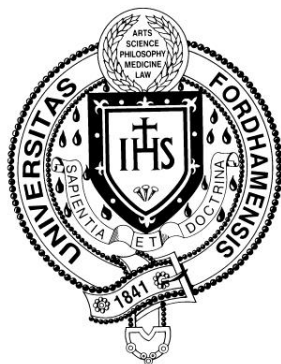


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A PAPER TIGER? PROSECUTORIAL REGULATORS IN CHINA'S CIVIL
ENVIRONMENTAL PUBLIC INTEREST LITIGATIONS

Chunyan Ding & Huina Xiao

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*Chunyan Ding** & *Huina Xiao***

ABSTRACT

In July 2015, China's national legislature brought in prosecutor-led civil environmental public interest litigation ("EPIL") for thirteen selected provincial areas of the country. After a two-year legal experiment, this prosecutor-led civil EPIL system was then established nationwide in July 2017. Yet, can it be said that prosecutorial regulators in China are in fact a paper tiger? Drawing upon content analysis of the 655 prosecutor-led civil EPILs and in-depth interviews with twelve frontline prosecutors and judges, this article examines the dynamics of regulatory practice and the motivation of the Chinese prosecutorial organs to engage in environmental regulation through litigation. Based upon the above two legislative landmarks in the law reform of this area, the regulatory practice of prosecutorial organs can be viewed as having occurred in three stages, with each stage featuring a distinct regulatory model: ad hoc regulation through local innovation before July 2015, forced regulation during the legal experiment from July 2015 to July 2017, and perfunctory regulation after the nationwide establishment of the prosecutor-led civil EPIL system in July 2017. The data shows that the Chinese prosecutorial organs have engaged in a larger number of such lawsuits since the second stage, but they have shown a strong preference for cases with less complicated facts, weak and small defendants, and minor environmental violations. Three factors that influence regulatory motivation are employed to analyse the change in regulatory models: the ambiguity of the law, the top-down political pressure for regulation, and the cost of regulation. This study highlights the very limited effectiveness of vertical political pressure in boosting prosecutorial regulation and the strong impacts of the cost of regulation and the

ambiguity of the law. In particular, the high cost of regulation that takes weak regulatory capacity, lack of regulatory autonomy, and the winning rate-oriented performance appraisal system into account have significantly weakened the motivation of prosecutorial organs to pursue civil EPIL. The findings of this study echo the conditions present in the successful prosecutorial regulations in Brazil and contribute to the scholarship about prosecutorial regulations in the field of environmental protection in the Global South.

Keywords: prosecutor-led environmental public interest litigation, prosecutorial regulation, regulatory motivation, regulation through litigation, enforcement of environmental law, china

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INTRODUCTION

Environmental law enforcement by China’s Environmental Protection Bureaus (“EPBs”) has been notoriously challenging.¹ Faced with severe environmental violations and such weak enforcement by EPBs,² China now needs new types of regulatory actors to step in to help enforce environmental law, and both non-governmental organizations and prosecutorial organs have taken on these roles in the Chinese environmental regulatory landscape. This article focuses on the prosecutorial regulators. The Chinese prosecutorial organs, called “the people’s procuratorate” (*renmin jianchayuan* 人民检察院), serve as prosecutors in criminal cases, representatives of the public interest and legal supervisors.³ Despite the public interests involved in environmental litigation, in the past the role of the Chinese

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¹ Alex Wang, *The Search for Sustainable Legitimacy: Environmental Law and Bureaucracy in China*, 37 HARV. ENVTL. L. REV. 365, 367 (2013).

² E.g., Benjamin van Rooij & Carlos Wing-hung Lo, *Fragile Convergence: Understanding Variation in the Enforcement of China’s Industrial Pollution Law*, 32 L. POL’Y 14, 15 (2010); Genia Kostka, *Command Without Control: The Case of China’s Environmental Target System*, 10 REG. GOVERNANCE 58, 58 (2016); Benjamin van Rooij, *REGULATING LAND AND POLLUTION IN CHINA: LAWMAKING, COMPLIANCE, AND ENFORCEMENT: THEORY AND CASES* 227-352 (2006); Benjamin Van Rooij, Rachel E. Stern & Kathinka Fürst, *The Authoritarian Logic of Regulatory Pluralism: Understanding China’s New Environmental Actors*, 10 REG. GOVERNANCE 3, 5 (2016).

³ Mingde Cao & Fengyuan Wang, *Environmental Public Interest Litigation in China*, 19 ASIA PAC. L. REV. 217, 222 (2011).

prosecutorial organs in environmental litigation was marginal and sporadic. However, on July 1, 2015, the Standing Committee of the National People's Congress (*quanguo renda changweihui* 全国人大常委会), China's national legislature, empowered the people's procuratorates to file environmental public interest litigation (*huanjing gongyi susong* 环境公益诉讼, "EPIL") against polluters in thirteen selected provincial areas. This regulatory innovation aimed to diversify the types of regulators and mechanisms there were to combat growing environmental violations.⁴ After a two-year experiment in legal reform with these prosecutor-led EPILs,⁵ the national legislature amended the Civil Procedure Law of the People's Republic of China ("Civil Procedure Law")⁶ on June 27, 2017 to establish the role of prosecutorial organs in filing EPIL and legalize prosecutorial public interest litigation nationwide.

Before this legal reform, it was widely doubted in the literature whether Chinese prosecutorial organs could become a strong enough regulatory force to deter environmental violations. For instance, drawing on 24 prosecutorial civil litigation cases up to March 2013, and in-depth interviews with 16 prosecutors, Shi and van Rooij find that prosecutorial regulation in China is unlikely to develop into a new enforcement tool due to the lack of capacity and independence as well as the preference for criminal work.⁷ As Cao and Wang suggest, "[the] nature and content of environmental public interest litigation are inconsistent with the nature of the procuratorate and its power."⁸ Liu also doubts whether prosecutorial organs have sufficient resources to devote to civil enforcement because they have been fully loaded with criminal prosecutions.⁹ Given the dependence of Chinese

⁴ Yifan Shi & Benjamin van Rooij, *Prosecutorial Regulation in the Global South: Environmental Civil Litigation by Prosecutors in China compared to Brazil*, 10 REG. GOVERNANCE. 44, 44 (2016).

⁵ Supreme People's Procuratorate, PLAN FOR THE PILOT REFORM SCHEME OF INITIATING PUBLIC INTEREST LITIGATIONS BY THE PEOPLE'S PROCURATORATES, (Promulgated on Jul. 2, 2015). *See also* Rooij, Stern, & Fürst, *supra* note 2.

⁶ Standing Committee of the National People's Congress, CIVIL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA (hereinafter CIVIL PROCEDURE LAW) (Promulgated on Apr. 9, 1991, Amended on Oct. 28, 2007, on Aug. 31, 2012 and on Jun. 27, 2017).

⁷ Shi & van Rooij, *supra* note 4.

⁸ Cao & Wang, *supra* note 3, at 222.

⁹ Jingjing Liu, *China's Procuratorate in Environmental Civil Enforcement: Practice, Challenges & Implications for China's Environmental Governance*, 13 VT. J. ENVTL. L. 66-67 (2011).

prosecutorial organs on local government at the same administrative level, some also argue that the procuratorate's environmental civil enforcement actions may still be subject to local interference.¹⁰ A common concern is the legal ambiguity about the procuratorate's standing and the procedural rules of EPIL.¹¹

Little literature has examined the performance of the Chinese prosecutorial organs in mobilizing EPIL and the factors that influence their performance since the national legislature approved prosecutor-led EPIL in July 2015. Do prosecutorial regulators remain a "paper tiger" even now that they have been granted standing to sue environmental polluters? How have those factors that have influenced regulatory motivation changed over time? How can the Chinese experience contribute to the discourse on prosecutorial regulation in the Global South? This article aims to update and deepen the understanding of the practice of prosecutor-led EPIL and the regulatory motivation of the Chinese prosecutorial organs over three stages: local innovation before the legal reform of July 2015; experimental legal reform from July 2015 to July 2017; and nationwide establishment of the prosecutor-led civil EPIL system after July 2017. Drawing on content analysis of 655 prosecutor-led civil EPILs up to December 2018, and in-depth interviews with 12 frontline prosecutors and judges from Beijing (north area of China), Shann'xi Province (northwest area of China), Fujian Province (southeast area of China), Guangdong Province (south area of China), Guangxi Zhuang Minority Autonomous Region (south area of China), and Guizhou Province (southwest area of China), as well as official statistical documents, this article finds that the Chinese prosecutorial organs' practice and regulatory motivation to engage in civil EPIL has changed through three distinct regulatory models: from *ad hoc regulation*, through *forced regulation*, to *perfunctory regulation*. It also finds that although prosecutorial regulators have filed more and more environmental civil lawsuits against environmental polluters throughout the three stages, they have demonstrated a stronger preference for handling cases with less complicated facts, minor

¹⁰ Christine J. Lee, "Pollute First, Control Later" No More: Combating Environmental Degradation in China Through an Approach Based in Public Interest Litigation and Public Participation, 17 PAC. RIM L. POL'Y J. ASS'N. 795, 805–806 (2008); Liu, *supra* note 9.

¹¹ See, e.g., Shi & van Rooij, *supra* note 4, at 47; Cao & Wang, *supra* note 3, at 222, 230; Liu, *supra* note 9, at 57.

environmental pollution, weak and small defendants, and a small number of monetary claims.

In this study, we employ three factors that may influence regulatory motivation to explain the change of the Chinese prosecutorial organs' practice on civil EPILs from 2003 to 2018: ambiguity of the law (legal factor), top-down political pressure for regulation (political factor), and organizational cost of regulation (organizational factor). We find that the vertical political pressure has relatively limited effectiveness, and the organizational cost of regulation concerning capacity and autonomy for regulation as well as the winning rate-oriented performance appraisal system plays a critical role in shaping prosecutorial regulation in China, echoing the Brazilian experiences of prosecutorial regulation. The study further gains insights on the dynamics of the regulatory motivations that influence the regulatory performance of prosecutorial organs in the Global South.

The article unfolds as follows. It first takes a brief look at China's procuratorate system as well as its roles in environmental protection. The following part presents the empirical data collected on the prosecutor-led civil EPILs from 2003 to 2018 and the regulatory changes throughout the three stages noted above. It then analyzes how the underlying political, legal and organizational factors have changed and influenced the regulatory motivation, leading to the different models of prosecutorial regulations in the three stages. The final part concludes with the implications of this study and the suggestions for enhancing prosecutorial regulation in China.

I. CHINA'S PROCURATORATE SYSTEM AND ITS ROLES IN ENVIRONMENTAL PROTECTION

In China, the people's procuratorates, as the State organs of legal supervision, exercise prosecutorial power to prosecute criminals and safeguard state security and social order, to protect the lawful rights and interests of individuals and organizations and the national interest and public interests, to guarantee the correct implementation of laws, to safeguard fairness and justice and protect the unity, dignity and authority of the legal system, as well as to ensure the smooth progress of construction of socialism with Chinese characteristics.¹²

¹² National People's Congress, ORGANIC LAW OF THE PEOPLE'S PROCURATORATES OF THE PEOPLE'S REPUBLIC OF CHINA (hereinafter ORGANIC

The procuratorate's functions are therefore not confined to criminal investigations and prosecutions, and also include supervision over the police, prisons, and courts to ensure that their activities conform to the law.¹³ In other words, the Chinese prosecutorial organs mainly undertake four types of work: criminal investigation and prosecution; supervision over criminal enforcement activities; supervision over civil and administrative litigations; and filing and participating in public interest litigations.¹⁴

In practice, however, prosecutorial organs devote most of their efforts to criminal prosecutions.¹⁵ For instance, out of ten procuratorial offices (*ting* 厅) in the Supreme People's Procuratorate ("SPP"), five offices deal with various criminal investigations and prosecutions,¹⁶ three offices deal with legal supervision of criminal enforcement activities¹⁷ and civil and administrative litigations,¹⁸ one office deals with public interest litigations,¹⁹ and one office deals with complaints, state compensation and judicial assistance.²⁰ It is noteworthy that at one point anti-corruption had been the most important work of the Chinese prosecutorial organs. However, its power of criminal investigation and prosecution has significantly decreased after the anti-corruption office was removed from the organization and a new State organ called "the Supervision Committee" (*jiancha weiyuanhui* 监察委员会) was established in 2018 to take over the prosecutorial organs'

LAW OF PROCURATORATES) (Promulgated on Jul. 5, 1979, Amended on Sept. 2, 1983, on Dec. 2, 1986 and on Oct. 26, 2018), art. 2.

¹³ Liu, *supra* note 9, at 47.

¹⁴ ORGANIC LAW OF PROCURATORATES, art. 20, *supra* note 12.

¹⁵ Liu, *supra* note 9, at 67.

¹⁶ See SPP, *Internal Institutions of the SPP*,

<http://www.spp.gov.cn/spp/gjyjg/nsjg/index.shtml>. Among these five offices that deals with criminal investigations and prosecutions, the First Office is in charge of the criminal prosecutions other than the prosecutions initiated by the Second, Third, and Fourth Offices; the Second Office deals with crimes of endangering national security, crimes of endangering public security, intentional homicide, robbery, drugs-related crime, etc.; the Third Office charges crimes of embezzlement and bribery, crimes of dereliction of duty, and crimes of servicemen's transgression of duties; the Fourth Office is responsible for the prosecution of crimes of disrupting the order of the socialist market economy; and the Ninth Office deals with minor crimes prosecutions.

¹⁷ *Id.* (The fifth Office).

¹⁸ *Id.* (The sixth and seventh Offices).

¹⁹ *Id.* (The eighth Office).

²⁰ *Id.* (The tenth Office).

authority and functions regarding anti-corruption.²¹ Since then, the SPP has promoted “Four Major Procuratorships” (*sida jiancha* 四大檢察) over criminal, civil, administrative and public interest litigations.²² This new development reveals a trend towards balancing the different types of prosecutorial work in China’s procuratorate system rather than keeping to its original focus on criminal work.

As Article 138 of the Constitutional Law of the People’s Republic of China²³ stipulates, “the Supreme People’s Procuratorate is responsible to the National People’s Congress and its Standing Committee. The people’s procuratorates at various levels are responsible to the organs of State power which created them, and to the people’s procuratorates at higher levels.” The Chinese prosecutorial organs are under the dual leadership: a vertical leadership of the superior procuratorates and a horizontal leadership of the local people’s congress (“LPC”) at the same level.²⁴ The SPP is the national and highest prosecutorial organ and directs the work of the local people’s procuratorates at provincial, municipal and county levels as well as the work of the special people’s procuratorates (*Figure 1*). The vertical leadership of the superior procuratorates, however, is confined to prosecutorial work only. Specifically, the upper-level procuratorates can direct the lower-level procuratorates to correct, rescind or revise the latter’s decisions if they believe such decisions are wrong. They can also designate jurisdiction to the lower-level procuratorates or handle the cases which are under the jurisdiction of the lower-level procuratorates, and call up on a centralized basis the prosecutors within their jurisdiction to handle cases.²⁵

²¹ The Central Committee of the Communist Party of China, REFORM PLAN FOR STRENGTHENING THE PARTY AND NATIONAL INSTITUTIONS (Promulgated on Mar. 21, 2018).

²² *To Provide Theoretical Support for the Comprehensive Development of the "Four Major Procuratorships" (Wei sidajiancha quanmian xietiao chongfen fazhan tígong lilun zhìcheng)*, PROCURATORIAL DAILY (JIANCHA RIBAO) (Feb. 18, 2019), http://www.spp.gov.cn/spp/zd gz/201902/t20190218_408223.shtml.

²³ National People’s Congress, CONSTITUTIONAL LAW OF THE PEOPLE’S REPUBLIC OF CHINA (Promulgated on Dec. 4, 1982, Amended on Apr. 12, 1988, on Mar. 29, 1993, on Mar. 15, 1999, on Mar. 14, 2004, and on Mar. 11, 2018), art. 138.

²⁴ Zhanhong Hao, *Analysis about the Working & Leading Relationship between Higher & Lower People’s Procuratorates (Shangxiaji renmin jianchayuan gongzuo lingdao guanxi xintan)*, 8 L. REV. (FAXUE ZAZHI) 114–117 (2009); Guiwu Wang, WANG GUIWU’S STUDY ON PROCURATORATE (WANG GUIWU LUN JIANCHA) 46 (2008).

²⁵ ORGANIC LAW OF PROCURATORATES, art. 24, *supra* note 12.

In terms of the horizontal leadership, the LPC and its standing committee horizontally control the appointments and budgets of the procuratorate at the same level.²⁶ For example, the chief procurators at various levels are elected and removed by the LPC at the same level, and the deputy chief procurators, members of prosecutorial committees and individual procurators are appointed and removed by the standing committee of the LPC at the same level.²⁷ The LPC, however, is integrated with the local party committee of the Communist Party of China (“CPC”) and subject to the CPC.²⁸ Indeed, “[i]n many jurisdictions, the chairman of the standing committee of the local people’s congress now concurrently serves as chairman or vice-chairman of the party committee at the corresponding level”.²⁹ The dependence of the local prosecutorial organs on the LPC and the local party committee is clear and significant.³⁰ In 2015, in order to avoid local interference with prosecutorial work, local prosecutorial organs underwent an institutional reform aimed at bringing about the centralized management of personnel, financial and material resources of the procuratorates below the provincial level.³¹ However, this reform only centralized the management of financial and material resources while personnel matters remain controlled by the LPC and the local party committee.³²

²⁶ Hao, *supra* note 24.

²⁷ ORGANIC LAW OF PROCURATORATES, art. 38, *supra* note 12.

²⁸ Keith J. Hand, *Understanding China’s System for Addressing Legislative Conflicts: Capacity Challenges and the Search for Legislative Harmony*, 26 COLUM. J. ASIAN L. 139, 157 (2013).

²⁹ *Id.* at 208.

³⁰ Shi & van Rooij, *supra* note 4.

³¹ Kai Xu, *Focusing on the Institutional Reform on the Centralized Management of Personnel, Financial and Material Resources of Local Courts Below Provincial Level (Jujiao sheng yixia fayuan jianchayuan ren cai wu tongguan zhidu gaige)*, PROCURATORATE DAILY (JIANCHA RIBAO) (Jul. 27, 2015) https://www.spp.gov.cn/spp/zd gz/201507/t20150727_102052.shtml.

³² Liang Zhang, *The Constitutional Perspective of Design and Reform of the Provincial Governing and Cross-Administrative-Division Court and Procuratorate System (Shengtongguan ji kua xingzheng quhua fayuan, jianchayuan shezhi gaige zhi xianfa shijiao)*, 23.1 J. CENT. SOUTH UNIV. SOC. SCI. (ZHONGNAN DAXUE XUEBAO(SHEHUI KEXUE BAN)) 41, 42 (2017); Qicai Gao, *The Legal Obstacles in Unified Management of Staff Members and Properties of Courts and Procuratorates below the Provincial Level (Shengyixia difang fayuan, jianchayuan rencai wu tongyi guanli gaige de falü zhang'ai)*, 1 J. SUZHOU UNIV. (SUZHOU DAXUE XUEBAO) 11, 15 (2014).

In the environmental protection arena, prosecutorial organs are responsible for investigating and prosecuting environmental crimes as well as supervising the work of EPBs and public security authorities with respect to environmental crimes.³³ The SPP's 2018 Work Report submitted to the National People's Congress stated that prosecutorial organs cracked down on crimes related to damaging the environment and national resources and that they had prosecuted 137,000 persons in the last five years (amounting to an increase of 59.3 percent over five years) for air, water and land pollution, the importation of "foreign garbage", the illegal occupation of cultivated land, illegal mining, illegal logging, and the like.³⁴

In addition, prosecutorial organs protect the environment through non-criminal approaches. First, prosecutorial organs have the power to protest (*kangsu* 抗诉), in accordance with the procedure of judicial supervision, illegal or incorrect rulings and judgments on civil and administrative environmental cases that are made by the lower-level courts³⁵ and request the same-level courts to conduct a retrial.³⁶ Second, prosecutorial organs can advise relevant public organs in charge of the implementation of environmental law (in particular, the EPBs) in order to effectively implement laws and regulations and reduce environmental violations and crimes.³⁷ Third, prosecutorial organs can support private environmental litigations as well as EPILs

³³ Liu, *supra* note 9.

³⁴ Jianming Cao, *Work Report of the Supreme People's Procuratorate at the First Meeting of the 13th National People's Congress* (*Zuigao renmin Jianchayuan gongzuo baogao, disanjie quanguo renmin daibaio dahui disanci huiyi*) XINHUA NET (XINHUA WANG) (Mar. 9, 2018), https://www.spp.gov.cn/spp/gzbg/201803/t20180325_372171.shtml.

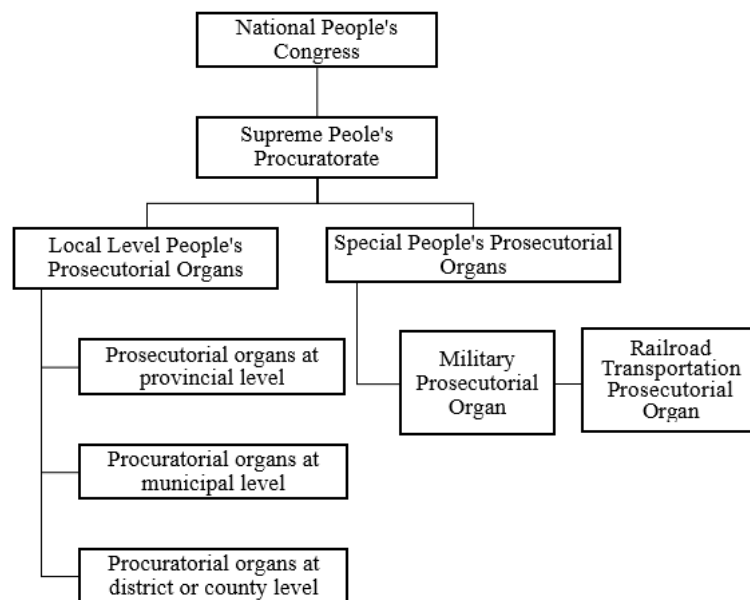
³⁵ Authors' Note (The people's procuratorate, as the State's legal supervisor, exercises a power to protest to the same-level court rulings and judgments on civil and administrative cases as well as criminal cases that are made by the lower-level courts and that it deems violating procedural and substantive justice.). See Fan Yu, *The Functions of Judicial Supervision and the Design for Its System (Part One)* (*Sifa jiandu de gongneng ji zhidu sheji (shang)*), 5 *JUSTICE OF CHINA* (ZHONGGUO SIFA) 22, 22 (2004).

³⁶ CIVIL PROCEDURE LAW, art. 208, *supra* note 6; Standing Committee of the National People's Congress, ADMINISTRATIVE PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA (hereinafter ADMINISTRATIVE PROCEDURE LAW) (Promulgated on Apr. 4, 1989, Amended on Nov. 1, 2014 and on Jun. 27, 2017), art. 93.

³⁷ SPP, PEOPLE'S PROCURATORATE PROVISIONS ON PROCURATORIAL SUGGESTIONS WORK (Promulgated on Feb. 26, 2019), art. 10.

filed by other state agencies or non-governmental organizations.³⁸ Fourth, prosecutorial organs can supervise and put pressure on relevant supervising agencies and state-owned units to fulfil their supervisory responsibilities and bring civil litigations if they fail or are slow in doing so.³⁹ Last but not least, prosecutorial organs have been recently granted authority to file civil and administrative EPILs. Out of all these non-criminal approaches that prosecutorial organs deploy in environmental protection, this article focuses on prosecutor-led civil EPILs.

Figure 1. Organizational Chart of the Chinese Prosecutorial Organs⁴⁰



II. EMPIRICAL FINDINGS ON THE THREE STAGES OF PROSECUTOR-LED CIVIL EPILS

Before July 2015, only a few of the local prosecutorial organs were engaged in the legal innovation of suing polluters through civil litigation, which is categorized here as the first stage of prosecutor-led civil EPILs. The national legislature then launched a two-year

³⁸ CIVIL PROCEDURE LAW, art. 55, *supra* note 6.

³⁹ Liu, *supra* note 9, at 54–55.

⁴⁰ See ORGANIC LAW OF PROCURATORATES, art. 12, 13, *supra* note 12.

experimental legal reform of prosecutor-led EPIL in July 2015, which is categorized as the second stage. In July 2017, the prosecutor-led EPIL system was formally established and implemented nationwide, which is categorized as the third stage in this article.⁴¹ Because a civil case tried in the way of ordinary procedure⁴² is required to be concluded within six months from the date of placing the case on file, according to Article 149 of the Civil Procedure Law, we divided the judicial decisions of prosecutor-led civil EPILs into three categories: (1) cases adjudicated before 2015 (inclusive) (i.e., cases filed before July 2015); (2) cases adjudicated in 2016 and 2017 (i.e., cases filed from July 2015 to July 2017); and (3) cases adjudicated after 2018 (inclusive) (i.e., cases filed after July 2017). Each category was used to investigate the practice of prosecutorial organs in the corresponding stage. This part first presents an overview of the empirical data on judicial decisions of prosecutor-led civil EPILs across the country made between 2003 and 2018. A descriptive analysis of empirical data that demonstrates the changing practice of prosecutorial organs over the three stages of prosecutor-led civil EPILs will then follow.

A. *A Bird's Eye View*

Our dataset contains 655 cases of prosecutor-led civil EPILs adjudicated from 2003 up to December 31, 2018. The cases adjudicated before 2014 were collected from the SPP's official

⁴¹ Authors' Note (The experiment started on July 1, 2015 and ended on June 30, 2017. There were only two cases adjudicated before July 1, 2015. We thus counted these two cases of 2015 in the first stage. The prosecutor-led EPIL system was legislated in July 2017. The majority of cases adjudicated after July 2017, however, were initiated by the prosecutorial organs in the pilot areas before July 2017. Therefore we counted the cases adjudicated in 2017 in the second stage. The third stage covers the cases that were filed after July 2017.).

⁴² *Id.* (Civil lawsuits are in principle tried in the way of ordinary procedure (*putong chengxu* 普通程序) while simple lawsuits may be tried in the way of easy procedure (*jianyi chengxu* 简易程序). See CIVIL PROCEDURE LAW, Art. 157, *supra* note 6. Prosecutor-led civil EPILs (except those civil EPILs incidental to criminal litigation) collected in our database were all tried in the way of ordinary procedure.).

publications,⁴³ online resources⁴⁴ and research articles,⁴⁵ while the cases adjudicated from 2014 to 2018 were collected from the Supreme People's Court's official online database called "China Adjudication Decisions Online".⁴⁶ In our dataset, there are only 31 prosecutor-led civil EPILs adjudicated before 2016, but the case number mushrooms from two cases in 2015, to 11 cases in 2016, 64 cases in 2017, and then to 549 cases in 2018 (Figure 2). Although, due to the delayed upload of adjudication decisions by the courts, the dataset only includes 53.77 percent of the total number of prosecutor-led civil EPILs (1,021 cases) in 2018,⁴⁷ nevertheless it is a robust sample to reveal the general characteristics of prosecutor-led civil EPILs in China. We coded a number of key variables, including the geographical location of the cases, the level of the court, the level of the trial, the date of the trial,

⁴³ Civil and Administrative Prosecutorial Office of the SPP (hereinafter CAPO), *THE PRACTICE AND EXPLORATION OF PROSECUTORIAL ORGANS-INITIATED PUBLIC INTEREST LITIGATIONS (JIANCHA JIGUAN TIQI GONGYI SUSONG SHIJIAN YU TANSUO)* 33–45 (2017).

⁴⁴ See, e.g., PKU Law, pkulaw.cn; see also China Courts' Website, chinacourt.org.

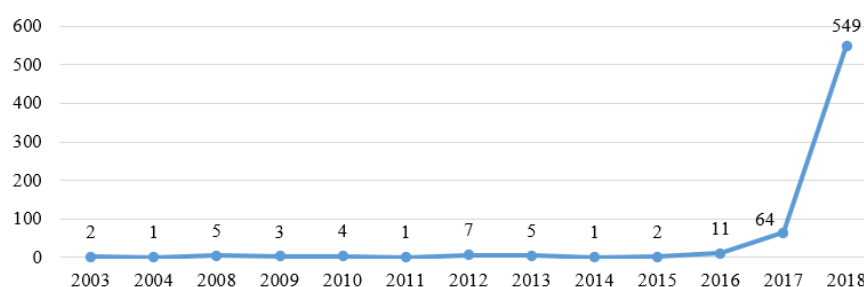
⁴⁵ Xudong Zhang & Jingjie Lin, *Expansion and Restriction: The Path for the Plaintiff Qualification Selection in China's Environmental Civil Public Interest Litigation*, 5 CHINA LEG. SCI. 133, 136 (2017); Zhi Bie & Tao Bie, *Overview of the Development of Environmental Public Interest Litigations (Huanjing gongyi susong jinzhan gaishu)*, 412.1 B ENVTL. PROT. (HUANJING BAOHU] 23, 23–25 (2009); Bojin Tao, *On the Practice of the Prosecutorial organ Participating in Environmental Public Suits (Jiancha jiguan canyu huanjing minshi gongyi susong de shijian jinlu)*, 39.4 J. XINJIANG UNIV. (PHILOSOPHY, HUMANIT. SOC. SCI.) (XINJIANG DAXUE XUEBAO (ZHEXUE RENWEN SHEHUI KEXUE BAN)) 34, 34–45, (2011).

⁴⁶ Authors' Note (According to the Provisions of the SPC on Online Publication of Judgments by the People's Courts (promulgated on Nov. 21, 2013), since January 1, 2014, all Chinese courts have been required to upload adjudication decisions to this online database except those cases involving state secrets, business secrets, privacy issues, and adolescent criminals. Therefore, China Adjudication Decision Online (*zhongguo caipan wenshu wang* 中国裁判文书网) has started releasing adjudication decisions from January 1, 2014.). See *Global Legal Monitor*, LIBRARY OF CONGRESS, <https://www.loc.gov/law/foreign-news/article/china-rules-of-online-publication-of-court-judgments-revised/>; see also *Home page*, CHINA JUDGEMENTS ONLINE, <http://wenshu.court.gov.cn> (Although Chinese courts are used to docket the same case involving multiple defendants as separate cases, we combine such cases into one case.).

⁴⁷ SPC, *The News Conference for "Chinese Environmental and Resources Cases Trial 2017-2018"*, "Report of the Chinese Environmental Judicial Development 2017-2018", and *Typical Cases of Ecological and Environmental Protection*, CHINACOURT.ORG (Mar. 2, 2019), <https://www.chinacourt.org/chat/fulltext/listId/51171/template/courtfbh20190302.shtml>.

the name and location of the prosecutorial plaintiff, the type of prosecutor-led civil EPILs, the type of defendant, the type of environmental violation, the type and amount of claims, and the result of the cases.

Figure 2. Case Number of Prosecutor-led Civil EPILs from 2003 to 2018



Source: Author

In terms of the type of adjudication decisions, out of 655 cases of prosecutor-led civil EPILs, 48 are verdicts dealing with procedural issues (7.33 percent), 592 are judgments dealing with substantive issues (90.38 percent), 14 are mediation decisions (2.14 percent) and one case (0.15 percent) is unknown. In terms of the level of the court, 568 cases (86.72 percent) were tried by the district court, 79 cases by the appellate court (12.06 percent), and 8 cases by the high court (1.22 percent). Out of all the cases, only 24 are appeal cases (3.66 percent). In terms of the type of prosecutor-led civil EPILs, 655 cases can be divided into two categories: 562 cases (85.8 percent) are “civil litigation incidental to criminal litigation” (*xingshi fudai mingshi susong*, 刑事附带民事诉讼, “incidental civil litigation”), through which civil claims against polluters are handled by the same collegial panel of environmental criminal litigation, and 93 cases (14.2 percent) are ordinary civil litigations (Table 1).

Table 1. Basic Information of Prosecutor-led Civil EPILs

	No. of cases	Percentage (%)
<i>Type of Adjudication Decision</i>		
Judgment	592	90.38
Order	48	7.33
Mediation decision	14	2.14
Unknown	1	0.15
Total	655	100.00
<i>Level of the Court</i>		
District court	568	86.72
Appellate court	79	12.06
High court	8	1.22
Total	655	100.00
<i>Level of the Trial</i>		
First instance	622	94.96
Appeal	24	3.66
Unknown	9	1.37
Total	655	100.00
<i>Types of Civil PILs</i>		
Ordinary civil litigation	93	14.20
Incidental civil litigation	562	85.80
Total	655	100.00

Source: Author

In terms of the geographical location of the cases, all provincial areas of the country have at least one prosecutor-led civil EPIL case except Hainan Province and the City of Tianjin (one of the four “municipalities directly under the Central Government”, *zhixiashi*, 直辖市). Zhejiang Province has 66 cases, the highest among all provincial places, followed by Hunan Province (55 cases), Jiangsu Province and Sichuan Province (51 cases), Hubei Province (47 cases), Anhui Province (46 cases), Jiangxi Province (40 cases), Yunnan Province (38 cases), Guangdong Province (36 cases), and Jilin Province (34 cases) (Figure 3). However, the data do not reveal a clear relation between the geographical distribution of the cases and the economic development of the areas. The number of cases in rich, middle-income and poor areas is 164 (25.04 percent), 107 (16.34 percent) and 384 (45.63 percent) respectively.⁴⁸

⁴⁸ See *China Statistical Yearbook 2018*, NAT'L BUREAU OF STAT. OF CHINA, <http://www.stats.gov.cn/tjsj/ndsj/2018/indexeh.htm> (For provincial per capita GDP rank.); see also *Rich Province, Poor Province*, THE ECONOMIST (Oct. 1, 2016), <https://www.economist.com/china/2016/10/01/rich-province-poor-province> (For the criteria of poor, middle-income, and poor areas. Rich provinces include Shanghai, Beijing, Tianjin, Jiangsu, Fujian, Guangdong, and Zhejiang. The middle-income provinces include Liaoning, Inner Mongolia, Shandong, Jilin, Chongqing, and Shanxi. The poor provinces include Heilongjiang, Hebei, Shanxi,

Figure 3. Geographical Distribution of Prosecutor-led Civil EPILs

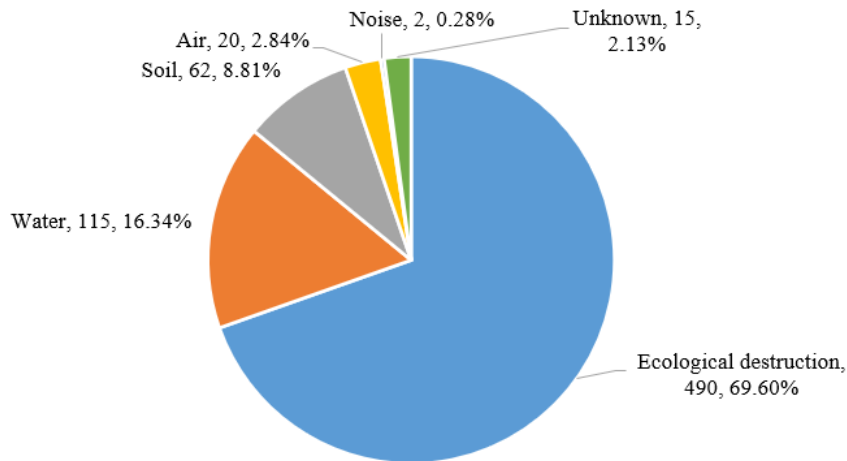
Notes: Bold emphasises added for the top 10 provinces.

Source: Author

In terms of the type of prosecutorial plaintiff, 601 (91.76 percent) are the prosecutorial organs at the district or county level and 54 (8.24 percent) are the municipal-level prosecutorial organs. Out of 633 cases with valid information, the defendants or environmental violators in 544 cases (85.93 percent) are individuals, those in 36 cases (5.69 percent) are companies, and those in 53 cases (8.37 percent) include both individuals and companies.

Regarding the type of environmental violation, the majority of the cases (69.60 percent) involve ecological destruction (such as illegal mining, logging, fishing, and occupation of cultivated land). Cases of water pollution and those of soil pollution account for 16.34 percent and 8.81 percent respectively. Air pollution (2.84 percent) and noise pollution cases (0.28 percent) are the least (Figure 4).

Henan, Anhui, Jiangxi, Hunan, Guangxi, Yunnan, Guizhou, Sichuan, Gansu, Qinghai, Xinjiang, Hubei, Ningxia, and Tibet.).

Figure 4. Types of Environmental Violations

Notes: The number of types may exceed the number of cases because one case may have more than one type of environmental violation.

Source: Author

In terms of the type of claims, the data show that in 344 cases (52.52 percent) the prosecutorial plaintiffs claimed an injunction, in 84 cases (12.82 percent) an apology, and in 477 cases (72.82 percent) a monetary remedy. The amount of monetary claims in prosecutor-led civil EPILs was relatively small. In the dataset, monetary claims in 63.64 percent of 473 cases with valid information were less than RMB 100,000; 27.06 percent of them ranged from RMB 100,000 to 1 million; and 9.31 percent of them exceeded RMB 1 million (Table 2). Regarding the court's award, monetary claims in 80.13 percent of 473 cases with valid information were fully supported, those in 8.25 percent of the cases were supported more than half, those in 3.81 percent of the cases were supported less than half, and only those in 5.50 percent of the cases were totally rejected. In 2.33 percent of the cases courts provided other remedies (order or injunction) in lieu of damages (Table 2). Out of 340 cases that claimed an injunction, 281 (82.65 percent) were upheld, 59 (17.35 percent) were rejected, and courts in 15 cases (4.41 percent) awarded monetary compensation in lieu of an injunction. Except the cases disputing jurisdiction issues, courts awarded at least one type of remedy (injunction, apology and monetary remedy). In other words, the overall winning rate of the prosecutorial plaintiff was 100 percent.

Table 2. The Amount of Monetary Claims and the Award Rate

	No. of cases	Percentage (%)
<i>Monetary Claims</i>		
<10,000	126	26.64
10,001-100,000	175	37.00
100,001-500,000	102	21.56
500,001-1,000,000	26	5.50
1,000,001-10,000,000	39	8.25
>10,000,000	5	1.06
Total	473	100.00
<i>Award Rate</i>		
0%	26	5.50
0%-50%	18	3.81
50%-100%	39	8.25
100%	354	74.84
>100%	25	5.29
Other remedies in lieu of damages (i.e., order or injunction)	11	2.33
Total	473	100.00

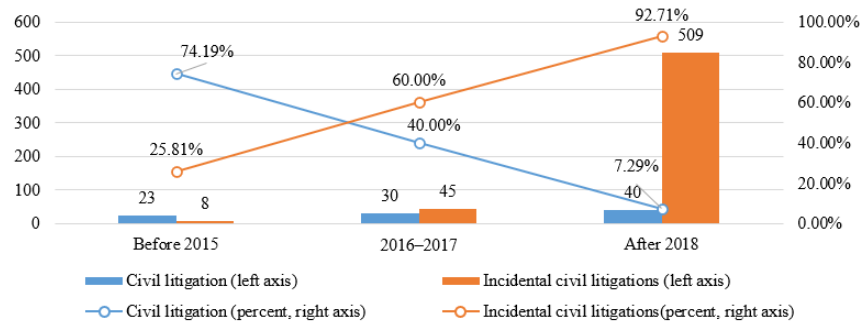
Source: Author

B. The Changing Practice of Prosecutor-led Civil EPILs over the Three Stages

This section provides a descriptive analysis of empirical data in each stage of prosecutorial regulation, which shows that the performance of the Chinese prosecutorial organs in engaging in civil EPILs has varied significantly in four aspects over the three stages. The first aspect is concerned with the type of prosecutor-led civil EPILs. Although the number of prosecutor-led civil EPILs in the third stage increased by more than six times compared with the second stage, the percentage of ordinary civil litigations of EPIL slipped to 7.29 percent, the lowest among the three stages, while the percentage of incidental civil litigations of EPIL rocketed to 92.71 percent, the highest in the three stages (Figure 5). This contrast shows that the prosecutorial organs are inclined to get clues to civil EPIL cases when they are investigating and prosecuting environmental criminal cases. Such an approach helps them to significantly reduce litigation costs in two major ways: first, the facts and evidence of environmental violations involved in criminal cases can be re-used for the purpose of pursuing civil EPILs; and second, civil proceedings of an incidental civil litigation can be simplified and merged into criminal proceedings, which is within the “comfort zone” of prosecutors. In contrast, in ordinary civil litigations of EPIL, prosecutorial organs take far more

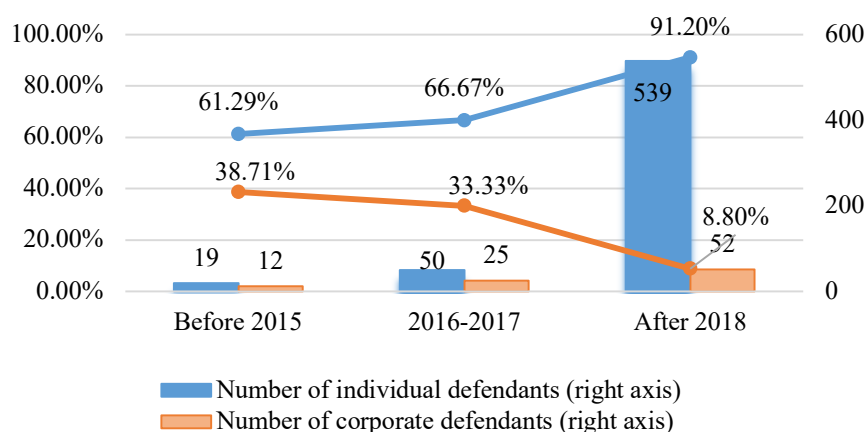
time and effort to investigate the case facts and collect evidence, and then participate in longer and more complicated civil proceedings.

Figure 5. Changes of Litigation Type over the Three Stages



Source: Author

The second aspect is concerned with the type of defendant in prosecutor-led civil EPILs. The data show that prosecutorial organs are more willing to choose individual defendants over corporate ones. The percentage of cases involving individual defendants increased from 61.29 percent in the first stage, to 66.67 percent in the second stage, and then to 91.20 percent in the third stage, increasing by 29.91 percent overall (Figure 6). However, the percentage of cases involving corporate defendants dropped from 38.71 percent in the first stage, to 33.33 percent in the second stage, and then further to 8.8 percent in the third stage (Figure 6). Therefore, the prosecutorial organs are clearly inclined to sue weak and small defendants in civil EPILs, and moreover they demonstrated a growing inclination to do this throughout all the three stages.

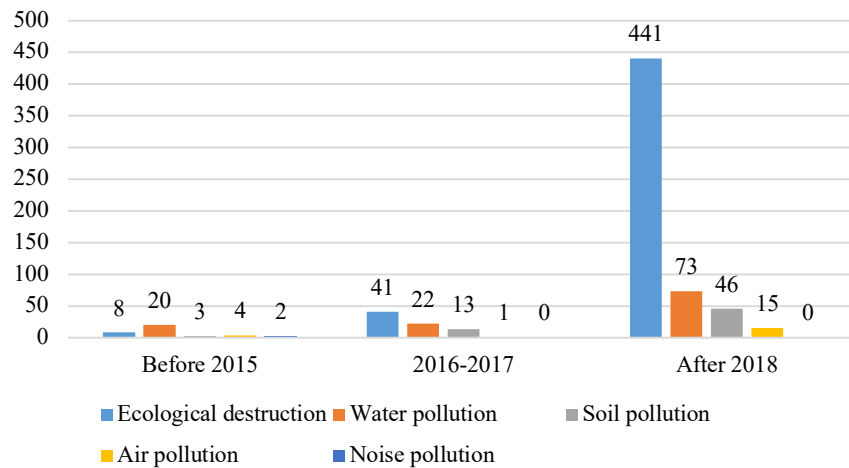
Figure 6. Changes of Defendant Type over the Three Stages

Source: Author

The third aspect of the changing practice of prosecutor-led civil EPILs concerns the type of environmental pollution involved in the cases. As mentioned above, ecological destruction cases are the most common type of environmental violation that gives rise to prosecutor-led civil EPILs. The data show that there were eight ecological destruction cases in the first stage. The number increased to 41 in the second stage and then rocketed to 441 in the third stage (Figure 7). The percentage of ecological destruction cases increased greatly from 21.62 percent in the first stage, to 53.25 percent in the second stage, and then further to 76.70 percent in the third stage. In contrast, the percentage of water, air and noise pollution cases significantly declined. The exception was soil pollution cases, whose percentage at first increased from 8.11 percent in the first stage to 16.88 percent in the second stage, but later dropped back to 8 percent in the third stage (Figure 8). Compared with other types of environmental violation, ecological destruction cases are much easier and cheaper for prosecutorial organs to handle in terms of case selection, fact-finding and evidence collection. Moreover, many of the ecological destruction cases were initiated in the manner of civil litigation incidental to criminal prosecution for ecological destruction, as analysed above, which saved substantially litigation costs on the part of prosecutorial organs. This explains why prosecutorial organs demonstrated a

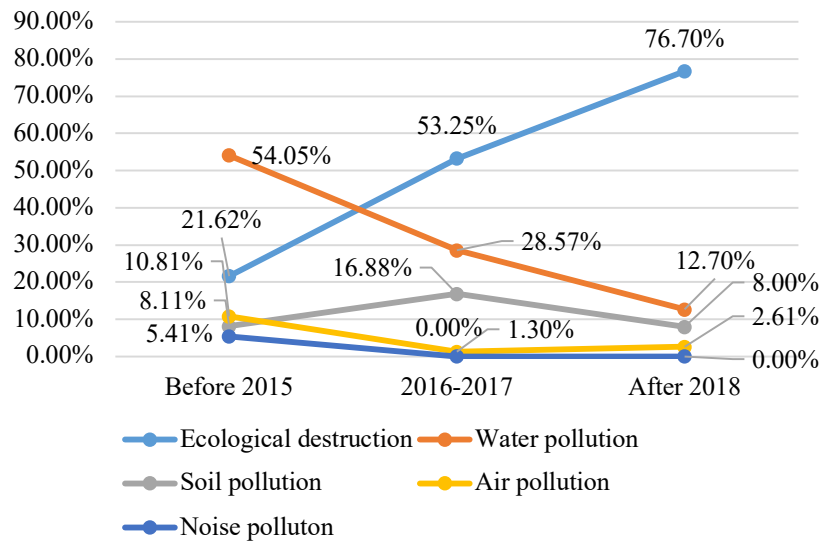
stronger preference for ecological destruction cases in pursuing civil EPILs throughout all the three stages.

Figure 7. Changes in the Number of Different Environmental Violations over the Three Stages



Source: Author

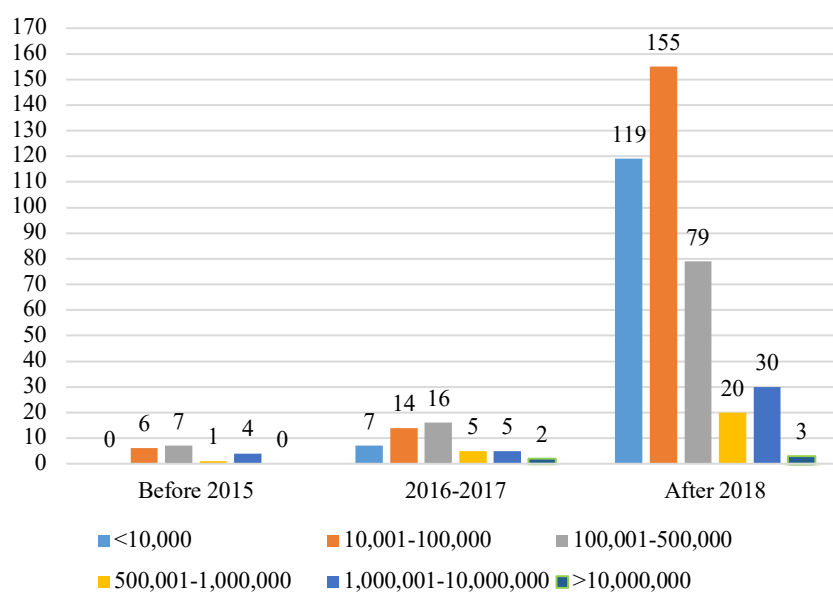
Figure 8. Changes in the Percentage of Different Environmental Violations over the Three Stages



Source: Author

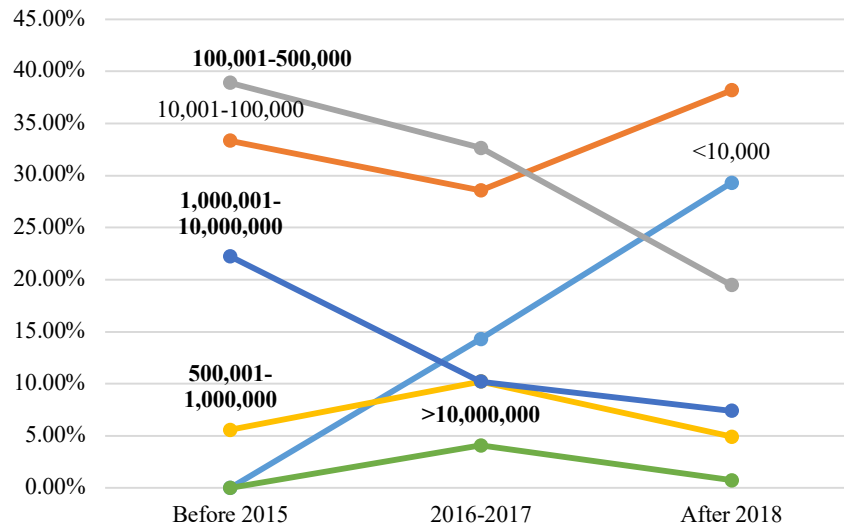
The fourth aspect of the changing practice of prosecutor-led civil EPILs concerns the amounts of monetary claims involved in civil EPILs. The data reveal that the overall amounts of monetary claims involved in prosecutor-led civil EPILs shrank over the three stages. Although the absolute value of the case number in each range of claim amounts grew (Figure 9), the percentage of cases with a smaller amount of monetary claims (less than RMB 10,000 and between RMB 10,001 and RMB 100,000) significantly increased, while the percentage of cases with a larger amount of monetary claims (more than RMB 100,000) decreased (Figure 10). A temporary small increase in the percentage of cases with the amount of monetary claim between RMB 500,000 and RMB 1,000,000 and over RMB 10 million in the second stage did not change the overall trend in this regard.

Figure 9. Changes in the Amount of Monetary Claims over the Three Stages



Source: Author

Figure 10. Changes in the Percentage of Different Categories of Monetary Claims over the Three Stages



Source: Author

To sum up, it is possible to descriptively characterize the trend of prosecutor-led civil EPILs against environmental polluters over the three stages as follows: although the case number is increasing, prosecutorial organs tend to choose less complicated cases involving minor environmental pollution against individual but not corporate defendants, and seek monetary claims of a smaller amount. In particular, in the first stage (before July 2015), despite a small number of cases, prosecutorial organs preferred high-profile cases with more complicated facts, corporate defendants, serious environmental pollution and larger monetary claims. However, from the second stage (from July 2015 to July 2017) on, despite a growing number of prosecutor-led civil EPILs, prosecutorial organs have been more willing to choose less complicated cases with lower monetary claims against individual defendants and minor environmental pollution. Why have prosecutorial organs changed their preference in terms of case selection when pursuing civil EPILs? How has their regulatory motivation changed over time? The next part endeavours to answer these questions.

III. EXPLAINING REGULATORY MOTIVATIONS OF PROSECUTORIAL ORGANS

Regulators are motivated by various factors. To study the regulatory motivation of prosecutorial organs, three categories of factors are employed: legal, political and organizational. The legal factor concerns whether the law has provided legal enforcers (e.g., courts, procuratorates, and the police) with a legal basis and procedural rules for regulation. The political factor concerns the top-down political pressure to implement national policies and strengthen regulation. The organizational factor refers to the calculations of the cost of regulation, which is concerned with regulatory capacity and autonomy as well as the performance appraisal mechanism applied to regulators.

In terms of the first factor, the presence of legal standing and procedural rules for regulation is critical for regulators to legalize and guide their regulatory acts. The law also establishes the accountability of regulators (including who is accountable, whom to account to, and what to account for).⁴⁹ The certainty of law reduces the legal risk of regulation. The ambiguity of law may restrict the scope of law application and make “organizations often simply copy what other organizations are doing”.⁵⁰ However, legal ambiguity may provide “opportunities for circumventing or enabling implementation at the local level”.⁵¹ Nolette, for example, suggests that the ambiguity of the law grants prosecutors the opportunity to bring government-led litigations and mobilize the law.⁵²

In relation to the second factor, the party-state relies on the cadre responsibility system to implement its policies or achieve its

⁴⁹ Colin Scott, *Accountability in the Regulatory State*, 27 J. L. SOC'Y. 38, 41 (2000).

⁵⁰ Ryken Grattet & Valerie Jenness, *The Reconstitution of Law in Local Settings: Agency Discretion, Ambiguity, and a Surplus of Law in the Policing of Hate Crime*, 39 L. SOC'Y. REV. 893, 901 (2005).

⁵¹ *Id.* at 895; see also Kitty Calavita, *Immigration, Law, and Marginalization in a Global Economy: Notes from Spain*, 32 L. SOC'Y. REV. 529, 546 (1998); Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1536-1538 (1992).

⁵² Paul Nolette, *Law Enforcement as Legal Mobilization: Reforming the Pharmaceutical Industry through Government Litigation*, 40 L. SOC. INQUIRY 123, 151 (2015).

targets, such as environmental policy,⁵³ campaign enforcement,⁵⁴ maximization of tax revenues,⁵⁵ population control,⁵⁶ and the like. Under the leadership of the party, government and legal institutions (including courts and procuratorates) at all levels should conform to the party's political goals. Local party committees and upper-level offices supervise the lower-level agencies to implement policies or innovations through performance appraisal or evaluation, rewards (e.g., promotion, and monetary or symbolic rewards) as well as sanctions (e.g., demotion, transfer-position, criticism and party discipline).⁵⁷

As for the last factor, law enforcers are by nature risk averse.⁵⁸ Law enforcers calculate the expected organizational costs and benefits before taking regulatory action. The existing literature often takes any cost associated with risk aversion into consideration.⁵⁹ In this study, however, we focus on the following aspects, which are concerned with the cost of regulation: the risk of losing cases, insufficient regulatory capacity and the risk of offending local government (i.e., the lack of regulatory autonomy), with the first two of these interacting with each other. In the setting of prosecutorial regulation, negative litigation outcome will significantly influence performance appraisal of the Chinese prosecutorial organs, which impacts the personnel, financial

⁵³ See, e.g., Wang, *supra* note 1; Kostka, *supra* note 2.

⁵⁴ See, e.g., Benjamin van Rooij, *China's War on Graft: Politico-Legal Campaigns Against Corruption in China and Their Similarities to the Legal Reactions to Crisis in the U.S.*, 14 PAC. RIM L. POL'Y J. 298, 298-336 (2005); Susan Trevaskes, POLICING SERIOUS CRIME IN CHINA: FROM "STRIKE HARD" TO "KILL FEWER" 24-41 (2010).

⁵⁵ Jean C. Oi, *Fiscal Reform and the Economic Foundations of Local State Corporatism in China*, 45 WORLD POL. 99, 126 (1992); Ji Li, *A Chinese Model for Tax Reforms in Developing Countries?*, THE BEIJING CONSENSUS? HOW CHINA HAS CHANGED WESTERN IDEAS OF LAW AND ECONOMIC DEVELOPMENT 176, 176-202 (Weitseng Chen ed., 2015); Huina Xiao, *Why Law Enforcement Is Weak in China: The Mindset of the Frontline Tax Officials*, 31 COLUM. J. ASIAN L. 218, 226-227 (2018).

⁵⁶ Kevin O'Brien & Lianjiang Li, *Selective Policy Implementation in Rural China*, 31 COMP. POL. 167, 172 (1999).

⁵⁷ See Yongshun Cai, STATE AND AGENTS IN CHINA: DISCIPLINING GOVERNMENT OFFICIALS 63 (2017) (Party discipline includes five categories: warned, seriously warned, removed from the position in the Party, on probation with the Party, and expelled from the party.).

⁵⁸ Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. OF LEGAL STUD. 1, 14 (1974).

⁵⁹ Mitchell Polinsky & Steven Shavell, *The Theory of Public Enforcement of Law* 3-83, Working Paper No. 11780, NAT'L BUREAU OF ECON. RES. 1, 3-83 (2005), <http://www.nber.org/papers/w11780>.

and material resources that the procuratorates can obtain, thus influencing their regulatory capacity. In addition, to implement policies and the law, prosecutorial organs must have adequate abilities concerning personnel and budget resources, knowledge, information, experience, administrative support, and the like. Insufficient capacity leads to a high risk of losing cases and a high cost of legal enforcement.⁶⁰ Finally, a lack of regulatory autonomy, in other words, “regulators’ susceptibility to external influence”, causes interferences from local government agencies and party committees.⁶¹ In developing countries, regulatory organs tend to have weaknesses in relation to autonomy and capacity, which leads to poor enforcement outcomes.⁶² In this study, given that the negative litigation outcome greatly matters for prosecutorial organs in terms of performance appraisal, and their regulatory capacity and autonomy remain weak, the costs of regulation through civil EPILs become a big concern for them .

IV. CHANGES IN REGULATORY MOTIVATION OF PROSECUTORIAL ORGANS OVER THE THREE STAGES

The empirical data presented in part three of this article demonstrate the changing practices of the Chinese prosecutorial organs in engaging in civil EPILs over the three stages. Indeed, the different practice of prosecutor-led civil EPILs in each stage shows three different regulatory models, which have been labelled as follows: “*ad hoc* regulation” through local innovation before July 2015; “forced regulation” during the legal experiment from July 2015 to July 2017; and “perfunctory regulation” after the nationwide establishment of the prosecutor-led civil EPIL system in July 2017. This part further investigates the dynamics of the underlying regulatory motivation of prosecutorial organs that can help us to understand the changes in their regulatory practices. As explained in part three, three factors (legal,

⁶⁰ Benjamin van Rooij, *Greening Industry Without Enforcement? An Assessment of the World Bank’s Pollution Regulation Model for Developing Countries*, 32 L. POL’Y 127, 138 (2010); see also van Rooij & Lo, *supra* note 2.

⁶¹ Lesley K. McAllister et al., *Reorienting Regulation: Pollution Enforcement in Industrializing Countries*, 32 L. POL’Y 1, 5 (2009).

⁶² Lesley K. McAllister, *Dimensions of Enforcement Style: Factoring in Regulatory Autonomy and Capacity*, 32 L. POL’Y 61, 61-78 (2010); Benjamin Van Rooij & Lesley McAllister, *Environmental Challenges in Middle-Countries: A Comparison of Enforcement in Brazil, Mexico, and Indonesia*, LAW AND DEVELOPMENT OF MIDDLE-INCOME COUNTRIES: AVOIDING THE MIDDLE-INCOME TRAP 288, 288–306 (Randall Peerenboom & Ginsburg Tom eds., 2014).

political and organizational) that influence regulatory motivation were adopted: the ambiguity or certainty of the law, the top-down political pressure, and the cost of regulation (which is concerned with weak capacity for regulation, lack of autonomy for regulation, and performance appraisal of prosecutorial organs). These factors are analyzed in detail for each of the three regulatory models of prosecutorial organs.

A. “Ad Hoc Regulation”: Local Innovation before July 2015

In the first stage (i.e., before July 2015), the law was ambiguous about the standing of prosecutorial organs to file civil EPILs, but this legal ambiguity at the same time provided an opportunity for legal innovation. In the dataset, a total of 31 civil EPIL cases were filed in ten provincial areas (Figure 2): Guangdong Province (7 cases), Shandong Province (6 cases), Zhejiang Province (5 cases), Jiangxi Province (3 cases), Jiangsu Province (3 cases), Sichuan Province (2 cases), Guizhou Province (2 case), Hunan Province (1 case), Fujian Province (1 case) and, the city of Chongqing (which is a municipality directly under the Central Government) (1 case). As analysed below, the number of civil EPILs was small due to the legal ambiguity over the issue of procuratorate standing, the weak political pressure for regulation and the high cost of regulation. Only when there was a strong political need and a high degree of certainty about winning the case would the local prosecutorial organs dare to file an action. Therefore, the prosecutorial organ’s practice at the first stage was termed “*ad hoc* regulation”, that is, prosecutorial regulation happened sporadically in response to particular local needs.

1. Ambiguity of the Law regarding Standing

China’s first Organic Law of the People’s Procuratorate that was passed in 1954 granted prosecutorial organs the power to file or participate in litigation in relation to significant civil cases that involve the interests of the state and society.⁶³ Furthermore, the 1979 Civil Procedure Law (Draft) had provisions regarding prosecutorial organs’ participation in civil lawsuits.⁶⁴ However, when the Civil Procedure

⁶³ ORGANIC LAW OF PROCURATORATES, art. 4, *supra* note 12.

⁶⁴ Hui Zhao, *Research and Analysis of Civil Procuratorial System (minshi jiancha zhidu yanxi)*, 47.6 J. INNER MONGOLIA NORM UNIV. (PHILOSOPHY, SOC. SCI.) (NEIMENGGU SHIFAN DAXUE XUEBAO (ZHEXUE SHEHUI KEXUE BAN)) 28, 28 (2018).

Law was finally promulgated in 1982, the draft provisions were not included because some believed that prosecutorial organs should only concentrate on criminal work.⁶⁵

Before July 2015, the national legislature, the SPP and the Supreme People's Court ("SPC") generally disapproved of prosecutor-led public interest litigation. Article 15 of the Civil Procedure Law that was amended in 1991 provides that "where an act has infringed upon the civil rights and interests of the State, a collective organization or an individual, any state organ, public organization, enterprise or institution may support the injured unit or individual to bring an action in a people's court". The law only entitled prosecutorial organs, as State organs, to "support" but not "participate in" civil litigations. Moreover, in 2004, the SPC replied to a local court which asked for instructions about the case of *En'shi Autonomous Prefecture Procuratorate v. Zhang Suwen* (regarding returning state property) that a prosecutor-led civil litigation in the name of the State for the purpose of protecting state property and public interest should not be accepted by the people's courts because of an absence of legal authority.⁶⁶ Subsequently, the SPP also issued a notice announcing that the people's procuratorates could not bring any civil or administrative litigation without the approval of the SPP.⁶⁷ After that, local prosecutorial organs stopped initiating such litigations.

However, with the establishment of a special environmental division within local courts, local legislators and the local judiciary (in particular, in Guizhou Province, Jiangsu Province and Yunnan Province) issued local regulations to grant prosecutorial organs standing to sue in civil EPIL. For instance, in 2007, the Intermediate People's Court of Guiyang City clarified in its judicial interpretation that the people's procuratorates were entitled to file EPIL.⁶⁸ In 2009, the People's Congress of Guiyang City passed a local regulation (*difangxing fagui* 地方性法规) titled "the Regulations on Promoting

⁶⁵*Id.* Liu, *supra* note 9, at 55 n.50.

⁶⁶ SPC, REPLY ON THE ENSHI CITY PEOPLE'S PROCURATORATE V. ZHANG SUWEN FOR RETURNING STATE PROPERTY CASE (Promulgated on Jun. 17, 2004).

⁶⁷ Zixin Zhang, *The Standing of the People's Procuratorate to File Public Interest Litigations and Special Features* (*renmin jianchayuan tiqi gongyi susong de diwei ji qi teshuxing*), 11 CHINESE PROCURATORS (ZHONGGUO JIANCHAGUAN) 59, 60 (2019).

⁶⁸ Alex Wang & Gao Jie, *Environmental Courts and the Development of Environmental Public Interest Litigation in China*, 3 J. CT. INNOVATION. 37, 38 (2010).

the Construction of an Ecological Civilization”,⁶⁹ which was the first local regulation to empower the people’s procuratorate to lodge civil EPIL.⁷⁰ Moreover, in 2008, the Intermediate People’s Court, the People’s Procuratorate and the Legal Affairs Office of the People’s Government in Wuxi City of Jiangsu Province jointly promulgated the Interim Regulations on the Handling of Civil EPIL Cases,⁷¹ which was the first set of local administrative rules (*difangxing xingzheng guizhang* 地方性行政规章) emphasizing that the people’s procuratorate should take the lead in engaging in civil EPIL.⁷²

Despite the absence of a national legal authority, with a green light from the local authority, local prosecutorial organs undertook the legal innovation of civil EPIL. For example, in the case of *the Municipal People’s Procuratorate of Guiyang City v Xiong Jinzhi, Lei Zhang and Chen Tingyu* (2008), the Municipal People’s Procuratorate of Guiyang City sued three violators of environmental law, requesting them to stop damaging Turtle Hill in Aha Lake and restore the vegetation they had destroyed in this area. Its standing to sue was upheld by the Intermediate People’s Court of Guiyang City.⁷³ Where there lacked local regulation or judicial interpretation to support the procuratorate’s legal standing, in order to justify the prosecutorial organ’s standing in civil EPIL some local judges developed an innovative but controversial expanded interpretation and application of Article 6 of the Environmental Protection Law of the People’s Republic of China,⁷⁴ which stipulates that all units and individuals have the obligation to protect the environment.⁷⁵

⁶⁹ Standing Committee of the People’s Congress of Guiyang, GUIYANG MUNICIPAL REGULATIONS ON PROMOTING THE CONSTRUCTION OF AN ECOLOGICAL CIVILIZATION (Passed on Oct.16, 2009), 43.6 CHINESE L. & GOV’T 43, 43-52 (2010).

⁷⁰ Dan Li, *The Local Practices of Environmental Public Interest Litigations and Its Institutional Implications* (*Woguo huanjing gongyi susong de difang shijian jiqi zhidu qishi*), 4 WESTERN L. REV. (XIBU FALV PINGLUN] 21, 22 (2011).

⁷¹ Jie Gao, *The Vitality of EPIL and Environmental Court* (*Huanjing gongyi susong he huanbao fating de shengmingli*), PEOPLE’S COURT DAILY (RENMIN FAYUAN BAO) (Jan. 29, 2010), <http://article.chinalawinfo.com/ArticleFullText.aspx?ArticleId=93268>.

⁷² *Id.*

⁷³ Cao & Wang, *supra* note 3.

⁷⁴ Standing Committee of the National People’s Congress, ENVIRONMENTAL PROTECTION LAW OF THE PEOPLE’S REPUBLIC OF CHINA (Promulgated on Dec. 26, 1989, Amended on Apr. 24, 2014).

⁷⁵ Zhang & Lin, *supra* note 45, at 136.

In August 2012, the Civil Procedure Law was amended to add a new provision, Article 55, that allows State organs prescribed by law or relevant organizations to bring a lawsuit for environmental pollution that damages public interests. However, the provision does not clarify which State organs and relevant organizations have standing to sue in civil EPIL. The ambiguity of the national law regarding the plaintiff's qualification almost turned the green light of the local authority to red and largely discouraged prosecutorial organs from filing civil EPIL at courts thereafter (*Figure 2*). In January 2015, the SPC reiterated that prosecutorial organs should only support social organizations to bring civil EPILs according to Article 15 of the Civil Procedure Law.⁷⁶ At that point, Chinese law had still not clarified the standing of prosecutorial organs to file civil actions in the public interest.

2. *Weak Political Pressure for Regulation*

In the first stage, the political pressure for regulation emerged with the local governments' concern about social instability resulting from deteriorating environmental pollution.⁷⁷ When serious environmental violations gave rise to public outcries, local governments had to respond and take action to punish the polluters. For instance, in the case of *the Municipal Procuratorate of Yueling City of Shandong Province v Fan Jinhe Case* (2003), the citizens in Yueling City complained about the severe air pollution caused by Fan's factory. As a result, the local government promised a sanction as a quid pro quo for the citizens' claim to stop the pollution.⁷⁸ In another case, *the Basic Procuratorate of Bishan County of Chongqing City v Chongqing Ou'Yong Livestock Cultivation Cooperative* (2010), poultry waste had fouled the Binan River and destroyed the habitats of species. The local government, the local party committee and the local prosecutorial organ were determined to resolve the problem. After seeking approval from the upper-level prosecutorial organ, the district-

⁷⁶ SPP, INTERPRETATIONS OF THE SPP ON SEVERAL LEGAL APPLICATION ISSUES OF TRIALING ENVIRONMENTAL CIVIL PUBLIC INTEREST LITIGATIONS (Promulgated on Jan. 6, 2015, Amended on Dec. 29, 2021), art. 15.

⁷⁷ Wang, *supra* note 1.

⁷⁸ Wusheng Zhang, *The Procuratorate of Yueling City of Shandong Province v. Fan Jinhe for Environmental Pollution Damages* (*Shandongsheng yuelingshi renmin jianchayuan su Fan Jinhe huanjing wuran sunhai peichang*), CHINA MASS LITIGATIONS: THEROIES AND ANALYSIS OF CASES (ZHONGGUO QUNTI SUSONG LILUN YU ANLI PINGXI) (2009), <http://www.riell.whu.edu.cn/view/5480.html>.

level procuratorate filed an action against the polluter.⁷⁹ Although they received *ad hoc* requests from the local government or party committee, prosecutorial organs at this stage faced little political pressure to lodge civil EPILs.

3. High Cost of Regulation

Despite an opportunity for legal innovation due to the ambiguity of the law, prosecutorial organs had to calculate the costs of filing civil EPILs. The most prominent cost related to the risk of losing the case, which could significantly influence their ranking among all local procuratorates in the annual performance appraisal conducted by their upper-level procuratorate. The performance appraisal mechanism was initially established to enhance prosecutorial work and management.⁸⁰ According to Yu, who conducted interviews in a district-level procuratorate, the performance appraisal mechanism comprised two parts: “quantity” (*shu* 数) and “rate” (*lü* 率). The quantity evaluation concerned the number of criminal cases initiated, the number of prosecutions of escaped criminals, and the number of protests of judicial decisions on criminal cases. The rate evaluation, which was more important, concerned the rate of cases closed, the quality of cases initiated, the rate of change of protested judicial decisions on criminal cases and the success rate of protests of judicial decisions on criminal cases. Among all these elements, the quality of cases initiated, which referred to the rate of acquittal and the rate of withdrawal, was the most important because it accounted for 40 percent of performance appraisal scores (Figure 11).⁸¹ As Yu has suggested, “if an acquittal is issued by the court or the prosecutorial organ withdraws a case because of insufficient evidence, it will have a veto effect on annual performance appraisals and all staff from the

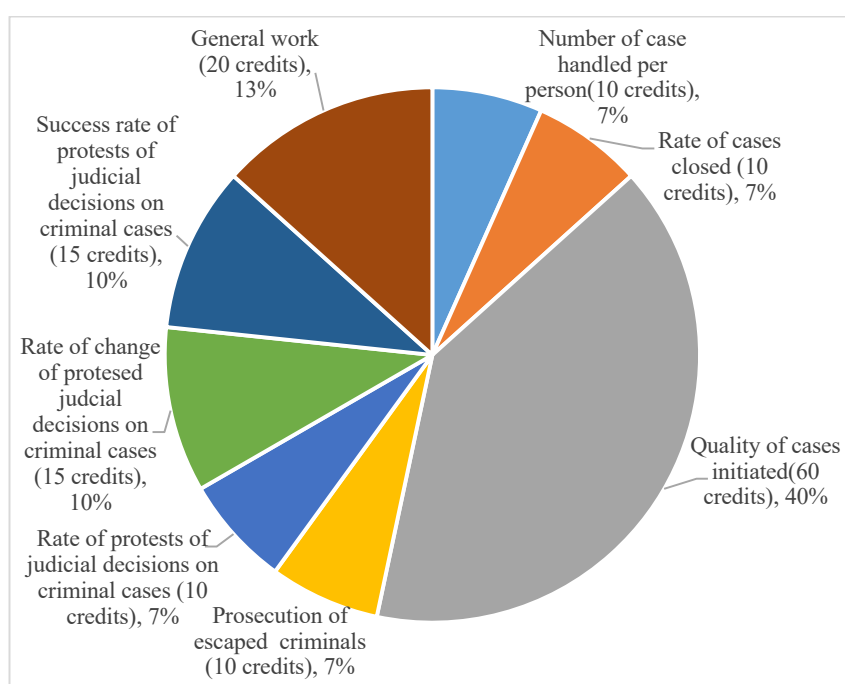
⁷⁹ *The Procuratorate of Bishan County of Chongqing Initiates Public Interest for the Pollution Victims* (*Chongqing bishanxian jianchayuan ti wuran shouhaizhe tiqi gongyi susong*), PROCURATORATE DAILY (JIANCHA RIBAO) (Aug. 5, 2010), <http://news.sina.com.cn/green/news/roll/2010-08-05/100520831780.shtml>.

⁸⁰ Zexuan Xiang, *Examination on the Performance Appraisal Mechanism of Procuratorial Work* (*Jiancha yewu kaoping jizhi tanxi*), 18.4 J. NATL. PROSEC. COLL. (GUOJIA JIANCHAGUAN XUEYUAN XUEBAO) 64, 67 (2010).

⁸¹ Deshui Yu, *A Survey Report about Performance Appraisal System in Prosecutorial organs* (*Guanyu jiancha jiguan jixiao kaohe zhidu de diaocha baogao*), 2 CRIM. SCI. (ZHONGGUO XINGSHI FA ZAZHI) 114, 116–117 (2015); Jinliang Jiang & Houliang Jiang, *The Influence of Performance Appraisal on the Dysfunction of Criminal Procedure* (*Jixiao kaoping dui xingshi chengxu shiling de yingxiang*), 17.2 L. SOC. SCI. (FALÜ HE SHEHUI KEXUE) 212, 214–218 (2018).

chief prosecutor down to basic-level personnel are required to jointly bear the responsibility. This is a fatal blow to a prosecutorial organ.”⁸² In addition, prosecutorial organs would be either punished or rewarded based on their ranking among all local procuratorates in terms of annual performance appraisal. For example, the procuratorates at the district level that ranked in the bottom three had to submit a report to identify problems and make improvement plans,⁸³ while the prosecutors working in those ranked in the top three over three consecutive years might have an opportunity to gain promotion, obtain a role model reward, or receive monetary benefits.⁸⁴

*Figure 11. Performance Appraisal Elements for a District-Level Procuratorate*⁸⁵



The same criteria of performance appraisal applied to prosecutorial regulation through civil EPILs. Under the pressure of the performance appraisal and inter-organizational competition, local prosecutorial organs were often reluctant to initiate civil EPILs

⁸² Yu, *supra* note 81, at 117.

⁸³ *Id.* at 118, n. 4.

⁸⁴ *Id.* at 119.

⁸⁵ *Id.* at 117.

because they lacked the capacity and confidence to win cases. A prosecutor from a northwest province told us in our interview:

There are risks of lodging ordinary civil litigations. First, it is difficult for prosecutorial organs to engage in civil litigations, as it requires stronger capacity than that required in criminal cases. Some large companies have stronger litigation capacity and are more professional than we are. Second, it brings great pressure to the prosecutorial organs if they lose the lawsuits, especially in the circumstances where more than 95 percent of criminal cases end with successful conviction in court. Despite few political risks, we procuratorates are subject to much pressure of performance appraisal. Our annual performance appraisal may rank the bottom if we lose a single case ... The prosecutors who lose the case are also subject to pressure within the organization. That would be very tough for us.

Although filing environmental civil EPILs can help a prosecutorial organ achieve innovation rewards,⁸⁶ this only happens if it succeeds at court. Another prosecutor from Guangdong province, who filed six civil EPIL cases between 2003 and 2014, admitted that prosecutorial organs at municipal or district level sought approvals and instructions from the upper-level prosecutorial organs as well as the local courts. This echoes the previous observations regarding the prosecutorial practice of handling criminal litigation called “pipelining processing” (*liushuixian zuoye* 流水线作业) or “reversed criminal procedure” (*xingshi chengxu daoliu* 刑事程序倒流). It refers to the internal cooperation and communication among the police, prosecutorial organs and courts before prosecutors bring criminal cases to the court in order to ensure conviction.⁸⁷ Therefore, the risk of losing cases is an

⁸⁶ Shi & van Rooij, *supra* note 4.

⁸⁷ See, e.g., Ruihua Chen, *From “Pipelining Processing” towards “Focusing on Adjudication”: A Thought on Chinese Criminal Judicial Reform* (Cong “liushui zuoye” zouxiang “yi caipan wei zhongxin”: dui zhongguo xingshi sifa gaige de yizhong sikao), 3 L. SCI. (FAXUE) 24, 26 (2000); Guoli Yu & Tao Jin, *On the Relationship of Judicial Justice and Section Game: Focusing on the Performance Appraisal of Prosecutorial Organs System* (Bumen boyi yu sifa gongzheng: yi jiancha jiguan jixiao kaohe wei zhongxin), 12.3 J. SOUTHWEST UNIV. POLIT. SCI. L. (XINAN ZHENGFA DAXUE XUEBAO) 63, 67 (2010); Xiao Cai, *On the Reverse Procedure in Prosecution: Research of Three Procuratorates in the Z Area of Guangdong Province* (Gongsu huanjie chengxu daoliu wenti yanjiu: yi guangdongsheng Z diqu san jianchayuan wei kaocha duixiang), 117 J. FUJIAN POLICE COLLEGE (FUJIAN JINGCHA XUEYUAN XUEBAO) 61, 62–68 (2010).

organizational cost for prosecutorial organs to engage in civil EPILs. As long as the winning rate-oriented performance appraisal mechanism remains unchanged, the motivation of prosecutorial organs to file civil EPILs will be restricted.

The other cost of engaging in civil EPILs concerned regulatory capacity and autonomy. The weak capacity of prosecutorial organs with respect to the shortage of knowledge and experience regarding ordinary civil litigation, case information, funding and human resources also contributed to their reluctance to file civil EPILs. In terms of human resources, many prosecutorial organs at municipal and district levels were only equipped with three to four prosecutors in charge of legal supervision of civil and administrative cases, with their work including the handling of EPILs. According to an interview at the People's Procuratorate of Laoshan District of Qingdao City of Shandong Province,⁸⁸ out of all the offices in this organization, only three staff were designated to the Office of Legal Supervision of Civil and Administrative Cases, and they had to handle 20 civil and administrative cases in the first half of 2009. In terms of financial resources, prosecutorial organs did not charge the parties a fee to protest judicial decisions on civil cases. With limited budgets, they lacked funding to file civil EPILs, which required them to hire and pay experts to provide expert opinions to support their claims.⁸⁹ If prosecutorial organs lost the case, they would have to bear high litigation costs.⁹⁰

Moreover, as noted in part one of this article, the dependence of prosecutorial organs on the local government and party committee also demotivated them to file civil EPILs against local corporates, in particular, large and listed companies. When those big corporate taxpayers were sued by prosecutorial organs in civil EPILs, the local government would intervene because it was afraid that such litigations could scare its large-sized corporate taxpayers away.⁹¹ Therefore, the

⁸⁸ Hong Mei & Lu Wang, *The Theory, History, and Suggestions on Legal Safeguards of Prosecutor-led Environmental Public Interest Litigations (Jiancha jiguan tiqi huanjing gongyi susong de falü, lishi, jiqi falü baozhang jianyi)*, 1 *CHINA ENVTL. L. SYSTEM (ZHONGGUO HUANJING FAZHI)* 45, 50 (2012).

⁸⁹ Hui Liu & Xin Jiang, *Empirical Research on the Pilot of Civil Public Interest Litigation Proposed by the Procuratorate (Jiancha jiguan tiqi minshi gongyi susong shidian qingkuang shizheng yanjiu)*, 25.2 *J. NATL. PROSEC. COLL. (GUOJIA JIANCHAGUAN XUEYUAN XUEBAO)* 59, 71 (2017).

⁹⁰ Mei & Wang, *supra* note 88, at 50–51.

⁹¹ Shi & van Rooij, *supra* note 4.

weak regulatory autonomy of prosecutorial organs further increased their cost of regulation in filing civil EPILs.

4. Summary

The first stage of prosecutorial regulation through civil EPILs is labelled as “*ad hoc* regulation”. The ambiguity of the law provided opportunities to some prosecutorial organs and courts to develop local innovation of civil EPIL in response to serious environmental violations. With the growing political concerns over environmental protection, owing to monetary or non-monetary rewards for legal innovation, local prosecutorial organs were also encouraged to file civil EPILs.⁹² Such forces, however, were insufficient to route civil EPILs into the mainstream work of prosecutorial organs due to the high cost of regulation. In general, procuratorates at local levels were reluctant to engage in civil litigations because of the winning rate-oriented performance appraisal mechanism. Their regulatory motivation was also weakened by the lack of regulatory capacity and autonomy when engaging in civil litigations against polluters.⁹³ Despite sporadic cases in some provinces, local prosecutorial organs were unwilling to devote much energy to the practice of civil EPILs.

B. “Forced Regulation”: Experimental Reform from July 2015 to July 2017

China started to experiment with prosecutor-led EPILs in July 2015. Since then, the standing of prosecutorial organs to sue in civil EPILs has been confirmed and the relevant procedural rules regarding civil EPILs have gradually developed. With strong top-down political pressure to implement this legal innovation, prosecutorial organs have become better equipped and empowered with more autonomy. In the second stage, the number of civil EPIL cases grew by 142 percent compared with the first stage, from 31 cases up to 75 cases (*Figure 5*). More prosecutorial organs became involved in the practice of civil EPILs. However, during the two-year legal experiment, the fully loaded political pressure for regulation and concerns over the cost of regulation combined to produce an undesirable outcome, that is, prosecutorial organs tended to file civil EPILs with less complicated facts and concerning less serious instances of environmental pollution.

⁹² *Id.*

⁹³ *See id.*; *see also* Liu, *supra* note 9.

This second stage of prosecutorial regulation through civil EPILs is termed as “forced regulation”.

1. *Certainty of the Law regarding the Standing of Prosecutorial Organs*

On July 1, 2015, the Standing Committee of the National People’s Congress (“NPCSC”), the national legislature, promulgated the Decision on Authorizing the SPP to Launch the Pilot Scheme to Initiate PILs in Certain Areas (“Pilot Scheme”) (*Table 3*). It authorized the SPP to experiment with public interest litigations in thirteen selected provincial areas (Beijing, Inner Mongolia Autonomous Region, Jilin Province, Jiangsu Province, Anhui Province, Fujian Province, Shandong Province, Hubei Province, Guangdong Province, Guizhou Province, Yunnan Province, Shannxi Province, and Gansu Province) in the area of ecological environment and resource protection, preservation of state-owned assets, transfer of state-owned land use rights, and food and drug safety.⁹⁴

The SPP subsequently published two sets of judicial interpretations to clarify the procedural rules of public interest litigations, including the scope of application, the jurisdiction of the procuratorate, the pretrial, the claims as well as the power to protest judgments on civil EPIL cases: one was the Plan for the Pilot Scheme of Initiating PILs by People’s Procuratorates⁹⁵ issued on July 2, 2015, and the other was the Measures for the Implementation of the Pilot Scheme of Initiating PILs by People’s Procuratorates⁹⁶ issued on December 16, 2015 (*Table 3*). The SPP designated the Office of Legal Supervision of Civil and Administrative Cases to handle public interest litigations and increased its staff for the purpose of promoting the work of public interest litigations.⁹⁷

⁹⁴ Standing Committee of the National People’s Congress, DECISION OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE’S CONGRESS ON AUTHORIZING THE SUPREME PEOPLE’S PROCURATORATE TO CONDUCT PUBLIC INTEREST LITIGATION PILOT PROJECTS (Promulgated on July 2, 2015); Qian Zhang, *Empirical Analysis on Pilot Project of the Prosecutorial organs’ Institution on Public Interest Litigation in China*, 5 *CHINA LEG. SCI.* 32, 39 (2017).

⁹⁵ SPP, *supra* note 5.

⁹⁶ See Part IV., *infra* subsec. B.1. (*Table 3*).

⁹⁷ SPP, MEASURES FOR THE IMPLEMENTATION OF THE PILOT SCHEME TO INITIATE PILS BY PEOPLE’S PROCURATORATES (Promulgated on Dec. 24, , 2015, Abolished on Dec. 26, 2020).

At the same time, to deal with public interest litigations brought by prosecutorial organs, the SPC issued the Measures for the Implementation of the Pilot Program of Trial by People's Courts of Public Interest Litigations Initiated by the People's Procuratorates⁹⁸ on February 25, 2016 (*Table 3*). This judicial interpretation stipulates the procedural rules of public interest litigations concerning the jurisdiction of the court, the documents that prosecutorial organs should submit to lodge a case, the announcement period of the settlement agreement reached through negotiation or mediation, as well as the party's right to appeal and the procuratorate's power to protest judgements on civil EPIL cases.⁹⁹ On April 1, 2017, the SPC made another judicial interpretation titled the Interim Working Rules on the Trials of Environmental Public Interest Litigations.¹⁰⁰ It applies to civil EPILs filed by both non-governmental organizations and prosecutorial organs (*Table 3*). The SPC clarified and supplemented the procedural rules for prosecutor-led civil EPILs regarding the court's explanations issued to the procuratorate about non-conformance with the conditions of filing a lawsuit and claims that are not well-founded, the presence of the prosecutor in court, the exemption of litigation fees and the procuratorate's right to appeal and retrial.¹⁰¹ Different from the SPP, which argued that prosecutorial organs should be distinguished from the plaintiff in civil litigation because they serve as legal supervisors of the State,¹⁰² the SPC was inclined to treat prosecutorial organs as the normal plaintiff, an equal party to the defendant in civil EPIL.

In sum, the Pilot Scheme granted prosecutorial organs in the 13 pilot areas standing to bring civil EPILs from July 2015 to July 2017, thus eliminating the legal ambiguity regarding the issue of standing. In the second stage, the SPP and the SPC also introduced much clearer procedural rules for pursuing such litigations. Despite its limited application to the selected provincial areas, the law of

⁹⁸ SPC, THE MEASURES FOR THE IMPLEMENTATION OF THE PILOT PROGRAM OF TRIAL BY PEOPLE'S COURTS OF PILS INSTITUTED BY PEOPLE'S PROCURATORATES (Promulgated on Feb. 25, 2016).

⁹⁹ *Id.*

¹⁰⁰ SPC, INTERIM WORKING RULES OF THE SPC ON THE TRIAL OF ENVIRONMENTAL PUBLIC INTEREST LITIGATION (Promulgated on Apr. 1, 2017).

¹⁰¹ *Id.* art. 40-48.

¹⁰² Hao Li, *The Role of Prosecutorial Organs in Public Interest Civil Litigation* (*Lun jiancha jiguan zai minshi gongyi susong zhong de diwei*), 11 L. SCI. (FAXUE) 168, 170 (2017).

prosecutor-led civil EPILs created much greater certainty than there had been in the first stage.

Table 3. Laws and Judicial Interpretations on PILs brought by the Prosecutorial Organs after 2015

Date issued	Authority	Laws & judicial interpretations	Content related to prosecutor-led civil EPILs
Jul. 1, 2015	NPCSC	The decision on Authorizing the SPP to Launch the Pilot Scheme to Initiate Public Interest Litigations in Certain Areas	Authorizing prosecutorial organs to experiment with public interest litigations in 13 selected provincial areas
Jul. 2, 2015	SPP	Plan for Pilot Scheme of Initiating Public Interest Litigations by the People's Procuratorates	Providing brief procedural rules on the scope of application, the pretrial, and the claims
Dec. 24, 2015	SPP	Measures for the Implementation of the Pilot Scheme of Initiating Public Interest Litigations by the People's Procuratorates	Providing detailed procedural rules mainly on the scope of application, the jurisdiction of the procuratorate, the pretrial, the claims, and the power to protest
Feb. 25, 2016	SPC	Measures for the Implementation of the Pilot Program of Trial by People's Courts of Public Interest Litigations Initiated by the People's Procuratorates	Providing procedural rules on the jurisdiction of the court, the documents submitted for lodging the case, the announcement period of the settlement agreement, and the party's right to appeal and the procuratorate's power to protest
Apr. 1, 2017	SPC	Interim Working Rules on the Trials of Environmental Public Interest Litigations	Providing detailed procedural rules on the explanations issued to the procuratorate, the prosecutor's presence in court, exemption of litigation fees and the procuratorate's right to appeal and retrial
Jun. 27, 2017	NPCSC	Decisions of Amending the Civil Procedure Law	Granting prosecutorial organs nationwide to file civil EPILs
Feb. 23, 2018	SPC & SPP	Interpretation on Several Issues concerning the Application of Law for Public Interest Litigations Initiated by the People's Procuratorates	Institutionalizing procedural rules for public interest litigations based upon the consensus of the SPC and the SPP

2. *Strong Political Pressure for Regulation*

The Pilot Scheme of prosecutor-led PILs firstly became party policy during the Fourth Plenary Session of the 18th CPC Central Committee in 2014.¹⁰³ The CPC suggested that the SPP and the SPC

¹⁰³ Central Committee of the Communist Party of China, *Communique of the Fourth Plenary Session of the 18th Central Committee of the Communist Party of China*, CHINA.ORG.CN (Oct. 23, 2014), http://www.china.org.cn/china/fourth_plenary_session/2014-12/02/content_34208801.htm.

should lead a reform to “seek to allow the people’s procuratorates to file public interest litigations”.¹⁰⁴ The clock was thus set ticking. To accomplish this legal reform, several supporting mechanisms were adopted. First of all, the SPP and the SPC headed the legal experiment and other offices (such as the CPC Central Political and Legal Affairs Commission, the Supervisory and Judicial Affairs Committee of the National People’s Congress, the Legislative Affairs Commission of the NPCSC, and the Legislative Affairs Office of the State Council) were included in the group.¹⁰⁵ Meanwhile, local governments and party committees also paid great attention to the experimental reform set out in the Pilot Scheme and participated in extensive communication and cooperation.¹⁰⁶ The party sub-committees within the pilot procuratorates were required to enhance the leadership of the work of public interest litigations and treat it as a “significant assignment”.¹⁰⁷ These organizational arrangements promoted information exchange and helped gather collective resources to implement the legal reform in the selected local areas.

Second, the performance of the pilot procuratorates was closely monitored by the upper-level procuratorates. The SPP often called meetings with all pilot procuratorates in order to report on progress, exchange information, share experiences, and provide guidance for subsequent work. It published on a monthly basis about the progress made on initiating public interest litigations and published guiding cases. The SPP further established a supervisory group to monitor the handling of some significant cases of public interest litigation.¹⁰⁸ It also initiated a movement called “Filling the Blank” (*jiejue kongbai* 解决空白), requiring every pilot procuratorate to file at least one public interest litigation during the second stage. An internal report about the work progress of prosecutor-led public

¹⁰⁴ Xin Gao, *The Making Process of the Work Scheme for Bringing Public Interest Litigation by the Supreme People’s Procuratorate* (*Zuigaojian gongbu tiqi gongyi susong shidian gongzuo fang’an zhiding jingguo*), JUSTICE NET (ZHENGYI WANG) (July 2, 2015), https://www.spp.gov.cn/ztk/2015/gyss/xgzs/201507/t20150702_100620.shtml, see also CAPO, *supra* note 43, at 46–47.

¹⁰⁵ CAPO, *supra* note 43, at 47.

¹⁰⁶ Jianming Cao, *Interim report of the SPP on the Pilot Work of Public Interest Litigation Initiated by Prosecutorial Organs*, SPP (Nov. 5, 2016), http://www.npc.gov.cn/wxzl/gongbao/2017-02/21/content_2007646.htm.

¹⁰⁷ CAPO, *supra* note 43, at 55.

¹⁰⁸ *Id.* at 60.

interest litigations, documented by the SPP, included the following statement:

Up to the end of June 2017, all 87 procuratorates at the municipal level have initiated public interest litigations; of the 759 procuratorates at the district level, 736 has filed public interest litigations and this accounts for 96.97 percent. Except for Beijing City and Jiangsu Province, other prosecutorial organs in the pilot areas have all filled the blank.¹⁰⁹

Under top-down political pressure for regulation, local prosecutorial organs in the pilot areas were forced to emphasize the work of PILs and mobilize various resources to carry it out. For instance, the provincial prosecutorial organ in a western China pilot province required all municipal procuratorates within the province to initiate at least one action of public interest litigation before March 2016 and the district-level procuratorates to file at least one action of public interest litigation before June 2016. Li noted a downside to this approach in commenting that the prosecutorial organs in these pilot areas “only pursue the result and ignore the process”.¹¹⁰

Finally, adopting a carrot-and-stick approach, the SPP and provincial procuratorates in the pilot areas provided rewards to encourage local innovations that promoted public interest litigations. The rewards included propagandizing local innovations as good practice and naming the pilot areas coming up with local innovations in the SPP and the SPC’s work reports. For instance, positive references were made in an official publication of the SPP to the establishment of case databases of public interest litigations by the procuratorates of Guangdong Province and Gansu Province.¹¹¹

3. *Reduced Cost of Regulation*

In the second stage, the number of prosecutors dealing with public interest litigations was increased in order to facilitate the legal

¹⁰⁹ Report on file with author.

¹¹⁰ Zheng Li, *Exploring the Improvement Path of Prosecutor-led Public Interest Litigations: A Perspective of the Pilot Programme's Dilemma* (*Jiancha jiguan tiqi gongyi susong de wanshan lujing tansuo: yi shidian kunjing wei shijiao*), 244 *ACAD. SEARCH TRUTH REAL.* (TANQIU) 60, 61 (2017).

¹¹¹ CAPO, *supra* note 43, at 60.

experiment. The SPP approved the addition of 86 municipal-level procurators and 761 district-level procurators to implement the Pilot Scheme.¹¹² The prosecutors in charge of public interest litigations shared knowledge and experiences with each other.¹¹³ Moreover, the autonomy of local prosecutorial organs was also improved. In order to protect prosecutors from local interference and local protectionism, the prosecutorial organs in the pilot areas adopted three measures. First, as leaders in the work on public interest litigations, the local party committees played a role in restricting interference from the local government. For example, the party committee of Yiwu City in Zhejiang province made the first guideline in the country that supported prosecutors to file public interest litigations.¹¹⁴ Second, some local procuratorates designated the work of public interest litigations to the Railroad Transportation Prosecutorial Organ (a special people's procuratorate, Figure 1), which is directly responsible to the provincial procuratorate.¹¹⁵ Third, the SPP established a supervisory group and launched several enforcement campaigns on land pollution, water protection, forest and grassland protection and the like to vertically and directly monitor and control the progress of significant cases of public interest litigation.¹¹⁶

Although these measures could, to some extent, help reduce the cost of regulation of prosecutorial organs, their impact should not be exaggerated. Despite more procurators participating in the work of public interest litigations, they had to go through a process of learning and gradually accumulating knowledge and experiences of handling civil EPILs. It remained difficult for prosecutorial organs to find sufficient clues to civil EPIL cases, either from the general public or from other government agencies. In terms of financial resources, prosecutorial organs still struggled to secure funding that was needed

¹¹² Zhang, *supra* note 94.

¹¹³ *Id.*

¹¹⁴ *The Local Party Committee and Government of Yiwu City of Zhejiang Province Issued the First Opinions of Supporting Public Interest Litigations* (Zhejiang yiwu chutai shouge difang dangwei zhengfu zhichi gongyi susong yijiang), YIWU GOVERNMENT (Jul. 20, 2017) http://www.yw.gov.cn/art/2017/7/20/art_1229138029_50770110.html.

¹¹⁵ *Xi'an Railway Transport Procuratorate Filed the First Civil Public Interest Litigation Incidental to Criminal Litigation among Shaanxi Railway Prosecutorial Organs*, PEOPLE'S PROCURATORATE OF XIAN RAILWAY (Apr. 30, 2019), http://www.sn.jcy.gov.cn/xtxatly/ywgz/gyssjcgz/201904/t20190430_133697.html.

¹¹⁶ CAPO, *supra* note 43, at 61–62.

to afford litigation expenses (such as expenses incurred collecting evidence and hiring experts) even though the SPC had exempted their litigation fees for the filing of civil EPILs with the promulgation of the Interim Working Rules on the Trials of Environmental Public Interest Litigations in April 2017 (*Table 3*).

Moreover, in terms of regulatory autonomy, even though the vertical pressure and empowerment of prosecutorial organs could help them mitigate the risk of going against local governments, their regulatory motivation and performance remained restricted by the lack of regulatory autonomy. One of the interviewees from a northwest province provided an example. A prosecutorial organ at the district level found that a local large chemical company had illegally emitted air pollutants. Although the local EPB made an administrative decision to impose a fine of RMB 50,000 and required the company to rectify the situation in one month, the company failed to comply with the decision and continued to pollute. The local prosecutorial organ decided to initiate a civil public interest litigation against the company.¹¹⁷ However, the local government did not allow this to happen. The interviewee said: “The prosecutor in charge of this case told me that he will resign after finishing the case.” He added that such a situation had not just occurred in one case – local prosecutorial organs faced constant local interference when handling civil EPILs.

4. *Summary*

In the second stage, the case number of prosecutor-led civil EPILs greatly increased and more prosecutorial organs participated in the practice of civil EPILs. This resulted from the certainty of the law regarding the standing of prosecutorial organs and the procedural rules regarding civil EPILs as well as the strong political pressure for regulation during the legal experiment period. However, given the reduced but still high cost of regulation, the pilot prosecutorial organs strategically chose to file civil EPILs that had less complicated facts, easily accessible evidence, and involved minor environmental violations and small and weak defendants compared with the civil EPIL cases filed in the first stage. Therefore, in this article the second stage of prosecutorial regulation through civil EPILs is characterized as “forced regulation”.

¹¹⁷ Authors’ Note (To maintain anonymity, we do not cite the source of the case information here.).

C. *“Perfunctory Regulation”*: Nationwide Implementation after July 2017

After the two-year legal experiment, the prosecutor-led civil EPIL was formally written into the Civil Procedure Law in July 2017 (Table 3). Since then, the nationwide prosecutorial organs have been allowed to file civil litigations against environmental polluters. In 2018, the number of such litigations grew by 472 cases compared with 75 cases in the second stage (Figure 5). This mainly resulted from the certainty of the law regarding civil EPILs across the country. However, this was accompanied by an increased tendency of prosecutorial organs to select easier cases, small and weak defendants, and minor environmental violations and damage. This is partly because the political pressure for regulation imposed on prosecutorial organs has become weak while the cost of regulation remains relatively high. This third stage of the prosecutor-led civil EPIL practice is termed “perfunctory regulation” in this article.

1. *Nationwide Certainty of the Law*

On June 27, 2017, the NPCSC added the second section of Article 55 of the Civil Procedure Law to legalize the practice of prosecutor-led civil EPILs.¹¹⁸ The section stipulates as follows:

Where the people’s procuratorate finds in the performance of functions any conduct that undermines the protection of the ecological environment and resources, infringes upon consumers’ lawful rights and interests in the field of food and drug safety or any other conduct that damages the public interests, it may file a lawsuit with the people’s court if there is no State organ or organization prescribed in the preceding section or the State organ or organization prescribed in the preceding section does not file a lawsuit. If the State organ or organization prescribed in the preceding section files a lawsuit, the people’s procuratorate may support the filing of the lawsuit.

¹¹⁸ *Decisions of the Standing Committee of the National People’s Congress on Amending the Civil Procedure Law of the PRC and the Administrative Procedure Law of the PRC*, PEOPLE’S DAILY (RENMIN RIBAO) (Jun. 28, 2017), <http://npc.people.com.cn/n1/2017/0628/c14576-29366977.html>.

Subsequently, the SPC and the SPP jointly promulgated the Interpretation on Several Issues concerning the Application of Law for Public Interest Litigations Initiated by the People's Procuratorates ("Joint Interpretation") on February 23, 2018.¹¹⁹ Echoing Article 55(2) of the Civil Procedure Law, Article 13 of the Joint Interpretation provides that prosecutorial organs should make a public announcement 30 days before bringing an action of EPIL to the courts. As a result, the legal ambiguity regarding the standing of prosecutorial organs has been eliminated in the country.

2. *Weak Political Pressure for Regulation*

After the legal experiment was conducted successfully and the national law established the standing of prosecutorial organs to sue in civil EPILs, the political pressure for regulation through civil EPILs was significantly reduced to the extent that it has become weak in the third stage. The corresponding mechanisms operating in the second stage also faded away and so without vertical supervision and monitoring prosecutorial organs are now less incentivized to lodge civil EPILs. Moreover, Article 55(2) of the Civil Procedure Law and Article 13 of the Joint Interpretation lay down the principle that prosecutorial organs should bring an action for civil EPIL only when there is no State organ or organization that is eligible to file a civil EPIL or the relevant State organ or organization fails to file one. Because prosecutor-led civil EPILs are seen as the last resort to protect environmental public interests, the overall political pressure for regulation through civil EPILs has become much weaker in the third stage compared to the previous one.

Recently, the SPP initiated a new scheme titled "Four Major Procuratorships" to promote and balance the procuratorate's work on criminal, civil, administrative and public interest litigations.¹²⁰ This indicates that the SPP will play a more active role as the representative of public interests and pay more attention to the work of public interest litigation than before. However, prosecutor-led public interest litigations are not only limited to civil EPILs but also include other forms such as prosecutor-led administrative EPILs and public interest

¹¹⁹ SPC & SPP, INTERPRETATION ON SEVERAL ISSUES CONCERNING THE APPLICATION OF LAW FOR PUBLIC INTEREST LITIGATIONS INITIATED BY THE PEOPLE'S PROCURATORATES (Promulgated on Feb. 23, 2018, Amended on Dec. 29, 2020).

¹²⁰ See *supra* note 22.

litigations that aim to protect public interests other than environmental ones (such as mass consumer interests, state-owned assets, state-owned land use rights, and cultural heritage). The SPP's decision to strengthen the work of public interest litigation does not guarantee that civil EPILs will remain a focal point in the future agenda of prosecutorial organs. In other words, prosecutorial organs will still be able to fulfil their mission regarding public interest litigation designated by the upper-level procuratorates if they shift the focus of their work to other forms of public interest litigations. For instance, when submitting a report on the work of prosecutor-led public interest litigations to the NPCSC in October 2019, the SPP highlighted that the total number of recorded public interest litigations in various forms reached 214,740 cases, the total number of public interest litigations filed in the courts reached 6,353 cases, and the total number of recorded EPILs reached 118,012 cases (accounting for 54.96 percent) between July 2017 and September 2019.¹²¹ But in terms of EPILs filed in the courts, the report was silent about whether those cases were solved through civil or administrative EPILs.

3. *Reducing but Still High Cost of Regulation (and Work-focus Shift to Administrative EPIL)*

In the third stage, prosecutorial organs under the leadership of the SPP have undergone two changes that might help enhance their regulatory capacity and reduce their cost of regulation. First, the SPP divided the previous Office of Legal Supervision of Civil and Administrative Cases at the various levels of the people's procuratorates into three separate offices: the Office of Legal Supervision of Civil Cases, the Office of Legal Supervision of Administrative Cases and the Office of Public Interest Litigations.¹²² The Office of Public Interest Litigations is equipped with independent financial and human resources so that prosecutorial organs may obtain more capacity for handling public interest litigations efficiently and professionally. Second, the SPP required that every provincial area

¹²¹ Jun Zhang, *Report of the Supreme People's Procuratorate on the Procuratorial Work of Public Interest Litigation (Zuigao renmin Jianchayuan guanyu kaizhan gongyi susong jiancha gongzuo qingkuang de baogao)*, SPP (Oct. 24, 2019), https://www.spp.gov.cn/spp/tt/201910/t20191024_435925.shtml.

¹²² Zhen Li, *The Spotlight of The New Divisions of the Supreme People's Procuratorate (Zuigaojian quanxin neishe jigou liangxiang)*, PEOPLE'S DAILY OVERSEAS VERSION (RENMIN RIBAO HAIWAI BAN) (Jan. 4, 2019), <http://legal.people.com.cn/n1/2019/0104/c42510-30502582.html>.

should have at least one environmental authentication institution that is willing to provide expert opinions without advance payment of authentication expenses. Therefore, prosecutorial organs are able to save on the expense of hiring experts until a judicial decision is made by a court, and the defendant will be ordered to pay authentication fees if it loses the case.¹²³ This can somewhat reduce the financial cost for prosecutorial organs in filing civil EPILs.

However, the roles of the above innovations in reducing the cost of regulation of prosecutorial organs are limited. Their lack of knowledge and experiences of dealing with civil litigation cannot be solved merely through setting up a separate office in charge of public interest litigations. The high cost of regulation associated with the success rate of litigation remains a big concern of prosecutorial organs when calculating the cost of regulation through civil EPILs because the same performance appraisal mechanism still operates within the procuratorate system in the third stage. Despite the second innovation mentioned above, prosecutorial organs still need to bear authentication expenses if they lose lawsuits. Such a practice will still cause them very much care about the success rate of civil EPILs and become cautious in case selection. In terms of the regulatory autonomy of prosecutorial organs, their lack of resistance to local interference remains unchanged since the local governments and party committees withdrew their special support for the purpose of implementing party policy and facilitating the legal experiment during the second stage.

Moreover, in the third stage, prosecutorial organs have demonstrated a clear shift of their work focus from civil to administrative EPILs. Together with the legal experiment on civil EPILs, the legal experiment on administrative EPILs was also conducted in the second stage.¹²⁴ According to Article 25(4) of the Administrative Procedure Law of the People's Republic of China amended on June 27, 2017,¹²⁵ when a prosecutorial organ finds that an administrative organ with the duties of supervision and administration in the field of environment and resource protection fails to perform its duties and causes damage to the national interest or social and public interests, the prosecutorial organ has the power to issue a "letter of

¹²³ Ministry of Justice, NOTICE OF THE GENERAL OFFICE OF THE MINISTRY OF JUSTICE ON FURTHER IMPROVING THE MANAGEMENT OF ENVIRONMENTAL DAMAGE FORENSIC APPRAISAL (Promulgated on May 24, 2019).

¹²⁴ SPP, *supra* note 5.

¹²⁵ Standing Committee of the National People's Congress, *supra* note 36.

prosecutorial suggestions” (*jiancha jianyishu* 检察建议书) to that administrative organ and put pressure on the latter to perform its duties pursuant to the law. The administrative organ should follow the prosecutorial suggestions and reply in written form to the prosecutorial organ within two months of receiving the suggestions. If there is an emergent risk of incurring further damage, it should reply in written form within 15 days.¹²⁶ The case will be closed in the pre-proceeding stage if the administrative organ complies with the prosecutorial suggestions. Otherwise, the prosecutorial organ has the power to file an administrative litigation against the administrative organ.¹²⁷

The parties to administrative EPILs are prosecutorial organs on the one hand and the delinquent administrative organ on the other. Filing administrative EPILs is indeed part of the procuratorate’s work of legal supervision over administrative agencies to ensure that their activities conform to the law. Administrative EPILs focus on the legal supervision of administrative organs which fail to discharge their duties over environmental and resource protection. The finding in this article is that prosecutorial organs have been more active in engaging in administrative EPILs than in civil ones, demonstrating an obvious shift in the work focus of prosecutorial organs in the third stage.

Table 4 presents a comparison between the civil EPIL work and the administrative EPIL work of prosecutorial organs during the second stage and during the first four months of 2019 – this was used as a sample for the third stage due to the availability of data. It shows that prosecutorial organs generally prefer administrative to civil public interest litigations. In terms of the number of cases on file, administrative EPILs accounted for 93.68 percent from January to April 2019, much higher than that of civil EPILs (6.32 percent) during the same period. Although the regulatory capacity of prosecutorial organs has been enhanced in the third stage, most of the organizational resources are spent on administrative EPIL work, leading to civil EPIL work being marginalized or rendered a “decoration” (*peichen* 陪衬).¹²⁸ Moreover, although prosecutorial organs are devoted to administrative

¹²⁶ SPC & SPP, *supra* note 119.

¹²⁷ *Id.*

¹²⁸ Xiaobin Weng & Xiang Zhou, *A Study on the Phenomenon of “Taking Administrative Litigation as Primary, the Civil Litigation as Supplement” in the Pilot Areas of Public Interest Litigation* (*Gongyi susong shidian zhong de “xingzhu minfu” xianxiang yanjiu*), 11 SOC. SCI. FRONT (SHEHUI KEXUE ZHANXIAN) 218, 218 (2017).

EPIL work, they have actually filed a much smaller percentage of administrative EPILs at the courts in the third stage (9.48 percent) than the second stage (21.65 percent). This means that most administrative EPILs are solved in the pre-trial stage and litigation is not common.

Table 4. Comparison between Civil and Administrative EPIL Work of Prosecutorial Organs

	2015.07-2017.06	2019.01-2019.04
<i>Placing the case on file</i>		
Civil	/	1,648 (6.32%)
Administrative	/	24,419 (93.68%)
Total	/	26,067 (100.00%)
<i>Litigation</i>		
Ordinary civil litigation	113 (6.51%)	79 (9.13%)
Incidental civil litigation	1,248 (71.85%)	704 (81.39%)
Administrative	376 (21.65%)	82 (9.48%)
Total	1,737 (100.00%)	865 (100.00%)
<i>Clues to cases</i>		
Civil	890 (18.10%)	1,210 (5.75%)
Administrative	4,026 (81.90%)	19,819 (94.25%)
Total	4,916 (100.00%)	21,029 (100.00%)

Source: SPP's work report on the prosecutor-led PIL in the pilot areas (June 2017); SPP's work report on the national prosecutor-led PIL (January - February 2019), and SPP's work report on the national prosecutor-led PIL (March -April 2019). We could not find the work report in 2018. These report files are with the authors.

The work-focus shift of prosecutorial organs to pre-trial resolution of administrative EPILs resulted from an institutional calculation of the cost of regulation in terms of the availability of clues to cases, difficulties of handling cases, and other organizational benefits concerned.¹²⁹ In other words, administrative EPIL work requires a lower cost of regulation than civil EPIL but is likely to generate effects of regulation more valued by the SPP. Specifically, first, prosecutorial organs can more easily obtain and access clues to administrative EPILs than those of civil EPILs.¹³⁰ As Table 4 shows, 81.90 percent of clues to cases were administrative, and only 18.10 percent were civil in the second stage. In the first four months of 2019, the percentage of clues to administrative case increased by 12.35 percent and reached 94.25 percent while that of clues to civil case

¹²⁹ *Id.* at 219-221.

¹³⁰ *Id.* at 219.

decreased to 5.75 percent. As the state organ of legal supervision, prosecutorial organs have much experience supervising and monitoring administrative agencies. The easy accessibility of clues to administrative cases therefore helps to save on the cost of regulation in the practice of EPILs.

Second, prosecutorial organs have fewer difficulties in handling administrative EPILs than in handling civil EPILs. The key legal issue for prosecutorial organs to prove in administrative EPILs is a dereliction of duty on the part of the administrative agency,¹³¹ and it is not so difficult for prosecutorial organs to obtain the relevant evidence given their rich experiences concerning legal supervision of administrative organs. In civil EPILs, however, prosecutorial organs have to deal with much more complicated facts, legal issues as well as claims, and spend more financial and human resources collecting evidence regarding the issues of unlawfulness, fault, causation and damages.¹³²

Third, prosecutorial organs may obtain their organizational benefits through administrative EPILs. As Table 4 shows, most administrative EPIL cases are closed before litigation as the Administrative Procedure Law allows prosecutorial organs to issue a letter of prosecutorial suggestions as a precondition for filing administrative public interest litigation, and thus have a chance to negotiate with the targeted administrative organs. A prosecutor from Shaanxi Province told us in our interview that:

Prosecutorial organs focus more on administrative EPILs because the handling of administrative cases is less costly. Prosecutorial organs are encouraged to close the cases in the pre-trial stage. During the legal experiment, local administrative institutions were on their guard for the possible risks of being sued by prosecutorial organs. After the legal experiment, they knew what would happen and came up with a routinized mechanism with the local prosecutorial organs. Both sides thus enhanced cooperation, which turned out to be good.

¹³¹ *Id.* at 220.

¹³² *Id.* at 220-221.

This statement echoes that of another prosecutor from Guangdong Province that we interviewed:

During 2015 and 2017, Guangdong Province, among the first batch of pilot areas, brought a number of administrative public interest litigations. Now we become more rational because our ultimate goal is not suing an administrative organ. Instead, we want to solve environmental problems. The current practice is to issue a letter of prosecutorial suggestions. If administrative organs reply and correct their misconducts, prosecutorial organs will not sue them ... Now we deal with such cases through pre-trial resolution ...

Indeed, due to a lack of autonomy, local prosecutorial organs bring lawsuits against local governments with great caution. At the same time, local procuratorates are also motivated to make use of their authority of legal supervision over administrative organs as a bargaining chip so that they can mobilize more political and organizational resources. Such a motivation has become much stronger after the anti-corruption office was removed from the prosecutorial system, which lost political advantages in trading with local governments. The administrative public interest litigation system provides such an opportunity. As a prosecutor from Fujian Province told us: “we want to enhance our supervisory power through administrative public interest litigations to impose more pressure on the local government.” In their article, Weng and Zhou also advance a similar view:

The establishment of the National Supervisory Commission has greatly weakened the prosecutorial power. After removing the centralized power of investigating corruption cases, the prosecutorial organs are badly in need of a new authority to fill this vacuum. Therefore, some local procuratorates have suggested changing from playing ‘anti-corruption card’ to playing ‘legal supervision card.’ Obviously, to be the plaintiffs of public interest litigation is a chance ... prosecutorial organs should regard it as a ‘new spin-off business’.¹³³

¹³³ *Id.* at 223.

4. Summary

In the third stage, prosecutorial organs nationwide have been given the standing to sue in civil EPILs and the legal ambiguity has been completely removed. Prosecutorial regulation through civil EPILs has instead become part of the procuratorate's responsibilities and its routine work. Prosecutorial organs have to file civil EPILs against polluters in order to discharge their responsibility in this regard. According to an official report, Chinese environmental protection bureaus imposed administrative sanctions on 186,000 cases in 2018, while the number of prosecutor-led civil EPILs nationwide was 1,021,¹³⁴ accounting for 0.55 percent of the administrative sanctions.¹³⁵ Therefore, only a small fraction of the environmental pollution cases escalated to civil EPILs are being brought by prosecutorial organs. On the other hand, with the weak political pressure for regulation and the continued high cost of regulation, prosecutorial organs are inclined to choose less complicated cases involving minor environmental pollution, weak and small defendants, and a small amount of monetary claims. Moreover, in the third stage, prosecutorial organs have devoted most of their efforts to administrative EPILs because of the lower cost of regulation in engaging in such administrative cases, which further weakens the regulatory motivation of prosecutorial organs to pursue civil EPILs. Despite the enhanced financial and human resources, prosecutorial organs have tended to use them to deal with administrative but not civil EPIL work. For this reason, the third stage of prosecutorial regulation through civil EPILs has been characterized as "perfunctory regulation".

CONCLUSION

This article classifies the regulatory practices of the Chinese prosecutorial organs in terms of lodging civil environmental public interest litigations against polluters from 2003 to 2018 into three stages: local innovation before July 2015, legal experiment from July 2015 to July 2017, and nationwide establishment of the prosecutor-led civil EPIL system after July 2017. The empirical findings show that the overall number of prosecutor-led civil EPILs has grown throughout the

¹³⁴ SPP, *supra* note 47.

¹³⁵ Ganjie Li, *The Report of the State Council on Environmental Situation and Accomplishment of Environmental Protection Goals in 2018*, Ministry of Ecology and Environment (Apr. 21, 2019), http://www.npc.gov.cn/npc/xinwen/2019-04/21/content_2085653.htm.

three stages, whereas the percentage of cases with complicated facts, strong corporate polluters, severe environmental violations, and high damage amounts has decreased in turn. In other words, prosecutorial organs have been filing more and more civil EPIL cases, but they have a strong preference for cases with less complicated facts, weak and small defendants, minor environmental violations, and small amounts of monetary damage. Therefore, although the Chinese prosecutorial regulators are more than a paper tiger, they are also far from being a tiger with sharp teeth.

To further explain the changes in prosecutorial regulation through civil EPILs in China, the article examined the regulatory motivation of prosecutorial organs over the three stages, investigating the dynamics of three factors that influence regulatory motivation: ambiguity of the law (legal factor), top-down political pressure for regulation (political factor), and organizational cost of regulation (organizational factor). The three stages of the regulatory practice of prosecutorial organs present three models resulting from the dynamic combination of the legal, political and organizational factors. Without the political pressure for regulation and the certainty of the law, and with the high cost of regulation, the prosecutorial organs only engaged in environmental regulation sporadically. This was the “*ad hoc* regulation” of the first stage. Under an authoritarian political regime, the top-down political pressure for regulation forced prosecutorial organs in the pilot areas to file civil EPILs against environmental polluters despite the continued high cost of regulation. This was the “forced regulation” of the second stage. When top-down political pressure for regulation becomes weak, prosecutorial organs retreat and carry out the civil EPIL work without real determination. This is the “perfunctory regulation” of the third stage (*Table 5*).

This study finds that the legal ambiguity provided opportunities for local innovation of civil EPILs. The law that clearly establishes the standing and procedures for prosecutorial regulators is a necessary but not sufficient condition for the development of prosecutorial regulation through civil EPILs. The organizational cost of regulation, which is concerned with the risk of losing litigation, the cost of litigation and the risk of going against local government, has the most bite. The cost of regulation has become a common factor that significantly influences the regulatory motivation of prosecutorial organs and shapes their regulatory behaviours in filing civil EPILs throughout the three stages. For instance, it is observed that

prosecutorial organs prefer civil litigations incidental to criminal litigation, and prefer to file cases with less complicated facts, weak and small defendants, and minor environmental violations. They also prefer the administrative EPIL work (in particular, pre-trial resolution of administrative EPILs) rather than the civil EPIL work.

Table 5. Characteristics of Prosecutorial Regulation in the Three Stages

Stage	Regulatory model	Features of civil EPIL cases		Regulatory motivation		
		Number of cases	Percentage of complicated cases, serious damages, corporate defendants, large amount of monetary claims	Political factor: political pressure for regulation	Legal factor: ambiguity of the law	Organizational factor: cost of regulation
1st stage (before July 2015)	<i>Ad hoc</i> regulation	Lowest	Highest	Weak	Ambiguity	High
2 nd stage (July 2015 - July 2017)	Forced regulation	Medium	Medium	Strong	Certainty (partial)	Reduced but still high
3 rd stage (after July 2017)	Perfunctory regulation	Highest	Lowest	Weak	Certainty (nationwide)	Reducing but still high

This study argues that a short-run top-down approach has very limited effectiveness, which seems a common problem of regulation in China. It also provides evidence that the perceived cost of regulation by regulators is the Achilles' heel of regulation in authoritarian China. To address notoriously weak environmental law enforcement at the local level, the central authority often sets "high-priority, quantitative environmental targets" to mobilize its massive bureaucracy.¹³⁶ The outcome, however, is often poor because of weak regulatory capacity and lack of autonomy and accountability.¹³⁷ This state of affairs is reflected in the well-known idiom that "the central has measures, and the local has counter-measures (*shangyou zhengce, xiayou duice* 上有政策, 下有对策)".¹³⁸ Similar problems have occurred in food safety regulation. The widely used top-down regulatory campaigns, according to Liu, "reflects Beijing's institutional weakness in stabilizing its regulatory capacity".¹³⁹ In fact, the top-down approach takes no account of the perceived cost of regulation by regulators

¹³⁶ Wang, *supra* note 1.

¹³⁷ *Id.*; Kostka, *supra* note 2.

¹³⁸ Wang, *supra* note 1, at 416.

¹³⁹ Peng Liu, *Tracing and Periodizing China's Food Safety Regulation: A Study on China's Food Safety Regime Change*, 4 REG. GOVERNANCE 244, 256 (2010).

associated with the organizational appraisal system, regulatory capacity and regulatory autonomy.

This study also highlights the conditions needed for successful prosecutorial regulation: low cost of regulation and a well-developed legal system. In Brazil, although the Ministério Público (the Public Prosecution Office, “MP”) had originally been dedicated primarily to criminal prosecution, civil litigation on behalf of environmental interests became “an equally important part of its work”.¹⁴⁰ Based on the existing studies, the success of prosecutorial enforcement in Brazil mainly resulted from two conditions. First, the Brazilian Constitution of 1988 grants the MP strong “administrative and functional autonomy”,¹⁴¹ including high independence from other branches of the government and the other three judicial branches, budget guarantees and autonomy, and strong personal tenure for prosecutors.¹⁴² This allows them to act free of undue influence from local government. In addition, “e[ach] prosecutor independently chooses how to conduct the investigations and lawsuits in his or her jurisdiction without fear of dismissal, demotion, or involuntary transfer to another jurisdiction”.¹⁴³ All these reforms were taking place when Brazil began to transform into a democracy after a military dictatorship, and thus leaders of the MP had the opportunity to lobby for the institution’s independence and civil litigation powers.¹⁴⁴ Second, the MP went through a process of capacity building in terms of recruitment and specialization. The mindset of prosecutors was also changed and they began to perceive “the institution’s civil work to be more dynamic and important than its criminal work”.¹⁴⁵ As a result, the number of public civil actions filed each year by the MP rose to almost 10 percent of the number of administrative fines issued each year throughout the 1990s,¹⁴⁶ compared with only 0.55 percent in China.¹⁴⁷

¹⁴⁰ Lesley K. McAllister, *MAKING LAW MATTER: ENVIRONMENTAL PROTECTION AND LEGAL INSTITUTIONS IN BRAZIL* 57 (2008).

¹⁴¹ *Id.* at 64.

¹⁴² Shi & van Rooij, *supra* note 4; McAllister, *supra* note 140, at 64–65.

¹⁴³ McAllister, *supra* note 140, at 65.

¹⁴⁴ *Id.* at 75, 83.

¹⁴⁵ *Id.* at 82.

¹⁴⁶ *Id.* at 101.

¹⁴⁷ Li, *supra* note 135.

Despite some criticisms of excessive discretion and limited accountability,¹⁴⁸ the Brazilian experience shows that autonomy and capacity are critical to effective prosecutorial environmental regulation. China's experiences have confirmed this. In particular, the lack of regulatory autonomy on the part of the Chinese prosecutorial organs has significantly increased the costs of regulation and thus undermined the effectiveness of prosecutorial regulation in the environmental regulatory landscape. Moreover, associated with the limited regulatory capacity, the existing winning rate-oriented performance appraisal mechanism further discourages prosecutorial organs from filing important but controversial civil EPIL cases. These factors have combined to frustrate the establishment of a culture and practice of active and effective prosecutorial regulation that safeguards environmental interests. As Mueller found from Brazil's prosecutorial enforcement, "when the costs to the regulator are high, the equilibrium level of compliance will be low", and "these costs can include not only the administrative and logistic cost but also the political costs of contradicting the interests of those in power or those it relies on for support".¹⁴⁹

McAllister argues that prosecutors in "civil law countries tended to play a larger role in protecting the public interests in private civil litigation than the attorney general in common law countries".¹⁵⁰ In order to promote prosecutorial regulation in China, the autonomy of prosecutorial organs must be enhanced. The government should further implement institutional reform within the procuratorate system with the aim of centralizing the management of personnel, financial and material resources of local procuratorates below the provincial level.¹⁵¹ Capacity building, of course, is an equally significant means of improving prosecutorial regulation. The SPP needs to reform the current winning rate-oriented performance appraisal criteria in order to motivate prosecutorial regulation through public interest litigations.

¹⁴⁸ Salo V. Coslovsky, *Relational Regulation in the Brazilian Ministério Público: The organizational basis of regulatory responsiveness*, 5 REG. GOVERNANCE 70, 71 (2011).

¹⁴⁹ Bernardo Mueller, *Who Enforces Enforcement?: Can Public Prosecutors in Brazil Break the Endless Regress?*, 3RD WORLD CONG. OF ENVTL. & RES. ECONOMISTS, KYOTO, JAPAN 1–25, 23 (2006), <http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.381.7076>.

¹⁵⁰ McAllister, *supra* note 140, at 61; *see also* John Henry Merryman & Rogelio Perez-Perdomo, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA*. 103 (4th ed. 1985).

¹⁵¹ Xu, *supra* note 31.

In addition, despite the established standing and procedures for prosecutor-led EPILs, the proper rules regarding environmental damage authentication, cooperation with EPBs with respect to case information and evidence collection and effective judgment enforcement, the management and supervision of the use of awarded monetary remedies in civil EPILs should be further developed in China.

