

Home States' Human Rights Regulations on Multinational Enterprises

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Abstract. Multinational enterprises are double-edged swords for foreign countries. They bring economic developments to foreign countries, especially developing countries, but they also bring serious human rights damages to foreign countries. Host states are considered as an applicable option to regulate MNEs, since MNEs conduct their activities within host states' territories. However, host states have some shortcomings of regulating MNEs, which cannot be overcome easily. Even though principles provided for MNEs under the UNGPs and the OECD guidelines are respecting and protecting human rights, these standards don't have legal enforcement power. Thus, this paper uses regulatory research method to explore the idea of home states' regulations on MNEs for the avoidance of violating human rights by discussing home states' obligations to regulate MNEs under international human rights law and institute human rights due diligence initiatives. Human rights due diligence initiatives are effective regulatory mechanisms for home states to mandate MNEs to protect human rights. In the current situation, only a few developed countries like France and Germany adopted similar initiatives. In the future, more countries should implement human rights due diligence initiatives.

Keywords: Human rights; home states; due diligence; MNEs.

1. Introduction

Multinational enterprises (MNEs) act as a key stimulus to the development of developing countries. Governments can obtain financial resources, foreign technologies, and MNEs typically relates to increased productivity and job opportunities [1]. In order to attract MNEs locating in their territories, some states have limited restrictions on MNEs, which leave an opportunity for MNEs to violate human rights. For example, Doe sues Exxon Mobil Corp., a United States corporation, because subsidiaries of Exxon Mobil Corp. engaged in extrajudicial killing and other merciless activities via military power in Indonesia. The UNGPs and the OECD Guidelines provide principles and guidelines for MNEs to guide them protecting human rights. However, they are volunteer standards, which means it is up to MNEs to decide whether they implement such rules or not. Since host states are not reliable in protecting human rights and MNEs are unlikely to control themselves, home countries become an appropriate option to prevent MNEs from violating human rights.

This paper firstly discusses that MNEs cause many problems of human rights in host states and use the case of Doe v. Exxon Mobil Corp. to illustrate. This paper and then discusses MNEs' responsibilities of respecting and protecting human rights in the international formal documents, such as the UNGPs and the OECD Guidelines and analyses the limitations of these two international regulations. This paper thirdly analyzes the obligations of home states to uphold human rights under international law and the barriers of home states' regulation. Finally, this paper discusses human rights due diligence and comparing France, German and EU due diligence of human rights initiatives.

2. Human Rights Issues Raised by MNEs

In the current period of economic globalization, MNEs are intimately tied to the development of the global economy and have a significant influence on every state's human rights, since MNEs set up a variety of branches abroad and have enormous economic power [2]. Some countries especially developing countries, which are called host states, need to attract MNEs to their domestic markets for investment opportunities [3]. With the afraid of relocation, host states cannot be expected to monitor

and control MNEs' business activities [3]. As a result, these jurisdictions risk losing out on business if too restrictive human rights criteria are implemented [3]. Therefore, MNEs can encroach on human rights in host states easily.

Exxon Mobil Corp.(EMC) is a United States corporation, and EMC established a number of subsidiaries, notably Exxon Mobil Oil Indonesia Inc. (EMOI), which runs a sizable facility for the extraction and processing of natural gas in Indonesia's Aceh Province.¹ In the case of *Doe v. Exxon Mobil Corp.*, Indonesian citizens sue EMC, and claimed that EMC's security forces violated the Alien Tort Statute (ATS) and several common law tort laws by engaging in extrajudicial death, torture, harsh, merciless, and humiliating treatment, as well as arbitrary imprisonment.² Defendants EMC and its subsidiaries EMOI should be responsible for the abuses inflicted by Indonesian soldiers providing security for defendants' natural gas operations.³

Doe v. Exxon Mobil Corp. is one of numerous cases that MNEs do harm to human rights in host states. In comparison to other states, states that uphold looser standards for human rights will have greater investment prospects [3]. However, it contributes to severe violations of human rights.

3. MNEs' International Responsibilities to Protect Human Rights

With the serious violations of human rights by MNEs, international organizations have begun to set up series of international guidelines or principles to encourage MNEs to respect human rights. These regulations recommend what and how MNEs can do to protect human rights.

3.1. The United Nations Guiding Principles on Business and Human Rights (UNGPs)

The emergence of UNGPs was the result of growing awareness of the effects that business, and particularly MNEs had on the human rights of persons, organizations, and societies where they operated [4]. The UNGPs were finished by John Ruggie, and they were the first business and human rights instrument that an intergovernmental organization had ever endorsed formally [4]. The second of the UNGPs' three pillars is the corporate responsibility to respect human rights, which requires businesses to refrain from violating others' human rights and to take actions to lessen any adverse consequences they may have on those rights [5]. Regardless of their legal obligations, enterprises are urged to adopt policy commitment and management practices targeted at supporting the fundamental labor and human rights included in international law [6]. Some parts of second pillars of the UNGPs relate to third pillar "Access to Remedy". This pillar aims to enhance the rights of victims whose human rights are encroached by companies through legal methods [7].

The UNGPs still have limitations on preventing MNEs from violating human rights. They prescribe that one of the responsibilities of enterprises is protecting human rights, but not ones that are legally obligatory, which is universally accepted norm in international law [8]. Moreover, the UNGPs don't contain what consequences enterprises will have if they violate responsibility of respecting human rights or embody any third-party scrutiny [5]. Even though the UNGPs acknowledge that victims of enterprises that encroach human rights are likely to encounter problems of or restrictions on access to efficient remedy methods, they haven't offered a mechanism for monitoring or enforcing the behavior [5]. Thus, the UNGPs are designed as a soft law by Ruggie and cannot legally force MNEs to obey the responsibilities stipulated in the UNGPs [7].

3.2. OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (OECD Guidelines)

The Organization for Economic Co-operation and Development (OECD) is composed of 38 countries. The OECD issued the Declaration on International Investment and Multinational Enterprises in 1976, and the most recent iteration of those guidelines, known as the OECD Guidelines,

¹ *Doe v. Exxon Mobil Corp.*, 391 F. Supp. 3d 76, 2019 U.S. Dist.

² *Doe v. Exxon Mobil Corp.*, 391 F. Supp. 3d 76, 2019 U.S. Dist.

³ *Doe v. Exxon Mobil Corp.*, 2022 U.S. Dist.

was released in 2023 [3]. According to the OECD Guidelines, MNEs are essential to the global economy and promote economic, social, and environmental advancement through their foreign investment activities [9]. In the Guidelines, the overall behavior of MNEs operating abroad, including human rights, employment and industries and environment, is regulated [9]. The OECD Guidelines recommend that enterprises should devote to regulations that prohibit workplace discrimination, effectively prevent employment of child, and abolish all unwilling or mandatory labors [10]. The enterprises are urged to implement or collaborate with others through legitimate processes to remedy the harmful effects on human rights [5]. Therefore, with the goal of protecting human rights, the OECD Guidelines provide relevant principles and standards for MNEs.

Even though the OECD Guidelines contain principles of protecting human rights, they don't have legally enforcement power for MNEs. It is up to MNEs itself whether they adopt the principles or not. Given the substantial economic power inequalities between MNEs and victims, it is difficult to expect MNEs to voluntarily follow the guidelines [2]. The OECD set up National Contact Points (NCPs) to implement Guidelines effectively.⁴ However, if MNEs breach the Guidelines, NCPs cannot impose any results on MNEs and commentators have questioned the NCPs' overall effectiveness as a reviewing or accountability body [5]. As a consequence, the OECD Guidelines works as a soft law [11].

4. Home States' Obligations to Regulate MNEs for the Protection of Human Rights

Since host states are reluctant to regulate MNEs and MNEs are unlikely to regulate themselves to respect human rights, home states may be considered as an appropriate option to regulate MNEs. For the safeguarding of human rights, home states ought to impose extraterritorial rules on MNEs.

4.1. Extraterritorial Regulations in International Human Rights Law

The Universal Declaration of Human Rights (UDHR), the International Covenant on Economic Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) make up the International Bill of Human Rights and are significant pieces of international human rights law. The following growth of international human rights legislation was influenced by the UN General Assembly's approval of the UDHR in December 1948. The ICESCR and ICCPR are two international treaties that were ratified by the UN General Assembly in December 1966. These two International Covenants moreover promote international human rights. The responsibilities imposed on states in the two covenants are to respect, safeguard and achieve human rights. In terms of the ICCPR, states are recommended to regulate MNEs' extraterritorial activities to uphold their commitments to the Covenants' provisions for human rights [3].

The UNGPs also refer to home states' extraterritorial regulations on MNEs. The commentary of Article I, section A, para 2 of the UNGPs mentioned that international human rights law allows states to control the extraterritorial operations of businesses established on their territory or under their jurisdiction, as long as a recognized jurisdictional basis exists. It means that if certain requirements are conformed, home states can regulate MNEs' extraterritorial activities to safeguard human rights. The UNGPs encourage MNEs to carry out human rights due diligence and, in some cases, mandate that states implement due diligence provisions for human rights for improvement of protecting human rights. Besides the UNGPs, the OECD Guidelines recommend point out the importance of human rights due diligence. Some home states gradually realize the vital role of human rights due diligence in regulating MNEs' extraterritorial activities and implement due diligence law of human rights, and specific laws will be discussed in detail in the part of 3.3.

⁴ OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, 2023

4.2. Limitations of Home States to Regulate MNEs

It is a common notion that home states have positive functions in preventing MNEs from violating human rights, but there are barriers that impede home states' regulations on MNEs. Extraterritoriality is commonly challenged in the context of commerce and human rights as an encroachment on the host state's sovereignty [12]. States must not interfere in the internal or external affairs of another state through direct or indirect way for whatever purpose [3]. This implies that home states are obliged to obey principle of non-intervention and host states' sovereignty when they exercise extraterritorial regulations [3]. It concerns home states that other nations, especially developing ones, might view the extraterritorial legislation of the home state as "arrogant, patronizing, paternalist, and racist [13]." This emphasizes that sovereignty is a sensitive problem between home and host states [13]. As a result, home states practice their jurisdiction restrictively, because they can not interfere with host states' sovereignty of host states [13].

When MNEs do harm to human rights of host states' citizens, two jurisdictions existed for host states' citizens to choose to seek for remedies. That is host states or home states. Host states' victims have increasingly turned to the home states' courts, where parent enterprises are headquartered, for remedies after being faced with barriers to filing civil lawsuits in their own nations to address these damages [14]. Nevertheless, MNEs frequently evade the jurisdiction of home States[15].For instance, in case law nations, the principle of forum non conveniens gives courts discretion to dismiss the case when they believe that, to chase the equality and interests of each part , it may be better heard in another forum, such as the host State where the challenged business activities took place [15]. The case law of some countries permits dismissal, when "another tribunal, usually in the host country, is more appropriate and convenient because the parties, witnesses, and evidence are located there [16]." MNEs always seek forum non conveniens dismissal, as this will often represent the last they will see of the litigation [14]. As a result, citizens of host states are further impeded by principles of forum non conveniens [17].

4.3. Human Rights Due Diligence Initiatives

The UNGPs and the OECD Guidelines work as "soft laws", which do not have legally enforcement power on states and corporations, but they generate enforceable obligations with respect to enterprise due diligence obligations of human rights and environments [18]. Human rights due diligence seeks to "identify, prevent, mitigate and account for how they address their adverse human rights impacts."⁵ According to Ruggie, due diligence is a procedure to allow home states to uphold human rights through which businesses guarantee adherence to national laws and control the danger of violating human rights [9]. Following the due diligence standards in the UNGPs and the OECD guidelines, some states, such as French and German, implement due diligence initiatives to address harmful impact on human rights caused by large and powerful enterprises. These human rights due diligence initiatives give home states appropriate methods to regulate MNEs.

4.3.1 French duty of vigilance law

"Duty of Vigilance of Parent and Instructing Companies" (Vigilance Law), which is a comprehensive due diligence law of human rights and environment, was adopted by France in 2017 [19]. The Vigilance law is applicable to enterprises with their headquarters in France that have more than 5000 employees there, or with 10,000 employees all over the world (including through direct and indirect subsidiaries), or overseas businesses with their headquarters that have French subsidiaries with more than 5000 employees there [19]. According to the Vigilance Law, enterprises have to establish, effectively implement and publish vigilance plans [3]. The stakeholders must be associated with when enterprises draft the plan⁶. The plan must include appropriate vigilance measures to guard against violations of human rights and environmental harms brought on by any suppliers' or

⁵ The UNGPs, Article 17

⁶ Vigilance Law, Article 1

subcontractors' activities, with whom it has a business relationship [19]. Specifically, measures should contain: a chart that describes, evaluates, and ranks hazards; processes for evaluating the state of suppliers and business partners; measures that can reduce dangers or stop infractions; a warning system that gathers reports of real or present threats; a monitoring system to evaluate the measures and its efficiency [8]. According to the Vigilance Law, enterprises will be fined if they don't publicize or have vigilance strategies in place [19]. If a problem occurs as a consequence of inadequately putting the plan into action, the parent enterprise can be held responsible [19].

4.3.2 German act on corporate due diligence obligations in supply chains

Germany instituted the Act on Corporate Due Diligence Obligations in Supply Chains (German Law) in 2021, which took effect in 2023 [20]. In the German law, enterprises that start headquarters, administrative and principle places of business and registered offices in German, without respect to their legal form, with more than 3000 employees (since 2024, the number of employees will be 1000) are under control.⁷ Even if other MNEs may sell products and services on the German market, those MNEs are exempt from the German law if they do not have a German headquarter or domestic branch [20]. A "human rights risk" is what German law refers to as an event that might possibly lead to a violation of international human rights [20]. Enterprises must provide an annual report detailing how they conform with due diligence requests [8]. The due diligence obligations in the German law contain: invent a risk management system; appoint a responsible person within the enterprise; enact regular risk analyses; establish preventive measures for both its direct suppliers and its own business; offer remedial measures; have a complaints procedure; impose due diligence obligations about risk on its indirect suppliers and document and report.⁸ The German law requires enterprises to do yearly risk assessments to detect risk of their own activities and the businesses of their direct suppliers [20]. If enterprises don't obey the obligations under the German law, the Federal Office for Economic Affairs and Export Control, the official agency which monitors enterprises' implement of the German law, can fine enterprises and these enterprises are likely to be prohibited from taking part in public procurement procedures up to three years [20].

4.3.3 EU proposal for a directive on corporate sustainability due diligence

Directive on Corporate Sustainability Due Diligence (EU Proposal) was adopted by EU Commission in 2022. The EU Proposal applies to both large EU-based enterprises and MNEs with considerable turnover in EU [8]. These enterprises are required to perform due diligence on the global human rights and environmental implications of their activities, including those of their supply chain partners and subsidiaries [21]. The EU Proposal mandates that enterprises shall implement due diligence by combining due diligence into policies, and identify, prevent, mitigate adverse human impacts, and monitor due diligence policy, and enact complaints procedure, and participating public communicating on due diligence.⁹ The EU Proposal also establishes a national supervisory authority, which have powers to levy financial penalties on enterprises to monitor the regulations [8]. Moreover, the EU Proposal imposes civil liability on enterprises for breaching their due diligence requirements [8].

5. Conclusion

MNEs represent the new impetus for economic development. Host states, mostly developing countries, impose less regulations including human rights standards on MNEs in order to attract MNEs locating in their territories, which results in major human rights breaches in host states. Under such circumstances, international organizations provided principles and guidelines like the UNGPs and the OECD Guidelines that encourage MNEs to respect human rights, mitigate negative influence they caused on human rights and provide remedies for infringed citizens. However, these principles

⁷ German Law, Section 1 (1)

⁸ German Law, Section 3 (1)

⁹ The EU Proposal, Article 4

and guidelines work as “soft laws”, which only provide volunteer standards for MNEs and lack adequate enforcement mechanisms. Thus, it is impossible that MNEs will obey their human rights responsibilities voluntarily.

Because of the above limitations, requiring home states to regulate MNEs for the avoidance of violating human rights becomes an alternative option. The international Bill of Human rights, the UNGPs and the OECD Guidelines contain relevant provisions that states shall regulate MNEs’ extraterritorial activities that violate human rights. Nevertheless, home states’ extraterritorial regulations still have barriers. They should comply with principle of non-intervention and are not allowed to impede host states’ sovereignty. Moreover, when victims sue MNEs in home states as MNEs infringe their human rights, home state’s court may use forum non conveniens as an excuse to dismiss the case.

Human Rights Due Diligence is an essential requirement for states and MNEs in the UNGPs and the OECD Guidelines. Recently, some states institute human rights due diligence initiatives, which require certain enterprises to implement due diligence process. Commonly, subsidiaries and their suppliers of enterprises are included. In this way, home states can regulate MNEs’ extraterritorial activities effectively.

This paper only discusses the French Law, the German Law and the EU proposal. There are other states also implementing due diligence law, but only a few states in the world enact similar law. In the future, more states should institute similar law which is suitable for their states’ conditions. Consequently, human rights will be protected more comprehensively.

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