The Obligation of Home States to Regulate Multinational Enterprises on Human Rights: Taking China as An Example

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Abstract. The world economy cannot develop without foreign investment or multinational enterprises. Meanwhile, the extraterritorial human rights responsibilities of MNEs have become the focus of attention in the world today. Certain transnational corporations pollute the environment, conduct commercial bribery, and violate the labor rights in host countries, which causes considerable damage to locals.At present, it is difficult to make a breakthrough in exploring the restriction of social responsibilities of MNEs, and the effect of host countries on the regulation of human rights responsibilities of MNEs is not good. Therefore, this paper will analyze how to better realize the human rights responsibilities of MNEs through the home-state approach. Taking China as an example, this paper will study China's methods of regulating the human rights liability of MNEs investing abroad and compare the regulatory means of other countries to propose improvement for China's regulation of MNEs as the home country, building a more complete, powerful and effective regulatory policy.

Keywords: Multinational enterprises; home state; human rights.

1. Introduction

Multinational corporations are playing a growing role in international investment. They have a significant impact on regional human rights issues in addition to advancing the economic development of the host countries. On the one hand, multinational enterprises and their commercial activities have created more jobs and opportunities for local people. The advancement of the economy has also improved the living conditions. On the other hand, lots of companies have violated human rights to reduce production costs and gain more profits. For example, invading labor rights, polluting the environment of host states, hiring child labor, etc.

Most poor developing countries have low labor costs, gathering a majority of labor-intensive industries. Therefore, multinational enterprises tend to move their factories to these countries. However, the host countries have not yet established a comprehensive legal system in relevant areas. Because of the lack of effective regulations, working conditions for local staff are extremely poor. To be specific, the wages are below the minimum standard and employees are forced to work overtime without pay, which causes serious damage to human rights. Moreover, human rights violations by MNEs also include employing and exploiting child labor and abusing employees with unreasonable and ridiculous company rules or regulations. For example, Shenzhen Gucci was exposed to abuse employees, asking a pregnant woman to stand guard for dozens of hours, eventually leading to miscarriages. And Foxconn's strict management system led employees to jump to their deaths [1].

It can be seen that the human rights problems caused by multinational corporations have led to serious harm all over the world and cannot be ignored. The United Nations has been working on this problem for many years and has proposed two solutions. One is from the standpoint of business enterprises' obligations to protect human rights, and the other one combines the responsibilities of the state and the companies [2]. However, the practice in recent years has shown that the former method cannot curb the negative trend of human rights violations well. As a result, the UN has steadily shifted its regulatory emphasis to the duties and responsibilities of states [2]. In the draft of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises, the human rights responsibilities of MNEs were integrated into the regulatory obligation of states.

Currently, most studies focus on the human rights liability of MNEs and few studies on regulation obligations of states on extraterritorial human rights of MNEs. Besides, there are difficulties in the practice of regulating the human rights of MNEs by host countries, and most scholars focus on the human rights regulatory obligations of home countries. As one of the developing countries, China has gradually formed a legal system to regulate human rights and strives to improve it to a comprehensive one. This paper takes China as an example to discuss the obligations of home countries to supervise the human rights responsibilities of MNEs and how to implement such regulations. In the end, specific suggestions for China would be proposed on how home countries can more effectively regulate the human rights issues of MNEs.

2. Reasons for Home States Regulation

2.1. Drawbacks of Host Countries

Theoretically, the host nation has the primary responsibility to oversee multinational enterprises under the present legal system. However, given the development of the domestic economy, some developing countries have lowered standards of environment and human rights protection, to attract more investment on their initiative. Therefore, loads of transnational companies tend to invest in such countries because of more attractive policies. On the contrary, more multinational enterprises pollute the environment and harm labor rights and interests in their economic activities. Furthermore, such countries face the "race-to-the-bottom" threat of losing business if strict protective regulations are implemented [3].

This phenomenon happened clearly in the mineral exploitation industry of Papua New Guinea. In the 1990s, Papua New Guinea was rich in minerals particularly. To boost the national economy, the government issued a series of decrees and policies to appeal to investment. It stipulated that multinational enterprises that obtain the relevant licenses issued by the government could be exempt from environmental liability. Moreover, it also restricted citizens and legal persons from filing lawsuits [4]. Therefore, mineral mining companies obtained an exemption from environmental pollution, which caused serious consequences. The series of activities led to environmental damage and threatened the right to life and health of residents.

What is more serious is that certain multinational enterprises use their abundant resources and funds to bribe the government and ask for convenience and support in politics, the economy, and even the military to pave a more convenient road for their business behaviors, which results in disastrous consequences [2]. In history, there have been cases of shooting residents, with no regard for people's lives and safety.

Most of the backward host countries are developing countries, which are very poor and lack a comprehensive and effective legal and regulatory system. Besides, they also lack the technologies and skills to regulate multinational enterprises. For example, in the case of transnational water pollution and environmental pollution, expertise in environmental impact assessment of transnational enterprises is required [5]. These drawbacks cause that even though host states are willing to regulate MNEs, they do not have strong capacities to enforce laws and implement them well.

2.2. Rationality of Home Countries

Compared with the limitations of host states to regulate multinational enterprises which were mentioned above, home countries have the need and strength to regulate the obligations of MNEs for extraterritorial human rights protection. Firstly, home countries have the right to regulate subsidiaries located in the host countries because of personal jurisdiction. The home states are the countries where the multinational companies are registered, where the main place of business and control center are located [6]. Therefore, home states could regulate the extra-territorial activities of the companies in this way.

Secondly, home states always are developed countries with complete and strong legal systems to regulate MNEs from violating human rights. A variety of regulations and policies in aspects of

legislation, administration, and judicature could prevent violations in advance, supervise the behaviors of companies during the process, and play the role of relief afterward [2]. Moreover, home countries own sufficient economic strength, a comprehensive legal system, and enough expertise or technology to oversee their domestic multinational corporations. Generally, the compensation standard of the home countries is higher than that in host states, which can better protect and relieve extraterritorial sufferers of human rights violations and deter the actions of MNEs [6].

Another reason is that regulating multinational enterprises' human rights responsibilities is consistent with the interests of home countries [7]. The commercial behaviors of MNEs would not only affect the reputation of the enterprises themselves but also influence the impression of the home countries in the minds of the people of the host states [7]. A better image could help countries implement their policies and strategies of investment in foreign countries more efficiently and also affect other investments between other states. For example, China has adopted the "Belt and Road" policy. During the activities of investment of China, various multinational enterprises focus on improving the infrastructure of countries along the route and do favors for economic development and improvement of living standards by the regulation of the mother country. This phenomenon not only brings considerable profits to the companies but also increases the influence and power of China.

3. Current Situation of Regulation in China

3.1. International Practice

How to govern the obligations of MNEs to uphold human rights has emerged as a global concern. Many international organizations have provided advice and helped countries reach a consensus on protecting human rights. Among them, the most representative is the UN Guiding Principles on Business and Human Rights (GPs) [8]. The GPs build mechanisms at the three levels of state, corporate, and society to guarantee that the human rights responsibilities of companies are implemented within the framework of protection, respect, and remedy.

The GPs put forward foundational principles and operational principles at the national level to regulate MNEs, indicating state obligations. Firstly, states are requested to protect human rights from being abused by third parties and specify the minimum standards for the protection of human rights that they expect from MNEs within their territory and jurisdiction [8]. To be specific, the GPs emphasize that in order to prevent, sanction, and address human rights crimes, states need to implement effective strategies, laws, and regulations [9]. Other important operational principles like implementing policies to supervise companies, the importance of the relationship between states and businesses, Supporting businesses to respect human rights in places that are affected by conflicts, and the need for policy coherence.

The GPs not only set up the obligation for host countries but also clarify the necessity for home states to supervise the MNEs. China has repeatedly expressed its firm support for principles in the Human Rights Council. Therefore, under the guidance of the GPs, China not only regulates the multinational enterprises operating in China as a host country but also supervises the Chinese multinational enterprises established abroad through the methods above.

3.2. Domestic Practice

3.2.1. Legislation

In recent years, China has gradually intensified its supervision over the extraterritorial activities of multinational enterprises. Therefore, the government has issued a series of policies and strategies on corporate social responsibilities, foreign investment, and environmental protection responsibilities, to guide and regulate multinational enterprises to avoid human rights violations in operating activities and achieve sustainable development eventually.

Initially, The government has issued a series of national standards and guidelines to help enterprises and other organizations better fulfill their social responsibilities. For example, the government

promulgated GB/T 36000-2015 Guidance on social responsibility referring to international standards, and human rights is one of the topics [10]. Moreover, a series of normative documents were issued to urge Chinese transnational companies to assume social responsibilities and better develop in host countries. In May 2015, the State Council issued the Guiding Opinions on Promoting International Industrial Capacity in Equipment Manufacturing Cooperation. In these guidelines, MNEs are asked to abide by the laws and regulations in host countries, safeguard the legal interests and rights of workers, save resources and protect the environment, assume social responsibility, and eventually promote local economic development [10]. Guidelines for compliance management systems also have a significant influence on the operation of multinational enterprises. The guide aims to establish and operate a compliance management system for various types of enterprises in China. Then, this system would help identify, analyze, and evaluate compliance risks, and make recommendations, to help enterprises reduce the risk of legal sanctions, penalties, and reputation damage while guiding enterprises to assume social responsibilities and reduce human rights violations [10].

3.2.2. Administration

At present, China regulates extraterritorial multinational enterprises through two stages in administration: confirmation or recordation in advance, and supervision during the process.

Chinese multinational enterprises should first complete the confirmation or recordation procedures before making overseas investments, which is implemented by the Ministry of Commerce and National Development and Reform Commission (NDRC) respectively. Firstly, the Measures for the Administration of Overseas Investment of Enterprises, which were issued in 2017 by NDRC, regulate that MNEs conducting sensitive projects shall be subject to confirmation management, while other MNEs engaging in non-sensitive projects only should be subject to recordation management (Articles 13 and 14) [11]. Moreover, the Ministry of Commerce also issued the Measures for the Administration of Overseas Investment in 2014 to oversee the investment of MNEs. Similarly, overseas investment involving any sensitive nation, area, or sector must go through confirmation management, while others just need to be recorded (Article 6) [12]. In a nutshell, the scope of MNEs that should be confirmed is limited, only including some sensitive countries, regions, or industries. Moreover, the documents of MNEs for examination are limited to the purpose of investment or the impact analysis on national security, which will not focus on the social responsibilities of MNEs [7].

Later, In the course of Chinese enterprises' economic activities abroad, the relevant departments will continue to supervise and manage their operations. To be specific, one, the government-issued measures which are mentioned above involve advocated principles for the overseas business behavior of Chinese enterprises; Two, China establishes a mechanism for MNEs to regularly report key processes of their outbound investment to the relevant department and punishment; Three, China encourages multinational companies to disclose corporate social responsibility reports. All of these measures regulate MNEs from norms, solutions to protect and address violations, as well as the final result.

3.2.3. Judicature

China implements some judicial measures in human rights liability supervision for MNEs after the violation. These methods are consistent with the general practice of most countries in the world, among which the most outstanding one is in the field of overseas anti-corruption. China has included overseas commercial bribery into the scope of criminal law, but there are no relevant provisions in the field of environmental and labor protection.

In Amendment (VIII) to the Criminal Law of the People's Republic of China which was issued in 2011, extraterritorial bribery will also be punished. Anyone who give property to an official of foreign governments or international organizations to gain improper commercial benefit shall be punished. This regulation has a profound impact on the field of overseas anti-corruption.

4. International Practice

4.1. Prior Approval

At present, there are few prior regulatory measures for multinational enterprises in international society, and the main means are prior approval and field limitation on multinational enterprises. However, the purpose of the approval is to guarantee national security, while the human rights obligations of MNEs are not included in the object of approval.

For example, the United States has imposed restrictions on foreign investment in South Africa. Since the 1940s, South Africa has implemented a series of laws and policies to enforce racial segregation of the black population. Later, to force South Africa to change its domestic laws, the United States introduced several bills. MNEs in America were banned in commerce of crude oil, petroleum products, and nuclear technology with South Africa, and any perchance with the military, police, or other apartheid institutions. Moreover, investments or loans to the South African public sector were also prohibited [11].

Besides, the United States recently issued an executive order banning its investors from investing in companies it said: " were controlled by the Chinese military ". On the surface, the US imposed barriers to its investors entering the Chinese market because of national security. However the real reason is to suppress Chinese companies. All of the methods can act as a restriction on the MNEs in advance, to implement some limitations on certain regions, industries, and countries.

4.2. In-process Supervision

4.2.1. Transparency and disclosure

During the process of multinational enterprises' operating activities, companies are requested to be transparent and disclose information concerning human rights compliance of MNEs. Moreover, the obligation of transparency and disclosure is not limited to human rights but includes other business social responsibilities.

In 2010, disclosure obligations gained attention for the first time in the human rights area, owing to the adoption of the Dodd-Frank Act in the US. In the act, Companies that are publicly traded on a stock market are required to report due diligence measures used to protect human rights publicly. Similar transparency requirements can be found in the UK Modern Slavery Act 2015 and the California Transparency in Supply Chains Act. Both laws ask particular businesses to disclose whether there is any fact or risk of slavery or inhuman working conditions in their supply chains, and what the business intends to curb it [3].

Considering the strength of this method, on the one hand, when there is no violation of human rights by MNEs in the host states, home countries can guide multinational companies to operate autonomously and in compliance to protect human rights, and reduce the possibility of invasion at the same time [4]. On the other hand, home countries only make normative requirements for the information disclosed by MNEs, rather than the actual business behaviors, which will effectively avoid the problem of jurisdictional conflict [4]. However, the effect of the requirement of transparency and disclosure is limited and cannot change the behaviors of MNEs thoroughly by companies only have to publish a declaration.

4.2.2. Due diligence requirements

Human rights due diligence is an indispensable method to regulate MNEs and is listed in Principle 17 of the UN Guiding Principles on Business and Human Rights. The companies have to regularly identify and assess existing or possible negative human rights impacts in advance of the projects. Later, MNEs should take timely and effective measures against the adverse consequences, and monitor the effect of their response. In the end, MNEs are asked to report their response and result to the public, to address their negative impacts.

The French law on due diligence for mother companies and international ordering companies, enacted in March 2017, is the first comprehensive law in this area. Companies of a particular size are

required to have a due diligence procedure that could find potential hazards to human rights in their operations and supplier chain [3]. Although the law does not specify the details of the program, it has played a significant role in encouraging companies to operate legally and reduce human rights damage.

4.3. Punishment after Violation

In the international community, the home countries generally have two methods to regulate and punish MNEs when they have caused serious human rights violations in the host countries. First, the court of the home country accepts the civil action brought by the victim of the host country against the transnational corporation; the other is an administrative review of the overseas investment and operation behavior of the multinational company.

4.3.1. Civil liability

In practice, there are many cases in which the victims have filed infringement lawsuits and claimed compensation in the court of the country where the multinational company is located, and have achieved success. One of the often-used pieces of legislation concerning transnational human rights abuses is the Alien Tort Claims Act (ATCA) of the United States. According to the law, U.S. district courts have jurisdiction of first instance over civil suits filed by foreigners for "violations of the laws of each country or treaties of the US" [12]. Beginning in the early 2000s, victims began using ATCA as the basis for lawsuits against multinational companies for invasion of human rights and environmental pollution. Although the majority of lawsuits did not result in final verdicts against defendant companies, they set a precedent for civil actions in the home countries.

However, in current international practice, the court of the home country usually cites the “inconvenient court principle” to reject the claims of the victims from the host country. Although the “inconvenient court principle” has positive significance in resolving the active conflict of jurisdiction in international civil litigation, reducing the trial cost of the court, facilitating litigants, and even promoting international cooperation and comity, there are a series of problems in its judicial practice in the context of transnational corporations.

4.3.2. Administrative review

Compared with the above method, direct administrative review or criminal punishment against transnational corporations in the home countries will play a more effective and direct regulatory effect and has achieved a remarkable effect in the field of anti-corruption.

The Foreign Corrupt Practices Act (FCPA) was promulgated by the United States in the 1970s. As the first law aimed at regulating the overseas commercial bribery of transnational corporations, it has pioneering significance and has gradually derived a relatively complete and mature rule system in the decades of development, which paves a profound foundation for the legal operation of MNEs and human rights protection in the field of anti-corruption [7]. Moreover, the UK has also made outstanding contributions in this area. The UK implemented the Bribery Act 2010, which regulates four crimes, namely, the crime of offering bribes, accepting bribes, bribing foreign public officials, and preventing bribery by commercial organizations. This act applies to a wide range of subjects, and there are special provisions in the jurisdiction. If the person committing the bribe has a "close connection" with the UK in the conduct of the act, or if the offense is committed in a UN member State and involves a public official, the UK has jurisdiction [13]. Besides, the penalties under the Act are severe. However, both countries act as a deterrent to multinationals while leaving some room for resolution. For example, the issue of commercial bribery is addressed privately through non-prosecution agreements, or companies are provided with "adequate procedures" to guide the establishment of relevant mechanisms, to achieve corporate compliance.

5. Improving Measures in China

5.1. Legislation

At present, China has a large number of laws and regulations for the human rights responsibilities of multinational enterprises, but their effectiveness level is not high enough. At the same time, the cohesion and coordination between the laws need to be improved to constantly fill the legal gap and form a complete legal system. In this way, China can keep pace with the international community to protect human rights. On the one hand, it will lay a solid foundation for the implementation of hard or soft international law, and on the other hand, it will also create a better environment for Chinese enterprises to invest abroad [10].

To be specific, given the particularity of China's economic system and the characteristics of Chinese multinational enterprises, different policies should be formulated according to the nature and scale of enterprises. First, the law should consider the difference between large enterprises and small or medium enterprises, and make a reasonable standard division [10]. The same policy criteria may lead to an excessive burden on small and medium enterprises, while the regulation of large enterprises is not strong enough; Besides, the application of the law should distinguish between state-owned enterprises and private enterprises, because the risks of state liability arising from them are different [10]. Generally, state-owned enterprises are likely to incur national human rights obligations because they are controlled by the country. Therefore they should hold a higher human rights responsibility than private enterprises. Moreover, the application of the law should be limited to some parts of supply chains. Given the length of chains in the modern economy, implementing human rights due diligence obligations throughout the whole chain would place an overdue burden on businesses, and it is unrealistic and unreasonable to ask companies to be responsible for the actions of all suppliers.

5.2. Administration

5.2.1. Add human rights assessment

As what was mentioned before, the confirmation or recordation for multinational enterprises in China only focuses on the authenticity and security of overseas investment projects. Therefore, this method can not regulate the human rights problem thoroughly and sometimes leads to human rights crises in host countries. To prevent the danger in advance, human rights assessment could be added to prior confirmation or recordation. Companies that are going to invest in other countries should identify and estimate human rights risks in overseas investment destinations, including possibilities, types of human rights risks, and methods to address them. Later, multinational companies should form a report detailing human rights issues and solutions for overseas investments and submit it to the relevant authorities [14]. In this way, some human rights violations can be curbed effectively in advance and reasonable response to the danger can be implemented timely.

5.2.2. Refine the supervision

Although China uses a variety of methods to regulate multinational enterprises in the process of investment, the effect is not good, so stronger and more effective regulatory measures are still needed.

Firstly, there are a large number of advocated principles aimed at encouraging and guiding MNCS to operate legally and comply with local environmental and protection standards in host countries. However, the expressions and definitions are general and indistinct, which can not operate practically. Moreover, the principles are only advocated by the government, not compulsory. Therefore, more detailed and effective regulations should be established. Besides, Relevant supervision and punishment mechanisms should be established and improved to ensure the actual implementation and effect of the regulation; Second, for the corporate social responsibility report, China should develop a reference guide at the national level that contains the specific format, content and other unified indicators of the report, to provide comparable reference opinions for subsequent review [4]; Increasing the transparency of public participation would likely create more effective constraints on business. At present, China only requires companies to submit information to the relevant authorities.

Regarding the theory of "community has the right to know" in European and American countries, and considering the possible impact of public participation on the cultivation of corporate goodwill, disclosure of the information submitted by enterprises to the public to a reasonable degree can greatly enhance the constraints on enterprises [7].

5.3. Judicature

At present, there is no clear law in China to express that China has jurisdiction over extraterritorial human rights litigation under certain circumstances. In practice, there has been no breakthrough in the obligation of the state and business to provide relief to victims.

Due to the consideration of national economic interests and corporate goodwill, the principle of inconvenient courts has been abused in some cases. Therefore, this principle should be reasonably applied and analyzed in specific cases [14]. To be specific, China may consider appropriately adjusting the application of this principle in cases where the victim is unable to obtain any judicial remedy in the host countries. According to the specific circumstances of the case, the jurisdiction of the national court should be established flexibly and reasonably, to balance the interests of the state and the interests of the victim to obtain relief.

Moreover, China should provide appropriate convenience in providing judicial relief to the victims. The system of corporate independence and limited liability prevailing in most countries, to varying degrees, prevents victims from holding the parent company of a transnational corporation accountable. To further improve our country's ability to provide relief, the judicial authorities can investigate and affix the relevant responsibilities of the parent companies of MNEs through the principle of "unveiling the corporate veil" [14]. However, this practice may produce large economic and judicial costs. Therefore, the application should be cautious, only in necessary situations, and should be combined with the specific facts of the case. If this principle is properly applied, it can strengthen the relief to the victims.

6. Conclusion

In recent years, the social responsibility of multinational enterprises has become an inescapable issue in every country. In addition to strengthening the regulation of enterprises themselves and host countries, the responsibility of home countries in this issue is increasingly important. The study found that China takes corresponding regulatory measures on the human rights liability of transnational enterprises in the legislative, administrative, and judicial aspects, which is generally consistent with international practice. However, there are still some problems that need to be perfected and improved. For example, in legislation, improvements need to be made in the connection between various laws of different ranks; in terms of administration, it is better to increase and improve the human rights assessment process and strengthen supervision through greater transparency and public participation; for judicial aspect, the court should make reasonable use of the inconvenient court principle, and improve the judicial relief for victims. In this way, the human rights of the host countries could be protected to the greatest extent through comprehensive home countries' supervision and regulation.

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