

# Environmental Public Interest Litigation in China: A Critical Examination

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## Abstract:

Environmental Public Interest Litigation (EPIL) by non-governmental organizations (NGOs) emerged in China within the last decade amidst the growing focus on environmental issues and the increasing political need to bring greater public participation to the area. This article examines the current practice of EPIL by NGOs in order to understand potential flaws and deficiencies of NGO participation in this relatively new field of environmental litigation. The article sets out by exploring EPIL as a legal pathway for the public to become involved in China's environmental governance. It then analyzes the legal provision of environmental litigation in China before critically examining several instances of EPIL initiated by NGOs between 2015 and 2019. This article finds that NGOs show weaknesses in their current EPIL practice, including in case selection and litigation risk assessment, but are willing to test and potentially expand the scope of EPIL into new areas of environmental protection such as noise pollution and renewable energy. It concludes that these weaknesses and strengths of NGO involvement in EPIL reflect the constantly evolving landscape of environmental governance and environmental litigation in China.

**Keywords:** public participation, public interest litigation, environmental litigation, Chinese courts, pollution, wildlife protection

## 1. INTRODUCTION

Environmental public interest litigation (EPIL) by non-governmental organizations

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(NGOs)<sup>1</sup> emerged in China in the last decade, amidst the growing focus on environmental issues and the increasing political need for greater public participation in the area. EPIL represents the standard avenue for the public to resolve environmental disputes, supervise environmental quality and enforce government policy.<sup>2</sup> Through this approach, the public is included in environmental governance to address environmental problems. By accessing environmental information, often as a precursor to environmental litigation, members of the public can defend their individual and collective self-interests, and are able to supervise government policy process as well as industrial polluters' performance. Similarly, NGOs often resort to litigation, as a strategy to affect government policies and actions in a context where opportunities of resistance are otherwise limited.<sup>3</sup>

Since 2015, a number of environmental NGOs have worked to bring dozens of EPIL cases each year and these NGOs have become an integral part of the ongoing construction of China's environmental governance. As EPIL appears to have empowered NGOs to exercise some supervisory functions on issues concerning public interests,<sup>4</sup> there have been strong voices, from China and abroad, advocating widening

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<sup>1</sup> In this context, Chinese law formally uses the term 'social organization' instead of 'non-governmental organization (NGO)'. For the sake of its more prevalent usage in English, this article prefers the label NGO, except when directly referring to the text or content of Chinese law.

<sup>2</sup> R. Stern, 'From Dispute to Decision: Suing Polluters in China' (2011) 206 *China Quarterly*, pp. 294-312, at 295; S.Y. Tang, C.P. Tang & C. Lo, 'Public Participation and Environmental Impact Assessment in Mainland China and Taiwan: Political Foundations of Environmental Management' (2005) 41(1) *Journal of Development Studies*, pp. 1-32, at 6-15.

<sup>3</sup> X. Ren & L. Liu, 'Building Consensus: Support Structure and the Frames of Environmental Legal Mobilization in China' (2019) 29(121) *Journal of Contemporary China*, pp. 109-24, at 15.

<sup>4</sup> Q. Gao, 'Public Interest Litigation in China: Panacea or Placebo for Environmental Protection' (2018) 16(4) *China: An International Journal*, pp. 47-75, at 53.

access of EPIL to individual citizens.<sup>5</sup> From a comparative perspective, environmental litigation is an essential norm in environmental legislation, representing increasing demand from citizens for decentralized environmental governance.<sup>6</sup> There is valuable experience in environmental governance to be learned from jurisdictions with more established practice, including, for instance, the United States, the European Union<sup>7</sup> as well as India<sup>8</sup> and Brazil.<sup>9</sup> Such practices represent how citizens, by adopting formal means, become empowered to influence environmental policies and improve environmental conditions.<sup>10</sup> They have also raised hopes that ‘citizen suits’ would play a stronger role in China’s environmental governance.<sup>11</sup> Nevertheless, it is important to examine the effects of environmental litigation by contextualizing the social and political conditions of citizen suits. Compared to environmental litigation in developed countries that have seen success to a greater or lesser extent, such practices within emerging powers still raise questions. While most literature focuses on assessing legal institutions that pave way for transparency in policy processes,<sup>12</sup> few have focused on conditions upon which civil society efficiently serve public interests in environmental

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<sup>5</sup> T. Zhai & Y.C. Chang, ‘Standing of Environmental Public-Interest Litigants in China: Evolution, Obstacles and Solutions’ (2018) 30(3) *Journal of Environmental Law*, pp. 369-97, at 389.

<sup>6</sup> M. Dumas, ‘Taking the law to court: citizen suits and the legislative process, *American Journal of Political Science*, (2017), 61, 4: 944-957, at 944.

<sup>7</sup> L. Krämer, ‘Public Interest Litigation in Environmental Matters before European Courts’ (1996) 8 (1) *Journal of Environmental Law*, pp. 1-18, at 1.

<sup>8</sup> M. Faure & A. V. Raja, ‘Effectiveness of Environmental Public Interest Litigation in India: Determining the Key Variables’ (2010) 21 (2) *Fordham Environmental Law Review*, pp. 239-94, at 293.

<sup>9</sup> Brinks, D. M. & Gauri, V. (2010). *Courting social justice: judicial enforcement of social and economic rights in the developing world*, New York: Cambridge University Press, at 944.

<sup>10</sup> Faure & Raja, n. 8 above, at 288-291.

<sup>11</sup> 林燕梅、成功 Y. Lin & G. Cheng, ‘美国公益诉讼制度下水污染案例分析’ (2011) 6(1) *The Environmental Rule of Law*, pp. 90-103, at 100. <A water pollution case study in the public interest litigation system of the USA > (in Chinese)

<sup>12</sup> Dumas, n. 6 above, at 945.

litigation practices.<sup>13</sup> Take the example of India's water management. Despite the fact that environmental activists have proactively adopted environmental litigation as an approach to advocate their causes,<sup>14</sup> heated debates have occurred questioning if such legal practices have weakened central government's authority and thus have resulted in questionable environmental decisions.<sup>15</sup>

Questions can be raised on how free NGOs are to participate in environmental enforcement through litigation in China. NGO involvement in legal cases requires them to be financially sustainable. However, as NGOs are affected by strict government registration and fundraising regulations,<sup>16</sup> they are generically ill-prepared to become involved in EPIL. Furthermore, NGOs are constrained by the principles and practice of the Chinese judicial system, where local courts, explicitly under the leadership of the Communist Party, are largely embedded within, and often dependent on, local governments.<sup>17</sup> When participating in EPIL cases, NGOs have to be very careful about the battlegrounds they choose. Some argue that NGOs are supposed to play a supportive role in environmental regulation, rather than a confrontational one.<sup>18</sup>

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<sup>13</sup> S. Prasai & M. D. Surie, 'Water and climate data in the Ganges basin: Assessing access to information regimes and implications for cooperation on transboundary rivers' (2015) *Water Alternatives* 8(2), pp. 20-35, at 24-29.

<sup>14</sup> *Ibid*, at 24.

<sup>15</sup> M. Kumar & C. Pandit, 'India's water management debate: is the 'civil society' making it everlasting?' (2018) *International Journal of Water Resources Development*, 34(1), pp. 28-41, at 38; C. Pandit, 'Environmental over enthusiasm', *International Journal of Water Resources Development*, 30(1), pp. 110-120, at 112-13, 119.

<sup>16</sup> L. Xie, *Environmental Activism in China* (Routledge, 2009, at 3-19); J. Hsu, C. Hsu & R. Hasmath, 'NGO Strategies in an Authoritarian Context, and Their Implications for Citizenship: The Case of the People's Republic of China' (2017) 28 *Voluntas*, pp. 1157-79, at 25.

<sup>17</sup> Ren & Liu, n. 3 above, at 5; Stern, n. 2 above, at 307.

<sup>18</sup> Gao, n. 4 above, at 54.

Although an increasing body of scholarship has developed which examines the features and policy construction of EPIL in China,<sup>19</sup> few have questioned NGOs' own practice in the field of EPIL by analysing the details of their behaviour, approach or risk perception when participating in lawful environmental enforcement. This article assesses the current practice of EPIL by NGOs, and exposes a number of flaws and deficiencies in their participation in this relatively new field of environmental litigation.

The article is structured as follows. Section 2 explores the government's intentions in promoting public involvement in environmental governance. Section 3 then sets out the legal framework of three types of environmental enforcement: EPIL by NGOs; EPIL by the procuratorate; and ecological environmental damage compensation (EEDC) lawsuits by local governments. Section 4 of this article analyses the data relating to EPIL cases available between 2015 and 2018, and goes on to evaluate EPIL by NGOs, focusing in particular on its role after the introduction of EPIL by the procuratorate and EEDC cases. Section 5 investigates the current practice of EPIL by NGOs through an examination of five EPIL cases. This critical examination exposes certain flaws, deficiencies and causes for concern or criticism regarding NGOs' current practices. Section 6 concludes by evaluating the current role of EPIL by NGOs and related issues within the constantly evolving landscape of environmental governance and litigation in China.

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<sup>19</sup> M. Cao & F. Wang, 'Environmental Public Interest Litigation in China' (2011) 19(2) *Asia Pacific Law Review*, pp. 217-35, at 225-27; R. Zhang & B. Mayer, 'Public Interest Environmental Litigation in China' (2017) 1(2) *Chinese Journal of Environmental Law*, pp. 202-28, at 211-13.

## 2. PUBLIC PARTICIPATION AND ENVIRONMENTAL PUBLIC INTEREST LITIGATION BY NGOs

China has witnessed dramatic changes in its environmental governance in the past three decades. Along with signing the Rio Declaration<sup>20</sup> and promoting the principle of sustainable development, the Chinese government has promulgated China's Agenda 21,<sup>21</sup> which recognizes these core principles of the Rio Declaration.<sup>22</sup> In addition to policy learning through China's increasing involvement in global environmental governance, the Chinese government has initiated policy reforms to promote governability with the involvement of multiple actors, enhanced information disclosure and transparency.<sup>23</sup> Although state agencies remain the most important actors and environmental regulation continues to rely strongly on command-and-control, they are no longer the sole actors and approaches available.<sup>24</sup> A market-based regulatory approach has also been introduced, which introduces economic incentives for market actors.<sup>25</sup> The public is also increasingly involved in the policy process, as discussed

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<sup>20</sup> General Assembly of the United Nations, 'Report of the United Nations Conference on Environment and Development' (A/CONF. 151/26 Vol. I), 12 Aug. 1992, Annex I.

<sup>21</sup> State Council of the People's Republic of China, *China's Agenda 21: White paper on China's population, environment and development in the 21st century* (1994). An abstract in English is available at <https://pubmed.ncbi.nlm.nih.gov/12288811/>.

<sup>22</sup> 郭武 W. Guo, '论中国第二代环境法的形成和发展趋势' (2017) (1) *ZUEL Law Journal* pp. 85-95, at 90 < On the Formation and Development Trend of China's Second Generation Environmental Law > (in Chinese).

<sup>23</sup> G. He, Y. Lu & A. Mol, 'Changes and Challenges: China's Environmental Management in Transition' (2012) 23(3) *Environmental Development*, pp. 25-38, at 33-34.

<sup>24</sup> L. Zhang, P.J. Mol & S. Yang, 'Environmental Information Disclosure in China: in the Era of Informatization and Big Data' (2017) 12(1) *Frontiers of Law in China*, pp. 57-75, at 59.

<sup>25</sup> B. Zhang et al., 'Policy Interactions and Underperforming Emission Trading Markets in China' (2013) 47(13) *Environmental Science & Technology*, pp. 7077-84, at 7077-78.

further below. Nevertheless, the government has been slow to implement policy reforms and substantive legal change has been slow to materialize.

## **2.1. Public Participation in China**

The Chinese government has offered various justifications for engaging the public through policy change. Generally speaking, to a degree the practices of enhanced public participation resemble practices of decentralized governance as a global trend which features the involvement of multiple non-state actors. Indeed, the central government has shown a preference for promoting public participation for the benefits it may bring in better policy implementation. Faced with serious environmental challenges, policymakers believe that effective public engagement is beneficial because it may facilitate public acceptance of policy decisions. It also allows inputs from experts, contributes to improved compliance and supports policy implementation.<sup>26</sup>

Chinese authorities also had to react to a growing demand for deliberative democracy, which resonates in environmental activism. In the face of environmental activism and organized collective action, authorities are careful to try and maintain social control and control triggers to social instability. Challenges to China's political authority from environmental activism have developed rapidly. In the first quarter of 2017 alone, the Ministry of Ecology and Environment (MEE) received 88,000 complaints through citizens' hotline, more than a half of these cases were on air

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<sup>26</sup> J. Newig & O. Fritsch, 'Environmental Governance: Participatory, Multi-Level – and Effective?' (2009) 19(3) *Environmental Policy and Governance*, pp. 197-214, at 198.

pollution and the rest were on pollution of noise, water and solid waste.<sup>27</sup>

Additionally, there is a growing public demand for transparency and participation in environmental policy making.<sup>28</sup> Unhappy about environmental crises such as air and water pollution, Chinese citizens, mostly from middle-class and urban backgrounds, increasingly voice their dissatisfaction. Such activism takes diverse forms including membership of environmental NGOs (both legal and illegal) and participation in social movements, court cases, and protests, especially in relation to environmental issues that might have an immediate impact on the protesters' daily life.<sup>29</sup> These developments have persuaded the government to accommodate public participation, at least to some extent,<sup>30</sup> to incorporate the public in policy processes.<sup>31</sup> The Chinese government sees an instrumental use for public engagement, namely, strengthening party legitimacy and enhancing its political control over the regime.<sup>32</sup>

## 2.2. China's Environmental Laws and Public Participation

The Chinese central government has effected substantive reforms in its environmental

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<sup>27</sup> 'Air pollution more than half of environmental complaints in China', *China Daily* (4 May 2017), available at [http://www.chinadaily.com.cn/china/2017-05/04/content\\_29208110.htm](http://www.chinadaily.com.cn/china/2017-05/04/content_29208110.htm).

<sup>28</sup> A. Wang, 'Explaining Environmental Information Disclosure in China' (2018) 44(4) *Ecology Law Quarterly*, pp. 865-924, at 875-77.

<sup>29</sup> Ren & Liu, n. 3 above, at 10.

<sup>30</sup> Wang, n. 28 Above, at 880.

<sup>31</sup> B. He & M. Warren, 'Authoritarian Deliberation: The Deliberative Turn in Chinese Political Development' (2011) 9(2) *Perspectives on Politics*, pp. 269-89, at 279.

<sup>32</sup> O. Almen, 'Participatory Innovations Under Authoritarianism: Accountability and Responsiveness in Hangzhou's Social Assessment of Government Performance' (2018) 27(110) *Journal of Contemporary China*, pp. 165-79, at 167-178; B.J. Dickson, et al., 'Public Goods and Regime Support in Urban China' (2016) 228 *China Quarterly*, pp. 859-80, at 860; X. Zhu & K. Wu, 'Public Participation in China's Environmental Lawmaking: in Pursuit of Better Environmental Democracy' (2017) 29(3) *Journal of Environmental Law*, pp. 389-416, at 416.



legal system to encourage public participation in environmental governance.<sup>33</sup> Most notably, the Environmental Protection Law of the People's Republic of China (EPL hereinafter) underwent a major revision and expansion in 2014.<sup>34</sup> It declares that individual citizens are 'entitled' to environmental information.<sup>35</sup> Other documents such as the Law of the People's Republic of China on Appraising of Environment Impacts<sup>36</sup> and Regulation on Environmental Impact Assessment of Planning<sup>37</sup> require the public to be engaged in public consultations, while 'empowering' citizens to supervise environmental quality and 'enforce' government policy by accessing such information.

Some scholars believe that these changes improve the interactions between the people and the legislature and facilitate the incorporation of public opinions into law.<sup>38</sup> For instance, even before the 2014 revision of the EPL, NGOs and scientists were invited to put forward their views via open discussion in the public sphere regarding the proposed amendments to the EPL, marking the first time that state authorities openly debated with the public the revision of a national law.<sup>39</sup> Further, the revised EPL requires that full environmental impact appraisal (EIA hereinafter) reports (instead of only a summary, as used to be the practice) must be made available to the public and that these reports must include a chapter on how the public participated in the EIA

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<sup>33</sup> Guo, n. 22 above, p. 93.

<sup>34</sup> Order of the President of the People's Republic of China, No. 6, 24 April 2014.

<sup>35</sup> Art. 53 EPL.

<sup>36</sup> First promulgated in 2002 and revised in 2016. This law is the foundation of the Regulation on Environmental Impact Assessment of Planning.

<sup>37</sup> Order of the State Council, No. 559, 17 August 2009.

<sup>38</sup> Zhu & Wu, n. 32 above, at 390.

<sup>39</sup> L. Zhang, G. He & A. Mol, 'China's New Environmental Protection Law: A Game Changer?' (2015) 13 *Environmental Development*, pp. 1-3, at 2; L. Zhang, et al., 'Power Politics in the Revision of China's Environmental Protection Law (2013) 22(6) *Environmental Politics*, pp. 1029-35, at 1032.

process.<sup>40</sup> This law also requires the government to adopt various forms of engagement when incorporating the public in policy making.<sup>41</sup> Public consultations have also been adopted in budget deliberations,<sup>42</sup> whereby participants have a better chance of seeing their opinions incorporated in the policy process.

Some commentators suggest that the decision to grant NGOs access to EPIL is an experiment by the central government,<sup>43</sup> especially targeted at localities suffering from weak enforcement or non-enforcement of environmental regulations.<sup>44</sup> Leaders at local level may implement environmental policy strategically,<sup>45</sup> and local governments may favour industries from the same region, including polluters, who contribute to local revenue. From this vantage point, the EPIL system challenges local governments' autonomy in environmental governance. Public mistrust may exist at the grassroots level if local governments have restricted the activities of environmental NGOs,

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<sup>40</sup> Art. 56 EPL.

<sup>41</sup> M. L. Tseng, et al., 'Sustainable Consumption and Production for Asia: Sustainability Through Green Design and Practice' (2013) 40 *Journal of Cleaner Production*, pp. 1-5, at 3.

<sup>42</sup> X. Yan & X. Ge 'Participatory Policy Making Under Authoritarianism: The Pathways of Local Budgetary Reform in the People's Republic of China' (2015) 44(2) *Policy and Politics*, pp. 215-34, at 218.

<sup>43</sup> J. Liu, 'China's Procuratorate in Environmental Civil Enforcement: Practice, Challenges and Implications for China's Environmental Governance' (2011) 13 *Vermont Journal of Environmental Law*, pp. 41-66, at 64; J. Liu, 'Environmental Justice with Chinese Characteristics: Recent Developments in Using Environmental Public Interest Litigation to Strengthen Access to Environmental Justice' (2015) 7(2) *Florida Agricultural & Mechanical University Law Review*, pp. 229-60, at 260.

<sup>44</sup> A. Wang & J. Gao, 'Environmental Courts and the Development of Environmental Public Interest Litigation in China' (2010) 3 (1) *Journal of Court Innovation*, pp. 37-50, at 42-44; Ren & Liu, n. 3 above, at 6.

<sup>45</sup> X. Li, et al., 'Authoritarian Environmentalism and Environmental Policy Implementation in China' (2019) 145 *Resources, Conservation and Recycling*, pp. 86-93, at 87; X. Zhu, et al., 'Regional Restrictions on Environmental Impact Assessment Approval in China: The Legitimacy of Environmental Authoritarianism' (2015) 92 *Journal of Cleaner Production*, pp. 100-8, at 105.

particularly when such NGOs are perceived to pose a threat to the interests of the local government. Informal communication arrangements between the government and non-state actors including NGOs,<sup>46</sup> experts and technocrats<sup>47</sup> are an alternative means whereby the public is involved in policy process.

### 3. THE LEGAL FRAMEWORK OF ENVIRONMENTAL LITIGATION

There are three categories of environmental litigation in Chinese law: civil EPIL by NGOs; civil and administrative EPIL by the procuratorate; and EEDC (see Table 1). The legal framework for these categories is outlined in the three sections below. There are, understandably, some overlaps, collaboration and even conflicts in this new area of law. Additionally, but beyond the scope of this article, parties who directly suffered from acts of pollution or environmental damage have a right to sue the perpetrators under the general law of tort.

Table 1 Different Types of Environmental Litigation

	Civil EPIL by NGOs	Civil EPIL by the procuratorate	Administrative EPIL by the procuratorate	EEDC Litigation
Plaintiff	environmental	the procuratorate	the procuratorate	local

<sup>46</sup> K. Shin, 'Neither Centre Nor Local: Community-Driven Experimentalist Governance in China (2017) 231 *China Quarterly* pp. 607-33, at 612.

<sup>47</sup> Tang et al., n. 2 above, at 32.

	NGO			government
Defendant	polluter	polluter	government department	polluter
Main cause	environmental damage	environmental damage	illegal exercise of power, or inaction	environmental damage
Governing law	Environmental Protection Law (2014 amendments)	Civil Procedural Law (2017 amendments)	Administrative Procedural Law (2017 amendments)	NONE
Other main rules	Judicial Interpretation by the Supreme People's Court (January 2015)	Joint Announcement by the Supreme People's Court and the Supreme People's Procuratorate (March 2018)	Joint Announcement by the Supreme People's Court and the Supreme People's Procuratorate (March 2018)	Judicial Interpretation by the Supreme People's Court (June 2019)
Active since	January 2015	July 2015 (pilot), July 2017 (national)	July 2015 (pilot), July 2017 (national)	December 2015 (pilot), January 2018 (national)

### **3.1. Civil EPIL by NGOs**

The 2012 amendments to the Civil Procedural Law of the People’s Republic of China<sup>48</sup> first introduced the concept of public interest litigation to national law, stating that authorities and ‘relevant organizations’ as specified by law can litigate against activities that harm the social public interest, such as pollution of the environment.<sup>49</sup> The specification of ‘relevant organizations’ for environmental litigation purposes was introduced in April 2014 in the aforementioned amendments to the EPL.<sup>50</sup> To be eligible, a ‘social organization’, or environmental NGO, must be registered with the civil affairs authorities at prefecture-level city or above, in accordance with law. Additionally, it may only litigate against activities causing environmental pollution or ecological damage if it has engaged in public interest activities for environmental protection for five years or more continuously without any law breaking.<sup>51</sup> In January 2015, the Supreme People’s Court issued its judicial interpretation, setting out the practical and procedural rules for ‘social organizations’ to bring environmental public interest litigations.<sup>52</sup>

### **3.2. Civil and Administrative EPIL by the Procuratorate**

In July 2015, the Standing Committee of the National People’s Congress authorized the

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<sup>48</sup> Order of the President of the PRC, No. 59, 31 Aug. 2012.

<sup>49</sup> Civil Procedural Law of the PRC, Art. 55.

<sup>50</sup> Order of the President of the People’s Republic of China, No. 6, 24 Apr. 2014.

<sup>51</sup> Art. 58 EPL.

<sup>52</sup> ‘Interpretation of the Supreme People’s Court on Several Issues concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations’, Interpretation 2015/No.1 of the Supreme People’s Court.

Supreme People's Procuratorate to start a two-year pilot run of procuratorial public interest litigation in 13 province-level regions. The decision was motivated by the need 'to strengthen the protection of national interest and social public interest'.<sup>53</sup> Both the Supreme People's Procuratorate and the Supreme People's Court then issued Implementation Measures for procuratorial public interest litigation in January<sup>54</sup> and February 2016,<sup>55</sup> respectively. These measures set out that the procuratorate of any level within the pilot regions could bring either civil public interest litigation or administrative public interest litigation.

Civil public interest litigation concerns activities that harm social public interest in areas such as environmental pollution, or food or medicine safety infringements affecting a large number of consumers. Administrative public interest litigation concerns the illegal exercise of power or inaction by governmental departments that harm national interest or social public interest, including in the realm of ecological and environmental protection.

Following the pilot run, the terms of the Implementation Measures were adopted after some minor tweaks in the form of amendments to the Civil Procedural Law of the PRC and the Administrative Procedural Law of the PRC respectively, in June 2017.<sup>56</sup> The involvement of procuratorates in public interest litigation was a monumental shift in policy and practice, as it quickly mobilized the vast resources available to more than

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<sup>53</sup> Available in Chinese on the National People's Congress website at: [http://www.npc.gov.cn/zgrdw/npc/xinwen/2015-07/01/content\\_1940395.htm](http://www.npc.gov.cn/zgrdw/npc/xinwen/2015-07/01/content_1940395.htm).

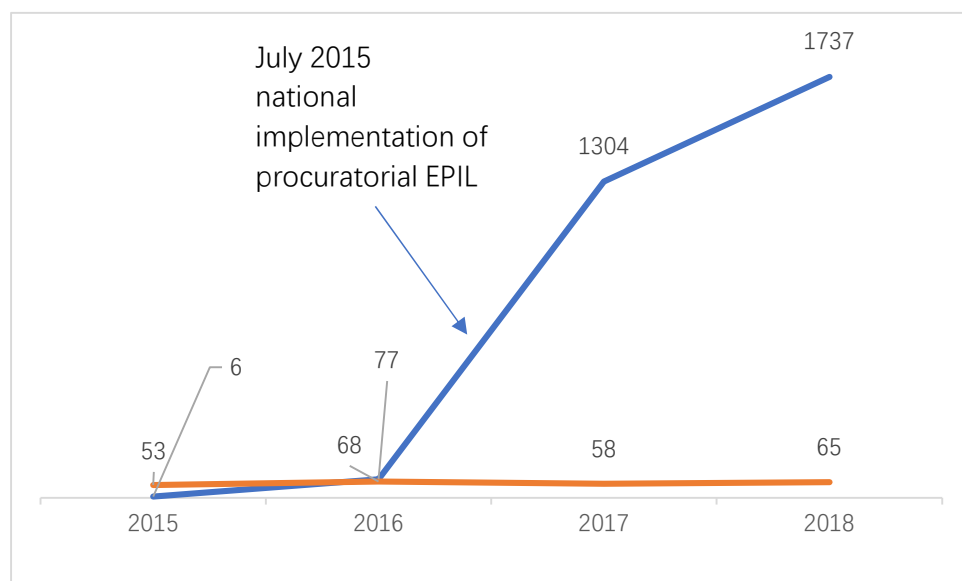
<sup>54</sup> Available in Chinese on the Supreme People's Procuratorate website at: [https://www.spp.gov.cn/zdgz/201601/t20160106\\_110439.shtml](https://www.spp.gov.cn/zdgz/201601/t20160106_110439.shtml).

<sup>55</sup> Available in Chinese on the Supreme People's Court website at: <http://www.court.gov.cn/zixun-xiangqing-37422.html>.

<sup>56</sup> Civil Procedural Law of the PRC, Art. 55(2); Administrative Procedural Law of the PRC, Art. 25(4).

3,600 procuratorates in China. Prosecutors outside the pilot regions wasted no time in taking advantage of this new power, and thousands of public interest litigations have been brought forward by the procuratorate (see Figure 1).

Figure 1 Number of EPIL cases by the procuratorate and NGOs



### 3.3. Ecological Environmental Damage Compensation Litigation

The latest entrant into the fray of environmental litigation comes in the form of EEDC. In December 2015, the General Office of the Communist Party of China Central Committee and the General Office of the State Council jointly issued a pilot reform plan for a new system of EEDC to be trialled in seven province-level regions between

2015 and 2017.<sup>57</sup> The system was consolidated and expanded for national implementation in December 2017 by a full Reform Plan from the same two General Offices, effective from 1 January 2018.<sup>58</sup> In June 2019, the Supreme People's Court issued 'Provisions of the Supreme People's Court on Trial of Ecological Environment Damage Compensation Cases (Trial)', marking the continuing development of the EEDC system.

EEDC cases can only be brought by provincial or prefectural level government and their designated department, but not by county level government.<sup>59</sup> After events such as sudden major environmental incidents, pollution, or damage to ecology, EEDC litigation is only available if the government cannot agree on damages or remedies after negotiation with the person or entity causing the damage, or if no negotiation could take place.<sup>60</sup>

Although the EEDC system has been in place for almost either two to four years in various parts of China, it has so far been based on policy documents and judicial interpretations, and is yet to be formally enshrined in any law or regulations. The Party and the State Council's pilot plan and full plan made no mention of any specific piece of legislation that would give effect to the new system. Given the weight of political authority that a joint plan from the Communist Party and the State Council carries, there is no reason to doubt that EEDC will become law, sooner or later.<sup>61</sup> In any event, the

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<sup>57</sup> Available in Chinese on the State Council website at: [http://www.gov.cn/zhengce/2015-12/03/content\\_5019585.htm](http://www.gov.cn/zhengce/2015-12/03/content_5019585.htm).

<sup>58</sup> 'Reform Plan of the Ecological Environmental Damage Compensation System', available in Chinese on the State Council website at: [http://www.gov.cn/zhengce/2017-12/17/content\\_5247952.htm](http://www.gov.cn/zhengce/2017-12/17/content_5247952.htm).

<sup>59</sup> Reform Plan, *ibid*, Part 4, Section 3.

<sup>60</sup> Interpretation 2019/No.8 of the Supreme People's Court, Art. 1.

<sup>61</sup> The Tort Liability Part of the Civil Code, enacted by the National People's Congress in May 2020 to



lack of formal legal basis has not prevented the court from reaching a decision in the majority of cases brought forward by local governments.<sup>62</sup>

#### 4. EXAMINATION OF EPIL CASES BY NGOS

From 2015 to 2018, between 53 and 68 EPIL cases were initiated by NGOs each year, with a slight increase in number overall. Although the procuratorate started almost a year later than NGOs in EPIL, the number of procuratorial EPIL cases very quickly dwarfed those put forward by NGOs, especially after the pilot run ended and national implementation started (see Table 2 and Figure 1). Nevertheless, a closer examination of the number indicates that the vast majority of procuratorial EPIL cases are either administrative EPIL or civil EPIL attached to criminal prosecution.<sup>63</sup> In 2018, out of the 1,737 procuratorial EPIL cases, 376 (21.7%) were administrative EPIL, while 1,248 (71.8%) were civil EPIL attached to criminal prosecution. Only 113 (6.5%) were civil EPIL unrelated to criminal proceedings.<sup>64</sup>

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commence on 1 January 2021, contains provisions on the liabilities from environmental pollution and ecological damage, but makes no specific reference to EEDC principles or procedures.

<sup>62</sup> Supreme People's Court website, available at: <http://www.court.gov.cn/zixun-xiangqing-162292.html>. Some cases were explicitly decided on the basis of the aforementioned 'reform plan'.

E.g., 山东省环境保护厅 v 山东金诚重油化工有限公司, (2017)鲁 01 民初 1467 号, 济南市中级人民法院 (21 Dec. 2018); 黄强勇 v 龙海市水利局, (2018)闽 06 民终 1109 号, 漳州市中级人民法院 (25 May 2018).

<sup>63</sup> A typical scenario for bringing civil EPIL attached to criminal prosecution will be where the procuratorate is already prosecuting for crimes of damaging the environment (commonly under Criminal Law of the PRC, Art.338) and establishes evidence of the environment damage in terms of its scale and the likely costs for remedial work. The criminal prosecution will then proceed to establish the criminal liability, while the civil EPIL trialed and decided by the same court in a single process will establish the civil liability.

<sup>64</sup> Supreme People's Court press conference on 2 Mar. 2019, full script in Chinese available at: <https://www.chinacourt.org/chat/fulltext/listId/51171/template/courtfbh20190302.shtml>.

Administrative EPIL is beyond the remit of NGOs. Although nothing in the law stops NGOs from bringing forward any civil EPIL, it is arguably inconvenient or inefficient for NGOs to start civil EPIL if the claim could be attached to an ongoing criminal proceeding by the procuratorate. In any case, NGOs still brought more than a third of the civil EPIL independent of criminal prosecution (65 out of 178, or 36.5%) in 2018. A much smaller number of EEDC cases were dealt with by the court around the same period, with a cumulative total of 20 by the end of 2018.<sup>65</sup>

Table 2 Number of EPIL cases by the procuratorate and NGOs<sup>66</sup>

	NGOs	The Procuratorate
2015	53 <sup>67</sup>	6 <sup>68</sup>
2016	68 <sup>67</sup>	77 <sup>69</sup>
2017	58 <sup>70</sup>	1,304 <sup>70</sup>
2018	65 <sup>70</sup>	1,737 <sup>70</sup>
Total	244	3,124

Within civil EPIL the procuratorate should play a complementary role to NGOs, at

<sup>65</sup> Supreme People's Court press conference on 2 March 2019, *ibid*.

<sup>66</sup> There are some relatively minor discrepancies among the statistics from different sources.

<sup>67</sup> 李楯 D. Li (ed), *环境公益诉讼观察报告* [Review of Public Interest Litigation in Environment Protection 2016] (Law Press China, 2017), at 1.

<sup>68</sup> *Ibid*, at 311 & 316.

<sup>69</sup> Supreme People's Court press conference on 7<sup>th</sup> March 2017, news report available in Chinese at <https://www.chinacourt.org/article/detail/2017/03/id/2573898.shtml>. Li, n. 67 above, at 311-325 would indicate that the number could be as high as 140.

<sup>70</sup> Supreme People's Court press conference on 2<sup>nd</sup> March 2019, n. 65 above.

least in theory. According to the Civil Procedural Law of the PRC, the procuratorate may bring public interest litigation only if no suitable governmental department or NGO could litigate, or if such department or organization would not litigate.<sup>71</sup> In practice, the procuratorate is much more active through the use of a pre-litigation procedure, which serves to identify and encourage qualifying NGOs to come forward and bring civil EPIL.<sup>72</sup> Moreover, the procuratorate can offer further assistance in civil EPIL brought by NGOs, such as helping with the collection of evidence or sending out prosecutors at the court hearing in support of the NGOs.<sup>73</sup> The latest report from the Supreme People's Procuratorate in October 2019 calculated that assistance was provided in 87 EPIL cases by NGOs,<sup>74</sup> which would account for more than a quarter of all such cases.<sup>75</sup>

Intriguingly, the enthusiasm of NGOs to bring EPIL seems to be significantly and positively influenced by the presence of procuratorial involvement. Under the pilot run in 2016, procuratorates in only 13 out of 31 provincial-level regions in Mainland China (excluding the Special Administrative Regions of Hong Kong and Macau) could initiate EPIL. NGOs had no such restriction and could bring EPIL anywhere since January 2015. Nevertheless, of the 68 EPIL cases brought by NGOs in 2016, only 18 came from

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<sup>71</sup> Civil Procedural Law of the PRC, Art. 55(2).

<sup>72</sup> 张锋 F. Zhang, '检察环境公益诉讼之诉前程序研究' ['Research into the Pre-trial Procedure of Prosecutorial Environmental Public Interest Litigation'] (2018/11) *Political Science and Law* 151.

<sup>73</sup> E.g. 中华环保联合会 v 朱宏根, (2018)苏 05 民初 1192 号, 苏州市中级人民法院 (26 Dec. 2019).

<sup>74</sup> 张军 J. Zhang, '最高人民法院关于开展公益诉讼检察工作情况的报告' <'Report by the Supreme People's Procuratorate on undertaking procuratorial work for public interest litigation'> (23 Oct. 2019), available at [https://www.spp.gov.cn/spp/tt/201910/t20191024\\_435925.shtml](https://www.spp.gov.cn/spp/tt/201910/t20191024_435925.shtml).

<sup>75</sup> The latest available number count is 298 cases by the end of June 2019. Supreme People's Court press conference on 30 July 2019, script available in Chinese at: <http://www.court.gov.cn/zixun-xiangqing-173942.html>.

outside the pilot run regions.<sup>76</sup> In other words, 73.5% of the EPIL cases by NGOs were concentrated in 41.9% of the regions where the procuratorates could already bring EPIL. While each of the 13 provincial-level regions included in the pilot run had at least one EPIL case by NGOs in 2016, 10 out of the 18 regions outside the pilot run did not see a single case, including both highly developed regions such as the municipals of Shanghai and Tianjin as well as large, less prosperous inland provinces such as Sichuan and Jiangxi.

This unusual concentration of cases where NGOs choose to get involved could be explained partly by the small number of qualified and interested NGOs. Although more than one thousand registered ‘social organizations’ are potentially able to bring EPIL, fewer than twenty of these come forward each year.<sup>77</sup> Unsurprisingly, regionally based environmental NGOs tend to launch EPIL with a clear regional focus. If more regionally based NGOs are involved in places where the procuratorate are under the pilot run, EPIL is more likely to materialize therein.

However, a large number of EPIL cases are in fact brought by nationally based environmental NGOs, most noticeably the China Biodiversity Conservation and Green Development Foundation (CBCGDF), Friends of Nature (FON), and the All-China Environment Federation. Although these organizations are registered within one region, which happens to be Beijing for all three, they operate nationally and initiate EPIL well

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<sup>76</sup>葛枫 F. Ge et al, ‘2016 年度环境公益诉讼观察报告’ <‘Observation report on environmental public interest litigation in the year of 2016’> in Li, n. 67 above, at 337.

<sup>77</sup> Ibid at 335; 黄娜、杜家明 N. Huang & J. Du, ‘社会组织参与环境公益诉讼的优化路径’ (2018) 36 (9) *Hebei Law Science* 191, at 193 <Optimized Path for Social Organization Participating in Environmental Public Interest Litigation> (in Chinese).

outside their place of registration. Interestingly, even these organizations prefer to litigate in certain regions and not others, especially in view of the fact that, before June 2017, many of the regions disfavoured by NGOs had no help from the procuratorate. The existence of such apparent regional preference will be revisited in the case analysis.<sup>78</sup>

Meanwhile, although EEDC cases remain relatively few in number, their emergence would push EPIL by NGOs into an uncomfortable and further weakened position. EPIL by NGOs takes precedence over EPIL by the procuratorate, as the latter should only proceed if no NGO is in place to litigate.<sup>79</sup> Since June 2019, however, EEDC cases by local governments trump EPIL by NGOs, as the court must suspend the EPIL trial until after the completion of the EEDC trial. EPIL can only cover issues not already dealt with in the EEDC case.<sup>80</sup>

Similar to other rules and practice surrounding the EEDC structure currently under development, this priority rule currently is not affirmed in any law or regulation. Nevertheless, this status shift for NGOs, from being the preferred litigant in EPIL to the deferred party after the EEDC case, is a potentially crucial development. In effect, a local government can now supersede any ongoing EPIL by initiating EEDC proceedings, causing much delay and uncertainty for the NGO in the original EPIL. It is possible that the maturing of the EEDC system will further complicate the tasks for NGOs contemplating EPIL as they now have to negotiate between the judicial and

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<sup>78</sup> Section 5.3, below.

<sup>79</sup> Civil Procedural Law of the PRC, Art. 55 (2).

<sup>80</sup> Interpretation 2019/No.8 of the Supreme People's Court, Art. 17.

administrative powers even more carefully than a few years ago. Such an imminent challenge is not easy for NGOs to deal with, especially at the current stage of the development of EPIL which, as we argue in the next section, already displays some notable deficiencies and flaws affecting EPIL by NGOs.

## **5. CRITICAL EXAMINATION OF EPIL PRACTICE BY NGOs**

### **5.1. The Objectives and Choices of EPIL by NGOs**

Although EPIL and EEDC are new labels which have emerged in the past few years, governmental or administrative involvement in major environmental incidents is certainly neither novel nor unusual. However, NGOs have struggled at times to coordinate their involvement, including in litigation, in the fast-evolving developments following major environmental crises. First and foremost, NGOs have often chosen to litigate regarding incidents in which the administrative powers have taken effective control of the situation, including the implementation of remedial work and the imposition of financial sanctions on the wrongdoers. In these cases, NGOs arriving later at the scene often struggle to establish either new evidence about what had happened or new demand to what the administrative powers have already imposed. This in turn obscures the objectives of pursuing such EPIL and raises the question as to the choice made by these NGOs.

### *The Tengger Desert case*

In September 2014, media reports emerged about serious water and soil contamination of parts of the Tengger Desert in Inner Mongolia and Ningxia.<sup>81</sup> For years, various industrial operations had been disposing of hazardous elements into the environment without due processing, in a blatant breach of domestic law and regulation. The overt accumulation of serious pollution was vividly depicted in graphic material and video reporting by the national media, leading to a public outcry at a time when environmental concern was high on the list of national concern. Authorities ranging from the State Council to the MEE took swift actions in the following months and most of the clean-up and restoration work was successfully implemented by September 2015.<sup>82</sup>

Meanwhile, CBCGDF lodged an EPIL in the local court in August 2015. The lawsuit was rejected by the Zhongwei Intermediate People's Court and CBCGDF's appeal against this rejection was again dismissed by the High People's Court of Ningxia Autonomous Region.<sup>83</sup> The main reason given by both courts in rejecting CBCGDF's lawsuit was that the CBCGDF charter did not specifically provide that 'protection of the environment' was part of its operation,<sup>84</sup> which disqualified the organization from

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<sup>81</sup> *CCTV News*, 6 Sept. 2014, available at

<http://m.news.cntv.cn/2014/09/06/ARTI1410011258266870.shtml>.

<sup>82</sup> By December 2014, the State Council established a dedicated 'supervision and investigation group' to oversee the handling of the incident and the clean-up efforts to follow. The then Ministry of Environmental Protection undertook most of the work, imposed various sanctions on the perpetrator companies within its administrative powers, and put in place plans for restoration of the environment by February 2015. With most of the clean-up and restoration work successfully implemented by September 2015, the Ministry of Environmental Protection removed the 'special supervision status' it imposed on the restoration project in November 2015.

<sup>83</sup> 中国生物多样性保护与绿色发展基金会 v 宁夏瑞泰科技股份有限公司, (2015)卫民公立字第 6 号, 宁夏回族自治区中卫市中级人民法院 (19 Aug. 2015); (2015)宁民公立终字第 6 号, 宁夏回族自治区高级人民法院 (6 Nov. 2015).

<sup>84</sup> As required by the Interpretation of the Supreme People's Court on Several Issues concerning the

pursuing EPIL.<sup>85</sup>

CBCGDF applied to the Supreme People's Court for a retrial in January 2016. The retrial was granted and then completed in a matter of one week, with the final judgment of the Supreme People's Court in favour of CBCGDF, directing the local court to accept the EPIL. The Supreme People's Court pointed to various stated objectives in the charter of CBCGDF, ranging from 'supporting biodiversity and green development' to 'promoting the establishment of an ecological civilization and the harmony between human kind and nature', and concluded that the scope and aim of CBCGDF did encapsulate 'protection of the environment', despite the absence of explicit phrases to that effect.<sup>86</sup> The retrial judgment was later selected to be a 'guiding case' by the Supreme People's Court, further endorsing its authority and merit.<sup>87</sup>

Zhongwei Intermediate People's Court promptly accepted the EPIL launched by CBCGDF in early 2016 against the eight defendant companies responsible for serious pollution of the Tengger Desert. Yet, this development was overtaken by the events unfolding outside the court system, as the pollution incident had largely been dealt with by the administrative authorities several months earlier. As later court documents would show, the defendants were held financially liable for a total sum of 569 million renminbi (RMB 569 million) in various fines and expenses for remedial work and environmental

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Application of Law in the Conduct of Environmental Civil Public Interest Litigations, Art. 4.

<sup>85</sup> Art. 55 EPL.

<sup>86</sup> 中国生物多样性保护与绿色发展基金会 v 宁夏瑞泰科技股份有限公司, (2016)最高法民再 47 号, 最高人民法院 (28 Jan. 2016).

<sup>87</sup> Guiding Case No.75, English translation by Stanford Law School China Guiding Cases Project available at <http://cgc.law.stanford.edu/guiding-cases/guiding-case-75/>. 'Guiding cases' are selected by the Supreme People's Court to serve as a guidance, if not binding authorities, for future decisions by all courts. For a more detailed explanation of this system, see e.g. Lu Xu, 'The Changing Perspectives of Chinese Law' (2019) 5 *The Chinese Journal of Global Governance* 153, 162.



restoration.<sup>88</sup> By 2016, the remedial and restoration work either had been implemented or was in the process of being implemented under governmental supervision. Despite CBCGDF getting a judicial endorsement from the Supreme People’s Court to go ahead with the lawsuit, it was unclear what this particular EPIL could achieve.

After more than a year, CBCGDF settled with each of the eight defendant companies. CBCGDF was said to be ‘satisfied’ by the proof provided by the companies that work had been done or was being done to remedy the environmental damage. Each company ‘voluntarily’ contributed a sum to be used for ‘repairing the service function of the local environment’, totalling around RMB 6 million.<sup>89</sup> CBCGDF also recovered RMB 1.28 million in costs from the settlement.

It is appropriate that companies or individuals who wilfully and recklessly pollute the environment in the pursuit of higher profit margins are hit with significant financial and other sanctions, both for remedying the damages they have caused and as a deterrent for future entities contemplating such behaviours.<sup>90</sup> The perpetrators of the Tengger Desert pollution were made to pay RMB 569 million, and a number of their managers and executives received prison sentences in separate criminal proceedings.

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<sup>88</sup> Respective liabilities range from RMB 1.97 million to 219 million for each defendant. 中国生物多样性保护与绿色发展基金会 v 宁夏中卫市大龙化工有限公司, (2016)宁 05 民初 16 号, 宁夏回族自治区中卫市中级人民法院 (28 July 2017); 中国生物多样性保护与绿色发展基金会 v 宁夏中卫市美利源水利有限公司, (2016)宁 05 民初 12 号, 宁夏回族自治区中卫市中级人民法院 (28 July 2017).

<sup>89</sup> The contribution varied from RMB 100,000 to 1.43 million for each company. 中国生物多样性保护与绿色发展基金会 v 宁夏中卫市大龙化工有限公司, (2016)宁 05 民初 16 号, 宁夏回族自治区中卫市中级人民法院 (28 July 2017); 中国生物多样性保护与绿色发展基金会 v 宁夏明盛染化有限公司, (2016)宁 05 民初 18 号, 宁夏回族自治区中卫市中级人民法院 (28 July 2017).

<sup>90</sup> 徐以祥 Y. Xu, ‘论我国环境法律的体系化’ (2019), 41(93) *Modern Law Sciences*, pp. 83-95, at 90-92 < ‘On the Systematization of Chinese Environmental Laws’ > (in Chinese).

There was no indication that the RMB 569 million was inadequate to punish the perpetrators and restore the environment, as far as money and modern science would allow. By the time CBCGDF attempted to initiate EPIL, and certainly by the time it got the green light from the Supreme People's Court in 2016, the administrative process to deal with this major incident was in full motion and producing outcomes. It is unclear what was to be gained by the EPIL despite the eventual RMB 6 million settlement, as there was no sign that this sum of 'voluntary contribution' accounted for anything that the original sum of RMB 569 million failed to cover.

*The Hyundai Motors case*<sup>91</sup>

There are other examples of EPIL being pursued with unclear objectives. Hyundai Motors was found to be selling a specific type of vehicle between March 2013 and January 2014 that failed to meet Beijing emissions standards due to defective fuel injectors. Hyundai promptly moved to remedy the defect in these vehicles and by June 2014 its remedial actions were approved by the authorities. In September 2014, the Beijing Bureau of Environmental Protection imposed administrative sanctions in accordance with law and regulation and confiscates 'unlawful income' to the sum of RMB 13.5 million. It also imposed a 10% penalty of RMB 1.35 million.<sup>92</sup>

Yet in May 2016, more than 18 months later, FON decided to initiate EPIL over the incident, demanding that Hyundai be ordered to stop selling the vehicles concerned

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<sup>91</sup> Announcement by Beijing No.4 Intermediate People's Court (27 May 2019), available at <http://bj4zy.chinacourt.gov.cn/article/detail/2019/05/id/3965982.shtml>.

<sup>92</sup> *Beijing Business Today*, 18 Nov. 2014, available at <http://finance.people.com.cn/n/2014/1118/c1004-26043889.html>.

and pay an unspecified sum of compensation ‘as to be determined by experts’ for the damage to the atmosphere by the polluting cars. Hyundai responded that it had not sold any cars in violation of the regulation for more than two years, and that the claim was therefore groundless. After almost three years, the parties settled in May 2019, with Hyundai voluntarily contributing RMB 1.2 million for ‘protecting and repairing the atmosphere, preventing air pollution and supporting environmental public interest activities’, in addition to RMB 200,000 to FON to cover costs incurred in the litigation.

Similar to the settlement in the Tengger Desert cases above, there was no indication that the original sanction of almost RMB 15 million imposed by the government was inadequate, or that the EPIL by FON established any new facts unknown in 2014. With no knowledge of Hyundai’s decision making process, it may nevertheless be speculated that RMB 1.4 million of voluntary contribution, mostly in the name of protecting the environment, was a modest price to pay for a multinational carmaker to terminate a longstanding dispute with a major environmental NGO. For FON, on the other hand, RMB 200,000 could cover much of its litigation costs, so that the EPIL potentially did not result in a significant financial loss.

It is notable that, in both the Tengger Desert and the Hyundai Motor cases, the NGO concerned chose to take action after a high-profile incident or against a high-profile defendant, even where administrative authorities had seized clear and effective control of the situation many months before the EPIL. The litigation did not uncover any additional liability or legal responsibility that had been overlooked in the consideration of administrative measures and sanctions. It is therefore hardly

unexpected that no court judgment against any of the defendants was forthcoming and the cases resulted in settlement after several years with some voluntary contribution and reimbursement of costs by the defendants.

In most cases, administrative measures in the wake of major environmental incidents do, and should, take effect much quicker than any court judgment. If the objective of NGOs was to oversee policy implementation, EPIL by NGOs should arguably focus on identifying what the ‘fire-fighting’ administrative measures have not covered or have missed, instead of focusing on what has already been addressed under the scrutiny of national media.

## **5.2. Litigation Costs and Risk-Perception of NGOs in EPIL**

On several occasions, the decisions by NGOs as to which EPIL to pursue and how to approach litigation reveal a potentially skewed perception of the costs and risks of EPIL, as illustrated in the cases below.

### *The ‘Poisonous Land’ of Changzhou*

In September 2015, a secondary school in Changzhou, Jiangsu Province, moved to its newly built campus. In the following months, many pupils started displaying symptoms such as nausea, skin irritation, hair loss and so on. The ensuing investigation identified the cause as soil pollution of a plot of land about 200 metres away from the campus. Although the land was not in use at that time, it had been the site of several chemical

and pesticide factories between the late 1960s and the early 2000s. The incident was reported on national television in April 2016 as ‘the poisonous land of Changzhou’ and caused wide-ranging concern among the public.<sup>93</sup>

FON and CBCGDF, two major environmental protection organizations, joined forces to bring forward EPIL in May 2016. They identified three defendant companies as responsible for the pollution and demanded compensation for damage to the environment, a public apology, and the reimbursement of costs incurred by the NGOs.

The case was, however, complicated by several factors. The three companies, one of which is a large state-owned enterprise of Changzhou, had moved away from the relevant site many years before the exposure and the lawsuit. More importantly, in 2008 the plot of land had already been recovered by the local government for redevelopment, which included ongoing efforts to remedy the known historic pollution. Although at the time of their activities the companies acted in a way which would be considered blatantly harmful to the environment by modern standards, it was less straightforward to establish the illegality of some of those activities retrospectively.

Consequently, FON and CBCGDF lost at first instance. The court acknowledged the obvious public interest in bringing the lawsuit, but found that the defendants were not in a position to implement any remedial steps, given that they no longer had control of the land. The claim also failed to establish the exact responsibilities of the defendants, given the highly complicated history of privatization of state-owned enterprises and

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<sup>93</sup> *The Paper*, 18 Apr. 2016, available at [https://www.thepaper.cn/newsDetail\\_forward\\_1457900](https://www.thepaper.cn/newsDetail_forward_1457900).

various corporate restructurings over many years.<sup>94</sup>

The decision caused shockwaves, not only because this was a high-profile loss for two major NGOs, but also because of how the court fees were calculated. On the basis of the monetary claim of RMB 377.3 million as compensation for environmental damage, the court applied its standard fees of about 0.5% and arrived at a figure of RMB 1.89 million in court fees. If FON and CBCGDF had to shoulder the sum between them, this would have been a heavy financial burden for even large and nationally established NGOs to bear.

Fortunately for FON and CBCGDF, their appeal was partially upheld by the High People's Court of Jiangsu Province. The court held that the difficulty in proportioning liabilities to each defendant could be overcome if the court exercised its judgement on what was reasonable. Although not everything the defendant companies did in the past was necessarily illegal at the time, they were held responsible for the continuing harmful contamination of the land and ordered to apologize to the public.

However, for several years after the companies ceased their operations, the land had been retained by the local government, which was already making efforts to remedy any remaining problems. The fact that land pollution was a historical issue made it difficult for the court to decide on present financial liabilities. The court rejected FON and CBCGDF's suggestion to award compensation as some recognition of the costs of the remedial work undertaken by the local government over the land, because the local

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<sup>94</sup> 北京市朝阳区自然之友环境研究所 v 江苏常隆化工有限公司, (2016)苏 04 民初 214 号, 江苏省常州市中级人民法院 (25 Jan. 2017).

government was not a party to the EPIL. There was no feasible way to calculate, or even to estimate, the appropriate monetary compensation for any lasting damage to the environment after ongoing restoration efforts by the local government.

On the controversial issue of court fees, the appeal court held that since there was no basis for assessing monetary compensation, the case should be treated as a non-monetary lawsuit, with the court fees at first instance and on appeal of RMB 100 each borne by the three defendant companies.<sup>95</sup> In essence, the NGOs won on principle and did not have to pay the RMB 1.89 million court fees; the companies lost and had to apologize, but did not have to pay hundreds of millions in compensation. Following this final decision, FON decided to drop the case. CBCGDF applied to the Supreme People's Court for a retrial.<sup>96</sup>

While the Supreme People's Court will re-examine the case, the first-instance imposition of RMB 1.89 million in court fees was a timely reminder to NGOs of the risks of litigation. Given the growing sentiment for environmental protection in the society in general, there is arguably the unspoken assumption, held by both the public and those involved, that EPIL is a rightful action brought in the public interest by well-intentioned NGOs against irresponsible perpetrators who harm the environment. The losing party pays the court fees, so it would be the polluters who pay. They should also pay for the reasonable costs incurred by the claimants, including attorney fees and other expenditures.<sup>97</sup> Against this background, it is largely understandable that lawyers in

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<sup>95</sup> 北京市朝阳区自然之友环境研究所 v 江苏常隆化工有限公司, (2017)苏民终 232 号, 江苏省高级人民法院 (26 Dec. 2018).

<sup>96</sup> CBCGDF website (25 Jan. 2019), available at: <http://www.cbcdgf.org/NewsShow/4857/7421.html>.

<sup>97</sup> Interpretation 2015/No.1 of the Supreme People's Court, Art.22.

court proceedings would ask for sensational figures of hundreds of millions of RMB.

Since cases such as the ‘poisonous land of Changzhou’ reminded claimants of the prospect of losing a case at the cost of very substantial court fees, many calls have been made for the fees to be set at a low, flat rate, such as RMB 50 per case, independent of the monetary value of the case.<sup>98</sup> The main argument for such special treatment is the public-interest nature of EPIL as well as the fact that NGOs are not litigating for their own financial gains.

Some of the claims by NGOs, especially in relation to their attorneys’ fees and litigation costs, do not naturally support the argument for treating EPIL as special, non-monetary litigation. As things stand, the rules heavily favour NGOs in EPIL, with the court having the option to ask the defendants to bear reasonable costs of NGOs, while there is no corresponding possibility for the defendants’ costs to fall on NGOs even if the claim fails. Moreover, the court can allow deferment, discount or even waive the court fees payable by NGOs.<sup>99</sup> Even so, there have been multiple instances of NGOs claiming much higher costs and attorneys’ fees than the court is prepared to award.

In the ‘poisonous land of Changzhou’ case, FON and CBCGDF claimed costs of RMB 1.45 million between them. The court was clearly unimpressed by the scale of these claims and awarded RMB 230,000 to each, or less than a third. However, in the application to the Supreme People’s Court for a retrial, CBCGDF again claims not only the full costs, but also asks the court fees to be restored to RMB1.89 million each at

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<sup>98</sup> 肖建国、宋史超 J. Xiao & S. Song, ‘程序视角下的环境民事公益诉讼若干问题’ <‘Several issues of civil environmental public interest litigation from a procedural perspective’> in Li, n.67 above, 355-362, at 362.

<sup>99</sup> Interpretation 2015/No.1 of the Supreme People’s Court, Art. 33.



first instance and on appeal, to be borne by the defendant companies, instead of RMB100 each as set by the High People's Court.<sup>100</sup> It seems a remarkable display of confidence for any litigant to ask the court to increase the court fees by almost 20,000 times of what the court has been prepared to charge, and it suggests that any implicit message from the appellate court expressing its discontent at the high costs being claimed has been lost.

The 'poisonous land of Changzhou' saga is not an isolated example of the court's discomfort with the costs claimed by NGOs in EPIL. In a case about waste disposal from Shandong Province, CBCGDF claimed RMB 300,000 in attorneys' fees plus further 'contingency fees' dependent on the outcome of the litigation. Jinan Intermediate People's Court presumably did not like the notion of some litigation bonus and awarded RMB 100,000.<sup>101</sup> Sometimes the court is stricter or more forthright about the level of fees. The smallest amount of attorneys' fees awarded could be as little as 4% of what a victorious NGO claimed.<sup>102</sup> In an appeal on waste-water discharge from Zhejiang Province, the High People's Court gave a succinct but stern lecture on how the attorneys' fees should be 'only what is reasonable'. CBCGDF had claimed RMB 688,700 in attorneys' fees but the court took issue with the notion that this figure was purely based on what the attorneys claimed to be entitled to, with no other verification

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<sup>100</sup> *The Beijing News*, 25 Jan. 2019, available at <http://www.bjnews.com.cn/news/2019/01/25/542977.html>.

<sup>101</sup> 中国生物多样性保护与绿色发展基金会 v 山东金诚重油化工有限公司, (2016)鲁 01 民初 780 号, 济南市中级人民法院 (27 Dec. 2018).

<sup>102</sup> 湘潭生态环境保护协会 v 湘潭市金鑫矿业有限公司, (2018)湘 03 民初 196 号, 湖南省湘潭市中级人民法院 (30 Sept. 2019). The court awarded RMB 10,000 in attorneys' fees out of RMB 236,300 claimed (4.2%), despite finding the defendant liable for RMB 654 million in damage to the environment.

of the actual number of hours worked or the amount of work undertaken. The final award was set at RMB 200,000.

Notably, the appeal in the latter case was an outright loss for CBCGDF as the court dismissed it on all grounds. Nevertheless, the court discretionarily split the court fees of RMB 195,995 equally between CBCGDF and the defendant company, while granting a discretionary discount of CBCGDF's share only of the court fees from RMB 97,997.5 to 1,000.<sup>103</sup>

The court's willingness to waive 99% of the court fees it could legitimately charge an NGO which has just lost its appeal, is indicative of the generally supportive attitude of the judiciary vis-a-vis NGOs in EPIL. In some cases, the NGOs arguably demonstrate a callous attitude towards the risks and costs inherent in litigation, at least until the court decides against them. It is not impossible for NGOs to lose outright in EPIL, for example by failing to establish that the activities under scrutiny were harmful to the environment, despite committing substantive sums towards forensic analysis.<sup>104</sup>

In September 2017, an environmental NGO based in Chongqing made national news headlines by bringing EPIL against three major online food delivery platforms simultaneously, alleging that they failed to provide environmentally friendly alternatives to disposable cutlery. Without waiting for court proceedings to commence, this NGO also revealed to the media that it was preparing next to sue both McDonald's

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<sup>103</sup> 中国生物多样性保护与绿色发展基金会 v 浙江富邦集团有限公司, (2018)浙民终 1015 号, 浙江省高级人民法院 (25 Apr. 2019).

<sup>104</sup> 北京市朝阳区自然之友环境研究所 v 北京都市芳园房地产开发有限公司. (2015)四中民初字第 233 号, 北京市第四中级人民法院 (24 Oct. 2018).

and KFC at the same time.<sup>105</sup> The news report contained no information or discussion as to how a local environmental NGO would be preparing the resources to take on five of the biggest names in the food industry at the same time and the financial consequences if the litigation did not go well.

It is argued that any strategy to go after the big, headline-making incidents or global commercial names, perhaps in the expectation that the court will simply grant all costs in a win or at least mitigate all fees in a loss, is not convincing as a robust long-term plan for the development of EPIL. At the same time, the suggestion to charge only nominal court fees does not sit comfortably with the practice of some NGOs to claim costs and attorneys' fees at a level which multiple courts have found exorbitant.

### **5.3. Questionable Practices by Major NGOs in EPIL**

Some of the practices by major NGOs engaged in EPIL would go beyond questions of institutional choice and arguably impact upon the foundation of justice. The following two cases raise concerns that major environmental NGOs may have brought the impartiality and neutrality of the judicial system into question, and obstructed adherence to strict jurisdictional boundaries within the legal system.

#### *The forensic public interest fund*

In December 2016, the China Environmental Protection Foundation (CEPF) brought

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<sup>105</sup> *The Beijing News*, 24 Sept. 2017, available at [http://www.xinhuanet.com/legal/2017-09/24/c\\_1121713836.htm](http://www.xinhuanet.com/legal/2017-09/24/c_1121713836.htm).

forward an EPIL against a steel processing company in Tangshan, Hebei Province, regarding air pollution. This case was remarkable for being the first time that an EPIL made use of funding from a newly established ‘China Environmental Protection Fund’, which awarded RMB 100,000 to the case for the cost of forensic analysis relating to the environmental damage caused by the defendant company. According to the terms of the fund, any Chinese court can apply to it for a sum of money between RMB 60,000 and 120,000 to carry out necessary investigation in any civil EPIL.<sup>106</sup> However, this fund was established by none other than CEPF, the claimant in this particular EPIL. The judges in this case had to actually fill an application form to apply to CEPF for money, in order to facilitate forensic studies in the litigation, before eventually directing a settlement between the parties in March 2019.

The rationale for this new fund, as explained on its website, speaks about the difficulties for ‘the majority of courts’ in securing financial support to carry out their investigative duties in EPIL, which the fund seeks to address.<sup>107</sup> Noble as the intention may be, the current operation of the fund would mean that, in cases such as this, the court received money, not to mention having actively applied for it, from one of the litigant parties to carry out its judicial investigations, before reaching a hopefully just and unbiased decision. This would patently affront some of the basic tenets of natural justice and the rule of law, not least that the judge should remain neutral and impartial, or that justice must be seen to be done. It was inexplicable and arguably unacceptable that CEPF did not excuse itself from even considering the application for money in

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<sup>106</sup> CEPF website, available at [http://www.cepf.org.cn/jjhd/201903/t20190314\\_695880.htm](http://www.cepf.org.cn/jjhd/201903/t20190314_695880.htm).

<sup>107</sup> Ibid.

relation to litigation that it was actively participating in. The awkwardness of this course of events apparently eluded many, as the news of this settlement was covered by the national newspaper for the judiciary as a good example of judicial innovation.<sup>108</sup> Such a mode of funding practice where an NGO acts both as the funding source to support the work of the judiciary and an active litigant in the same EPIL, without taking any note of the obvious conflict of interest, is in clear need of fundamental rethinking.

### *The Shandong Lorry Cases*

NGOs seem to display some regional preferences when considering EPIL. In some cases, however, this arguably has gone much further to the extent of attempting to actively manipulate the jurisdiction of the court.

In February 2018, FON brought two similar EPIL cases in Beijing No.4 Intermediate People's Court against two lorry manufacturers based in Shandong Province, in relation to vehicle emissions beyond the legal threshold and the consequential air pollution.<sup>109</sup> The lorries concerned were manufactured in Shandong and had never been sold in Beijing. FON preferred the case to be trialled in Beijing instead of Shandong and chose to sue a joint defendant in each case, both being retailers based in Beijing who signed retail agreement with the manufacturers. It offered no explanation of its forum choice or litigation strategy. Notably, the retail agreement

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<sup>108</sup> *People's Court Daily*, 25 June 2019, available at [http://rmfyb.chinacourt.org/paper/html/2019-06/25/content\\_156898.htm](http://rmfyb.chinacourt.org/paper/html/2019-06/25/content_156898.htm).

<sup>109</sup> 北京市朝阳区自然之友环境研究所 v 北京环宇宝龙汽车销售服务有限公司, (2018)京 04 民初 48 号, 北京市第四中级人民法院 (16 Aug. 2018); 北京市朝阳区自然之友环境研究所 v 北京中顺天达贸易有限公司, (2018)京 04 民初 49 号, 北京市第四中级人民法院 (16 Aug. 2018).

between the manufacturers and retailers only came into effect several months after the manufacturers had stopped making and selling the lorries which were found in violation of emission regulations. The court found that the Beijing-based defendants had no connection with the offending lorries, and nor were these lorries ever sold in Beijing by any retailer as they never obtained the necessary permission for sale in the capital.

Alongside some incisive remarks about the potential harm of jurisdiction manipulation by claimants, the court explicitly concluded that ‘the defendant is only added to this litigation by FON for the purpose of altering the jurisdictional court’. Both lawsuits were promptly dismissed and FON was directed to bring them forward in Shandong instead.

FON’s strategy of seeking to alter the jurisdictional court is unexplained and highly questionable. If it felt that the Beijing court would be more favourable to its claims, such a move would arguably run counter to the policy motives for EPIL, such as promoting transparency in environmental governance.<sup>110</sup> Without any evidence or argument to the contrary from FON, it would seem that Shandong, and not Beijing, would have been most impacted by any environmental damage caused by the lorries concerned. It was arguably inappropriate for a national, environmental NGO such as FON to attempt to manipulate the jurisdiction of the court in such a manner.

The Shandong case further illustrates the false sense of security displayed by some NGOs in bringing forward EPIL claims. For any law-abiding, environmentally-conscious company, the prospect of being drawn into EPIL by a major NGO must be

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<sup>110</sup> Wang, n. 28 above, p. 901.

both daunting and frustrating. As things stand, judicial interpretation explicitly forbids counterclaims by a defendant in EPIL against the claimant NGO.<sup>111</sup> Furthermore, in suing businesses, NGOs are possibly motivated by the ‘indirect’ effects of EPIL, which are to raise environmental awareness among the public and pressure polluting companies to comply with environmental regulations.<sup>112</sup> Nevertheless, given the likely consequences of EPIL such as reputational damage, it is possible that defendants, especially those dragged into ill-conceived EPIL such as the two Beijing-based retailers found by the court to be completely unrelated to the defective lorries in question, may seek formal redress against claimant NGOs in future, for example through separate tort lawsuits.

#### **5.4. New Directions in EPIL by NGOs**

Notwithstanding some of the more questionable practices presented above, there are some genuinely exciting efforts by NGOs in bringing forward EPIL cases which have the potential to better define the scope and content of environmental protection. At the time of writing, several EPIL cases are going through legal proceedings, which have the potential to answer difficult questions such as whether governmental bodies could become liable in EPIL if they cause environmental damage, or whether state-owned monopoly utility companies could be liable in EPIL in the absence of a breach of

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<sup>111</sup> Interpretation 2015/No.1 of the Supreme People’s Court, Art. 17.

<sup>112</sup> J. Peel, & H. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy*, (Cambridge: Cambridge University Press, 2015), at pp. 28-50.

regulation.

In September 2018, CBCGDF brought forward EPIL against the Wildlife Rescue Centre of Guangxi Autonomous Region and its superior, the Forestry Authority of Guangxi, in relation to the death of armadillos. These armadillos were smuggled into China back in 2017, when they were discovered by law enforcement and handed over to the Wildlife Rescue Centre for quarantine. CBCGDF alleged that, after quarantine was completed, the Wildlife Rescue Centre failed to follow the proper procedure of not releasing eight animals found to be ‘healthy but weak’, which eventually led to their death.<sup>113</sup> The case covers multiple issues of great interest, ranging from the applicability of public interest standards to specific tasks of animal quarantine, to the responsibility of governmental departments and their ancillary institutions. The case may well shed light on the previously raised question<sup>114</sup> of whether civil EPIL can be brought against a governmental department or its subsidiary.

Moreover, in June 2019, CBCGDF brought an EPIL claim against a number of defendant companies in Wuhan, Hubei Province in relation to the death of 36 adult and 6,000 juvenile Chinese sturgeons, a critically endangered species. CBCGDF alleged that the defendant companies carried out construction of a bridge and roadworks without proper environmental assessment and that the constant noise from the construction work eventually caused the death of the fish.<sup>115</sup> This is likely to be the first time that noise becomes the focus of EPIL as a new addition to the usual suspects

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<sup>113</sup> *The Beijing News*, 7 May 2019, available at [http://www.xinhuanet.com/legal/2019-05/07/c\\_1124459053.htm](http://www.xinhuanet.com/legal/2019-05/07/c_1124459053.htm)

<sup>114</sup> Zhai & Chang, n. 5 above, at 384.

<sup>115</sup> CBCGDF website, 14 June 2019, available at <http://www.cbcdgf.org/NewsShow/4857/8920.html>



of air, soil and water pollution.

Beyond wildlife protection, some EPIL by NGOs ventures into uncertain territories in terms of the scope of environmental protection. After several years of efforts and two court hearings, FON's EPIL on wind energy, against the state-owned monopoly electricity network company of Gansu Province, was accepted by the court.<sup>116</sup> The defendant company produces no electricity itself and only contracts with various producers of wind, solar and fossil energy. The essence of the claim is that the defendant company chooses to restrict and cut back on the full capacity of wind energy from time to time due to constraints on energy capacity and the operation of its electricity infrastructure. This results in wind energy not being harvested to the maximum as required of an electricity network company by law,<sup>117</sup> which in turn leads to fossil energy being used in substitution. Such activities are allegedly cause environmental damage, which could have been averted had the capacity of the electricity supply network been greater to accommodate those periodic excesses in wind energy.

It is notable that the defendant company does not directly cause environmental damage as it is not engaged in the actual production of electricity. With myriad political, legal, economic and technological moot points to navigate, it may well be several years before the dust settles on this ongoing lawsuit. Nevertheless, it is encouraging to see NGOs willing to test the boundaries and make efforts to expand beyond the EPIL comfort zone.

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<sup>116</sup> 北京市朝阳区自然之友环境研究所 v 国网甘肃省电力公司, (2018)甘民终 679 号, 甘肃省高级人民法院 (28 Dec. 2018).

<sup>117</sup> Renewable Energy Law of the PRC, Art. 14.

## **6. CONCLUDING REMARKS**

EPIL represents the commitment of the Chinese central government to address environmental issues and the harm caused by environmental incidents, as well as the political drive to move important, especially monetary, decisions in the fallout of environmental incidents away from the government as policy makers and towards the courts as just arbitrators. The findings in this article indicate that EPIL by NGOs is now a reasonably established part of the legal enforcement mechanism in environmental protection.

Meanwhile, the role of EPIL by NGOs among competing mechanisms in the Chinese legal system is evolving. Although EPIL has empowered NGOs to exercise some supervisory functions on public interest issues, NGOs are restricted in their choice of pathways to participate in environmental governance. Our findings indicate that although state powers such as the court and the procuratorate have been supportive overall in substantive ways, the contribution of EPIL by NGOs is nevertheless under pressure from competing mechanisms in the form of EPIL by the procuratorate and EEDC litigation. In particular, EEDC has the potential to undermine the justification for EPIL by NGOs as local governments are arguably in a better position to represent the public interest in the case of environmental damage to a local area. EEDC has also been prioritized over EPIL in recent court rulings. Such inherent competition exists despite the overall support that the court, the procuratorate and the government have

shown towards NGOs in bringing forward EPIL.

Furthermore, the involvement of Chinese NGOs in EPIL reveals some of the challenges of incorporating the public in environmental governance. Our findings indicate that, when practising EPIL, some NGOs seem almost oblivious to the inherent costs and risks of litigation. This may be explained by Chinese NGOs' organizational development and financial status. Apart from restrictive registration policies,<sup>118</sup> NGOs are faced with pressure to mobilize funding to secure financial stability.<sup>119</sup> Compared to their counterparts in Western liberal democratic societies, where some NGOs have become specialists in environmental litigation, Chinese NGOs have comparatively less legal knowledge and expertise.<sup>120</sup> Therefore, it seems reasonable to suggest that these NGOs would need to consider a different funding and sustainability model for EPIL, as they are likely to incur significant costs, even in successful lawsuits.

Similarly, as EPIL has only been established in the last decade, very few NGOs have gained a high level of knowledge and expertise with respect to China's environmental governance.<sup>121</sup> Accordingly, NGOs' legal approaches represent mixed practices, which show a tendency to focus litigation efforts on sensational, major incidents that received national media and public attention. Often litigation is pursued by NGOs despite prompt and significant administrative measures having already been taken to address the problem, while their perception of the costs and risks involved in

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<sup>118</sup> J. Ashley & P. He, 'Opening one eye and closing the other: the legal and regulatory environment for "grassroots" NGOs in China today' (2008) *International Journal of Civil Society Law*, pp. 26- 96, at 41.

<sup>119</sup> J. Zhu, S. Ye, & Y. Liu, 'Legitimacy, board involvement, and resource competitiveness: drivers of NGO revenue diversification,' (2018) 29 *Voluntas*, pp. 1176-89, at 1176-77.

<sup>120</sup> Ren & Liu, n.3 above, at 10.

<sup>121</sup> *Ibid*, at 13.

litigation would appear questionable across different cases. It is submitted that the problems and concerns identified in relation to the EPIL practice of NGOs would need to be fully examined in any discussion of potentially expanding the scope of EPIL under Chinese law. Hence, China's experiences in environmental litigation differs from those found in liberal democracies, reminding us particularly of the challenges in adopting the legal approach to protect the environment in the context of Chinese culture and politics.<sup>122</sup>

NGOs are evidently learning and experimenting in new areas, such as wildlife protection and energy production, by implementing EPIL as the most effective tool to formally engage with stakeholders such as governmental departments or major state-owned enterprises. Alongside developing a more balanced view of the opportunities and risks of EPIL, it can certainly be hoped that NGOs will take full advantage of the EPIL mechanism as an alternative approach to the more dominant procuratorial EPIL and the emerging EEDC lawsuit. With a better understanding of the system of EPIL, more reasoned decision-making and more efficient use of its resources, NGOs can certainly play an important role in China's evolving environmental governance.

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<sup>122</sup> R. Percival and H. Zhao, 'The Role of Civil Society in Environmental Governance in the United States and China' (2014) 24 *Duke Environmental Law & Policy Forum* 142, at 146-153,