

# The Research into the Protection of Plaintiff's Right of Action in Environmental Litigation Against Multinational Enterprises

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## ABSTRACT

Environmental rights are an integral part of the human rights of every human. Environmental litigation is necessary to ensure that regardless of the social class of individuals, they have access to safe, healthy, sustainable, and clean surroundings. There has been a great dormancy in environmental litigation procedures which calls for research to identify reasons and find solutions. The research process is complex because of limitations in determining violations of ecological human rights. There are various reasons causing inequality in humans enjoying necessary environmental rights. The doctrine of forum non conveniens is one obstacle towards achieving environmental rights and requires an amicable solution for all cases. Standards are not uniform for all places internationally, making it challenging to develop uniform policies. Research shows that different reasonable plaintiffs are considered foreign, leaving matters open to infringement. Protection of legal action is rugged for various reasons and differences like Multinational Corporations. Environmental rights research is best conducted using the observational method. The method is best because it is qualitative and will enable researchers to classify their observations. The technique can be carried out in three ways including controlled, participant, and naturalistic observations to get wholesome information on the quality of the environment. Surveys and questionnaires will be used to collect data from respondents and compare it to their observed data. Researchers should use the regression method of data analysis while descriptive statistics will help to researcher visualize the environmental situation. The results will help researchers develop recommendations to improve ecological rights for the reviewed location. The doctrine of forum non conveniens is meant to serve environmental human rights and, therefore, should be enhanced for the purpose. Authorities need to solve problems of plaintiff difficulties by introducing and improving environmental public interests' lawsuits. This will be successful by stressing the vital points that form the fundamental requirements for successful ecological human rights.

**Keywords:** *Environmental Human Rights, Environmental litigation, Equality.*

## 1. INTRODUCTION

Economic globalization has brought about the growth and prosperity of multinational corporations (MNCs), at the same time, it has raised more and more environmental issues. Although the global environmental management movement has had a profound impact on the environmental policies of multinational corporations, however, most multinational corporations still fail to apply the same rigorous economic analysis to environmental decisions as they do to other decisions. The local populations whose habitability rights have been

destroyed are undoubtedly the greatest victims of the environmental damage that results from this situation. They are powerless to resist the transnational economies unless they file a lawsuit, and their right to sue on this issue is in jeopardy.

However, there are still some questions that remain unsolved. The primarily problem is how can we improve and select the desirable methods to guarantee the right to sue in response to the current situation that it is difficult to guarantee the right to sue for environmental human rights violations by transnational corporations.

Lyuba Zarsky addressed the convergence of human rights and environmental ethics, the impact of trade liberalization on the environment and human rights, the impact of environmental damage on civil, political or welfare, and labor rights, and directly relates to the tools and insights of a range of disciplines such as corporate social science. [1]

In *Environmental Human Rights and Climate Change Current Status and Future Prospects*, [2] the professor Bridget Lewis discussed the current state of environmental human rights at the international, regional and national levels and provided a critical analysis of the future development of this field. He envisaged specific areas of future development where he called for further clarification and regulation of environmental rights so that they could be used more effectively against various environmental hazards.

This paper takes a variety of research approaches. It encompasses both the study of policy and the implementation of law from normative jurisprudence on the discovery and identification of legal rules and legal principles empirical jurisprudence, and the study of society as a whole outside the law from the study of the intellectual nature of the content of the law itself.

## **2. ACTUAL PROBLEMS**

### ***2.1. Difficulty on Guaranteeing the Environmental Human Rights by Not National Corporations***

Environmental litigation is one of the significant ways to implement environmental law and it is a process in which the court hears cases related to environment in accordance with its legal authority and specific litigation procedures. At a time when multinational companies are highly active, cases of violation of environmental human rights by multinational companies are common. The citizens whose right to live and the right to live in the environment are violated are not guaranteed the right to litigate against the violation of environmental human rights by multinational companies, and they are unable to defend their rights through effective means. The lack of creation of environmental rights due to the inadequate basis of the parent law to the subordinate law system, which restricts the creation of environmental rights by the subordinate law. This phenomenon leads to the lack of creation of environmental rights, the lack of clarity of environmental substantive rights, and the abnormal state of the legal norms of environmental rights showing the vacuum of environmental substantive rights and the dormancy of procedural rights. [3] It is also due to the lagging research of auxiliary theory supporting judicial operation, which makes environmental litigation dormant as a legal procedure for environmental rights protection. There are a variety of reasons. One reason is the extraterritorial limitations on the jurisdiction to use

human rights law. Moreover, there is the general principle that applies to human rights law within a state. These two reasons must implement their human rights obligations within their territory. In other words, as a general principle, human rights law applies only territorially. The extraterritorial applicability of human rights law has become a matter of recent controversy as more and more environmental victims seek remedies under human rights law.

In addition, it's difficult to prove environment-based human rights violations. While it is still relatively common to prove causation in litigation, it is more difficult to prove the existence of causation in environmental cases. Often, when the environment has been polluted, the consequences may not be revealed until decades or more later, at which point it is difficult to determine the exact cause of the environmental damage, let alone to establish that the environmental damage caused some harm to human rights. Even when there is some understanding of the causes and effects that cause the environment, it is still difficult to attribute an event or effect to one event with certainty because the particular event or effect is usually only one of many contributing factors.

### ***2.2. Reasons for the Difficulty in Guaranteeing the Right to Environmental Litigation***

Firstly, the inequality of the parties to the litigation makes sense. It is worth pointing out that the "inequality" here does not mean that the litigation rights enjoyed by the two parties are not equal, or that there is a difference in the status of the litigation, but refers specifically to the environmental litigation, the two parties are often in the economic base, the amount of information, technical level and other aspects of the disparity. As a result, there is a clear distinction between the strengths and weaknesses of the two parties in litigation. [4] To begin with, there is an inequality of financial resources. The victims of environmental pollution caused by illegal emissions from enterprises are often unspecified citizens. After entering the litigation process, the victim, as the plaintiff, is often in a weak position and has difficulty in competing with the defendant in terms of financial resources. The second is the unequal capacity to obtain evidence. In the above-mentioned pollution damage proceedings, the burden of proof on the plaintiff's side is to prove that the defendant has committed an act of discharge and that it has suffered damage as a result. The defendant, on the other hand, has to prove that it does not carry out the discharge, or that there is no necessary causal link between the discharge alleged by the plaintiff and the consequences of the damage suffered from it. The causal link between the discharge and the damage is very complex and difficult to prove, because of the indirect, social, complex and latent nature of environmental pollution. [5] In cases, the defendant presents an expert

report proving that it does not carry out the discharge, or that there is no causal relationship between the discharge and the consequences of the damage. The plaintiff is required to testify to the contrary. As far as the power of individual citizens is concerned, their forensic ability cannot compete with that of enterprises. Once again, there is an unequal ability to save oneself. Self-rescue here refers specifically to the fact that after the damage has occurred, the victim often suffers both financial and emotional damage. Individuals alone are unable to change the situation of environmental pollution and are less able to help themselves. Although the enterprises that have caused damage are often ordered to stop production or to rectify the situation within a certain period of time, they are able to operate normally by changing the direction of production or investing in pollution control due to their strong economic base, and they have a strong ability of self-rescue.

Secondly, the doctrine of *forum non conveniens*, also poses a certain obstacle to the guarantee of the right to environmental litigation. The *forum non conveniens* doctrine means that Court A, although it has jurisdiction over a particular case, does not find it convenient to have jurisdiction over that case after considering factors such as the participation of the parties in the proceedings and the convenience of Court A itself to hear the case. At this time, Court A may decline to exercise such jurisdiction if Court B in another country, which also has jurisdiction over the action, is more convenient and also in the interests of the parties and the general public. What's more, the doctrine of *forum non conveniens* infringement on the right to sue is direct. According to existing judicial practice, the application of the doctrine of *forum non conveniens* application by the receiving court usually results in dismissal of the action or termination of the action. The U.S. courts apply the doctrine of *forum non conveniens* to the dismissal of most of the lawsuits, and most take the conditional dismissal of the lawsuit. Most of the early cases adopted this model to apply the doctrine of *forum non conveniens* to dismiss the lawsuit with certain conditions attached to the defendant. But no matter which practice are adopted, there is no doubt that the protection of the right to sue is impacted badly. Both their rights and interests are infringed, which means they can't safeguard their legal rights.

Thirdly, from an international perspective, there is no uniform application of standards at the international level, and the different legal systems between countries reinforce the restrictions on environmental human rights law make it difficult to handle. The impediment posed by the doctrine of *forum non conveniens*, on the other hand, is mainly manifested by the fact that it is not uniformly applied internationally and is misinterpreted by countries with different legal systems. For example, in civil law countries, it faces certain difficulties of implementation. In civil law countries, due to the influence of the idea of separation of powers, the legislator restricts the exercise

of judicial power by formulating a perfect and strict legal system. Besides, this tendency is reflected in the judicial field by generally limiting the discretion of judges. Therefore, the status and role of judges in civil law countries are more limited. At the same time, Judges only need to make decisions according to the laws formulated by the legislator. There is no need to develop and create law through jurisprudence, as is the case with judges in common law systems, and legislators in civil law countries do not allow for the existence of such a power.

In contrast, discrimination against foreign plaintiffs is common in common law countries. There are benefits in the US legal system that attract foreign plaintiffs, such as high amounts of damages, success fee arrangements and pre-trial discovery procedures, foreign plaintiffs flock to litigate in US courts, a situation that would significantly increase the burden on US courts. As a result, US courts need to impose W restrictions on foreign plaintiffs' choice of forum, and US courts will exercise jurisdiction when they believe that their national interests are better served by having cases heard in their own courts. Conversely, US courts will apply the doctrine of *forum non conveniens* to turn away litigation, leaving the interests of plaintiffs, particularly foreign plaintiffs, unprotected or subject to a greater degree of infringement. This constitutes discrimination against foreign plaintiffs and the *forum non conveniens* doctrine has developed into a tool for judicial protection. Compensation matters have been underway, ever since the loss of Malaysia Airlines flight MH370 in 2014. According to international aviation regulations, the families of those lost have the right to choose whether to file a lawsuit in China, the United States or Malaysia, and some families of those lost have chosen to file a lawsuit in the United States due to the relatively high amount of compensation available in the United States.[6] Previously, a lawsuit filed by the families of those lost in India had been dismissed in a local court in Chicago, USA. In past cases where compensation was successfully awarded, it is not as high as the parties has expected. Moreover, litigation in the US is expensive and lengthy, and is likely to be dismissed by the local courts. The limited judicial resources in the US also make it unlikely that the courts will expend too much effort on MH370, which has fewer missing persons in the US. The doctrine of *forum non conveniens* then facilitates the dismissal of foreign plaintiffs' lawsuits by US courts.

### **3. THE REASON WHY LITIGATION IS DIFFICULT TO PROTECT**

#### ***3.1. Obligations of Multinational Corporations***

Principles that guide MNCs and litigious rights not only aids in the creating of new global law commitments but also in expounding current principles and practices for businesses as well as states. The guides help improve

the existing standards to ensure the conservation of human, labor, and environmental rights.[5] The principles are framed in three main pillars including the state obligation to guard against human rights abuse, MNCs' duty to respect human rights, and the need to help the abused achieve remedy.[7] Various international organizations like the organization for economic cooperation and development (OCDE) work to build better policies towards providing litigious rights in different MNC countries.

Businesses should respect litigious rights concerning both national and international laws. MNCs will perform their operations while adhering to the rules, regulations, policies, and administrative practices of the state they operate in. Various states have various international agreements to ensure that transnational business enterprises adhere to international and national laws. The MNCs are expected to conduct their business while providing human and labor rights to the environment. Their production processes should be carried out with regard to how they affect the environment and citizens of the business's host country.

To fulfill their responsibility in respecting litigious rights, the MNCs should ensure the implementation of various policies. The policies aid in their commitment to respect and find a proper remedy for adverse effects on human rights. To avoid future negative impacts on litigious rights, enterprises can assess actual and potential human rights effects, incorporating and acting upon the findings. The research can aid in ensuring the MNCs avoid practices or products that are bound to abuse human rights. The MNCs can involve the state, stakeholders, and other potentially affected groups in identifying potential human rights risks. Litigious rights are comprehensive and can affect various people or sectors. [8] Therefore, it is up to the MNCs to identify different types of litigious rights and avoid their abuse of those rights.

The business' products, practices, or omission of activity by MNCs can cause adverse effects against human rights. The need for MNCs to reduce the cost of production makes them use environmentally hazardous processes that significantly affect the host country's citizens country. The violation of environmental human rights makes it the host country's responsibility to take the necessary measures to curb the infringement. [8] However, since MNCs are great contributors to the economy, they enjoy substantial political power internationally. The position of authority might sometimes cause the MNC's negligence of human environmental rights.

Despite this, the act of negligence and violation of environmental human rights is punishable through private international law. Both the national and international laws harmonize to establish liabilities of the MNCs and decide on compensation. Since MNCs are

non-state actors, the applicable law is not predetermined. Hence it becomes hard to determine the outcome of the negligence case. However, when the law is applied, the MNCs face consequences that could lead them to be chased out of the host country. Due to this fact, MNCs need to respect and regulate environmental litigation rights.

### ***3.2. Need to Fulfil the Responsibility and Protect Environmental Human Rights***

States should respect human rights, respect them, prevent their abuses, and promote human rights. States should consider human rights acknowledged in both national and international law. Even though the states are not accountable for human rights abuse from the private sector, they could interfere by ensuring conservation of the belligerent rights by implementing preventive and remedial measures. Preventative and restorative measures to be considered include; policies, legislation, adjudication, and regulations that enhance and protect the rule of law. Engaging and regulating MNCs' extraterritorial activities that take place within the state is vital towards protecting human rights. [9]

MNCs are significant in the growth of various states; however, the states should not place the economic interests of the MNCs before human rights. Therefore, states should ensure that laws requiring business corporations to respect human rights are enforced. MNCs should comply with national laws, including respect for human, labor, and environmental rights. Many MNCs are not familiar with the state's federal laws they operate in. The state has to provide clarity in some parts of law and policy like laws governing the right to use of land and environmental protection rights. Cooperate, and security laws that shape the business behavior should also be explained to the enterprises to avoid future misunderstandings. The state should be aware of the implications of various rules and policies to different human, labor, and environmental rights. Therefore, guidance to MNCs on respecting human rights is the critical role of the state.

When businesses recognize that they have instigated or contributed to adverse effects, they should ensure that the victims receive remedy. The state also should ensure that victims of human rights abuse are given a remedy and protected from further abuse. The state inspects, punishes and compensate business-related human rights abuse. Remedies may include rehabilitation, apologies, financial and non-financial compensation, and prevention of further harm. [10]

Active engagement in offering remedy to victims is an obligation of the MNCs in ensuring that litigious rights are respected. Suppose the adverse effects have not been caused by the MNCs but are associated to their procedures, products or services through their

relationship in business. In that case, the MNCs are obligated to respect human rights. The MNC might not be compelled directly in providing remediation but can assist in doing so. Some MNCs may be operating in conflict-affected areas, making them complicit to human rights abuses by other people. In this case, the corporations should make sure that they do not worsen the state of affairs. They can however assess on how to best respond to and consult external expertise like international human rights institutions.

The state has a responsibility to ensure that judicial mechanisms present in the host country ensure remediation of human rights abuse victims. They should ensure that corruption and political pressures do not prevent justice's endowment against business-related rights abuse. Various legal and practical barriers may slow the provision of justice. However, the state should be able to overcome the obstacles and offer remedies depending on the specific rights and needs of the victims.

National and international human rights institutions play a vital role in ensuring that the victims remedy human rights abuses related to business operations. These institutions provide well-resourced and adequate information regarding human rights abuse and various consequences of the abuse. The institutions are not non-state-based, experienced, and are not faced with corruption and political pressure problems. These characteristics will make it easier for them to provide better solutions and remedies for business-related human rights abuses. Therefore, the state is expected to facilitate access to national and international human rights institutions and incorporate the state mechanisms in providing better remedies.

Other international organizations such as the OCDEs, United Nations, and various NGOs ensure remediation to victims of human rights abuse by MNCs. OCDEs assist in law-making and creating corporate duties [5]. Upon human rights abuse, these organizations have a role in punishing the guilty corporations and offering a remedy to the victims of abuse. United Nations has also played a significant role in enhancing human rights and ensuring that abuse victims are given appropriate remedies.

## **4. SUGGESTIONS AND IMPROVEMENTS**

### ***4.1. Improve the Doctrine of Forum Non conveniens to Better Serve the Environmental Human Rights Litigation***

Originated from common law countries, the doctrine of forum non conveniens is widely accepted in the courts of those western countries. This common law principle gives courts the discretion to decline exercising jurisdiction over certain cases where the underlying principles of justice and convenience favor dismissal. [11] The use of this doctrine in legal practice truly makes

it more convenient to bring litigation against the violation of environmental human rights committed by multinational corporations.

However, unreasonable aspects of the doctrine of forum non conveniens still exist and awaits to be improved. First of all, the application of this doctrine in legal practice always get interference with the separate judiciary system of other countries. According to the principles established in *Piper Aircraft Co. v Reyno*, when the court decides to apply the doctrine and refuse to hear the case for certain reason, they can choose to reject with some conditions, which is usually referred as conditional refusal of action. For example, in a real example called Bhopal Gas Case which is about the environmental pollution conducted by US company in India, the US court refused to hear the case by applying the doctrine and attached some conditions such as obedience to the jurisdiction of the Indian courts and waiver of the defense of limitation. In this case, American court indirectly interfered with Indian legal justice by attaching those conditions and give some guidance to this case's proceedings in Indian courts to some extent. Secondly, when the court apply the doctrine and refuse to accept the case, claimant's enthusiasm to sue is often hit. Consequently, it might leave the dispute unsolved for several years. Plus, determining the amount of compensation may become a thorny issue. Most environmental human right violation cases end up with one party pay amount of compensation to the party whose interests are damaged. But the compensation standards in different countries differ a lot. When the court of district where the standards are much higher refused to hear the case and transferred the case to other courts where the compensation would be much less, the interests of the party receiving compensation may suffer losses. Except that, it would usually take a long time for the court to decide whether to apply the doctrine of forum non conveniens, which lengthened the trial time and increased the cost of the case.

Facing the predicaments of the doctrine of forum non conveniens, adjustments must be made to make it more suitable for legal practice nowadays. For conditional refusal of action, it is strongly suggested that conditional refusal of action should be abolished. The legal nature of conditional dismissal proceedings is vague, which brings a heavy litigation burden to the plaintiff. Therefore, in order to avoid the denial of justice arising from the application of the principle of inconvenience to the court and the certainty of the outcome of the lack of fair settlement of proceedings, the conditional refusal of proceedings should be eliminated. In the meantime, foreign claimants shall be accorded equal respect as the native plaintiffs. As for the compensation topic, relevant international legal instrument can make uniform provisions for this, which can prevent the different compensation standards between different nations. Furthermore, the government should clearly set the time

limit for the court to make its decision of applying this doctrine on the purpose of saving suit time and relevant costs.

#### ***4.2. Introduce Environmental Public Interest Litigation to Solve the Problem of “Plaintiff Difficulties”***

Environmental public interest litigation is a popular way across the world to resolve the problem of violation of environmental human rights conducted by multinational enterprises. Similar litigation form can be found in China, US and some other countries. For example, in China, the Civil Procedure Law as amended in 2012 (2012 CPL) and the Environmental Protection Law as amended in 2014 (2014 EPL) formally created EPIL by authorizing public authorities and environmental groups to bring lawsuits against "acts of polluting or damaging the environment that has harmed the public interest." [12] In other words, qualified claimants only need to show that there has been a harm to public interest, not a harm to an individualized property or economic interest, to have standing to sue, which distinguish the environmental public interest litigation from other forms of suits. The form of environmental public interest litigation is well worth learning in the global society.

In order to make the environmental public interest litigation better play a role, some points should be stressed. First of all, for the reason that sometimes there is no direct victimization group of environmental pollution problem, at which time the claimant would be hard to find to bring a litigation directly, a specialized national institution can be set by law to bring lawsuit against multinational enterprises who violated environmental human rights. And it must be noted that such litigation is raised to protect the social integral interest, instead of the interest of any specific populations. Plus, towards the problem that the claimants always have trouble of taking evidence and investigating the facts, the law should establish relevant legal provisions to facilitate the litigation. For example, the law can grant special right to the national institution who acts as the claimant to initiate special surveys. Furthermore, initiating lawsuits against multinational companies cannot ignore its transnational nature. Sometimes, to grasp some important evidence that can tip the balance in the whole lawsuit, the claimant parties have to cross the border to any other countries like the home country of the corporations. So, any international legal instrument can be established to facilitate cross-border evidence collection in environmental human rights litigation. The domestic law in each country can also be unified in the international legal instrument. Finally, it must be noted that the environmental public interest litigation system is still in its infancy worldwide. The global society should work together to polish the

environmental public interest litigation system after later legal practice.

#### **5. CONCLUSION**

In recent years, environmental damages are getting more and more serious globally, which raises public awareness towards environmental human rights protection. With the development of economic globalization, multinational enterprises now play an active role in the global society. But in the meantime, they are also the principal members whose acts leads to the global environmental damages during their commercial conducts. Litigation is an essential method for environmental human right protection. Nevertheless, considering that the legal instrument concerning litigation right protection and their specific system are far from perfect, and also multinational enterprises' sphere of influence can always put some pressure on the filing and process of litigation. Some alteration can be adopted to guarantee victims' right to litigation. The doctrine of forum non conveniens should be improved in many aspects. Conditional refusal of action is strongly recommended to be abolished to reduce the burden of plaintiff. Meanwhile, foreign claimants shall be accorded equal respect as the native plaintiffs on the purpose of truly legal justice. Some international legal instrument should also make uniform provisions to harmonize the difference in the provisions of domestic laws on the amount of compensation. Except the adjustment on the doctrine of forum non conveniens, environmental public interest litigation can be introduced globally, which is on the purpose of protecting the society's common interest in a better way. A specialized institution can be set up or be appointed to act as the claimant to bring lawsuits for society's common interest, or to provide special assistance for the convenience of litigation. However, in a word, it is the whole global society's duty to work together to harmonize the huge difference between different states' legal provisions towards environmental human rights litigation. By polishing relevant international legal instruments, environmental human rights would finally be well protected in the future.

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