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Mingzhe Zhu

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# Biodiversity Litigation in China: Confronting Degradation from All Sides in the Era of Ecological Civilization

ZHU Mingzhe\*

Short bio: Mingzhe Zhu works at Law Faculty of the University of Antwerp as a Senior Postdoctoral Researcher. He obtained his PhD in Law from Sciences Po de Paris in 2015 and works as a historian and philosopher of law. Mingzhe's primary line of research focuses on the relation between political authority, society, and nature in the Anthropocene, with particular attention to contesting power imbalance and social inequality in environmental governance. He teaches various courses, including Legal Philosophy, Chinese Legal History, Comparative Law, and Law & Ecology in several Chinese and European universities.

Abstract: China at the same time enjoys mega-biodiversity and suffers from degradation. In the context of China's commitment to build "Ecological Civilization" (EC), the growing awareness of biodiversity conservation has produced legislative, institutional, and judicial developments. In effect, the political momentum created by EC is so vast that the enterprise of conservation can be seen in different kinds of process, including public interest litigation, criminal justice, and even civil adjudication. Biodiversity litigation in China is not symbolized by a handful of high-profile landmark cases, but by a large number of ordinary judgements sentenced by local level courts. Though the judicial value of international treaties remain ambiguous, international biodiversity law (IBL) serves as a source of inspiration in both the drafting of laws and judicial practice. This chapter further proposes that better elaboration of the IBL can help to improve China's judicial practice in conservation, and that future research shall shed more lights on the use of scientific arguments and the contribution from some often-neglected actors, such as prosecutors.

Key Words: (In)applicability of IBL, Criminal Justice, Public Interest Litigation, Civil Adjudication, Scientific Expertise

# I. Introduction

In the context of promoting “ecological civilization,”<sup>1</sup> biodiversity law is increasingly attracting attention in China. China—one of the world’s 12 mega-biodiverse countries<sup>2</sup>—signed the Convention on Biological Diversity (CBD) in 1992 and ratified it in 1993, making it one of the first state parties to do so. By that time, the National People’s Congress (NPC) had already ratified the Convention for the Conservation of Antarctic Marine Living Resources (in 1980); later on, it ratified the Cartagena Protocol on Biosafety (2005) and the Nagoya Protocol (2016). China has also been a member of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) since 1981, the Convention on Wetlands of International Importance (Ramsar Convention) since 1992, the United Nations Framework Convention on Climate Change (UNFCCC) since 1994, and the United Nations Convention to Combat Desertification (UNCCD) since 1997. China has also forged bilateral agreements, as in the case of its 2012 treaty with Russia regulating fishing.<sup>3</sup> As this chapter will highlight, the CBD and the CITES stand out among these instruments as having the most practical value in biodiversity litigation in China.

The chapter’s main body is divided into four parts, the first of which briefly introduces China as a megadiverse country and examines the domestic transformation of the international instruments concerning biodiversity. The second part details the application of scientific expertise and indirect use of IBL in Chinese judicial practice, as well as the main channels through which the dynamics of biodiversity litigation mostly unfold. The third part confirms the potential value of IBL and clarifies the challenges that China’s environmental justice system must handle, and finally, the fourth explores two fronts of biodiversity litigation in China that

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\* Research Group of Law & Development, Faculty of Law, University of Antwerp. Address: Faculty of Law Stadscampus, University of Antwerp, 23 Venusstraat, Antwerp, 2000, Belgium. E-mail: [mingzhe.zhu@uantwerpen.be](mailto:mingzhe.zhu@uantwerpen.be). This research is funded by the Research Foundation - Flanders (File number: 76473). The author thanks the research assistance of Yikai Li and Lisha Yu.

<sup>1</sup> The 17<sup>th</sup> National Congress of the Chinese Communist Party (CCP) in 2007 identified the promotion of “ecological civilization” as one of as an explicit goal. The constitutional amendment in 2018 further adopted this term in the constitution.

<sup>2</sup> <<https://www.cbd.int/countries/profile/?country=cn#facts>> accessed 19 January 2021.

<sup>3</sup> Cooperation Agreement between The People’s Republic of China and the Russian Federation to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2012).

have been discussed only rarely: the reliance on scientific evidence and the role of prosecutorial preliminary procedure.

## II. Particularities of the Chinese Context

### A. A Mega-Biodiverse Country in Difficulties

China contains a variety of ecosystem types, among which grasslands, forests, deserts, and agricultural ecosystems are most common, covering 87.7% of all ecosystem areas.<sup>4</sup> In terms of individual species, China is home to the third-most in the world when it comes to vascular plants and 13.7% of the world's total when it comes to vertebrates.<sup>5</sup> The geographic distribution of China's ecosystems and species are shaped by its landscapes: mammals and vascular plants densely populate South China and the mountain regions, for example, but are less common in North China and in plains.<sup>6</sup> River and lake basins in the South are also home to amphibians, reptiles, and inland fishes.<sup>7</sup> Most of the birds in China are migratory, traveling along the coastal areas and appearing in the mountainous areas of Southwest China.<sup>8</sup> More than 28,000 marine species are present, accounting for roughly 11% of the world's total.<sup>9</sup> As a country with a long agricultural tradition, China also grows and raises the world's largest variety of cultivated crops, fruit trees, and domesticated animals.<sup>10</sup>

The conservation of this biodiversity is facing critical challenges. Within China, 34.7% of invertebrate species, 35.9% of vertebrates, and 10.9% of higher plant species are endangered.<sup>11</sup> The national authority identifies degradation (loss of habitat), overexploitation of natural resources, pollution, large-scale monoculture (single-species agriculture), invasive species, and

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<sup>4</sup> The Ministry of Environmental Protection of China, *China's Fifth National Report on the Implementation of the Convention on Biological Diversity* (China Environmental Press 2014) 16 (hereafter CBD the Fifth National Report- China).

<sup>5</sup> CBD the Fifth National Report- China (n 4) 16.

<sup>6</sup> CBD the Fifth National Report- China (n 4) 16.

<sup>7</sup> CBD the Fifth National Report- China (n 4) 19.

<sup>8</sup> CBD the Fifth National Report- China (n 4) 18-19.

<sup>9</sup> CBD the Fifth National Report- China (n 4) 19.

<sup>10</sup> CBD the Fifth National Report- China (n 4) 19.

<sup>11</sup> CBD the Fifth National Report- China (n 4) 19.

climate change as the major causes of biodiversity loss.<sup>12</sup> From a broader, historical perspective, biodiversity loss in China has also been a result of the vast landscape transformation that has taken place since 1949. Even as the centralized administrative system adopted measures to encourage reforestation and prevent land erosion, it also felled massive forests to fuel steel furnaces, filled lakes to create rice paddies, and supported agriculture in previously pastoral regions.<sup>13</sup> And in 1978, when market mechanisms were newly introduced in China, they raised not only economic growth<sup>14</sup> but also resource extraction and ecological loss to new heights.<sup>15</sup>

In 2007, as awareness of the importance of ecological challenges grew, the term “Ecological Civilization” (EC) entered the Chinese legal and political domain when the promotion of EC was identified as an explicit goal by the 17<sup>th</sup> National Congress of the Chinese Communist Party (CCP).<sup>16</sup> The elevation of EC as a national priority embodied China’s political determination to shift its focus from economic exploitation to sustainability,<sup>17</sup> and indeed, in 2018, the NPC integrated the term to the preamble of the Chinese constitution.

## B. Ambiguous Judicial Value of International Treaties

As China’s constitution lacks a specific clause on the value and applicability of international law, it is difficult to categorically label China as a monist or dualist state.<sup>18</sup> Art. 67 of the constitution recognizes the powers of the Standing Committee of the NPC to enact

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<sup>12</sup> CBD the Fifth National Report- China (n 4) 20-21.

<sup>13</sup> In general, see Judith Shapiro, *Mao’s War Against Nature: Politics and the Environment in Revolutionary China* (Cambridge University Press 2001).

<sup>14</sup> Justin Yifu Lin, *Demystifying the Chinese Economy* (Cambridge University Press 2011).

<sup>15</sup> Elizabeth C Economy, *The River Runs Black: The Environmental Challenge to China’s Future* (Cornell University Press 2019).

<sup>16</sup> Coraline Goron, ‘Ecological Civilisation and the Political Limits of a Chinese Concept of Sustainability’ (2018) 4 *China Perspectives* 39. It is worth notice that the initial official translation of ‘生态文明’ in English was ‘conservation culture’. See Report to the Seventeenth National Congress of the Communist Party of China on Oct. 15, 2007, available at <[https://www.chinadaily.com.cn/china/2007-10/24/content\\_6204564\\_5.htm](https://www.chinadaily.com.cn/china/2007-10/24/content_6204564_5.htm)> accessed 5 February 2021.

<sup>17</sup> Mingzhe Zhu, ‘Sturm Und Drang of Ecological Civilization’ (2021) 11 *IUCN AEL Journal of Environmental Law* 67.

<sup>18</sup> On the applicability of international law before Chinese justice in general, see Keyuan Zou, ‘International Law in the Chinese Domestic Context’ (2010) 44 *Valparaiso University Law Review* 935; Congyan Cai, ‘International Law in Chinese Courts During the Rise of China’ (2016) 110 *The American Journal of International Law* 269 (hereafter Cai, ‘International Law in Chinese Courts’).

and amend laws that do not concern fundamental civil or penal institutions or the organization of state institutions. Art. 67 also recognizes the power of the NPC to ratify and abrogate treaties, though it does not stipulate where treaties fall in the hierarchy of norms. In practice, applicability of international instruments is decided either by laws enacted by the NPC or by the judicial policy of the Supreme People's Court (SPC). At one time, the automatic incorporation and supremacy of international treaties was the rule, being confirmed by many individual statutes. For instance, in private international law, international treaties prevailed over national legislation in foreign-related civil relations, as provided for in Art. 142 of the General Principles of Civil Law (1986), among other provisions. Such was also the case for the Environmental Protection Law (EPL) before its 2015 amendment.<sup>19</sup>

Today, the rule of necessary transformation seems to be replacing that of automatic incorporation. The 2015 amendment of the EPL repealed the clause that granted supremacy to international law. The new Civil Code, voted on in May 2020, does the same in the domain of civil law.<sup>20</sup> Still, the SPC can, via its judicial policy, individually determine how certain international treaties are applied.<sup>21</sup> For instance, the SPC rejects the direct application of the World Trade Organization (WTO) law but instructs the judiciary to interpret domestic law so that it is consistent with WTO law.<sup>22</sup> [Meanwhile, it stipulates that judges can refer directly to the appendices of the CITES in criminal cases that concern endangered species.](#)<sup>23</sup> Recently, in a case concerning the damage arising from the hydrocarbon pollution caused by the collision of two foreign ships, the SPC ruled that if a legislative text is adopted to incorporate the rules of an international treaty, then the court must interpret that domestic law in conformity with the

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<sup>19</sup> Art. 46, Environmental Protection Law (1989/2015). In the Chinese context, a law can be substantially different to its original text after several revisions, while keep the initial title. When citing such laws, this chapter indicates both the dates of promulgation and the last revision.

<sup>20</sup> Other examples, see Cai, 'International Law in Chinese Courts' (n 18) 274.

<sup>21</sup> [The Organic Law of the People's Courts \(1979/2018\) provides that the SPC can decide judicial policy on the interpretation and application of specific statutory provisions \(Art. 18\), but it is the SPC itself that promulgated the Provisions of the SPC on Judicial Explanation \(最高人民法院关于司法解释工作的规定\) in 2007. In practice, the SPC publishes several 'explanations' that are \*de facto\* binding in judicial practice. Although many of them merely provide more detailed instructions to the judges, it is not uncommon that a judicial policy in the name of explanation or interpretation substantially alters the requirements of the statutory rules. See Vai Io Lo, 'Towards the Rule of Law: Judicial Lawmaking in China' \(2016\) 28 \*Bond Law Review\* 149. The judicial explanations cited in this chapter are judicial policy of this sort.](#)

<sup>22</sup> 《最高人民法院关于审理国际贸易行政案件若干问题的规定》法释[2002]27号。[Regulation on Administrative Procedure Concerning International Trades (2002)]

<sup>23</sup> We will discuss the use of international expertise later.

treaty it incorporates.<sup>24</sup> The question of whether this conformity method can be generalized to other situations remains unanswered. With all in this in mind, it becomes clear that scholarship on biodiversity litigation in China inevitably involves studying the legislative texts inspired by the CBD and their interpretations in judicial practice. At the same time, it is equally important to note that a directly applicable text is more likely to be referred to before the court than a text that serves only for interpretative purposes, the reason being that the application of the latter depends largely on the judge's knowledge of legislative history and international law.

## C. Selective Transformation of IBL in Legislation

China has incorporated IBL through both national policy and national law. Before examining this incorporation in detail, we will first take a brief look at the overall landscape of biodiversity regulation in China. Until quite recently, China had no comprehensive law on biodiversity. In October 2020, during the pandemic, the Biosecurity Law was enacted,<sup>25</sup> and the National Park Law was in the drafting process.<sup>26</sup> Numerous laws contain provisions concerning biodiversity.<sup>27</sup> The most commonly applied of these is the Penal Code's section on environmental crimes, particularly Art. 340 (on maritime protection), 341 (on illicit hunting, transport, purchase, and sale of endangered wild animals), 344 and 345 (on illicit logging and damage of plants). Art. 30 of the EPL, as amended in 2015, clarifies the state's duty to conserve biodiversity; the Wild Animal Protection Law (1988/2018), meanwhile, requires that ecosystems' interests be balanced and contains provisions on managing alien species and biological-genetic resources. Other laws related to environmental protection and agriculture, such as the Seed Law (2000/2013) and Forest Law (1984/2019), have also been revised in

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<sup>24</sup> 运输部上海打捞局、普罗旺斯船东2008-1有限公司中华人民共和国最高人民法院（2018）最高法民再368号。[*Shanghai Bureau of Salvage v. Provence Shipowner 2008-1 Ltd*, Supreme Court (2018)] The cases cited in this chapter can be found on the official website of the judicial system China Judgements Online: <<https://wenshu.court.gov.cn/>> accessed 5 March 2021.

<sup>25</sup> Law on Biodiversity (2020), available at <<http://www.npc.gov.cn/npc/c30834/202010/bb3bee5122854893a69acf4005a66059.shtml>> accessed 10 March 2021.

<sup>26</sup> <<http://www.npc.gov.cn/npc/c30834/202001/a6a83ce994e244d39b369ce2d9ad338c.shtml>> accessed 10 March 2021.

<sup>27</sup> An overall review of China's biodiversity legislation, see Wenxuan Yu and Jason J Czarnezki, 'Challenges to China's Natural Resources Conservation and Biodiversity Legislation' (2013) 43 *Environmental Law* 125.

response to treaty obligations.<sup>28</sup> Further regulations are set to appear in the coming years—the framework of reserves constructed around national parks by the administration, for example, will be put into perspective when the corresponding legislation is promulgated.

Many of China’s domestic laws concerning biodiversity were enacted or amended after the ratification of one or both CBD and the CITES. Before a bill is first read, the entity in charge of drafting sends a representative to speak to the NPC.<sup>29</sup> Typically, when the entity in question is a ministry or other governmental body, this representative, or rapporteur, is a leading official who explains what inspired and motivated the draft. Frequently, when explaining such motives, rapporteurs highlight the need “to fulfill China’s international obligation” or “to adapt to international law.” In reply to the NPC’s request for the drafting of the Law on Biosecurity, for instance, the Ministry of Ecology and Environment clearly stated that the law would incorporate both the CBD and the Cartagena Protocol.<sup>30</sup> Later, when explaining the draft of law, the rapporteur also emphasized the legislation’s importance in honoring the international commitment that China made when it ratified the CBD and other international instruments.<sup>31</sup> Such comments suggest that IBL is, at the very least, an inspiration in Chinese domestic environmental law. Although it may not always be clear how particular treaties and pieces of legislation correspond, we can nevertheless identify certain cases in which the international law has directly inspired the domestic—both by examining the comments of rapporteurs and by recognizing straightforward textual similarities between the two.

With respect to inspiring domestic law, the CITES is the international instrument most frequently cited before the NPC on biodiversity conservation. As early as 1988, the Wild Animal Protection Law stipulated (through Art. 24) that the executive branch’s approval is necessary for the import or export of any wild animal subject to international treaty restriction. The rapporteur for this bill specifically explained to the NPC that this provision was intended

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<sup>28</sup> See China’s 6<sup>th</sup> National Report for the Convention on Biological Diversity: 5, available at <<https://chm.cbd.int/database/record?documentID=241353>> accessed 15 March 2021.

<sup>29</sup> Art. 29(2) of the Law on Legislation (2000/2015).

<sup>30</sup> 生态环境部：《对十三届全国人大一次会议第008、150号议案的答复意见》（环建函〔2018〕16号）， Available at <[http://www.mee.gov.cn/gkml/sthjbgw/jytafw\\_new/201809/t20180926\\_629621.htm](http://www.mee.gov.cn/gkml/sthjbgw/jytafw_new/201809/t20180926_629621.htm)> accessed 15 March 2021.

<sup>31</sup> 高虎城：《关于〈中华人民共和国生物安全法（草案）〉的说明》， Available at <<http://www.npc.gov.cn/npc/c30834/202010/a2d515b5158c4216b9e1d83038b5c820.shtml>> accessed 15 March 2021.

to fulfill China's international obligation under the CITES.<sup>32</sup> The clause remained untouched by two revisions to the law, one in 2004 and the other in 2009, and its eventual revision in 2016 continued to defer to international regulation: the 2016 amendment directed the authority in charge of wildlife import and export to publish a directory of animals whose trade is restricted by international law.<sup>33</sup> Another example of legislative adaptation of the CITES is the 1998 amendment to the Forest Law, whose Art. 38 stipulates that the Administration of Forestry must be consulted before each trade of "precious trees and their products and derivatives, the export of which is forbidden or restricted, and the annual export quantitative restrictions." The Minister of Forestry at the time described this clause as a response to the requirement of the CITES.<sup>34</sup>

In addition to taking the general measures for conservation and sustainable use prescribed by Art. 6 of the CBD, China's environmental legislation particularly highlights five of the CBD's requirements.

First, and arguably the most evident example, is the domestic adoption of the duty to identify and monitor (Art. 7 of the CBD). This duty is reflected in the Forest Law (Art. 27), the Wild Animal Protection Law (Arts. 11, 12, 14, and 16), and the Grassland Law (Arts. 6, 25, 30, 54), all of which instruct various level of government to monitor biological resources and formulate a directory of protected species and their habitats.<sup>35</sup>

Second is the requirement of *in situ* (on-site) conservation (Art. 8 of the CBD) by several provisions in the domestic law governing zoning and maintenance in protected areas. The domestic versions of this requirement are exemplified by the EPL (Art. 29), the Forest Law (Arts. 31 and 35), the Wild Animal Protection Law (Art. 12), the Seed Law (Art. 10), and the Law on Animal Husbandry (Art. 13).

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<sup>32</sup> 《关于〈中华人民共和国野生动物法（草案）〉的说明》（1988年8月29日在第七届全国人民代表大会常务委员会第三次会议上）[Report on the Draft of the Wild Animal Protection Law before the Standing Committee of the NPC (1988)], available at <[http://www.npc.gov.cn/wxzl/gongbao/2000-12/26/content\\_5002181.htm](http://www.npc.gov.cn/wxzl/gongbao/2000-12/26/content_5002181.htm)> accessed 15 March 2021.

<sup>33</sup> Art. 35 of the Wild Animal Protection Law. Although the law does not specifically designate which organ is in charge, the directory in question is published and updated by the National Forestry and Grassland Administration.

<sup>34</sup> 《关于〈中华人民共和国森林法修正案（草案）〉的说明》（1997年10月29日在第八届全国人民代表大会常务委员会第二十八次会议上）[Report on the Draft of the Amendment of the Forest Law before the Standing Committee of the NPC (1997)], available at <[http://www.npc.gov.cn/wxzl/gongbao/2000-12/17/content\\_5003927.htm](http://www.npc.gov.cn/wxzl/gongbao/2000-12/17/content_5003927.htm)> accessed 20 March 2021.

<sup>35</sup> As is suggested by the titles of the laws, it is the national and local organs of forestry and grassland administration that identify and monitor.

Third is the establishment of incentive and support mechanisms (Arts. 7 and 20 of the CBD). Most of the laws mentioned in the previous paragraph contain general provisions on the state's duty to incentivize, through proper policy, biodiversity conservation by individuals and social organizations.<sup>36</sup> They also stipulate that the state shall facilitate conservation research and provide subsidies, remedies, or long-term loans to conservation activities.

Fourth, to promote public education and awareness (Art. 13 of the CBD), the EPL, Forest Law, and Wild Animal Protection Law designate public education and awareness as a general principle of Chinese biodiversity law. The clauses in question show high textual similarity with the CBD's Art. 13(a).

Fifth and finally, the assessment of impacts and minimization of adverse impacts provided for by Art. 14 of the CBD are embodied in various domestic provisions. The general environmental impact process is instituted by Art. 19 of the EPL, and even more specifically, Art. 13 of the Wild Animal Protection Law requires "analysis, prediction, and assessment of the proposed projects that are likely to have impacts on wild animals and their habitats to avoid or minimize such effects." This clause is almost a word-for-word translation of Art. 14(a) of the CBD, though references to public participation are missing.<sup>37</sup> Art. 34 of the Forest Law (as amended in 2019) further incorporates Art. 14(e) of the CBD, requiring the government to enact emergency response plans.

Other examples of positive responses to the CBD include the state's duty to state's duty to restore habitat and prevent the growth of invasive alien species, as prescribed by Art. 12 of Wild Animal Protection Law and Art. 60 and 81 of the Law on Biosecurity. Indeed, in comparison with other domains of law, international norms play a substantial role in inspiring the law of the land when it comes to biodiversity. However, the provisions inspired by the CBD's general requirements do not usually prescribe any substantial legal consequence of noncompliance, and therefore, they are rarely applied by the judiciary.

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<sup>36</sup> Art. 12, 44, and 45 of Forest Law; Art. 4, 5, and 8 of Wild Animal Protection Law; Art 7 and 9 of Law on Environmental Protection.

<sup>37</sup> Having said that, Art. 53 of Law on Environmental Protection provides that citizens shall have access to environmental information, and participate and oversee environmental protection. On public participation in Chinese environmental law, see Xiao Zhu and Kaijie Wu, 'Public Participation in China's Environmental Lawmaking: In Pursuit of Better Environmental Democracy' (2017) 29 Journal of Environmental Law 389.

China's incorporation of CBD-prescribed obligations at the national level is a selective process, not a comprehensive one, which is clear in China's partial acceptance of the CBD's objectives. The EPL highlights the conservation of biological diversity and biosecurity in its Art. 30, and fragments of germplasm resource conservation can be found in the Seed Law (Arts. 8 and 9), Forest Law (Art. 31), Law on Agriculture (Arts. 18 and 64), Law on Animal Husbandry (Arts. 9–14 and 18), Wild Animal Protection Law (Arts. 17 and 25), and the Regulation on Wild Plant Protection (Arts. 14 and 15). However, it is difficult, if not impossible, to identify any clause that transforms “the fair and equitable sharing of the benefits arising out of the utilization of genetic resources” (Art. 1 of the CBD). On the contrary, the legislature is concerned with the foreign threat to China's germplasm resources. When the Seed Law was amended in 2015, the rapporteur explained that “some foreign individuals, corporations, or other organizations can easily have access to the germplasm resources of our country under the disguise of scientific research.”<sup>38</sup> As a result, Art. 56 of the Law on Biosecurity reaffirms state sovereignty over germplasm and requires the State Council's approval for any international research project on utilizing germplasm resources. President Xi Jinping echoed this concern in 2020 when he underlined the centrality of biosecurity as a part of overall national security.<sup>39</sup>

China's emphasis on sovereign rights and national security is deeply rooted in its national history as a colonized nation and its self-perception as a third-world country faced with consistent exploitation by the Global North.<sup>40</sup> This mentality has led to a constitution that insists on a typically “modernist” ontology of nature in two senses.<sup>41</sup> *First, it maintains the absolute distinction of human beings from nonhuman ones by virtue of their inherent qualities, and it insists that the former shall own the latter.* Art. 9(1) reverently prescribes that “all mineral resources, waters, forests, mountains, grasslands, unreclaimed land, beaches, and other natural resources” are owned by the state (except those legally owned by local collective economic organizations). In other words, Chinese law establishes state ownership of natural resources, of

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<sup>38</sup> 《关于<中华人民共和国种子法（修订草案）>的说明》（2015年4月20日在第十二届全国人民代表大会常务委员会第十四次会议上）[Report on the Draft of the Amendment of the Seed Law before the Standing Committee of the NPC (2015)], available at <[http://www.npc.gov.cn/wxzl/gongbao/2016-01/05/content\\_1958845.htm](http://www.npc.gov.cn/wxzl/gongbao/2016-01/05/content_1958845.htm)> accessed 20 March 2021.

<sup>39</sup> 《习近平谈总体国家安全：把生物安全纳入国家安全体系》，available at <<http://cpc.people.com.cn/n1/2020/0414/c164113-31673157.html>> accessed 20 March 2021.

<sup>40</sup> See Maria Adele Carrai, *Sovereignty in China: A Genealogy of a Concept since 1840* (Cambridge University Press 2019), chap. 3; Cih-yu Shih, *Navigating Sovereignty: World Politics Lost in China* (Palgrave Macmillan 2004).

<sup>41</sup> Philippe Descola, *Par-Delà Nature et Culture* (Gallimard 2005).

which the elements of biodiversity are considered part. Second, the constitution also draws a clear distinction between public authority and civil society. Art. 89(6) entrusts the State Council, the central government, with the authority to implement “ecological civilization.” Within this constitutional framework, which seeks to avoid “the tragedy of the commons”<sup>42</sup> by clarifying the state’s sovereign ownership of nature, China’s state-centric approach to biodiversity is only logical.

This constitutional ontology further explains the absence of a “rights turn” in China’s biodiversity and environmental litigation at large. Despite years of petitioning by environmental lawyers, including certain preeminent ones,<sup>43</sup> recent constitutional and legislative amendments have not included the term “environmental right(s).” Environmental protection and improvement instead remain state duties championed by constitutional lawyers.<sup>44</sup>

Since neither the constitution nor statutory law recognize a state obligation to respect or judicially protect an individual or collective right to environmental protection, ordinary citizens’ initiatives are marginalized in the realm of environmental litigation. According to Art. 12 of the Administrative Procedure Law (APL), concerned citizens cannot sue the government for failing to perform its legal duty unless such a failure violates a specific right.<sup>45</sup> However, an alternative instrument for holding the government accountable is made available by procedural law. As this chapter will discuss later, Art. 25(3) of the APL provides that prosecutors can urge the executive branch to fulfill its environmental duties by way of public interest litigation (PIL). This mechanism, known as prosecutorial PIL, is one of the means by which Chinese magistrates can respond to the urgent need for biodiversity preservation, and through it, they have developed an alternative to rights discourse. To that end, Chinese judges tend to conceive of the environment as a public good and of ecological degradation as a threat to the public interest.

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<sup>42</sup> Garrett Hardin, ‘The Tragedy of the Commons’ (1968) 162 *Science* 1243–48.

<sup>43</sup> For example, 吕忠梅: 《环境权入宪的理路与设想》, 《法学杂志》2018年第1期, 第23-40页。The author is the president of the China Environmental Law Association.

<sup>44</sup> Art. 9(2) and Art. 26, Constitution. See 张翔: 《环境宪法的新发展及其规范阐释》, 《法学家》2018年第3期, 第90-97页。

<sup>45</sup> Christopher Stone has discussed the magnitude of right discourse. Although not of precisely the same subject matter, I find that the same discussion can apply to human being’s right to a safe and healthy environment. See Christopher D Stone, ‘Should Trees Have Standing? - Toward Legal Rights for Natural Objects’ (1972) 45 *Southern California Law Review* 450.

### III. The Marginal Role of IBL & Pathways of Biodiversity Litigation

#### A. Science sans frontière

Compared with the legislature's emphasis on national sovereignty and vigilance in transplanting international law, the universalism and attachment to scientific objectivity of the SPC's epistemology are remarkable. Indeed, the SPC's judicial policy requires judges to refer to lists formulated by international institutions when determining whether a species is "precious" or "endangered." The most typical example of this is a judicial explanation issued in 2000, whose Art. 1 stipulates that the phrase "precious and endangered wild animal," where it appears in the Penal Code, shall be interpreted to include all animal species on Appendices I and II of the CITES.<sup>46</sup> The same article defined the coverage of "wild animal" as sufficiently broad to include specimens born to domesticated parents. In a controversial 2016 criminal case, the court found a man guilty for breeding and selling some dozens of parakeets that had been born and raised in the man's apartment.<sup>47</sup> A less-known example can be found in a judicial explanation on smuggling jointly issued by the SPC and the Supreme People's Procuratorate (SPP).<sup>48</sup> Art. 10 of the explanation repeats the wording of the 2000 judicial explanation and directs judges to consider both wild and domesticated animals appearing in CITES Appendices I and II "precious animals" under Art. 151(2) of the Penal Code. Similarly, Art. 12 of the 2016 explanation considered the plants protected by the CITES to be "precious plants" under Penal Code Art. 151(2).

It remains a matter of debate whether the full weight and severity of criminal law shall be the instrument deployed in the name of biodiversity conservation to punish trading in domesticated individuals. We can imagine that a textualist interpreter of the statutory law would

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<sup>46</sup> 《最高人民法院关于审理破坏野生动物资源刑事案件具体适用法律若干问题的解释》（法释[2000]37号）。[Judicial Explanation of the Supreme Court on Application of Law in Criminal Litigation Concerning Wild Animal Resource (2000)].

<sup>47</sup> 王某、谢某福非法收购、运输、出售珍贵、濒危野生动物、珍贵、濒危野生动物制品罪，深圳市中级人民法院（2017）粤03刑终1098号二审刑事判决书。[*Prosecutor v Wang and Xie*, Intermediate Court of Shenzhen Municipality (2017)] Abbreviated as 'Parakeets Case'.

<sup>48</sup> 《最高人民法院、最高人民检察院关于办理走私刑事案件适用法律若干问题的解释》（法释[2014]10号）[Judicial Explanation of the Supreme Court on Application of Law in Criminal Litigation Concerning Smuggling (2014)].

disapprove of the SPC's policy, which alters the plain and ordinary meaning of the word "wild." The matter of statutory interpretation is discussed in section VI, but more critical here is to appreciate the SPC's role in policymaking, without which we cannot understand how the regulatory landscape is constructed in environmental matters.

As established by Art. 10 of the Law on the Organization of the People's Courts, the SPC supervises the judicial system. Similarly, Art. 10 of the Law on the Organization of the People's Procuratorates dictates that the SPP "leads" the prosecutorial system.<sup>49</sup> These laws also grant their corresponding entities the competence to exercise disciplinary power via guiding cases and judicial explanations. Some explanations go so far as to modify the substance of the legislative text that they are meant to clarify, and whether these explanations have the binding force of law has been the subject of continuous scholarly discussion.<sup>50</sup> In 2007, the SPC enacted a self-empowering provision whose Art. 10 provides that the judiciary shall regard judicial explanations as law.<sup>51</sup> Since 2015, the SPC and SPP have issued several explanations and responses, circulars, notices, and recommendations concerning environmental litigations. For instance, the Recommendations on Judicial Protection of Environment establish specific jurisdiction in biodiversity cases, which supports the creation of new, special divisions for biodiversity conservation.

The creative force of judicial explanation has made the CITES one of the most cited international treaties before Chinese courts. Chinese judges use its appendices to determine whether the hunting, owning, selling, purchasing, or smuggling of certain animals is punishable by criminal law, and neither the SPC nor local judges seem to be particularly suspicious of the reliability of the international scientific bodies or the correctness of their determinations. Evidence even more revealing of judges' attitude is their judicial use of the Red List of the International Union for Conservation of Nature (IUCN). Unlike the appendices of the CITES, whose application is at least stipulated by judicial policy, the IUCN Red List is not referred to

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<sup>49</sup> In China's constitutional framework, the prosecutors are neither component of the judicial power, nor that of the executive power.

<sup>50</sup> See 王成: 《最高法院司法解释效力研究》, 《中外法学》2016年第1期, 第263-279页。

<sup>51</sup> Provisions of the Supreme People's Court on the Judicial Explanation (2007). Despite the more common use of 'judicial interpretation', I insist on the term 'explanation', saving 'interpretation' for the application of law in concrete case. Even if the Constitution and Law on Legislation do not grant the Supreme Court with legislative power and the explanations have merely status of internal disciplinary instruments within the judicial systems, they are *de facto* the norms that the court will observe in a trial. We will cite them as binding law in the following sections.

in any regulation. Nevertheless, criminal tribunals consistently cite the list in endangered or precious species cases. The Red List is typically cited alongside the CITES appendices, but even so, they are two different lists with different contents, and we can even identify at least a dozen criminal cases since 2015 in which the amici curiae simply inform the judges that the animals in question appear on the Red List. In most of these cases, the judges found the suspects guilty because the animals they had hunted or traded were also on the national conservation-priority list. In one extreme case, the court even ruled that the Alexandrine parakeet was “precious and protected,” despite its only being listed as “near threatened” by the IUCN.<sup>52</sup> It is true that a considerable number of the birds in question (471, to be precise) were transported, but regardless, the species is not technically protected under Chinese criminal law. This rare and exceptional case unexpectedly demonstrated just how willing the Chinese judicial system is to accept the judgments of established scientific authorities.<sup>53</sup>

## B. Indirect Application of IBL

Besides exercising their semi-legislative power, the SPC and SPP also guide judicial activities by deciding which precedents are “models” that should be followed in future cases. The SPC has published about 140 guiding cases since 2012, each with an accompanying note explaining its selection; all thirteen of the most cases are related to environmental law.<sup>54</sup> Moreover, in 2017, the SPC issued ten model cases on environmental PIL to help manage the introduction of PIL to civil and administrative procedures.<sup>55</sup> In 2018, the SPP similarly selected its own ten model cases related to prosecutorial PIL, including comments and highlights attached to each case.<sup>56</sup> *Though these guiding and model cases have no binding force per se, they still serve as useful indicators of the possible evolution of judicial practice.*

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<sup>52</sup> 陈兴华非法运输珍贵、濒危野生动物案永仁县人民法院一审刑事判决书，（2015）永刑初字第60号。[*Prosecutor v Xinghua Chen*, Court of the Yongren County (2015)]

<sup>53</sup> Compare Sheila Jasanoff, ‘A New Climate for Society’ (2010) 27 *Theory, Culture & Society* 233.

<sup>54</sup> The English translation of most cases can be found on the website of Stanford Law School’s China Guiding Cases Project, available: <<https://cgc.law.stanford.edu/>> accessed 20 April 2021.

<sup>55</sup> 《最高法发布十件环境公益诉讼典型案例》，Available: <<https://www.chinacourt.org/article/detail/2017/03/id/2573898.shtml>> accessed 20 April 2021.

<sup>56</sup> 《最高检发布检察公益诉讼十大典型案例》，Available: <[https://www.spp.gov.cn/spp/zdgz/201812/t20181225\\_403407.shtml](https://www.spp.gov.cn/spp/zdgz/201812/t20181225_403407.shtml)> accessed 20 April 2021.

One particular precedent sheds light on the possible indirect application of IBL. China Biodiversity Conservation and Green Development Foundation, an environmental NGO that brings numerous environmental protection cases before Chinese courts, routinely cites the CBD in its pleas to justify its stance in PIL.<sup>57</sup> In one of the guiding cases on environmental law, the SPC cited the definition of biodiversity provided by the CBD and concluded that an organization specializing in biodiversity conservation shall be considered an “environmental organization” and therefore has the standing in PIL.<sup>58</sup> The SPC did nothing more here than highlight a common perception that the phrase “environmental protection” encompasses biodiversity conservation. But not only does this action suggest that the judiciary will interpret the term “environmental protection” broadly, it also indicates that an international treaty can be cited as a persuasive authority, if not as a legal ground for deciding a case.

The SPC later normalized the practice that judges elaborate their complete arguments with legal and nonlegal considerations, as well as direct and indirect ones.<sup>59</sup> These recommendations on judicial decision-writing encourage the judiciary to do more than simply justify their decisions in light of the law: they must show that their judgments are further motivated by underlying pragmatic considerations. The SPC suggests that judges can use scientific evidence and everyday experience to achieve this goal.<sup>60</sup> Since the normalization of the practice, the consideration of biodiversity has expanded in environment-related criminal justice. In the context of China’s enthusiasm for ecological civilization—but also of China’s upcoming hosting of the CBD’s 15<sup>th</sup> Conference of the Parties meeting in Kunming—Chinese judges’ and citizens’ knowledge and awareness of IBD might increase.

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<sup>57</sup> 中国生物多样性保护与绿色发展基金会诉深圳市速美环保有限公司、浙江淘宝网络有限公司，杭州市中级人民法院（2016）浙01民初1269号一审民事判决书；中国生物多样性保护与绿色发展基金会环境污染责任纠纷，最高人民法院（2016）最高法民再51号审判监督民事裁定书。

<sup>58</sup> 中国生物多样性保护与绿色发展基金会诉宁夏瑞泰科技股份有限公司环境污染公益诉讼案，最高人民法院（2015）民再47号民事裁定书。

<sup>59</sup> 《关于加强和规范裁判文书释法说理的指导意见》（2018）。Recommendations on Strengthening and Standardising Arguments in Judicial Decision (2018).

<sup>60</sup> Recommendation 13, Recommendations on Strengthening and Standardising Arguments in Judicial Decision (2018).

## C. Three Channels of Biodiversity Litigation

Today, the Chinese judicial system intervenes in biodiversity conservation mostly through three channels: criminal justice, public interest litigation (PIL), and civil adjudication. Cases brought before the courts in these ways can help researchers to verify whether the relevance of IBL is indeed growing.

### *1. Criminal Justice and the Rise of Biodiversity Consideration*

Although Arts. 341, 344, and 345 of the Penal Code criminalize the hunting, transporting, trading, and logging of endangered species, they mainly target damage done to individuals, not to local ecosystems. The 2000 judicial explanation mentioned above further further fortified this tendency by providing a scale for determining the length of an offender's prison term according to the number of plant or animal individuals harmed and the amount of money involved.<sup>61</sup>

Recently, on the SPC's recommendation, judges have begun to consider the functions of a given species at issue in a case in connection with other elements of its local ecosystem. In a simple criminal case of illicit logging, the court ruled that the felling of three endangered yews threatened local biodiversity and therefore harmed the public interest.<sup>62</sup> In March 2020, the SPP and the SPC co-issued a judicial explanation that requires prosecutors and judges to consider the extent of the ecological loss when applying Art. 344 of the Penal Code.<sup>63</sup> Likewise, in publishing the model cases of environmental offenses, the SPP praised the efforts of judicial power in preserving biodiversity.<sup>64</sup> During the last few years, Chinese judges have already acquired a new ritual: beginning their rulings with a paragraph on the importance of biodiversity and the place in the ecosystem of the particular species at issue.<sup>65</sup> This ritual was further

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<sup>61</sup> Art. 3, 4, 5, and 6, Judicial Explanation of the Supreme Court on Application of Law in Criminal Litigation Concerning Wild Animal Resource (2000).

<sup>62</sup> 雅安市人民检察院诉郑涛非法采伐、毁坏国家重点保护植物罪，雅安市中级人民法院（2019）川18刑初7号刑事判决书。

<sup>63</sup> 最高人民法院、最高人民检察院关于适用《中华人民共和国刑法》第三百四十四条有关问题的批复，法释（2020）2号。

<sup>64</sup> 徐盈雁：《最高检发布10起检察机关加强生态环境司法保护典型案例》，《检察日报》2015年6月17日，Available at <[http://www.spp.gov.cn/zdgz/201506/t20150617\\_99553.shtml](http://www.spp.gov.cn/zdgz/201506/t20150617_99553.shtml)> accessed 21 April 2021.

<sup>65</sup> See 徐州市云龙区人民检察院诉张爱民、李楠等非法收购、运输、出售珍贵、濒危野生动物、珍贵、濒危野生动物制品罪，徐州市鼓楼区人民法院（2016）苏0302刑初189号刑事判决书；

generalized in the context of the COVID-19 outbreak. For example, the judge of an illicit hunting case in March 2020 spent half of the very concise decision lecturing on the ecological significance of weasels and squirrels (the animals hunted in the case) and on the enormous threat to the public health posed by poaching them.<sup>66</sup> In light of rising public concern with biosecurity, the judiciary may incorporate biodiversity consideration in its decisions more often.

## 2. *Public Interest Litigation*

The double amendment in 2017 of the Law on Administrative Procedure and the Law on Civil Procedure, along with the EPL (as amended in 2015), create the legal framework of environmental PIL. Arts 55(1) and 55(2) of the Civil Procedure Law recognizes NGOs and prosecutors' standing in civil PIL, Art. 58 of the EPL further stipulates the qualification of suitable NGOs, and Art. 25(4) of the APL endows prosecutors with the competence to sue the government.

Environmental NGOs are succeeding in attracting public attention to biodiversity loss. The most recent example is the Green Peafowl Case.<sup>67</sup> In March 2017, during its investigation in a rainforest in Yunnan Province, the NGO Wild China, whose objective is to document endangered natural reserves and species, discovered that the construction of a hydropower station would destroy the largest green peafowl habitat in China and probably result in bird's regional disappearance. The corresponding lawsuit, investigated and reported on by the dominant state-owned television network China Central Television, has generated immense attention since its very beginning.<sup>68</sup> The case represented a perfect combination of factors that together helped sympathetic citizens visualize the abstract concept of habitat loss: a species with high aesthetic value, a habitat known for its rich biodiversity and mysterious rainforest, a

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重庆市万州区人民检察院诉杜发国、杜发田等非法收购、运输、出售珍贵、濒危野生动物、珍贵、濒危野生动物制品罪上诉案刑事判决书，重庆市第二中级人民法院（2018）渝02刑终1号刑事判决书。

<sup>66</sup> 宜兴市人民检察院诉王杰非法狩猎罪，苏州市姑苏区人民法院（2020）苏0508刑初91号刑事判决书。

<sup>67</sup> 自然之友环境研究所与中国水电顾问集团新平开发有限公司、中国电建集团昆明勘测设计研究院有限公司裁定案，云南高级法院（2017）云民辖23号民事裁定书。[*Friends of Nature Institute v Xinping Development Co. Ltd*, Decision on jurisdiction, High Court of Yunnan Province (2017)]

<sup>68</sup> 《 因 为 绿 孔 雀 》 ， Available at <<http://m.news.cctv.com/2019/05/19/ARTIFbRLfZwClqrmtMouKTHU190519.shtml>> accessed 28 April 2021.

threat to that habitat from a giant monopoly, and finally, the suit's broadcast by an investigation program that enjoys high credibility among the educated audience.

Another environmental NGO, the Friends of Nature Institute, sued the grid company and the company that designed the hydropower station before a local court on the ground of biodiversity loss prevention. In light of its lack of experience in environmental matters, the court of presumed territorial jurisdiction asked the High Court to reassign the case, and the High Court complied, reallocating it to the jurisdiction of the Municipal Court of Kunming.<sup>69</sup> On 20 March, 2020, the court ruled against the defendant and halted the project until further environmental impact assessment (EIA) could be completed,<sup>70</sup> but the plaintiff was not satisfied because they suspected the new EIA would again approve the construction. The value of this judgment symbolized more than just the conservation of a rainforest: not only did it satisfy the public's demand that rare and remarkable birds be saved, it further raised awareness of the environmental risks of power plant construction in general. The power sector, meanwhile, currently expects an increase in lawsuits because numerous similar projects are endangering the habitats of other species, albeit perhaps ones less often considered so beautiful.<sup>71</sup> Both parties have appealed the judgment, and the disputes now focus on the validity of the original EIA, which had previously granted the project a green light.

Since 2017, prosecutorial PIL has become the procuratorates' center of gravity, especially in the realm of environmental protection.<sup>72</sup> Through 2019, more than half of the public interest prosecution cases concerned environmental protection and resources, totaling 118,012 such cases.<sup>73</sup> The results of these lawsuits include the removal of more than 31 million tons of solid

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<sup>69</sup> 自然之友环境研究所与中国水电顾问集团新平开发有限公司、中国电建集团昆明勘测设计研究院有限公司裁定书，云南高级法院（2017）云民辖23号民事裁定书。[*Friends of Nature Institute v Xinping Development Co. Ltd*, Decision on jurisdiction, High Court of Yunnan Province (2017)]

<sup>70</sup> 自然之友环境研究所诉中国水电顾问集团新平开发有限公司，昆明市中级人民法院（2017）云01民初2299号民事判决书。[*Friends of Nature Institute v Xinping Development Co. Ltd*, Intermediate Court of Kunming Municipality (2017)]

<sup>71</sup> 《停建！！涉及“绿孔雀案”的水电站一审被宣判停止建设》，Available at <<http://news.bjx.com.cn/html/20200323/1056569.shtml>> accessed 28 April 2021.

<sup>72</sup> On the list of model cases of prosecutorial PIL published by the SPP, 15 out of 23 concern environmental protection. The complete list is available at <[https://www.spp.gov.cn/xwfbh/wsfbt/202109/t20210915\\_529543.shtml#2](https://www.spp.gov.cn/xwfbh/wsfbt/202109/t20210915_529543.shtml#2)> accessed 2 May 2021.

<sup>73</sup> 张军：《最高人民法院关于开展公益诉讼检察工作情况的报告》，Procurator-General's Discourse before the Standing Committee of the National People's Congress, 23 October 2019. Available: <[https://www.spp.gov.cn/spp/tt/201910/t20191024\\_435925.shtml](https://www.spp.gov.cn/spp/tt/201910/t20191024_435925.shtml)> accessed 2 May 2021.

waste and the reparation 4.5 billion RMB in ecological damage.<sup>74</sup> Meanwhile, the SPP focuses its efforts on environmental governance involving the conservation of ecosystems, such as protecting river and maritime ecosystems.<sup>75</sup>

### *3. Civil Action in Light of the New Civil Code*

The reparation of environmental and ecological damage will become one of the most discussed topics in the coming years. As the Civil Code promulgated in 2021 establishes a complex mechanism governing reparations for environmental damages—a system that involves victims, NGOs, and the state—it will be interesting to see how judges determine the nature and cost of alleged damage. More importantly, Chapter 7 of the book on civil liability recognizes the idea of pure ecological loss and therefore goes beyond the previous paradigm, which focused on pollution. Biodiversity contributes to the introduction of ecological damage through a disputed case from decades ago that concerned the damage caused by an environmental improvement effort. That case is discussed below.

In 1995, the transport authority of Hubei Province began to plant Chinese junipers alongside the national highway as an environmental optimization measure. Quite ironically, the transport authority's meat would become poison to local tree growers: though juniper is native to China, it was not common in this area, and since the planting began, pear trees' productivity has continuously decreased in the area surrounding the highway. Even worse, in 2003 and 2004, an outbreak of pear rust caused 14,000 acres of pear orchard to completely fail to produce; the junipers were later proven to be the primary carrier of the attacking fungus. Some 2,000 households of pear growers sued the transport authority for damaging the local ecosystems by failing to consider junipers' negative impact on surrounding agriculture. The court ruled against the pear growers, finding that the spread of disease did not fit the pollution-based concept of damage described by the General Provisions of Civil Law.<sup>76</sup> Since then, this Since then, the pear growers' failed case has raised awareness of biosecurity among legal professionals, and it became one of the incentives for the inclusion of "ecological degradation" alongside

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<sup>74</sup> Ibid.

<sup>75</sup> Ibid. It seems that the SPP specifically relates 'environmental governance' to ecosystem protection that involves several provincial or municipal jurisdictions.

<sup>76</sup> 2227户梨农诉交通委员会等七被告生态侵权案，见吕忠梅主编：《环境法案例评析》，高等教育出版社2006年版，第84-85页。

“environmental pollution” as a source of civil liability.<sup>77</sup> So formulated, Art. 1229 allows the victims of adverse ecological impacts other than pollution, such as biodiversity loss and invasion by non-native species, to demand remedy.

The innovative efforts of this chapter of the Civil Code on environmental liability are not limited to escaping the paradigm of pollution. Art. 1232 institutes punitive remedies in cases of intentional environmental offences that cause severe consequences, and Art.1234 further stipulates that where remediable ecological degradation is caused by a violation of national provisions but no personal harm is identifiable, the state (or other organizations authorized by law to do so) can demand that the responsible person proceed with remediation. These provisions are at odds with the continental legal tradition, which recognizes liability only when personal harm is identifiable and which rejects punitive remedies.

Art. 9 of the Civil Code states, “When conducting a civil activity, a person of the civil law shall act in a manner that facilitates conservation of resources and protection of the ecological environment.”<sup>78</sup> This provision, together with other “ecological provisions” of the Code,<sup>79</sup> can—if we paraphrase Otto von Gierke—be “drops of eco-centric oil” in anthropocentric civil law.<sup>80</sup> We can expect that the Chinese judiciaries will further constrain property and contractual liberty in the name of ecological good. However, it is premature to hope for a self-aware eco-centric approach. After all, statutory rules cannot predetermine their application, and “the law” is also a factor of how lawyers understand environmental governance and the role of civil law therein. So far, mainstream civil law doctrine still resents the inclusion of ecological consideration, seeing it either as a black sheep that troubles the purity of the civil law system or as a repetition of the principle of *ordre public*.<sup>81</sup>

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<sup>77</sup> Art. 1229, Civil Code.

<sup>78</sup> The provision does not distinguish between natural and legal persons. Therefore, we shall interpret ‘person’ in the ordinary term.

<sup>79</sup> Besides Art. 9, ecological consideration can be found in Art. 286, 326, 346, 509(3), 621, 1229-1235.

<sup>80</sup> Mingzhe Zhu, ‘The Ecologization of the Chinese Civil Code’ (2020) 64 *Pravovedenie* 511.

<sup>81</sup> 苏永钦：《现代民法典的体系定位与建构规则》，载《交大法学》（第1卷），上海交通大学出版社2011年版，第59-93页；尹田：《民法基本原则与调整对象立法研究》，载《法学家》2016年第5期，第10-19页。

## IV. The Need for Further Elaboration of IBL

If we analyze the previous sections, we can see that ecological concerns and the relevance of IBL are growing simultaneously in Chinese judicial practice. In this context, Chinese judiciaries will face the challenge of balancing the mandates of conservation, the rule of law, and other aspects of sustainability. Careful elaboration of IBL, and especially its relationship with other regimes of law, will be necessary as judges manage these often-competing requirements.

Because the vast majority of Chinese biodiversity litigation is tried before criminal tribunals, determining how IBL should be correctly applied can serve a vital function in maintaining the rule of law in environmental justice. Biodiversity consideration can encourage judges to leave overkill behind as a standard for environmental harm and to instead evaluate damages in terms of ecosystem or habitat conservation, therefore improving the efficiency with which biodiversity loss is prevented.<sup>82</sup> At the same time, reliance on a scientific concept that has neither a clear legal status is likely to be criticized, especially in the name of *nulla poena sine lege*.<sup>83</sup> For instance, in the Parakeets Case, the defendant's lawyer challenged the legality of the judicial explanation of 2000 over its broadening of the applicability of a crime by removing the qualifying word "wild." The biologists, through their *amici curiae*, expressed a different view: they testified that tolerating the domestication of members of the endangered species would encourage their capture and eventually lead to habitat destruction.<sup>84</sup> The court of appeal ultimately found the defendant guilty, but it sentenced him to two years in prison instead of the five provided for by the Penal Code.<sup>85</sup> Similar decisions opened discussions on the role

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<sup>82</sup> James Chen, 'The Fragile Menagerie: Biodiversity Loss, Climate Change, and the Law' (2018) 93 *Indiana Law Journal* 303, 304.

<sup>83</sup> It goes without saying that legal concepts cannot avoid ambiguity. Still, empirical research demonstrates that a degree of legal certainty is achievable in practice. John Hasnas, 'Back to the Future: From Critical Legal Studies Forward to Legal Realism, Or How Not to Miss the Point of the Indeterminacy Argument' (1995) 45 *Duke Law Journal* 84; Brian Bix, 'Doctrine, Data, and High Theory' (2016) 6 *UC Irvine Law Review* 137.

<sup>84</sup> 深圳市宝安区人民检察院诉王某、谢某福非法收购、运输、出售珍贵、濒危野生动物、珍贵、濒危野生动物制品罪，深圳市中级人民法院（2017）粤03刑终1098号二审刑事判决书。[*Prosecutor v Wang and Xie*, Intermediate Court of Shenzhen Municipality (2017)]

<sup>85</sup> 深圳市宝安区人民检察院诉王某、谢某福非法收购、运输、出售珍贵、濒危野生动物、珍贵、濒危野生动物制品罪，深圳市中级人民法院（2017）粤03刑终1098号二审刑事判决书。[*Prosecutor v Wang and Xie*, Intermediate Court of Shenzhen Municipality (2017)] Art. 63(2) of the Penal Code provides that the court can mitigate the penalty with the approval of the SPC.

of IBL within the Chinese legal system amongst criminal lawyers. For example, Professor Zhou Guangquan, an authority on criminal law and an eminent member of the Constitution and Law Committee of the NPC, has argued in a short essay that the judiciaries should recognize that the CITES does not, in itself, fall into the regime of criminal law and that incriminating any trade that involves species on the CITES appendices puts proportionality at risk.<sup>86</sup> In this sense, we can predict the growing relevance of IBL in Chinese environmental justice.

Meanwhile, habitat conservation cases that target clean energy projects such as hydropower stations reveal the complicated and problematic trade-off between renewable energy and biodiversity. The development of large-scale renewables projects will almost inevitably involve occupying and transforming vast landscapes in the wild.<sup>87</sup> In other words, China's energy transition will, at least in the short term, jeopardize its biodiversity—a fact that makes renewables projects the targets of biodiversity PIL. In 2016, China Environmental Protection Foundation filed a public interest complaint before the Municipal Court of Yantai, Shandong Province against a wind-farm project on Changdao Island for disturbing the seasonal bird migration.<sup>88</sup> Though this wind farm had been a symbol of the paradigm shift in the local economy from highly polluting industries to clean power and was operated by state-owned enterprises, the settlement reached by the parties mandated the removal of all wind turbines and the reforestation of the island.<sup>89</sup>

Of course, this is not to say that Chinese environmentalists favor biodiversity over mitigating climate change. The very same NGO that first advocated for climate change litigation in China has also sued enterprises over biodiversity causes. The so-called “first climate change litigation in China,” a case against the State Grid Corporation for excessively abandoning wind power, was filed by the Friends of Nature Institute, which was also the

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<sup>86</sup> 周光权：《危害人工繁育珍贵、濒危野生动物的罪与非罪》，《法治日报》2021年11月3日第10版。

<sup>87</sup> Jordi López-Pujol and Ming-Xun Ren, ‘Biodiversity and the Three Gorges Reservoir: A Troubled Marriage’ (2009) 43 *Journal of Natural History* 2765; Mingyue Pang and others, ‘Ecological Impacts of Small Hydropower in China: Insights from an Emergy Analysis of a Case Plant’ (2015) 76 *Energy Policy* 112; Hongzhang Xu and others, ‘Limiting the Effects of Hydropower Dams on Freshwater Biodiversity: Options on the Lancang River, China’ (2019) 70 *Marine and Freshwater Research* 169.

<sup>88</sup> 中华环保基金会诉长岛联凯风电发展公司环境破坏案，山东省烟台市中级人民法院（2016）鲁06民初373号民事调解书。[*CEPF v Kailian Wind Power Ltd.*, Court of Yantai Municipality (2016)]

<sup>89</sup> See 徐光明、孙航、郭宏伟：《旧产能退出去，新经济走进来——山东烟台法院服务新旧动能转换工作纪实》，《人民法院报》2018年7月30日第1版。[Guangming Xu, Hang Sun, Hongwei Guo, ‘From Old Productivity to New Economy’ *Journal of People’s Court* (Beijing, 30 July 2018).]

plaintiff in the Green Peafowl Case.<sup>90</sup> However, biodiversity conservation lawyering is, at least for now, much more visible. Despite urban residents' increasing public awareness of climate change,<sup>91</sup> Chinese judges may still find no legislative instruments with which to urge more radical governmental measures or impose further limitation on private-sector emission. [The SPC has announced that climate mitigation and emission trade will be the focus of the following years, making it vital for the Chinese government and eco-aware citizens to balance the subtle and often competing interests of emission reduction and habitat conservation.](#)

## V. Neglected Fronts of Biodiversity Litigation

Legal scholarship often focuses on the application and interpretation of sources of law, taking for granted that judges are the princes of the law's empire. In order to fully grasp the dynamics of biodiversity litigation in China, we will explore the use of scientific expertise in trials and the role of prosecutors.

### A. Science in Robes

The SPC designates the judicial protection of the environment and natural resources as one of three “tough battles” to win in its *Essential Tasks for the Judicial Reform in 2020*.<sup>92</sup> Specific measures in this “battle” include the reorganization of jurisdiction over environmental and natural resources cases, the definition of boundaries between ecological damage and PIL, and the exploration of punitive damages in cases concerning ecological loss.<sup>93</sup> In several more developed provinces (such as Shandong and Jiangsu), the institutional perspective on this task may include transforming the environmental chamber into a separate court that exercises jurisdiction over civil, criminal, and administrative litigation related to environmental issues.

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<sup>90</sup> 自然之友环境研究所诉国家电网宁夏公司案，甘肃省高级人民法院（2018）甘民终679号民事裁定书。 [*The Friends of Nature Institute v Ningxia State Grid*, High Court of Gansu Province (2018)]

<sup>91</sup> The China Center for Climate Change Communication has conducted two national surveys entitled *Climate Change in the Chinese Mind*, retrospectively in 2012 and 2017. The percentage of respondents who know at least a little about climate change raise from 6% to 92.7%. Binbin Wang, Yating Shen, and Yangyang Jin, ‘Measurement of Public Awareness of Climate Change in China: Based on a National Survey with 4,025 Samples’, (2017) 15 *Chinese Journal of Population Resources and Environment* 285–91.

<sup>92</sup> 最高人民法院：《2020年人民法院司法改革工作要点》。

<sup>93</sup> 刘峥：《对〈2020年人民法院司法改革工作要点〉的解读》，《人民法院报》2020年2月27日。

The SPC seems to have confidence—based on five years of experience and 10 million first-instance cases—in the tribunals’ competence to manage environmental litigation.<sup>94</sup>

This structural turn may help a new model of judicial reasoning to flourish in environmental justice: submitting scientific evidence to argue the necessity of conservation.<sup>95</sup> The first indicator of the rise of science before the court is the increasing reliance in trials on scientific expertise on biodiversity. Before 2014, Chinese courts did consult scientists on environmental issues to identify which species of plant or animal had been captured, killed, or traded and to determine the nature of pollutants or waste. However, the opinions given by these experts usually did little more than inform the court whether the creature in question could be found on one of the national or international directories, or whether the volume of the emission surpassed the regulation or technical standards. This information was sufficient to decide the offense, and among 68 first-instance cases regarding illicit hunting in 2013, not a single judge asked for an evaluation of the deed’s ecological impact. Since 2015, judges have gradually developed the habit of summoning experts to evaluate the particular species’ bigger-picture value. For instance, a research institute testified in 2018 before a court in the Hunan Province that the capture of Chinese hwamei would cause significant damage to the local ecosystem.<sup>96</sup> As a response to the Standing Committee’s decision on February 24, 2020, the SPP published six model cases of prosecutorial wildlife protection, of which four involved expert witnesses. In categories of environmental offenses that depend more on experts’ discretion, such as pollution and natural resources damages, the princes of the law’s empire are only more willing to seek scientific assistance.

The second indicator of the possible ascendance of scientific evidence is the growing emphasis on biosecurity. In the context of the initial COVID-19 outbreak’s alleged origination from a wet market in Wuhan and association with the consumption of wildlife,<sup>97</sup> the Standing Committee of the National People’s Congress enacted the Decision on Full Prohibition of

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<sup>94</sup> 《最高法召开环境资源审判庭成立五周年发布会》，Available at <<http://www.court.gov.cn/zixun-xiangqing-173942.html>> accessed 20 May 2021.

<sup>95</sup> Benoit Mayer, ‘The State of the Netherlands v. Urgenda Foundation: Ruling of the Court of Appeal of The Hague (9 October 2018)’ (2019) 8 *Transnational Environmental Law* 167.

<sup>96</sup> 王某某、吴某某非法狩猎罪，湖南省宁乡市人民法院（2018）湘0124刑初497号刑事判决书。

<sup>97</sup> A broader account on wildlife consumption of wildlife and epidemic, see John Vidal, “‘Tip of the Iceberg’: Is Our Destruction of Nature Responsible for Covid-19?” *The Guardian* (18 March 2020) <<https://www.theguardian.com/environment/2020/mar/18/tip-of-the-iceberg-is-our-destruction-of-nature-responsible-for-covid-19-aoe>> accessed 22 March 2021.

Wildlife Trade and Alimentary Use for the Sake of People's Life and Health Security.<sup>98</sup> This eight-article text relates the necessity of wildlife protection to biosecurity, ecological security, and public health. Technically speaking, this decision of the legislative body is not a proper legal text, but given the gravity of the pandemic and the dramatic global quarantine, the concern conveyed by the decision with biodiversity and its linkage to hunting and eating will dominate the revision of the Wildlife Protection Law, as well as judicial interpretation of relevant statutes. Indeed, the magnitude of epidemiological discourse has already directed judges' attention to the relationship between culinary habits and public health.

## **B. The Role of Prosecutorial Preliminary Procedure and the Effectiveness of Biodiversity Law**

As we have mentioned in the previous section, prosecutors have become active in PIL. Their activism may eventually block the access of civil society. Compared with the total of 118,012, the number of environmental cases brought by NGOs is nearly negligible—no more than a few dozen per year.<sup>99</sup> In fact, though about 700 NGOs have the standing to engage in environmental litigation, only 25 had brought cases by 2018.<sup>100</sup> Even in 2019, which the SPC considers a landmark year in terms of NGO-filed public interest actions, the total count is just 179, less than one-tenth of the number of prosecutorial PIL cases.<sup>101</sup> The practical utility of initiatives originating in civil society is even more suspect if we consider the fact that many of China's ecology-oriented NGOs have their roots in public sectors.<sup>102</sup> One of the key actors in biodiversity litigation, for example, China Biodiversity Conservation and Green Development Foundation, was established in 1985 by the initiative of a number of vice presidents of the Political Consultative Conference, the political legislative advisory body.

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<sup>98</sup> 《全国人民代表大会常务委员会关于全面禁止非法野生动物交易、革除滥食野生动物陋习、切实保障人民群众生命健康安全的决定》，Available at <<http://www.npc.gov.cn/npc/c30834/202002/c56b129850aa42acb584cf01ebb68ea4.shtml>> accessed 22 March 2021.

<sup>99</sup> 陈杭平、周晗隽：《公益诉讼“国家化”的反思》，载《北方法学》2019年第6期。

<sup>100</sup> 王琳琳：《保障社会组织开展公益诉讼需精准施策》，载《中国环境报》2018年3月14日。

<sup>101</sup> 《中国环境资源审判（2019年）》[White Book of Environmental Justice (2019)], available at <<http://www.court.gov.cn/zixun-xiangqing-228341.html>> accessed 25 March 2021.

<sup>102</sup> On the government organization of environmental non-governmental organizations, see Guobin Yang, 'Environmental NGOs and Institutional Dynamics in China' [2005] *The China Quarterly* 46; Jonathan Schwartz, 'Environmental NGOs in China: Roles and Limits' (2004) 77 *Pacific Affairs* 28.

Prosecutors' true force, however, stems from their authority to oversee the executive branch by way of preliminary procedure before actual prosecution. Art. 55(2) of the Civil Procedure Law and Art. 25(4) of the APL establish a mandatory preliminary procedure before prosecution.<sup>103</sup> ~~Primarily inspired by the texts of American environmental law on notice in citizen suits,~~<sup>104</sup> These provisions direct the prosecutor to first advise the executive-branch body in charge of the subject at hand of its duty and urge it to perform that duty before filing a suit before the court. In practice, the executive branch follows the prosecutors' advice in an overwhelming 99.5% of cases;<sup>105</sup> only in very exceptional occasions do prosecutors actually need to sue the government for its noncompliance. Of ten model PIL cases selected by the SPP, seven were resolved without prosecution. In the remainder, the prosecutors used their authority to orchestrate collaboration between different governmental departments and protect public interests.<sup>106</sup>

The active role of the prosecutor as the biodiversity conservator is not without drawbacks. Prosecutors, especially those at the county level, are rarely versed in environmental knowledge, and in practice, their advice is not always realistic.<sup>107</sup> In fieldwork, officials of the local Bureau of Environmental Protection told us that they had no choice but to obey the prosecutors' requests because an implicit chain of command constructed by bureaucratic disciplinary measures places the prosecutors in the de facto superior position.

The bright side of prosecutorial intervention is that it contributes to the effectiveness of biodiversity law in a regime dependent on executive discretion and regulation. Indeed, the effectiveness of environmental law is a complicated matter, and we can distinguish at least three forms of effectiveness: legal effectiveness, meaning that the law is respected; behavioral

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<sup>103</sup> The be precise, the text of the Civil Procedure Law does not mention the preliminary procedure but a notice issued jointly by the Supreme Court and the Supreme Procuratorate in November 2019 makes it clear that this procedure is mandatory in prosecutorial public interest litigation through civil action. See 《最高人民法院、最高人民检察院关于人民检察院提起刑事附带民事公益诉讼应否履行诉前公告程序问题的批复》，法释〔2019〕18号。

<sup>104</sup> 张锋：《检察环境公益诉讼之诉前程序研究》，载《政治与法律》2018年第11期。

<sup>105</sup> 张军：《最高人民检察院关于开展公益诉讼检察工作情况的报告》，Procurator-General's Discourse before the Standing Committee of the National People's Congress, 23 October 2019.

<sup>106</sup> 《最高检发布检察公益诉讼十大典型案例》，Available at <[https://www.spp.gov.cn/spp/zd gz/201812/t20181225\\_403407.shtml](https://www.spp.gov.cn/spp/zd gz/201812/t20181225_403407.shtml)> accessed 29 March 2021.

<sup>107</sup> 刘建新：《论检察环境公益诉讼的职能定位及程序优化》，载《中国地质大学学报（社会科学版）》2021年第4期。

effectiveness, meaning that the law changes people's behavior; and problem-solving effectiveness, meaning that the aim of the legal provisions is achieved.<sup>108</sup> If we accept the premise that biodiversity law's effectiveness can be improved by two avenues, namely better legislation and better implementation, it is possible to argue that Chinese prosecutors walk both paths towards more effective biodiversity law through their exercise of prosecutorial preliminary procedure.

In terms of rule-making, prosecutors can urge local governments to enact local regulations. Most of the current provisions concerning biodiversity entrust the executive branch with the power and duty to act but prescribe no legal consequences of inaction, an arrangement that gives governments too much discretion. When local governments fail to adopt regulatory norms, prosecutorial intervention can limit this overabundance of administrative discretion. In 2016, for instance, the prosecutor's office of Jilin Province issued prosecutorial advice effectively mandating that the provincial Five-Year-Plan would include measures devised to improve protection of the Yidong River.<sup>109</sup> This isolated and rather anecdotal case demonstrates the weight of preliminary procedure, which allows prosecutors to review the governments' policymaking.

When it comes to rule-implementation, prosecutors behave as coordinators and help solve the challenges of interdepartmental cooperation. Of the ten model prosecutorial public interest cases, two concerned issues of interdepartmental coordination. In the Shuimoxi Wetland Nature Reserve case, the industrial park planned by the county overlapped with the reserve, and its construction had altered the function of the wetland ecosystem. The prosecutor of the Municipality of Chongqing decided to take over and initiated the preliminary procedure, as a result of which the county major accepted the prosecutor's advisory opinion and, under the prosecutor's supervision, paid the private enterprises in the industrial park to leave.<sup>110</sup> In the other case, a villager had illicitly maintained a fishery on the Cihu Lake. The illegal fishing activity has continued for more than fourteen years because it fell within the jurisdiction of five offices with no efficient coordination practices. At the demand of the office in charge of land

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<sup>108</sup> Sandrine Maljean-Dubois, 'Introduction. The Effectiveness of Environmental Law: A Key Topic' in Sandrine Maljean-Dubois (ed), *The Effectiveness of Environmental Law*, vol 3 (Intersentia 2017) 4–5.

<sup>109</sup> 参见《吉林公益诉讼推动河流综合治理，省检察院向省政府发检察建议》，[https://www.thepaper.cn/newsDetail\\_forward\\_1629027](https://www.thepaper.cn/newsDetail_forward_1629027).最后访问：2020年6月14日。

<sup>110</sup> 《重庆市石柱县水磨溪湿地自然保护区生态环境保护公益诉讼案》， Available at [https://www.spp.gov.cn/spp/zd gz/201812/t20181225\\_403407.shtml](https://www.spp.gov.cn/spp/zd gz/201812/t20181225_403407.shtml)> accessed 5 June 2021.

management, the municipal prosecutor intervened in May of 2018 by issuing its advisory opinion and holding a workshop to orchestrate the fishery-closing operation among the five offices (and roughly 150 officers) in question.<sup>111</sup>

## VI. Conclusion

While biodiversity remains unfamiliar to Chinese courts, and indeed is not yet a well-defined legal term, the judicial system is becoming more active in conservation efforts. Because Chinese judges rarely apply international law and the provisions that have adopted CBD requirements do not prescribe any concrete consequences of violations, IBL has almost no visible direct application in Chinese justice. Indeed, the truth is that the normative foundation of biodiversity litigation is built by domains other than “environmental law.” In criminal cases, it has for a long time been the policy of the SPC to rely on the CITES’s appendices as sound scientific evidence to determine whether a species is endangered and therefore protected by the Penal Code. Over the last decade, scientific expertise has been gaining authority before the tribunal of law as judges have begun to invite biologists and environmental scientists to testify as to species’ values to local ecosystems. The conservation effort stands to benefit from judges’ transcending the paradigm of overkilling in biodiversity conservation—just as they left behind the paradigm of pollution in environmental protection—and taking and taking habitat and ecosystem conservation into consideration. Argumentative strategy, in turn, must be improved in order to avoid jeopardizing the certainty of the law, particularly criminal law.

Judges, prosecutors, and NGOs serve different functions in biodiversity litigation. Outside of narrowly defined legal rights and causality, judges are more concerned with the social impacts of their judgments, and they act to promote eco-awareness. While environmental NGOs win some well-reported cases and help to raise public awareness of habitat protection, the quantity of their actions remains marginal, even negligible. In contrast, the supervisory power of prosecutors—exercised not through litigation itself but through preliminary procedure—runs the whole gamut of environmental governance, from forming outlooks to evaluating outcomes. In this context, prosecutorial advice seems a proper mechanism by which the both the rule-making and the rule-implementing effectiveness of biodiversity law may be improved.

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<sup>111</sup> 《湖北省黄石市磁湖风景区生态环境保护公益诉讼案》， Available <[https://www.spp.gov.cn/spp/zd gz/201812/t20181225\\_403407.shtml](https://www.spp.gov.cn/spp/zd gz/201812/t20181225_403407.shtml)> accessed 5 June 2021.