A NEW ROLE FOR CIVIL SOCIETY ORGANIZATIONS IN ENVIRONMENTAL GOVERNANCE IN CONTEMPORARY CHINA

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Environmental governance in an authoritarian state is highly dependent on government actors and actions. In the case of China, the state-oriented approach exhibits some shortfalls and fatigue, especially after decades of privileging breakneck economic development over environmental conservation. Recognizing growth is self-limiting if public health and security fail, the state is willing to strengthen environmental policies at the central level. This provides opportunities for institutional change when coupled with bottom-up pressure from a growing middle class and intellectuals who assert their representation of the general public. In order to understand the state-civil society relationship and dynamics of environmental governance in an authoritarian state I chose to analyze a new environmental governance instrument in China, the Environmental Public-interest Litigation (EPiL) policy.

Using an empirical case study and action research methodology, I found that civil society organizations in China have attained a functional role in environmental governance vis-à-vis the authoritarian state, albeit subject to constant control and changes imposed by the state as it conducts policy experiments and implements new policies involving nonstate actors. This observation demonstrates that civil society, as a

private actor, can complement state agencies to contribute to environmental law enforcement as laboratories for legal theories and practices. It also supports good governance in responding to social-environmental issues and stability of the society at large, given the state remains open to civil society. This research highlights how processes of institutionalization and organizational specialization allow civil society organizations to develop professional capabilities that create opportunities to influence public policy. We see the openings and opportunities are there for civil society organizations, but there is also fluidity in governance in China. These research outcomes invite future studies.

BIOGRAPICAL SKETCH

Hao Zhuang was born in Kunming city, Yunnan Province, China. The area is one of the important biodiversity hotspots of the world. For nearly 20 years, Hao Zhuang has pursued a career in the field of international conservation and civil society organizations as senior management professional and consultant. In 1999, she supported a 15 million Euro bilateral environmental conservation project initiated by Royal Dutch and Chinese government (Forest Conservation and Community Development Project). The project works with and in seven national and provincial nature reserves in Yunnan Province, to improve the provincial government's capacity in park management, establish GIS information system, and promote community development in forestry rural areas. From 2002-2005, she worked for The Nature Conservancy China Program, as the Chief Financial Officer, in Northwest Yunnan. After finishing her master's study at Cornell in 2008 in International Agriculture and Rural Development (IARD) as a Ford Fellow, she returned to the country and served as the China Country Program Director for the International Union for Conserving Nature (IUCN) in Beijing. In this capacity, she led the country program to expand the collaboration between Chinese ministry agencies and IUCN Commissions to decentralize forest landscape restoration approach to local context, and to initiate the global Green List which aims to reward good management practices in protected areas across the world. Through a highest-level international advisory platform to the central government of China, IUCN keeps establishing an active consultative role to Chinese state on environmental policies.

From 2012-2016, she acted as the Technical Advisor in multiple US Government-funded environmental and sustainable development programs with Winrock International, in different regions of China. This experience encompassed one-on-one mentoring and supporting domestic and local environmental organizations in environmental management, capacity development, and organizational strategic planning and management. During this period as a field practitioner, she has noticed thriving environmental civil society organizations and has partaken first-hand in many diverse efforts with these growing organizations to alleviate environmental problems across the country. Whereas civic actions have become a more common phenomenon over the last two decades, she also witnessed first-hand the uncertainty of the state-society relationship and the struggles of the grassroots organizations in effecting change under the general political structure. This experience encouraged her to go back to academic research work in 2016.

Her academic training includes bachelor's degree in Economics from Guangdong University of Foreign Language and Trade, China (1996), and MPS degree in International Agriculture and Rural Development (2008) from Cornell University. In year 2016, she returned to Cornell University to pursue a Doctoral degree in the Department of Natural Resources.

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I would like to give a special acknowledgement and gratefulness to the organization, Friends of Nature (FoN), as my organizational study case. The open invitation and hospitality provided by its Director General, Mr Zhang Boju, and head of the legal team, Ms Ge Feng, was a priceless opportunity for me to be an insider during the field research. I cannot thank them enough for their confidence in my capacity to support their work and their trust in me with precious and restricted archival materials reflecting the long and detailed history of the organization. Thanks also to all other staff in the legal department of the organization, who have provided me with great openness and incredible support whenever I needed it. I am greatly indebted to them all for their extensive contributions to my research. I am also grateful to all of my interviewees for sharing important information to shape and support my research.

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CHAPTER 1. INTRODUCTION

1.1 Dissertation Plan

Environmental governance in China has a long history of being highly dependent on government mechanisms to manage and address environment-related issues since the establishment of the country. However, the state-oriented approach exhibits some shortfalls and fatigue. A recent environmental census conducted by the Ministry of Ecology and Environment of China in 2018, records a total of nine million incidences of pollution, including 7.4 million cases coming from industrial causes.[1] Yang Chaofei, the Vice-Chairman of the Chinese Society for Environmental Sciences, and the former Chief Engineer of Ministry of Environmental Protection, points out that 80% of the environmental crises happened during the previous two decades is attributed to the government's weak enforcement; 45% of which is due to incorrect policy decisions by the government (Yang et al. 2015). The intricate relationship between the state and state-nurtured market-oriented businesses has led to a lax environmental law enforcement during the last four decades. At the same time, there have been increasing numbers of environmental crisis and demands for safer and more secure living conditions (e.g., air quality, water pollution, feed safety) from the growing middle class; hence, the state's

[1] News report from the Guardian at https://www.theguardian.com/world/2018/mar/31/china-environment-census-reveals-50-rise-in-pollution-sources (accessed on date February 22, 2020)

legitimacy is being challenged for its efficiency and effectiveness in addressing environmental issues.

Meanwhile, an increasing number of individual citizens and community groups is calling for expanded opportunities for public participation in the decision-making process, as they feel that their personal interests and social welfare are at stake. The embedded relationship between the state and the market, as well as the lax environmental enforcement, particularly in local settings where economic development is starkly prioritized over environmental protection, are the underlying forces that motivate civil society to try to insert itself into the predominantly state-controlled governance model. As an authoritarian state, Chinese civil society is underdeveloped. It is not practical to expect civil society organizations to oppose the state, yet there are opportunities to complement the state. While the initiation of such changes is likely to come from the state, ineffective environmental management by the state triggers vigorous societal demands. This pressure pushes the Government of China (GoC) to look to civil society to support learning and development of new models of social regulation. This experimentation and innovation contribute to stability in the long-run and precious opportunities to test a multi-actor governance system under an authoritarian scheme.

Recently, new developments involving civil society organizations are occurring in environmental governance in China, in particular, within the judicial system and environmental law enforcement. By examining civil society's engagement in

environmental governance in the realm of environmental laws in China, this dissertation provides an important and unique lens to examine governance theory in general, and empirical practice of Environmental Public-interest Litigation (EPiL). This policy was officially launched at the beginning of 2015 under two major pieces of legislation, namely the Civil Procedure Law (2012), and the Environmental Protection Law (2014). This policy legally defined the standing rights for civil organizations in courts, to sue government agencies (during the first half of 2015) and private businesses or individuals for their environmental misconducts, for the purpose of protecting public interest. For the first time in China's history, civil society organizations obtained the legal rights to attempt to hold polluters or policy implementors accountable for their performance. EPiL is an experiment the government of China is conducting to address environmental problems, societal grievances, and demands for a better and safer environment. The experiment implies the state's openness to different voices and methods, including the state's tolerance of trials and errors, and their willingness to learn new knowledge and capacities, and advocate for change. However, the practices suggest the state is strictly monitoring and controlling the development and involvement of civil society organizations in this experiment.

Since the start of the new policy, some rapid and dramatic changes have been discerned in the course of this experiment. Legally, the right to sue government agencies was taken away from civil society organizations several months after it was first granted. The public prosecutor was brought in and authorized to handle administrative litigations that involve any government agencies as defendants. In practice, civil society organizations

that pursue litigation are challenged externally by public prosecutor's institutional (data and funds) and staff resources. Internally, these organizations need to solve the problems of being short of funds, and lack of professional staff and capacity, as well as political limitations.

In this dissertation, I examine the newly established policy experiment of EPiL to evaluate the respective roles of the state and nonstate actors in policy development and implementation, and the new dynamic relationship between them in contemporary Chinese environmental governance. I ask this general question:

> Under an authoritarian state, how do civil society organizations – as representative of society in general, and as a private actor – interact with the state to protect public interest in environmental quality?

On a practical and personal level, as a career professional managing conservation programs and working in non-governmental organizations in China since 1999, I have witnessed the environmental degradation that the country pays for its economic advance. But I have also noticed thriving environmental civil society organizations and have partaken first-hand in many diverse efforts that they take to alleviate environmental problems across the nation. This doctoral dissertation stems from my extensive professional experiences and background in China's environmental non-governmental organizations (NGOs), where dynamics between civil society and the state are constantly in motion and where the functional roles that the civil sector can play under

the dominant state are always being questioned. While openings by the Chinese state for civil society to participate in governance, environmental domain, in particular, are gradually surfacing, evidence suggests that NGOs are not limited to a passive and subordinate role to the state. They are also not adversarial with the state as civil society is often characterized in the West. This opening is intermittent and needs to be closely examined to analyze the evolution of both sides and the values that NGOs can bring into the relationship to inform future strategies and actions in the field.

In my past work to support and mentor domestic grassroots environmental NGOs in organizational management and capacity development, I have come across a number of focused and committed organizations (one of them discussed in this dissertation) that have been able to secure a seat at the table with the state and exert some influence on environmental policymaking. There are surely many others who struggle to realize their functions and stimulate changes particularly concerning government policies and legislations, under the general political structure that dictates full control by the state in these fronts. This reality prompted my interest to conduct research to understand the deeper causes and effects of nonstate actors in an authoritarian state's environmental governance. Using a case study of EPiL policy, and through study of an environmental NGO's (ENGO) experience in practicing EPiL over the past five years and their broader organizational development trajectory, I further ask the following questions:

> What changes have ENGOs brought to China's environmental law enforcement, and environmental governance at large? How does ENGOs engagement

influence the state and representation of public interests in society (i.e., environment)? What factors enable and constrain ENGOs' ability to realizing functional, institutional, and complementary roles in governance structure?

From a theoretical perspective, the topic of state-society dynamics is often raised to scrutinize the governing approach of an authoritarian state. Under the investigation of state-society interactions, it is worthwhile to use empirical cases to illustrate the role (or change in role) of civil society with regard to the state. In the past two to three decades, we have observed waves of control and restrictions on civil society organizations from the GoC. However, we also see the development of Chinese civil society has made significant progress, to the point that the government cannot ignore the roles it can play in relations with the state. In environmental governance, this is especially valid when the state has self-fulfilling needs as it puts more priority on protecting the environment and natural resources as it pursues its development agenda.

The general question posed in this dissertation can also serve to help people outside of China, or countries with similar political structures to understand how an authoritarian state contends with a rising civil society. And for those who are practitioners and willing to work to influence environmental policies in their countries, the experiences and lessons from this study case will bring valuable peer references.

In the following chapters (Chapter 2-4) of this dissertation, I will respond to the overarching research question by discussing three respective aspects: a) the interactions

between the state and civil society organizations under the state-initiated and controlled experiment of EPiL, and some of these immediate effects on policy change; b) the contribution of civil society organizations as private actor in the state dominated and prolonged closed system of environmental law enforcement; and c) the functional and complementary role of civil society organizations in environmental governance under current state-society dynamics, which aims at better governance, and the organizational trajectory that gives rise to it.

1.2 Theoretical Framework

1.2.1 Environmental Governance and Experimental Governance

Arild Vatn (2015) defines environmental governance as the process to use, manage, and protect environment resources, emphasizing two key elements: **structure** and **process**. Two sets of institutions under governance include rules of access to resources, as well as the interrelationships between three key actors: state, market, and civil society. In practice, the complexity of regulating environmental issues is challenging conventional approaches to governance (Wolf 2011), with the legitimacy and efficacy of the state institutions being publicly and privately questioned (Hajer 2003). When such legitimacy crises happen, as Archon Fung (2015) points out, it is the opportunity for participatory alternatives, which allows the public/citizen to engage in the policy-making process. It is observed that a broader range of stakeholders is being incorporated into a new form of governance, creating a network of interest groups and collating information through

new mechanisms of consultation (Howlett 2011, 128-129). Citizens, civil society groups, and corporate actors therefore increasingly shape policymaking across the world. In Fung's (2015) analysis, such participation would help to offset democratic failures in conventional policy-making processes, and to increase the effectiveness of governance in solving practical problems in society.

In order to do so, the state sometimes adopts an experimental approach. Experimentation emerges when political actors adapt in a dynamic context, offering flexibility and the opportunity to test novel policy options on a limited scale, as failed interventions are reversible at least to some extent (Tassey 2014). Bulkeley and Broto (2013) see experiment as a means through which polities diffuse, as symptomatic of changing structures of political authority and opportunities. Within the literature on sustainable transitions, experiments are seen as innovative, bottom-up operations outside the institutional structures of firms and governments (Hegger et al. 2007). In this context, experiments can be understood as trial and error, particularly through innovations in the rule-making process itself (Hoffmann 2009). Experimental governance can be realized by including new practices and associated efforts, and to introduce new actors that challenge the dominant values of the old institutions (Kivimaa et al. 2017). Evans (2011) sees experiment as a means for testing existing forms of knowledge and technology in city planning, and an open-ended and adaptive response to the emergent properties of the system.

Sabel and Zeitlin (2011) see experimental governance as a machine for learning from diversity, an emergence response to the rising unpredictability and uncertainty in contemporary society. They emphasize that experimentation must include a learning component in order to be effective and adapt to a changing environment. According to Van der Knaap (1995), the learning and adaptive process will help state officials reflect on existing knowledge and beliefs and shows that it is willing to take actions for change in a dynamic context. Learning happens to the state, as well as the civil society organizations. Both actors will benefit and develop new knowledge, capacities, and common understandings of why the policy was developed in the first place. The reflexive process of learning also requires both the state and other participating actors to be ready for change. EPiL policy, as a typical Chinese policy experiment, carries many characteristics as the above scholars have discussed. The active engagement of ENGOs, as new civil actors in EPiL, suggests a new opening attitude of the state towards civil forces, in order to better manage social problems. The successes of individual lawsuits filed by ENGOs, to be discussed later in this dissertation, are inspiring. However, the strong-state political context decides that the state can limit civil engagement during policy implementation process, some rapid and dramatic changes during the first five years EPiL are observed. It is a question for GoC to find out how to involve civil society organization in the environmental conservation and management, without worrying about potential power shifts. Civil society organizations will not be satisfied to act as workhorses merely following orders, but want to bring in innovations, social concerns, and accountability questions about the state into the governance conversation. In the process of policy setting and implementation, both sides are

learning new knowledge and capacities, and adapting new practices in response to heightened environmental problems and calls for greater accountability. The new dynamics in the judicial, legislative, and administrative domains of the state are accompanied by dynamics within civil organizations and new patterns of interaction between state and civil society actors.

1.2.2 Private Enforcement of Environmental Laws

Public enforcement refers to the use of government agencies to investigate, sanction, and penalize the violators of legal rules (Polinsky et al. 2007). Government agencies as law enforcers include police and prosecutors, as well as government agencies such as the Department of Agriculture, Department of Education, and Environment Protection Bureau. Under Chinese laws, public enforcement of environmental laws used to be the principal approach, which can be categorized into administrative penalties (i.e., non-judicial actions) on violations of the existing rules and regulations, and criminal lawsuits over illegal acts that cause serious environmental damages. Mol and Carter (2006) underscores the insufficient conventional enforcement resources to address existing social-environmental problems caused by embedded state-market relationship, which is the structural flaw in China. Within the state-nurtured market, economic development is prioritized and used as the primary promotion indicator for local cadres thereby leading to lax environmental enforcement. On the other side, through the last three Five-Year-Plans (2006-2020), the GoC has recognized that failure to conserve the environment is limiting future development opportunities and have announced a strong

‘green’ message to emphasize the significance of building and maintain a healthy environment for China. The willingness to strengthen environmental policies at the central state level combined with bottom-up pressure from a growing middle class and intelligentsia produce opportunities for institutional change. EPiL is one example of such change.

The state has responsibilities for law enforcement in the US, but also has long endorsed private enforcement. Here, the state encourages private citizens, NGOs, and private lawyers to regulate social harms (Glover 2011), and the system relies explicitly on enforcement by private parties to achieve public regulatory objectives. According to Glover, private enforcement can provide a complementary role to public bodies that sometimes can be limited by resources and information. Proponents of private enforcement see its merits, such as enhancing the ‘fairness’ of the legal system, improving the efficiency of the judicial process, and decreasing the costs of public enforcement by delegating certain enforcement actions to private actors. They argue private enforcement has a complementary role instead of being a substitute to public enforcement, as it can fill the remedial gap to enforce public laws. Opposing scholars (Coffee 1983, Clopton 2016) underline the risk of excessive lobbyists influence, the burdens and costs that arise when private and public enforcement both pursue redundant suits, and over-enforcement of the public laws.

The party-state political structure in China dictates that public agencies are the core enforcement power for public policies in the country, with private lawyers being mostly

involved in business law cases, while group litigation is not popular.[2] Under the criminal procedure context, the conventional legal power relation among the 'iron triangle', investigation, prosecution, and adjudication that are distributed among the police, prosecutors, and courts, locks the power within public authorities and increases intra-institutional friction (Li and Guo 2019). The power hierarchy that exists between public authorities and private individual lawyers makes it difficult to access information that they are supposed to have for litigations.

For the first time in China's history, the EPiL policy marks the state in including private enforcement into the judicial system for broader societal and public interest good. The implementation of the policy can lend notably distinctive processes and consequences; it presents an opportunity to study how the introduction of a private enforcement regime influences public policy for environmental outcomes and to examine the dynamics between public and private actors in the course of enforcement to achieve intended and overarching environmental objectives. I will return to this topic in Chapter 3, where I review several litigations and legislation suggestions from the NGO sector and discuss the novel legal theory in remedy, methodologies in judicial system, and new areas of environmental protection introduced by ENGOs.

[2] According to The Guiding Opinions of the All-China Lawyers Association on Class Action Cases: In China, 'Class action cases are usually about land expropriation and requisition, housing demolition and relocation, immigration of reservoir area, enterprise reform, environmental pollution and the protection of the interests of the migrant workers, etc.' According to the Civil Procedure Law (CPL) of the People's Republic of China (PRC), collective or class actions can be divided into three categories: joint litigation (including 2-10 litigants); representative litigation (>10 litigants on either side, and a representative are elected to represent the party in litigation); and public interest litigation.

1.2.3 Civil Society and Civil Society Organization's Development in China

The notion of Civil Society in the West can be traced back to the 17-18th century in Europe, where the bourgeois class in these societies constituted and mobilized on their own. Cohen and Arato's (1992) study of the bourgeois as a group who "represent the values and interests of social autonomy in face of both the modern state and the capitalist economy", under the backdrop of the developing market economy and the repulsion of the state-administrative influence on personal lives. Habermas (1989) discusses this class that "uses public sphere to confer in an unrestricted fashion and discuss their own opinions, interests, and perspectives" (Habermas 1964), where they also learn about the commonly shared topics from others to profile a public interest. This characteristic nurtured an equally shared power and position of normal private citizens vis-à-vis the state; it then became a natural extension and the impetus of contemporary civil society. Gramsci studied how civil society, through the connection to the state, organizes consent and constricts class struggles (Burawoy 2003). Gramsci's study focused the growth of working class in a society, the process of reaching a balance through the struggles and negotiation with the state, coordinated and orchestrated by civil society. Polanyi (1944) points out that when land, labor, and currency become commodities in a free market, social protection of the working classes will rise to resist the expanding market and call for the state's intervention to keep the social order.

The concept of civil society was introduced to China in early 1900s. Literatures in the past have analyzed China's civil society (organizations) primarily for the purpose of understanding the liberal democratization process, as early studies of NGOs focus heavily on the political democratization potential of civil society as the ultimate goal (Song, Wang, and Kristen 2015). But it is not how civil society could work in the context of China. From a historical and cultural lens, the bourgeois class was not evident throughout China's long imperial history and the first half of the last century. Fei Xiaotong (1948), a distinguished Chinese anthropologist and sociologist, points out that idiosyncratic social structures are noticeable in the respective Western and Chinese contexts. He highlights that Western social structure is an organizational mode of association (*zu zhi ge ju* 组织格局*)* (101), based on the principles that individuals will follow the agreed upon rules among the organizations. Chinese society is grounded in Confucianism, which consists of a pattern of discrete centers fanning out into a web-like network (111). Individuals in the center of the network build upon kinship/family social relationships, to connect with the society at large – Fei calls it as "Differential Social Circle (*cha xu ge ju* 差序格局*)"*. Under this structure, the boundaries between private and public sphere are vague (112), public interest in this context reflects collective group interests (the smaller intimately related circles) rather than a societal one. It is significantly different from the broader interest shared across Western societies. Spires (2011) discusses Tocquevillean's civil society theory and compares it within China's context. The theory highlights that civil society has a role to pressure the state to enhance democracy and accountability, or in authoritarian regimes, to pressure the state to democratize. Spires argues that it is not the case in China's context. Spires

studies grassroots organizations[3] and. sees them existing as "contingent symbiosis" in China. The relationship with the state is fragile and aims to mutual benefits to both sides – deliver social services or voice the concerns for the state or government departments and operation opportunities for organizations to fulfill their missions and visions. Some literatures argue that the expansion of civil society in China will lead to better governance under an authoritarian regime rather than a democratic one (Kang 2008, 2018; Spires 2011; Teets 2013; Stern, Furst and van Rooij 2016; Dai and Spires 2018; Teets and Almen 2018; Froissart 2019).

From a political perspective, "a system of gradated controls" is the basic feature of the state-society relationship in contemporary China (Kang and Han 2008), where the state exerts various control strategies over social organizations. Under this system, the state dominates the balance of power between the state and society. However, the state also recognizes the virtue of civil organizations in helping to manage society, regulate/monitor social orders, and maintain stability of the society, which the China state prioritizes the most. Kang (2018) sees these emerging social forces as the inconvenient but inevitable byproducts of marketization. Under this system, the state will tolerate the existence of civil society, to permit certain social autonomy to allow civil organizations to provide public goods when states do not have sufficient capacity, but firmly control the political and public spheres (Kang and Han 2008).

[3] The author particularly differentiates these organizations from corporatist organizations – state-censored organizations, and the state uses them to communicate and control over civil society.

State policies towards civil society from the 1980s to 2020 in China have experienced dramatic ups and downs (detailed later in Chapter 4). It illustrates the state's hesitation and trends of control over society. On the other hand, civil society organizations are learning to act more strategically in nurturing the niche that would prove them to be valuable and necessary to the state without the worry of a shift in power; paving a way to create an enabling policy environment for making changes. At the same time, in order to be able to represent the general public and their interests, civil society organizations also work to grow their roots to reach public individuals, to gain trust and legitimacy from its constituency and civic individuals.

1.3 Research Methodology

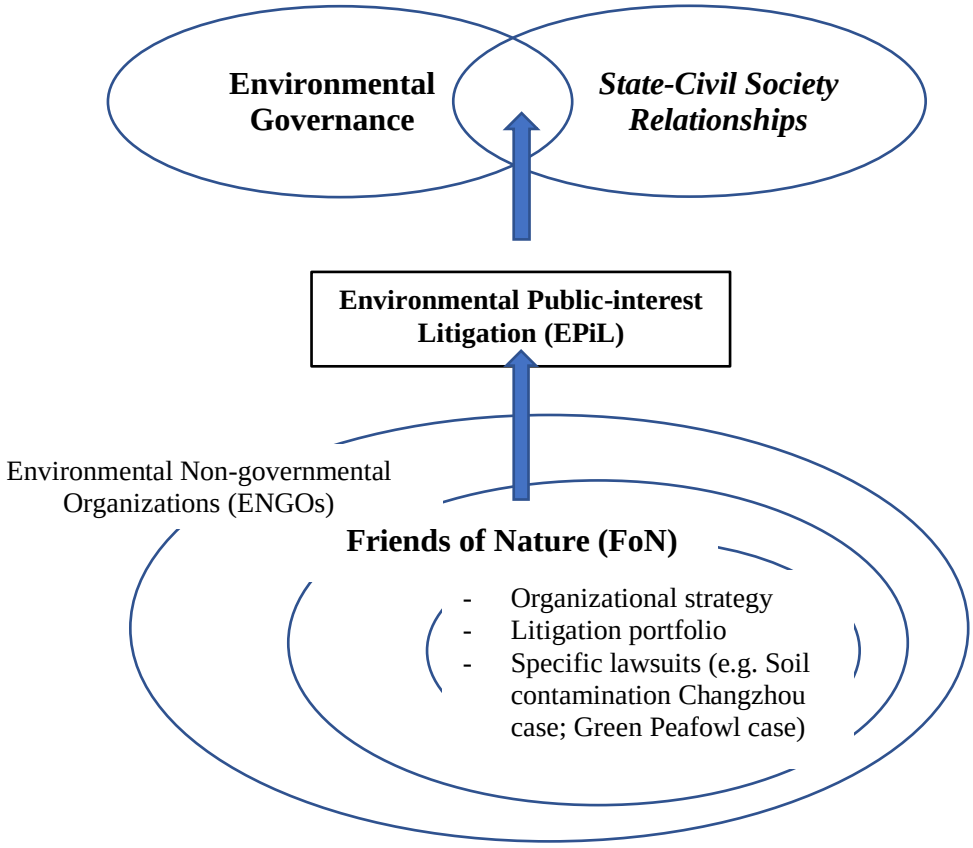
This dissertation adopts action research as a general research methodology. The research framework is a nested empirical case study of EPiL. In order to understand contemporary governance dynamics in China, I focus the study on EPil policy to examine state-civil society relationships, which I identify as a critical interface for understanding the theory of governance in China. In the analysis of EPiL, I study one organization in detail from an insider's perspective. This organization, a leading Chinese Environmental NGO (Friends of Nature [FoN]), is contextualized in the larger class of ENGOs. As the oldest ENGO in China, and the one of the most successful civil organizations[4] in pursuing EPiL, FoN allows me to closely examine the new policy in

[4] Another two civil organizations are All-China Environment Federation (ACEF), and China Biodiversity Conservation and Green Development Foundation (CBCGDF). Both organizations have government background. While FoN is formed by individual citizens.

detail. EPiL cases are studied extensively in relation to the larger FoN litigation portfolio and to the development of FoN's long-term organizational strategy. Figure 1 illustrates the empirical research framework underpinning this dissertation.

From September to December 2018, I worked within FoN, first as a participant-observer and then eventually shifted to an action researcher (Wilmsen 2012) role when the team invited me to become involved in their strategic planning and project work.

Figure 1. Research Framework



Founded in 1994, FoN is officially the first environmental non-governmental organization established in China; founded after the imperial period of the country by

Mr. Liang Congjie, the grandson of a well-respected and influential Chinese reformer and scholar (Mr. Liang Qichao). The organization has gained credibility for working with all sectors of society, including the GoC, despite its historical lack of enthusiasm for working with NGOs. For example, as will be discussed later in this dissertation (Chapter 2 & 4), the government invited FoN to comment on one of the country's new *Environment Protection Laws* in April 2017 and *Soil Pollution Prevention and Control Law* in 2018.

I analyze FoN's legal engagement, beginning in 2011, with civil litigation and later with EPiL since its introduction in 2015. The analysis of different lawsuits presented in Chapters 2 and 3 is nested in the litigation portfolio of this highly visible NGO; its organizational strategies and development path is discussed in Chapter 4. This NGO represents a key actor in applying EPiL, a newly and major development in Chinese environmental governance. Such analysis is especially pertinent to the field of environmental governance as it happens at a critical site where environmental and social structure are subject to destabilizing forces.

As the first registered domestic NGO, FoN has not only served as a symbol of Chinese civil society for the last two and half decades, but more so, it represents a kind of institution that aspires to differentiate from the many forms of government-affiliated organizations in a wholly state-run country like China. The founders of FoN set up an organizational mission that helps individual citizens realize their environmental responsibilities and promotes and supports actions by the public for bettering the

environment (discussed in Chapter 4). Over the years since it was founded, strategies of the organization have been evolving under dynamic circumstances in order to achieve the same set mission (interview with founder of FoN, Beijing, November 2018). During the last several years, FoN has seen public-interest litigation as an opportunity to represent people and communities harmed by environmental pollution in the judicial system and to possibly improve the environment using legal approaches. Though the ultimate goal remains to be environmentally sustainable, the organization undertakes anthropocentric approaches to ensure people are contributing to and partaking in this cause, which aligns with the organization's overarching mission once again. Additionally, FoN believes that environmental litigation cases can accumulate first-hand evidence and information of current environmental challenges in the real world, which can subsequently be used to urge authorities for policy change. For this, FoN anticipates its future will be to actively participate in the environmental legislation process with the state agency, whereby representing the interests of lay citizens and public interest as a civil organization (interview with FoN Director General Zhang Boju, Beijing, November 2018).

Among the pioneering group of civil society organizations, FoN is the leading NGO that made a leap into the legal arena of environmental protection in 2008 when it was still an unfamiliar territory to many. By setting up its legal team and carrying out legally focused program activities, FoN began its involvement in environmental litigation practices from then on. Since the inception of EPiL, it has become one of the nine (2015), and sixteen (2016) NGOs that attains legal organizational status, which is

demanded for plaintiffs by the EPiL policy, and possesses the legal capacity to represent victim communities in environmental litigation courts in China (Li 2016).

Being privileged working inside the organization gave me access to organizational records, archive documents, and publications/reports on litigation efforts that FoN had been involved in since 2008. My research used qualitative methods as a primary approach, starting with desk studies of all legal documents of the 40 litigation cases FoN filed since, including organizational records of the legal process, internal evaluation reports, court judgement files, and communication records between FoN, lawyers, courts, and the media. All official files were in Chinese and for the purpose of this dissertation, I translated all relevant documents into English.

While working in the organization, I conducted interviews with FoN staff, external partners, lawyers, scholars, journalists, and FoN's founders. Among which 24 persons[5] were interviewed for 2-10 hours each. I interviewed 5-8 key persons more than once, based on the information provided in the first interviews that was relevant to the research, to enhance my understanding of topics of interest and to pursue detailed discussions of key points. Most of the interviewees were selected based on my previous knowledge of the organization and which people and units were the most relevant to address my research questions. This strategy was augmented using the snow-ball method (Teddlie and Tashakkori 2009, 175), where I asked the selected interviewees to recommend

[5] Interviews with informants, and in-depth interviews with key staff, Director General of FoN (four generations of DGs), external partners, and external scholars and lawyers were applied throughout the course of my research period.

additional persons I should interview, considering the interests of my investigation, which help achieve a comprehensive picture of the case and history from all pertinent sources.

After being invited to become fully involved in FoN's legal team's daily work, which included facilitating the team to develop an annual work plan for 2019, I shifted to be an action researcher. Action research methodology underlines relationships of reciprocity in a research project, which will not only benefit the researcher's academic goals by providing direct access to actions and actors, but also empower the actors to use the research findings to improve their social situation. It emphasizes that a researcher shall bring the theoretical knowledge and analytical skills back to serve the community, while the community will use their specialized knowledge and skills to apply research results and then develop new knowledge and advance theory (Wilmsen 2012). This action researcher role provided me with an in-depth understanding, and an insider's perspective, of the organizational goals and strategies through assessment of actual litigation cases undertaken since FoN's legal team was officially established in March 2010 (Interview with FoN Director General Zhang Boju, Beijing, November 2018). In my facilitator's role, I led the legal team to systematically review all litigation cases FoN had handled since 2011 by environmental theme (categories), problem analysis, and stakeholder mapping. Consequently, specific litigation strategies utilized, and outcomes expected by FoN were the focus of this analytical process. The aim of these exercises was to exemplify the trajectories of the NGO's involvement and its role

in governance, reflect on external opportunities and risks, identify potential alliances, and develop action plans for the future.

Specific cases were selected for closer assessment to understand the advocacy impacts. Chapter 2 examines the legislation advocacy related to the new *Soil Pollution Prevention and Control Law* of 2018. Comparisons were made vis-à-vis comments and enacted law articles to reflect the extent of adoption. The purpose was to understand the extent of influence by FoN in lawmaking and strategizing for future advocacy efforts to support future legislations. This also helped FoN understand and assess the dynamics between the state and the NGO, and to explore potential opportunities in order to adapt and find new niches for more effective interactions with the state.

In addition to my internal organizational role, I was able to attend and observe in-person two court trials in session, to witness first-hand the dynamics among the NGO, the court, government agencies, and private businesses. One of the trials was the first open court trial (November 29, 2018) for the case of the new Ecological and Environmental Damage Compensation System (EEDCS), where a provincial government sued a private company for its misconduct in polluting a river and asked for RMB 55 M (~USD 8 M) (the exchange rate USD 1=RMB 6.9 to be used throughout this dissertation) as the penalty for environment damage and to cover river ecosystem restoration costs. The second court trial (December 18-19, 2018) was a case where FoN was the co-plaintiff in suing private chemical companies – the Changzhou soil pollution case, which is the specific case of study presented in Chapter 2 of this dissertation.

During the field work, I also attended the 4th National Environment Governance Conference (December 1-2, 2018) co-organized by FoN in Fuzhou City. The conference annually gathers legal and governance scholars, government agency officials (city government, environment protection departments/bureaus), NGO members who are currently litigation plaintiffs and those who desire to participate in EPiL, media reporters, university staff, and judicial officials (court and prosecutors) across the country. During this three-day conference, I observed the most updated dialogues and information on topics that were the latest focus of environment governance through legal instruments and conducted additional interviews with law scholars and partner organizations.

In the research for this dissertation, I employed thematic analysis (Braun and Clarke 2006; Nowell et al. 2017) to identify, organize, analyze, and then describe the themes, socio-cultural contexts, and structural conditions obtained from field data collected in 2017-2019. Given my prior 18-year work experiences in China's NGO sector and my knowledge of FoN, I employed an inductive strategy (Yin 2014, 138) to connect the data sets collected from different and embedded units of analysis, such as, the organization, the staff, and litigation portfolio, to explain various levels of events. All data were collected in a quasi-formal capacity while I was embedded inside the organization. Ethical controls on the research as defined by Cornell University were strictly observed throughout the research.

Chapter 3 examines different litigations from NGOs under EPiL policy from 2015-2019. The discussion generates secondary data from law literatures, ENGO's official website, newspaper articles, and official court documents of ruled lawsuits. The official court documents on individual litigations information are from China Judgements Online – the official court document database website（中国裁判文书网）(at http://wenshu.court.gov.cn). As part of the government information disclosure, the platform is organized by the Supreme Court of China, which provides all the official documents of ruled lawsuits. I also use Wusu (无诉案例) (at https://www.itslaw.com) as the complementary search engine to check for court information on individual cases. For the quoted information on litigation cases, laws, and regulations of People's Republic of China, I use Beida Fabao (北大法宝), the most professional law and regulation database established by Peking University and its Legal Information Center (in 1985, at http://en.pkulaw.cn) to access to the related laws and regulations (both in Chinese and English language) for reference.

1.4 Overall Structure

The dissertation is presented in five chapters including this introduction and the last concluding chapter. The structure and discussions are organized as follows.

Chapter 2: *"A Suckermouth Catfish in a Fish Tank": Civil Organizations and Environmental Public Interest Litigation in China*

This chapter focuses on the experimental experiences from the first five years of EPiL implementation (2015-2018). Using individual litigation case and legislation influence case, the questions of how does EPiL inform understanding of GoC's experiment in environmental governance, and how does civil society organizations leverage their experience with EPiL to influence policy change, and how the state learns and adapts from this process are addressed.

Analysis/Findings: This chapter introduces a judicial reform, a new instrument of environmental governance in China – environmental public interest litigation (EPiL). The policy recognizes 'public interest' – legally defined as the interest of the non-specified class of people. It is the first time that civil organizations have been formally granted a role within China's environmental governance. This policy presents the adoption of EPiL as an example of experimental governance and policy learning more broadly, toward strengthening environment protection in China. Experimental governance is an alternative approach prompted by an evolving society and necessitated by the challenges to conventional governance. Its key feature is the inclusion of new actors, who offer fresh perspectives and adaptive solutions. The most experimental element of EPiL is the legitimation of (unprecedented) participation by nonstate actors, specifically NGOs, in what was formerly an exclusive legislative and policy process. By examining the study case of FoN and a specific soil pollution EPiL litigation, I show that this ENGO uses its new legal standing to gather information from communities confronting environmental risks, pursue litigation, pressure state actors to respond to

environmental problems more proactively, to enhance regulatory compliance, and also to promote and shape new national environmental legislation.

The chapter illustrates a dynamic picture between the state and civil society by reviewing the rapidly changed policy under EPiL from 2015-2018. The policy change includes engaging public prosecutors into EPiL to eliminate ENGOs legal standing in administrative litigation (to sue government agencies); and allow government agencies directly into public-interest litigation against business companies and individuals. These dynamics highlight new patterns of interaction between state and civil society actors in China, which involve a wide array of shifts, with a clear tension to control, which are difficult to anticipate. The experimental policy introduces a new actor into the environmental governance of China. It is clear that both the state and civil society organizations are learning new knowledge and capacities during the process. Both actors are adaptive to new challenges and changes. Although NGOs are not well equipped to lead all environmental lawsuits across the country, they work to provoke state agencies to improve their performance for greater accountability.

Chapter 3: *Private Enforcement of Environmental Laws in China – New Experiences arising from the Environmental Public-interest Litigation Policy*

This chapter discusses the background of state/government agencies as the prevalent law enforcer in China, how the newly involved civil society organizations contribute to environmental law enforcement, representing a private force. More importantly, the

chapter argues the merits and limitations of bringing civil organizations into the conventional judicial system of China as private law enforcers. It summarizes some preliminary effects of involving private actors in law enforcement, public policy formulation, the legal system, and environmental governance in general in China with a selection of empirical cases in the beginning period of EPiL implementation. In this chapter, I also visit the prosecutorial statistics since the beginning of EPiL policy (2015-2018) and the historical development of the role of public prosecutors since the 1950s. This information supports assessment of indirect effects of the introduction of private actors into the judicial system, which contribute to improvements in public enforcement of environmental regulations. Several litigations filed by NGOs are discussed to test the new knowledge and value that NGO's cases bring into judicial system. These include diversity in infringement, innovative methods in the liability of environmental torts, and environmental damage evaluation and ruling.

Analysis/Findings: Before EPiL policy took place, public enforcement of China's environmental laws was mainly divided into administrative penalties (i.e., non-judicial actions) on violations of the existing rule and regulations, and criminal lawsuits over illegal acts that cause serious environmental damages. Previous studies indicated the insufficient conventional enforcement resources to address existing social-environmental problems caused by this structural flaw (Mol and Carter 2006). This chapter finds that a) private actors complement public enforcement by filling gaps in environmental law enforcement, which stimulates public actors, resulting in more vigorous enforcement of environmental protections; b) private actors complement

public enforcement by acting as a litigation laboratory on innovative legal theory, methodologies, and new areas of environmental protection; and c) risks of private enforcement including interference in regulating policy and overzealous enforcement for private interests as stated by the critics, are found to be immune in the case of EPiL albeit its ability to have some influence on legislative process and legislations.

Chapter 4: *The Role Change of ENGOs Under the Authoritarian State – A Historical and Organizational View of Friends of Nature*

This chapter reviews the academic literatures on China's civil society, and the state policy changes on civil society organizations over the period from 1980-2020. The reflection places a cultural, social, and political basis to understand and analyze civil society development in China's context. The social-political setting in a party-state China shaped the development path, yet civil society organizations continue working to pave an enabling environment to develop and realize an active and functional role in governance. The chapter then focuses upon the 25-year history of the civil society organization – Friends of Nature, a pioneer among the peers of ENGOs, by reflecting the steps and organizations strategies adapted by FoN during last two and half decade. In this chapter, I answer the question of how does a civil society organization become involved in the process of such change in environmental governance in China, and what are the specific organizational strategies to enable the change of the role and the state-society dynamics?

Analysis/Findings: This chapter reviews government structure and state policies on civil organizations since 1980 and shows a picture of a state-controlling environment and rapid changing political context for civil society to navigate in China. Under three generations of leadership – Jiang Zemin, Hu Jintao, and Xi Jinping, the state-civil society relationship has been in flux with shifting political landscape and everchanging social and environmental problems. However, the recently issued policies send a controversial signal to engage, yet more strictly control/limit civil society organizations' involvement in public issues. The controversy is observed in the judicial reform policy – EPiL, and Xi's general policy of strengthening the Party's leadership in both social/civil and economic areas. Meanwhile, NGOs have taken a proactive and adaptive approach to exerting their influences under these political pressures and taking policy/judicial opportunities opened to them. These efforts aim to push the state to move to be more open to involving civil society in the governance process. The process is non-linear.

For those interested in knowing what is presently happening in environmental governance in China, and other (E)NGOs and civil societies in similar political settings who work to pave roads for possible successful roles in policy making and forging changes for society, FoN's organizational development showcase can bring many valuable insights. During its development trajectory over the last 25 years, FoN adopted two specific strategies to support the organization to become independent and professional, namely institutionalization and specialization in law. The first strategy allows the organization to diminish the dependency on influential individual leaders and

eventually built-up institutional competence and a positive reputation. It also enables the organization to be recognized as an independent and capable entity to undertake efforts under government's invitation and consent. The second strategy helps FoN to become specialized in legal and judicial issues, through its litigation practices and successful participation and endeavors in influencing two major sets of Chinese environmental laws (enacted in 2012 and 2014). These two laws built a foundation for EPiL policy (enacted in 2015), which grants the legal standing for civil society organizations in judicial system to hold polluters accountable for their environmental misconducts. Efforts from a single organization will not be able lead to societal change by itself, as many more agents of change involving other NGOs in various areas are needed. This chapter provides a possible pathway to support other fellow civil society organizations who share the same aspirations in practices.

Chapter 5 provides a general summary on the discussions and findings that the dissertation addressed. Also, I have included updated information on the newest developments in EPiL since 2019, and the progress during 2020 for those litigation cases discussed in the dissertation. In this chapter, I also proposed the needs and potential topics for future studies and research.

1.5 References

Braun, V, and Clarke, V. 2006. “Using thematic analysis in psychology.” *Qualitative Research in Psychology* 3(2), 77–101.

Bulkeley, H, and Broto, VC. 2013. “Government by Experiment? Global Cities and the Governing of Climate Change.” *Transactions of the Institute of British Geographers* 38, 361–75.

Burawoy, Michael. 2003. "For a sociological Marxism: the complementary convergence of Antonio Gramsci and Karl Polanyi." *Politics & Society* 31, no. 2 (2003): 193-261.

Clopton, Zachary D. 2016. "Redundant Public-Private Enforcement." *Vand. L. Rev.* 69: 285.

Coffee, Jr, John C. 1983. "Rescuing the private attorney general: Why the model of the lawyer as bounty hunter is not working." *Md. L. Rev.* 42: 215.

Cohen, Jean, and Arato, Andrew. 1992. “Politics and the Reconstruction of the Concept of Civil Society.” *Cultural-political interventions in the unfinished project of enlightenment*: 121-142.

Dai, Jingyun, and Spires, Anthony J. 2018. “Advocacy in an Authoritarian State: How Grassroots Environmental NGOs Influence Local Governments in China.” *The China Journal* 79 (January): 62–83. https://doi.org/10.1086/693440.

Evans, James P. 2011. “Resilience, Ecology and Adaptation in the Experimental City: Resilience, Ecology and Adaptation.” *Transactions of the Institute of British Geographers* 36, 223–37.

Fei, Xiaotong. (1948). *Xiang tu Zhongguo*. Folk.

Froissart, Chloé. 2019. “From Outsiders to Insiders: The Rise of China ENGOs as New Experts in the Law-Making Process and the Building of a Technocratic Representation.” *Journal of Chinese Governance* 4 (3): 207–32. https://doi.org/10.1080/23812346.2019.1638686.

Glover, J. Maria. 2011. "The Structural Role of Private Enforcement Mechanism in Public Law." *Wm. & Mary L.* Rev. 53: 1137.

Habermas, Jürgen. 1964. “The public sphere: an encyclopedia article.” *The idea of the public sphere: A reader* (2010): 114-120.

Habermas, Jürgen, 1989. *“The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society.”* Cambridge, Mass.: MIT Press. Chapters 1 and 2.

Hegger, Dries LT, Van Vliet Jenneke, Van Vliet Bas JM. 2007. “Niche Management and Its Contribution to Regime Change: The Case of Innovation in Sanitation.” *Technology Analysis & Strategic Management* 19(6), 729–46.

Hoffman, MJ. 2009. “Experimenting with climate governance.” Amsterdam Human Dimensions of Environmental Change Meeting.

Hajer, Maarten. 2003. “Policy without polity? Policy analysis and the institutional void.” *Journal of Policy Sciences* 36(2), 175–195.

Howlett, Michael. 2011. *“Designing Public Policies: Principles and Instruments.”* Routledge, New York.

Li, Li, and Guo, Tianwu. 2019. "Enforcement of Amended Criminal Procedure Law in China: Unbalanced Power Relations between Public and Private Participants." China: *An International Journal* 17, no. 2: 39-59.

Kang, Xiaoguang, and Han, Heng. 2008. "Graduated Controls: The State-Society Relationship in Contemporary China." *Modern China* 34 (1): 36–55. https://doi.org/10.1177/0097700407308138.

Kang, Xiaoguang. 2018. "Moving Toward Neo-Totalitarianism: A Political-Sociological Analysis of the Evolution of Administrative Absorption of Society in China." *Nonprofit Policy Forum 9* (1). https://doi.org/10.1515/npf-2017-0026

Kivimaa P, Hildén, M, Huitema, D, Jordan, A, and Newig, J. 2017. "Experiments in climate governance – A systematic review of research on energy and built environment transitions." *Journal of Cleaner Production* 169, 17–29.

Fung, A. 2015. "Putting the Public Back into Governance: The Challenges of Citizen Participation and Its Future." *Public Administration Review*, 75(4), 513–522. https://doi.org/10.1111/puar.12361

Mol, Arthur PJ, and Neil, Carter. 2006. "China's Environmental Governance in Transition." *Journal of Environmental Politics* 15(2), 149–170.

Nowell, Lorelli S, Norris, Jill M, White, Debora E, and Moules, Nancy. 2017. "Thematic Analysis: Striving to Meet the Trustworthiness Criteria." *International Journal of Qualitative Methods* 16(1), 1–13.

Polanyi, Karl, and MacIver, Robert Morrison. 1944. *"The great transformation."* Vol. 2. Boston: Beacon press.

Polinsky, A. Mitchell, and Shavell, Steven. 2007. "The theory of public enforcement of law." *Handbook of law and economics* 1: 403-454.

Sabel, Charles F., and Zeitlin, Jonathan. 2011. "Experimentalism in transnational governance: emergent pathways and diffusion mechanisms." *GR: EEN (Global Reordering: Evolution through European Networks) Working Paper 3*.

Spires, Anthony J. 2011. "Contingent Symbiosis and Civil Society in an Authoritarian State: Understanding the Survival of China's Grassroots NGOs." *American Journal of Sociology* 117 (1): 1–45. https://doi.org/10.1086/660741.

Tassey, Gregory. 2014. "Innovation in Innovation Policy Management: The Experimental Technology Incentives Program and the Policy Experiment." *Science and Public Policy* 41(4), 419–24.

Teddlie, Charles, and Tashakkori, Abbas. 2009. *"Foundations of Mixed Methods Research: Integrating Quantitative and Qualitative Approaches in the Social and Behavioral Sciences."* SAGE Publishing, Thousand Oaks, CA.

Teets, Jessica. 2013. "Let Many Civil Societies Bloom: The Rise of Consultative Authoritarianism in China." *The China Quarterly* 213 (March): 19–38. https://doi.org/10.1017/S0305741012001269.

Teets, Jessica, and Almen, Oscar. 2018. "Advocacy under Xi: NPO Strategies to Influence Policy Change." *Nonprofit Policy Forum* 9 (1). https://doi.org/10.1515/npf-2017-0028.

Van der Knaap, Peter. 1995. "Policy Evaluation and Learning: Feedback, Enlightenment or Argumentation?" *Evaluation* 1(2), 189–216.

Van Rooij, Benjamin, Stern, Rachel E, and Fürst, Kathinka. 2016. "The Authoritarian Logic of Regulatory Pluralism: Understanding China's New Environmental Actors: Authoritarian Logic of Regulatory Pluralism." *Regulation & Governance* 10 (1): 3–13. https://doi.org/10.1111/rego.12074.

Vatn, Arild. 2015. *"Environmental Governance-Institutions, Politics and Actions."* Edward Elgar. Cheltenham, UK. Northampton, MA, USA

Wilmsen, Carl. 2012. *"Participation, Reciprocity, and Empowerment in the Practice of Participatory Research."* University of Berkeley, Retrieved April 23, 611–629. https://nature.berkeley.edu/community_forestry/Workshops/2006/WCAR%202006%20final%20draft%20Wilmsen.pdf

Wolf, Steven A. 2011. "Network Governance as Adaptive Institutional Response: The Case of Multifunctional Forested Landscapes." *Journal of Natural Resources Policy Research* 3(3), 223–35.

Yin, Robert K. 2014. *"Case Study Research – Design and Methods."* SAGE Publishing, Thousand Oaks, CA.

Yang, Zhaoxia, and Zhang, Xiaoning. 2015. "Discuss the Issues and Response to the Government's Accountability on Environment Performance." *Journal of Jishou University (Social Science Edition)*. Vol. 36, No. 4: 1-12 论我国政府环境问责的乱象及其应对———写在新《环境保护法》实施之初* 杨朝霞, 张晓宁 (北京林业大学生态法研究中心,北京 100083)

CHAPTER 2. "A Suckermouth Catfish in a Fish Tank": Civil Organizations and Environmental Public Interest Litigation in China[6]

2.1 Introduction

Increasing concern about the environment and public health has sparked mass collective action in China over the last decade. The number of environmentally motivated 'mass incidents' (such as protests or large civilian gatherings) increased by 29 % every year from 1996 to 2011 (Kennedy 2012). The Chinese government is facing growing pressure to prove its effectiveness and legitimacy in environmental protection internally and manage its reputation externally. To these ends, the state has begun to experiment with new approaches to environmental policy. In this chapter, I focus on the state's evolving approach to law enforcement through Environmental Public Interest Litigation (EPiL). EPiL was endorsed by central legislation and policy in 2015 and gives civil society actors the legal standing to bring lawsuits against commercial entities and government agencies that they believe are responsible for illegal environmental degradation, in order to protect the "public interest" – legally defined as the interest of the non-specified class of people.[7] This is the first time that civil society actors have been legally granted a role in environmental governance.

[6] A revised version of this chapter will appear as Zhuang, H. and Wolf, S.A. (forthcoming) A Suckermouth Catfish in Fish Tank": Civil Organizations in Chinese Environmental Governance, *Environmental Sociology.*

[7] The legal definition of "public interest" is interpreted by the Supreme People's Procuratorate of China on its official website (in Chinese) at:

In this chapter, I investigate Chinese EPiL by showing how a leading environmental non-governmental organization (NGO), Friends of Nature (FoN), filed several lawsuits and contributed to changes in national environmental laws. FoN is a very visible NGO and key actor in applying EPiL; its growing portfolio of litigation is a major development in Chinese environmental governance. An analysis of its organizational strategy and a lawsuit that it initiated over soil contamination provides insights into environmental governance, addressing the following questions: a) How is EPiL affecting environmental governance in China? More specifically, b) how is the state learning from and responding to lawsuits, through revising laws on pollution and environmental conservation, and c) to what extent are domestic NGOs able to leverage their experience with EPiL to influence new legislation and policies?

This study finds that EPiL is an experimental and adaptive response by the state to public unrest, to push private sector actors and local governments to mitigate the environmental impacts of their economic activities. In addition, EPiL will catalyze growth in Chinese civil society. EPiL has brought new perspectives into Chinese environmental governance from civil society and the public more broadly. FoN is a pioneer (among a progressive group of domestic NGOs) in using lawsuits to gather information from the front lines of environmental crises and leveraging that information to push for and shape new environmental legislation. Its work illustrates that despite the

http://www.spp.gov.cn/spp/zhuanlan/201904/t20190412_417222.shtml. (Accessed on date July 10, 2019)

fact that NGOs are not well equipped to handle all the environmental lawsuits across the country, they nonetheless have some significant influence. Civil society organization's new legal standing has spurred other actors in the judicial system to respond to environmental concerns more proactively and it has contributed to development of more effective policies and legal enforcement. Below, before further analysis of FoN and its lawsuit over soil contamination, I briefly describe the general history of environmental governance in China.

2.2 Environmental Governance in Contemporary China

For many years, the Chinese state chose to prioritize economic progress regardless of the environmental consequences (interview with Chinese law scholar and activist, Fuzhou, December 2018). It actively cultivated markets, including most of the large-scale industries and enterprises in the country. Environmental regulations were lax, and industries became major contributors to pollution. But after three decades of rapid growth, the Chinese government began in the 2000s to address environmental issues more comprehensively, recognizing that the country's development depends not only on economic growth, but also environmental quality and the sustainable use of resources. Today, the state appears to be playing catch-up on the environmental front to keep up with the full-throttle pace of economic development.

Environmental governance in China is centrally planned, to prioritize strategies and actions and to enact and enforce environmental laws. The 10th Five-Year Plan (FYP)

(2001–2005) addressed afforestation, pollution, and the protection of natural resources. The 11th FYP (2006-2010) instituted a more resource-efficient development model, and the 12th (2011-2015) announced a shift to "green development" with a focus on energy efficiency, a reduction in pollution, an increase in forest cover, and sustainable growth.[8] At the same time, the 2012 national strategy of "ecological civilization" called for confronting the often contradictory demands for both environmental health and economic growth.[9] Most recently, the current, or 13th, FYP (2016-2020) addresses China's "unbalanced, uncoordinated, and unsustainable growth" through innovative, coordinated, green, and inclusive growth.[10]

Under China's FYP process, local agents implement policy under the management of the central state across five-year planning cycles. Local innovation is encouraged through bureaucratic decentralization, or "direct improvisation" (Ang 2016, 17). This process combines decentralized experimentation with *ad hoc* central management

[8] The National Development and Reform Commission's description of the 11th Five-Year Plan: Targets, Paths and Policy Orientation can be found at: http://en.ndrc.gov.cn/newsrelease/200603/t20060323_63813.html. See also the news report at: https://www.china-briefing.com/news/12th-five-year-plan-hailed-as-greenest-fyp-in-chinas-history. A translation of the 12th Five-Year Plan can be found at: https://cbi.typepad.com/china_direct/2011/05/chinas-twelfth-five-new-plan-the-full-english-version.html. (accessed on date July 10, 2019)

[9] This concept was initiated by former chairman Hu Jingtao in 2007, and was included in China's national strategy in 2012. It has been under development ever since, generating scholarly and popular conversation. An official and optimistic discussion can be found at: https://www.chinadialogue.net/article/show/single/en/8018-Ecological-civilisation-vision-for-a-greener-China-part-one. A more critical assessment is available at: https://thediplomat.com/2018/03/what-does-xi-jinpings-new-phrase-ecological-civilization-mean. (accessed on date July 10, 2019)

[10] Li Keqiang, Report on the Work of the Government (Fourth Session of the 12th National People's Congress, Beijing, China, March 5, 2016), at: http://online.wsj.com/public/resources/documents/NPC2016_WorkReport_English.pdf; People's Republic of China, 13th Five-Year Plan on National Economic and Social Development, March 17, 2016 at the official website: http://en.ndrc.gov.cn/newsrelease/201612/P020161207645765233498.pdf. (accessed on date July 10, 2019)

(Heilmann 2008), wherein the state distills generalizable lessons for national policymaking from broad-based (local) initiatives. Progress is therefore iterative and adaptive – which is imperative in a fluid and diverse environment. The state learns from the actions and feedback of the previous period and can improve policy.

But environmental protection measures are imposed onto a regulatory apparatus that has been designed to promote economic growth, and it is often a poor fit. Furthermore, the state does not dictate environmental management at lower levels and cannot assure the effectiveness of the measures undertaken by local agents. Indeed, conventional governance (command and control) no longer suffices. This environment requires trying something new, with new actors involved in the process. To these ends, the state is investing in new patterns of engagement, interdependence, and flows of information and resources among state, market, and civil society actors (Wolf 2011). This system allows local experiments (*ShiDian*) to back up or generate formal national policies (Heilmann 2008). The purpose of such decentralized experiments is to find innovative policy instruments that can be generalized while maintaining strict central leadership.

2.3 Experimental Governance and Policy Learning

The complexity of regulating environmental issues is challenging conventional approaches to governance (Wolf 2011), with the legitimacy and efficacy of the state institutions being publicly and privately questioned (Hajer 2003). A broader range of stakeholders is being incorporated into a new form of governance, creating a network

of interest groups that collate information through new mechanisms of consultation (Howlett, 2011. 128-129). Citizens, civil society groups, and corporate actors therefore increasingly shape policymaking across the world.

There is much potential in experimental governance (Bulkeley and Broto 2013). Experimentation emerges when political actors adapt in a dynamic context, offering flexibility and the opportunity to test novel policy options on a limited scale, as failed interventions are reversible at least to some extent (Tassey 2014). Within the literature on sustainable transitions, experiments are seen as innovative, bottom-up operations outside the institutional structures of firms and governments (Hegger et al. 2007). In this context, experiments can be understood as 'trial and error,' particularly through innovations in the rule-making process itself (Hoffmann 2009). Experimental governance can take two forms: a) new practices and associated efforts to learn from their effects; and b) the introduction of new actors that challenge the dominant values of conventional approaches and institutions (Kivimaa et al. 2017). In the context of city planning, experimentation includes purposive interventions undertaken by research and policy communities, where data from environmental monitoring is fed back into a management process (Evans 2011), an open-ended and adaptive response to the emergent properties of the system.

Indeed, experimentation must include a learning component in order to be effective and adapt to a changing environment. According to Van der Knaap (1995), "policy-oriented learning is the process in which policy actors strive to improve and perfect public policy

and its underlying normative assumptions through the detection and correcting of perceived imperfections". By conducting experiments on policies through adaptive governance, state officials are making space to reflect on existing knowledge and beliefs and shows that it is willing to take actions for change in a dynamic context. To be most effective, such a problem-solving approach for social organization requires an open society where people are objective and can openly criticize one another's design (Popper 1996, 7). The reflexive process of learning also needs to include an understanding of why the policy was developed in the first place, what to analyze and learn (via accumulation and assimilation of information [Freeman 2008, 9]), who benefits from this learning process (Forester 1985), how to learn (Freeman 2008, 9), and freedom from coercion, distort, or threats (Habermas 1984).

Scholars analyzing the implementation of environmental policies in China during the past decade (e.g., Mol and Carter 2006; Lo and Tang 2006; van Rooij 2006, 2010; Tang and Lo 2009; He and Mol 2012; Mol 2009, 2014) have summarized the core reasons for the failure of the implementation of environmental policies: a) unparalleled economic development and the dynamic nature of the related environmental impacts; b) the prioritization of the economy over the environment; c) the central-command policy that overrides local autonomy for the sake of economic growth and leaves little motivation and space for local governments to enforce central policies; and d) and a weak civil society whose participation in decision-making processes, media reports, and access to information is constrained. While the first three points have been previously addressed, for the last point, it can be claimed further that the slow development in China's civil

sector contributes to the equally slow decentralization of environmental policies, which is weakened without the critical mechanism brought by NGOs (Mol and Carter 2006).

2.3.1 A New Actor in China's Environmental Governance: NGOs

In the early 1990s, environmental NGOs and activists (mainly public intellectuals and media personalities) were warning authorities about the environmental crisis, urging the government to enact policies supporting conservation and mitigating environmental threats (e.g., terminating dam projects) (Shapiro 2016, 125-129). The Chinese government accepted technical and financial support to support environmental stewardship (Teets 2015) and environmental NGOs came to play a civil watchdog role (Mertha 2005; Shapiro 2016, 118–119). Domestic NGOs have flourished since 2005, working in areas such as disaster relief, rural development, health, education, and more. Under President Xi (2012–present), for the first time in the history of the People's Republic of China, the Five-Year Plan (2011–2015) encouraged the development of social welfare and philanthropy, setting a goal to "strengthen the construction of social organization" through the development of civil organizations,[11] which sent a clear encouraging message to NGOs.

However, this sector has had its share of ups and downs, depending on the strength of their challenge to China's prospering economy. The growth of NGOs shows the

[11] In Chapters 33 and 39, respectively. An unofficial English translation is available at: http://cbi.typepad.com/china_direct/2011/05/chinas-twelfth-five-new-plan-the-full-english-version.html. (accessed on date July 10, 2019)

potential of organizing individuals' voices and actions to address shared issues and problems. But some scholars question whether NGOs will act less like watchdogs and more like assistants, lending legitimacy to the state through the appearance of accountability, particularly when they are invited to assist decentralized government agencies (Geall and Hilton 2014). Others have argued that by administering or implementing state environmental regulatory standards, NGOs act as a shadow agency of the state (Guttman et al. 2018).

At the same time that the influence of domestic NGOs has grown, international NGOs (INGOs) have become less welcome, over concerns about increasing western influence on political institutions. Starting in January 2017, foreign organizations were required to re-register under a new INGO management law, or lose the ability to remain in the country – even those that had worked in China for years.[12] By the end of 2017, only 461 foreign NGOs had registered, a small fraction of the estimated 1,000–7,000 foreign NGOs in China before 2017, according to the new state agency responsible for INGOs, the Ministry of Public Security.[13]

[12] There were many reports and commentaries on the implementation of *Law of the People's Republic of China on the Administration of Activities of Overseas Nongovernmental Organizations in the Mainland of China* and its potential consequences for international NGOs. See http://chinadevelopmentbrief.cn/articles/practical-guide-to-the-ongo-law-registration-and-filing and https://thediplomat.com/2017/03/overseas-ngos-in-china-left-in-legal-limbo. (accessed on date July 10, 2019)

[13] Some newspapers continue to publish the registration status of social organizations in China. Two examples can be found at: http://www.scmp.com/news/china/policies-politics/article/2097923/why-foreign-ngos-are-struggling-new-chinese-law and https://thediplomat.com/2017/06/more-than-7000-foreign-ngos-in-china-only-72-registered-so-far. (accessed on date June 15, 2019)

Interactions between the state and NGOs are key to the next steps in environmental governance, taking experimentation and learning to a new frontier. The newly initiated EPiL policy, in which civil organizations use litigation to provoke state agencies to actively respond to environmental problems, provides an opportunity to look into a central government-led experiment and the (new) roles of civil organizations to stimulate policy learning of the state.

2.3.2 Environmental Public Interest Litigation Policy (EPiL)

Environment Public Interest Litigation (EPiL) is a legal policy initiated by the Chinese state in 2015 after a nearly ten-year process (2005-2014) (interview with FoN legal team leader, November 2018). Different from lawsuits over environmental protection in the US, which can be brought by any individual citizen seeking to enforce an environmental law, EPiL specifies that the public interest can only be represented by registered social organizations, that can sue individuals, business entities, or government agencies, for environmental misconduct. The two major provisions regarding the qualification of civic organizations are as follows.

- The Civil Procedure Law of China (Civil Litigation Law) (1991, 2007, 2012): Article 55 states that "Entities and organizations with permission under the law may initiate lawsuits before people's courts against actions detrimental to social and public interests, including environmental pollution and broad

infringement of consumer rights." The most recent amendment, its third, took place in 2017.

- The revised Environmental Protection Law of China (EPL) (1989, 2014): Article 58 states that "only social organizations that satisfy the following two requirements may file lawsuits with the courts against acts that pollute the environment, cause ecological damage, or harm the public interest: a) Be registered with a government civil affairs department at or above the level of a city with districts (municipality); b) Be engaged specifically in public service activities in environmental protection for five consecutive years without any record of violation of laws."

The EPiL policy entered into effect on January 1, 2015 based on these two pieces of legislation, as the principle legal code, together with the judicial interpretation of laws from the Supreme Court and Supreme Prosecutor that provides official guidance to judicial practices in applying laws. EPiL is the tool of interpretation, applying these two laws and officiating the legal standing of NGOs.

Four months after EPiL came into effect, the state passed a further law to distinguish between two types of lawsuits, according to who is the defendant: administrative litigation, where government agencies are defendants, and civil litigation, where individuals and/or businesses are defendants. The state also sought to limit administrative litigation such that the public prosecutor became the only entity able to

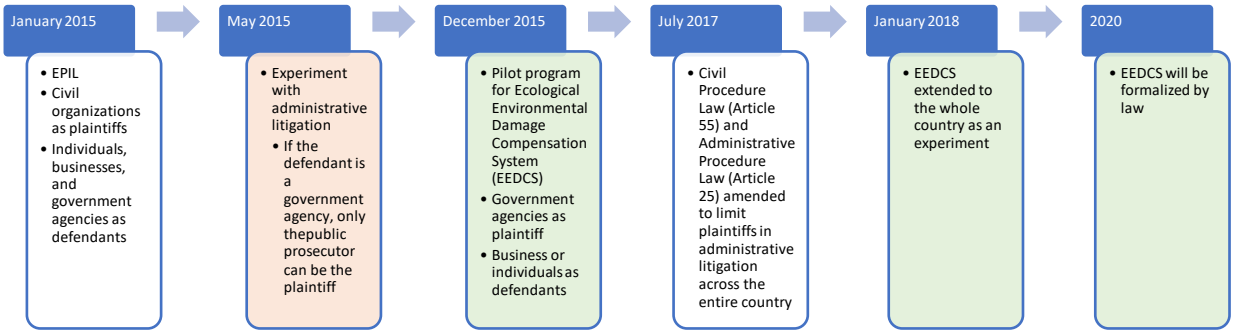
file such lawsuits. After a two-year pilot program in selected provinces, the state officially amended the Civil Procedure Law (Article 55) and the Administrative Procedure Law (Article 25) to these ends on July 1, 2017.[14] As a result, NGOs can file civil lawsuits, but not administrative ones. In other words, civil actors can no longer sue the state over environmental issues; that right is reserved for public prosecutors.

At the end of 2015, the State Council launched a second experiment in seven provinces: The Ecological and Environmental Damage Compensation System (EEDCS) Reformation Pilot ("*Shidian*") Plan.[15] EEDCS allows government agencies to sue individuals or companies for their environmental misconduct. A two-year pilot program ran in selected provinces from December 2015 to December 2017. The pilot program has been extended to the entire country since January 1, 2018, with no formal legislation yet. The state plans to institutionalize this system by 2020.[16]

Figure 2 is a timeline for the development of the EPiL policy. Its evolution from 2015–2018 shows how the array of permissible key actors shifted over time.

[14] See http://npc.people.com.cn/n1/2017/0628/c14576-29366977.html (in Chinese). (accessed on date July 10, 2019)
[15] See http://www.gov.cn/zhengce/2015-12/03/content_5019585.htm (in Chinese); (accessed on date July 10, 2019)
[16] The implementation plan for the system is available (in Chinese) at: http://www.pkulaw.com/chl/236e81bce011d466bdfb.html?keyword=生态损害赔偿制度 (accessed on date July 10, 2019)

Figure 2. Timeline of the development of EPiL policy



2.4 Case Study and Research Methods

This chapter analyzes a leading NGO's experience with EPiL and a single lawsuit. Friends of Nature (FoN) has practiced litigation since 2011 and been involved in EPiL since its inception in 2015. The following sections focus on FoN's suit over a chemical manufacturer's responsible for soil contamination. As one of the first lawsuits under EPiL, this experience informed the development of a newly established national law on soil contamination. FoN's ability to link judicial engagement to legislative engagement reflects a contemporary development in China's environmental governance by non-state actors under the premises of experimentalist governance and policy learning.

Founded in 1994, FoN was the first official domestic environmental NGO established in China. The organization aims to help individual citizens recognize their environmental responsibilities and to promote actions by the public for improving the environment. FoN has served as a leader of Chinese civil organization for the last two and half decades, representing organizations that are different from those government-

affiliated organizations. The organization has gained credibility for working with all sectors of society, including the Chinese government.

FoN was one of first nine NGOs in China to obtain the legal status to be a plaintiff when EPiL was introduced in 2015 (Li 2016). As detailed below, FoN‘s theory of change is based on the belief that environmental lawsuits are a means of introducing evidence of the costs of pollution into popular debates and policy processes. Beyond securing court judgements against polluters and enhancing risk of prosecution for all polluters, FoN seeks to participate in crafting environmental legislation. They aim to communicate the interests of the general public and of specific communities to state agencies and to develop expertise that is valued in processes of policy development.

Having worked in China’s NGO sector since early 2000s, I engaged with FoN from September to December 2018, following one year of desk research on EPiL and Chinese ENGOs. I acted as a participant-observer at the beginning and later shifted into an action research role (Wilmsen 2012) after being invited to facilitate the organization’s annual strategic planning meeting. Working inside the organization provided the primary and secondary data for this chapter, which included access to people, organizational records, archives, documents on the 40 lawsuits filed by FoN since 2015, court judgments, and records of communication between FoN, lawyers, courts, and the media. All FoN files were in Chinese, which I translated into English wherever necessary.

Twenty-four individuals were interviewed for 2-10 hours each, including senior staff and four current and former Directors General of FoN, external partners, prominent scholars, and lawyers. I interviewed eight contacts more than once. Table 1 includes the details of the interview work. Interviewees were selected based on my knowledge of the organization and understanding of the people and units most relevant to my research questions. This strategy was combined with snowball sampling (Teddlie and Tashakkori 2009, 175), meaning interviewees recommended additional interview contacts in order to produce a comprehensive picture of EPiL, FoN's over-all litigation strategy, and the specific soil contamination case analyzed here.

Table 1. Interview respondents

Number of interviews	**Position**	**Dates**
11	Friends of Nature staff	9/2018 – 12/2018
4	Directors General of Friends of Nature	7/2018 – 1/2019
5	External partners	9/2018 – 12/2018
4	Lawyers	11/2018 – 12/2018
Total: 24		

I was invited to participate in daily operations of FoN and then to facilitate the development of the 2019 work plan for the legal program. This action research role provided an insider's view of organizational goals and strategies, risks associated with specific actions and opportunities, and a detailed review of the portfolio of lawsuits filed

since FoN's legal team was established in March 2010. This information allowed me to select one lawsuit as the focus of an in-depth case study to address my specific research questions. The justification for case study selection is provided later in Section 2.5.2. Documents containing the consultative comments on the new Soil Contamination Prevention and Control Law (2018) submitted by FoN's leaders to the legislative authority deserve special mention. As one element of the larger case study, the formal comments submitted by FoN (July 27, 2017) and the national legislation enacted (August 31, 2018) were compared to assess FoN's influence in lawmaking and inform FoN's strategic planning process. This comparison directly informed my assessment of relationships between EPiL, FoN, environmental governance and policy learning.

2.5 Learning in Action

In the following section, I briefly describe how the EPiL policy continued to develop after its initial rollout, including the number of lawsuits filed. To illustrate EPiL and the civil actors' new role in it, I dedicate the bulk of this section to a detailed account of a particular case pursued by FoN on soil contamination. Lastly, the evolution of new environmental legislation resulting from EPiL cases and civic participation is presented, to show how NGOs leveraged their position for policy changes.

2.5.1 The Evolution of Environmental Public Interest Litigation Policy (EPiL)

The rapid change to EPiL (in limiting the right to sue the state over environmental issues for public prosecutors) is an example of the government's policy learning from experimentation.

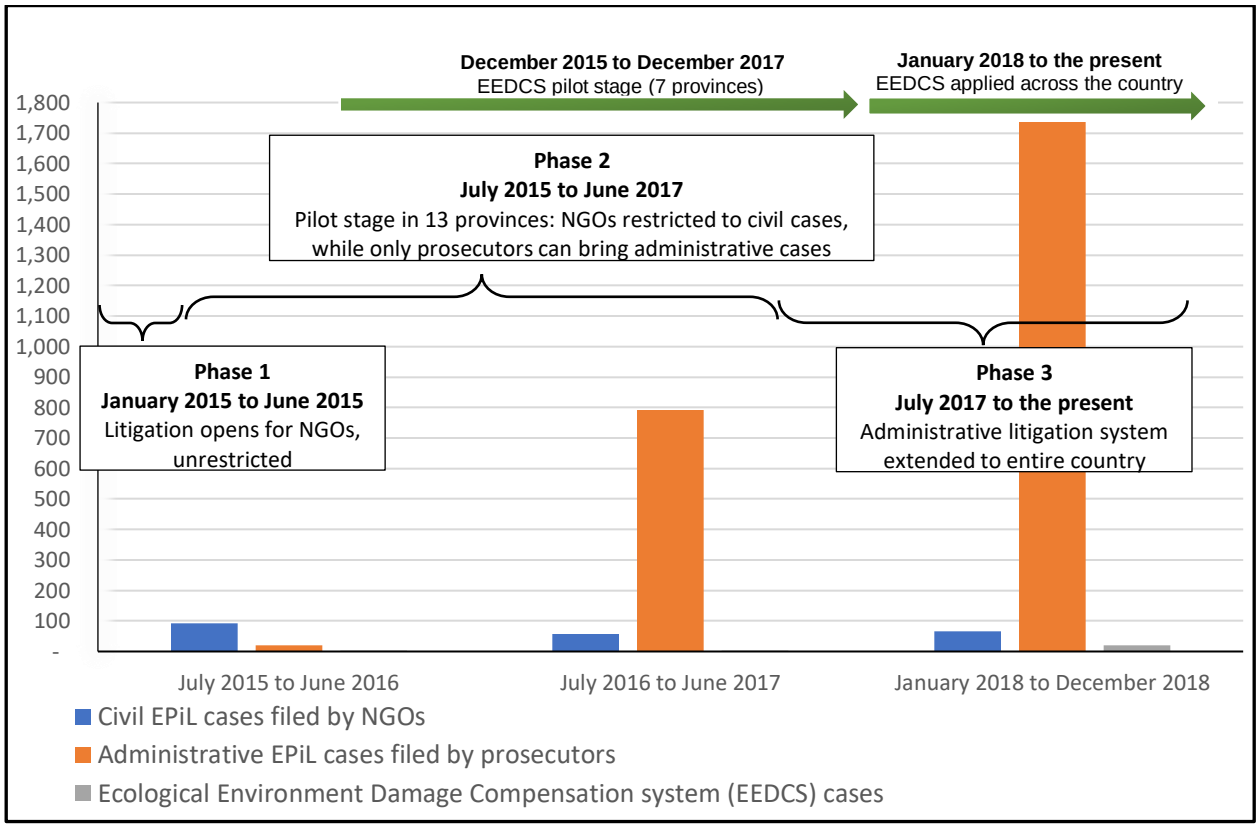
Prosecutors in the pilot provinces filed a total of 4,378 public interest lawsuits (not limited to environmental cases) in just 18 months (July 2015-December 2016). Among these, 495 cases were presented at court hearings, including 57 civil lawsuits and 437 administrative lawsuits.[17] Compared to the 12 lawsuits filed by prosecutors from the end of 2015 to the beginning of 2016 (the early months of the pilot period), the rapid increase in the number of cases in 2016 demonstrates a vivid strategy change within the long-established procuratorate system. The spike in 2016 in lawsuits filed by administrative prosecutors is a testament to the government's strategy to counteract the effects of the inclusion of civil organizations when the legislation was first revised. The central state gives exclusive authority to the public prosecutor in administrative public-interest litigation, which serves to keep the new judicial development under central control (interview with FoN legal team member, Beijing, November 2018, and with EPiL lawyer, Fuzhou, December 2018). In practice, prosecutors can move faster than NGOs because they have more resources and a more established position in the

[17] Statistics are from the official website of the Supreme People's Procuratorate of the People's Republic of China at: http://www.spp.gov.cn/spp/zdgz/201701/t20170105_177576.shtml. (accessed on date June 15, 2019)

litigation arena. To some extent, prosecutorial zeal for administrative EPiL counteracts the exclusion of NGOs.

Figure 3 illustrates the changing numbers of environmental lawsuits brought by NGOs, prosecutors, and government agencies (which represent civil cases, administrative cases, and environment damage compensation cases under Ecological Environmental Damage Compensation System [EEDCS], respectively).

Figure 3. Environment Lawsuits Filed by Different Actors



July 2015 to June 2016 (12 months)	
NGOs	93
Prosecutors	21
Government	3

July 2016 to June 2017 (12 months)	
NGOs	57
Prosecutors	791
Government	3

January 2018 to December 2018 (12 months)	
NGOs	65
Prosecutors	1,737
Government	20

Sources: Supreme Court of the People's Republic of China, "*White Paper on China's Environmental Resource Trial" (2016, 2017, 2018)*

The major change after the policy revision, as evident in the above figure, is that NGOs are now restricted to only civil cases and cannot pursue administrative lawsuits for the public interest. As such, NGOs no longer have access to the courts to pursue governmental accountability for environmental degradation. In fact, over the approximately three years since EPiL was introduced, the total number of environmental lawsuits filed by NGOs actually decreased by 30%. When the pilot period ends in the near future, under the EEDCS policy, government agencies across various levels will be able to initiate the same civil lawsuits that NGO can file now, which could lead to competition with NGOs to be a plaintiff in a case.

In order to further illustrate the functions and contributions of EPiL as a Chinese experiment in managing non-state actors in environmental governance, I next present and examine one particular EPiL case through the lens of an NGO.

2.5.2 Case Study: Soil Contamination in Changzhou

As one of the 16 NGOs with the ability to do so, FoN has initiated 40 lawsuits on environmental issues by the end of 2018. Thirty-four went to court, half of which were settled or closed during the first four years of the EPiL policy (2015–2018). The

remaining are awaiting trial or in the process of gathering evidence.[18] Those lawsuits cover a wide range of environmental issues including soil, water, and air pollution; biodiversity loss; damage to conservation areas; climate change; and solid waste mistreatment. This chapter focuses on a lawsuit on industrial soil contamination, a case that was nominated in 2018 as one of the 10 most influential lawsuits (civil and criminal) of China.[19] The case illustrates the entanglement of the state and industrial firms in the economic rise of China in recent decades. In determining liability for the soil contamination, the lawsuit addresses the deep linkage between the state and commercial firms, giving rise to difficult legal questions and political controversies. As one of the first cases on soil contamination adjudicated under the EPiL policy, this case could set a far-reaching precedent. Indeed, lessons from the case were used to make changes in a new law on soil contamination. This case was also selected for this analysis because the entirety of the case unfolded during my fieldwork.

Soil contamination is an enormous problem in China, including both agricultural pollution in rural areas and industrial pollution in urban areas. Prior to August 31, 2018, soil contamination was not regulated.[20] A 2014 nationwide survey on soil showed that

[18] FoN's website (accessed June 15, 2019) at: http://www.fon.org.cn/index.php?option=com_k2&view=itemlist&layout=category&Itemid=176.
[19] The Most Influential Litigation Cases is an annual nomination to serve as legal precedent, co-organized by The China Law Society, The Supreme Court of China, the Southern Weekly, and Law Press China. The reports on the selection process can be found at: http://www.infzm.com/contents/145299 (in Chinese) and https://xw.qq.com/cmsid/20190225A0CJRZ00 (in Chinese). (accessed on date July 10, 2019)
[20] The law in both Chinese and English can be found at: http://en.pkulaw.cn/display.aspx?id=2bbcddcda54e1659bdfb&lib=law&SearchKeyword=&SearchCKeyword=%CD%C1%C8%C0%CE%DB%C8%BE%B7%C0%D6%CE%B7%A8. (accessed on date July 10, 2019)

16% of the 6.3 million km^2 of lands surveyed were polluted, with 83% of the contaminated soil samples testing positive for toxic inorganic pollutants such as cadmium, mercury, arsenic, chromium, and lead.[21] On April 18, 2016, Friends of Nature (FoN), together with the China Biodiversity Conservation and Green Development Foundation (CBCGDF), sued three chemical factories in Changzhou City, Jiangsu Province, for contaminating water and soil resources. The plaintiffs alleged that the factories had mishandled hazardous waste over a large area (260,000 m^2) over four decades of manufacturing pesticide and fertilizer products (1970s-2009). During that time period (in 2000s), these factories had been transferred from state ownership to shared-stock limited companies involving state capital, worker shareholders, and individual investors. In 2009, the contaminated land and land-use rights had been transferred to the Changzhou City Land Reservation Center.[22]

FoN and CBCGDF claimed that the factories had violated the Environmental Protection Law, the Solid Waste Pollution Prevention Law, and the Violation of Rights and Responsibilities Law, and asked defendants to pay the cost of the environmental cleanup and recovery, ~USD 54 M. The two plaintiffs also requested a public apology from the factory owners in mainstream media outlets. The case was officially accepted and filed by Changzhou City People's Intermediary Court on May 16, 2016.

[21] This survey was released by the Ministry of Environment Protection in 2014. The report is available (in Chinese) at: http://www.ndrc.gov.cn/fzgggz/ncjj/zhdt/201404/t20140418_607888.html. (accessed on date July 10, 2019)

[22] According to the Ministry of Land and Resources ("Measures for the Administration of Land Reserving [2018 Revision]"), all land transfer transactions shall be handled under the unified administration of land and resources authorities, called land reserving institutions (Article II). In this case, that was the Changzhou City Land Reservation Center.

The defendants (the chemical factories) believed the new user (the Changzhou City Land Reservation Center) was liable for the protection and restoration of the land. In 2011, the district government began to plan a commercial and residential development project at the site. The Center hired technical professionals from the Changzhou City Environmental Protection Research Institute to conduct an environmental assessment. Results showed that groundwater and soil were severely contaminated. In 2013, a remediation plan was proposed to the local government. The first phase began in March 2014, funded by local government; by the end of 2015, 95% of the project had been completed (as presented to the court through documents and discussion in December 2018). The clean-up was interrupted when the contaminated soil was exposed in open air during remediation, emitting a foul smell that led to the hospitalization of several students from a nearby school. The incident was reported by local newspapers and social media and eventually China Central Television, in a "Live News" broadcast on April 17, 2016.[23]

A follow-up investigation discovered that contaminated soil had been allocated for road construction. This misconduct eventually led to a second lawsuit wherein FoN sued the company hired for remediation, the Black Peony Company. A new study indicated that even after remediation the soil would never reach the minimum standards necessary for residential land use. Under pressure, the local government then recategorized the land

[23] Video clip from CCTV Live News on April 17, 2016, at: http://tv.cctv.com/2016/04/17/VIDEH1Anxd2qtiQKEDIvNpA9160417.shtml. (accessed on date July 10, 2019)

at the site, from commercial development to public green land. Nevertheless, the estimated remediation costs were ~USD 58 M, to be covered by the local government.

On January 25, 2017, the Changzhou City Intermediary Court gave its decision that defendants were not responsible for covering the costs of remediation and were not required to publicly apologize. The decision was based on the prevention and control of soil contamination law and stated;

> Should the pollution be stopped or should there be historical reasons where the identity of the polluters cannot be confirmed, the relevant public authorities will be responsible for recovery and remediation. If the original user of the land has transferred the use rights to another party, then the new land user is responsible for recovery. But this does not release the original user from environmental responsibility for the land. (Civil Judgment by the Changzhou Intermediary Court [Su-04-Civil-Chu-No.214, 2016], translated by the author)

The court furthermore stated that the local government had already implemented clean-up actions at the site, and thus the environmental risks identified by the plaintiffs were under control. Therefore, the public environmental interest intended by the lawsuit had been realized. With this, the court denied the claim from FoN and CBCGDF, making them responsible for the litigation fee: ~USD 274,000 – a percentage of the claim amount (all information is from the Civil Judgment by the Changzhou Intermediary Court [Su-04-Civil-Chu-No.214, 2016], translated by the author).

The judgement and associated litigation fee caused a stir in the media and among civil organizations and lawyers. They were surprised by the denial of "polluter pays" principle, as well as the exceptionally high court fee for the two non-for-profit organizations, which amounted to a three-year budget for an average-sized NGO in China.

The NGOs appealed to the Jiangsu Provincial High Court on February 24, 2017, the appeal based on the "polluter pays" principle and the argument that government authorities cannot be made liable for polluters. Moreover, they argued that the polluting enterprises had continued their operation uninterrupted even as state-owned enterprises were being marketized.[24] The NGOs insisted that the companies were still liable despite the changes to private sector policies after the pollution happened, and that they should 1) eliminate ecological damage to the soil and groundwater at the site and nearby, restoring the contaminated site to its original status; and 2) apologize publicly, through national, provincial, and city-level media.

From the standpoint of the appellees (the former defendants, chemical factories), the state-owned business sector had sold the shares of the enterprises to new private owners.

[24] This process began in 1988, transforming parts of state-owned enterprises into non-state-owned enterprises. Marketization turned state-owned enterprises into independent legal persons and entities in market competition that have autonomy in business operation and are responsible for their own losses and profits, bearing their own risks and self-discipline.
More information can be found at: http://french.china.org.cn/english/2003chinamarket/79517.htm. (accessed on date July 10, 2019)

Under this historical context, the new owner of the enterprise should be liable for the debts related to environmental clean-up. But according to the "polluter pays" and "whoever benefits, compensates" principles, the profit-bearer of the previous enterprises – the local government – should be responsible for the cleanup. When the land was transferred to the local government in 2011, it sold at below market price, with a clause stating that there were "other/underground responsibilities" that the new user would have to bear, including possible cleanup. In this case, the state was the new owner, profit-bearer, and beneficiary from the land transactions.

The appellate Court ruled that there was no conflict between the local government's implementation of remediation effort and the liability borne by the polluters. In other words, when the new party assumed the tasks of remediation, that did not imply that they were being held responsible for it, nor that the polluters were no longer liable. The court judge explained that it may have been the responsibility of the polluters to undertake these tasks, but they were not formally, legally liable. Regarding the costs of remediation, the court ruled that there were two ways for the defendants to pay: either to undertake the recovery effort or compensate a third party for the recovery effort. As recovery was currently underway by the local government, it was unnecessary for the appellees to undertake the recovery themselves. Should the local government believe that appellees were liable for all or part of the associated costs, they should file a separate case for such compensation. The court noted:

> It is beyond the scope of this EPiL to order the three factories to be liable for the recovery cost that the local government has already paid. As the local government is not a party to this lawsuit, this court has no right to define the rights and responsibilities between them and the appellees. Nor should the local government be involved as a third party in this case. Considering the complexity and long-term needs of any recovery effort, there is uncertainty associated with its effectiveness. The court will welcome any legitimate social organizations to file separate lawsuits against the appellees in due course, if there is concern that current efforts are ineffective or incomplete in the future. At present, because the cost of recovery is not yet known, the court cannot rule on ordering compensation of the environmental pollution by the appellees. (Civil Judgment by the Jiangsu Province High Court [Su-Civil-Final-No.232, 2017], translated by the author)

On December 26, 2018, two and a half years after the case was first filed, the Court ruled that the three appellees would offer an official public apology for their environmental misconduct with 15 days of the ruling and pay the lawyer fees and travel costs for the two NGOs (~USD 67,000). An official public apology was printed at *The Legal Daily* on January 29, 2019. CBCGDF, the second plaintiff, decided to file an appeal with the Supreme Court, insisting that the three factories pay for the costs of environmental damage, based on the "polluter pays" principle. The case was filed at the Supreme Court on January 25, 2019, and the parties are now waiting for the court's instruction on the next step.

2.5.3 Leveraging Litigation Experience for Legislative Change

For FoN, most lawsuits take two-to-three years from when they are first filed until they are closed, although some last five or more years. For instance, the first environmental lawsuit filed by FoN has been pending since 2011. The organization has therefore developed parallel mandates/strategies, practicing law at EPiL courts with professional attorneys while advocating for policy changes as an NGO.

By 2018, FoN had already been involved in six lawsuits related to soil contamination. Given the extent of its involvement in these cases, the organization began to leverage its experiences to shape new legislation. An example can be found in its influence in the 2018 Law on the Prevention and Control of Soil Contamination. FoN provided advice to legislative authorities as an advisory agency based on its firsthand experience in investigations and court trials from 2016 to 2018. The law was approved on August 31, 2018 and went into effect on January 1, 2019.[25]

According to the Legislation Law of People's Republic of China (the latest amendment is from March 2015), the public has the right to participate in the development and amendment of basic laws. This can take different forms: forums, discussion meetings,

[25] See https://globalcompliancenews.com/china-new-law-prevention-control-soil-pollution-20181012 or https://www.china-briefing.com/news/china-soil-pollution-law-environmental-compliance-businesses. (accessed on date July 10, 2019)

and hearings, in different circumstances. Legislators are required to listen to public opinion:

> Where there are significantly different opinions on any issue in a bill or where any issue in a bill involves any major adjustment of interests, a hearing shall be held to hear the opinions of the relevant representatives of grassroots organizations and groups, departments, people's organizations, experts, deputies to the National People's Congress, and other concerned parties. The operation division of the Standing Committee will decide who – the fields, party agencies, department, organizations and experts – is relevant and who shall be included in the consultative process. (Legislation Law, Article 36)

Benefiting from its collaborative relationship with the Ministry of Environmental Protection (now the Ministry of Ecology and Environment), FoN was invited in April 2017 by the committee developing the Law on the Prevention and Control of Soil Contamination to be a co-partner in consultation and comment on the proposed law (interview with FoN legal team member, Beijing, November 2018). FoN was considered to be a representative grassroots organization with direct and firsthand experience given its role in the abovementioned cases.

The law eventually included 99 articles and was revised twice during a roughly four-month period (April to August 2017). FoN's strategy was to focus on the most significant principles that should be included in a law rather than dwell on the details,

and to emphasize that the law should solve problems and be practical (interview with FoN legal team member, Beijing, November 2018; FoN archive documents).

The four principles that FoN focused on are:

1. The law should address the determination of the responsible party and a mechanism to make such a determination in soil contamination cases; to ascertain the responsible party in accordance with the "polluter pays" principle, the law should consider the protection of the public interest and the feasibility of enforcing accountability.
2. In determining which party is responsible, the law should specify which agencies are responsible for making decisions. This will make monitoring easier and makes agencies accountable for their decisions.
3. Civil organizations should have the right to file lawsuits in soil contamination cases.
4. The public should have the right to know the status of polluted lands. A catalog of soil contamination risk and remediation control and management should be created and made public, to allow supervision and monitoring.

Ten articles in the final enacted law were revised to incorporate the suggestions from FoN (FoN organization records, September 6, 2018, compiled by the author). The details of the revisions are elaborated below.

Based on the "polluter pays" principle, FoN suggested that the law should clearly determine who has what rights, who has what responsibilities, and who is liable for the costs of the cleanup, including a mechanism for the prevention and remediation of soil contamination. Furthermore, the law should protect the public interest to the maximum extent and consider the feasibility of holding parties accountable. In response to this suggestion, to Articles 45 and 47, the phrase "liable parties" was added, to emphasize responsible parties and liabilities at different levels (person or entity, local government, and the state) and in different contexts. This point was further emphasized in Article 48 to clarify the responsibility of specific agencies in specific circumstances, rather than simply giving the State Council's environmental protection department the authority to determine the responsible party on a case-by-case basis. This amendment helps entities foresee the legal consequences of their acts.

FoN's third principle, the granting to civil organizations the right to file lawsuits in soil contamination cases, was a challenge to the first draft of the law, which allowed only the state department of environmental protection to file compensation claims. But FoN insisted that civil organizations should be included as potential plaintiffs, believing soil contamination to be a public issue. The suggestion was adopted in Articles 4 and 97 of the new law: "Where soil contamination injures the interests of the state or the public, the relevant authority or organization may bring action in the people's court".

The final principle is the public right to know the status of various parcels of contaminated land, which FoN believed would be possible only through a catalog of the

management and control of soil contamination risks and remediation. Furthermore, FoN believed that listing or removing a parcel of land from such a catalog is an important step for the land to begin the reuse process. To ensure strict supervision, the de-listing should not be limited to authorities' review and validation but also the public, who must have access to the relevant information. The second draft of the law only loosely defined risk management and monitoring duty, and who had the authority to approve the change of status and information disclosure, and furthermore specified that the party responsible for soil contamination could apply for the land to be de-listed. But the final enacted law mandated that environment agencies and the provincial government are responsible for assessing risk, including ongoing monitoring and reporting (Articles 16, 21, 58, 59, 66, and 70). Those reports are then to be used as evidence for the de-listing or other changes in the catalog. This information and subsequent decisions are to be disclosed to the public in a timely manner (Articles 58, 66, and 70).

2.6 Discussion

Policy learning is the core of experimental governance; it aims to improve public policies to manage the market and society and benefit the general public. Good policy learning requires an open state, involvement by social actors, and a transparent process. The EPiL experiment in China signals an open attitude to civil organizations, while at the same time, the rapid change in policy in the last five years implies some uncertainty on the part of the state. More transparent and standardized due process to support civil organizations' right to file litigation is also needed to achieve policy learning of the state.

Only with that can civil organizations be brought into the legislative process with a better understanding of when, how, and to what extent they can participate.

Innovations in public policy are a response by the Chinese state to environmental problems. EPiL is an unprecedented approach that gives civil society organizations a lawful role in environmental governance. In the short history of EPiL (2015–present), several prompt top-down adjustments have already been made. The experiment continues to accommodate new dynamics and address state-market relations in courts. The judicial system is experiencing turbulence, evidenced by the sharp increase of lawsuits processed by public prosecutors. As an EPiL lawyer told me, "when you put a suckermouth catfish into a fish tank, the original harmony and balance will be broken, and the original fish in the tank will have to swim around hard due to the newcomer" (interview with EPiL lawyer, Fuzhou, December 2018). EPiL is unstable, with a third, relatively unfamiliar party joining the state and market forces. EPiL will likely remain in flux given the unknowns ahead, the system reacting to NGO actions.

The rollout of EPiL has seen both civil society organizations and the state learning to adapt: the state is observing and adjusting the regulation and policy. It uses constructive feedback to develop and amend legislation, as NGOs bring in different information than state agencies. NGOs themselves are learning and testing different patterns of interactions with the state, expanding the boundaries of what has conventionally been considered their scope of work (e.g., environmental education, public service, scientific research into conservation). This is the first time that Chinese environmental NGOs are

undertaking litigation as specialized professionals, a bold and promising step toward becoming an active and functional actor in the governance system.

Moreover, NGOs are limited by insufficient professional personnel, institutional experience and capacity. Several studies have examined the legislative processes that allowed civil organizations to become part of EPiL, assessing how civil organizations (especially FoN) succeeded in influencing both the process and final product (the laws) in 2012 and 2014 (Lin Y 2018; Lin H 2018). These studies show that the organizations' success can be attributed to an ongoing process of "incubation" over the last decade, made possible in part through increased budgets. Most concretely, the organizations accumulated legal knowledge, submitted official motions to the central government, and developed social networks to mobilize, participate in, and otherwise influence the legislation process. Organization staff improved their capacity to collect information and, as they gained political experience, the ability to judge political opportunities, finding the balance between politically constructive or destructive actions. But the need for a high level of capacity continues to limit the growth of litigation organizations.

Using legal instruments to influence policy is new for Chinese environmental NGOs. The 2018 Soil Contamination Management and Prevention Law is one of the 14 cases that FoN has been involved in, the most significant and successful case to date (see FoN's 2017 Annual Report for a summary of its legislation advocacy work). FoN was able to participate in the consultative process for this law for two major reasons. First, it was the plaintiff in several nationally recognized lawsuits from 2016 onward, gaining

a firsthand perspective on soil contamination in China.[26] Second, FoN had previously collaborated with other institutions. Giving NGOs consultative opportunities is not yet standard procedure and is based on invitation by the legislation authorities. The participation and influence of NGOs in China's environmental legislative process are still *ad hoc*, depending to a large extent on the capacity and political connections of individual organizations.

Nevertheless, this chapter argues that environmental NGOs do have an advantage in EPiL and legislation advocacy processes, through which NGOs could increase their participation in environmental governance. In the Changzhou case, the historical relationship between the state and private business was the focus of the court trial, which could only come under scrutiny from one of the three parties who have the legal standing to file a lawsuit, civil organization (the other two being a prosecutor or government agencies). Furthermore, the question of who should pay for the environmental damage was a key part of the NGOs' concern. The 2018 ruling did not insist that the former state-owned enterprise would pay the local government back for the ~USD 58 M remediation costs, so the other NGO plaintiff in this case, China Biodiversity Conservation and Green Development Foundation (CBCGDF), appealed to the Supreme Court to insist on the enforcement of the "polluter pays" principle. Their special third-party perspective gives NGOs the angle to confront the state-market relationship and potential conflict of interest. In other cases, individual lawsuits may

[26] An analysis of the soil contamination law can be found at: https://www.bdlaw.com/publications/china-enacts-landmark-legislation-addressing-soil-contamination. (accessed on date July 10, 2019)

uncover new aspects of environmental problems, leading over the longer term to new laws and regulations.

Second, in contrast to other plaintiffs in EPiL, NGOs have different investigative techniques and sources of information. Through building alliances and collaborations, an NGO can expand its network in sites across the country. NGOs are beginning to specialize, meaning that some are developing specific expertise and field techniques and then collaborating with other organizations to form broader interdisciplinary alliances. Examples can be found from Green Jiangnan, a Nanjing-based NGO that specializes in the investigation of industrial pollution, and the Wuhu Ecology Center, based in Wuhu City, Anhui Province, that specializes in the waste incinerator industry. This decentralized structure of local organizations across the country also allows NGOs to file cross-region, river-basin based lawsuits, difficult for prosecutors or government agencies restricted by their jurisdiction boundaries. NGOs also develop their own channels for information by creating hotlines for pollution, awareness campaigns, questionnaires, or internet-based applications such as the *Blue Map*.[27]

Third, by practicing law under the EPiL framework, NGOs represent the public. In this framework, environmental damage or risks are quantified as affecting the interest of the

[27] The *Blue Map* is a mobile technology application and hub of environmental data for users who live in China, intended to encourage citizens to share information about air/water quality and pollution sources on a public online platform. It can be found at: http://wwwen.ipe.org.cn/AirMap_fxy/AirMap.html. (accessed on date July 10, 2019)

public or country. Since these issues concern the interest of any involved or relevant individuals, NGOs can insist on the right for the general public to participate in the process, through information disclosure, consultation rights in legislation, or the policy making process. It is too early to conclude that NGOs are making progress in this regard. But it is undeniable that NGOs have attained a position to pursue future involvement.

It is through the above means and qualities that an NGO with legal rights under the EPiL policy has the ability to support learning and adaptation in environmental policy by the state. Just one lawsuit brought by civil organization, as illustrated in this chapter, can drive the enactment of a new law.

2.7 Conclusion and Future Directions

This chapter discusses a new instrument of environmental governance in China, Environmental Public Interest Litigation (EPiL). It presents the adoption of EPiL as an example of experimental governance and policy learning more broadly, toward strengthening environment protection in China. Experimental governance is an alternative approach prompted by an evolving society and necessitated by the challenges to conventional governance. Its key feature is the inclusion of new actors, who offer fresh perspectives and adaptive solutions. The most experimental element of EPiL is the legitimation of (unprecedented) participation by nonstate actors, specifically NGOs, in what was formerly an exclusive legislative and policy process. Friends of Nature is a highly visible NGO and is a key actor in applying EPiL, which is itself a major

development in Chinese environmental governance. My analysis shows the dynamics between the state and the NGO and how both actors are adapting to changes and challenges and applying lessons learned to policies and practices in a new legal context.

In a country as large as China, it is too costly for the state to closely monitor every business. In other words, weak law enforcement is a major challenge. By experimenting with a new policy – EPiL – the state includes civil society actors, which carry societal and localized characteristics, that can act as a sensing and filtering watchdog to monitor and supervise the frontline and decentralized behaviors. The litigation cases brought back to the court by an NGO, the information disclosed through NGO channels, and the arguments persistently used with impartial angle in making a case, would be the attributes that enable NGOs to realize their values and continue to contribute to the experiment of environmental governance as the conventional methods and actors could not offer. Thus, it can be further anticipated that NGOs can help the state to save transaction costs in environmental law enforcement, while also acting as a sensor and filter to amplify environmental problems that are of most concern by the society for state's prioritization and corresponding allocation of policies and resources.

Looking ahead, the EPiL policy may lead to another breakthrough in the environmental governance path of China. Another illustrative EPiL case that FoN filed is about protection of an endangered species. The green peafowl (*Pavo muticus*) is a species endemic to China that was listed as endangered by the International Union for Conservation of Nature (IUCN) in 2009. There are estimated to be approximately 500

individuals left across the country (Kong et al. 2018). In 2016, the construction of the ~USD 536 M Gasa Hydropower Plant project began in the last intact habitat of the species in Yunnan Province. Being concerned about the serious risks and threats the hydropower plant would have on the green peafowl's existing habitats, FoN sued the hydropower company and the Environmental Impact Assessment Agency in court, requesting an immediate halt to construction to eliminate risk for the species.

The green peafowl case was one of the first two lawsuits aimed at preventing damage to the environment rather than punishing and/or compensating for damages that have already happened. As for FoN, the lawsuit exemplified the continuous fight between development and environmental protection that the country has faced over the past several decades with its rapid economic development. The initiation of such a lawsuit, in the point of view of FoN, is that it will hopefully help complement the course of fixing to preempting for China's environmental management and governance in the years to come (interviews with FoN legal team director and the Director General, Beijing, November 2018). The case had its first court trial in August 2018, which stimulated a national discussion on future preventative environmental laws among legal scholars and legislative authorities that continues today. If the case eventually succeeds it will demonstrate a new opportunity for NGOs to lead a new debate in environmental legislation – preventative laws and regulations on top of environmental penalties.

Through the study of a specific EPiL case with NGOs as plaintiffs and a review of NGOs partaking in the new EPiL policy, this chapter has explained the potential for and the

limitations of EPiL and its role facilitating learning in order to strengthen existing environmental laws and policies. The chapter concludes that since the new policy launched, changes were immediate and ongoing. NGOs as newcomers in the legislative sphere have unique roles to play towards leveraging new environmental legislation and even unintentionally triggering the adjustments and learning for existing policy by the state. However, more questions need to be asked to better understand how and why EPiL, as an experimental and learning policy, will evolve. How can NGOs continue to shape environmental governance and regulations through EPiL? To what extent can civil organizations play a functional role in environmental public interest litigation?

No single EPiL case can illustrate the future for the ongoing governance experiment on environment quality in China. But analyzing experiences from the lens of an NGO provides a fresh perspective on the interactions between the new and old actors and the direct impressions of the actions and intentions of the newcomer. The continuous adjustments and counteractive measures triggered by the adding of a new element into the mix is an experiment in and of itself, which will require future research efforts to record and analyze the evolution of the new system, the consequences and effects, and its learning processes.

2.8 References

Ang, Yuen Yuen. 2016. "*How China escaped the poverty trap."* Cornell University Press.

Braun, V and Clarke, V. 2006. "Using thematic analysis in psychology." *Qualitative Research in Psychology* 3(2), 77–101.

Bulkeley, H and Broto, VC. 2013. "Government by Experiment? Global Cities and the Governing of Climate Change." *Transactions of the Institute of British Geographers* 38, 361–75.

Evans, James P. 2011. "Resilience, Ecology and Adaptation in the Experimental City: Resilience, Ecology and Adaptation." *Transactions of the Institute of British Geographers* 36, 223–37.

Freeman, Richard. 2008. "*Learning in Public Policy*." In: Goodin RE, Moran M, Rein M (eds) Oxford Handbook of Public Policy, pp. 367–388. Oxford University Press, Oxford.

Forester, John. 1985. "The policy analysis-critical theory affair: Wildavsky and Habermas as bedfellows?" In: Forester J (ed) *Critical Theory and Public Life*, pp. 145–164. MIT Press, Cambridge, MA.

Geall, Sam and Hilton, Isabel. 2014. "China's Environmental Governance Challenge." In: the Worldwatch Institute (ed) *State of the World 2014: Governing for Sustainability*, pp. 129–137. Island Press, Washington, DC.

Guttman, D and Young O, Jing Y, Bramble B, Bu M, Chen C, … Zeidan R. 2018. "Environmental governance in China: Interactions between the state and "nonstate actors"." *Journal of Environmental Management* 220(15), 126–135.

Habermas, John. 1984. "*The Theory of Communicative Action I: Reason and Rationalization of Society*." Beacon, Boston, MA.

Hajer, Maarten. 2003. "Policy without polity? Policy analysis and the institutional void." *Journal of Policy Sciences* 36(2), 175–195.

He, Guizhe, Lu, Yongling, Mol, APJ, and Beckers, Theo. 2012. "Changes and challenges: China's environmental management in transition." *Environmental Development* 3, 25–38.

Hegger, Dries LT, Van Vliet, Jenneke, and Van Vliet, Bas JM. 2007. "Niche Management and Its Contribution to Regime Change: The Case of Innovation in Sanitation." *Technology Analysis & Strategic Management* 19(6), 729–46.

Heilmann, Sabastian. 2008. "From Local Experiments to National Policy: The Origins of China's Distinctive Policy Process." *The China Journal* 59, 1–30.

Hoffman, MJ. 2009. "Experimenting with climate governance." *Amsterdam Human Dimensions of Environmental Change Meeting.*

Howlett, Michael. 2011. "*Designing Public Policies: Principles and Instruments*." Routledge, New York.

Kennedy, J. 2012. "Environmental protests in China on dramatic rise, expert says." *South China Morning Post*, 29 October.

Kivimaa, P, Hildén, M, Huitema, D, Jordan, A, and Newig, J. 2017. "Experiments in climate governance – A systematic review of research on energy and built environment transitions." *Journal of Cleaner Production* 169, 17–29.

Kong, Dejun, Wu, Fei, Shan, Pengfei et al. 2018. "Status and distribution changes of the endangered Green Peafowl (*Pavo muticus*) in China over the past three decades (1990s–2017)." *Avian Research* 9(18).
Kooiman, Jan. 1993. "*Modern Governance: New Government-Society Interactions."* SAGE Publishing, Thousand Oaks, CA.
Li, Dun (ed.). 2015. "*Review of Public Interest Litigation in Environment Protection (2015)"*. Law Press, China.
Li, Dun (ed.). 2016. "*Review of Public Interest Litigation in Environment Protection (2016)."* Law Press, China.
Lin, Hong. 2018. "Constructing Legitimacy: How Do Chinese NGOs Become Legitimate Participants in Environmental Governance? The Case of Environmental Protection Law Revision." *The Journal of Chinese Sociology 5(6).*
Lin, Yanmei. 2018. "Practical Research on Environmental Public Interest Litigation from the Perspective of Social-Ecological System Resilience." *Doctoral dissertation, China University of Political Science and Law, March 2018.*
Lo, CWH, and Tang, SY. 2006. "Institutional Reform, Economic Changes, and Local Environmental Management in China: The Case of Guangdong Province." *Environmental Politics* 15(2), 190–210.
Mertha, Andrew C. 2005. "China's "Soft" Centralization: Shifting Tiao/Kuai Authority Relations." *The China Quarterly* 184, 791–810.
Mertha, Andrew C. 2009. "'Fragmented Authoritarianism 2.0': Political Pluralization in the Chinese Policy Process." *The China Quarterly* 200, 995–1012.
Mol, Arthur PJ, and Neil, Carter. 2006. "China's Environmental Governance in Transition." *Journal of Environmental Politics* 15(2), 149–170.
Mol, Arthur PJ. 2009. "Environmental Governance Through Information: China and Vietnam." *Singapore Journal of Tropical Geography* 30(1), 114–129.
Mol, Arthur PJ. 2014. "The Lost Innocence of Transparency in Environmental Politics." In: Gupta A, Mason M (eds) *Transparency in Global Environmental Governance*, pp. 39–60. The MIT Press, Cambridge, MA.
Nowell, Lorelli S, Norris, Jill M, White, Debora E, and Moules, Nancy. 2017. "Thematic Analysis: Striving to Meet the Trustworthiness Criteria." *International Journal of Qualitative Methods* 16(1), 1–13.
Popper, KR. 1966. "*The Open Society and Its Enemies."* Routledge and Kegan Paul, London.
Shapiro, Judith. 2016. "*China's Environmental Challenges*." Second edition. Polity Press, Malden, MA.
Tang, Shuiyan, and Lo, Carlos WH. 2009. "The Political Economy of Service Organization Reform in China: An Institutional Choice Analysis." *Journal of Public Administration Research and Theory* 19(4), 731–67.
Tassey, Gregory. 2014. "Innovation in Innovation Policy Management: The Experimental Technology Incentives Program and the Policy Experiment." *Science and Public Policy* 41(4), 419–24.
Teets, Jessica C. 2015. "The Evolution of Civil Society in Yunnan Province:

Contending Models of Civil Society Management in China." *Journal of Contemporary China* 24(91), 158–175.
Teddlie, Charles, and Tashakkori, Abbas. 2009. "*Foundations of Mixed Methods Research: Integrating Quantitative and Qualitative Approaches in the Social and Behavioral Sciences*." SAGE Publishing, Thousand Oaks, CA.
Van der Knaap, Peter. 1995. "Policy Evaluation and Learning: Feedback, Enlightenment or Argumentation?" *Evaluation* 1(2), 189–*216.*
Van Rooij, Benjamin. 2006. "*Regulating Land and Pollution in China: Lawmaking, Compliance, and Enforcement: Theory and Cases."* Amsterdam University Press, Amsterdam.
Van Rooij, Benjamin. 2010. "The People vs. Pollution: Understanding Citizen Action against Pollution in China." *Journal of Contemporary China* 19(63), 55–77.
Wilmsen, Carl. 2012. "Participation, Reciprocity, and Empowerment in the Practice of Participatory Research." *University of Berkeley, Retrieved April 23, 611–629.* https://nature.berkeley.edu/community_forestry/Workshops/2006/WCAR%202006%20final%20draft%20Wilmsen.pdf
Wolf, Steven A. 2011. "Network Governance as Adaptive Institutional Response: The Case of Multifunctional Forested Landscapes." *Journal of Natural Resources Policy Research* 3(3), 223–35.
Yin, Robert K. 2014. "*Case Study Research – Design and Methods."* SAGE Publishing, Thousand Oaks, CA.

CHAPTER 3. Private Enforcement of Environmental Laws in China – New Experiences arising from the Environmental Public-interest Litigation Policy

3.1 Introduction

Public enforcement refers to the use of government agencies to investigate and to sanction and penalize the violators of legal rules (Polinsky et al. 2007). In the US, the enforcer of laws in this case can include police, prosecutors, and also government agencies such as Department of Agriculture, Department of Education, Environment Protection Agent, and Food and Drug Administration. Besides public enforcers, the United States encourages private citizens, NGOs, and private lawyers to regulate social harms (Glover 2011). This can occur when non-governmental groups use litigation to deter misconduct. According to Glover, private enforcement can provide a complementary role to public bodies who sometime can be limited by resources and information.

Private enforcement has a long history in the US, and the system relies explicitly on enforcement by private parties to achieve public regulatory objectives. An important challenge in the modern administrative state is understanding how private enforcement of government policies influences administrative governance (Glover 2011). Proponents of private enforcement argue that it can fill a remedial gap to enforce public laws, thus shall be treated as the complement instead of a substitute to public

enforcement. The merits of private enforcement also include enhancing the 'fairness' of the legal system, improving the efficiency of the judicial process, and decreasing the costs of public enforcement by delegating certain enforcement actions to private actors. The opponents underline the risk of excessive influence by lobbyists, the burdens and costs that arise when private and public enforcement pursue redundant suits, and over-enforcement of the public laws. In class action lawsuits, private enforcer, driven by fee awards and without real clients to be accountable, will deviate from the ultimate purpose of private enforcement – serving social interests and broadening the scope of law enforcement. For example, private enforcers may simply piggyback on government efforts without providing any independent value. In other cases, given the overzealous, uncoordinated, and democratically unaccountable nature of private enforcement, one needs to vest administrative agencies with litigation 'gatekeeper' powers to prevent overdeterrence and other privately driven interests to enforcement.

In China, government enforcement of laws and regulations is the prevailing approach. The enforcers are administrative agencies, and enforcement approaches normally involve fines and other compulsory means, such as disciplinary warning, confiscation of illegal gains, ordering for suspension of business or production, and administrative detention. Critics point out that over-powerful administrative agencies oftentimes practice enforcement beyond established legal frameworks, due to the co-existence of national laws and local rules and regulations adopted by municipalities. (Sulin Han,

Yale Law School).[28] Although two national laws, the Administrative Litigation Law[29] and the Administrative Reconsideration Law [30] are designed to govern the administrative and judicial review process, abuse of government enforcement caused by unrestrained enforcement power at local levels is still salient (Sulin Han, Yale Law School). While lay citizens can voice their grievances and complaints through an informal petition system, namely *Xinfang* – where citizens and business can write letters or call to appeal to high level government authorities. This particular petition is not a legal channel and cannot provide a regular stream of information to the government (Minzner 2006).

Recently, however, China has begun to allow certain civil suits. (Huang 2013). In the case of environmental law enforcement, the Civil Procedure Law (2012, article 119) of China[31] requires and limits that the plaintiff must be a citizen, legal person, or any other organization with a direct interest in the case.[32] Although the Civil Procedure Law marks the beginning of private enforcement in environmental laws in China, practices

[28] Paul Tsai China Center, Yale Law School, see https://law.yale.edu/china-center/resources/administrative-enforcement-china (accessed on date February 22, 2020)
[29] English translation of the Law is available at: https://www.chinafile.com/ngo/laws-regulations/administrative-litigation-law-of-peoples-republic-of-china-2015-amended-version (accessed on date February 22, 2020)
[30] English translation of the Law is available at: https://www.chinafile.com/ngo/laws-regulations/law-of-peoples-republic-of-china-administrative-reconsideration (accessed on date February 22, 2020)
[31] English translation of the Law is available at: http://en.pkulaw.cn/display.aspx?id=4f970d90a380a757bdfb&lib=law&SearchKeyword=&SearchCKeyword=%C3%F1%CA%C2%CB%DF%CB%CF%B7%A8 (accessed on date February 22, 2020)
[32] The 'direct interest parties' refer to the citizens, legal persons and other organizations who are directly involved in civil actions. The parties who support litigation or represent other parties in a litigation shall not be regarded as having direct interest. The legal explanation from National People's Congress, year 2000 (in Chinese), see http://www.npc.gov.cn/npc/c2267/200012/bf3ddadfa97343aba08b165428af7764.shtml (accessed on date February 22, 2020)

during the initial period were more to seek justice for individuals and not necessarily for the broader society because of the exclusivity of direct interest vested in plaintiffs. By 2014, the revision of the Environmental Protection Law (article 58) specified that civil organizations would be able to step in to enforce the public laws, which was the first time in China's history that such legal status in jurisdictional system was recognized. Accordingly, starting in January 2015, EPiL was launched to legitimize civil organizations (NGOs) to serve as plaintiffs in representing public interests to sue polluters and enforce public environmental policy.

The latest amendment of the Civil Procedure Law (Article 55) in 2017 contained this inclusion of civil organizations clause, easing the "direct interest" limits. The amendment expanded the condition to include those who tend to represent broader social interests of the "unspecified class of people" – public interest, into the plaintiff list. The new initiative has included civil organizations as one of the allowable plaintiffs, besides individuals and corporations who are represented by private and corporative lawyers in civil lawsuits. With this, private enforcement in environmental laws makes a significant turn and progress under the new legal policy on public-interest litigation, EPiL.

In order to boost economic development, pollution of the environment was allowed under lax environmental regulations as well as weak law enforcement, and industries became one of the major contributors to pollution. According to the 2018 "environmental census" conducted by Ministry of Ecology and Environment, there are

7.4 million sources of industrial pollution out of the total nine million.[33] One of the driving forces to push the EPiL policy to be in place is mostly due to insufficient conventional enforcement resources to address existing social-environmental problems caused by this structural flaw (Mol et al. 2006).

Before the EPiL policy went into effect, public enforcement of Chinese environmental laws was mainly divided into administrative penalties (i.e., non-judicial actions) on violations of the existing rules and regulations, and criminal lawsuits towards illegal acts that cause serious environmental damages. The first type of enforcement was taken by environmental agencies at decentralized levels along with their mandates in regular monitoring of compliance (mainly by environmental conservation agencies – MEP), while prosecutorial agencies at respective levels were responsible for filing criminal environmental cases.

Hence, the Chinese government has been using criminal law to punish environmental misconducts since 1997,[34] while EPiL as a solitary means of enforcing environmental laws for public interests began in 2015. It was only after EPiL gave private litigants

[33] News report from the Guardian at: https://www.theguardian.com/world/2018/mar/31/china-environment-census-reveals-50-rise-in-pollution-sources (accessed on date February 10, 2020)
[34] The Amendment Criminal Law of P.R.C, 1997, added a new Section 6 (Article 338-346), titled as Crimes of Undermining Protection of Environmental Resources. The crimes cover the illegal activities of emission to air and water system, solid waste management, hunting and fishery, occupy farmlands, mining and logging. See http://en.pkulaw.cn/display.aspx?id=34409e4748a7e4a3bdfb&lib=law&SearchKeyword=&SearchCKeyword=%D6%D0%BB%AA%C8%CB%C3%F1%B9%B2%BA%CD%B9%FA%D0%CC%B7%A8(1997%D0%DE%B6%A9)#menu46 (accessed on date February 10, 2020)

authority to enforce public policy that a wider variety of actors was able to defend public interests in court.

The difference between these newly possible judicial actions under the framework of environmental public interest litigations and the existing public enforcement of criminal offenses are significant, as evident from one of the EPiL's cases during its early implementation period. The Tengger Desert Case (2015, to be discussed in Section 3.4) illustrates that conventional public enforcement was not sufficient to deter misconduct and protect public interest, but yet this can be realized through EPiL and private enforcement. Under an EPiL civil case on Tengger filed by a private actor (NGO), the court ruled to order the defendants to pay a penalty almost 100 times more than the fines levied in a previous public prosecution criminal case. This result represents the striking difference in the stakes between public enforcement and that of judicial action where public interest or goods are concerned.

Because China only began allowing NGOs to bring environmental claims for public interest in 2015, which can lend to notably distinctive processes and consequences. This new EPiL policy presents an opportunity to study how the introduction of a private enforcement regime influences public policy for improved ecological outcomes. It can also help to examine the dynamics between public and private actors in the course of enforcement to achieve the intended and overarching environmental objectives.

This chapter addresses this unique and timely opportunity and works to fill a void where there are presently few Western studies of this new legal initiative. In short, the aim of this chapter is to summarize and analyze the merits and risks of private enforcement and some of its preliminary effects on public actor in law enforcement, public policy, legal system, and environmental governance generally in China. To do so I will provide a selection of empirical cases from the beginning period of EPiL implementation.

This chapter argues that a) private actors complement public enforcement by filling gaps in environmental law enforcement, which contributes to expanded accountability of public actors, resulting in more enforcement actions; b) private actors complement public enforcement by acting as a litigation 'laboratory' to bring novel legal theory to remedies, methodologies, and new areas of environmental protection; and c) risks of private enforcement, including interference of regulating policy and overzealous enforcement for private interests as stated by the critics (mainly based on scholars' studies in the US), are found to be immune in the case of EPiL albeit its ability to have some influence on legislative processes and legislations.

Following the introduction, Section 3.2 will provide the general theoretical framework of private enforcement and some background information about China's judicial system, especially with respect to the evolution of the new EPiL policy.

In Section 3.3, I will review the prosecutorial statistics during the period from the beginning of EPiL policy in 2015 to 2018 to assess the overall and unanticipated effects

of private actors' introductory roles towards public enforcement of environmental regulation - particularly, on public prosecutors or prosecutorial agencies. The increase in environmental cases brought by public prosecutors since EPiL was promulgated suggests that public actors are subject to new pressures, resulting in expanded accountability. Specifically, I argue that the public supervision function of prosecutors (especially over government agencies' performance) is aroused by new EPiL practices – specifically, granting legal standing to private non-state actors to initiate public-interest litigation. In parallel, I argue that certain internal motivations of the prosecutor also become one of the drivers of such enforcement. In the Chinese Constitution (Article 129,132), a prosecutor is to act as the supervisor to monitor and inspect the performance of police and application to existing laws and regulations. However, this function was temporarily overthrown during the political turmoil of 1966–1976 when the Chinese legal system disintegrated and has generally underperformed thereafter. The results from the administrative litigation pilot project, and the rate of closed cases through pre-court procedures (where no trial is needed) show that prosecutors are now motivated to urge administrative agencies to strengthen enforcement by putting more oversights of environmental law compliance and taking prompt action as needed.

While numerous scholars have argued that US administrative agencies act as 'litigation gatekeepers', in Section 3.4 I show that in China the reverse is also true. That is, private enforcers act as 'litigation laboratories' that allow the government to test novel legal

theories while minimizing accountability in the event of backlash.[35] By assuming an enforcement role, private actors create political pressures that motivate public prosecutors to enforce laws more actively. These effects combine to create opportunities to apply and test novel litigation theories that then change the substantive content of Chinese environmental law. In Section 3.4 I discuss the Tengger Desert Case to consider how private enforcement operated as a litigation laboratory. Most importantly, this urges the state to be responsive and actively participate in law enforcement. Moreover, examples of NGOs bringing in cases to test diversity in infringement and the liability of environmental torts, and to apply innovative methods in environmental damage evaluation and ruling are provided later in this chapter. These are being put out for successive adoption by the courts in the long-term, made possible by the involvement of private actors.

Section 3.5 discusses the potential downsides of private enforcement, including enforcement redundancy and the possibility that it interferes with regulators' ability to control public policy. Despite these possibilities, private enforcement exhibits the potential to influence new legislations to some extent. I find that the mentioned risks are yet to happen and may not be a concern in the case involving EPiL in China and the Chinese environmental plaintiffs involved. The rapid change in EPiL policy that cuts off administrative standing rights from civil organizations to prosecute and authorize

[35] Thus, Chinese environmental prosecutors have not simply supplemented government regulation. They have also played an important role in recrafting the substance of Chinese environmental laws.

government agencies to file the same civil litigation cases as NGOs can do, shows the judicial system's swift change to be back in control.

In sum, the benefits of private enforcement in China are gradually surfacing in light of the implementation of the EPiL policy. But more research is needed to provide a more comprehensive assessment in this subject under the context and history of China's judicial system. As a newly initiated policy, EPiL has passed its first five-year 'warm-up' period and we see that new creative process has been brought into the conventional judicial system in China, creating novel opportunities and promise for wide-ranging enforcement. With the pendulum of balance being moved for the first time in China's historically tight system by the addition of private enforcement, the outcome is more positive than the potential downsides presented in other cases and elsewhere. Based on the cases illustrated in this chapter, new private actors in China's judicial system will at least for now contribute constructively to overall enforcement and, in this case, an improved environment.

3.2 Literature Review

3.2.1 Theory Review: Public and Private Enforcement

In the US, private litigation has a long history where the system relies explicitly on enforcement by private parties to achieve public regulatory objectives (Glover 2011). An important challenge in the modern administrative state is understanding how private

enforcement of government policies influences administrative governance. Adherents of robust private enforcement point out that non-governmental litigants' step in to enforce the law when the government fails to do so. Opponents agree that private litigants play a gap-filling role but note that overzealous private enforcement undermines agency authority by preventing regulators from coordinating policy goals.

Clopton (2016) argues that private enforcement fills a remedial gap and should be treated as a complement to public enforcement rather than as a substitute. Private and public enforcement, in other words, is not a zero-sum contest. Coffee (1983) emphasizes the failsafe function of private enforcement, saying that private enforcement is a necessity when public enforcers are captured by private interest groups, and when public enforcement is underfunded. Besides, compared with public attorneys, private lawyers are more flexible and innovative to bring diverse cases to the court, which can reflect the concerns and interests from a decentralized and diverse society and marginalized populations within it. In this process, private enforcement would represent the 'fairness' of the legal system – every single individual would be protected by law. Stephenson (2005) discusses the benefit of private enforcement that brings in more enforcement resources to jurisdictional systems and makes allocation of public resources more efficient. Private enforcement also fosters innovative litigation strategies and settlement techniques. Coffee (1983) points out that legal continuity is warranted with private enforcement because possible disruptions due to changes in legislative policy will not affect enforcement in this case.

The critical views of private enforcement are also thorough. Under a more specific context, class action in US, Clopton (2016) warns about private enforcement redundancy in excessively harsh punishments and over-enforcement of the public (and sometimes private) laws; Coffee (1983) argues that private enforcers are analogous to 'bounty hunters'– where private attorneys are motivated by fee awards and lack real clients to constrain their performance and accountability in class action cases. The incentive structure behind 'bounty hunters' encourages lawyers to become entrepreneurs, who assesses costs and benefits as an economic decision-maker. This can give enforcers an excessive incentive to settle because they will receive a fee but may not pursue full recovery for the injured class. This creates a free rider problem when private attorneys piggyback on the government's efforts as entrepreneurs in law enforcement. In particular, they can access and utilize the existing information that automatically carries a certain level of legitimacy and can be contestable at court as it is free, saving their own investigation time and efforts for possible favorable economic returns. The entrepreneurial characteristic of the 'bounty hunter' can also excite them to accept an inadequate settlement, what Coffee calls, "the juicy bone of higher-than-ordinary fee award", which leads to results opposite the ultimate purpose of private enforcement – serving social interests and broadening the scope of law enforcement.

Stephenson (2005) compared public attorney generals and private plaintiffs. The aim of the former is to deter, detect, and correct socially harmful violations of the law for broader societal good, while the latter is for private compensatory purpose. Stephenson argues that the private right of action (private plaintiff) a) wastes judicial resources and

excessively deter socially beneficial activities (like Coffee, Stephenson also questions the motivation behind private plaintiffs, which leads to overzealous and inefficient enforcement, and prioritizing private interests over public social benefit); b) interferes with public enforcement efforts, disturbing government enforcement priorities and cooperative relationships between regulators and regulated entities; and c) raises concerns about the democratic accountability of law enforcers (the excessive and inconsistent enforcement due to the fact that private plaintiffs' lack of accountability for social impact of their enforcement decisions). While Engstrom (2013) also worries about overzealousness, uncoordinated actions, and lack of democratic accountability associated with private enforcement, he proposes vesting administrative agencies with gatekeeper powers to address those risks.

Private enforcement in China includes some notable differences from practices in the US. The party-state political structure of China ensures that public agencies are and will remain the core enforcement power in the country into the foreseeable future, with private lawyers being mostly involved in business law cases, and group litigation is not popular.[36] Li and Guo (2019) discuss social participation in criminal law enforcement, based on the new amendments of the Criminal Procedure Law of China in 2012. The amendments reflect the government's ambition to redistribute power between state and

[36] According to The Guiding Opinions of the All-China Lawyers Association on Class Action Cases; In China, "Class action cases are usually about land expropriation and requisition, housing demolition and relocation, immigration of reservoir area, enterprise reform, environmental pollution and protecting the interests of the migrant workers, etc." According to the Civil Procedure Law (CPL) of the People's Republic of China (PRC), collective or class actions can be divided into three categories: joint litigation (including 2-10 litigants); representative litigation (>10 litigants on either side, and a representatives are elected to represent the party in litigation); and public interest litigation.

private actors by introducing a hybrid system to increase public participation through open trials and lay citizen supervision. However, the authors argue that the empirical data do not endorse a positive result of private participation. The conventional legal power relation among the 'iron triangle', under criminal procedure context, the investigation, prosecution, and adjudication power are distributed among the police, prosecutors, and courts, locks the power within public authorities and increases intra-institutional friction. The power hierarchy that exists between public authorities and private individual lawyers makes it difficult to access to the information that they are supposed to have for litigations.

Li and Guo (2019), review two possible stages in which private actors can partake in criminal procedures: filing and investigation of the cases, and supervision under probation. They argue that lawyers do not have a role in social regulation from the first stage of case filing due to a weak Chinese civil society which impedes the development of this group. As such, though private participation occasionally occurs at the beginning of litigation, that is not the norm. Although the amendment gives the rights to defendant lawyers to participate during the investigation stage, particularly regarding illegally procured evidence, it is practically difficult for a variety of reasons. Even though private lawyers are authorized to provide social support during the probation period, it is not fully realized because the lawyers lack financial resources, appropriate training, and information. In particular, inadequate access to information and potential economic and political threats to individual lawyers become the obstacles of engagement.

In spite of this situation, increasing concern about the environment and public health has sparked mass collective action in China over the last decade. The number of environmentally motivated "mass incidents" (such as protests or large civilian gatherings) increased by 29% every year from 1996 to 2011 according to Yang Chaofei.[37] Moreover, Yang et al. (2015) point out that 80% of the environmental crises happened during the previous two decades is attributed to the government's weak enforcement; 45% of which are due to incorrect policy decisions by the government. The Chinese government is under growing pressure to prove its effectiveness and legitimacy in environmental protection internally and manage its reputation externally. Over the last decade, the state has been critiqued for not sharing information about public health issues, environment problems, crime, and so on. The discontentment is not limited to arguing that public information should be disclosed in the first place, but also about whether lay citizens can access such information when they want. This situation leads to the dilemma that central and decentralized state of China is lagging in enforcement targeting environmental misconducts at local levels (may be due to overwhelming caseloads or other reasons, such as local governments' economic interests), while there is grievance from citizens, who demand transparency and hold private business, as well as government agencies accountable for their environmental performances.

[37] Yang Chaofei, the Vice-Chairman of the Chinese Society for Environmental Sciences. His speech was quoted in the news report at China Southern Post, dated Oct. 2012; see https://www.scmp.com/news/china/article/1072407/environmental-protests-china-rise-expert-says (accessed on date February 22, 2020)

3.2.2 Environmental Public Interest Litigation Policy (EPiL) in China's Judicial System

In likely response to this dilemma, Environment Public Interest Litigation (EPiL) was promulgated as a legal policy in 2015 after a nearly ten-year process (2005–2014) by the Chinese state (interview with FoN legal team leader, Beijing, October 2018). In contrast to lawsuits over environmental protection in the US, which can be brought by any individual citizens seeking to enforce an environmental law, EPiL specifies that public interest can only be represented by registered social organizations, who can sue individuals, business entities, or government agencies for environmental misconduct. The two major provisions regarding the qualification of civic organizations are as follows: The Civil Procedure Law of China (CPL) (2012), Article 55; and the revised Environmental Protection Law of China (EPL) (2014), Article 58. Details of these laws can be found in Chapter 2.

The EPiL policy went into effect on January 1, 2015 based on these two pieces of legislation, as the principle legal code, together with the judicial interpretation of laws from the Supreme People's Court (SPC) and the Supreme People's Procuratorate (SPP), which provided official guidance to judicial practices in applying laws. In other words, EPiL is a policy supported by the serial law interpretations, officiating the legal standing of NGOs.

As one of the civil law countries, China's judicial system differs from the legal system in the US in many ways. Organizationally, it is not an independent branch; and separation of power between legislative, executive, and judicial functions across the Chinese government does not exist (Liu 2011). The SPC is the highest judicial organ, and the SPP is the highest state organ for legal supervision.[38] Together with the State Council (executive), the judicial system operates under the supreme organ of the state, the National People's Congress (NPC; a legislature). In practice, the courts are responsible and accountable to the people's congresses at the corresponding governmental levels and are financed by the governments at the same level.[39] This institutional arrangement may cause the judiciary to be prone to some local influence. The procuratorate, as the prosecutorial counterparts to the courts, shares a similar structure to the courts, and subjects also to each levels of governmental control, while also under the dual leadership of the Superior Procuratorate (Chen 2015, 159).

Functionally, with principles adopted from the civil law tradition, the modern legal system of China puts statutory laws as the utmost importance. Under which, courts' rulings cannot be made according to previous rulings or interpretations by other courts. Therefore, unlike in the US, Chinese court judgements have no precedential effect but can only serve as guidance (Liu 2011). Following the civil law's inquisitorial system, which differs from the adversarial legal system in the US where judges act as impartial

[38] Art 127, Constitution of the People's Republic of China (中华人民共和国宪法), entered into force December 4, 1982, amended March 14, 2014.
[39] Clarke, D. The Chinese Legal System, http://docs.law.gwu.edu/facweb/dclarke/public/ChineseLegalSystem.html (accessed on date February 22, 2020)

referees between prosecution and defense, Chinese judges undertake active and extensive investigation and interrogations to reveal and ascertain the facts in the cases, thereby making their decisions on a case-by-case basis. Informally, one of the key characteristics of the Chinese legal system rests with the heavy influence of traditional values and philosophy grounded in Confucianism. This is reflected in a general dislike for litigation and preference for extra-judicial mechanisms such as mediation as the primary means for dispute resolution.

As mentioned above, China's judicial system is overseen and operated by judges who also act as investigators in court, collecting evidence from plaintiff(s) and defendant(s), that forms the basis of their rulings. The ruling is based on existing laws and regulations, interpretations of laws and regulations, and major implications from Guiding Cases that had been preselected and endorsed by the highest legal authority (this contrasts with precedent cases in the US).[40] The Guiding Cases system started from November 2010, when the Supreme People's Court of China (SPC) selected and re-issued certain court judgments as de facto binding Guiding Cases (GCs) to guide the adjudication of similar subsequent cases and ensure the uniform application of the law (Stanford Law School,

[40] The source of law in China's context include: (1) the PRC Constitution; (2) "basic" laws (基本法) enacted by the National People's Congress (NPC); (3) other laws (法律) issued by the NPC Standing Committee; (4) NPC Standing Committee interpretations of the Constitution and basic law (立法解释); (5) State Council regulations and other documents having the force of law (行政法规); (6) ministerial regulations, standards, and rules (部门规章); (7) interpretations of the Supreme People's Court and Supreme People's Procuratorate; (8) regulations issued by the people's congresses and their standing committees of sub-national levels of government (地方法规); (9) sub-national level executive regulations and legal documents (地方政府规章); and (10) individual cases decided by Chinese courts; and (11) international agreements (Alford and Shen 1997, 127-28).
Alford, W. P., & Shen, Y. (1997). Limits of the law in addressing China's environmental dilemma. *Stan. Envtl. LJ*, *16*, 125.

China Guiding Case Project).[41] This practice allows judges to influence and be influenced by other judges' decisions and the key messages from these guiding cases are treated as law interpretations by judges in their verdicts. Cases selected and listed in the GC are legally binding and influence a court's ruling at a larger scope and context, that the court at all levels can reference the Guiding Case as law interpretation.

Many scholars (Zhu 2012; Lv 2014, 2016, 2017, 2018 a, b); Wang and Cheng 2014; Gong 2015; Wang 2019; Cai 2019) discuss the necessity of inviting civil supervision of public law enforcement. They called for legislation to formalize the public participation and supervisory rights of society; some gave specific recommendations for providing concrete support, such as establishing special financial resources to encourage litigation actions by civil organizations. Several studies on EPiL try to understand the effect of the policy, especially the effect on civil organizations (Li 2015, 2016; Gong 2015; Wang 2014). The wide coverage of environmental problems and misconducts is one of the clear characteristics of NGO lawsuits. Apart from environmental pollution (air, water, soil), deforestation and environmental damage caused by mining, hydro dams, and real estate development; endangered species protection, and natural and cultural heritage protection cases are not uncommon nowadays. Moreover, NGOs also brought diversity into the courts in terms of infringement and defendants (compare with the past, there are more large-scale industrial companies that are big contributors to local governments' tax revenue, state-owned enterprises, travelling agencies, and food delivery chains).

[41] Stanford Law School started a project to study the Guiding Cases in China, and other collaborative projects. Details can be found at: https://cgc.law.stanford.edu (accessed on date February 22, 2020)

Original information about cases can come from media reports, then civil organizations will follow-up on the reports with in-depth investigations, changing the nature of the cases from an isolated local event to a national open-to-public discussion of litigation.

a) The New Actor

As a new participant in the judicial system, NGOs in China have a short yet tortuous development history. In the early 1990s, environmental NGOs and activists (mainly public intellectuals and media personalities) were warning authorities about the environmental crisis, urging the government to enact policies supporting conservation and mitigating environmental threats (e.g., terminating dam projects) (Shapiro 2016, 125–129). As discussed thoroughly in Chapter 2, this sector has had its ups and downs, depending on the strength of their challenge to China's prospering economy. While domestic NGOs have grown, international NGOs (INGOs) have become less involved in domestic Chinese litigation in response to concerns over increasing Western influence on political institutions.

The newly initiated EPiL policy, where the domestic civil organizations use litigation to provoke state agencies to actively respond to environmental problems, provides an opportunity to look into the (new) roles of civil organizations in stimulating public law enforcement by the state.

b) The Rapid Adjustment in EPiL

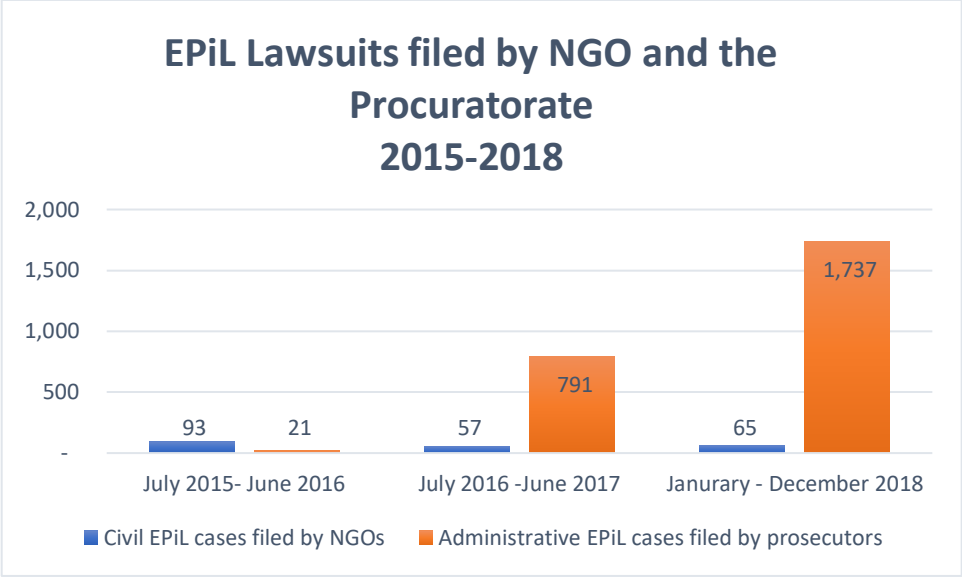
Six months after EPiL went into effect in July 2015, the state passed another law to distinguish between two types of lawsuits, based on the identity of the defendant: administrative litigation, where government agencies are defendants, and civil litigation, where individuals and/or businesses are defendants. The state also sought to limit administrative litigation so that the public prosecutor became the only entity able to file such lawsuits. After completing a two-year pilot program in selected provinces, the state officially amended the Civil Procedure Law (Article 55) and the Administrative Procedure Law (Article 25) to these ends on July 1, 2017.[42] As a result, NGOs can file civil lawsuits, but not administrative ones from that point on. In other words, civil actors can no longer sue the state over environmental issues; that right is reserved for public prosecutors.

The Procuratorate in the pilot provinces filed a total of 4,378 public interest lawsuits (not limited to environmental cases) in just 18 months (July 2015–December 2016) (Figure 4). Among these, 495 cases were presented at court hearings, including 57 civil lawsuits and 437 administrative lawsuits.[43] Compared to the 12 lawsuits filed by prosecutors from the end of 2015 to the beginning of 2016 (the early months of the pilot period), the rapid increase in the number of cases in 2016 demonstrates a vivid strategy

[42] See http://npc.people.com.cn/n1/2017/0628/c14576-29366977.html (in Chinese). (accessed on date February 22, 2020)
[43] Statistics are from the official website of the Supreme People's Procuratorate of the People's Republic of China at: http://www.spp.gov.cn/spp/zdgz/201701/t20170105_177576.shtml. (accessed on date February 22, 2020)

change within the long-established procuratorate system. The spike in 2016 in lawsuits filed by administrative prosecutors is a testament to the government's strategy to counteract the effects of the inclusion of civil organizations when the legislation was first revised. Prosecutors can move faster than NGOs because they have more resources and other advantages in power. To large extent, prosecutorial zeal for administrative EPiL counteracts the stimulus coming from the newcomer in judicial system - NGOs.

Figure 4. Changes in EPiL lawsuits between NGOs and prosecutors (2016-2018)



Sources: The Supreme People's Court of China, *White Paper on China's Environmental Resource Trial (2016, 2017, 2018)* – organized by the author

3.3 Administrative Environmental Public-interest Litigation System

3.3.1 A New Component of EPiL – Administrative EPiL

The new EPiL policy starts a new phase of environmental governance in China. It is the first time China included civil society organizations into its judicial system. Nevertheless, the new policy experiences some ambiguity, particularly surrounding the division and effects of public and private enforcement with the introduction of non-state actors in the legal process.

Six months after the commencement of EPiL policy, a critical adjustment was initiated from the central state, to specifically bring in public prosecutors as the exclusive plaintiff in EPiL administrative cases. The National People's Congress, Standing Committee issued the pilot project plan[44] for EPiL in procuratorate system, which started on July 1, 2015 and lasted for two years. The pilot project covered 13 provinces: Beijing, Inner Mongolia, Jilin, Jiangsu, Anhui, Fujian, Shandong, Hubei, Guangdong, Guizhou, Yunnan, Shanxi, and Gansu (Figure 5). The scope of litigation cases included national and social public interest in ecological environmental and resources protection, protection of state-owned assets, transfer of the right to use state-owned land, and other

[44] Decision of the Standing Committee of the National People's Congress on Authorizing the Supreme People's Procuratorate to Launch the Pilot Program of Initiating Public Interest Actions in Certain Areas 2015-7-1. See http://en.pkulaw.cn/display.aspx?id=3d0f61e2d252d325bdfb&lib=law&SearchKeyword=&SearchCKeyword=%BC%EC%B2%EC%BB%FA%B9%D8%CC%E1%C6%F0%B9%AB%D2%E6%CB%DF%CB%CF%B8%C4%B8%EF%CA%D4%B5%E3%B7%BD%B0%B8 (accessed on date February 22, 2020)

fields. During the period of the pilot project, the government's focus was on instituting administrative public interest litigations in cases concerning environmental and resource protection. The Plan highlighted the possibility of issuing new legislation if the pilot experience was successful. As a result, Public-Interest administrative litigation (where the prosecutor is the only entity who can file such a lawsuit) was included in the amendment of the Civil Procedure Law (Article #55) and Administrative Procedure Law (article #25). Figure 5 shows the locations of the selected pilot provinces for prosecutor's Public-interest Litigation.

Figure 5. Pilot Provinces for Administrative Public-interest Litigation practices (2015-2016)

According to the SPP, prosecutors in the first pilot provinces had managed a total of 4,378 public-interest litigation cases in just 18 months, by the end of year 2016. Among which 495 cases were presented to court hearings[45] – including 57 civil litigations, 437 administrative litigation cases, and one administrative and civil case.[46] Numerous studies (Liu 2017; Jiang 2019; Hu and Tian 2016; Hu and Chi 2017; Zhang 2019 – Government report) go into details and claim that the Procuratorate treated 3,763 cases with a pre-court procedure approach, which urged the administrative agencies to take rectification actions. Among which 75.4% of the administrative agencies corrected their misconducts after receiving the Procuratorial Recommendations.

3.3.2 Debates on Administrative EPiL

Before the pilot project of Administrative EPiL, law scholars in China debated the potential conflicts and judicial rationality behind having a prosecutor be the plaintiff in an EPiL case. Among the abundant literature, Lv (2016) and Jiang and Zhang (2017) expressed concern about the new role of prosecutors in EPiL. Both of them discussed the Taizhou Case, one of the first EPiL cases in 2016. The Environmental Protection Association of Taizhou vs. Taixin Jinghui Chemical Company (2016) is a litigation where a local registered civil organization sued six chemical companies for

[45] Statistics from the official website of the Supreme People's Procuratorate of the People's Republic of China at (in Chinese) at: http://www.spp.gov.cn/spp/zdgz/201701/t20170105_177576.shtml (accessed on date February 22, 2020)
[46] Statistics announced by SPP (in Chinese) at: http://www.spp.gov.cn/spp/zdgz/201701/t20170105_177574.shtml (accessed on date February 22, 2020)

mistreatment of the chemical waste discharged into public rivers and the environmental damage caused to the river ecosystem (discuss in detail later). In this case the city government and local prosecutor acted as the supportive party to provide assistance in the process of investigation, evidence collection, and environmental damage evaluation. In the end, the court ruled that the six chemical companies had to pay for environmental damage and restoration efforts, amounting to ~USD 2,330 M [47] – the largest environmental settlement to date (see Section 3.4 for details of this case).

According to Lv (2016) and Jiang and Zhang (2017), the role of the prosecutor in this case had no judicial basis, as the public prosecutor's major judicial mandates are to file criminal public litigations and supervise administrative agencies performances, according to the Constitution. The existing laws did not authorize the public prosecutors to sue individuals and/or private businesses in civil cases. This created conflicts between the role of the supporting plaintiff and supervision organ of the judicial system, defined by the Constitution (Art. 129) and the Organic Law of the People's Procuratorates of P.R.C for prosecutor. Lv (2016) argues that having prosecutors file litigations against individuals and companies, bypassing environmental agencies will sabotage the authority of environmental organs and create confusion. The best government organ to represent the public interest in the preservation of environmental and natural resources should be environmental agencies; leading an environmental litigation is also part of their administrative duties. The prosecutor was not the plaintiff in the Taizhou Case in

[47] The exchange rate USD 1=RMB 6.9 is used throughout this dissertation.

the first place, yet the case provided a basis to explore the potential practical issues in the judicial process, and raised some concerns about the role of the prosecutor: Is the Procuratorate a normal plaintiff or supervision agency in a litigation? If the court ruled against Procuratorate, what is the legal process – appeal or reject the court ruling as a supervisory organ? Can plaintiffs and defendants share equal legal rights in a litigation? If this is not guaranteed, it will be against the jurisprudence of Civil Procedure Law. The authors also argued that a prosecutor as an institution does not have sufficient staff and expertise in environmental cases because the field requires substantial scientific knowledge and professional capacities as well as experiences in environmental science. Hence, capacity barriers will be a challenge for prosecutors in environmental litigations, so the prosecutor may not be the best candidate for EPiL.

Parallelly, scholars underline the newly acquired role of the Procuratorate in EPiL as to counterweigh the administrative power of government agencies, by highlighting and recognizing judicial supervisory role and jurisdiction right of prosecutor (Liu 2017; Hu and Chi 2017; Sun et al. 2017; Hu and Tian 2017; Zhan and Yin 2017; Wei 2017; Zhang 2019 - Government report). In this regard, the Prosecutor benefits from the relative independency from government agencies, and the special judicial status gives the Prosecutor the authority and privilege in conducting investigation, collecting evidences, communicating with other public organs, and pushing government departments for actions (Liu 2017; Hu and Tian 2017; Zhan and Yin 2017). Administrative EPiL can also save judicial resources by resolving the cases through administrative corrections – pre-court processes and Procuratorial Recommendations, increased efficiencies, and

providing the space for relevant agencies to fulfill their designed environmental enforcement duties – to avoid intervening with administrative authority but reflecting the principle of "exhaustion of remedies" before the court (Hu and Chi 2017).

Another study suggests connecting criminal cases to civil litigation and filing criminal litigation against individual officials after an administrative case (Liu 2017). There are worries that the prosecutor will piggyback on the existing criminal database, being zealous to increase the number of cases rather than finding the cases with significant environmental impacts, which oftentimes involve high-profile, financially and politically influential polluters (Zhang Jun, October 2019, Report from Supreme People's Procuratorate to the Standing Committee of People's Congress). Others also voice concern about the conflict-of-interest prosecutors face because of their dependence on government finances at some local sites.[48]

3.3.3 Special Aspect of Administrative EPiL - Prosecutorial Recommendation

The new approach – Administrative PiL (APiL) – is exploratory because it gives unconventional duties and authority to prosecutors. After four years, numerous reports and articles are available that analyze the new administrative APiL practice. In his report

[48] A report article from China of ClientEarth, a European environmental law group, at China Dialogue (Feb 2019): https://www.chinadialogue.net/article/show/single/en/11095-China-s-prosecutors-are-litigating-government-agencies-for-being-soft-on-pollution (accessed on date February 22, 2020)

to the 14th meeting of the Standing Committee of People's Congress (October 23, 2019),[49] Mr. Zhang Jun, the Chief Procurator of the Supreme People's Procuratorate updated the latest progress in APiL. In total, 214,740 PiL cases were filed from July 2017 to September 2019, among which, 187,565 cases were processed with pre-court approach, and 6,353 cases were brought to courts for trials. For all the APiL cases, 54.96% (i.e., 118,012 cases) were environment and natural resource related (EPiL). In this report, Zhang highlighted the significant contribution of the pre-court process. From the accumulated statistics from the first three years since 2017, 97.37% of the pre-court recommendations issued by the Prosecutors received a response from an administrative agency who has an environment-related responsibility, and/or correction actions were taken (including to stop and control environment damage – injunction; enforce penalty administrative decision and dismantle the pollution sources/factories). Here, the key is the prosecutorial recommendation (Hu and Chi 2017).

Under the latest judicial interpretation document (February, 26, 2019) - *Provisions on the Procuratorial Recommendation Work of People's Procuratorates*,[50] Procuratorial Recommendation is "an important way for people's procuratorates to perform the duties of legal supervision according to the law, participate in governance, safeguard judicial justice, promote administration by law, prevent and reduce illegal criminal activities,

[49] The report is available at: https://www.spp.gov.cn/spp/tt/201910/t20191024_435925.shtml (in Chinese) (accessed on date February 22, 2020)
[50] The document is available at: http://en.pkulaw.cn/display.aspx?id=5814c869a0088a53bdfb&lib=law&SearchKeyword=Provisions%20on%20the%20Procuratorial%20Recommendation%20Work%20of%20People%27s%20Procuratorates&SearchCKeyword= (accessed on date February 10, 2020)

protect national interests and public interests, protect the lawful rights and interests of individuals and organizations, and guarantee the unified and correct implementation of law (Art. 2).” The Recommendations can serve to retry defendants, correct incorrect judgments, and help decide to pursue public interest litigations later. Recipients of these notices must respond to the recommendations within two months and provide an official written reply to the prosecutor.

The circumstances under which a Recommendation can be issued are also identified in this document. For the interest of this chapter, I only highlight the most relevant two articles to EPiL practices:

> Article 3: People's procuratorates may directly make procuratorial recommendations to entities involved in cases handled by them, relevant competent authorities at the corresponding level, and other relevant entities; and
>
> Article 10: Where, in fulfillment of duties, a people's procuratorate finds that an administrative authority assuming supervision and administration responsibility for ecological environment and resource protection, food and drug safety, state-owned property protection, transfer of state-owned land use rights and other fields illegally exercises functions and powers or has nonfeasance, causing harm to national interests or public interests, and where the conditions for public interest litigation prescribed in law are met, a procuratorial recommendation of urging fulfillment of duties according to the law shall be made to the

administrative authority under the procedures of handling public interest litigation cases.

According to this document, Prosecutorial Recommendation is an internal governmental practice that only involves public agencies. Such information is not open to society. For instance, Article 20 only regulates that when the matters involve significant social impacts – party committee, People's Congress, government, inspection and supervision authorities, and industrial self-regulation organizations may be copied with the written recommendation. It also implies that the general public will have no access to cases, not to mention their monitoring endeavors.

3.3.4 Why Administrative EPiL?

Prosecutors are subsequently included in EPiL for many reasons. In this chapter I discuss and try to understand how private enforcement influences administrative governance. Thus, it is pertinent to direct our analysis here to the public actor in law enforcement, and to delve in depth into two areas (internal and external) to explore the rationale behind the prosecutorial role in relation to the positions of public and private environmental law enforcement. Primarily, I argue that the central government has aroused the traditional supervisory role of the prosecutor in order to maintain central control while allowing NGOs to become a new engine of public-interest litigations. Internally, the prosecutor also cherishes the opportunity to rebuild its once-lost reputation and authority.

First, scholars (Liu 2017; He and Cao 2018) looked at the history of prosecutor in China. After the People's Republic of China was established in 1949 to September 1954, prosecutors acted as supervisors to monitor and inspect the performance of police, approve arrests, and initiate public prosecutions. In 1954, the constitution and Procuratorate Organic Law defined two major mandates of prosecutor: a) as a supervisory organ; and b) as a representative of state to lead civil litigations, which involve people's general interests. But those civil litigation practices stopped in 1958, when the country stepped into massive political chaos for over a decade. In November 1960, three agencies – the court, procuratorate, and police were combined – and the supervisory role of procuratorate was lost. Later, the procuratorate as a judicial organ was officially dismissed in the Constitution (1975, Art. 25), and policy was authorized to practice supervisory duties. In 1982, the Constituency was revised, and it returned the supervisory role back to Procuratorate, but such role can only apply to supervising the police and is limited in criminal litigation cases (Art.129 & 135). On September 2, 1983, the Organic Law of the People's Procuratorates redefined the function of procuratorates, to supervise judicial activities of people's courts, and supervise the execution of judgments and orders in criminal cases, as well as activities of prisons, to ensure they conform to the law.

In spite of this, the role for procuratorate in civil litigation (especially related to public interest cases) was not clarified in this version. Yi (2017) argues procuratorate began filing public-interest litigations, representing the state (especially in state-owned

enterprises litigation cases), in the late 1990s. The majority of those cases were related to the loss of state-owned assets during the property-transfer reform process – from state-owned to collective property. For example, from 1997-2004, Nanyang City prosecutor, Henan Province filed 79 cases related to public-interest – 56 state asset loss cases, 12 environmental pollution, and nine monopoly cases. Henan Province filed over 500 cases during that period. In 2004, the Supreme People's Court stopped this practice based on the judgement of a case in Shi'en City, Hubei Province, where the city prosecutor sued an individual for illegally embezzling state assets (>USD145,000) by using a state-owned gas station. The court judged that city procuratorate had no standing in civil cases, and the past practices in civil cases will stop.[51]

In July 2015, after almost 10 years, the pilot of APiL with Procuratorate had provided a significant opportunity for procuratorate to explore a new niche that recognized a role within the judicial system of China. Besides criminal litigation, the Procuratorate also explored the supervisory roles in civil and administrative cases. The blooming administrative cases that processed in courts nationwide illustrated the enthusiasm of the Procuratorate towards the new EPiL policy. After a long and winding journey in judicial practices, having lost its supervisory role and undefined role in the judicial system for a long period of time, the Procuratorate now takes EPiL as an opportunity to expand territory and re-build its authority and reputation.

[51] The judge: the Supreme People's Court (2004) (Civil-No. 53#) (effective from June 17, 2004). 最高人民法院［2004］ 民立他字第 53 号(2004 年 6 月 17 日生效执行)

Nevertheless, such an attempt cannot be realized if EPiL policy was not initiated by the central state in the first place. To be more specific, the prosecutor cannot have a distinctive role in environmental law enforcement as a result of the history of the judicial system. In other words, prosecutors have been triggered to assume a clear role in enforcing environmental laws for public interest, after NGOs were not allowed to participate in public-interest judicial litigation through the later adjustment of administrative EPiL. The new adjustment adds a state organ to be sole plaintiff, specifying that the Procuratorate is the only legal entity able to sue government agencies. Consequently, it will influence the dynamics among environmental organs, the judicial system, and state-society relationships, as the addition of a new actor (NGOs) to judicial practices has impelled the state to become cautionary to make changes to policy such as including non-state actors in environmental litigations. This is because the state needs to balance the power relationships of private and public players. It is worth knowing that the new change in EPiL policy eventually limits civil society organizations' roles in litigation as private enforcers, when the state becomes eager to take back the control. How does this new policy contribute directly to the intended result for public enforcers – public organs improving their environmental performance and strengthening public enforcement related to environment on the ground? I expand this discussion in the next section.

3.4 Private Enforcement Complements Public Enforcement as Litigation Laboratories in EPiL

While numerous scholars have argued that American administrative agencies act as "litigation gatekeepers" (Engstrom 2013), I show that private enforcers in China act as "litigation laboratories" by allowing the government to test out novel legal theories, while at the same time creating pressure for public actors to hold administrative government agencies accountable.

The new policy of EPiL represents China putting environmental protection as a prioritized subject matter in the country's development history. For many years, the Chinese state chose to prioritize economic progress regardless of environmental consequences (interview with Chinese law scholar and activist, Fuzhou, December 2018). The state actively cultivated markets for development objectives, including most of the large-scale industries and enterprises in the country. Environmental regulations were lax, and industries became major contributors to pollution. In his first book on environmental issues (*China's Water Crisis*, 1999), Ma Jun – a journalist and later the founder of an ENGO (Institute of Public and Environmental Affairs [IPE]) – warned that 70% of the rivers and 90% of the shallow aquifers in urban areas have been polluted at various levels. Soil contamination is another enormous problem in China, including both agricultural pollution in rural areas and industrial pollution in urban areas. Prior to

August 31, 2018, soil contamination was not regulated.[52] A 2014 nationwide survey showed that 16% of the 6.3 million km^2 of lands surveyed were polluted, with 83% of the contaminated soil samples testing positive for toxic inorganic pollutants such as cadmium, mercury, arsenic, chromium, and lead.[53] These environmental problems overwhelmed the supervising agency – the Ministry of Environmental Protection (MEP) – considering the workload and technical challenges of monitoring and controlling omnipresent environmental pollutions across the whole country. MEP was superseded in 2018 by Ministry of Ecology and Environment (MEE), a new agency that combines different government departments whose mandates was related to natural resources, environment, and climate change. Under the (former) MEP institutional setting, pollution control was the most important mandate,[54] which placed focus on ex-post effects rather than ex-ante efforts. This setting was attributed to the facts that vast environmental pollution problems have surfaced requiring MEP's full efforts, and also due to the uncertainty in the preventative legislation to address environmental problems.

After reviewing the civil organization's EPiL cases during the last five years, I argue that the role of the NGO is to act as a frontline agent to identify and file the most significant cases with broader social and localized characteristics; and also, to act as a

[52] The Soil Pollution Prevention and Control Law of the People's Republic of China was issued in August 2018. The law document in both Chinese and English can be found at: http://en.pkulaw.cn/display.aspx?id=2bbcddcda54e1659bdfb&lib=law&SearchKeyword=&SearchCKeyword=%CD%C1%C8%C0%CE%DB%C8%BE%B7%C0%D6%CE%B7%A8. (accessed on date February 22, 2020)

[53] This survey was released by the Ministry of Environment Protection in 2014. The report is available in Chinese at: http://www.ndrc.gov.cn/fzgggz/ncjj/zhdt/201404/t20140418_607888.html. (accessed February 22, 2020)

[54] The MEP official website (archive) at: https://web.archive.org/web/20070405100457/http://www.zhb.gov.cn/ (accessed February 22, 2020)

watchdog that oversees the government's performance. Moreover, NGOs can identify and pursue these ex-ante issues, which as one of the following cases in this section (Green Peafowl case) shows, have not been remediated by governmental regulators and courts. NGOs can consequently advocate to fill regulatory gaps and thereby ensure comprehensive protection and serve the broader social/public interest – controlling environmental health risks to public in the future.

In next two sections, I will analyze two EPiL cases from civil organizations, where one tried to address the risks of natural habitat loss due to the construction of a hydropower plant prior to any actual harm being done, and another that was briefly mentioned in the introduction on desert pollution, the Tengger Desert Case. The latter will be discussed in detail, being a major testing ground for a number of novel legal theories and methodologies that proved to pave the way for subsequent public and private enforcement using EPiL.

3.4.1 Green Peafowl Lawsuit

The Green Peafowl lawsuit, described in this section, illustrates how an NGO filed a case that aimed to prevent environmental damage before it happens, which would not have surfaced without private enforcement. This case also contributes to fill a regulatory gap. It provides an example of NGOs complementing existing public enforcement by ensuring comprehensive protection by seeking prospective relief. In the process, the

private actor also exerted pressure on public actors to be accountable and to serve a broader social interest.

The case was based on the need to protect a rare bird and its habitat. The population of the green peafowl (*Pavo muticus*), a species endemic to China which was listed as endangered in the International Union for Conservation of Nature's Red List (IUCN Red List) in 2009, is estimated to have dwindled to approximately 500 individuals (Kong et al. 2018). The construction of the ~ USD 536 M Gasa Hydropower Plant was initiated in 2016 in Yunnan Province's city of Yuxi, the last major habitat of the green peafowl. The project followed many other hydropower dams constructed in this region marked with rich water resources as upper streams of many international rivers, such as the Mekong, the Salween, and the Red River, all flowing through one of the top biodiversity hotspots in the world.[55] As the habitats declined over years of intensive hydropower development in this region, the remaining areas became especially posed for and sensitive to environmental risks.

In July 2017, Friends of Nature (FoN) filed an EPiL case suing Hydrochina Corporation Xinping Development Company Ltd. and Powerchina Corporation Kunming Survey, Design and Research Company Ltd. The case underlined the threats and damages that

[55] Conservation International (CI) identified 36 bio-biodiversity hotspots globally, which represent just 2.4% of Earth's land surface, but they support more than half of the world's plant species as endemics — i.e., species found no place else — and nearly 43% of bird, mammal, reptile and amphibian species as endemics. Yunnan Province (Southern China) is included in the Indo-Burma hotspot. More references can be found at the official website of CI: https://www.conservation.org/priorities/biodiversity-hotspots; and Critical Ecosystem Partnership Fund (CEPF): https://www.cepf.net/our-work/biodiversity-hotspots (accessed February 22, 2020)

the currently under-construction hydropower station could pose to the natural habitats of endangered species. The NGO claimed there will be severe risks of damaging the ecosystem with significant global ecological value, and the species that are living in this habitat. Harming an endangered biodiversity hotspot of the world underscores a public interest issue (interview with FoN Director General and legal team leader, Beijing, November 2018). The particular ecological arguments from FoN are as follows.

- The construction and operation of the station will flood and submerge the low-lying region, and some of the major habitants of green peafowl, which is originally a part of the Shuangbo County Dinosaur River Nature Reserve; and potentially lead to regional extinction of this species.

- Construction of the station includes clearing of trees along the riverbanks and some road construction, which will pose threats to a number of species including Cycad (Class I National Protected wild plants) and Hume's pheasant (*Syrmaticus* humiae [Class I National Protected wild animal]). It will then risk the degradation towards the only and relatively well-preserved monsoon rainforest ecosystem in dry and hot valley in the Red River Watershed.

This case was a preventative (as injunction in US) civil EPiL suit that concerned future potential ecological damages. Specifically, it questioned the design of the construction project and the rationality and objectivity of its environmental impact assessment and

raised the concern as to whether the project was part of the national hydropower policy (interview with FoN legal team leader, Beijing, November 2018).

I see shared commonalities between this case and the Tennessee Valley Authority vs. Hiram Hill et al., 437 U.S. 153 in 1978. The US Tennessee case was ruled based on the interpretation of the Endangered Species Act of 1973. The green peafowl case intends to include the ecological and social impacts of a hydropower plant into the court discussion, while expanding the focus from species protection into a public interest lens of the ecological landscape, which covers human, animals, and plants as a whole in this region.

Dam construction was halted quickly after the filing of the case, though this was primarily a result of publicity arising from the lawsuit and not the lawsuit itself.[56] Also, the delay was only temporary. A court hearing started a year after the acceptance of the case by Kunming Intermediate People's Court in August 2018. While it is still ongoing and there is yet a court ruling on this case, there is progress that is pertinent and will likely contribute to the basis for the eventual rulings. These include province-wide surveying of the species, publishing of conservation zoning plan by Yunnan province, and passing biodiversity protection regulations at the provincial level, which has been in effective since January 1, 2019.

[56] A sample of news report and articles can be found at: *https://www.chinadialogue.net/blog/9747-Dam-building-threatens-endangered-green-peacock/en* (accessed February 22, 2020)

This litigation is significant for the NGO and the country, because it represents one of the first two cases that seeks prospective relief that would prevent damages to the ecosystem and endangered species to occur rather than controlling and/or compensating environmental harms that have already happened. The first court trial (March 20, 2020)[57] ruled that the company had to halt all the construction projects and conduct a new Environmental Impact Assessment (EIA).

As mentioned, the main mandate of the environmental supervising agency remains pollution control. For prevention of potential environmental harm caused by development projects, the agency relies predominantly on the EIA mechanism, established about a decade ago, which may exhibit some flaws in rationality and objectivity in practice. Hence, the Green Peafowl Case shows that an NGO is filling voids in the legal system, by ensuring risks prevention as well when environmental protection is a concern, which otherwise would not be attended to or pursued by the supervising agencies or the judicial actors.

This is the first environment-related legislation to place focus on ex-ante efforts rather than those after damage has already happened. This eventual shift in focus (preventive vs. corrective) in legal statutes is made possible by NGOs, the establishment of litigation laboratories that I argue in this section. They contribute by bringing up the equal

[57] One of the news reports on the court trial and the case is available at: https://www.sixthtone.com/news/1005387/yunnan-courts-ruling-may-not-stop-damaging-dam%2C-activists-warn (accessed April 17, 2020)

importance of prevention in environmental protection efforts through their pursuit of allowed and legalized actions in this aspect.

3.4.2 Tengger Desert Pollution Case

This case illustrates how a new policy (EPiL) concerning public interest can help clarify who can be the plaintiffs (through explanation of NGO's legal standing by Supreme People's Court), the types of environmental cases that can be included under the policy, and new legal theories that can be proposed and applied in future EPiL cases. Like many other Chinese national policies, EPiL policy is more of a framework when it was introduced, thereby allowing sufficient flexibility that can accommodate variations across the country. There were no detailed clauses available to guide every step of its implementation. The first EPiL cases filed by civil organizations were innovative tests, where the cases contributed to identifying new boundaries and rules to guide future actions as they proceeded in courts and consequent rulings were given. The Tengger Desert Pollution Case was such a test. It resulted in urging the state to clarify what kind of environmental cases civil organizations could file (legal standing rights in environmental pollution cases), as subsequently upon closure of this case, the explanation was formalized as legal guidelines applying to the country through its listing as a Guiding Case (Case #75).

In January 2017, the Tengger Desert Pollution Case was selected by the Supreme People's Court (SPC) to include on its list of China Judicial Guiding Cases – a judicial

system that began in January 2012 – and it had accumulated 112 cases by February 15, 2019.[58] The Guiding Case System (GCS) was designed to provide guidance to different judges and courts at decentralized levels with the summarized experiences from individual litigation cases. Considering the imbalanced economic and social development across the country and complexity of environmental disputes in urban and rural settings, the GCS aims to level differences encountered under different adjudication among some courts and even different judges within the same court. Its ultimate objective is to "unify the scales of justice and standards of court decisions and regulate judges' discretionary power" (Wang 2013). The local courts can use the Guiding Case to the extent possible on a voluntary basis. The Tengger Desert Pollution Case was the first EPiL case included on this official list. Up until January 2020, among a total of 139 GCSs, there are only five from civil organizations (Cases #75, 130, 131, 132, & 134).

One primary outcome of the Tengger Desert Case has been the clarification of civil (social) organization's legitimacy to file environmental public interest litigations.[59] With this Guiding Case, the Supreme People's Court of China sent a signal to courts across the country that environmental public interest litigation is legal, and a valuable tool for ensuring environmental accountability[60]. The case also set an example of

[58] The SPC's website for Guiding case is at: http://www.court.gov.cn/fabu-gengduo-77.html; and by January 2020, there are in total 139 cases listed. (accessed February 22, 2020)
[59] Key judgement points are summarized at the beginning of the case details, which are mainly about civil organizations' roles and definition in EPiL. See http://www.court.gov.cn/fabu-xiangqing-34322.html (accessed February 20, 2020)
[60] An example of the discussion can be found at: https://www.eli.org/vibrant-environment-blog/key-victory-citizen-suits-china (accessed February 20, 2020)

collaboration between civil organizations and media (mass and social media) to urge state agencies to be responsive and actively participate in law enforcement.

Since September 2014, multiple media outlets have reported on the untreated wastewater dumped by chemical plants into the Tengger Desert.[61] Chemical plants situated in industrial parks set up near the desert at the junction of Inner Mongolia, Ningxia, and Gansu provinces were found and exposed by reporters, for their illegal discharge of untreated sewage through underground pipes to rectangular pits about the size of several football fields.[62] The sludge would naturally evaporate, then deposits removed and buried deep in the desert. In Tengger Industrial Park, enterprises used chemicals such as nitrate, naphthalene, benzene, and coal chemical and metallurgical raw materials in their production processes. Another pollution source came from papermaking and packaging printing plants in Zhongwei Industrial Park.

The local districts' environmental protection departments and public security bureaus responded by establishing investigation and accountability procedures for the pollution. In December 2014, after the exposure of the pollution incident, President Xi Jinping instructed the state to establish an inspection team to convince the Tengger Industrial Park to carry out large-scale rectification. Following the establishment of the inspection

[61] Online resources provided by Environmental Justice Atlas organization on Tenggerdesert pollution case, at: https://ejatlas.org/print/1-untreated-waste-water-dumped-by-chemical-plants-in-tengger-desert-inner-mongoliachina (accessed February 20, 2020)

[62] One key media report was done by a photojournalist "*Death of the desert*", an exclusive on TenggerDesert, first published in the Beijing News, September 2014. See https://www.chinadialogue.net/article/show/single/en/8015Deathofthedesert (accessed February 20, 2020)

team, in May 2015, the Ministry of Ecology and Environment (MEE) issued an official notice, requesting corresponding provincial environmental protection agencies (EPAs) to initiate a special supervision project for this case (May 2015–September 2015) and report the progress directly to MEE. Other relevant government stakeholders were copied on this official notice, including local governor, regional environmental monitoring center, Central Bank, and the China Securities Regulatory Commission.[63]

The first legal case of the Tengger Desert Pollution was ruled on April 30, 2015. The defendant Ningxia Mingsheng Dyeing Company was convicted of environmental pollution and was fined ~USD 725,000. The defendant Lian was convicted of environmental pollution crime (under Crimes of Undermining Protection of Environmental Resources: Criminal Law of P.R.C, Article 338) and was sentenced to 18 months in prison, suspended for two years, and fined ~USD 7,250.

The administrative sanctions expanded to a total of 24 people from the Inner Mongolia Autonomous Region Environmental Protection Agency, who were held accountable and punished with disciplinary actions from the Party branch and the higher-level government. In Ningxia Zhongwei City, eight investigations have been filed, and 15 public officials were given disciplinary actions or criticized for the negligence of their duties.

[63] The official notice from MEE (in Chinese) at: http://www.mee.gov.cn/gkml/hbb/bgt/201505/t20150521_302081.htm (accessed February 20, 2020)

In June 2015, the Supreme People's Procuratorate named the Tengger Desert Pollution Case as one of the key cases that the procuratorial organs pursued to protect the environment.[64] According to the SPP, the Tengger Case exhibited actions taken by different government actors in enforcing public policy, and "maximized the functions of arrest, prosecution, investigation and prevention" in a comprehensive manner. The Office of Supervision over Criminal Investigation, the Public Prosecution Office, and the Prosecutor's Office for Malfeasance and Tort of the Supreme People's Procuratorate listed this case as a model case that was supervised and handled under public supervision. It also demonstrates that the Supreme People's Procuratorate "joined hands with the Ministry of Public Security and the Ministry of Environmental Protection, among others, to form the supervision group to severely punish criminal acts and form the overall resultant force in ecological environment protection" (quoted from the SPP's official document, see footnote 37).

On August 13, 2015, the China Biodiversity Conservation and Green Development Foundation (CBCGDF), an environmental NGO, filed a public interest litigation case at the Intermediate Court of Zhongwei City, Ningxia against the same eight chemical companies for their illegal discharge of untreated industrial wastewater into the Tengger Desert. The case brought by the NGO was an environmental public interest litigation – for the protection of the public good, i.e., desert. The EPiL case, different from the previous criminal one launched by the government, required the court to sentence and

[64] Ten Model Cases concerning Procuratorial Organs' Reinforcement of Judicial Protection of Ecological Environment Issued by the Supreme People's Procuratorate at: http://www.lawinfochina.com/display.aspx?id=19650&lib=law (accessed February 20, 2020)

order the defendant to bear civil liability such as stopping the infringement, eliminating the danger, restoring the original condition, compensating for the loss, and offering a public apology.

This NGO-filed EPiL case experienced some turbulence in the first five months. The Intermediate Court dismissed the case on the grounds that CBCGDF did not have standing to be the plaintiff of the case under the Environmental Protection Law (EPL). The reason the NGO lacked standing, according to the Intermediate Court, was because it failed to meet the statute eligibility that the organization shall focus on public interest environmental protection activities. The court reached this ruling by pointing out that the NGO's articles of incorporation did not include public interest environmental protection activities explicitly and specifically as the organization's purpose. Later in the year, the high court at provincial level sustained the trial court's decision upon CBCGF's appeal for the same reasoning. Subsequently, in late 2015, the NGO appealed to the Supreme People's Court, China's highest appellate body. On January 29, 2016, the SPC eventually reversed the decision of the High Court and ruled that CBCGDF had standing to sue, based on the liberal interpretation of the statutory requirement for standing.[65] According to the SPC, the courts determining the eligibility of social organizations in EPiL should focus on: a) whether the organization's purpose and scope of business include the protection of environmental public interests, b) whether it had

[65] The Supreme Court's ruling was based on the interpretation of the statute of NGO's standing status, as outlined on Supreme Court's official website (in Chinese) at http://www.court.gov.cn/fabu-xiangqing-34322.html; a translation of this decision is also available at Stanford Law School's Guiding-Case Research Project, at: https://cgc.law.stanford.edu/guiding-cases/guiding-case-75/ (accessed February 20, 2020)

actually engaged in environmental protection public interest activities (prior to the lawsuit), and c) whether there was an association between the environmental public interest that it sought to protect (in this case) and its purpose and scope of the business.

In February 2016, Zhongwei Intermediate People's Court promptly accepted the application of CBCGDF suing against a total of eight enterprises for soil pollution damage compensation. The defendant parties agreed to solve the disputes through court mediation and started to remediate the contaminated sites and clean the polluted groundwater.

On August 28, 2017, CBCGDF and the defendants reached mediation agreement, having the eight polluting enterprises involved in the case paid ~USD 82.5 M for the restoration of the contaminated soil and for the prevention of polluting soil again, and another ~USD 0.87 M to a public welfare fund for environmental damages, and for the plaintiff's attorney fees, expert witness fees, and travel expenses. The total of ~USD 83 M settlement of the EPiL case, filed by CBCGDF, is nearly 100 times larger than the earlier public prosecution fine. The case is also the largest so far achieved in an environmental public interest case in China as a result of court mediation.

In its judgement, the Supreme People's Court stated that "active in environmental public interest activities" was not just limited to direct involvement in improving the environment but included other activities that benefited environmental governance such

as public education, legal aid, and bringing public interest lawsuits."[66] Hence, the legitimacy of an NGO's role in EPiL was reinforced and public interest was focused for the first time in the Chinese legal system through this case.

The Tengger Desert Case represents a significant development of Chinese NGO's public interest litigation efforts. It could encourage more NGOs to bring suits to polluters, representing public interest and goods.[67] The case also confirmed that deserts were a type of environment that can be included under public interest lawsuits, being the first desert pollution case. In this case, the environmental damage to the desert might have been overlooked, and desert as an environmental public good not necessarily included, because the use of these lands by human and impacts on them when contaminated were minimal. Yet, regardless of its use or effects on human activities, we see from this case that a desert is an ecosystem and thus is a common good that falls under the definition of environment for protection by the EPiL policy. At the same time, private enforcers, acting as litigation laboratories, were able to establish the social and ecological costs of the pollution incidents, which had not been done before under public enforcements. The scope of the petalitres for the criminal violations, over 100 times the original amount, reflects the different perceived values of a desert – a public-owned ecological environment.

[66] More details can be found in the report from China Dialogue, at: https://www.chinadialogue.net/blog/9715-Six-important-environmental-cases-/en (accessed February 20, 2020)

[67] The latest Annual "White Paper "on Environmental Resource Court Trails issued from the Supreme Court (May 8, 2020) indicates that courts at all levels accepted 179 EPiL cases filed by NGOs in year of 2019. This statistic reflects the increasing effort from civil organizations. The report (in Chinese) is posted at: http://www.court.gov.cn/zixun-xiangqing-228391.html (accessed February 20, 2020)

Perhaps the more prevalent influence from this case is the pressure created for government prosecutors to enforce environmental laws. As China Daily, a mainstream Chinese newspaper, reported two days after the court verdict (August 28, 2017), [68]

> *"*The Tengger Desert pollution case also shows some local governments no longer focus on GDP-centric governance; instead, they accord due priority to environmental and ecological protection. Besides, the judiciary, too, attaches importance to public interest litigation for environmental protection, which used to be difficult because of the indifference of local authorities and the difficulty in collecting evidence.*"*

A year after this EPiL was closed, the media and the NGO followed up on the remediation effort in the area and the management of the compensation fees from the court ruling. They had noticed and reported subsequently in an article that "Central Government has become stricter on environmental enforcement in the Northwest region in recent years". [69] The central government promptly dispatched a second team of national environmental inspectors to Ningxia Province to evaluate past enforcement efforts and results in June 2018. They explained that one company had been ordered to shut down with immediate effect when it was found that its production facilities had not

[68] "Tengger case shows even big firms can't escape penalty for polluting", China Daily, August 30, 2017, at: http://www.chinadaily.com.cn/opinion/2017-08/30/content_31304856.htm (accessed February 10, 2020)

[69] The exact wording in Chinese reads as "近年来中央对西北地区的环保督查逐渐趋严"

been retrofitted per local environmental protection agency's request with former violation notices but continued production. In addition, a local government official admitted that the NGO's case was in fact a "lesson learned" for the local government to not take environmental protection lightly.[70] In November 2019, an inspection team from the Ministry of Ecology and Environment was sent to Tengger Desert to investigate the newly discovered pollution cases.[71] Government agencies in undertaking environmental enforcement have become more serious and effective after the Tengger Case.

3.4.3 Judicial Practices on Ecological Restoration Liability

In addition to the difference in damage awards ordered by the local courts and the Intermediary People's Court's differentiating conviction between criminal acts and public interest breaches, respectively, as just described for the Tengger Case, the issue of environmental damage liability has also become a testing ground through EPiL. A new judicial concept, Ecological Restoration Liability, emerges as a result of work conducted by EPiL groups. Through cases brought by the NGOs, the NGOs developed this new theory of liability, as well as pioneered the concept of injunction in

[70] "Tengger Desert Pollution Case: 6 million Fines Go Undecided, CBCGDF Expects the Implementation", October 11, 2018, CBCGDF website at: http://www.cbcgdf.org/English/NewsShow/5001/6368.html. Original article quoted was published and appeared on https://c.m.163.com/news/a/DTM04TOT00259ARN.html?spss=newsapp October 9, 2018. (accessed February 20, 2020)

[71] News report on this new round inspection mission can be found at: https://www.scmp.com/news/china/society/article/3037117/pollution-scandal-near-china-nature-reserve-tengger-deserts-edge; or https://www.chinadaily.com.cn/a/201911/11/WS5dc8af91a310cf3e355767c0.html (accessed February 20, 2020)

environmental damage litigations, as existing theories have proven to be insufficient for application in these cases.

The General Provisions of the Civil Law of the People's Republic of China identifies 11 civil liabilities.[72] One liability is related to the concept of ecological restoration and it has been used as a basis of interpretation in environmental lawsuits. The civil liability of *Restoration to the Original Condition* (Article 179, [5]) is mainly developed based on the principle of protecting goods, properties, and/or people. However, the concept of ecological restoration liability, with environment as its subject, is very different from the conventional understanding of damage liability in Civil Law (Lv 2017). For instance, once a freshwater environment is damaged, it can be difficult, if not impossible, to restore the damaged ecosystem back to its original condition. Secondly, the quantitative evaluation of damages requires courts and judicial staff to possess technical knowledge and expertise in biology and ecology from external resources. All these situations raise new questions for civil courts, when the conventional approach is used to interpret environment similarly as material goods, properties, or people. Therefore, in order to better understand and explain what the ecological restoration liability will be, actual cases are critical as collecting and testing grounds for new information and novel methods.

[72] The General Provisions of the Civil Law of the People's Republic of China (2017 revision), Article 179 Civil liability shall be assumed primarily in the following manners: (1) Cessation of infringement. (2) Removal of obstacles. (3) Elimination of danger. (4) Restitution of property. (5) Restoration to the original condition. (6) Repair, reworking, or replacement. (7) Continued performance. (8) Compensation for loss. (9) Payment of liquidated damages. (10) Elimination of adverse effects and rehabilitation of reputation. (11) Making an apology.

The Standing Committee of the National People's Congress discussed twice (June and October 2016) how to best include ecological restoration liability into Civil Law revision (2017) as a new clause. In fact, there are an increasing number of environmental cases being requested for civil liabilities, and NGOs are asking for injunctions for environmental damage in their cases. However, the final revision did not accept the suggestions, based on the argument that general civil liability of "Restoration to the Original Condition" would cover the environmental case scenarios. This hesitation from legislative authorities indicates a level of uncertainty at the state level on ecological cases, yet it provides opportunities for law practitioners to file first-hand cases to leverage for future legislation.

Under the EPiL policy, and to a larger extent as a result of pioneering EPiL cases, civil organizations are legally qualified (and officially recognized after rulings of initial cases) to file different types of cases to test alternative remedy options, environmental problems, pollution scenarios, investigation and cognizance of damage, and so on. These attempts allow the judicial system to develop new guidelines and principles for environmental civil cases. Cases from an NGO raise the argument on the uniqueness of ecological damage and its tie-in liability no longer applicable or sufficient under the traditional civil tort liability definition.

a) Ecological Environmental Tort

Ecological environmental damage is a kind of tort,[73] and ecological environmental restoration as one of the remedy choices began to appear in judicial rulings starting from two judicial interpretation documents issued in 2015 (Lv 2016 b).[74] Ecological restoration liability has been specified and endorsed by the Supreme People's Court as the fundamental value of environmental justice (Li 2018),[75] and became a popular type of remedy in environmental public interest damage cases beginning in 2015 (Lv 2016 b). Argued by environmental NGOs and ecologists, to engaging the polluters into environment restoration has a punitive nature while it also can create educational effects, which pushes polluters to learn and better understand environmental issues.

Gong Gu (2016), a law professor at Zhejiang University studied the very first 38 EPiL cases filed by civil organizations in 2015 – the first year EPiL policy became effective. His work highlights that 23 out of 38 cases had included ecological damage restoration liability in their appeal, a recurring theme in the onset of these NGO-led environmental lawsuits. Ecological damage restoration liability requests polluters to restore

[73] "Interpretation of the Supreme People's Court of Several Issues on the Application of Law in the Trial of Disputes over Liability for Environmental Torts" (Date of issue: June 1, 2015). Article 14.
[74] Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations" (Date of issue: June 1, 2015); and "Interpretation of the Supreme People's Court of Several Issues on the Application of Law in the Trial of Disputes over Liability for Environmental Torts" (Date of issue: June 1, 2015).
[75] The newest revision of the General Provisions of the Civil Law of the P.R.C (effective since January 1, 2017) included one new article into the context: *Article 9: The parties to civil legal relations shall conduct civil activities contributing to the conservation of resources and protection of environment*.

ecosystems or the physical sites back to pre-damage status.[76] Among these cases (38), civil organization plaintiffs demanded that polluters restore the damaged environment or assume restoration costs (23), pay for ecosystem service loss in monetary terms (10), and asked for environment damage compensation under the appeal of cessation of infringement (29). Another study by Li Zhiping (2018), a professor at Zhongshan University's Law School, reviewed 15 officially ruled civil cases between 2014 and 2016, [77] which included the ruling on compensation for ecological restoration responsibility for polluters. Among those, 12 cases were filed by civil organizations, while three cases were filed by local prosecutors. Again, we see ecological restoration liability has been anemic in the past, but now the prevalent push of this concept is by NGO under its given role in EPiL.

These early experimental experiences from civil organizations cases helped the Chinese judicial system test evaluation and investigation methods in environmental cases and develop judicial principles in litigation rulings. The cases brought by civil organizations raise numerous questions such as how to define damages, to what extent can damages be quantified and qualified under the particular environmental theme – water soil, air, forest…; how to calculate environmental damage in monetary terms, given the challenges that environmental scientists have not yet reached a consensus on practical questions of environmental restoration; – to what extent can we know that the

[76] Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations" (Date of issue: June 1, 2015); Article 20-1.
[77] Official sources announced that 45 EPiL cases are filed with courts in year 2015. The author collected 38 cases from openly accessible resources for this analysis.

environment is restored to its original status? What is the baseline to define "original status"? How to decide the punitive fees and costs, what is the standard/principle of restoration, and the role external expertise in court under this context? Regarding managing restoration funds, is public participation an essential component in the process? In the first year of EPiL implementation, civil organizations filed cases aimed at demonstrating the diversity of environmental damage, infringement, and environmental torts.

These cases covered water[78], soil[79] and air pollution[80], forest destruction[81], oil spill in open oceans[82], solid waste disposal[83], mangrove forest destruction due to development projects [84] and wetland [85] or historical site [86] destruction because of real estate

[78] Cases can be found (but not limited to): All-China Environment Federation (later after ACEF) sue individual person (Fang Yunshuang) for polluting the public fishpond; Taizhou Environment Federation sue six (chemical) companies for waste water discharge into the public river in Tai Xing City, Jiang su Province (the Taizhou Intermedia Court ruled the six companies to pay RMB 160.67 M to compensate environmental damage of the river and eco-system restoration); Chongqing Green Volunteer Association sued local mining company for polluting reservoir; Friend of Nature sued Wal-ai-te chemical company for illegally release industrial waste to public river.

[79] Cases like: Tengger Desert Pollution case - China Biodiversity Conservation and Green Development Foundation (CBCGDF); Chang Zhou Soil pollution case - Friend of Nature; Changzhou Environment Public-interest Association sued private company and a legal person for polluting land soil. (ruled by courts)

[80] Cases include (but not limited to): All-China Environment Federation (ACEF) vs. Zhenghua Company, Shandong Dezhou for illegal air emission (ruled by court); Friend of Nature vs. Hyundi for vehicle exhaust air emission; China Biodiversity Conservation and Green Development Foundation (CBCGDF) vs. Volkswagen AG for exhaust air emission; Gui Yang Public Environmental Education Center vs. Gui Zhou Sanyuan Co., for air pollution. Friend of Nature vs. National Grid, Gan Su Branch.

[81] Cases like Fu Jian Green Home Volunteers & Friend of Nature vs. four individual persons (Xie Zhijing) for destroying forest because of illegal mining activities.

[82] China Biodiversity Conservation and Green Development Foundation (CBCGDF) vs. Kang Fei Petrol Co., for oil spill

[83] Gui Yang Public Environmental Education Center vs. Guizhou Hengda Cement Co.,; Friend of Nature vs. Black Peony Co.,;

[84] China Mangrove Conservation Network and CBCGDF vs. Hai Nan Mangrove Tourism Development Co., & Friend of Nature and All-China Environment Federation (ACEF) vs. Hai Nan Fu Li Real Estate Co., (2019.9)

[85] Friend of Nature vs. Du Shi Fang Yuan, residential management company (mediated).

[86] CBCGDF vs. Zheng Zhou Hua Rui Real Estate Company and Jin Yun Construction Company.

development, and endangered species protection.[87] The majority of these cases are still winding their way through court trials and investigations. Four have reached their final disposition, and several were settled by mediation. These cases raise innovative views on tort classification, which have not been covered in public enforcement. For instance, there are cases against automobile companies for exhaust air emission cases against food delivery companies for ignoring customers' requests for forgoing single-use utensils, and a case against a China-power Network for failing to buy electric power from local small-scale power stations, instead of buying power from coal-power plants, which increased carbon emissions. These cases appear at the court for the first time, urging judicial system to respond to the rapid changing environment, compel for new policies and legislations to regulate environmental misconducts.

b) Respective Legal Liability

While the notion of ecological restoration liability is not yet customary to most legal actors, the first cluster of NGO cases aimed to ensure that ecological restoration will be listed as a selection of remedies. The iconic EPiL case filed on January 1, 2015 (exact effective date of the policy) requested ecological restoration as a remedy. In this case, Fu Jian Green Home Volunteer and Friends of Nature (FoN) sued three individuals (Xie Zhi Jing and two others) who mined timber near Nanping City, Fujian Province. These individuals failed to extend their mining license and, together destroyed 18,890.6 m^2 of forests even though they had not obtained a forest land-use license. The two NGO

[87] Friend of Nature vs. HydroChina Xinping Development Co., (Green Peafowl Case).

plaintiffs requested that the defendants restore the damaged forest land within three months or pay ~USD 159,420 as an ecological restoration fee if they failed to meet the timeline. Moreover, the defendants were also responsible for compensating the loss of ecosystem services with a fee amounting to ~USD 194,200.

A third party was hired at the time to provide technical support in calculating the ecological restoration costs – Beijing Zhonglin Assets Appraisal Co., which specializes in appraising forest resources. In addition, this company is affiliated with the State Forestry Administration, where it has experience in forest resource evaluation, payment for forest ecosystem services, and forestry carbon credit calculations, as these are almost exclusively the work of the state in the Chinese context. Their scientific expertise in the forestry field is the core reason the two NGOs commissioned the company to work on this case. Nevertheless, it is also clear their expertise was not directly related to judicial evaluation purposes for environmental damage. Because of the novel application of valuing natural resources in civil tort disputes, despite the company's extensive technical experiences, it did not have any previously accepted methodology to use as a reference. Nevertheless, the requirement for ecological restoration liability and ecosystem service loss compensation has been supported by the court ruling at the end (see the Civil Judgement by Fu Jian High Court: [2015] Civil-Final-No. 2060, translated by the author). This shows how different actors in one of the early and significant EPiL lawsuits navigated and moved into the unfamiliar but imminent territory of ecological restoration. Especially, the ecological restoration concept used to only apply to environmental technical projects, rather than at the court.

Meanwhile, another case briefly discussed in Section 3.3 illustrates how civil organizations through EPiL have acted as litigation laboratories for the new ecological restoration liability concept and its legal adoption from the perspective of cost calculations. In August 2014, Taizhou City Environmental Federation (an NGO) sued six chemical companies (including Taixing Jinhui Chemicals Co. and Jiangsu Changlong Chemical Co.) for their illegal discharge of acid waste into a public river system during the period from October 2012 to February 2013 (hereafter Taizhou Water Pollution Case). The company paid individuals (Mr. Dai Weiguo, Mr. Yao Xueyuan, among others) to dispose the chemical acid waste, knowing that those individuals were not licensed to do so.

In 2014, Jiangsu Society for Environmental Sciences (JSSES) was invited by Taizhou City Prosecutor and Environmental Protection Bureau to identify and assess the environmental pollution damage. In its Environmental Pollution Damage Assessment Report, JSSES indicated that in order to reduce the environmental risk in the river water system to an acceptable level (a total of 25,943,795 tons of acid waste was discharged during the period from January 2012 to February 2013), it would cost ~USD 368 M. And in the scenario that the six companies followed the national regulation of toxic waste to dispose the acid, a total of ~USD 531 M would be needed. Based on this information, JSSES resolved that the ecological damage cost ranged from RMB 700 to 1754.31 for every ton of acid waste discharged. Taking into account that the river also provides drinking water to the residents in the region, (categorized as Class II water),

JSSES suggested the environmental damage restoration cost should be 4.5 times the virtual disposal cost (reflecting the sensitivity of environmental functions). In the final verdict, the Supreme People's Court closed the case on January 31, 2016 (2015 Civil - Shen-No. 1366 - translated by the author) and ruled that the six chemical companies had to bear the ecological restoration damage compensation liability for a total of ~USD 2,329 M. Among which, approximate 40% of that amount was to be used to improve technology in the factories, which aims to help the business to reduce future environmental misconducts.

c) Calculation of Ecological/Environmental Liability

During court trials, how this restoration compensation value is calculated became the spotlight of the case. JSSES, used the *Virtual Disposal Approach* as the calculation basis. This approach was first included, as one of the recommended technical methodology to calculate environmental damage, in the official regulation document - *Several Opinions on the Environmental Pollution Damage Assessment* by Ministry of Environmental Protection (MEP, later Ministry of Ecology and Environment [MEE] in 2018) back in 2011.[88] The official regulation was issued to provide guidance for technical assessments of environmental damage cases, which can eventually be used to support environmental judicial cases (prior to EPiL policy). The document was issued under the circumstances that environmental pollution misconduct cases have increased rapidly during a period

[88] The document (in Chinese) can be found at: http://www.mee.gov.cn/gkml/hbb/bwj/201105/t20110530_211357.htm (accessed January 21, 2021)

when environmental legislations lacked detailed clauses to define legal liability and the technical assessments to endorse the judicial ruling. In practice, the methodology outlined in this document has been used, in most cases, to assess the costs of environmental projects.

In this first document,[89] MEP defined assessment procedure, principles, and alternative methods. The assessment methods focus on the actual damage costs to individual persons, properties, environmental emergency response activities, investigation costs, and pollution remediations. When pollution remediation occurs, it aims to reduce the environmental risks to an acceptable level, noticing that this risk is defined to meet human needs from the environment rather than assessing and protecting the biological or ecological health of the environment itself. Secondly, assessments would be based primarily on the actual costs of activities. Only under situations where restoration projects cannot be done, then the "virtual disposal approach" would be recommended. (Section 4.5.1 of the *Recommended Methods for Damage Assessment* [Edition I]). This first edition places emphasis on the real direct costs for pollution remediation under different environmental cases (including surface and ground water, air, soil, and marine water). In the situations where the virtual costs method applies, an average cost from the last three years (of the agencies who will be responsible for the restoration project) and the quantity of pollution will be considered. The method neglects some important features of the environment; for instance, the flowing characteristic of some

[89] The document (in Chinese) can be found at: http://www.mee.gov.cn/gkml/hbb/bwj/201105/W020110530352486511962.pdf (accessed February 20, 2020)

environment elements, such as water and air. In the river pollution case mentioned earlier, the discharged acid in a river would be diluted within hours or days (depends on the flow rate of that river and retention rate of a water body). However, there will be immediate biological damage caused to fish populations and aquatic plants and irreversible changes to river-bed sediments, and these damages are not covered in the document. In the case of forest trees removed during illegal mining activities, ecosystem services that the destroyed forest might have provided – air, water, and conservation functions were not explicit in this document. Where is the boundary of environmental damage that should count in judicial context? All these empirical questions call for an improved guideline.

In light of this, in October 2014, MEP issued *Recommended Methods for Environmental Damage Assessment* (Edition II),[90] to consider how to assess damages in a manner that accounts for the holistic and interconnected nature of the environment. The second edition clearly defined the scope of "ecological environmental damage" where it can be identified. Section 6.4 explains specific scenarios: "in either one of the following situations: concentration of the pollutant in environmental elements exceeding the (national and/or local) standards, increase of the mortality rate or decrease in population of species, biological species composition change after pollution; and deformity of organism caused by pollution." The document also clarified several fundamental concepts (besides the technical specificities for calculations in the first edition),

[90] The document (in Chinese) can be found at: http://www.mee.gov.cn/gkml/hbb/bgt/201411/W020141105395741560668.pdf (accessed February 20, 2020)

including environmental restoration, ecological restoration, ecosystem service functions, baseline, and acceptable risk level. These concepts are to guide implementation in the broad sense and are not just as tools for valuation purposes. They will also help to design restoration objectives and action plans that include project monitoring and evaluation. Furthermore, this document sets up a separate appendix to explain the *Virtual Disposal Approach* [91] - an improved version from the previous method in 2011. The new version updates information on environmental function sensitivity coefficients (for instance, surface water class I-V, air quality I & II; soil I-IV, groundwater I–V; and near-shore marine system I–IV), and respective sensitivity ecoefficiency. So far, the technical standards and recommended methods are available, what is needed are the empirical lawsuits to translate the paper document into judicial practices.

Li et al. (2019) indicate the use of *Virtual Disposal Approach* in judicial cases started in 2012 and has increased steadily since. Most of the cases where judges used the approach to decide their rulings happened in 2015, primarily because a considerable number of NGO-initiated EPiL cases included claims for ecological restoration as a remedy, and the approach was used to calculate compensation claims. Another reason for the proliferated application of this approach is due to the example set by the Taizhou Water Pollution Case, which brought national attention to a water pollution issue, and resulted in a ruling amounting to the highest punitive compensation fee for

[91] The document suggests that where the damage to the ecological environment caused by the environment pollution fails to be completely restored through a restoration project, the restoration costs are much greater than the benefits, or the evaluation indexes for the restoration of damage to the ecological environment are lacked, the restoration expenses may be calculated by reference to the method of virtual disposal costs.

environmental misconduct in history USD 2,329 M. The case sets up an example to calculate environmental damage and leads to a court-ruled penalty, so that the successive cases try to use the same (court-proved) approach.

d) The Broader Influence of Empirical Cases

The court ruling of this case presents a model of how to use the *Virtual Disposal Approach (VDA)* to assess ecological damages caused to a flowing river system. The case provides a basis for courts, environmental technical experts, and NGOs to discuss and explore the experimental adoption of a solution from written regulation. The final restoration costs adopted 4.5 as the ratio to multiply the unit cost of the disposal costs, symbolizing the punitive nature of the court judgement. Several scholars (Li 2018; Lv 2016 b; Lv 2017 point out that current civil law and tort law take conventional aims at protecting private properties and individual interests, but in environmental tort cases, redressing private concerns to deter future misconducts furthers public interests. Thus, the multiplication of actual costs of recovery is required to compensate damage perpetrated towards the hidden but publicly shared goods. Such cases challenge existing legislation to respond to protecting public interests (in the context of environment), define the boundaries of environmental tort, identify environmental liabilities, and develop new remedy options to protect and restore environmental functions for now and the future.

During the 17-month court trial process, two legal documents[92] were issued by the Supreme People's Court (SPC). These documents interpreted and clarified that environmental restoration is polluters' tort liability. They also explained that courts can support ma plaintiff's request for restoring the damaged environment to its original state. Courts can rule to request other liabilities such as stopping the tortious act, removing obstructions, eliminating dangers, making an apology, and providing compensation for losses. This represented the formal adoption by the SPC of the notion of restoration

[92] The two legal documents issued in 2015 after the EPiL policy started, to clarify the environmental liabilities and responsive remedies:

1. **"Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations" (Date of issue: June 1, 2015):**

Article 20: Where the plaintiff requests the restoration to the original state, the people's court may render a judgment in accordance with law that the defendant shall restore the ecological environment to the state and functions before the damage occurs. If complete restoration is impossible, the people's court may permit the adoption of alternative restoration methods.
The people's court may…or may directly render a judgment that the defendant shall assume the expenses for restoring the ecological environment. The expenses for restoring the ecological environment include the expenses for preparing and implementing the restoration plan, monitoring, and supervision, among others.

Article 21: Where the plaintiff requests the defendant to pay expenses for the loss of service functions from the period when the ecological environment is damaged to the restoration thereof, the people's court may support such a request in accordance with law

2. **"Interpretation of the Supreme People's Court of Several Issues on the Application of Law in the Trial of Disputes over Liability for Environmental Torts" (Date of issue: June 1, 2015):**

Article 1: For damage caused by environmental pollution, a polluter shall bear tort liabilities regardless of fault. If the polluter claims no liability on the ground that the discharge of pollutants complies with national or local pollutant discharge standards, the people's court shall not support such a claim.

Article 13: The people's court may, based on the claim of the aggrieved party and the specific case circumstances, rationally render a judgment to order the polluter to assume civil liabilities, including but not limited to the stopping the tortious act, removal of obstruction, elimination of danger, restoration to the original state, making an apology, and making compensation for losses.

Article 14: Where the aggrieved party requests restoration to the original state, the people's court may, in accordance with the law, render a judgment that the polluter shall assume the liability for restoring the environment, and at the same time, determine the expenses for restoring the environment that shall be borne by the defendant when it fails to perform the obligation of restoring the environment.

liability that was pioneered by NGOs. Here, it reaffirms that NGOs acted as laboratories that induced the government to adopt their theory for the new policy. The final court ruling for the Taizhou Water Pollution Case used these two legal documents as law basis, which becomes an example that individual litigation encourages the development of new legislation (legal interpretation from the two documents in this case). This illustrates well an experimental process where the results generated from testing are used to feedback and support the test itself.

3.5 EPiL's Buffering of Private Enforcement Risks

One of the main claims by opponents of private enforcement is the possibility of its interference with regulators' ability to control public policy. In China's EPiL, we have seen that private litigation practices can influence public policy (i.e., new legislation), yet such influence is not the same as being observed and alarmed by US scholars.

The Changzhou Soil Pollution Case in 2016 (discussed in Chapter 2) was filed by two NGOs, CBCGDF and FoN, against three chemical companies for mishandling hazardous wastes and contaminating the water and soil resources of a large area in Changzhou City (260,000 m^2) over a period of four decades (1970s–2009). With this case, one of the co-plaintiffs (FoN) found itself in a position to influence new legislation as a result of its first-hand experience in court.[93] At the invitation of the Ministry of

[93] According to the Legislation Law of People's Republic of China (the latest amendment, from March 2015), the public has the right to participate in the development and amendment of basic laws.

Ecology and Environment (MEE), FoN, together with other NGOs and legal scholars, conducted research on soil pollution prevention as part of a broader assessment of environmental legislation. As one of the outputs of this project, FoN provided advice to legislative authorities as an advisory agency benefiting from its frontline experience in investigations and court trials. Some of their recommendations were eventually considered and incorporated in the final enacted *Law on the Prevention and Control of Soil Contamination (2018)* (effective from January 1, 2019).[94]

From this recent enacted soil contamination law, we can see that the NGO used the specific litigation, Changzhou case and their experiences, to influence the new soil pollution prevention legislation. Using the lawsuit as a basis and under the "polluter pays" principle, in their suggestions, FoN emphasized that the law should address the determination of the responsible party and a mechanism to make such a determination in soil contamination cases; the law should also consider the protection of public interests and the feasibility of enforcement. FoN asks for specifying decision-making agencies and an accountability mechanism for public monitoring purposes. A considerable portion of the regulation encompasses pollution risks in addition to aftermath pollution remediation obligations. These coincide with one of the key suggestions that the NGO gave: a catalog of soil contamination risks and a practice standard of remediation controls and management should be created and open to public,

[94] A news report on the new Law, at: https://globalcompliancenews.com/china-new-law-prevention-control-soil-pollution-20181012 and https://www.china-briefing.com/news/china-soil-pollution-law-environmental-compliance-businesses. (accessed February 20, 2020)

that allow supervision and monitoring. And risk management should be regulated using a national standard system.

While some form and a certain extent of influence on the environmental legislation has been made by the private actor through EPiL, such progression does not seem to be leading to the situation that critics of private enforcement observe or find to be of concern. On the contrary, as the following case illustrates, actions of private enforcement were blocked by the GoC, so that private actors are excluded from participating in some areas and circumstances of environmental law enforcement. This setback of private enforcement, on the premise as inadmissible by the state, demonstrates its control over private enforcement in China's context, which actually dismisses the worries of private enforcement interfering with regulators' ability to control public policy that is claimed by scholars in the case of EPiL.

Litigations over marine ecosystems are an example in which civil organizations were not permitted to file EPiL cases. In marine environment cases, we observed that the GoC acted proactively to limit private enforcement when it was found to challenge regulatory priorities, as a self-regulatory measure for the state to retain long-held control. Nonetheless, such governmental control can be a hindrance to sufficient and consistent openings for private enforcement to take place and possibly narrowing the private enforcement space.

The *Marine Environment Protection Law* of the People's Republic of China (Amendment 2017) specifies scenarios including any damages caused to marine ecosystems, marine aquatic resources, or marine protected areas that result in heavy losses to the state. Article 89 in this law reads that "only the *interested government department* empowered by the provisions of this Law will have the legal right to conduct marine environment supervision and control, and shall, on behalf of the State, claim compensation to those held responsible for the damages." Thus, judicial courts at different levels have used this law to dismiss suits and appeals from civil organizations. These include the 2018 Shandong Rongcheng Weibo Fishery Case (see discussion later in this section), and the case on oil spill by US firm Conoco Philips and China National Offshore Oil Corp (CNOOC), in 2011,[95] against marine polluters. CBCDGF tried to file the case with Qingdao City High Court,[96] but both cases were rejected under the basis of this law.

However, there is a different voice from academia to support the involvement of civil organizations in marine resource litigation. Zheng and Wang (2019) debate whether only public enforcement in marine environment could be sufficient, quoted the recent law enforcement evaluation mission led by the Standing Committee of People's Congress (2018) in eight provinces. The mission report shows that 10% of the marine gulfs in China are heavily polluted, less than 40% of the continental coastline are under

[95] An article at China Dialogue discussed this incident: https://www.chinadialogue.net/article/show/single/en/4418-Transparency-test-in-the-Bohai-Sea (accessed February 20, 2020)
[96] Information is also available at CBCDGF's website at: http://www.cbcgdf.org/NewsShow/4857/12341.html (accessed February 20, 2020)

protection, and about 42% of the coastal zone exceeded its carrying capacity. The main cause is presumably pollution and lax enforcement allowing pollution to continue. Many others (Cui 2019; Fan 2019; Zhang 2019) argue that the existing administrative authority and management structures over marine resources have flaws such as singly depending on administrative sanctions for environmental misconducts, insufficient human resources and equipment within government agencies to manage the vast coastal areas, and lack of legal and societal supervision. These scholars underline the necessity for including civil organizations and prosecutors in the marine environment litigation process.

In practice, the situation is far more muddled. Mei Hong et al. (2019) show that there were 600 marine-related cases filed during the period from July 2017 to the end of 2018. That included 367 civil cases (private), four EPiL cases, two administrative EPiL cases, 222 environmental criminal cases, three administrative cases, and two cases that combine criminal and EPiL. The following case, where a civil organization filed at the beginning, then eventually was ruled as criminal and administrative public-interest suit at the end, tells us more about Chinese prosecutors acting proactively to limit private enforcement when it is found to challenge regulatory priorities.

On March 16, 2018, Friends of Nature (FoN) sued Shandong Rongcheng Weibo Fishery Ltd. Co. and two other individuals for the environmental damage caused by their illegal fishery activities. The case was dismissed by City Marine Court (April 16, 2018) and later the Provincial High Court (September 2018), based on the Article 89 as mentioned

earlier. Still, on March 22, six days after FoN sued, Guan'nan County Procuratorate filed a criminal and administrative public-interest litigation case at the county level, to sue Rongcheng Weibo and 18 individuals for the same offense. In the press conference,[97] Guan'nan County Procuratorate announced a criminal investigation and claimed that defendants should be responsible for a total of ~USD 188 M to cover environmental damage to the marine ecosystem and ecological restoration costs.

If Article 89 in Marine Protection Law is exclusive, then neither civil organizations nor prosecutors would be able to file a case. The local prosecutor filed a criminal case then extended the case to be an EPiL case later. That is against the law. However, a detour seems to be working in practice.

Most recently (February 13, 2020), the Supreme People's Court issued the final determination to reject FoN's appeal and sustain the original ruling that the NGO does not have the standing to file a marine case. The legal basis of this determination again referred to the Article 89, emphasizing only the interested government department empowered by the provisions of this Law have the legal right to request compensation on behalf of the state.

It seems the debates on whether the involvement of civil organizations in marine environmental litigation is necessary will continue. It is also clear that on-the-ground

[97] News report on the press conference at: http://k.sina.com.cn/article_1784473157_6a5ce645020010pdh.html?cre=tianyi&mod=pcpager_focus&loc=24&r=9&rfunc=100&tj=none&tr=9 (accessed February 20, 2020)

practices already demonstrate conflicts in the related legislation and local demands for stronger law enforcement. Public enforcement by limited authorities is, and will not be, sufficient to solve the vast environmental problems currently facing China. In spite of this, private enforcement in this regard cannot occur with the government's superseding authority of permissible actions in EPiL with this case.

While enforcement by private actors for the marine ecosystems and environment had been barred because of the co-existing and conflicting marine protection laws, other circumstances that private enforcement actions were called on to a stop are not uncommon. In most cases, especially in the beginning implementation of new public interest litigations policy, NGOs had been rejected and their legal standing to act as plaintiffs in EPiL cases were denied. The Tengger Desert Case (see Section 3.4) is a representative example of this kind of government stoppage by the courts, with the NGO being turned down twice but eventually being granted the rights in its second appeal to the Supreme People's Court.

Although the Tengger Case happened at the very early stage in the new policy, that local courts may not fully adopt to new practices. Multiple rejections of civil organizations' applications subsequently will still be able to illustrate and explain the issue of limited private enforcement under EPiL. Early in the chapter, I discussed the concerns over private enforcement's possible interference with regulators' control of public policy exist in the US. Here, I argue that such risks carried by private enforcement have been buffered and seem to be immune in China's case when restriction by the GoC.

3.6 Discussion and Conclusion

With the start of EPiL policy, prosecutors are evoked to recover their supervisory role over government agencies which had been lost for many decades. The prosecutor also assumes a clear public enforcement role in environmental lawsuits as seen in the rapidly increasing cases they handle. Together with a swift change by the government to distinguish administrative cases (i.e., defendants are government agencies) within environmental public interest litigations, a public actor – the prosecutor does work to hold government agencies accountable for their administrative actions. We can see the effect of private enforcement on administrative governance in this sense. Though the new administrative EPiL policy puts a considerable restriction on private enforcement. More broadly, the outcome from a successful litigation case filed by an NGO, which places much emphasis on public-interest and social impacts, can be embraced to raise public awareness of environmental conservation and legal principles such as polluter pays; especially when assisted by mass and social media.

Additionally, with specific cases discussed in the chapter, private enforcement brings in innovations which can be seen to complement and provide an experimental base to public enforcement though there are some possible risks of duplicate enforcement under certain conditions. Lastly, a major benefit of private enforcement is found to be influencing public policy for broader social interest goals without too much concern that

it will interfere with regulators' control of public policy due to quickly changed and imposed restrictions by the GoC.

3.6.1 Private Enforcement as Complementary vs. Redundancy to Public Enforcement (Arguments 1 and 2)

US legal scholars highlight that private enforcement can fill a remedial gap to help further enforce public laws, which works as a complement not substitute to public enforcement (Clopton 2016). We see that in China, the EPiL practices led by civil organizations have shown the evidence and potential to bring diverse environmental cases and innovative remedial options to the courts, which have been overlooked by public actors. Not all the cases will be successful though; in other words, NGOs do not have all the solutions. But the experimental litigations from civil organizations work to elaborate the variety of environmental damages, pinpoint and draw out the conflicts of interests among the state and the market and identify potential risks that need to be avoided.

Working as a laboratory to allow different voices and suggestions for finding new remedies, private enforcement is able to provide experiments and experiences for public actors to learn and adjust policies. It reflects the flexible and innovative nature of private actors as Coffee (1983) describes, that the private actors bring diverse cases to the court, mirroring the concerns and interests of a diverse society and marginalized populations, which represents the 'fairness' of legal system. It also echoes what Stephenson (2005)

claims, that private enforcement fosters innovative litigation strategies and settlement techniques. Considering the complex and fluid nature of the environmental crisis and increasing societal demands that the Chinese state faces, these experiences and support from private actors are crucial and can be complementary to public efforts.

Nonetheless, the combination of criminal cases with EPiL increases the chances of redundancy and over-punishments of misconducts and over-enforcement of public laws. The Tengger Case and Taizhou Water Pollution Case discussed earlier all stem from small-scale criminal litigation but being extended and scaled up to a national guiding case. The concern of duplicating efforts may not be so much related to private actors or civil organizations, as they have at best limited access to the criminal case database, but more on the part of public prosecutor who has the advantage to file criminal charges in the first place and choose to do so in lieu of pursuing a public interest case for environmental violations.

In the discussion on how private enforcement can complement or rather, duplicate the effort of public enforcement, possible redundancy by NGOs is raised due to the abundance of small and easily won environmental cases. For instance, as opposed to the "tiger case"- referring to big (state-owned) companies, causing severe environmental damage, possibly over an extended period of time, is the "cockroach case" – referring to small and middle size enterprises, and individual (criminal-based) violations. It is clear that "tiger cases" will be much harder to win and probably will last for years, while smaller cases can be won more easily by private actors and used to gain experiences and

improve organizational capacities. Thus, the prevalence of "cockroach cases" across the country can possibly lead to over enthusiasm of private enforcement by NGOs.

At the same time, for the fact that the first court's judgement on the Changzhou Soil Pollution Case (discussed earlier) rejected the claim from two NGO plaintiffs, making the losing party responsible for the litigation fee of ~USD 274,000 – a percentage of the total claim amount. The judgement and associated litigation fee caused a stir in the media and among civil organizations and lawyers, as it amounted to a three-year budget for an average-sized NGO in China, which they simply cannot afford. Consequently, this kind of fee set forth for the losing party can be a large burden and deterrent for private actors to file EPiL cases. Following this, critics have urged that the litigation fee for EPiL cases should be charged regardless of the amount claimed by the plaintiff in each lawsuit, but instead at a fixed rate and per case basis. If this request is supported, it may lead to an overzealous situation by private enforcement that U.S scholars' censure. But at the moment, the actual scenario of private enforcement in China does not warrant such concern and EPiL has been so far immune to this potential risk that private enforcement carries elsewhere.

3.6.2 Private Enforcement Influencing vs. Interference to Public Policy (Argument 3)

In China's context, the conventional strong-state structure, merely depending on administrative enforcement to manage the market and control misconduct eventually

becomes inadequate and unsatisfactory. Being short of voice from the society in environment management, and a lack of civil aspects in the judicial system, the state is challenged for its legitimacy and effectiveness. EPiL emphasizes that cases shall be based on the reason of protecting public-interest, it differentiates this policy from other legal practices, and identifies a gap for new legislations that will not be limited by conventional private-interest tort. As the public-interest case will represent the interest of the non-specified class of people,[98] it is designed to protect vulnerable public individuals when facing strong market forces and state projects. In this regard, the policy aims to represent the fairness of the legal system to protect human communities as well as nature and ecosystems.

Towards this end, NGOs emerge fitted for this role in the legal policy and have shown promise in influencing legislative processes and legislations for broad social-interest objectives, as illustrated in the Changzhou Case and the subsequent soil contamination prevention and control law. Scholars (Lin YM 2018; Lin H 2018) have investigated the organizations' success in influencing the legislative processes (especially from 2012-2014) and argue that the progress made so far is attributable to an ongoing process of 'incubation' over the last decade, made possible in part through increased organizational budgets. Meanwhile, in order to ensure effective private enforcement, NGOs will need to keep accumulating legal knowledge, submitting official motions to central government, and developing social networks to mobilize participation and influence the

[98] The legal definition of "public interest" is interpreted by the Supreme People's Procuratorate of China on its official website (Chinese) at: http://www.spp.gov.cn/spp/zhuanlan/201904/t20190412_417222.shtml (accessed July 10, 2019)

legislation process. There are also increasing requests on somewhat more sophisticated individual and organizational capacities such as information collection, political experience, the ability to judge political opportunities, and finding the balance between politically constructive or destructive actions. The continuation of the private actors' positive influences in serving broader public interest would depend upon a high level of capacity, as well as sufficient funding of litigation organizations.

The observation that NGOs started to build alliances and collaborations across the country, specialized their technical expertise, and develop field investigation techniques to form broader interdisciplinary alliances can help enhance private enforcement's ability to influence litigation practices. Such collaboration enables NGOs to file cross-region, river-basin based lawsuits, which will be difficult for prosecutors or government agencies restricted by their jurisdictional boundaries to oversee and process. This effort may have the potential to influence regional environmental legislation and conservation policies on ground. Still, reflecting on Engstrom's critiques (2013) of private enforcement for its uncoordinated, and democratically unaccountable characteristics, it may be too early to conclude that the observed pioneering efforts by individual NGOs can be developed into a sectoral strategy, which would boost their private enforcement influence.

Earlier in this chapter, I introduced the rapid change in EPiL policy within the first year of its implementation. Within six months from its beginning in 2015, the administrative public-interest litigation regulation restricted NGOs to only civil cases so that they could

not pursue administrative lawsuits for the public interest. Hence, NGOs were restricted to pursuing governmental accountability for environmental degradation. While prosecutors could move faster than NGOs and possess more human and information resources (especially the criminal case data) as well as other advantages in terms of power, it can be said to some extent, that was prosecutorial zeal for administrative EPiL (used 83 times increase over two and half years)[99], which counteracts the exclusion of NGOs. In fact, over the approximately three years since EPiL was introduced, the total number of environmental lawsuits filed by NGOs actually decreased by 30% (from 93 cases in 2015-2016 to 65 cases in 2018).

On the other hand, by the end of 2015, a new policy experiment – the Ecological Environmental Damage Compensation System (EEDCS) policy, began supporting government agencies across various levels to initiate the same civil lawsuits that NGOs can file now, based on the theory that government agencies as the representative of the ownership of public property and natural resources, will act as plaintiffs in environmental dispute cases at courts. Ultimately, EEDCS policy could lead to competition with NGOs to see who a plaintiff in a case would be, which is undesirable as it can be considerable discourage private enforcement. Under the strong state, this could mean pushing public enforcement back in dominance with the pendulum swinging away from private enforcement. As such, the potential setback of private enforcement interfering with public policy, as warned by US legal scholars, has yet to

[99] The Procuratorate's EPiL cases increased from 21 filed cased in 2015 to 1737 filed cases by the end of 2018. Also see details in Figure 1.

happen in China's case, where the state has taken back control of the policy, leaving private enforcement in a more passive position, early on in environmental law enforcement.

In conclusion, the benefits of private enforcement in China are more complicated than past scholars have realized. The empirical cases presented using the three arguments in this chapter could help to demonstrate that. As a newly initiated policy, EPiL has passed its first five-year 'warming-up' period and we see that fresh air has been brought into the conventional judicial system, creating novel opportunities for wide-ranging enforcement, but also turbulences and provocations by private actors. Certainly, there is the loss of balance in the long-held system due to private enforcement coming in, but the outcome can be more positive than the potential downsides presented elsewhere. As the policy continues in the years to come, there will certainly be more cases and trends available for ongoing evaluation on how private enforcement influences the legal system and environmental governance in China.

3.7 References

Cai, Shouqiu. 2019. “Seventy Years of China’s Environment and Sources Law.” Chap. II of *Basic Theory of Environment and Resources Law in China.* China Renmin University Press. 中国环境资源法七十年。 蔡守秋，《 中国环境资源法学的基本理论》第二章第二节。 中国人民大学出版社 （2019年4月）

Chen, Jianfu. 2015. “*Chinese Law: Context and Transformation.” Revised and Expanded Edition*. Martinus Nijhoff Publisher.

Clarke, Donald C. 2005. "The Chinese Legal System." *donclarke. net/public/Chinese Legal System.* http://docs.law.gwu.edu/facweb/dclarke/public/ChineseLegalSystem.html

Clopton, Zachary D. 2016. "Redundant Public-Private Enforcement." *Vand. L. Rev*. 69: 285.

Coffee, Jr. John C. 1983. "Rescuing the private attorney general: Why the model of the lawyer as bounty hunter is not working." *Md. L. Rev*. 42: 215.

Cui, Jinxing. 2019. “The Role of Marine EPiL and Optimization Mechanism Under the Transition of New Environment Protection Context.” *Journal of Zhe Jiang Ocean University (Humanities Science)* Vol. 36, No.6:9-12. 环境管制变迁视角下的海洋环境公益诉讼功能定位与机制优化。崔金星。浙江海洋大学学报，2019 年 12 月，第 36 卷，第 6 期。9-12

Engstrom, David Freeman. 2013. "Agencies as Litigation Gatekeepers." *Yale Law Journal.* 123: 616-712.

Fan, Huazhong. 2019. “The Prosecutor in Marine EPiL.” *Journal of Zhe Jiang Ocean University (Humanities Science)* Vol. 36, No.6:35-40. 樊华中。检察机关参与海洋环境公益诉讼。浙江海洋大学学报，2019年12月，第36卷，第6期。35-40

Geall, Sam, and Hilton, Isabel. 2014. "China’s environmental governance challenge." In *State of the World*, pp. 129-137. Island Press, Washington, DC.

Glover, J. Maria. 2011. "The Structural Role of Private Enforcement Mechanism in Public Law." *Wm. & Mary L. Rev*. 53: 1137.

Gong, Gu. 2016. “Empirical Analysis on Environment Public-interest Litigation of Year 2015 in China.” *China Legal Science.* No. 9: 16-33. 2015年中国环境民事公益诉讼的实证分析。巩固，法学。2016年第9期

Guttman, Dan, Young, Oran, Jing, Yijia, Bramble, Barbara, Bu, Maoliang, Chen, Carmen, Furst, Kathinka et al. 2018. "Environmental governance in China: Interactions between the state and “nonstate actors”." *Journal of environmental management* 220: 126-135

He, Qinghua and Cao, Shiteng. 2018. “The Development History of the people’s procuratorate system of China.” *People’s Procuratorial (Semimonthly)*, No. 20:24-30. 人民检察制度的发展历程-纪念检察机关恢复重建四十周年。何勤华,曹诗腾，人民检察。2018第20期

Huang, Robin Hui. 2013. "Private enforcement of securities law in China: a ten-year retrospective and empirical assessment." *The American Journal of Comparative Law* 61, no. 4: 757-798.

Hu, Weilie and Tian, Kai. 2017. “Pilot Project of Procuratorial Organ Initiating Administrative Public Welfare Litigation.” *Administrative Law Review*. No.2:19-35. 检察机关提起行政公益诉讼试点情况研究。胡卫列，田凯。行政法学研究, 2017年第2期。

Hu, Weilie and Chi, Xiaoyan. 2017. “Review the Pre-court Procedures from Administrative Public-interest Litigation Pilot Projects.” *Journal of National Prosecutors College*. Vol.25 No.2:30-48. 从试点情况看行政公益诉讼诉前程序。胡卫列，迟晓燕。国家检察官学院学报。2017年第25卷第2期。

Jiang, Bixin. 2019. “Practices and Institutionalization of Environment Public-interest Litigation in China.” *Journal of Law Application*.No.1:5-12. 中国环境公益诉讼的实践发展及制度完善。江必新，法律适用。2019年第1期：5-12

Jiang, Guohua and Zhang, Bin. 2017. “The Seven Basic Problems of Environmental Civil Public Interest Litigation in China— Derived from an environmental pollution case between Environmental Protection Association and some Chemical Companies.” *Journal of Political Science and Law*.No.2. (2017):36-47. 中国环境民事公益诉讼的七个基本问题-从“某市环保联合会诉某化工公司环境污染案”说开去。江国华，张彬，政法论丛。2017年第2期。

Kong, Dejun, Wu, Fei, Shan ,Pengfei, Gao, Jianyun, Yan, Dao, Luo, Weixiong, and Yang, Xiaojun. "Status and distribution changes of the endangered Green Peafowl (Pavo muticus) in China over the past three decades (1990s–2017)." *Avian Research* 9, no. 1 (2018): 18.

Kong, Xiang-wen, Wang, Ding, and Yu, Ji-ming. 2017. “Research Report on Pilot Programme of Procuratorial Organ Initiating Administrative Public Interest Litigation.” *Journal of Administrative Law Research*. Vol. 5:87-98. 检察机关提起行政公益诉讼试点工作调研报告。孔祥稳，王玎，余积明。行政法学研究。2017年第5期。

Li, Dun (ed.). 2015. “*Review of Public Interest Litigation in Environment Protection (2015)”.* Law Press, China.

Li, Dun (ed.). 2016. “*Review of Public Interest Litigation in Environment Protection (2016).”* Law Press, China.

Li, Li, and Guo, Tianwu. 2019. "Enforcement of Amended Criminal Procedure Law in China: Unbalanced Power Relations between Public and Private Participants." China: *An International Journal* 17, no. 2: 39-59.

Li, Zhiping. 2018. “Analysis on the Legal Nature of Ecological Restoration Liability.” *Journal of China University of Geosciences (Social Sciences Edition)*. Vol. 18 No.2:48-59. 生态环境修复责任法律性质辨析。李挚萍。中国地质大学学报（社会科学版，2018年3月，第18卷第2期。

Li, Zhiping and Liu, Chang. 2019. “The Application of Virtual Disposal Cost Approach in Environmental Criminal Justice Practice.” *Academic Journal of Zhengzhou*. No. 2 :86-91. No. 2. 虚拟治理成本法在环境刑事司法实践中的运用。李挚萍，刘畅。中州学刊2019年2月第2期。

Lin, Hong. 2018. “Constructing Legitimacy: How Do Chinese NGOs Become Legitimate Participants in Environmental Governance? The Case of

Environmental Protection Law Revision." *The Journal of Chinese Sociology*. Vol.5 No. 6 (2018).

Lin, Yanmei. 2018. "Practical Research on Environmental Public Interest Litigation from the Perspective of Social-Ecological System Resilience." *Doctoral dissertation, China University of Political Science and Law*, March 2018.

Liu, Jingjing. 2011. "Overview of the Chinese legal system." *Envtl. L. Rep. News & Analysis* 41: 10885.

Liu, Yi. 2017. "The Judicial Practice and Theoretical Exploration of Public Interest Litigation Brought by the Procuratorate." *Journal of National Prosecutors College.* Vol. 25. No.2:3-18. 检查公益诉讼的司法实践与理论探索。刘艺，国家检察官学院学报2017年第25卷第2期。

Lv, Zhongmei. 2014. "Review and Outlook of the Institutionalization of the Environmental Judicial System." *China Trial.* No. 102 . 环境司法专门化的回顾与展望吕忠梅。中国审判新闻月刊，第102期（2014年8月）

Lv, Zhongmei. 2016. "Suggestions to Establish Special Funds to Support Environmental Public-interest Litigation – Interview with Lv Zhongmei." *China Trial.* No. 5. 黄晓云. "吕忠梅代表: 建议设立基金鼓励环境公益诉讼." 中国审判 5 (2016): 25-26

Lv Zhongmei. 2016. "Environmental Judicial Rationality Will not be Limited by "Sky-high Penalty" – Taizhou Water Pollution EPiL Case." *China Legal Science*. No. 3:244-264. 环境司法理性不能止于"添加"赔偿：泰州环境公益诉讼案评析。吕忠梅，中国法学。2016 年第 3 期。

Lv, Zhongmei and Dou, Haiyang. 2017. "Empirical Analysis on Environment Restoration Responsibility." *Chinese Journal of Law*. No.3 (2017):125-142. 修复生态环境责任的实证解析。吕忠梅，窦海阳，法学研究。2017 年第三期。

Lv, Zhongmei. 2018. "The Pathway and Reasons for the Addition of Environmental Right into the Constitution." *Law Science Magazine*. No. 1. 23-40. 环境权入宪的理路与设想。吕忠梅，法学杂志。2018 年第 1 期。

Lv, Zhongmei. 2018. "Thinking on the Research of Environmental Law in the New Era." *Journal of China University of Political Science and Law*. No.4 :5-14. 新时代环境法学研究思考。吕忠梅，中国政法大学学报。2018 年第 4 期。

Lv, Zhongmei and Liu, Changxing. 2019. "Institutionalization of China Environmental Judicature System and Specialization Innovations – Annual Observation 2017-2018." *China Review of Administration of Justice.* No.2:1-35. 环境司法专门化与专业化创新发展：2017-2018 年度观察。吕忠梅，刘长兴。中国应用法学。2019 年第 2 期。

Lv, Zhongmei. 2019. "From Result Control to Risk Prevention – the Important Transition of China's Environmental Laws." *China Ecological Civilization Magazine*. No. 1: 10-14. 从后果控制到风险预防-中国环境法的重要转型。中国生态文明双月刊（2019 第一期）10-14

Ma, Jun. 2004. "*China's water crisis*." Norwalk, CT: East Bridge.

Mei, Hong and Yin, Yue. 2019. "Problems and Countermeasures in the Judicial

Judgment of the Sea-related Environment." *Journal of Guizhou University (Social Sciences)*. Vol.37 No.3:79-89. 梅宏，殷悦 （2019） 涉海环境司法的难题与应对。 贵州大学学报（社会科学版），2019年6月第37卷第3期：79-89

Mertha, Andrew C. 2005. "China's "soft" centralization: Shifting tiao/kuai authority relations." *The China Quarterly* 184: 791-810.

Minzner, Carl F. 2006. "Xinfang: an alternative to formal Chinese legal institutions." *Stan. J. Int'l* l. 42: 103-179

Polinsky, A. Mitchell, and Shavell, Steven. 2007. "The theory of public enforcement of law." *Handbook of law and economics* 1: 403-454.

Shapiro, Judith. 2016. *"China's environmental challenges."* John Wiley & Sons.

Stephenson, Matthew C. 2005. "Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies." *Virginia Law Review*: 93-173.

Teets, Jessica C. 2015. "The evolution of civil society in Yunnan province: Contending models of civil society management in China." *Journal of Contemporary China*. 24, no. 91:158-175.

Wang, Canfa and Cheng, Duowei. 2014. "Dilemma Faces EPiL Under the new Environment Protection Law, and the Resolution." *Journal of Law Application*. No.8 (2014):46-51. 新《环境保护法》下环境公益诉讼面临的困境及其破解。王灿发，程多威，法律适用。2014 年第 8 期。

Wang, Lifeng. 2013. "The Necessity and Function of China Guiding Case System" - 中国指导性案例项目 (China Guiding Cases Project), Oct. 15, 2013, available at https://cgc.law.stanford.edu/commentary/9-professor-wang.

Wang, Shekun. 2013. "The Role of Civil Organizations in Environment Public-Interest Litigation-Research Report and Cases Analysis." *The Environmental Rule of Law*. (Part II):157-192. 民间环保组织在环境公益诉讼中的角色及作用。王社坤，中国环境法治（2013年卷（下）

Wei, Wenchao, Liu, Xiao Fei, and Sun, Qian. 2017. "Several Thoughts on the Pilot Project of Prosectutors' Administrative Public-interest Litigation." *People's Judicature*. No.13:19-23. 检察机关 提起公益诉讼试点工作若干问题的思考。魏文超，刘小飞，孙茜。人民司法，特别策划。13.2017

Yang, Zhaoxia, and Zhang, Xiaoning. 2015. "Discuss the Issues and Response to the Government Accountability on Environment Performance." *Journal of Jishou University (Social Science Edition)* Vol. 36, No. 4: 1-12 论我国政府环境问责的乱象及其应对—写在新《环境保护法》实施之初。杨朝霞,张晓宁 (北京林业大学生态法研究中心,北京100083)

Zhan, Zhongle and Yin, Ting. 2017. "The Development Path of Environmental Administrative Public-interest Litigation." *Journal of National Prosecutors College*. Vol. 25 No.2:49-58. 环境行政公益诉讼的发展路径。湛中乐，尹婷。国家检察官学院学报。2017 年 3 月第 25 卷第 2 期。

Zhang, Jifeng. 2019. "The Identity Verification of Plaintiff in an EPil – from Rongcheng

Weibo Case." *Journal of Zhe Jiang Ocean University (Humanities Science)* Vol. 36, No.6:5-8. 环境公益诉讼中原告主体身份的认定-以荣成韦伯案为例。张继锋。浙江海洋大学学报，2019 年 12 月，第 36 卷第 6 期。5-8

Zhang, Jing. 2019. "Study on Multi-plaintiff Coordination System in Marine EPiL – A View from Ministry of Ecology and Environment." *Journal of Zhe Jiang Ocean University (Humanities Science)* Vol. 36, No.6:15-19. 自然资源部视角下的海洋环境公益诉讼多元原告协作机制探索。张靖。浙江海洋大学学报，2019 年 12 月，第 36 卷第 6 期。15-19

Zhang, Jun (the Chief procurator of the Supreme People's Procuratorate of China). 2019. "The Government work report of the Supreme People's Procuratorate, 2019. At the 14th meeting of the Standing Committee of the 13th Nation People's Congress in Beijing (October 23, 2019)." 最高人民检察院关于开展公益诉讼检察工作情况的报告—2019 年 10 月 23 日在第十三届全国人民代表大会常务委员会第十四次会议上 - 最高人民检察院检察长-张军. https://www.spp.gov.cn/spp/tt/201910/t20191024_435925.shtml

Zheng, Shaohua and Wang, Hui. 2019. "The Start of China's Marine EPiL." *Journal of Zhe Jiang Ocean University (Humanities Science)* Vol. 36, No.6:1-5. 中国海洋环境公益诉讼的生成。郑少华，王慧。浙江海洋大学学报，2019 年 12 月，第 36 卷第 6 期。

Zhu, Xiao. 2012. "The Principles for Public Participation in Environmental Basic Law." *China Legal Science.* No.12:127-133. 论公众参与与基本原则入环境基本法。竺效，法学 2012 年第 12 期

CHAPTER 4. The Role Change of ENGOs Under the Authoritarian State – A Historical and Organizational View of Friends of Nature

4.1 Introduction

In the previous chapters, I have discussed the EPiL policy as an experiment initiated by the Government of China (GoC) to mobilize social actors to manage the environmental crisis. In this process both GoC and social actors – the civil society organizations – learn new knowledge and capacities and adapt new policies and strategies. Civil society organizations also develop a new and more proactive and functional role in environmental governance of China by practicing litigation, thereby influencing environmental legislation and policies (see Chapter 2). The potentials of private actors in enforcing environmental laws are tested during such process. The merits of private actors in the course of enforcement to achieve the intended and overarching environmental objectives are noticeable (see Chapter 3). These include triggering public actors in administrative EPiL (APiL) leading to greater accountability of the government in general, so that private actors complement public enforcement by acting as a litigation laboratory on innovative legal theory, methodologies, and new areas of environmental protection. In this chapter, I will explore why and how these role-changes could happen in the first place, using an inside organizational lens to analyze the development trajectory of a major Chinese environmental organization, Friends of Nature.

Robust market forces and the increasing expression of grievances about the social-environmental crisis from the general public are causing the state to reconsider strategies for regulating the market and meeting societal demands. Hence, the state has begun to engage with the emerging momentum and resources arising from society, especially with respect to environmental and public health issues.

The concept of civil society was introduced to China in early 1900s. Early studies of Chinese civil society raised critical views on how domestic non-governmental organizations (NGOs) could be functioning as watchdogs to confront the state with societal needs and promote actions toward democratization. In this chapter, I argue that because NGOs grow from a cultural foundation and political history that differ from those observed in West, they carry uniquely salient Chinese characteristics, and aim to develop a complementary role to the state in order to promote better governance in the country. Civil society organizations led by intellectuals need to grow their roots to reach private individuals, in order to gain trust and legitimacy from its constituency and civic individuals. In addition, they also need to be strategic in nurturing the niche that would prove valuable and necessary to the state without the worry of a shift in power; at the same time paving a way to create an enabling policy environment for making changes.

Recently, civil society organizations have developed some functional roles in environmental governance to complement the state in regulating the market, to hold the polluters (including private and public entities) accountable for environmental

misconducts, and also to provoke government agencies for more effective law enforcement. This leads to better governance. By examining a specific case, this chapter explores the agent of change role of one civil society organization in China's environmental governance under current state policies and seeks to understand how one NGO realizes it through a historical and organizational perspective.

As an iconic Chinese civil society organization, Friends of Nature (FoN) was the country's first officially established NGO (1994) with a mission to address environmental issues and cultivate green citizenship in the country. After 25 years, the organization has gained enough successful experiences to acquire a seat at table with state agencies, where FoN can act proactively to influence the development of new environmental policies. Some of the successes are not only from FoN alone, but as an alliance effort with a group of civil society organizations. By reviewing the history and some milestone moments of the organization, this chapter exemplifies the evolutionary trajectory of a civil society organization and their interactions with the state specifically within the Chinese context.

A review of state policies on civil organizations since 2000 shows a picture of a state-controlling environment and rapid changing political context for civil society to navigate in China. Under this background, FoN adopted two significant strategies to grow from a grassroot educational organization to a professional civil society actor. As the first strategy, institutionalization aimed to diminish the dependency on influential individual leaders and eventually built-up institutional competence and a positive

reputation within FoN. This strategy enables the organization to be recognized as an independent and capable entity to undertake efforts under government's invitation and consent. Second, FoN evolved to become specialized in legal and judicial issues, as shown through its litigation practices and successful participation and endeavors in influencing two major sets of Chinese environmental laws: *Environmental Protection Law* (2014) and *Soil Pollution Prevention Law* (2018), in particular. These two pieces of legislation led to the launching of the Environmental Public-interest Litigation (EPiL) policy that was unprecedently granted legal standing as a plaintiff in courts. Being one of the pioneers in public-interest litigation practices, EPiL's experiences will not only help to enforce environmental laws, but also support FoN to use the first-hand litigation experience to influence future environmental legislation.

Using empirical evidences, this chapter illustrates the dynamic between the NGO and the state. The state-civil society relationship has always been in flux with shifting political landscape and everchanging social and environmental problems. NGOs have taken a proactive and adaptive approach to exert their influences under the political pressures and policy/judicial opportunities. The internal institutionalization and specialization process support the organization to become independent and professional, while building a reputation and expertise in environmental law enforcement. This process also supports actions to improve and create external policy opportunities. This, in return, reshapes the state-NGO relationship. The dynamic includes ups and downs, while pushing the state to move to be more open to civil society being involved in the governance process, but it is non-linear.

By no means can FoN lead to societal change by itself, as many more agents of change involving other NGOs in various areas are needed. For those civil society organizations that also want to realize such a role change and act more functionally with the state, this chapter provides a possible pathway to support their practices. It is also hoped that the empirical analysis of the China story will provide insights for other NGOs and civil society in similar political settings to adopt in paving their ways to possible successful roles in policy making and change.

4.2 Background and Literature Review

Recent activities show a trend in Chinese civil society organizations that resemble their counterparts in other countries in that they seek to be the intermediary realm between the state and society to balance rapid economic growth and societal calls for public interest and benefit. But different from their Western counterparts, Chinese civil society organizations operate and grow under strong political constraints and a state-dominating setting. They also stem from strong family-based kinship networks rather than an individual-rights based cultural context. These determine that Chinese civil society organizations do not necessarily target political democratization as the ultimate goal, which some earlier scholars tried to find as the potential and proof of the existence of civil society in the country. Instead, civil society in China takes on another goal within the possible political framework and traditional social backdrop. It develops a complementary role to the state to achieve better governance in the country, which

implies more effective market regulation, efficient delivery of social services, and greater accountability of government. A complementary role embodies more than being a service provider to help the state in meeting societal demands. Civil society organizations also work to become more autonomous, institutional, and professional, while remaining non-adversarial to the state. The objective is to engage in governance with a functional position. The next section will review the cultural and social political context for the development of civil society in China. A reflection on the state policies illustrates a tortuous path for this sector over the past 20 years, making the case for how it arrives to where it is, worth examining.

4.2.1 Civil Society's Development in China – A Foreign Concept with Chinese Characteristics

Some studies in the West trace the original civil society back to the 17-18th century in Europe, where the bourgeois class in these societies constituted and mobilized on their own. This rise of civil society owed largely to the need of responding to the control of the state and the change to market economy. Cohen and Arato (1992) saw the bourgeois as seeking to "represent the values and interests of social autonomy in face of both the modern state and the capitalist economy", under the backdrop of the developing market economy and the repulsion of the state-administrative influence on personal lives. Habermas (1989) discussed the emergence of this group due to growing commercial exchange and trade activities, and when group concerns went beyond mere protection of their economic assets but also recognition of their social status. This class "uses

public sphere to confer in an unrestricted fashion and discuss their own opinions, interests, and perspectives" (Habermas 1964), where they also learn about the commonly shared topics from others to profile a public interest. It is this characteristic that gave birth to an equally shared power and position of normal private citizens vis-à-vis the state; it then became a natural extension and the impetus of contemporary civil society. Gramsci, as inspired by the Bolsheviks and their proletarian movements, studied how civil society, through the connection to the state, organizes consent and constricts class struggles (Burawoy 2003). Gramsci looked at how class forces in a society can be balanced through the struggles and negotiation with the state, coordinated and orchestrated by civil society. Polanyi (1944), in his "double movement" theory, deliberated two organizing principles in society: economic liberalism principle which aims for a self-regulating market; and a countermovement for social protection on the working and landed classes, when land, labor, and currency become commodities in a free market. The countermovement is the resistance to the expanding market from the society, asking for the state's interference to keep social order.

In the East, Chinese society went through different challenges and development than those in the West. The bourgeois class or equal power between normal people and the state was not evident throughout China's long imperial history and the first half of the last century. The concept of a collective society apart from the state and market has a separate origin on that side of the world, with distinctive social cultural roots under the country's own economic development pace and particular socio-political backdrop. As the distinguished Chinese anthropologist and sociologist, Fei Xiaotong, wrote and

compared in his book *From the Soil* (1948), idiosyncratic social structures are noticeable in the respective Western and Chinese context. He highlights that western social structure is an organizational mode of association (*zu zhi ge ju* 组织格局*)* (101), which consists of organizations formed by individuals, with individuals following the agreed upon rules among the organizations. Chinese society is grounded in Confucianism, which consists of a pattern of discrete centers fanning out into a web-like network (111). Individuals in the center of the network build upon kinship/family social relationships, to connect with the society at large – Fei names it as "Differential Social Circle" (*cha xu ge ju* 差序格局*)"*. Under this structure, the boundaries between private and public sphere are vague (112), as social order exists in both private (kinship/family) and outside of privately related circles.[100] In fact, Fei argues that under this structure, individual rights are seldom recognized (114). According to this theory, public interest in this context reflects collective group interests (the smaller intimately related circles) rather than a societal one. It is significantly different from the broader interest shared across the Western societies. In fact, because of its cultural heritage, the public sphere in Chinese society is instead rooted in circles of close ties (kinship/family) and distinct from the rise of public sphere that is characterized by self-association of individuals with shared interests in the West.

[100] "In 'The Great Learning', public order is achieved by moving toward the center of discrete circles—that is, toward the family. Private selfishness, however, is justified by moving outward, toward the state. Both public officials and private persons use the same ambiguous conception of the social order to define the context of their action. This situation differs greatly from that in Western society, in which public and private rights and obligations are divided distinctly." (Excerpt From: Fei Xiaotong's Xiangtu Zhongguo. *From the Soil*. iBooks.)

However, this theory is based on analysis of rural villages of China during the last century, with a specific cultural focus. Later, and especially during the last four decades, the country has experienced rapid economic development and growing urban centers. With increasing mobility of the population to newly created workplaces, groups of individuals – young, educated, and independent, move to cities adopting new lifestyles. This dynamic launches a different type of network and social relationship among people, which changes the family/kinship web often observed in rural and older China. While urbanization and economic progresses contribute to the westernization of society in contemporary China, political events that preceded economic development have already disrupted long-established social structures. As Chamberlain (1993) believed, in the 1950s China "rudely and violently" liberated people from the constraints of traditional family and social bonds, which exactly cultivate the "soil" for the growth of civil society.[101]

The political system and government structure alongside the history of economic development since 1980s, provide a unique stage for Chinese civil society and its growth, in addition to the cultural foundation. In Sections 4.2.2 to 4.2.4, I will review more details of the social-political evolution and policy changes towards civil organizations under four leadership phases in a discussion of a Chinese characterized civil society.

[101] China in the 1950s experienced three revolutionary events: the 1950 Agrarian Reform Law, under which lands, animals, and machinery were re-distributed to peasants from landlords; and in 1953, the state included all private businesses under state control; and the Great Leap Forward in late 1950s.

Would the new changes in the structure of Chinese society lead to a civil society as observed in the West? Previous research try to find and define civil society in contemporary China, Perry (1994) describes three generations who studied Chinese politics since the 1960s (also see analysis by Harding [1984]).[102] By examining research works focused on state-society relationships and civil society, Perry concluded that China is more than a testing ground for theories from other countries in the world, due to its notable diversity in terms of culture, political variations, and complex bureaucratic arrangements. Hence, Chinese civil society entails characteristics that are not evident in other parts of the world.

Among many studies on China, Chamberlain (1993) claimed that Chinese civil society in is a "community bonded autonomous entity, empowered by its collective determination to resist the constraints and regulations from the society and the state". Such an entity is sustained by the broadly shared belief and attitude among its individual citizens, and constantly interacts with the state and the society. This resonates with the general concept of civil society from the West. But specifically, under the development stage that China was going through that Chamberlain (1993) studied, he noted that "China's civil society is in the industrial workplace, and because of realm of civil law in 1986, Chinese society becomes more litigious, and more civil". This suggests the

[102] The third-generation scholars (1990s) who analyze China's state-society relationship rejected the totalitarian model (first generation in 1960s – influenced by the experiences from Soviet Union) and pluralism model (second generation in 1970s studies adopted the U.S. approach), and they have been influenced by European traditions of civil society theories, for instance, Tilly (1975) and Habermas (1989).

beginning of emphasizing individual rights in Chinese society, which was absent in previous times.

Similarly, Yang (2003) argued that China's civil society emphasizes the importance of citizen rights, which seemingly aligns closer with the Western model. Yet, Yang distinguished that a key different element in the China's model is the goal to maintain a harmonious relationship between civil society and the state. This idea is in contrast with the US model, which highlights the mistrust of the power of state and underscores the independence of civil society, and the European model that emphasizes the role of the state in nurturing community and civil society. This marks the Chinese characteristics that stem from its cultural roots and state-society relationships.

This chapter puts civil society at its center of study to understand the dynamic with the state, but first, the context for this discussion needs to be explained. With a civil society largely defined with Chinese characteristics as described above, I now turn to literatures on the dynamic between the state and civil society. In an authoritarian state, civil society's existence and its development trajectory are largely defined by the state. However, civil society is actively looking at opportunities to influence state policy and participate in policy making processes. The following sections will reflect on the current related studies and policies, to provide a basis for s discussion of the development of a civil society organization.

4.2.2 Studies on China's State-Civil Society Organization Relationships

Past literatures have analyzed China's civil society (organizations) primarily for the purpose of understanding the liberal democratization process, as early studies on NGOs focused heavily on the democratization potential of civil society (Song et al. 2015). Under this lens, the authoritarian state would ostensibly deprive the association rights of individuals and ban civil organizations from establishing political structures. However, as the state sees the dual functions of civil organizations (challenger to the state and provider of public good), the state will tolerant their existence and expect civil organizations to provide welfare services when needed to serve the state's interest, while strictly managing the growth of the sector (i.e., the corporatist model [Hsu and Hasmath 2014]). Studies conclude that the expansion of civil society in China is leading to better governance under an authoritarian regime than one of democratization (Kang 2008, 2018; Spires 2011; Teets 2013; Stern, Furst and van Rooij 2016; Dai and Spires 2018; Teets and Almen 2018; Froissart 2019). These studies illustrate a general political environment to understand the development of civil society and the state-society dynamic in China.

Spires (2011) looked into Tocquevillean's civil society theory which highlights that the civil society's role is to pressure the state to enhance democracy and accountability, or in authoritarian regimes, to pressure the state to democratize. But he argued that this is not the case in China's context, nor is the corporatist model in characterizing Chinese

civil society solely. Spires showed that grassroots organizations[103] exist as "contingent symbiosis" in China. Such a relationship with the state is fragile and it brings mutual benefits to both sides – deliver social services or voice the concerns for the state or government departments and operation opportunities for organizations to fulfill their missions and visions. In local context particularly, civil society organizations can help local governments promote social welfare goals and enforce policies and laws; as long as the NGO's activities are not clashing with local political and economic interests. Spires highlighted both legal and social legitimacy of NGOs, and lax enforcement of their regulation leaves opportunities to local operation. Such a dynamic was also observed by Teets (2013) in a "consultative authoritarianism" model where the state encourages a fairly autonomous civil society. The model allowed a pluralistic society participating in policy formation and implementation in order to meet needs of society, but simultaneously working under direct and indirect controls from the state.

From the state's perspective, Kang and Han (2008) suggested that "a system of gradated controls" is the basic feature of the state-society relationship in contemporary China, where the state exerts various control strategies over social organizations. The state wants to dominate the balance of power between the state and society, yet still sees the virtue of civil organizations. The state permits limited freedom to allow civil organizations to provide public goods when the states does not have sufficient capacity, but firmly controls the political and public spheres. Kang (2018) reasoned that certain

[103] The author particularly differentiates these organizations from corporatist organizations – state-censored organizations, and the state uses them to communicate and control over civil society.

emerging social forces are inconvenient but inevitable byproducts of marketization. As a response, the party-state adopted the "administrative absorption of society" to allow certain social autonomy. The system though controls the growth of civil organizations through approaches such as establishing party branches in civil organizations; strengthening the function of supervisory agencies; having indirect control via registration, tax, auditing, and ethical punishment for those disobey orders; and through formal regulations and rules. The formal policies and regulations/laws will be discussed in detail later in this chapter.

Particularly in the regulatory field, van Rooij (2010) saw new legal opportunities in civil litigation against the state and the industries, and suggested alternatives for citizen activism: political actions, including complaints and petitions; and legal actions covering tort and administrative litigation. Van Rooij et al. (2016) later observed some regulatory pluralism happened to bring new actors (i.e., citizens, judges, and prosecutors) into the regulatory community, side-by-side with party-state control. This demonstrates that the state both needs and fears the new actors as they see simultaneous positive roles and potential negative risks associated with such changes.

Studies of the state-society relationship show that a variety of situations exists. To understand how civil society comes to these possible dynamics with the state, the following section discusses and analyzes the factors observed that support the growth of the civil sector in the one party-state of China.

4.2.3 Enabling Factors to the Growth of Civil Society in China

a) From a state's perspective: Government's structure

Besides the development of citizenship and economic workplace, fragmented government structure has also provided a niche for and stimulus to the growth of civil society. The "centralized management (vertical management or *Chuizhi Guanli*)" where government applies both vertical control – "*Tiao*" (i.e., the center administrative control) and horizontal cooperation – "*Kuai*" (mutual support and help among local agencies) examined by Mertha (2005) requires local adaptations of centrally made policy. In such ways, government agencies at local levels have to seek expertise, extra hands, and sometimes, social resources in order to fulfill governmental mandates and to respond to external challenges from society, but even more so due to internal government structure. The rubric of "fragmented authoritarianism" (Lieberthal and Oksenberg 1988) also leads to increased pluralization in policy-making process in authoritarian China.

b) From a market's perspective - Embedded state-market relationship

Ang (2016) discussed a co-evolutionary approach in China, where the mutual adaptation of market and the state has led to the economic development during the last 40 years. In her book, *How China Escaped the Poverty Trap,* Ang showed that markets in China were built with weak institutions (in 1980s, post-Mao era); features and practices of these weak institutions were the hidden potential raw materials for building markets

when good governance did not exist. Examples of such features include mixing public and private interests, partial regulation, and campaign-style policy implementation. Subsequently, the emerging markets that had been built can stimulate strong institutions, which in turn preserve (not build) markets. This is also the case at national and subnational levels in China, following the non-linear and co-evolutionary paths of development oscillating between state and market.

China began building markets with weak institutions through practices like local governments embracing capitalism, advancing policy innovations, and competing to produce economic results where bureaucratic incentives for growth included cadre promotion and retainment of revenues generated at local level (Ang 2016, 6-7). The consequences of this process are striking. The embedded state-market relationship has created a network abundant in conflict of interests and erratic law enforcement. It is difficult for the state to strictly regulate the market that it builds, especially in local settings. On top of that, regulatory motivation is low on the government side, considering performance of officials and local governments is evaluated heavily on maintaining economic successes. Particularly on the environmental front, this incentive system creates a challenge for state agencies to monitor and keep business units responsible for their behaviors in compliance with the laws when the call and for strengthening enforcement to improve the environment comes. Under these circumstances, there is a need for a third-party, i.e., civil society, to hold these main players accountable and balance the acts of the state and the market.

c) From a society's perspective – Needs for self-support

Domestic NGOs in China have experienced a dramatic increase in number since 2005. Many of these organizations focus on disaster relief, rural development, health, and education, but a large number is also addressing environmental conservation issues (especially in urban regions). This new group of organizations often starts with simple and clear ideas about a specific environmental issue or concern or some aspect of social wellbeing. Some individuals initiate discussion around those issues or concerns and ask other people to work together to share or find potential solutions, ultimately conglomerated into formal groups. These new groups portray the possibility to organize individuals' voices and actions to address public-interest or public-good issues that they all face. Geall and Hilton (2014), Lang and Xu (2013), and Steinhardt and Fengshi (2016) looked at citizen complaints, mass incidents, anti-incinerator campaigns, and public protests that happened in past years. Through the studied incidents, these scholars tried to understand the various aspects of a) public good motivation behind citizen activism; b) leadership of elites and their social networks with government power; c) importance of organizational and coordination capacity; and d) weak and absence of NGOs.

Despite the apparent growth of Chinese civil society organizations due to the various favorable conditions mentioned above, state-society relationships in an authoritarian state have a strong tendency to tilt according to the operating environment set forth by the state. That is to say, while the state-society pendulum may be swinging and there is always imbalance, the state remains in the dominating position that orchestrates the ups

and downs through its key policies affecting the NGOs. Such a policy environment is discussed in the next section.

4.2.4 Policy Environment for Civil Organizations – Changes and Local Adaptations

From the 1980s to 1990s, Chairman Jiang Zemin encouraged international NGOs and countries to bring funding and expertise into the country to support the government in environmental conservation and management. Since then, the state started to see the potentials of civil forces in the environmental field. The real blossoming of the domestic NGO sector benefited from the enabling policy environment in early 2000, through Chairman Hu Jintao's period (2002–2012). During his term in office, the state publicly recognized the inequalities and imbalances (in economic and social development; economy, and ecology; inland and coastal; rural and urban areas). Hu's administration encouraged private and civil sectors to participate and address those imbalances by creating a supportive environment. From the national level, Hu announced the aim to create a harmonious society and "put people first" in 2004; in September 2010, he proclaimed a new blueprint for social management *("Shehui Guanli"*社会管理*)*, where the role of social organizations was highlighted. In this model, the state promotes the development of social organizations, provides opportunities and channels for public participation in the process of decision-making and coordination of social interests and issues. Subsequently, a special section (Section Nine) in the 12th Five-year-Plan (2011–

2015),[104] explicitly expressed the need for social organizations[105] to defuse social contradictions/issues and explained the mechanism for involvement.[106] The Plan emphasized the principles of plural participation, joint management, and coordinated and dynamic adjustment (Chapter 37). It also specified mechanisms to improve the public announcement system concerning public decision-making, public participation mechanisms (i.e., public hearing, letter complaints, masses' visit to government cadres, and use of mass media to express social interests). The Plan sent a clear invitation for consultation from social organizations (Chapter 40). At the same time, it also underlined the principles needed to strengthen supervision over social organization to ensure harmonious and stable society and gave priority to those who were involved in economic development, charity, and community welfare (Chapter 39).

This supportive policy environment resulted in some successful and nationally prominent policy advocacy efforts in the environmental arena. These are namely: a) the public debates on Nu River dam – the project was halted by Premier Wen Jiabao in 2004 (Yang and Calhoun 2007); b) the first public hearing on environmental issues associated with the Yuan Mingyuan Lake Remediation Project happened in April 2005 – an

[104] In the 12th Five-Year Plan for the period of 2011–2015, the state encouraged the development of social welfare and philanthropy, setting a goal to "strengthen the construction of social organization" through the development of civil organizations. Details can be found in Chapters 33 and 39, respectively. An unofficial English translation is available at: http://cbi.typepad.com/china_direct/2011/05/chinas-twelfth-five-new-plan-the-full-english-version.html. (accessed August 5, 2020)

[105] The Plan specifies "social organizations" includes mass organizations, grassroots autonomous organizations, various social groups; enterprises and institutions. (Chapter 37, Article 1)

[106] The English translation of the 12th Five-year-plan is at: http://www.asifma.org/uploadedFiles/Resources/PRC-12th-FYP%281%29.PDF (accessed August 5, 2020)

alliance among NGOs requested and initiated the first public hearing on the remediation plan on one of the most famous historical heritage parks in Beijing (more details will be provided later in the FoN case study); and c) the amendment of the Environment Protection Law from 2012-2014. Froissart (2019) investigated the legislative process and the role of NGOs, as a new entry actor, in rebalancing power relationships among administrative agencies and posing direct impacts in reframing the law. She argued that NGOs are becoming more professional, autonomic, and systemic, and have evolved from an outsider to an insider in the process of environmental governance.

From practical implementation, several incidents demonstrate the enabling environment to support the development of social organization, mainly through the financing sources perspective. The first private foundation – The One Foundation[107] – was officially registered in Shenzhen city in 2010; in 2012, the same city held the first "Charity Fair" – a communication platform, endorsed by the government that was designed to stimulate collaboration among foundations, enterprises, and social organizations. In addition, the first Charity Law[108] in Chinese history was enacted in September 2016. It provided a legal basis to promote charity organizations and fundraising activities in China. One of the significances of this Law is that it changed the situation of fundraising from privilege of few government-run organizations to lay citizens.

[107] The One Foundation was registered in Shenzhen on December 3, 2010; it focuses on disaster relief, children's welfare, training of public welfare professionals, and funding grassroots charities. The operation of the Foundation used to be affiliated with the government-run Chinese Red Cross in the past, the official registration in 2010 marks the first private charitable fundraising organization in the country.

[108] The law defines who can register as a charity organization, registration and operation, fundraising from the public and donation, information disclosure and tax benefits.

Nonetheless, the political environment for social organizations has changed since 2015, indicating a new epoch under Chairman Xi Jinping's government. First, the *Law of the People's Republic of China on Administration of Activities of Overseas Nongovernmental Organizations in the Mainland of China* was adopted by the National People's Congress Standing Committee (NPCSC) on April 28, 2016 and came into force in January 2017.[109] The Law requested all International NGOs (INGOs) to register with public security organs, and to find professional supervisory units inside the country. Those who cannot register their offices will lose the status to continue staying in the country. As a direct impact, by the end of 2017, the Ministry of Public Security – the new state agency responsible for INGOs – reported that 461 international NGOs succeeded in registering under the current law. At the same time, the estimation showed that there were 1,000–7,000 international NGOs working in China before 2017.[110] The law will control the work of INGOs inside of China, breaking the connection between international and domestic NGOs, and weakening foreign influences (Kang 2018).

As for domestic social organizations, some strong messages were sent from the central state during this period. In September 2015, the General Office of the State Council issued released the document, *The Interim Opinions on Strengthening the Party*

[109] Many media press reported and commented on the implementation and potential consequences on international NGOs of such a law, two examples are: http://chinadevelopmentbrief.cn/articles/practical-guide-to-the-ongo-law-registration-and-filing/ and https://thediplomat.com/2017/03/overseas-ngos-in-china-left-in-legal-limbo/ (accessed August 5, 2020)

[110] Some media sources keep updating the registration status of social organizations in China. Two examples can be found at: http://www.scmp.com/news/china/policies-politics/article/2097923/why-foreign-ngos-are-struggling-new-chinese-law and https://thediplomat.com/2017/06/more-than-7000-foreign-ngos-in-china-only-72-registered-so-far/ (accessed August 5, 2020)

Construction Work of the Social Organizations (关于加强社会组织党的建设工作的意见(试行).[111] This regulation requested the establishment of Party branches with at least three Party-members in all not-for-profit organizations. Another legal document issued by the State Council Office was a detailed regulation to promote the development of a social organization foundation. *Opinions on Reforming the Management System of Social Organizations to Promote the Healthy and Orderly Development of Social Organizations*（关于改革社会组织管理制度促进社会组织健康有序发展的意见),[112] was enacted August 21, 2016. This document specified detailed policies to encourage and nurture social welfare service organizations, reinforce government agencies and Party branches' control over social organizations, and closely monitor interactions/exchanges with international communities.

Under a state-dominant context, the general political and policy environment is critical to social organizations as it will decide what a social organization can do, and how it can work. With the examples mentioned above, social welfare organizations can grow fast given that local government readily provides assistance in registration and funding and nurtures those organizations with staff trainings and free official spaces in some cities. For those that include policy advocacy as part of their organizational mandates, they have to test and develop viable strategies to adapt to the fast-changing political environment. For instance, Xi's Anti-corruption Campaign since 2012 has led to high

[111] The official document in Chinese can be found at: http://dangjian.people.com.cn/n/2015/0929/c117092-27645046.html (accessed August 5, 2020)
[112] The official document in Chinese can be found at: http://www.gov.cn/zhengce/2016-08/21/content_5101125.htm (accessed August 5, 2020)

turn-over among local government cadres.[113] This campaign considerably impacted advocacy strategies of NGOs. Using personal connections between NGO leaders and individual government officials to advocate has been commonly applied and is proven to be effective (Hsu and Jiang 2015; Teets 2017). Yet, the high turn-over of government individuals compels NGOs to seek new strategies. Several studies observed a trend to develop expertise (Teets and Almen 2018), increase NGO's professionalism (Dai and Spires 2018; Liu 2020), and influence legislation (Froissart 2019). At the same time all studies are asking for more transparency, including formal and institutional channels for participation.

In summary, civil society under a state-dominant and control environment still exists by all means, but it does not come from a collective and self-organized society like it is defined in the West, i.e., from the rise of the bourgeois. The cultural roots of Chinese society emphasizing harmony and family ties help define a civil society that does not act as an adversary to the state; at the same time, its representation of a broad public interest can be limited because of the relatively weak self-association of individuals in the society. As such, civil society with strong Chinese characteristics differs from others in its aspiration. Rather than being a watchdog to confront the state, it strives to contribute to improved governance alongside the state and has a functional role in the

[113] An article in Washington Post estimated more than 2.7 million officials were investigated, among which 1.5 million were punished, during the first six year of the campaign. See https://www.washingtonpost.com/world/asia_pacific/in-china-investigations-and-purges-become-the-new-normal/2018/10/21/077fa736-d39c-11e8-a275-81c671a50422_story.html (accessed August 5, 2020)

governance structure. Even so, this is not easily attainable and the tortuous path that Chinese civil society undergoes indicates the attitude of the state. Yet the government structure and the environmental consequences due to economic development has pushed the state to open to civil forces to be actively involved in managing problems.

All of these characteristics lead to the main question of the roles Chinese civil society organizations can have with the state, where there are opportunities and needs for them; but is it a functional role besides serving as work contractor or service provider? And if a functional role as Chinese civil society organizations have aspired is attained, what contributes to realizing such a role?

From previous chapters, empirical evidence showed that Chinese civil society organizations are making breakthroughs in participating in environmental policy making and law enforcement. They have succeeded in developing certain autonomous, professional, and innovative roles in China environmental governance. Such progress does not happen overnight but takes decades to be realized. I now turn to a particular case to closely examine from an insider's view as to how this could happen. Using one representative NGO case – Friends of Nature – I will review the organizational development history during the last 25 years (1994-2018). The analysis reveals that advocacy for policy change is possible when an NGO establishes its professional independence and develops capacities and expertise within a certain critical field, while also being able to represent public interest and mobilize citizens, all of which constitute as bargaining power and values meaningful to the state.

4.3 The Study Case – Friends of Nature

This section examines FoN's evolution encompassing three core programs throughout its history: environmental education, civic actions, and policy advocacy. These programs are intertwined and act as the pillars of the organization's work in achieving its set mission. Depending on the operating environment in different time periods, each of the programs has become the prime focus over the organizational evolution trajectory, emerging one after another. Underpinning the programmatic strategies and activities conducted over the years presented in this section, there were two key internal organizational strategies that made the work possible – namely professionalization and specialization. These helped to ensure that FoN was prepared when opportunities came. These two strategies may not seem obvious and intentional when examined them at this later stage in FoN's development. Nevertheless, they were crucial in my analysis and will be discussed in the following section.

The methodology applied in this research was discussed in detail in the Chapter 1. In summary, an action research approach was adopted during my four-months of field work embedded in FoN, from September to December 2018. Primary and secondary data about the organization, and 25-year historical records were collected with support from FoN, and I was able to interview this organization's staff, external partners, leaders and staff from other NGOs, scholars, and lawyers.

4.3.1 Founding the Organization (1993–1994)

On June 5, 1993, a group of concerned Chinese intellectuals had their first public discussion on environmental issues in modern China at Linglongta Park（玲珑塔） in Beijing. It was during this meeting that these people pledged to improve China's environment and support its citizens in participating in this effort.[114] The meeting led to the first environmental NGO in the country. On March 31, 1994, Friends of Nature (FoN) was officially registered with the Ministry of Civil Affairs.

The founder of the organization, Mr. Liang Congjie believed that creating a non-governmental organization would be the most effective way to reach the largest number of fellow Chinese, to jointly act upon the looming environmental issues facing modern China.[115] Hence, from the beginning, FoN has sought to involve the general public in environment protection efforts. FoN identifies itself to be a domestic membership-based environmental NGO that strives continually to expand its base to serve its members in their actions for the environment. Members come from anywhere across the country, and they form membership groups in multiple Chinese cities for localized efforts. These membership groups are independently operated, sometimes with weekly/monthly activities organized under different environmental themes.

[114] FoN English brochure, internal document, 2016
[115] "A Friend of Nature", May 5, 2017, FoN organization's website at: http://www.fon.org.cn/index.php?option=com_k2&view=item&id=10854:a-friend-of-nature&Itemid=121 (accessed July 20, 2020)

4.3.2 Public Awareness and Environmental Education (1994–present)

In its early years, FoN took interest and worked on raising the public's awareness through outreach activities and media reporting on emerging environmental problems at the time. According to Director General Liang Congjie, the work of FoN at that time was about "enlightening the public", which was "what people needed as China modernizes, and FoN had set out to match this expectation of the society".[116] The emerging environmental cases included the logging of natural forests in Southwest China which seriously threaten the survival of the Grey Snub-nosed Monkey (*Rhinopithecus bieti*) (listed as Endangered in IUCN Red List)[117], and the illegal poaching of the Tibetan antelope (*Pantholops hodgsonii*) in the Northwest China. In addition, at a session of the Chinese People's Political Consultative Conference (CPPCC), FoN's leader proposed to move Capital Steel, one of the top state-owned steel manufacturers, out of Beijing because it was a major source of air pollution in the city.[118] The proposal was later confirmed and approved, and the factory eventually moved. Such a success was not common for a grassroots organization. Nonetheless, the success would not have been possible without Mr. Liang's personal connections and recognized roles in the government – Mr. Liang having been a member of the national CPPCC since 1998.[119]

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[116] Interview with (six) Director Generals of Friends of Nature, by Heyi Institute, dated December 2014; (in Chinese) at: http://www.hyi.org.cn/news/hangye/833.html (accessed July 20, 2020)
[117] IUCN Red-list for this species, at: https://www.iucnredlist.org/species/19597/17943738 (accessed July 20, 2020)
[118] FoN English brochure, internal document, 2016
[119] The review of Mr. Liang Congjie, see https://www.theguardian.com/world/2010/nov/15/liang-congjie-obituary (accessed July 20, 2020)

Entering into the new millennium, FoN began to implement longer-term education programs, while continuously pursuing previously mentioned public environment campaigns and activities across the nation. It is worth noting that all four founding members[120] of FoN have a professional background in education. The official registered name of FoN is *Academy for Green Culture* – an affiliate of the Academy for Chinese Culture, suggesting the organization is an educational body to outsiders. This name can be readily understood and usually welcomed by Chinese society in general, as education is held in high regards and emphasized throughout Confucius culture and history. As such, there was no coincidence that environmental education became the early program focus and has always been the core of FoN's programs.

During the first ten years, two branded programs, namely the Antelope Bus (about 2000–2007) and the Green Hope Action Projects (about 2000–2008), were major efforts in environmental education. The two programs were inspired by ideas from overseas that tried to take the opportunity of national priorities and policies at the time. The Antelope Bus was a minivan decorated with a painting of antelope (main conservation target from illegal poaching as discussed above). With a highly mobile advantage, such vans traveled across the country and made periodic stops along the way to deliver environmental conservation knowledge and awareness messages to the general public. The Green Hope Action Project, also launched in 2000, was more targeted and group

[120] The founders are Mr. Liang Congjie, Ms. Liang Xiaoyan, Mr. Yang Dongping, and Mr. Wang Lixiong.

oriented. Collaborating with the GoC, the Project was designed to provide short-term environment classes or activities in elementary schools across the country under the national government poverty alleviation program – Project of Hope and Hope School (希望小学).[121] This high-profile and heavily endorsed government program was designed to provide fair access of education to children in poverty stricken rural areas. FoN recruited and coordinate teaching volunteers from the cities to deliver environmental sessions to rural schoolteachers and children. According to a third-party project evaluation, the resulting impacts from the programs, with some expected but others unintended, are testaments of FoN's effective niches in the civil society at that time.[122]

Overall, FoN took a pioneering position in environmental education in China based on these two major programs. Methodological approaches in these programs at that time were innovative and bold in the country; specifically, the mobile education stations and the organized volunteer educators from cities. The mobility of the vans broke geographic limits for FoN, allowing the organization to work outside of the registered city – Beijing, and to promote and recruit members across the country. Programs are inclusive and diversified to cover different demographics – youth to seniors; urban to

[121] An official introduction of the Project at: http://www.china.org.cn/features/poverty/2004-08/09/content_1095783.htm (accessed August 5, 2020)

[122] A third-party conducted project's evaluation (2007) stated: that there is "realization of exceptional efforts and considerable achievements because of the involvement of the volunteers that were unintended from the project design. These include volunteers helping and contributing to the development of the rural areas other than the facilitation of environmental related activities. The training and organization of volunteers are certainly one of the key strengths of the project as well as FON, where it continues to be an active and rewarding platform for individuals to make themselves useful in charitable endeavors" (p.11). – internal document from the organization.

rural. Interactions happening during the process were fostered across different social settings promoting a better understanding of situations at local settings, inequality, and other social causes of environmental issues.

4.3.3 Citizens Engagement and Civic Actions (2008–present)

Externally, the country's economic engine has worked ceaselessly for almost three decades while China's economy proceeded at an unprecedented growth rate. But growth came with unparalleled burdens on and costs to the environment. The year 2008 marked an important milestone for China when it hosted its first Olympics, propelling China to the front of the international community as an emerged world power. Moreover, the world had been focusing on climate change with China as a key player in making or breaking some of the international treaties to mitigate its foreseeable environmental impacts.

From 2008, FoN has initiated a number of action-focused environmental programs, building upon the knowledge and awareness raised from previous education endeavors. These included Urban Waste Management, Household Waste Reduction, Blue Lab (address air pollution issue), Low Carbon Family, and River Monitoring.[123] Through these ongoing programs under the *Public Action Center* arm of FoN until today, the organization provides activity designs and project models for lay citizens to practice and

[123] At FoN's official website, more details on those programs are available at: http://www.fon.org.cn/index.php?option=com_content&view=featured&Itemid=244 (accessed July 20, 2020)

take concrete individual actions at home or workplaces, and as collective activities, to make positive changes to the environment.

During this period, FoN's original environmental education focus entered into a second phase and in 2013 spun off as an affiliate but separate entity – Gaia Nature School. In addition to offering periodic classes and outdoor camps to the general public, the School works to cultivate family-based environmental education groups to organize and implement environmental actions in communities and at home. It also provides training to trainers on a nationwide basis. This institutional change stemmed from the needs for sustainability of the programs and started generating revenue from individual and family participants and increasing public involvement in nature related activities. Since its establishment, Gaia Nature School remains the leader in environmental education in China.

4.3.4 Policy Advocacy through Public-Interest Litigation (2011–present)

As mentioned above, even during its first 10 years FoN was involved in policy advocacy, mainly through its founder Mr. Liang's personal influence and networks, and its focus on emerging, high-profile environmental cases. As a member of the CPPCC, Mr. Liang also had constantly submitted proposals to the Conference pushing for legal reform and regulatory framework changes in favor of the environment and those populations that have been affected by environmental degradation and pollution.

A crucial event illustrating FoN's legal effort in its early days can be traced back to April 2005 – the first environmental public hearing in the country. In this case, FoN, along with many other NGOs, appealed to Beijng's Yuanmingyuan (圆明园, Old Summer Palace) Administration Bureau to conduct an Environmental Impact Assessment (EIA) on lining the park's lake beds with plastic sheets. The Yuanmingyuan Drainage Project was designed to improve and maintain the environment of this historical park, funded by Beijing City Government (budgeted ~USD 30 M).[124] The project caught public concern because the plan proposed to use plastic sheets to cover the entire lakebed, which can clearly lead to serious ecological damages to the lake ecosystem. The Project was openly criticized by ecologists, city residents, and environmental NGOs. Upon the collective requests, the State Environmental Protection Agency (SEPA) held the first public hearing on April 13, 2005 to discuss this environmental issue.[125] Three months after the public hearing, SEPA made a ruling on the full modification of the Yuanmingyuan Project based on a new EIA report. In the following year, FoN was invited by SEPA to take part in consultations on policy making. According to FoN's leader and board member, this official invitation represented a response from the government to the NGO's continual submission of proposals through CPPCC over the years (Interviews, FoN Director General [2013–present] and FoN founder, Beijing, December 2018).

[124] The exchange rate USD 1=RMB 6.9 to be used throughout this dissertation
[125] FoN brochure, 2017. Translated by the author

In 2005, FoN began supporting environmental pollution victims in seeking compensation through legal means, helping them voice their grievances to the larger society including state authorities. Within the organization, staff with legal backgrounds had been tasked with developing an in-house team of public interest lawyers upon formal board approval in 2006. In the 2008 strategic plan, policy advocacy and litigation work were also explicitly stated as a major focus of FoN for the coming years.

These internal developments were happening in parallel with FoN making professional connections with international NGOs that specialized in environmental justice and public interest litigation, e.g., American Bar Associations (ABA) and Natural Resources Defense Council (NRDC). Concepts of environmental litigation had been exchanged and explored for local application during several rounds of meeting between the INGOs and FoN, who was also joined by another domestic NGO, e.g., Institute of Public and Environmental Affairs (IPE).[126] However, there was no concrete plan as to how to apply to a case yet in those discussions (Interview with FoN Director General [2009–2012], Li Bo, virtual interview, January 2019).

Between 2008 and 2010, this group of NGOs focused on developing programs to support the pursuit of environmental litigation as a key policy advocacy effort. They have identified that training and capacity building in legal knowledge and practices

[126] The official website for these organizations can be found respectively at: https://www.americanbar.org/advocacy/rule_of_law/where_we_work/asia/china/; https://www.nrdc.org/china; and http://wwwen.ipe.org.cn/about/about.aspx (accessed August 5, 2020)

among target groups such as young lawyers, judges, NGOs, and academia, to be the first effort needed. Consequently, the NRDC funded the Environmental Public Interest Lawyer Project which was launched in 2009; and in the following year, the three-year Environmental Public-interest Litigation Action Network Project (EPiL) with ABA began implementation. It was hoped that, through those capacity building efforts FoN could identify potential opportunities within the current policy environment and expand new work involving participation in the Chinese legislative process (Interview with FoN founder, Beijing, December 2018).

Besides international exchange, a domestic self-supporting mechanism has been shaped during this process. The mechanism exists among the alliance NGOs, including IPE, the Green Home of Fu Jian, and China Biodiversity Conservation and Green Development Foundation (CBCGDF), that supports each other with potential cases and field investigations, or stands together as co-plaintiff in the court. Another self-support mechanism crossing discipline and expertise is with the Center for Legal Assistance to Pollution Victims (CLAPV). the Center is an NGO registered under China University of Political Science and Law in October 1998, consisting of a group of volunteer law professors and lawyers, aims to increase public awareness of environmental law, improve environmental law enforcement, and provide legal assistance to protect the rights of pollution victims. Since the very beginning of EPiL policy, CLAPV has worked closely with FoN in courts and in the field, providing professional expertise and legal endorsements in supporting plaintiff in individual lawsuits.

Meanwhile, the first full-time staff responsible for legal program implementation, and the first full-time public interest lawyer joined FoN in 2010. In the following months, a legal advisory team that engaged external lawyers and legal professionals on a part-time voluntary basis to support related efforts was established. Together, they formed the initial FoN legal team.

Starting from 2010 upon formation of its legal team, FoN, as an organization, has resolved to use the impact of individual environmental lawsuits it initiates or involves, to drive broader legal and policy reforms. In other words, this renewed strategy will not be solely reliant on the state's decision and approval to open space for NGOs to take part in legislative processes. Instead, FoN plans to realize its value as part of civil society by taking on various responsibilities within environmental litigation practices. These practices include field investigations, identifications of violations/cases, collections of court evidences, and technical calculations of environmental damages in monetary terms. All of these are instrumental to the process of legal battles. Although winning the cases will undoubtedly bring positive outcomes to the environment, even cases that FoN lost still serve as important policy learning avenues (as discussed in Chapter 2) and legal laboratories (as discussed in Chapter 3) that FoN will offer to the state – an advocacy means, nonetheless.

FoN began to pursue environmental public interest litigation as early as 2009, in the midst of preparations on building its internal team and international collaborations on

legal programs. At that time, FoN attempted to file a total of seven cases, but due to various reasons, they failed to be filed in the end.

In October 2011, FoN successfully filed its first environmental litigation case (Yunnan chromium soil pollution), which helped the organization gain practical experiences and useful insights into its role in legal cases. Specifically, the organization could develop technical expertise to engage legal cases, and to improve risk assessments, such as the financial risks/costs to be involved in soil pollution field investigation (Interview, FoN Director General, Zhang Boju, Beijing, December 2018). From 2015, FoN has concentrated on the legal practices of EPil, becoming one of the top three litigating civil organizations in China. Until the end of 2018 FoN has filed 34 suits in 19 provinces.[127] Friends of Nature's 2019 strategic plan outlined legal and policy advocacy programs around thematic focuses across various environmental issues (namely Environmental Legislation, Public Health, Climate Justice, Biodiversity Protection, and Overseas Investment Responsibility), in order to analyze potential risks and needs. The new program strategy also sets priorities and litigative strategies when undertaking the cases.

In 2012, the revision of China's Environmental Protection Law (EPL) began as the state put effort to reform the environmental regulatory framework. The MEP (now MEE) took the initiative for the first time to invite and organize civil organizations to discuss the first draft of the revision. With this official opening, FoN undertook an active role

[127] FoN proposed 40 suits, with 34 successfully filed with courts. Those 40 cases covered water pollution (5 cases); air pollution (16); soil (10), and environmental destruction (9).

in public consultation and participation throughout the policy reform process that lasted until 2014. The first revision stated that the All-China Environmental Federation (a government-organized NGO under SEPA) would represent the public and act as plaintiff for all public interest lawsuits. FoN, together with other environmental NGOs, fought strongly on this point arguing that this legal standing should be granted broadly to civil organizations in general, rather than only allowing one government-organized NGO to be able to file a case when public interest is concerned.

FoN and a civil society alliance (including NGOs, legal scholars, media, and government officials) eventually influenced the amended EPL (2014) and the amended *Civil Procedures Law* (2012).[128] Under these two amended laws, all NGOs are granted legal standing to function as plaintiffs in environmental public interest litigation. Moreover, these two legislations accelerated and formed the basis for the following new Environmental Public-interest Litigation (EPiL) policy, which came into effect in January 2015, officiating NGOs as new legal and legitimate actors in China's environmental governance.

Another important legislative influence achieved by FoN concerned the 2018 *Law on the Prevention and Control of Soil Pollution*. By 2018, FoN had gathered extensive legal experiences in six litigation cases related to soil pollution issues, especially the direct and firsthand involvement in the nationally recognized Changzhou soil pollution

[128] The process of influencing legislation by NGO alliances has been discussed in a number of papers. One of the studies cited in this chapter is from Froissart (2019).

case (discussed in detail in Chapter 2). Because of this experience and the previous good collaborative relationship with the MEP, FoN was invited to be a co-partner in the consultation contract with the Standing Committee (task force of soil pollution prevention law), to comment on the new *Soil Pollution Law* in April 2017. FoN provided detailed comment on the two drafts of the law over a period of four months, and some significant principles considered by FoN (e.g., polluters pay principle) were eventually incorporated in the final enacted law.

Through implementation of legal practices over the last four years (2015–2018), FoN has submitted 230 motions to national and local People's Congress, participated in legislation processes in more than 80 environment laws and regulations, and requested 1160 public information disclosures.[129] Policy advocacy through submitting motions have a become a continuous effort. FoN's legal practices in EPiL also provided the Chinese judicial system with innovative legal theory and methodologies and pledged new areas of environmental protection such as preventative protection (discussed in detail in Chapter 3).

4.4 Discussion

As the first as well as the leading environmental NGO, FoN carries some commonly shared characteristics of civil society organizations in China. The founders were a group of intellectuals, for some other ENGOs, the leaders are journalists or retired government

[129] FoN's organization introduction (PowerPoint), 2018. Internal document

officials, who were concerned about the lack of access to information among the general public concerning environmental issues and social-political causes. They decided to expose those issues, called for attention and awakened environmental consciousness in the general public; as the first Director General of FoN put it – "to enlighten the public." This focus suggests that the organization is different from a self-organized, self-supported citizen group (often seen in civil society research from the West); as the organizers did not act in their own private interests, but rather were driven by social responsibilities and assumed the initiative to "educate" the general public as a target group to improve the status quo.

Different from some traits expressed in early Western civil society studies, FoN did not have a strong foundation based on individual citizens. Hence, FoN needs to reach out and work alongside the general public in order to build its 'grassroots' base. This is to gain trust and legitimacy from its constituency and civic individuals, so that they can represent them and the public interest. However, under an authoritarian state context, the history of NGO development reflects state-dominance. Through policies and regulations, the state stays vigilant in its openness to civil society organizations due to concern of losing control and stability in the society (e.g., Arab Spring). Therefore, civil society organizations also have to be strategic in nurturing the niche that would prove valuable and necessary to the state without the worry of a shift in power. This helps civil society organizations to stay alive while developing a complementary feature. Beyond, they also eagerly explore the opportunities to develop an agent of change role, bring innovations into the policies and legislation systems, and more importantly to secure a

functional and institutional status in environmental governance structure. Practicing law through public-interest litigations and influencing new environmental legislations are new endeavors adopted by FoN during the past five years. FoN wants to provoke the state to improve the governance structure and policy implementation and hold business polluters to greater accountability. This role is different from a service provider, but with more autonomy, innovations and can directly question the performance of government. The recent successes discussed in the previous chapters suggest that FoN is making progress in this direction. In order to achieve this success, institutionalization and specialization in law are the two keys that helped FoN to open the door for a role-change with the state.

Reviewing FoN's trajectory, FoN has always been fostering its members across the regions and in cities. This remains a core business for the organization in order for it to stay connected to society and to be realized for representing relevance and legitimacy. FoN provides trainings, technical expertise, and in some cases finances to support members' local activities. As of September 2017, FoN supports 22 volunteer groups across the country, running weekly/monthly activities organized under different environmental themes. Although the member groups do decide and organize their own activities, FoN provides ideas and support in alliance with the civic action program themes run by the organizations. The close interactions between the central organization and local groups help strengthen the connection between FoN and the society at large.

In practice, operational struggles have impelled FoN to move beyond member coordination and project implementation to make decisions on institutionalization. First, there was a lack of linkages between organizational missions and programs within the organization.[130] A project-based funding system created a dilemma that staff teams only focused on project implementation and actions as project workload increased, with less time to reflect on how activities could contribute to overall goals. Constituency members did not see clear direction coming from the organization because there was no consensus among the staff and management teams. As a result, members had to identify their own interests and activities to keep the groups alive and attached. Secondly, as the organization grew with a high dependency on an influential leader (not uncommon in Chinese NGOs), FoN had to gradually transit to an organizational management model due to the real risks for an organization relying on a single person for leadership, resources, and operations.

The institutionalization process started in June 2004 when the FoN Board decided to change the single leadership governing model by appointing an executive to lead the organization working under a Board of Directors. Until now, six persons have served in this position. Moreover, a strategic planning process in 2008 gave rise to a shared organizational mission, vision, and values among all staff, for the first time in FoN's history. One considerable change in the institutionalization process was to establish policy advocacy and environmental litigation as the core organizational strategies. By

[130] Interview with (six) Director Generals of Friends of Nature, by Heyi Institute (in Chinese), dated December 2014. see http://www.hyi.org.cn/news/hangye/833.html (accessed July 20, 2020)

this process, FoN sent several salient messages to the outside. FoN aimed to establish an organizational image and reputation; to avoid individual *ad hoc* activities and strengthen organizational collaboration with partners; and to place organizational focus to practice law and influence legislation and policy.

The need to establish professional capacities and reputations in the legal field was also recognized. Capacity building efforts commenced in 2004, and FoN began to form a legal program and hired professional lawyers as permanent staff members in 2010. Specialization in the legal field helped the organization in securing a professional status, sound expertise, and field experiences to initiate changes to state policies. The organization's history illustrates that FoN's specialization is achieved through collaborations with international NGOs with legal (ABA) and environmental litigation (NRDC) expertise during the early stage (2004). The strategic partnerships with China's top legal academic institution and law scholars (China University of Political Science and Law, and particularly with CLAPV)[131] and alliances built with individual lawyers and judges by providing training opportunities have strengthened the organization's role and reputation in environmental law and justice. Over a 10-year period, FoN has steadily developed a legal expertise by accumulating a team of professional staff and gaining specialized knowledge and experiences in specific environmental cases from the field.

[131] Official website at http://en.riel.whu.edu.cn (accessed July 20, 2020)

To change institutional structure and develop specific field of expertise constitutes the main components of FoN's organizational shift. Not only is functioning as an institution important for the survival and growth of the organization, it is equally critical in terms of securing trust and confidence from its constituency, partners, and (especially) the state.

By being able to represent and mobilize the society as a civil society organization, for instance with its national network of volunteers and members, FoN brings concrete advantages to the state partner. When the time comes, the state will benefit from more connections to society, that may help for practical reasons in addressing social issues or fortifying nationalism and the country's image. This societal connection will convey local information and public remedial actions to support the common objective of environmental protection. This can also save the state transaction costs in communicating about societal demands.

This shift (beginning in 2008) did not happen overnight. It took four years before FoN participated in the EPL legislation revision process (2012), and seven years before EPiL began (2015). The initial efforts can even be traced back to 2004, when FoN started to look for expertise and experiences from international organizations. The invitation by government to take part in the legislative process is also due to the continuous submission of motions to The Chinese People's Political Consultative Conference in the prior years.

Many activities that FoN led, organized, and/or undertook were to break through the existing system to create possibilities for the future. It is during this timing when government is willing and ready to make changes that some bold and innovative attempts can be tested, sometimes in collaboration with government agencies. It will be too late to wait for a full and clear approval from the state, which will clearly limit the autonomy and space of civil organizations. As discussed earlier, the enabling policy environment during Chairman Hu Jintao's period in early 2000 provided FoN a political opportunity to become actively involved. FoN's efforts included engaging with stakeholders from the state, such as holding meetings with and trainings for judicial actors, which enabled the state to see the qualities of the NGOs. The plaintiff standing defined by law assures that NGOs can participate in environmental law enforcement even under a circumstance when certain activities are not allowed. For instance, Chairman Xi's new policies on controlling civil organizations in the most recent years can no longer limit and affect the legal standing role of NGOs in the courts, after such role has already been endorsed by laws that NGOs have succeeded to influence.

The 25-year history of FoN shows the specific organizational strategies – institutionalization and specialization – support the organization to create policy opportunities to make change happen; this, in return, reshapes the state-NGO dynamic.

4.5 Conclusion and Future Research

The experiences of a prominent Chinese NGO that has demonstrated some success in bringing changes to contemporary environmental policies can provide valuable insights for other NGOs. In particular, the organizational institutionalization and specialization that FoN embarked on before any significant engagement in policy change happened, can be given as antidotes to other organizations for making successful role changes. The success of FoN lets us retrace the organization's steps and lessons learned to arrive at its current position as a change agent for the state. The documentation and analysis of such a roadmap has revealed necessary elements and critical factors attributing to its achievements. These can be useful reference for other civil society organizations and practitioners who are in the same operating environment and share similar limitations and stresses. Although it may seem intuitive that institutionalization and specialization for civil society organizations are fundamental in gaining autonomy and securing valued position in a society, it is not common in Chinese NGOs. This can be attributed to the limitation in capacities and cultural preference in personal leadership and generalization of approaches. In this case, the lessons from FoN underscore the importance of these two somewhat neglected strategies in this context, and the necessity to invest with organizational efforts and resources early in preparation to successfully addressing future opportunities under the domination of the state.

For example, critics of Chinese NGOs often indicate, and as NGOs often self-reflect, that their main constraint in achieving their goals and missions is a lack of capacities.

Though technical capacity is unquestionably indispensable as shown in the case of FoN's legal team, we also see from FoN that the determining factor for success lies more on the institutional capacity (e.g., strategic thinking and planning, political judgement, social networking, mobilizing and managing resources). In the common situations of NGOs where resources are always limited, institutional capacity would be equally needed, which could help guide the building of the necessary types and extent of technical capacities.

Certainly, a case and the analysis based on one organization cannot fully provide the picture of the state-civil society dynamic and explain the drive behind it. Nevertheless, the trajectory of a particular NGO over the course of 25 years allows us a sufficiently long period to capture significant changes and their impacts over the long-term. This enables the analysis to filter out short-range thrills or pitfalls that do not persist and/or are inconsequential over the organization's history. The events, strategies, and their outcomes covered over a long period of time can help us to better identify meaningful trends and the far-reaching characteristics attributing to them.

Moreover, the efforts and successes of one organization like FoN is by no means adequate to make sweeping social changes. To do that, we need many more NGOs that can interact with the state like FoN. Though FoN on its own is not a sufficient force to change the society at large, its case exemplifies that changes are possible by an NGO through its influence on the state and driving policy changes. Thus, this case study is meant to inspire other organizations to reference and take innovative actions that can

transpire into more agents of change. It is for the other practitioners mainly to know and adopt the possible routes to developing a role-change that they may also aspire to through this illustration of actual courses undertaken with some successes. By joining forces among NGOs, including those in other fields, such as, public health, food security, and citizens' rights, the ultimate objective of social change can be attained.

FoN chooses to focus and use litigation as its change agent strategy. It can be in other areas to drive changes as well, for instance, technology, data management, and frontline investigation for other civil organizations. Existing literatures have studied NGOs that are specialized in the power of data and information disclosure, such as the Institute of Public and Environmental Affairs (IPE) (Sun and Yan 2020). Others focus on resistance from community and organizations to a waste incinerator, with NGOs playing an intermediary role, such as Nature University (Bondes and Johnson 2017). The examples are based on individual NGOs or represent stand-alone efforts in a certain field. Therefore, future research can investigate state-civil society dynamics from a multidisciplinary and cross-regional view. It would be interesting to understand and assess if it is possible to grow an alliance of NGOs, who divide and fulfill roles with each of their organizational specializations to contribute to a greater impact. Additionally, collaborations of NGOs across geographical regions or ecological environments would serve as another focus of China's state-society dynamic research in the future seeing that there is an imminent need for social forces in this regard for a large country like China.

4.6 References

Ang, Yuen Yuen. 2016. "*How China escaped the poverty trap."* Cornell University Press.

Bondes, Maria, and Johnson, Thomas. 2017. "Beyond localized environmental contention: horizontal and vertical diffusion in a Chinese anti-incinerator campaign." Journal of Contemporary China 26, no. 106: 504-520.

Burawoy, Michael. 2003. "For a sociological Marxism: the complementary convergence of Antonio Gramsci and Karl Polanyi." *Politics & Society* 31, no. 2 (2003): 193-261.

Fei, Xiaotong. (1948). *Xiang tu Zhongguo. Folk.*

Fei, Hsiao-t'ung, Xiaotong Fei, Gary G. Hamilton, and Wang Zheng. (1992). *From the soil: The foundations of Chinese society.* Univ of California Press.

Chamberlain, Heath B. 1993. "On the Search for Civil Society in China." *Modern China* 19 (2): 199–215. https://doi.org/10.1177/009770049301900206.

Cohen, Jean, and Arato, Andrew. 1992. "Politics and the Reconstruction of the Concept of Civil Society." *Cultural-political interventions in the unfinished project of enlightenment*: 121-142.

Dai, Jingyun, and Spires, Anthony J.. 2018. "Advocacy in an Authoritarian State: How Grassroots Environmental NGOs Influence Local Governments in China." *The China Journal* 79 (January): 62–83. https://doi.org/10.1086/693440.

Froissart, Chloé. 2019. "From Outsiders to Insiders: The Rise of China ENGOs as New Experts in the Law-Making Process and the Building of a Technocratic Representation." *Journal of Chinese Governance* 4 (3): 207–32. https://doi.org/10.1080/23812346.2019.1638686.

Gao, Xiang, and Teets, Jessica. 2020. "Civil Society Organizations in China: Navigating the Local Government for More Inclusive Environmental Governance." *China Information*, March, 0920203X2090811. https://doi.org/10.1177/0920203X20908118.

Geall, Sam, and Hilton, Isabel. 2014. "China's environmental governance challenge." In *State of the World*, pp. 129-137. Island Press, Washington, DC.

Habermas, Jürgen. 1964. "The public sphere: an encyclopedia article." *The idea of the public sphere: A reader* (2010): 114-120.

Habermas, Jürgen, 1989. *The Structural Transformation of the Public* Sphere: An Inquiry into a Category of Bourgeois Society. Cambridge, Mass.: MIT Press. Chapters 1 and 2.

Harding, Harry. 1984. "The Study of Chinese Politics: Toward a Third Generation of Scholarship." *World Politics* 36 (2): 284–307. https://doi.org/10.2307/2010235.

Hsu, Carolyn L., and Jiang, Yuzhou. 2015. "An institutional approach to Chinese NGOs: State alliance versus state avoidance resource strategies." China Quarterly: 100.

Hsu, Jennifer YJ, and Hasmath, Reza. 2014. "The local corporatist state and NGO relations in China." *Journal of contemporary China* 23, no. 87: 516-534.

Hsu, Jennifer YJ, and Hasmath, Reza. 2017. "A Maturing Civil Society in China? The Role of Knowledge and Professionalization in the Development of NGOs." *China Information* 31 (1): 22–42. https://doi.org/10.1177/0920203X16676995.

Kang, Xiaoguang, and Han, Heng. 2008. “Graduated Controls: The State-Society Relationship in Contemporary China.” *Modern China* 34 (1): 36–55. https://doi.org/10.1177/0097700407308138.

Kang, Xiaoguang. 2018. “Moving Toward Neo-Totalitarianism: A Political-Sociological Analysis of the Evolution of Administrative Absorption of Society in China.” *Nonprofit Policy Forum* 9 (1). https://doi.org/10.1515/npf-2017-0026.

Lang, Graeme, and Xu, Ying. 2013. "Anti-incinerator campaigns and the evolution of protest politics in China." *Environmental Politics* 22, no. 5: 832-848.

Lieberthal, Kenneth, and Oksenberg, Michel. 1988. *Policy making in China: Leaders, structures, and processes*. Princeton University Press.

Liu, Dongshu. 2020. “Advocacy Channels and Political Resource Dependence in Authoritarianism: Nongovernmental Organizations and Environmental Policies in China.” *Governance* 33 (2): 323–42. https://doi.org/10.1111/gove.12431.

Mertha, Andrew C. 2005. "China's “soft” centralization: shifting tiao/kuai authority relations." *The China Quarterly* 184: 791-810.

Oi, Jean C. 1992. “Fiscal Reform and the Economic Foundations of Local State Corporatism in China.” *World Politics* 45 (1): 99–126. https://doi.org/10.2307/2010520.

Perry, Elizabeth J. 1994. “Trends in the Study of Chinese Politics: State-Society Relations.” *The China Quarterly* 139 (September): 704–13. https://doi.org/10.1017/S0305741000043113.

Polanyi, Karl, and MacIver, Robert Morrison. 1944. *“The great transformation.”* Boston: Beacon press.

Song Chengcheng, Wang Shizong, and Parris, Kristen. 2015. "All roads lead to Rome: autonomy, political connections and organizational strategies of NGOs in China." *China: An International Journal* 13, no. 3:72-93.

Spires, Anthony J. 2011. “Contingent Symbiosis and Civil Society in an Authoritarian State: Understanding the Survival of China’s Grassroots NGOs.” *American Journal of Sociology* 117 (1): 1–45. https://doi.org/10.1086/660741.

Steinhardt, Christopher, and Wu, Fengshi. 2016. "China’s New Species of Environmental Protests." *IPP Review*.

Sun, Yu, and Yan, Wenjie. 2020. "The power of data from the Global South: environmental civic tech and data activism in China." International Journal of Communication 14: 19.

Teets, Jessica. 2013. “Let Many Civil Societies Bloom: The Rise of Consultative Authoritarianism in China.” *The China Quarterly* 213 (March): 19–38. https://doi.org/10.1017/S0305741012001269.

Teets, Jessica C., Hasmath, Reza, and Lewis, Orion A.. 2017. "The incentive to innovate? The behavior of local policymakers in China." Journal of Chinese Political Science 22, no. 4: 505-517.

Teets, Jessica, and Almen, Oscar. 2018. “Advocacy under Xi: NPO Strategies to Influence Policy Change.” *Nonprofit Policy Forum* 9 (1). https://doi.org/10.1515/npf-2017-0028.

Van Rooij, Benjamin. 2010. "The people vs. pollution: understanding citizen action

against pollution in China." *Journal of contemporary China* 19, no. 63 (2010): 55-77.

Van Rooij, Benjamin, Stern, Rachel E., and Fürst, Kathinka. 2016. "The Authoritarian Logic of Regulatory Pluralism: Understanding China's New Environmental Actors: Authoritarian Logic of Regulatory Pluralism." *Regulation & Governance* 10 (1): 3–13. https://doi.org/10.1111/rego.12074.

Wang, Qun, and Kang, Xiaoguang. 2018. "China's Nonprofit Policymaking in the New Millennium." *Nonprofit Policy Forum* 9 (1). https://doi.org/10.1515/npf-2018-0013.

Yang, Guobin. 2003. "Civil Society in China: A Dynamic Field of Study." *China Review International* 9 (1): 1–16. https://doi.org/10.1353/cri.2003.0057.

Yang, G.B, Calhoun, C. 2007. "Media, Civil Society, and the Rise of a Green Public Sphere in China." *Journal of China Information*, 21 (2):211-236

CHAPTER 5. CONCLUSION

5.1 Summary of Argument

This dissertation addresses the main question of ***how civil society organizations – as a representative of the general public and a private actor, interact with an authoritarian state to protect the environment.*** Based on empirical research and analysis, I conclude that civil society organizations in China have attained a functional role in environmental governance vis-à-vis the authoritarian state, albeit with constant control and changes imposed by the state as it conducts policy experiments and implements new policies involving non-state actors. This observation demonstrates that civil society does have a role to play and can complement state agencies to contribute to achieving good governance in responding to social-environmental issues, and stability of the society at large, given the state remains open to engaging civil efforts from society. The dissertation reports that through two major processes of institutionalization and organizational specialization, civil society organizations can become more independent and professional, while building reputations and expertise to support actions to improve and create external policy opportunities. To reach this finding, I chose to focus on a new environmental governance instrument in China, the Environmental Public-interest Litigation (EPiL) policy, to support my analysis in three aspects.

First, in Chapter 2, I showed that civil society organizations can influence new legislation and policies by enforcing environmental laws and becoming involved in

environmental litigations as soon as the state grants legal standing to them as a new actor. Under the experimental governance model prompted by an evolving society and necessitated by the challenges to conventional governance, the China state unprecedentedly legitimized civil society organizations into the formerly exclusive legislative and policy processes. I contribute to theories of experimental governance and policy learning by laying out the dynamics between the state and NGOs through the early years of EPiL implementation in an authoritarian context. In addition to this direct influence, the new actor in the reformed governance structure also generates some undercurrent, outside the control setting of the policy experiment. It includes sparking changes to the judicial system and players and facilitating learning for both the state and the NGOs in the process, which can eventually lead to strengthening of existing environmental laws and policies to protect the environment and urge for a greater accountability of the state.

Second, I argued that civil society organizations can contribute positively to environmental law enforcement and the judicial system as a private actor by bringing in innovations and offering testing grounds for environmental legal theories through the examples of environmental litigation cases in China in Chapter 3. Contrary to the critics of private enforcement in the US, my study shows that China's setting is immune from possible interference from private actors to regulator's control of public policy because the Government of China could make quick changes to impose restriction on civil engagement. Moreover, the cases discussed demonstrated that the larger benefit of private enforcement lies in influencing public policy to address broader societal goals

(i.e., public interests). Participation and legal standing of civil society organizations in the lawsuits that highlighted the historical relationship between the state and market for the environmental offense is imperative. NGOs help safeguard the interest of the public especially when the state is implicated in producing environmental damage or faces a conflict of interest in mounting preventive actions. As the only impartial party to file EPiL (the other two qualified plaintiffs are prosecutors and government agencies), civil society organizations can promote environmental justice by representing the public and the environment.

Finally, with the authoritarian state's full control of public policy and decision making, civil society organizations cannot initiate change. They must resort to various ways of making preparations in order to meet opportunities when they arise. While civil organizations can take steps to push the state to adjust policies, there are significant risks and constraints involved. The interactive, mutual beneficial relationships between the state and civil society provides an opportunity for me to conduct a systems analysis. In Chapter 4, I traced back in history to examine the evolution trajectory that one civil society organizations (Friends of Nature) took to arrive at the position warranted in the previous two chapters. From a historical and organizational perspective, I identify two central organizational strategies, which are institutionalization and specialization. Behind 25-years of development by this organization, it was because of these strategies that help it gained traction in being autonomous and functional to policy processes in the face of the state. Before reaching this conclusion, I first claimed that the roots and growth of Chinese civil society are based in salient characteristics that are different from

the West. The main objective of civil society in China is to develop a complementary role to the state to realize better governance, and not necessarily to oppose or challenge the authoritarian regime. This is different from the state-society relationship in the West. I further argued how NGOs can remain non-adversarial while striving to act beyond serving as a contractor for state functionally. Instead, it is to establish their professional independence, and specialize by building their capacities and expertise in a certain field; at the same time, gaining legitimacy from the public it represents and mobilizing citizens for protection of public interests.

5.2 2019 Updates on EPiL and Individual Case

In the fifth year since the EPiL policy became enacted, the three involved plaintiffs, namely civil society organizations, public prosecutors, and (local) government agencies are all making progresses in environmental public-interest litigations. Table 2 illustrates this dynamic.

From these latest statistics, we see steady increase in public prosecutors' EPiL litigations, as compare to 1737 cases in 2018 (see Chapter 2). It is worth mentioning that public prosecutors place more efforts on the combination of criminal and civil cases, leveraging the public prosecution's resources of criminal database to address environmental issues.

Table 2. Number and types of EPiL case filed in 2019

Plaintiff	**Civil EPiL**		**Administrative EPiL**		**Criminal + Civil EPiL**		**EEDCS (Env. Damage Compensation) ****		**Totals**
	Cases field in Courts	Court Ruled	Case filed	Court Ruled	Case filed	Court Ruled	Case filed	Resolved	Cases filed in Courts
Civil Orgs	179 *	58	--	--	--	--	--	--	179
Public Prosecutors	312	248	355	277	1642	1370			2309
Local Govt. Agencies							49	36	49
Totals:	491	306	355	277	1642	1370	49	36	--

Sources: "*White Paper on China's Environmental Resource Trial (2019).*" Supreme Court of the People's Republic of China

Remarks:

***** *For civil organizations, the total number of cases successfully filed at courts through the first five years under EPiL policy are respectively 55 (2015), 65 (2016), 58 (2017), 65(2018), and 179 (2019). There was a sharp increase in 2019. Because there is no detail information available, it is hard to explain why civil organizations file more cases, and what type of cases (in term of environmental damage or pollution) were filed.*

****** *Among these 49 cases, 28 applied for judicial confirmation, which means the local government and defendants will resolve the case through "administrative consultation" instead of court trial. Among these cases, 23 litigations have been resolved. The remaining 21 went to court trial, and 13 have been closed with court judgements.*

Another important change in EPiL policy is the development of the Ecological and Environmental Damage Compensation System (EEDCS) system, which supports government agencies across various levels to initiate the same civil lawsuits that NGOs can now file. This is due to the rationale of government agencies as representative of ownership over public property and natural resources and can accordingly act as

plaintiff in environmental dispute cases at courts. It was planned back in 2015 that the EEDCS would be formalized in law by 2020 (see Chapter 2), which did not happen. However, in 2019, the Supreme Court issued the document *Several Provisions of the Supreme People's Court on the Trial of Cases on Compensation for Damage to the Ecological Environment (for Trial Implementation)*.[132] The document is a guide for court trial practices. It emphasizes the importance of 'pre-trial' procedure – to encourage consensus-oriented consultation efforts by local government agencies with polluters to resolve the case; and most importantly to coordinate relations between civil organization filed litigation with government agencies' case, where 'competitions' are involved. This judicial interpretation prioritizes the government's case over civil litigation by civil organizations, when both cases are filed against the same environmental damage. Civil public interest lawsuit shall be suspended first, and after the trial of EEDCS case is completed, civil organizations can file a new litigation on the damages by providing proven evidence, which are not found in the trial of the previous case.

It is clear that civil organizations in EPiL practices are facing the pressure of an external shrinking policy environment to engage civil efforts, as we see above. Internally, civil society organizations are urged to develop a clear idea of future's litigation strategies: practical questions such as quantity-oriented or quality-oriented? If the later, what types of litigation shall be filed? And how to make it influential? The 2019 spike in EPiL

[132] The official document (and English translation) can be found at: http://en.pkulaw.cn/display.aspx?id=20f815c05e49c26ebdfb&lib=law&SearchKeyword=&SearchCKeyword=%A1%B6%B9%D8%D3%DA%C9%F3%C0%ED%C9%FA%CC%AC%BB%B7%BE%B3%CB%F0%BA%A6%C5%E2%B3%A5%B0%B8%BC%FE%B5%C4%C8%F4%B8%C9%B9%E6%B6%A8%A1%B7 (accessed August 5, 2020)

cases by NGOs (179 cases) represents an opportunity for future's research to understand the plaintiff organizations, motivation, and possible effects of this rapid change.

Another update of individual litigation is the Green Peafowl Case, which was the first preventative EPiL suit briefly mentioned in Chapter 2 and discussed in-depth in Chapter 3. It has entered into a second trial after the court ruling in March 2020 was appealed by the plaintiff.

In the first trial, the court ruled that the hydropower construction will have irreversible impacts on the habitat of the green peafowl and poses great risk to the species. Hence, the court ordered the defendant (the hydropower company) to halt the plant project. In addition to the temporary environment injunction, the ruling also included that after the company conducts a second Environmental Impact Assessment as required by the Environmental Department and undertakes improved measures approved by the department, the relevant supervising agency will then decide on the project according to specific circumstances.

Notwithstanding the issuance of a temporary injunction order in this pioneer preventative civil EPiL suit that concerns future potential ecological damages, the plaintiff (i.e., FoN) appealed the decision on the basis that there is still potential risk to the species under the given conditions with this ruling; arguing that only if there is a

permanent injunction can such ecological threat be eradicated completely. The second trial commenced in August 2020 as a result of this appeal.[133]

One of the key arguments during the appeal was with regards to the Environmental Impact Assessment (EIA) required before the hydropower project can be launched or resumed. FoN claims that the assessment, conducted by Kunming Engineering Corporation Ltd. (a subsidiary of Power Construction Corporation of China, which is a state-owned enterprise in the energy sector), has serious flaws. The subsequent EIA report is considerably inadequate and inaccurate from an ecological point of view; thus, if it is used as the sole basis to determine the eligibility of an injunction to the project, the ecological risk will be tremendous. The question here is whether the case shall be ruled based on a commercial-running agency that is also a technical arm of the hydropower corporation? The core message that FoN tries to convey to the trial and society at large from this landmark lawsuit is to prevent potential and future environmental risks. Without an objective and evidence-based proof of environmental or ecological damage, which is technically or scientifically important but difficult to do in any circumstance, how should the court – judicial system on the whole – make an informed and sound decision? Such a decision has to be balanced between conserving for the future and making private sector bear the massive economic costs for present.

[133] One of the news reports (Chinese) on the court trail can be found at: http://www.legalweekly.cn/hbfz/2020-08/27/content_8288899.html (accessed July 20, 2020)

5.3 Final Remarks

The discussion of economic development versus conservation in China is experiencing a new era. Under the state dominating setting, government-led efforts show a few mindful clues for the state to publicly recognize that a quality environment is essential for the development of society. Those efforts include establishing an overarching guiding principle in ecological conservation pronounced by Xi, reforming of the state environmental agency and national policies, and adding public participation clauses to environmental legislations. The question remains how to achieve this ideal.

Within one of those efforts in particularly, the state has opened a door to allow civil society organizations to legally and directly hold polluters and government agencies accountable for environmental protection under the new EPiL policy. Because civil society organizations are to represent the public and its interests, their involvement and contribution in public interest litigations is undeniable. The granted standing in environmental litigations for civil organizations has largely changed the established arrangement in the Chinese judicial system, creating a new role for complementing the enforcement of environmental laws, and provoking public prosecutors and agencies to greater levels of accountability.

Nevertheless, empowering nonstate actors to participate in the judicial process does not necessarily prescribe success in achieving the ultimate goal of EPiL: protecting the public interest (in this case the environment) and securing environmental outcomes.

Environmental and ecological outcomes will need time and require scientific research to accumulate data and evidence to prove such outcomes are actually achieved. The gap of information becomes a major obstacle for the courts to rule in favor of environmental outcomes. In some cases, this gap has even been used as an excuse to rule against public-interests, as discussed in this dissertation (for instance, the Green Peafowl Case in Chapter 3). Besides, the total litigations filed by civil society organizations, 422 litigations from 2015-2019, are far from solving all environmental misconducts currently existing in China. This sets a new question of whether China will encourage a culture of regulatory compliance in the coming future by supporting the growth of EPiL cases.

Though dwarfed both in scale and in number of litigations and influence in court decisions by public actors, what civil society organizations have succeeded to do is establish cases for the environment that have not been surfaced or known otherwise, with its changed role alongside an authoritarian state. Ideally, the cases can trigger public deliberation, attract political and legislative focuses that can lead to policy changes, and new regulations and legislations if and when the state keeps open to change. When civil society organizations bring in innovative methodologies and legal theories during the initial policy period to fill some of these gaps, it is then for the state to contemplate and act. For civil society organizations, they will have to be ready to seize opportunities to make vigorous and continuous changes in their role in China's environmental governance.

Nevertheless, there are still many research gaps that exist, calling for future studies and building upon the findings from this dissertation. These can include, but are not limited to, does civil society organizations' engagement contribute to concrete environmental outcomes? Whether the civil society organizations can continue engaging and influencing environmental policies like they could do during the first five years under EPiL? What if the state changes the enabling environment? Will and can civil society organizations develop strategies to work together as alliance to confront the policy challenges? If it happens, will such alliance strategies re-shape the state-society relationships in China? The environmental governance structure in China is ever-changing with a strong authoritarian characteristic. Studies of China can contribute to the governance theories by providing a diversified context to assess state-society relations.