

CLIMATE CHANGE LITIGATION: A PROMISING PATHWAY TO
CLIMATE JUSTICE IN CHINA?

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* Jiangfeng Li is a J.S.D. Candidate at Yale Law School. This paper was originally presented at the “Climate Change Litigation Scholarship Workshop” in Singapore in June 2018, which was co-organized by Yale Law School and National University of Singapore. The author owes a debt of gratitude to Professors Douglas Kysar, Jolene Lin, Jacqueline Peel, Andri G. Wibisana, Yan ZHU, Zhu WANG, Xiaoyue ZHAO and other participants of the Workshop for their valuable comments and suggestions. The author would also like to thank the editors of Virginia Environmental Law Journal for their great editing and comments.

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I. INTRODUCTION

Climate change poses a serious threat to the Earth’s systems and humanity.¹ According to the Intergovernmental Panel on Climate Change’s Fifth Assessment Report and a body of sound scientific evidence, we know with more than ninety-five percent certainty that human activity is responsible for the Earth’s warming.² Against this background, climate change litigation has been filed in domestic courts and international tribunals in the European Union and twenty-seven countries.³ These cases have applied public or private law to the problem

¹ S. VijayaVenkataRaman, S. Iniyan & Ranko Goic, *A Review of Climate Change, Mitigation and Adaptation*, 16 RENEWABLE & SUSTAINABLE ENERGY REV. 878, 878–85 (2012); *Climate Change Threats and Solutions*, ENV’T & ECOLOGY, <http://environment-ecology.com/climate-change/785-climate-change-threats-and-solutions.html> (last visited Apr. 19, 2019).

² Intergovernmental Panel on Climate Change [IPCC], *Summary for Policymakers*, in *Climate Change 2013: The Physical Science Basis*, at 15–16 (2013), http://www.climatechange2013.org/images/report/WG1AR5_SPM_FINAL.pdf.

³ The numbers are based on the data provided by Columbia Law School Sabin Center for Climate Change Law (led by Professor Michael Gerrard) which made two charts in collaboration

of climate change and made courts an important forum for debate and discussion regarding transnational climate change regulation.⁴ But the world's largest greenhouse gas emitter,⁵ China, is missing from this trend, as it has not employed litigation as a means of climate change regulation thus far.

Nevertheless, recent legal developments in China suggest the country is opening the doors to climate change litigation. For example, China included a "Climate Change Response Law" as a "Research Project" in its 2016 national legislation agenda.⁶ The first draft of the Climate Change Response Law released in 2015 for public comment included a general provision for public participation, meant to encourage corporate entities or individuals to either report noncompliance to the regulatory authorities or bring enforcement lawsuits.⁷ Though the draft law did not provide details of the specific requirements for bringing such a lawsuit, it signaled the Chinese government's changing attitude towards climate change litigation. China's position with respect to this recent legal development is consistent with its continuing climate change mitigation efforts, which have largely been driven by domestic concerns—energy demand and security, environmental deterioration, and economic transformation—and the need to maintain a responsible international image.⁸ Other initiatives include enabling public interest litigation by non-governmental organizations ("NGOs") through major reforms to the Environmental Protection Law ("EPL") introduced in 2014.⁹ Also, a pilot

with Arnold and Porter LLP: "U.S. Climate Change Litigation Chart" and "Non-U.S. Climate Change Litigation Chart." CLIMATE CHANGE LITIGATION DATABASES (2019), www.climatecasechart.com.

⁴ Hari M. Osofsky, *The Continuing Importance of Climate Change Litigation*, 1 CLIMATE L. 3, 4 (2010).

⁵ *Global Greenhouse Gas Emissions Data, Emissions by Country*, EPA (2017), <https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data#Country>.

⁶ P.R.C. NATIONAL DEVELOPMENT AND REFORM COMMISSION, CLIMATE CHANGE DIVISION, *Zhong Guo Ying Dui Qi Hou Bian Hua De Zheng Ce Yu Xing Dong 2017 Nian Du Bao Gao* (中国应对气候变化的政策与行动2017年度报告) [CHINA'S 2017 ANNUAL REPORT ON POLICIES AND ACTIONS TO ADDRESS CLIMATE CHANGE] (2017), <http://www.ndrc.gov.cn/gzdt/201710/W020171101318500878867.pdf>.

⁷ *Zhong Hua Ren Min Gong He Guo Ying Dui Qi Hou Bian Hua Fa (Chu Gao)* (中华人民共和国应对气候变化法(初稿)) [P.R.C. Climate Change Response Law] (first draft for comments, Sept. 16, 2017), available at <http://www.hbets.cn/index.php/index-view-aid-705.html>.

⁸ LISA WILLIAMS, THE LOWY INST., *CHINA'S CLIMATE CHANGE POLICIES: ACTORS AND DRIVERS* (July 2014), <https://www.files.ethz.ch/isn/182715/chinas-climate-change-policies.pdf>.

⁹ See *Zhong Hua Ren Min Gong He Guo Huan Jing Bao Hu Fa (2014 Xiu Ding)* (中华人民共和国环境保护法(2014修订)) [Law on Environmental Protection] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 24, 2014, effective Jan. 1, 2015), CLI.1.223979 (PKULaw).

program launched in July 2015 has facilitated prosecutions¹⁰ against ministries and sub-national governments to enforce environmental laws.¹¹

Given these developments, this article engages in a theoretical analysis of the prospects for climate change litigation in China. Section II defines the concept of “climate change litigation” in the context of China, since this term can have either a broad or narrow meaning. Section III discusses why China should encourage climate change litigation, with a focus on identifying the regulatory role climate change litigation can potentially play in the complex landscape of climate change governance. Section IV undertakes a theoretical prognosis of potentially available forms and types of claims for climate change litigation in China, with analysis focusing on China’s current legal framework and using empirical evidence from other countries’ climate change litigation experience. This section also looks into China’s progress in other types of environmental litigation. Section V analyzes the various factors that serve either as obstacles or impetus for promoting climate change litigation in China, and provides an overall assessment of the prospects for climate change litigation in China. Section VI makes some proposals for China to further its legal initiatives and reforms to advance climate change litigation. Finally, the article concludes in Section VII with some observations about the prospect of climate change litigation in China.

II. DEFINING CLIMATE CHANGE LITIGATION IN THE CHINESE CONTEXT

In order to understand what climate change litigation in China might look like, it is necessary to first define the term “climate change litigation.” Climate change litigation, if understood in its broadest sense, can encompass a variety of litigation types because climate change is the accumulated effect of an enormous range of human activities in daily life, commercial dealings, and industrial production.¹² Thus, from one perspective, virtually all litigation can be regarded as having climate

¹⁰ In China, the term “procuratorate” is usually used to describe the function served by the “prosecutor” in a common law system. See Jingjing Liu, *China’s Procuratorate in Environmental Civil Enforcement: Practice, Challenges & Implications for China’s Environmental Governance*, 13 VT. J. ENVTL. L. 41, 43–47 (2011) (giving an overview of China’s procuratorate system). This article uses “prosecution office” when referring to procuratorate so as to clarify the meaning for English-speaking readers.

¹¹ See *Jian Cha Ji Guan Ti Qi Gong Yi Su Song Shi Dian Fang An* (检察机关提起公益诉讼试点方案) [*Pilot Program for Procuratorial Organs to Initiate Public Interest Litigation*], PROCURATORIAL DAILY (July 3, 2015), http://www.spp.gov.cn/zd gz/201507/t20150703_100706.shtml.

¹² Chris Hilson, *Climate Change Litigation in the UK: An Explanatory Approach (Or Bringing Grievance Back In)*, in CLIMATE CHANGE: LA RIPOSTA DEL DIRITTO, (F. Fracchia & M. Occhiena eds., Editoriale Scientifica 2010), 421, 422–23.

change implications.¹³ For example, China's economy largely depends on coal usage, and coal is not only a major contributor to China's air pollution but also the main source of the country's greenhouse gas ("GHG") emissions.¹⁴ This means that any litigation over the control of coal usage will inevitably have an impact on climate change by indirectly increasing or reducing GHG emissions. Looking to the consequences of a lawsuit, therefore, does not necessarily help to define climate change litigation as a separate category.

Instead, when we talk about climate change litigation as a separate and identifiable category, it makes more sense to identify some common features among these suits. David Markell and J.B. Ruhl define climate change litigation as "[a]ny piece of federal, state, tribal, or local administrative or judicial litigation in which the tribunal decisions directly and expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts."¹⁵ This definition is widely accepted by other scholars.¹⁶ Its basis also avoids the mechanical difficulty of exploring the inner motivation behind a lawsuit, and instead looks to the visible judgements issued by tribunals or courts to determine whether a particular lawsuit falls within the scope of climate change litigation. Its shortcoming, however, is that it excludes litigation that raises climate change issues of fact or law at some point during proceedings which happen to occur outside of the tribunals' or courts' final judgments. Thus, though a good approach for the purpose of engaging in an empirical study, that definition is not suitable to describe climate change litigation in the Chinese context.

First, the Chinese legal system does not abide by the common law precept of *stare decisis*, and Chinese courts do not regularly publish their decisions.¹⁷ As such, the number of reported cases available in China is very limited. Also, Chinese courts do not engage in the same sort of detailed, thorough, and lengthy reasoning in their judgments as common

¹³ *Id.*

¹⁴ Matthew Kahn, *Will China Reduce Coal Consumption and Greenhouse Gas Emissions?*, KLEINMAN CENTER FOR ENERGY POLICY (June 21, 2016), <https://kleinmanenergy.upenn.edu/policy-digests/will-china-reduce-coal-consumption-and-greenhouse-gas-emissions>.

¹⁵ David Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change In The Courts: A New Jurisprudence Or Business As Usual*, 64 FLA. L. REV. 15, 27 (2012).

¹⁶ See Michael Byers et al., *The Internationalization of Climate Damages Litigation*, 7 WASH. J. ENVTL. L. & POL'Y 265, 270 (2017); Meredith Wilensky, *Climate Change In The Courts: An Assessment of Non-U.S. Climate Litigation* 1, 2 (Sabin Ctr. for Climate Change L., White Paper, 2015), https://web.law.columbia.edu/sites/default/files/microsites/climate-change/white_paper_-_climate_change_in_the_courts_-_assessment_of_non_u.s._climate_litigation.pdf.

¹⁷ Mark Jia, *Chinese Common Law? Guiding Cases and Judicial Reform*, 129 HARV. L. REV. 2213, 2215–16 (2016).

law courts do, making it difficult to classify Chinese litigation based on final court decisions. In addition, since the purpose of this paper is to evaluate the prospects for developing climate change litigation in China, it is more appropriate to define climate change litigation at the stage of initiating or filing a lawsuit.

Accordingly, this article adopts a definition of climate change litigation broader than that of Markell and Ruhl. It borrows Chris Hilson's definition of climate change litigation as including any administrative or judicial case in which the claimants or defendants include climate change elements (facts, laws, or arguments) in the framing of their claims or defenses—these elements may be the causes or impacts of climate change, or they may posit a correlation with climate change.¹⁸ This definition does not include cases that are initiated for the purpose of achieving GHG reductions in which parties frame their claims without reference to climate change elements. As mentioned above, the exclusion of such cases makes sense because unless the parties explicitly reveal their underlying intentions, it is impossible to know the real motives behind each case. This definition also does not include cases initiated without reference to climate change elements but which have the result of achieving GHG reductions, either directly or indirectly. This exclusion is warranted because the definitional scope would otherwise be too broad to effectively assess the impact of litigation on climate change regulation.¹⁹ Therefore, the definition only addresses those cases with obvious consideration of climate change elements.

Using this definition, there are currently no cases in China which qualify as climate change litigation. The following Sections will evaluate the prospects for the emergence of climate change litigation in China.

III. WHY SHOULD CHINA DEVELOP CLIMATE CHANGE LITIGATION?

As shown by Professor Michael Gerrard's statistics, China is not the only country which has failed to develop climate change litigation.²⁰ One might then ask why China should develop climate change litigation at all. Some may even suggest that it is more appropriate to address this global crisis at the international level or through legislative efforts. It is true that international and top-down national efforts are critical to tackling climate change, but climate change litigation can play an important role in the multidimensional climate change governance regime and should not be neglected. Theoretical analysis and empirical evidence from other

¹⁸ Hilson, *supra* note 12, at 422–23.

¹⁹ *See id.*

²⁰ CLIMATE CHANGE LITIGATION DATABASES, *supra* note 3.

countries also show that climate change litigation can act as a driving force to push forward climate change regulation.

A. Climate Change Regulation: A Multidimensional Governance Regime

Climate change itself is a complex problem in the sense that all countries contribute to and are affected by it to varying degrees. One nation alone cannot resolve this problem, and the world cannot use just one approach to address the problem effectively. Targeting a multifaceted problem like climate change instead requires a multidimensional legal regime.

In theory, climate change regulation can be divided into top-down and bottom-up orientations, and each orientation has multiple dimensions, as illustrated in Figure 1.

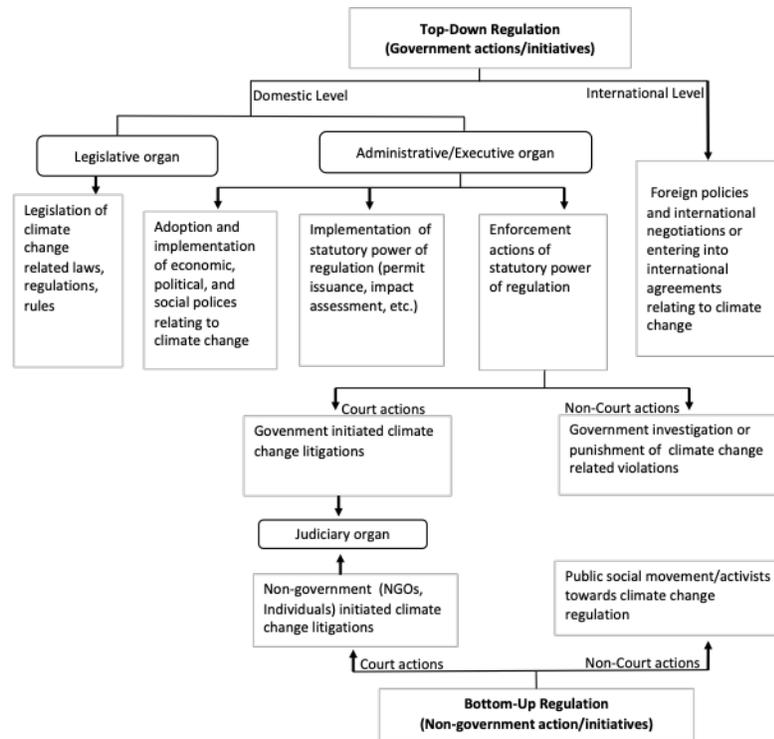
1. Top-Down Regulation

Top-down regulation mainly refers to those actions or initiatives undertaken by central or local governments.²¹ At the international level, governments can participate in international or regional negotiations and then enter into multilateral or bilateral agreements relating to climate change regulation, such as the Paris Agreement.²² At the domestic level, governments can achieve climate change regulation through the different branches of government. Legislatures enact climate change related laws that set forth the general legal framework for climate change regulation. Executive administrative agencies adopt and implement economic or social policies relating to climate change, exercise statutory powers relating to climate change regulation—such as issuing GHG emission permits, conducting environmental impact assessments relating to GHG emissions, and establishing GHG emission trading programs—and carry out enforcement actions under statutory powers. These enforcement actions may be judicial or nonjudicial: governments carry out nonjudicial enforcement actions by conducting self-initiated investigations and imposing penalties on those entities or individuals who violate statutory requirements, but they also initiate judicial proceedings to seek court-enforced remedies against climate change-related conduct.

²¹ See Peter Johnson, *Top-Down and Bottom-Up Solutions to Climate Change*, CLIMATE GENERATION BLOG (December 10, 2015), <https://www.climategen.org/blog/top-down-and-bottom-up-solutions-to-climate-change/>.

²² See Jessica F. Green et al., *A Balance of Bottom-Up and Top-Down in Linking Climate Policies*, 4 NATURE CLIMATE CHANGE 1064 (2014).

Figure 1: Climate Change Regulation Landscape: Top-Down and Bottom-Up Regulation



2. Bottom-Up Regulation

Bottom-up regulation refers to actions or initiatives taken by non-government entities or individuals.²³ Non-government actions can also be divided into judicial and nonjudicial actions. On the one hand, the public, through individual activists or non-profit organizations, can undertake different types of social movements and activities—such as public parades and demonstrations, government lobbying, and media publicity—to advocate for the adoption or improvement of climate change regulation and the abolishment or punishment of activities that worsen climate change. Although these actions outside of court usually do not have specific targets, they play a major role in enhancing public awareness of climate change issues and often indirectly push governments to enhance climate change regulation. On the other hand,

²³ See Johnson, *supra* note 21.

non-government entities or individuals can resort to the assistance of courts by initiating climate change lawsuits, which urge the court to apply or interpret climate change-related laws, regulations or rules, and pass judgment on rights and duties with respect to fact-specific climate change issues.

3. *Climate Change Litigation in the Regulatory Landscape*

As Figure 1 shows, the judiciary is at the intersection of top-down regulation and bottom-up regulation, as it addresses litigation brought by both government and non-government players. It is not difficult to recognize the regulatory effect of the top-down regulation, because governments assume a position with the necessary power and resources to enforce their regulations. But the regulatory effect of bottom-up regulation—especially climate change litigation—is often underestimated.²⁴ Though climate change litigation is not the only tool for climate change regulation and it is not as important as international treaties ratified by major GHG contributors,²⁵ it can play an important role in making sure that the whole regulatory landscape evolves and functions well. As further analyzed below, climate change litigation, if employed effectively, can even serve as a driving force for climate change regulation.

B. Climate Change Litigation: A Driving Force for Climate Change Regulation

Climate change litigation, as mentioned in the previous section, can be used by the government to engage in top-down climate change regulation and employed by non-government entities or individuals to push for bottom-up change. As Jacqueline Peel and Hari Osofsky noted in their conceptual map of regulatory pathways for climate change litigation, climate change litigation mainly serves its regulatory role through “direct pathways”—statutory interpretation, common law development, and constitutional interpretation—and “indirect pathways”—“prods and pleas,” impact on values or norms, and increasing costs for GHG emissions.²⁶ Peel and Osofsky’s conceptual regulatory map was built in the presumed context of a common law legal system where court judgments have precedential value and bind future court rulings. Also,

²⁴ Amelia Thorpe, *Tort-Based Climate Change Litigation and the Political Question Doctrine*, 24 J. LAND USE & ENVTL. L. 79, 88 (2008).

²⁵ Brian J. Preston, *Climate Change Litigation: A Conspectus*, 5 CARBON & CLIMATE L. REV. 3 (2011).

²⁶ Jacqueline Peel & Hari M. Osofsky, *Climate Change Litigation’s Regulatory Pathways: A Comparative Analysis of the United States and Australia*, 35 L. & POL’Y 150, 153–55 (2013).

the courts in a common law system have the power to interpret and build up common law rules. Since this article aims to explore the prospects for climate change litigation in China, which operates not as a common law regime but as a civil law system, it will only analyze the regulatory pathways of climate change litigation that may apply to China's legal system.

1. Statutory Application and Interpretation

Almost all courts in the world are empowered to apply and construe laws in the particular cases brought before them. Cases may be brought under existing environmental statutes to compel or constrain government regulation. The courts' application or interpretation of the relevant climate change statutes can then mandate or undermine the legal bases of the governments' regulatory powers going forward, and thus affect the governments' future climate change regulatory landscape.²⁷

To date, the majority of climate change litigation brought in Western countries like the United States and Australia has asked courts to interpret and apply statutes.²⁸ In these climate change lawsuits, courts are called upon to decide "whether and how administrative agencies must take climate change into account in decision-making under existing statutes."²⁹ Even though only a few of these cases are ultimately successful—most of these lawsuits are dismissed on procedural or substantive grounds—these cases have become a significant factor in shaping climate change regulation.³⁰ Successful cases, like the high-profile *Massachusetts v. EPA*,³¹ directly changed the future regulatory scope of a major environmental statute in the United States.³² Unsuccessful cases can also draw the public's attention to the issue of climate change.³³ Specifically, the adjudication of a case's merits, even

²⁷ *Id.* at 156.

²⁸ Markell & Ruhl, *supra* note 15, at 25.

²⁹ *Id.*

³⁰ Samvel Varvaštian, *Climate Change Litigation, Liability and Global Climate Governance—Can Judicial Policy-making Become a Game-changer?* 4–5 (May 2016) (unpublished Berlin Conference paper, *Transformative Global Climate Governance après Prais*), <https://refubium.fu-berlin.de/bitstream/handle/fub188/18585/Varvastianxclimatexchangexlitigation.pdf?sequence=1&isAllowed=y>.

³¹ 549 U.S. 497 (2007).

³² *Id.* at 532.

³³ See, e.g., INUIT CIRCUMPOLAR COUNCIL CANADA, INUIT PETITION INTER-AMERICAN COMMISSION ON HUMAN RIGHTS TO OPPOSE CLIMATE CHANGE CAUSED BY THE UNITED STATES OF AMERICA (2005), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2005/20051208_na_petition.pdf; Andrew C. Revkin, *Inuit Climate Change Petition Rejected*, N.Y. TIMES WORLD BRIEFING (Dec. 16, 2006), <https://www.nytimes.com/2006/12/16/world/americas/16briefs-inuitcomplaint.html>.

when producing an anti-regulation result, can promote “consideration of the underlying visions of right, responsibility, and social order that are adopted (or implied) by judicial decisions.”³⁴ In addition, when courts justify case dismissals by pointing to the governments’ other responsibilities, they can indirectly “prod and plead” for regulatory action by other government entities.

2. Prods and Pleas

“Prods and pleas,” as defined by Benjamin Ewing and Douglas Kysar, take place when one government actor “signal[s] to other institutional actors that a given problem demands attention and action.”³⁵ In particular, when a social need is not within one government actor’s regulatory scope or capacity, that actor can still flag the seriousness or urgency of the need by inviting the appropriate government actors to resolve the problem.³⁶ For example, the U.S. Supreme Court drew Congress’s attention to the problem of asbestos litigation through its judicial decisions.³⁷ In climate change litigation, when courts feel that they have reached the boundaries of their power, they can prod and plead with the legislature or executive administrative agencies to take action, thereby “legitimat[ing] and catalyz[ing]” certain regulatory needs.³⁸

The concept of “prods and pleas” asks courts to consider the legal issues brought before them with the understanding that even if they cannot directly decide those issues, they can influence other actors capable of protecting related interests.³⁹ In a legal system like that of China where there is no clear delineation of the regulatory functions and powers of different government organs, prods and pleas can play a vital role in unifying the regulatory authorities and satisfying multidimensional regulatory needs. In particular, in many jurisdictions where there is no specific climate change law, the courts’ ability to prod and plead can serve as an effective tool to initiate government exploration of the feasibility of extending environmental regulation to climate change problems.⁴⁰

³⁴ Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 356 (2011).

³⁵ *Id.* at 354.

³⁶ *Id.*

³⁷ See, e.g., *Norfolk & W. Ry. v. Ayers*, 538 U.S. 135, 166 (2003) (recognizing that “[t]he ‘elephantine mass of asbestos cases’ lodged in state and federal courts . . . ‘defies customary judicial administration and calls for national legislation’”).

³⁸ Peel & Osofsky, *supra* note 26, at 155.

³⁹ Ewing & Kysar, *supra* note 34, at 423.

⁴⁰ Jacqueline Peel, *Issues in Climate Change Litigation*, 5 CARBON & CLIMATE L. REV. 15, 23 (2011).

3. Flow-On Regulatory Effects

Besides the courts' direct effect on changing the regulatory legal framework through their interpretation and application of statutes and the indirect effect they have on tweaking the regulatory landscape through their "prod and plead" function, climate change litigation has important flow-on regulatory effects. First, climate change litigation, if successful, sets forth remarkable legal precedents that encourage future potential climate change litigants in the jurisdiction rendering the decision and even in other jurisdictions where the courts remain silent on particular climate change issues. These cases can thus set climate change trends regionally, nationally, or even globally.⁴¹ Second, climate change litigation, no matter how successful, has flow-on influence in the climate change regulatory landscape by attracting public attention and provoking public dialogue. Increasing public discussion can also help shape the public's perception of climate change regulation.⁴² Although these regulatory effects are informal and do not mandate behavioral changes, they help change the regulatory landscape by motivating policy discussions and problem solving that may not occur otherwise.⁴³

The potential regulatory functions of climate change litigation, if employed properly, can likewise serve as an effective driving force for climate change regulation. Top-down regulation tends to be slow-moving, as governments may not timely identify regulatory loopholes or develop proper means of regulation. In contrast, bottom-up regulation can signal particular areas of concern and provide feedback to the governments regarding the effectiveness or reasonableness of top-down regulation mechanisms. Thus, since the public directly suffers from the adverse impacts of climate change and is also subject to top-down government regulation, they are in the best position to advocate for protection of rights and to challenge the government's top-down regulatory measures, if necessary.

IV. THEORETICAL PROGNOSIS OF POTENTIAL CLIMATE CHANGE LITIGATION IN CHINA

As the world's most populous country and fastest-growing economy, China has surpassed the United States as the world's largest GHG

⁴¹ Varvaštian, *supra* note 30, at 5.

⁴² JACQUELINE PEEL & HARI M. OSOFSKY, CLIMATE CHANGE LITIGATION: REGULATORY PATHWAYS TO CLEANER ENERGY, 223–24 (Cambridge University Press, 2015).

⁴³ Peel & Osofsky, *supra* note 26, at 157.

emitter.⁴⁴ It therefore has a significant role to play in global efforts to address climate change.⁴⁵ Recognizing the important role that litigation could play in the climate change regulatory landscape, this section engages in a theoretical analysis of the various avenues for pursuing climate change litigation in China and the types of claims available to plaintiffs in China.

A. Potential Forms of Climate Change Litigation in China

Climate change litigation can be categorized according to factors such as the type of plaintiff, type of defendant, objectives of the litigation, and the laws supporting the claims.⁴⁶ Since China has not yet had any climate change litigation, it is more meaningful to discuss potential avenues for litigation in terms of the type of plaintiff, as this is closely linked to the preliminary question of standing—that is, who is allowed to bring a lawsuit in front of the court or tribunal.⁴⁷ This lens helps shed light on the feasibility of three potential avenues for climate change litigation in China: (1) public interest litigation (“PIL”), which refers to lawsuits brought by environmental groups or other social group entities; (2) government enforcement litigation, which refers to lawsuits brought by government entities against other government entities, corporate entities, or individual citizens;⁴⁸ and (3) private causes of action, which are lawsuits brought by private actors (individuals, corporations, or other private entities)⁴⁹ against government defendants, other corporate entities, or individuals for infringement of certain rights.⁵⁰ These three forms of litigation have appeared in other areas of environmental law in China, even though they have not yet been used in the context of climate change.

⁴⁴ See *Each Country's Share of CO₂ Emissions*, UNION OF CONCERNED SCIENTISTS, <https://www.ucsusa.org/global-warming/science-and-impacts/science/each-country-s-share-of-co2.html#.Wsw3XE3Vw5t> (last visited March 21, 2018); John Vidal & David Adam, *China Overtakes US as World's Biggest CO₂ Emitter*, THE GUARDIAN (June 19, 2007), <https://www.theguardian.com/environment/2007/jun/19/china.usnews>.

⁴⁵ GUOYI HAN ET AL., FORES, CHINA'S CARBON EMISSION TRADING: AN OVERVIEW OF CURRENT DEVELOPMENT xiii (2012), <https://fores.se/wp-content/uploads/2013/04/WEB-FORES-China.pdf>; INTERNATIONAL ENERGY AGENCY, WORLD ENERGY OUTLOOK 2017, EXECUTIVE SUMMARY 3 (2017), <https://www.iea.org/Textbase/npsum/weo2017SUM.pdf>.

⁴⁶ Wilensky, *supra* note 16, at i.

⁴⁷ Giulio Corsi, *A Bottom-up Approach to Climate Governance: The New Wave of Climate Change Litigation*, 2–3 (ICCG Reflection No. 57, 2017), http://www.iccgov.org/wp-content/uploads/2017/10/57_Climate-change-litigation_Giulio-Corsi.pdf.

⁴⁸ Wilensky, *supra* note 16, at iii.

⁴⁹ Broadly speaking, environmental groups are also private actors, but considering that public interest litigation is different in kind from litigation between private parties and has different procedural rules, this paper singles out public interest litigation as a separate form of litigation distinct from other private rights of action.

⁵⁰ Wilensky, *supra* note 16, at iii.

As China is a civil law system with a strong emphasis on the application of statutory law, courts usually resort to statutes to determine whether they may hear specific claims. The following analysis, drawing from the experience of other environmental law cases in China, evaluates the feasibility of developing each form of climate change litigation in China.

1. Public Interest Litigation

PIL refers to lawsuits filed either to advance the cause of minority or disadvantaged groups or individuals or to raise issues of broad public concern.⁵¹ PIL is different from ordinary litigation in that it aims to protect the interests of the public or a large group of people beyond those bringing or defending the lawsuit.⁵² PIL is usually brought by environmental NGOs and has been employed to combat climate change outside of China. In the United States, the plaintiffs in the majority of these lawsuits are environmental NGOs targeting government agencies in connection with permits, rules, or environmental impact assessments.⁵³ Environmental groups in non-U.S. jurisdictions have also brought lawsuits challenging an emissions source's permits or requiring government action to reduce GHG emissions.⁵⁴ For example, a Ukrainian environmental group successfully brought an action against the environmental ministry for failing to address climate change and thereby breaching Ukraine's international obligations.⁵⁵

In China, though there has not been any PIL focusing on climate change, there have been a several instances of PIL addressing other environmental issues. China saw its first real PIL in 2009 in a suit brought by an environmental group against a private company for pollution.⁵⁶ These cases became more common in January 2015 when the revised version of the Environmental Protection Law ("EPL") went into force.⁵⁷ Since the new EPL took effect, Chinese courts at all levels have tried

⁵¹ See *About Public Interest Litigation*, PILS PROJECT, <https://www.pilsni.org/about-public-interest-litigation> (last visited Mar. 23, 2019).

⁵² See *What Is Public Interest Litigation?*, ACTION 4 JUSTICE, https://action4justice.org/q_and_a/public-interest-litigation/ (last visited Mar. 23, 2019).

⁵³ Markell & Ruhl, *supra* note 15, at 74.

⁵⁴ Wilensky, *supra* note 16, at ii, 26–27, 34.

⁵⁵ See *Environment-People-Law v. Ministry of Env'tl. Prot.*, Lviv Circuit Admin. Ct. (2009) (Ukraine).

⁵⁶ Editorial, *Eight Cases That Mattered*, CHINADIALOGUE (July 26, 2011), <https://www.chinadialogue.net/article/show/single/en/4429-Eight-cases-that-mattered>.

⁵⁷ Dimitri de Boer & Douglas Whitehead, *Opinion: The Future of Public Interest Litigation in China*, CHINADIALOGUE (Nov. 8, 2016), <https://www.chinadialogue.net/article/show/single/en/9356-Opinion-The-future-of-public-interest-litigation-in-China>.

more than fifty cases of environmental PIL.⁵⁸ This is largely due to the stronger legal basis laid out in the new EPL for PIL. The new EPL grants standing to environmental NGOs that have been registered and engaged in environmental protection activities for over five years.⁵⁹ This interpretation of the EPL received additional support from a related judicial interpretation issued by China's Supreme People's Court in January 2015, which further specified the type of eligible NGOs to bring PIL.⁶⁰

As of now, the EPL does not seem to preclude lawsuits on climate change. Article 58 of the EPL states that qualified environmental NGOs can bring lawsuits against “acts of polluting the environment or destroying ecology, which undermine the public interest.”⁶¹ Since there is strong scientific evidence that climate change has adverse impacts on the ecological system and the well-being of humans—that is, climate change undermines the public interest—there is a basis for courts to interpret Article 58 to include climate change claims raised by qualified environmental NGOs. There is, however, a potential conflict between the EPL and PRC Civil Procedure Law as revised in 2017. The Civil Procedure Law states that environmental NGOs may bring lawsuits in connection with acts that “pollute [the] environment . . . or otherwise damage the public interest,” omitting the EPL's language about “destroying ecology.”⁶² There is, therefore, some uncertainty regarding whether the court would apply this provision to a climate change claim.

Nonetheless, the PIL mechanism provided under the EPL provides what appears to be a feasible hook for environmental NGOs to bring climate change lawsuits. Most importantly, this mechanism solves the standing question, which is a common obstacle to climate change lawsuits. Without the EPL's hook, and according to the general PRC Civil Procedure Law, a plaintiff, apart from satisfying the burden of proof

⁵⁸ Zhang et al., *China's New Environmental Protection Regulatory Regime: Effects and Gaps*, 187 J. ENVTL. MGMT. 464, 466 (2017).

⁵⁹ Zhong Hua Ren Min Gong He Guo Huan Jing Bao Hu Fa (2014 Xiu Ding) (中华人民共和国环境保护法(2014修订)) [Law on Environmental Protection] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 24, 2014, effective Jan. 1, 2015), art. 58, CLI.1.223979 (PKULaw).

⁶⁰ Zui Gao Ren Min Fa Yuan Guan Yu Shen Li Huan Jing Min Shi Gong Yi Su Song An Jian Shi Shi Yong Fa Lv Ruo Gan Wen Ti De Jie Shi (最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释) [Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations] (issued by Sup. People's Ct., January 6, 2015, effective January 7, 2015), CLI.3.240914(EN) (PKULaw).

⁶¹ 2014 Law on Environmental Protection, art. 58.

⁶² Zhong Hua Ren Min Gong He Guo Min Shi Su Song Fa (中华人民共和国民事诉讼法) [P.R.C. Civil Procedure Law (2017 Revision)] (promulgated by the Standing Comm. Nat'l People's Cong., June 27, 2017, effective July 1, 2017), art. 55, CLI.1.297379(EN) (PKULaw).

for its claims, has to demonstrate a direct interest in the lawsuit it files by establishing causation and injury-in-fact,⁶³ which are usually difficult to establish in climate change claims.⁶⁴ But in PIL, environmental NGOs are given *de jure* standing when pursuing public interest goals. Therefore, PIL is a viable avenue for advancing climate change litigation in China.

2. Government Enforcement Litigation

Government enforcement litigation refers to lawsuits brought by governments against other government agencies, corporate entities, or social entities. There is climate change litigation in the form of government enforcement lawsuits in other countries, but the total number of cases is relatively small compared to other forms of litigation.⁶⁵ The few existing precedents include government-initiated lawsuits against national governments for failure to fulfill obligations under international treaties such as the Kyoto Protocol,⁶⁶ against corporate entities for providing false information when applying for renewable energy credits,⁶⁷ and individuals for violating laws in relation to the EU emissions trading system.⁶⁸

Though China uses the term “public interest litigation” to refer to government enforcement lawsuits, these actions resemble government enforcement actions in other jurisdictions. These enforcement actions usually address very serious cases of environmental pollution or other matters affecting the public interest, and the remedy sought is usually a government mandate to restore the public good in question. This means that the monetary damages that are usually available in PIL are generally not available for this type of lawsuit. For example, in a 2017 case in Jilin Province (located in northeast China), the local People’s Procuratorate, in collaboration with the local government, issued 266 proposals for certain administrative agencies to halt serious air pollution and improve

⁶³ P.R.C. Civil Procedure Law, art. 119; Zui Gao Ren Min Fa Yuan Guan Yu Shi Yong “Zhong Hua Ren Min Gong He Guo Min Shi Su Song Fa” De Jie Shi (最高人民法院关于适用《中华人民共和国民事诉讼法》的解释) [Interpretation of the Supreme People’s Court on the Application of the Civil Procedure Law of the People’s Republic of China] (promulgated by the Sup. People’s Ct., Dec. 18, 2014, effective Feb. 4, 2015), art. 91, CLI.3.242703(EN) (PKULaw).

⁶⁴ Corsi, *supra* note 47.

⁶⁵ Wilensky, *supra* note 16, at 13. There were only six enforcement cases filed by government agencies for violation of a climate change regulation or statute. *Id.*

⁶⁶ Case C-107/05, *Comm’n v. Finland*, 2006 E.C.R. I-00010; Case C-122/05, *Comm’n v. Italy*, 2006 E.C.R. I-00065; Non-Compliance Procedure of Greece under The Kyoto Protocol, CC-2007-1/Greece/EB (2008).

⁶⁷ *Clean Energy Regulator v. MT Solar Pty* [2013] FCA 205 (Austl.) (imposing penalties for providing false information in relation to the installation of solar panels and Renewable Energy Certificates).

⁶⁸ *R v. Dosanjh* [2013] EWCA 2366 (Eng.).

environmental quality in the Changbai Mountain area. After the relevant agencies acted on 199 of the proposals, the Procuratorate initiated forty-two lawsuits aimed at getting the agencies and private actors to carry out environmental remediation.⁶⁹ To avoid confusion, this chapter considers such enforcement litigation as a stand-alone category rather than a subset of PIL.

According to an implementation guideline issued by the PRC Supreme People's Court, government enforcement litigation is divided into civil action and administrative action depending on whether the defendants are government or non-government entities. Civil actions are those filed against private citizens, corporate entities (legal persons) or other entities which commit acts that harm social and public interests.⁷⁰ Administrative actions are those cases filed against a government entity that has the administrative power to implement the laws governing ecological protection and the protection of natural resources but illegally exercises its authority or fails to perform its statutory duties, thereby harming the State's or the public's interests.⁷¹

Government enforcement litigation is a viable avenue for climate change litigation, as China has successfully experimented with it in other areas of environmental protection. Specifically, China launched a pilot program to authorize the People's Procuratorate to initiate public interest lawsuits in areas including environmental and ecological protection.⁷² This pilot program eventually became a formal mechanism when it was codified into the revised 2017 PRC Civil Procedure Law, which specifies that the People's Procuratorate can initiate "public interest lawsuits" in

⁶⁹ See Cases relating to Jilin Changbai Mountain Ecological Environment and Resource Protection Public Interest Litigation, in "The Supreme People's Procuratorate Published 26 Typical Cases of Public Prosecution Trials Initiated by Procuratorial Organs", case No. 2 (June 30, 2017), http://www.spp.gov.cn/spp/zxjy/qwfb/201801/t20180131_362948.shtml.

⁷⁰ Zui Gao Ren Min Fa Yuan Guan Yu Yin Fa "Ren Min Fa Yuan Shen Li Ren Min Jian Cha Yuan Ti Qi Gong Yi Su Song An Jian Shi Dian Gong Zuo Shi Shi Ban Fa" De Tong Zhi (最高人民法院关于印发《人民法院审理人民检察院提起公益诉讼案件试点工作实施办法》的通知) [Notice of the Supreme People's Court on Issuing the Measures for the Implementation of the Pilot Program of Trial by People's Courts of Public Interest Litigation Cases Instituted by People's Procuratorates], (promulgated by the Sup. People's Ct., Feb. 25, 2016, effective Mar. 1, 2016), art. 4, CLI3.265007(EN) (PKULaw).

⁷¹ *Id.* art. 14.

⁷² Quan Guo Ren Min Dai Biao Da Hui Chang Wu Wei Yuan Hui Guan Yu Shou Quan Zui Gao Ren Min Jian Cha Yuan Zai Bu Fen Di Qu Kai Zhan Gong Yi Su Song Shi Dian Gong Zuo De Jue Ding (全国人大常委会常务委员会关于授权最高人民检察院在部分地区开展公益诉讼试点工作的决定) [Decision of the Standing Committee of the National People's Congress on Authorizing the Supreme People's Procuratorate to Launch the Pilot Program of Initiating Public Interest Actions in Certain Areas] (promulgated by the Standing Comm. of the Nat'l People's Cong., July 1, 2015, effective July 1, 2015), CLI.1.250522(EN) (PKULaw).

situations where it identifies acts that endanger the ecological environment or the protection of natural resources.⁷³

Government enforcement litigation is also a possible form of climate change litigation in China because the related procedural laws are open to the possibility of courts broadly interpreting them to cover climate change claims. As stated above, both the PRC Civil Procedure Law and the Supreme People's Court's guideline state that the People's Procuratorate can pursue lawsuits to prevent acts of endangerment to the ecological environment, to protect natural resources, or to halt illegal performance or non-performance of governmental duties in these areas.⁷⁴ Since it is possible to establish a link between acts contributing to climate change and adverse impacts on the ecological environment and natural resources, the People's Procuratorate could pursue lawsuits under this grant of power.

3. Litigation by Private Actors

Lawsuits brought by private actors, including individual citizens or other corporate or social entities, have been the dominant form of climate change litigation in other countries.⁷⁵ Private actors usually seek redress from government agencies, companies, or other private actors for infringement of their rights stemming from such sources as human rights treaties, domestic statutory provisions (e.g., tort law), or constitutional rights provisions.⁷⁶ According to Wilensky, nearly eighty percent of all non-U.S. climate change litigation has been brought by individuals (not including environmental NGOs) and industry groups, and more than ninety percent of those cases have been brought against governments.⁷⁷ In the United States, by contrast, most cases have been PIL brought by environmental NGOs against the government.⁷⁸

In China, private actors have brought two different types of lawsuits. The first is brought against government agencies for failing to act or for exceeding their authority relating to environmental protection. For example, in a 2016 case, an individual sued his local environmental

⁷³ Zhong Hua Ren Min Gong He Guo Min Shi Su Song Fa (中华人民共和国民事诉讼法) [P.R.C. Civil Procedure Law (2017 Revision)] (promulgated by the Standing Comm. Nat'l People's Cong., June 27, 2017, effective July 1, 2017), art. 55, CLI.1.297379(EN) (PKULaw).

⁷⁴ P.R.C. Civil Procedure Law, art. 55; Decision of the Standing Committee of the National People's Congress on Authorizing the Supreme People's Procuratorate to Launch the Pilot Program of Initiating Public Interest Actions in Certain Areas, CLI.1.250522(EN) (PKULaw).

⁷⁵ Wilensky, *supra* note 16, at iii.

⁷⁶ Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?* 7 *TRANSNAT'L ENVTL. L.* 37, 40 (2018).

⁷⁷ Wilensky, *supra* note 16, at 33–34.

⁷⁸ Markell & Ruhl, *supra* note 15, at 74.

protection bureau for failing to address an environmental hazard caused by his neighbor.⁷⁹ Similarly, in 2017, a private company sued a local environmental protection bureau to vacate its administrative order punishing the company for emitting air pollution while burning coal.⁸⁰ In contrast, the second category includes lawsuits brought against other individuals or private entities for harm caused by environmental pollution.⁸¹ This type of suit also includes breach of contract cases arising from misrepresenting compliance with compulsory environmental standards for transacted products.⁸²

The issue of standing may also pose challenges for private actors who wish to bring climate change lawsuits. As mentioned earlier, the PRC Civil Procedure Law requires plaintiffs to have a direct interest in the lawsuits they file and to satisfy the burden of proof for all aspects of the claim,⁸³ such as causation or injury-in-fact.⁸⁴ For example, in one environmental lawsuit, the lower court dismissed a suit brought by a group of individuals claiming that the owner of a hog farm created a stench in the neighborhood. The lower court reasoned that the plaintiffs' claim should be pursued through PIL, but the plaintiffs were not qualified environmental organizations and therefore did not have standing to bring

⁷⁹ Yang Shi Bing Yu Xin Huang Dong Zu Zi Zhi Xian Huan Jing Bao Hu Ju Bu Lv Xing Fa Ding Zhi Ze An (杨仕炳与新晃侗族自治县环境保护局不履行法定职责案) [Yang Shibing v. the Env'tl. Protection Bureau of Xinhuang Dong Autonomous Cty.], XIANG 1227 XINGCHU NO. 5, CLIC.41249216 (PKULAW) (People's Ct. of Xinhuang Dong Autonomous Cty., Hunan Province 2016).

⁸⁰ Han Chuan Shi Bai Yun Guo Ji Da Jiu Dian Guan Li You Xian Gong Si Su Han Chuan Shi Huan Jing Bao Hu Ju Chu Fa An (汉川市白云国际大酒店管理有限公司诉汉川市环境保护局处罚案) [Hanchuan Baiyun Int'l Hotel Mgmt. Co. v. Hanchuan Env'tl. Protection Bureau], E 0984 XINGCHU NO. 1, CLIC.44074057 (PKULAW) (People's Ct. of Hanchuan City of Hubei Province 2017).

⁸¹ See, e.g., Yuan Gao Yue Zhen Qi Su Bei Gao Wang Bao Hua Huan Jing Wu Ran Ze Ren Jiu Fen An (原告岳振岐诉被告王宝华环境污染责任纠纷案) [YUE Zhenqi v. WANG Baohua], LIAO 1481 MINCHU NO. 1968, CLIC.36529809 (PKULAW) (People's Ct. of Xing Cheng City 2016).

⁸² See, e.g., Gan Su Hai Tian Ding Sheng Qi Che Mao Yi Ji Tuan You Xian Gong Si Yu Zhang Chun Qing Mai Mai He Tong Jiu Fen An (甘肃海天鼎盛汽车贸易集团有限公司与张春清买卖合同纠纷案) [Gansu Haitian Dingsheng Auto Trading Group Co. v. Zhang Chunqing], GAN 04 MINZHONG NO.149, CLIC.10427599 (PKULAW) (Baiyin City Intermediate People's Ct. 2016).

⁸³ Zhong Hua Ren Min Gong He Guo Min Shi Su Song Fa (中华人民共和国民事诉讼法) [P.R.C. Civil Procedure Law (2017 Revision)] (promulgated by the Standing Comm. Nat'l People's Cong., June 27, 2017, effective July 1, 2017), art. 119, CLI.1.297379(EN) (PKULAW); Zui Gao Ren Min Fa Yuan Guan Yu Shi Yong "Zhong Hua Ren Min Gong He Guo Min Shi Su Song Fa" De Jie Shi (最高人民法院关于适用《中华人民共和国民事诉讼法》的解释) [Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China] (promulgated by the Sup. People's Ct., Dec. 18, 2014, effective Feb. 4, 2015), art. 91, CLI.3.242703(EN) (PKULAW).

⁸⁴ Corsi, *supra* note 47.

a PIL.⁸⁵ Though the appellate court reversed and held that the individuals had standing because they were directly affected by the smell from the hog farm, this case illustrates the strict approach Chinese courts may take in granting standing. And compared to plaintiffs in general environmental lawsuits, plaintiffs in climate change lawsuits face more difficulty in demonstrating that they have been directly affected by a particular defendant's GHG emissions or government agencies' inaction or improper action.⁸⁶ There is, therefore, a good chance that the challenges of establishing standing may hinder private climate change lawsuits in China.

To summarize the above Section, public interest lawsuits and government enforcement lawsuits are possible forms of climate change litigation in China, despite the uncertainty of whether courts will take an expansive approach in interpreting the relevant procedural laws. However, litigation by private actors offers less potential than PIL and government enforcement litigation since Chinese courts can be quite strict on the issue of standing.

B. Typology of Potential Climate Change Litigation Claims

After assessing the potential forms of climate change litigation in China, it is worthwhile to explore the types of claims that a plaintiff could bring. In other jurisdictions, climate change lawsuits have involved various claims, including: 1) tort-based claims using traditional theories of nuisance, negligence, or civil conspiracy; 2) claims based on fraud or misrepresentation as to the environmental attributes of goods and services in contracts or trade practices; 3) claims based on administrative law to institute judicial and merits-based review challenging government agency decisions or conduct; and 4) rights-based claims brought under constitutional law or human rights law.⁸⁷ China is a civil law country, meaning its legal system is different from other jurisdictions like the United States and Australia where most climate change lawsuits have occurred. Thus, some grounds of action available in other jurisdictions, such as constitution-based claims, are not available in China.

⁸⁵ Li Tai Ping Deng Su Yang Xiao Wei (李太平等诉杨小伟) [LI Taiping etc. v. YANG Xiaowei], Jin 04 Minzhong No. 53, CLIC.8520155 (PKULaw) (Shanxi Changzhi Intermediate People's Ct. 2016).

⁸⁶ Corsi, *supra* note 47.

⁸⁷ See Preston, *supra* note 25.

1. Statutory Claims

Following the continental civil law tradition, China's legal rules are codified and promulgated by legislative or governmental bodies that have been given lawmaking power.⁸⁸ The codified legal rules then provide the basis for judicial decisions.⁸⁹ To file a claim concerning climate change, an applicant must therefore rely on specific legislation that provides for litigation as a means of resolving the dispute in question. For climate change litigation, the alleged violation of climate change laws would constitute the most direct pathway for adjudication. China, however, does not currently have a climate change statute. This situation might change since China recently embarked on an initiative to enact a specific climate change law, as demonstrated by including a "Climate Change Response Law" as a "Research Project" in its 2016 national legislation agenda.⁹⁰ The Climate Change Department under the National Development and Reform Commission ("NDRC") circulated a first draft of the "Climate Change Response Law" in 2015 for public comment.⁹¹

The draft Climate Change Response Law reflects a primarily top-down regulatory mindset, as it mainly emphasizes the government's responsibilities with respect to climate change mitigation and adaptation. For example, it stipulates that: 1) China's central and local governments should set up a GHG emission accounting system and a climate change control responsibility evaluation system, conduct on-site inspection of GHG emitting enterprises, and establish a disclosure system for climate change information;⁹² 2) the central and local governments should take adaptation measures to prevent or reduce climate change impacts;⁹³ and 3) the government should establish a GHG reporting system to track the GHG emissions of important institutions or enterprises and a GHG emission verification system to verify the GHG emission reporting from

⁸⁸ Wang Chenguang, *Law-Making Functions of the Chinese Courts: Judicial Activism in a County of Rapid Social Changes*, 1 FRONTIERS L. CHINA, no. 4, 2006, at 527–29.

⁸⁹ Zhong Hua Ren Min Gong He Guo Min Shi Su Song Fa (中华人民共和国民事诉讼法) [P.R.C. Civil Procedure Law (2017 Revision)] (promulgated by the Standing Comm. Nat'l People's Cong., June 27, 2017, effective July 1, 2017), art. 7, CLI.1.297379(EN) (PKULaw); *Id.* art. 5 ("When trying civil cases, the people's courts must base on facts and according to the laws").

⁹⁰ P.R.C. NATIONAL DEVELOPMENT AND REFORM COMMISSION, *supra* note 6.

⁹¹ Press Release, N.D.R.C. Dep't of Climate Change, Qi Hou Si Jiu "Ying Dui Qi Hou Bian Hua Fa (Chu Gao)" Zheng Qiu Qi Ye Jie He Fei Zheng Fu Zu Zhi Yi Jian (气候司就《应对气候变化法(初稿)》征求企业界和非政府组织意见) [The Climate Division Sought Comments from Business Community and NGOs on 'Climate Change Law (Initial Draft)'] (Sept. 18, 2015), http://qhs.ndrc.gov.cn/zcfg/201509/t20150922_751777.html.

⁹² Zhong Hua Ren Min Gong He Guo Ying Dui Qi Hou Bian Hua Fa (Chu Gao) (中华人民共和国应对气候变化法(初稿)) [P.R.C. Climate Change Response Law] (first draft for comments, Sept. 16, 2017), ch. 2, available at <http://www.hbets.cn/index.php/index-view-aid-705.html>.

⁹³ *Id.* ch. 3.

institutions or enterprises.⁹⁴ Notably for our purposes, the draft Climate Change Response Law also includes a general provision for public participation, which encourages corporate entities or individuals to report climate change violations to the regulatory administrative authorities or bring a lawsuit through the courts.⁹⁵ This provision suggests that climate change litigation will be an option available to the public in the near future.

Though the draft law does not specify the forms of lawsuits available under the “public participation” provision, it seems that the most likely form arising under it will be either public interest lawsuits against government agencies for inaction or improper performance of their regulatory duties, or private litigation brought by institutions or enterprises against government agencies for harm caused by those agencies’ wrongful decisions. According to the draft Climate Change Response Law, government agencies and officials will be subject to administrative penalties (and criminal prosecution for serious violations) for failure to perform their administrative and supervisory duties specified in the Climate Change Response Law.⁹⁶ They may also be held liable for any harm caused to the institutions or enterprises within their regulatory scope.⁹⁷ The draft law does not, however, grant the public the ability to sue private actors, though it does include provisions to impose administrative penalties on GHG emitters for emissions above permitted quotas and for issuing fraudulent or misleading reports with respect to GHG emissions.⁹⁸

Of course, since China’s draft Climate Change Response Law is still on the legislative agenda, it is unclear whether China will actually adopt the specific climate change law, and, if adopted, how the law will end up addressing the issue of climate change litigation. Without a specific climate change statute in place, litigants must bring claims under other climate change related statutes, such as the PRC Environmental Protection Law and the 2015 Air Pollution Prevent and Control Law.⁹⁹

The PRC Environmental Protection Law, first adopted in 1989 (“1989 EPL”) and then revised in 2014 (“2014 EPL”), states that environmental protection encompasses all factors affecting human existence, including

⁹⁴ *Id.* arts. 18, 21.

⁹⁵ *Id.*

⁹⁶ *Id.* art. 33.

⁹⁷ *Id.*

⁹⁸ *Id.* arts. 12, 33.

⁹⁹ Zhong Hua Ren Min Gong He Guo Da Qi Wu Ran Fang Zhi Fa (中华人民共和国大气污染防治法(2015年修订)) [P.R.C. Law on Air Pollution Prevention and Control] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 29, 2015, effective Jan. 1, 2016), CLI.1.256292 (PKULaw).

air, fresh water, ocean, land, forests, and grassland.¹⁰⁰ As mentioned earlier, the 2014 EPL allows environmental NGOs to bring lawsuits for acts that pollute the environment or cause ecological damage, and this allowance seems to cover climate change. Also, the latest revision in the 2015 Air Pollution Prevention and Control Law included regulation of GHG emissions within its ambit by requiring “coordinated control” of air pollutants and GHGs.¹⁰¹ This provides potential bases for claims against the government for failure to effectively control GHG emissions. However, GHG control only appears in this single general and declaratory provision of the 2015 Air Pollution Prevention and Control Law. Also, despite requiring coordinated control of air pollutants and GHGs, the law makes it clear that GHGs are not regarded as pollutants under the statute.¹⁰² What is more, enforcement measures enumerated in the law target air pollutants without any reference to GHGs, so it is very likely that a Chinese court would adopt a narrow and restrictive approach when interpreting these statutes and thus exclude application to climate change issues.

2. Tort-Based Claims

Tort-based climate change claims have been brought in other jurisdictions, including the United States.¹⁰³ These claims have evolved from being “derided as frivolous long shots that would be shot down quickly” to being more frequently relied on by private actors seeking damages from GHG emitters.¹⁰⁴ In China, tort-based claims have become common in other environmental contexts. Under the PRC Tort Liability Law, there is a separate chapter on “Liability for Environmental Pollution.” The rules favor plaintiffs by adopting the principle of causation presumption, where the burden of proof of causation shifts to the defendants, requiring them to rebut liability and/or show that there is

¹⁰⁰ Zhong Hua Ren Min Gong He Guo Huan Jing Bao Hu Fa (2014 Xiu Ding) (中华人民共和国环境保护法(2014修订)) [Law on Environmental Protection] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 24, 2014, effective Jan. 1, 2015), art. 2, CLI.1.223979 (PKULaw); Zhong Hua Ren Min Gong He Guo Huan Jing Bao Hu Fa (1989 Nian) (中华人民共和国环境保护法 (1989年)) [P.R.C. Law on Environmental Protection] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 1989, effective Dec. 26, 1989), art. 2, CLI.1.4544 (PKULaw).

¹⁰¹ P.R.C. Law on Air Pollution Prevention and Control, art. 2.

¹⁰² *Id.*

¹⁰³ Robert F. Blomquist, *Comparative Climate Change Torts*, 46 VAL. U. L. REV. 1053, 1055–59 (2012).

¹⁰⁴ Luciano Butti, *The Tortuous Road to Liability: A Critical Survey on Climate Change Litigation in Europe and North America*, 11 SUSTAINABLE DEV. L. & POL'Y 32, 33 (2011).

no causality between the alleged act and the harmful result.¹⁰⁵ In addition, strict liability applies to environmental torts, which means that the party causing a cognizable harm will be held liable regardless of fault.¹⁰⁶

The 2014 EPL, which is regarded as the most progressive and stringent environmental protection law in China,¹⁰⁷ further states that a violator can be held liable under the PRC Tort Liability Law for any harm caused by its environmental pollution or ecological acts, with a statute of limitations of three years.¹⁰⁸ Also, the 2015 Air Pollution Prevention and Control Law gives individuals a private right of action under the PRC Tort Liability Law to sue polluters for harm caused by air pollution.¹⁰⁹ Some observers argue that since this law does not provide for tortious liability as a remedy for harm directly caused by climate change, tort liability is not available for climate change lawsuits in China.¹¹⁰ However, the 2014 revised EPL and the 2015 Air Pollution Prevention and Control Law provide possibilities for bringing tort-based claims, as both statutes have general provisions encompassing ecological destruction or GHG control.

It is still, however, uncertain whether courts will take a proactive approach to expand tort liability to GHG emissions since GHG control only appears in the general and declaratory provisions of the laws and since both laws target environmental pollution caused by pollutants not defined as including GHGs. Relatedly, the provisions on reversing the burden of proof and applying strict liability are only available for claims based on environmental pollution, which may not cover climate change claims. Therefore, efforts to bring tort-based claims in China will face the same obstacles that plaintiffs face in other jurisdictions—plaintiffs will have to establish standing¹¹¹ and causation.¹¹² Though plaintiffs in PIL can overcome the standing hurdle because the law grants them *de jure*

¹⁰⁵ Zhong Hua Ren Min Gong He Guo Qin Quan Ze Ren Fa (中华人民共和国侵权责任法) [P.R.C. Tort Liability Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010), ch. VIII, art. 66, CLI.1.125300(EN) (PKULaw).

¹⁰⁶ *Id.* art. 65 (“Where any harm is caused by environmental pollution, the polluter shall assume tort liability”).

¹⁰⁷ Zhang et al., *supra* note 58, at 464.

¹⁰⁸ Zhong Hua Ren Min Gong He Guo Huan Jing Bao Hu Fa (2014 Xiu Ding) (中华人民共和国环境保护法(2014修订)) [Law on Environmental Protection] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 24, 2014, effective Jan. 1, 2015), CLI.1.223979 (PKULaw).

¹⁰⁹ Zhong Hua Ren Min Gong He Guo Da Qi Wu Ran Fang Zhi Fa (中华人民共和国大气污染防治法(2015年修订)) [P.R.C. Law on Air Pollution Prevention and Control] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 29, 2015, effective Jan. 1, 2016), art. 125, CLI.1.256292 (PKULaw).

¹¹⁰ Blomquist, *supra* note 103, at 1066.

¹¹¹ Butti, *supra* note 104, at 33.

¹¹² David A. Grossman, *Tort-Based Climate Litigation*, in ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES 193, 217 (William C. G. Burns & Hari M. Osofsky eds., 2009).

standing, the plaintiffs in those lawsuits still face the problem of proving causation. And, as climate change is caused by a multiplicity of human actions and is accumulated across different generations, it is difficult to identify specific harms that may be attributed to a particular defendant.¹¹³

Currently, the draft Climate Change Response Law proposed by the Chinese government does not include tort liability but instead adopts a top-down regulatory approach to climate change issues. It is unclear whether the final Climate Change Response Law, if enacted, will retain this approach or add provisions allowing private lawsuits under tort law. If so, then tort-based claims would be made available under the Climate Change Response Law as they currently are in both the 2014 EPL and the 2015 Air Pollution Prevention and Control Law. Otherwise, the absence of tort liability in the final Climate Change Response Law will be yet another a factor discouraging the courts from ruling on tort-based claims in the climate change context.

3. Rights-Based Claims

There is also a growing trend of rights-based claims in climate change lawsuits in other jurisdictions, especially after the landmark case of *Ashgar Leghari v. Federation of Pakistan*.¹¹⁴ In that case, a Pakistani court ruled in favor of the plaintiff in a public interest lawsuit in September 2015, holding that the national government's inadequate implementation of the country's National Climate Change Policy 2012 violated the citizen plaintiff's fundamental rights safeguarded by Pakistan's 1973 Constitution.¹¹⁵ China's constitutional law at first glance seems to present a similar opportunity. Though the Constitution of the People's Republic of China is silent on climate change, it does have a general provision (Article 26) which includes a duty of the State to protect the environment: "The State protects and improves the environment in which people live and the ecological environment. It prevents and controls pollution and other public hazards. The State organizes and encourages afforestation and the protection of forests."¹¹⁶ But while there are good prospects for the growth of rights-based litigation in some jurisdictions (including Pakistan, the Philippines, and South Africa),¹¹⁷ this Section argues that rights-based litigation, deriving from either the Constitution or international treaties, is an unlikely prospect in China.

¹¹³ Butti, *supra* note 104, at 33.

¹¹⁴ *Ashgar Leghari v. Federation of Pakistan*, (2015) W.P. No. 25501/2015 (Pak.)

¹¹⁵ Peel & Osofsky, *supra* note 76, at 52–55, 62–63.

¹¹⁶ XIANFA art. 26 (1982).

¹¹⁷ Peel & Osofsky, *supra* note 76, at 62, 66.

First, constitutional rights are not enforceable rights in China, meaning that the public cannot bring lawsuits on constitutional grounds. In theory, the Chinese Constitution, enacted by the National People's Congress, which is in principle the supreme body of state power, sets out the fundamental guiding principles under which China is governed and its laws are enacted.¹¹⁸ However, in practice, the Chinese Constitution has been viewed as a static and primarily hortatory and nominal political document; the provisions are largely empty promises instead of legally binding norms.¹¹⁹ Scholars have criticized the Constitution's "theoretical supremacy" as having little impact on the public since the judicial branch is not allowed to directly rely on constitutional provisions to decide cases.¹²⁰ Also, though courts can apply ordinary statutes, they do not have the power to review the constitutionality of those statutes.¹²¹ In short, the Constitution may play an important role in China's governance and regulation, especially by influencing the legislative process under its guiding principles,¹²² but it cannot be used as a legal basis for a climate change lawsuit in a Chinese court.

Second, it would be difficult to derive rights-based claims from the human rights provisions in international treaties to which China is a signatory. China's Constitution is silent on the issue of whether Chinese courts can directly apply international treaties. Some key statutes, such as the PRC General Principles of the Civil Law and the PRC Civil Procedure Law, do have provisions stipulating that a court should apply the provisions of an international treaty acceded to by China when there is a conflict between the treaty and China's domestic laws. These provisions are, however, limited to disputes involving foreign elements,¹²³ while there is no definitive answer as to whether a Chinese court can directly apply international treaties in domestic disputes, especially when there is

¹¹⁸ XIANFA pmb. (1982).

¹¹⁹ Thomas E. Kellogg, *Constitutionalism with Chinese Characteristics? Constitutional Development and Civil Litigation in China*, 7 INT'L J. CONST. L. 215, 216–17 (2009).

¹²⁰ ALBERT CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 89 (2d ed., Hong Kong Univ. Press 1999).

¹²¹ *Id.*

¹²² Yan Lin & Tom Ginsburg, *Constitutional Interpretation in Lawmaking: China's Invisible Constitutional Enforcement Mechanism*, 63 AM. J. COMP. L. 467, 467 (2015).

¹²³ Zhong Hua Ren Min Gong He Guo Min Fa Tong Ze (2009 Xiu Zheng) (中华人民共和国民法通则(2009修正)) [General Principles Of the Civil Law Of the People's Republic Of China (2009 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2009), art. 142, CLI.1.167199(EN) (PKULaw); Zhong Hua Ren Min Gong He Guo Min Shi Su Song Fa (中华人民共和国民事诉讼法) [P.R.C. Civil Procedure Law (2017 Revision)] (promulgated by the Standing Comm. Nat'l People's Cong., June 27, 2017, effective July 1, 2017), art. 260, CLI.1.297379(EN) (PKULaw).

a potential conflict between the treaty and domestic law.¹²⁴ In theory, Chinese law treats international treaties as a source of law that courts can apply. In practice, it is unlikely that a court would directly apply an international treaty if it is in conflict with Chinese constitutional law or a key statute enacted by the Standing Committee of the National People's Congress.¹²⁵ What a court may do is decline to apply domestic law that conflicts with an international treaty.¹²⁶ Applying this to climate change litigation, though plaintiffs may conceivably argue that the failure of the government to implement certain measures to address climate change violates human rights as enshrined in the international human rights treaties that China has ratified, it is unlikely that such arguments would be accepted by a court, especially considering the Chinese government's history of denying allegations about its human rights record.¹²⁷

Therefore, it seems that the prospect of bringing rights-based claims in China, whether based on constitutional law or international human rights treaties, is not promising. Instead, to summarize, the most likely avenues for climate change litigation in China are those premised on enforcement of specific climate change laws. The Chinese legal system is code based and the courts are most comfortable interpreting, applying, and operating under specific statutes.¹²⁸

V. ASSESSMENT OF THE PROSPECTS OF CLIMATE CHANGE LITIGATION IN CHINA

Having considered various pathways for climate change litigation in China, this section turns to consider a variety of factors that are likely to obstruct or facilitate the emergence of climate change litigation in China. Such factors have to be considered in light of the fact that the legal culture in China is not as strong as that in the United States or Australia. Further, apart from the laws on the books, there are socioeconomic and political factors affecting the potential for climate change litigation in China. This section begins with discussion of the hurdles that stand in the way of

¹²⁴ Chen Xin, *Guo Ji Ren Quan Gong Yue Zai Zhong Guo De Shi Yong* (国际人权公约在中国的适用) [*Application of International Human Right Treaties in China*], CHINA L. NETWORK, <http://www.iolaw.org.cn/showNews.aspx?id=1036> (last visited May 4, 2018).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *She Ping: Ren Quan Shi Shen Me De Zheng Lun Bu Neng Bei Li Chang Shi* (社评:人权是什么的争论不能背离常识) [*Editorial: Debate On Human Rights Should Not Be Against Common Sense*], GLOBAL TIMES (Apr. 12, 2009), <http://opinion.huanqiu.com/editorial/2016-04/8810141.html>; *Zhong Guo Zhi Mei Ren Quan Bao Gao Shuang Chong Biao Zhun* (中国指美人权报告双重标准) [*China Pointed Out that the United States Adopted a Dual Standard in the Human Rights Report*], BBC CHINESE (Mar. 5, 2002), http://news.bbc.co.uk/chinese/simp/hi/newsid_1850000/newsid_1855400/1855445.stm.

¹²⁸ Chenguang, *supra* note 88, at 2–3 (2006).

climate change litigation emerging in China, including the lack of judicial independence and absence of specific climate change legislation. The next part then examines the factors that may encourage the emergence of climate litigation in China, namely the growing concern among Chinese citizens of the impacts of climate change and the government's awareness of the importance of addressing climate change.

A. *Obstacles Facing Climate Change Litigation in China*

There are several key factors preventing climate change litigation from taking root in China: first and foremost, China's economic model—the “carbon economy”—hinders its adoption of climate change litigation; second, China does not have a specific statute granting Chinese citizens the option to pursue climate change litigation; third, China lacks an independent court system to take on a regulatory role through its climate change adjudications; and fourth, China lacks a litigious culture which might have pushed forward the emergence and development of climate change litigation.

1. *The “Carbon Economy” in China*

China has been the world's second-largest economy in terms of gross domestic product (“GDP”) since 2010,¹²⁹ and this growth has largely depended on the country's consumption of fossil fuels. During the years of 1985 to 2014, more than ninety-five percent of China's energy consumption came from coal, oil, and natural gas.¹³⁰ The total consumption of those three fossil fuels in 2014 was more than seven times that of 1980.¹³¹ Coal accounted for more than seventy percent of the total energy consumption every year during that period, which in turn accounted for over half of the world's total coal consumption.¹³² With its economic development heavily dependent on fossil fuel consumption, China's economy is essentially a “carbon economy,” and it has contributed nearly one-third of global energy-related carbon dioxide emissions.¹³³

The predominance of the carbon economy is a significant reason for the current lack of climate change litigation in China. Given that more

¹²⁹ See generally *World Economic Outlook Database*, INT'L MONETARY FUND (Jan. 2018), <https://www.imf.org/external/pubs/ft/weo/2017/02/weodata/index.aspx>; R.A., *Second in Line*, THE ECONOMIST, (Aug. 16, 2010), https://www.economist.com/blogs/freeexchange/2010/08/china_0.

¹³⁰ LAWRENCE BERKELEY NATIONAL LABORATORY, KEY CHINA ENERGY STATISTICS 2016 18 (2016), <https://china.lbl.gov/sites/default/files/misc/ced-9-2017-final.pdf>.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

than ninety-five percent of China's energy comes from the burning of fossil fuels, the majority of China's enterprises, including state-owned enterprises and large private companies, are emitting GHGs. If China opens the door to climate change litigation, these powerful entities would become defendants in lawsuits, detracting from their vital role in China's economic growth. From the Chinese government's perspective, allowing climate litigation to occur might open a Pandora's box and force the shift to a low-carbon economy too quickly. Moreover, this lack of control sits uneasily with the Chinese government's traditional style of governance, which would almost certainly seek to retain control of the speed and direction of the transition.

2. Lack of Specific Climate Change Legislation

As discussed above, China has not enacted a specific law that would allow the public to bring claims addressing climate change issues. Although several existing laws could be interpreted to apply to climate change issues, their specific meaning or scope of application is still vague. Most importantly, GHGs have not been listed as pollutants under PRC law. As such, existing laws may not be applicable to the control of GHGs emissions.¹³⁴ Therefore, there is uncertainty as to whether climate change lawsuits could be brought under existing statutes.

3. Lack of Independent Courts

The extent to which courts can play an effective regulatory role in climate change litigation is largely affected by the ability of the courts to issue judicial rulings that freely undertake reasoning and consider the climate change issues in their applicable legal framework. Chinese courts are, however, highly politicalized and lack the independence to set impactful precedents.¹³⁵ Their work is subject to Communist Party monitoring and control through political-legal committees at each level.¹³⁶ Also, courts in China perform their adjudicative function in a very "hierarchical structure that demands [judges'] loyalty [and

¹³⁴ Deng Haifeng, *China*, in CLIMATE CHANGE LIABILITY 133 (Richard Lord et al. eds., 2012).

¹³⁵ See Rongzhen Li, *Wo Guo Si Fa Gong Zuo De Xing Zheng Hua Qu Shi Ji Gai Ge Jian Yi* (我国司法工作的行政化趋势及改革建议) [*The Administrative Trend of Our Country's Judicial Work and Proposals for Reform*], CHINESE LAWYER no. 4, 1999, at 8-9.

¹³⁶ Phyllis L. Chang, *Deciding Disputes: Factors That Guide Chinese Courts in the Adjudication of Rural Responsibility Contract Disputes*, 52 L. & CONTEMP. PROBS. 101, 115 (1989). Political-legal committees are the functional departments of China's Communist Party. They are in charge of leading and supervising the country's judicial, procuratorial, public security, national security, and judicial administrative organs.

deference] to higher policies and directives.”¹³⁷ It is, therefore, unlikely that a Chinese court would take a proactive or innovative approach to climate change claims or issue rulings based on climate change concerns unless it was explicitly instructed to do so by the Chinese government.

4. General Cultural Resistance to Litigation

Finally, China is not a litigious country. The non-litigious nature of Chinese society is due to deep-rooted historical and social factors. Historically, Chinese society and state governance were predominantly influenced by the philosophy of Confucianism, which put a great emphasis on social roles, clan ethics, and “*li*” (ritual propriety).¹³⁸ Confucianism taught that social order was best preserved through maintenance and coordination of social relationships under the guidance of moral principles, while laws and punishment serve an ancillary role.¹³⁹ Following this belief, Chinese society developed a social practice of resorting to “*guanxi*” (social connections) to resolve disputes.¹⁴⁰ Though some scholars argue that the role of *guanxi* in contemporary China is decreasing due to the establishment of stronger and more formal legal structures and a market economy,¹⁴¹ it is undeniable that longstanding cultural resistance to litigation embedded in the *guanxi* ideology continues to influence the Chinese general public.¹⁴²

In addition, Chinese society’s perception of the government is still influenced by the historical ideology of rejecting Western notions of a limited and neutral government and favoring a paternalist state with superior authority to determine moral standards.¹⁴³ The people rely heavily on the government’s decisions and usually demonstrate deference to governmental authority.¹⁴⁴ When individuals or the public feel that

¹³⁷ Yedan Li et al., *Understanding China’s Court Mediation Surge: Insights from a Local Court*, 43 L. & SOC. INQUIRY 58, 60 (Winter 2018).

¹³⁸ Ronnie Littlejohn, *Chinese Philosophy: Overview of History*, INTERNET ENCYCLOPEDIA PHIL., <https://www.iep.utm.edu/chin-pho/#SH1b> (last visited Apr. 19, 2019); Ambrose Yeo-chi King, *Kuan-hsi and Network Building: A Sociological Interpretation*, 120 DAEDLUS, J. AM. ACAD. ARTS & SCI. 63, 73–75 (1991).

¹³⁹ Yujun Feng, *Legal Culture in China: A Comparison to Western Law*, 16 REVUE JURIDIQUE POLYNESIENNE [R.J.P.] 115, 116 (2010).

¹⁴⁰ Carol A.G. Jones, *Capitalism, Globalization and Rule of Law: An Alternative Trajectory of Legal Change in China*, 3 SOC. & LEGAL STUD. 195, 197 (1994).

¹⁴¹ See Douglas Guthrie, *The Declining Significance of Guanxi in China’s Economic Transition*, 1998 CHINA Q. 254, 255–56 (1998).

¹⁴² Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People’s Republic of China*, 19 BERKELEY J. INT’L L. 161, 222–23 (2001).

¹⁴³ *Id.* at 186, 220–21.

¹⁴⁴ *Id.*

their interests have been infringed, they tend to first bring the issue to the attention of government officials and request assistance in resolving the issue.¹⁴⁵

These factors together largely explain why China has not developed climate change litigation. Some of these obstacles, such as the lack of a specific climate change law and cultural resistance to litigation, seem to be lessening. But other factors, such as the lack of an independent court system and the dominance of the carbon economy, will continue to affect the prospects of climate change litigation in China into the foreseeable future.

B. Impetus for Climate Change Litigation in China

Though there are notable obstacles hindering China's adoption of climate change litigation, there are a number of factors reflecting the country's willingness to facilitate climate change litigation. These factors include: 1) domestic concerns relating to climate change; 2) the Chinese government's increasingly climate-sensitive stance; and 3) China's evolving legal culture.

1. China's Domestic Concerns Relating to Climate Change

As Lisa Williams has observed, China has domestic concerns relating to climate change, which will in turn drive the Chinese government to address GHG emissions.¹⁴⁶ First, the Chinese government regards China as one of the countries most vulnerable to the adverse impacts of climate change.¹⁴⁷ Second, as the world's largest total energy consumer,¹⁴⁸ China's increasing demand for energy cannot be satisfied by its domestic supply alone. Energy security through alternative energy sources has thus become attractive to the Chinese government because it is "an important strategic issue concerning China's economic growth, social stability, and national security."¹⁴⁹ Third, China has an urgent need for economic transformation, which involves adopting green-development policies and

¹⁴⁵ For example, the lay people would seek the government's help to get their unpaid salary from their employers. See e.g., *Wei Nong Min Gong Tao Xin 1.6 Yi Yuan* (为农民工讨薪1.6亿元) [Seeking Payment of 160 million Yuan for Migrant Worker], RENMIN DAILY, Jan. 19, 2018, at 13, http://paper.people.com.cn/rmrb/html/2018-01/19/nw.D110000renmrb_20180119_3-13.htm.

¹⁴⁶ WILLIAMS, *supra* note 8, at 20.

¹⁴⁷ P.R.C. STATE COUNCIL, ZHONG GUO YING DUI QI HOU BIAN HUA DE ZHENG CE YU XING DONG (2008) (中国应对气候变化的政策与行动(2008)) [CHINA'S POLICIES AND ACTIONS FOR ADDRESSING CLIMATE CHANGE (2008)] (Oct. 2008), <http://www.ccchina.org.cn/Detail.aspx?newsId=28091&Tid=60>.

¹⁴⁸ DAVID SHAMBAUGH, CHINA'S FUTURE 93 (Polity Press 2016).

¹⁴⁹ ØYSTEIN TUNSJØ, SECURITY AND PROFIT IN CHINA'S ENERGY POLICY: HEDGING AGAINST RISK 118 (Colum. U. Press 2013).

indirectly reducing GHG emissions. The green-growth path provides an opportunity for China to rebalance economic growth and environmental protection.¹⁵⁰ Fourth, China views its international image, namely how the international community regards China's role on the world stage, as important to its economic success and growth.¹⁵¹ As such, the Chinese government has always emphasized that it is a responsible government, and, to maintain this image, it must address climate change.¹⁵²

These domestic concerns provide an impetus for the Chinese government to adopt a more pro-regulatory stance toward climate change and to employ climate change litigation as a means of climate change regulation. As China undertakes its transformation from a carbon-dominated economic model, the obstacles created by hydrocarbon reliance will likely decrease.

2. Chinese Government's Growing Climate-Sensitive Stance on Climate Change

China has been accused in the past of not fulfilling its responsibilities to reduce GHG emissions and of obstructing international efforts to control climate change.¹⁵³ In response, China has undertaken substantial efforts to improve and enhance its climate change regulation and has demonstrated an increasingly climate-sensitive stance. First, China has incorporated climate change into the country's strategic goals for economic and social development. For example, in 2007 China included "emphasis on GHG control" in its national Eleventh Five-Year Plan ("FYP") (2006–2010)¹⁵⁴ for economy and social development.¹⁵⁵ The

¹⁵⁰ OECD, CHINA IN FOCUS: LESSONS AND CHALLENGES i, x (2012), <https://www.oecd.org/china/50011051.pdf>.

¹⁵¹ *Id.*

¹⁵² *Ying Dui Quan Qiu Qi Hou Bian Hua, Zhong Guo Shi Fu Ze Ren Guo Jia* (应对全球气候变化, 中国是负责任国家) [*Response to Climate Change: China Is A Responsible Country*], CHINA DAILY (Nov. 16, 2017), <http://www.ccchina.org.cn/Detail.aspx?newsId=8720&TId=57>; P.R.C. STATE COUNCIL, *supra* note 148.

¹⁵³ WILLIAMS, *supra* note 8, at 1.

¹⁵⁴ *Zhong Guo Li Ci Wu Nian Gui Hua* (中国历次五年规划) [*List of China's Five-Year Plans*], COMMUNIST PARTY NEWS, <http://dangshi.people.com.cn/GB/151935/204121/> (last visited May 4, 2018). The FYPs are shaped by China's Communist Party through the plenary sessions of the Central Committee and approved by National People's Congress, and they are regarded as the most authoritative national guidelines for the whole country's economic and social development. See Oliver Melton, Testimony for the U.S.-China Economic and Security Review Commission, China's Five-Year Planning System: Implications for the Reform Agenda 2–3 (April 22, 2015), <https://www.uscc.gov/sites/default/files/Melton%20-%20Written%20Testimony.pdf>.

¹⁵⁵ P.R.C. STATE COUNCIL, ZHONG GUO GUO MIN JING JI HE SHE HUI FA ZHAN DI SHI YI GE WU NIAN GUI HUA (中国国民经济和社会发展第十一个五年规划纲要) [P.R.C. 11TH FIVE-YEAR PLAN FOR THE DEVELOPMENT OF NATIONAL ECONOMY AND SOCIAL DEVELOPMENT], ch. 24 (2005), <http://ghs.ndrc.gov.cn/zttp/ghjd/quanwen/>.

Twelfth FYP (2011–2015), released March 2011, also named green and low-carbon development as an important guiding policy and set binding targets to reduce CO₂ emissions by seventeen percent per each unit of GDP.¹⁵⁶ The Thirteenth FYP, promulgated in March 2016, includes a separate chapter on “actively responding to global climate change,” which aims to achieve GHG control in the key industries of electricity, steel, construction, and chemicals, and to promote low hydrocarbon reliance in energy, construction, transportation, and other high GHG-emitting industries.¹⁵⁷ In June 2007, China also issued its first national plan addressing climate change—China’s National Climate Change Program (“2007 National Program”)¹⁵⁸— which was the first national plan on climate change issued by a developing country.¹⁵⁹

Second, the Chinese government has paid great attention to institutional development of climate change administration. As early as 1990, China set up a National Coordination Group on Climate Change, which was restructured in 1998 as the National Coordination Group on Climate Change Response Strategies.¹⁶⁰ In June 2007, China established a National Leading Committee on Climate Change (the “Leading Committee”), led by the prime minister and twenty heads of ministries and government departments.¹⁶¹ In 2008, the Department of Climate Change was created, which analyzes the impact of climate change and

¹⁵⁶ ZHONG GUO GUO MIN JING JI HE SHE HUI FA ZHAN DI SHI ER GE WU NIAN GUI HUA GANG YAO (中国国民经济和社会发展第十二个五年规划纲要) [PRC 12TH FIVE-YEAR PLAN FOR THE DEVELOPMENT OF NATIONAL ECONOMY AND SOCIAL DEVELOPMENT], ch. 3 (2011), http://www.gov.cn/2011lh/content_1825838_2.htm.

¹⁵⁷ P.R.C. STATE COUNCIL, ZHONG HUE REN MIN GONG HE GUO GUO MIN JING JI HE SHE HUI FA ZHAN DI SHI SAN GE WU NIAN GUI HUA GANG YAO (中华人民共和国国民经济和社会发展第十三个五年规划纲要) [OUTLINE FOR P.R.C. 13TH FIVE-YEAR-PLAN FOR THE DEVELOPMENT OF NATIONAL ECONOMY AND SOCIAL DEVELOPMENT] ch. 46 (2016), http://www.npc.gov.cn/wxzl/gongbao/2016-07/08/content_1993756.htm.

¹⁵⁸ P.R.C. STATE COUNCIL, GUO WU YUAN GUAN YU YIN FA ZHONG GUO YING DUI QI HOU BIAN HUA GUO JIA FANG AN DE TONG ZHI (国务院关于印发中国应对气候变化国家方案的通知) [NOTICE OF THE STATE COUNCIL ON PRINTING AND DISTRIBUTING CHINA’S NATIONAL PLAN ON CLIMATE CHANGE] (2007); *translated in China’s National Climate Change Program* (2007), <http://www.china-un.org/eng/chinaandun/economicdevelopment/climatechange/t626117.htm>.

¹⁵⁹ Haifeng, *supra* note 134, at 116.

¹⁶⁰ SECOND NATIONAL COMMUNICATION ON CLIMATE CHANGE OF THE PEOPLE’S REPUBLIC OF CHINA (Nov 8., 2012), <http://unfccc.int/resource/docs/natc/chnnc2e.pdf>.

¹⁶¹ P.R.C. STATE COUNCIL, GUO WU YUAN GUAN YU CHENG LI GUO JIA YING DUI QI HOU BIAN HUA JI JIE NENG JIAN PAI GONG ZUO LING DAO XIAO ZU DE TONG ZHI (国务院关于印发成立国家应对气候变化及节能减排工作领导小组的通知) [NOTICE OF THE STATE COUNCIL ON ESTABLISHING A NATIONAL LEADING COMMITTEE ON CLIMATE CHANGE, ENERGY SAVING AND EMISSION REDUCTION] (2007), <http://fgcx.bjcourt.gov.cn:4601/law?fn=chl357s249.txt>.

develops and coordinates important strategies, plans, and systems relating to climate change.¹⁶²

Third, China has continuously undertaken reform to improve the country's policy and legal frameworks in relation to climate change.¹⁶³ China has established an extensive set of top-down laws and policies related to environmental protection,¹⁶⁴ though it does not currently have a statute specifically addressing climate change. In recent years, however, China has made attempts to enact such a law. As discussed above, China included a "Climate Change Response Law" as a "Research Project" in its 2016 national legislation agenda, and it released the first draft of a "Climate Change Response Law" in 2015 for public comment. The draft climate change law, which includes a provision allowing the public to bring lawsuits on climate change issues, signals the government's changing attitude toward climate change litigation. These efforts undertaken by the Chinese government to enhance climate change controls parallel the expanse of climate change litigation throughout the world.

In particular, this legislative initiative on a specific climate change law shows that climate change litigation will at least not be restricted or prohibited *per se* in China. Nevertheless, since climate change litigation would involve bottom-up regulation mainly driven by private actors, and will therefore be more difficult for the government to control, it is uncertain whether the Chinese government will open the door to climate change litigation.

3. China's Evolving Social-Cultural-Legal Context

As mentioned earlier, China's lack of a litigious culture, and the public's general disfavor of litigation as a means of resolution, presents an obstacle for developing climate change litigation in China. However, despite the fact that the Chinese public still favors non-adversarial means of dispute resolution (such as mediation or conciliation), there is a recent trend showing that traditional attitudes toward law and the courts are changing.¹⁶⁵ Though China only saw its first environmental PIL in 2009, it has witnessed the growth this type of suit since then. Indeed, Chinese courts have tried more than fifty environmental public interest cases since

¹⁶² DA QI HUAN JING SI (大气环境司) [ABOUT DEPARTMENT OF CLIMATE CHANGE], P.R.C. NAT'L DEV. & REFORM COMMISSION, <http://m.mee.gov.cn/dqhjgls/> (last visited May 4, 2018).

¹⁶³ Haifeng, *supra* note 134, at 113.

¹⁶⁴ Alex Wang, *Green Litigation in China Today*, CHINADIALOGUE (Jun. 18, 2011), <https://www.chinadialogue.net/article/show/single/en/4413-Green-litigation-in-China-today>.

¹⁶⁵ BEE CHEN GOH, *LAW WITHOUT LAWYERS, JUSTICE WITHOUT COURTS: ON TRADITIONAL CHINESE MEDIATION* 130 (Routledge 2016).

the new EPL went into force in 2015.¹⁶⁶ This suggests that instituting climate change litigation, even if it is not regarded as the most effective means of resolving climate change disputes, would likely be employed by the Chinese public.

C. An Overall Assessment: Mixed Prospects

Generally speaking, there are notable obstacles hindering the development of climate change litigation in China. The fact that China's economy is carbon-dominated and cannot be changed in the short term may continue to discourage the Chinese government from allowing bottom-up regulation through climate change litigation. In addition, without a specific climate change statute and independent courts, there will be foreseeable difficulties for the Chinese public to bring and receive judgments on climate change claims. Also, since China's climate change regulation has mainly focused on top-down regulation from central and local governments, it is reasonable to predict that this status quo will be maintained for several years to come.

Nevertheless, given the Chinese government's domestic climate change concerns—the need to mitigate and adjust to the increasingly adverse impacts of extreme weather and the desire to transform its economic model—climate change regulation through top-down regulation without bottom-up regulation will be insufficient. In the meantime, with increasing public awareness of the seriousness and urgency of addressing climate change and the continuing flow-on influence from other jurisdictions' developments in climate change litigation, there will be increasing calls for bottom-up regulation. Without a specific climate change statute granting the public direct access to the courts for climate change claims, the chances of succeeding in attempts to file climate change lawsuits will be quite low. However, even unsuccessful attempts may have the positive flow-on effect of pushing forward the development of climate change litigation, such as the enactment of a pro-litigation specific climate change statute. As China has witnessed the blossoming of PIL in other types of environmental litigation under the new EPL, China may well have a promising future in climate change litigation with the adoption of a pro-litigation climate change statute.

¹⁶⁶ Zhang et al., *supra* note 58, at 466.

VI. PROPOSALS FOR PAVING THE WAY FOR CHINA'S CLIMATE CHANGE LITIGATION

Climate change litigation, as a bottom-up approach to climate change regulation, is an important means of regulation, which can effectively test and provide feedback on the top-down government regulation. Though Chinese law does not currently provide for climate change litigation, theoretical analysis shows that the current legal framework does not preclude its development. Potential forms and claims might even exist under current legal structures. However, due to continuing obstacles impeding potential climate change lawsuits in China, this article proposes that China should at least undertake the following reforms to encourage and facilitate the development of climate change litigation.

A. Enact a Pro-Litigation Specific Climate Change Law

China has laid the legislative groundwork for a specific climate change statute, but the current draft released by the Chinese government does not provide a path to climate change litigation. Though the draft includes a provision seemingly encouraging the public to file lawsuits in connection with climate change issues, this litigation-relevant provision has a very narrow application—the draft law only contemplates lawsuits against government agency administrative action, and does not seem to allow the targeting of private actors.¹⁶⁷ Unlike the EPL and the Air Pollution Prevent and Control Law, the draft law also does not provide environmental NGOs with standing to bring public interest claims, nor does it provide access to tort claims. This may be due to the underlying mindset of the government that climate change is not as urgent or serious as pollution, and therefore should not enjoy the same favorable rules relaxing the requirement for standing and burdens of proof. However, climate change is indeed a serious problem which needs effective regulation. Therefore, China should adopt a specific climate change law facilitating climate change lawsuits against government agencies and private actors. This law should expressly allow tort liability in climate change lawsuits, though the plaintiffs would still need to overcome the burden of proof. A specific climate change statute would be the most direct means of encouraging the public to undertake climate change litigation.

¹⁶⁷ Zhong Hua Ren Min Gong He Guo Ying Dui Qi Hou Bian Hua Fa (Chu Gao) (中华人民共和国应对气候变化法(初稿) [P.R.C. Climate Change Response Law] art. 12 (first draft for comments, Sept. 16, 2017), available at <http://www.hbets.cn/index.php/index-view-aid-705.html>.

B. Extend Government Enforcement Litigation to Climate Change Violations

Government enforcement litigation, or lawsuits brought by the government prosecuting authorities for environmental violations, has been adopted by the Chinese government as a special means of public interest environmental litigation. Though the rules include some general language which could potentially cover climate change issues, there is still great uncertainty whether the courts would actually adopt the broad interpretation required. Considering that government enforcement lawsuits play an increasingly important role in challenging other government agencies' regulatory behavior and private actors' environmental violations, this is a missed opportunity in the area of climate change. The Chinese government should expressly extend government enforcement lawsuits to climate change violations at the policy level, so that climate change lawsuits brought by government agencies enjoy the same favorable rules of standing and burden of proof.

C. Enhance Public Participation in Climate Change Regulation

As mentioned earlier, public participation in climate change regulation, either through climate change litigation or social advocacy, can serve as a driving force for bottom-up climate change regulation. Though the current legal framework presents notable obstacles to climate change litigation in China, China's experience with the development of other types of environmental litigation indicates that public involvement can increase. As the public becomes more sensitive to environmental concerns and access to the courts improves, the public will gradually become more willing to look to litigation to resolve their environment-related concerns. Currently, though the Chinese public is increasingly aware of climate change, the idea of suing GHG emitters may still seem novel. Therefore, China should first enhance publicity and increase access to information concerning other countries' developments in climate change litigation. It should also support the public's social activities or movements in advocating for climate change controls. With increasing awareness of the potential regulatory role climate change litigation can play, China will have fertile soil for developing climate change litigation.

VII. CONCLUSION

Climate change litigation has yet to take root in China. However, as this article argues, China can develop climate change litigation to effectively address the serious problem of climate change. Tackling

climate change requires a multidimensional governance regime that includes both top-down regulation from government agencies and bottom-up regulation from public participation in judicial or non-judicial activity.

Litigation can be a driving force for an effective response to climate change through the process of the courts applying and interpreting statutes, prods and pleas, and the flow-on regulatory effects of the litigation process. While exploring the regulatory role climate change litigation can play, this article has offered a theoretical prognosis of potential pathways for the emergence of climate change litigation in China. It also discussed the economic, social, historical, and cultural factors currently impeding the development of climate change litigation in China. However, considering China's domestic concerns about the risks and impacts of climate change and China's evolving legal framework and social sentiments regarding climate change and environmental litigation, climate change litigation has an opportunity to develop in China.

In light of these factors, this article proposes that China should enact a pro-litigation climate change statute, extend government enforcement litigation to climate change, and enhance public participation and education with respect to climate change regulation. Though there is still considerable uncertainty regarding the future prospects of climate change litigation in China, this article holds an optimistic view that China will gradually become receptive to climate change litigation.