

The Characteristics of Corporate Environmental Responsibility in Climate Change Litigation

Dan Zhan

Dalian Ocean University, Dalian, Liaoning, China

ABSTRACT

Climate change has affected human beings around the world, and the atmospheric system on which it depends is changing. Under the influence of climate change, extreme weather occurs frequently. In order to respond more actively to global climate change, climate change litigation is emerging globally, involving more subjects such as governments or enterprises in climate governance actions. This paper summarizes the characteristics of climate change litigation against enterprises from the existing climate change litigation cases, mainly including the legal basis of litigation and the change of claims in litigation.

KEYWORDS

Climate Change Litigation; Corporate Responsibility; Environmental Responsibility.

1. THE CONNOTATION DEFINITION OF CORPORATE ENVIRONMENTAL RESPONSIBILITY

The concept of corporate environmental responsibility originates from corporate social responsibility. Modern corporate social responsibility can be traced back to the United States in the 1920s. The environmental responsibility of enterprises has been continuously emphasized in the international community. In 1948, the *Universal Declaration of Human Rights* covered environmental rights, and the international community gradually paid attention to environmental rights. The *Stockholm Declaration* in 1972 made it clear for the first time that enterprises need to bear environmental responsibility, which is a milestone in the international environmental movement. The OECD's *Code of Conduct for Multinational Corporations* (OECD) proposes that enterprises should "reduce the ecological footprint through environmental impact assessment, clean production and environmental management systems". Under the UN's *Global Compact*, corporate social responsibility is classified into four key areas: human rights, labor rights, environmental sustainability and anti-bribery. As an international social responsibility identification standard, the social responsibility of SA8000 includes three aspects: labor rights protection, consumer rights protection and environmental protection.

After the American scholar Oliver Shelton first put forward the concept of corporate social responsibility, its extension has been expanding. In 1954, Howard Bowen put forward the question of what social responsibilities should be expected of enterprises, and humanistic corporate social responsibility is the obligation of businessmen to actively move closer to relevant policies, make corresponding corporate decisions and take satisfactory actions in order to achieve the goals and values of society.[1] Carroll proposed the corporate social responsibility (CSR) pyramid model, and environmental responsibility is listed as the core content of ethical responsibility.[2] Freeman advocates that enterprises should be responsible for multiple stakeholders including the environment.[3] Kitzmueller and Shimshack believe that the core of social responsibility is corporate

environmental responsibility, including a series of actions taken by enterprises to achieve sustainable development and reduce energy consumption, protect the social environment, and prevent and control pollution.[4] Rassindren and Hans believe that corporate action to improve social welfare to enhance the public interest is also one of the contents of corporate environmental responsibility.[5]

2. THE EXISTING LEGAL BASIS FOR THE DETERMINATION OF CLIMATE RESPONSIBILITY

2.1. Basis of International Law in Climate Change Litigation

The international conventions based on the *United Nations Framework Convention on Climate Change* (UNFCCC), the *Paris Agreement* and the *Kyoto Protocol* have been used as the basis for litigation and adjudication in climate change litigation. UNFCCC, as the first international convention on cooperation to address climate change in human society, has established the principle of common but differentiated responsibilities, the principle of fully considering the needs of developing countries, the principle of climate response under the concept of sustainable development, and the principle of prevention first, mitigation and adaptation, which provides a framework for the country to cope with climate change. Under the *Kyoto Protocol*, the countries in Annex B are required to achieve greenhouse gas emission reduction targets and have ushered in the era of carbon trading, establishing corresponding carbon trading mechanisms. Under the *Paris Agreement*, a climate governance framework was established and the overall goal of climate governance was clarified. This goal provides an international legal basis for the demonstration of corporate climate responsibility in judicial practice. In the case of *Milieudefensie et al. v. Royal Dutch Shell plc.*, one of the grounds for Shell's decision to enhance its carbon emission targets was the *Paris Agreement*.[6] The court recognized the plaintiff's claim that Shell should also comply with the 1.5° target and take active and effective measures to reduce emissions. Under the UNFCCC Convention, the participants are countries or regions. As the liability carrier, there are obstacles for countries to directly use the Convention as the basis for private subjects to bear climate responsibility in private climate change lawsuits, mainly by allocating obligations to different liability groups through domestic legislation.

The international human rights convention represented by the *European Convention on Human Rights* is one of the bases for litigating against countries and governments in climate litigation. The right to life, private life and family life to be respected in the *European Convention on Human Rights* has already been applied in climate change litigation. Under the *Guiding Principles on Business and Human Rights: Implementing the United Nations Framework on Protect, Respect and Remedy*, companies have a responsibility to respect human rights. Even if the actions of companies or their associates do not have a negative impact on human rights, companies are also required to take positive measures to avoid or mitigate adverse human rights impacts related to their business relationships and business, products or services. In climate change litigation based on international law, the subjects being litigated are mostly states and governments, emphasizing the state's duty of care regarding human rights in the context of global climate change. In practice, courts promote climate actions and demonstrate the climate responsibilities of enterprises through the interpretation of human rights laws.[7] For instance, in the aforementioned case of *Milieudefensie et al. v. Royal Dutch Shell plc.*, the court pointed out that although the goals of the Paris Agreement are not binding, they represent a generally recognized and accepted standard that protects the common interests of humanity in preventing dangerous climate change. The plaintiff held that, in accordance with the right to life and the right to private life under the *European Convention on Human Rights*, Shell's emissions threatened the lives and living environment of Dutch citizens, and the court also recognized this argument. The verdict of this case has had a significant impact on other ongoing or future private climate change lawsuits.

2.2. The Legal Basis for Domestic Climate Change Litigation

In the domestic laws of various countries, the legal basis for initiating climate change lawsuits involves multiple aspects. The Constitution, tort law, economic law, etc. have all become options for filing lawsuits. In countries where there is no specific or complete climate change law within the country, the constitution often becomes a favorable basis for initiating climate lawsuits, requesting the government or enterprises to be responsible for citizens' climate-related rights. Under tort law, enterprises are the targets targeted. The actions of enterprises in destroying carbon sinks and generating large amounts of greenhouse gases during production will be regarded as the causes of infringing upon the living environment of the parties involved or causing property losses to the parties involved. In economic law, when it comes to consumer rights protection law, advertising law, etc., the enterprises facing litigation are not only traditional high-emission enterprises, but financial institutions will also become the targets of litigation.

The first is that the Constitution serves as the basis for climate change litigation. In climate change litigation based on the Constitution as the legal basis, the core demands mainly revolve around citizens' rights to environmental health and the right to guarantee climate stability. Among them, cases where the right to guarantee climate stability is explicitly recognized by judicial authorities are relatively few, while cases where courts accept climate change lawsuits based on the infringement or threat to citizens' environmental health rights and interests are more common. For instance, in the case of *Gbemre v. Shell Petroleum Development Company of Nigeria Ltd. and Others.*,^[8] the plaintiff argued that Shell carried out large-scale natural gas burning in the community during its exploration and production activities, without taking into account the environmental impact of its activities on the livelihood and collective survival of the community, as well as the adverse effects of natural gas burning on climate change and the potential threat to life. This kind of natural gas burning activity violates the right to life and human dignity under Articles 33 and 34 of the *Constitution of Nigeria*, and reinforces this right in Articles 4, 16 and 24 of the *Charter of Human and Peoples' Rights in Africa*. Among the existing cases of determining corporate climate responsibility, *Milieudefensie et al.v.Royal Dutch Shell plc.* is representative. The court held that the responsibility of enterprises stems from the unwritten duty of care under the *Dutch Civil Code*. Enterprises have the obligation to 'show due care' and need to take reasonable measures to avoid causing damage to others or the environment. In this case, the court's determination of the enterprise's duty of care stems from the interpretive application of international soft law and domestic laws.

The second is to conduct climate change litigation based on tort law. The long-term and large-scale greenhouse gas emissions of enterprises also involve the application of tort law. In lawsuits based on tort law, plaintiffs often believe that a company's greenhouse gas emissions are related to the losses and damages it has suffered. The company should provide economic compensation for the losses and damages it has suffered, and it should also take measures to prevent future damages. When it comes to enterprises' emissions of greenhouse gases, the plaintiffs often start from the enterprises' production and operation behaviors, accusing them of causing climate change and violating the corresponding environmental laws, and demanding compensation from the enterprises or seeking other remedies. Legal departments involving various aspects such as species protection and air laws. For instance, in 2008, a private climate change lawsuit in the United States accused Dominion Nuclear Connecticut of violating the *Connecticut Environmental Protection Act* (CEPA) and other common laws.^[9] The plaintiff believes that the increase in the production capacity of nuclear power plants, coupled with the warming of seawater caused by climate change, will affect Marine species. The court of first instance dismissed the lawsuit on the grounds that its litigation reasons were not valid. In the appeal, the Supreme Court of Connecticut reviewed the legal claims of the Atomic Energy Act and CEPA.

The third is climate change litigation based on economic law. Climate change lawsuits filed against enterprises for greenwashing involve advertising laws, consumer laws, etc. Enterprises label

themselves as environmentally friendly, but in reality, they have not achieved the corresponding results. In the case of *Deutsche Umwelthilfe v. Apple Distribution International Ltd.*,^[10] Apple claimed that the carbon dioxide emissions generated from the production of these watches were offset through compensation programs. But the problem is that Apple has not clearly stated exactly what these compensation items are. Moreover, it is not clear whether these compensation projects will continue to operate throughout the entire period when fossil carbon emissions remain in the atmosphere. The plaintiff, Deutsche Umwelthilfe, believes that Apple's promotion of its products as 'carbon-neutral' is misleading and not conducive to fair competition.

3. THE CHANGING TREND OF CORPORATE ENVIRONMENTAL RESPONSIBILITY UNDER CLIMATE CHANGE LITIGATION

In a large number of private climate change lawsuits, litigants demand that companies assume corresponding responsibilities for their contributions to climate change. Since 2017, a series of cases have been filed by states and municipal authorities in the United States, among which are seeking billions of dollars in compensation to cover the infrastructure needed for climate adaptation, such as building seawalls to protect coastal properties. In existing climate change litigation, requests for enterprises to directly compensate litigants for damages or losses are generally difficult to obtain court support due to the inability to establish a causal relationship. However, in the subsequent development of climate change litigation, requests for enterprises to make preventive damages will be supported by courts. In addition to economic compensation, requests for enterprises to take actions in the production process to address climate change will also be supported, generally manifested as the social responsibility of enterprises, such as making complete information disclosures and fulfilling carbon emission reduction commitments.

3.1. Require Enterprises to Increase Preventive Compensation

In a large number of private climate change lawsuits, in addition to claiming damages, plaintiffs often ask defendant enterprises to take preventive measures to prevent the expansion of further damage in the future, such as covering the costs required for taking preventive measures. In the case of *Native Village of Kivalina, And City of Kivalina Vs. Exxon Mobil Corporation, Et. Al.*, the plaintiff argued that the large-scale greenhouse gas emissions from ExxonMobil had caused the sea level to rise, which would affect the survival of the residents of Kivalina. Therefore, the plaintiff requested the defendant to pay compensation for the damages already caused and to be caused, including the costs required for inland relocation.^[11] *Municipalities of Puerto Rico v. Exxon Mobil Corp* filed by the City of Puerto Rico in 2022, the plaintiffs argued that the company's fossil fuel products played a major role in the storm disaster that occurred locally in September 2017. The defendant's production activities are still ongoing, which will accelerate local climate change and harm the health, safety and other rights and interests of local residents. The defendant requests economic compensation for the losses caused to the local area.^[12]

3.2. Enterprises are Required to Fulfill the Obligation of Information Disclosure

The obligation of information disclosure is regarded as one of the corporate social responsibilities that enterprises should undertake, including the environmental information of enterprises. In a large number of existing lawsuits, it is believed that enterprises should fulfill their social responsibilities. This includes requirements for the disclosure of ESG (Environmental, Social and Governance) reporting information, information related to carbon dioxide in the application for administrative licensing, and whether the increase in carbon emissions will violate applicable standards, etc. In addition, the documents and communications of enterprises related to climate change have also become the objects that are required to be made public, and the incorrect disclosure of climate risks

by enterprises will also become the objects of alleged behavior. For instance, in 2016, former employees of Exxon Mobil filed a lawsuit against the company, claiming that it had engaged in behaviors such as failing to disclose internally compiled climate change reports. In the process of enterprises fulfilling their social responsibilities, information disclosure is both an essential and a duty that should be fulfilled.^[13] It is a compliance with the rules within the legal framework and also a guarantee of the right to know of consumers and the public. It is also beneficial for enterprises to take the initiative to fulfill their information disclosure obligations, which is conducive to their stable operation and the establishment of a good corporate image. Enterprises should take the initiative to do a good job in information disclosure and fulfill their social responsibilities.

3.3. Enterprises are Required to Implement Emission Reduction Commitments and Behaviors

In the existing climate change lawsuits, there is a view that enterprises should participate in the global carbon neutrality actions, take environmental factors into account in their management processes, and make environmental compliance commitments. Therefore, some enterprises have been sued in court for failing to adopt cleaner production methods. In the case of *Friends of Milieudefensie et al. v. Royal Dutch Shell plc.*, the plaintiffs requested the court to rule that Shell must achieve zero emissions by 2050 to comply with the Paris Agreement. The reason is that under the Dutch Civil Code and European human rights law, Shell has the duty of care and the obligation of human rights protection, and should take appropriate actions to curb its contribution to climate change. The court held that Shell's massive greenhouse gas emissions have contributed to global warming and the occurrence of extreme weather, and the occurrence of this result is irreversible, threatening the human rights of the Dutch people. Shell has the responsibility to take measures to limit its contribution to global climate change. The court made a judgment. Shell is required to reduce the emissions of all its activities by 45% by 2030 compared with the level in 2019.

4. CONCLUSION

Although in climate change litigation, there are only a few cases where lawsuits against enterprises have been supported by courts. However, through courts, enterprises are actively or passively participating in global climate governance and making contributions to it. The process of climate change litigation has not been smooth sailing, and a large number of failed cases have also provided inspiration for enterprises to undertake environmental responsibilities. The climate and environmental responsibility of enterprises is not only reflected in the emission of greenhouse gases such as carbon dioxide during the production process, but also in their own information disclosure and emission reduction commitments, which have become the focus of attention in climate change litigation. As the main emitters of greenhouse gases, enterprises should naturally participate in climate governance. In the future, more actions of enterprises will be associated with environmental responsibilities, and enterprises will also bear legal environmental responsibilities.

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