

Environmental Violations Caused by MNEs and Regulations to Complete Remedy

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Abstract. This paper focuses on the environmental infringement problems caused by multinational enterprises in the context of economic globalization. Due to the profit-seeking nature of multinational enterprises and the economic and technological investments that they bring to developing countries, coupled with the lack of relevant legislation, environmental violations caused by multinational enterprises in developing countries are particularly serious. Victims often have difficulties in obtaining adequate remedies. The problem of such violations is actually a violation of human rights, so it is necessary to regulate this problem. By analyzing the biggest characteristic of MNEs which is profit-seeking, this paper proposed several possible ways to regulate them, both in terms of legislation and enforcement considering the current situation. The feasible ways include extending the subject of liability for environmental torts, setting fund to guarantee relief.

Keywords: Multinational Enterprise; environmental violation; regulation.

1. Introduction

The industrial revolutions in history have led to technological progress, the development of the world economy and the deepening of links among countries. As the world economy continues to integrate and develop, the awareness of environmental protection is increasing. There has also been a gradual increase in relevant legislation and research. The industrialization process of developed countries, in particular, has been characterized by the pursuit of economic development at the expense of the environment. Only they suffered after the completion of industrialization did they turn their attention to environmental issues and then set strict environmental standards and a strict liability system for environmental damage to protect and compensate the environment, in order to maintain the ecosystem on which we depend. In the face of increasingly stringent environmental regulations and the high environmental costs, developed countries' multinational enterprises have turned their attention to developing and underdeveloped countries, causing natural and human environmental violations in these countries. Due to the gaps in legislation of developing countries and the inadequacy of the international community's regulations, the remedies for victims are inadequate and environmental damage is common due to the low cost of environmental violations by multinational enterprises. Most scholars today have noted that environmental violations by MNEs happen more frequently in developing countries, and have tried to improve the legislation, such as improving the system of denial of legal personality, or improving the process of accountability to reduce the difficulty of remedy for victims. In addition, few scholars have considered the prevention of this phenomenon and the improvement of compensation for victims through the creation of public funds [1-4].

This paper therefore researches the root causes of the problem of infringement by multinational enterprises by studying the nature of multinational enterprises, and proposes possible regulatory measures from several perspectives.

2. Environmental torts by multinational enterprises

With the deepening development of economic globalization, the number of multinational enterprises is increasing and they play an important role in the global economic activities. While at the same time, the environmental infringement problems caused by multinational enterprises are also

common, not only the pollution of the natural environment, but also the destruction of the human environment. It is obvious that the latter type of infringement caught much less attention. In order to provide a more detailed visualization of the specific situation of human rights violations by multinational enterprises, several relevant case studies are presented below.

2.1 multinational enterprises' violations of the natural environment

For the pollution of the natural environment, there is an issue of the oil spill by ConocoPhillips. In June 2011, news of an oil spill at the Penglai 19-3 oil field in the Bohai Sea came to light after two oil spills had already occurred at the field in the previous month, which made the situation worse by delays and concealment by the operator. ConocoPhillips continued to spill oil for months afterwards, causing serious damage to the marine environment and to the livelihoods and daily business and life of local residents.

2.2 multinational enterprises' violations of the human environment

For the destruction of the human environment, there are cases such as the case 'Haupu and Baisert v. France'. In this case, a private company, RIVNAC, acted as agent for the French government in a partnership with a government-owned company to develop a luxury hotel project. The site of the project was in Tahiti, an 'overseas' French department, and preparatory work was already underway. Residents of the Tahiti community filed a complaint with the 'Human Rights Commission' claiming that the project encroached on their tribal territory including an important ancient mausoleum reflecting the history, culture and life of the tribe. They also stated that the land contained a traditional fishing ground where around 30 families made their living from fishing. They argued that their right to privacy and family life, granted under articles 17 and 23 of the International Covenant on Civil and Political Rights, had been violated by the French Government. The Committee's decision reads as follows. The Committee considers that, for the purposes of the Covenant, the term family should be interpreted broadly and should include all the elements that constitute a family as understood by that society. When the meaning of the term family is described specifically, it should include the traditional culture of the society. The Committee considered, on the basis of the complaint, that the local population regarded their relationship with their ancestors as a fundamental element of tribal identity and that it played an important role in their family life. [5] The Committee concluded that the complainant's right to privacy and family had been arbitrarily interfered with, in violation of article 17, paragraph 1, and article 23, paragraph 1, of the Convention³. The Committee requested the French Government to take measures within 90 days to grant appropriate compensation to the injured party. This case concerns the protection of indigenous cultural heritage from the impact of economic development.

3. The current state of environmental torts by multinational enterprises and its causes

3.1 General introduction

The above cases are only the tip of the iceberg of many multinational enterprises' environmental abuse problems. In fact, there are a large number of environmental problems of multinational enterprises. Meanwhile, although countries have been paying more attention to such environmental damage problems with the continuous development of the economy and society, actually, there are still many inadequacies in the regulation of such problems. In the meantime, the corresponding remedies after the environmental damage problems occurred are not in place. For instance, in the ConocoPhillips spill mentioned above, the US parent company of ConocoPhillips paid 1 billion in administrative compensation to China for its subsidiary's major environmental liability. However, this was far from enough compared to the serious consequences of the accident. There are imperfections in the relevant litigation system, inadequacies in the relevant laws such as the

Environmental Law, the fact that multinational companies are generally limited liability companies, and the fact that they are multinational which makes pursuit difficult. There is also the lack of mandatory and 'inconvenient' rules in international law. All in all, the fundamental measure of the problem is to improve relevant legislation in all aspects [6-7].

3.2 Legislative loopholes

In terms of legislation, China is a typical representative of developing countries, and the above case is used to analyse the legislative loopholes of developing countries in relation to the environmental tort of multinational enterprises. Firstly, the revised Company Law of China does not provide article about the liability of multinational enterprises for environmental infringement. They shall not abuse the rights of shareholders to the detriment of the company or other shareholders. They shall not abuse the independent status of the company as a legal person and the limited liability of shareholders to the detriment of the company's creditors. The shareholders of the company shall be jointly and severely liable for the debts of the company if they abuse the independent status of the company as a legal person and the limited liability of the shareholders to evade debts to the serious detriment of the interests of the creditors of the company. This article reveals that Chinese legislation is almost vacant in terms of the regulation of the relevant issues. Meanwhile, looking at the specific content of the regulation of these few articles, it can also be found that it is relatively crude and difficult to carry out specific operations. As China is one of the developing countries with a high level of economic and social development and ability of legislation, relevant legislation in China is incomplete as mentioned above, the legislation in other developing countries is worrying as well [8-9]. Litigation concerning environmental infringements by multinational companies is usually conducted in the courts of the place where the infringement took place. The reasons include the widespread application of the principle of forum non conveniens internationally, the general custom of multinational companies to establish parent and subsidiary companies, and the profit-seeking nature of multinational companies which will be analyzed in detail later. Meanwhile, the place where the infringement took place in most cases were the developing countries whose relevant laws are not complete. The situation is that existing many loopholes and gap in the relevant laws, not to mention the mechanisms for accountability, enforcement and monitoring. In general, remedy mechanisms in developing countries still have a long way to go. In contrast, some developed countries, such as the superpowers under the trend of economic globalization, have well-developed economies and perfect legislation. Owing to that, many victims of infringement by multinational enterprises would try to litigate in countries with perfect legal mechanisms, such as the United States, to seek more fair and beneficial remedies. The number of lawsuits in such developed countries, the number of multinational enterprises involved in such lawsuits, and the diversity of the causes of action are also diverse. Why is the current situation of infringement by multinational companies still so worrying as that the injured party can obtain a more adequate remedy in countries with good legal regulations and mechanisms? This is related to the nature of multinational companies.

3.3 The impact of the nature of multinational enterprises on the issue of environmental tort

As a matter of fact, most developed countries have set strict environmental standards and improved compensation systems and mechanisms to protect their environment. Due to that, the costs of environmental damage in developed countries are so high that multinational companies are producing more in developing countries now. As developing countries are still in a position to promote faster economic development, some of them may set lower environmental standards to attract foreign capital. The cost of causing environmental damage in developing countries is generally lower than in developed countries because of the relatively backward level of legislation and judicial operation in developing countries themselves. Meanwhile, the production costs of raw materials and manpower in developing countries are lower. Therefore, multinational companies prefer to establish subsidiary in developing countries.

Owing to the fact that multinational companies are the product of economic globalization, their fundamental purpose is to do everything possible to reduce production costs in order to obtain more profits. To achieve this purpose, most profit-seeking multinational companies are naturally unwilling to have too much input in environmental protection. Meanwhile, they may even take advantage of legal loopholes including the separate legal personality of their subsidiaries and the limited liability nature of the company to avoid liability for environmental violations. Nowadays, the development of the world economy is still in a state of imbalance. The transfer of environmental pollution from developed countries to developing countries is particularly evident in the environmental torts committed by multinational enterprises against host countries. The reasons for the seriousness of environmental violations by MNEs in developing countries and the difficulty of obtaining adequate remedies are obviously also related to the characteristics of MNEs and their willingness to cause environmental violations in developing countries, and so on. The above-mentioned profit-seeking nature of MNEs and their use of legal loopholes are similar to the difficulty of implicating parent-subsidiary liability. When MNEs cause environmental violations, for instance, some multinational companies set up their subsidiaries in some developing countries. In order to reduce the cost of waste disposal, they cause environmental infringement. Since it is difficult to pierce the corporate veil from the current legal system and make a strong parent company liable, the parent company, because of its limited liability and the separate legal personality of its subsidiaries, takes advantage of the limited nature of its liability to follow up compensation only within the scope of the subsidiary's assets which are generally not very large. Therefore, the corresponding compensation and liability for infringement is not settled. It is still more beneficial than harmful for the company as a whole. As mentioned above, in some cases, better remedies can be sought through litigation in developed countries, for which the international community can make modest efforts to reduce the resistance of victims to seek such help. It may seem like an easy solution, but in fact it has implications for free trade. If such remedies are convenient and feasible, the costs to multinational companies could increase substantially. As a result, some multinational companies may relocate their headquarters to countries with relatively inadequate legal mechanisms or withdraw capital from developing countries. This is undoubtedly detrimental to developing countries that need to adapt to economic globalization and need foreign capital, foreign technology, in order to find solutions to social problems including economic development, technological development, labor employment problems. Therefore, a simple and brutal path to such a remedy is not feasible. In fact, in this day and age, the social development driven by multinational enterprise and relevant regulation have always been a matter of balance. The world needs multinational enterprise to promote the allocation of resources and economic development. It also needs regulations to prevent them from infringing on human rights in their unrestricted pursuit of profit and to grasp the right scale when regulating them.[10-12].

3.4 The need for regulation of environmental torts by multinational enterprises

We need to reduce this phenomenon by improving the legal system because the environmental violations committed by multinational companies are a violation of the common natural resources of mankind, a violation of human rights and a failure to enable people to develop on an equal footing. This phenomenon should be paid more attention to, and regulated in order to avoid the uncontrolled expansion of multinational enterprises and the growing imbalance in development. It is true that multinational enterprises have emerged as a result of economic globalization and MNE is an important form of economic globalization for economic development. Otherwise, they should also balance the relationship between development and equity and the protection of human beings in order to achieve a harmonious and balanced sustainable development, rather than promoting the rapid development of the other side by squeezing one side and transferring the risks to the other, not to mention that the essence behind it is the violation of human rights. The study '*Our Common Future: The Global Commission on Environment and Development*' states, sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their needs. It consists of three important concepts. The first point is the concept

of 'needs', especially the basic needs of the world's poor people, which should be given special priority. The third point is the concept of 'constraints', which means the limits imposed by the state of technology and the organization of society on the environment's ability to meet immediate and future needs. The third point is the concept of 'limits', which means the limits imposed by the state of technology and social organization on the ability of the environment to meet immediate and future needs. Behind the concept of sustainable development lies the idea of 'equity', which encompasses equity between different people in different regions within the same era. For example, one country cannot take over more resources and transfer development risks to other countries just because it is more economically developed. The limited nature of natural resources and the unlimited nature of human desire determine the contradictions in the development process. Countries with different levels of economic and social development should enjoy the same right to develop. The concept of equity also includes inter-generational equity, the need to achieve balanced development between generations to meet the needs of the present without compromising the development capacity of future generations. The principle holds that all human generations are in the same living space, and they have equal access to the natural resources and social wealth in this space. Meanwhile, they should have the same right to live, and they should give equal development rights to people in all countries, regions, and to all generations. The fundamental point is the protection of people's right to live and their right to develop, which is essentially a matter of human rights, a human rights issue closely related to the environment. As multinational enterprises are powerful spreading all over the world in all walks of life, the economic power of some multinational enterprises even exceeds some sovereign states. The issue of environmental infringement and protection and remedy related to multinational enterprises is undoubtedly an important issue related to sustainable development and human rights, which needs to be paid attention to in the process of continuous development. Therefore, it is necessary to establish innovative mechanisms to regulate environmental violations by multinational enterprises through the enrichment of relevant legislation, the improvement of law enforcement and the administration of justice. Other the imbalance of development and the violation of human rights will be strengthened.

4. Regulation of environmental torts by multinational enterprises

4.1 general points

In this regard, attention should be paid to the various actors involved in multinational enterprises such as their parent companies, their subsidiaries, the home countries of their parent companies, and the host countries of the multinational enterprises, as well as the various actors of the international community. All these actors have close relationships with MNEs that they can influence and affect them. Among the various methods of regulation, it is important to improve the mechanism of upward recourse. As mentioned above, there is a form of infringement. In this occasion, to seek redress from its parent company is a kind of prevention of abuse of rights that is supposed to be set up for the promotion of economic development. In addition to the improvement of the subject of accountability, it is also important to improve the ways of redress including litigation, and to refine and make fair the specific forms and contents of compensation.

4.2 Procedural and legislative improvements

In terms of litigation procedures, the burden of proof needs to be appropriately reduced for the plaintiff victim, who is, after all, mostly a local population. Whose ability to gather evidence or other strengths are difficult to contend with a powerful group of multinational companies.

In terms of legislation, one idea is to unify international environmental tort legislation. The rationale for this is that, as it is harmonized, the process will absolutely involve all countries, with the economically and legislatively advanced developed countries being able to apply their own legislative techniques. As a result, the relevant legal regulation will be relatively complete. In addition, if countries apply unified international environmental tort legislation, disputes over the application of

the law will be reduced and the difficulties in reaching appropriate remedy which are caused by applying relatively backward legislation in developing countries will be avoided due to the 'forum non conveniens' principle. However, the disadvantages of such an approach are clear: the only way to get rid of this dilemma seems to be to harmonize national environmental tort laws under the conflict of laws approach. Nevertheless, this is a much bigger pipe dream for the foreseeable future, which is difficult to implement and the process may concern too many interests, so it will be a longer and complex process. In fact, the fairness of the legislation resulting from harmonization may not be very reliable. Furthermore, as a result of the application of unified environmental tort laws across countries, multinational companies may reconsider whether to invest in developing countries when setting up subsidiaries or making investments as they do not benefit from the 'low cost of environmental torts' in developing countries. If they look away from developing countries, then developing countries will be hindered in their economic and technological development in the context of economic globalization [13-15].

4.3 Subject of liability for environmental torts should be extended

Another idea is that to expand the subject of liability for tort liability. For example, as state environmental liability has been more developed in international environmental law. Meanwhile, as states are obliged to keep acts under their control from causing environmental harm to other states, foreign investment and technology transfer could be defined as acts that require regulation under state control. Besides, once this causes environmental damage, the exporting country will be responsible. Moreover, the exporting country can achieve this by establishing strict and relevant review standards for overseas investments at home. Likewise, as the host country has the domain jurisdiction, it is the government's responsibility and the meaning of its existence to set applicable environmental standards and effectively enforce laws to protect its own environment and citizens.

In addition, for the improvement of upward recourse mechanism, the main purpose of recourse against the parent company is through the denial of separate legal personality of the subsidiary. It is not unusual for there to be an element of control between a multinational parent and a subsidiary. Therefore, 'control' in this context does not mean ordinary control, but a sufficiently effective control which is not limited to whether the control is in the form of shares or agreements. Besides, there are other cases where legal personality is used to avoid liability, such as a significant transfer of assets from the subsidiary to the parent company. After the corporate veil has been pierced, the parent company is still unwilling to pay compensation and there are no detailed mandatory provisions under the laws of the home and host countries. At the same time, it is difficult to obtain redress through international law. In this situation, public pressure can be brought to bear on the parent company through the mass media to call for the protection of environmental and human rights. Even if the above-mentioned situation does not typically arise, in accordance with the principles of equity, the parent company should in fact be asked to pay appropriate compensation based on a balance between efficiency and fairness depending on the specific circumstances of the violation. However, it is important not to focus solely on the protection of the victim and not to misuse the relevant means of imposing liability on the parent company such as using the mass media to inflame the facts in order to incite the public and gain sympathy or imposing excessive liability on the parent company. Besides, what should be done if the parent company is in fact not at fault and the assets of the subsidiary company do not enable the victim to be adequately compensated? [16]

4.4 Assurance of relief implementation

This is where the role of the state and the international community can be brought into play. The state should pay attention to environmental tort remedies such as setting up an environmental tort remedy fund and allocating part of its financial taxes which serves as this fund to provide state public remedies for environmental tort problems that are not adequately compensated. Similarly, the international community can raise public funds for remedies through relevant calls. However, the application of such a fund needs to be strictly regulated by law and should be a bottom-up remedy,

otherwise the establishment of a fund may even encourage more and more multinational companies to avoid liability for environmental violations.

In addition to the improvement of the remedy after the occurrence of the tort, in fact, the relevant laws should be improved to avoid the occurrence of such tort as far as possible. For example, at the beginning of the establishment of multinational companies, their home countries should set up relevant laws to emphasize and inform the penalties for environmental infringement. When the multinational companies try to get into the host country, the host country should set the threshold of entry, or in its entry to collect such as 'Guarantee' in order to play a positive role in the future, when the company feels difficult to compensate the compensation. The establishment of the amount of 'Guarantee' is a problem that needs to be considered. When establishing the system of 'Guarantee' for the prevention of environmental infringement when multinational companies enter the country, it should be divided into grades corresponding to different proportions or amounts of 'Guarantee'. The reference factors include the capital, group system, production and operation of multinational competencies. The multinational companies are divided into different grades, and the grade with the strongest economic strength and the largest operating market is the grade that should pay the most amount of 'Guarantee'. At the same time, the amount of the 'Guarantee' set up by the specific situation of the establishment of the company should pay attention to the balance. If the amount is too little, it cannot achieve the effect of future compensation and deterrence at this time. If the amount is too much, it will discourage multinational companies and the country will be difficult to attract foreign investment and other advanced technology.

5. Conclusion

This paper analyzed the problem of environmental infringement by multinational enterprises with the background of economic globalization. By analyzing the emergence of multinational enterprises and their characteristics, it delves into the causes of the current situation of environmental infringement by multinational enterprise, and works out measures to address these analyses. It was found that there are gaps and loopholes in the legislation regulating environmental infringement by multinational enterprises. Therefore, first of all, the legislation should be improved for that the law is the basis of the regulatory mechanism. The legislation should improve the system of denying the independent legal personality of the company, upward resource mechanism, clear and expand the subject of responsibility. Meanwhile, all the forces should work together. In terms of procedure, the burden of proof on the victim should be reduced. Environmental tort remedy fund should be set up to ensure the implementation of the remedy, and 'Guarantee' should be set to prevent torts. As it has been argued in this article, the problem of environmental violations by multinational enterprises is essentially a problem of human rights violations, so the corresponding regulation is very important and it is a reflection of the concept of sustainable development. Several ideas for such regulation in the article may contribute to filling the legal gaps and improving the relevant remedial mechanisms.

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