



China's Environmental Mediation: Past Popularity, Present Challenges & Future Revitalization

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Outline



- I. Overview of China's Environmental Problems, Environmental Disputes and How Are Environmental Disputes Resolved
- II. Overview of Mediation in China
- III. Mediation v. Litigation: the Future of China's Environmental Mediation





China's Environmental Problems

- China's booming economy in the past three decades has produced pervasive and serious environmental degradation
- Air pollution and water pollution top the list of the public's concerns



China's Environmental Legislative Achievement On the Book v. Poor Enforcement On the Ground

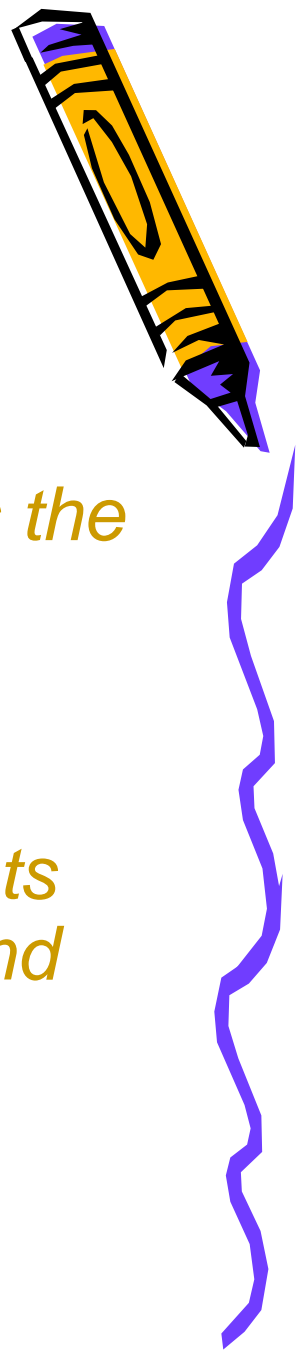


- China has developed one of most dynamic environmental law frameworks in Asia
- Since 1991 there has been at least one environmental legislation enacted or amended every year
- However, many of the laws are general and vague, and very few of them are enforced

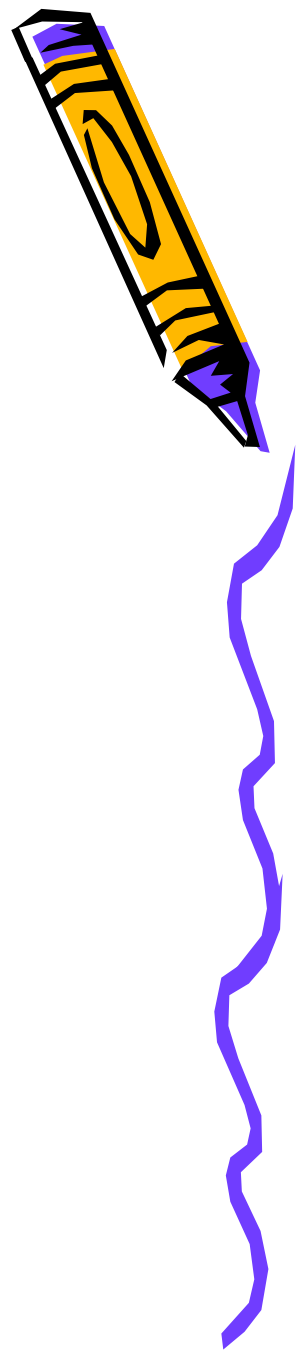


Dramatically Increasing Environmental Disputes

- *National statistics shows dramatically increasing environmental disputes across the country*
- *Many of these disputes involved a large number of victims and lasted for years*
- *Some of the disputes led to violent protests and severely threatened social stability and China's international image*



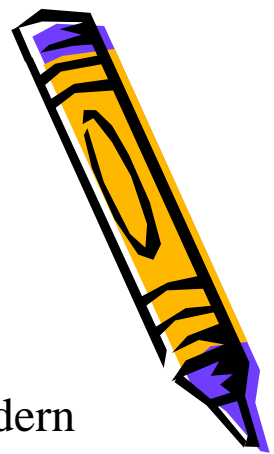
How Are Environmental Disputes Resolved



- Litigation
- ADR
 - Mediation: 1) Court-performed Mediation
 - 2) Administrative Mediation
 - 3) People's Mediation
 - Arbitration
 - Letters & Visits



Environmental Litigation I

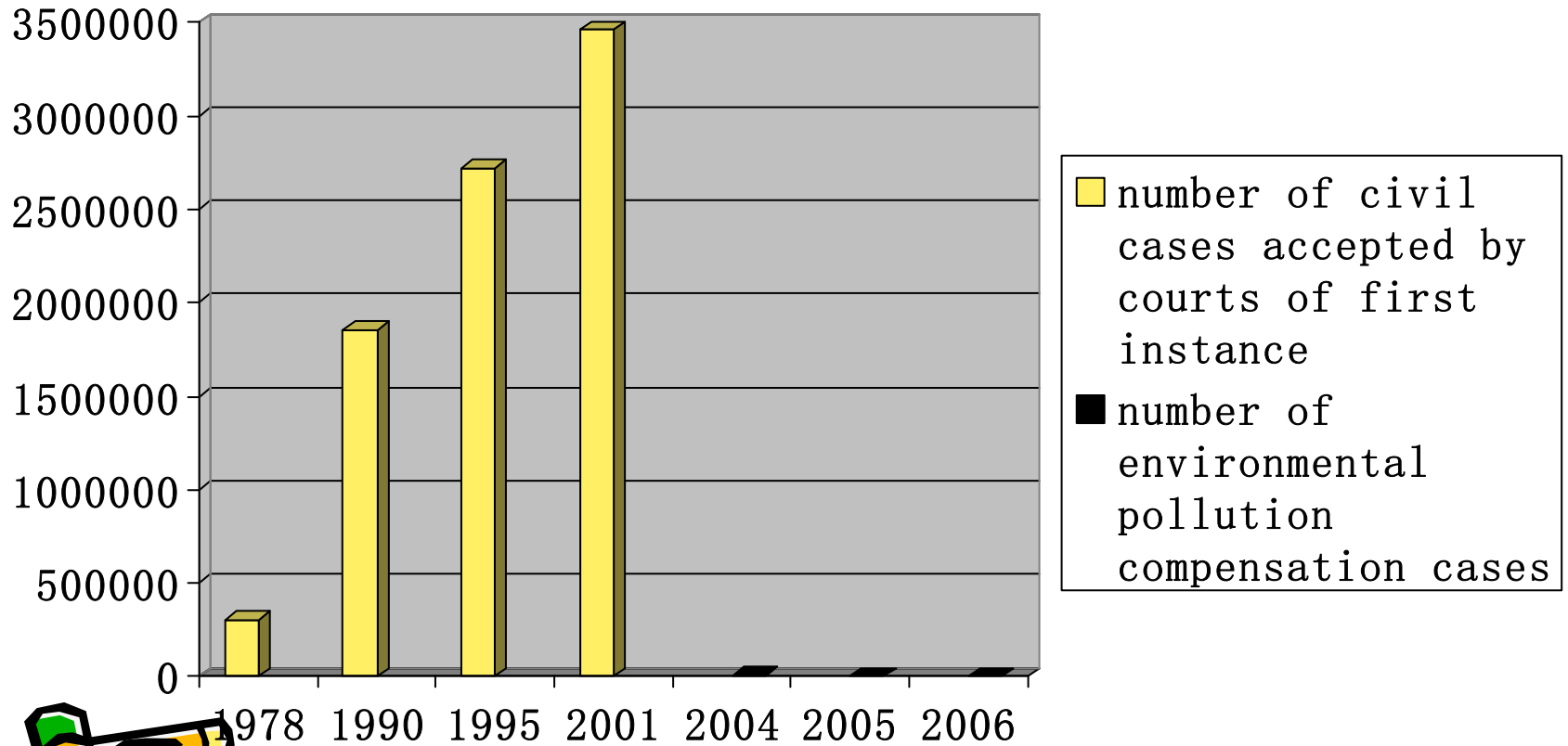


- Traditional antipathy towards litigation v. fast growing litigation in modern China (statistics)
- Reasons for “litigation explosion”
 - *Transitional economy produces increasing complicated and technical disputes*
 - *The public’s growing consciousness to use litigation to protect individuals’ legitimate interests and rights, eg. 1 RMB case*
 - *Society of acquaintances v. society of strangers, eg. Guangzhou ranks No.1 in the ten most offish cities in China*
 - *Changing values: collective harmony v. individual interests, eg. magazine column on “how to sue your neighbors”*

However, relatively few environmental disputes end up in court due to various reasons, though the number of environmental litigation is increasing and progressive developments have been seen.



Environmental Litigation II



Overview of Mediation in China



- China has been one of the world's most committed nations in using mediation to resolve disputes
- Operates the largest and most extensive mediation program worldwide
- “Oriental Experience”



History of Using Mediation



the United States

China

ADR movement in 1960s

More than 2,000 years





Reasons of Using Mediation

the United States

Efficient, flexible and affordable dispute resolution

China

- Confucian Philosophy
- Ideology of Mao & Its Lingering Impacts
- A Weak Judicial System

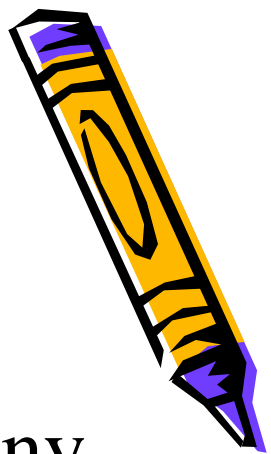


Confucian Influence on Mediation

- Li 禮--the preservation of natural harmony (achieved through mediation)
- Jang 让--compromise or yielding to settle disputes

-- It's better to keep a friend than to win a victory.

-- It is better to be vexed to death than to bring a lawsuit.



Mediation Under Mao



- Mediation is used as a means of educating people and implementing the Communist Party policy.
- Form for public participation and popular justice.
- The dispute resolution function of mediation is not so important & disputes have to be resolved in a politically correct way, eg. getting a divorce may not be possible because it was perceived as inconsistent with national socialist construction.



Impact of A Weak Judicial System On Mediation



- Lack of Independent judiciary
- Low competency of judges
- Corruption
- Judges often encounter novel disputes which are not yet addressed by legislation
- Afraid of reversals by higher-level courts
- Difficulty in enforcing civil judgments



Functions of Mediation



the United States

China

Dispute resolution

- Dispute resolution
- Mobilizing the mass to support party policies
- Dispute and crime prevention (“first line of defense”)
- Social control



Changing Differences in Functions of Mediation



- *In Mao's era, dispute resolution was perhaps the least important one in those four functions*
- *The primary function of mediation today has shifted to resolving civil disputes in non-political terms by applying legal rules*
- *Lingering Impacts of Mao's Ideology: "Rule of Virtue" & "Harmonious Society" that advocate for using more mediation and less litigation so as to impose tighter control on the society.*



Forms of Mediation



the United States

- Court-annexed Mediation
- Community Mediation
- Mediation associated with specific agencies

China

- Court-performed Mediation
- People's Mediation
- Work-unit Mediation
- Administrative Mediation



People's Mediation

- Organized by the People's Mediation Committees (PMC), under the supervision of courts and local justice bureaus, represents an exercise of popular democracy
- By early 1990s there was over 10 million mediators & over 1 million PMC
- Local PMC mediate millions of cases a year with a very high settlement rate
- Free
- Mediation agreement as civil contract



Administrative Mediation



- Generally less common but plays a special role in env. disputes
- Jurisdiction: a dispute over the liability to pay compensation or the amount of compensation, usually handled by EPBs
- Advantages of administrative mediation in env. disputes: local EPBs have the technical expertise and familiarity with laws and the regulated industry
- Mediated settlement not subject to judicial review: if disputants dissatisfy with the mediated outcome from local EPBs, they can bring the original disputes to court claiming against the other party instead of EPB (gov. agencies' continuing unease with being sued in an administrative litigation)



Court-Performed Mediation



- Civil Procedure Law Art. 85: in handling civil cases, the court may distinguish between right and wrong and mediate disputes according to the principle of parties' voluntariness and based on clear facts.
- Judge who hears the case acts as mediator (coercion, decide cases based on proposed solutions if not accepted by parties).
- Mediation is a way of exercising the power of adjudication by judge.

Mediation agreement has the same effect as a verdict.

Mediation agreement generally cannot be appealed.



Mediation in Contemporary Chinese Society



- *Economic development leads to more and complicated disputes*
- *Development of formal dispute resolution institutions for civil and commercial matters*
- *Willingness to use legal weapon to protect rights, social harmony becomes less important*
- *Litigation over civil and economic matters has increased, and mediation is receding, particularly in the cities (a symbol of China's legal modernization?)*



Recession of Mediation

- The number of cases mediated by PMC each year declined by about 20% between 1990 and 1999
- In early 1980s the percentage between disputes settled through PMC and in court was 17:1, 2001 (1.7:1), 2002 (1.3:1), 2003 (1.33:1), and 2004 (1.25:1)
- More than half of all the civil and economic disputes brought to the courts were mediated in the 80s → now cases closed by judgment far outnumbered the cases closed through mediation



The Future of China's Environmental Mediation

Mediation: good tradition still relevant today or barrier to economic development & rule of law in modern China? Due process or popular justice?

- The same question applies to the environmental field: China's environmental disputes are growing quickly. Given the weakness in env. legislation and enforcement, many of the disputes actually need to be litigated in court to clarify ambiguous laws, establish important legal principles and promote the development of China's environmental governance.

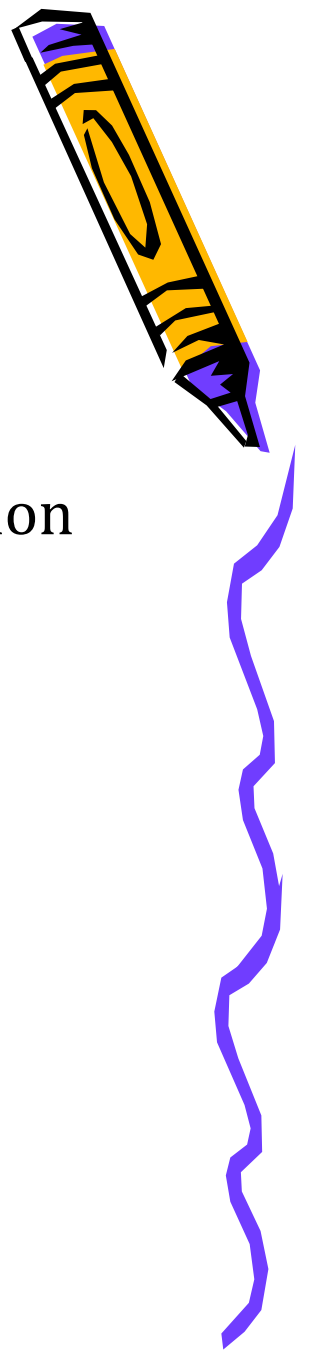


The Future of China's Environmental Mediation



- Though mediation has generally been decreasing, the use of mediation in court for resolving env. disputes bounce back recently (judges prefer or advocate for mediation)
- In China's newly created specialized env. courts, most of the cases are resolved through mediation (creating a "pan-mediation" atmosphere)
- Push for mediation in almost every case litigated, generally no such concept that mediation might not be appropriate on certain occasions.
- It is a big issue on how to properly handle the relationship between litigation and mediation to resolve env. disputes effectively and efficiently and at the same time promote env. rule of law in a developing country like China.





*Case Study:
All China Environmental Federation v. Jiang
su Jiangyin Container Inc. Sep. 2009*

- The first environmental public interest civil litigation brought by an NGO
- Resolved through mediation
- Praise & criticism
- Further thoughts



Nature of Environmental Disputes



- Involve a large number of victims and diverse stakeholders, and some of them may or may not be represented
- Complicated, technical and can easily be prolonged
- More public than private, receive significant attention
- Long-term consequence for the environment, public health, and future generations
- Competing values, interests and opinions
- Significant resource imbalances among the parties



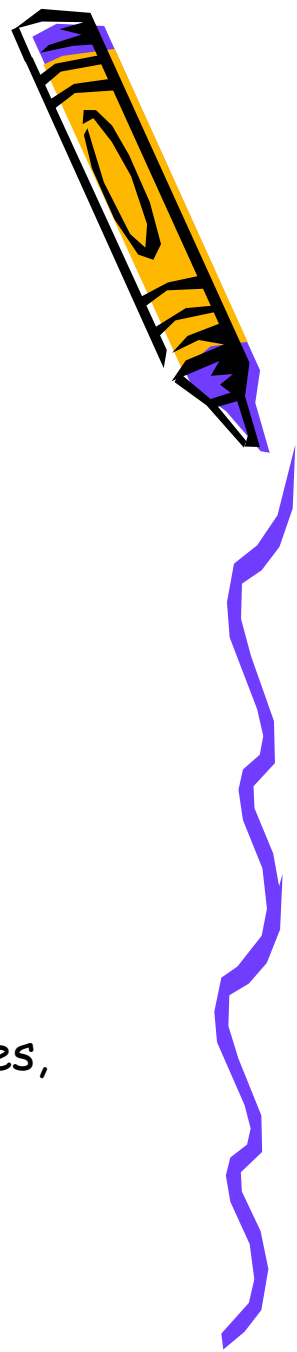
Benefits of Mediation in Environmental Disputes



- Faster and more affordable dispute resolution
- Freely express oneself
- Explore creative options that are not available through court remedy
- Improve relationship among disputing parties, particularly helpful if they will continue to deal with each other in future



When is Mediation Appropriate?



- Issues are high priority
- Issues are identifiable and negotiable
- Affected stakeholders can be identified and represented
- Enough time and resources are available
- All stakeholders support using the process
- Maintaining relationships between the parties is important
- There is a deadline of some kind
- There is some way to assure implementation of agreement
- Data is available and can be shared

* Findings of the Administrative Conference of the United States, 1986



When is Mediation Inappropriate?



- Definitive or authoritative resolution is required for precedent
- Persons who are significantly affected are not participants
- Significant questions of government policy requiring additional procedures
- Maintenance of established policy is especially important for consistency
- Full public record is important
- Continuing jurisdiction over the matter is necessary by the courts

** Findings of the Administrative Conference of the US and text of the Administrative Dispute Resolution Act of 1996





Revitalizing Mediation in Contemporary Chinese Society

- Increasing disputes going to court v. limited judicial resources and qualified judges, therefore a healthy balance between litigation and mediation for dispute resolution is necessary – developing screening guidelines
- Comprehensive dispute resolution system with multilayer of approaches to different disputes
- Mediation as an efficient, effective and economic dispute resolution method – specialized env. dispute resolution legislation
- Training of judges and dispute resolution professionals

