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The Exploration of the Remedies of Environmental Infringement by Multinational Corporations: Taking China as an Example

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Abstract: Under the background of an increasing number of multinational corporations, it is noteworthy that they can bring great benefits and harm to host states at the same time. Consequently, it is necessary for host states to build up effective regulations to deal with potential risks. This essay chooses to take China as an example. As the biggest developing country in the world, how to regulate foreign investments has become an imperative issue if China wants to achieve further and sustainable development. By introducing its current legislative system and displaying cases, this essay analyzes the deficiencies of the current regulation system from legislative and judicial aspects. Based on the above analysis, this paper also attempts to explore possible solutions to make up for the weaknesses. Ultimately, the author agrees to construct a more exclusive and comprehensive legal system for MNEs in China and refine the prevailing judicial remedies. The main methods used in this paper are literature analysis and comparative analysis.

Keywords: Multinational corporation, Environmental infringement, Principle of forum non conveniens, Limited liability system, Independent legal personality.

1. Introduction

Multinational enterprises (MNEs) refer to corporations that consist of decision-making centers located in one country and more than one operating centers (with or without legal personality) located in other countries [1]. Nowadays, with the irresistible trend of economic globalization, for gaining higher profits and a broader global market, the scope of MNEs is expanded to the whole world as links between the host states and home states.

Nevertheless, due to MNEs' intrinsic tendency to pursue more profit, besides numerous economic benefits, pollution of the environment to host states is almost inevitable during the production process. According to the statistics, since the reform and opening, foreign direct investment (FDI) flows into China have increased from $11.007 billion in 1992 to $144.369 billion in 2020 [2]. Simultaneously, China scored 37.3 points in the 2020 Global Environmental Performance Index Report, ranking 120th out of more than 180 countries [3]. It illustrated that with the considerable amount of foreign investment flowing in, environmental infringement caused by MNEs has also become an increasingly important problem to China.

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An environmental tort can be demonstrated as the infringement of the public's right to property, personality, and the environment on a wide scale due to the perceived adverse effects of activities on various natural or artificially modified factors, such as the atmosphere, water, land, forests, and human monuments, resulting in a decline in the quality of the environment [4].

In conclusion, this paper will discuss the weaknesses of China's current approaches to deal with environmental infringement caused by MNEs and attempt to improve the legal system and explore effective measures.

2. Current Regulatory Basis for Environment Tort

It is more proper for host States to provide remedy mechanisms to compensate victims of corporate environmental degradation. Hence, the liability of these companies must be claimed through the judicial and administrative remedies available within national legal systems.

2.1. China's Legislative System Relevant to Environmental Problem

Compared with other countries, China has not established a thorough legislation system to regulate environmental infringements, and there is still a significant blank in the stipulations relating to the liability of MNEs for environmental abuses. Specifically speaking, China's regulation system can be divided into three layers.

2.1.1. Constitution

As the most effective code in China's legal system, the Constitution lays down the principles of environmental protection responsibility for MNEs. It reads that "any organization or individual is prohibited from appropriating or destroying natural resources by any means". It also stipulates that "Foreign enterprises and other foreign economic organizations within the territory of China, as well as Chinese-foreign joint ventures, must abide by the laws of the People's Republic of China". The upper regulations offer a reasonable foundation for setting up liabilities to MNEs when causing harm to the environment in China.

2.1.2. Laws and regulations enacted by the legislature

According to the object of regulation, the laws stipulate the behavior of MNEs from different aspects, which can be classified into three categories.

The first category is provisions in special environmental laws and regulations. For example, the Environmental Protection Law of the People's Republic of China reads that "All entities and individuals have the obligation to protect the environment". Besides, laws like the Energy Conservation Act, the Marine Environment Protection Act, and the Law on Prevention and Control of Radioactive Pollution stipulate the liabilities from different angles.

The second category is the environmental protection requirements for foreign investors in foreign investment laws and regulations. For instance, the Foreign Investment Law of the People's Republic of China regulates that "Foreign investors and foreign-invested enterprises conducting investment activities in China shall abide by Chinese laws and regulations and shall not endanger China's national security or harm the public interest". Other laws like the PRC-foreign Cooperative Joint Venture Law and the Provisional Administrative Measures for Approval of Foreign Investment Projects have similar regulations as well [4].

The last category is provisions on environmental protection for foreign investment in other sectoral laws. The Civil Code of the People's Republic of China provides that "Where damage is caused to others as a result of polluting the environment or destroying the ecology, the infringer shall be liable

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for the infringement". The Criminal Law also establishes the offense of "pollution of the environment".

2.1.3. Local Legislations

According to the Constitution, the people's congresses of provinces and municipalities directly under the Central Government and their standing committees may, if they do not contravene the Constitution, laws or administrative regulations, enact local laws and regulations.

In China, local legislations also include provisions relevant to environmental protection. For example, the Shanghai Municipal Regulations on Environmental Protection stipulates that "Development zones shall implement centralized disposal of water pollutants in accordance with the regulations and shall not introduce pollution-producing projects if water pollution prevention and control facilities have not been completed or are incomplete." In addition, the Regulations on Prevention and Control of Water Pollution in Zhejiang Province and the Regulations on Prevention and Control of Air Pollution in Beijing Municipality all stipulate local environmental standards, which constrain the production and operation behavior of enterprises, including transnational corporations, in the local context [5].

2.2. Jurisdicitons of Subsidiaries and Parent Companies

In the process of jurisdiction, the application of the law presupposes the establishment of jurisdiction and the identification of responsible parties with liabilities under the law. Therefore, jurisdiction should be clarified in cases of environmental infringements. It included the jurisdiction of subsidiaries and the parent company [6].

2.2.1. Jurisdictions over Subsidiaries

Since the subsidiaries are usually directly responsible for causing environmental damage, the courts of the host states have jurisdiction based on the principle of personal and territorial jurisdiction. Meanwhile, according to the principle of determining jurisdiction over torts, the place of commission of the tort and the place of the result of the tort are both in the host states, so the host State has uncontested jurisdiction as well [1].

2.2.2. Jurisdictions over Parent Companies

Based on the structure of MNEs, the companies set up in host states are normally subsidiaries controlled by their parent companies abroad. Since the major shortcoming of filing a lawsuit against the subsidiaries as defendants is the possibility of resulting in the victims being unable to obtain adequate financial compensation, when subsidiaries do not possess affluent assets to undertake liabilities, many victims would "pierce the veil of the company" and propose a lawsuit in home states. For example, in the Bhopal gas leak case in India, the Indian government chose to file the lawsuit in America, where the proximately liable subsidiary's parent company was located [7]. However, the biggest obstacle to this approach is that courts in home states can dismiss the request for prosecution based on the principle of forum non conveniens.

3. Obstacles to Seeking Relief

According to the statistics, few lawsuits issued by host states to seek compensation for environmental violations by transnational corporations have been successful. Therefore, discovering potential obstructions hidden behind the customary jurisdiction procedure plays an irreplaceable role.

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3.1. China's Current Legislation System Lacks Thoroughness and Effectiveness

By making horizontal comparisons with some developed countries who has constructed relatively mature legislative system about environmental infringement caused by MNEs, it can be more simple to dig out drawbacks in China's legal system.

3.1.1. Horizontal comparisons with other countries

3.1.1.1. America

In America, the earliest regulation about the environment can be traced back to the introduction of the National Environmental Policy Act in 1969, in which America highlighted a principle that the balance between developing the economy and protecting the environment must be kept. Then, in 1970, with the boost of environmental protection activities, the US government established the Environmental Protection Agency, and issued a great number of laws and regulations in succession, indicating that America has entered the "post-industrial age". Nevertheless, it is noteworthy that the US federal government has publicly stated that it has a "neutral policy" towards multinational companies, which means MNEs in America are subject to the same constraints and regulations as domestic corporations. This policy can be recognized as the first relevant attempt to regulate MNEs behavior. However, although the McKinnny Act in 2000 tried to reaffirm this issue, the regulation to MNEs about environmental protection hasn't got any further development until today [5].

3.1.1.2. Japan

Compared to the United States, Japan's environmental protection legal system presents a different picture. After World War II, Japan had posed great effort into reviving its economy, which caused devastating damage to the environment simultaneously. At that time, serious public hazards occurred very frequently, like the widely known Minamata Disease Events stemming from organic mercury and Itai-Itai Disease caused by cadmium. Driven by the above phenomenon, Japan has set out to reinforce the regulations about environmental protection. It has continued for decades, and among series of legislations, the Natural Environment Protection Act issued in 1972, together with the Basic Law on Countermeasures against Public Hazard, has become the two pillars of Japan's environmental law system. Consequently, Japan has set up a relatively thorough legal system about environment. Its comprehensiveness is very worthy of reference by other countries [5].

3.1.2. Weaknesses of China's Legal System

In China, at the level of the whole nation, there is no specific legislation on controlling the transfer of pollution by MNEs, but rather a model of decentralized legislation. For example, the Constitution prohibits the appropriation or destruction of natural resources by any organization or individuals and local laws and regulations enacted to specifically address environmental protection, like the Regulations of Shanghai on Environmental Protection. Besides, the few legislative provisions are too principled and lack operationalization as well, which basically only provides abstract standards without any concrete explanation of the implementation of the law [8].

In conclusion, there's no denying that most countries have already realized that with the rapid burgeoning of global trade, the protection of environment should be paid as much attention as to the prosperity of economic growth. However, few countries have established comprehensive legal system presently. According to the cases involving environmental pollution by multinational enterprises, there're still lots of defects in today's regulation system in host states.

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3.2. Specific Obstacles in the Process of Jurisdiction

3.2.1. The Principle of Forum Non Conveniens

There has not been an explicit demonstration of the principle of forum non conveniens. The original meaning of the Latin text is “inconvenient court”, and its illustration in practice can be roughly described as “It allows a court of competent jurisdiction to decline to exercise jurisdiction where a substantially more convenient and suitable alternative court exists” [9]. The essence of this principle is the application of discretion by a state’s domestic courts to decline to exercise jurisdiction [10]. The following two steps should be considered when deciding whether this principle should be applied. Firstly, to determine whether an alternative court exists. Secondly, if an alternative court exists, the next step is to decide whether the case needs to be dismissed, considering the relevant public and private interest factors [11].

Typical cases reflecting the defects of this principle can be traced back to the Bhopal gas leak case and the lawsuit issued by plaintiffs in Ecuador against the Chevron. In these two cases, involving MNEs both caused severe environmental damage to the host states. To get adequate compensation from the parent companies, the victims chose to initiate proceedings in the courts of the home states. Nevertheless, the courts of home states all rejected the victims’ requests because of the doctrine of forum non conveniens, which forced the victims only able to file lawsuits against the subsidiaries in host states. As a result, since the subsidiaries’ capability to undertake responsibility was rather limited, the victims’ compensation was far from affluent to make up the loss.

According to the case analyses, flaws of this principle can be summarized from the following aspects.

Firstly, the application in practice of this principle has departed from its original purpose for which it was established. At the beginning, the principle was generally regarded as a tool to balance the interests of the plaintiff, defendant and the court and is discretionary in nature [7]. But with the dramatically growth of the MNEs, considerate transnational tort disputes were incurred, which were often sued by foreign victims in the MNEs’ domicile. Meanwhile, the sub-parent organizational model typically adopted by MNEs makes victims more tend to sue the parent company in home states to obtain adequate reparation. Under such circumstance, the “forum non conveniens” has provided the home states with a seemingly reasonable excuse to refuse victims’ claims [9]. Therefore, the abuse of “forum non conveniens” can turned this principle into a matter of connivance that helps the home state to evade the responsibility.

Secondly, the use of this principle deprives the plaintiffs’ opportunity to obtain sufficient compensation for the damage arising from infringements, which encourages the arrogance of MNEs to damage the environment recklessly and is not conducive to the host states’ safeguarding their legitimate interest in the long run. According to the statistics in the US, of the 55 cases in which United States courts declined to exercise jurisdiction based on the forum non conveniens doctrine, only 1 was re-filed in a foreign court, while the others were either forced to settle with the defendant or the lawsuit was abandoned [12]. The actual damage awarded to the plaintiffs in the judgments in the aforementioned cases also fell far short of the amount they had requested.

3.2.2. Regime of Independence of Legal Personality

The most common legal form of an MNE is a closely controlled group of companies held by a parent company or an intermediate holding company and linked by shares, i.e., a parent company and its subsidiaries [13]. According to the relevant provisions of the Company Law of China, the company may set up subsidiaries, which have legal personality and independently bear civil liabilities in accordance with the law, which can be recognized as an embodiment of the limited liability system

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in Chinese law. As the cornerstone of the modern company law system, the limited liability system was once considered by scholars to be a great institution invention "as important as the invention of the steam engine and electricity".

Even though subsidiaries have independent legal personality and can undertake the damage responsibility on their own theoretically, in fact the parent-subsidiary relationship in an MNE is very close, with the activities and business model of the subsidiary being decided by the parent company and the technology and resources of the parent and subsidiary being shared. Their operations and economic returns are closely linked to the parent company [14]. Whether in China or abroad, after the occurrence of these serious environmental pollution accidents, the parent company, as the shareholder of the subsidiary, has proposed to bear the losses with a limited liability system and to compensate for the environmental pollution up to the limit of the parent company's investment, leaving the host state's serious environmental public interest losses to be full responsibility of the subsidiary, which, however, often does not have the ability to bear the responsibility that matches the consequences of its pollution. As a result, just like the principle of forum non conveniens stated above, the abuse of limited liability system makes it a de fecto trick for the parent company to escape from liability.

In response to the problem, China has attempted to establish relevant stipulations to regulate parent companies' behavior. For example, the Company Law provides that shareholders of a company who abuse the independent status of the company's legal personality and the limited liability of its shareholders to evade debts and seriously jeopardize the interests of the company's creditors shall be jointly and severally liable for the company's debts. In other countries, this regime is universally applied and is also called "piercing the veil of corporation".

Nevertheless, since relevant provision of China's legal personality denial system is relatively brief and vague, there are still many difficulties in applying the system to solve problems, like the lack of specific provision and feasible measure, which makes it hard to determine the facts and solve the problems. All these need to be further improved in the future legislative work.

4. The Exploration of Effective Measures

It is now commonplace to observe that the causes and consequences of global environmental change cannot be addressed through the exercise of national jurisdiction alone [15]. It is more proper for host States to provide remedy mechanisms to compensate victims of corporate environmental degradation. Hence, the liability of these companies must be claimed through the judicial and administrative remedies available within national legal systems [16].

4.1. Establish a Thorough Regulatory System

Since the reform and opening of China, there has been no unified legislation on the utilization of foreign direct investment and environmental protection, which has created regulatory loopholes in the process of utilizing foreign investment [17]. Therefore, it is of great significance for China to adjust the current legal system. The author believes that coordination should be carried out mainly in the following two areas.

4.1.1. Absorb the MNEs as Separate Subjects into the Existing Legal System

Due to the boosting trend of China's opening and attracting foreign investment, it is inevitable that more MNEs would be active in Chinese market, which leads to necessity and urgency to build up exclusive legislation to regulate their behavior. To realize this aim, it is necessary to clarify the scope of application of MNEs from the current legal system, and subsequently introduce new specialized legislation if possible and necessary.

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4.1.2. Develop Relevant Remedies to Assist in the Implementation of the Law

Although the author put forward the idea of refining and adding the existing law, the inherent limitation of the law dictates that its scope and capability of the law to regulate is also limited. Considering that, building up institutional mechanisms to support better implement the law. Nowadays, the most popular call in the academic community is to construct environmental protection standard and environmental insurance system. By clarifying the standard, pollution caused by MNEs can be prevented in advance. Some scholars agree that a phased improvement of environmental protection standards should be constructed, dividing the goal into several steps for gradual realization [18]. The insurance system refers to the transfer of liability risk to the insurer through an insurance mechanism in respect of the liability of the insured for environmental tort damages that the insured should have borne on its own to the victims as a result of pollution of the environment, which offers feasibility for MNEs to make amends after the pollution [19].

4.2. Set up the Boundaries of the Use of Principle Forum Non Conveniens

Since the principle of forum non conveniens was born with a certain degree of rationality and benefit, it should not be rejected in its entirety, but rather its possible negative effects should be controlled. At the macro level, the court should not limit its attention to the level of judicial proceedings alone but should increase its focus on the public interest [11]. This can be achieved by clarifying each step in the implementation of the principle.

The key point in applying the principle is to decide whether there is an adequate alternative forum for a case. In the past, this threshold has been simply minimized to the place where the infringement occurred. Therefore, Consideration should be given not only to the “greater expediency” of the alternative court exercising jurisdiction over the accused, but also to the “greater likelihood” of the alternative court exercising jurisdiction over the accused [20]. If the alternative court does not have the ability to provide effective remedies to aggrieved parties who have suffered from the environmental damage, it cannot be regarded as a suitable alternative court.

Moreover, when applying this principle, private and national interests should both be considered as important weighing factors [21]. In weighing the private interest factor, courts have tended to focus on the evidence, the distance between the witness's location and the court, and the costs involved, which varies with the development of technology and should be reassessed depending on the facts of cases. Many American scholars believe that “If we allow our corporations to pollute the natural environments of other countries with impunity, we are not only harming our environment, but we are also violating our responsibility to ensure that our actions at home do not harm the environments of other countries”.

4.3. Complete the Regime of Piercing the Veil of Corporations

China's Company Law for the legal person personality denial system of the existing provisions of the system is relatively vague, the application of the circumstances and recognition standards are not specified, which is the practice of transnational corporations in environmental infringement cases cannot be directly applied to the system for the prosecution of an important reason [14]. Therefore, author agrees to add up explicit explanations of the concept mentioned in the clause. For example, expanding the scope of corporate shareholders to natural and legal persons and enlarge the scope of creditors to creditors of contractual debt and creditors of tortious debt [14].

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5. Conclusion

Under the era of economic globalization, the burgeoning of international cooperation and transnational corporations has become an inevitable trend, which bring both benefit and harm to host states. As a developing country who is still in need of considerable foreign investments to improve its economy and protect its own interest, taking environment as an example, it is of great significance and urgency for China to explore an effective way to regulate MNEs' behavior, restricting it within a controllable scope. Therefore, based on the imperfect current legislative situation, the author agrees to optimize China's regulative system from legislative and judicial levels.

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