

Research on the Establishment of Environment Protection Division in Chinese Court

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Abstract: The critical condition of the environment and the fact that lots of environmental disputes can't be solved effectively by means of filing lawsuit, show that Chinese judicial system hasn't fulfilled people's expectation of the functions that the environment protection should have. There are many reasons, such as the lack of judicial sources, the difficulties in producing proof by victims, the limits of the plaintiff's standing and the interregional pollution not be ruled by the territorial jurisdiction. Recently, in order to deal with the serious environmental condition, some district courts set some specialized environment protection divisions. These divisions have the broad jurisdiction including civil jurisdiction, administrative jurisdiction and criminal jurisdiction. They are also positively trying to accept public lawsuits and get some typical cases. The establishment of environmental division is the innovation of Chinese environmental judicial mechanism. However, while the environment protection divisions are getting great achievements, they also meet many difficulties such as the lack of cases, the legal crisis met by environmental public lawsuit, incompetence of the territorial jurisdiction in coping with the interregional pollution, the difficulty of fixing the environmental damages and the difficulty of the judgments implementing. On the way to pursue the specialization of environmental lawsuit, the environment courts in New Zealand, New South Wales in Australia and Memphis in the USA have done great exploration. The successful experience of these courts may be used as useful reference to promote the innovation of the Chinese environmental judicial mechanism. In order to bring into play the functions of the justice in environment protection and solve the difficulties that are met by the environment protection divisions, China should set environment courts and give them broad exclusive jurisdiction. Meanwhile, we should absorb some environmental professors to hear the cases, apply the open plaintiff system, and make some innovations in the aspects of evidence rule and judgments implementing mechanism.

Keywords: environment court, environment protection division, judicial system,
Mechanism innovation

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On the aspect of environment protection, “the state law and the international law always lag behind the development of the situation. Today, with the rapidly accelerating and expanding impact on the basis of the environment, the legal system has already been lagged far behind, the urgent need isto strengthen the existing methods which are used to prevent and solve the environment issues, and develop new methods.”¹ The setting of environment protection divisions in some district courts in China is an act for the “situation development”. What effects do these environment protection divisions have? What problems do they have? Do they suit the need of the serious environment situation entirely? The community hasn’t got any answers to these questions. This thesis will begin at analyzing the difficulties which Chinese environment judicial system meets and the reasons. Through introducing and analyzing the practice of Chinese environment protection divisions and the foreign environment courts, this paper will point out the problems that the practice of Chinese environment protection divisions has and give suggestions to the innovation of the Chinese environment judicial mechanism.

I .The difficulties that Chinese environment judicial mechanism meets and its reasons

According to the uncompleted statistics, the environment issues in China have increased over 20% every year since 1998. In recent years, the tendency developed more and more seriously that it increases 29% each year.² Report on China's 2007 Environmental Status published by Ministry of Environment Protection showed that the original State environment Protection Administration received 110 sudden environment incidents, one incident every two workdays on average. According to the statistics made by the original State environment Protection Administration, from 2002 to 2006, the average growth rate of the report because of the environment problems was 87%. Contrarily, the environment cases didn’t increase accordingly. In 2004, there were 4453 cases of environment pollution while there were only 1545 cases in 2005 and 2146 cases in 2006.³ It is estimated that the disputes which went to the courts were less than 1% of the disputes which happened actually. On the one hand, the serious environment condition needs judicial system provides legal support, and lots of acute environment disputes need to be solved through judicial proceeding in time. On the other hand, the environment problems are more and more severe, many environment cases are not within the jurisdiction of courts and many environment disputes are not solved for a long time.

The above condition shows that Chinese judicial system hasn’t fulfilled people’s expectation of the functions that the environment protection should have. There are four reasons:

Firstly, the existing environment judicial resources can’t response to the specialized environment problems. The reasons for environment pollution are very complex. After the pollutants enter into environment, they will make the physical, chemical and biological reactions such as

¹ The world environment and development committee Wang Zhijia and Ke Jinliang translate “our common future” Jilin university press 1997 version page 430-431

² Xi Jianrong “The pollution case of Kunming Yangzong sea may promote the fifth environment protection division to establish” published on “China News” Nov. 7th 2008, G03 version

³ Wu Jing “Another sword over the polluters’ head” published on “The People's Daily” May 8th 2008, 005 version

toxicological and pathological transformation, diffusion, absorption. The reaction process is also quite complex. Even the existing science and technology can't get right and complete knowledge on the influence way and the harmfulness of the harmful things.⁴ However, most of judges are lack of professional knowledge and can not solve the cases well. Nowadays, the trail of environment cases is distributed in civil division, administrative division and criminal division. It makes the limited environment judicial resources become more decentralized. There is also an absence of the lawyers who are proficient in environment problems and are familiar with environment law. The lack of the environment judicial resources is bound to influence the efficiency and fairness of the trail of environment cases.

Secondly, the difficulty of collecting evidence for victims causes the scarcity of the environment cases. For the environment tortious actions contain many complex professional knowledge, collecting the evidence of the tortuous reasons needs some relevant scientific knowledge and equipments, which the common victims don't have. For the environment damage are long-lasting, latent and widespread, it is difficult to collect evidence. In practice, the polluter are always the enterprises which get the power of economy, science and information, while the victims are always the common people who are lack of fudge ability and resistance capability. The polluters are always in a strong position, and they always take the firsthand information for the environment damage. However, they often take the excuse of business secretes to refuse to provide the information which is relevant to the pollution and damages. This brings more difficulties for collecting evidence. The difficulty of collecting evidence makes the low exception of winning the suits for victims and influences the motive of filing lawsuits.

Thirdly, the existing rules which set strict limits for the plaintiff's standing cause the environment dispute settlement mechanism unsmooth. The environment pollution is widespread that one pollution source may cause damage to hundreds of people, and watershed pollution will involve more victims. Some common victims do not dare to suit because of the lack of the capability of collecting evidence, and the others don't want to suit because of the low sense of the rights. Moreover, the procurator organ and some environment protecting communities and persons bring environment suits but without legal ground. The strict limits to the plaintiff's capability as a subject exclude many latent environment cases out of the proceedings, and this is also a disguised form of indulging the environment pollutions.

Fourthly, the existing judicial mechanism is not beneficial to the trail of pollution cases involving two or more administrative regions and two watersheds. Nowadays, the courts always hear the environment cases within the jurisdiction based on the administrative division. For the polluters often are the major tax payers, the trail of environment cases are often interfered by regional protectionism. There is phenomenon that the courts in different regions shuffle the cases onto another. This causes the disputes can't be solved for a long time. Even if the environment protection departments have the environment suit capability, they also don't have enough zeal of dealing with the cases through the judicial proceedings, because they might be found a failure to supervise if they put the pollution enterprises onto the courts. Therefore, trailing environment

⁴ Song Zongyu "Research on the civil liability of environment tort" Chongqing university press 2005 version, page 118

cases based on administrative division is not beneficial for the courts providing judicial support to the management of the cross-regional and watershed pollutions.

II. The practice of the environment protection division in China

With the serious environment condition, the innovation of the environment judicial mechanism in China becomes very urgent. Recently, the establishment of the specialized environment protection division⁵ in some district courts, which is considered as the first innovation of the Chinese environment judicial mechanism, is accepted by the theoretical circles and practical circles.⁶The first specialized environment protection division is the environment protection trial division of Guiyang Intermediate People's Court and the environment protection division of Qing Zhen people's court, set on Nov. 20th, 2007. The second is the environment protection trial division of Wuxi Intermediate People's Court, which is set in May 6th, 2008. The next one is the environment protection trial division in Kunming. It is said that some district courts in the Huaihe river and Chaohe lake basin also establish some specialized environment protection division.⁷

i .The establishment background and the jurisdiction

The establishment of the environment protection division in Guiyang aims directly at the serious situation in Guiyang that the “two lakes (Hongfeng lake, Baihua lake) and one reservoir (Aha reservoir)” are changed from “jar” into “dye vat” because of the interregional pollution, and it has threatened the drinking water security of several million people in Guiyang. The blue algae event of Taihu lake in May, 2007 directly precipitated the establishment of the environment protection division in Wuxi. The establishment of the environment protection division directly related to the Yangzong Sea pollution event which happened in October golden week. It can be said that the above four environment protection divisions are all established at the distress time.

All the above four divisions deal with the environment cases with the “three-in-one” trial type including civil trial, administrative trial and criminal trial, and they have the powers to enforce the valid judgments. Although the four divisions are set up because of water pollution events, the jurisdictions of the four divisions are not only water pollution cases but also the cases about the

⁵ Twenty years ago, the supreme people's court in hubei province put forward the idea of establishing environment protection division. At that time, the response of the supreme people's court is that environment court is different from people's court, and there is no legal basis for establishing environment protection division in grassroots courts.(see “The answer to the report of Wuhan Qiaokou people's court establishing environment division” from the supreme people's court. Recently, the environment protection circuit courts which are established by some district courts for helping the environment protection department deal with environment administrative execution problems are not the specialized environment protection divisions, therefore this paper will not discuss it.

⁶ See Chen Yuanyuan “Environment protection division expects to break down the development bottleneck”, published on “China's environment” Sep 25th 2008, 003 version Wan Exiang “The speech of Wan Exiang vice president on the opening ceremony of seminar about the judicial protection for water resources

⁷ Wan Exiang “The speech of Wan Exiang vice president on the opening ceremony of seminar about the judicial protection for water resources <http://www.sina.com.cn>, 2008-06-19.

protection of forest resources and land resources. To solve the trans-regional pollution problems, the jurisdiction of Guiyang environment protection division isn't limited in its jurisdiction. The environment protection trial division of Guiyang Intermediate People's Court can try the first instance civil and administrative cases involving the environment protection, management of the "two lakes and one reservoir" water resources and torts against the "two lakes and one reservoir" water resources out of Guiyang jurisdiction, according to the designated jurisdiction decision by the supreme court in Guizhou province. The environment protection cases in Guiyang jurisdiction are trialed first by Qing Zhen environment protection division designated by Guiyang Intermediate Court. The criminal cases with incidental civil action are also tried by Qing Zhen people's court together.

On the jurisdiction of the environment divisions, they have broader authority than the other divisions in the court. All the cases about the environment pollution are trialed by the environment division, which has broken down the traditional division of work on the civil cases, administrative cases and criminal cases. Moreover, these divisions have the executive powers to the valid judgments. Except some executions of the criminal judgments, the executive power has been the exclusive power of the executive division for a long time. Even if the intellectual property divisions and the juvenile divisions which are established before have no special execution power. It is clear that the environment divisions are given the special authority and independence that any other divisions don't have. Theoretically speaking, from the beginning of the case trial to putting the polluters into the prison, the environment division doesn't need the help of the other divisions.

In addition, another light spot of the environment division is that it has a try of the public interest lawsuit without the clear law regulations. Guiyang environment division give the standing to sue of the environment public interest lawsuit to four units including the administration of the "two lakes and one reservoir", the environment protection agency, the forestry bureau and the procuratorate. Wuxi environment protection trial division not only regulates the procuratorate and the environment protection administration have the subject qualification for the environment public interest lawsuit, but also absorb the environment protection organizations and the property management sectors in residents communities.

ii. The operation effect and the typical cases

According to statistics, there are more than sixty pollution sources at the basin of the "two lakes and one reservoir", discharging all kinds of waste water in 220 million cubic meters every year. Quite a lot of pollution sources are out of the administration jurisdiction of Guiyang. The relevant departments have invested more than one billion to manage pollution but without any effects. However, the severity of the pollution suffered by the "two lakes and one reservoir" is quite dissymmetrical to the number of the environment cases which are accepted. From 2006, the two levels courts in Guiyang have trialed seven cases in all, and all the cases are civil cases. In 2006, there are two cases are completed. From January to September in 2007, five cases were accepted and three cases are tried with a amount of 149'000 RMB involved. On the aspect of environment administrative lawsuit, the courts in the city almost didn't try one case recently. On the aspect of criminal cases, only Qing Zhen court tried a criminal case about catching aquatic

products illegally in 2007 (one case three persons).⁸

It is said that Qing Zhen environment division has tried about 90 environment protection cases in 10 months after it was founded,⁹ including no less than 32 cases which are out of Qing Zhen popedom.¹⁰ The efficiency of the two courts in Guiyang is very high. The rate of announcing the judgment at the court session gets to 90.48% from the beginning to July in 2008, and the rate of accepting the first instance judgments gets to over 90%.¹¹ It is strange that 85% of the 90 cases tried by Qing Zhen environment protection division are illegal act against forest, and the cases involved water pollution are only 5%. It is very dissymmetrical to the original intention of the foundation for water and the situation of water pollution in Guiyang.¹²

In the past 3 years, the two levels courts in Wuxi have accepted 18 environment protection lawsuits, 273 administrative review cases and 104 execution cases.¹³ According to statistics, from the foundation in May 2008 to the middle of September, the environment protection division of Wuxi court have tried 192 cases. The number of cases is far more than the number of the 181 cases¹⁴ of the courts in the whole city in the past whole year. However, most of the cases tried by the environment protection division of Wuxi court are administrative execution cases. So far, there is no report about the division accepting the environment protection public interest case or the environment criminal cases.

There are many reports about the cases tried by Guiyang environment protection division. The following are three typical cases:

(1) The trans-regional pollution cases of the Administration of the “two lakes and one reservoir” in Guiyang v. Guizhou Tianfeng Chemical Co.,Ltd. The defendant locates out of Guiyang popedom, and it stacked the phosphogypsum waste residue, which are discharged by it, near the upper stream of Hongfeng Lake in the past 10 years. On Dec.27th, 2007, the administration of the “two lakes and one reservoir” in Guiyang filed the environment public interest suit to Qing Zhen environment protection division. The division made a decision against the defendant and asked the defendant to stop using the spoil area immediately and adopt measures to exclude the hindrance of the spoil area to the environment and eliminate the danger in limited time. It is

⁸ Zhang Shiyan “Guiyang sets up environment protection division”, “Legal system life”, Nov.26th 2007, 018 version

⁹ Wang Zhiqiu “Environment protection division expects to break down the development bottleneck”, published on “People’s News”, Sep.18th 2008, 015 version

¹⁰ Shu Taifeng “Whether the environment protection division can keep a land” published on “Government legal system”, article 20, 2008, page 26-27

¹¹ Zhang Wei “Escort for establishing ecological civilization city” published on “Guiyang Daily” July 9th 2008 A03 version

¹² Wang Zhiqiu “Environment protection division expects to break down the development bottleneck”, published on “People’s News”, Sep.18th 2008, 015 version

¹³ Wu Jing “Another sword over the polluters’ head” published on “The People’s Daily” May 8th 2008, 005 version

¹⁴ Xi Jianrong “The pollution case of Kunming Yangzong sea may promote the fifth environment protection division to establish” published on “China News” Nov. 7th 2008, G03 version

reported that the defendant has performed the judgment.¹⁵This case is the first case after Qing Zhen environment protection division foundation. There are two features of the case. Firstly, the case is a trans-regional pollution case which tried and executed by court. Secondly, this case is an environment public interest lawsuit and it is also the first environment public interest lawsuit tried by common court.

(2) The case of Lang Xueyou cutting trees unlawfully. The defendant cut 29 trees owned collectively by the village from Oct. 20th to Nov. 19th, 2007. The direct economic losses are 6453.50 RMB. On Dec. 28th, 2008, Qing Zhen environment protection division found the defendant Lang Xueyou guilty of illegal logging of trees, and sentenced 2 years' imprisonment and 1000RMB fine and economic compensation loss of 6453.50 RMB. Meanwhile, the environment court found that the compensation which the defendant paid is not enough to compensate the ecological economic value damage caused by his criminal act, so the court asked the defendant to plant 145 trees at the place where the crime is committed in 90 days after the judgment took effect. This case has two obvious features. Firstly, this is the first criminal public interest suit attached with civil suit supported by the national procurator organ.¹⁶ Secondly, For the first time the court has paid attention to the ecological value of the trees and asked the defendant to plant trees to compensate the damage caused by his criminal act.

(3) The case of Guiyang People's Procuratorate v. Xiong Jinzhi, Lei Zhang and Chen Tingyu destroying vegetation. About in September in 2006, the three defendants contracted the Wugui mountain in zhulin Village, Xiaohe district to develop project of tourism and catering trade. The three defendants began the construction without declaring the program, land using formality and construction formality to any departments and caused the destroy of tortoise mountain massif damage of 2000 square meters vegetations on the mountain. The plaintiff prosecuted that the three defendants built houses and ancillary facilities without any approval from any administrative department, their actions seriously violated the Water Pollution Control Act and other related laws and regulations, therefore, the plaintiff requested the court to ask the defendants to stop ceasing the infringing act, blackout the houses built on the tortoise mountain of the Aha reservoir and recover the 2000 square meters vegetation which were damaged by them. On Nov. 26th, 2008, through the mediation by Qing Zhen environment protection division in court, the two parties reached the mediation agreement. The defendant agreed to blackout the houses built on the tortoise mountain of the Aha reservoir and recover the vegetation on the tortoise mountain in 30 days after signing the agreement.¹⁷The feature of this case is that it is an environment public interest lawsuit filed by procurator organ as a civil plaintiff. It is the first case in the whole country.

The environment protection divisions have got many achievements, but at the same time, they

¹⁵ Yan Zhijiang "We have eliminated a pollution source at the upstream of Guiyang Hongfeng lake" published on "Legal System Daily", Aug. 11th, 2008, 005 version

¹⁶ Zhang Wei "Escort for establishing ecological civilization city" published on "Guiyang Daily" July 9th 2008 A03 version

¹⁷ Yan Zhijiang "Guizhou procuratorate files the environment public lawsuit for the first time" published on "Legal System Daily", Nov. 27th, 2008, 005 version

also face some problems, such as the lack of cases, the validity danger suffered by the environment public lawsuits, the interregional pollution not be ruled by the territorial jurisdiction, the difficulty of fixing the environmental damages and the difficulty of the case implement and so on.¹⁸ It is said that other people's good quality or suggestion whereby one can remedy one's own defects. The environment courts set up by some foreign countries to solve the environment problems may provide some new thoughts for the innovation of the environment judicial mechanism in China.

III. Environment Court System of Other Countries

Currently, some countries have established environment courts, such as Australia, New Zealand, America, South Africa, Switzerland, Pakistan, Kuwait, Bangladesh etc., of which the Environment Court of New Zealand, the Land and Environment Court of New South Wales and the Environment Court of Memphis are of longer history and more mature. They will be introduced respectively as following.

i .Environment Court of New Zealand

From 1925 to 1995, at least 60 laws regulating contamination had been enacted in New Zealand, while the environmental pollution was spreading at the same time. The reason is that these laws are lack of coordination and systematic, as Geoffrey Palmer, former New Zealand Minister of Environment, said these acts are "uncoordinated and non-unified ode"¹⁹. The agencies processing environmental disputes are non-unified, and the internal organizations of these agencies are of various sorts²⁰. From the 80th of the last century, the legal system of resources and environmental management in New Zealand is going through a series reform, the most significant achievement of which is the Resource Management Act of 1991. This act, up to 400 pages, took the place of about 60 unassociated previous environment laws. It establishes a comprehensive framework to promote sustainable management of resources. This framework includes three basic subjects: (1) sustainable management, (2) effects-based management, and (3) public participation. The Resource Management Act of New Zealand is regarded as the first piece of legislation in the world designed to achieve sustainable development²¹. While New Zealand is also considered as the first country in the world definitely adopt the environmental management system based on the theory of sustainable development²².

The Environment Court of New Zealand deals with the disputes mainly according to the

¹⁸ See Shen Zhengrong and Su Faxuan "Why there is no people for the environment public lawsuit" published on "Xinhua Daily", July 3th, 2008, A06 version; Zhang Wei "Escort for establishing ecological civilization city" published on "Guiyang Daily" July 9th 2008 A03 version; Chen Yuanyuan "Environment protection division expects to break down the development bottleneck", published on "China's environment" Sep 25th 2008, 003 version; Yan Zhijiang "Environment protection division asks administrative departments to resolve differences" published on "Legal System Daily", Feb. 14th, 2008, 005 version

¹⁹ Geoffrey Palmer, 1995, *Environment: the international challenge*, Victoria University Press, p.150.

²⁰ Geoffrey Palmer, 1995, *Environment: the international challenge*, Victoria University Press, p.150.

²¹ Stephen Higgs: "Mediating Sustainability: The Public Interest Meditor in the New Zealand Environment court", *Environmental Law*, Winter, 2007, p.61.

²² Bret C. Birdsong: "Adjudicating Sustainability: New Zealand's Environment Court", *Ecology Law Quarterly*, 2002, Vol.29, p. 6.

regulation of the Resource Management Act, but the court is not the creation of the act. Its predecessor is Planning Appeal Board which established in 1953 to deal with the land-use controversy. At that time, the New Zealand Parliament sought to establish a specialized court to ensure the justice between citizens and the planning department,²³ which bring the Planning Appeal Board to real. It had the jurisdiction over land-use disputes in rural areas, residential areas, commercial areas, industrial areas and nature reserves. Because of the nature of the disputes, the scope of the review, as well as the expertise used in dealing with the affairs, the board was considered having a special status by many commentators. For instance, R.J. Bollard, retired judge of Environment Court, hold that the decisions of the Planning Appeal Board had a more far-reaching significance than those of ordinary courts, as they involves the issue of a wide range of public interest, precedent value, as well as the tremendous amount.²⁴ Although the board was officially named as the Environment Court until 1996 in the amendment of the Resource Management Act, the most power of the court comes from the delegation of Resource Management Act of 1991.

The court consists of environment judge, alternate environment judge, environment commissioner and deputy environment commissioner.²⁵

The environment judge is appointed by the Governor-General, and enjoys the life appointment. The environment commissioner needs to have the appropriate knowledge and skills in the areas associated with the environment disputes, including business, economics and local government affairs, planning and resource management, environmental science, architecture and engineering, as well as alternative dispute resolution, etc. The environment commissioner is appointed by the Governor-General, and the term is 5 years. The Environment Court is composed of environment judges and environment commissioners just to ensure it is "not only with comprehensive knowledge but also expertise" to handle the affairs it will face.²⁶ The cases are usually heard by the full court made up of 1 environment judge and 1-2 environment commissioners. While in the situation of applying warrant, it is heard by only 1 environment judge.

According to the delegation of the Resource Management Act, virtually all matters involving environmental issues are under the jurisdiction of the environment court. It has the power to make a specific legal statement,²⁷ review the administrative decisions made by local authorities,²⁸ and enforce the parties to fulfill the obligations prescribed in the Resource Management Act through civil or criminal procedure.²⁹ During the exercise of its jurisdiction, the

²³ David Sheppard: "Forty Years of Planning Appeals", Resource Mgmt. News, May/June 1995, p. 20.

²⁴ R.J. Bollard, The Important Role of Town and Country Planning Boards, N.Z. L.J. 233 (June 5, 1973).

²⁵ At present, there are 8 environment judges, 5 alternate environment judges, 15 environment commissioners, and 6 deputy environment commissioners in the court. See the website of New Zealand Environment Court: <http://www.courts.govt.nz/environment/judges-commissioners/default.asp>, 01-16-2009.

²⁶ see the Resource Management Act of New Zealand, section 253.

²⁷ see the Resource Management Act of New Zealand, section 310-313.

²⁸ see the Resource Management Act of New Zealand, section 120.

²⁹ see the Resource Management Act of New Zealand, section 314-321.

environment court has the same status and power as the ordinary trial courts,³⁰ but it is not bound by ordinary procedure and evidence rules prescribed in the law set for other courts in New Zealand.³¹ In New Zealand, the level of the Environment Court is equivalent to the District Court, and the parties against its decisions may appeal to the High Court. But the High Court will only review the legal matters of the first instance judgments,³² but leave the fact and policy matters. Such wide range of power causes the Environment Court to play a crucial role in environment protection and sustainable use of resources in New Zealand. A researcher said "Establishing the environment and resource management on the basis of sustainability and giving the specific court a wide range of power to review and make environmental policies, in trying such a kind of integrated management system, New Zealand made a ground-breaking step."³³

The prominent feature of the Environment Court is not only its extensive and exclusive jurisdiction, but also its productive mediation system. In addition to ruling, the Environment Court also encourages both parties to settle disputes through two other channels, that is judicial settlement conferences³⁴ and alternative dispute resolution (ADR). Judicial settlement conference is an important approach, which helps to identify and define issues, clarify views, and find ways to reach a consensus of both parties.³⁵ ADR includes mediation, reconciliation or other procedures useful for resolving problems before or during the course of the hearing.³⁶ Initially, the mediation procedure was hardly used. Until recent years, it has been utilized extensively and effectively, and each year there are hundreds of successful mediation cases, which usually involve significant environmental impacts.³⁷ It is noted that the mediation in Environment Court is under the auspices of the Environment Commissioner, and the parties do not have to pay additional costs. Environment Commissioner presiding over the mediation can ensure the legality of mediation agreement, and help the parties to explore and choose more sustainable agreements. The researchers believe that the mediation under Environment Commissioner contributes to the protection of public interest.³⁸

ii. Land and Environment Court of New South Wales in Australia

Before 70's of the 20th century, the environment and planning affairs in New South Wales were

³⁰ see the Resource Management Act of New Zealand, section 247 and 278.

³¹ see the Resource Management Act of New Zealand, section 269 no.1 and 2, section 276 no.1 and 2.

³² see the Resource Management Act of New Zealand, section 299.

³³ Bret C. Birdsong: "Adjudicating Sustainability: New Zealand's Environment Court", *Ecology Law Quarterly*, 2002, Vol.29, p. 70.

³⁴ see the Resource Management Act of New Zealand, section 267.

³⁵ R.J. Bollard & S.E. Wooler, *Court-Annexed Mediation and Other Related Environmental Dispute Resolution*, N.Z. L. Rev. 707, 707 (1998) at 711.

³⁶ see the Resource Management Act of New Zealand, section 268.

³⁷ From June 2004 to June 2005, the Environment Court dealt with more than 1368 cases, 350 of which the parties chose the court-annexed mediation (26% of the sum). See *Env't Court, E. 49: Report of the Registrar of the Environment Court for the 12 Months Ended 30 June 2005*, at 6 (2005). p 8.

³⁸ Stephen Higgs: "Mediating Sustainability: The Public Interest Mediator in the New Zealand Environment court", *Environmental Law*, Winter, 2007, p.61.

regulated by many laws, and many different courts and administrative division had jurisdiction over them. The jurisdiction of these institutions overlapped in many areas, causing confusion in practice. During 70's of the 20th century, a series of reforms in legislation and litigation system had been carried out in the state. The establishment of the Land and Environment Court was a part of the early reform of the environmental law in New South Wales. The significant increase of the comprehensive and specialized environmental legislation in the field of planning and environmental pollution made the establishment of a special court with specialized knowledge and skills to be necessary. The legislative information showed that the Land and Environment Court was established to "straighten out a wide range of the jurisdiction of the current courts or divisions on the land use and development, land evaluation and tax, as well as the implementation of these laws."³⁹

The Land and Environment Court was established under the delegation of Land and Environment Court Act 1979, and it replaced the former Land and Valuation Court of New South Wales and local government appeals divisions. The level of the court is inferior to the High Court of Australia and New South Wales Court of Appeal, and at the same level of the Supreme Court of the state. The Land and Environment Court consist of 5 judges and 9 illegal technical commissioners. The selection and term of the judge is same to the judges in other courts. The term of illegal technical commissioners is 7 years, and they are required to have special knowledge, experience or appropriate qualifications satisfying the Minister of Planning and Environment in the areas of local management or urban plan, environmental science, environment protection or assessment, land evaluation, construction, engineering, surveying or building construction, natural resource management and etc.

The Land and Environment Court has exclusive jurisdiction based on a large number of environmental and planning laws. It can deal with civil disputes in the field of environment and planning, review administrative decisions on the planning and construction aspects, as well as accept the criminal complaint doing harm to the environment. The judges can hear all kinds of cases, while the illegal technical commissioners can only review administrative decisions.⁴⁰ The parties against the decisions of the commissioners may appeal to the judges of the court, but the appeals are only limited to legal error, and can not point to the commissioner's value review results of administrative decisions. The parties against the judge's decisions in the Land and Environment Court can appeal to the Court of Civil Appeal of the state's Supreme Court, if the decisions are of civil aspects, while they can appeal to the Court of Criminal Appeal of the state's Supreme Court, if they are judgments in criminal matters.

The Land and Environment Court has made important contributions to the development of environmental law in New South Wales since it was set up. During the practice of nearly 30 years, the court has developed case law in a series of key areas, including the polluter-pays, serious environmental offenders sentenced to imprisonment, open proceedings in the public

³⁹ Landa, D.P.:1979, 17 April, Hansard, NSW Legislative Assembly, p.3349-3350.

⁴⁰ see M. L. Pearlman: "The Land and Environment Court of New South Wales: A Model for Environment Protection", Water, Air, and Soil Pollution, 2000, Vol123, p396.

interest litigation, cross-border pollution, and the principles of ecological sustainable development which includes the precautionary principle. For example, in the case *Environment Protection Authority v. Gardner* in 1997, the judge of the Land and Environment Court Lloyd sentenced Gardner harming the environment 12 months imprisonment and fined \$25,000.⁴¹ This is the first sentence of imprisonment in respect to the environmental crime in New South Wales. In another example, according to the provisions of Chapter 25 in the *Environmental Offences and Penalties Act 1989*, if a violation of law will cause or threaten to cause environmental damage, anyone has the right of access to the Land and Environment Court to stop the act. In the case *Brown v. Environment Protection Authority*, the plaintiff held that the permit issued to the paper mill by the defendant was invalid, for the paper mill discharged the untreated sewage directly into the river. After reviewing the explanation of the *Environmental Offences and Penalties Act*, the Land and Environment Court held that the plaintiff had standing.⁴² The Chief Judge of the Land and Environment Court M. L. Pearlman believed "a large number of legal principles developed by the court is critical to the reform of environmental law"⁴³.

On the aspect of procedure, the basic idea of the Land and Environment Court is to settle the dispute quickly and effectively through minimizing unnecessary form bound as far as possible. For example, the value review proceeding of an administrative decision does not apply evidence rules. Meanwhile, the court strives to shorten the cycle of litigation by defining controversial points before the trial, as well as the procedure of the evidence collation and service. In addition, the court also provides comprehensive mediation service, and the parties may choose a trained mediator to mediate the dispute between them.⁴⁴ In November 2002, the Land and Environment Court set up Internet-based computer system, the e-court system, for the litigants and their agents. The parties and their agents can submit petitions initiate proceedings and track the progress of litigation via internet. As a part of the e-court, the telephone conference equipment has been applied successfully. The judges and commissioners can use the system to deal with the urgent applications in proceeding or conduct litigation guidance and call pre-trial conference. M. L. Pearlman said "The Land and Environment Court is a great success, not only in terms of cost, efficiency and justice, and especially in the innovation of environmental law, which becomes a model of other states".⁴⁵ Queensland established the Planning and Environment Court in 1990, and South Australia established the Environment Court in 1993. The jurisdictions of the two courts, however, are quite different from that of the Land and Environment Court in New South Wales.

iv. Environment Court of Memphis in America

Since more than one century ago the government of Memphis had tried to control environmental

⁴¹ *Environment Protection Authority v. Gardner*: 1997, 7 November, Justice Lloyd, NSWLEC.

⁴² *Brown v Environment Protection Authority and Anor*: 1992a, 78 LGRA, 119.

⁴³ M. L. Pearlman: "The Land and Environment Court of New South Wales: A Model for Environment Protection", *Water, Air, and Soil Pollution*, 2000, Vol123, p398.

⁴⁴ see the Land and Environment Court Act, section 5a.

⁴⁵ M. L. Pearlman: "The Land and Environment Court of New South Wales: A Model for Environment Protection", *Water, Air, and Soil Pollution*, 2000, Vol123, p406.

damages through implement of the environmental code and the court's punitive measures, but this effort did not succeed. The reasons are as following: (1)The cost of breaking the law was low, while the cost of abiding by the law was relatively high.(2)The efficiency of dealing with cases in Memphis District Court was low. Usually, a case had to go through a number of courts from the beginning to the end, and the proceedings cycle was quite long.(3)Generally, the importance of these environmental cases had been covered by a large number of criminal cases piled up in the courts, thus the judges had no time to spend a lot of energy on hearing environmental cases.(4)As a result of independent functions of various departments, the implementation process of the cases was of low efficiency.⁴⁶

In 1982, more than 700 reports of attacks by rats and 44 cases of rat bites were happened in Memphis. There were thousands of illegal rubbish dumps in Memphis and Shelby in 1982. Given the severe situation, in the early 80s of last century, in order to strengthen enforcement of environmental code, Memphis began with the reform. Eventually, they learned from the model of the Indianapolis Environment Court, and established the Environment Court of Memphis. The court has the jurisdiction of the toxic waste and illegal dumping cases, as well as the cases of the rodent, sexually transmitted diseases, food contamination, construction safety, wild animals and so on.⁴⁷

The establishment of the Environment Court makes the judges to concentrate their efforts on studying environmental laws and focus on the cases of violation environmental laws. The efficiency of the court is quite high. Under normal circumstances, the cases will get into the proceedings during 1 to 2 weeks. While under emergency situations, the cases will enter the proceedings within 24 to 48 hours. The court has also developed its own jurisprudence, and innovative mechanisms actively, such as giving the defendants a reasonable time to correct the violations through on-site appearances by the judge system, enforcing the defendants to restore the environment as soon as possible through the judge remitting hefty fines. The successful operation of the Environment Court leads to the rapid improvement of the environment in Memphis.⁴⁸The court was recognized as a specialized court by American Bar Association in 1992. Nowadays, the model of the Environment Court is adopted in the other cities of the United States.

IV. The reference value of the foreign environment court system to Chinese environment judicial mechanism

Seeing the establishment background of the foreign environment courts, almost all the environment courts are set under the situation that environment problem is very serious but the traditional judicial system does not meet the reality need, so environment courts are set to try the

⁴⁶ see Larry E. Potter: "The Environment Court of Memphis, Shelby County, Tennessee: The Past, The Present, and The Future", *Georgia Law Review* Winter, 1995, Vol.29,p. 314-315.

⁴⁷ see Larry E. Potter: "The Environment Court of Memphis, Shelby County, Tennessee: The Past, The Present, and The Future", *Georgia Law Review* Winter, 1995, Vol.29,p. 316-318.

⁴⁸ see Larry E. Potter: "The Environment Court of Memphis, Shelby County, Tennessee: The Past, The Present, and The Future", *Georgia Law Review* Winter, 1995, Vol.29,p. 323.

environment case and provide judicial support to the environment protection. It can be said that the foreign environment courts, as well as Chinese environment protection divisions, are set up at the hard time. Because the political system and judicial tradition are different, there are many differences among the foreign environment courts, such as organization system, jurisdiction and operational mechanism. Although China cannot imitate some country's pattern, the following common characteristics of the foreign environment courts can give the reference value to the innovation of Chinese environment judicial mechanism.

i .Setting up the environment court and entrusting with it broad and exclusive jurisdiction

The foreign environment courts always have broad and exclusive jurisdiction, so that all the case related with environment protection, from the mouse raiding the human to the environmental pollution accident, are all under the environment court's jurisdiction. Because of the exclusive jurisdiction of the environment court, it can concentrate the environment cases which are submerged in other kinds of cases. That has strong public influence so that to display the guide and education function of the justice to the society. Because the environment courts try environment protection cases specially, they can concentrate judges who are familiar with environment law and have some professional environment knowledge, so they don't need to request all the judges who are possible to try environment cases to have related knowledge structure. It is advantageous for centralizing of the judicial resources and reducing the judicial cost.

The Chinese environment protection divisions have deal with the civil, administrative and the criminal cases which are involved in the environment protection. The scope of jurisdiction is quite broad. However, the environment protection divisions don't have the exclusive jurisdiction of the environment case, and they are only a helpless choice of the district courts in integrating the judicature resources, facing the serious environment problems. Because environment protection division's jurisdiction to environment protection cases is not clearly authorized by law, but it comes from the attribution of the court, thus the jurisdiction area of the environment protection divisions will be influenced by the transformation of the court. Therefore, the jurisdiction of the environment protection divisions and even the existence of environment protection divisions are unstable. At the same time, because of the benefit of interior division in court, many environment protection cases are possibly submerged in other cases with the other forms, which is not favor to the centralized jurisdiction to the environment protection cases; or it may make some cases which have environmental factors but not belong to environment protection cases enter into the trial procedure of environment protection division, which will affect the efficiency of environment protection division and will cause the jurisdiction confliction of between the environment protection division and other divisions. Moreover, the shift of cases among the divisions will also affect the efficiency of the case trial.

Because of the small jurisdiction of environment protection divisions and the low status, it is difficult for justice to play the function of harnessing the interregional pollution and the basin pollution in the form of environment protection division. The environment protection division tries the interregional pollution case mainly in the form of the designated jurisdiction decision from the higher court. It has no doubt to be able to guarantee the environment protection

divisions to trial some interregional pollution cases through designated jurisdiction, however, because the transmission of the cases among different divisions has wasted time, it has affected cases trial efficiency. Moreover, because of the existence of regional protectionism, some environment protection case also possibly submerged in other cases in the form of other subject matters of the cases, thus they cannot enter the trial procedure of the environment protection divisions smoothly. Therefore, designated jurisdiction is only a temporary action but not the long effective system.

Above all, we think that China should set up the environment courts, and entrust them with widespread and exclusive jurisdiction to the environment cases. The environment courts are not set up according to the administrative regionalization, and their jurisdiction area should be deterred according to the region and basin. Only this can centralize the judicial resources in the wider range, can make the professional environment case be trialed by professional environment courts effectively and fairly, and can have the stronger public influence. At the same time, it can also remove the influence of the regional protectionism, and display the function of the justice in the management of the region and the basin fully. Certainly, setting up the environment division has no legal basis now, so it needs the legislature to summarize the current practice of environment protection divisions promptly and enact the legislation about the establishment of the environment courts when the time is ripe.

Presently, the maritime courts also have jurisdiction to the cases of the pollution of sea area from the land source and the cases of the navigation waters. The key jurisdiction of the maritime courts is the cases of Bohai Sea from the land pollution source and the Yangtze River waters from the land pollution source.⁴⁹ Some experts suggested to set up the environment protection division in maritime courts.⁵⁰ We believe that it is better for the maritime courts to manage the sea pollution cases which are caused by the ships emissions, divulging, leaning drains the oil or other deleterious substances, the marine production, the work or open the ship, and the ship building work, because in the aspect of the environment protection case, the maritime courts are less professional than the environment protection divisions. Moreover, if we set the environment protection divisions in maritime courts in future, then how to coordinate the relations between the maritime courts and the environment protection divisions is also a problem.

ii. Absorbing environment expert to participate in the case trying

The environment experts are skilled in the environment profession and have the related experience. They realize environment questions profoundly. Absorbing expert to participate in the case trial can make up the deficiency of the judge's knowledge structure. The environment experts in foreign environment protection courts participate the case trial procedure directly, not only provide the advisory opinions. It is helpful for the environment experts to learn the cases comprehensively and factually, guaranteeing that the cases are trialed effectively and fairly. Moreover, because of environment expert's specialized knowledge and the skill as well as the

⁴⁹ See "Some opinions about the development of navigation trail from the supreme court"

⁵⁰ Zhou Zixun "Environment protection division suffers legal short board" published on "Environment", 2008, 09 version, page

rich experience, they play the influential role in the court's mediation procedure and in the substitution dispute solution.

About how to absorb the environment expert to participate the case trial, there are mainly three kinds of patterns: environment special commissioner pattern, juror pattern and expert Inquiry board pattern. In view of China's actual situation, we consider that the juror pattern and the expert Inquiry board pattern may be useful, and the juror pattern is better. The juror pattern uses China's jury system directly. The environment experts as the juror hear the litigants' statement and participate the case investigation directly, which is advantageous for the environment expert to learn the cases and is beneficial to enhance the trial efficiency of the cases. As for expert inquiry board pattern, because the experts will not participate the trial of cases directly, and they just learn the cases through judge's descriptions, which obviously does not favor to the effective and fair trial of the cases. Moreover, we may consider to set up the neutral environment protection experts pool. The environment protection experts evaluate the litigant's loss and the reasons, and provide the expert advice to the litigants for referring. Then, the litigants decide to choose either the lawsuit or other disputes solution way.

iv. Using the open plaintiff qualification system

As for the problem that the environment protection divisions have no enough cases to try , on one hand, it is because it is difficult to provide the proof in the environment cases, as well as people are lack of environment rights-defending awareness, and on the other hand is that the plaintiff qualification is limited strictly by the law. The environment problems are social problems, any individual and organization should be authorized to file a lawsuit to relieve their own rights and protect the public interest. If any person is authorized to file the environment lawsuit for the public welfare, it means that there are millions of eyes who stare at the polluters momentarily, so that to make them dare not to act rashly. Simultaneously, the environment protection institutions will also exercise their responsibilities positively, because polluting enterprises in their jurisdiction are sued also means their omission. So it's necessary to establish the environment public welfare lawsuit system.

Presently, only Chinese "Marine environment Protection law" has entrusted the department which exercises marine environment surveillance authority with the qualification to claim the civil injury compensation against the liable person who violates marine resource. As for the environmental pollution in other areas, there is no law to entrust the rights with any subject to file the environment protection public welfare lawsuit, but the law requests the plaintiff to have the direct relation with this case. Therefore the practice of the environment protection divisions to give some organizations such as the procurator agency, the environment protection department, the environment protection organizations the qualification to file the environment protection public welfare lawsuit is actually illegal. However, the practice of the current environment protection public welfare lawsuit has not criticized by the legal supervision institution. On the contrary, it obtains the community widespread commending and support. This shows fully that there is common sense of establishing the environment public welfare lawsuit system in China. In view of the important meaning of the environment protection public welfare lawsuit to the management environment pollution and the Chinese stern environment protection condition, the

legislature should speed up the legislative step and establish the environment protection public welfare lawsuit system as soon as possible. There are problems of the insufficient cases in the practice of the environment protection divisions, and the environment protection public welfare lawsuit is the important way to solve the problems. The environment protection public welfare lawsuit is indeed a systematic project, however, at least we should permit its existence legally first, and then practice as well as study and perfect.

iv. Carrying on the mechanism innovation positively

The foreign environment courts have the positive innovative spirit, like the electron court system in New South Wales land and environment court, the system of Memphis Environment Division's judge dealing the cases at spot, the mediation procedure of New Zealand Environment Division and so on. The positive innovation spirit of environment courts perhaps because of the characteristic of specialization and the small scale as well as the independence. Because of their specialization, they have profound realization to the involved area, having the innovation initiative. Because of the small scale and the independence, their transformation's resistance is small and the cost is low.

The environment protection divisions which are initially established in China have already displayed the positive innovative spirit in practice. For instance, the Wuxi environment protection division is trying the practice of accepting, trying and implementing a case within one day.⁵¹ The Qing Zhen environment protection division invites administrative organ to participate the mediation to solve disputes, Kunming environment protection division participate environment enforcement joint conference and so on. However, the innovation of the Chinese environment judicature system can not satisfy the practical needs. Moreover, these innovations are only the fragmentary cases, not form the system. For instance, because it is difficult for the polluter to presented evidence so they are remiss to file the lawsuit, which causes the environment protection divisions have few cases to try, it needs us to have the innovation urgently in the environment lawsuit evidence rules. We suggest to use the causal relation estimation rule in the environment lawsuit, including the indirect counter-evidence rule, the epidemic disease study rules of causation and so on, which are specially suitable for the evidentiary rules in the environment lawsuit. These evidentiary rules are widely used in the developed industrialized country's environment infringement suit. The purpose is lightening plaintiff's proof burden. Moreover, the emphasis of the environment protection cases decisions and the executions is not punishing the polluter, but is recovering the ecological environment. All the measures which are advantageous to recover the ecological environment can be used in decision and the execution. For instance, the environment protection division of Qing Zhen City judged the woods damager to plant trees is worth promoting. In practice, if the polluter is willing to take the positive effective measure to recover the damage which is caused by his illegal activity, we may consider to reduce fine and use the suspension of sentence, even reduce the prison term and so on.

⁵¹ See Zhao Zhenghui "Wuxi strengthens the environment protection" published on "People's Court News", May 7th, 2008, 001 version; Pu Minqi "The first environment protection court in Jiangsu is established" published on "China National News", May 23rd, 2008, D01 version