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## **The Successes and Obstacles of Environmental Public Interest Litigation in China: Findings from 570 Court Cases brought by NGOs, Public Prosecutors and Local Government**

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### **Abstract**

Incorporating environmental public interest litigation (EPIL) is an important development in the evolving framework of environmental governance in China. Through quantitative and qualitative analyses of decided cases brought by local government, public prosecutors and environmental NGOs, this study critically examines the features, strengths, difficulties and obstacles in the EPIL practice of China. While there is remarkable success overall for all three groups in terms of outcome, they each display different approaches and focuses. The prosecutors have established themselves as the cornerstone of the system by being the most efficient in winning the greatest number of cases. NGOs moved away from collaboration with the prosecutors in low-value cases, effectively into a competition with the government in a smaller number of high-value cases. Though they are willing to venture into areas where others hesitate over. The findings offer valuable insight to current EPIL practice and inform future policy adjustment and legislation.

**Keywords:** Chinese law, public interest litigation, environmental litigation, environmental NGO, public prosecutor, local government

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## 1. Introduction

In the past decades, the Chinese environmental framework has evolved dramatically into a comprehensive legal system incorporating a total of approximately 30 laws and 130 regulations, representing Chinese government's commitment to relying on law enforcement in environmental governance.<sup>1</sup> An area of notable changes is the incorporation of the public in environmental policy process,<sup>2</sup> including via information disclosure and participation in environmental impact assessment.<sup>3</sup> Commentors have nevertheless critiqued the weak enforcement of these legal requirements and the insignificance of such involvement,<sup>4</sup> noting that the root cause lies in the ambiguous legal texts.<sup>5</sup>

The institutionalization of Environmental Public Interest Litigation (EPIL hereinafter) represents an important development in China's legal and political reform, where involving the citizens serves to improve China's environmental performance that heavily relied on regulatory policy instrument. These contemporary reforms also strengthens the Party's rule with an impression of improving the rule of law.<sup>6</sup> The burgeoning environmental movement, non-governmental organizations (NGOs) in

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<sup>1</sup> Zheng Shaohua and Wang Hui, '中国环境法制四十年：法律文本、法律实施与未来走向 <Forty Years of Environmental Rule of Law in China>' (2018) 11 *Law Science* 17-29

<sup>2</sup> Lei Zhang, Guizhen He, and Arthur PJ Mol, 'China's new Environmental Protection Law: a game changer?' (2015) 13 *Environmental Development* 1-3

<sup>3</sup> Guizhen He, Yonglong Lu and Arthur PJ Mol, 'Changes and challenges: China's environmental management in transition' (2012) 3 *Environmental Development* 25-38

<sup>4</sup> Xiao Zhao and Kaijie Wu, 'Public Participation in China's Environmental Lawmaking: In Pursuit of Better Environmental Democracy', (2017) 29(3) *Journal of Environmental Law* 389-416

<sup>5</sup> Ran Ran 'Perverse incentive structure and policy implementation gap in China's local environmental politics' (2013) 15(1) *Journal of Environmental Policy & Planning* 17-39

<sup>6</sup> Qianfang Zhang, 'The Communist Party Leadership and Rule of Law: A Tale of Two Reforms' (2020) 30 (130) *Journal of Contemporary China* 578-595 <https://doi.org/10.1080/10670564.2020.1852743>

China are keen to adopt a legal approach to affect environmental policy.<sup>7</sup> This is regarded by NGOs as an effective route to influence environmental policy, such as supervising government policy process<sup>8</sup> as well as industrial polluters' performance,<sup>9</sup> but with less potential risks than advocacy activities that may endanger their status.<sup>10</sup> Concurrently, the central powers in China have authorized and instructed both local government and the People's Procuratorate, China's public prosecutors, to join in EPIL actions, using litigation as important enforcement measures. The Chinese court now hear and decide over two thousand EPIL cases every year, offering a crucial forum for the discussion and examination of China's evolving environmental governance and practice.

In examining the system of EPIL, existing scholarship tends to focus either on the rigorous description of the legal regimes that enabled the quick growth of EPIL in recent years or the doctrinal questioning of the implications and ideologies of public interest litigation in the particular legal and political system of China.<sup>11</sup> EPIL is seen as an experiment by the Chinese state, with many questions over the integrity of the judicial system<sup>12</sup> and doubting whether such practice would lead to meaningful public

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<sup>7</sup> Xiangyi Ren and Lili Liu, 'Building Consensus: Support Structure and the Frames of Environmental Legal Mobilization in China' (2019) 29(121) *Journal of Contemporary China* 109-124

<sup>8</sup> Rachel E Stern, 'From Dispute to Decision: Suing Polluters in China' (2011) *The China Quarterly* 294-312

<sup>9</sup> Benjamin van Rooij, 'The People vs. Pollution: Understanding Citizen Action against Pollution in China' (201) 19(63) *The Journal of Contemporary China* 55-77

<sup>10</sup> May Farid and Hui Li, 'Reciprocal Engagement and NGO Policy Influence on the Local State in China', (2020) *Voluntas*, doi:10.1007/s11266-020-00288-5

<sup>11</sup> Mingde Cao and Fengyuan Wang, 'Environmental Public Interest Litigation in China', (2011) 19(2) *Asia Pacific Law Review* 217-235; Richard Zhang and Mayer Benoit, 'Public interest environmental litigation in China' (2017) 1(2) *Chinese Journal of Environmental Law* 1(2) 202-228

<sup>12</sup> Daniel Carpenter-Gold, 'Castles Made of Sand: Public-Interest Litigation and China's New Environmental Protection Law' (2015) 39 *Harvard Environmental Law Review* 241; Stern (n 8).

participation,<sup>13</sup> typically with the sample base of a small number of representative cases.<sup>14</sup> There is arguably a widening gap between what is happening in thousands of EPIL cases in China and what is depicted and examined in the literature.

This present study aims to start bridging such a gap, by undertaking quantitative and qualitative analyses of over 800 EPIL cases, including 570 final judgments and decisions. It seeks to answer the following questions. How successful are the procuratorate, local government and NGOs as claimants in EPIL in terms of outcome of litigation and recovery of compensation and costs? What are the differences in focus and approach for the different groups and how such differences contribute to their main achievements and difficulties in EPIL? What are the potential implications for EPIL policies and strategies of the different groups based on the successes and obstacles encountered in practice?

This article is structured as follows. Section 2 provides the context and overview of the legal framework for EPIL in China. Section 3 explains the methodology of this study, especially the choice of cases in the study and the constraints. Section 4 presents the key quantitative findings in data, tables and diagrams, before Section 5 substantively analyses the underlying issues and implications of such findings. Section 6 makes a number of suggestions as to how NGOs, the procuratorate and the government could adjust their strategies and priorities in EPIL, as well as the possible realignment of the legal framework based on the existing practice. The article concludes in Section 7.

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<sup>13</sup> Jingjing Liu, 'China's Procuratorate in Environmental Civil Enforcement: Practice, Challenges and Implications for China's Environmental Governance' (2011) 13 *Vermont Journal of Environmental Law* 41-63; Jingjing Liu, 'Environmental Justice with Chinese Characteristics: Recent Developments in Using Environmental Public Interest Litigation to Strengthen Access to Environmental Justice' (2012) 7(2) *Florida A&M University Law Review* 229

<sup>14</sup> Scott Wilson, 'Environmental participation in the shadow of the Chinese state' (2016) 4(3) *Economic and Political Studies* 211-237.

## 2. Context and overview of EPIL framework

### 2.1 China's legal and political environment for EPIL and NGOs

Scholarship has noticed that governmental willingness is a key factor impacting the implementation of legal regulation that relates to involving the public. On the one hand, local government units in China have been found not only to not specifically implement public engagement,<sup>15</sup> but also to be selective in information disclosure to the extent of strategic 'information manipulation'.<sup>16</sup> On the other hand, the traditional model of the local government acting only as the regulator, issuing administrative penalties when environmental damage occurs, is also seen as a flawed approach of environmental protection, where the remedial work often ended up as 'polluted by the enterprise, paid for by the government'.<sup>17</sup> EPIL and the legal approach more generally could represent an effective and low-risk compromise for Chinese government in balancing the complex needs of allowing public engagement and protecting the environment.

In addition, it is worth noting that a pronounced feature of the Chinese judicial system is that it does not function independently. Explicitly under the leadership of the Communist Party, local courts are largely embedded within the local governments and are often dependent on the government.<sup>18</sup> Other legal obstacles include the difficulty in proving acts of pollution, causation and evidence of damage, as well as procedural

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<sup>15</sup> Xiao Zhu, Lei Zhang, Ran Ran and PJ Mol Arthur, 'Regional restrictions on environmental impact assessment approval in China: the legitimacy of environmental authoritarianism' (2015) 92 *Journal of Cleaner Production* 100-108; Xiaoliang Li, Xiaojin Yang, Qi Wei and Bing Zhang, 'Authoritarian environmentalism and environmental policy implementation in China' (2019) 145 *Resources, Conservation & Recycling* 86-93

<sup>16</sup> Alex L Wang, 'Explaining environmental information disclosure in China' (2018) 44 *Ecology Law Quarterly* 865, 911-913.

<sup>17</sup> Weiyu Wu, 'The Reform of the Compensation System for Ecological and Environmental Damage in China' (2020) 60 *Natural Resources Journal* 63-102, 72.

<sup>18</sup> Ren and Liu (n 7); Stern (n 8).

limitations.<sup>19</sup> Following this line of analysis, commentators have questioned whether the promulgation of EPIL challenges local government's autonomy in environmental governance, or whether the Chinese judicial system has constrained NGOs to function independently in EPIL.<sup>20</sup> Several studies have examined the features of the practices of EPIL in China, suggesting that NGOs have played limited roles in the field, judged by the slow growth of number of EPIL cases brought by NGOs.<sup>21</sup>

Chinese NGOs have increasingly adopted legal practices when impacting environmental governance. Compared with direct actions or protests for their advocacy, NGOs have shown interest to engage with a legal approach as part of their advocacy activities, with the intention to avoid confrontation with government.<sup>22</sup> A gradual shift can be seen in NGOs clearly adopting legal mobilization as a distinctive goal to support their cause. Past experiences indicate that NGOs with legal expertise, when conducting advocacy, had merely aimed to raise the public's awareness of their environmental rights and possibly pursue selected cases to defend their interests. In comparison, EPIL has provided NGOs with more legal space to engage in China's environmental governance, with the possibility to challenge political authorities in the name of defending public interests. However, existing scholarship informs us that NGOs have shown weaknesses in acting as a professional force in litigation practices. They have displayed difficulties in financial resources to meet litigation costs<sup>23</sup> as well as a lack

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<sup>19</sup> van Rooij (n 9) 68-69.

<sup>20</sup> Wilson (n 14)

<sup>21</sup> Dan Guttman *et al*, 'Environmental governance in China: Interactions Between the State and NonState actors' (2018) 220 *Journal of Environmental Management* 126-135; Scott Wilson, 'Environmental participation in the shadow of the Chinese state' (2016) 4(3) *Economic and Political Studies* 211-237

<sup>22</sup> van Rooij (n 9)

<sup>23</sup> CBCGDF (China Biodiversity Conservation and Green Development Foundation) Look Back on the Changzhou Environment Public Interest Case, (2017), <https://cbcgdf.wordpress.com/2017/02/07/look-back-on-the->

of legal expertise.<sup>24</sup> The considerable legal involvement of environmental NGOs brings about further changes to the fabrics and relationships in the Chinese legal and political system, where local government, the judiciary and the public prosecutors all had to adapt to and accommodate such development.

## 2.2 Overview of EPIL framework

EPIL is a relatively new, narrow and clearly demarcated area within the broad realm of environmental law and litigation in China. Generally speaking, parties who suffered loss as a result of pollution or other environmental and ecological harm have been pursuing their claims under the general law of tort for decades.<sup>25</sup> That part of the general law is now consolidated by the Civil Code that came into force on 1 January 2021, which also allows punitive damages for the first time in serious cases of deliberate pollution or ecological damage.<sup>26</sup> On the other hand, EPIL concerns litigation by claimants, who have not suffered loss themselves, claiming compensation and other remedies in the name of ‘public interest’ (*gongyi*). EPIL only really become practicable from 2014 with the amendments to the Environmental Protection Law.<sup>27</sup> As things stand, only three groups are allowed to bring EPIL, namely environmental NGOs, the

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[changzhouenvironmental-pubic-interest-litigation-case/](#); Chun Zhang and Damin Tang, ‘Changzhou Soil Pollution Case is Far from over’, *China Dialogue*, (2017), <https://www.chinadialogue.net/article/show/single/en/9630-The-Changzhou-soil-pollution-case-is-far-from-over/>; Guttman (n 21)

<sup>24</sup> Qi Gao, ‘Public Interest Litigation in China: Panacea or Placebo for Environmental Protection?’ (2018) 16(4) *China: an international journal* 47- 75

<sup>25</sup> Environmental Protection Law of PRC, first enacted in 1989, had specific provisions on litigation to claim compensation for environmental pollution in Articles 41 and 42.

<sup>26</sup> Civil Code of PRC, Art.1232

<sup>27</sup> The 2012 amendments to the Civil Procedure Law (Art.55) provided that authorities and relevant organizations as regulated by law may bring public interest litigation, without specifying what these authorities or organizations were.

procuratorate, and local government.

Civil EPIL may be brought by qualified NGOs since 2014. These NGO must register with the authorities, have environmental protection as their main objectives, and are clear of any unlawful activities or rule-breaking in the previous five years.<sup>28</sup> In civil EPIL, NGOs may ask the court for a wide range of remedies against the defendant responsible for environmental or ecological harm, such as ending relevant behaviours or activities harmful to the environment, taking remedial actions, paying compensation for environmental damage including the loss of service function during the period of harm prior to full recovery, reimbursing expenditures and costs in clearing up pollution or remedying the damage to the environment, and public apology by the defendant.<sup>29</sup> NGOs may also recover reasonable costs they have incurred in pursuing EPIL, including costs of forensic analysis and lawyers' fees.

Civil EPIL by the procuratorate started in 2015 with a pilot implementation in thirteen provinces and became national in 2017. Where the procuratorate discovers incidents of environmental damage, it should make the effort to ask either relevant authorities (i.e. governmental departments) or qualified organizations (i.e. NGOs) to come forward and bring civil EPIL. In cases where no such authority or organization is ready to take on the civil EPIL, the procuratorate may then initiate civil EPIL itself instead.<sup>30</sup> A similar set of remedies is available in procuratorial EPIL as those by NGOs. In addition to civil EPIL, the procuratorate may also bring forward administrative EPIL

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<sup>28</sup> Environmental Protection Law of PRC, Art.58.

<sup>29</sup> Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Environmental Civil Public Interest Litigations, Art.18-21.

<sup>30</sup> Civil Procedure Law of PRC, Art.55.



against local government or governmental departments for not fulfilling their duties of environmental protection.<sup>31</sup> The court may find the government to be in breach of their duties and order timely performance of the duties. There is no scope for compensation or any financial concerns in administrative EPIL by the procuratorate against the government.

Lastly, EPIL by the government remains the least formalized procedure out of these three groups of claimants. Although local government has initiated and won several cases of EPIL in the past, the effort of institutionalizing the procedure only started in 2016 with the Ecological Environmental Damage Compensation (EEDC hereinafter) system piloted in seven provinces, which went national in 2018. Although there is suggestion that EEDC could be classified as state interest litigation rather than public interest litigation, such distinction is not widely supported.<sup>32</sup> In essence, EEDC is broadly comparable to civil EPIL brought by NGOs and the procuratorate, albeit with some procedural differences such as the pre-litigation requirement for the local government to attempt negotiation with the prospective defendant. More importantly, the practical rules of EEDC are still based on policy documents from the central government instead of any law enacted by the National People's Congress.<sup>33</sup> There are

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<sup>31</sup> Administrative Procedure Law of PRC, Art.25.

<sup>32</sup> Hao Li, '生态损害赔偿诉讼的本质及相关问题研究 <A Study on the Essence of Ecological Damage Compensation Lawsuit and Related Issues>' (2019/4) *Administrative Law Review* 55-66, at 58-60; Xinqi Liu, '我国公益诉讼制度的逻辑梳理与修正 <The logic and adjustment of the public interest litigation system in China>' (2020/3) *The Chinese Procurators* 56-59, 57.

<sup>33</sup> Articles 1234 & 1235 of the Civil Code provide that authorities as designated by the State or organizations regulated by law could demand remedy of and compensation for ecological environmental damage, without specifying details such as which authorities have such powers or the procedures they must follow for EEDC. Thus the basis of EEDC litigation practice is still rooted in the Reform Plan of the Ecological Environmental Damage Compensation System (2017, available on the State Council website: [http://www.gov.cn/zhengce/2017-12/17/content\\_5247952.htm](http://www.gov.cn/zhengce/2017-12/17/content_5247952.htm)) and 2019 provisions from the Supreme People's Court. For the basis of EEDC practice, see Lei Xie and Lu Xu, 'Environmental Public Interest Litigation in China: a critical examination' (2021)

questions marks over many practical details in EEDC procedure such as authorization for initiating EEDC cases by different levels of government, to be examined below.

Table 1 Number of court resolved EPIL cases 2015-19

	NGOs	Procuratorate	Government EEDC
2015	53 <sup>34</sup>	6 <sup>35</sup>	N/A
2016	68 <sup>34</sup>	77 <sup>36</sup>	Very few
2017	58 <sup>37</sup>	1,304 <sup>37</sup>	Very few <sup>38</sup>
2018	65 <sup>37</sup>	1,737 <sup>37</sup>	8 <sup>39</sup>
2019	58 <sup>39</sup>	1,895 <sup>39</sup>	36 <sup>39</sup>

Table 1 presents the number of EPIL cases dealt with by the court by the different claimants between 2015 and 2019. Despite minor discrepancies in the exact figures

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Transnational Environmental Law (FirstView) 1-25, doi:10.1017/S2047102520000448.

<sup>34</sup> Dun Li (ed), *Review of Public Interest Litigation in Environment Protection 2016* (Law Press China, 2017) 1

<sup>35</sup> Ibid 311 & 316.

<sup>36</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 34) 311-325 would indicate that the number could be as high as 140.

<sup>37</sup> Supreme People's Court press conference on 2<sup>nd</sup> March 2019, full script available in Chinese at <https://www.chinacourt.org/chat/fulltext/listId/51171/template/courtfbh20190302.shtml>.

<sup>38</sup> There were 30 resolved EEDC cases in total by May 2019. Supreme People's Court press conference on 5<sup>th</sup> June 2019, full script available in Chinese at <http://www.court.gov.cn/zixun-xiangqing-162292.html>.

<sup>39</sup> Supreme People's Court, '中国环境资源审判(2019年) <Adjudgment of Environment and Resources Cases in China (2019)>' (May 2020), available in Chinese at <http://www.court.gov.cn/zixun-xiangqing-228341.html>.

from different sources, the overall picture is nevertheless consistent. NGOs have 50 to 70 EPIL cases resolved in court each year, while the procuratorate have closer to 2,000 cases. The number of EEDC cases brought by local government has risen sharply in 2019 and is quickly catching up to NGO cases.

### 3. Methodology

This present study conducts qualitative and quantitative analyses of decided EPIL court cases initiated by NGOs, the procuratorate and local government. It examines these cases with regard to issues including the nature of any litigation, the environmental element concerned, outcome, monetary value, litigation costs and so on. The results of such examination provide insights on the involvement of different actors in environmental litigation, their preferences, strategies and limitations.

For the avoidance of any selection bias in relation to information sources, this study only examines cases fully reported on China Judgements Online (CJO hereinafter), the official website run by the Supreme People's Court for court judgments and related documents.<sup>40</sup> As of January 2021, CJO houses over 114 million documents and has for a number of years claimed to be the world's largest database of court judgments. This exclusion of any non-CJO sources could leave out cases, which are otherwise important, yet it should enhance the integrity of the study overall due to the clear threshold of eligibility to minimize bias due to information sources.

Two important issues should be noted about CJO cases and any data generated thereon. Firstly, in this massive database, there is no consistently reliable mechanism

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<sup>40</sup> <http://wenshu.court.gov.cn>.

for comprehensive identification of all cases in any branch of law or of any particular type. Although there are numerous searchable variables and filter options, the actual data entries, at the rate of typically more than 30,000 cases per day, are carried out by thousands of Chinese courts in real time, each likely having their own preferences and protocols in categorization or classification. Although functions such as full-text searches will mostly alleviate difficulties such as different categorization of cases by different courts, it is always possible that any study will overlook many cases for reasons such as typographical errors in the original documents or missing a viable combination of keywords by the researchers.

Secondly, as massive as the CJO is and as quickly as it is still growing, it is not a complete database of all court judgments in China. Although the Supreme People's Court has directed all courts in China that they should upload all judgments within seven days of issuance, unless there are reasons for not doing so such as concerns of national security, only a percentage of new cases are actually uploaded in the past few years.<sup>41</sup> The status quo of CJO also means that even the most comprehensive study of cases therein will miss out on potentially important cases.

Bearing in mind these two important caveats about the lack of comprehensiveness, this study used a combination of search and filter functions to pick up as many cases of EPIL as possible from the CJO database. With most of the searches conducted between June and August 2020, the initial effort gathered 881 judgments and related documents, using relevant keywords such as EPIL (*huanjing gongyi susong*), EEDC (*shengtai*

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<sup>41</sup> Yang Jinjing, Qin Hui & He Haibo, '裁判文书上网的中国实践 <Chinese practice of publishing court judgments online>' [2019/6] *China Law Review* 125-147, 128; Lu Xu, 'The Changing Perspectives of Chinese Law: Socialist Rule of Law, Emerging Case Law and the Belt and Road Initiative' (2019) 5 *Chinese Journal of Global Governance* 153-175, 169.

*huanjing sunhai peichang*), civil public interest lawsuit (*minshi gongyi susong*), administrative public interest lawsuit (*xingzheng gongyi susong*) and so on. These cases were then read and examined substantively, with irrelevant cases removed, procedural documents without enough substance discounted, and multiple documents in relation to the same case combined. Table 2 presents the final number of all EPIL cases that reached a final outcome examined in this study.

Table 2 Number of cases with final outcome analysed in this study

<i>Claimants</i>	<i>Types</i>	<i>Number of Cases</i>
NGO	civil EPIL	110
Procuratorate	civil EPIL	394
	administrative EPIL	21
Government	EEDC	28
	pre-EEDC or non-EEDC	17
Total		570

Collating the number of total EPIL cases known to have reached the court by 2019, it can be roughly estimated that the cases covered in this study would represent between a fifth to a quarter of all EPIL cases brought by NGOs, over 5% of cases by the procuratorate and perhaps half of the cases by the government. Though far from being comprehensive, the sample base in this study is nevertheless large enough to be

representative of the current EPIL practices in China.

It is noted that the number of civil EPIL by the procuratorate includes 147 civil cases brought forward independently and 247 civil cases attached to another criminal prosecution (*xingshi fudai minshi susong*). After some effort of comparison, there is no discernible difference between these two groups of cases. The choice of whether to proceed with the civil case independently or to attach it to a criminal proceeding seems to be largely dependent on circumstances, such as whether there is a timely ongoing prosecution case. This group of 394 cases will therefore not be further distinguished below.

It should be further noted that the number of NGO cases above excludes a series of cases in relation to the pollution of Tengger Desert. The case and its surrounding circumstances have been explained in detail elsewhere.<sup>42</sup> Although this series of eight cases substantively concerned the same incident and issues, formally they each went through trial, appeal, retrial at the Supreme People's Court before final settlement back at the first instance court, generating a paper trial of more than twenty documents in total on CJO. The inclusion of eight cases over substantively the same incident could also skew the picture when presented alongside others.

Finally, there are inherent limitations to this study that relies exclusively on court judgments. There is little information on those cases that do not reach the court, for example the large number of pre-litigation environmental protection cases dealt with by the procuratorate discussed below. Nevertheless, the value of insights offered by hundreds of decided cases in a rigorous and penetrating examination of the practice of

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<sup>42</sup> Xie and Xu (n 33).

EPIL in China arguably far outweighs such limitations.

#### 4. Research findings

This section presents the results of this study of 549 cases in relation to the environmental elements involved, outcome of litigation, value of monetary claims for environmental damage, and value of claims for litigation costs. Those 21 cases of administrative EPIL do not fit comfortably into such breakdown and are treated separately.

##### 4.1 Main Environmental Elements

The main environmental elements or causes for EPIL from these 549 cases are categorized as follows: 1) pollution and illegal discharge from manufacturing or farming processes, excluding air pollution; 2) air or atmospheric pollution 3) dumping of solid wastes, liquids, oil, silt and other hazardous substances such as medical wastes away from sites of production; 4) pollution or leakage caused by traffic accidents; 5) illegal mining; 6) occupation and / or destruction of forest, grassland or farmland; 7) fishing, hunting and other wildlife related activities, including illegal lumbering. There are a small number of cases which do not fit into any of these seven categories. Some cases reached settlement and were withdrawn where the judgments did not reveal the exact nature of any environmental harm concerned.

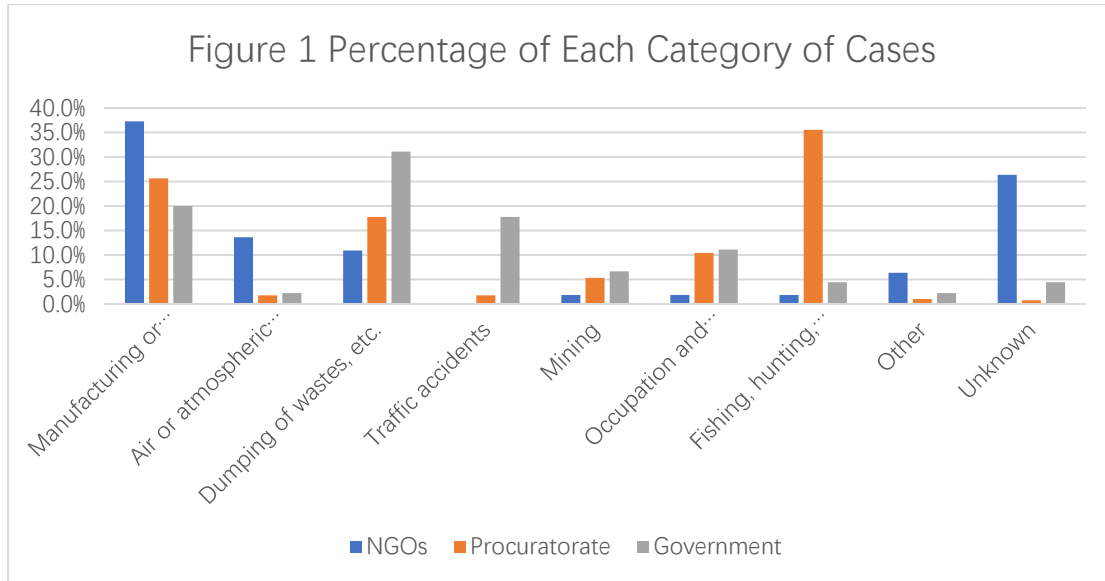
Table 3 presents the number of cases in each category from NGOs, the procuratorate and the government. Figure 1 presents the frequency of each category as a percentage of all cases by each type of claimants.

Table 3 Number of EPIL cases by environmental elements

	NGOs	Procuratorate	Government	Total
Manufacturing or farming discharge	41	101	9	151
Air or atmospheric pollution	15	7	1	23
Dumping of wastes, etc.	12	70	14	96
Traffic accidents	0	7	8	15
Mining	2	21	3	26
Occupation and destruction of land	2	41	5	48
Fishing, hunting, wildlife related	2	140	2	144
Other	7	4	1	12
Unknown	29	3	2	34

Figure 1 Percentage of each category of cases





## 4.2 Litigation Outcome

For NGOs, out of 110 cases that reached a final resolution, they were successful or partly successful in 49 cases. They lost 3 cases outright. 10 cases reached settlement. NGOs withdrew litigation in 35 cases. 12 cases were rejected by the court due to reasons such as lack of standing to sue or other restrictions in the law. One case reached a special outcome when it was supplanted by EEDC litigation, explained below.

For the procuratorate, out of 394 cases that reached a final resolution, the procuratorate were successful or partly successful in 383 cases. 4 cases were withdrawn by the procuratorate after the defendants fulfilled what was asked of them, while 6 cases reached settlement, all with the defendant paying the compensation originally demanded. Only in one case did the procuratorate fail to prevail on the substantive demand for compensation payment.<sup>43</sup> In other words, in 99.7% of the procuratorial

<sup>43</sup> 甘肃省白银市人民检察院 v 兰州银轮运输有限公司皋兰分公司, (2019)甘 95 民初 4 号, 甘肃矿区人民法

cases the defendant was found liable or agreed to take some responsibility for what the procuratorate claimed against them.

In addition, the procuratorate also won all 21 administrative EPIL cases against the government.

For the government, out of 45 cases that reached a final resolution, they were successful or partly successful in 27 cases. 8 cases reached settlement or had settlement agreement confirmed by the court. One case was withdrawn by the government after successful negotiation with the defendant. 9 cases were rejected by the court.

Table 4 Success rate of EPIL cases

	NGOs	Government
Success or partial success	49	27
Settlement	10	8
Loss	3	0
Rejection by the court	12	9
Total non-withdrawn cases	74	44
Success Rate	79.7%	79.5%

Table 4 presents a comparison of the success rate of NGOs and the government,

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院 (23 May 2019).

where withdrawn cases are excluded and settlements get counted as successful in fulfilling the demand of the claimants. The near perfect success in terms of outcome for procuratorial EPIL is left out from this comparison. It may be noted that the government did not lose a single case outright, while the NGO lost three times in court. The main contributor to the comparatively lower success rate of around 79% for either group of claimants is those 12 and 9 cases rejected by the court. The main reason for rejection of governmental cases is the lack of standing for lower-level government units,<sup>44</sup> especially under current EEDC policy that only authorizes provincial and prefectural level government or their delegated subordinates to sue.<sup>45</sup> The reasons for rejection of those 12 NGO cases are more varied, including where the NGO failed to convince the court of its connection to environmental protection in order to bring EPIL,<sup>46</sup> suing in a court with no jurisdiction over the subject matter,<sup>47</sup> and at least four cases of maritime litigation, which is not permitted under current EPIL as to be discussed below.

If these rejection cases are excluded from the calculation, then out of the 486 non-withdrawn, non-rejected civil EPIL or EEDC cases, the three groups of claimants were ultimately successful, partly successful or agreed to settle in 483 of them, representing

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<sup>44</sup> 兰州市西固区环境保护局, (2018)甘民终 386 号, 甘肃省高级人民法院 (26 June 2018); 黄强勇 v 龙海市水利局, (2018) 闽 06 民终 1109 号, 福建省漳州市中级人民法院 (21 June 2018); 青田县船寮镇人民政府 v 孟州市泰兴汽车运输有限责任公司, (2019)浙 1121 民初 4042 号, 浙江省青田县人民法院 (9 Dec. 2019).

<sup>45</sup> Reform Plan of the Ecological Environmental Damage Compensation System (n 33), Part 4, Section 3.

<sup>46</sup> 河南省企业社会责任促进中心 v 河北常恒能源技术开发有限公司, (2019)冀 01 民初 818 号, 河北省石家庄市中级人民法院 (15 July 2019); 北京市朝阳区自然之友环境研究所 v 中船海洋与房屋装备股份有限公司, (2019) 粤 01 民初 1096 号, 广东省广州市中级人民法院 (25 Nov. 2019).

<sup>47</sup> 北京市朝阳区自然之友环境研究所 v 中国石油天然气股份有限公司, (2017) 京民终 538 号, 北京市高级人民法院 (14 Sept. 2017); 北京市朝阳区自然之友环境研究所 v 山东凯马汽车制造有限公司, (2018)京 04 民初 48 号, 北京市第四中级人民法院 (16 Aug. 2018).

an incredible 99.4% overall success rate. NGOs fared worst out of the three groups, having lost three out of 62 cases. Still that would mean a success rate of 95.2%. The high success rate of EPIL claimants will be analysed further below.

#### 4.3 Monetary Value of Claims for Environmental Compensation

The majority of EPIL claims will specify a sum of environmental compensation to be paid by the defendant. There are often multiple components to this sum, typically including the costs for any emergency clear-up of pollution or hazard, the expected costs for full restoration of the environment, and the loss of environmental service function before such full restoration could be completed. In some cases, the claimants would only specify this monetary sum as an alternative to the demand of remedial work, i.e. compensation only payable if the defendant fails to remedy the situation a timely and satisfactory manner. In a small number of cases brought by NGOs, the claimant would make an unspecified monetary demand where ‘the exact sum is to be determined by forensic analysis’.<sup>48</sup>

Out of 110 NGO cases, 50 included specific sums in the demand, while a further 8 cases stipulated the to-be-determined monetary demand. Among those 50 cases with specified sums, 5 had value over 100 million RMB, 10 were between 10 million and 100 million, 21 were between 1 million and 10 million, 8 were between 0.1 million and 1 million, and 6 were below 0.1 million in value.

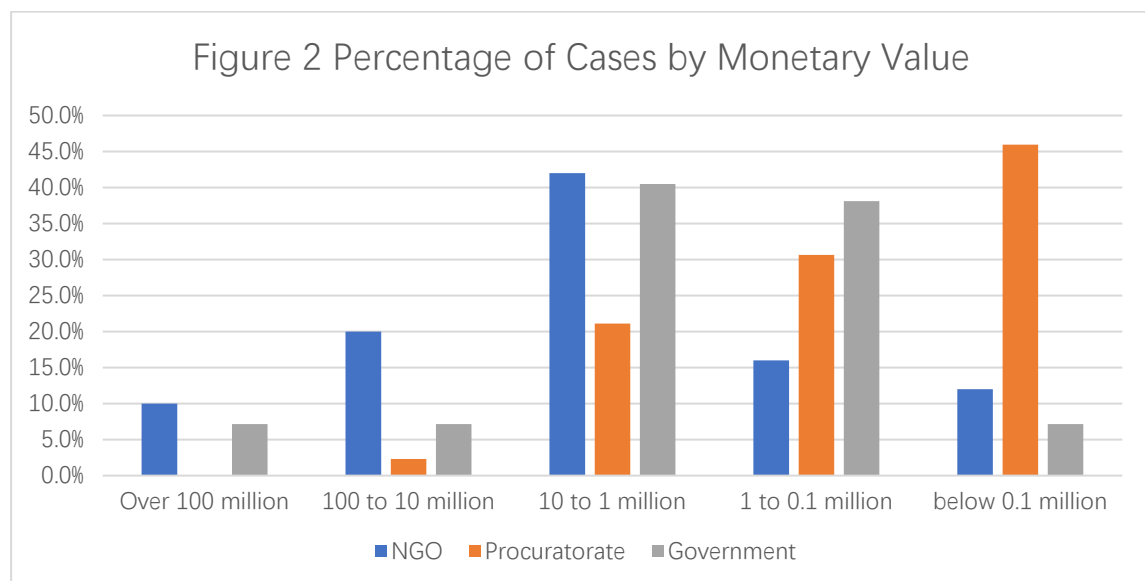
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<sup>48</sup> E.g. 中华环境保护基金会 v 中国石油天然气股份有限公司大连石化分公司, (2016)辽 02 民初 267 号, 大连市中级人民法院 (18 Dec. 2017); 中国生物多样性保护与绿色发展基金会 v 云南泽昌钛业有限公司, (2018)云 01 民初 32 号, 昆明市中级人民法院 (12 Dec. 2018).

Out of 394 procuratorate cases, 346 included specific sums in the demand. Among those 346 cases, no case had value over 100 million RMB, 8 were between 10 million and 100 million, 73 were between 1 million and 10 million, 106 were between 0.1 million and 1 million, and 159 were below 0.1 million in value.

Out of 45 government cases, 42 included specific sums in the demand. Among those 42 cases, 3 cases had value over 100 million RMB, 3 were between 10 million and 100 million, 17 were between 1 million and 10 million, 16 were between 0.1 million and 1 million, and 3 were below 0.1 million in value.

Figure 2 Percentage of cases by monetary value



In terms of the mean or median value of cases, those 50 NGO cases claimed a total sum of 1.442 billion RMB, or an average value of 28.83 million per case, with a median

value of 4.55 million. Bearing in mind the potentially distorting effect of extreme high value cases, by removing those 5 cases with value in excess of 100 million RMB, the average value of NGO cases comes down to 8.39 million per case.

For procuratorate cases, those 346 cases with specified sums claimed a total sum of 396 million RMB, or an average value of 1.15 million per case, with a median value of 0.139 million.

For government cases, those 42 cases with specified sums claimed a total sum of 908 million RMB, or an average value of 21.63 million per case, with a median value of 1.25 million. By removing those 3 cases with value in excess of 100 million RMB, the average value of government cases comes down to 4.55 million per case.

In terms of actual award by the court, of the 1.442 billion RMB claimed in those 50 NGO cases, the court upheld a total sum of 413 million, or 28.6% of the sum claimed. However, the two largest claims by NGOs, for 377 million<sup>49</sup> and 206 million<sup>50</sup> respectively, both obtained no monetary award in the court, which would have notably distorted the figures. If these two zero-award cases are excluded, then NGO would have won 48.1% of the sum claimed.

For procuratorate cases, of the 396 million claimed in 346 cases, the court upheld a total sum of 385 million, or 97.0% of the sum claimed.

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<sup>49</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). This case is discussed in detail by Xie and Xu (n 33).

<sup>50</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). This is the special case of NGO EPIL being supplanted by government EEDC lawsuit, discussed below.

For government cases, of the 908 million claimed in 42 cases, the court upheld a total sum of 658 million, or 75.4% of the sum claimed.

Table 5 presents the comparison of case values and award values among the three groups of claimants, including adjusted figures by excluding certain extreme high value cases as explained above.

Table 5 Monetary Value of Cases

	NGOs	Procuratorate	Government
Median value of cases (million RMB)	4.55	0.139	1.25
Adjusted mean value per case (million RMB)	8.39	1.15	4.55
Adjusted award percentage	48.1%	97%	75.4%

#### 4.4 Litigation Costs

The law on EPIL and policies on EEDC allow recovery of certain costs by the claimants against the defendants. The decision is largely at the discretion of the court and not explicitly dependent on the outcome or merit of the lawsuit,<sup>51</sup> but it is customary that some costs will be awarded to the successful claimants at a level seen as ‘reasonable’ by the court. Current rules clearly favour claimants in EPIL, as there is no possibility

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<sup>51</sup> Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Environmental Civil Public Interest Litigations, Art.22; Provisions of the Supreme People's Court on Trial of Ecological Environmental Damage Compensation Cases, Art.14.

for the defendant to recover any costs from the claimant even if the claimant loses the case.

For NGOs, their costs claim typically cover lawyers' fees, cost of forensic analysis or expert reports, travel expenses of staff, and so on. Among those 50 NGO cases with specified monetary values, 47 of them came with a costs claim, totalling 17.98 million RMB, or 1.24% of the value of main claims. The court awarded 6.44 million in the end, or 36% of the claimed costs. The main reductions are high lawyers' fees and other expenditures such as salaries and pension contribution for staff members, which the court regarded as unrelated or irrelevant to the litigation.<sup>52</sup>

For the procuratorate, the main costs claimed cover forensic analysis or expert reports, as well as public announcement fees, which are routinely incurred as the procuratorate must make the effort to ask for NGOs to come forward to take EPIL first. Among the 346 procuratorate cases with specified monetary values, 146 came with a costs claim, totalling 14.82 million RMB, or 3.74% of the value of the main claims. The court awarded 14.47 million in the end, or 97% of the claimed costs. It is noted that unlike the other two groups, the procuratorate never claim lawyers' fees as procurators will attend court hearings themselves.

Among the 42 government cases with specified monetary values, 19 came with a costs claim, totalling 3.99 million RMB, or 0.44% of the value of the main claims. The court awarded 2.74 million in the end, or 68% of the claimed costs. The notable

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<sup>52</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); 中国生物多样性保护与绿色发展基金会 v 马鞍山国翔环保科技有限公司, (2018)皖民终 826 号, 安徽省高级人民法院 (29 Dec. 2018).



reductions are high lawyers' fees which the court regarded as beyond reasonable levels.

Table 6 A comparison of claims for litigation costs by the three groups of claimants

	NGOs	Procuratorate	Government
Percentage of cases with a costs claim	94%	42%	45%
Percentage of costs claimed to value of cases	1.24%	3.74%	0.44%
Percentage of costs awarded by the court	36%	97%	68%

## 5. Analysis and Discussion

### 5.1 High success rate overall in EPIL claims

The conspicuously high success rate for EPIL claimants has been highlighted above. By excluding rejected and withdrawn cases, EPIL claimants prevail in more than 99% of the decided cases. Only NGOs have really lost in a handful of cases, bringing its success rate down to a still impressive 95%. Underlying such statistics, a notable aspect of current EPIL claims in China is that the vast majority of cases are not controversial or substantially contested. Regardless of the environmental elements involved or the type of claimants, in most EPIL the defendant is willing to admit the fact that activities allegedly causing environmental harm had taken place. Among the hundreds of cases

examined, few defendants seriously attempted to argue that such activity never happened or that such incident had nothing to do with them. The main arguments for most defendants would typically focus around the extent of liabilities,<sup>53</sup> items claimable following an incident,<sup>54</sup> the methods for calculation of environmental damage and repair cost,<sup>55</sup> the allocation of responsibilities among co-defendants,<sup>56</sup> and so on. Quite often the defence or response in court submitted by a defendant was more of a pleading than any plea based on legal principles, such as that the cost of forensic analysis was too high or that the defendant could not afford what was demanded.<sup>57</sup> Generally speaking, for the overwhelming majority of cases that reach the stage of substantive judgment by the court, the defendants know and accept that they are liable for something. The court case is really about exactly how much they are liable for. It is very unusual for any claimant, be it the procuratorate, the government or an NGO, to lose any EPIL at this late stage, provided that they have cleared the earlier

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<sup>53</sup> 新郑市薛店镇人民政府 v 中国生物多样性保护与绿色发展基金会, (2018) 豫民终 344 号, 河南省高级人民法院 (12 June 2018), the first instance court calculated damages for loss of service functions due to lumbering activities as equivalent of a five-year period. On appeal, the claimant NGO wanted ten times the amount awarded, which was rejected by the appellate court.

<sup>54</sup> 无锡市锡山区人民政府厚桥街道办事处 v 上海市闵行区梅陇镇城市网格化综合管理中心, (2018) 苏 0205 民初 2606 号, 江苏省无锡市锡山区人民法院 (5 Nov. 2019), the claim for interest on the cost of emergency remedial work following waste dumping was rejected by the court. 郭家成 v 广东省广州市人民检察院, (2019) 粤民终 925 号, 广东省高级人民法院 (31 Dec. 2019), the defendants argued on appeal, unsuccessfully, that they should not be liable for the cost of forensic analysis.

<sup>55</sup> 云浮市云城区人民检察院 v 林进坚, (2020) 粤 53 刑终 30 号, 广东省云浮市中级人民法院 (1 July 2020), the defendants successfully argued on appeal that the amount of profit made from illegal waste dumping should not be included in the calculation for cost of environmental remedy.

<sup>56</sup> 安徽省芜湖县人民检察院 v 凤某某, (2020) 皖 0221 刑初 15 号, 安徽省芜湖县人民法院 (28 June 2020);

<sup>57</sup> 东莞市环境科学学会 v 何树朝, (2018) 粤 01 民初 707 号, 广东省广州市中级人民法院 (23 July 2019); 中华环保联合会 v 朱宏根, (2018) 苏 05 民初 1192 号, 江苏省苏州市中级人民法院 (26 Dec. 2019); 四川省高县人民检察院 v 曾庆云, (2019) 川 1525 刑初 17 号, 四川省高县人民法院 (18 July 2019).

hurdles such as having the standing to sue or suing in a court with jurisdiction.

In this regard, the three cases lost by NGOs may provide some insight on how the unusual occurrence of losing an EPIL claim could nevertheless happen.

1) In the first case from Liaoning, the NGO alleged that several companies dumped large volume of sludge on certain sites near the provincial capital Shenyang, causing environmental harm.<sup>58</sup> However, it was established in the court proceeding that the sludge was from the normal operation of wastewater treatment plants serving the city, with all companies involved properly licensed by the city government and the sites for storage legally leased for such purposes. The storage of sludge was necessary at the time because Shenyang had no facility to process it. Since the establishment of new facilities, there was no addition of new sludge and the city government had been gradually clearing the storage sites since 2014. The defendants were not liable for essentially doing what was properly authorized and contracted by the government to do as part of the waste management of the city.

2) In the second case from Beijing, the NGO alleged that a property developer filled up ponds and wetlands in its construction of a residential development, causing environmental harm and loss of service functions.<sup>59</sup> After consideration of the evidence provided by all sides including environmental agencies of the Beijing municipal government, the court found that the so-called ponds and wetlands had dried up naturally years before the developer started any construction and the remnant plant growths represented fire and health hazards for the residents and the area. The

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<sup>58</sup> 中华环保联合会 v 国电东北环保产业集团有限公司, (2018) 辽民终 122 号, 辽宁省高级人民法院 (25 June 2018).

<sup>59</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 Dec. 2018).

developer's action in filling up the sites and digging up new artificial ponds in compliance with law and regulations was not harmful in anyway to the environment.

3) In the final case from Yunnan, the NGO alleged that an aborted construction project left some land with significant risks of landslide and environmental damage.<sup>60</sup> The defendant construction company provided photographic evidence and expert opinions that the pre-construction land was always liable to such risks, and that they have made all reasonable efforts such as replanting following the withdrawal of the project to minimize the risks. This convinced the court to reject all demands of the NGO.

The commonality of these three losses by NGOs is that they failed to establish any illegality or negligence by the defendants, who have essentially complied with the existing environmental law and regulations in the course of their normal business. It may be far more difficult for the court to support any allegation of liabilities in such cases. Whether the existing law should have allowed activities such as the storage of sludge, which could perhaps cause detriment to the environment, seems to be a different matter that the Chinese court may not be prepared to contemplate. It may also be surmised that neither the procuratorate nor the government would have taken any of the defendants in these three cases to court. Nevertheless, the fact that NGOs are not afraid of taking on the difficult cases of 'lawful operation within the law' is an important part of their contribution to the environmental governance of China, to be revisited below.

## 5.2 Superior performance by the procuratorate

Even against the background of high success rate overall for all EPIL claimants, the

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<sup>60</sup> 中国生物多样性保护与绿色发展基金会 v 云南建投第十一建设有限公司, (2019)云 29 民初 6 号, 云南省大理白族自治州中级人民法院 (9 Oct. 2019).

performance of the procuratorate is still noteworthy for the scale and efficiency of its operation. They currently take more than 95% of EPIL cases to the court out of the three groups. They make sure that the defendants are liable in 99% of the cases, winning virtually every case that eventually reached the judgment stage. Their claims for compensation and costs are upheld by the court to around 97% of the value. No case seems too small for them as they routinely take on EPIL for a few thousands RMB; yet they are equally competent to handle cases valued at tens of millions.

It may be tempting here to draw parallel with the famous or infamous 99% conviction rate in criminal proceedings for Chinese prosecutors in an authoritarian system.<sup>61</sup> There may also be some truth in that the procuratorate is a powerful institution in the Chinese legal system,<sup>62</sup> while the court is often seen as lacking in independence and authority in relation to the procuratorate and the government.<sup>63</sup> Nevertheless, any broad scepticism about the Chinese political and legal system would not be able to explain the fact that the government actually performs much poorer than the procuratorate in EPIL (75% of claim values compared to 97% of the procuratorate; 68% of costs claimed compared to than 97% of the procuratorate), or indeed have a marginally lower ‘success rate’ than NGOs in all non-withdrawn cases. The comprehensive success of the procuratorate in EPIL indicate that they are doing something differently, and arguably more efficiently than the other two groups.

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<sup>61</sup> Li Li, ‘High rates of prosecution and conviction in China: the use of passive coping strategies’ (2014) 42(3) *International Journal of Law, Crime and Justice* 271-285. It should be noted that a 99% conviction rate is not necessarily the sign of an authoritarian system, as for example China’s democratic neighbour Japan displays the same characteristic, see David Johnson, ‘Japan’s Prosecution System’ (2012) 41 *Crime and Justice* 35-74, 45.

<sup>62</sup> Yu Mou, ‘Overseeing Criminal Justice: The Supervisory Role of the Public Prosecution Service in China’ (2017) 44 *Journal of Law and Society* 620-645, 626.

<sup>63</sup> Randall Peerenboom, ‘Judicial Independence in China’ in Randall Peerenboom (ed) *Judicial Independence in China* (2010, Cambridge University Press) 82-84.

It is very likely that the selection of cases to litigate has had the greatest impact on the outcome. Although the procuratorate are bringing forward close to 2,000 EPIL cases every year, this is merely a tip of the iceberg in terms of the environmental cases handled by the massive system of the People's Procuratorate. In 2018, the procuratorate handled 59,312 public interest cases in relation to ecological and environmental protection.<sup>64</sup> In 2019, the count went up to 69,236.<sup>65</sup> In other words, only about 3% of the EPIL cases handled by the procuratorate are actually brought to the court. There is no statistics available on what exactly happened to the other 97% of cases which did not reach the court. It is clear that the majority of cases are resolved in the 'pre-litigation procedures', which the procuratorate follow prior to civil or administrative EPIL before actually initiating litigation in court.<sup>66</sup> This is where the procuratorate notifies the other party of their intention to consider EPIL in advance, where demands such as timely remedy of wrongdoing or performance of legal duties could be made. It has been reported that in 97.7% of cases, a governmental department will respond positively to pre-litigation procuratorial 'opinion' demanding the performance of duties, hence avoiding the need for litigation.<sup>67</sup> The rate of positive response or due compliance would likely be lower for potential defendants in civil EPIL cases. Still, the fact that the procuratorate only select 1 in 30 cases to go to the court is likely to be instrumental in

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<sup>64</sup> Annual Report of the Supreme People's Procuratorate for 2018 (12 Mar. 2019), full text in Chinese available at [https://www.spp.gov.cn/spp/tt/201903/t20190312\\_411422.shtml](https://www.spp.gov.cn/spp/tt/201903/t20190312_411422.shtml).

<sup>65</sup> Annual Report of the Supreme People's Procuratorate for 2019 (25 May 2020), full text in Chinese available at [https://www.spp.gov.cn/spp/gzbg/202006/t20200601\\_463798.shtml](https://www.spp.gov.cn/spp/gzbg/202006/t20200601_463798.shtml).

<sup>66</sup> Zhang Feng, '检察环境公益诉讼之诉前程序研究 <Research into the Pre-trial Procedure of Prosecutorial Environment Public Interest Litigation>' (2018)(11) *Political Science and Law* 151

<sup>67</sup> '<The procuratorate set up 113,848 cases of public interest litigation in the first eleven months of 2019>', Xinhua News Agency (14 May 2020), available at [http://www.xinhuanet.com/legal/2020-05/14/c\\_1125981755.htm](http://www.xinhuanet.com/legal/2020-05/14/c_1125981755.htm).

the impressive 99% success rate.

The really fascinating question, about which there is virtually no information available, is whether the procuratorate would follow up on every case that did not generate a positive response from the pre-litigation procedure, especially in cases where there is a chance the procuratorate would not win comfortably. Judging by the 394 civil EPIL cases brought by the procuratorate, it may be said that they are certainly not adventurous in their selection of cases to litigate. It is simply unknown whether the procuratorate will bring EPIL and risk losing a case if there is foreseeable uncertainty or difficulty, or whether they would play it safe and opt for the numerous other straightforward cases instead.

Meanwhile, this level of success of the procuratorate could also be explained by their legal expertise and accumulated experiences. More than three thousand procuratorates in China are staffed by more than 60,000 legally qualified procurators, ready to be sent into action in the nearest court, which forms a far stronger force of legal expertise than either NGOs or local government could summon. In cases covered by this study, for instance, it is fairly common for the procuratorate to send one team of procurators for the criminal proceeding and another team for the attached civil EPIL. In contrast, due to constraints such as available funding to be discussed below, the typical line-up for NGO cases is one non-lawyer NGO staff member and one instructed lawyer, often from Beijing or another province. Even when an NGO manages to put together a makeshift team of two or more lawyers, it has not always left the court with any good impression. In one case, for example, a court in Guizhou Province explicitly questioned the NGO's decision to instruct lawyers from two different firms respectively based in Beijing and Anhui as 'seemingly unnecessary', and in turn awarded only 100,000 RMB of the

550,000 RMB lawyers' fees claimed.<sup>68</sup> Moreover, with the large number of EPIL cases litigated by procurators every year, there are clear patterns emerging in the technical approach to many of the commonplace cases. Procurators now mostly travel on well-trodden paths in these cases in terms of what facts to prove, which forensic analysis to instruct, how to calculate compensation, what demands to make of the defendant, and so on. In essence, these are teams of legal professionals operating in a familiar environment, doing things they are comfortable with and increasingly experienced in. It will indeed be surprising if they are not faring better than a solitary lawyer flown in from another part of the country on an ad hoc basis.

Moreover, this combination of professionalism and lasting local connection seems to contribute to a broader vision of what EPIL could bring, than straightforward monetized compensation. In many cases, the procuratorate would demand remedial work instead of monetary compensation, and only specify the sum of compensation as an alternative if the work is not carried out in a timely fashion to a satisfactory standard. The procuratorate could also be agreeable to change their demands in response to the circumstances of the defendant. In multiple cases, for example, community work for environmental causes have been accepted as an alternative to monetary compensation where the defendants pleaded financial hardship.<sup>69</sup> Occasionally the procuratorate may even drop parts of a claim where the defendant was viewed as repentant.<sup>70</sup> In two cases

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<sup>68</sup> 中国生物多样性保护与绿色发展基金会 v 中国铝业股份有限公司, (2016)黔 0181 民初 138 号, 贵州省清镇市人民法院 (26 Oct. 2017).

<sup>69</sup> 缙云县人民检察院 v 傅彩伟, (2018)浙 11 民初 104 号, 浙江省丽水市人民法院 (29 Nov. 2018); 马鞍山市人民检察院 v 吴必祥, (2019)皖 05 民初 376 号, 安徽省马鞍山市人民法院 (27 Dec. 2019).

<sup>70</sup> 绩溪县人民检察院 v 程光钧, (2018)皖 1824 刑初 75 号, 安徽省绩溪县人民法院 (25 Oct. 2018).



on air pollution from manufacturing by the same procuratorate in Jiangsu Province, 40% of the compensation awarded by the court was suspended for two years, to be held as a fund from which any investment the defendants make for improving environmental protection in the manufacturing process could be reimbursed.<sup>71</sup> Such willingness by the procuratorate to adjust to the different circumstances of cases and defendants and the capacity to be involved in any follow-up matters such as the verification of remedial work could well explain the readiness by the court to grant what is asked for.

### 5.3 The triangle of relationships among NGOs, the procuratorate and the government

The scale and efficiency of the procuratorate's work put NGOs in an interesting position. The current design of EPIL framework dictates that the procuratorate should only start civil EPIL where there is no government or eligible NGO willing to initiate proceeding.<sup>72</sup> In practice, this means that before any EPIL, the procuratorate would put out a public announcement calling for any NGO to come forward and take a case to court. The theory, or original intention, is for NGOs to take the lead in litigation while the procuratorate should only provide a backup. The reality, as reflected in the data above, is that not only are NGOs incapable of fulfilling this role, they are ultimately unwilling to do so.

The capacity for litigation by the procuratorate has already been analysed. NGOs do

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<sup>71</sup> 无锡市人民检察院 v 江阴市海隆汽车销售服务有限公司, (2019)苏 02 民初 281 号, 江苏省无锡市人民法院 (3 Apr. 2020); 无锡市人民检察院 v 江阴星现汽车销售服务有限公司, (2019)苏 02 民初 282 号, 江苏省无锡市人民法院 (3 Apr. 2020).

<sup>72</sup> Civil Procedure Law of PRC, Article 55.

not have the personnel or resources to match, which is perhaps both understandable and expected. It is noted that in China's political system, NGOs are strictly controlled in registration, fund-raising and management and hence operate in a far more restrictive environment than their counterparts in western Europe or North America. Although there are more than one thousand registered NGOs who could potentially bring EPIL,<sup>73</sup> many of them are small, under-funded<sup>74</sup> and have rarely engaged in any litigation before. However, the more concerning aspect is about those NGOs that are capable of litigation that make starkly different choices in terms of the monetized value of cases as compared to the procuratorate. As the data above shows, the bulk of procuratorial EPIL cases are low in monetary value; over a half of the 346 cases examined are for 140,000 RMB or less. From the 50 NGO cases examined, only eight had a monetized value below 200,000 RMB.

Interestingly, all eight cases were from Jiangsu Province, while seven of them were decided between September 2014 and June 2016, within the first two years of EPIL in China. These early, small-value cases witnessed a clear pattern of collaboration between NGOs and the procuratorate, where the latter helped with the instruction of forensics and other preparation of cases, as well as sending procurators to the trial in support of the former.<sup>75</sup> Jiangsu is widely seen as the province where EPIL first took off back in

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<sup>73</sup> Na Huang and Jiaming Du, '社会组织参与环境公益诉讼的优化路径 <Optimized Path for Social Organization Participating in Environmental Public Interest Litigation>' (2018) 36(9) *Hebei Law Science* 191–200.

<sup>74</sup> Guttman (n 21)

<sup>75</sup> E.g. 连云港市赣榆区环境保护协会 v 王升杰, (2014)连环公民初字第 00002 号, 连云港市中级人民法院 (9 Sept. 2014); 镇江市生态环境公益保护协会 v 唐长海, (2015)镇民公初字第 00002 号, 镇江市中级人民法院 (23 June 2015); 中国生物多样性保护与绿色发展基金会 v 张虎, (2015)徐环公民初字第 1 号, 徐州市中级人民法院 (27 June 2016).

2014, especially when a landmark award of 161 million was obtained by a local NGO against polluting manufacturers,<sup>76</sup> sending signals of encouragement to others around the country. With hindsight, that early achievement may well be the most successful example of NGO EPIL to date. Yet NGOs, perhaps emboldened by the success and headline-grabbing figures, seemed keen to move on to ‘bigger’ things elsewhere.

The median value of NGO cases is now 32 times higher than that of procuratorial cases. A typical NGO EPIL case is in the millions, not thousands or tens of thousands anymore. In some cases, NGOs with no previous record of having won any EPIL cases claimed tens of millions in their first ventures into EPIL, which often did not go smoothly in the end.<sup>77</sup> It is unknown how, even whether, NGOs consider those newspaper announcements routinely put out by the procuratorate calling for NGOs to bring EPIL. In any event, the vast majority of these announcements have gone unanswered. The data above suggests that they will continue to go unanswered, as NGOs are simply not interested in the low-value end of EPIL in which the procuratorate are mainly operating.

Instead, the data shows that NGOs perform most similarly to the government in EPIL. NGOs and the government handle comparable numbers of EPIL cases each year. Both work with cases that are much higher in value than the procuratorate’s, though NGO

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<sup>76</sup> 江苏常隆农化有限公司 v 泰州市环保联合会, (2014)苏环公民终字第 00001 号, 江苏省高级人民法院 (29 Dec. 2014).

<sup>77</sup> E.g. 北京市丰台区源头爱好者环境研究所 v 镇江文化旅游产业集团有限责任公司, (2019)苏 11 民初 124 号, 镇江市中级人民法院 (15 Jan. 2020), stipulated 15 million RMB as compensation. The case was eventually withdrawn by the NGO. 北京市丰台区源头爱好者环境研究所 v 泰兴市友联精细化工有限公司, (2019)苏 12 民初 79 号, 泰兴市中级人民法院 (10 May 2020), the exact demand made in the case was unclear from the final judgment allowing withdrawal by the NGO. But judging from the court fees of RMB 295,300, which the court waived for the benefit of the NGO, the claim value must have exceeded 20 million.

cases are still higher in value than the government's. They achieve similar levels of success in terms of outcome. They claim comparable amount in costs in comparable numbers of cases, though NGOs tend to claim more and get less.

Should NGOs see their future role in EPIL as comparable to the government, however, it is important to point out one significant difference between the relationships in EPIL of the procuratorate to NGOs and the government to NGOs. As explained above, the law gives preference to NGO EPIL over procuratorial EPIL, so that the procuratorate should only litigate if NGOs do not. Yet between NGO EPIL and government EEDC lawsuit, the current judicial interpretations explicitly give preferences to government EEDC. The commencement of EEDC litigation will suspend any ongoing EPIL about the same incident until full resolution of the EEDC case, and the EPIL can only resume afterwards to cover issues not already dealt with in the EEDC case.<sup>78</sup> This 'competition' has already occurred in practice, where a 206 million RMB NGO EPIL case was supplanted by a 231 million RMB EEDC claim from the local government.<sup>79</sup> Had the award been made to the original NGO case, this would have been the largest win for any NGO EPIL. Yet not only might the NGO feel that they had their big win 'stolen' by the local government, this could also mean considerable uncertainty and costs for the NGOs in future cases. With the gradual formalization of EEDC, it is unclear whether NGOs have realized, or adjusted to, this change from being the favoured litigants in relation to the procuratorate since 2014, to the deferred

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<sup>78</sup> Judicial Interpretation 2019/No.8 of the Supreme People's Court, Art.17.

<sup>79</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, 山东省济南市中级人民法院 (27 Dec. 2018); 山东省生态环境厅 v 山东金诚重油化工有限公司, (2017)鲁 01 民初 1467 号, 山东省济南市中级人民法院 (21 Dec. 2018).

claimants in relation to the government since 2018. Consciously or otherwise, it would seem that NGOs have moved away from working closely with the procuratorate in the early days of EPIL on a larger number of low-value cases, as seen in Jiangsu, to a position where they would be effectively competing with the government in a smaller number of high value cases.

So far, local government has not been outperforming NGOs. The uncertainty and the non-legislation status of EEDC policies have continued to be a hindrance to many EEDC attempts. There is considerable discrepancy in the approach to EEDC across different parts of China. Qingdao in Shandong Province, for example, authorized all its subsidiary districts, which would be county-level government, to initiate EEDC without further approval from the prefectural city government.<sup>80</sup> In contrast, several county-level government units had their EEDC lawsuits rejected by the court because they could not prove authorization by the provincial or prefectural government, including in Shandong Province.<sup>81</sup> Nevertheless, it is common sense that the government in China would have far more resources at their disposal than NGOs. They have also only properly entered the fray for no more than two to three years. Once policies surrounding EEDC become clearer and more consistent legal rules, and once local government and their instructed lawyers have had a bit more time to learn and a few more cases to learn from, it is foreseeable that EEDC will dominate ‘big’ cases such as those with values in the tens of millions. NGOs would then be caught between a rock and a hard place,

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<sup>80</sup> 青岛市李沧区人民政府 v 刘永进, (2019)鲁 02 民初 1579 号, 青岛市中级人民法院 (27 Sep. 2019).

<sup>81</sup> 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 (21 June 2018); 兰州市西固区环境保护局, (2018)甘民终 386 号, 甘肃省高级人民法院 (26 June 2018); 日照市生态环境局五莲县分局 v 万立强, (2019)鲁 11 民初 298 号, 日照市中级人民法院 (6 Jan. 2020).

with the procuratorate efficiently dealing with routine low-value cases, that NGOs lost interest in since 2016, and the government taking all the EEDC actions as the preferred litigants.

#### 5.4 Different areas of expertise and focus

Such a sombre possibility, if not prediction, should certainly be avoided for a better system of environmental protection and governance. NGOs have already proven that they can offer something that the efficiency of the procuratorate or the resources of the government may be less able to deliver on. There are areas, such as water or ground pollution caused by manufacturing or farming discharge and waste dumping, where all the claimants have demonstrated willingness to get involved in. Yet in other areas, the different focus in terms of the environmental elements by the different EPIL claimants would best illustrate the importance of the continuing contribution of NGOs.

Among the cases examined in this study, air or atmospheric pollution is a stand-out focal point by NGOs. This is consistent with the general perception of air pollution as a major environmental problem in China.<sup>82</sup> In contrast, both the procuratorate and the government have largely stayed away from this area, at least in terms of EPIL. Air pollution accounts for 13.6% of NGO cases, while only 1.8% and 2.2% of procuratorate and government EPIL. A close analysis of the statistics exposes even greater disparity between the groups. For example, although 7 out of 394 procuratorate cases are classified as relating to air pollution, only 3 of these 7 were against pollution by legally operating manufacturers. The other four were against blatantly illegal activities such as

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<sup>82</sup> Mun S Ho and Chris P Nielsen (eds), *Clearing the air: the health and economic damages of air pollution in China* (MIT Press, 2007) 3-4

burning electronic wastes to extract aluminium or burning batteries to extract lead. Two of those three cases against manufacturers were by the same procuratorate in Jiangsu, mentioned above in relation to the incentive fund set up to encourage cleaner production. In other words, in 394 cases, out of thousands of procuratorates in China, only two have sued any lawful manufacturer about air pollution. It is unknown why the procuratorate do not act more often on this. It could be that they have settled many disputes in the pre-litigation procedures described above, though there is no information available to further investigate this possibility. Other speculations may be that it would be more difficult to assess air pollution and its consequences as compared to ground or water pollution that the procuratorate have got used to, or that it would be more uncertain whether the court would support the full extent of claimed compensation.

Some of the NGO experience could illustrate the potential difficulty in this area. In a high profile case from Zhejiang, the NGO sued an online vendor of a ‘cheating device’ that could potentially help car owners cheat the emission tests on their annual vehicle check.<sup>83</sup> Over 30,000 of such devices were sold on Taobao, the largest online trading platform in China. The NGO wanted Taobao to be jointly liable for 152 million RMB as compensation for damage to the atmosphere. However, the court found that Taobao had taken actions as soon as it became aware of any illegality and was therefore not liable. In the end, only the vendor company was found liable for 3.5 million RMB. A final footnote to the uncertainties of such air pollution claims is that the company was later found to have no asset for enforcement, rendering not only the 3.5 million RMB

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<sup>83</sup> 中国生物多样性保护与绿色发展基金会 v 浙江淘宝网络有限公司, (2019)浙民终 863 号, 浙江省高级人民法院 (14 Oct. 2019).

judgment worthless but also the NGO out of pocket for its lawyers' fees.<sup>84</sup>

Regardless of such difficulties, it is important to recognize that NGOs are clearly pursuing polluters on certain issues publicly in court, where the procuratorate or the government are lagging behind. Even the three 'lost' cases brought by NGOs, examined above, are obviously worthy discussions to be had in a court of law about the environmental implications of certain activities and operations. This would seem to be a good enough reason for the system of EPIL to continue to support and nurture the participation of NGOs, to test the boundaries of what current Chinese environmental law permits or prohibits.

#### 5.5 Difficulties in NGO case choices and costs

Nevertheless, the insistence by some NGOs over other areas of environmental protection could sometimes appear less than fully rational. For example, Chinese law currently only allows governmental departments of marine administration to sue for damage to the environment of the sea.<sup>85</sup> This excludes not only NGOs but also most government units under current EEDC policy.<sup>86</sup> The exclusion has been consistently upheld by various courts, including the Supreme People's Court.<sup>87</sup> But the denial only seems to stimulate multiple NGOs to bring forward lawsuits anyway, to be rejected by the court, and to subsequently voice concerns over not being able to sue on maritime

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<sup>84</sup> 中国生物多样性保护与绿色发展基金会 v 深圳市速美环保有限公司, (2020) 浙 01 执 857 号之一, 浙江省杭州市中级人民法院 (22 Dec. 2020).

<sup>85</sup> Law of Marine Environment Protection of PRC, Art.89.

<sup>86</sup> Provisions of the Supreme People's Court on Trial of Ecological Environmental Damage Compensation Cases, Art.2.

<sup>87</sup> 北京市朝阳区自然之友环境研究所 v 荣成伟伯渔业有限公司, (2019)最高法民申 6214 号, 最高人民法院 (21 Dec. 2019).



incidents.<sup>88</sup> Such persistence may well be reflective of the dissatisfaction NGOs are facing in terms of what they want to achieve and what they can achieve in EPIL.

It is not an overstatement to say that NGOs may find themselves in some sort of dilemma with regard to EPIL. They do not have the resources of the procuratorate or the government, which means they must litigate fewer cases. Meanwhile, NGOs seem to aim for as much impact as possible from a small number of cases, so collectively leave the low-value, straightforward ones to the procuratorate. Nevertheless, the high-profile cases are more uncertain and more difficult to win, with the costs being higher as well. Experienced lawyers willing to take these cases are few and far between, given the low number of cases, and may charge higher fees. The court does not always award the full costs even if NGOs win, which means there is even less money to fund the next round of litigation. This seems to be a downward spiral that severely diminishes the enthusiasm and capacity of NGOs in bringing forward EPIL.

On the point of lawyers' fees, it is hardly true that the court are being overly strict against NGOs. The government often has harder times in the court. Local government opted to drop claims for lawyers' fees or had such claims dismissed in multiple EEDC cases.<sup>89</sup> In the aforementioned 206 million RMB NGO case supplanted by EEDC, the NGO claimed 300,000 RMB of lawyers' fees. They may feel hard done by when the court only awarded 100,000 (33%). Nevertheless, the government, after winning 231

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<sup>88</sup> China Biodiversity Conservation and Green Development Foundation, '关于明确社会组织作为海洋环境公益诉讼原告建议 <Suggestion for confirming social organizations as claimants in maritime environmental public interest litigation>' (10 Feb. 2021), available at [https://www.sohu.com/a/450367096\\_100001695](https://www.sohu.com/a/450367096_100001695).

<sup>89</sup> 江苏省人民政府 v 安徽海德化工科技有限公司, (2017)苏 12 民初 51 号, 江苏省泰州市人民法院 (16 Aug. 2018); 山东省生态环境厅 v 山东道一新能源科技有限公司, (2018)鲁 0102 民初 8787 号, 济南市历下区人民法院(1 Apr. 2019).

million from this EEDC case, claimed 1.085 million of lawyers' fees but only received 200,000 (18%). Perhaps when NGOs look back to the 2014 landmark victory in Jiangsu mentioned above, they could also take note of the fact that after winning 161 million for public interest, the local NGO claimed the total costs of 0.1 million, which was awarded in full by the court. It is simply a part of current Chinese legal practice that the court will frown at high lawyers' fees. The impact is likely to be heavier on NGOs than local government, simply because the latter would have more resources to absorb such costs.

## 6. Policy Recommendations

### 6.1 Involvement of local NGOs and low-value cases

There may be several measures that NGOs could take to improve their position, while it will likely take an effective combination of many changes to really propel NGO EPIL to a level of success some had hoped to achieve. Firstly, it would seem important for more NGOs to get into EPIL, especially the local NGOs on the 'smaller' cases. Of the earlier success stories from Jiangsu Province, there was a healthy line-up of major national NGOs and local NGOs, dealing with a spread of cases ranging from 160 million to tens of thousands, with documented support from the procuratorate. It would seem that this spectrum of cases has largely been lost in the following years, with virtually no NGO responding to calls by the procuratorate to take on small, run-of-the-mill EPIL cases. It is suggested that experience and knowledge of the system are important in EPIL, as in any litigation or any legal system. It may be helpful if NGOs, especially the smaller, local NGOs, would start building their base of knowledge and

experience on the smaller cases, instead of having the focus of EPIL turned exclusively towards the handful of monumental disputes repeatedly highlighted in the media.

Although smaller cases would normally carry lower risks, they could actually incur higher ‘running costs’. As the data above show, despite the fact that the procuratorate never claims lawyers’ fees, their litigation costs as a percentage of the claim value is much higher than both NGOs and the government. These are mostly costs for forensic analysis to assess environmental damage. This would mean that NGOs, even for those focusing on the smaller cases, would need to secure a stable base of funding in the realm of EPIL operation. The good news here is that, unlike lawyers’ fees which the court would almost always closely scrutinize, there is far less argument over actually incurred costs of forensic analysis. The court has dismissed challenges by defendants against forensic fees several times over the actual sum for compensation, because the analysis, for example of subterranean water pollution, was costly but necessary.<sup>90</sup>

## 6.2 Personnel and financial support for EPIL

Alongside the knowhow and resources to instruct necessary forensic analysis, it would seem equally important for NGOs to find and develop a team of lawyers that they can rely upon, whom are not ostensibly motivated by half a million in fees. Understandably, some lawyers will be more reluctant to act in an area that they are less familiar with or less experienced in, and could charge higher fees. It is encouraging to see some of the major national NGOs now putting out job advertisement for in-house ‘public-interest lawyer’ positions, though this may be beyond the reach of most Chinese environmental NGOs but the largest ones. On the other hand, NGOs and the public

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<sup>90</sup> 天津市东丽区生态环境局 v 张长江, (2019)津 03 民初 217 号, 天津市第三中级人民法院 (15 Apr. 2020).

interest aspect could play an important role here in broadening the appeal of EPIL and secure more favourable terms. In a case from Henan, for example, the terms of service secured by a local NGO with its lawyers were quoted with apparent approval by the court. The agreed fees were heavily discounted on the standard level, fixed with no additional extras, and only payable on success from the amount awarded by the court and actually paid by the defendant to the NGO.<sup>91</sup> This seems a far more agreeable approach to support EPIL, than some NGOs' emerging practice of asking for lawyers' fees after a single hearing that would be many times over the average annual individual income of where they are litigating in.<sup>92</sup>

At the heart of these potential changes should be the practical understanding that EPIL is a costly system for NGOs, the procuratorate and the government alike. The procuratorates have thrown thousands of procurators at it to achieve the level of success they current enjoy. Any conception of winner-takes-all with all costs reimbursed is simply not applicable to the Chinese legal system. The lack of financial resources has always been seen as the biggest obstacle in NGO's EPIL practice,<sup>93</sup> and it is unlikely the problem would be solved substantially through litigation costs claim. NGOs should have plans and strategies to properly finance EPIL operations, rather than trying in vain to claim the salaries and pensions of their staff members in the court. They should also

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<sup>91</sup> 洛阳市吉利区辉鹏养殖专业合作社 v 河南省企业社会责任促进中心, (2018)豫民终 1525 号, 河南省高级人民法院 (27 May 2019).

<sup>92</sup> 中国生物多样性保护与绿色发展基金会 v 中国铝业股份有限公司, (2016)黔 0181 民初 138 号, 贵州省清镇市人民法院 (26 Oct. 2017); 中国生物多样性保护与绿色发展基金会 v 山西天脊潞安化工有限公司, (2016)晋 04 民初 35 号, 长治市中级人民法院 (11 July 2018); 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>93</sup> Tiantian Zhang and Yen-Chiang Chang, 'Standing of Environmental Public-Interest Litigants in China: Evolution, Obstacles and Solutions' (2018) *Journal of Environmental Law* 369-397, 385.

think more carefully about the areas they want to get into in terms of practical implications. For example, maritime disputes mentioned above are notably costly and tricky due to the likely scale of damage and the difficulty in establishing evidence.<sup>94</sup> In a pre-EEDC case from Zhejiang, even a partially successful claim led to court fees in excess of one million RMB for the government.<sup>95</sup> Furthermore, administrative EPIL that the procuratorate have been engaging with, which multiple NGOs have voiced their desire to have a share in, award nothing in terms of costs or lawyers' fees. Questions may legitimately be asked of NGOs as to why they think they have the expertise and resources to handle maritime or administrative EPIL, while most of them would turn down approaches from the procuratorate to help with even the simplest of cases, citing the lack of resources.

Environmental NGOs' increasing rights-awareness and technical expertise have put them in an unprecedented position informing and influencing both the legislative and administrative agenda of the Chinese government on environmental governance. At the same time, NGOs' relation to the state is also experiencing changes, representing citizens' demands for democracy in China's restrictive political reforms, where NGOs' practising EPIL represents certain empowerment and potentially improves the rule of law.<sup>96</sup> The findings and analysis above demonstrate that NGOs have played an invaluable role in improving environmental performance in China, though it is

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<sup>94</sup> Xisheng Huang and Hongzheng Wang, '海洋公益诉讼: 识别、困境与进路<Maritime Environmental Public Interest Litigation>' (2020) 28 *Chinese Journal of Maritime Law* 28-35.

<sup>95</sup> 中国水产科学研究院东海水产研究所 v 普罗旺斯船东 2008-1 有限公司, (2015)甬海法事初字第 36 号, 宁波海事法院 (25 June 2019).

<sup>96</sup> Erin Ryan, 'The Elaborate Paper Tiger: Environmental Enforcement and the Rule of Law in China' (2013) 24 *Duke Environmental Law and Policy Forum* 183-239; Martin Kwan, 'China's rule of law development: the increasing emphasis on internationalization of legal standards and the horizontal rule of law' (2021) 53 *Journal of International Law and Politics* 51-62.

important to recognize that the continued commitment and further development of NGO EPIL require sustainable financial and other support.

### 6.3 Realignment of EPIL practice and framework

EPIL is a new and dynamic area for Chinese law where the main actors are finding their own approach and areas of comfort. The relative success in some aspects and the lack of progress in others could well lead to the rethinking of the applicable framework. Some have even called for abolishing civil EPIL by NGOs.<sup>97</sup> While that is certainly a minority view in the overall pro-environment sentiment in China currently, more specific issues or difficulties should lead to realignment of particular rules and practices in EPIL.

Given the efficiency of the procuratorate and the reluctance of NGOs to get involved in low-value cases, for example, it seems appropriate for law reforms or reinterpretation of policies to allow the procuratorate proceeding with certain types or categories of civil EPIL without the public announcement stage. The procuratorate have clearly established themselves as the cornerstone of EPIL. It is right that this is recognized in the law, at least in certain contexts such as low-value routine cases against waste dumping or poaching, instead of some artificial narrative that they only play a backup role where NGOs or the government do not act. Meanwhile, pleas for more advantageous policies may hold less persuasion if not backed up by good performance. It will not be surprising if calls for another ‘public announcement’ process to be introduced for the sole benefit of NGOs before the government take any EEDC action

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<sup>97</sup> Xi Wang, ‘关于优化我国环境公益诉讼制度的建议 <Suggestions for optimizing the system of environmental public interest litigation>’, 28 Jan. 2021, available at [https://www.sohu.com/a/447325506\\_100001695](https://www.sohu.com/a/447325506_100001695).

are to fall on deaf ears,<sup>98</sup> given that NGOs hardly ever respond to similar announcement by the procuratorate.

The priority for policy makers and local government should instead be the formalization of EEDC policies into legislation, so that there will be clear and consistent rules in place across different provinces and administrative levels as to EEDC practice. The status quo where a government department could win an EEDC claim at first instance, only to be told that they had no standing to sue on appeal, wasting time and resources of everyone,<sup>99</sup> is plainly doing a disservice to the integrity of both environmental governance and the legal system more generally.

## 7. Conclusion

Through undertaking extensive examination of hundreds of court judgments, this study seeks to take the understanding of EPIL in China beyond the level of theoretical critique. While it is expected that a new system such as EPIL will encounter difficulties, especially within the legal system of China which has been under heavy scrutiny given its differences from many Western systems, the examination of actual cases provides far more insight than stereotypical depiction of how the government, the procuratorate or NGOs work in China.

This study shows that the procuratorate has established itself as the core of EPIL practice on multiple grounds, including the far greater number of cases, the scope of

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<sup>98</sup> ‘新环保法实施六年 环境公益诉讼实现对重点地区全覆盖 <Six years since commencement of the new Environmental Protection Law, environmental public interest litigation comprehensively covers all key areas>’, *Legal Daily* (8 Jan. 2021), available at <https://www.chinanews.com/gn/2021/01-08/9381551.shtml>, citing the suggestion of a deputy director of the legal department of a major environmental NGO.

<sup>99</sup> 黄强勇 v 龙海市水利局, (2018) 闽 06 民终 1109 号, 福建省漳州市中级人民法院 (21 June 2018).

their operations covering cases of varying significance, the positive outcome in almost all cases, and the efficiency and professionalism in general. The main concern or criticism that could be had seems to be that the procuratorate are too competent in what they are familiar with to venture into anything atypical or unusual. They would be happier to undertake many cases of waste dumping or forest logging with well tried and tested methodology, than taking cases such as air pollution or damage to the maritime environment which have few established approaches.

NGOs on the other hand are adventurous and willing to take on these challenges. They meet obstacles occasionally but are in general not easily deterred in pursuing what they see as important to environmental protection. Nevertheless, the sense of rapport between the procuratorate and NGOs in collaborative EPIL actions in the first couple of years after 2014 seem to have dissipated, largely due to NGOs' choice or preference to go for the high-value cases instead of the mundane cases that the procuratorate continue to be focusing on. Higher value litigation seems to demand higher costs on NGOs, high lawyers' fees in particular, which the court in many parts of the country is not prepared to fully endorse.

In abandoning the low-value operations, NGOs effectively moved into competition with the government and their EEDC lawsuits. Currently the government do not get much better results than NGOs in the court, either in terms of outcomes or reimbursement of costs. Nevertheless, governmental EEDC lawsuits explicitly enjoy procedural priority over NGO EPIL under current policy. Much of the difficulty for local government in EEDC is self-inflicted, such as the lack of proper authorization by the provincial government. When the EEDC system is fully established, most likely in laws rather than policy documents, it is foreseeable that the government could be more



efficient and active in pursuing EEDC. This in turn could exert considerable pressure on NGOs in EPIL.

A reasonable re-alignment of the EPIL system based on such findings could be the authorization of the procuratorate to undertake civil EPIL without first waiting for NGOs in some contexts, such as the low-value, well established areas. Meanwhile, more substantive adjustments may be needed for NGOs if they want to further develop their role in EPIL. Instead of focusing on what they are not currently permitted to do under current law, such as administrative EPIL or maritime lawsuit, it may be more practical and helpful to start on what they can do, including the low-value cases. This potentially builds not only the expertise within NGOs but also the professional help they could call on such as lawyers and scientists. NGOs should play to their strengths in terms of drawing broad support for the important cause of environmental protection, with a view to establish more favourable modes of partnership that does not always involve high levels of lawyers' fees that the court have frequently criticized. NGOs have played an important role so far in EPIL in China. It would be immensely helpful if they can learn from these successes as well as obstacles to continually develop their practice and conception of EPIL suitable to the Chinese system, so that they remain an important partner to both the procuratorate and the government in the future of EPIL and environmental governance of China.