

NOTE & COMMENT

DISPUTE RESOLUTION AND POWER PROJECT PERMITTING IN CHINA

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I. INTRODUCTION

China's energy industry expanded rapidly from 2005 to 2008, adding over 330 gigawatts of power construction.¹ Throughout this expansion, China's citizens have attempted to influence power project development through negotiations and confrontation, while the national government has focused on increasing electrical supply.² Citizens use several tools to influence power project development, from administrative litigation and adjudication to China's unique *xinfang* system and government "champion"-based alternative dispute resolution tools.³

This note explores Chinese administrative and alternative dispute resolution proceedings that occur after a power project has been permitted or construction has begun, but before the project opens.⁴ First, the note explains China's power project permitting process and introduces alternative dispute resolution ("ADR"), the players in permitting projects, and conflict-resolution systems. Then, the note examines the use of administrative proceedings and ADR in China's Nu River hydroelectric plant and Nansha refinery projects. Finally, the note evaluates how—although China's dispute resolution practices minimally accommodate citizen concerns—the citizen-raised concerns generally do not stand in the way of power development.

1. Keith Bradsher, *China Outpaces U.S. in Cleaner Coal-Fired Plants*, N.Y. TIMES, May 11, 2009, at A1, available at <http://www.nytimes.com/2009/05/11/world/asia/11coal.html>.

2. See INT'L ENERGY AGENCY, CHINA'S WORLDWIDE QUEST FOR ENERGY SECURITY 8 (2000) (discussing China's focus on increasing national energy security).

3. Carlos Wing-Hung Lo & Sai Wing Leung, *Environmental Agency and Public Opinion in Guangzhou: The Limits of a Popular Approach to Environmental Governance*, 163 CHINA Q. 677, 703 (2000) (describing how citizens are indirectly incorporated into planning processes and how their views are expressed by members of government agencies).

4. One reason that a study of administrative and alternative dispute resolution, rather than litigation, is particularly worth consideration in China is that China is a civil law country. "[T]he sole source of legal rules is legislation, which includes statutes enacted by the [National People's Congress], local People's Congresses, administrative regulations lawfully adopted by the State Council and the ministries and commissions subordinate to it, and similar administrative rules adopted at the local level." STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 145 (1999).

II. CHINA'S ENERGY INDUSTRY AND THE MINISTRY OF ENVIRONMENTAL PROTECTION

Some of China's 330 gigawatts of power projects added between 2005 and 2008 led to increased pollution and interference with citizens' lives.⁵ Even though China's energy efficiency has increased,⁶ some environmental gains are offset by the sheer amount of newly built power facilities. During the mid-2000s, China added the equivalent of Spain's entire electrical capacity to its grid each year.⁷ The construction of additional power plants has led to some citizen complaints, but before the complaints' effectiveness may be analyzed, the permitting structure for power plants needs to be explained.

Addition of capacity to the electrical grid is overseen by several ministries and agencies.⁸ Depending on the type of power added to the grid, different ministries are involved. For hydroelectric construction, for example, the Ministry of Water Resources ("MWR") (*shuili bu*) has seven cross-provincial oversight commissions that help plan projects' locations.⁹ The MWR's counterpart provincial water resources ("WR") bureaus are in charge of intra-provincial construction, but are overseen by the MWR.¹⁰ In addition to MWR and provincial WR-bureau approval, local projects that are "related to power stations must go through the" provincial Development and Reform Commission Energy Bureau ("DRC") (*nengyuan ju*), which may be overseen by the National Development and Reform Commission ("NDRC").¹¹ Citizens are rarely involved in the planning stages of power projects—even "notice and comment" before construction is rare.¹²

Another ministry, the Ministry of Environmental Protection ("MEP")—the former State Environmental Protection Administration ("SEPA")¹³—oversees enforcement of environmental matters that arise

5. China only produces 5.1 tons of carbon dioxide emission pollution per year per person, compared to the United States' 19.4 tons per person, and the EU's 8.6 tons per person. Elisabeth Rosenthal, *China Increases Lead as Biggest Carbon Dioxide Emitter*, N.Y. TIMES, June 14, 2008, at A5, available at www.nytimes.com/2008/06/14/world/asia/14china.html.

6. In 2008 "energy consumption per unit of GDP dropped 4.59 percent," and emissions of sulfur dioxide were down 8.95% between 2005 and 2008. Zhu Shaobin, *China's Economic Stimulus Plans Benefit Environment*, XINHUA, Mar. 10, 2009, http://news.xinhuanet.com/english/2009-03/10/content_10986048.htm.

7. ANDREW C. MERTHA, CHINA'S WATER WARRIORS: CITIZEN ACTION AND POLICY CHANGE 27 (2008).

8. See generally *id.* at 38–57 (describing pro- and anti-hydropower government agencies. The chart at 42 is of particular note for describing Chinese government structure).

9. See *id.* at 40–41 (attempting to clarify the convoluted agency-relationships involved in hydroelectric power permitting, and stating that the structure "has created a fair amount of confusion in terms of authority relations").

10. *Id.*

11. *Id.* at 43–45 (clarifying DRC and NDRC duties involved with power project permitting).

12. *Id.* at 133 (describing such periods of notice and comment as "extremely rare in China").

13. On March 15, 2008 SEPA was elevated and renamed the MEP. Xin Qiu & Honglin Li,

when a power plant is permitted.¹⁴ MEP's powers generally cover national concerns, policies, and inter-provincial environmental issues.¹⁵

Some of the MEP's powers and duties can be traced to China's 1989 adoption of the Environmental Protection Law ("EPL") (*huanjing baohu fa*), which institutes standards for the monitoring and maintenance of environmental quality and supervision.¹⁶ The EPL institutionalized citizen rights of involvement in environmental issues, which impacts project permitting by giving "all units and individuals . . . the right to report on or file charges against units or individuals that cause pollution or damage to the environment."¹⁷ Most notably, article 13 explains that a planning department cannot approve a project until environmental impact statements are approved.¹⁸

In addition to meeting the EPL's standards, power companies need to conduct an Environmental Impact Assessment ("EIA") that determines what steps may need to be taken to mitigate environmental damage.¹⁹ For construction projects that involve significant public interest and are not a matter of national security (which would allow the EIA to be kept secret), article 21 of the EIA Law indicates that when there may be a "significant environmental impact[.]" the company should seek opinions of environmental agencies, experts, and the public by holding meetings or hearings and then respond to these public comments by writing in the

China's Environmental Super Ministry Reform: Background, Challenges, and the Future, 39 ENV'T L. REPORTER 10152, 10152, available at <http://www.epa.gov/ogc/china/xin.pdf>.

14. See JAMES M. ZIMMERMAN, CHINA LAW DESKBOOK: A LEGAL GUIDE FOR FOREIGN-INVESTED ENTERPRISES 754 (2d ed. 2005).

15. See Embassy of People's Republic of China in India, Responsibilities of SEPA, <http://in.china-embassy.org/eng/szyss/hjbh/t82543.htm> (last visited May 20, 2010) (providing an in-depth list of the MEP's responsibilities); see also SEPA, <http://www.sepa.gov.cn> (last visited May 20, 2010).

16. Huanjing baohu fa [EPL] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 1989, effective Dec. 26, 1989), arts. 9–11, translated in LAWINFOCHINA, <http://www.lawinfochina.com/law/display.asp?id=1208> (last visited May 20, 2010) (P.R.C.) [hereinafter EPL]; see also ZIMMERMAN, *supra* note 14, at 758. Article 12 established that environmental protection departments shall "draw up plans for environmental protection which shall . . . be submitted to the people's government at the same level for approval before implementation." EPL, *supra*, art. 12.

17. EPL, *supra* note 16, art. 6. "In 1996 Chinese environmental officials received more than 67,000 letters complaining about environmental pollution. Just two years later, that number had increased dramatically to 241,321." Elizabeth Economy, *Environmental Enforcement in China*, in CHINA'S ENVIRONMENT AND THE CHALLENGE OF SUSTAINABLE DEVELOPMENT 102, 116 (Kristen A. Day ed., 2005).

18. EPL, *supra* note 16.

19. Huanjing ying xiang ping jie fa [EIA Law] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2002, effective Sept. 1, 2003), ch. I, art. 2, translated in LAWINFOCHINA, <http://www.lawinfochina.com/law/display.asp?db=1&id=2496> (last visited May 20, 2010) (P.R.C.) [hereinafter EIA Law]. For a practical description of an EIA in action, see HEILONGJIANG PROV. COMMC'NS DEP'T, PEOPLE'S REPUBLIC OF CHINA: HEILONGJIANG ROAD DEVELOPMENT II PROJECT (Yichun-Nenjiang) (2009), available at <http://www.adb.org/Documents/Environment/PRC/42017/42017-PRC-SEIA.pdf> (detailing an EIA for a road-building project).

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report why citizens' ideas are accepted or rejected.²⁰ A government agency may forgo public consultation if the agency does not wish to confront outside dialogue.²¹ EIAs must be conducted, and negative consequences apply if they are forgone. Article 31 of the EIA Law enumerates consequences for failure to submit an EIA—a halt to construction, a fine between 50,000 and 200,000 RMB, and an administrative punishment for person in charge of the project.²²

Although the MEP oversees the general compliance and EIA process, China does most power plant permitting at the local level. The local Environmental Protection Bureaus (“EPBs”) (*difang huanbaoju*) “are responsible for . . . drafting local laws, issuing administrative regulations, supervising and organizing work on environmental monitoring and control, and for the education and training in environmental issues. EPBs constitute the basic units for compliance with environmental laws and regulations,”²³ and they report to both the MEP and their local government.²⁴

The closeness of the permitting process to the site and the citizens should present unique opportunities for citizen involvement, but it has instead presented opportunities for a Chinese type of agency capture,²⁵ where government agencies charged with looking out for the public's

20. EIA Law, *supra* note 19, ch.3, art. 21.

21. Despite the hazy legality of whether or not an EIA was required for the Nu River project (since the project was approved before the EIA Law went into effect), an EIA should have been conducted after Premier Wen Jiabao called for further study of the project's environmental impact. See Ralph Litzinger, *In Search of the Grassroots: Hydroelectric Politics in Northwest Yunnan*, in GRASSROOTS POLITICAL REFORM IN CONTEMPORARY CHINA 282, 291 (Elizabeth J. Perry & Merle Goldman eds., 2007) (discussing environmental protests and Premier Wen's response). However, communication relating to the Nu River Hydroelectric project was not initially made public. See Shi Jiangtao, *Rumors of Dam-Building Leave Villages Fearing for Their Future*, S. CHINA MORNING POST, Feb. 25, 2008, at 6 (“[S]ixty-one mainland environmental groups and 99 individuals signed an open letter in August 2005 demanding the release of the environmental impact report under mainland law. But their appeal has been rejected because of national security considerations.”); see also EIA Law, *supra* note 19, ch. 3, art. 21 (noting that plans relating to public security may be kept secret).

22. EIA Law, *supra* note 19, ch. 4, art. 31. For a further discussion of the EIA Law see ZIMMERMAN, *supra* note 14, at 777–80. (This note may refer to either RMB (short for Renminbi, the People's Currency) or Yuan to express numerical amounts of Chinese currency. On March 31, 2010 the conversion rate was \$1 to 6.82 RMB.)

23. Stefanie Beyer, *Environmental Law and Policy in the People's Republic of China*, 5 CHINESE J. INT'L L. 185, 189 (2006); see also EPL, *supra* note 16, art. 7.

24. See Eric Zusman & Jennifer L. Turner, *Beyond the Bureaucracy: Changing China's Policymaking Environment*, in CHINA'S ENVIRONMENT AND THE CHALLENGE OF SUSTAINABLE DEVELOPMENT, *supra* note 17, at 121, 123.

25. Michael McGregor, *Reform and Regulation*, in 2 ENCYCLOPEDIA OF WHITE-COLLAR & CORPORATE CRIME 670, 674 (Lawrence M. Salinger ed., 2005). Agency capture is described:

The concept of agency capture—signified by close and cooperative relationships with regulated industries—has been one part of the critique of regulatory agencies. . . . [S]uspicious of agency capture occur when regulatory agency officials with a pro-industry bias are appointed . . . and when various forms of inducement or influence, political or psychological, are evident.

Id.

interest instead cater to the province's political goals or the state's best interest.²⁶ At the local level, EPBs "are [partially] funded by the local governments of which they are part."²⁷ "They receive no funding from the central government[;] . . . the majority of their funds derive from fees and fines levied against local factories"²⁸ that they are regulating, so the bureaus have an interest in not closing down or prohibiting development since the EPBs can raise funds (through fines) from permitting development.²⁹ Additionally, the EPBs, as state supervisory organs, have limited independent enforcement power and rely "heavily on the cooperation and support of their supervised departments [for enforcement]. Furthermore, the Law specifically requires that all major supervisory decisions or proposals must be approved by the government at the same level [i.e., the local government], as well as the superior supervisory authority."³⁰ The need for local government approval makes it difficult to enact and enforce regulations when the local government has close ties to a power plant.³¹ According to one late-1990s survey of EPB officers, the culture of the people who are appointed to EPBs also appears to value economic progress more highly than environmental progress.³² There are more than 16,000 EPBs in China.³³

26. Shui-Yan Tang et al., *Institutional Constraints on Environmental Management in Urban China: Environmental Impact Assessment in Guangzhou and Shanghai*, 152 CHINA Q. 863, 868-69 (1997). One example of agency capture occurred in Guangzhou and Shangia:

[S]ites for many major economic development projects in Guangzhou and Shanghai were determined by leading government officials before the Environmental Protection Bureau could initiate the EIA process. Even if major adverse environmental effects were identified in the subsequent environmental impact statement, it would be politically difficult for the Environmental Protection Bureau to insist on the project's cancellation or relocation. The best it can do, in most cases, is to require the project to adjust its design and to adopt mitigation measures.

Id.

27. Beyer, *supra* note 23, at 189.

28. Jonathan Schwartz, *Shifting Power Relations: State-ENG0 Relations in China*, in THE CHINESE PARTY-STATE IN THE 21ST CENTURY: ADAPTATION AND THE REINVENTION OF LEGITIMACY 58, 61 (André Laliberté & Marc Lanteigne eds., 2008).

29. *Id.* As another commentator stated, "[T]he system might have encouraged some EPBs to focus on collecting pollution fees and fines instead of trying to decrease total pollutant emissions." Carlos Wing-Hung Lo & Shui-Yan Tang, *Institutional Reform, Economic Changes, and Local Environmental Management in China: The Case of the Guangdong Province*, in ENVIRONMENTAL GOVERNANCE IN CHINA 42, 48 (Neil T. Carter & Arthur P.J. Mol eds., 2007). However, Lo and Tang go on to note that the revenue system has changed and a new process is being gradually implemented since the mid-1990s, starting in Guangzhou. Under the new system, "to obtain funding, each bureau has to submit detailed proposals and budgets [to a central authority], and the finance bureau may also monitor" how the funds are spent. The system, however, has not yet been extended to many poorer, interior provinces due to the overhead cost of additional layers of bureaucracy and redistribution management that it requires. *See id.* at 50.

30. JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 244-45 (2008) (citations omitted).

31. *See id.* at 244.

32. Shui-Yan Tang et al., *supra* note 26, at 870.

33. Zusman & Turner, *supra* note 24, at 123; *see also* LEI XIE, ENVIRONMENTAL ACTIVISM IN CHINA 13 (2009) (claiming that there were over 160,000 people employed by EPBs as of

Much of the MEP's and EPBs' responsibilities deal with project pre-approval before a plant receives a permit. This note, however, focuses on how sometimes—even after power plants receive permits from the NDRC and/or a provincial government—citizen concerns that are raised in administrative proceedings, the *xinfang* (letters and visits system), or by government “champions” can cause a hold-up in construction, a relocation, or a cancellation.

III. CHINESE DISPUTE RESOLUTION

Power plant permitting affects many groups in China. When interests collide, administrative courts, judicial courts, and more informal systems are used to resolve disputes. Chinese dispute resolution processes run the gamut from confrontational administrative litigation, where parties enter a court room and file lawsuits against the government, to actions of full-out protest. In between these two extremes are more informal dispute resolution systems that may be classified as types of ADR.

ADR can be defined as “the resolution of disputes through non-adversarial processes with the assistance of an impartial third party.”³⁴ According to the U.S. Institute for Environmental Conflict Resolution, ADR includes arbitration and mediation.³⁵ The Institute goes on to explain that ADR “was developed originally as an ‘alternative’ to litigation.”³⁶

Processes such as China's *xinfang* petitioning system present alternatives to litigation and can in some cases fulfill elements of American forms of ADR, although the analogy is not direct. The term “petitioning,” as used by the *xinfang* system, may refer to actual signed petitions and letters, but the *xinfang* system can also involve the intervention of a third-party (but government appointed) neutral to resolve disputes between citizens and another administrative agency.³⁷

2006); Economy, *supra* note 17, at 107 (claiming that as of 1998, 2,000 EPBs employed 60,000 people).

34. U.S. Institute for Environmental Conflict Resolution: Definition & Principles, <http://www.ecr.gov/Basics/Principles.aspx> (last visited May 20, 2010).

35. *Id.*

36. *Id.*

37. See *infra* Part III(B)(3) for a more complete description of *xinfang*.

Awareness-raising actions³⁸ also may be considered ADR actions when they involve the interference of a government “champion.”³⁹ In China citizens who are locked-out of early rulemaking processes may pursue activities designed to attract the attention of a champion person or government agency to pursue their interests. This person or agency then acts as an advocate within the government structure. Sometimes a person such as Premier Wen Jiabao will intervene and make an adjudicative decision, like an arbiter, after listening to and observing the arguments from players on both sides.⁴⁰

A. *The Players*

Citizens have a vested interest when a new power plant is to be constructed near their homes. Some citizens who are forced to move may believe they are owed greater compensation;⁴¹ others may be concerned with increased pollution that the plant may bring.⁴² However, some citizens may be content with the influx of new jobs into the region.⁴³

38. Actions of awareness-raising, more fully explored in Part III(B)(4), while not directly involving the interference of a neutral third party facilitator or mediator in the direct discussions, do appear to involve the interference of a neutral third party “behind the scenes.” See Rosemary O’Leary & Susan Summers Raines, *Dispute Resolution at the U.S. Environmental Protection Agency, in THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION* 253, 253 (Rosemary O’Leary & Lisa B. Bingham eds., 2003) (explaining that a third party neutral is necessary for a process to be referred to as ADR). In this note, the author defines *awareness-raising* as falling short of unapproved marches, or even tacitly-approved demonstrations. *Awareness-raising* refers to the project opponents’ conductance of legal conferences, seminars, or the spread of ideas on the Internet. As opposed to marches and protests that are generally seen as negative because they directly challenge the Party and the status quo, awareness-raising can be more acceptable because it involves a more muted form of mobilization. See JIE CHEN, POPULAR POLITICAL SUPPORT IN URBAN CHINA, 155 n.1 (2004) (describing how most citizens do not consider protest, demonstration, and petition (but not *xinfang* petition) to be options for the pursuit of goals. Additionally the government has “demonstrated its intolerance of such political acts.”). That is not to say the government does not sometimes suppress awareness-raising actions, as will be shown below. See *infra* Part IV(A)(2).

39. See Kevin J. O’Brien & Lianjiang Li, *Popular Contention and its Impact on Rural China*, 38 COMP. POL. STUDIES 235, 242–43 (2005) (describing how citizens sometimes seek and are successful in locating a government champion for their concerns).

40. See *infra* Part IV(A)(2) (mentioning Wen Jiabao’s hold-up of the Nu River hydroelectric project).

41. See He Qinglian, *The Hanyuan Incident: Draining the Pond to Catch the Fish*, CHINA RTS. F., No. 1, 2005, at 23, 23, available at <http://www.hrichina.org/public/PDFs/CRF.1.2005/1.2005TheHanyuanIncident1.2005.pdf>.

42. Chloe Lai & Shi Jiangtao, *Nansha Refinery “Likely to Move”*; *Delta Petrochemical Plant Could Shift to Western Guangdong After Opposition from HK, Macau*, S. CHINA MORNING POST, Mar. 21, 2009, at 1.

43. For example, the thoughts of one villager are recounted: “Yu Yezheng . . . said he had thought the petrochemical project would bring thousands of newcomers to Nansha in the next few years, causing the value [of his newly bought second apartment] to rise. [Now that the refinery is to be relocated,] ‘I kid myself that at least my apartment is in a nice location with clean air,’ he said.” Mimi Lau & Ivan Zhai, *Nansha Villagers Bear the Brunt as Refinery Relocated*, S. CHINA MORNING POST, Aug. 18, 2009, at 6; see also MERTHA, *supra* note 7, at 37 (describing subsidies for housing, irrigation, and drinking water).

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Despite their vested interest, citizens are often shut-out from the power project permitting and placement process. Recently, some citizens participated at the beginning of power project permitting through notice and comment or public hearings.⁴⁴ However, some commentators suggest that citizens' comments are not very effective because many farmers and villagers have neither the time nor the expertise to provide practical suggestions that will be taken seriously at public comment forums.⁴⁵ Without expertise to properly assess property values or the loss in income created from relocation, some villagers' interests are unmet. In one circumstance of dam relocation, "Xiaoshaba villagers say their living standards have worsened in the year since they were relocated. They say they have . . . been inadequately compensated for loss of livelihood, and that their new houses are too expensive and too small for multi-generation families."⁴⁶

Although citizens may lack education and information to effectively advocate their interests, relatively-better-educated local public officials and party members (or cadres) have an interest in the siting of new power plants. However, officials' interests may even be more conflicted and open to influence than the citizens' interests, since officials balance competing demands to increase economic growth and to ensure that environmental quality is respected.⁴⁷

Local media also play a role in power plant permitting. Several media organizations have uncovered energy industry scandals.⁴⁸ Chinese media

44. MERTHA, *supra* note 7, at 133 (describing such periods of notice and comment as "extremely rare in China").

45. See Jia Xijin & Zhao Yusi, *The Chinese Economic Stimulus Package and its Impact on Environmental Protection Organizations*, NAUTILUS INST. POL'Y F. ONLINE, 09-016A, Feb. 26, 2009, <http://www.nautilus.org/fora/security/09016XijinYusi.html> (providing an anecdotal example of citizens not being effective at providing comments).

46. See Shi Jiangtao, *supra* note 21.

47. See Maria Edin, *Remaking the Communist Party-State: The Cadre Responsibility System at the Local Level in China*, 1 CHINA: AN INT'L J. 1, 1, 13 (2003) (describing the system for evaluating cadres); see also *Ti xian ke xue fa zhan guan yao qiu de di fang dang zheng ling dao ban zi he ling dao gan bu zong he kao he ping jia shi xing ban fa* [The Method of Comprehensive Cadre Evaluation that Embodies the Requirements of the Scientific View of Development] (promulgated by the Org. Dep't of the CPC Cent. Comm., July 3, 2006, effective May 21, 2007) (P.R.C.), available at http://www.kaifu.gov.cn/kfdj/gbyrc/gbgl/200705/t20070521_2394.htm.

48. See Howard W. French, *Killing Puts Focus on Corruption in Chinese News Media*, N.Y. TIMES, Jan. 31, 2007, at A3, available at <http://query.nytimes.com/gst/fullpage.html?res=9D01EFDE153FF932A05752C0A9619C8B63&pagewanted=all> (describing how media have looked into coal power plant scandals). But see Wang Qian, *58 Punished for Shanxi Hush Money Story*, CHINA DAILY, Nov. 28, 2008, available at http://www.chinadaily.com.cn/china/2008-11/28/content_7248637.htm (describing how some coal companies have attempted to pay hush money to stop reporters from writing negative stories); *shan xi gan he mei kuang "feng kou fei" shi jian pu guang nei mu*, CHINA YOUTH DAILY, available at <http://news.qq.com/a/20081027/000561.htm> (demonstrating citizens reporting on the scandal).

organizations are particularly active when power projects develop,⁴⁹ and environmental concerns are increasingly covered by local media:

Between 1997 and 1999, the number of articles on the environment doubled. While 76 newspapers produced 22,066 articles on the environment in 1997, 75 newspapers produced 47,273 environmental articles in 1999. Among these articles, the percentage of in-depth reporting (investigations, featured articles, editorials) accounted for an average of 20 percent.⁵⁰

The government has even supported investigative journalism that could affect environmental impact assessments of power plant locations. “From 1993 to 2005, 50,000 journalists from across the country participated in the [‘China Environment Centennial Journey’ (*Zhonghua huanbao shiji xing*)] project and produced 150,000 reports on environmental issues.”⁵¹

Chinese non-governmental organizations (“NGOs”) that specialize in environmental issues (“ENGOS”) also have an interest in overseeing and ensuring that power plant permitting and construction respects environmental quality. These groups include Chongqing Green Volunteer Union,⁵² Friends of Nature, Green Environmental Volunteers, and Global Village Beijing.⁵³ At the end of 2005 there “were approximately 2,768 ENGOS.”⁵⁴ Almost 50% are government-organized NGOs, 2.6% are International NGOs, and of the other 47.5%, 40.3% are student ENGOS.⁵⁵ The ENGOS often operate on small budgets “of less than 100,000 RMB (approximately US \$15,000); and around 80 percent of these groups spend no more than 50,000 RMB (approximately US \$7,500) annually.”⁵⁶

China’s ENGOS differ from Western ENGOS in how they react to the state’s process for permitting power plants. Often, China’s ENGOS do not have a seat at the table for dialogue until after plans for the plant are already in motion.⁵⁷ According to Zhang Tianzhu, a co-drafter of China’s

49. See ELIZABETH ECONOMY, *THE RIVER RUNS BLACK: THE ENVIRONMENTAL CHALLENGE TO CHINA’S FUTURE* 163 (2004) (describing how in 2001 almost 79% of Chinese indicated they learned about environmental protection-related issues primarily from television and radio. Government publicity was second at 42%.).

50. LEI XIE, *supra* note 33, at 32.

51. Guobin Yang & Greg Calhoun, *Media, Civil Society, and the Rise of a Green Public Sphere in China*, 22 *CHINA INFO* 211, 221 (2007).

52. Jim Yardley, *Dam Building Threatens China’s ‘Grand Canyon’*, *N.Y. TIMES*, Mar. 10, 2004, at A1, available at <http://www.nytimes.com/2004/03/10/international/asia/10RIVE.html>.

53. LEI XIE, *supra* note 33, at 89.

54. *Id.* at 20.

55. *Id.* See generally *id.* at 17–29 (providing a background on NGOs in China).

56. *Id.* at 23.

57. But see one successful integration of the agencies as described in Jeffrey S. Lubbers, *Notice and Comment Rulemaking Comes to China*, 32 *ADMIN. L. REG. L. NEWS* 5 (2006), available at http://www.abanet.org/adminlaw/news/adlaw_fall2006.pdf. A pilot project in China utilizing a notice and comment period is described:

In the pre-proposal stage (what we would call an “advance notice of proposed

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10th National Environmental Five-Year Plan, Chinese NGOs have little input at the drafting stage of policies: “At present, Chinese NGOs can only see the result of policies; they cannot see the process of policy-making.”⁵⁸

International NGOs (“INGOs”) also can participate in the permitting process. Their influence, however, is mostly indirect. They may give funds to Chinese NGOs,⁵⁹ or they may write letters or petition to the Central government.⁶⁰ Some try to affect project financing.⁶¹ Many INGOs have an overarching goal of “fostering the development of Chinese civil society” and seek influence rather than direct action: “INGOs also encourage Chinese ENGOs to get in touch with the world outside China.”⁶² A few active INGOs include the “Ford Foundation, Partners for Community Development, and Oxfam.”⁶³ INGOs’ involvement in power plant permitting mostly encourages the Chinese government to pay greater attention to environmental sensitivity.⁶⁴

rulemaking”), public notice of a 30-day comment period was posted on November 30, 2005 on the bulletin boards of 1630 commodity transaction markets, 176 grass-roots commercial offices, the websites of the city government and the OLA, and several newspapers. Twelve comments containing 30 recommendations were received. In addition the OLA invited 15 market representatives and 12 wholesalers to a meeting to discuss the proposal on December 26, 2005.

Id. at 5. The description continues:

OLA then . . . announced a second round of notice and comment, this time on the full draft text, with a 35-day comment period. An extensive outreach was undertaken, including the distribution of 5000 booklets of the draft distributed in 1630 markets. In addition the OLA conducted on-site mini-conferences in two major markets and held “open debates” jointly with the wholesaler’s “chamber of commerce.” Through this outreach the OLA received 109 comments including 21 in writing. The final rule was then submitted for approval to the Guangzhou Municipal Government in early June and approved on July 3. . . . OLA representatives said it had been revised according to the public comments

Id. See *tui jin ke xue li fa, min zu li fa de xin ju cuo*, XINHUA, Apr. 20, 2008, available at http://news.xinhuanet.com/newscenter/2008-04/20/content_8014231.htm (discussing promotion of a notice and comment period for new regulations).

58. See Peter Ho, *Embedded Activism and Political Change in a Semi-Authoritarian Context*, in *CHINA’S EMBEDDED ACTIVISM* 1, 1 (Peter Ho & Richard L. Edmonds eds., 2007).

59. See Kristen N. McDonald, *Damming China’s Grand Canyon: Pluralization Without Democratization in the Nu River Valley* 78 (Fall 2007) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with The Water Resources Center Archives at the University of California, Berkeley) (describing a Chinese Academy of Sciences member’s criticism of NGOs for their willingness to accept foreign donations), available at http://www.lib.berkeley.edu/WRC/restoration/pdfs/KMcDonald_%20Dissertation_2007.pdf; see also LEI XIE, *supra* note 33, at 91.

60. See Litzinger, *supra* note 21, at 288 (describing one INGO’s efforts to petition Beijing).

61. ECONOMY, *supra* note 49, at 206 (describing how International Rivers Network undertook a campaign to force Morgan Stanley to withdraw from providing assistance in fundraising for the Three Gorges dam).

62. LEI XIE, *supra* note 33, at 91–92.

63. *Id.* at 91.

64. See Deyong Yin, *China’s Attitude Toward Foreign NGOs*, 8 WASH. U. GLOBAL STUD. L. REV. 521, 536-37 (2009) (describing INGOs’ responsibility as exposing corruption and ensuring environmental enforcement and describing the relatively limited realm of actions available for INGOs).

Foreign participants in the permitting process such as media, citizens, organizations, and countries may also influence China's power plant permitting processes.⁶⁵ Both foreign countries that are affected by China's power development plans—like the countries south of China's planned Nu River development project⁶⁶—and countries that are not directly affected by China's power projects also comment and try to influence China's energy development.⁶⁷ Foreigners' influence may result in the central government encouraging lower-ranked officials to review, alter, or halt planned power projects.

Although all the previously listed parties may be involved in permitting processes, national government officials play an exceptionally large role.⁶⁸ Chinese citizens are allowed to appeal to top government officials when concerns are not addressed on a local level.⁶⁹

Finally, environmental officials in organizations such as the MEP make comments that influence the development of a new power project as they put pressure on lower government officials to do their duties and create political cover that protects citizens who oppose a construction project.⁷⁰

B. China's Administrative and ADR Systems

Both administrative and ADR systems may be involved after a power generating project has been approved by a government body, or after the project has been given tacit approval to go forward (even in lieu of a released environmental impact statement), but with local opposition continuing.

This note briefly covers administrative litigation, then it addresses several forms of dispute resolution used in China, with a focus on

65. See Daniel Schearf, *UN: China Dam Project Threatens World Heritage Site*, VOICE OF AM., Apr. 13, 2006, <http://www1.voanews.com/english/news/a-13-2006-04-13-voa26.html> (describing how news organizations contributed to pressure UNESCO to involve itself in the Nu River project).

66. See *infra* Part IV(A)(1).

67. See *Challenges and Opportunities for U.S.-China Cooperation on Climate Change: Hearing Before the S. Comm. on Foreign Relations*, 111th Cong. (2009) (statement of Elizabeth Economy, Starr Senior Fellow and Director for Asia Studies, Council on Foreign Relations), available at <http://foreign.senate.gov/testimony/2009/EconomyTestimony090604a.pdf>; see also *China's Energy Policies and Their Environmental Impacts: Hearing before the U.S.-China Econ. & Sec. Rev. Comm.*, 110th Cong. (2008) (opening statement of Dr. Larry Wortzel, Chairman) (discussing China's energy policies and assessing China's approach to confrontation of climate change); cf. EPA-China Environmental Law Initiative, http://www.epa.gov/ogc/china/initiative_home.htm (last visited May 20, 2010) (describing how America's EPA-China Environmental Law Initiative hopes to foster "an ongoing dialogue on environmental law issues with China," which will involve discussions related to hydroelectric dams' environmental effects).

68. See, e.g., Litzinger, *supra* note 21, at 291 (describing Wen Jiabao's suspension of the dam project).

69. See Press Release, Yale Law School, The China Law Center Co-Hosts Two Workshops on Administrative Dispute Resolution (July 26, 2007), available at <http://www.law.yale.edu/intellectuallife/5466.htm>.

70. See *infra* Part III(B)(5) (describing that environmental officials have put pressure on lower government officials to protect citizens who oppose a construction project).

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administrative dispute resolution, the *xinfang* system,⁷¹ and awareness-raising. This note does not discuss conciliation/mediation (*minjian tiaojie*—folk mediation, or *xingzheng tiaojie*—administrative mediation),⁷² mediation/arbitration,⁷³ or arbitration, except as it applies to the *xinfang* system.⁷⁴

When an administrative body makes a decision, citizens have several ways to protest the decision. Citizens may ask for judicial review, appeal to another administrative body, participate in awareness-raising, protest, or riot.

1. Judicial Review of Administrative Decisions⁷⁵

China's Administrative Litigation Law ("ALL") was promulgated in 1989.⁷⁶ "The ALL has made it possible for individuals to bring a case

71. In China letters and petitions are a way for people to communicate with Zhongnanhai when opposing policies that have already been approved. The sending of letters and petitions are a form of informal negotiations that bring together the public and help the public's ideas to influence Zhongnanhai's decisions. See *infra* Part III(B)(3) for an in-depth description of the rationale behind describing *xinfang* as a method of ADR; see also Kirk Emerson et al., *The Challenges of Environmental Conflict Resolution, in THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION, supra* note 38, at 3, 8 (describing how participatory methods of environmental conflict resolution can compensate for lack of public access to negotiation sessions in legislative, administrative, and judicial systems and "promotes the idea of citizen participation in policy- and decisionmaking").

72. For a definition of conciliation, see Nat'l Alt. Dispute Res. Advisory Council, What is ADR: Conciliation, http://nadrac.gov.au/www/nadrac/nadrac.nsf/Page/What_is_ADR Conciliation (last visited May 20, 2010). Sometimes the terms *mediation* and *conciliation* are used interchangeably. SARAH E. HILMER, *MEDIATION IN THE PEOPLE'S REPUBLIC OF CHINA AND HONG KONG (SAR)* 6 (2009). "In [the] PRC mediation was traditionally, and is still, perceived as the main way of solving disputes between individuals." *Id.* at 3. "In 2000 for every dispute handled by the court of first instance, there were approximately 1.7 disputes dealt with by the People's Mediation Committees . . ." *Id.* at 3 n.5 (citation omitted).

73. "In hybrid processes, such as *med-arb*, the practitioner first uses one process (*mediation*) and then a different one (*arbitration*)." Nat'l Alt. Dispute Res. Advisory Council, What is ADR: Glossary of Terms, http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/What_is_ADR_Glossary_of_ADR_Terms#CC (last visited May 20, 2010) (defining combined or hybrid dispute resolution processes).

74. In arbitration, parties are able to choose their "judges," to take disputes out of the courtroom, and often to set their own ground rules for adjudication. See *zhongcai fa* [Arbitration Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), translated in LAWINFOCHINA, <http://www.lawinfochina.com/law/display.asp?db=1&id=710> (last visited May 20, 2010) (P.R.C.) (outlining the legal framework of the P.R.C.'s arbitration process).

75. There are many nuances and aspects of administrative law. For a more exhaustive treatment of administrative law in China, see generally LIN FENG, *ADMINISTRATIVE LAW: PROCEDURES AND REMEDIES IN CHINA* (1996).

76. *Xingzheng susong fa* [Administrative Litigation Law] (promulgated by the President of the P.R.C., Apr. 4, 1989, effective Oct. 1, 1989) translated in LAWINFOCHINA, <http://www.lawinfochina.com/law/display.asp?db=1&id=1204> (last visited May 20, 2010) (P.R.C.) [hereinafter ALL]. Note that the ALL can also be translated as the Administrative Procedure Law ("APL"). CONG.-EXEC. COMM'N. ON CHINA, 2005 ANNUAL REPORT 170 n.39 (2005), available at <http://www.cecc.gov/pages/annualRpt/annualRpt05/CECCannRpt2005.pdf> (describing how different sources translate the law interchangeably). Since the ALL was passed in 1989, the Supreme People's Court has issued two interpretations to clarify various issues. RANDALL PEERENBOOM & HE XIN, *DISPUTE RESOLUTION IN CHINA: PATTERNS, CAUSES AND*

against the administration [organization that promulgates regulations] and also laid down the relevant criteria and procedures for administrative litigation.”⁷⁷

Parties are limited in the range of issues they may raise in ALL proceedings: “[P]arties may only challenge specific acts that infringe their ‘legitimate rights and interests’, which has been interpreted to mean personal or property rights.”⁷⁸ Administrative actions that affect national defense or foreign affairs are beyond judicial review.⁷⁹ “For instance, the Three Gorges Dam Project . . . was classified as such with respect to its significance for economic development.”⁸⁰ Power projects such as the Three Gorges Dam are seen as necessary to the maintenance of national security since they provide so much energy to the Chinese state grid. Therefore, given that China places a high priority on energy security, it can be difficult for individuals to challenge a dam’s construction.⁸¹ However, the Nu River example below shows that, through pursuing ARD processes, citizens can blunt state arguments that a particular project is necessary to the national defense.⁸²

Yearly throughout the early 2000s, China hosted around 80,000 to 100,000 administrative litigation cases.⁸³ The plaintiff prevailed in 17% to 22% of cases between 2001 and 2004.⁸⁴ The cases that actually make it to court have been more successful than administrative cases in the United States, Taiwan, and Japan.⁸⁵ One reason for the higher success rates is that many disputes are resolved or blocked before proceeding to litigation stage,⁸⁶ and the lawsuits that proceed are pursued by people who are fully vested in the cause—they have much more to lose by yielding than some administrative litigants in the West may have to lose. However, one researcher argues that the amount of successful ALL cases

PROGNOSIS IN DEVELOPMENTS 16 (2007), available at http://www.fljs.org/uploads/documents/Peerenboom_He%20Xin%231%23.pdf.

77. LIN FENG, *supra* note 75, at 9.

78. PEERENBOOM & HE XIN, *supra* note 76, at 16; *see* ALL, *supra* note 76, ch. II, art. 11 (listing the types of cases that citizens may bring under ALL).

79. ALL, *supra* note 76, ch. 2, art. 12.

80. Beyer, *supra* note 23, at 191.

81. *See, e.g.*, MERTHA, *supra* note 7, at 38 (discussing peasant difficulties in opposing a putatively economically-beneficial dam near the Tiger Leaping Gorge).

82. *See infra* Parts III(B)(2) and IV(A)(3).

83. PEERENBOOM & HE XIN, *supra* note 76, at 16. However “parties [are encouraged] to first seek administrative reconsideration of the amount of compensation in land taking cases before turning to the court.” *Id.* at 17.

84. *Id.* at 16.

85. “These success rates stand in sharp contrast to success rates in the United States, Taiwan (both 12%), and Japan (between 4 and 8%).” *Id.*

86. “Accordingly, this ‘non-litigious nature’ is reflected in the PRC Laws encouraging either consultation, negotiation or conciliation as a first method of dispute resolution before resorting to arbitration or litigation.” Ying Lin & Natalie Stoianoff, *Foreign Investment in China: The Cross-Cultural Dilemma*, 1 MACQUARIE J. BUS. L. 1, 4 (2004), available at http://www.buslaw.mq.edu.au/docs/publications/past_editions/volume_1/1.linandstoianoff-1.pdf.

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may be lower than is claimed because some cases putatively resolved through negotiation are really settled through intimidation.⁸⁷

On failure in an administrative litigation case, “parties may petition for retrial pursuant to a discretionary supervision procedure. Rates of success [for the retrial], measured by reversal of the appellate decision or remand for retrial, ranged from 27 to 36 per cent between 2002 and 2004.”⁸⁸

There are some problems with using the ALL as a process for resolving disputes, and these problems are why many Chinese actors use other forms of dispute resolution. Not all of the stakeholders in power plant permitting have a role to play in ALL due to the narrow scope of ALL courts’ jurisdictions:

In principle, a court is only empowered to inquire into the legality (not the merits or appropriateness) of specific (concrete) administrative acts, which include the examination of the following: (1) sufficiency of evidence in decision-making; (2) proper application of laws and regulations; (3) proper observance of statutory procedures; (4) acting within power; and (5) proper use of official power.⁸⁹

Private NGOs therefore do not have standing in an administrative litigation proceeding.⁹⁰ Individuals whose property interests are threatened by the construction of power plants will need to initiate actions. “The narrow interpretation [essentially] prevents interest groups or individuals acting as ‘private attorneys general’ to use the law to challenge the administration.”⁹¹

Additionally, the ALL courts are not wholly independent of the local and provincial government structure.⁹² Like local EPBs:

[M]any courts still rely on local government for funding, and judges are still technically appointed by the local people’s congresses after vetting by local party organs. This arrangement has led to difficulties in filing suits, external interference in the litigation process, and

87. See Lianjiang Li & Kevin J. O’Brien, *Suing the Local State: Administrative Litigation in Rural China*, 51 CHINA J. 75, 75 n.2 (2004) (“Statistics concerning redress hinge on the interpretation of withdrawn cases, some of which undoubtedly result from intimidation rather than negotiation.”); see also *id.* at 76 (“In a 1999–2001 survey in Fujian, Jiangsu, and Jiangxi, for instance, only 9 per cent of 1,368 respondents said they would consider filing an administrative lawsuit if they discovered that their township government had made a decision contrary to central policies and regulations.”).

88. PEERENBOOM & HE XIN, *supra* note 76, at 17.

89. JIANFU CHEN, *supra* note 30, at 248.

90. PEERENBOOM & HE XIN, *supra* note 76, at 16 (detailing the limitations on who has standing to bring administrative litigation).

91. *Id.*

92. Indeed, sometimes even when the litigant wins, the orders are not enforced by the local government. See Lianjiang Li & O’Brien, *supra* note 87, at 90 (discussing how local governments sometimes ignore or subvert court rulings).

problems in enforcing judgments against the administrative defendants.⁹³

ALL courts are more efficiently used in “economically developed urban areas than in poorer rural areas . . . where the local governments exercise more control over the courts. Higher level courts are also less likely to be influenced by pressure from local governments.”⁹⁴

As administrative litigation is not a panacea for confronting all citizens’ concerns and some disputes in China never reach the administrative litigation stage due to fears of intimidation,⁹⁵ the time the case takes to process,⁹⁶ cost,⁹⁷ or difficulty in establishing standing,⁹⁸ the rest of this note discusses other ways citizens challenge power projects.

2. Administrative Review of Administrative Decisions⁹⁹

Many power project disputes, particularly those that involve citizen displacement due to construction of a hydroelectric dam, involve private property concerns. In land-takings cases, “regulations now require parties to first seek administrative reconsideration of the amount of compensation . . . before turning to the court.”¹⁰⁰ “There are two main grounds for administrative reconsideration. One is illegality and the other is inappropriateness [of the administrative decision].”¹⁰¹

When a power plant’s location raises environmental concerns, citizens may petition for administrative review. “Under the system of administrative review (*xingzheng fuyi*), administrative activity, non-performance or sanctions are subject to administrative appeal or judicial review at the discretion of the party concerned. In practice, the majority of administrative disputes are settled through mediation by environmental protection bureaus at various levels.”¹⁰²

93. PEERENBOOM & HE XIN, *supra* note 76, at 16 (citation omitted).

94. *Id.* at 16–17.

95. Lianjiang Li & O’Brien, *supra* note 87, at 76.

96. *Id.*

97. PEERENBOOM & HE XIN, *supra* note 76, at 17 (indicating that unlike administrative litigation, administrative reconsideration is free).

98. *See id.*

99. Administrative decisions “include actions taken by . . . agencies and regulators. They are bound by formal protocols and rules for determining relevant issues, violations, penalties, and settlements.” THE CONSENSUS BUILDING INST., USING DISPUTE RESOLUTION TECHNIQUES TO ADDRESS ENVIRONMENTAL JUSTICE CONCERNS: CASE STUDIES 9 (Jennifer Thomas-Larmer ed., 2003), available at <http://www.epa.gov/compliance/resources/publications/ej/annual-project-reports/cbi-case-study-report.pdf>.

100. PEERENBOOM & HE XIN, *supra* note 76, at 17.

101. LIN FENG, *supra* note 75, at 65. For a listing of other grounds for administrative reconsideration see *Xing zhengfu yi tao li* [Regulations on Administrative Reconsideration] (promulgated by the St. Council, Dec. 24, 1990, effective Jan 1, 1994, amended Oct. 9, 1994), § 42(4) translated in LAWINFOCHINA, <http://www.lawinfochina.com/law/display.asp?id=501> (last visited May 20, 2010) (P.R.C); see also LIN FENG, *supra* note 75, at 68.

102. Beyer, *supra* note 23, at 190–91.

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Administrative review of agency actions can be initiated by government supervisory organs, or reports may be made through a Reporting System (*jubao zhidu*) where:

[C]itizens may report any malpractice in governments on a confidential basis. These reports may also initiate the scrutiny of government [D]ecisions to investigate any major activities of government departments must be filed with the government at the same level and the superior supervisory organ. . . . [U]pon conclusion of the investigation, a supervisory organ is only empowered to make suggestions; [although it may impose disciplinary sanctions on officials in some cases and it may order the return, confiscation or recovery of property gained through illegal actions].¹⁰³

The reporting system has several requirements before application for reconsideration of a decision may be made:

- (1) The applicant shall be a citizen, a legal person, or any other organization that holds that a specific administrative act has directly infringed upon his/her or its lawful rights and interests;
- (2) There must be a specific defending party or parties of an application;
- (3) There must be a specific claim for reconsideration and a corresponding factual basis;
- (4) The case must fall within the scope for application for reconsideration;
- (5) The case must fall under the jurisdiction of the administrative organ that accepts the said case;
- (6) Other requirements stipulated by the laws and regulations.¹⁰⁴

Parties may choose administrative reconsideration because it is free, or because the legality and appropriateness of administrative decisions, and not just their concrete application, may be considered.¹⁰⁵

103. JIANFU CHEN, *supra* note 30, at 245.

104. Regulations on Administrative Reconsideration, *supra* note 101, § 31.

105. PEERENBOOM & HE XIN, *supra* note 76, at 17 (“If the reconsideration body finds the regulation inconsistent with higher legislation, it may annul the inconsistent regulation or, if it does not have the authority, it may refer the problem to the body that has such authority.”).

3. Letters and Visits (*Xinfang* and *Shangfang*)¹⁰⁶

If administrative review through environmental protection agencies and motions through judicial organs fail to satisfactorily resolve an environmental dispute, parties may attempt administrative petitioning in order to “put pressure on the state organ and to raise public sympathy to deal with the issue.”¹⁰⁷ The “Letters and Visits” *xinfang* system’s function contrasts to the initial “notice and comment” period that American public projects go through where input is given and public concerns are taken into account.¹⁰⁸ Much of *xinfang*’s informative and pressure-release is done ex post, after the complained-of action has already been completed, rather than before-the-fact, when the project is being planned. At a local level, the *xinfang* office may arbitrate disputes between citizens and other government agencies.¹⁰⁹ The *xinfang* system allows “[a]ny party [to] submit a written or oral complaint . . . to the Letters and Visitors Offices located in Party and Government organs as well as in media institutions.”¹¹⁰

Once a complaint is filed, the *xinfang* office may send personnel to investigate, or it may refer “individual petitions to other government agencies for action.”¹¹¹ These other agencies or higher *xinfang* bureaus may then suggest that local authorities listen to and resolve the citizens’ complaints.¹¹² However, directives from higher *xinfang* organizations are allegedly vague and general, which leads to petitions often being

106. Some commentators have translated the *xinfang* system as “correspondence and reception.” LIN FENG, *supra* note 75, at 92. The word *xin* means letters, and the word *fang* can mean visits. Carl F. Minzner, *Xinfang: An Alternative to Formal Chinese Legal Institutions*, 42 STAN. J. INT’L L. 103, 115 (2006). *Shangfang* is defined as “to go past basic level institutions to reach higher-level bodies, express problems and request their resolution.” *Id.* at 110 (2006).

107. Beyer, *supra* note 23, at 191.

108. See 10 C.F.R. § 50.91 (2007) (describing the notice and comment period required for alterations to a U.S. construction project plan).

109. See *infra* Part III(B)(3) for an example of a *xinfang* office acting as an arbitration forum.

110. Beyer, *supra* note 23, at 191. See also Memorandum on Env’t. Conflict Resolution from the Office of Mgmt. and Budget and President’s Council on Env’t. Quality 4 (Nov. 28, 2005), available at <http://www.justice.gov/adr/pdf/ombceqjointstmt.pdf> [hereinafter Memorandum] (describing Environmental Conflict Resolution (“ECR”) as a “third-party assisted conflict resolution and collaborative problem solving”). The *xinfang* system, although involving a state organ, serves a similar function by “negotiating and mediating to ensure the resolution of ‘important’ petitions, [and] supervising and investigating the resolution of petitions (by other entities).” Minzner, *supra* note 106, at 123. In China the state absorbs many institutions that would be controlled by true third-party neutrals in the U.S. See B. Michael Frolic, *State-Led Civil Society*, in CIVIL SOCIETY IN CHINA 46, 48 (Timothy Brook & B. Michael Frolic eds., 1997).

111. Minzner, *supra* note 106, at 117. This fact-finding process is also a tool of ADR. See Emerson et al., *supra* note 71, at 15 (defining fact-finding as “closely related to nonbinding arbitration. In this process, a neutral . . . receives information and listens to arguments presented by the disputants. The fact finder . . . evaluates the evidence and submits a report that contains findings of fact and sometimes recommendations.”).

112. Minzner, *supra* note 106, at 117.

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ignored.¹¹³ Local authorities have some latitude in responding to higher *xinfang* offices' suggestions when the dispute is transferred back.¹¹⁴

Xinfang offices can also discourage escalation of a dispute. The *xinfang* offices may observe a complaint, make a determination of its worth, then "conduct a degree of 'thought direction' (*sixiang shudao*) by convincing petitioners to halt their petitioning behavior."¹¹⁵ By persuading petitioners to drop complaints, the *xinfang* bureau may convince them that the state's action is correct.¹¹⁶ But if the rationale is insufficient to assuage the petitioners' complaints, the *xinfang* office's response may radicalize petitioners.

Most Chinese state agencies have a bureau for answering letters and receiving visitors.¹¹⁷ "Petitioners may seek relief from a wide variety of sources, including Party organs, government agencies, the procuracy and the courts."¹¹⁸ Examining citizens' complaints, higher officials who have power over local leaders can identify problems and sources of discontent.¹¹⁹ The leaders can use this information to delay a project or alter how it is conducted before too many people are displaced or before tensions run too high and result in protest.¹²⁰

Xinfang is a very popular scheme. In contrast to the mere hundred thousand yearly administrative lawsuits,¹²¹ "letters and visits to Party and government *xinfang* bureaus at the county level and higher totaled 8,640,040 for the first nine months of 2002, corresponding with an annual

113. Xi Chen, *Collective Petitioning and Institutional Conversion*, in POPULAR PROTEST IN CHINA 54, 65 (Kevin J. O'Brien ed., 2008); see also Minzner, *supra* note 106, at 117, 145 ("Even if petitioners successfully prompt higher-level intervention in a local dispute, the nature of the petition may simply shift to whether local leaders actually carry out the enforcement of central directives.").

114. Xi Chen, *supra* note 113, at 65. Xi goes on to discuss possible reasons for why higher *xinfang* organs so often delegate disputes. Reasons he lists include: limited resources, unfamiliarity with local circumstances, and fear of alienating coworkers and underlings. *Id.* at 66.

115. Minzner, *supra* note 106, at 118.

116. Although *xinfang* offices can act independently, the local cadres' evaluations are often dependent on how well they ensure social order. Sometimes ensuring social order means that complaints are dismissed rather than resolved or confronted. CARL MINZNER, SOCIAL INSTABILITY IN CHINA: CAUSES, CONSEQUENCES AND IMPLICATIONS 15 (2006), available at http://csis.org/files/attachments/061205_Minzner.pdf; see also Minzner, *supra* note 106, at 153–54. (describing responsibility systems that have a perverse effect toward encouraging harsh actions toward petitioners since "[x]infang responsibility systems generally do not simply link punishment [of cadres] to the legal merit of the grievances expressed in a mass petition; they also base sanctions on the number of people involved, the number and frequency of such incidents[,] . . . and the level of the government hierarchy to which they reach").

117. Minzner, *supra* note 106, at 116.

118. PEERENBOOM & HE XIN, *supra* note 76, at 14.

119. Laura M. Luehrmann, *Facing Citizen Complaints in China, 1951-1996*, 43 ASIAN SURVEY 845, 865 (2003); Eva Pils, *Land Disputes, Rights Assertion, and Social Unrest in China: A Case From Sichuan*, 19 COLUM. J. ASIAN L. 235, 261 (2005); see also PEERENBOOM & HE XIN, *supra* note 76, at 13.

120. See *infra* Part IV(A)(2) (discussing how the Nu River project was delayed after citizen input).

121. PEERENBOOM & HE XIN, *supra* note 76, at 16.

rate of 11.5 million per year.”¹²² In 2005 the letters and visits offices received a total of 12.66 million complaints.¹²³ Some complaints involved accusations of corruption; others involved population policies, taxation, and property policies that may involve land takings for power projects.¹²⁴ “In 2004 . . . the number of petitions protesting land issues surpassed that of petitions involving taxation.”¹²⁵ Often, low-ranking officials have a large degree of discretion on how to enforce administrative decrees.¹²⁶ The *xinfang* system helps supervise and reverse abuse of local officials’ discretionary actions.

In one example of *xinfang* in action, on October 25, 2001, 36 fishermen complained at the municipal government’s office regarding excessive fees that were imposed by a fishery management station.¹²⁷ In response, the officials invited the fishermen to the office. Then the officials called the city and county fishery bureaus. Officials from the fishery station and the county bureau were slow in coming, but did arrive on the same day. In response to their tardiness, a warning was circulated to other agencies stressing the need for prompt response to collective petitioning. The bureau worked as an arbitration forum where complaints could be heard and all sides could have their interests reconciled by an impartial third party.¹²⁸ Ultimately, the municipal bureau decided that the fees were excessive.¹²⁹

122. Minzner, *supra* note 106, at 105.

123. MINZNER, *supra* note 116, at 22.

124. *See id.* (mentioning complaints that deal with corruption and population policies); Minzner, *supra* note 106, at 159 n.339 (discussing how *xinfang* complaints involve property policies and taxation: “One survey of 184 petitions in the period from 1998 to 1999 suggests that approximately 64% of all petitions related to excessive tax burdens, 51% to various problems regarding land/property issues, and 30% to illegal use of force.”).

125. Minzner, *supra* note 106, at 159 n. 339.

126. LUBMAN, *supra* note 4, at 147.

127. Xi Chen, *supra* note 113, at 62.

128. Emerson et al., *supra* note 71, at 15 (defining arbitration as a situation where “the disputants present their cases to an impartial third party, who then issues an opinion”).

129. Xi Chen, *supra* note 113, at 62. *Xinfang* as applied to the fisherman example can sometimes function as a method of ADR. The principles listed in the Memorandum for defining actions as ADR require an Informed Commitment to the process by the organs; here the *xinfang* bureau and all players met, discussed and agreed on a decision. *See* Memorandum, *supra* note 110, at 7 (describing the basic principles for agency engagement in ECR). Balanced, voluntary representation is also required. *Id.* Although the government agency did not want to participate, it had the right to send officials—and the fishermen wanted to participate. Group autonomy was fulfilled since the group had a chance to be heard and to suggest solutions, and the *xinfang* bureau acted as a third-party neutral. The discussion was an informed process where everyone shared information equally. There was accountability where all could participate in the process in good faith. There was openness about the rules and the *xinfang* bureau’s procedure. The decision was enacted in a timely manner, and the decisions were implemented in compliance with laws. *Id.* However, the *xinfang* system is not wholly conducted by a neutral evaluator. The *xinfang* officials are subject to interference from other government officials in the bureaucracy and have political goals behind their actions. One author suggests that *xinfang* could be improved by making the *xinfang* overseers more detached from the government, like a neutral mediator or ombudsman. Zou Keyuan, *The Right to Petition in China: New Developments and Prospects*, in 285 EAI BACKGROUND BRIEF, at 8 (2006), available at www.eai.nus.edu.sg/

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Despite its popularity, *xinfang* is not a very successful method for achieving outcomes favorable to citizens. According to a study of *xinfang*, “less than 0.2% of petitioners surveyed succeeded in having their complaints addressed.”¹³⁰

Still, many Chinese citizens use *xinfang*, demonstrating that they have some belief the process presents benefits. One reason citizens may believe in *xinfang*'s efficacy is that in China many actors pressure courts to influence judicial outcomes.¹³¹ For example, “Judges experience interference from within their court (e.g., by the court president or the adjudication committee).”¹³² Additionally, a judge's knowledge that many citizens have filed *xinfang* petitions or have powerful administrative allies may influence that judge's view of justice¹³³ since “courts experience external ‘supervision’ by people's congresses in addition to interference by Party committees These conditions of adjudication . . . lead litigants and complainants to ‘go where the power is,’ and seek support from all those institutions influencing or even controlling the courts.”¹³⁴

Xinfang is also a fall-back provision that people choose when courts and administrative litigation fail to address concerns: “According to one survey, 63.4 per cent of those who eventually brought their complaints to the central authorities in Beijing had first sought resolution in the courts.”¹³⁵ Traditionally, *xinfang* lacks finality and that encourages multiple attempts to successfully resolve a dispute.¹³⁶ Petitioners may

BB285.pdf; see also Office of the U.N. Ombudsman, <http://www.un.org/en/ombudsman/help.shtml> (last visited May 20, 2010) (describing the U.N. ombudsman system).

130. Minzner, *supra* note 106, at 106 (citing Zhao Ling, *Xin fang gai ge yin fa zheng yi* [*Xinfang Reform Triggers Controversy*], NAN FANG ZHOU MO [SOUTHERN WEEKEND], Nov. 18, 2004); see also Yu Jianrong, *Zhongguo xinfang zhidu pipan* [*A Criticism of the Xinfang System*], XINHUA, Apr. 21, 2005, available at http://news.xinhuanet.com/report/2005-04/21/content_2860076.htm (discussing Yu's studies about the ill-efficacy of the *xinfang* system, postulating why it does not appear to work and how it can be made to work).

131. Benjamin L. Liebman, *China's Courts: Restricted Reform*, 21 COLUM. J. ASIAN L. 1, 24 (2007) (describing how courts are under pressure from Party superiors to resolve petitioners' grievances). For example, “88.5% made the visits in order to give the relevant local governments ‘pressure’ while 81.2% ‘knew that the Central Government cannot solve the problems directly, but they were hoping to obtain an official directive.” Zou Keyuan, *supra* note 129, at 3; Yu Jianrong, *Xinfang zhi du diao cha ji gaige si lu* [*A Survey of the Xinfang System and Thoughts on Reform*], in 2005 NIAN: SHEHUI XING SHIFEN XI YU YUCE [YEAR 2005 ANALYSIS AND FORECAST ON CHINA'S SOCIAL DEVELOPMENT] 212, 215 (Ru Xin, Lu Xueyi & Li Peilin eds., 2005).

132. Pils, *supra* note 119, at 261.

133. See Randall Peerenboom, *Judicial Independence in China: Common Myths and Unfounded Assumptions*, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 69 (Randall Peerenboom ed., 2010), available at <http://www.fljs.org/uploads/documents/Judicial%20Independence%20in%20China.pdf> (discussing how *xinfang* bureaus and local People's Congresses attempt to influence China's courts).

134. Pils, *supra* note 119, at 261.

135. PEERENBOOM & HE XIN, *supra* note 76, at 14.

136. In 2005, however, this lack of finality changed. See generally *Xin fang tiao li* [2005 Regulations on Letters and Visits] (promulgated by the St. Council, Jan. 10, 2005, effective May 1, 2005) translated in LAWINFOCHINA, <http://www.lawinfochina.com/law/display.asp?db=1&id=3920> (last visited May 20, 2010) (P.R.C.) [hereinafter Regulations on Letters and Visits].

petition to increasingly higher government organs,¹³⁷ and even if the dispute is resolved in their favor, they may have to again petition to ensure implementation.¹³⁸

Until 2005 *xinfang* regulations created incentives that seemed to encourage instability. Citizens, realizing what actions led to successful resolution of petitions, began organizing repeat, somewhat disruptive large-scale visits to *xinfang* offices.¹³⁹ The Regulations on Letters and Visits was amended in 2005 in an attempt to address problems with petitioning such as delays in resolution¹⁴⁰ and endless appeals.¹⁴¹ “The [new] Regulations limit the petitioners to three appeals to successively higher level administrative agencies, limit the number of representatives for each visit to five, and emphasize the need to obey the law and not disturb social order.”¹⁴² However, one author and commentator, Xi Chen, argues that the Regulations are routinely violated because “refusing to meet the petitioners is inappropriate, since it is the officials’ duty to dissolve collective petitions” and “the offense is so common.”¹⁴³ Local officials deal with the problem by telling petitioners to elect five representatives; this allows the petitioners to comply with the law but at the same time to demonstrate their mass support.¹⁴⁴

Increasingly, petitioning is looked on with disfavor,¹⁴⁵ and if the trend identified by authors Peerenboom and He continues, it is likely that letters and visits may decrease as a method for dispute resolution in China.¹⁴⁶ If retaliation against petitioners¹⁴⁷ is coupled with decreasing

137. “One recent survey of petitioners in Beijing found that the average number of central government bureaus visited by petitioners was six, and the maximum eighteen.” Minzner, *supra* note 106, at 143. This problem, however, has been resolved in part by the Regulations on Letters and Visits.

138. “[T]he nature of the petition may simply shift to whether local leaders actually carry out the enforcement of central directives.” *Id.* at 145.

139. *See id.* at 107.

140. Regulations on Letters and Visits, *supra* note 136, § 21 (dealing with the process for transferring petitions).

141. *Id.*

142. PEERENBOOM & HE XIN, *supra* note 76, at 14; *see* Regulations on Letters and Visits, *supra* note 136, § 18 (describing the regulations mentioned by Peerenboom and He Xin).

143. Xi Chen, *supra* note 113, at 69.

144. *Id.*

145. “In a 2007 survey of 560 petitioners who had come to Beijing, 70 per cent felt that local government retaliation had become more severe. Almost two out of three had been detained, with 18.8 per cent sentenced to prison or education through labour . . . because of their petition activities.” PEERENBOOM & HE XIN, *supra* note 76, at 14.

146. *See Xinfang zong liang chi xu pan sheng shi tou huo e zhi shangfang gengqu xiang li xing* [The Tendency of Continual Increases in Numbers of Xinfang Cases Has Been Checked, Petitioning Trends More Reasonable], XINHUA, Apr. 29, 2006, http://news.xinhuanet.com/politics/2006-04/29/content_4490873.htm (celebrating the decline in number of *xinfang* petitions from 2004 to 2006).

147. And there certainly is retaliation against petitioners. For example:

Xinfang responsibility systems attempt to maintain stability by holding mass petitioning behavior to a minimum. Party and government leaders, in no uncertain terms, risk their job security when they fail to adequately check mass petitions. While

returns in successful resolution of disputes, then Chinese citizens will resort to other methods, such as increased awareness-raising, to address their concerns.

4. Awareness-Raising¹⁴⁸

Increasingly, Chinese citizens use awareness-raising to influence administrative actions. Awareness-raising consists of outside-the-system ways of collecting people and pressure to resolve disputes.¹⁴⁹ Awareness-raising methods of compelling dispute resolution involve bringing together disparate groups into a position where they can legally share ideas while communicating opposition of government policies to bureaus and concerned parties that can change the policies.¹⁵⁰ Awareness-raising methods include the hosting of legal conferences, seminars, study tours and journalist salons,¹⁵¹ the use of alternative media such as posters and flyers,¹⁵² and the legal spread of opposition and ideas over the Internet.¹⁵³

The Chinese practice of awareness-raising may not initially seem to fulfill requirements of recognized American ADR principles since there is little face-to-face meeting “of stakeholders to reach a consensus decision that best satisfies their interests.”¹⁵⁴ In China it is difficult for

this may prompt some officials to conscientiously resolve grievances raised in mass petitions through available, legitimate channels, it encourages other officials to simply suppress citizen petitioning efforts.

Minzner, *supra* note 106, at 154.

148. See *supra* note 38 for a full definition of *awareness-raising* as used in this note by the author.

149. For example, Faxi villagers have participated awareness-raising:

[They] pursued a broad strategy aimed at garnering attention and support from multiple higher-level Party and government organs. These included Party committees, provincial *xinfang* bureaus, NPC delegates, and the procuratorate, among others. In large part, this strategy was underpinned by the perception (a correct one) that all of these organs possessed some ability to affect the disposition of village grievances by raising the issue to the attention of core leadership figures. Formal legal decisions do not appear to have been exempt from this intervention.

Minzner, *supra* note 106, at 150–51.

150. Xi Chen, Presented at the Annual Meeting of the American Political Science Association: Art of Troublemaking: Chinese Petitioners’ Tactics and Their Efficacy, at 11 (Sept. 2, 2004), available at http://www.allacademic.com/meta/p_mla_apa_research_citation/0/5/9/7/0/pages59702/p59702-1.php. Xi discusses citizens’ acts that range from alliance-building to disruption, to seeking elite intervention or public sympathy, and symbolic acts such as hunger-strikes. Xi classifies these acts as troublemaking. The author’s definition of awareness-raising, however, only includes Xi’s concepts of seeking elite intervention or public sympathy and does not include Xi’s more directly confrontational acts.

151. Guobin Yang & Calhoun, *supra* note 51, at 219, 228 (for descriptions of selected journalist salons).

152. *Id.* at 222.

153. “A survey of the web presence of environmental NGOs conducted in March 2004 finds that of the 74 organizations surveyed, 40 (or 54%) have web sites. . . . Twenty-four (or 60%) of the 40 web sites just mentioned have bulletin boards for public discussion.” *Id.* at 224. And “the Green Net of *China Youth Daily* set aside a special column on the Nu River campaign and collected nearly 200 articles on the topic.” *Id.* at 228.

154. O’Leary & Raines, *supra* note 38, at 254 (describing recognized ADR elements).

stakeholders to have a face-to-face meeting when issues are as important to national energy security as the construction of a large hydroelectric plant or a giant petroleum refinery. Awareness-raising, however, allows citizens to seek a champion to represent their interests in government stakeholder meetings.¹⁵⁵

Although some of the more successful practices of *xinfang*, such as the aforementioned fishermen example, meet authors O'Leary and Raines' principal elements of ADR,¹⁵⁶ Chinese awareness-raising only meets some elements. In awareness-raising (1) the parties directly affected by the permitting actions do not both agree to participate; (2) the parties or representatives of both sides do not meet; (3) a third-party neutral does not have an authority to impose a solution; (4) the parties do not agree on an outcome; and (5) awareness-raisers may be unable to turn to another option to resolve the dispute.¹⁵⁷

Despite the lack of face-to-face meeting, awareness-raising communication leads to stakeholders' opinions being championed by people in ministries such as the MEP,¹⁵⁸ and then heard by higher agencies. The higher government agencies act as a neutral third party that influences the permitting agency's decisions. The more powerful government party can intervene through informal discussions with the administrative agency that may result in an agreed outcome.¹⁵⁹ However, the neutral third party, like an arbitrator, sometimes imposes a decision on disputing groups—deciding if the case should proceed, if it should be

155. See Litzinger, *supra* note 21, at 289 (describing how “certain authorities in the central government complained . . . to Premier Wen Jiabao that the Yunnan government should not have permitted the creation of a new hydroelectric corporation” and that the Nu River hydroelectric project should be held-up).

156. *Xinfang* meets the Memorandum's requirements for ADR when parties are able to meet with the administrative agency. See *supra* note 129 (for a discussion of how the Memorandum's requirements were met in the fishermen example). *Xinfang* also meets many of O'Leary and Raines' requirements for ADR because when parties meet with the agency (1) parties agree to participate; (2) the parties directly participate; (4) the parties agree on an outcome; and (5) the parties could feasibly withdraw and seek resolution in court. The only factor sometimes missing is (3), because the *xinfang* bureau is more than a neutral mediator and may impose a solution. See O'Leary & Raines, *supra* note 38, at 254–55 (describing the elements required). In this note's case studies, the parties were not able to meet with the administrative agency in the planning of the power plants. However, despite the lack of a face-to-face meeting, a higher previously uninvolved and neutral government agency presided over a decision, like an arbitrator.

157. *Id.* (listing the elements required); GAIL BINGHAM, RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE 72 (1986) (describing four similar aspects necessary for something to be considered environmental dispute resolution: the process is voluntary; the parties meet face to face; the parties are assisted by a mediator; and the goal is to reach a mutually acceptable resolution of the issues in dispute).

158. See Litzinger, *supra* note 21, at 289 (describing a “major rift” between those in government); *infra* Part IV(A)(1) (describing how members of China's national environmental protection bureau argued against the dam proposal).

159. See O'Leary & Raines, *supra* note 38, at 254–55 (listing the elements).

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reviewed at a lower branch of government, or if the protesters should be silenced.¹⁶⁰

When awareness-raising results in the conveyance of communication to higher-level champions, it bears a resemblance to the mainstream ADR concept of policy dialogues. In a policy dialogue, groups of stakeholders “explore the issues in controversy to see if general recommendations can be developed and to try to reach agreement on the policy standard or guidelines the government will propose.”¹⁶¹

Policy dialogues in Chinese power project awareness-raising actions, like those in the United States, generally only “put forward general, nonbinding recommendations or broad policy preferences.”¹⁶² Groups in China are limited to only proposing policies and raising awareness because government stakeholders do not attend forums created by awareness-raising. Many parties affected by power plant construction are shut out from the negotiating and rule-making table.¹⁶³ Another difference between American public policy dispute resolution and Chinese awareness-raising is that a third party “protector of the process” is not involved to facilitate discussion and the decision maker does not directly express a willingness to be influenced by the views of the shareholders.¹⁶⁴

Although the government does not come to the negotiating table, citizens’ opinions appear to be considered by government actors who could be deemed third parties. Both Premier Wen Jiabao’s response to the Nu River dam project and government agencies’ response to stakeholder concerns regarding permitting in the Nansha Refinery dispute appear to have been affected by complaints and discussions raised in awareness-raising actions.¹⁶⁵

In the Nu River case, awareness-raising legal conferences and Internet postings were used to communicate distrust of and disgust with power plant development processes. Distrust was communicated, but the postings were eventually shut down¹⁶⁶ and several awareness-raisers were monitored.¹⁶⁷ It is unclear to what degree awareness-raising affects disputes’ outcomes. At a minimum, government departments take notice

160. Cf. MERTHA, *supra* note 7, at 149 (describing how four cases of citizen opposition to hydroelectric dam projects were treated differently by government officials).

161. Emerson et al., *supra* note 71, at 13.

162. *Id.*

163. See Litzinger, *supra* note 21, at 285 (describing how rural citizens are rarely involved in the planning of development initiatives).

164. Emerson et al., *supra* note 71, at 20.

165. See *infra* Part IV(A)(4) (discussing actions of awareness-raising involved in the Nu River controversy); see also *infra* Part IV(B)(2) (discussing actions of awareness-raising involved in the Nansha refinery).

166. See Litzinger, *supra* note 21, at 290.

167. See McDonald, *supra* note 59, at 77–78 (discussing the monitoring of dam opponents).

of and may be influenced by the discontent, and the methods are a somewhat safer way of expressing discontent than outright protest.¹⁶⁸

5. Protests (Dispute Resolution Failures)¹⁶⁹

Accompanying a rise in the amount of filed *xinfang* petitions and a lack of successful resolution of petitions,¹⁷⁰ the number of protests rose from 58,000 in 2003 to 72,000 in 2004, “50,000 of which were environmental protests.”¹⁷¹ These protests can occur when citizens feel that their concerns are not being considered.¹⁷² Protests result when people confront a lack of outlets for influencing a situation. A protest is designed to express grievance and to coerce the central government to act and resolve an issue.¹⁷³ Several protests in the late 2000s involved power projects.

Citizens in Chengdu protested against an ethylene plant/oil refinery that many saw as potentially spewing pollution. The 2008 protest was organized through websites, blogs, and cell phone text messages.¹⁷⁴ As part of the protest, around 400 to 500 protestors walked, some with masks over their mouths.¹⁷⁵

China Guodian’s plans in 2004 to develop a hydroelectric dam in Hanyuan required massive relocation of citizens, and was protested vigorously after complaints through official channels were unaddressed. To head-off the planned dam “[p]easants [first] petitioned the Hanyuan county government, the Ya’an municipal government, the Sichuan provincial government, and even, on two trips in July and August 2004, to Beijing. But nothing came of any of this.”¹⁷⁶ Following the failed petitions, in September 2004, citizens began to protest and showed up at the

168. See *infra* Part IV(A) (discussing the Nu River controversy); see also *infra* Part IV(B) (discussing the Nansha refinery case).

169. Regarding protests that surround power plant permits, a further question may be what factors particularly contribute to radicalizing Chinese citizens. Protests may be driven primarily by pollution, lack of compensation, citizens’ socioeconomic level, population density, bureaucratic apathy, or something else.

170. See PEERENBOOM & HE XIN, *supra* note 76, at 14 (listing 12.7 million petitions in 2005); Minzner, *supra* note 106, at 106 (discussing how only 0.2% of petitions are addressed “successfully”).

171. MERTHA, *supra* note 7, at 17.

172. See *id.* at 152. (discussing the central government’s concern for social stability amidst rising numbers of protests).

173. See KARL-DIETER OPP, THEORIES OF POLITICAL PROTEST AND SOCIAL MOVEMENTS: A MULTIDISCIPLINARY INTRODUCTION, CRITIQUE, AND SYNTHESIS 38–39 (2009) (discussing protest behavior).

174. Edward Wong, *In China City, Protesters See Pollution Risk of New Plant*, N.Y. TIMES, May 6, 2008, at A6, available at <http://www.nytimes.com/2008/05/06/world/asia/06china.html>.

175. *Id.*

176. William Lowry & Andrew Mertha, *Aftershocks: The Post-Disturbance Institutionalization of Policy Change* 7–8 (Midwest Pol. Sci. Ass’n 2009), available at http://falcon.arts.cornell.edu/am847/pdf/Midwest_2009.pdf.

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construction site and prevented the workers from using their equipment.¹⁷⁷

Protests, if handled improperly, can turn into riots. In October and early November 2004, “more than 100,000 people protested the Pubugou Dam project in Sichuan Province, until the riot police crushed the demonstration.”¹⁷⁸ As of December 7, 2006, three people were still jailed and one executed for their role in the protests, which left a policeman dead.¹⁷⁹ The citizens in Hanyuan city, near the Pubugou dam, were protesting forced relocations.¹⁸⁰

Still, most Chinese do not join protests even though only 0.2% of their *xinfang* petitions are answered satisfactorily.¹⁸¹ Perhaps the Chinese citizens’ pliability to accept government inattention is in part due to the fact that some Chinese citizens still see their economy as growing and opportunity as being boundless.¹⁸²

IV. CASE STUDIES

Parties involved in power project permitting disputes interact differently depending on the circumstances and players in each case. However, case studies of the Nu River hydroelectric dams and the Nansha refinery help demonstrate how Chinese power project dispute resolution systems function.

A. *The Nu River Hydroelectric Dams*¹⁸³

1. Background and Interests

In the Nu River region of Yunnan province,¹⁸⁴ the construction of a series of hydroelectric power plants was delayed due to grassroots political mobilization and the enactment of awareness-raising ADR that

177. *Id.* at 8.

178. Jim Yardley, *Chinese Dam Projects Criticized for Their Human Costs*, N.Y. TIMES, Nov. 19, 2007, at A1, available at <http://www.nytimes.com/2007/11/19/world/asia/19dam.html>.

179. *China Executes Dam Protester*, BBC NEWS, Dec. 7, 2006, <http://news.bbc.co.uk/2/hi/asia-pacific/6217148.stm>.

180. See He Qinglian, *supra* note 41, at 23–24. “[O]ver the past 50 years, major hydroelectric engineering projects in China have displaced 16 million people.” *Id.* at 24.

181. See Minzner, *supra* note 106, at 106 (citing Zhao Ling, *Xinfang gaige yinfa zhengyi* [*Xinfang Reform Triggers Controversy*], NAN FANG ZHOU MO [SOUTHERN WEEKEND], Nov. 18, 2004).

182. Michael Bristow, *China Avoids Major Social Unrest*, BBC NEWS, June 18, 2009, <http://news.bbc.co.uk/2/hi/asia-pacific/8102233.stm>.

183. Andrew Mertha and Ralph Litzinger cover the Nu River project in greater depth. Their articles are particularly worth examining to see all the important points of administrative and petitioning negotiation between the groups. See generally MERTHA, *supra* note 7; Litzinger, *supra* note 21.

184. Yunnan is a province in China’s south. It borders Vietnam, Laos, and Myanmar.

involved letter writing, visits, and political pressure rather than litigation.¹⁸⁵

Environmental groups particularly opposed construction of 13 hydroelectric dams in Yunnan because the area affected by the hydroelectric dams was a U.N. Educational, Scientific, and Cultural Organization (“UNESCO”) natural world heritage site.¹⁸⁶ The dam developer, the Yunnan Huadian Nu River Hydropower Development Company, was created in June 2003—just weeks before UNESCO approved the Three Parallel Rivers area (*sanjiang bingliu*) as a World Heritage Site.¹⁸⁷ One month later, the NDRC examined the proposed dam project and after two days, on August 14, approved the project.¹⁸⁸ The proposed dams would have a “total capacity of 21,320 MW—about 17 per cent more than that of the massive Three Gorges Dam. They would generate more than 103 million MW of power a year and 36 billion yuan in annual income.”¹⁸⁹ Much of the revenue would go to the development company, but the “Nu River prefectural government would still get at least 1 billion yuan a year, 10 times its 2002 income. . . . The project would uproot about 50,000 people.”¹⁹⁰

The project was particularly pushed by several Yunnanese government officials¹⁹¹ who argued that the dams were “part of a provincial development strategy to make money by targeting the regional electricity market, which, they argue, will . . . alleviate poverty on the upper reaches of the Nu.”¹⁹² For example, “1,700 villagers, mostly from the Lisu ethnic minority, had an average annual per capita income of 860 yuan in 2006, below the internationally recognised poverty line of 924 yuan. Some local officials say harnessing the huge power potential of the Nu River is a natural solution to that problem.”¹⁹³ At the time of the planned hydroelectric dam projects, power demand was rising in China. During summer 2004, there were power shortages in 16 of China’s 31 provinces.¹⁹⁴

185. See generally Litzinger, *supra* note 21 (describing grassroots opposition to hydropower development).

186. UNESCO World Heritage Center: Three Parallel Areas of Yunnan Protected Rivers, <http://whc.unesco.org/en/list/1083> (last visited May 20, 2010).

187. Litzinger, *supra* note 21, at 286.

188. MERTHA, *supra* note 7, at 121.

189. Shi Jiangtao, *supra* note 21.

190. *Id.*

191. See Candy Zeng, *Green Challenge to China’s Mega-Projects*, ASIA TIMES ONLINE, Mar. 20, 2008, http://www.atimes.com/atimes/China_Business/JC20Cb01.html.

192. Litzinger, *supra* note 21, at 287–88.

193. Shi Jiangtao, *supra* note 21. One particularly notable example of pro-development provincial leadership opinion regarding the project is a comment by a Communist Party Secretary, Bai Enpei: “A power plant may ruin the picturesque Nujiang gorge. But is that all that conservation means, to have our people wearing animal skins for others to watch and enjoy?” Zeng, *supra* note 191.

194. See Tom Butler, *Thai Groups Battle New China Dam*, BBC NEWS, Jan. 19, 2004, <http://news.bbc.co.uk/2/hi/asia-pacific/3402389.stm>.

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Although government officials and residents who lived upriver were generally content with the dam development plan,¹⁹⁵ some “village residents who live[d] in the valleys and along the river’s edge were concerned that they would be relocated to upland regions less suitable for cultivating rice and other staple foods.”¹⁹⁶ Similarly, villager relocation was a large concern during the Three Gorges Project, which required over 1.3 million villagers to be relocated, and which resulted in the arrest of petitioners who traveled to Beijing to have their cases heard by a neutral petitioning bureau.¹⁹⁷ For a new hydroelectric project to receive local support, land compensation must be appropriate and the area to which locals are relocated must be suitable for farming.¹⁹⁸

Southeast Asian NGOs objected to the dam construction and pursued extra-legal petition methods to attempt to hold up the project. The Southeast Asia Rivers Network (“SEARIN”) “publicly criticized the project and called on the Chinese government to consult with countries downstream before building the dam” and, “on December 16, 2003, [SEARIN’s] Thai director . . . submitted a protest letter to the Chinese ambassador at the PRC embassy in Thailand, demanding that the Chinese government suspend the project immediately.”¹⁹⁹ The letter was signed by 83 Thai and Burmese groups.²⁰⁰

International NGOs based farther afield also objected to the construction. A California-based NGO, International Rivers Network, “organized a petition, signed by seventy-six organizations based in over thirty different countries, which was sent directly to . . . [Chinese President] Hu Jintao, calling for a detailed study of the environmental and social impacts of the dams.”²⁰¹

In late September 2003, some members of Chinese government agencies joined in opposing the project.

China’s National Environmental Protection Bureau held a closed-door meeting in Beijing, where thirty experts . . . opposed the Nu River dam proposal. They argued that it had been poorly thought out, was driven excessively by the profit motive, adversely affected

195. MERTHA, *supra* note 7, at 124.

196. Litzinger, *supra* note 21, at 294. In a similar situation in Hanyuan in Sichuan province, “Before they were relocated, these peasants had a few thousand *mu* of fertile land that enabled them to make a decent living. After they were relocated, they were given poor hillside land on which they could only plant corn and were unable to eke out an existence.” He Qinglian, *supra* note 41, at 23.

197. See ECONOMY, *supra* note 49, at 207–08 (describing Three Gorges Dam resettlement).

198. See e.g., Interview with a villager on the Yangtze River (Mar. 2007).

199. Litzinger, *supra* note 21, at 288.

200. Butler, *supra* note 194.

201. Litzinger, *supra* note 21, at 288–89.

the biodiversity of the region, and further strained relations between the government and the region's multi-ethnic minority populations.²⁰²

Provincial officials in Yunnan responded to the agencies' broadcasting of pro-dam propaganda "throughout provincial media outlets."²⁰³ According to one researcher, "Mass media in [Kunming, the capital of Yunnan Province] are strictly administered by the authorities, which prevented them from reporting articles that object to governmental policies."²⁰⁴

Environmental groups based in Beijing and outside of Yunnan province joined the protest by organizing awareness-raising activities such as complaints in newspapers and the signing of petitions.²⁰⁵ One Beijing group, Green Environmental Volunteers, mobilized awareness of the construction by building alliances with members of China's MEP who opposed the construction, and then used their expertise and fame to build close links with the media.²⁰⁶ From August 2003 to February 2004 "more than 20 newspaper articles concerning the dam project and the controversy around it were published"²⁰⁷ around the country, including one article published in the "daily newspaper of the CCP" and a TV program.²⁰⁸ By March 2004, another group, "the Chongqing Green Volunteer Union, [had] collected 15,000 petition signatures opposing the Nu dams."²⁰⁹

Awareness-raising acts became bolder in February 2004 when "twenty journalists, environmental protection volunteers, and conservation scholars in Beijing joined activists in Yunnan and embarked on their own investigative tour. For nine days, from February 19 to 24, they traveled along the Nu River, held meetings with local officials," spoke with village residents, took photographs, and recorded videos.²¹⁰ They initially planned to hold a "major educational exhibition of their findings, . . . [but] [u]nder pressure from the government, however, they canceled this action."²¹¹ Instead, they built a website, "which could be

202. *Id.* at 289.

203. McDonald, *supra* note 59, at 73.

204. LEI XIE, *supra* note 33, at 99–100.

205. Litzinger, *supra* note 21, at 289 (listing several groups that were involved).

206. See LEI XIE, *supra* note 33, at 100–01.

207. *Id.* at 102.

208. *Id.* Importantly, Professor Zhou Tianyong of the Central Party School argued that residents along the Yellow River where 13 hydroelectric dams had been built had not benefited greatly from the construction. The residents "had an average net income of 1,772 yuan (US \$220) per head in 2004—about half the national average—despite the 50 billion yuan (\$6.2 billion) project." Namju Lee, *The Development of Environmental NGOs in China: A Road to Civil Society?*, 6 CHINA BRIEF (2006), [http://www.jamestown.org/single/?no_cache=1&tx_ttnews\[tt_news\]=32261](http://www.jamestown.org/single/?no_cache=1&tx_ttnews[tt_news]=32261).

209. Yardley, *supra* note 52.

210. Litzinger, *supra* note 21, at 290.

211. *Id.*

accessed in both Chinese and English.”²¹² The groups sought foreign and domestic assistance through their website. The quest for foreign support seems to indicate that some environmental groups believe that foreign pressure can affect government decisions regarding power plant siting.²¹³

2. Problems with Petitioning, Awareness-Raising, and Protest

Although dissent against the hydroelectric dams increased, environmental groups based outside of Yunnan province became more vocal than the locals.²¹⁴ Outside groups are arguably less vulnerable to government pressures that discourage parties from petitioning, awareness-raising, and protest.

Sometimes provincial officials who want to encourage development and some citizens who expect compensation pressure local government officials to approve projects or to cooperate with hydroelectric development companies.²¹⁵ The local government officials can sometimes have a good deal of power and influence over administrative and regulatory units since the projects they oversee may fund local EPBs and local judges; the officials’ opinions can influence their clients’ administrative rulings.²¹⁶

Chinese cadres have a general interest in accepting power plant construction that will lead to greater economic development because their service evaluations may heavily weight the amount of economic development brought to their municipality.²¹⁷ Failing to provide economic improvement for constituents is a good justification for removal of local officials.

During the Nu River project, “Local cadres who openly opposed the dam were hesitant to join forces with the environmental organizations in village meetings because they feared that they would lose their jobs or be criticized by higher-ranking party authorities.”²¹⁸

When a local official works with an environmental group, that official also takes a risk since local positions are either appointed or the election

212. *Id.*

213. Too much foreign influence, however, can open a project to criticism. “In April, 2005, [China Academy of Social Sciences member Fang Zhouzi] gave a well-publicized speech at Yunnan University entitled, ‘A Direct Attack on Fake Environmentalist Dam Opponents.’” McDonald, *supra* note 59, at 78. Additionally, Fang criticized the NGOs for their willingness to accept foreign donations. *Id.*

214. *Id.* at 75–76.

215. See Litzinger, *supra* note 21, at 294 (describing citizens pressuring local government officials).

216. See Zhu Suli, *Political Parties in China’s Judiciary*, 17 DUKE J. COMP. & INT’L L. 533, 552 (2007) (discussing the Communist Party’s interference in the judiciary and arguing that such interference is necessary to maintain social and economic development); cf. Jianfu Chen, *supra* note 30, at 244 (describing how supervision departments’ independence is questionable).

217. See Edin, *supra* note 47 (describing the system for evaluating cadres).

218. Litzinger, *supra* note 21, at 294.

of those positions is strongly influenced from higher government levels.²¹⁹ Local officials see little practical benefit from opposing a government policy that may be backed by a provincial government. Environmental groups can offer little protection or reward to local officials who take their side, whereas the government can offer job security if local officials join with their opinions.²²⁰

The fate of Dr. Yu Xiaogang demonstrates how local cadres' and citizens' fears of provincial-directed reprisal against people who oppose the dams are justified. Dr. Yu directed a Kunming-based environmental NGO that petitioned the national government through letters, visits, and calls, and held meetings and attempted to hold conferences. As a result of his opposition to the Nu River project, Dr. Yu "was barred from leaving China and forbidden from engaging in public speaking or workshop organizing. Two of Dr. Yu's staff members were pressured to leave the organization, and Dr. Yu was asked to voluntarily resign."²²¹

Even within-the-system administrative negotiation caused trouble for Mu Guangfeng, a director of SEPA's Supervision Department, who led opposition to the dam and was fired after speaking too much to the press.²²² He was eventually restored to an "acting" and not a permanent capacity—which made it clear that if he spoke out too much he would be removed again.²²³

Awareness-raising activities also hurt local opponents of the hydroelectric project. Local residents' dissenting views were noted in meetings that were held with urban-based environmental groups. Names on papers petitioning the government or criticizing the project were used to identify potential troublemakers.²²⁴ Residents who took a larger involvement in the project faced reprisal: "[T]he farmers who had participated in the educational study tour also suffered for their association with Dr. Yu's charette. Their trip video and other materials were confiscated, they were instructed not to talk with anyone about dams, and they were put under 'observation' by the local public security bureau."²²⁵

Political dynamics that dissuade local citizens from involvement in administrative permitting proceedings, awareness-raising meetings with

219. Kevin J. O'Brien & Lianjiang Li, *Accommodating Democracy in a One-Party State: Introducing Village Elections in China*, 162 CHINA Q. 465, 485–86 (2000) (describing village elections and mentioning that influence can occur due to the limiting of candidates who run).

220. One report concluded that joining with environmental groups "was risky because such groups are viewed as operating largely outside the party-state system." Litzinger, *supra* note 21, at 294.

221. McDonald, *supra* note 59, at 77–78.

222. MERTHA, *supra* note 7, at 122.

223. *See id.*

224. Litzinger, *supra* note 21, at 290.

225. McDonald, *supra* note 59, at 79.

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environmental groups, and environmental protests against power plants become even more complicated when the citizens are not members of the Han majority ethnic group. Some minorities “are hesitant to join protest campaigns organized by outsiders. They fear that their participation will be viewed as an ethnic-based movement, which runs the risk of undermining national unity, a crime against the state.”²²⁶ These minorities’ fears have deleterious effects on their ability to be heard in administrative proceedings dealing with power plant permitting. Many Nu River residents’ minority status may have contributed to their absence from some protest, petitioning, and awareness-raising campaigns.²²⁷

Despite the difficulties faced by the hydroelectric dam’s opponents, on April 1, 2004 Premier Wen Jiabao ordered construction on the dam project (but not testing or other preparation work) suspended.²²⁸ Although progress in addressing citizens’ concerns may have resulted in part due to awareness-raising complaints,²²⁹ there seems to be a sense of inevitability that the dam projects will eventually be completed in some form.²³⁰

While awareness-raising, letters, and petitions can raise issues for discussion and can prevent injustice when one group is more powerful than the other, successful dispute resolution that respects the interests of many parties often requires meeting, discussion, and analysis of possible solutions to a problem.²³¹ These meetings may often effectively be conducted through government champions who are informed by awareness-raising and *xinfang*.

226. Litzinger, *supra* note 21, at 295.

227. “Over 90% of the [Nu River Lisu Autonomous Prefecture] prefecture’s population is a member of a state-recognized ethnic minority group.” McDonald, *supra* note 59, at 3.

228. Litzinger, *supra* note 21, at 291. Mertha describes how hydrological and geological measurements and the building of roads was not a violation of Premier Wen’s directive. MERTHA, *supra* note 7, at 126. Premier Wen may have felt bolder about asking for a halt to the project because all aspects of the EIA Law had not been fulfilled in regards to the initial hydroelectric project. The EIA Law was adopted in October 2002 and went into effect in September 2003 after the Nu River Project’s approval. EIA Law, *supra* note 19.

229. Litzinger, *supra* note 21, at 288–89 (describing success of international petitions); Jim Yardley, *Seeking a Public Voice on China’s “Angry River”*, N.Y. TIMES, Dec. 26, 2005, at A1, available at <http://www.nytimes.com/2005/12/26/international/asia/26china.html> (describing success of domestic petitions).

230. Litzinger, *supra* note 21, at 291. Although Premier Wen “called for a more extensive study of the dam project proposal and for more involvement of the scientific and environmental communities[.]” his call just delayed rather than ended the project. *Id.*

231. See ROGER FISHER & WILLIAM URY, GETTING TO YES 58–60 (Bruce Patton ed., 2d ed. 1991) (discussing the invention of creative options for conflict and dispute resolution in a negotiation).

3. Public Policy Alternative Dispute Resolution (Dialogue)

Dialogue that informs “champions” in government agencies of citizen concerns was facilitated by Dr. Yu Xiaogang who introduced peasant activists to a public policy forum. In October 2004, before he was disciplined, Dr. Yu brought peasant activists to a conference on Hydropower and Sustainable Development.²³² The conference could be considered a public policy forum since the forum permitted different actors and interests in the Nu River hydropower dam to meet and discuss policy. Often, peasants are excluded from these meetings that are held by policy experts and officials.²³³

At the meeting, a farmer, Ge Quanxiao, directly addressed the audience and argued that laws and regulations designed to protect the villagers’ rights “to be informed[,] . . . to participate[,] . . . [and] to undertake monitoring” were violated by the current hydropower policy and that the preparations for the dam were having a negative impact on the area’s residents.²³⁴

Although some attempted to marginalize Ge’s comments by claiming that there would be no “significant environmental degradation,” his words may have had some effect since “immediate construction . . . [came to be] opposed” by the NDRC, which had initially authorized the project.²³⁵ At the meeting, like in policy dialogues in U.S. environmental dispute resolution, divergent views were communicated and nonbinding recommendations were considered, as the NDRC decided to conduct further study.²³⁶

4. Administrative Dispute Resolution

Actions of awareness-raising, ADR, and public input temporarily halted the Nu River project, however, development plans began again in 2005. These plans once again did not involve environmental groups or local citizens in the planning process.²³⁷ Although a combination of awareness-raising pressures again put a temporary stop to the project, and as a result of the awareness-raising pressures:

[L]ocal authorities and the power company soon produced a scaled-down version of the hydropower plan, which gave priority to the building of four dams in the middle reaches of the Nu. The smaller proposal, which reportedly passed a compulsory green assessment and won the backing of the NDRC and the country’s top

232. MERTHA, *supra* note 7, at 130.

233. *Id.*

234. *Id.* at 130–31.

235. *Id.* at 133.

236. *Id.*; Emerson et al., *supra* note 71, at 13 (describing the components of policy dialogues).

237. Yardley, *supra* note 178.

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environmental watchdog, sparked another outcry. Sixty-one mainland environmental groups and 99 individuals signed an open letter in August 2005 demanding the release of the environmental impact report under mainland law. But their appeal has been rejected because of national security considerations over the international river. . . . After UNESCO threatened again to remove the Yunnan site from its World Heritage list, the provincial government was forced last year to deny overseas media reports that preparations for the project were under way despite Beijing's ban.²³⁸

The companies then back-stepped and said they were awaiting approval from the NDRC.²³⁹

Despite several hold-ups and restarts, development proceeded until an administrative argument was made in 2009. Environmental groups noted that development companies flouted "legal procedures for conducting an environmental assessment of hydro-works and began damming the river."²⁴⁰ When the groups demonstrated that companies attempted to circumnavigate legal channels, Premier Wen called for another halt to development and "demanded an in-depth study of the likely impact on the local ecology and communities."²⁴¹

Even with implementation of administrative dispute resolution processes, the move toward development sometimes seems inexorable. In a similar case of hydroelectric dam development:

An appraisal meeting about the Ahai generating plant on the Jinshajiang River was going to be held on [December 29, 2008] and environment protection organizations were invited. However, on the 22nd, without any notification to the public, preliminary construction work on the plant was completed and the diversion hole connecting the two sides of the river had been built so that the river could be cut and the dam built at any time.²⁴²

Additionally:

238. Shi Jiangtao, *supra* note 21; see also Jim Yardley, *China Proposes Fewer Dams in Power Project to Aid Environment*, N.Y. TIMES, Jan. 12, 2006, at A16, available at <http://www.nytimes.com/2006/01/12/international/asia/12river.html?n=Top%2fNews%2fInternational%2fCountries%20and%20Territories%2fChina> (discussing national security considerations). "An investigation led by UNESCO's Beijing office culminated in an April 2006 fact-finding mission to the Nu River valley. Several months later the mission report threatened to place the Three Parallel Rivers site on the list of 'Endangered World Heritage' if its concerns regarding the integrity of the site were not addressed." McDonald, *supra* note 59, at 83 (citation omitted).

239. Shi Jiangtao, *supra* note 21.

240. Antoaneta Bezlova, *China Reins in Dam Builders*, IPS NEWS, June 18, 2009, available at <http://www.ipsnews.net/news.asp?idnews=47259>.

241. Jane Macartney, *Chinese Premier Wen Jiabao Halts Construction of Power Plant on Nu River*, TIMES ONLINE, May 21, 2009, <http://www.timesonline.co.uk/tol/news/environment/article6332022.ece>.

242. Jia Xijin & Zhao Yusi, *supra* note 45 (footnote omitted).

Confronted with public opposition to controversial projects in the past, the power companies' strategy has always been to build downstream works first, and then argue that without completing the projects upstream, the investment made will be wasted. . . . "In many cases, a lot of money is invested even before the official approval of the projects."²⁴³

Some, however, see a shift in the Chinese government policy of deferring less toward development. One commentator argues that the move to hold-up development of the Nu River's Liuku power plant, despite its near-finished state of construction, is a positive sign that environmental bureaus are finally ready to challenge companies and local governments that build projects and then expect approval despite non-completion of EIAs or failing to provide public comment periods.²⁴⁴

5. Concluding Remarks on the Nu River Project

Successful opposition to the Nu River hydroelectric power plant permitting process was probably initially driven by international and urban environmental organizations rather than by locals utilizing ADR.²⁴⁵ The contemporaneous designation of the zone as a World Heritage Site also pressured China's central government.²⁴⁶

Local opposition was a bit muted in relation to the planned development,²⁴⁷ and villagers who expressed opposition through media interviews and attempts to attend a conference on rivers were put under observation and harassed.²⁴⁸ Members of minority groups feared involvement because they were afraid they may be accused of trying to undermine the government.²⁴⁹ Some local officials were complicit in villager relocation and dam development in townships even before projects were fully approved and before diverse views could be heard.²⁵⁰

243. Bezlova, *supra* note 240 (quoting Ma Jun, China's Director of Public and Environmental Affairs). Anecdotally, this mind-set can be reflected in a visit that the author took to China's Three Gorges Project. The author asked about the fate of the Yangtze river dolphins and if any fish-ladders were planned for the project. The tour guide replied that the dolphins were probably already extinct and that a few fish would be trucked past the dams. The damage was already done so it would not be worthwhile to spend cash to ensure the survival of a few more fish. Interview with tour guide at the Three Gorges Dam (Mar. 2007).

244. *See* Bezlova, *supra* note 240 (providing Ma Jun's comments).

245. Litzinger, *supra* note 21, at 295.

246. *See* Yardley, *supra* note 178.

247. *See* McDonald, *supra* note 59, at 76 (discussing the problems faced by NGOs in mobilizing opposition to the dam projects).

248. *See id.* at 77-78 (describing the harassment of Dr. Yu).

249. *See* Litzinger, *supra* note 21, at 295 (describing minorities' fears to participate in protest campaigns).

250. McDonald, *supra* note 59, at 79-80, 83 (discussing local officials' complicity with dam development officials).

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Villagers in Xiaoshaba were relocated even though the Liuku project's environmental assessment was not yet complete.²⁵¹

Ultimately, citizens' petitions and awareness-raising actions were quashed and abrogated by the local provincial government, which put citizens under observation, then reworked the plan without the environmental groups' input, and subsequently started development before fulfilling required state environmental protocols.²⁵² However, proof of a flawed permitting process, combined with letters opposing the dams and actions from foreign countries, probably encouraged the 2004 project shutdown. UNESCO's involvement in 2005 also likely delayed the project and led to its scaling-back.

In 2009 administrative dispute resolution procedures informed by citizen complaints appear to have halted the project. Until the environmental assessment is completed, the already near-complete dams will remain idle.²⁵³

By refusing to open the almost-completed Nu River Liuku dam, China's government demonstrates that even though powerful corporate and provincial interests may seek to create a *fait accompli*, the central government can represent citizen interests and can enforce environmental compliance on power plant projects.

B. Nansha Refinery

In China's south, government action informed by citizen *xinfang* and government champions influenced development of another power project—Guangzhou's Nansha refinery.

1. History and Interests

Sinopec and Kuwait National Petroleum Company agreed in 2007 to construct the Nansha oil refinery in the Pearl River Delta between Hong Kong (*xianggang*) and Guangzhou in order to ease "the tension of Guangdong's petroleum supply [and promote] . . . energy security and . . . social stability."²⁵⁴ The refinery was estimated to cost around \$5 billion to complete, making the project China's largest joint venture.²⁵⁵ The project would process 15 million metric tons of crude oil a year and

251. Shi Jiangtao, *supra* note 21.

252. MERTHA, *supra* note 7, at 121.

253. See Bezlova, *supra* note 240 (describing how Beijing halted work on the Liuku dam in May 2009).

254. Wang Yang, Huang Huahua Meets Nansha Refinery Project Representatives, Guangdong Foreign Aff., (June 29, 2008), <http://www.gdfao.gov.cn/english/news/guangdong/200901060008.htm>. (Guangdong is the province in which the city of Guangzhou is located.)

255. Jonathan Watts, *Hong Kong Calls for Transparency on Eco Impact of Planned Oil Refinery*, GUARDIAN, Mar. 20, 2009, available at <http://www.guardian.co.uk/environment/2009/mar/20/guangdong-nansha-oil-refinery-hong-kong>.

produce 800,000 tons of ethylene.²⁵⁶ Although oil is almost negligible in China's non-automotive energy mix, it plays a part in southeast China, where the Nansha refinery is located: "Oil-fired power plants account for up to 15 percent of the power generation capacity in parts of southeastern China."²⁵⁷

Following the project's approval by the NDRC in 2007, residents inside eight square kilometers of land were removed to make room for the project.²⁵⁸ Each villager was given 40,000 yuan in compensation for their lost farmland. "They also receive about 700 yuan each on a quarterly basis, in the form of bank interest on the 63 million yuan compensation the 830 villagers were supposed to be paid for the farmland itself."²⁵⁹ However, the permitting process was not complete after the NDRC's approval. The project needed to complete an EIA followed by a half-month public comment period.²⁶⁰

An EIA was made for the project, but there was concern that the EIA would not be made public.²⁶¹ Groups from Hong Kong lawmakers to bloggers to Greenpeace called for the EIA to be made public.²⁶² The Government pushed back, telling media not to run "comprehensive coverage" of the EIA, but that they would in due time make the report public.²⁶³ Although some citizens hoped the EIA would come out in March, the refinery was ultimately relocated, and as late as August the EIA for the new location had not yet begun.²⁶⁴

256. Chloe Lai, *Key Report on Nansha Refinery Under Wraps*, S. CHINA MORNING POST, Mar. 20, 2009, at 6.

257. Keith Bradsher, *Pinched by Price Controls, Power Plants in China Scale Back*, N.Y. TIMES, Jan. 24, 2008, at C4, available at <http://www.nytimes.com/2008/01/24/business/world-business/24power.html>. A discussion of citizen action against an oil refinery is relevant to a discussion regarding power project permitting since an oil refinery raises similar environmental impact concerns.

258. Zeng, *supra* note 191.

259. Lau & Zhai, *supra* note 43.

260. See Lai, *supra* note 256.

261. During the Nu river project in August 2005, there was even greater concern that an EIA would not be made public. See MERTHA *supra* note 7, at 139. It is not always certain that the details of the EIA are going to be made public, and although some representatives of the public were permitted to briefly glimpse at the report, the "material was whisked away a soon as [a] panel [at a conference] ended." *Id.* at 140; see also Allison Moore & Adria Warren, *Legal Advocacy in Environmental Public Participation in China: Raising the Stakes and Strengthening Stakeholders*, 8 CHINA ENV'T SERIES 3, 14 (2006), available at http://www.wilsoncenter.org/topics/pubs/CEF_Feature.1.pdf (describing how [a]lthough Article 4 of the EIA Law requires EIA reports to be made public . . . the provision is not self-enforcing in practice. Environmental authorities . . . still fail to make EIA reports publicly available . . . even when explicitly demanded.").

262. Watts, *supra* note 255.

263. Lai, *supra* note 256.

264. See Judith Wang, *Sinopec-KPC to Move Nansha JV Complex to Zhanjiang*, ICIS NEWS, May 11, 2009, <http://www.icis.com/Articles/2009/05/11/9214833/sinopec-kpc-to-move-nansha-jv-complex-to-zhanjiang.html> (discussing that the EIA was still pending final approval in May 2009); see also Mimi Lau, *Controversial Oil Refinery Relocated to Zhanjiang*, S. CHINA MORNING POST, Aug. 12, 2009, at 4 ("A Sinopec spokesman said work on a feasibility report on

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Calls for the EIA to be released were particularly strong in Guangzhou because the city is relatively open and progressive in public reporting of EIAs and in considering multiple factors in permitting processes.²⁶⁵ Guangzhou residents are also more active in expressing concern regarding their environment than are residents in other Chinese cities.²⁶⁶

Ultimately, disputes surrounding the Nansha Refinery situation were resolved through general administrative processes that were informed by awareness-raising ADR.

2. Awareness-Raising and the Refinery

The public push-back against the Nansha refinery focused on awareness-raising in order to be heard by the government. There was institutionalized lobbying on the part of 14 Guangdong provincial People's Congress deputies,²⁶⁷ but there were no publicized mass protests or marches.

Some officials in the provincial government pushed back against citizens who opposed the refinery. Media were told not to report on the refinery controversy.²⁶⁸ One prohibition—entitled “Environmental impact report for the Guangdong Nansha integrated oil refinery and petrochemical project”—sent to websites warned: “All internet sites are prohibited from reproducing, commenting on, or discussing anything relating to the content of this report. Nor should it be discussed on blogs. Furthermore, blogs should set up keyword filtering to make sure the topic isn't discussed. All websites are requested to strictly implement these rules.”²⁶⁹

3. Guangzhou's Special Champions

When a decision was announced to move the refinery, the parties whose concerns were listed as encouraging the move were primarily government champions rather than citizens. Lobbying by representatives in Pearl River Delta cities and “new Guangdong Communist Party Secretary Wang Yang's departures from his predecessor's approach to

the Donghai location [in Zhanjiang], including an environmental impact evaluation, began [in mid-August] and would take 18 months to complete.”)

265. Carlos Wing-Hung Lo & Sai Wing Leung, *supra* note 3, at 680.

266. “In comparison with findings from a national survey, more citizens were aware of environmental problems in Guangzhou than in the whole country.” *Id.* at 685 n.27.

267. Lai, *supra* note 256.

268. *Id.*

269. Xiao Qiang, *Notice Banning Discussion of Guangdong Nansha Oil Project Environmental Impact Report*, CHINA DIGITAL TIMES, Mar. 18, 2009, <http://chinadigitaltimes.net/2009/03/notice-banning-discussion-of-guangdong-nansha-oil-project-environmental-impact-report/>.

development,” were likely vital to reconsideration of the refinery’s location.²⁷⁰

Guangzhou public officials may have opposed development in a more vocal and effective fashion than Nu River public officials because of their areas’ relative income levels. In the Nu River region, peasants made an average of 860 yuan per year;²⁷¹ Hong Kong and Macau possess a large number of rich and relatively sophisticated urban-dwellers who have attained a higher standard of living. The refinery was eventually moved in the wake of the EIA statement to a place that only has a yearly GDP of “17,973 yuan (HK \$20,400), nearly 20,000 yuan lower than Guangdong’s average.”²⁷² The objection of relatively well-off and sophisticated citizens to the refinery’s location could have also played a part in the relocation, since richer citizens could have greater political power than poorer people in a developing region.

Guangzhou also may have succeeded in having its concerns heard because of its experienced EPB officials. The city has received awards for environmental management,²⁷³ and its citizens are relatively well-informed regarding environmental protection.²⁷⁴

Perhaps as a result of public cries for the EIA report’s release, the report was issued in the same year it was made. In contrast, the Nu River project bore no public report even four years after Wen Jiabao’s initial hold-up of the project.²⁷⁵ The political power of Guangzhou’s local representatives, when coupled with Hong Kong residents’ affluence and the important central policy of lowering pollution in the Pearl River Delta (“PRD”) region, possibly provided enough pressure to influence decisions to relocate the refinery.²⁷⁶

4. Concluding Remarks on the Nansha Refinery

Ultimately, the Nansha refinery and petrochemical plant was moved away from the Guangzhou, Hong Kong, Macao PRD region in the wake of public opposition. The plant was relocated further west along the coast to Zhanjiang.²⁷⁷

270. Lai & Shi Jiangtao, *supra* note 42.

271. Shi Jiangtao, *supra* note 21.

272. Ivan Zhai, *Guangdong to Help its Backward West Prosper: Region is Earmarked for Heavy Industries*, S. CHINA MORNING POST, Sept. 30, 2009, at 5.

273. Carlos Wing-Hung Lo & Sai Wing Leung, *supra* note 3, at 680.

274. “In comparison with findings from a national survey, more citizens were aware of environmental problems in Guangzhou than in the whole country.” *Id.* at 685 n.27.

275. See Schearf, *supra* note 65 (discussing the first two years of delayed information release); Zao Noam, *Damming Salween Needs Proper Study First*, BANGKOK POST, Mar 14, 2008, available at <http://www.internationalrivers.org/en/node/2958>.

276. Independently of the EIA assessment, a successor Party Secretary and the State Council created “guidelines for the Pearl River Delta’s development up to 2020,” which stressed less development in the eastern region of the PRD. Lai & Shi Jiangtao, *supra* note 42.

277. Zhai, *supra* note 272.

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The Nansha Refinery case demonstrates that power project permitting can be influenced and local concerns can be addressed when local officials express distaste for nationally approved policies. Local officials may have considerable power even when state-owned corporations such as Sinopec are involved in the siting process. However, the Nansha Refinery situation could be an isolated case where politics influenced the EIA assessment and relocation. In many cases of power project permitting, information is not released to the public in a timely fashion that permits local officials to make informed complaints to influence EIA assessments and disrupt planned development.²⁷⁸

V. EVALUATING CHINA'S ADR PRACTICES WITH RESPECT TO POWER PROJECTS

The Nansha refinery and Nu River hydroelectric dam case studies show that in China, even when citizens lack a direct administrative channel to affect power project permitting procedures, their opinions are still heard. However, the Chinese practice of power-plant-permitting-ADR through *xinfang* and government “champions” only bears similarity to mainstream ADR in result rather than to mainstream ADR’s form.²⁷⁹

The Chinese experience in resolving power project disputes differs from mainstream ADR in that China’s processes take place after-the-fact. China’s processes do not result in a round-table dialogue of all stakeholders. Despite marginalizing direct citizen involvement in dispute resolution, China’s power project developments are sometimes informed by input from citizen stakeholders.

China’s system allows citizens to express views on power project placement, but China’s top-down decision-making creates pressures. Decisions are sometimes put into motion before lower-level actors provide significant feedback. To be heard, citizens may resort to *xinfang* and administrative remedies, and then turn to awareness-raising or violent protests to hold-up a project. A lack of full dialogue between all stakeholders before construction begins can be costly, especially if constructed dams never open as a result of later-raised citizen concerns.

An ex post policy that only reviews projects after construction begins and removes permitting disputes from private litigation has dissatisfied

278. Carlos Wing-Hung Lo & Sai Wing Leung, *supra* note 3, at 679; see also Alex Wang, *China Environmental News: More Open Information, Stronger Rights Protection*, NRDC SWITCHBOARD, Sept. 13, 2009, http://switchboard.nrdc.org/blogs/awang/china_environmental_news_more.html (reposting an Aug. 17, 2009 article by Xu Qi of the MEP, who notes that because information was released to the public regarding the siting of the Nansha Refinery before the EIA was done, other stakeholders could play a role in the EIA and project planning and development process).

279. See *supra* Part III(B)(3)-(4) (describing how *xinfang* and awareness-raising relate to ADR).

citizens who are shut out from early decision-making processes. By removing citizens from direct involvement and practicing a non-direct-participatory type of ADR, China successfully developed its coal industry and many new renewable electricity sources such as hydroelectric dams.²⁸⁰

Although citizens are largely shut-out from direct influence on power project siting disputes, their interests are still represented. Based on information gathered from *xinfang* and awareness-raising, champions in organizations such as the MEP, local EPBs, and *xinfang* bureaus may take up citizens' cases. These champions appeal to higher organs and fight for influence against provincial governments, the NDRC, and other pro-development ministries.²⁸¹

It remains to be seen whether the trailblazing path of provinces like Guangdong in establishing "notice and comment" periods will eventually lead to an expansion of ADR's role.²⁸² *Xinfang* and other dispute resolution tools already ameliorate the impact of planned decisions, but citizen input into champion ministries may evolve to a before-the-fact process to reflect more participatory ADR techniques such as facilitation, negotiated rulemaking,²⁸³ or policy dialogues.²⁸⁴ Despite evidence of some reform, it is uncertain whether China will converge toward participatory ADR or if China will maintain its current separation of citizens and policy-decisions.

For the time being, power development seems to be pushing ahead despite increased citizen input, with few projects cancelled as a result of *xinfang* or government champion interventions, while China's government races to confront a possible doubling or tripling of power requirements over the next 20 years.²⁸⁵

280. From 2005 to 2008, China added over 330 gigawatts of energy construction. See Bradsher, *supra* note 1.

281. See Lubbers, *supra* note 57. See generally MERTHA, *supra* note 7, at 38–57 (describing pro- and anti-dam forces).

282. *Id.*

283. In negotiated rulemaking or "reg-neg," regulatory agencies "design environmental regulations by first negotiating with interested stakeholders." Emerson et al., *supra* note 71, at 12.

284. *Id.* at 11–13 (explaining several forms of environmental conflict resolution).

285. See Ligang Song & Yu Sheng, *China's Demand for Energy: A Global Perspective*, in CHINA: LINKING MARKETS FOR GROWTH 225, 242–43 (Ross Garnaut & Ligang Song eds., 2007) (discussing how once China reaches \$5,000 GDP per capita, over a 10 to 15 year period, energy consumption will double or triple).