Exploration of the Development Path of Climate Change Litigation in China under the "Dual Carbon Goals"

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Abstract
Climate change litigation has increased significantly in recent years, and climate justice has emerged as an essential means of combating climate change. The important value of climate change litigation in the risk society is the implementation of environmental and judicial preventative functions. As a major carbon emitter, China lacks dedicated laws to address climate change. To address climate change, achieve the "double carbon" aim, and apply the "prevention-oriented" concept in environmental and resource protection law, our country's judicial organs must overcome procedural and substantive legal hurdles. To build a judicial approach to climate change litigation in China, on the basis of repairing the existing laws and regulations, adding relevant provisions on climate change, and actively promoting judicial interpretation, the existing environmental civil and administrative public interest litigation should be reintegrated into the existing legal system, repairing the blank areas and designing and reconstructing the system for pre and rebuilding of the system.

Keywords
dual carbon goals; climate change litigation; public interest remedies for ecological damage; preventive environmental public interest litigation

1.introduction

Climate change litigation began in the United States in the late 1980s, and after years of growth, it has evolved into a significant tool of global governance for addressing climate change. In the report of the 20th Party Congress, General Secretary Xi Jinping stated that "we will actively and steadily push forward carbon peaking and carbon neutrality, and actively participate in the global governance of climate change," indicating a direction for China's concrete practice in addressing climate change. With the signing of the Paris Agreement and the implementation of the objective of carbon peaking and neutrality (hereafter referred to as "dual-carbon"), research on climate change lawsuits in China has grown in recent years. Climate change litigation, as a form of social governance via judicial channels, exemplifies the "service and guarantee" role of "dynamic justice" in the context of climate change in China.

In February 2023, the Supreme People's Court issued the Opinions of the Supreme People's Court on Providing Judicial Services for the Positive and Steady Promotion of Carbon Peak and Carbon Neutrality by Completely, Accurately, and Comprehensively Carrying Out the New Development Concept (hereinafter referred to as the "Opinions"), as well as 11 typical cases of the judiciary's positive and steady promotion of carbon peak

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and carbon neutrality. The Opinions set forth detailed requirements for the judicial adjudication of climate change response cases, emphasizing the importance of adjudicating greenhouse gas emission infringement cases in accordance with the law, determining whether the causal relationship between the enterprise's emission behavior and the consequences of the damages is established in accordance with the law, and thoroughly investigating the special adjudication rules for such cases. However, in China's judicial practice, climate change litigation primarily focuses on related litigation that has an indirect impact on climate change, and no climate change litigation has yet been filed that violates carbon emission policies or regulations and directly violates environmental rights by emitting greenhouse gases. As a result, the theoretical and practical communities must urgently investigate a set of litigation processes that can not only execute and promote China's "dual-carbon" aim, but also fulfill the demands of climate change litigation.

2. Challenges and Scrutiny: Dilemmas in China's Climate Change Litigation

On January 4, 2021, the Supreme People's Court issued the "Specification on Types of Environmental Resource Cases and Statistics (for Trial Implementation)", which clarifies that climate change litigation is a specialized type of case, implying that the resolution of climate change disputes in China now has the support of judicial organs. However, accurately speaking, China's climate change litigation is still in its early stages, and has only realized the initial establishment of the system and the initial completion of the rules, and still faces many challenges under the preventive perspective and the "dual carbon" goal, which can be mainly summarized in the following three aspects: the extension and connotation of air pollutants, These are described as follows: the scope and meaning of air pollutants, the precautionary principle, and evidence of a causal link between emissions and harm. The resolution of the above three dilemmas is related to whether the Chinese paradigm of climate change litigation can be effectively constructed and implemented, and whether China can make the transition from a participant to a rule maker in the practice of global climate governance.

2.1Investigation into Whether Greenhouse Gases are Pollutants in the Atmosphere

Global warming is expected to continue until the mid-21st century, according to the Intergovernmental Panel on Climate Change's (IPCC) Sixth Assessment Report, which was released from July 6 to August 6, 2021. The analysis examined five emission models, and under any of the model parameters, global surface temperatures would continue to climb until at least the middle of the twenty-first century. This is because mankind's cumulative greenhouse gas emissions continue to generate the greenhouse effect, and global warming remains a megatrend.

With China seeking to achieve carbon peaking by 2030 and carbon neutrality by 2060, the question of whether greenhouse gases can be managed as air pollutants has a significant impact on whether climate change litigation may be initiated. Article 2 of the People's Republic of China's Law on Prevention and Control of Air Pollution states that "air pollutants and greenhouse gases shall be controlled in a synergistic manner," but greenhouse gases are not included in the scope of air pollutants, the legal attributes of greenhouse gases have yet to be clarified, and there is a lack of operable norms for the synergistic control of air pollutants and air pollutants. Although there is considerable theoretical agreement on the synergistic man-

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agement of air pollutants and greenhouse gases, there are significant practical challenges to promoting synergistic air quality protection and climate change response. There is no legislation or case law identifying greenhouse gases as pollutants, raising concerns regarding the actionability of greenhouse gas emissions. If it is not treated appropriately, a number of issues will occur. On the one hand, it will be difficult for the judiciary to make a judgment based on the existing legal norms and find that enterprises emitting greenhouse gases in excess of the standard have violated the law; on the other hand, because the scope of the atmosphere itself includes greenhouse gases, administrative authorities will not be able to regulate greenhouse gas emissions, and the ecological and environmental protection departments do not have the authority .As a result, the administrative authorities will also encounter a dilemma, the ecological environmental protection authorities as a defendant, if the regulation of greenhouse gases does not belong to their own statutory duties to defend, it does not constitute administrative omission; if the ecological environmental protection authorities claim that the regulation of greenhouse gases belongs to administrative discretion, it can be argued that it has the power to In both circumstances, the plaintiff faces a significant legal challenge.

2.2 Lack of emphasis on the precautionary concept of risk.

The precautionary principle is an important principle in environmental law, which states that measures should be taken ahead of time to predict, analyze, and prevent environmental degradation or damage caused by environmental development and use, in order to avoid and eliminate any potential environmental damage.The principle of risk prevention primarily prevents three types of environmental risks: damage that has occurred but cannot be determined due to limitations in scientific cognition, scientific controversy that cannot predict whether the damage will occur, and new things that cannot be judged using its rule of thumb. The current state of climate change litigation in China is characterized by a disregard for the precautionary principle. The lack of attention to the precautionary principle limits the efficacy of climate change lawsuits in China.

Overall, environmental dangers are classified as “material origin,” and the level of risk is determined by the type of the pollutants themselves. The judgment of “significant risk” is relevant to both administrative and civil public interest lawsuits on climate change. The precautionary principle is directly embodied in Article 1 of the Supreme People’s Court Interpretation on Several Issues Concerning the Application of Law to the Trial of Environmental Civil Public Interest Litigation Cases; however, this judicial interpretation does not go into detail about the criteria and basis for determining “significant risk” or whether serious, irreversible, or irretrievable environmental damage is covered. Unfortunately, the court interpretation provides no further explanation of the criteria and reason for establishing “significant risk,” nor does it specify whether catastrophic, permanent, or irreparable environmental damage is included. The primary reason is that preventative environmental public interest litigation for the emergence of ecological and environmental dangers requires a high degree of likelihood, thus the determination of “significant risk” and the development of climate change litigation are inextricably linked.

In particular, in climate change civil public interest litigation, the court’s liability system for climate change continues the provisions of the Tort Liability Law, which focuses on compensation for losses such as environmental remediation costs, the purchase of Carbon P&P CERs to carry out alternative remediation, and other forms of liability. These liability mechanisms provide ex post facto remedy, but they cannot be used to

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address permanent or irreparable environmental harm. Climate change administrative public interest lawsuit seeks to hold administrative organs accountable for failing to take certain actions to address climate change. Our country can now only conduct collateral evaluation of abstract administrative acts; once changed into a specific administrative act, it becomes actionable. However, if irreversible environmental damage occurs, lawsuit is unquestionably too late.

2.3Difficulty establishing a causal relationship between emissions and harm Difficulty establishing a causal relationship between emissions and harm

Climate change litigation is divided into two categories: civil and administrative. In administrative litigation, no proof of causation is required, however in civil action, a causal relationship between a specific act of emission and the consequence of the damage must be proven. Article 1230 of the Civil Code allows for the reversal of causation in environmental tort cases, but Article 8 of the Interpretation of the Environmental Civil Public Interest Litigation states that the plaintiff must have evidence to prove prima facie that there is a causality between the damaging act and the result in order to recognize the causality. Because of the latent nature of the atmospheric environment and its specialized character, obtaining the plaintiff's initial proof of causation is especially challenging. Typically, the plaintiff can demonstrate that climate change caused some harm, but it is difficult to establish a causal link between the damage and a specific emission practice. The reason for this is that the fluctuation of climate change causes the logical link between climate change and its negative repercussions to be ambiguous, resulting in the difficulty of establishing the causal relationship needed by present legislation. Examining whether an emissions activity is indirectly responsible for climate change-related impacts involves important questions, such as how far the causal chain may be stretched.

In judicial practice, the causal relationship of the preliminary proof of responsibility for what the content of the proof, the standard of proof is what, in the environmental public interest litigation system still belongs to the legal vacuum, and unclear proof of the content of the obstacles to the effectiveness of environmental justice, it is very easy for the plaintiff's "preliminary proof" of the responsibility to become a "full proof" burden, so that the plainti.Adequate proof" burden, so that the causal link of the burden of proof unquestionably returns to the plaintiff, substantially aggravating the environmental public interest lawsuit in the plaintiff's burden of proof, is not conducive to the explanation of the facts.

3.The Changing Path of Climate Change Litigation in China

"The conservative nature of the law tells us to restrain the urge to do something new, and to treat fervent demands with calm and skepticism." Climate change litigation should emphasize the importance of risk prevention, and it should be "patched up" and polished gradually. The development of climate change litigation should choose a realistic and feasible path, which should be based on the positive interpretation of climate change provisions in existing laws and regulations, and take the real environmental protection demands as the direct service orientation, and ultimately form the Chinese paradigm of environmental litigation combining "prevention and punishment". Of course, in order to establish this paradigm, we must first grasp and validate the three difficulties listed below.

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3.1Pollutant certification of greenhouse gases

Giddens argues in The Consequences of Modernity that natural changes generated by human knowledge systems pose ecological risks. Regulatory law in the fields of ecology and the environment can already be considered "risk legislation". In the perspective of risk society, caused by human production and living behavior of greenhouse gas emissions, the global ecological risk has been apparent or potential occurrence of the characteristics of high frequency. As the adjustment of greenhouse gas emissions caused by ecological and environmental risks of climate change litigation system, greenhouse gases need to be controlled as a pollutant in order to provide the basis for legislation.Specific recommendations can be developed from the following two aspects: one is in the "air pollution prevention and control law," the greenhouse gases into the category of air pollutants, rather than listed separately, and with the existing provisions of the air pollutants for the type of control, here, we can not only clarify the jurisdiction of the subject, but also for the administrative organs of the law enforcement to provide a clear legal basis, to avoid the emergence. The administrative authorities to the lawfulness of the powers and responsibilities of the reason for "legal" circumvention; the second update of the "Comprehensive Emission Standards for Air Pollutants," a clear greenhouse gas emission standards, to provide a clear basis for emission reduction emissions behavior; and, from another perspective, the above update can also be used for the current carbon emissions trading to provide accounting support.

3.2Remediation of existing areas

China's ecological and environmental damage remedy system can handle climate change lawsuits, but the essential procedural and substantive regulations require further improvement. Climate change reasons are typically more complicated than other environmental issues, with a bigger influence on public welfare. China's climate change litigation can be explored using the existing legal structure, reducing the need for legal changes. China's climate change litigation in ecological and environmental damages within the framework of the public welfare relief system is more operational, with a smaller impact on the existing legal system. However, China's environmental and public welfare relief system law is more comprehensive, but there is still considerable space for improvement. For example, environmental protection organizations, administrative organs, and procuratorial organs are working to establish multiple relief channels between the interface of administrative and judicial power allocation, as well as checks and balances, among other issues that are contentious and yet to be resolved. As a result, we might begin by addressing the environmental harm to the public welfare assistance system.

Although China has established a "dual-carbon" "1 + N" policy system, China's legislation to deal with climate change is a decentralized legislative model, which means that some of the areas of climate change are addressed in special legislation or existing laws and regulations in the relevant provisions of the amendment. "Good law is a prerequisite for good governance," but China's present climate change legislation is still insufficient, making it difficult for climate change litigation to flourish. In this regard, the strategy to enhance the present system consists mostly of two parts. The first is to strengthen specialized legislation in certain sectors. Responding to climate change in carbon market trading, corporate environmental information disclosure, green finance, and other emerging, key areas of legislation are mostly departmental regulations and normative documents, with a relatively low legislative level, so it is appropriate to further improve the basis of the legal status of these areas of legislation in order to improve regulatory efforts.

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Second, current laws and regulations must be amended to include and alter appropriate aspects addressing climate change.Climate change affects many fields, and China already has relatively comprehensive and mature legislation on the subject, so special provisions to address climate change can be added to legislation on environmental protection, energy utilization, natural resources, and other related areas.

3.3Actively promote judicial interpretation.

Judicial interpretation is a crucial example of the judiciary's ability to play a dynamic role that promotes legislative gaps while keeping fairness and justice. Improving the public welfare relief system for ecological environmental damage is a viable path for the growth of climate change lawsuit in China, and climate litigation, as a novel kind of litigation, has epochal implications. At the moment, many countries in the international arena have already established precedents for climate litigation, and climate litigation and civil litigation have a unified legal basis, with the theoretical precedent of actual application in justice, so climate litigation research in China must keep up with international trends. In the context of dual-carbon governance, judicial participation is an essential road, and climate litigation is to encourage the government to proactively carry out climate governance in order to ensure the effective achievement of dual-carbon goals through favorable ways.

First, it is required to determine which specific lawsuit climate change litigation falls under. For example, in the previous first case of climate litigation, the court will be classified as environmental public welfare litigation cases. Deng Haifeng stated that, due to the real needs of the construction of the national climate change governance system, under the guidance of the judicial model of objective order maintenance, China's response to climate change is "most feasible at the judicial level is to establish a public interest litigation system". Through the study of judicial examples, Prof. Zhu Mingzhe believes that the judiciary implements climate policies in a large number of civil lawsuits, demonstrating that climate change lawsuits in China are primarily environmental civil public interest lawsuits, with the remainder being environmental administrative lawsuits. Second, given the high danger of climate lawsuit, the response to climate change should be oriented on prevention, so that the problem is avoided before it arises. Of course, judicial interpretation of the risk prevention principle must be clear, detailed, and improve risk identification and burden of proof distribution, as the excess of climate change special legislation necessitates the promotion of judicial interpretation to solve the damage caused by climate change.

4.conclusion

As for the exploration of ways of litigation on climate change in China, there are currently two ways in the academic community. One option is to depend on the existing legal system to limit legal changes, while the other is to focus on tackling the problem of climate change by fundamentally establishing climate change-specific laws. For the former, some scholars believe that environmental justice has always had relief and preventive characteristics, but the relief characteristics of environmental justice have a high risk, because the current climate change caused by the damage, relying only on the aftermath of the relief is insufficient to achieve the desired results, and then advocating for climate change litigation access to preventive environmental public interest litigation.This paper contends that, in accordance with China's "double carbon" goal, the future of climate change litigation should be the damage caused by climate change as the object of regulation, through compensatory liability as a means of regulation, based on specialized climate

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change laws and regulations, in the public interest, and for the purpose of specialized legislation.

The efficacy of greenhouse gas regulation is the cornerstone of the long-term growth of climate change litigation, as evidenced by the degree of ecological environment recovery and the synergy of various litigation procedures within the system. The Kunming Declaration of the World Congress on Environmental Justice was released on May 26-27, 2021, and advocates the use of diverse judicial measures related to the provisions, highlighting the importance of actively adopting preventive judicial measures, prioritizing the application of restorative judicial measures, and exploring the improvement of the public interest litigation system.

5.Actual Path of Climate Change Litigation in China

In China, the objective order maintenance model of climate justice is more often used than the subjective rights protection one. The protection and restoration of legal order is dependent on the ongoing improvement of legislative norms. When specialized legislation fits the criteria of need, practicality, and urgency, the adoption of laws like the Law on Combating Climate Change and the Law on Public Interest Litigation will surely help to safeguard and develop climate change litigation.

5.1Reintegration of the legal system and the correction of blank regions

On November 16-17, 2020, the Central Working Conference on Comprehensive Rule of Law explicitly articulated Xi Jinping's views on the rule of law. General Secretary Xi Jinping used the word "accelerate" to call for accelerating the improvement of the socialist legal system with Chinese characteristics, emphasizing the importance of actively promoting legislation in the areas of ecological civilization and risk prevention, filling in the gaps and strengthening the weak points.Fill up the gaps and compensate for the weak places. Subsequently, on July 30, 2021, the Politburo of the Central Committee said unequivocally that in order to achieve carbon neutrality and peaking in a systematic and orderly way, campaign-style carbon reduction must be corrected. This means that achieving the dual-carbon objective will need ongoing enforcement of carbon reduction rather than campaign-style enforcement. Several nations have already passed legislation to tackle climate change at the moment. Since the signing of the Paris Agreement in 2015, countries around the world have set off a climax of formulating climate-related laws, such as the German federation reducing carbon emissions year by year, at least 55% in 2030, and at least 5% in 2050 for the purpose of legislation, and enacting the Federal Act on Climate Protection in 2019; France reducing fossil fuel consumption year by year, and to 30% of the 2012 level by 2030. The legal goal is to increase new energy sources to 32% by 2030, and the Green Growth and Energy Transition Act was passed in 2015. In addition to the nations stated above, Finland, South Korea, the European Union, Denmark, Japan, and New Zealand have all passed legislation one after the other. All nations have passed domestic laws to change and include the international treaties they have signed, increasing the country's compliance capabilities. Simultaneously, they have addressed the domestic management system for tackling climate change, namely the problems of "who governs and how to govern" through law. As a major global carbon emitter, China is also facing the problem of internalizing international treaties into domestic laws, and its legislation on climate change is still in a state of legislative deficiency. In the context of the era of comprehensive rule of law, in order to strengthen China's own ability to cope with climate change, the Law of the People's Republic of China on Responding to Climate Change should be formulated, and in terms of the functional organization of management, most of the reforms in China in 2018 have already divested the function of responding to climate change from

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the National Development and Reform Commission and transferred it to the Ministry of Ecology and Environment, which has reduced a certain degree of difficulty in formulating a Law on Responding to Climate Change in China certain difficulties.

The Law on Combating Climate Change can, first and foremost, establish the method of "soft and hard law co-rule" in China. At the moment, China's greenhouse gas emission reductions are mostly based on "soft law" such as the "13th Five-Year Plan for Controlling Greenhouse Gas Emissions," which results in the reduction of greenhouse gases. The passage of the Law on Combating Climate Change, a "hard law," can turn the responsibility to reduce emissions into a legal requirement, and greenhouse gas emitters who fail to meet their commitments will be liable to the law. Second, in order to achieve the dual-carbon goal, the Law on Addressing Climate Change must be revised to align with existing laws, such as incorporating the basic requirements for addressing climate change into the Law on Environmental Protection and adapting the Laws on Pollution Prevention and Control, Natural Resource Conservation, Biodiversity Conservation, and Recycling Economy, among others. Because greenhouse gas production is mostly determined by industry, it is important to revise the Law on Prevention and Control of Air Pollution, as well as the Law on Recycling Economy, to prevent legal inconsistencies. To facilitate the realization of the dual-carbon goal, it should include, in addition to the general provisions, by-laws, and legal liabilities common to the law, notary participation, information disclosure, climate change mitigation and adaptation, environmental impact assessment, and international cooperation.

5.2The Design and Restructuring of Preventive Environmental Public Interest Litigation

Preventive relief is a future-oriented relief system distinguished by its forward-thinking and legislative nature. China's existing ecological and environmental relief system focuses on after-the-fact remedies, imposing economic fines rather than restoring natural functioning. Based on the definition of ecological and environmental problems produced by greenhouse gas-induced climate change, it is frequently difficult to restore the status quo ante, thus attention must be directed toward the development of ecological and environmental preventative relief systems. As previously stated, greenhouse gas emissions caused by climate change risk frequently have a long latent cycle, are difficult to immediately produce substantial ecological and environmental damage characteristics, require "significant risk" to establish the judgment standard, and follow the principle of risk prevention throughout the judicial process. The determination of "significant risk" should follow the serious or irreversible determination of the standard, that is, potential, uncertain ecological and environmental risks appear, and if they may cause the environmental public interest to be seriously infringed upon, or even irreversible, the right to relief can be sought through litigation. The judgment of "significant risk" should be applied not just to civil public interest litigation on climate change, but also to administrative public interest litigation on climate change.

After resolving the aforementioned issues, climate change civil public interest litigation should address the issue of a single method of responsibility. Article 1167 of the newly enacted Civil Code defines the mode of liability as "elimination of danger, exclusion of obstruction, and cessation of infringement," but this mode of liability is not prospective or preventive in nature, and it is difficult to obtain circumstantial relief for new types of climate change risks. However, such responsibility is neither forward-thinking or preventative

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in character, making it impossible to get full relief from emerging climate change hazards. At this point, the genesis of the United States of America's environmental protection injunction system should be explained, since the environmental public interest may do damage to the situation, by ordering the immediate halt of unlawful conduct of the court measures. In our nation, such measures have a comparable judicial practice; for example, the intermediate people's court of Kunming City established the "on the handling of environmental civil public interest litigation cases of a number of issues of opinions (for trial)" and obtained good results. Therefore, While relying on the United States' environmental protection injunctive system, China should also rebuild its current environmental liability system, with the preventative relief system as the primary focus of growth. Furthermore, in international proceedings, the state is frequently named as a defendant in civil public interest lawsuit on climate change, arguing that the state has failed to perform its duty of care.Scholars of administrative law and civil law in China generally believe that state compensation law has the nature of private law, so that the state can become a qualified defendant in climate change infringement litigation, as well as in climate change civil public interest litigation. However, the source of the state's obligation as a qualified defendant lacks a legal basis, and some scholars believe that the principle of national sovereign immunity adopted in China's legislation will lead to civil public interest litigation in climate change litigation; the state cannot assume civil liability for climate change due to the state duty of care. This is also a practical concern that has to be addressed.

In terms of administrative public interest litigation on climate change, it is widely acknowledged in the academic community that there is a lack of system in China's environmental administrative public interest litigation, and administrative public interest litigation on climate change, as a subset of administrative public interest litigation on the environment, faces the same issue, so I will not repeat it here. However, it is worth noting that, in the future, if the procuratorial authorities to bring as a preventive administrative public interest litigation on climate change, the scope of the case should be expanded appropriately, one of which is to clarify the scope of the preventive environmental legal system, is delineated as a preventive environmental legal system can be used as the basis for prosecution, which can greatly enhance the procuratorial authorities to focus on the greenhouse gas emissions of the industry to strengthen the awareness of risk prevention; the second is the abstract administrative action into the scope of environmental administrative public welfare litigation, abstract administrative action for unspecified subjects, once the environmental risk, the harm will far exceed the specific administrative action. In order to prevent the occurrence of abusive lawsuits, the scope of the review can be kept in line with the current "administrative reconsideration law".

Overall, climate change litigation is a good way to develop domestic policies to address climate change through judicial retrogression, and moderate dynamic justice does not overstep legislative and executive powers while no longer passively waiting for decision-making by legislative and law enforcement authorities, emphasizing justice's proper role in national governance. The consistency of the legal system can be successfully ensured by enacting the Law on Combating Climate Change and revising the relevant elements of current law. To eliminate the inherent conflict between climate change public interest litigation and existing laws and systems, a preventive environmental public interest litigation system should be explicitly established in environmental stand-alone legislation to provide a clear legal foundation for climate change litigation. As a result, from the standpoint of climate change litigation, it may optimize the efficacy of dynamic justice while also providing a new way of thinking for the implementation of the rule of law for the dual-carbon aim without jeopardizing the legal system's consistency.

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