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The ‘bitcoin judgements’ in China: Promoting climate awareness by judicial reasoning?

Mingzhe Zhu

Correspondence

Email: Mingzhe.Zhu@uantwerpen.be

ORCID: <https://orcid.org/0000-0003-3986-0027>

Abstract

In 2021 and 2022, Beijing courts annulled three contracts for cryptocurrency mining, holding that they were contrary to the public interest. The judges based their decisions on Chinese law provisions concerning contractual validity, and supported their arguments by citing various policy documents warning of the risks of cryptocurrency-related activities to financial market stability and energy consumption. Although the provisions that the courts cited were recently reformed, the courts’ line of reasoning and approach may set an example for future cases concerning carbon-intensive activities. This note therefore considers these judgements in the broader context of climate change litigation, reflecting on the role of courts in implementing industrial and microeconomic policy in the interpretation of contract law.

1 INTRODUCTION

On 14 December 2021, the District Court of Chaoyang, Beijing rendered a judgement in a dispute between two private companies, annulling their cryptocurrency mining contracts, holding that cryptocurrency mining is contrary to the public interest.¹ The court of appeal—the Third Intermediate Court of Beijing—later upheld the court of first instance’s judgement and its reasoning.² In a year characterized by global heatwaves, wildfires and other adverse climate events, these seemingly mundane judgements have attracted international attention, because both courts explicitly referred to climate change mitigation considerations in their reasoning.³ According to ClientEarth China, these are the first judgements to explicitly mention China’s targets for carbon peaking and neutrality.⁴ Contrary to climate litigation brought in other countries,⁵ these

¹ The District Court of Chaoyang in Beijing, *Beijing Fengfujiuxin Marketing and Technology Co. Ltd. v Zhongyan Zhichuang Blockchain Co. Ltd.* (14 December 2021) [(2020) Jing 0105 Minchu No.69754] (Bitcoin I). The translations of the judgements are the author’s own.

² The 3rd Intermediate Court of Beijing, *Beijing Fengfujiuxin Marketing and Technology Co. Ltd. v Zhongyan Zhichuang Blockchain Co. Ltd.* (7 July 2022) [(2022) Jing 03 Minzhong No. 3852] (Bitcoin II).

³ See, e.g., I Kaminski, ‘Chinese Court Rules Bitcoin Mining Harms the Climate’ (Climate Home News, 21 July 2022).

⁴ See *ibid.*

⁵ See M Powers, ‘*Juliana v United States*: The Next Frontier in US Climate Mitigation?’ (2018) 27 *Review of European, Comparative and International Environmental Law* 199; J Verschuuren, ‘*The State of the Netherlands v Urgenda Foundation*: The Hague Court of Appeal Upholds Judgment Requiring the Netherlands to Further Reduce Its Greenhouse Gas Emissions’ (2019) 28 *Review of European, Comparative and International Environmental Law* 94; M Wewerinke-Singh and A McCoach, ‘*The State of the Netherlands v Urgenda Foundation*: Distilling Best Practice and Lessons Learnt for Future Rights-Based Climate Litigation’ (2021) 30 *Review of European, Comparative and International Environmental Law* 275; O Kelleher, ‘A Critical Appraisal of *Friends of the Irish Environment v Government of Ireland*’ (2021) 30 *Review of European, Comparative and International Environmental Law* 138.

judgements did not bring about material changes into the Chinese State's approach to climate action. However, they provide insights into the working of the Chinese judiciary in the context of climate governance. The analysis of these judgements suggests that, in China, judges seem minded to incorporate climate considerations into the adjudication of contractual disputes.⁶ It reveals that Chinese courts may rely on policy documents that are not legally binding,⁷ and use statutory and contractual interpretation to achieve goals of climate policy in civil adjudication.⁸ Indeed, these judgements may be regarded as exemplary of the specificities of climate change litigation in the Chinese context.

This case note analyses the so-called 'bitcoin judgements', paying specific attention to the courts' consideration of public interest. Because the provisions in the Contract Law that the courts relied on have since been abrogated, their line of reasoning cannot be simply repeated in similar cases. Therefore, the case note examines the feasibility of using public order as a means to halt greenhouse gas-intensive activities.

2 CASE SUMMARY

In May 2019, the Beijing Fengfujiuxin Marketing and Technology Co. Ltd. (the plaintiff), stipulated two contracts commissioning the Zhongyan Zhichuang Blockchain Co. Ltd. (the defendant) to purchase 1,542 microdata storage servers to be used for bitcoin mining. A third contract stipulated that 93 percent of the profits from the mining would be transferred to the plaintiff, as either fiat currency or bitcoin.⁹ The facilities were installed in a crypto-mining farm in Liangshan County—a hydropower-rich region in Sichuan Province and one of China's crypto-mining 'hotspots'. The plaintiff paid the service provider RMB 100 million (roughly US\$14 million). The defendant stopped the payment after transferring 18.3463 bitcoins to the plaintiff.¹⁰ The plaintiff sued the defendant, claiming that the latter failed to perform its contractual obligations, and sought damages of 278.1655 bitcoins or US\$95.5 million (roughly RMB 67 million).¹¹ The defendant claimed that the plaintiff was in breach of contract for not having paid electricity bills, which interfered with the operation of the servers. The defendant alleged that this set of circumstances excused it from performance.¹²

The court of first instance ruled that the three contracts should be regarded as one single

⁶ Y Zhao, S Lyu and Z Wang, 'Prospects for Climate Change Litigation in China' (2019) 8 *Transnational Environmental Law* 349.

⁷ H Du and H Zhang, 'Climate Neutrality in the EU and China: An Analysis of the Stringency of Targets and the Adaptiveness of the Relevant Legal Frameworks' (2022) 31 *Review of European, Comparative and International Environmental Law* 495; X 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; J Lin, 'Climate Governance in China: Using the "Iron Hand"' in B Richardson (ed), *Local Climate Change Law: Environmental Regulation in Cities and Other Localities* (Edward Elgar 2012) 300.

⁸ M Zhu, 'The Rule of Climate Policy: How Do Chinese Judges Contribute to Climate Governance without Climate Law?' (2022) 11 *Transnational Environmental Law* 119.

⁹ Bitcoin I (n 1) paras 6–8.

¹⁰ *ibid* para 11. According to the plaintiff's calculation, 1 bitcoin in January 2021 was worth about US\$34,335 (*ibid* para 2).

¹¹ *ibid* para 2.

¹² *ibid* para 3.

contractual arrangement on bitcoin mining. The court went on to consider whether that single contractual arrangement could be regarded as valid.¹³ China has not enacted any specific legislation on cryptocurrency. The court however noted that various governmental departments—including the People’s Bank, Ministry of Public Security, National Development and Reform Commission (NDRC), and Supreme People’s Court (SPC) – had issued several ‘notices’, ‘announcements’ or ‘circulars’ on the prevention and resolution of risks associated with virtual currency trading.¹⁴ Even though none of these policy documents is binding in civil litigation,¹⁵ the court used them to identify the adverse impacts of cryptocurrency on the public interest.

The court of first instance decided that the validity of the contract was governed by the provisions of the Contract Law.¹⁶ Article 52(4) of the Contract Law prescribes the invalidity of any contract that harms the public interest.¹⁷ The court voided the contracts because cryptocurrency trading and mining were against the public interest, not because they were unlawful. Otherwise, the applicable provision would have been Article 52(5) of the Contract Law—which concerns unlawfulness.¹⁸

To explain why the trading and mining of bitcoin jeopardizes the public interest and, therefore, is not protected by law, the court referred to the rationale for the cited policy documents. First, the court observed, cryptocurrency trading is a form of speculation that is risky for private entities and for the stability of the financial markets. The court stated that the price of cryptocurrency ‘is not based on any real value’ and therefore can be easily manipulated, which puts financial market stability at risk.¹⁹

Second, the court observed that ‘mining consumes huge energy, emits a large quantity of carbon dioxide, risks the upgrading of the industrial structure of our country, as well as **threatens** the achievement of the national goals of carbon peaking and neutrality’.²⁰ The court also observed that, precisely because cryptocurrency mining presents considerable dangers and risks, relevant policy documents in the form of circulars and notices strictly regulate this area. The court pointed out that the 2022 update of the NDRC Catalogue for Guiding Industry Restructuring listed cryptocurrency mining as one of the industries ‘to be eliminated’. The court therefore concluded that the cryptocurrency mining contracts at issue were void, as they were against the public interest.²¹

The plaintiff appealed, stressing that the policies applicable in 2019—when it contracted with the defendant—only mentioned the financial risks of bitcoin trading, not energy consumption. It

¹³ *ibid* para 17.

¹⁴ *ibid* para 14. These documents included: ‘Notice Concerning the Prevention of Risks Associated with Bitcoin’ (People’s Bank of China et al, 3 December 2013), ‘Public Notice on Preventing Risks of Fundraising through Coin Offering’ (People’s Bank of China et al, 4 September 2017), ‘Notice Warning Against Illegal Fundraising in the Name of “Virtual Currency” and “Blockchain”’ (China Banking and Insurance Regulatory Commission et al, 24 August 2018), ‘Notice on Regulating Virtual Currency “Mining” Activities’ (NDRC et al, 3 September 2021), and ‘Notice on Further Preventing and Resolving the Risks of Virtual Currency Trading and Speculation’ (People’s Bank of China et al, 15 September 2021).

¹⁵ Zhu (n 8) 127.

¹⁶ Bitcoin I (n 1) para 16.

¹⁷ *ibid* para 19; Bitcoin II (n 2) para 26.

¹⁸ Bitcoin I (n 1) para 18; Bitcoin II (n 2) para 16.

¹⁹ Bitcoin I (n 1) para 19.

²⁰ *ibid*.

²¹ *ibid*.

furthermore noted that the contracts concerned only bitcoin mining, and not trading. The plaintiff also argued that the court of first instance should not have declared the contract void on the basis of concerns over energy consumption and industrial upgrading. To support its argument, the plaintiff cited a case in Shanghai, where the judges recognized the value of bitcoin, which the SPC had praised as a leading decision.²²

The court of appeal confirmed the decision and the reasoning of the court of first instance. It however revised the motivation of the judgement, phrasing it in a more coherent and concise manner. The court of appeal confirmed that cryptocurrency-related activities are detrimental for both financial market stability and climate change mitigation and, therefore, banned by State policy. The court referred to a notice jointly issued in September 2021 by the NDRC and other ministries, stating that achieving climate goals was an important public interest.²³ The court added that that ‘private entities in a socialist market economy shall bear the social responsibility of promoting high-quality and sustainable development’.²⁴

3 ANALYSIS

3.1 From public interest to public order

Both judgements are based on the premise that cryptocurrency-related activities are not in the public interest. The classification of an activity as being against the public interest has significant legal implications under Chinese law.²⁵ One might therefore expect to find a set of standards and methods to guide judicial interpretation of what may be regarded as an activity that is not in the public interest. Unfortunately, such guidance does not exist, and civil lawyers in China cannot reach consensus on the parameters to define activities that are in the public interest. Legal scholars agree that public interest can only be identified by referring to legally binding norms—namely, legislation and the State Council’s decree-laws.²⁶ One of the leading drafters of the Civil Code has even argued that only those interests clearly identified as such by legislation and decree-laws should be considered as public interest.²⁷ In judicial practice, instead, it is quite common to identify public interest through the interpretation of non-binding policy documents. Therefore, it is not surprising that judges in the case under review referred to this kind of documents.

In 2021, the Civil Code replaced the provisions of the Contract Law regarding the validity of contracts and other civil transactions. Article 153 of the Civil Code provides two circumstances that make a contract null and void: (1) that the contract violates a provision of a law or of a decree-law; and (2) that the contract is against the public order. In contrast to the earlier provision of the Contract Law, Article 153 of the Civil Code does not say that contracts against the public interest are null and void. Cryptocurrency mining and trading are not unlawful under the provision of the

²² Bitcoin II (n 2) para 2.

²³ *ibid* para 24.

²⁴ *ibid* para 26.

²⁵ Prior to the Civil Code, this classification alone can void any action. In the Civil Code, the term ‘public interest’ is mentioned 11 times in its 1,260 articles.

²⁶ On the different binding force between decree-laws and other administrative measures in civil adjudication, see Zhu (n 7) 127–128.

²⁷ Y Wang and S Guan, ‘Taking Public Interest in the General Provisions of Civil Code Seriously’ (2017) 4 *Social Sciences of Chinese Higher Education* 77.

Civil Code, since they are not prohibited by any law or decree-law of the State Council. Therefore, the only possible pathway seems to be that cryptocurrency mining is against the public order.

The normative value of the documents cited in the bitcoin judgements merits closer examination. Although Article 153 of the Civil Code stipulates that an act is unlawful only when it violates law or decree-law, some courts might rely on other policy documents to determine the lawfulness of an act. The SPC has clarified that violation of a governmental regulation does not affect a contract's validity, unless the regulation in question concerns a matter of public order—such as financial market stability, market economy, or microeconomy policy.²⁸ In other words, according to the SPC, no regulation can outlaw a legal transaction. Regulations can, at best, suggest the requirements of public order. The term 'regulation' should only be used to refer to ordinances issued by departments of the central government or by local executive branches. A ministerial ordinance must be formally adopted at a ministerial meeting and published as an order.²⁹ None of the notices or circulars cited in the judgements under review meets these requirements. It is the Notice on Further Preventing and Resolving the Risks of Virtual Currency Trading and Speculation (2021) that classifies '[v]irtual currency-related activities' as 'illegal financial activities' and 'banned'.³⁰ This is not a binding legal documents and cannot make cryptocurrency illegal.

The NDRC Catalogue for Guiding Industry Restructuring is the only ordinance cited by the courts that, from a purely doctrinal point of view, can be used to determine the requirements of public order. According to this regulation, however, cryptocurrency mining is only 'to be eliminated' and strictly regulated in China, but not illegal. According to the State Council's decree-law, financial institutions must not invest in projects in sectors 'to be eliminated' and governmental departments must adopt measures to halt activities in these sectors.³¹ In administrative procedure, this categorization can produce specific effects, such as justifying the government's decision not to grant a permit to a heavily polluting or emitting project. The Catalogue cannot outlaw activities related to one of these sectors, but can inform the court that their elimination is in accordance with the requirements of public order.

Indeed, there is no consensus on criteria to determine the specific requirements of public order in an individual case, and it is likely that judges would rely on a wide range of policy documents to motivate their decisions. Chinese judges, as other civil servants, have to fulfil the overall mission of policy implementation or, in bureaucratic jargon, 'put policy into work and produce tangible effects'.³² China's long-term targets of carbon peaking and neutrality serve as inspiration in law-and policymaking and are being formalized as legal instruments. For instance, the recently adopted Yellow River Protection Law demands the local governments restructure industrial, energy and transport sectors to achieve carbon neutrality.³³ Judges might consider carbon neutrality targets as they interpret existing laws. The judiciary's attempt to implement climate policy is well exemplified by the annual report of the SPC Chief-Justice, which declares the courts' commitment to climate

²⁸ Minutes of the National Courts' Civil and Commercial Trial Work Conference (SPC, 8 November 2019) art 31.

²⁹ Decree-law on Rectification of Ordinances (State Council, adopted 16 November 2001, amended 22 December 2017) arts 27 and 30.

³⁰ 'Notice on Further Preventing and Resolving the Risks of Virtual Currency Trading and Speculation' (n 14).

³¹ Decision on Implementing the Provisory Regulation for Guiding Industry Restructuring (State Council, 2 December 2005) art 19.

³² See X He, 'Pressures on Chinese Judges under Xi' (2021) 85 *The China Journal* 49; S Wang, 'Guiding Cases and Bureaucratization of Judicial Precedents in China' (2019) 14 *University of Pennsylvania Asian Law Review* 96.

³³ Yellow River Protection Law (adopted 30 October 2022, in effect from 1 April 2023) art 87(2).

change mitigation.³⁴ Rather than questioning the adequacy of climate policy and urging the State to set more ambitious climate goals, the Chinese judiciary has seemingly attempted to tackle the climate emergency by incorporating nonbinding climate policies into its decisions over contractual and other civil disputes.³⁵

3.2 Allocation of powers of climate governance

Chinese climate policy predominantly consists of piecemeal policies adopted by various departments and local governments, in the form of plans, roadmaps, working guidance, and notices.³⁶ The coherence and authority of these measures are questionable.³⁷ Even in sectors in which formal legislation is available, the legislature is usually reluctant to prescribe rigid and concrete legal obligations.³⁸ These fragmented and non-binding documents have however begun to produce tangible social effects in various ways, often involving dynamic and complex bureaucratic coordination. In terms of litigation, the actual impacts of China's climate policy depend on the willingness and capacity of judges to interpret statutory and contractual provisions to suit climate goals. In the absence of a framework climate law, the determination of Chinese judges to achieve social welfare often renders them implementers of climate policy.

Meanwhile, it is reasonable to question whether and for how long the current regulatory landscape will last. After all, the Department of Climate Change of the Ministry of Ecology and Environment (MEE) is drafting a climate law and the SPC issued in February, 2023 its policy on climate change litigation.³⁹ One might expect that, with dedicated law and judicial policy, judges will no longer need to find their own path through the regulatory jungle of climate governance.

However, the status quo is likely to persist for a considerable period. The NDRC has been the undisputed leader in formulating and implementing China's climate policy, as climate issues in China are treated primarily as a development and industrial problems, not as an environmental matter.⁴⁰ This framing has significant implications for the framework of climate governance in China. When industrial transformation is at stake, the responsible ministries guarantee that the transformation will not hinder economic growth.⁴¹ Therefore, they enjoy large discretion to

³⁴ 'Annual Working Report of the Supreme People's Court before the National People's Congress on March 8, 2022' <<https://www.court.gov.cn/zixun-xiangqing-351111.html>>.

³⁵ Zhao et al (n 6); M Zhu, 'How China's Courts Implement Climate Policy' (China Dialogue, 26 August 2022).

³⁶ Du and Zhang (n 7); Zhu (n 8); He (n 7).

³⁷ It is safe to say that they are not binding in civil procedure. In administrative procedure, however, given that judges can examine the legality of a regulatory measure, the stance that some of them can be binding under certain circumstances should not be categorically rejected. See Zhu (n 8) 129. In fact, Ma Huaide, the President of Chinese Association of Administrative Law and the Rector of China University Political Science and Law, argues that the plans voted by the National People's Congress should be considered binding in administrative law. H Ma, 'Building the Rule of Law in the Era of Planning' (2021) 3 China Legal Science 18, 20.

³⁸ Du and Zhang (n 7).

³⁹ The Opinions on Providing Judicial Services to Promote Carbon Emissions Peaking and Neutrality (SPC, 17 February 2023), official Chinese version available at <<https://www.court.gov.cn/zixun-xiangqing-389351.html>>.

⁴⁰ M Zhu, 'China's Developmentalist Approach to Climate Governance' (2022) 12 IUCN AEL Journal of Environmental Law 22.

⁴¹ On the use of industrial policy in China as a means to improve the competitiveness of industrial sectors, see P Aghion et al, 'Industrial Policy and Competition' (2015) 7 American Economic Journal: Macroeconomics 1.

frequently modify policy and adapt microeconomic plans to needs that keep evolving all the time. Binding norms, such as decree-laws and ordinances, usually take longer time to be prepared, adopted, and modified. Conversely, the executive branch can issue and circulate nonbinding policy documents, such as circulars, notices and roadmaps, rather quickly.⁴² Therefore, non-binding policy documents have become the preferred form of climate policy in China. Within this paradigm, the MEE would not be able to regulate areas traditionally reserved to ministries with competences over industrial matters, and the climate law under preparation is likely to include very few specific duties and obligations.

In its opinion entitled ‘Providing Services and Safeguards for the Unified Market Policy’, the SPC emphasizes that it will support the well-functioning of the market mechanisms that are designed to solve environmental and resource problems.⁴³ It is clear that the SPC will act primarily as a market regulator in implementing the central government’s grand design over China’s carbon-neutral future.

4 CONCLUSIONS

The two bitcoin judgements exemplify the willingness of the Chinese judiciary to limit private autonomy for the sake of the public interest. The judges held that certain activities must be outlawed because they pose risks to financial markets and to the climate, and as such are contrary to the public interest. Their determination of the notion of public interest relied on a set of circulars and notices. Although these documents deliver an unmistakable message that the Chinese State plans to ban cryptocurrency, formally these documents may not outlaw civil or commercial activities. The line of reasoning followed by the courts in these judgements cannot be replicated in later cases, because public interest is no longer a criterion to assess the validity of contracts under Chinese law. However, the Chinese judiciary can continue to render cryptocurrency-related contracts void on the basis of public order, by extensively referring to policy documents.

The regulatory framework of China’s climate governance is likely to continue to consist of legislation devoid of specific and concrete legal obligations, allocating responsibilities to countless departmental and local actors. An all-encompassing framework climate law is hardly conceivable, as long as the Climate Change Department of the MEE is in charge of drafting of the legislation. Cross-departmental competences are often a cause for dispute within bureaucratic organizations. Since climate policy remains in the hands of technocrats who work for ministries that seek to solve the climate crisis by means of technological, industrial, and economic development, macroeconomic planning will continue to be the dominant approach to climate policy in China.

The bitcoin judgements highlight the peculiarities of climate change litigation in China. In the cases under review, the litigants did not raise climate concerns and may have had no interest in

⁴² On the mentality of law skepticism among Chinese economists and policymakers, see X Lan, *Embedded Power: Chinese Government and Economic Development* (Shanghai Renmin Press 2021) 293.

⁴³ Opinion on Providing Services and Safeguards for the Unified Market Policy (SPC, 14 July 2022), official Chinese version available at <https://pccz.court.gov.cn/pcajxxw/pcswwz/swwzxq?id=9D26873BACC6D708ABE18C996B93C42A>. For a discussion of this document in English, see S Finder, ‘Why & How the Supreme People’s Court Is Providing Services and Safeguards for the Unified Market Policy’ (Supreme People’s Court Monitor, 15 August 2022) <https://supremepeoplescourtmonitor.com/2022/08/15/why-how-the-supreme-peoples-court-is-providing-services-and-safeguards-for-the-unified-market-policy/>.

contributing to the grand plan of carbon neutrality. In their concise and problematically motivated decisions, the Chinese judges asserted that market entities have a duty to avoid carbon-intensive activities. Their approach is perhaps mundane, the cases at issue are often trivial, but these judgements may nevertheless be regarded as an effort to tackle climate change in the courtroom.

These judgements raise familiar questions on the role of the judiciary in climate governance: can judges make climate law without an explicit democratic mandate? What is the role of nonbinding documents in statutory and contractual interpretation? The judgements do not offer guidance on how to align private business with climate ambitions, but they do shed light on the different directions in which the powers of the judiciary may be exercised in the fight against climate change.

Mingzhe Zhu is Senior Postdoctoral Researcher at the University of Antwerp. His research focuses on the links between political authority, society and nature in the Anthropocene, with particular attention to challenging State violence and extractivist capitalism. Zhu has published more than 50 publications in Chinese, English and French, including ‘The Rule of Climate Policy’ (2022) 11 *Transnational Environmental Law* 119 and ‘Biodiversity Litigation in China: Confronting Degradation from All Sides in the Era of Ecological Civilization’ in Guillaume Futhazar et al (eds), *Biodiversity Litigation* (Oxford University Press 2022) 119. He is the Chief Editor of the Law and Culture Series at the Commercial Press. The work described in this note was supported by a grant from the Research Foundation – Flanders (File number: 76473). The author is grateful for the insightful comments from the journal editors.