all involved one or two "bad actors," and the lifting of these moratoria are conditioned on the corrections.

of these "bad actors." The reason for imposing the moratorium was either because the city exceeded its total pollutant discharge control limits set forth by the higher authority or because the relevant local environmental protection bureau did not fully carry out its supervisory duty. Exceeding the total pollutant discharge control limits means that the city has serious environmental problems, but the failure of the local environmental protection bureaus to enforce environmental rules also means serious environmental problems. The failure of the local environmental protection bureaus means that the local governments exerted their influence to protect money-making polluters, which inevitably leads to serious environmental problems.

The four enterprise groups subject to moratoria are Datang International Power Generation Company, Limited; China Huadian Corporation; China Huaneng Group; and China Guodian Corporation. All of these enterprise groups are power generation enterprise groups. The moratoria were imposed because each enterprise group had one subsidiary that broke relevant environmental rules.

On July 3, 2007, the SEPA imposed river basin-wide moratoria on six cities, two counties, and five industrial zones/parks, namely Chaohu City and Wuhu Economic Development Zone of Anhui Province (the Anhui part of the Yangtze River Basin), Baiyin City and Lanzhou High-Tech Industrial Development Zone of Ganshu Province, Bayanzhuoer City of Inner Mongolia, Weinan City of Shaanxi Province, Hejin County-Level City and Xiangfen County of Shanxi Province (Yellow River Basin), Zhoukou City of Henan Province and Bangbu City of Anhui Province (Huaihe Basin), and Handan Economic and Technology Development Zone of Hebei Province, Puyang Economic Development Zone of Henan Province, and Shenzhou County Industrial Park of Shandong Province.

All river basin-wide moratoria address water pollution. The main reason given by the SEPA is that the water quality of these parts of the river is Grade V or worse, which means that these parts of the river cannot accept any more water pollutants. Therefore, the rationale for imposing these river basin-wide moratoria is similar to that of the moratoria imposed on Tangshan and Luliang.

29. Id. Grade V means the water is unsuitable for direct contact with the human body. If the water quality is worse than Grade V, the water has almost lost its ecological function.
C. Effect of Moratoria

So far, the moratoria have been very successful. Among the four cities subject to moratoria, Laiwu was the first to make necessary corrections and have the moratorium lifted. After the SEPA imposed the moratorium on January 10, 2007, the Laiwu government immediately established an ad hoc office to handle matters related to the moratorium. Under the influence of this office, the Laiwu Steel Group, the main target of the moratorium, stopped the illegal project and sealed up the relevant equipment. As the local government had taken necessary measures to bring illegal conduct in line with the law, the SEPA decided on February 13, 2007 to lift the moratorium. 30

Among the other three cities subject to the moratoria imposed on January 10, 2007, Tangshan and Liupanshui have taken effective measures to make necessary corrections. As to Tangshan, it was reported on January 31, 2007 that the 2x300MW coal power generator groups of the Tangshan Coal Power Plant had been closed. 31 On March 26, 2007, SEPA reported that the moratorium was to be lifted. 32 As to Liupanshui, the two coal power projects, the new Guizhou Faer 4x600MW project and Guizhou Yemazhai 3x200MW technology modification project were also shut down, as reported by SEPA on January 31, 2007. 33 So far, the SEPA has not reported positive information regarding Luliang, so we may presume that this city has not made necessary corrections.

The four enterprise groups also made several corrections. Datang International Power Generation Company was subject to a moratorium because it failed to shut down the 5x50MW generator group of the Tangshan Coal Power Plant, one of its subsidiaries, pursuant to its EIA. The SEPA issued an order in October 2006 requesting that it shut down the generator group by December 31, 2006. However, Datang International Power Generation Company did not follow the order, which triggered the moratorium. 34 After the moratorium was imposed, it quickly carried out the December 2006 order, and the SEPA lifted the moratorium, as reported by

34. Press Release, supra note 27.
the SEPA on March 26, 2006. China Huaneng Group has shut down the small generator groups and taken sulfur reduction measures required by the SEPA. China Guodian Corporation also has taken the required sulfur reduction measures. The SEPA was reported to have lifted the moratoria on both of them on March 15, 2007. So far, there has been no official news release on the moratorium of China Huadian Corporation.

As yet, there is no official news release on the effects of the river basin-wide moratoria.

IV. INTERPRETATION OF EFFECTIVENESS: SUPPORT OF THE CENTRAL GOVERNMENT

Why were the moratoria generally effective? Could it be the public embarrassment factor? Were the moratoria effective simply because particular cities and enterprise groups were singled out and the heads of those cities and enterprise groups lost face and were thus forced to comply with the law? If the public embarrassment factor was the reason, moratoria may lose effectiveness when the public embarrassment factor loses its force as more cities and enterprise groups are subjected to them.

However, this article takes the opinion that the public embarrassment factor may account partly for the effects achieved, but the support of the central government and the inherent rationale of the moratoria are more important reasons for their effectiveness. This section discusses the support of the central government; the following section will discuss the inherent rationale of the moratorium.

A. Policy of “Resource-Conserving and Environment-Friendly Society”

The change of the Chinese national policy toward environmental protection is the most important buttress of the moratoria. Before the SEPA took moratorium measures, China had already made preparations at the policy level, which provides political and legal support for the moratoria. The policy of “resource-conserving and environment-friendly society” was proposed in 2005. At the Conference on Population, Resources, and Environment held by the Central Committee of the Communist Party of China on March 12, 2005, Mr. Hu Jintao, President of the People’s Republic of China and Secretary General of the Communist Party of China, said that China should try to develop a society committed to resource conservation.

35. Press Release, supra note 32.
37. Id.
and environmental sustainability. He emphasized that scientific development, further economic structure adjustment, and the change of economic development mode are essential to reduce the pressure on the population, resources, and environment and for the development of a sustainable economy and society. He also said that it is necessary to speed up the adjustment of the economic structure and to abandon extensive economic development for intensive economic development, so that economic development is achieved on the basis of an improved quality of life for the populace, efficient use of resources, reduction of environmental pollution, and emphasis on quality and efficiency.38

On December 3, 2005, the State Council issued the Decision on Implementing the Scientific Development View and Strengthening Environmental Protection.39 This Decision presents a framework rule regarding the environmental protection work to be taken by the executive branch of the government. As to the importance of environmental protection work, the Decision provides that, although the discharge of most pollutants is under control, the discharge of main pollutants is still beyond the carrying capacity of the environment. As to environmental management systems, the Decision provides that the government should gradually streamline the responsibilities of each governmental agency and the management system according to the needs of regional ecosystems in which the agency sits so that governmental agencies can better cooperate with each other in environmental protection work. As to international exchange and cooperation, the Decision provides that China should take part in the work on climate change, biodiversity, desertification, wetland protection, ozone layer protection, reduction of persistent organic pollutants, nuclear safety, and others, which demonstrates China's willingness to shoulder international responsibilities. This framework provides guidelines for the environmental protection work to be undertaken and sets the basic tone for the national governmental policy. This Decision strongly disfavors developing the economy through environmental degradation. Besides declaring the overall environmental policy, some paragraphs of the Decision provide direct support for the moratoria, as discussed below in Part VI.

The policy of "resource-conserving and environment-friendly society" was further developed in two major events of 2006. The first was the release of The Eleventh Five-Year Plan for National Economic and Social


Development and its Outline (the Eleventh Five-Year Plan Outline), the second was the Sixth National Environmental Protection Conference.

The fourth session of the Tenth National People’s Congress (NPC) deliberated and passed the Eleventh Five-Year Plan Outline on March 14, 2006. The Eleventh Five-Year Plan Outline puts much emphasis on resource conservation and environmental protection, especially in Part Six, entitled “Building a Resource-Conserving and Environment-Friendly Society.” This part has five chapters that declare respectively the governmental policies on the development of a recycling economy, the protection and restoration of natural ecosystems, strengthening environmental protection, strengthening resources management, and the reasonable use of marine and climate resources. The introductory language of this part provides that China should implement the basic national policy of conserving resources and protecting the environment, developing a sustainable economy, and building a “resource-conserving and environment-friendly society.” The Eleventh Five-Year Plan Outline provides binding targets that the government is responsible for achieving. For example, the energy consumption per unit GDP must be reduced by 20 percent and main pollutants (SO₂ and COD) must be reduced by ten percent, compared with the relevant numbers at the end of 2005, which was the end of the tenth five-year plan period.

At the Sixth National Environmental Protection Conference, held in Beijing on April 17 through 18, 2006, Premier Wen Jiabao proposed three changes, the essence of which emphasizes equally environmental protection and economic development and taking all appropriate and necessary measures to achieve this goal, including legal and administrative measures. These famous three changes include changing from emphasizing only economic growth to emphasizing both economic growth and environmental protection; changing environmental protection’s lagging behind economic development into simultaneous advancement of both; changing protecting the environment using mainly administrative measures to solving environmental problems by comprehensively using legal, economic, technological, and necessary administrative measures.


41. Id.

42. Id.

In sum, by adopting the policy of taking legal and other measures to achieve the resource conservation and environmental protection goals of the Eleventh Five-Year Plan Outline, and especially through its binding targets, the Communist Party of China and the People’s Congress of China send a clear message that resource conservation and environmental protection are as important as economic development.

The Sixth National Environmental Protection Conference signified a momentous change for environmental protection because it greatly enhanced the status of environmental protection and established a new relationship between environmental protection and economic development. It also signified that China had passed the period of developing the economy by sacrificing the environment and entered into a new era of protecting the environment and optimizing the economy simultaneously. This change in fundamental national policy will lead to further changes, although these changes depend on the cooperation of and implementation by local governments.

In July 2006, the Central Committee of the Communist Party of China issued The Experimental Comprehensive Evaluation Rules for Local Communist Party and Governmental Teams and Local Leaders Embodying the Scientific Developing View. The new rule, placing more weight on environmental protection, addressed the promotion of local communist party and local government officers. This new rule sent a clear signal of the fundamental national policy change and was intended to curb the economic development movement of local governments.44

B. Support of the NDRC

The moratoria have won the support, or at least the acquiescence, of other ministries and commissions of the central government, especially the NDRC. The NDRC is a macroeconomic management agency under the State Council that studies and formulates policies for economic and social development, maintains a balance of economic aggregates, and guides the overall economic system restructuring. Because it makes key economic policies, it is perhaps the most powerful branch of the central government as far as the civilian economic life is concerned. Within the hierarchy of the Chinese governmental system, the NDRC is at a higher position than the SEPA. As moratorium measures will have impacts on economic development, the support of the NDRC is essential.

How did the SEPA win NDRC's support? One reason is that the NDRC must follow the order of the central government’s policy of “resource-conserving and environment-friendly society.” Another, less obvious reason lies in the SEPA’s choice of moratorium targets. The projects for which the SEPA decided to impose moratoria are also disfavored by the NDRC.

V. INTERPRETATION OF ITS EFFECTIVENESS: INHERENT RATIONALE

As mentioned previously, if a region-wide moratorium is imposed, no EIA applications in the region will be approved. Not only does this punish the wrongdoers; it also punishes those whose EIA documentation is otherwise perfectly qualified for approval. The situation is similar for an enterprise group-wide moratorium, an industry-wide moratorium, or a river basin-wide moratorium.

While it may seem unreasonable, it is not necessarily so. The rationale of the moratorium is what I call the totality principle. The totality principle of environmental law means that in legislation, administrative enforcement, compliance, and adjudication, one should regard the environment as a totality and solve environmental problems from a perspective of totality. According to the totality principle, once an area or ecological system has environmental problems seriously endangering the environmental quality of the region or ecological system as a totality, it is necessary to take measures for the whole of the region or ecological system. A moratorium of EIA approvals is just such a measure. It demonstrates the principle of totality and its rationale can best be explained with the principle of totality. The following analysis proves that the totality principle should be, and in fact is, a fundamental principle of environmental law.

A. Necessity of Totality Principle

The features of the environment and environmental problems and the goals of environmental protection make the totality principle necessary. The totality feature of the environment and environmental problems make it necessary to regard the totality principle as a fundamental principle of environmental law. The totality of the environment includes three aspects. The first is that all environmental elements of an area or ecological system are interrelated and these interrelated environmental elements form a

The totality of the environment leads to the totality of environmental problems. All environmental problems affect not only the local environment but also, in varying degrees, the environment of other places, and ultimately these problems affect the whole human environment. Similarly, the improvement of the local environment has positive effects on the environment of other places and ultimately has positive effects on the whole of the human environment.

The purposes of both domestic and international environmental law also make it necessary to take the totality principle as a fundamental principle. The environmental laws of all nations generally establish a goal of harmonizing the relationship between the environment and human beings. In order to harmonize the relationship between the environment and human beings, one must look at the environment and environmental problems as a totality and make comprehensive decisions. First, environmental problems are interrelated, which means that one must take into consideration and address multiple environmental problems at the same time. Furthermore, the processes for solving environmental problems are also interrelated. Second, environmental problems, economic development, social development, and political affairs are all interrelated, so the traditional compartmentalized approach cannot efficiently and effectively harmonize the relationship between the environment and human beings. Therefore, in order to harmonize the relationship between human beings and the environment, there is a genuine need to consider totality as a fundamental principle of environmental law.

The same conclusion is reached when considering international environmental law. International environmental law is developed to coordinate the actions of different nations related to the environment. There are at least two types of problems to be addressed by international environmental law, namely, transboundary environmental problems and global environmental problems. When the cause and effect of an environmental problem are in two countries sharing a boundary, there is a transboundary environmental problem. Thus, there is a need to solve such environmental problems using international law in general and international environmental law in particular. Global environmental problems refer to environmental problems affecting the whole Earth, such as ozone layer depletion and the reduction of biodiversity. Both transboundary and global environmental problems are the result of the totality of the environment and environmental problems. These examples illustrate that, given transboundary and global environmental problems, international environmental law should consider totality as its principle.
B. Evidence of the Totality Principle in Chinese Domestic Environmental Law

As basic environmental institutions are the core of environmental law, in order to examine whether there is a particular principle, one must first examine whether basic environmental institutions demonstrate this principle. People generally believe that basic Chinese environmental institutions include environmental planning, environmental impact assessment, three-simultaneousness, and the permit system. These basic institutions demonstrate and embody the totality principle in various degrees.

1. Environmental Planning

Environmental planning generally includes environmental quality control, pollutant discharge control, pollutant cleanup, natural ecology protection, and others. Environmental planning is the demonstration of environmental policies and environmental protection goals. As it encompasses environmental protection work generally, environmental planning is a basic tool to harmonize the relationship between human beings and the environment. In order to ensure that environmental planning is appropriate, one should consider long-term, intermediate-term, and short-term environmental plans and should also consider the harmonization between the environmental plans of the city, the region, and the river basin. At the same time, environmental protection plans must be coordinated with economic and social development plans. The provisions of Articles 4 and 12 of the Environmental Protection Law of the People's Republic of China demonstrate such requirements. Therefore, environmental planning's inherent nature, content, and relationship with other social development

46. Environmental Protection Law, supra note 7. Article 4 provides that the plans for environmental protection formulated by the state must be incorporated into the national economic and social development plans; the state shall adopt economic and technological policies and measures favorable for environmental protection so as to coordinate the work of environmental protection with economic construction and social development.

Id. art. 4.

Article 12 provides that the competent departments of environmental protection administration of the people's governments at or above the county level shall, in conjunction with relevant departments, make an investigation and an assessment of the environmental situation within areas under their jurisdiction, draw up plans for environmental protection which shall, subject to overall balancing by the department of planning, be submitted to the people's government at the same level for approval before implementation.

Id. art. 12.
issues directly and clearly reflects the requirements of and demonstrates the totality principle.

2. Environmental Impact Assessment

Environmental impact assessment is a legal institution whereby environmental impacts of a particular development plan or development project are analyzed, predicted, and assessed. Additionally, the EIA develops policies and measures to prevent or mitigate negative environmental impacts of development plans and projects and to achieve coordinated and sustainable economic, social, and environmental development. When developing an EIA, one must comprehensively consider from a totality perspective all possible impacts on the ecological system from the proposed plan or project. Only in this way can an EIA provide scientific guidance to decision making. The EIA clearly demonstrates the requirements of the totality principle in its purpose and the factors to be considered in developing an EIA.

3. Three-Simultaneousness

"Three-simultaneousness" is a term of art in Chinese environmental law. It means that for all new projects and the modification or expansion of existing projects, the facilities to prevent pollution and other public hazards and other environmental protection facilities must be designed, developed, and put to use simultaneously with the principal project. Three-simultaneousness is the extension of the EIA. It implements the environmental measures and plans established in the EIA and similarly demonstrates the requirements of the totality principle.

47. Id. art. 26. This article is the most important provision on the principal legislation on three-simultaneousness, which provides that

[i]installations for the prevention and control of pollution at a construction project must be designed, built and commissioned together with the principal part of the project. No permission shall be given for a construction project to be commissioned or used, until its installations for the prevention and control of pollution are examined and considered up to the standard by the competent department of environmental protection administration that examined and approved the environmental impact statement. Installations for the prevention and control of pollution shall not be dismantled or left idle without authorization. If it is really necessary to dismantle such installations or leave them idle, prior approval shall be obtained from the competent department of environmental protection administration in the locality.

Id.
4. Permit system

A permit system in environmental law means all developments, construction, and operations with possible adverse environmental impacts may only be carried out after a permit is duly issued by a competent authority in response to the application. These projects may only be done in accordance with the terms and conditions set forth in the permit. The permit system is the implementation of environmental plans in specific situations. Through the permit, the general requirement of environmental plans is converted to specific requirements for particular projects. Therefore, as with environmental planning, the permit system also demonstrates the totality principle.

In addition to basic environmental law institutions, legislation, administrative enforcement, compliance, and adjudication processes all demonstrate the requirements of the totality principle. The organization of environmental administrative agencies illustrates this point. Generally speaking, administrative agencies are organized according to administrative regions. However, ecological and environmental systems are determined by nature and may not correspond with the administrative regions. As such, to accommodate the totality of environmental systems, environmental administrative agencies may be organized according to river basins or natural ecological zones, which may not correspond with regular administrative regions. Many countries have established administrative authorities for major rivers and ecological protection zones independent of local governments. This is also a demonstration of the totality principle.

C. Evidence of the Totality Principle in International Environmental Law

As with domestic environmental law, international environmental law also demonstrates the totality principle. A short summary of relevant documents developed in the history of the international environmental law illustrates this point.

The 1972 Declaration of the UN Conference on the Human Environment includes a rudimentary expression of the totality principle. The Declaration proclaimed that "[m]an is both creature and moulder of his environment."48 "Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights [—even] the right to life itself."49 A growing class of environmental problems, because they are regional or global in extent or because

49. Id.
they affect the common international realm, will require extensive cooperation among nations and action by international organizations in the common interest.” The Conference calls upon Governments and peoples to exert common efforts for the preservation and improvement of the human environment, for the benefit of all the people and for their posterity.” The words did not explicitly or directly mention the totality principle, but contained in them some elements of the totality principle.

The 1992 Rio Declaration provides in Principle 7 that “States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem.” Principle 19 points out that “States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.” All these provisions demonstrate the requirements of the totality principle.

From the above analysis, we find that the totality principle should be, and is, a principle of environmental law. Both the domestic environmental law and international environmental law have reflected the requirements of the totality principle in various degrees. Environmental law theory should further develop this principle and give more guidance to the future development of environmental law. China should cooperate with other countries to further develop this principle at the international level.

VI. LEGAL CONTROVERSY

Although the moratorium is a powerful and useful enforcement tool, it is not free from legal challenge. Thus far its legality has not been challenged in a court of law so we do not yet have the benefit of jurisprudence.

For legal authority, the SEPA relies primarily upon the Decision on Implementing the Scientific Development View and Strengthening Environmental Protection. Indeed, this Decision provides some support for the moratorium measures. For example, Paragraph 21 provides that the national government will set discharge targets for main pollutants and distribute the main pollutants discharge targets among all provinces or metropolitan entities directly under the Central Government, which will

50. Id. ¶ 7.
52. Id. princ. 19.
53. See supra note 39.
54. Such metropolitan entities are at the provincial level in terms of its local government.
in turn allot the discharge targets among the lower local governments under its control. Step by step, discharge targets for the main pollutants will be fixed at the county level. This paragraph has an important sentence, which provides that, "for those areas which exceed the pollutant discharge targets, which has serious ecological disruption, or which has not fulfilled its ecological recovery task, the approval of construction projects increasing the total pollutant discharge or having comparatively large negative ecological effects will be subject to a moratorium." This sentence directly bolsters specific moratorium measures taken by the SEPA.

As to enterprises, another sentence of the same paragraph provides that "as to pollutant discharging work units that cannot achieve the statutory pollutant discharge targets at a regular basis or who exceed the total pollutant discharge limit, they should make changes within a time limit, during such time limit, the said work unit should limit its output and discharge, and should not construct projects increasing the total of pollutant discharge." This sentence directly supports enterprise group-specific moratoria.

The main legal deficiency is that the aforementioned legal support cannot be properly classified as a law or an administrative regulation of the People's Republic of China. Although the moratorium is more directly and importantly supported by the Decision of the State Council Implementing Scientific Development View and Strengthening Environmental Protection, the Decision itself is not an administrative regulation in the strict sense. At the national level, only laws and administrative regulations are binding for all branches of the government. Both the "law" and "administrative regulation" are terms of art in Chinese law. According to the Legislation Law of the People's Republic of China, only if a document has been formally made as an administrative regulation and promulgated with a numbered State Council Order can it be an administrative regulation. The Decision did not meet that requirement. Although it is binding for subordinate administrative agencies, the court will not necessarily follow it if a moratorium is challenged in court. Similarly, the Eleventh Five-Year Plan Outline does not meet the requirement set forth in the Legislation Law

55. Supra note 39, para. 21.
56. Id.
57. Id.
to qualify as a law. The Iron and Steel Industry Development Policy and the Notice on the Strengthening of Sulfur Dioxide Pollutant Control of Coal Power Plants are both ministerial ordinances, which are at a much lower position in the hierarchy of legal rules and are not binding on the courts.

Another legal problem with the moratorium is that there is no clear procedure for imposing moratorium measures and there is arguably insufficient protection for innocent would-be investors whose projects are otherwise perfectly legal. If the SEPA wants to impose a moratorium on a city, the city government of course could communicate with the SEPA through their internal political communication mechanisms and judicial intervention would not be permitted in this legal system. However, for enterprise groups and would-be private investors, there is indeed a need for court intervention or judicial review. Big enterprise groups have great influence and it is possible for them to argue before the SEPA through informal procedures if they get word that they may be subject to a possible moratorium. Even so, a formal administrative hearing procedure and administrative review procedure can be an effective way of preventing arbitrariness of the SEPA. If the law provides for a judicial review process, the procedural due process requirement will be better met. For other innocent would-be investors, this procedural protection is even more necessary as most of them are not so powerful as to enable them to argue strongly before the SEPA.

VII. CONCLUDING REMARKS

By initiating moratorium measures, the SEPA makes a big law enforcement innovation embodying the principle of totality. As the SEPA declared that it would use moratorium measures more frequently and against more cities and enterprise groups, there is clearly a need to improve this law enforcement mechanism in the future. When China revises its basic framework environmental protection law, China should make provisions on moratorium and provide clear procedure and criteria so that the legitimate rights and interests of other interested parties and stakeholders can be protected. Transparency and public participation will help the interested parties and stakeholders to protect their legitimate rights and interests. Even before the revision of the basic framework for

59. Id. arts. 23 (providing that "[a] law adopted by the National People’s Congress shall be published with a Presidential Order signed by the President"), 41 (providing that "[a] law adopted by the Standing Committee of the National People’s Congress shall be published with a Presidential Order signed by the President"). Therefore, whether a law is adopted by the National People’s Congress or its Standing Committee, a Presidential Order is necessary.

60. Effects of First Group of Moratoriums, supra note 31.
environmental legislation, the individual sectoral laws can also make provisions in moratoria. The newly revised Law of the People’s Republic of China on Prevention and Control of Water Pollution made the breakthrough and became the first sectoral environmental law introducing a moratorium of EIA approvals. Article 18 of this law provides that the State shall apply an overall quantity control regime for the discharge of main water pollutants. The same article provides that all provincial-level governments shall reduce and control the overall quantity of the discharge of main water pollutants within their respective jurisdictions and shall further allot the overall quantity control targets among city and county governments. The same article further provides that, for areas that exceed their respective overall quantity control targets for the discharge of main water pollutants, the environmental protection agencies concerned shall impose a moratorium on the approval of EIA documentation of construction projects increasing the overall quantity of the discharge of main water pollutants. The revision of this law indicates a new development trend and other sectoral pollution control laws are expected to be revised in the same manner in the future. After such reviews, the problem of the weak legal basis for the moratorium will be solved and this law enforcement measure will be even stronger.

62. Id.
63. Id.