

Congressional/Executive Commission on China Issues Roundtable:

"Clearing the Air: The Human Rights and Legal Dimensions of China's Environmental Dilemma"

**Statement of Brian Rohan
Associate Director
American Bar Association/Asia Law Initiative**

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It is a privilege to appear before the Congressional-Executive Commission on China at this important roundtable. For the past twelve years I have worked on environmental law and international development issues. I began my environmental law career with the U.S. Environmental Protection Agency, where for five years I led efforts to clean up hazardous waste sites and obtain financial commitment from companies responsible for the contamination. Afterwards, I spent several years working in Africa and the former Soviet Union, including two years in Moldova and Ukraine as a liaison for the ABA's Central Europe and Eurasian Law Initiative (CEELI). Upon returning to the United States, for several years I have been working in the ABA's Washington D.C. office. Initially, I served as Director of Environmental Law Programs at CEELI, where I managed environmental governance programs in Moldova, Ukraine, Uzbekistan and Uganda. I also supervised broader rule of law reform efforts, including human rights advocacy, judicial training, and bar association development in Moldova and Ukraine. Currently, I am Associate Director of the ABA's Asia Law Initiative. In this capacity, I manage legal reform projects in China and throughout Asia.

ABA's Asia Law Initiative

The American Bar Association's Asia Law Initiative - ABA-Asia - is a public service project that provides technical assistance in support of legal reforms in the countries of Asia. The project is governed by a nine-member Council that includes U.S. Supreme Court Justice Anthony Kennedy, former White House Counsel Lloyd Cutler, former White House Counsel A.B. Culvahouse, Director of the Yale China Law Center Paul Gewirtz, and other distinguished American attorneys. The Council's Chair is Roberta Cooper Ramo, the first woman president of the ABA.

ABA-Asia is similar to the ABA's successful CEELI program, which has been active in Eastern Europe and the former Soviet Union since 1990. Working in partnership with local organizations (both governmental and non-governmental), ABA-Asia provides ongoing assistance in a variety of areas, including judicial reform, legal profession reform, legal education reform, criminal law/anti-corruption, citizens' rights advocacy, and gender issues.

ABA-Asia has available to it the expertise and experience of the ABA's over 400,000 members, as well as other legal experts in the United States and abroad. ABA-Asia is therefore able to offer the highest level of practical expertise to address host countries' requests for assistance. **A full listing of our current project activities is attached as Appendix A.**

The ABA Approach in China

ABA-Asia's strategy in China is to implement programs that 1) enhance Chinese citizens' access to the legal system; 2) create legal norms by which citizens can defend their legal rights and demand governmental transparency, and 3) strengthen the capacity and impartiality of the Chinese legal system. ABA-Asia pursues these aims through trainings, practical skills-building programs and demonstration projects that highlight rights fundamental to citizens' relationship with government. These rights include access to governmental information, transparent and participatory decision-making, and standing of citizens to challenge governmental action. By focusing on these rights, ABA-Asia's aim is to help foster a culture in which citizens know their rights, are empowered to assert them, and have a reasonable expectation of fair and impartial resolution.

To produce long-term reform, programs must be indigenous in their conception, design and implementation. When beginning a project in any substantive area, ABA develops partnerships with leading Chinese experts, being sure that these experts represent a variety of stakeholder perspectives, such as academia, industry, NGOs, local government, central government, media, and private legal practice. When empowered with real program design decisions, these Chinese leaders develop a strong sense of ownership of the project, and the substance is more effectively tailored to the Chinese context.

To the greatest extent possible, programs are delivered outside of Beijing. Target audiences are those groups with the greatest capacity and inclination to advocate on behalf of citizens' rights, such as local government officials, public-spirited lawyers and academics pursuing reform agendas. Through these related strategies, ABA strives to implement projects that demonstrate the fundamental value of the rule of law, while simultaneously training reform-minded stakeholders in the actual provision of those rights.

The China Environmental Governance Project

In February, 2002, with funding from the East-Asia and Pacific Bureau of the U.S. State Department, ABA placed an attorney liaison in Beijing on a *pro bono* basis to implement its Rule of Law and Environmental Governance Project in China. Using environmental law as the substantive theme, the project has the much broader goal of increasing capacity in rule of law and developing replicable models in good governance, particularly in such areas as access to information, governmental transparency, citizen participation in decision-making, and defense of citizens' rights through legal advocacy. In brief, the project is conceived to conduct a series of training programs on Chinese environmental law, focusing on those aspects of law where citizens have substantive and procedural rights vis-a-vis government. The trainings, in turn, are stepping-stones to follow-on demonstration activities, in which participants actually implement a legal tool that creates and delivers greater citizens' rights and access to the legal system. Further information about this project can be found in an article about a December 17, 2002 ABA presentation at the [Woodrow Wilson Center for International Scholars](#).

The project has generated strong interest in China, and attracted prominent participants from many sectors to an ABA-initiated Project Advisory Council. By all accounts, the project accomplished its one-year objectives and more. Based on its warm reception, its demonstrable success, and the strong Chinese enthusiasm for continuing the project, it is clear that there are substantial further gains to be made in rule of law and governance in China by working through the lens of environmental law.

The Project's First Steps: Set Up and Formation of the Project Advisory Council

During the first quarter of 2002, ABA overcame a variety of bureaucratic obstacles to structure a working partnership with the Center for Environmental Education and Communication (CEEC) of the State Environmental Protection Administration of China. ABA's next step was the creation of a Project Advisory Council (PAC). These steps allow a variety of stakeholders in environmental governance, from

government, NGO, academic, industry and private law practice perspectives, to offer insights and input that guide the development of the project, including selection of sites for the workshops, curriculum content and training style, and development of follow-on activities. Equally as important, the members of the PAC, all prestigious experts in various aspects of Chinese legal and environmental affairs, imbue the project with elevated status, and afford the ABA liaison access to many contacts in central government, academia, the NGO community, media, and the training cities.

The PAC selected the three cities where the environmental governance training sessions were conducted. The three cities, Shenyang, Wuhan, and Chifeng, present a variety of environmental problems, diverse geographic locations, and differing size and population considerations. Thereafter, the PAC set about designing the training curriculum. More than half of the 21 member PAC agreed to be presenters at the three sessions. The final curriculum focuses on Chinese environmental law and the roles and relationships among stakeholders in processes such as environmental impact assessment, public participation in environmental decision-making, and the role of advocacy to defend citizens' rights. **A composite curriculum from the three sessions is attached as Appendix B.**

The Next Step - Three Training Sessions

The three trainings took place in July and August, 2002. Each consisted of three days of instruction, panel presentations, roundtables and informal discussion. In each city, there were between 50 and 60 participants, ranging from lawyers, judges, media, industry, NGOs, and government. With presenters drawn from the PAC and including the most prestigious and compelling experts on Chinese environmental law and advocacy, the sessions were lively and engaging. The last day of each three day program was devoted to local environmental problems, and included an interactive session in which attendees discussed options for a substantive follow-on activity to implement the training's content. In the end, participants in each location developed consensus on a follow-on activity, and have set their attention to its implementation.

All three sessions were video taped by CEEC and a composite training VCD is being created from the edited tapes. The VCD will be distributed to several dozen provincial level Environmental Protection Bureaus (EPBs) throughout China.

The Critical Step: The Follow-on Activities

Building on these training programs, ABA conducted a series of follow-on activities that highlight innovative environmental management techniques in the context of Chinese environmental law. Each activity also demonstrates best practices in rule of law and good governance. In this way, ABA is helping its Chinese partners not only to adopt techniques that increase efficiencies and public participation in environmental protection, but also to undertake measures that get to ABA's core objective in this project: developing models that provide for greater governmental transparency, increased citizen participation in decision-making, and enhanced respect for and implementation of Chinese law.

In Shenyang, the follow-on activity consists of drafting, enacting and implementing a law to ensure access to information and public participation in environmental decision-making - the first such law of its kind at the municipal level in China. In Wuhan, participants are working on development of a publicly accessible computer database to provide comprehensive data on environmental conditions. In Chifeng, the emphasis is on a participatory process to formulate an affirmative role for local government in devising sustainable land use practices that combat desertification.

Focus on the Shenyang Follow-On

The Shenyang EPB prepared a draft of the first municipal-level public participation law of its kind in China. The draft law included elements of citizen access to information, public participation requirements, and mandatory transparency among facilities releasing pollutants into the environment. Prior to the July training session, the first version of the law was published in the June 24 edition of the *Shenyang Evening News*. The draft law was discussed during the training session and about 100 people sent comments to the EPB following the newspaper publication.

In August and September, ABA coordinated an assessment of the draft law by a team of Chinese and international experts; in September, ABA and the EPB hosted a drafting and analysis workshop in Shenyang attended by EPB officials, Shenyang People's Congress representatives, and about a dozen other stakeholders, including visiting Chinese and foreign experts. This yielded extensive written comments on the draft law, which ABA compiled and presented to the EPB and all participants.

Based on these comments, the EPB made significant changes to the draft law, and published a revised version of the law on October 14 in the same newspaper. This publication also yielded approximately 100 comments, to which the EPB has responded by making further changes to the law. Commenters included ordinary citizens, students, and academics, as well as technical experts.

In November, Mr. Li Chao, Deputy Director of the Shenyang EPB, informed ABA of a sharp competition between Shenyang Municipal Government and Shenyang People's Congress for the right to promulgate this law. The People's Congress wanted to enact it as a local law, but ultimately the Municipal Government prevailed. The law has received the necessary final approvals, and shortly will be published a third and last time, whereupon it will take effect as a Shenyang Municipal Government Regulation. The Shenyang People's Congress is expected to elevate it to local law status within a year. **An English translation of the final law is included as Appendix C.**

Mr. Li has expressed a strong desire for further collaboration between the Shenyang EPB and ABA. The EPB has asked ABA to host a second series of trainings in Shenyang, to focus specifically on implementation of the new law. Mr. Li specifically envisions trainings for citizens on how to assert their new rights granted under the law. Assuming adequate funding resources, this training will be held in Spring, 2003.

The Shenyang EPB also hopes to undertake a similar process in revisions to all of its environmental laws, including expert commentary and public comment and participation. Mr. Li wants to improve other rules and laws in Shenyang to a level similar to the Public Participation Law, and ensure that they comply with WTO requirements. He also has expressed an interest in holding public hearings on the role of the public in environmental impact assessment.

Future Directions: Training and Follow-on Activities

Continued implementation of the existing follow-on activities is essential. The follow-ons present a unique opportunity to design and implement governance tools that are readily accepted and applicable in the Chinese context. While the project's achievements in its first 12 months are impressive, much more remains to be done in order to institutionalize these efforts and demonstrate their applicability on the national level.

ABA also plans to memorialize the three existing follow-on activities by means of self-contained modules covering both the procedural and substantive elements. For example, not only will the various texts of the public participation law in Shenyang be documented, but also the content of trainings, roundtables, and citizen comments received in connection with the law's development.

As the three existing follow-on activities progress, ABA also will develop stakeholders in these efforts as local experts, trainers and spokespeople for the project and for rule of law and governance reform generally. In conjunction with the materials documented in the modules, this cadre of trained stakeholder experts from each training/follow-on location is critical to ABA's long-term efforts to both build capacity in good governance tools among Chinese stakeholders and to strengthen indigenous leadership on broader rule of law reform.

ABA also hopes to begin additional training programs and follow-on projects in three more cities, leveraging both the modules created from the existing follow-ons and the local expertise developed in each. Specific locations, project themes, and kick-off events will be developed in a manner similar to the trainings and follow-ons in Shenyang, Wuhan and Chifeng, with substantial involvement of the PAC and other partners.

Future Directions: Citizens' Rights Advocacy

Building on the experience, relationships, and credibility developed during the project's first year, ABA also hopes to expand its presence in China in an important direction: by providing **direct support to emerging citizen advocacy efforts**. Building on relations developed through the PAC, through ABA's outreach to the broader legal community in China, and particularly through relations developed during implementation of the follow-on activities in the target cities, ABA will support advocacy that accomplishes a range of activities, including direct representation of citizens' legal claims, lobbying and campaigning on public interest matters, publications, and indigenously conceived trainings and other events focusing on rule of law and good governance themes.

ABA has observed that public interest advocacy in China is emerging according to several models. Individuals and organizations housed within universities have conducted successful advocacy work; established lawyers in major law firms have achieved groundbreaking court decisions; and independent, lesser-known lawyers are exploring public interest advocacy through work resembling an advocacy NGO. ABA will support the efforts of carefully selected Chinese partners working through these models as well as through other creative approaches.

By assisting advocates working through varied structures ABA's goals are to create both the broadest possible field of public interest advocates and to achieve the strongest possible advocacy results. By supporting advocacy in various forms, ABA's efforts will build a comparative track record as to which institutional arrangements yield the most effective public interest advocacy in China. As different advocacy partners pursue different types of work (some focusing on client-oriented litigation, others pursuing cases with broader societal implications, still others doing client counseling and mediation, etc.) ABA's efforts also will shed light on which types of advocacy are most effective in China's political and legal environment.

As these advocacy efforts mature, ABA also will encourage an informal network among them and similarly minded legal professionals throughout China. This network will benefit from a variety of perspectives, backgrounds, and specializations. ABA will also seek to include public interest law firms, NGOs, and activists from outside China in appropriate partnerships with Chinese counterparts, to enhance the effectiveness and sustainability of the advocacy network.

Of course, all these proposed future activities are dependent on sufficient resources. ABA received \$385,000 from the State Department for its first year of activity; second year requirements may be as high as \$700,000. Discussions are ongoing with various bureaus within the State Department, and a small amount of money has been secured to maintain the project on an interim basis. Considering both the

project's track record and the tremendous opportunity to support citizens' rights that has now emerged, ABA is exploring all possible options to secure the funds necessary to properly implement all future activities described above.

Why are the Chinese Participating in this Project?

As described above, the Chinese participants in this project represent a broad range of stakeholders, both within the PAC and in the provincial trainings and follow-on activities. The level of enthusiasm and substantive involvement among all of these groups far surpasses initial expectations. Several factors explain this. First, the extent of environmental devastation is well known within China, and the government has made environmental restoration an urgent priority. At the same time, the awakening about the possibilities of - perhaps the inevitability of - the rule of law has many Chinese yearning for new legal approaches. Among participants in this project, there is a strong sense that this project - using environmental law as a means to promote broader rule of law - is the right approach at the right time. Put another way, **the reform-minded community with whom we are working sees this project as a well-timed, viable approach to political reform.**

Another important factor motivating the Chinese is the prestige that the project brings to participants. While perhaps inexplicable to those with an American's jaded impressions of lawyers, working with the American Bar Association carries tremendous cache in China. When thinking of the ABA, the Chinese do not think of lawyer jokes; rather they see an influential professional association with great credibility and substantive resources on the very legal topics that are of great interest in China today. That, combined with the sense that the project is showing important results, makes the Chinese keen to be a part of it.

The ABA's sincere involvement of local partners in project design and implementation is another important aspect of the project's success and the Chinese enthusiasm for it. As described above, from its inception, the program has been conceived and delivered by and for Chinese. The PAC is not a ceremonial board; its substantive involvement in design and delivery is real and comprehensive. The training curriculum was designed to emphasize domestic Chinese law and policy. While international themes have featured prominently in certain aspects of the trainings - such as norms of public participation, the role of public dialogue in policy formation, etc. - these topics have been raised largely by the Chinese presenters and experts with whom ABA has worked. In this way, international experience is conveyed in a way that is relevant to the Chinese context, and that minimizes the sense of foreigners preaching to the Chinese about how to reform their system

Central Government's Reaction

ABA has been careful to solicit support for all aspects of the project from Chinese authorities. At its inception, officials were quite skeptical - indeed suspicious - of the project. Timely and tactful intervention from the U.S. Embassy helped to sort through bureaucratic obstacles, and by partnering with the CEEC, itself an entity within SEPA, ABA was able to allay initial fears and secure effective operating space, both literally and figuratively.

Another strategically important aspect of ABA's relationship with central government is the composition of the PAC. ABA invited senior officials from SEPA, the NPC's Environmental Protection and Resource Conservation Committee, and the China Law Society (whose leadership consists of very senior retired central government officials) to participate as PAC members. These relationships have been indispensable to the smooth progress of the project.

In just the past week ABA gained interesting insights about governmental reaction to our program when our Beijing-based liaison was summoned to meet with senior SEPA officials. From SEPA's perspective, the purpose of the meeting was to inform us whether SEPA would support continuation of our project and approve its extension. This was clearly more than a formality. Happily, the SEPA officials reported that they would continue to support the project. They described it as particularly "forward" for China, and did express some telling reservations regarding NGOs (See below.) However, they also explained that the primary factor motivating their continued support was the overwhelming interest in the project among the regional EPBs.

Indeed, focusing efforts outside of Beijing has been a cornerstone of the project, and this SEPA interaction confirms ABA's belief that not only are provincial institutions often isolated from Beijing-based information and initiatives (making them hungry for whatever they can get); they also are often the best level at which to undertake reform efforts. Further from Beijing, they can be and often are more experimental. And highly desirous of increasing their status, regional offices also are interested to implement new approaches that may ultimately have national significance.

ABA's experience offers several clear lessons. To implement highly visible programs with multiple parties, particularly regarding legal reform, central government support is essential. At the same time, regional offices of government present a tremendous resource for partnership, and are given broad latitude as laboratories for reform. However, neither central government support nor local level interest is a given; to be able to work "within the system" in China, the substantive theme of an activity must be carefully selected to align with Chinese priorities and pose no overt threat to overarching governmental concerns. This is **the crucial issue of "political space."** Environment currently enjoys substantial political space in China. Other issues, such as human rights or labor rights, do not enjoy such space, making efforts to work with the Chinese in such areas far more difficult and the prospects for substantive results far less likely. This is not to say that other themes should not be pursued, but that in pursuing such topics the prospects for achieving reform from within will be reduced while the chances for antagonism and mistrust inevitably will be increased.

What Does this Project Say about "Civil Society" in China?

The very word "NGO" raises suspicions within some government offices in China. In fact, in a recent meeting, SEPA explained to ABA that one of its key initial reservations about supporting this project was that ABA seemed intent on energizing NGOs to criticize the government. As stated to us, the Chinese government has no intention of supporting programs whose aim includes training NGOs in the art of contesting governmental authority. Yet at the same time, SEPA has asked for assistance in implementation of the new Environmental Impact Assessment Law, which in several articles calls for public opinions and testimony to be incorporated into official decisions. The Shenyang Public Participation Law is even far more explicit in its grant of rights to citizens. This dichotomy raises an important set of questions: Who is going to represent citizens and "civil society" in these and other emerging legal contexts where citizens are given clear rights? Is there an NGO sector waiting to be nurtured? What are the "Chinese characteristics" of the third sector?

Answers to these questions are necessarily speculative at this point. However, in trying to provide effective civil society assistance to China, several observations are noteworthy. First, a blossoming of "Western-style" NGOs in China remains a distant dream. Concerned about threats to social stability, the Chinese government has no interest in sanctioning large numbers of organizations that are truly independent from government, and that will assert themselves in various sectors of politics and society in ways often critical of government. Those organizations that do brave the obstacles and function as NGOs must ever be cautious in their approach; further latitude from government is not likely to be forthcoming in the short term.

However, the situation is not as bleak as it may seem. The absence of strong and independent NGOs merely means that reform-minded elements of Chinese society must find other ways to express themselves. Often this includes affiliations and organizations that Westerners would not consider to be leading-edge reform entities, such as private law firms, academic institutions or even local government officials. However, in China it is these places where the greatest energy for reform resides. And quite importantly, these organizations, largely connected to the state bureaucracy in some or other form, offer an extent of political cover that an independent NGO does not enjoy.

Worth particular mention among these entities is the emerging phenomenon of public interest oriented lawyers in China. From private law firms, from academia, from local government posts, even from within the military, lawyers - particularly lawyers interested in environmental law - see new possibilities to test the outer limits of tolerance and activism as they undertake test cases seeking environmental damages for aggrieved citizens and seeking to enforce the novel public rights such as contained in the Shenyang law and the new EIA law.

Finally, reiterating the importance of political space, it is essential that all of these reform entities, from wherever they come, focus their energy on issues for which there is adequate tolerance and the ability to achieve results. The harassment of criminal defense lawyers in China is well known. However, **using environmental law as the entry point, there is great potential to establish important precedents for citizens' rights that will extend to other substantive areas over time.**

What Does this Project's Success Say about USG Engagement on Human Rights Issues with China?

As described above, ABA's Rule of Law and Environmental Governance Project in China pursues aims far broader than simply the perfection of the Chinese environmental law system. The environment is the wedge issue, the Trojan Horse, by which the ABA is working with the legal reform community in China to advance cutting edge concepts of rule of law, governance, and transparency. Environmental law is unique among legal disciplines, in that its fundamental precepts are effective procedural interactions between citizens and government, transparency of information, and citizens' legal ability to challenge acts of government. Significantly, environmental law issues typically affect large numbers of ordinary citizens in direct, tangible ways. Thus, it is an ideal vehicle by which to enhance the relationship between the citizen and the state.

Considering this, combined with the desperate state of China's environment, the time is particularly ripe for programming on environmental governance in China. That is not to say that environmental law is the only substantive area of law in which to engage in China. Many areas of law also offer pathways to strengthen citizens' abilities to defend their rights through law, such as property rights and land tenure, criminal procedure law, and even domestic relations law. However, in some instances, these other areas are associated with taboos or sensitivities that make effective programming much more challenging. By leading with this project on environmental governance, ABA hopes to open the path to increased citizens' rights protections and civil society development, even to eventually include those areas, such as labor rights and or human rights, where sensitivities continue to run so deeply that open, on the ground programming of the kind undertaken in this project is not currently feasible.