

Research on the Responsibility of Labour Rights Protection of MNEs Taking Foxconn Incident as an Example

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ABSTRACT

From 2010 to 2012, Foxconn had a series of employee suicides, and then Foxconn's serious illegal employment behaviour aroused social attention and heated discussions. As the main supplier of Apple, Foxconn's illegal employment behaviour has also caused society and academia to think about how MNEs should assume the responsibility of protecting workers' rights. Based on the Foxconn suicide incident and relying on Chinese relevant labour rights laws and regulations, the article analyses the theoretical basis for the protection of labour rights by MNEs. On this basis, as the host country, China puts forward specific suggestions on how to hold MNEs' responsibility for labor protection.

Keywords: *Multinational Enterprises, Responsibility to Protect Labour Rights, Corporate Social Responsibility, Human Rights.*

1. THE RAISING OF THE QUESTION

With the development of economic globalization, Foxconn has gained the name of 'World Factory' under its global technology and electronic products processing business. However, from 2010 to 2012, a series of Foxconn employees committed suicide by jumping, resulting in 14 deaths and 3 serious injuries. After these incidents, Apple, as the main principle of Foxconn, launched a special investigation on its employment practices.[1] The investigation results showed that the base salary of Foxconn employees in 2009 was only 900 yuan per month. The basic salary accounted for less than 50% of the total income, which was far below the minimum wage standard stipulated in the Labour Law of the People's Republic of China. The phenomenon of low basic salary had caused many employees "voluntarily" timeout because this was the main way for employees to increase their income. In addition, the employees worked more than 100 hours of overtime per month before the suicide incident, which is a serious violation of the relevant provisions of China's Labour Law.[2] As a major demander of electronic parts to Foxconn, Apple is liable for Foxconn's serious labor

rights violations and interests. Moreover, the jurisprudence basis to apple's labor rights protection liability for Foxconn's serious infringement on its labor rights and interests has aroused controversy among the society and the academic community. In response to this problem, some scholars argue that although Apple cannot be held legally responsible for the illegal employment behaviours of its suppliers under existing laws, it can directly or indirectly hold MNEs liable for infringement of labor rights through bilateral investment agreements in the future.[3] Some scholars believe that based on the basic theories of corporate social responsibility and urgent needs, in reality, multinational enterprises should bear the responsibility of protecting labour rights.[4]

In summary, this article will examine the following questions: whether MNEs should be held liable for violations of workers' rights by their suppliers. If so, what is the theoretical basis for such liability, and how should China hold MNEs liable for labor protection on its supply chains.

2. EXISTING LEGISLATIVE PROVISIONS FOR THE PROTECTION OF LABOR RIGHTS AND INTERESTS OF MNES IN CHINA

2.1. Legislative provisions regulating Foxconn's illegal employment practices

According to China's Labour Law and Labour Contract Law, Foxconn had violated workers' legitimate rights and interests, especially in the areas of statutory wages and working hours. First, with regard to the legal wage standard, according to Article 48(2)[5] of the Labour Law and the calculation method of the minimum wage standard set out in the Annex of the Minimum Wage Regulations,[6] the wage level of Foxconn employees is far below the local minimum wage standard, which is a clear violation of the law. Secondly, in terms of overtime, Foxconn employees' overtime hours far exceed the provisions of Article 36 and Article 41 of China's Labour Law [7] because overtime pay is the main source of income for Foxconn employees. The 'voluntary' overtime behaviour of employees is a product of Foxconn's illegal means to guide employees to work overtime in a disguised form. In addition, according to the 'Notice of the State Council on Strictly Curbing the Abusive Payment of Overtime by Enterprises', Foxconn's overtime pay violates the State Council's basic principle of requiring employees to combine work, rest, and protect their health.[8]

2.2. Legislative provisions related to Apple's corporate social responsibility

First, China regulates Apple's activities based on territorial jurisdiction, and therefore, Apple should comply with the provisions of the Civil Code, the Company Law, etc. Article 86 of the Civil Code explicitly requires social responsibility for a for-profit legal person.[9] In addition, the provisions of the Company Law regarding labour unions and employee representative assemblies are an important manifestation of the Company Law's requirement for enterprises to assume social responsibility for their workers and safeguard their legitimate rights and interests.[10] Although the Civil Code and the Company Law stipulate those for-profit legal persons and corporation persons shall bear social responsibilities, the scope of subjects stipulated by the law is relatively broad. Therefore, the provisions of the Civil Code and the Company Law cannot be directly used to regulate the social responsibility of multinational enterprises in judicial practice, nor can they be directly used as the basis for judgments in cases related to multinational enterprises.

Secondly, as a foreign-invested enterprise, Apple's investment activities in China should be directly subject

to the Foreign Investment Law of the People's Republic of China (hereinafter referred to as "Foreign Investment Law"). According to the relevant provisions of the Foreign Investment Law [11], Apple should comply with the content of labour rights protection. As the only law in China that directly regulates foreign-invested enterprises and foreign investors, the "Foreign Investment Law" has few and unclear regulations on the social responsibility of multinational companies. For example, the specific scope, manner, and legal consequences of corporate social responsibilities of multinational enterprises are not stipulated. That leads to a lack of enforceability and operability in judicial practice.

In general, China's existing legal provisions on protecting multinational enterprises' labor rights. Interests are mostly general and principle clauses, which lack operability. According to China's existing legislation, Apple cannot be held directly responsible for Foxconn's labor rights violations. Therefore, the following will demonstrate the legitimacy of Apple's responsibility for labour rights protection from a theoretical perspective.

3. THE THEORETICAL BASIS FOR MNES TO UNDERTAKE THE PROTECTION OF LABOR'S LEGAL RIGHTS AND INTERESTS

3.1. Workers' rights belong to the category of human rights

International human rights protection is gradually moving from universal protection to the protection of the weak. At the present stage, international human rights protection is in the period of the right to survival. The main target of international human rights protection is "those who are socially weak due to the constraints of natural conditions, labour conditions and other economic conditions", that is, to realize the protection of the basic right to survival of the weak.[12] The labor rights embody the concept of survival, i.e., "to ensure the safe and healthy survival of workers and to ensure a secure and dignified life".[13] The purpose of labour rights protection is to protect the right to survival of workers, prevent the living conditions of labor from threatening workers' survival, and provide remedies for violations of the right to survival. Therefore, labour rights protection is an important part of international human rights protection. International human rights law realizes the protection of citizens' right to survival by providing for labour rights and thus implements specific contents of human rights protection. Article 3 of the Declaration on the Aims and Purposes of the International Labour Organization stipulates that the ILO should promote the employment of workers, guarantees their working conditions such as wages and

hours, recognizes their right to collective bargaining, and expand social security measures for workers.[14] The Universal Declaration of Human Rights provides in principle that human beings are "equal in dignity and rights", i.e., that they are equally protected by law. This principle has guided the establishment of the right to labour equality. Articles 23 and 24 specify the specific rights of workers.[15] The International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as "the Covenant"), based on the Universal Declaration of Human Rights, provides the right to work in a fuller and more detailed manner. They focus on the provisions of Articles 6, 7, 8 and 10 of the Covenant,[16] which affirm the right to work, good working conditions, freedom of association, and guarantee the right to organize on an equal footing. At the same time, the special interests of vulnerable subjects (families, mothers, children) are guaranteed. In addition, in 1998, the ILO passed eight fundamental international labour conventions, which were multilateral international treaties that provide specific protection of labour rights. It has stipulated the minimum age of employment, identifying the right of workers to freedom of association and organization, organizing and bargaining collectively, and the right of men and women to equal pay for equal work. At the same time, it prohibits acts of forced and compulsory labour, discrimination in employment and occupation, and in particular, the worst forms of child labour are explicitly prohibited.

International human rights treaties are based on a "contractual" relationship between States parties, which means that each state party has the right to require other states parties to undertake the obligation to protect the rights of workers in accordance with the content of the treaty, as well as its own obligation to do so. This obligation requires States to recognize, respect, guarantee, promote, and protect labour rights. The obligation to recognize requires States to incorporate the labour rights contained in the International Declaration of Human Rights into domestic law, making them a legal right enjoyed by domestic workers.[17] As the subject of domestic laws, multinational enterprises ignore, indulge or allow their suppliers to infringe laborers' rights, which violate the laws and regulations of home and host countries, so they shall bear the liabilities for such infringement.

At the same time, more and more scholars advocate that multinational enterprises have the status of subjects in international law. Based on the theory of "balance of rights and obligations", some scholars believe that multinational enterprises, while enjoying the rights provided by international law, should also bear the corresponding obligations.[18] Other scholars believe that multinational enterprises can directly participate in international relations and can directly enjoy the rights and undertake the obligations of international law

according to the constitutive elements of international law subjects. Therefore, multinational enterprises have the condition of being the subject of international law.[19] In addition, some scholars believe that economic relations and political relations interact and intermingle. Some traditional political international relations adjusted by the international law in the past were gradually subject to economic factors and became comprehensive international relations. At the same time, multinational enterprises rely on their strong economic strength and global economic strategy, are widely involved in international relations.[20] At the same time, in some fields, international treaties directly regulate the rights and obligations enjoyed by multinational enterprises. In many regional international organizations, multinational corporations have also acquired the same rights and obligations as sovereign states in international law. Based on this, multinational enterprises' ability to gain rights and obligations in international laws has actually gotten positive recognition. The paper believes that giving multinational enterprises the status of subjects in international law can better enable them to assume their due social responsibilities.

3.2. Requirements for MNEs to assume social responsibility

MNEs have transformed "shareholder first" theory to "stakeholder" theory from the corporate governance level. Stakeholders refer to "groups and individuals who have a stake in the production and operation of the enterprise and its consequences",[21] including shareholders, creditors, managers, employees, suppliers, consumers, society, etc. It covers a wide range of subjects since stakeholders provide physical and human capital to the company and then enjoy common ownership of the company. Therefore, shareholders are not the only owners of the company but only one of the stakeholders. Operators should make decisions and manage their business operations based on full consideration of the overall interests of stakeholders. CSR is a reasonable extension of the stakeholder theory, which is a product of the development of the times. CSR has evolved from the initial ethical responsibility to diversified responsibility that combines domestic hard law responsibility and international soft law responsibility today. Among them, issues related to the corporate ethical bottom line in CSR have been recognized by both host and home countries in the form of enacted law or case law, and the assumption of CSR is ensured through compulsory state power. Take China as an example. China's Labour Law, Labour Contract Law, and Social Security Law are all related to the issue of corporate social responsibility. All of them are reflected by workers' rights, such as workers' right to association, collective negotiations, social security, rest vacation right, etc. If multinational enterprises cannot assume the corresponding social responsibility

according to the relevant laws, their "inaction" or active unreasonable "action" will be recognized as illegal behaviour.

It is worth noting that soft law responsibility, requiring multinational enterprises to assume social responsibility with standards higher than those mandated by law, belongs to a public expectation that multinational companies can assume social responsibility responsibly. Such responsibility belongs to the voluntary and spontaneous behaviour of enterprises and does not have any compulsory power. However, with the emergence of the corporate responsibility movement, international organizations are forced to formulate codes, guidelines, and declarations of corporate social responsibility with high standards and strict requirements under the pressure of public opinion and the economy to guide multinational enterprises in their human rights responsibilities. Among them, the most representative ones are the Code of Conduct for Multinational Corporations formulated by the OECD, the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy formulated by the International Labour Organization, the Global Compact of the United Nations, and the Guidelines on the Responsibilities of Transnational Corporations and Other Business Enterprises about Human Rights of the United Nations Commission on Human Rights. These international CSR instruments are somewhat "contractual" in nature,[22] resembling a bilateral or multilateral agreement. Therefore, although these documents are not guaranteed by state coercive power, if multinational enterprises do not undertake CSR, they will be subjected to economic sanctions by international organizations and pressure from the market. Even they will face a double blow to corporate profits and international reputation. The negative effects of MNEs do not undertake CSR are no less than those brought about by punitive measures of legal responsibility. The responsibility of protecting workers' rights is an important part of corporate social responsibility, which belongs to the scope of corporate social responsibility. Therefore, in addition to the bottom-line responsibility in protecting workers' rights and interests, multinational enterprises should actively undertake corporate social responsibility with higher standards and stricter requirements for the long-term interests and international reputation of the enterprises themselves.

4. STRENGTHEN THE PROTECTION OF LABOR RIGHTS AND INTERESTS AND IMPROVE THE SUPERVISION AND IMPLEMENTATION MECHANISM

4.1. Introduction of Corporate social responsibility system and improvement of relevant domestic legislation

The production and operation activities of MNEs in China are directly regulated by the Foreign Investment Law, which only mentions in general terms in Article 32 that foreign-invested enterprises shall be responsible for protecting labour rights.[23] However, in judicial practice, the Foreign Investment Law only affects the suppliers of MNEs located in China and cannot directly affect MNEs themselves. For example, in the Foxconn incident, Apple was not held accountable. According to Articles 10, 11, 12, and 13 of the OECD Guidelines for Multinational Enterprises (hereinafter referred to as the Guidelines),[24] multinational enterprises shall conduct due diligence to identify, prevent, mitigate and address actual or potential adverse effects of the multinational enterprise's business activities on matters covered by the Guidelines. Such adverse effects include those directly caused or contributed to by the multinational enterprise's own business activities, as well as those based on a business relationship. Business relationships include business partnerships and relationships between suppliers of multinational enterprises and other enterprises outside the supply chain. Both of them are directly related to the multinational enterprise's business activities, products, or services. For adverse effects caused by the multinational enterprise's activities, it should eliminate them. For risks not caused by the multinational enterprise's actions but existing in its supply chain that may adversely affect the matters covered by the Code, the multinational enterprise should also take the necessary steps to suspend or prevent the occurrence of adverse effects. At the same time, multinational enterprises should encourage their business partners in the supply chain to adopt the principles of responsible business conduct in line with the Code's requirements. Therefore, the Code clearly states that multinational enterprises should take responsibility for their business activities and related enterprises in their supply chains. Therefore, China should actively conclude and accede to relevant international treaties, improve the content of the Foreign Investment Law regarding the social responsibility of enterprises investing abroad. Also, China should provide an institutional basis for multinational enterprises to assume responsibility for protecting labour rights and interests, especially to take responsibility for violations of labour rights and interests by enterprises in their supply chains.

4.2. Strengthen the implementation and supervision of labour protection laws and regulations

The standards for protecting labour rights and interests in Chinese existing legislation have met the requirements of international human rights treaties. However, to pursue the rapid growth of the local economy, some local governments do not punish enterprises enough for illegal employment practices and even try to meet the interests of multinational enterprises with lower expected costs of a violation. As a result, labour rights protection standards remain at the legislative level only and are not effectively enforced. At the same time, labour inspection in China mainly adopts a "complaint-driven passive inspection approach"[25]. The relevant labour security supervisory departments mainly follow the principle of corrective action against enterprises' violations, which cannot effectively restrain enterprises' violations of workers' rights and interests.

Based on this, China can appropriately learn from the Australian government's relevant practices in labour supervision. For example, the enforceable undertaking of the Fair Work Ombudsman (FWO).[26] The Enforceable undertaking is an agreement between the FWO and the companies under its jurisdiction, which includes a series of undertakings by the company to the labour inspector to rectify labour violations and to conduct business in compliance with relevant Australian labour laws and regulations. Suppose an enterprise fails to meet the agreed employment standards or violates the relevant contents of the agreement. In that case, the court will compel the enterprise to stop the infringement and impose an administrative fine on the enterprise with illegal employment.[27] In addition, FWO can intervene at any time during the operation of the enterprise based on the complaint of the parties. For example, when a worker believes that his or her labour rights may be potentially violated, he or she can contact the FWO directly by phone or online for assistance, and the FWO will take the initiative to investigate and provide feedback to the complainant on the suspected violations.[28]

Based on the Fair Work Ombudsman labour inspection system, the Chinese government urgently needs to improve its labour inspection model. First, Chinese labour security supervision departments should strengthen active and selective inspections of multinational companies and their suppliers in the supply chain based on passive inspections. Second, based on the supervision, labour security supervision departments should strengthen the administrative penalties for illegal employment practices of domestic enterprises to enhance the deterrent effect of labour supervision. In addition, the expected increase in the cost of violation of labour rights and interests by MNEs

against their suppliers is to a certain extent forcing MNEs to pay attention to the labour practices of their host country suppliers, take the initiative to require suppliers to comply with the law and assume the responsibility to protect the rights and interests of laborers in their supply chains.

4.3. MNEs strengthen internal and external supervision

MNEs' own internal supervision and external private supervision should be coordinated with public authority supervision to form a complete monitoring system to protect labour rights in MNEs.

4.3.1. Internal supervision

First, human rights due diligence, as an important element of the UN Guiding Principles on Business and Human Rights, requires enterprises to identify. Through self-investigation and monitoring, the adverse impacts that their production and operation activities have had or may have on human rights and timely measures to mitigate, avoid, and prevent them.[29] At the present stage, China's "One Belt, One Road" initiative promotes Chinese enterprises to go global further. Therefore, before entering countries along the Belt and Road, Chinese enterprises should conduct human rights due diligence on their own activities and the laws and regulations of those countries to ensure that their social responsibility towards workers in the countries along the Belt and Road matches the requirements of the governments of those countries on the social responsibility of multinational companies.

Second, in addition to the Foxconn incident, Hewlett-Packard was also previously exposed to illegal employment and poor working conditions in its supply chain located in other countries. It led to an internal labour movement at Hewlett-Packard and coupled with public pressure from relevant external NGOs. Hewlett-Packard established social groups, the first supplier code of conduct in the electronics industry sector in 2002.[30] Since then, more and more multinational enterprises have recognized the importance of internal monitoring through internal supplier codes of conduct. Based on this, Hewlett-Packard, IBM, and Dell jointly issued the Electronic Industry Code of Conduct (EICC) in 2004. That requires managers to audit the performance of companies in their supply chains in terms of labour standards, work environment, and ethics. Then, classifying these companies according to the audit results and further requires managers to correct any elements that do not meet the EICC standards promptly and continuously improve them. After the Foxconn incident, Apple also joined the EICC. EICC is an evaluation audit conducted by multinational enterprises on their initiative, while the SA8000 standard is a

compliance audit conducted by suppliers and subcontractors on their own. MNEs such as Wal-Mart and Nike have taken CSR standards that meet SA8000 requirements as a prerequisite for establishing a partnership with them.[31] Therefore, this paper suggests that the Chinese government should include "joining the EICC or the existence of an internal EICC audit organization" as one of the entry conditions for foreign investors to enter China to carry out investment activities. That is, the EICC as a passport for foreign investors to enter the Chinese market. At the same time, the Chinese government should encourage domestic enterprises to take the initiative to conduct independent audits and certification of SA8000 standard before entering the international market.

4.3.2. External supervision

In 2010, the State of California introduced the California Transparency In Supply Chains Act, which requires multinational enterprises to investigate and evaluate human trafficking and slavery in their supply chains. The California government requires large multinational companies with annual profits of more than \$100 million to make mandatory disclosure of specific measures the company has taken to eliminate human trafficking and slavery from its supply chain in five areas specified in the Act [32]. The relevant information disclosed is required to be prominently placed on the company's official website and presented to the public in a convenient, easy-to-understand format. To some extent, this information influences the purchasing choices of consumers, especially those concerned with the human rights sector. This government-directed consumer choice is a way to induce multinational companies to take responsibility for protecting the labor rights of companies in their supply chains through social supervision.

The Chinese government can take a cue from the CTSCA and pass legislation to require foreign investors to assume mandatory disclosure obligations on matters related to labour rights and interests of their supply chain companies. In addition to disclosing information on the company's official website, multinational enterprises can also be required to expose such information on online sales platforms or attach it to product packaging in the form of QR codes or bar codes. So that consumers can easily and quickly access relevant information in the shopping process and exercise the right to public supervision to the greatest extent, thus prompting multinational companies to take the initiative to assume responsibility for the protection of labour rights and interests in their supply chains.

5. CONCLUSION

Labor rights, as one of the important components of human rights, is an important right to ensure workers' 'safe and healthy existence and secure and dignified life'. With the development of globalization of the economy, violations of workers' legal rights and interests occur frequently, especially between suppliers of multinational companies and their laborers. The Foxconn case, which is the focus of this paper, is a typical example. The question of how to hold Apple responsible for the violations of labor rights by Foxconn, i.e., whether China, as the host country, should hold Apple responsible for the violations of labor rights by suppliers in the supply chain of multinational companies, has aroused the attention and heated discussions from all walks of life. This paper argues that Apple should be held responsible for the protection of workers' rights and interests, because Apple has the theoretical basis for the protection of workers' rights and interests, both in terms of the rights of workers and the level of corporate social responsibility. Based on this, this paper believes that China should strengthen the protection of labor rights and interests and improve the supervision and implementation mechanism. On the one hand, we should refer to the provisions of the OECD Guidelines for Multinational Enterprises and improve the content of the Law on Foreign Investment regarding the social responsibility of foreign-invested enterprises; on the other hand, we can learn from the Fair Work Ombudsman system in Australia to strengthen the administrative penalties for illegal employment practices of domestic enterprises; in addition, we should call on multinational companies to In addition, multinational companies should be called upon to establish a set of perfect internal and external supervision system related to labor rights protection, which can guarantee multinational companies to respect and protect the basic rights and interests of workers, and also prompt multinational companies to take the initiative to assume the responsibility of protecting the labor rights and interests of their supply chain.

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