



On the System Construction of Ecological Damage Compensation Responsibilities

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Abstract

Ecological damage liability is a new “civil liability” accompanied by ecological damage in the era of environmental crisis. Environmental liability insurance system, environmental funding system, ecological damage assessment system and other system should be established to improve the ecological damage liability system in our country and provide institutional guarantee for the construction of ecological civilization society.

Key words: Ecological damage; Compensation; Liability

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INTRODUCTION

China’s rapid economic growth in the past decades has brought a high price, especially that of the environmental cost. There is a tendency of increasingly serious environmental pollution and ecological destroy in China. Thus, ecological damage is becoming a new type of damage to get legal remedies. This brings great challenge to traditional China law system. How to define ecological damage and construct a reasonable ecological damage

legislation is of great importance. Except for perfecting environmental citizen suit law, China should set up relevant systems such as environmental reliability insurance system, environmental protection fund system and ecological damage evaluation system, so as to offer statutory guarantee for the construction of ecological civilization society.

1. PERFECT THE SYSTEM OF ECOLOGICAL DAMAGE ASSESSMENT

To make the liability accurate, ecological damage liability should be based on the ecological damage assessment system. There must be a scientific ecological damage assessment system to determine the amount of ecological damage. Ecological damage assessment system can also reduce the cost of environmental litigation disputes. Experience of developed countries shows that seeking restoration of contaminated environment and resources are often faced with protracted litigation, which is not conducive to timely repair environmental damage. In common law system, take the United States as an example, in 300 lawsuits from environmental damage filed in 1989 (Exxon Valdez tanker spill case occurred in that year) many of the plaintiffs are still trying to repair the environmental damage that the 9th Circuit Court had already held until March 15, 2009.

There are a lot of reasons for the lengthy litigation of such environmental damage events. One of which is that the parties must undergo costly, highly complex environment and resource damage assessment studies. Its institutional reason is related to the lack of environmental damage assessment system. Recognizing these problems, the US Congress enacted the “Oil Pollution Act of 1990 (hereafter referred to as “OPA90”),

authorizing federal states and three appointed judges as public trustees to restore the damaged natural resource damage. The US Congress also designated “national Oceanic and atmospheric Administration” (NOAA) to issue the evaluation rules of oil pollution damage for the

Ministry of Natural Resources, which starts the process of setting up an ecological damage assessment system. So far, the US has already established a rather advanced and mature ecological damage assessment system on the basis of environmental remediation costs and a participation mechanism of responsible parties. The civil law countries, such as Italy, Portugal and so on have also established a system of ecological damage assessment. For example, Article 18 of "Italian Environment Act" provides that "if the damage can not be accurately determined, the judge will consider the following factors and fair ruling: (a) environmental restoration costs; (b) the polluter's related profit." The considerations of environmental damage assessment is defined as environmental restoration costs and polluter's profit in this article. The latter is not strictly in the scope of environmental damages, which is considered to have introduced some kind of punitive damages factors. Thus it can be seen that the development tendency of the two legal systems both establish and perfect the ecological damage assessment system to provide environmental damages standard for environmental justice basing on environmental remediation costs as a benchmark.

Ecological damage assessment should be based on a series of scientific technical specifications. In this regard, some scholars have pointed out that "the identification and quantification of ecological damage generally has a strong technical characteristics, which should be base on the acquisition of environmental monitoring data, research of environmental science, the use of economics method and other scientific and technical study." On the evaluation of environmental damage (including pure environmental damage), the Chinese Ministry of Environmental Protection issued the "opinions on carrying out identifying and appraisal work of environmental pollution damage" and "the recommended method to calculate the amount of damages to the environment" on May 30, 2011 and began to promote sound environmental damage assessment system to provide applicable standards for environmental management, environmental justice, etc.. The Environmental Protection Department issued the "the evaluation procedures of pollution damage of environmental emergency to emergency phase" on August 2, 2013, constructing an environmental damage assessment procedures system of environmental emergencies in the emergency phase. The above regulations and technical standards involve ecological damage assessment system, which remain some following problems: First, the content and technical assessment index system of environmental damage is in the exploratory stage, so the rationality of the index system still need to be further tested and revised; secondly, the legal rank is too low, which affects the effectiveness of its judicial application; Third, the lack of participation mechanism of responsible parties or potential responsible parties. Thus, the environmental damage assessment

system still need to be scientific stipulated on the basis of environmental remediation cost in the basic law and assimilate the participatory mechanisms of responsible after being further explored, and improved in practice.

2. PERFECT THE ENVIRONMENTAL LIABILITY INSURANCE SYSTEM

It is believed that

environmental liability insurance is a kind of insurance that takes the compensation liability of the insured because of environmental pollution as insurance object. And its object is usually limited to personal injury, property damage or other economic loss due to natural disasters or accidents and other emergencies.

There are also some scholars claimed that "environmental liability insurance refers to the liability insurance that targets the insured shall be liable for environmental compensation or management responsibility because of environmental pollution." The difference between the two lies in the different perspectives of the object of insurance. The former is limited to the traditional economic losses while the latter is limited to environmental compensation or governance responsibilities. The author believes that the combination should be taken. The subject of environmental liability insurance involves the overall of traditional loss of life or personal injury, property damage and other economic losses and ecological damages caused by environmental pollution. Liability insurance system is a "non-fault compensation system" which is an integral part of "damages or compensation system" in nature. That is to say, it is not a system based on tort by negligence but a system aims at relief victims and spread risks. "Non-fault compensation system" includes labor occupational accident insurance, compulsory automobile liability insurance, environmental liability insurance and other compensation system. Professor Wang Zejian believes that "tort liability system, non-fault compensation system and social security system constitute a three-stage damages or compensation system." As for the functions of environmental liability insurance system, Professor Zhou Ke believes that

environmental liability insurance has a pre-preventable feature which could achieve the purpose of compliance with laws indirectly so as to reach the effects of managing risk and spreading loss. It is effective to improve the insured's independent consciousness of controlling pollution risk so that investment in pollution equipment would be increased to reduce premiums to encourage the development of enterprises more cautious.

Liability insurance system is of great significance in the field of environmental responsibility, especially for commonly compulsory insurance requirements in the international convention and the legislations of different countries in the field of nuclear damage, hazardous waste damage, marine oil pollution damage and so on. However, its functions is very limited in the case of a purely

environmental damage. This is due to the enormous damage caused by the pure environmental damage. It is hard to bear the insurance compensation for most insurance companies and the insured could hardly afford such high cost of insurance. So it still needs reinsurance. In progressive ecological damage cases, it is difficult to determine premiums reasonably because the accident risk is hard to calculate.

From the point of environmental liability insurance model, the United States, Germany and Sweden adopt a model that giving priority to compulsory liability insurance and supplemented by any insurance model while Britain and France adopt the opposite model. "EU Environment liability Directive" implement any insurance model to its member states. By the end of 2007, the ministry issued "guidance on environmental pollution liability insurance", which requires to carry out environmental pollution liability insurance pilot work in key industries and regions. Article 52 of "Environmental Protection Law" promulgated in 2014 provides, "the state encourages to insure environmental pollution liability insurance" and any insurance model could be adopted at this stage. I believe that environmental liability insurance system should be further explored, researched and scientifically built to deal with the remedy problem of traditional environmental damage and ecological damage. As for the compensation for the ecological damages in special field such as nuclear damage, hazardous waste damage, marine oil pollution damage, etc., the implementation of compulsory insurance system and the reasonable regulation of liability limit are considerable. And it should be carried out voluntary insurance at the present stage in other areas of ecological compensation.

3. SET UP A CORRESPONDING ENVIRONMENTAL DAMAGE LIABILITY FUND SYSTEM

Environmental damage liability fund, also known as the "Environmental mutual funds" or "public compensation fund",

refers that a certain amount of funds provided by the relevant operators to form a fund according to a certain way, once the legal liability emerges, the Fund will bear the legal liability and give remedies to victims in a timely way.

From the functional views of the system, environmental damage liability fund system has its own independent system values as one of the components of "non-fault compensation system". It is of great help to set up a corresponding environmental damage liability fund system to make up for the functional limitation of environmental damage compensation liability system and environmental liability insurance system and share loss. Specifically, there are two reasons as follows: Firstly, the ecological damage remedy function of environmental damage compensation

liability system is difficult to achieve when the responsible person cannot be ascertained or the responsible person has no compensation ability. In this case, the establishment of environmental damage liability fund system could remedy ecological damage together with environmental liability insurance system. Secondly, environmental damage liability fund system could be a kind of remedial and reliable ecological damage remedy system if the responsible person cannot be ascertained or the responsible person has no compensation ability when adopting voluntary insurance and responsible parties are not insured.

The environmental damage liability fund system in our country is at the primary stage at present and has made some achievements. For example, a number of national and local environmental protection foundation have been established according to the regulations of "Foundation Management Regulations" (2004) and environmental damage liability fund system has also established in some areas, but it is still far from mature. For another, "Although China joined "the International Convention on Civil Liability for Oil Pollution Damage" (referred to CLC convention) in 1980, it has not been a Member State of "Establishment of an International Fund for Compensation for Oil Pollution Treaty" (1971) and (1992). Therefore, China's oil industry still has no mandatory obligation to establish oil pollution fund from the angle of international law. "However, Article 66 of "Marine Environmental Protection Law" (1999) provides that "establish vessel-induced oil pollution insurance and oil pollution compensation fund system according to the principle of Shipping Liability for Oil Pollution Damage risk-sharing by ship owners and shippers", which provides a legal basis for the establishment of ship oil pollution compensation fund system. Then, Article 56 of "Prevention of Pollution from Ships Marine Environment" (2009) states "the owner of the goods and the agent who receives the seaborne persistent oil substances goods in waters under the jurisdiction of the People's Republic of China should pay ship oil pollution compensation fund." Accordingly, the notification of "the levy management approach of Ship Oil Pollution Compensation Fund" CZ [2012] No. 33 issued by the Ministry of Finance and the Ministry of Transport in May 11, 2012, establishes the specific fund management rules. Thus, a mandatory ship oil pollution compensation fund system has been established in the domestic law, which is conducive to marine environmental protection and responsibility sharing. However, in inland, inland waters and other non-oil damage fields, there has not been established any similar environmental damage liability fund system because of the lack of coverage, so the system has not yet become the universal base system.

From the view of comparative law, the US "Superfund Act" (CERCLA, promulgated in 1980 and amended in 1986) is a more typical, mature environmental damage liability fund legislation. According to which the US government set up a "super fund" whose fund comes

from federal grants and tax on petroleum and chemical industry. And it is a reasonable expense mainly used to pay government and private for cleaning up pollution and restoring the environment. "Super fund" is under the direct management of U.S. Environmental Protection Agency Administrator, having the status of an independent legal subject and the qualification of suing and responding. It has made distinguished contributions in the history of environmental governance in the United States.

The author believes that we should perfect the environmental damage liability fund system in our country by learning from foreign environmental damage liability fund legislation, which is more mature. The US "Superfund Act" (CERCLA, promulgated in 1980 and amended in 1986) is certainly a representative one. To achieve this goal, we should pay attention to the following factors: First, the legislative forms. It is considerable to stipulate the system into the "Environmental Protection Law", the specialized "Environmental Liability Act", or formulated by the State Council as formulating the "Environmental Damage Liability Fund Regulations". Second, the legislative goals. Legislative goals should be focused on establishing an environmental damage liability fund system which is widely covered and universal. The system established should cover all areas of marine, inland and inland water. It should also cover the field of oil pollution damage and non-oil pollution damage. However, it is noteworthy that the field of nuclear damage is quite special, so the supplementary guarantee responsibility is provided by governments while environmental damage liability fund could not help according to the "nuclear contamination Convention". Which excludes the applicability of the "Establishment of an International Fund for Compensation for Oil Pollution Treaty". The reason is that the governments have direct and important regulatory obligations to the safety of nuclear according to the Convention. Supplementary guarantee responsibility should be taken by the government because the environmental damage caused by the nuclear energy is often too enormous and nuclear energy is usually monopolized by the state. The author believes that the rule "supplementary guarantee responsibility should be taken by the government" also apply to the field of domestic nuclear environmental damage. Thus, the field of nuclear damage should be excluded from the scope of environmental damage liability fund system. Third, the nature, uses and applicable conditions of the funding system. From the view of its nature, the environmental damage liability fund system is a kind of supplementary guarantee responsibility system. That is to say, only the responsible person cannot be fixed or the responsible person has no compensation ability or the responsible person should not pay for the compensation according to the law will the fund give compensation. Accordingly, after the fund paid the compensation, it could recourse once it identified those responsible. Funds should be primarily used as a reasonable

fee to repair the environment. Thus, this standard, there are both wide place and narrow place in Article 17 of "Ship Oil Pollution Compensation Fund levy management approach". Item 3 of the Article, "the direct economic losses caused by fisheries and tourism" has nothing to do with the environment restoration. The scope of "other expenses approved by the State Council" in Item 6 is not clear and too wide, which should be deleted; "the assessment costs of natural resources damage and environmental functions damage" has not been provided, which is too narrow and should be increased. As for the specific applicable situations of fund, Professor Chen Ciyang claims that "(environmental damage liability) Limitation of Liability of fund can be divided into two circumstances. One is in the case of unknown sources, and the other is when the polluter is fixed but he has no ability to pay for the pollution. Under these two circumstances, the responsibility to compensate for the damage and remediation expenses will be taken by the Fund." Article 15 of "Ship oil Pollution Compensation Fund levy management approach" provides that the environmental damage liability fund can also be used when the cost of statutory liability limit exceeds or perpetrators are exempt from the amount of compensation liability by law. The above provisions is more reasonable and should be upheld.

CONCLUSION

To cope with increasingly serious environmental problems, China should set up relevant systems such as environmental citizen suit system, environmental reliability insurance system, environmental protection fund system and ecological damage evaluation system, so as to offer statutory guarantee for the construction of ecological civilization society.

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