Advances in Politics and Economics
ISSN 2576-1382 (Print) ISSN 2576-1390 (Online)
Vol. 5, No. 4, 2022
www.scholink.org/ojs/index.php/ape

Original Paper

A Review of the Research on Transnational Environmental Tort Law

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Received: October 13, 202 Accepted: November 14, 2022 Online Published: November 17, 2022

doi:10.22158/ape.v5n4p72 URL: http://dx.doi.org/10.22158/ape.v5n4p72

Abstract

The accelerated pace of globalization has brought about rapid economic development, while the number of transnational environmental pollution problems is also increasing. On the one hand, the imbalance of the global economy has intensified, and transnational corporations have taken advantage of the low cost and low standards of environmental protection in developing countries to transfer polluting industries; On the other hand, with the awakening of citizen's environmental awareness in developing countries, more and more people realize that their own legal provisions are not enough to compensate for their losses, so they choose to go overseas to appeal to the home country courts. Based on the review of relevant literature in China and foreign theoretical circles in recent years, this paper summarizes it from three aspects: jurisdiction, application of law and transnational corporations, with a view to promoting the improvement of China's transnational environmental tort law.

Keyword

transnational environmental tort, jurisdiction, application of law, transnational corporations

1. Introduction

With the green clause written into the China Civil Code, the importance of ecological civilization has been placed at an unprecedented height. On a global scale, environmental problems are no longer restricted by regions, and the environmental conflicts between countries caused by economic development are becoming increasingly significant. Under state immunity and diplomatic protection, the result of environmental right protection is not satisfactory, which is brought about by prosecuted national liability. So people began to seek to solve the problem of transnational environmental tort through private international law. At this stage, taking individuals as the basis for civil liability has

become the focus of solving the problem.

With the theme of "transnational environmental tort" as the key word, the author collected 69 valid papers and literatures at home and abroad. Through the research methods of literature comparison and induction, the author figured out the writing idea of "court jurisdiction - application of law - recognition and enforcement of judgments" (see Figure 1). At the same time, in view of the leading role of transnational corporations in transnational environmental tort, it is supplemented by a further study of transnational environmental tort from the perspective of transnational corporations.

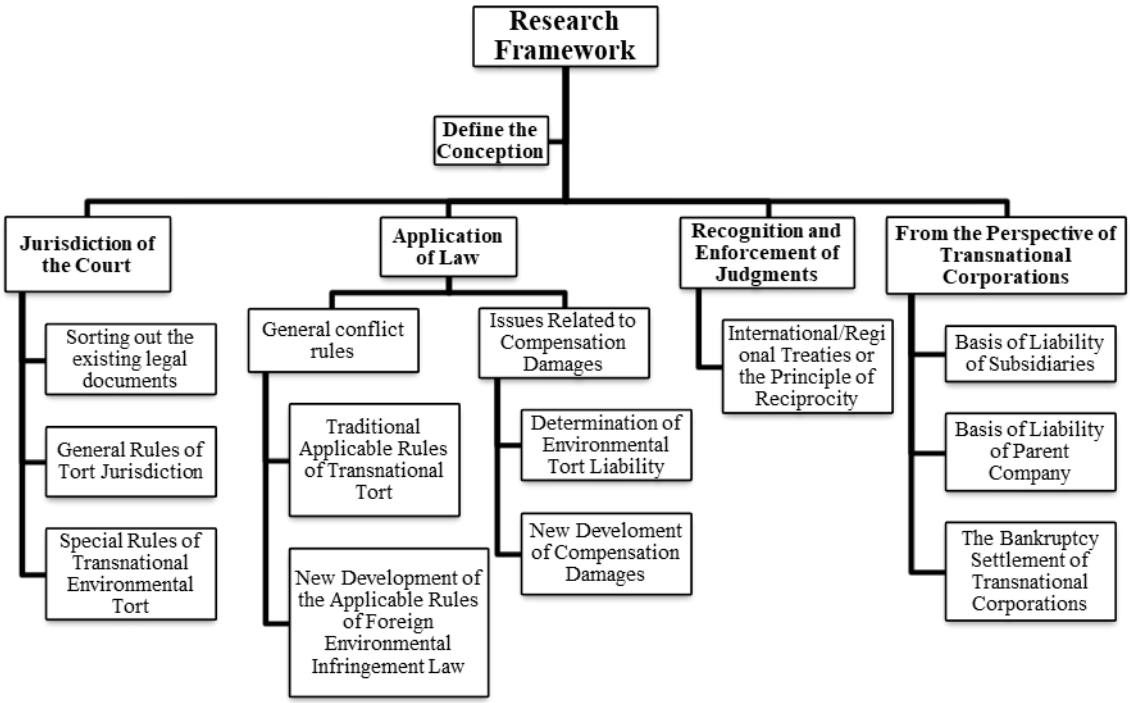

Figure 1. Research Framework

2. Clarify the Basic Problems of Transnational Environmental Tort

2.1 Determine the Concept of Transnational Environmental Tort

Transnational environmental tort, also known as cross-border environmental tort, foreign environmental tort, has been described differently in papers. No matter which one, scholars emphasize that the concept should include both "foreign-related" and "environmental tort".

The "foreign-related" is embodied in the subject, object, reasons and facts on which rights and obligations are based. Some scholars interpret "foreign-related" from the perspective of the subject, believing that the nationality and domicile of the infringer and the victim in a foreign country can be recognized as "foreign-related". The infringer, led by transnational corporations, has set up subsidiaries around the world, which has not only improved the local economy, but also polluted the local environment. There is also a view that "foreign-related" is mainly reflected in the object. Natural

resources are not separated by the division of national territory and regions. It is difficult to ensure that environmental pollution generated within one country will not have a negative impact on neighboring countries. For example, China and Russia are bounded by the Songhua River. In 2005, the chemical substances produced by the explosion of a chemical plant in Jilin Province flowed into the Songhua River, which had a bad impact on the water quality. The quality of life of coastal residents (including Russian residents) was also affected. For another example, countries in Europe are closely connected. In the last century, when countries established factories to develop their economies, cross-border air pollution and water pollution incidents occurred frequently. Others believe that those who cause damage to the public environment or the extraterritorial environment are also "foreign-related".

2.2 Differentiation and Analysis of the Characteristics of Foreign Environmental Infringement

After determining the scope of "foreign-related", the definition of environmental tort should also be clarified. It is generally accepted that environmental tort is not equal to environmental pollution. From the perspective of concept traceability, environmental tort, as a kind of tort, should be considered as negative obligation; Environmental pollution, which belongs to ecology, is a technical term derived from environmental science and has no legal significance. From the perspective of coverage, Cao Mingde pointed out that environmental tort, in a broad sense, should include environmental pollution and ecological damage. It can be noted that "ecological destruction" has been included in the scope of legal adjustment in the Civil Code, and "polluter" will be replaced by "infringer". It can be seen that the scope of environmental tort is far greater than environmental pollution. Chen Quansheng defines environmental infringement in his book as follows: the fact that human activities cause pollution or damage to the living and ecological environment, and thus infringe on the relevant rights and interests of a certain number of residents, thereby endangering human survival and development. This definition is in line with the current cognitive trend of the theoretical community on environmental tort.

3. The Jurisdiction of Transnational Environmental Tort

The research on transnational environmental tort in domestic and foreign academic field started from the judicial jurisdiction, and it is the primary issue to determine whether the court has jurisdiction to resolve foreign disputes. Jurisdiction has important procedural significance. The jurisdictional legal basis of transnational environmental tort can be divided into international and domestic aspects. The research on international content is relatively limited, because the number of truly effective international conventions is small and the signatory countries are limited, and the provisions on jurisdiction in the effective documents are also different, so many scholars have objections to their effectiveness. For example, the <Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden> provides for international jurisdiction, <Hague Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters> and other documents on the jurisdiction of general infringement also apply to environmental infringement. Scholars focus more on the domestic laws of various countries, focusing on the rules of

jurisdiction.

3.1 Traditional Rules of Jurisdiction of Transnational Torts

Environmental tort, as a kind of tort, should follow the jurisdiction rules of general foreign-related tort when there is no special provision for it. On the basis of sorting out the changes in the foreign dispute jurisdiction provisions of the <Civil Procedure Law >, Chen Jian summarized the jurisdiction rules of foreign torts in China as follows: the general jurisdiction is mainly personal jurisdiction, while the special jurisdiction is territorial jurisdiction (but not stipulated in China), supplemented by the exclusive jurisdiction related to natural resources and the agreement jurisdiction, including agreement jurisdiction and implied jurisdiction. In contrast, Xiang Zaisheng distinguishes between the civil law system and the common law system in his research and analyzes their legislative practice respectively. Among the civil law countries, Germany and Switzerland have made special provisions on foreign-related environmental infringement, while others still follow the principle of "plaintiff accommodated to defendant " doctine and the principle of jurisdiction of the court where the infringement occurs.

3.2 New Development of Jurisdiction Rules of Transnational Environmental Tort

The application of traditional jurisdiction rules in the field of foreign-related environmental tort has limitations, so the new rules begin to develop gradually in judicial practice. The doctrine of forum non conveniens is one of the most important jurisdictional rules in the field of transnational environmental tort. The home country court's rejection of the foreign prosecution is mostly based on this principle. Most scholars believe that the doctrine of forum non conveniens greatly hinders the development of foreign-related environmental tort. In her research, Feng Yanan pointed out that when judging the specific application of the doctrine of forum non conveniens, American courts usually need to consider two factors: "whether there is a substitute court" and "whether there are relevant factors in the case that decide the court to suspend the proceedings according to the doctrine". When judges try cases, they often need to take into account the attitude of administrative organs, other governments and the public interests involved, so they usually adopt a conservative attitude. However, a small number of scholars affirmed the significance and role of the doctrine of forum non conveniens, and believed that the negative impact of the principle could be avoided by adding restrictions and objectively considering private interests and public interests. Liu Enyuan pointed out that in the early stage of China, the principle of national sovereignty was overemphasized, and the "excessive jurisdiction" made it difficult to resolve environmental damage compensation disputes, so the doctrine of forum non conveniens should be applied.

The author believes that the purpose of the principle is to prevent the abuse of jurisdiction and ensure the close relationship between the case and the trial court, which is unfair for the victims of the two parties who are already in a weak position to limit their court choice. Moreover, in the existing judicial cases, the court is too harsh in determining the application of the principle, and often attaches conditions to dismiss the lawsuit. The distorted use of the doctrine of forum non conveniens makes it

meaningless.

In addition to the doctrine of forum non conveniens, some scholars also put forward the doctrine of international comity, or a similar provision—considering the domestic localization requirements of various countries. The jurisdiction of the home country court over the environmental tort dispute occurred in another country may involve interference with the legal or administrative power or even judicial power of other countries. Therefore, when considering the application of the principle, the judge should focus on the balance of the relevant interests of the two countries. However, some scholars believe that the application of this principle will inevitably limit the jurisdiction of the home country. Therefore, it seems more in line with the development of the times to develop the doctrine of comity into the doctrine of reciprocity. For example, in the context of the "the Belt and Road Initiative", the development of the doctrine of reciprocity between China and other member countries can not only ensure the national interests of both sides, but also conform to the vision of building a community with a shared future for mankind.

In addition, theorists hold different views on the principle of the jurisdiction of the court of first instance. Opponents of this principle believe that under this principle, it is difficult for victims to bring a lawsuit to the home court after they resort to the host court. On the contrary, supporters believe that the principle can play a positive role in resolving foreign-related jurisdictional conflicts, which is conducive to the recognition and implementation of the judgments of the host country's courts in the home country, and is clearly stipulated in international treaties such as the <Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968>. Moreover, in the context of the <The Alien Tort Claims Act> of the United States, when the defendant raised a defense on the ground of exhaustion of local remedies, the judge characterized it as "reasonable consideration" rather than "must consider".

4. The Legal Application of Transnational Environmental Tort

After removing the obstacles of the conflict of jurisdiction of the court, it is directly faced with the problem of the application of the lex causae. Similar to the jurisdiction, the exploration of the legal application of transnational environmental tort in various countries also starts from the relevant provisions of traditional general tort.

4.1 Core Issue: Definition of the Tort Spot

As one of the earliest principles of private international law, the lex loci delicti is the embodiment of "place domination" and plays an unshakable role in the legal application of transnational tort. But then came the controversial question that lasted for many years: how to define the tort spot? Because of the normality of isolated infringement in foreign-related environmental infringement, it is crucial to define the tort spot in this field. In his article, Tian Hongyun subdivided the tort law into the law of the place where the act was committed and the law of the place where the result occurred, and proposed that the former is represented by Austria, and the latter is represented by the United States. China allows a

choice between the two. This classification has been widely recognized by the academic community. Xiang Zaisheng, in his article on the study of jurisdiction, summarized the way in which the two laws can be applied, which is similar to our country, as the "ubiquitous principle". However, some scholars, in their early studies, believed that the indirectness of environmental infringement was caused by the fact that the infringement acted on the environmental media after the occurrence of the infringement, and then the media acted on the victim to produce the final infringement result. Therefore, it is believed that there should also be a place where the infringing media pass through. Although it is a common view to recognize the indirectness of environmental tort, few scholars have proposed the place where the media passed.

After the lex loci delicti, the lex fori and the overlapping application of the two are also regarded as the applicable rules of traditional general torts, and the common lex personalis of the parties is also included in the study.

4.2 Applicable Rules of Conflict of Laws on Environmental Tort

Although China has not yet issued special provisions on the application of transnational environmental tort, countries (regions) represented by Switzerland, Germany and the European Union have successively issued relevant laws as early as the end of last century. At present, the academic field research on the new applicable rules can be summarized as follows: the principle of the closest connection, the principle of autonomy of will and the principle of benefiting the victim. The principle of the closest connection originated from the proper law proposed by Morris in 1951. Some scholars regard it as a combination of applicable laws such as the law of the place of tort, the law of the court and the personal law of the parties. The introduction of the principle of autonomy of will is considered by some scholars as the embodiment of the preferential protection of the interests of victims, but some others hold the opposite view that the principle of unrestricted autonomy of will forces the victims in the vulnerable party to passively agree with the legal choice of the infringer. The author believes that the principle of party autonomy embodies the fundamental value of private international law, but the existence and realization of the principle of party autonomy should take substantive fairness as the ultimate goal, so it is necessary to provide protection for victims by attaching conditions to the principle of party autonomy.

It is precisely because of the legislative blank of the special provisions on transnational environmental tort in China, and the provisions on the application of law that have been issued in other countries are different, which has given the academic community large space to explore. In the existing papers, scholars have put forward suggestions for the improvement of China's legislation through the induction of traditional and new rules of law application. First of all, although there are new rules proposed, scholars have no objection to the core status of the lex loci delicti, but there are disputes about the specific application of the place where the act is performed or the result occurs. Some scholars believe that the right of choice should be left to the parties. For example, Liu Enyuan believes that the parties should choose the applicable law by agreement within a limited scope. Opponents believe that the

parties lack a clear understanding of foreign law, so the court should make a choice. The other part of scholars have an obvious preference for the choice of the two places, both of which tend to choose the law of the place where the result occurs. Wang Ronghua, Wang Xiaojie, Cai Xin and other scholars pointed out that the application of the place where the results occurred was more consistent with the legislative purpose, and Xu Kai believed that the application of the latter could provide more protection for victims.

The author believes that it is crucial to clarify the specific meaning of the lex loci delicti, "Who will determine that the place of infringement is the place where the act is performed or the result occurs?" "How to judge?" And "What is the basis for determination?" These issues are directly related to the principle of the closest relationship, the principle of autonomy of will and the principle of victim protection.

5. From the Perspective of Transnational Corporations

Transnational corporations are one of the unavoidable subjects in the legal issues of transnational environmental tort. Among the valid documents retrieved, 40.58% of the papers were about transnational corporations. In addition to the jurisdiction and application of law summarized above, the responsibility of transnational parent companies has become one of the academic concerns. Secondly, it can also be noted that the existing researches are mostly analyzed from the perspective that China is the transferred pollution country (i.e., the host country), but in several articles with a relatively recent age, the research perspective that China is the home country began to appear, or the dual role of China as the host country and the home country was analyzed in many aspects.

The first issue that scholars pay attention to is the limitation of the company's limited liability system in foreign-related environmental tort disputes. Jiang Ming pointed out that the main form of transnational corporations' investment in China is that subsidiaries assume limited liability as independent legal persons, that is, all the assets of subsidiaries assume unlimited liability, while the parent company only assumes limited liability for the part of its capital contribution. However, due to the particularity of the integration of the organizational structure of transnational corporations, the huge environmental pollution damage the corporations caused and the important role they play in the local economy, the victims who resort to the courts of the host country always could not get the result they want. At the same time, the limited liability system has also become a tool for the parent company to avoid liability risks. Professor Yu Jinsong regards the victim as an involuntary creditor. Under the limited liability system, if the subsidiary is unable to pay high damages, the victim's losses will not be compensated directly.

Therefore, it is the current consensus that the parent company should bear the liability for damages under certain circumstances. However, its theoretical basis is controversial. Some scholars pointed out that the reason why the parent company bears the responsibility is to "pierce the corporate veil", that is, to break through the system of disregard of corporate personality. This is one of the views widely

respected by the domestic and foreign academic community at present. Considering that the system of disregard of corporate personality already has a system basis in China, it can be standardized by taking the subsidiary's inability to bear environmental tort damages as a special case. Another part of scholars believe that the basis for the parent company to bear the responsibility is that the parent company directly bears joint and several liabilities. For example, under the strict liability system in the <Comprehensive Environmental Response, Compensation and Liability Act> of the United States, the parent company, as an operator, can become one of the potential subjects of accountability, that is, it does not need to pierce the corporate veil, and bear the responsibility directly. In addition to the two above, some scholars also put forward the "multinational enterprise responsibility theory" and the "enterprise rule theory", pointing out that the parent company and subsidiary can be regarded as a whole, ignoring the independence of the subsidiary, and the parent company can directly bear the responsibility. Cai Xin pointed out that the third view was rejected by most countries because it hindered international investment.

Last but not least, some scholars proposed that companies should bear Corresponding Social Responsibility (CSR), which extends the obligation of environmental information disclosure. The author believes that this view can be combined with the current popular ESG research. Claim after environmental infringement belongs to ex post facto rights protection, while emphasis on corporate social responsibility and environmental information disclosure obligations belongs to ex ante prevention. Obviously, moving the timeline forward can have a better effect.

In foreign countries, scholars' research on the legal issues of transnational environmental tort is also relatively rich, forming many research results. The overall focus is on environmental tort issues and tort claims of transnational corporations. For example, Daniel Bertram analyzed the problem of environmental tort from the perspective of transnational corporations. He believed that transnational corporations, as powerful participants in the global economic pattern, caused more environmental damage because of impunity for enterprises and institutional barriers prevalent in host countries, which prevented victims from obtaining legal remedies. This view is consistent with the general view in China. He also emphasized that transnational tort litigation is still a tool to achieve procedural and substantive environmental justice. Michael Anderson mentioned that the climate change caused by the emission of carbon dioxide and other greenhouse gases at the present stage will affect the environmental quality of surrounding countries. However, different from the research perspective of domestic scholars, Anderson emphasized the strict censorship treatment of transnational corporations that they are subjected to at present. Foreign scholars in the field of transnational environmental tort research in a variety of forms. For example, Noah Sachs explained the problems of tort liability system by establishing a theoretical model of responsibility negotiation based on the institutional theory of politics, and summarized the main obstacles to the implementation of liability system at this stage based on the model.

6. Research Prospect

6.1 Summary of Research Status

First of all, the overall number of existing papers at home and abroad is limited, and some of the them has a long time span. China formally implemented the <Law on the Application of Laws> in 2011, and the previous laws and regulations have limited reference value. With the promulgation of the <Civil Code>, the chapter of the original <General Principles of Civil Law> on the legal application of foreign-related civil relations has become invalid, and the corresponding judicial interpretation has also become invalid. Secondly, the focus of the academic community is more concentrated and prominent, in which the research on the application of law is obviously more than the jurisdiction, and the recognition and enforcement of judgments are less involved. On the basis of theoretical research, there are also a lot of practical analysis from the perspective of transnational corporations, or from the perspective of oil pollution, nuclear pollution, dangerous goods transport and other special environmental tort fields. In addition, it can be noted that the concern of marine environmental tort has increased in recent years, which is directly related to the frequent occurrence of international marine environmental pollution incidents.

The relief of transnational environmental tort has gone out of the framework of national liability and started to move towards private law and internalization. Although the formulation of a unified international treaty is the most direct and effective solution, the existing judicial practice has proved that the path is full of obstacles and difficult to achieve the ultimate goal. Therefore, it is more effective to focus on the relevant provisions of national laws. Many scholars have shifted their focus to the establishment of punitive compensation system, compensation fund system and liability insurance system, while others have emphasized the connection with civil law, criminal law and administrative law.

6.2 Future Outlook

China has not yet established special article on transnational environmental tort, which indicates that there is still space for researching in this field. And among the existing documents, although some of them were written in the beginning of the 21st century, some of the raised problems, such as “the court lacks a unified standard for determining the place of infringement”, “restricting party autonomy”, and “should tend to protect the rights and interests of the weak”, have not been resolved until now. And with the invalidation of legal documents, there is no law to judge the “place of infringement”. Legal gaps lead to problems that are difficult to solve in judicial practice.

On the other hand, China’s economy has developed at a high speed in recent years. It is no longer in line with China’s national conditions to regard China as the host country of transferred pollution. The number of Chinese enterprises “going global” has increased, indicating that China’s becoming a home country is the trend in the future. Changing the inherent perspective thinking and innovating the research content from multiple dimensions may become a new perspective for the study of transnational environmental tort law issues.

At the same time, the specific characteristics of environmental tort is not only reflected in environmental tort compared with general tort, but also reflected in the different characteristics of environmental tort in different fields. Existing research focuses on water pollution (marine pollution), nuclear pollution and hazardous waste transportation, but does not involve other pollution factors such as air pollution, noise pollution and soil pollution. Therefore, when discussing the legal issues of transnational environmental tort, special analysis should also be carried out in combination with the particularity of different environmental fields.

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