

A Study on the Unlawfulness Element of Preventive Liability in Environmental Civil Public Interest Litigation

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Abstract. Unlawfulness shall be regarded as an independent constituent element in the confirmation of preventive liability in environmental civil public interest litigation. In defining the connotation of unlawfulness, the general substantive unlawfulness standard can better strike a balance between environmental activities and environmental protection. Given the complexity of the environment and the diversity of environmentally harmful acts, differentiated application of unlawfulness judgment standards is required for various types of environmental risks. In the determination of unlawfulness for preventive liability, it is necessary to clarify the identification criteria for the core essential element of "significant risk", and specify the burden of proof concerning the unlawfulness element under preventive liability.

Keywords: Environmental Public Interest, Unlawfulness, Preventive Liability, Substantive Unlawfulness, Civil Litigation

1. Introduction

Environmental civil litigation mainly falls into three categories: environmental tort litigation, environmental civil public interest litigation, and ecological and environmental damage compensation litigation. Among them, environmental tort litigation belongs to the scope of traditional civil tort litigation and corresponds to Article 1129 of the *Civil Code of the People's Republic of China*. The confirmation of tort liability in such cases adopts the constituent element criteria for traditional tort liability. Environmental civil public interest litigation is a special type of civil public interest litigation. Current laws do not separately specify the specific constituent elements for liability confirmation, and judicial practice and academic theories generally refer to the constituent elements of ordinary tort liability for judgment. For this reason, the following discussion on the independent value of the unlawfulness element in environmental civil public interest litigation will carry out analysis largely combined with scenarios of environmental torts, yet the definition of the nature of liability elements for such public interest litigation is not entirely restricted by the traditional tort liability constituent system.

To judge whether unlawfulness can serve as an independent constituent element for confirming preventive liability in environmental civil public interest litigation in China, the primary prerequisite is to clarify whether unlawfulness is an essential constituent element of environmental tort liability, and no unified consensus has been reached on this issue at the level of legal dogmatics to this day.

Further tracing the source, great divergences have always existed in academic research and judicial practice not only for environmental tort liability, but also for general tort liability as its superordinate concept. The mainstream academic theories on the confirmation of general tort liability are divided into the three-element theory and the four-element theory. The core divergence between the two theories lies in whether subjective fault and objective illegality can be separated, namely whether the unlawfulness of an act shall be listed separately as a judgment element for tort liability. As a special type of tort, environmental tort is also caught in the academic controversy over the independence of the unlawfulness element. Although the imputation logic of environmental civil public interest litigation cannot be directly equated with the constituent rules of environmental tort liability, scholars also hold different views on the independence of its unlawfulness element.

In line with the theories on constituent elements of general torts, some scholars classify the confirmation of environmental tort constituent elements into the two-element theory and the three-element theory [1]. The two-element theory holds that unlawfulness is not included in the constituent elements of environmental civil torts, and contends that fault incorporates unlawfulness, meaning fault is a concept containing both subjective and objective factors [2]. The three-element theory argues that unlawfulness is one of the constituent elements of environmental civil torts, treating unlawfulness as the judgment of the nature of objective acts and fault as the assessment of the actor's subjective state of mind [3]. These two methods of constituent element identification indicate, on the one hand, that the dispute over whether the unlawfulness of an act is an independent constituent element for confirming preventive liability of environmental torts still exists in the field of environmental torts; on the other hand, they reflect that the imputation principle applicable to environmental torts is the no-fault liability principle, which means the fault element does not need to be considered.

In the field of environmental civil public interest litigation, theoretical controversy likewise exists over whether the element of act unlawfulness holds an independent position in the application of liability confirmation rules. Concentrating on the confirmation of preventive liability in environmental civil public interest litigation, the unlawfulness element faces more prominent problems of being weakened and reduced to a mere formality due to its inherent preventive nature. Article 5 of the *Environmental Protection Law of the People's Republic of China* (hereinafter referred to as the *Environmental Protection Law*) establishes the basic principles of prioritizing protection and focusing on prevention, which also apply to the field of environmental torts. The introduction of the concept of preventive liability into environmental civil public interest litigation represents an important institutional innovation to put the preventive principle of environmental protection into practice. Some scholars argue that a debate between liability law and conduct law arose during the initial formulation of China's tort law. Liability law emphasizes protection and remedy for aggrieved parties, while conduct law tends to censure unlawful acts [4]. Traditional tort law places greater emphasis on censuring unlawful conduct, namely the confirmation of act unlawfulness. Torts in modern society take diverse forms, and certain acts themselves are not subject to censure. A typical scenario involving preventive liability occurs in environmental torts, where enterprises discharge pollutants that meet relevant emission standards. Therefore, alongside the shift in contemporary legal concepts, the core purpose of tort liability no longer lies in condemning tortfeasors; some acts themselves are even free from censure, and unlawfulness has thus been absorbed into fault. In other words, these scholars hold that liability confirmation for modern environmental torts should center primarily on remedying victims and lowering barriers for victims to obtain compensation. This paper, however, contends that treating unlawfulness as an independent constituent element in environmental torts will not raise difficulties for victims seeking remedies. In

practice, unlawfulness does not equate to formal illegality in a narrow sense. Adopting the general substantive unlawfulness standard, the interests protected by tort law are not limited to benefits attached to categorized rights. Meanwhile, under substantive unlawfulness for judging wrongful acts, the aforementioned act of discharging pollutants that comply with relevant standards qualifies as a censurable unlawful act, which creates no contradiction with the above viewpoint.

By its very nature, preventive liability does not require the occurrence of actual damage as a prerequisite, but focuses on the possibility of substantial risk arising. The assessment of substantial risk is closely linked to unlawfulness. Criteria for determining unlawfulness are frequently referenced when defining the concept of risk and judging the degree of substantiality, for instance, specific pollutant emission standards serve as a basis to evaluate risk levels. Compliance with unlawfulness criteria is not equivalent to violating administrative regulations, yet risk assessment is correlated with unlawfulness. Victims often need to cite relevant standards and specifications during proof submission, which forms part of the objective unlawfulness element. For this reason, establishing unlawfulness as an independent element will greatly facilitate the identification of substantial risks in environmental civil public interest litigation.

An analysis from the perspective of the imputation principle for environmental torts shows that the no-fault liability principle applies generally to environmental torts in China, except for punitive environmental tort liability stipulated in Article 1232 of the *Civil Code*. This means subjective fault is not a universal criterion for establishing environmental tort liability; this element is mostly used to determine the applicability of punitive damages based on the tortfeasor's subjective mindset. If act unlawfulness is subsumed into subjective fault, judicial review will be rigidly confined to the two established elements of damage consequence and causation. This blurs the liability boundary between harmful lawful acts and harmful unlawful acts, and may improperly restrict the freedom of social entities to utilize environmental resources in a legitimate manner. It can thus be seen that the unlawfulness element undertakes core institutional functions such as delineating the scope of protection under tort law and classifying types of tortious acts.

Scholars have long been divided on whether unlawfulness shall be listed as a separate constituent element, whether in liability for environmental civil public interest litigation, environmental tort liability, or general tort liability as their superordinate category. Taking the four-element theory of tort liability as the theoretical foundation, this paper combines the characteristics of preventive liability in environmental civil public interest litigation to demonstrate that unlawfulness acts as the core criterion for judging the establishment of preventive liability and shall be set as its independent constituent element. It shall also be clarified that the doctrinal division between the three-element theory and four-element theory in traditional tort law does not interfere with the independent selection of liability elements for environmental civil public interest litigation. As environmental civil public interest litigation differs from ordinary private interest tort litigation, defining the independence of the unlawfulness element does not need to be fully constrained by the inherent framework of general tort theory.

2. Divergent interpretations of the connotation of unlawfulness

Apart from exploring whether the unlawfulness element ought to be independent from the perspective of tort liability confirmation logic, we may also proceed from multiple interpretations of the very meaning of unlawfulness itself. Different connotations of unlawfulness correspond to distinct academic viewpoints, and accordingly affect the judgment on the independence of the unlawfulness element. The following part lists and discusses these divergent understandings of the connotation of unlawfulness.

2.1. Formal unlawfulness and substantive unlawfulness

Current domestic disputes over unlawfulness in tort liability mainly center on whether it shall serve as an independent element, while the distinction between formal unlawfulness and substantive unlawfulness receives insufficient attention. Still, divergent interpretations of the connotation of unlawfulness deserve equal emphasis, for different understandings may lead to entirely different classification theories of tort liability constituent elements. In the confirmation of preventive liability within environmental civil public interest litigation, the identification of "significant risk" is strongly correlated with the division between formal unlawfulness and substantive unlawfulness. For this reason, this paper first distinguishes and discusses formal unlawfulness and substantive unlawfulness in the section concerning the connotation of the unlawfulness element.

Two interpretations of unlawfulness in the field of tort law exist in domestic academic circles, namely formal unlawfulness and substantive unlawfulness. This division originally derives from theoretical discussions on the unlawful attributes of criminal acts in criminal law, and the classification system can be traced back to German criminal law theories at the earliest. Formal unlawfulness focuses on the actor's breach of the positive or negative obligations stipulated by legal norms; substantive unlawfulness emphasizes that an act imposes adverse and negative impacts on the legal interests protected by legal norms. Formal unlawfulness and substantive unlawfulness are merely two separate analytical perspectives for legal evaluation of an act, rather than two completely distinct forms of illegality. Accordingly, formal unlawfulness only refers to the formal connection between an act and legal norms, whereas substantive unlawfulness points to the substantive grounds for an unlawful act [5].

Each confirmation method has its merits and drawbacks. Formal unlawfulness sets relatively clear boundaries for defining unlawful acts, yet it bears limitations. For instance, in environmental civil public interest litigation, owing to the complexity of the natural environment and the diversity of technologies, numerous behavioral standards remain unregulated, or certain legally protected interests have not been categorized as rights. Such acts shall still be deemed unlawful when these unregulated interests are infringed upon. Meanwhile, the adoption of formal unlawfulness will greatly restrict judges' discretionary power, resulting in an overly conservative scope of remedy provision.

Substantive unlawfulness means an actor's act objectively violates specific legal norms or general codes of conduct. The confirmation of unlawfulness involves legal value judgment, and an evaluation can only be made by comprehensively weighing factors such as the type of infringed rights or interests, whether the actor is aware of others' rights and interests, and the interest comparison between the actor and the injured party [6]. Therefore, even if a tortfeasor causing environmental damage complies with administrative environmental protection regulations, such compliance does not negate unlawfulness if damage is inflicted on others, and the tortfeasor shall still be held liable for environmental pollution tort. Take the Green Peafowl Case as an example. The hydropower construction project carried out by the defendant Xinping Company was implemented in accordance with the *Environmental Impact Assessment Law of the People's Republic of China*. The company entrusted an environmental assessment institution to compile an environmental impact assessment report, which was reviewed and approved by the former Ministry of Environmental Protection. During construction, the project was conducted strictly under the EIA approval issued by the former Ministry of Environmental Protection, without committing the administrative illegal act of starting construction prior to obtaining approval. Nevertheless, Xinping Company was still required to bear corresponding preventive liability. In the context of preventive liability, its

hydropower station construction act posed risks of harm to rare and endangered wild animals and plants such as green peafowls and cycads, as well as tropical seasonal rainforests and tropical rainforests, which constituted "significant risk" and satisfied the requirement of substantive unlawfulness for preventive liability. In light of this case, relying solely on administrative illegality determined by documents such as environmental impact assessment reports to judge unlawfulness for preventive liability in environmental civil public interest litigation proves rather narrow. For any construction project, the environmental impact assessment report compiled by the developer and assessment institution is predictive in nature, so its content may contain deficiencies and fail to fully assess and predict all potential risks. Though professional technical assessment bodies supervise the substantive review conducted by environmental authorities approving the project, these authorities may also fail to detect existing flaws. They can only expect such defects to be uncovered during project construction or even operation, and remedied through special subsequent environmental impact assessment [7].

Analysis of the above typical case leads to the conclusion that compliance with environmental protection regulations is not the sole criterion for judging the existence of unlawfulness. A comparison of the characteristics of formal unlawfulness and substantive unlawfulness reveals that both have strengths and weaknesses. Thus, these two standards can be applied selectively on a case-by-case basis when handling complex liability bearing scenarios.

China's legislative practice concerning environmental torts has witnessed the evolution of unlawfulness confirmation standards, which is specifically reflected in the continuous clarification of legal interests damaged by environmental torts [8]. For this reason, this paper holds that a general substantive unlawfulness model, which takes substantive unlawfulness as the principle and formal unlawfulness as the exception, shall be adopted in the confirmation of preventive liability in environmental civil public interest litigation. As mentioned above, formal unlawfulness and substantive unlawfulness constitute a pair of opposing concepts in criminal law. Given that the mission and purpose of criminal law lie in the protection of legal interests, the essence of a crime, or the true implication of unlawfulness, can be summed up as the infringement of legal interests [9]. This is because the understanding of the concept of substantive unlawfulness and the essence of unlawfulness originates from the comprehension and deduction of the tasks or purposes of criminal law [10]. In other words, the scope of content covered by unlawfulness judgment and the boundary of unlawful elements must be restricted by the regulatory intent and protection purposes preset by criminal laws [11]. The cognitive foundation of defining substantive unlawfulness and the core of unlawfulness derives from the interpretation and inference of the objectives of criminal law. From the perspective of environmental civil public interest litigation, the essence of unlawfulness herein also refers to the infringement of environmental public interests. Establishing an independent unlawfulness element can further clarify the categories of damaged legal interests in environmental civil litigation. The *Civil Code* also stipulates two exceptional circumstances where formal unlawfulness is applied for confirmation. First, the punitive compensation liability for environmental torts directly specified in Article 1232 of the *Civil Code* shall be borne under the condition of "violating legal provisions", which falls under formal unlawfulness. Second, Article 1166 of the *Civil Code* prescribes that where the law stipulates tort liability shall be assumed, such provisions shall prevail. The application of formal unlawfulness standards for unlawfulness confirmation under special laws is embodied in relevant provisions of the *Law of the People's Republic of China on Prevention and Control of Environmental Noise Pollution*, *Law of the People's Republic of China on Prevention and Control of Radioactive Pollution*, *Law of the People's*

Republic of China on Prevention and Control of Soil Pollution, Law of the People's Republic of China on Prevention and Control of Environmental Pollution by Solid Waste and other statutes [12].

In summary, on the premise that unlawfulness acts as an independent constituent element, the general substantive unlawfulness standard is applied in practice, while formal unlawfulness is adopted under special circumstances. This indirectly demonstrates that the confirmation of unlawfulness is not narrowly limited to judging whether laws and regulations are violated, so it will not bring alleged adverse impacts on victims seeking remedies.

2.2. Conduct unlawfulness and consequence unlawfulness

Conduct unlawfulness means that an act committed by a perpetrator objectively violates legal provisions, which is mainly manifested as breach of statutory obligations, violation of laws enacted for the protection of others, or intentional infliction of harm on others through acts contrary to public morality. Its judgment criteria include violation of prohibitive legal provisions, breach of statutory duties, or infliction of damage on others in violation of public morality. Consequence unlawfulness refers to judging unlawfulness primarily from the consequence of conduct. If an act infringes absolute rights or interests protected by law without legitimate defenses, such act shall be deemed unlawful, and its judgment criterion mainly lies in whether the conduct causes damage to legally protected rights and interests [13]. Under German law, the theory of consequential unlawfulness applies to infringements of absolute rights listed in Paragraph 1 of Article 823 of the *German Civil Code*, such as infringements upon life, physical integrity, health, personal liberty and ownership. As long as damage to these absolute rights occurs, the act shall be confirmed as unlawful, without the need to examine whether the conduct itself violates duty of care or other requirements.

Shall conduct unlawfulness or consequence unlawfulness be adopted for confirming the unlawfulness of preventive liability in environmental civil public interest litigation? Exclusive adoption of either standard is one-sided. Some scholars advocate the dual theory of unlawfulness, dividing unlawfulness into that characterized by rights infringement and other types of unlawfulness, the latter including unlawfulness arising from breach of mandatory regulations and violation of public order and good customs [14]. Other scholars hold that the existence of unlawfulness shall be comprehensively judged combining the type of infringed interests and the form of infringing conduct [15]. A number of scholars propose that consequence unlawfulness or conduct unlawfulness shall be applied separately according to whether the tortious act is committed intentionally or negligently [16]. Still others argue that the confirmation standard for the unlawfulness of environmental tortious acts shall be determined based on distinctions among infringed interests [17].

This paper holds that the standard of adopting different unlawfulness confirmation methods according to the category of infringed interests shall be applied to judge the unlawfulness of preventive liability in environmental civil public interest litigation. Drawing on the rules for environmental tort liability confirmation, interests infringed by environmental torts are classified into statutory rights and non-statutory protected interests. For statutory rights, which are legally typified protected interests, the standard of consequence unlawfulness shall apply. Since rights are explicitly stipulated by law and inherently inviolable, no examination will be conducted on whether the environmental tortious act violates other prohibitive legal provisions. Unlawfulness may be affirmed provided the right is damaged without justifiable defenses. Moreover, applying the theory of consequence unlawfulness to judge the unlawfulness of environmental tortious acts involving rights proves more convenient and efficient in practice, balancing the freedom of environmental activities and the protection of victims' rights. For non-statutory protected interests, the theory of

conduct unlawfulness shall be adopted to confirm the unlawfulness of preventive liability for tortious acts. As protected interests beyond statutory rights are not typified in legislation, exclusive application of consequence unlawfulness may easily impair the freedom of environmental activities due to the ambiguous boundary between such interests and environmental behavioral liberty. Hence the adoption of conduct unlawfulness strikes a reasonable balance between legally protected interests outside statutory rights and the freedom of environmental activities.

2.3. Differentiated application of unlawfulness standards for various types of risks

Different countermeasures shall be adopted in response to diverse types of environmental damage risks. When confronted with cumulative risks such as heavy metal pollution, judges generally examine whether the liable party fulfills long-term monitoring obligations and whether the cumulative amount of heavy metals exceeds environmental capacity, namely applying the substantive unlawfulness standard for confirmation. Compliance with standards in instantaneous or short-term discharge does not negate unlawfulness if cumulative harm is caused. In the Taizhou Environmental Pollution Case, the court clarified when judging the occurrence of actual environmental damage: rivers possess natural self-purification capacity, and water quality monitoring indicators may return to compliance standards after a certain period, yet restored water quality readings cannot erase the actual damage already inflicted on aquatic ecosystems. This ruling stems from the special attributes of environmental damage, as ecosystems feature complex structures and integral nature. In this case, illegal discharge of waste acid into the Taiyun River and Gumagan River drastically lowered water pH values and severely destroyed aquatic ecosystems. Ecological remediation can only remedy the environment to a limited extent and hardly restore the ecosystem to its original state. Severe damage to aquatic ecosystems tends to cause the extinction of rare aquatic species, which can never be regenerated once lost. Accordingly, compliance defenses based on data from a limited period shall not be accepted for cumulative risks, and substantive unlawfulness shall serve as the confirmation standard. Whether the actor fulfills the high duty of care to avoid ecological damage may be set as the criterion for judging substantive unlawfulness. In light of specific case facts, inspection may focus on whether the actor employs best available techniques, carries out environmental risk assessment, and establishes emergency response mechanisms for unexpected incidents.

For sudden risks such as hazardous chemical leaks, reference shall be made to Article 22 of the *Measures for the Administration of Emergency Response to Sudden Environmental Incidents*. Priority is given to examining whether the obligation to implement emergency plans is breached, namely the unlawfulness of conduct combined with the assessment of duty of care.

For ecological damage risks such as deforestation for development, Article 29 of the *Environmental Protection Law of the People's Republic of China* shall be referenced. Unlawfulness is confirmed by examining violations of the ecological protection redline system, that is, the formal unlawfulness standard is applied.

3. Confirmation of unlawfulness for preventive liability in environmental civil public interest litigation

Previous discussions on whether unlawfulness shall be established as an independent constituent element mostly start with analyses from the perspective of environmental torts for private interests, followed by comparative research adapted to environmental public interest litigation. Nevertheless, environmental civil public interest litigation differs from private-interest environmental tort

litigation, so discrepancies inevitably exist in the confirmation of unlawfulness between the two. Accordingly, this section explores the confirmation of the unlawfulness element for preventive liability in the context of environmental civil public interest litigation, proceeding from the inherent characteristics of preventive liability itself in environmental public interest matters.

3.1. The essence of unlawfulness of preventive liability

Preventive liability is one form of liability assumption within the tort liability system. Preventive liability in environmental civil public interest litigation refers to the preventive liability borne by actors whose acts of polluting the environment or damaging ecological systems harm social public interests, or create significant risks of harming social public interests, including cessation of infringement, removal of obstacles and elimination of dangers.

The essence of unlawfulness of preventive liability can be interpreted as the breach of obligations for risk control. It does not take the occurrence of actual damage as a prerequisite, but focuses on the possibility of the formation of significant risks. Provisions concerning the prevention and halt of environmental torts in the Tort Liability Part of the *Civil Code* serve as the substantive legal basis for Article 19 of the Judicial Interpretation [18]. In accordance with Article 1234 of the *Civil Code*, unlawfulness acts as the prerequisite for instituting environmental civil public interest litigation and the behavioral constituent element constituting preventive liability.

The confirmation of unlawfulness for preventive liability differs from that for traditional damage compensation. First, the two have different confirmation purposes. Preventive liability aims to stop impending infringing acts in advance and prevent the occurrence or escalation of damage consequences via injunctions or risk prevention measures, with an emphasis on preclusion of potential risks. Traditional damage compensation is based on actual incurred harm, compensating victims for sustained losses through indemnity and other means, and focuses on post-hoc remedies. In addition, the two adopt different criteria for judging unlawfulness. The judgment of unlawfulness for preventive liability requires more comprehensive considerations, incorporating factors such as the urgency and hazardous nature of the conduct and its impact on public interests. For instance, in environmental judicial practice, an act may be deemed unlawful if it carries significant environmental risks and may cause irreversible harm to public interests, even if actual damage has not yet occurred. In such cases, the claimant must produce sufficient evidence to substantiate the claim of "significant risk"; otherwise, the concept of significant risk will be misused, leading to the abuse of preventive liability and undue restriction on the freedom of environmental activities. By contrast, judgment of unlawfulness for traditional damage compensation is generally premised on the occurrence of actual damage, and places greater emphasis on the causal link between conduct and damage consequences. There are also differences in the burden of proof between preventive liability and traditional tort damage claims. For preventive liability, the aggrieved party needs to prove that the conduct poses imminent danger or may cause substantial damage, and that such danger is urgent. For example, when applying for an injunction, evidence must be submitted to prove that the actor's conduct may threaten personal rights and interests or public interests. For traditional damage compensation claims, the aggrieved party is required to prove the occurrence of actual damage, the fault of the tortfeasor and the existence of causation, with a relatively lighter burden of proof.

3.2. Judgment on "significant risk" in the unlawfulness confirmation of preventive liability

As mentioned above, the confirmation of unlawfulness for preventive liability focuses on the possibility of significant risk arising, and the identification of significant risk in environmental civil public interest litigation constitutes a vital part of the application of the general substantive unlawfulness standard. For this reason, this paper regards significant risk as one of the crucial evaluation criteria for unlawfulness, and proceeds to discuss the identification of "significant risk".

Article 1 of the *Judicial Interpretation on Environmental Civil Public Interest Litigation* stipulates that the prerequisite for accepting preventive environmental civil public interest litigation is "acts of environmental pollution or ecological damage that create significant risks of harming social public interests". Four major controversies usually arise over the significant ecological and environmental risks: the scope of basic objects of significant risk, the distinction between significant risk, general risk and danger, the identification of the attribute "significant", and the time point for confirming significant risk.

First comes the scope of basic objects of significant risk, namely disputes over the types of legal interests likely to be infringed under such circumstances. The judicial interpretation specifies the object as "social public interests", a broad concept which raises the question whether it covers only ecological and environmental interests, or both ecological and environmental interests as well as personal and property interests. This gives rise to the division between a single basic object and a dual basic object. This paper holds that such division exerts no influence on the definition of unlawfulness, for the core concern under the context of environmental civil public interest litigation lies in environmental interests; the occurrence of damage to personal interests serves merely to distinguish public interest litigation from private interest litigation. Both classification modes incorporate the element of environmental interests, and share the common goal of confirming unlawfulness for liability assumption in environmental civil litigation, so either classification is applicable. Environmental interests are closely linked to personal interests, yet the adoption of the single basic object principle proves more concise and convenient considering factors such as the claimant's cost of proof and case handling efficiency.

Second, whether the interpretation of significant risk shall be narrowed down to "danger" or expanded to "risk". It must be clarified that "danger" refers to circumstances with the highest probability of ecological damage, where the likelihood of damage occurring is higher than that of non-occurrence as inferred from empirical rules. The probability of harm under "risk" is lower than that under "danger"; it is impossible to determine whether damage will occur or deduce its likelihood via direct experience, and the occurrence of harmful consequences cannot be objectively ruled out [19]. This paper maintains that "danger" shall be adopted as the criterion for identifying "significant risk", for four reasons. First, general risk carries high uncertainty and blurred boundaries, which may lead to unrealistic expectations. Some scholars argue that taking general risk as the standard for significant danger requires caution toward potential adverse consequences, meaning preventive measures shall be adopted regardless of whether environmental risks cause actual damage and whether a causal relationship exists between harmful environmental acts and tangible harm. Such an interpretation of significant risk will severely restrict the freedom of environmental activities and trigger excessive precaution out of undue fear. Second, the occurrence of "danger" can be predicted and its probability of harm measured by existing science and technology as well as professional expertise, rendering its boundaries clearer and facilitating the judgment of preventive liability. It should be noted that the lower probability of harm under general risk does not equate to a lowered threshold for applying preventive measures. Greater uncertainty

surrounding general risk increases difficulties for parties to comprehend the situation and for courts to conduct assessment, which easily leads to expectation gaps between the two sides and actually raises the threshold for preventive measures. On the contrary, when "danger" serves as the standard for significant risk, damage is far more likely to occur. Preventive measures to stop such harm become more necessary, assessment criteria are more explicit, and the rationality and necessity of precautionary actions are better justified. The litigation threshold is thus lowered to safeguard rights in environmental civil litigation. Third, tracing the usage of the term itself, the addition of the adjective "significant" to the noun "risk" inherently intends to draw a distinction between the two concepts. Significant risk is therefore analogous to danger, or lies between danger and ordinary risk. The structure of the term itself rules out the broad interpretation of significant risk as ordinary risk. Fourth, Articles 18 and 19 of the *Judicial Interpretation on Environmental Civil Public Interest Litigation* prescribe the preventive liability form of "elimination of danger" rather than "elimination of risk", demonstrating that legislation also tends to narrow the connotation of "significant risk" down to "danger".

Next is the identification of the attribute "significant". In combination with China's legal provisions and relevant stipulations of the *Rio Declaration on Environment and Development* [20], the "significant" in "significant risk" shall feature urgency in terms of time, reality of occurrence, and damage consequences of a severe or irreversible degree. These three points must be corroborated by sufficient evidence, namely the sufficiency of proof. Scientific data, expert opinions, monitoring reports and other evidence shall be submitted to prove the existence, degree and urgency of risks. For example, in environmental civil public interest litigation, claimants need to produce environmental impact assessment reports, forensic evaluation opinions and other materials to support their claims. Attention shall be paid to avoiding over-reliance on professional evidence. In the trial of civil public interest litigation, due to difficulties in proving causation, parties tend to regard professional evidence as the sole authoritative criterion. Nevertheless, scientific evidence does not represent conclusive findings on professional matters and does not possess inherent reliability. Any documents issued by expert assistants and forensic appraisers merely constitute opinions and views on specialized issues [21]. Both the claimant and the respondent still need to apply empirical rules and present competing accounts of events to the court in the form of coherent narratives [22]. When judging whether the claimant has fulfilled the burden of persuasion, judges shall also make assessments by virtue of empirical rules, and shall not presume high credibility merely because the claimant submits a large volume of specialized evidence or the issuers hold high professional qualifications. Otherwise, the process of proof persuasion and fact reconstruction will degenerate into a competition over the quantity of professional opinions. This will hinder judges from forming inner conviction, make it impossible to restore the full facts of a case, and fail to protect environmental public interests. Meanwhile, judges shall not accept all professional evidence submitted by claimants as the basis for judgments without scrutiny. They shall fully exercise the authority of active investigation and evidence collection granted to judges in environmental civil public interest litigation, and require claimants to evaluate and interpret their evidence. Failure to do so will unduly reduce the claimant's burden of proof and lead to the abuse of preventive liability.

The last item is the time point for confirming significant risk. Ecosystems are characterized by diversity, stability and sustainability. Diversity covers ecosystem diversity and species diversity. Stability refers to an ecosystem's capacity to resist external disturbances and maintain the relative stability of its own structure and functions, as well as its ability to recover its original state after being disturbed. Stability is correlated with ecosystem complexity, and different ecosystems possess varying degrees of stability. Sustainability means the long-term capacity of an ecosystem to maintain

a healthy state and achieve continuous development, requiring the ecosystem to sustain steady output of ecological service functions through self-regulation and adaptation amid environmental changes and disturbances. Stability is divided into resistance stability and resilience stability. Disputes over the time point of significant risk in environmental civil public interest litigation usually arise during the stable stage brought by resilience stability. Resistance stability refers to the buffer effect formed by an ecosystem's initial capacity to withstand environmental damage acts, which generally embodies the prevention-oriented principle of preventive liability and seldom gives rise to controversies. For scenarios involving resilience stability, questions emerge when the ecological environment exceeds critical thresholds at the time of the harmful act yet falls within such thresholds at the time of trial. This paper holds that the ecological environmental conditions at the time of trial shall serve as the evaluation standard. Proceeding from the legislative purpose of preventive liability, which is to prevent and protect against environmental damage that has not occurred but is highly likely to occur, ordering actors to bear liability merely on the ground that the environment once failed to meet relevant standards when it has returned to normal conditions by the time of trial runs counter to the original intent of preventive liability, turning advance prevention into ex post punishment. The objects of remedy for significant risk are ecological and environmental public interests exposed to real and imminent dangers. Preventive measures imposed by rulings are only meaningful if ecological environmental interests still face a high risk of damage at the time of trial [23].

In hearing cases of preventive public interest litigation, courts shall implement the principles of prioritizing protection and putting prevention first. They shall comprehensively judge whether the respondent's conduct constitutes the significant risk of harming social public interests as specified in Article 1 of the Judicial Interpretation on Environmental Civil Public Interest Litigation, from dimensions including the unique value of protected objects, the probability of damage occurrence, the severity of harmful consequences and the irreversibility of harm. This helps keep the ecological impacts of natural resource development and utilization within reasonable limits and safeguard ecological security. At the same time, the philosophy of green development shall be upheld, along with the principle of resource protection and sustainable utilization. Coordination shall be achieved among economic development, livelihood security and ecological protection to promote harmonious coexistence between human beings and nature [24].

3.3. Burden of proof for unlawfulness confirmation in preventive liability

In environmental civil public interest litigation, the claimant bears the initial burden of proof and must produce prima facie evidence to prove that the respondent's conduct creates significant risks of harming social public interests. Once the claimant fulfills this initial burden, the respondent shall assume the burden of counter-proof, namely proving that its conduct will not cause significant risks or that effective measures have been taken to eliminate such risks.

The process of proof undertaken by the injured party for preventive liability is the concrete application of the general substantive unlawfulness standard. For this reason, the respondent's burden of proof shall not be advanced simply on account of the difficulties of proof faced by the claimant. For instance, regarding acts with administrative permits and complying with emission standards, the judgment on preventive liability shall not hinge on whether the respondent can disprove causation. Instead, judgment shall first be based on whether the claimant can prove the existence of significant risks stemming from such acts. In the Five-leaf Maple Case, the court held that the project involved was still in the preliminary pre-feasibility study stage, and the evidence submitted by the claimant was insufficient to prove that the respondent had committed actual acts of

ecological damage and infringement upon social public interests. Nevertheless, the court ruled against the respondent solely on the ground that the respondent failed to disprove the causation between unlawful acts and damage consequences [25]. Such interpretation represents not only improper allocation of the burden of proof in judging preventive liability, but also inadequate argumentation on the general substantive unlawfulness standard. Taking substantive unlawfulness as the core of argumentation can resolve both the idling of the unlawfulness element and the improper allocation of the burden of proof simultaneously.

4. Conclusion

The essential attribute of preventive liability in environmental civil public interest litigation lies in unlawfulness, rather than the occurrence of damage consequences or subjective fault. As an independent constituent element of environmental tort liability, unlawfulness occupies an irreplaceable core position from the perspective of legal theory. Clarifying its connotation, confirmation criteria and normative functions not only helps to deeply grasp the legal characteristics of the unlawfulness element, but also promotes the improvement of preventive liability confirmation in China's environmental civil public interest litigation.

At the theoretical level, through a dialectical analysis of formal unlawfulness and substantive unlawfulness, as well as conduct unlawfulness and consequence unlawfulness, this paper demonstrates the rationality of adopting the general substantive unlawfulness standard that takes substantive unlawfulness as the principle and formal unlawfulness as the exception in judicial practice. This standard avoids mechanical reliance on administrative norms and flexibly responds to different types of environmental damage and significant risks through differentiated interpretations of the connotation of unlawfulness.

Within the framework of preventive liability in environmental civil public interest litigation, the essence of unlawfulness is embodied as the breach of obligations of risk management and control. Its particularity lies in taking "significant risk" as the core of unlawfulness judgment, and such risk shall be narrowly interpreted as "danger" with practical urgency, irreversible consequences and scientific predictability. Excessive reliance on professional evidence shall be avoided in the identification of significant risks, and judges shall conduct multi-dimensional reviews based on empirical rules. Meanwhile, the ecological environment status at the time of trial shall be taken as the time node for judging the existence of risks, so as to prevent preventive liability from being alienated into ex post punishment. In terms of the allocation of burden of proof, the reasonable structure of "preliminary proof and counter-proof" shall be adhered to. This approach prevents the restriction of the freedom of environmental activities caused by the reversal of burden of proof, and avoids the risk of abusive litigation arising from the emptying of the claimant's burden of proof.

In-depth research on the unlawfulness element in environmental civil public interest litigation has multiple practical significance, including clarifying theoretical disputes, guiding legislative improvement and standardizing judicial adjudication. Nevertheless, current theoretical and practical research on this key issue in China remains insufficient. The underlying reason is that the current legislation and judicial practice of environmental protection tend to prioritize the demands of environmental governance while neglecting the internal logical consistency of the legal system.

The unlawfulness element in environmental civil public interest litigation shall not be left idle. It is necessary to promote the coordinated development of theoretical research on unlawfulness and judicial practice, explore the theory of unlawfulness from the perspective of legal jurisprudence, and improve the system of confirmation criteria at the legislative level. Only by constructing a hierarchically clear and logically sound system for unlawfulness confirmation can the conflicts of

criteria in current environmental judicial practice be resolved, enabling the environmental civil public interest litigation system to become a rigorous, operable and socially valuable governance tool. Under the guidance of the green principle of the *Civil Code*, judicial interpretations shall be adopted to further clarify the specific judgment criteria of unlawfulness and establish corresponding confirmation rules for infringements of uncategorized environmental rights and interests. In addition, it is essential to promote the connection between environmental civil public interest litigation and the ecological and environmental damage compensation system, build a more complete full-chain liability system, strive to make preventive liability a powerful judicial tool for safeguarding ecological security, and advance the construction of modern rule of law that promotes the harmonious coexistence of humanity and nature.

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