China’s new approach to environmental governance and environmental public interest litigation

Han Jiang*
Independent Scholar and Legal Practitioner, Jinan, Shandong Province, China

Patricia Blazey
Senior Lecturer, Department of Accounting and Corporate Governance, Macquarie University, Sydney, Australia

Yan Wang
Senior Procurator of the Fourth Rank, No. 8 Procuratorial Department, People’s Procuratorate of Shandong Province, China

Hope Ashiabor
Associate Professor, Department of Accounting and Corporate Governance, Macquarie University, Sydney, Australia

This article examines the comprehensive reform of the Chinese environmental governance system since the early 2010s after the goal of constructing ecological civilization was integrated into China’s state policies. Legislative changes have been undertaken in order to improve the environmental governance system and juridical environmental protection has been reinforced to tackle environmental challenges through a revised public interest litigation system. China’s current environmental public interest litigation system consists of civil environmental public interest litigation and administrative environmental public interest litigation. Only procuratorates have standing in administrative environmental public interest litigation whereas environmental non-government organizations who are permitted to undertake civil cases are in practice marginalized. Individuals, on the other hand, do not have standing in either civil or administrative environmental public interest litigation cases. The ecological and environmental damages litigation system has been established in order to recognize government agencies that have standing in protecting environmental public interest.

Keywords: China, environmental governance, environmental public interest litigation, ecological civilization, procuratorates, Chinese environmental non-government organizations (ENGO)

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1 INTRODUCTION

Environmental deterioration and pollution has become one of the most significant issues encountered by Chinese society today. China’s fast economic growth over the past 40 years has resulted in irrecoverable damage to its natural environment. Indeed, considerable literature exists about the scale of environmental degradation that China now grapples with. Excessive and unauthorized polluting activities and the discharge of high levels of pollutants, as well as local governments’ malfeasance, corruption and collusion with polluting enterprises have undermined environmental governance. Hazardous and poisonous chemicals have been unscrupulously emitted and discharged into the air and rivers from factories all over the country. Inappropriate disposal of manufacturing and domestic waste has contaminated the lands and water. A vast number of mining and logging companies have been unsustainably grabbing natural resources leaving lands unattended and ruined without any recovery measures.

As a consequence, extreme weather conditions, air pollution, acid rain, chemical residues and excessive contents of heavy metals in foods and drinking water, have seriously endangered the health of individuals and undermined the quality of life of ordinary people. Moreover, many plants and animals are facing extinction resulting from the direct and indirect threats of illegal activities, such as poaching and habitat destruction. The authors of this article argue that the adverse impacts of environmental pollution on Chinese people needs to be given urgent attention particularly now that environmental pollution is either strictly limited, or prohibited outright, through legislation.

Many environmental incidents have not only harmed people’s health, and quality of life, but caused serious social problems threatening the harmony and stability of Chinese society. As a result increasing numbers of public protests have put pressure on the government to act on pollution problems. Lubman observes that public protests in this regard rose at a rate of about 30 percent per year between 1996 and 2011 and in 2013 by 30 percent year on year. At the same time, he observes local governments obstructed the enforcement of environmental legislation making it difficult for environmental non-profit groups to sue polluters. During the period 2006 to 2015, governments at all levels have received millions of environment-related

5. Ibid.
‘letters and visits’ cases\(^6\) nationwide, including the filing of 1,170,279 environmental pollution cases in 2012 alone, with the number continuing to multiply.\(^7\)

For a long time, the need for a healthy environment was ignored by the authorities either negligently or intentionally as there was no legal obligation on authorities to ensure sustainable environmental development. A single-minded approach to economic development was the dominant strategy, reflected in Gross Domestic Product (GDP) driven policies adopted by the Chinese government during the early stages of China’s economic development.\(^8\) Subordinating environmental well-being to economic growth was widely accepted and prevalent amongst government officials and citizens because improving living standards was the prime target of Chinese society up to the end of the twentieth century.\(^9\) In fact, prior to 2007, environmental quality was not included in the government officials’ performance assessments.\(^10\) As a result, weak enforcement and implementation of environmental legislation, together with local protectionism for polluting enterprises, have been the main obstacles to China’s effective environmental governance. The general public’s low level of environmental consciousness, lack of awareness about environmental issues and their unwillingness to take action on environmental protection, have also been responsible for poor environmental management.\(^11\)

The World Bank in its Report 2030 on China (2012) warned the government that unless it moved to a green economy, the resulting environmental degradation and resource depletion would approach 10 percent of its GDP.\(^12\) The Bank stated that quite apart from stimulating growth, green development would significantly improve the quality of China’s economic growth so that less production and the use of fossil fuels would greatly reduce health issues from air and water pollution, water scarcity and land subsidence.\(^13\) The Report was critical of China’s approach to the management of its environment arguing that China must bolster its responses to environmental degradation by undertaking collective action in combination with non-governmental organizations, industry and individuals as well as fostering public awareness through mass education campaigns.\(^14\)

Moreover, from a legal perspective the courts have in the past been hampered by the lack of a coherent body of environmental jurisprudence. In order to rectify this, the

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\(^{6}\) The term ‘letters and visits case’ means that ‘citizens, legal persons or other organizations give information, make comments or suggestions, or lodge complaints to the people’s governments at all levels; and to relevant departments of the people’s governments, at or above the county level, through correspondence, e-mails, faxes, phone calls, visits. These are dealt with by the relevant administrative department. *Regulations on Letters and Visits 2005*, Decree of the State Council of the People’s Republic of China No. 431, art 2 <www.gjxfj.gov.cn/gjxfj/xsgk/fgwj/xftl/webinfo/2016/03/1460416222477305.htm> accessed 3 June 2018.

\(^{7}\) Xudong Zhang, *Research on the Special Procedure of the Civil Environmental public-interest Litigation* [环境民事公益诉讼特别程序研究] [in Chinese], (Law Press China [法律出版社], 2018) 1; Youhai Sun, ‘The Analysis and Countermeasure Suggestion to Some Problems in Current Environmental and Resources Trial’ [对当前环境资源审判若干问题的分析和对策建议] [in Chinese], (17 September 2014) *People’s Court Daily* [人民法院报] 8.

\(^{8}\) Jiang (n 3) 217.

\(^{9}\) Ibid.


\(^{11}\) Jiang (n 3) 220–21.

\(^{12}\) World Bank (n 1) 39.

\(^{13}\) Ibid.

\(^{14}\) Ibid.
Supreme People’s Court (SPC) adopted the Case Guidance System in 2010 which is binding on lower court decisions. In addition, from a practical perspective, China lacks effective environmental law enforcement.

Recognizing the seriousness and urgency of environmental problems, environmental governance has become a key focus of government policy resulting in the promulgation and amendment of many laws, regulations and policies designed to improve the existing legal system.

2 IMPROVING ENVIRONMENTAL GOVERNANCE IN THE NEW ERA

2.1 The construction of ecological civilization

Articles 9 and 26 of Constitution of People’s Republic of China 1982 (PRC Constitution) stipulate that the state is responsible for protecting and improving the natural environment and ecological well-being so as to prevent and control pollution. The influence of environmental conservation was relatively underdeveloped until the last decade because the government believed that economic growth should surpass environmental well-being, and suffering environmental pollution, ecological destruction and disasters was considered an inevitable phase of economic development. This inclination can be found in the China’s Five-Year-Plans, drafted by the National Development and Reform Commission (NDRC) which focused on economic targets and GDP growth rates. Such Plans once approved by National People’s Congress (NPC) provided a roadmap for officials to implement development plans at the central, provincial and local levels. The 10th Five-Year-Plan (2001–05) for example, focused on developing trading links outside China, technologies, education, macro control, reforming finance taxation, banking and investment. A short paragraph recognized the need to improve ecological conservation which focused on forests and desertification; the latter causing sand storms affecting Northern China’s air quality. The 11th Five-Year-Plan 2006–10 also focused on economic development and mandated that the national economy should grow at an annual average rate of 7.5 percent so that by 2010 China’s GDP would reach 26.1 trillion RMB and per capita growth 19,270 RMB.

Nonetheless, during the 17th Communist Party of China’s National Congress (CPCNC) in 2007, former President Hu Jintao announced the need for ecological progress. Notably in the same year the State Environmental Protection Administration

18. Ibid.
was promoted to a fully-fledged ministry. The 12th Five-Year-Plan (2011–15) mandated that energy consumption per unit of GDP had to be cut by 16 percent in order to cut carbon emissions by 17 percent by the end of that Five-Year-Plan period, which would reduce carbon intensity by 40–50 percent from 2005 levels.21

As a result of the government realizing the serious consequences of the unsustainable development model, the situation has gradually improved, when China moved into what is referred to as the ‘New Era’ following President Xi Jinping’s election as the President of China in 2013. At the Third Plenary Meeting of the 18th Communist Party of China Central Committee (CPCCC), held in November 2013, a blueprint was published that focused on improving protection for ecosystems due to the drain environmental degradation was having on China’s GDP.22 The blueprint sought to accelerate the development of functional zones, promote economic intensive resource use, set up comprehensive environmental governance, identify ecological conservation and restoration and respond to global climate change.23 The importance of ecological civilization construction and the strategies for accelerating ecological progress were re-emphasized in the 19th CPCNC Report.24 The 13th Five-Year-Plan (2016–21) introduced a chapter that focused entirely on improving the state of the environment.25

Furthermore, in the 2018 Constitutional amendments relating to ecological civilization construction was added to paragraph 7 of the preamble and Article 89(6) of the PRC Constitution.26 This is the first time that ecological civilization construction has appeared in the PRC Constitution.

In order to adapt changes in state policies regarding the environment and to facilitate the implementation of ecological construction, the restructure of ministries and commissions was initiated after the Third Plenary Meeting of the 19th CPCCC in early 2018.27 In March 2018, the Plan on Institutional Reform of the State Council was approved in the first session of the 13th NPC.28 The restructure of the State Council, which included establishing the Ministry of Natural Resources (MNR)

21. Ibid.
23. Ibid.
25. Thirteenth Five-Year-Plan for National Economic and Social Development Program (n 22).
and the Ministry of Ecology and Environment (MEE), was instigated to integrate authorities in order to improve environmental governance. The MNR replaced the former Ministry of Land and Resources, State Oceanic Administration and National Bureau of Surveying and Mapping Geographic Information, responsible for managing the public-owned natural resource assets, monitoring natural ecosystems, improving environmental management systems, and restoring ecosystems.29 The MEE replaced the former Ministry of Environmental Protection so as to improve accountability and facilitate the enforcement of environmental policies.30 The MEE monitors ecological well-being, the discharge of all pollutants and conducts law enforcement activities. It manages prominent environmental issues, formulates and implements the state’s environmental policies plans and standards, supervises the safety of nuclear power, manages climate change mitigation strategies, and organizes pollution prevention and control programs.31 The corresponding institutional restructuring was completed at local government levels during the following year. These changes did away with government departments and agencies engaged in overlapping responsibilities.32

The MEE and MNR work closely with other government departments on various environmental governance programs and campaigns. The Chinese government has implemented a number of anti-pollution action plans to address atmosphere, water and soil pollution.33 For example, it has built the largest sewage treatment capacity in the world, reducing the concentration of particulate matters (PM10 and PM2.5) in the atmosphere. Forest coverage has been increased from 16.6 percent to 22 percent over the past two decades and the government has now totally banned the import of foreign waste.34 Recently, the government launched a plan for establishing a domestic waste recycle system by the end of 2020, with 46 pilot cities selected to implement the compulsory rubbish recycle policy inclusive of financial punishments for violations.35 At the international level, the Chinese government has actively participated in the global ecological progress. It has played an essential role in reaching the agreement on climate change and released the National Plan for the Implementation of the 2030 Agenda for Sustainable Development.36
2.2 Review of the amendments to environmental legislation

The new objectives of China’s environmental policies resulted in corresponding changes to environmental legislation. The Environmental Protection Law of the PRC (EPL) was amended in 2014 (effective January 2015) as the government recognized the need for a more robust approach in addressing environmental issues. The 2014 amendments provide opportunities for Chinese civil society to initiate legal actions when polluting activities affect them as a group. This was followed by the Interpretation of the Supreme People’s Court on Several Issues Concerning the Application of Law in the Hearing of Environmental Civil Public Interest Lawsuits promulgated in 2016 (The Interpretation) which clarifies certain provisions of the EPL.

As part of the government’s new approach to environmental malfeasance, revisions have also been made to other environmentally related legislation as well as the promulgation of new laws, such as the PRC Water Pollution Prevention Law, the PRC Nuclear Safety Act, the PRC Marine Environmental Protection Law, the PRC Atmospheric Pollution Prevention Law, the PRC Environmental Protection Tax Law, the PRC Wildlife Protection Law, the PRC Environmental Impact Assessment Act. In 2019, the promulgation of the PRC Soil Pollution Prevention Law filled the long-existing legislative gap in the area of pollution prevention and control. It represents the completion of a general legal framework addressing China’s atmosphere, water and soil pollution.

Law-making changes are not limited to environmental legislation but have influenced the Civil Code of PRC. Article 9 of the newly promulgated General Provisions of the Civil Law 2017 explicitly states that ‘the parties to civil legal relations shall conduct civil activities contributing to the conservation of resources and protection of environment’. This new principle, known as the Green Principle, has become one of the fundamental legal principles and guidelines included in all civil cases in China.

In 2013, the SPC and the Supreme People’s Procuratorate (SPP) jointly issued the judicial interpretation, Interpretation of several issues concerning the application of law in handling criminal cases of environmental pollution 2013, and in 2016 added

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38. Environmental Protection Law of the People’s Republic of China 2015, NPC, Revised and adopted at the 8th Session of the Standing Committee of the Twelfth NPC on April 24, 2014, promulgated to take effect on January 1.
39. PRC Water Pollution Prevention Law (2017 Revision), NPC (27 June 2017); PRC Nuclear Safety Act (2017 Revision), NPC (1 September 2017); PRC Marine Environmental Protection Law (2017 Revision), NPC (4 November 2017); PRC Atmospheric Pollution Prevention Law (2018 Revision), NPC (26 October 2018); PRC Environmental Protection Tax Law (2018 Revision), NPC (26 October 2018); PRC Wildlife Protection Law (2018 Revision), NPC (29 December 2018).
six more articles to handle changing circumstances and emerging issues. The Interpretation of several issues concerning the application of law in handling criminal cases of environmental pollution 2016 provides more detail whilst increasing penalties for severe environmental-related crimes. Besides, the administrative penalties for polluting activities as well as the administrative and disciplinary sanctions of governmental officials, environmental liabilities are mainly modified by the amended EPL.

The number of articles in the EPL has been increased to 70 from 47. It has substantially raised the penalty faced for illegal polluting activities. Whilst Article 59 sets a new punitive mechanism of daily-based continuous financial punishment, Article 63 has for the first time included administrative and criminal responsibilities for the owners of polluting enterprises. The law enforcement power of environmental authorities has also been enhanced. 

Clarification of the responsibilities and duties of governmental authorities and agencies in the field of environmental governance has been undertaken. Last but not least, one of the most noticeable contributions of the new EPL is the establishment of the accountability mechanism in environmental governance, discussed in the next section.

2.3 Accountability mechanism and performance review system for governmental officials

Lack of accountability has been a long-lasting issue in Chinese environmental governance and was one of the main reasons for the weak enforcement of Chinese environmental laws. The question of who should be responsible for environmental well-being was a challenge for China throughout its fast economic growth period. The revised EPL has solved this troublesome question by explicitly distributing the responsibilities to all parties in society. Whilst Article 6 states citizens have unenforceable moral obligations to support ecological progress as well as business entities that have legal liabilities for pollution and ecological problems caused by their operations, the ultimate responsibility for ecological well-being is on the shoulders of local governments at all levels. Article 26 of the new EPL stipulates that the state shall apply an environmental protection accountability system and an evaluation and review system to monitor the performance of relevant departments and officials. In May 2015, five months after the new EPL had taken effect, the CPCCC and the State Council jointly issued the Opinions on Accelerating the Construction of Ecological Civilization 2015, which provides guidelines for the comprehensive implementation of the ecological civilization construction strategy.

44. Environmental Protection Law of the People’s Republic of China 2015 (n 38) arts 59, 63.
45. Ibid, arts 24, 25.
46. Ibid, art 6.
47. Ibid, art 26.
the supervision of law enforcement. This is designed to lay a solid foundation for the new accountability system in Chinese environmental governance.

As a consequence of China having the largest population in the world, a huge bureaucracy consisting of thousands of administrative organs and semi-governmental institutions exists. As such its political system operates under a dual power structure. Central authorities have little control over the implementation of national policies at local levels due to local governments having their own specific interests. Because of this dual authorities structure, the enforcement of environmental policies has always been problematic because of a conflict of interests within the bureaucratic system whereby policies are subject to modification as a result of bargaining amongst central and local authorities. Nevertheless, senior local government officials’ nominations and promotions are controlled by the central authorities. The outcomes of local officials’ performance review in the past have determined the future of their political career. Therefore, in order to persuade local government officials to be fully engaged in ecological protection, a ‘must-be-achieved goal’ has been added into their performance evaluation. This has been designed as an incentive to local governmental officials so as to fulfill the government’s ecological civilization construction strategy.

Before the 18th CPCNC, the ‘green index’, which includes energy efficiency and pollution control, represented a small portion of a provincial officials’ performance assessment; the GDP being a dominating factor in their performance evaluation. As a result, protecting ecological well-being was just treated as extra work once they had completed their GDP growth targets. Section 25 of the Opinions, on the other hand, has made it clear that:

the indexes of resource consumption, environmental damage, eco-efficiency, etc., ought to be included into the Comprehensive Economic and Social Development Evaluation System [for senior government officials], and their weight should be substantially increased in the assessment.

As a consequence, the ecological civilization construction (now one of the top five goals of the state) has been added into the government officials’ performance reviews, especially for local heads. Furthermore, the original GDP growth dominated evaluation method has been changed to a differentiated evaluation system with diverse criteria according to local features all of which emphasize ecological protection. Moreover, section 25 has introduced the concept of the Natural Resource Balance

51. Ibid.
53. Chen (n 10) 148; Jiang (n 3) 216.
55. Opinions on Accelerating the Construction of Ecological civilization 2015 (n 49) section 25.
56. Ibid.
Sheet and Off-office Auditing of Natural Resource Assets and Environmental Liability for Party and government leading cadres.\textsuperscript{57} Five cities have been selected by the CPCCC and the State Council as pilot cities to test the feasibility and effectiveness of these new assessment tools.\textsuperscript{58}

Nowadays, Chinese authorities accept that ecological well-being is a vital indicator of development, which in turn benefits the long-term health and sustainability of the economy. In practice, MNR, MEE, NDRC with other government departments evaluate whether the provincial governments and Party Committees have met their ecological protection objectives. The results are incorporated into ecological progress assessments and used as a core component in the accountability and performance review system. Senior officials who fail to meet the ecological progress goals set in their performance assessments may miss the chance for future promotion and face disciplinary punishment, administrative sanction or prosecution for criminal liability.

The Opinions set stringent accountability measures to ensure government officials’ ecological liabilities are strictly established.\textsuperscript{59} It proclaims that all serious ecological damages and breaches of environmental laws and ecological policies are recorded and processed according to the laws and the Party’s disciplines; further the responsible officials are accountable during their life time and can be deprived of the opportunity to transfer to other important positions or gain promotion.\textsuperscript{60} In August 2015, the CPCCC and the State Council jointly published the Measures for the Accountability of the Party and Government Leading Cadres’ Liability for Ecological Environmental Damages (Trial) that provide a detailed plan for implementing the ecological accountability mechanism for senior Party and government officials.\textsuperscript{61} The Measures focus on addressing the enforcement and implementation issues of the ecological accountability mechanism by creating certain new principles, such as identifying the right responsible persons, combining action-oriented with result-oriented accountability measures, distributing equal responsibilities to both Party and government leading cadres.\textsuperscript{62} It sends a strong message that persons who damage the ecological environment will hold lifelong accountability for their actions. One month later, the content of the Measures have been written into the Integrated Reform Plan for Promoting Ecological Progress 2015 with corresponding punishments for ecological breaches.\textsuperscript{63} It also stresses once again that the leading cadres who are found responsible for environmental deterioration will be held accountable no matter if they are employed in their original position, are transferred, promoted or retired.\textsuperscript{64}

\textsuperscript{57} Ibid.
\textsuperscript{59} Opinions on Accelerating the Construction of Ecological civilization 2015 (n 49) section 26.
\textsuperscript{60} Ibid.
\textsuperscript{61} Measures for the Accountability of the Party and Government Leading Cadres’ Liability for Ecological Environmental Damages (Trial), CPCCC and the State Council, (17 August 2015).
\textsuperscript{63} Integrated Reform Plan for Promoting Ecological Progress 2015 (n 58) section 51.
\textsuperscript{64} Ibid.
Last but not least, the national environmental protection supervision system has been established to ensure the implementation and enforcement of the new accountability mechanisms.65 Under this new supervision system, 2017 witnessed more than 18,000 Party and government leading cadres and officials held accountable for failure to carry out their environmental liabilities.66 The new measures are in response to Articles 67 to 69 of the EPL, which sets a general framework for the new accountability system.67 In short, adopting the institutional environmental protection approach and relying on the rule of law have become the fundamental philosophy of Chinese environmental governance.68 The Chinese leadership realizes that only the strictest system and the strictest rule of law are effective tools to protect the ecological environment.69

Nonetheless, even a sophisticated and comprehensive system cannot guarantee improved environmental governance without effective and efficient enforcement that fills the gap between the making and implementation of environmental laws and policies. In practice, sometimes, the implementation and enforcement of environmental legislation and government policies can be problematic. On this point, section 28 of the Opinions illustrates the methods that seek to strengthen the supervision of law enforcement.70 In order to achieve the ambitious objectives of ecological progress, the central government has introduced a series of reformatory measures to reinforce the implementation of ecological progress policies and the new accountability mechanism.71

Soon after MEE’s establishment, central and local environmental protection inspection and supervision groups were introduced to conduct stringent regular national environmental inspection and supervision. Within the first ten months of 2018–19, the MME had deployed more than 30,000 people to conduct nine rounds that involved nationwide environmental protection, inspection and supervision activities. This resulted in 18,000 people working in heavy polluted areas around Beijing, Tianjin and Hebei, being found guilty of 19,442 gas-related breaches that involved atmospheric contamination.72 After the MEE launched regular inspections, though the air quality has significantly improved, it has been at the cost of shutting down thousands of local factories. Because the economic model of mainland China has not yet been fully transformed to a sustainable and environmental-friendly model, shutting down all heavy polluted enterprises clearly is neither feasible nor realistic.73

An arbitrary one-size-fits-all enforcement approach and selective law enforcement

65. Ibid.
68. Xi (n 33).
69. Ibid.
70. Opinions on Accelerating the Construction of Ecological civilization 2015 (n 49) section 28.
71. Xi (n 3).
still exists in the implementation of environmental laws and policies, therefore, the goals of ecological progress and economic sustainability have to be carefully balanced particularly when the problem of unemployment is taken into account. Realizing these problems, the MEE issued the Opinions on Further Strengthening Supervision and Law Enforcement of Ecological and Environmental Protection to correct what was perceived as incorrect law enforcement methods so as to protect the legitimate interests of enterprises.

Nonetheless, there remain major accountability factors as local governments often breach their ecological obligations and are frequently involved in corruption and local protectionism. This is due to China’s dual authorities political structure, so local governments can exercise their powers with little constraint. The 2018 Qinling illegal building case is a classic example of how a local government ignored the central governments’ policies and arbitrarily modified the environmental laws and policies to suit their own needs. The Qinling Mountain national nature reserve area, which prohibits commercial exploitation, had been illegally exploited to build massive high-end private villas and other commercial real estate projects. However, after the violation was discovered by the CPCCC in 2014, President Xi issued six correction instructions during the following four years. Yet the illegal construction did not cease and more illegal commercial construction projects were commenced classified as cultural tourism projects.

It was not until July 2018 that the Commission for Discipline Inspection of the CPCCC (the highest discipline inspection authority) conducted a thorough investigation. They discovered that 57 illegal commercial real estate development projects either in progress or completed were taking place in the national nature reserve area. The investigation team uncovered corruption and referred those responsible to the judicial organs which resulted in their being found criminally liable. The local government then pledged to restore the abused nature reserve area by the end of June 2019. A few months after the Qinling case ended, a similar case involving illegal commercial construction projects continued to occur in the national nature reserve area.

77. Ibid.
78. Ibid.
79. Ibid.
80. Ibid.
81. CCTV News, ‘Xi’an has issued a plan to tackle serious problems in the Qinling mountains, and it will be completed by the end of June’ [西安发布秦岭突出问题整治方案 6月底前全面完成整治] [in Chinese], China News [中国新闻网] (2019) <www.chinanews.com/gn/2019/03-18/8783478.shtml> accessed 14 April 2018.
involving an illegal commercial construction project which resulted in damage to the ecological environment was exposed in another province.82 In fact, there are countless environmental violations caused by the omission and malfeasance of local administrative organs and it is probable that this situation is unlikely change in the foreseeable future.

For a long period of time, China has adopted an administration-led environmental governance model, which relied on the relevant administrative organs and their superiors to exercise effective supervision functions. However, due to limited resources and a vast increase in environmental disputes along with the institutional flaws of this approach, there has been a large vacuum in Chinese environmental governance. By understanding the limitation of the administration-led approach and conforming to the principle of governance under the rule of law, an increasing number of juridical methods have been introduced to overcome the shortcomings of the original environmental governance model.

3 REMEDIES FOR ENVIRONMENTAL DAMAGE

Besides administrative protection, environmental litigation is a further and arguably essential pathway in promoting the protection of the environment.83 Breaches to environmental laws usually involve direct and indirect violations of an individuals’ health and property rights. The penalties and remedies for violations are found in the PRC Criminal Law and the PRC Tort Law.84 Accordingly, Chinese environmental litigation can be classified as criminal and civil environmental litigation, which comply with PRC Criminal Procedural Law and PRC Civil Procedural Law (CPL). In the case of environmental criminal protection, all 15 environmental-related crimes within nine articles, are categorized into two types: pollution and environmental resources destruction, under section 6 ‘Crimes of Impairing the Protection of Environment and Natural Resources’ of Chapter VI of Crimes Obstructing the Administration of Public Order of the PRC Criminal Law. In the past, the PRC Criminal Law only punished pollution and environmental resource destruction by persons that seriously infringed the health and property rights of other people.85 In other words, there was no criminal liability if environmental destructive activities caused no direct and urgent harm to people’s health and property.

With the rising environmental consciousness in Chinese society since the 2000s, a major modification of environmentally-related crimes was introduced by the 8th Criminal Law Amendment 2011, that has shifted purely human legal interest oriented criminal protection to a dual protection for both human and environmental interests.86

83. Zhang (n 7) 1.
85. Criminal Law of the People’s Republic of China (n 84) Chapter VI.
86. Yanfang Hou, ‘Research on the early criminal protection for the environmental legal interests’ [环境公益刑事保护的提前化研究] [in Chinese] (2019) 3 Political Science and Law [政治与法律], 111–20; Yanhong Liu, ‘Multi-dimensional interpretation of the crime of
For instance, the crime of a major environmental pollution accident, which was rarely applied in practice, has been abolished and replaced by the crime of environmental pollution. The essential constitutive element of the crime has been altered to ‘seriously polluting the environment’. Article 1 of the Interpretation of Environmental Criminal Cases 2016 explains the meaning and scope of ‘seriously polluting the environment’ and further reinforces juridical protection of the ecological well-being established by the 8th Criminal Law Amendment 2011. It also reconfirms the status of the environmental legal interest in China’s environmental criminal protection.

The question of whether the aggressive and protective criminal protection in environmental protection are appropriate remains controversial amongst Chinese scholars because it illustrates the tendency of early criminal protection. Most criticism focuses on the blurring of the boundary between administrative and criminal law. However, when considering the seriousness of damage, the nature and features of the environmental legal interest, perhaps early criminal protection is not only justifiable but necessary. This is because the adverse consequences of pollution or ecological destruction are often undetectable and not recoverable. In fact, penalizing potential damage offenses relating to ecological well-being has dramatically improved the situation of weak criminal protection against environmental violations. The number of environmental criminal proceedings initiated by procuratorates increased 22.4 percent nationally in 2014 and increased further by 59.3 percent in 2016. In the meantime, the courts dealt with 1,188 environmental pollution cases nationally in 2014, which grew 7.9 times from 2013 and more than the sum of the past ten years. The courts concluded more than 19,000 environmental resources cases in 2015, which had risen by 18.8 percent from 2014; and the number of concluded cases had slightly dropped to 18,874 whilst the number of received cases has increased to 20,394. Though criminal penalties for environmental crimes include detention, imprisonment, fines and confiscation of property, this does not remedy the damaged environment. The authors therefore argue that though protective criminal environmental protection is justifiable, it is not in practice an effective tool in solving the issues encountered by Chinese environmental governance.

That having been said, individuals can undertake litigation under PRC Tort law. The PRC Tort Law has an independent chapter on the liability for environmental pollution but it lacks definitions for the terms of ‘environment’, ‘pollution’ and ‘polluter’, thus, the
meanings of these terms should be referred to the relevant environmental legislation. Article 64 of the EPL explicitly states that the person shall assume his/her tortious liability of environmental pollution or ecological destruction in accordance with the relevant provisions of the PRC Tort Law.

In order to contain the increasingly serious environmental pollution in China, the PRC Tort Law sets a standard of strict liability, often referred to as no-fault liability, for polluters. The remedies and compensation for environmental damages can be found in the general provisions of PRC Tort Law. Articles 65 to 68 stipulate the basic principles for the tortious liability for environmental pollution. The constitutive elements of environmental liability include polluting actions, the facts relating to environmental damage and the causal relationship between the two elements. Hence, polluters might bear tortious liability for damages, even if their polluting activities have been granted permission by the authorities.

Due to the nature of civil environmental litigation, the protection is mainly linked to private environmental rights, namely the victims’ personal or property rights. The juridical protection for the public environmental rights, on the other hand, is far from sufficient because its scope is hard to define and it is difficult to find appropriate remedies for damages. The only remedies for public environmental rights are ‘cessation of infringement, removal of obstruction and elimination of danger’ to prevent further losses. The juridical remedy for existing damages to environmental public interest had been excluded from the current civil environmental litigation system. In practice, the violators in many severe notorious environmental accidents that caused significant economic losses and ecological damages, such as Zijin Mining Industry Trans-provincial Water Pollution Case, Shanxi and Hunan Provinces Blood-lead Case, Dalian Petrol Pipeline Explosion Marine Pollution Case, etc., all escaped from taking responsibility for infringements to environmental public interest.

It can be argued that one of the most significant improvements in China’s approach to environmental protection is the establishment and development of the environmental public interest litigation (EPIL) system. EPIL, as an essential part of the environmental governance, provides a safeguard for the implementation and enforcement of environmental legislation and environmental governance reform. Different from environmental private litigation, EPIL not only seeks remedies from existing environmental abuse, but also focuses on ecological restoration and preventing potential threats for the ecological well-being. Therefore, the EPIL system was urgently required to fill the gap in environmental juridical protection.

95. Xiaoming Xi and Supreme People’s Court Tort Law Research Group (eds), Understanding and application of the provisions of PRC Tort Law [中华人民共和国侵权责任法条文理解与适用] [in Chinese], (People’s Court Press [人民法院出版社], 2011) 458.
96. Environmental Protection Law of the People’s Republic of China 2015 (n 38) art 64.
97. Xi et al (n 95) 452.
98. Tort Law of the People’s Republic of China (n 84) arts 65–68.
99. Xi et al (n 95) 454–58.
100. Ibid, 455–57.
101. Ibid, 457.
102. Ibid.
103. Tort Law of the People’s Republic of China (n 84) art 21.
104. Xi et al (n 95) 457.
105. Wang et al (n 91) 103; see also Jiang (n 3) 218.
106. See Zhang (n 7) 20, 54, 65.
4 THE BENEFIT OF EPIL AND ITS LIMITATIONS

4.1 The establishment of the EPIL system in China

In order to fill the vacuum in the juridical protection of public environmental rights, the EPIL system as a part of the public interest litigation (PIL) system was established in the early 2010s. Public interest is a broad and vague concept and its ownership cannot be distinguished, identified or abstracted from the general public. It is often to be referred to as national interest, social interest, or both. In theory, environmental public interest litigation is designed to provide the general public with a legal response to acts or omissions by governments, businesses and individuals that are likely to result in or do result in environmental malfeasance. It can involve prevention, mitigation, remediation or compensation for harm done to the environment. As such it does not necessarily mean that environmental laws are violated, rather there is a likelihood that the right of the public to a healthy environment is at risk or worse has been deleteriously affected by an act or omission by a particular organization, person or the government.

A healthy environment ties in with the public’s sense of social, cultural and physical well-being. In the context of the Chinese EPIL, it represents the constitutional right to a healthy environment, which is collectively owned by all citizens. However, the development of PIL has encountered many obstacles. In the past, public environmental rights together with other types of public interest have been omitted by Chinese society for a very long time. Public interest is vulnerable when lacking surveillance and protection, and the absence of genuine protection has, in turn, encouraged violations. It is a negative aspect of human nature that some people maximize public resources or sacrifice the public interest for their own benefit, when there was no consequence or cost to themselves. Apart from low environmental consciousness, the reason for the indifferent attitude towards public interest in China is due to its own unique cultural and historical background. Historically, traditional Chinese society has been an agricultural civilization where the ownership of private rights was clearly defined but most rights and interests belonged to successive emperors. In other words, public interest did not exist and the common people were not allowed to express concern about anything outside their domestic affairs. Hence this resulted in a long-lasting indifference towards public interest in traditional Chinese culture.

With China’s rapid economic development, the consciousness of civil rights among Chinese citizens has resulted in gradual focus on public interest rights. Under these circumstances, even without a legislative basis, several PIL cases have emerged nationwide since the late 1990s though in the main these were consumer protection cases. However, the public’s attitude towards the relationship between the ecological environment and themselves has changed. Human beings are an indivisible part of the natural ecological system so that ecological well-being is essential for people to have a dignified and meaningful life. Consequently the value of the

111. Hou (n 86) 113–14.
ecological environment has come to be recognized and afforded protection by legislators. However, for EPIL cases, only a few were initiated in the pilot period of establishing the Adjudication Tribunal for Environment and Resources at designated local People’s Courts since the mid-2000s. Examples are the 2003 Shandong Province Leling Chemical Wastes Pollution EPIL case and the 2011 Yunnan Province Qujing Chromium Pollution EPIL case.112

Before 2012, due to a lack of legislation, the total number of the EPIL was around 50 in the whole country.113 Pre-2012 EPIL there were four types of plaintiffs, namely environmental non-government organizations (ENGO), procuratorate, government agency and individual citizen.114 The standing of these EPIL plaintiffs was derived from the local regulations of the pioneer provinces that were exploring EPIL in their jurisdictions, such as Guizhou, Yunnan and a few other economically advanced coastal provinces.115 Just a few demonstrative EPIL cases cannot provide genuine juridical protection for the public environmental rights. Therefore, under these circumstances, Article 55 of the CPL 2012 revision has introduced civil PIL, which includes EPIL, consumer protection PIL and other types of PIL. This arrangement is aimed to facilitate EPIL as a feasible tool for restoring ecological damage.

EPIL is supposed to be an effective safeguard for protecting people’s constitutional right to a healthy environment but it has been subject to many oppositions from Chinese scholars during the law-making process based on the argument that PIL would break the fundamental principle of Direct Interests Involved in civil litigation.116 However, by considering the nature of PIL, the threshold of Direct Interests Involved principle could only hinder the legitimate claims for remedies arising from infringements to the public interest. This is because it precludes the opportunity to seek legal remedies arising from damages to the public interest if there is no obvious victim or a victim refuses to take any action. Furthermore, the principle of Direct Interests Involved is based on the assumption that all individuals are proactive defenders of their own rights and will actively pursue legal remedies for damages. In reality, a vast number of victims, who have a direct interest in a case, have been reluctant to proceed due to excessive litigation costs.117 Chu observes that scholars in the 2000s

112. Wei Jiang and Jianguo Xiao (eds), Civil Procedural Law (7th edn) [民事诉讼法] [in Chinese] (China People’s University Press [中国人民大学出版社], 2015) 156-159; see also CASOSPRL (n 2) 35–44.
114. Ibid.
115. See Wu (n 113) 50–56, 111–12; see also Yan (n 113) 335–41.
116. Jiang, Xiao (n 112) 150; Civil Procedure Law of the People’s Republic of China 2012 Revision, NPC, (2012), art 119(1) ‘the plaintiff must be a citizen, legal person or any other organization that has a direct interest in the case’.
117. Deyong Shen and Supreme People’s Court Implementing Civil Procedural Law Amendment Leading Group (eds), Understanding and application of the Supreme Court’s Judicial Interpretations of Civil Procedural law [最高人民法院民事诉讼法司法解释理解与适用] [in Chinese], (People’s Court Press [人民法院出版社], 2015) 755.
sought to establish less restrictive standing which has now come to fruition.\(^\text{118}\) Thus, the revised Article 55 of the CPL 2012 has made an exception to the principle of Direct Interests Involved in Article 119.\(^\text{119}\) Amendments to the CPL 2012 and the EPL 2014 mandate it is no longer necessary to have a direct interest in a case, rather a need to demonstrate there is harm or could be harm to the public interest and not individual or economic interests.

Chinese legislators introduced the PIL system by revising the Eligible Party test in the CPL instead of promulgating a new law mainly because it was the most efficient way to introduce the PIL into the Chinese legal system.\(^\text{120}\) PIL was totally new to Chinese society and the government considered there was no time to wait for the introduction of a new piece of legislation due to the lengthy process involved. As a result, Article 55 of the CPL 2012 was just a makeshift change to fix the urgent practical issues that had hindered the establishment and implementation of the PIL system.\(^\text{121}\) Obviously, one article is far from sufficient to support the whole PIL system.

### 4.2 The challenges to environmental governance at the initial stage of Chinese EPIL

The flaw in the legislative design of PIL made it unfeasible in practice. The term ‘legally mandated administrative organs and relevant organizations’ in Article 55 was too vague and general. It also lacked further clarification to define and interpret the scope and meaning of the term. Besides, there were no criteria or guidelines to identify which entities can be classified as ‘relevant organizations’ while only a few administrative organs, namely the marine environment supervision authorities,\(^\text{122}\) had been mandated. Moreover, Article 55 failed to specify whether procuratorates are the legitimate plaintiffs, though they had successfully launched many EPIL cases since the mid-2000s. In addition, individual citizens were no longer considered to be qualified claimants for EPIL due to fears about the potential excessive number of lawsuits that could occur along with an abuse of the litigation process. As a consequence, the implementation of the EPIL was frustrated due to the defects of Article 55. Only less than 20 demonstrative EPIL cases were brought to court nationally during the following two years after the introduction of the EPIL, and no cases were accepted by the courts in 2013.\(^\text{123}\) Among these cases, only one was initiated by a procuratorate in 2014 while the remainders were filed by ENGOs.\(^\text{124}\) In fact, most of the EPIL cases initiated by ENGOs were rejected by local courts on the basis that they failed to meet

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120. Art 55 is under Section 2 ‘Parties’ of Chapter V ‘Participants in Proceedings’ of the CPL 2012; ‘Eligible Party’ test of the CPL set a criteria for examining the eligibility of the trial participants. ‘Having a direct interest in the case’ was one of the criteria for the ‘Eligible Party’ test before the amendment to art 55.
121. See Zhang (n 7) 25.
123. See Wu (n 113) 43–48; see also Yan (n 113) 386–88.
124. Ibid.
the standing requirements. Even in accepted cases, ENGOs were forced to accept the mediation process coordinated by local governments. In short, it can be argued that the EPIL existed in name only after it has been legitimized by the 2012 CPL amendment.

On the other hand, the enforcement of environmental laws has been strengthened with the improvements in administrative action. For example, the environmental authorities issued ‘more than 97,000 decisions on administrative penalties with total fines of 4.25 billion RMB’ in 2015, which is 34 percent higher than 2014 figures. In 2017, the number of environmental-related administrative penalty cases increased to 233,000 whilst total fines jumped to 11.58 billion RMB, an increase of 265 percent from 2014. Nonetheless, the results are far from sufficient to recover the costs of environmental degradation. Without an effective judicial system, the threats to environmental well-being have remained serious and pressing after the introduction of the EPIL. In 2013, China’s overall environmental quality was just average with some severely polluted regions. For instance, on average, all the cities across the country experienced 36 days with haze, which having not reached such a historic peak since 1961, and the number climbed to more than 100 days in certain areas, with more than 44 percent of cities suffering acid rain. Although the environmental quality was slightly improved in 2015, the challenges in environmental protection were still a major challenge. The 2015 statistics illustrate that more than 78 percent of cities failed to meet the national air quality standard; 22.5 percent of cities experienced acid rain problems with the average frequency at 14 percent; and the water quality at 42.5 percent of groundwater monitoring sites was poor while very poor at another 18.8 percent sites. In 2017, two years after implementing the new EPL, environmental quality has gradually improved with the development of environmental governance. The nationwide average concentration of PM10 was 22.7 percent lower than 2013 levels; the acid rain occurrence was 36.1 percent and average acid rain frequency was 10.8 percent, which had decreased by 1.9 percent and 2.7 percent from 2016 levels respectively; but the results of underground water quality assessments were not optimistic, being poor at 51.8 percent of monitoring sites and very poor at 14.8 percent of sites. Statistically, the economic loss arising from environmental degradation demonstrates massive economic losses which had gone ignored. For instance, in 2000 alone, environmental-related economic loss reached more than US$77 billion and in 2006 environmental damage equaled at least 3 percent of that year’s economic growth; extreme weather conditions alone caused more than US$50 billion in economic loss in 2011; and in several provinces, economic growth figures would be negative if the cost of pollution was taken into account. Unfortunately, there is no sign that this trend will cease in a short time.

125. Yan (n 113) 201.
126. Ibid.
129. Wang et al (n 91) 105.
131. Ibid, 22, 33.
132. MEP (n 127) 6.
133. MEE (n 128) 1, 15, 29.
134. Alpermann (n 50) 127; Wei Liang, ‘Changing Climate? China’s New Interest in Global Climate Change Negotiations’ in Joel Jay Kassiola and Sujian Guo (eds), China’s Environmental
Furthermore, even though administrative protection is the most effective measure in environmental governance, in reality many administrative organs have failed to fulfill their duties. For example, whilst in June 2010 the SPC issued the Notice on Issuing Several Opinions on Providing Judicial Guarantee and Services for Accelerating the Transformation of the Economic Development Mode explicitly stating that the courts at all levels should accept and facilitate environmental compensation lawsuits raised by the environmental governance authorities on behalf of the state, few responsible government agencies took legal action against polluting companies and the ENGOs’ proposals of suing the polluters were often rejected or ignored by local authorities. Moreover, even if environmental authorities had filed lawsuits against polluters at that time, it is questionable as to whether the cases would have been accepted by the local courts.136 Local governments’ malfeasance, corruption and collusion with polluting enterprises undermined Chinese environmental governance as well as a lack of strong supervision and regulating mechanisms to prevent or control the administrative organs’ actions that may have compromised the public interest.137

5 POST-2014 EPIL REFORM

5.1 Courts and EPIL

Article 58 of the new EPL has extended the scope of EPIL, which originally only covered polluting activities, to include all other ecological abuses.138 This change has not only significantly strengthened juridical protection for ecological well-being but has also brought great challenges to the courts because the EPIL requires more specialized knowledge and expertise, which most of the courts have not yet acquired.

Theoretically there are a variety of approaches to hearing environmental cases. Other than dealing with environmental matters in the general court system, under the second approach, judges are specifically appointed to adjudicate environmental cases. This approach is often referred to as the ‘green bench’ though such tribunals tend to operate within the existing court system. The third approach involves setting up specialist environmental courts or tribunals, presided over by judicial officers whose focus is environmental matters.139 China’s approach to the enforcement of environmental laws is a blend of the first and second patterns. Environmental courts are often set up either in the environmental division within the Intermediate People’s courts, or as separate tribunals at the basic court level to adjudicate on matters involving flagrant breaches of...
environmental laws.\textsuperscript{140} The SPC decides which courts in its different geographical areas can accept first instance environmental civil public interest lawsuits.\textsuperscript{141} The courts have devised rules that enable them to process all environmental cases no matter what the appropriate jurisdiction. With pollution at critical levels, the absence of a national network of environmental courts throughout China is considered by Tian Chenyou, Deputy President of Yunnan Higher Court, as a major constraining factor that hampers uniformed decision-making in such matters.\textsuperscript{142} The SPC started to specialize in environmental judicial adjudication by establishing the Adjudication Tribunal for Environment and Resources at designated local courts since 2007.\textsuperscript{143} In 2014, the SPC established its own Adjudication Tribunal for Environment and Resources during its institutional restructuring, followed by local courts nationwide, with the goal of ecological civilization construction and solving practical issues in environmental trials.\textsuperscript{144}

However, prior to 2014 specialized environmental adjudication organs have not been able to guarantee effective environmental judicial protection as the courts have historically displayed a passive and inactive role in EPIL. This is because environmental disputes usually have a vast number of victims and could be easily turned into the so-called mass incidents that would jeopardize social stability, as the polluters often are the local major taxpayers.\textsuperscript{145} Both the local economy and social stability are the key concerns of the local authorities and Communist Party of China (CPC) Committees, which control the fiscal appropriation of the courts and have a strong influence over local court decisions in key matters. Occasionally the courts need to ask these bodies’ permission to accept environmental dispute cases.\textsuperscript{146} Similarly, the effectiveness of any environmental protection policy regime is dependent on institutions that ensure unfettered compliance with environmental laws. Local interference by government officials in judicial decision-making is said to be common in order that local industries are protected.\textsuperscript{147} When such safeguards are absent in any legal system, it perpetuates a perception that judicial decisions are tainted with bias.\textsuperscript{148} Hence, local protectionism has been one of the main obstacles for EPIL and environmental governance in China. A further disturbing factor is a misunderstanding amongst the general public. Li observes that China has not yet succeeded in implementing a system whereby Chinese faith in the judicial system has improved, because

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141. The Interpretation of the Supreme People’s Court on Several Issues Concerning the Application of Law in the Hearing of Environmental Civil Public Interest Lawsuits (1 June 2015) art 7.
143. Zhang (n 7) 25.
144. Ibid.
145. Yan (n 113) 274, 388, 397–98; see also Jiang (n 3) 218–19; Wu (n 113) 75, 131.
146. Ibid.
147. Ibid.
148. Mei Hong, Yanjie Yin, ‘A Feasible Approach to Environmental Public Interest Litigation: The People’s Procuratorate as Plaintiff’ in Paul Martin, Zhiping Li, Tianbao Qin, Anel Du Plessis, Yves Le Bouthillier (eds), \textit{Environmental Governance and Sustainability} (Edward Elgar, The IUCN Academy of Environmental Law Series 2012) 137.
\end{flushright}
there exists a misconception amongst some members of the public that a significant number of judges are corrupt and therefore not impartial.\textsuperscript{149}

As mentioned above, during the comprehensive reformation of environmental governance, China has taken administrative efforts to prevent the interference of local protectionism in the courts and judicial methods have become increasingly important in the ecological progress. With China’s ongoing juridical reform, as a result of the Fourth Plenary Meeting of the 18th CPCCC in October 2014, the Decisions on Several Major Issues Concerning Comprehensively Advancing the Rule of Law was proposed to improve the judicial system through several reformatory arrangements, which have also improved the development of EPIL.\textsuperscript{150} For instance, since May 2015, the case-filing examination procedure, which had been used to impede environmental public interest disputes, has been replaced by the case-filing registration procedure, that has removed the threshold of pre-trial substantial examination for filing cases, with the result that the court has no right to reject EPIL cases if the application documents have passed the formality examination.\textsuperscript{151} The Decisions also propose to establish circuit courts as well as exploring the possibility of establishing trans-regional courts and procuratorates to reduce the local governments’ influence in the judicial field; and to improve the transparency and public participation in the judicial process by developing the judicial information disclosure system and jurors participation mechanism.\textsuperscript{152} In 2018, the NPC promulgated the Law of the People’s Republic of China on People’s Jurors stipulating that the collegiate bench of first instance PIL cases will consist of seven members that include both Judges and People’s Jurors.\textsuperscript{153} These reformatory arrangements are positive impacts on the EPIL system.

It is argued that courts should be the last defense line to safeguard the public interest and play an active role in EPIL.\textsuperscript{154} In January 2015, the SPC issued the Interpretation on Several Issues Concerning the Application of Law in Civil EPIL and Interpretation on Several Issues Concerning the Application of Law in CPL to further clarify the role and status of courts in EPIL.\textsuperscript{155} At present, the courts have the responsibility to examine the plaintiffs’ claims and alter the claims if the original claims cannot effectively protect public interest.\textsuperscript{156} During EPIL proceedings, courts should collect evidence when necessary,\textsuperscript{157} and self-admission, mediation, withdrawal of


151. Yan (n 113) 288–89.

152. Decisions on Several Major Issues Concerning Comprehensively Advancing the Rule of Law (n 150).

153. Law of the People’s Republic of China on People’s Jurors, NPC, (27 April 2018), arts 15, 16(2).

154. See Zhang (n 7) 23.

155. Interpretation on Several Issues Concerning the Application of Law in PRCCPL, SPC (4 February 2015) arts 284–91; Interpretation on Several Issues Concerning the Application of Law in Civil EPIL, SPC (7 January 2015).

156. Interpretation on Several Issues Concerning the Application of Law in Civil EPIL (n 155) art 9.

lawsuits are all under the examination of the court and would be rejected if the court found it might infringe public interest. Apart from giving judges a high level of discretion in EPIL, the level of jurisdiction for civil EPIL cases has been raised, unless otherwise provided by law or judicial interpretation. Intermediate courts instead of local district courts will hold the first instance hearings of EPIL so as to reduce potential interference from local protectionism.

However, the challenges for courts in EPIL hearings cannot be ignored. According to 2018 statistics, there were around 124,000 judges and 70,000 procurators in China with more than 12.295 million new cases received by the courts nationwide in the first six months of 2018. On average, each judge receives approximately 200 new cases annually. With limited judicial resources, judges are overwhelmed by the increasing number of cases. As a consequence, the shortage of judicial resources has limited the further development of EPIL. In addition, since the EPIL is still in its initial phase of development with constant adjustments, a strict plaintiff qualification standard has been adopted to control the number of EPIL cases at a manageable level for its long-term healthy development.

5.2 Establishing the procuratorate-initiated EPIL system

The adverse impacts of Article 55 of the EPL on the EPIL system is reflected in weak juridical protection for ecological well-being and has forced the central government to rethink which model of EPIL is most suitable for Chinese environmental governance. By considering the legal system and the practical challenges of EPIL, the CPCCC has proposed the possibility of establishing the procuratorate-initiated PIL system in the Decisions on Several Major Issues Concerning Comprehensively Advancing the Rule of Law.

Reconfirming the procuratorate’s standing in EPIL and choosing the procuratorate-initiated PIL model was a thoughtful arrangement that considered the challenges encountered by EPIL, the procuratorate’s legal and political status, as well as the political reality in China. From a legal perspective, the procuratorate are given legal supervision power, by the PRC Constitution. The procuratorate is the representative of public interest and exercises its supervisory power over judicial activities and the implementation of the law. Apart from the criminal prosecution function,

158. Ibid, arts 16, 25, 27.
159. Ibid, arts 6, 7.
162. Decisions on Several Major Issues Concerning Comprehensively Advancing the Rule of Law (n 150).
163. Constitution of the People’s Republic of China 1982 (Fifth Amendment) (n 26) art 134. 164. Yan (n 113) 188–90; CASOSPR (n 2) 15, 32–33.
the procuratorate used to have the right to file the civil and administrative cases in the
courts on behalf of public interest cases. This right was removed from the procurat-
orate’s power list at the beginning of the reform and opening-up period in the early
1980s to prevent the public-power’s arbitrary over-interference with the market-
oriented economy. On the contrary the constitutional status of the procuratorate
makes it the most suitable representative of public interest.

Moreover, as the legal supervision body and public prosecution organ, procurato-
rates have the knowledge and resources to protect public interest in litigation proceed-
ings. The EPIL can also strengthen its legal supervision capacity to correct and
prevent public interest infringements caused by administrative organs, private entities
and individuals, which would in turn foster advancing the rule of law in China. As a result, they are more likely to be immune from the influence of local protectionism. Thus, the procuratorate has major advantages in EPIL compared with other qualified plaintiffs. In short, this public-power-dominant model aims to strengthen the implementation of the EPIL system, fuel the develop-
ment of Chinese environmental governance and promote a legal system that focuses
on environmental protection.

In response to the CPC CCC’s proposal, the NPC Standing Committee issued the
Decision on Authorizing the Supreme People’s Procuratorate to Launch the Pilot Pro-
gram of Initiating PIL in Certain Areas on 1 July 2015 to authorize the SPP roll-out of
a two-year period of procuratorate-initiated PIL pilot program in 13 provinces. The
SPP published the Pilot Program of Initiating PIL by the Procuratorial Organs and
Implementation Measures for the Pilot Program of Initiating PIL by People’s Procu-
ratore whilst the SPC issued the Implementation Measures for the Pilot Program of
People’s Courts’ Hearing PIL Cases Initiated by People’s Procuratorates to deploy
and support the roll-out plan of the PIL pilot program.

During the two-year pilot period, a dual-structured EPIL system, which consists of
civil and administrative EPIL, has gradually been formed. In order to solve the imple-
mentation issue of civil EPIL, the procuratorate has been conferred with the right to
support, supervise and urge qualified plaintiffs to initiate the EPIL cases. In addition,
when there are no qualified plaintiffs or the qualified plaintiff refuses to file an EPIL
case after receiving the procuratorates’ Notice of Urge to Sue, procuratorates can
bring cases directly to the court after notice period ends. The pilot administrative
EPIL, on the other hand, was introduced to force the environmental administrative
organs to fulfill their duties by utilizing EPIL. This is unlike the legal remedies for
civil EPIL, which includes ‘cessation of infringement, removal of obstruction,

165. Ibid.
166. Ibid.
167. Xi (n 137).
168. Yan (n 113) 188–90; CASOSPR (n 2) 15.
169. See Yan (n 113) 210–13.
170. Decision on Authorizing the Supreme People’s Procuratorate to Launch the Pilot Program
 of Initiating PIL in Certain Areas, NPC, (1 July 2015).
171. Pilot Program of Initiating PIL by the Procuratorial Organs, SPP (2 July 2015); Implementa-
 tion Measures for the Pilot Program of Initiating PIL by People’s Procuratorates, SPP
 (24 December 2015); Implementation Measures for the Pilot Program of People’s Courts Hear-
 ing PIL Cases Initiated by People’s Procuratorates, SPC, (25 February 2015).
eliminating danger, restoring to the original state, compensation for damage and ecological function losses, apologies as well as alternative restoration methods’ for ecological damage.\textsuperscript{172} Claims for administrative EPIL include revocation or partial revocation of the illegal administrative acts that have damaged environmental public interest, performing statutory duties within a time limit, as well as confirming the illegality or invalidity of administrative acts.\textsuperscript{173}

After the two-year pilot period was successfully completed, the Standing Committee of the NPC passed the Decision on Amending the CPL and the PRC Administrative Procedure Law on 27 June 2017.\textsuperscript{174} Since then, the procuratorate-initiated EPIL system has been established and implemented nationally. The relevant clauses of EPIL are now integrated in all new environmental legislation, such as the Soil Pollution Prevention and Control Law 2019 for example.\textsuperscript{175} Whilst the 2017 CPL amendment confirmed the procuratorates’ standing in civil EPIL by an additional subsection 2 to Article 55;\textsuperscript{176} Article 25 subsection 4 of the Administrative Procedure Law 2017 amendment introduced the administrative EPIL into the legal system with procuratorates the only qualified plaintiff in this new type of EPIL.\textsuperscript{177} In early 2018, the SPC and SPP jointly issued the Interpretation on the Application of Law in Procuratorial Public-interest Litigation Cases (2018 Interpretation) to provide practical guidance for the implementation of the EPIL.\textsuperscript{178} Civil EPIL cases can sometimes be heard together with related criminal cases in the same trial proceedings, known as the Civil EPIL Suit Collateral to Criminal Proceedings system.\textsuperscript{179} In this scenario, the first instance civil EPIL can be held either by intermediate courts or local district courts depending on the related criminal case.\textsuperscript{180} In July 2018, the CPCCC Comprehensively Deepening Reform Committee passed the proposal for establishing the PIL Department of SPP, which is now the No. 8 Procuratorial Department, responsible for all procuratorate-involved PIL proceedings.\textsuperscript{181} Three months later, the standing of the procuratorate in PIL was confirmed in Article 20 of the Organic Law of the People’s Procuratorates 2018 Amendment.

Nonetheless, since the PIL system has just been established, there is still room for future improvement. In practice, the procuratorates’ litigation status in PIL has not been achieved yet and it is now the most controversial issue in current PIL legislation. While the SPC believed that procuratorates should be treated as ordinary plaintiffs in PIL, the SPP claimed that, as the public interest representative and the legal

\textsuperscript{172} Interpretation on Several Issues Concerning the Application of Law in Civil EPIL (n 155) arts 18–21.
\textsuperscript{173} Implementation Measures for the Pilot Program of Initiating PIL by People’s Procuratorates (n 171) art 43.
\textsuperscript{174} Decision on Amending the PRC Civil Procedure Law and the PRC Administrative Procedure Law, NPC (1 July 2017).
\textsuperscript{175} Soil Pollution Prevention and Control Law of the People’s Republic of China (n 40) art 97.
\textsuperscript{176} Civil Procedure Law of the People’s Republic of China 2017 Revision, NPC (1 July 2017).
\textsuperscript{177} Administrative Procedure Law of the People’s Republic of China 2017 Revision, NPC (1 July 2017).
\textsuperscript{178} Interpretation of Several Issues Concerning the Application of Law in Procuratorial PIL Cases, SPC and SPP (2 March 2018).
\textsuperscript{179} Ibid, art 20.
\textsuperscript{180} Ibid.
\textsuperscript{181} Yan (n 113) 351.
supervisory body, procuratorates participating in PIL is for protecting juridical justice and social justice, thus, their litigation status should be the same as public prosecutors in criminal cases.182 During the law-making process, legislators have compromised and created an ambiguous term to refer to the procuratorates’ status in PIL, as the ‘PIL initiator’. The term of ‘PIL initiator’, which firstly appeared in Pilot Program of Initiating PIL by the Procuratorial Organs and was reconfirmed by the 2018 Interpretation, can be seen as an acknowledgement of the procuratorates’ special status in PIL.183 However, the legislators have left its meaning and scope undefined for further clarification in the future. As a consequence, due to the lack of a legal basis, the PIL initiator’s procedural rights and obligations are presently referred to as civil plaintiffs in accordance with CPL but with several special procedural arrangements to demonstrate their differing status from ordinary plaintiffs.

Moreover, in current judicial practice, there are significant regional discrepancies in the application of EPIL, especially for marine environmental disputes, among courts from different provincial jurisdictions. For instance, the Qingdao maritime court of Shandong province has denied procuratorates’ standing in maritime civil EPIL cases and ruled that only marine environmental supervision authorities have standing in such cases. This is due to Article 89 of the Marine Environmental Protection Law;184 however, the Guangzhou maritime court of Guangdong province has recognized the procuratorates’ standing in maritime civil EPIL cases in Guangzhou Municipal Procuratorate v Li.185 In early 2019, Ningbo maritime court of Zhejiang province accepted the Zhoushan municipal procuratorate that initiated a civil EPIL case where the destruction of marine biological resources occurred involving the illegal wildlife trading of sea turtles.186 Thus, further judicial interpretations by the SPC are urgently required to unify the application of the law in EPIL. In addition, other debatable questions regarding procuratorates’ involving procedural rights and obligations, their powers in evidence collection, status in second instance, burden of proof, retrial procedure etc., also need further clarification during the ongoing legislative process.187

In fact, the current EPIL system mainly relies on judicial interpretations and guiding cases issued by the SPC and SPP rather than legislation promulgated by the NPC and these semi-legislative documents are sometimes incoherent and incompatible with each other. It has not only weakened the constitutionality of EPIL but also impedes its future development and improvement. Furthermore, merely two articles regarding the plaintiffs’ standing in procedural laws is far from sufficient to support the existing EPIL system, which has gradually become more sophisticated and complex. That is because, as a new type of litigation, there are fundamental differences between EPIL

182. See CASOSPR (n 2) 79–84, 169–70; see also Wu (n 113) 239–45; Yan (n 113) 190–91.
183. Pilot Program of Initiating PIL by the Procuratorial Organs (n 171) Section 2.1.2; Interpretation of Several Issues Concerning the Application of Law in Procuratorial PIL Cases (n 178); see CASOSPR (n 2) 81–84.
184. Marine Environmental Protection Law of the People’s Republic of China 1999 Revision (n 122) art 89.
185. Guangzhou Municipal Procuratorate v Li (2017) Yue 72 Civil First No. 431.
and normal civil and administrative litigation from the perspective of legislative purpose, procedural values, participants’ status, legal relationships and so forth. Therefore, many Chinese scholars have called for special legislation for EPIL procedural law or, at least, separate chapters in each procedural law for the EPIL.

5.3 EPIL pre-trial procedures

Although there are still some shortcomings in the current procuratorate-initiated EPIL system, after two years following a pilot period nationwide implementation, it has proved to be a successful model for the Chinese EPIL system. Nevertheless, juridical environmental protection can never be a replacement but rather a supplement for environmental administrative management and, due to the modest and restrained nature of legal supervision power, the procuratorate-initiated EPIL system should only be the last resort for protecting environmental public interest. Furthermore, limited resources make it is unfeasible and unrealistic that procuratorates should be the main force behind environmental governance. Thus, a mandatory pre-trial procedure has been set for all procuratorate-initiated EPIL cases.

For the civil EPIL pre-trial procedure, as mentioned above, procuratorates should firstly urge the relevant government agencies and ENGOs to file the lawsuits and provide legal support for them. Procuratorates can file EPIL only if there is no qualified plaintiff or the qualified plaintiff refuses to take action after the notification period. This illustrates the supplementary nature of procuratorial power in the current EPIL system. Unlike civil EPIL, currently the procuratorate is the only legitimate plaintiff in administrative EPIL and the purposes of the two types of EPIL are different. Thus, the pre-trial procedure in administrative EPIL is issuing Procuratorial Suggestions that request administrative organs to correct their mistakes, complete their duties, fulfill their responsibilities of protecting public interest and report corrective methods and outcomes to the procuratorate within one month. The procuratorates will initiate EPIL cases only if the responsible administrative organ refuses to take action, which is very rare in reality. That is because once the EPIL case enters into the litigation process, even if the threats to public interest have been removed, the court might still confirm the illegality of the responsible administrative organs’ breach of duty, which will also affect the performance evaluation of the responsible governmental officials. Hence, the responsible administrative organs tend to solve problems within the pre-trial procedure instead of entering into litigation proceedings. In practice, the pre-trial procedure has played an essential role in the current administrative EPIL system. In 2018, the procuratorates initiated 59,312 EPIL cases nationally, whilst 53,521 cases entered into the pre-trial procedure, in which 97 percent cases were finalized during the pre-trial procedure because the administrative organs had fulfilled their duties. Furthermore, providing a second chance for local environmental authorities

188. Ibid, 71–254; Zhang (n 7) 69–82; Yan (n 113) 68–69.
189. Ibid.
190. See Zhang (n 7) 142–44; Xi (n 137).
to tackle issues rather than bringing the government representatives to court creates a buffer that releases the tension between juridical and administrative organs.

Pre-trial procedure is arguably the most cost-effective way to protect the ecology significantly saving the juridical and administrative resources of the courts, procuratorates and potential defendant government agencies. Moreover, the purpose of EPIL is not to win litigation or to identify the faults of the administrative organs, but rather restore and protect ecosystems. If the pre-trial procedure can serve that purpose, it would be unnecessary to go through the whole process. Under this philosophy, the SPP with both the Ministry of Land and Resources (now the MNR) and the other nine Ministries and Commissions which include MEE and MNR jointly issued two governmental regulations in 2017 and 2019 respectively to request all relevant governmental agencies to fully cooperate with procuratorates in EPIL. Therefore, it can be argued that notwithstanding Chinese environmental governance is largely administrative-oriented, juridical protection has become increasingly important with the development of EPIL.

6 ADMINISTRATIVE ORGANS AND THE ECOLOGICAL AND ENVIRONMENTAL DAMAGES LITIGATION

Due to the limits of administrative power in environmental governance, as aforementioned, administrative penalties are not sufficient to compensate for ecological damage. Hence, environmental authorities sometimes have to utilize the civil EPIL to fulfill their duties. In judicial practice, government agencies have filed civil EPIL cases according to local regulations since the 2000s, but their standing was not recognized nationally until the SPC issued the Notice on Issuing Several Opinions on Providing Judicial Guarantee and Services for Accelerating the Transformation of the Economic Development Mode in 2010. Before the 2012 CPL amendment, government agencies, as legitimate plaintiffs, filed 22 EPIL lawsuits, representing more than 40 percent of the total EPIL cases accepted by courts. However, since a narrow interpretation of the ‘legally mandated administrative organs’ in Article 55 of 2012 CPL has been adopted, the standing of most government agencies has been excluded from EPIL except the marine environment supervision authorities.

In order to respond to the CPCCC’s demand on promoting ecological progress under the rule of law and establishing the ecological and environmental damages (EED) compensation system, a two-year-period pilot program of EED litigation (EEDL) was launched in seven designated provinces in December 2015, five months after launching the procuratorate-initiated PIL pilot program. As authorized by the

195. Zhang (n 7) 140–41; Wu (n 113) 131–35.
196. Ibid.
197. Wu (n 113) 111–12.
198. Yan (n 113) 386–88.
199. Pilot Program to Reform the Ecological and Environmental Damage Compensation System, CPCCC and the State Council (3 December 2015).
State Council, the provincial governments of pilot areas have been granted standing in EEDL and can entrust the local environmental authorities to file EEDL lawsuits against ecological abusers. After seeing the successful outcomes of the EEDL during the pilot period, the CPCCC and the State Council decided to implement the EED compensation system across the country in 2017 and authorized plaintiffs have been expanded to include all municipal governments. In January 2018, the SPC published the Provisions on the Trial of Marine Natural Resources and Ecological and Environmental Damages Litigation Cases to provide judicial guidance for maritime courts in holding the marine EEDL lawsuits and to reconfirm the marine environment supervision authorities’ standing in such cases, based on Article 89 of the Marine Environmental Protection Law. In May 2019, the SPC issued the Provisions on the Trial of Ecological and Environmental Damages Litigation Cases (Trial) (EEDL Interpretations) to solve the issues in judicial practice and to make procedural arrangements for EEDL and civil EPIL cases, which have shared the same legislative purpose with many overlapping procedures.

Arguably, the EEDL is one kind of civil EPIL where qualified government agencies are the plaintiffs with specific claims, i.e. financial compensations against severe ecological infringements. In fact, the two litigation systems are essentially the same because they both provide juridical protection for environmental public interest. The EEDL Interpretations explicitly state that if the courts accept EEDL and EPIL for the same ecological abuse at the same time, both cases should be heard by the same collegiate bench and the EPIL should be halted until the EEDL process is completed. The court can begin the EPIL process if the environmental public interest has not sufficiently been compensated after the EEDL is finished or new damages for the same infringement has been determined and brought to court as EPIL cases. In other words, in the Chinese legal system, the government agencies’ right to standing is the top priority in the judicial protection of environmental public interest. This is because they are the most powerful public interest protectors, who have resources, expertise and the ability to collect evidence. In addition, juridical protection is never the first option for administrative organs. To save juridical resources, like EPIL, EEDL set a mandatory pre-trial negotiation procedure, namely, government agencies are allowed to initiate the EEDL only if they fail to reach a compensation agreement with ecological abusers after pre-trial negotiations. Furthermore, as in other civil EPIL cases, procuratorates provide support to government agencies in EEDL or bring a case directly to the court if the government agencies fail to file the lawsuit after the notification period of intending to sue.

In fact, the present parallel law-making processes for the two litigation systems result from defects in civil EPIL legislation. This legislative arrangement is a compromise for restoring the government agencies’ standing in EPIL. However, many scholars

200. Ibid.
201. Reform Plan of Ecological and Environmental Damage Compensation System, CPCCC and the State Council (27 December 2017).
202. Provisions on the Trial of Marine Natural Resources and Ecological and Environmental Damages Litigation Cases, SPC (15 January 2018); Marine Environmental Protection Law of the People’s Republic of China 1999 Revision (n 122) art 89.
203. See Provisions on the Trial of Ecological and Environmental Damages Litigation Cases (Trial), SPC, (5 June 2019).
204. Ibid, arts 1, 2.
206. Ibid, art 20; Reform Plan of Ecological and Environmental Damage Compensation System (n 201) sections 4(4)–4(5).
declare that EEDL does not belong to EPIL because its role is protecting the national interest or the state’s ownership of environmental resources, which is not the same as the environmental public interest. The reason for this disagreement among Chinese scholars is that the terms of public interest, national interest and social interest have been randomly used in different pieces of legislation without clear definitions, and as a consequence, the scope and meaning of public interest is vague, inconsistent and sometimes contradicted in the legal system.\(^{207}\) Because the two types of litigation share the same purpose, being the protection of environmental public interest similar to other litigation procedures, it can be argued that integrating the two types of litigation into one comprehensive EPIL system would avoid potential contradictions within Chinese juridical environmental protection and make the whole system more systematic and coherent.\(^{208}\)

7 ENGOS’ AND INDIVIDUALS’ PARTICIPATION IN EPIL AND ENVIRONMENTAL GOVERNANCE

7.1 ENGOs in the current EPIL system

The challenges to ecological well-being have become increasingly complex and serious. In the meantime, due to the limited resources, administrative organs alone can no longer satisfy the needs of modern environmental governance. The value of ENGOs to the EPIL system has been gradually recognized in China.\(^ {209}\) Arguably experienced environmental ENGOs are better equipped to undertake matters relating to the environment rather than prosecuting authorities because this is the focus of their interest.\(^ {210}\) Although Article 55 of the 2012 CPL recognized the standing of ‘relevant organizations’ in EPIL, it failed to provide any definition for this ambiguous term. As a consequence, no ENGO-initiated EPIL had been accepted by the courts from 2012 to 2013.\(^ {211}\) To rectify the issue, the new EPL has provided legislative support for ENGOs by listing the detailed and implementable criteria for the ENGOs’ standing requirements in the Article 58 which mandates that only a social organization registered with the civil affairs department of the people’s government at or above the level of city can engage in such litigation and must be registered for five consecutive years without any violation of the law.\(^ {212}\) In addition, although the court can no longer reject EPIL cases filed by ENGOs, if they meet the stipulated qualification criteria, the shortcomings of the restrictive standing requirements should not be ignored. The unreasonable restrictions were based on the hypothesis that existing judicial resources are not able to process the potential excessive amount of EPIL cases if all ENGOs are permitted to file the EPIL lawsuits.\(^ {213}\)

In 2015 supported by the procuratorate, a local ENGO initiated an EPIL lawsuit, the *Taizhou Environmental Federation v Jiangsu Changlong Agro Chemical Ltd. & Others*,

207. See Yan (n 113) 42–45; Wu (n 113) 126–28.
208. Yan (n 113) 213.
211. Yan (n 113) 387; Wu (n 113) 79, 206.
212. Environmental Protection Law of the People’s Republic of China 2015 (n 38) art 58.
which is now the guiding case of SPC.\textsuperscript{214} It is one of the most influential EPIL cases in Chinese EPIL history because the court awarded 160 million RMB for environmental compensation and permitted the alternative environmental remedy, which has created the precedent in the Chinese environmental juridical protection.\textsuperscript{215} Since then, ENGOs have resumed their active participation in EPIL utilizing this juridical tool to improve the development of environmental governance in China. They expand new frontiers of EPIL to the field outside pollution and environmental resource damages, namely biodiversity, climate change and other new emerging environmental issues. For instance, in 2017, Friends of Nature (FON) initiated their first preventative biodiversity EPIL case for protecting the endangered species, \textit{pavo muticus}, from extinction.\textsuperscript{216}

Importantly ENGOs voice grassroots concerns and represent public interest in environmental protection.\textsuperscript{217} Most of them have no financial ties with either the government or polluting companies. As independent parties, they provide oversight in the implementation of environmental laws and policies at the local government level, investigating pollution events and taking legal action to fight polluting industries while protecting pollution victims.\textsuperscript{218} However, at present, they are still excluded from the administrative EPIL without a proper reason.

Nevertheless, the reality is that there are just 8,000 ENGOs in China, including those registered as non profit or other forms of organizations, but only approximately 10 percent meet the qualification criteria, in which just 13 out of 36 registered National ENGOs have obtained standing in EPIL; and most of the qualified ENGOs lack motivation, resources or the ability to initiate EPIL.\textsuperscript{219} In practice, many EPIL cases can only rely on procuratorates as there are no qualified ENGOs in the regions. This puts significant pressure on lower level procuratorates, especially those in the less economically developed ecologically fragile areas. As a result, too few ENGO-initiated EPIL cases have been brought to courts, which has caused the imbalanced development between civil and administrative EPIL and left a vacuum in China’s environmental governance. Therefore, it is argued the legislature should remove all unreasonable restrictions on ENGOs and provide more legislative support to motivate their participation in both civil and administrative EPIL.

7.2 Challenges for ENGOs in current environmental governance

ENGOs are supposed to be the leading force in civil EPIL and environmental governance. However, because the Chinese authorities have historically held a skeptical attitude towards private entities, ENGOs and individuals were excluded from environmental governance.\textsuperscript{220} For a long period of time, ENGOs were only allowed to play a supportive role in government programs and educational fields.\textsuperscript{221} Until now, the majority of ENGOs remain in the educational sector engaged in cooperative environmental protection programs or campaigns with the government.\textsuperscript{222}

\textsuperscript{214} (2014) Su Environmental-Civil-PIL Final No. 00001.
\textsuperscript{215} Zhang (n 7) 83.
\textsuperscript{216} (2017) Yun 01 Civil First No. 2299.
\textsuperscript{217} Jiang (n 3) 222.
\textsuperscript{218} Ibid, 223.
\textsuperscript{219} Yan (n 113) 345-47, 388; Wu (n 113) 64; Jiang (n 3) 222.
\textsuperscript{220} Yan (n 113) 390.
\textsuperscript{221} Jiang (n 3) 222.
\textsuperscript{222} Ibid.
In order to maintain social stability, the Chinese government has implemented strict controls on the registration and administration of NGOs since the early 1990s; that is all NGOs intended to be registered with the Ministry of Civil Affairs or the local Civil Affairs Bureaus must be sponsored by a relevant government institution. As a result, many Chinese domestic NGOs often are known as ‘government-owned non-government organizations’ as their independence is circumscribed. In addition, due to the strict political control, ENGOs have encountered many obstacles in their daily operation. At present, fund raising is a significant challenge encountered by ENGOs resulting from limited channels and financial support. Nonetheless, even though China’s domestic philanthropy is still immature, ENGOs tend to avoid receiving foreign funding because it is too politically sensitive and may involve national security issues. Some of the ENGOs, like the All-China Environmental Federation (ACEF), have adopted a membership model with their daily operation dependent on membership fees paid by member enterprises. The flaws in this model are obvious. In practice, none of the ACEF filed EPIL cases have been brought against its member enterprises, hence, the neutrality of ACEF is often questionable due to a potential conflict of interests.

Moreover, the development of ecological civilization construction and legal system construction is quite imbalanced from region to region. Some local governments, especially those in the less economically developed but ecologically fragile regions, take the view that EPIL lawsuits may be regarded as threats to social stability. That is because such areas are under pressure to improve local economic performance. In addition, in Chinese culture, litigation can be seen as hostile behaviour, which often indicates the end of the relationship. Nevertheless, a good relationship with local governments is essential for ENGOs’ future development. Furthermore, small localized ENGOs are either directly controlled by local authorities or supervised by government agencies, and are unwilling to be seen as ‘trouble-makers’ and many of them cannot afford the financial cost of initiating EPIL. As a result, most of the small localized ENGOs are usually reluctant to participate in EPIL because they do not want to confront local authorities, state-owned corporations or private companies who are the major local tax payers. After the procuratorate-initiated EPIL system was established, many qualified ENGOs have tended to wait for procuratorates to initiate EPIL cases rather than do it themselves. In practice, only a few influential national ENGOs, such as FON, ACEF, China Biodiversity Conservation and Green Development Foundation (CBCGDF), etc., are proactively engaged in EPIL and these ENGOs either have a governmental background or have a strong relationship with the authorities. Therefore, unless the present ENGO supervision and management model is changed, the marginalized position and difficult circumstances for ENGOs in EPIL might not change. Unfortunately, there is no sign this issue can be solved in a short time.

Presently, the most pressing issues encountered by ENGOs are the excessive litigation costs of EPIL. Losing an EPIL case, apart from the court fees, involves litigation expenses, which they can hardly afford. In many cases, court fees alone could lead

223. Social Organization Registration Management Regulations (Revision), State Council (6 February 2016) arts 3, 9.
224. Jiang (n 3) 222.
225. Wu (n 113) 80.
226. Ibid, 206, 214.
227. Yan (n 113) 347, 390–93, 397.
228. Ibid, 347; Jiang (n 3) 222.
229. Yan (n 113) 304–10; see also Wu (n 113) 99–101.
ENGOs into bankruptcy. That is because the EPIL cases usually involve a large amount of financial compensation for damages and court fees are charged according to a certain percentage of the claimed amount, which is often far beyond most ENGOs’ tight budgets. The recent case of FON, CBCGDF v Jiangsu Changlong Nutrichem Ltd., Changzhou Changyu Chemical Ltd. is a classic example of the difficult situation faced by ENGOs in EPIL.230 In the first instance decision, even though the court found the defendants caused the environmental deterioration, the ENGOs lost the case and were ordered to pay 1.89 million RMB in court fees.231 It is hard to believe that the decision was absent from the influence of local protectionism. Fortunately, the appeal heard by the High People’s Court of Jiangsu province held that all litigation costs should be covered by the polluting companies but the damages for the pollution was not supported on the basis that the government has already restored the ecological well-being.232 ENGOs filing EPIL lawsuits do not do so for their private interests so it is unfair to let them undertake risks for protecting the public interest.233 This unreasonable obstacle has already significantly hindered the development of EPIL in China.

Though the possibility of a costs order looms for litigants, the Measures for the Payment of Litigation Fees 2006 determines that the losing party is not required to pay the winning party’s attorney fees though the winning party has to pay for any fees that are incurred when they find an accrediting body to undertake verifications (as an evidence) without gaining the consent of the losing party or the court. The losing party only has to pay a reasonable portion for loss of wages and accommodation and the court can decide what is reasonable. The respondent is required to pay for inspections, lawyers’ fees and other expenses incurred and costs related to ecological restoration investigations.234 On the other hand, whilst ENGOs have encountered risks of unaffordable court fees as a result of losing a case, all relevant judicial interpretations and regulations exempted procuratorates from paying court fees in all EPIL cases.235 The Administrative Measures for the Payment of Court Fees 2006, which was passed a decade ago, has not adapted to the fast-changing situation, especially for the newly emerged EPIL system, resulting in barriers to EPIL’s development.236 In fact, the SPP and SPC have planned to jointly send proposals to the State Council to revise the current Administrative Measures so as to change the current court fees for EPIL cases.237 In practice, in Yunnan province, the pioneer in EPIL development, the Yunnan Province High People’s Court has issued the first court fee exemption to an ENGO, in the CBCGDF v Yunnan Zechang Titanium Ltd. case in June 2019.238 Hopefully juridical interpretations or regulations will eventually remove court fees for all EPIL plaintiffs, including ENGOs, which would in turn promote the further development of the EPIL system. Furthermore, instead of letting ENGOs bear the litigation costs themselves, they should be allowed to access financial

231. Ibid.
233. Yan (n 113) 304.
235. Yan (n 113) 302–04.
236. Ibid.
238. (2019) Yun Judicial-Assistance-Other No. 47.
aid from the EED Compensation Fund, which had been used to support procuratorates in EPIL cases. The financial support would be a great motivation for ENGOs to participate in current EPIL, which would probably resolve the low rate of civil EPIL cases.239 In addition, establishing a pro bono EPIL attorneys system letting legal attorneys play a more proactive role in civil EPIL can also relieve the burden on ENGOs. Last, it can be argued that mutual understanding and trust between the government and ENGOs, especially those who have no governmental background, is vital to the long-term success of the EPIL system in China. The authorities should provide legislative support in eliminating all discriminative restrictions for ENGOs and create a favourable culture and atmosphere to encourage them to be proactively involved with EPIL.

7.3 Individual participation in environmental governance

Environmental public interest is not only a duty of the government but also the responsibility of everyone in society. The public are the rightful owners of environmental public interest and public participation is a fundamental principle of environmental law.240 All citizens have the right and responsibility to fight against ecological deterioration and supervise the application of the law and its enforcement.241 Nonetheless, individuals’ standing in EPIL has been excluded since 2012 and has not yet been restored.

It would arguably be impossible in a country of the size and population of China to permit all citizens to initiate a public interest case in the court system. Presently, individuals are only allowed to indirectly access EPIL by providing information about public interest violations to eligible plaintiffs and asking them to file the lawsuit.242 As aforementioned, the restriction on the private entities’ participation in EPIL is based on the imaginary potential abuse of litigation and excessive lawsuit claims.243 Arguably, this concern is unnecessary because in order to initiate an EPIL lawsuit, there is a mandatory requirement to provide preliminary evidence to prove the existing abuse or potential threats to environmental public interest.244 This arrangement filters the potential abuse of litigation.245 Though the government feared an excessive number of lawsuits, in reality most Chinese citizens lack enthusiasm to participate in EPIL.246 That is because apart from the high threshold of initiating EPIL, such as expensive litigation costs, expertise in environmental and legal fields, etc., avoiding litigation is the long-last tradition of Chinese culture.247

Furthermore, as the concept of ecological well-being is relatively new to Chinese society, lack of environmental consciousness is still prevalent in the older generation. It is fortunate that a majority of the younger generation accept the concept of harmony

239. Yan (n 113) 139.
240. Environmental Protection Law of the People’s Republic of China (n 38) arts 5, 6, 57; Constitution of the People’s Republic of China 1982 (Fifth Amendment) (n 26) art 2.
241. Ibid.
242. Yan (n 113) 138.
243. Zhang (n 7) 175; see also Yan (n 113) 174–84.
244. Interpretation on Several Issues Concerning the Application of Law in PRCCPL (n 155), art 284(3); Interpretation on Several Issues Concerning the Application of Law in Civil EPIL (n 155) arts 1, 8.
245. Yan (n 113) 211–12.
246. Ibid; see also Wu (n 113) 84, 189–92, 204–07, 214.
247. Ibid.
between nature and human beings following more than 20 years of education and publicity. In fact, there is a well-accepted consensus amongst the majority of Chinese scholars that there is an inevitable trend of allowing individuals to participate in EPIL. EPIL is a good channel to cultivate the general public’s environmental consciousness and to accelerate the process of shaping the culture of green and sustainable development.

8 CONCLUSION

This article has sought to demonstrate that China’s state policies are linked to its environmental degradation issues and argues that public interest litigation is an invaluable tool for correcting these issues. The procuratorate-initiated EPIL system, which consists of civil and administrative EPIL, was introduced to overcome the shortcomings of the original system. In practice, most of the administrative EPIL cases have been resolved during the mandatory pre-trial procedures. That is because the new accountability mechanism and governmental officials’ performance review system for ecological progress, which are designed to strengthen enforcement of environmental laws, have provided incentives for local administrations to rectify the environmental issues before the formal trial process.

Meanwhile, the EEDL system has been established to recognize the government agencies that have standing in protecting environmental public interest. Although the rules and regulations governing environmental public interest litigation make it very difficult for a would-be litigant group to file a case in court even with a legitimate complaint, there have been positive outcomes as illustrated above. The need for strengthened legal frameworks that empower the public to challenge acts or omissions in the courts that are likely to negatively impact on the environment is now more important than ever. The authors suggest that the requirement of an environmental group being established for over five years should be less onerous. Furthermore, even though individual citizens are the indispensable parties in environmental protection, they have still been excluded from the current EPIL system.

Without the cooperative efforts of all parties, achieving the goal of ecological progress and sustainable development will be difficult, if not impossible. Therefore, promoting environmental consciousness and public participation is essential for the success of Chinese environmental governance in the future.