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Climate Litigation in a 'Developmental State': The Case of China

Mingzhe ZHU | ORCID: 0000-0003-3986-0027
School of Law, University of Glasgow, Glasgow, Scotland, UK
mingzhe.zhu@uantwerpen.be

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Abstract

Despite the absence of a framework climate law, China's judiciary has expressed its determination to take climate change litigation seriously. This article argues that the Chinese approach to climate change litigation can be better understood within China's climate governance paradigm. Primarily understanding climate change as a matter of development instead of a matter of environment or human rights, the Chinese government believes that mitigation and adaptation can only be achieved through a smarter development strategy. The state entrusts the power of making and implementing climate policy to the developmental and industrial departments of the executive branch, allowing them to use macroeconomic measures to transform the structure of energy and industry. If this paradigm persists, Chinese judges are unlikely to condemn carbon majors or require the adaptation of more ambitious climate goals. Instead, the judiciary will interpret statutory law or contracts in light of the state's climate goals, with the hope of incentivizing industrial upgrades. Despite this approach's apparent advantages of mainstreaming climate considerations, judges are facing the challenge of employing more sophisticated legal techniques and empirical expertise in respect of the energy system.

Keywords

China – developmental state – non-binding climate policy – policy functions of judiciary – energy system

1 Introduction

It is becoming fashionable to tackle climate change through the courts, with the cumulative number of climate change litigation cases exceeding 2,300 worldwide in 2023.[1] The ever-growing importance of litigation in global climate governance also raises questions concerning the role and limits of judges within an open democratic society and incites comparative studies.[2] However, the majority of discussions have been focused on landmark cases, primarily from the Global North. Despite some noteworthy efforts to explore the development of climate jurisprudence in the Global South,[3] numerous structural and systemic barriers persist, causing less publicized cases in the Global South to go unnoticed.[4] This creates a gap in the research agenda. Because of this research gap, we could easily take for granted the model of climate change litigation of the North, thereby underestimating the efforts of the judiciary of the South and further missing the precious opportunity to appreciate the great diversity of relationships between judicial power and socio-political changes.

This article is intended to shed light on judicial decision-making and motivation in climate change-related cases before the Chinese courts. As the largest emitter of greenhouse gases (GHGs), China's climate law and jurisprudence have been the subject of academic investigation. The most obvious feature of China's institutional climate governance framework is the predominance of the executive power and its policy and the lack of legislative instruments.[5] Although most, if not all, climate policy documents are non-binding per se,

1 Joana SETZER and Catherine HIGHAM, 'Global Trends in Climate Change Litigation: 2022 Snapshot' (2023) Policy Report 11.

2 For example, Jacqueline PEEL and Jolene LIN, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113 American Journal of International Law 679,726; Joana SETZER and Lisa BENJAMIN, 'Climate Litigation in the Global South: Constraints and Innovations' (2020) 9 Transnational Environmental Law 77,101.

3 PEEL and LIN (n 2) 726; SETZER and BENJAMIN (n 2) 101.

4 E Lisa F SCHIPPER and others, 'Equity in Climate Scholarship: A Manifesto for Action' (2021) 13 Climate and Development 853,856.

5 Haomiao DU and Hao ZHANG, 'Climate Neutrality in the EU and China: An Analysis of the Stringency of Targets and the Adaptiveness of the Relevant Legal Frameworks' (2022) 3 Review of European, Comparative & International Environmental Law 495,509; Xiangbai HE, 'Legal and Policy Pathways of Climate Change Adaptation: Comparative Analysis of the Adaptation Practices in the United States, Australia and China' (2018) 7 Transnational Environmental Law 347,373; Jolene LIN, 'Climate Governance in China: Using the "Iron Hand"' in Benjamin RICHARDSON (ed.) *Local Climate Change Law: Environmental Regulation in Cities and Other Localities*, Edward Elgar, 2012, 300–324.

Chinese judges have cited them in many contractual disputes to make statutory or contractual interpretation appear more concrete.[6]

This article tries to make sense of the judicial application of non-binding policy documents by the interrelation between the judiciary and state authority.[7] It argues that the Chinese judiciary function primarily as policy implementors within the broader framework of handling climate change issues with a developmentalist approach. The article is organized as follows. Section 2 theorizes the developmentalist approach to climate governance. Section 3 reviews the motivation of four cases to provide a concrete example of the actions of judges in regulating industrial upgrading. Section 4 highlights the complexity of measuring the concrete outcomes of Chinese climate-related judicial decisions. Section 5 distinguishes different policy functions of China's judiciary in climate governance.

2 Theorizing the Climate Developmental State

In economics, the term 'developmental state' refers to a state that uses economic policies to generate rapid industrialization and economic growth.[8] Similarly, a state can also actively deploy economic and industrial policies to achieve climate goals, which justifies using the term 'climate developmental state.' Almost immediately since its initial participation in climate diplomacy, China has perceived climate change primarily as a developmental issue, the good governance of which concerns industrial structure, and that the design of climate policy can determine the outcomes of international rivalry in development.[9] The developmentalist paradigm determines the comprehension and articulation of climate issues and predicts the institutional structure of climate governance in China. It entrusts the power of making and implementing climate policy to the government ministries and departments that administer industrial affairs, and it allows them to achieve climate goals by

6 Yue ZHAO, Shuang LYU, and Zhu WANG, 'Prospects for Climate Change Litigation in China' (2019) 8 Transnational Environmental Law 349,377; Mingzhe ZHU, 'The Rule of Climate Policy: How Do Chinese Judges Contribute to Climate Governance without Climate Law?' (2022) 11 Transnational Environmental Law 119,139.

7 See Mirjan R. DAMASK, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press, 1986).

8 John B KNIGHT, 'China as a Developmental State' (2014) 37 The World Economy 1335,1347.

9 Historical introduction to China's "developmentalist approach", see Mingzhe ZHU, 'China's Developmentalist Approach to Climate Governance' (2022) 12 IUCN AEL Journal of Environmental Law 22,39.

using macroeconomic measures to transform the structure of industries and energy.[10]

The allocation of power in a developmental state can explain at least two characteristics of China's climate law and policy. First, it explains the lack of legally binding regulation and carefully defined rights and duties. Because these ministries and departments must constantly update industrial and macroeconomic policy to cope with the ever-changing realities of the global supply chain and geopolitics,[11] they usually enjoy a large amount of discretion and room for manoeuvre. Therefore, the preferred forms of regulation are notices, roadmaps, action plans, and circulars – which do not prescribe specific legal rights and duties and do not require a lengthy adoption procedure.

Second, it explains the climate policy documents' focus on industrial transformation by strengthening state intervention. The Tianjin Regulation on Achieving Carbon Peaking and Neutrality, the most elaborate local climate policy to date, offers a good example. Most of its 82 articles provide that the municipal government shall mobilize regulatory and directional tools to restrict fossil fuel sectors, encourage renewables, optimize industrial structure and transport connection, upgrade hard-to-abate sectors, support research and development in relevant domains, and promote public awareness.[12]

Admittedly, proactive industrial policy measures are also used in other jurisdictions and were even proposed as solutions to sustainability and equity challenges.[13] However, the Chinese model is unique because the existing climate policy documents do not recognize the citizens' right to hold the government accountable for failing to adopt prescribed regulatory and directional measures or meet climate goals. With almost unchallenged discretion,

10 ibid.

11 For instance, one of the urgent challenges for these developmental bureaucrats to deal with is the Unites States' ban on microchips. Don CLARK, 'The Tech Cold War' s "Most Complicated Machine"' That's Out of China's Reach' *The New York Times* (New York, 4 July 2021) <https://www.nytimes.com/2021/07/04/technology/tech-cold-war-chips.html> accessed 27 November 2022; Virginia HARRISON and Martin FARRER, 'What Do US Curbs on Selling Microchips to China Mean for the Global Economy?' *The Guardian* (London, 19 October 2022) <https://www.theguardian.com/world/2022/oct/19/what-do-us-curbs-on-selling-microchips-to-china-mean-for-the-global-economy> accessed 27 November 2022.

12 Tianjin Regulation on Achieving Carbon Peaking and Neutrality (27 September 2021). (天津市碳达峰碳中和促进条例).

13 Jonas MECKLING, 'Making Industrial Policy Work for Decarbonization' (2021) 21 Global Environmental Politics 134,147; Wim NAUDE, 'Climate Change and Industrial Policy' in Adam SZIRMAI, Wim NAUDE, and Ludovico ALCORTA (eds.) *Pathways to Industrialization in the Twenty-First Century: New Challenges and Emerging Paradigms*, Oxford University Press, 2013, 271–292.

industrial ministries can radically change their policy direction overnight. For example, cryptocurrency was encouraged in 2019, only to be eliminated in 2022, according to the recent update of the Catalogue for Guiding Industry Restructuring issued by the National Development and Reform Commission (NDRC). Facing an electricity shortage in 2021, China has promoted coal power plants at home but halted its global investments in coal.

This developmentalist approach to climate governance could generate positive outcomes, as some studies have shown optimism in assessing the possibility of China achieving its goals of peaking and neutrality.[14] In terms of climate change litigation, however, this approach raises at least two important challenges regarding the function of judges. First, if non-binding policy documents can inspire innovative statutory and contractual interpretation, judges may eventually substitute the legislative requirements with the demands of climate policy. Second, because climate policy concerns mainly macroeconomic and industrial measures instead of the determination of rights and duties, its judicial application requires judges to depart from traditional legal analysis and consider the practical implications of their decisions in the context of GHG reduction by restructuring and upgrading the industrial and energy sectors. These challenges are exemplified in four widely mediatized climate-related cases, as discussed in the next section.

3 Renewables and Bitcoin: Archetype Climate Change-Related Cases in a Developmental State

This section illuminates the practical application of the developmentalist approach through two distinct sets of climate change cases in China. The first set revolves around the issue of high curtailment rates for wind and solar power by grid companies, while the second focuses on the significant energy consumption associated with cryptocurrency mining. These cases are classified as 'core' climate change cases due to their direct and explicit engagement with matters of fact or law regarding 'the substance or policy of climate change causes and impacts'.[15]

14 Shu ZHANG and Wenying CHEN, 'Assessing the Energy Transition in China towards Carbon Neutrality with a Probabilistic Framework' (2022) 13 Nature Communications 87; Zhu LIU et al, 'Challenges and Opportunities for Carbon Neutrality in China' (2021) Nature Reviews Earth & Environment 1, 15.

15 David L MARKELL and JB RUHL, 'An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?' (2011) 64 Florida Law Review 15, 27.

The two cases involving renewable energy curtailment were initiated by the same environmental nongovernmental organization, the Friends of Nature Institute (FON), against state-owned provincial electric power companies in Gansu and Ningxia respectively.[16] In both instances, the plaintiff argued that the defendants failed to fulfil their obligations as stipulated in Article 14 of the Renewable Energy Law (REL). Article 14 mandates grid companies to 'purchase all electricity generated from renewable energy sources' and to provide necessary connection services.[17] In both cases, while the defendants procured electricity generated from wind and solar sources, they neglected to establish the required grid connections.[18] The plaintiff contended that the grid companies' notably high curtailment rates violate this provision.[19] Furthermore, the plaintiff presented an extensive and purposive interpretation of Article 29 of the same law, which delineates the defendants' responsibilities.[20] Although Article 29 specifies that a grid company is liable for failing to purchase all renewable electricity only if such failure results in economic harm to the producer,[21] FON argued that the defendants should be held accountable for the environmental degradation arising from their reliance on coal-fired power sources.[22]

The outcomes of the two cases have diverged. On April 10, 2023, an agreement was achieved between Gansu State Grid and FON under the mediation of the Gansu Mining Area Court. As per the terms of the agreement, Gansu State Grid committed to: (a) continuous investment to integrate renewable electricity into the grid before 2025; (b) provide an annual report during the execution of the aforementioned project to the court, with a corresponding

16 The Mining Area Court in Gansu, *the Friends of Nature Environmental Institute of Chaoyang District, Beijing v State Grid Gansu Electric Power Corporation* (17 April 2023) [(2019) Gan 95 Minchu No. 7] (甘肃矿区人民法院公告 [(2019) 甘95民初7号], cited hereafter as 'Gansu case'); The Yinchuan Intermediate People's Court in Ningxia, *the Friends of Nature Environmental Institute of Chaoyang District, Beijing v State Grid Ningxia Electric Power Corporation* (20 April 2023) [(2018) Ning 01 Minchu No. 109] (宁夏回族自治区银川市中级人民法院民事判决书 [(2018) 宁01民初109号]), cited hereafter as 'Ningxia case'.

17 Article 14 of the Renewable Energy Law (2005).

18 Gansu case (n 16) Annex 1 (Complaint of Civil Public Interest Litigation, Application for Change of Claims), para. 7; Ningxia case (n 16) para. 3.

19 Gansu case (n 16) Annex 1, paras. 8–11; Ningxia case (n 16) para 4.

20 Gansu case (n 16) Annex 1, paras. 13–15; Ningxia case (n 16) para 4.

21 Article 29 of the Renewable Energy Law (2005).

22 Gansu case (n 16) Annex 1, para. 15; Ningxia case (n 16) para 4.

copy furnished to FON; and (c) disclose information pertinent to the utilization of clean energy, subject to public oversight.[23]

In the Ningxia case, however, the court concluded that Ningxia State Grid had not violated the REL.[24] The court's interpretation of Article 14 of the REL was influenced by the 'Measures for the Guaranteed Full Purchase of Renewable Electric Power,' issued by the NDRC on March 24, 2016. This guidance specified that grid companies are obliged to 'purchase all electricity' under Article 14 of the REL only when electricity consumption is viable and secure.[25] The court further emphasized that the provincial Development and Reform Commission of Ningxia had verified that Ningxia State Grid had met its renewable energy consumption target.[26] Moreover, the court acknowledged that coal-fired electricity is essential to ensure grid stability, given the inherently unpredictable, intermittent, and volatile nature of wind and photovoltaic energy production.[27] The court observed that renewable resources are predominantly concentrated in the western region of the country, which is geographically distant from the power load centre situated in the eastern part.[28] As a result, the court recognized the formidable challenge of achieving complete local utilization of these resources.

The two bitcoin cases are more representative in China: while the parties to the contractual dispute showed no particular interest in climate action, the court proactively applied statutory interpretation in respect of the state's climate goals. The facts of the first case were simple.[29] In May 2019, the plaintiff and the defendants signed three contracts that stipulated the plaintiff would purchase 1,542 microdata storage servers for bitcoin mining and transfer 93% of the profits from the mining to the plaintiff as either fiat currency or bitcoin.[30] The plaintiff paid RMB 100 million to purchase the facilities and maintain their operation. The defendant paid 18.3463 BTC but stopped sharing

23 Gansu case (n 16) Annex 2 (Mediation Agreement), paras 4–6.

24 Ningxia case (n 16) para 16.

25 Notice of the National Development and Reform Commission on the Issuance of Administrative Measures for the Guaranteed Full Purchase of Renewable Electric Power, 24 March 2016, Fagai Nengyuan (2016) No. 625. (《国家发展改革委关于印发<可再生能源发电全额保障性收购管理办法>的通知》，发改能源〔2016〕625号).

26 Ningxia case (n 16) para. 16.

27 Ibid para 15.

28 Ibid.

29 Mingzhe ZHU, 'The "Bitcoin Judgements" in China: Promoting Climate Awareness by Judicial Reasoning?' (2023) 32 Review of European, Comparative & International Environmental Law 158,162.

30 The District Court of Chaoyang in Beijing, *Beijing Fujiuxin Marketing and Technology Co. Ltd. v Zhongyan Zhichuang Blockchain Co. Ltd.* (14 December 2021) [(2020) Jing 0105

the profits from the mining operation afterwards.[31] Therefore, the plaintiff sued and sought damages.[32]

The court of first instance voided the contractual arrangement between the parties because it jeopardized the public interest. The court ruled that the governing law shall be the Contract Law instead of the Civil Code promulgated in 2021. Article 52(4) of the Contract Law stipulates that a contract is void if it harms the public interest.[33] To determine the requirements of the public interest, the court turned to several policy documents on the prevention and resolution of risks of virtual currency trading.[34] The court found that, according to these documents, cryptocurrency-related activities consume an immense amount of energy and can create instability on the financial market, therefore going against the public interest. As the result, it voided the contracts in question. The court of appeal upheld both the decision and the reasoning of the court of first instance.[35]

Although both courts used terms like 'unlawful' and 'against the law' when discussing the legal qualification of cryptocurrency, they did not void the contracts based on *pacta illicita*. Otherwise, they would have cited Article 52(2) rather than Article 52(4). This line of reasoning cannot persist in light of the Civil Code (2021) that substitutes the provisions of the Contract Law with very different rules regarding validity. Article 153 of the Civil Code stipulates two circumstances that will void a transaction: (1) violation of an imperative provision of law or decree and (2) contrary to public order and public morals.

The second bitcoin mining case serves to illustrate the solution provided by the Civil Code.[36] On June 5, 2020, Shanghai Qinju Co. Ltd. (the plaintiff)

Minchu No. 69754] (北京丰复久信营销科技有限公司与中研智创区块链技术有限公司服务合同纠纷一审民事判决书 [(2020) 京0105民初69754号]), paras. 6–8.

31 Ibid para 11.

32 Ibid para 2.

33 Ibid para 18.

34 Ibid para. 14. These documents included Notice Concerning the Prevention of Risks Associated with Bitcoin (December 2013), Public Notice on Preventing Risks of Fundraising through Coin Offering (September 2017), Notice Warning Against Illegal Fundraising in the Name of 'Virtual Currency' and 'Blockchain' (August 2018), Notice on Regulating Virtual Currency 'Mining' Activities (September 2021), and Notice on Further Preventing and Resolving the Risks of Virtual Currency Trading and Speculation (September 2021).

35 The 3rd Intermediate Court of Beijing, *Beijing Fujiuxin Marketing and Technology Co. Ltd. v Zhongyan Zhichuang Blockchain Co. Ltd.* (7 July 2022) [(2022) Jing 03 Minzhong No. 3852] 北京丰复久信营销科技有限公司与中研智创区块链技术有限公司服务合同纠纷二审民事判决书 [(2022) 京03民终3852号].

36 The District Court of Dongcheng in Beijing, *Shanghai Qinju Industry Co., Ltd. v. Beijing Yun'er Computing Technology Co. Ltd.* (25 October 2021) [(2021) Jing 0101 Minchu No. 6309]

signed a service contract with Beijing Yun'er Computing Technology Co. Ltd. (the defendant) and entrusted the defendant to provide technical service for 685 microdata storage servers. The defendant guaranteed adequate power supply to ensure the operation of mining equipment and, in the event of power failures, compensate the plaintiff for the loss. During the performance of the contract, however, more than ten blackouts occurred. As a result, the plaintiff sued the defendant for compensation.[37] The defendant countered by asserting that the contract was null and void due to the prohibition of bitcoin mining under state policy.[38]

Comparable to the courts in the preceding case, the Court of Dongcheng District arrived at the judgment that the contract was indeed void. As in the first bitcoin case, the court considered the same policy documents.[39] The court stipulated that the governing law should be the Civil Code. It based its rationale on Article 153(2) of the Civil Code, which dictates that any transaction contrary to public morals is null and void. To ascertain the contours of public morals, the court referred to Article 9 of the Code, commonly known as the 'ecological principle.'[40] That article dictates that when engaging in civil activities, legal entities should factor in the necessity of conserving resources and protecting the environment.[41] The court contended that cryptocurrency-related activities not only transgressed state policy but also contravened the mandate of the ecological principle. Consequently, these activities were deemed offensive to public morals and rendered void.[42]

Collectively, these cases illuminate several noteworthy aspects of climate change litigation within a developmental state. The judiciary maintains a deep deference to the executive branch, demonstrates a vested interest in the tangible implications of its verdicts, and displays substantial attentiveness to industrial progress. These distinctive attributes are explored in greater detail in the subsequent sections.

(上海勤鞠实业有限公司诉北京云尔计算科技有限公司委托合同纠纷一审民事判决书 [(2021) 京0101民初6309号]).

37 Ibid para 3.

38 Ibid para 4.

39 Ibid paras 19–20.

40 Ibid para 20.

41 Article 9, Civil Code (2020).

42 See n 36, para 20.

4 Difficulty of Achieving Positive Outcomes through Industrial Upgrades

Assessing the success of a climate-related case is challenging because multiple criteria apply.[43] In the Chinese context, the Supreme People's Court (SPC) has made clear that the judiciary shall provide 'judicial service' for the achievement of the nation's carbon targets, especially in the domain of industrial upgrading.[44] In practice, judges frequently assert positive outcomes and, at the same time, considerations of industrial practicalities. Sometimes judges prioritize industrial and macroeconomic considerations. In the cases concerning renewable energy, for instance, the judges indeed posited that the elevated curtailment rate stems from limitations within the electricity infrastructure. While they might also agree that some impetuses are needed for China's largest company by revenue, the State Grid, to modernize the electrical power system, it would seem that according to their way of thinking, demanding the defendants to pay the remedy would not solve the problem.

However, this structural thinking may not apply to scenarios involving smaller entities. In the first bitcoin case, for example, the prominence of bitcoin mining's substantial energy consumption and carbon footprint obscures the crucial aspects of energy generation and emission sources. We need to scrutinize the installation blueprint for crypto-mining facilities and its contextual backdrop to offer insights into China's grid distribution and its susceptibility.

The facilities in question of the first bitcoin case were installed in crypto-mining farms in Liangshan County, Sichuan Province, a province rich in hydropower. The county's current installed hydropower capacity is about 3.6 MW and, according to the county government's plan, will reach 4.3 MW by 2027.[45] However, due to geographic remoteness, a proportion of the hydropower produced here is either difficult or uneconomical to connect to the grid. To maintain profitability, since 2015, the owners of the power stations have supplied power for crypto-mining, making this county one of the epicentres of crypto-mining in China. With the national government now determined to

43 Kim BOWER, 'Lessons from a Distorted Metaphor: The Holy Grail of Climate Litigation' (2020) 9 Transnational Environmental Law 347.

44 'Providing Powerful Judicial Services for Actively and Steadily Promote Carbon Neutrality and Carbon Peaking: The Supreme People's Court Promulgated the First "Two-Carbon" Normative Document and Released Illustrative Cases' (The Supreme People's Court of the People's Republic of China, 1 February 2023) <https://www.court.gov.cn/zixun-xiangqing-389371.html> accessed 30 April 2023.

45 Opinion on Promoting High Quality Industrial and Economic Development in Liangshan County. (《凉山州推动工业经济高质量跨越式发展的实施意见》).

halt crypto-mining, we can expect the decline of crypto-mining operations in this area, with the left-over power uncertain to be applied to other industries.

On a broader level, the electricity grid in Sichuan Province should be optimized to meet the imperatives of mitigation. This province in southwest China creates eighty percent of its electrical supply using hydropower.[46] In the context of the 'Western Development' policy announced in the late 1990s, most of the hydropower capacity in Sichuan was added in the 2000s, coinciding with the strategy of simultaneously upscaling electricity generation and introducing high energy-consumption sectors to this province.

However, as the concept of 'ecological civilization' gained political momentum, the adverse environmental impact of hydropower stations caught the attention of the industrial ministries. In 2018, the Ministry of Water Resources, the NDRC, the Ministry of Ecology and Environment (MEE), and the National Energy Administration (NEA) jointly issued an opinion on eliminating small-scale hydropower stations along the Yangtze River.[47] By the end of 2021, of the 5,131 small hydropower stations in Sichuan, only 239 are allowed to operate.[48] Amid the heat waves of the summer of 2022, Sichuan suffered from drought, and its hydropower generation capacity was severely curtailed, leading to power shortages.[49] How the developmental state adjusts the industrial structure of this province and other regions of its territory to cope with environmental protection, grid stability, and climate governance remains a topic of observation.

A paradox of the developmentalist approach to climate change litigation thus emerges. On the one hand, the commitment to guiding economic and industrial transformation through individual cases requires specific analysis to consider various elements that determine the concrete impact of a decision in the real world. On the other hand, the convention of identifying the public

46 Yanlong HU et al., 'Current Status, Challenges, and Perspectives of Sichuan's Renewable Energy Development in Southwest China' (2016) 57 Renewable and Sustainable Energy Reviews 1373.

47 Opinions on Carrying out the Cleanup and Rectification of Small Hydropower in the Yangtze River Economic Zone (Hydropower [2018] No. 312)《关于开展长江经济带小水电清理整改工作的意见》(水电〔2018〕312号) Official version in Chinese available at http://www.gov.cn/zhengce/zhengceku/2018-12/31/content_5440398.htm. A hydropower station with less than 2.5 installed capacity is categorized as 'small'.

48 Xiaoling WANG, 'Rectification of Small Scaled Hydropower in Sichuan Is Almost Done' *China Environmental News* (16 March 2022) 5.(王小玲:《四川基本完成小水电分类整改》,《中国环境报》2022年3月16日第5版).

49 Reuters, 'Explainer: The Power Crunch in China's Sichuan and Why It Matters' *Reuters* (26 August 2022) <https://www.reuters.com/world/china/power-crunch-chinas-sichuan-why-it-matters-2022-08-26/> accessed 3 September 2022.

interest by policy documents instead of adopting consequence-oriented assessment does not enable judges to assess the actual outcomes of their decisions.

5 Judges and Climate Policy in a Developmental State

There are no easy solutions for the challenges identified above. Instead of proposing solutions, it is necessary to try to make sense of the challenges by stressing the policy functions of China's judicial system.

China's judiciary implements state policies through the formulation of judicial policies and adjudication. The judiciary is an organic part of social governance and always interacts with other state organs. The judiciary has three principal functions in social governance. First, it integrates judicial functions into the political functions of state governance and social transitions. Second, it handles and resolves social disputes to promote social transition and mitigate negative outcomes of transition. Third, it constructs and shapes social structures and relations.[50]

Climate change litigation only pushes this function to a more sophisticated level. In searching for a resolution that can provide concrete results, the judiciary will find that the case cannot be confined to a specific area. All aspects of socio-economic life are relevant to climate change mitigation and adaptation. In addition to the operation of 'yellow vehicles' (ie highly polluting vehicles that are issued with yellow labels because they do not conform to specified emission standards), coal consumption, ozone layer depletion, and solar water heater installations discussed in the existing literature, climate change policies involve many other scenarios. The potential inclusion of GHG emissions' impacts in environmental assessments would allow an administrative law approach to climate change litigation.[51]

The co-benefit of air pollution and GHG emissions reduction could also inspire lawsuits against polluting companies.[52] In land use disputes, litigants

50 GU Peidong: "Contemporary China's Judicial Ecology and Its Improvement", "Legal Research", Issue 2, 2016, 38. (顾培东：《当代中国司法生态及其改善》，《法学研究》2016年第2期，第38页)。

51 Ministry of Ecology and Environment: 'The 14th Five-Year Plan' Implementation Plan for Environmental Impact Assessment and Pollution Emission Permit Reform (Draft for Comments). (生态环境部：《"十四五"环境影响评价与排污许可改革实施方案（征求意见稿）》)。Xiangbai HE, 'Mitigation and Adaptation through Environmental Impact Assessment Litigation: Rethinking the Prospect of Climate Change Litigation in China' (2021) 10 Transnational Environmental Law 413,439.

52 ZHAO Yue: 'Exploring the Path of Climate Change Litigation in China – An Empirical Analysis Based on 41 Air Pollution Public Interest Litigation Cases', 'Journal of

can argue for energy efficiency and emission reduction. For example, State Grid, in a dispute over prospecting rights, argued that the definition of 'public interest' should consider the 44 billion tons of CO_2 emissions that could be reduced annually by the completion of the grid project.[53] According to the SPC, since the signing of the Paris Agreement, Chinese courts have adjudicated 1.12 million first instance carbon-related cases.[54] It seems that the SPC counts every single contractual dispute involving energy supply or renewable energy companies as a climate change case. Climate change considerations will almost inevitably arise in criminal, administrative, and civil cases. Thus, it is not that some judges will be dealing with climate-related cases but that all judges may be expected to carry out climate policy in adjudication.

The SPC's policy function also consists of its directive and supervisory power, which can guide lower courts' implementation of policy. In the field of climate change, the SPC is already making moves. In the White Paper 'China Environmental Resources Judgment (2019),' the SPC has, for the first time, made 'adjudicating climate change mitigation cases in accordance with the law' a separate section and has committed to judging cases that occur in climate change mitigation or adaptation. It also committed to 'focusing on the use of a variety of judicial adjudication means to promote the implementation of two means of climate change mitigation and adaptation, and promote the construction of a national climate change response governance system.'[55] In the White Paper of 2021, the SPC further clarified that climate change cases can occur in 'criminal, civil, administrative and public interest' areas. On February 17, 2023, the SPC issued an overall guidance document regarding climate change. This policy is likely to have a tangible impact on future cases without changing the developmentalist paradigm.

Shandong University (Philosophy and Social Sciences Edition)', Issue 6, 2019, 26–35 (赵悦：《气候变化诉讼在中国的路径探究——基于41个大气污染公益诉讼案件的实证分析》，《山东大学学报（哲学社会科学版）》2019年第6期，第26–35页)。

53 First-instance civil judgment on the property damage compensation dispute between Chengde County Qianyu Mining Co., Ltd. and Hunan Provincial Power Transmission and Transformation Engineering Company, Beijing Xicheng District People's Court (2016) Beijing 0102 Minchu No. 1894. (承德县乾宇矿业有限责任公司与湖南省送变电工程公司等财产损害赔偿纠纷一审民事判决书，北京市西城区人民法院(2016)京0102民初1894号。)

54 https://www.court.gov.cn/zixun-xiangqing-389371.html.

55 Supreme People's Court: 'China Environmental Resources Trial (2019)', People's Court Press, 2020 edition, 16.

6 Conclusion

Climate change is a common concern of humankind, and using litigation to promote good climate governance is a global phenomenon. However, each jurisdiction seems to handle climate-related cases differently, which confirms the lessons of comparative law on the persistence of legal culture.[56] What the Chinese judiciary does in those cases may not be exemplary. It is not unusual to find problematic legal reasoning or premature assertation of the practical consequences.

This abnormality reveals the particularity of Chinese legal culture in climate change litigation. In China, in the view of this author, climate change is first and foremost considered a developmental problem that is to be solved by developmental technocrats in industrial and economic ministries through microeconomic policy documents that are flexible and not legally binding. These non-binding documents play an important role in the judicial process by informing contractual and statutory interpretation, sometimes even by supplanting the provisions of the relevant legislation. Their importance is not comprehensible without considering judges' attitudes towards policy implementation. Despite the dogmatic and pragmatic difficulties of the Chinese approach to climate change litigation, it will continue to be characterized by judicial implementation of industrial policy as its dominant orientation.

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56 Roger COTTERRELL, 'Comparative Law and Legal Culture' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006), 709.