

Comparison of the Sino-US prohibition order system in environmental protection

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Abstract. Environmental protection has become a hot topic today, environmental pollution, the awakening of environmental protection consciousness, lead to environmental protection innovation in the legal system, environmental protection prohibition system in recent years also on the hot plate of protecting the environment, but the prohibition system in our country is corresponding in the civil procedure law, but there are many defects compared with other countries. This paper mainly compares with the American environmental protection prohibition system to find out the system suitable for the further development and improvement of the Chinese environmental protection prohibition system. Mainly compare the environmental protection prohibition system and start subject, application conditions, audit procedures, the rights of the applicant, according to China's national conditions and environmental protection practice, suitable for the development of our country environmental protection prohibition specific system, in order to perfect the system and can well applicable to the field of environmental protection in our country.

Keywords: Prohibition order; environmental protection; comparison.

1. Introduction

The system of injunction originated in Roman law, mainly by the local administrator making a specific order against a subject. The Roman law ban (interdict) is a specific instrument ordered by a Roman magistrate for or not a certain act. And the system of injunction truly became a remedy in formal judicial proceedings after the establishment of equity. Under the principle of "fairness and justice",

The chancery court established the new relief measures in the course of the case, and gradually developed the temporary injunction in civil litigation in the Anglo-American law system. The Anglo-American legal prohibition system originated in the United Kingdom. When the original court has no jurisdiction basis or lack of remedy, but if not, the plaintiff may suffer irreparable loss, the injunction provides an equitable remedy to protect the legitimate rights and interests of the parties. Therefore, the injunction system has been developed in the British and American legal countries, and provides a fair and just remedy for the fair handling of cases.

Through legal practice, the injunction system provides a fair and just means in the handling of cases, and has been well applied in the British and American law system. After experiencing serious environmental pollution, the United States actively seeks for various legal means to solve environmental pollution. The prohibition system is one of the means, and constantly improves and develops, stopping the occurrence of many environmental problems in time through the prohibition system. China environmental problems in recent years, the Chinese people's environmental protection consciousness constantly awakening, in environmental protection is actively looking for a way out, innovative environmental protection measures, technical environmental protection facilities, update the environmental protection law, make it can play a more powerful means to protect the environment. Therefore, in the field of environmental protection in China, we also learn from and innovation of environmental protection prohibition system. Although the legal system of environmental protection prohibition system is not specified in China's Environmental Protection Law, in some local documents, the prohibition system has been innovated in the field of environmental protection, but there are still many problems that need to be further improved. Therefore, by comparing some problems in environmental protection between China and the United States, find out the shortcomings of China's environmental protection ban system, draw lessons from the ban system of the United

States, and put forward corresponding suggestions and suggestions for improvement according to the actual situation of China's environmental protection.

2. Introduction to the development of the Sino-US prohibition order system

2.1 The American injunction system

The American legal system formed in the British colonial period has much followed the British legal system. As early as the 10th century in Britain, the common law was developed first in order to establish a strong centralization. By the end of the 13th century, the common law had become a rather rigid legal system, with many defects such as the formalism of procedure, the conservatism of content, the obsolete trial system and the simplicity of relief. To remedy this defect in the common law, a new form of law arises, and this is equity. In the middle of the 19th century, the American states still applied the binary system proceedings of the British colonial common courts and courts of equity. There are three types of American bans: permanent, temporary, and preparatory bans.

2.2 China's prohibition order system

Prohibition system first issued in 1988 on the implementation <civil law of the People's Republic of China> several issues (trial) ", the opinion stipulates the people's court in litigation of need to eliminate obstruction, stop infringement, eliminate danger, first ruled according to the authority or application, the provisions from the behavior of the defendant litigation intervention, and the "prohibition" system has similar function. At this time, although it is not clear that the prohibition system, but the behavior preservation system has been clear. The Supreme People's Court issued by 1992 on the application of the civil procedure law of the People's Republic of China opinions of the civil procedure law "preservation and advance execution" system, which implied the meaning of behavior preservation, created the case before ordering actor to stop infringement, the rules closer to the "prohibition" system. The Maritime Special Procedure Law, which came into effect on July 1, 2000, specifically stipulates the maritime injunction, which refers to the compulsory relief measures requiring the maritime court to make or not act certain in order to safeguard the legal rights of the maritime claimant. The law will reflect the application of the behavior preservation system in maritime aspects. In 2000, China's intellectual property law system formally stipulated the "prohibition" system, and the "Patent Law", "Trademark Law" and "Copyright Law" successively determined the "prohibition" system. At this time, the prohibition system was formally stipulated in the field of intellectual property law.

With the continuous increase of environmental pollution, Public awareness of environmental protection has increased, In terms of environmental protection, The Kunming Intermediate People's Court established an environmental court in 2008, Mainly responsible for environmental pollution cases, In November 2010, Kunming Intermediate People's Court, Kunming Intermediate People's Court and Kunming Procuratorate jointly formulated the Opinions on Handling Environmental and Environmental Civil Public Interest Litigation Cases (Trial), The system is a whole new judicial practice, In serious harm to the environment, The court may issue a writ of prohibition upon the applicant's application, Take decisive measures to timely prohibit the defendant's relevant actions, And the public security organs shall assist in the execution. On November 15, 2011, Chongqing High People's Court issued the Opinions on the Pilot Establishment of Special Trial Courts for the Centralized Trial of Criminal, Civil and Administrative Environmental Protection Cases. Article 20 stipulates: " Implement the environmental protection prohibition system. In an emergency, if the defendant pollutes or destroys the environment under one of the three circumstances that may seriously endanger environmental safety, cause the difficulty to restore the environment or aggravate the damage to the environment, if the people's court considers it necessary after examination upon the plaintiff's application, it may make a ruling to prohibit the acts of environmental pollution and damage. During the examination, when necessary, the people's court may hold a hearing, or investigate and collect evidence for verification according to its powers. If an application for an

environmental protection prohibition order is filed before the lawsuit, the suit shall be filed within 15 days after the ruling of the people's court prohibiting the act of environmental pollution or damage is served. "The document also made clear provisions on the environmental protection prohibition order, and also stipulated on the application of the environmental protection prohibition order, further clarifying the application procedures of the environmental protection prohibition order, making it easier for the parties to operate.

3. Comparison of the application procedures of the prohibition injunction system

3.1 Comparison between the starting subjects of the Sino-US injunction system

(1) The subject of the American injunction system

The launch of the prohibition system in the US is based on the application of the parties, and in the field of environmental protection is also based on the application of the parties. No court starts the prohibition system according to its authority. The court is a judicial organ, which should start the corresponding judicial procedure according to the application of the parties. It should not deviate from the principle of judicial trial and take the initiative to start the corresponding judicial procedure outside the scope of the request, which can better reflect the principle of fairness and justice.

(2) China's ban system is launched

Behavior preservation should first have the general litigation conditions, meet the requirements of litigation, and the most important thing is the interests of litigation. Whether in the early stage of prosecution or in the process of prosecution, also regardless of this lawsuit or counterclaim, the application for behavior preservation must be the relevant parties to this case. The relevant personnel who apply for behavior preservation before litigation shall enjoy the right of civil claim, and shall have the civil action right capacity and civil action capacity. The person who applies for behavior preservation in the lawsuit should be the plaintiff or the third person who allows the independent claim, which is a necessary condition to start the behavior preservation procedure.

Article 100 of the Civil Procedure Law stipulates: " The people's court may, upon the application of one party, order to preserve the property of the other party, order it to make certain acts or prohibit certain acts; if the party does not apply, the people's court may also take preservation measures if necessary. "The article stipulates that the start of the behavior preservation system can be initiated by the parties or the court according to their powers. In the preservation of specific acts stipulated in China's Patent Law, Trademark Law and Copyright Law and the maritime compulsory decree stipulated in the Special Procedure Law of Maritime Litigation, the application of the parties or interested parties is clearly stipulated, and the court cannot make it according to its functions and powers. In these laws do not stipulate that the court can start the prohibition system, but the environmental protection litigation is relatively special litigation, environmental litigation, for environmental damage, no direct relationship between organizations and state organs can bring environmental public interest litigation to protect the environment, therefore, I think, in the field of environmental protection litigation, the court can start the prohibition, and in the civil procedure law, the court can start the preservation of the remedy, therefore, the environmental protection field court start the prohibition has legal basis, also in line with the particularity of environmental protection. Therefore, the initiation of an injunction in the field of environmental protection can be initiated based on the application of the plaintiff and the court in accordance with its authority.

3.2 Comparison of the application conditions for the Sino-US injunction system

(1) Conditions for application

The release of the order is likely to cause damage to the defendant's economic interests of the order, therefore, the release of the order is not as long as there is an application, after the application of the parties, the judge when deciding whether to issue after many consideration, in the United States in law, but in practice and formed a more strict system. When a party applies for a writ of prohibition, the judge should consider whether it should be issued, usually measuring whether it should be issued

on the following strict principles: 1) irreparable damage. The applicant must show to the court that a failure to issue an injunction would cause irreparable loss, a loss that cannot be compensated for or cannot be measured by a pecuniary measure. 2) 's balance of benefits. The judge would measure the applicant's impaired interest and weigh it against the respondent's damaged interest as a result of the injunction. 3) Public Interest Consideration. The judge will also consider the effect of the injunction on the public interest in deciding whether to issue it.

(2) Application conditions for China's injunction system

The civil procedure law, one hundred and one provisions: " interested parties because of emergency, do not immediately apply for preservation will make its legitimate rights and interests by irreparable damage, can before filing a lawsuit or apply for arbitration to the property, the domicile or have jurisdiction over the case of the people's court to apply for preservation measures. If the applicant shall provide security but not, the applicant shall reject the application. "The article stipulates in the application for preservation should meet the" emergency "and" irreparable damage "these two conditions, but for" emergency "and" irreparable damage " the two conditions are not specified, when applicable, the understanding of the two conditions are not clear, in the specific application judge is difficult to decide whether preservation, in practice, apply for litigation before behavior preservation is more difficult to achieve, because the judge has no judgment standard, also afraid to make the wrong ruling. Therefore, for the behavior preservation system, the applicable standards should be further clarified, because China is a case law country, there is no clear law, judges cannot make laws, therefore, because to strengthen the legislation of the applicable standards of the behavior preservation system, cannot be stipulated in the use of vague concepts, resulting in a blank in the application of the law.

Through the system of prohibition application conditions, the American prohibition system development earlier, and the United States is a case law, the judge in the application of the case can consider whether to issue the prohibition, many times in practice, has formed a relatively complete application conditions, and in accordance with the corresponding principles to review whether conform to the conditions of the prohibition. Late prohibition system development in China, the behavior preservation system is another name of prohibition system, both are essentially the same, but the behavior preservation system development late, has been in groping stage, the application conditions for vague, no clear standard, and China is a case law country, although the judge has discretion, but because there is no unified standard, fuzzy, the parties in the application not good persuasion, the judge exercise discretion is uneven, should not be issued, lead to applicable confusion.

3.3 Comparison of the protection of the rights of the respondent

(1) The United States injunction system guarantees the right to be applied for

In the United States Federal Rules of Civil Procedure clearly stipulates the right to hear, while the Federal Rules of Civil Procedure also provides for the merger of the hearing and entity-based hearing before the issuance of a preliminary injunction. And for the respondent's right to know, the injunction system of the United States stipulates the principle of notice, with no notice as the exception. Rule 65, section 1, of the US Federal Rules of Civil Procedure generally requires notice of a temporary injunction, except without notice to the opposing party or his attorney, and a preparatory injunction may not be issued without notice to the opposing party. The United States also has a punitive system. The above system is set up in the United States on the injunction system to protect the right of application, but also to prevent the abuse of the injunction system by applicants.

(2) China's prohibition junction system protects the rights to be applied

In the behavior preservation procedure in China, the application for behavior preservation is the right enjoyed by the plaintiff, and there is no clearer guarantee for the rights of the respondent. The Civil Procedure Law stipulates the subject of the preservation of acts, but does not specify the notification of the respondent and the right to know. Although it provides that the application for behavior preservation should provide a guarantee, Article 105 of the Civil Procedure Law stipulates: " If the application is wrong, the applicant shall compensate the respondent for the loss suffered by

the preservation. "For improper preservation can also apply for state compensation. However, there is no punitive compensation measures, because in judicial practice, it is inevitable that there will be malicious application for preservation. If there is no punitive measures for this case, it will be an indulgence of illegal acts.

4. The impact of the US in-law ban system on China

4.1 We will improve the application conditions for China's prohibition order system

According to Article 101 of the Civil Procedure Law, the application for preservation should meet the two conditions of "emergency" and "irreparable damage", but these two conditions are relatively vague, and it is difficult to measure these two standards in practice, so it is difficult for the judge to make a ruling when applying for an injunction. Under the conditions of the US injunction application, we can see that there are strict standards, a good measure of whether a case can issue an injunction, and the balance of interest between issuing an injunction and not issuing an injunction. Therefore, China's prohibition order application should improve its application conditions according to the actual situation of our country. We can draw lessons from the three standards of irreparable damage of the United States, the balance of interests and the consideration of public interest to improve China's application standards.

4.2 Improve the review system of China's prohibition order system

Late prohibition system development in our country, in the civil procedure law as the behavior preservation system, but only the corresponding system regulation, there is no detailed provisions of the system, there are still many problems in application, because our country is a law, the law has no clear provisions, it is difficult to persuade the parties. Therefore, China's prohibition system should learn from the experience of the United States to improve the audit procedures of the system, and at the same time, according to China's legal system, the corresponding audit system should be formulated. The following audit system shall be established when the prohibition of environmental protection and the legitimate rights and interests of the respondent shall be protected:

(1) Set up the hearing procedures. After the order of injunction, the parties are given the right to apply for reconsideration and a hearing, and the parties shall state about whether the injunction should be issued, allowing the parties to provide the necessary evidence and conduct cross-examination. That, after fully hearing the opinions of both parties and examining the relevant facts and evidence, the judge determines whether these measures should be modified, revoked or sustained.

(2) Establish a standard of review combining formal review and substantive review. For the "emergency", the applicant should provide the preliminary evidence of the environmental infringement, the infringement result and the damage caused before filing the environmental lawsuit, to clarify the special features of the environmental infringement cases. The combination of monetary compensation and management cost, compensation ability of the respondent and environmental damage to the environment; in the design of procedural relief rules, the parties have the right to apply to the people's court at the same level. As for the right of the parties to apply for reconsideration to the superior court, it shall be suspended. [10]

4.3 Improve the protection of the rights of the prohibition system in China

The Civil Procedure Law stipulates the subject of the preservation of acts, but does not specify the notification of the respondent and the right to know. There is no right to defend the respondent. For China's behavior preservation system, we should learn from the United States to classify different situations according to the prohibition system, and decide whether to notify the respondent according to the case situation, but we should not directly not inform the respondent to issue the prohibition order, which deprives the respondent of the right to know and the right to appeal. For the merger of the US prohibition hearing and the entity hearing, China is also worth learning from. At the same time, listen to the opinions of the respondent and cross-examine the corresponding evidence, which

can also be used as evidence in the trial, avoiding the repeated waste of judicial resources. The prohibition system in the United States provides punitive damages for the parties who maliciously apply for the prohibition, and China should also learn from this system, which is conducive to avoid applicants and the court, which will not only lead to the waste of judicial resources, but also damage the interests of the respondent.

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