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A Study on the Human Rights Responsibility of Transnational Corporations and its Supervision Mechanism

From the Perspectives of the Host country

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ABSTRACT
The human rights responsibility of transnational corporations mainly concentrates on labour, environment, life, and freedom. Because transnational corporations cannot be the subject of international law, the present situation of the fulfilment of human rights is not optimistic. Based on the background of human rights supervision over transnational corporations, this paper observes the problems existing in the supervision of host countries representing developing countries from the perspective of domestic laws and points out the necessity to further strengthen the regulation of limited liability in terms of domestic laws and regulations. The establishment and improvement of legal supervision mechanisms shall be accelerated by establishing and introducing international law norms and treaties to which MNEs are members and introducing the new overall theory of parent companies and subsidiaries of MNEs, the accountability mechanism shall be expanded. The domestic legal norms and regulatory mechanisms of MNEs in developed countries shall be used for reference.

Keywords: *Multinational Corporations, Human Rights Responsibility, Host Country Supervision.*

1. INTRODUCTION

With the recent support for more strict regulations on multinational enterprises, it seems to be the case that more and more people have realized the massive power an MNE can have over a developing country and to the whole global economy. MNEs can play a huge part in countries' economic development, especially for developing countries. But they also can create a detrimental impact for a host country. Such host state regulation is especially needed when the human rights of the host state citizens have been violated by MNE behavior. However, such victims are unable to seek redress from the MNE's parent company due to the doctrine of limited liability. Without regulation from the host state, the MNEs are freer to act with impunity, secure in the knowledge that no matter the number of host state victims its exposure to liability will remain limited.

Even though the consensus right now is that MNEs should be better regulated to protect the host countries and their citizen's rights, but how to achieve this goal is still being debated. Some proponents have argued for international standards for regulating MNEs, this paper will show the difficulty of achieving such a goal. This is largely due to countries can not reach an agreement on what regulations should be put in place. We will also discuss some of the reasons why some of the developing countries are so reluctant on regulating MNEs. Thus, this paper will seek to establish a position of domestic regulations on MNEs are needed. We will first discuss the current status of regulations in place and MNE's social responsibility. This section will show the difficulty of enacting an international regulation for MNEs. In the second section, the paper will highlight

why regulations are necessary. There are a lot of reasons why such domestic regulations are necessary, but for the focus of this paper, we will only be focusing on the protections offered by the limited liability doctrine for the MNEs. This protection can let MNEs avoid liability and responsibility to the host country. Lastly, there will be an evaluation of the current regulations host countries have in place for multinational enterprises and, suggest solutions for the host countries to consider as alternatives that they can implement to protect both potential future victims and their own interests.

2. STATUS OF PERFORMANCE OF HUMAN RIGHTS RESPONSIBILITIES BY MULTINATIONAL CORPORATIONS

2.1. Research Background and Basic Content of Human Rights Responsibility of Transnational Corporations

In terms of the performance of human rights responsibilities, the host country and home country impose regulations on multinational corporations. In practice, fairness and impartiality are often impossible due to the different standards of domestic laws. Take the case of China and the United States in punishing environmental pollution as an example compared with millions or even hundreds of millions of fines imposed in the United States, China's relevant legal documents only require the suspension of business operations for rectification, a fine of tens of thousands of yuan, and the removal of fines from the commercial value gained by transnational corporations for their avoidance and violation of laws and regulations. Thus, in the idea of maximizing profits, illegal production is more cost-effective, so MNEs do so at the expense of the environment. Regulatory arbitrage is pervasive, but the residents of the neighbourhood and beyond must bear the consequences.

The theoretical basis of MNE's human rights responsibility comes from the requirements of CSR theory. The theory of "CSR" came into being in the early 20th century and has been greatly enriched in the following decades. At the beginning of the 20th century, with the increasing influence of enterprises on society, the public expectation of enterprises is higher and higher. They thought enterprises should return their social resources to those who contribute to the enterprises in the form of welfare instead of blindly expanding their own capital while holding a large amount of social capital. Nowadays, modern enterprises pay more attention to social effect and need more social responsibility because social responsibility is an external moral constraint and an impact on the legitimacy and international reputation of MNEs [1]. The human rights responsibility of transnational corporations mainly concentrates on two aspects: one is the right that each person has, the other is the right that derives from the corporation's environment. Specifically, it includes the following three aspects.

First of all, labour rights mainly include prohibitions on forced labour, the use of child labour, discrimination, and the payment of debts by labour. The business philosophy of international companies is to maximize profits, so their production sites are always moved to labour-intensive and low-price developing countries. The protection of laborers' rights and interests and the accumulation of more capital by MNEs as much as possible are a game of interests, which makes all kinds of behaviours of MNEs must be paid enough attention to by host governments.

In addition, environmental and human rights have obvious common characteristics. As the common cause of all mankind, the environmental protection issue has been getting hot since it received wide attention in the 1990s. However, the recent examples of environmental accidents caused by transnational corporations show that there are still many deficiencies in protecting the environment, which need to be guided and regulated by the government. Some transnational corporations in developed countries continue to transfer their industries. For them, the industrial transfer will reduce costs and create higher economic benefits and continue to expand overseas industries and raise global awareness. As a result, large numbers of multinationals have flooded into developing countries. These multinational companies wantonly destroy the local ecological environment, seriously reduce the quality of life of residents, and pose a serious threat to the health of residents.

Finally, the right to life and freedom falls within the scope of the right to personality and are inherent to every human being. No one may deprive it on any pretext except through legal recourse and legal action. On the one hand, multinational companies shall not deprive their employees of basic human rights by signing contracts or otherwise during business. On the other hand, as the producers and providers of products, multinational companies shall observe quality standards and ensure that the right of life of consumers is free from any infringement; otherwise, they shall bear the corresponding human rights liabilities.

2.2. Current state of human rights regulation in transnational corporations

2.2.1. The background of human rights regulation in transnational corporations

Firstly, transnational corporations are not subjecting to international law. At present, there are many controversies about whether the transnational corporation can be the main body of international law

and whether the transnational corporation can be the main body of international law is an important basis for its responsibility.

According to the basic principle of traditional public international law, the subject of international law must possess a certain personality. Conditions: (1) possession of a given territory and population; (2) ability to enter into treaty agreements to create international law; (3) the right to sue for breaches of obligations under international law; (4) freedom from the jurisdiction of other sovereign States [2]. According to the above conditions, scholars at home and abroad generally believe that only sovereign states are the subjects of international law, and their actions are subject to international political constraints and incentives. In his book "International Law", Professor Zhou Yisheng holds that only the state is the subject of international law and opposes the private being the subject of international law [3]. Professor Wang Tieya also believes that sovereign states are the basic subjects of international law and that there are non-state subjects of international law and ethnic organizations and other intergovernmental organizations fighting for independence [4]. However, individuals and corporations, as natural persons and legal persons, cannot participate in international relations independently and to assume the rights and obligations of international law directly, so they are not qualified as subjects of international law.

Traditional international law centred on sovereign states only stipulates an exceptional subject of international law, namely, international organization. As defined by the International Law Association, international organizations are intergovernmental organizations of sovereign States and are alliances of States or consortiums of States established by a number of States based on treaties for specific purposes. This exception is based on the fact that international organizations are institutions created by sovereign States for mutual cooperation and exercise their rights and obligations under international law under the mandate of sovereign States. For example, United Nations organizations have the right to enter into agreements with the Member States or other international organizations to the extent necessary to achieve their purposes and principles. Following the definition of the subject in international law, international environmental law recognizes that all private persons, including transnational corporations, are not the subject of international environmental law but the object of regulation. Thus, the vast majority of international law treaties (including, of course, international environmental law treaties) do not allow direct participation by groups of transnational corporations. In contrast, only a few international law treaty-making bodies allow indirect participation by non-governmental organizations. For example, the United Nations Economic and Social Council (ECOSOC) stipulates those discussions on resolutions of international treaties supported by the ECOSOC allow for the indirect participation of intergovernmental organizations and give them observer status, that is, participation in discussions without voting rights.

In the area of international human rights law, traditional international law held that Governments were the primary perpetrators of human rights violations, and earlier international human rights instruments focused on regulating the obligations and responsibilities of Governments with regard to the protection and promotion of human rights, while transnational corporations were not within the scope of their regulation. MNEs are held to be responsible, like other individuals, to respect the rights of others under international human rights treaties. Still, these treaties do not apply to corporations directly but regulate contracting states [5]. Discussions on whether MNEs should be held accountable for international human rights obligations as limited subjects of international law are clearly at an impasse.

Secondly, there are some limitations in the current international human rights law on the human rights liability of transnational corporations. Influenced by the traditional idea of "state centralism," many provisions of international law rely only on the domestic legislation of the contracting state to regulate the behaviour of transnational corporations indirectly, rather than directly imposing human rights liability on transnational corporations. Almost no international law directly stipulates the human rights obligations of transnational corporations. The responsibility of transnational corporations to promote and protect human rights is regulated by domestic law rather than international law. Moreover, by means of the international treaty, many non-contracting states do not recognize the legal effect of the treaty on their own, so that many host country's judgments cannot be recognized in non-contracting states.

2.2.2. Regulation of MNEs in host countries (developing countries) from the perspective of domestic law

The regulation of the host country on the human rights obligations of transnational corporations is from two aspects: meanwhile, the content of the human rights obligations of transnational corporations under international human rights law in respect of labour standards, environmental standards, and so on overlaps with the contents of labour law, company law and environmental law of the host country to some extent [6], and these domestic legal provisions of the host country can supervise and regulate the human rights issues of transnational corporations in advance, in the process and afterward; meanwhile, the host country, as

the place where the violations occur and based on the principle of territorial jurisdiction, can investigate the human rights violations of transnational corporations and provide corresponding relief opportunities for victims.

Currently, corporate human rights abuses are regulated by national laws in many countries, mostly in the areas of health, work safety, environmental protection, and labour rights. Many states have also adopted extraterritorial jurisdictions to regulate human rights crimes committed by transnational corporations or to mitigate the adverse effects of traditional common law by applying the doctrine of forum non-conveniences. However, most countries only have the principal stipulation to the transnational corporation human rights responsibility, which has many problems in the concrete judicial practice. For example, Article 6 of China's Environmental Protection Law only stipulates in general terms that "all units and individuals have an obligation to protect the environment." Some developing host countries have even passed legislation to exempt MNEs from environmental liability for operating in the host country.

3. REASONS FOR REGULATIONS AND NECESSITY

3.1. Regulations of MNEs in theory V. reality

As we discussed in the first section, whether MNE's behaviours can or should be regulated from an international level has been debated back and forth. We showed that until recently, most people believed regulating MNEs should be left up to the home or host countries. But there has been a call worldwide to regulate multinational corporations through an international treaty or committee. The proponents of such regulations have been largely from developing countries [7]. Even though this theory has gathered support worldwide, it has been very difficult to put it into action. This is mainly due to nations having different positions from each other, especially between developed and developing countries. So the theory of having an international standard for all of the MNEs just seems unfeasible. Even with the establishment of the intergovernmental commission on transnationals corporations and an information and research centre on transnational corporations, the vital areas of human rights are still not developed fully along with the formations of codes of conduct [8].

One of the reasons it is hard to get a standardized international regulation for MNEs is that it is hard to get all of the countries on the same page. Because undoubtedly, host countries receive great benefits from welcoming multinational enterprises into their countries. For example, MNEs often stimulate the local economy by offering increased employment opportunities to the domestic labour force and through investments in underdeveloped sectors such as technology or infrastructure. However, this mutually beneficial collaboration between corporations and host countries has also allowed those corporations to expand their businesses seemingly without limit. Resulting in their holding an enormous amount of power over the global economy. Without adequate regulations to govern them, multinational enterprises have the power and ability to create lasting impacts that are often unacceptable in the eyes of society.

The benefits are why developing countries such as India and China are concerned about the negative impact on their economies if there are regulations for the MNEs on an international level. Such a concern allows MNEs to adopt double standards of safety and health. To save costs, the standards of construction design, selection of construction materials, construction of safety devices, and facilities were often far lower than those of similar factories established in Europe and the USA.

The great incentives attached to MNEs often push nations, especially developing nations, to compete to attract FDIs by promising MNEs less regulation than other nations. This phenomenon is called "race to the bottom" [9]. Developing nations often compete with other nations, each offering fewer regulations to MNEs because MNEs are not easy to attract. And those nations understand only economical, and regulation incentives can win the MNEs' favour towards them. Sempra Energy, based in the U.S., decided to operate its power plant in Mexico for the reason to be able to escape the air quality control in California [10]. Some nations will let MNEs operate under a different set of rules that were created especially for MNEs. For example, Sri Lanka created a separate system of law or waivers of national law for MNEs entering their country [11]. Due to the large benefits attached with MNEs, even big economic powers such as China, and Russia even changed their company laws to be more similar to western laws to attract FDI.

3.2. The necessity of domestic regulations

With expectations changing for MNEs, the call for regulations also intensifies. Without an adequate standard in place, it is very easy for MNEs to mitigate risk and responsibilities while operating in a host country. Oftentimes, corporations do this through the doctrine of limited liability. The principle behind limited liability is seen as an essential component behind how corporations choose to operate. The doctrine of limited liability states that shareholders have no responsibilities to the company's financial debt beyond their level of investment and cannot be held liable financially [12]. In today's context, the limitation of liability protects the parent company from the

subsidiary's actions in host countries. This includes debt and tax responsibilities.

Because of the protections offered to MNEs by limited liability, the parent companies are thus protected from any loss if any damages occur and can benefit from setting up subsidiary companies overseas. If liability can simply be avoided by setting up a subsidiary, this might encourage corporations to take riskier actions and commit further abuse of human rights [13]. After all, corporations are focused on profit maximization.

Therefore, it is extremely difficult for victims who have encountered human rights abuses to obtain a remedy for their sufferings. Because MNEs are not only protected by corporate law but also by jurisdiction restrictions [13]. This is especially unfair for tort victims. Unlike victims who willingly enter a contract, tort victims did not consent to allocate risk with the corporations. They are often left without a remedy, all without their consent [12].

It is clear then that the current corporate law principle does not offer corporations adequate governance and cannot protect tort victims against human rights abuse. Since the victims and host countries cannot rely on the current regulations, this paper argues that additional regulations on top of the basic corporate law are needed. But who should be responsible for regulating multinational corporations? It is evident that the host countries must take primary responsibility in regulating the MNEs in their jurisdiction. The host states are most directly affected by the behavior of the MNEs, with far-reaching and transformational impacts on all aspects of their societies. Further, the host states have a moral and ethical duty to protect their citizens from preventable dangers. It is the position of this paper that the best regulations would be domestic regulations. In the third section of this paper, we will outline some of the current regulations and suggestions for host countries.

4. OPTIMIZE THE REGULATORY PATH

4.1. Establish the international law statues of organizations such as the International Law Association joined by multinational companies

The establishment of an international law association to confirm the status of multinational corporations as subjects of international law can more effectively supervise the behaviour of multinational corporations and protect human rights. "Human rights are inherent to every person due to his birth, and they do not depend on any endowment from the state or social system." Since human rights come from inherent human dignity, they are moral rights that restrict national sovereignty and the power of multinational corporations, including not taking actions that undermine the enjoyment of human rights [14]. Therefore, multinational companies should also bear human rights responsibilities. Establish an international law association, requiring multinational companies to join, pay dues on time, and a certain amount of security as their property to assume human rights responsibilities. Under this circumstance, as a legal subject, multinational corporations have an enforceable property and can better bear the responsibility for losses caused by human rights violations.

4.2. Accelerate the establishment and improvement of legal supervision mechanisms

Introduce international law treaties and enter the transformation of domestic law. The Guiding Principles on Business and Human Rights [15] adopted in 2011 aroused heated discussions on the relationship between multinational corporations and human rights in China. China has always affirmed its positive attitude towards the industry, commerce, and human rights, influences. However, there is no clear provision in China's domestic law. Therefore, China can introduce the theoretical basis and provisions of such treaties, such as formulating special chapters for multinational companies in the civil code and companies to stipulate the legal status of multinational companies, Specific rights, and obligations.

Sign a multilateral agreement to establish a mutual recognition mechanism for judicial adjudication and enforcement. Because the business premises and property locations of multinational companies usually span multiple countries, the laws and regulations of each country are different, and multinational companies do not have a dominant position in international law. Therefore, judicial judgment and enforcement of multinational companies are sometimes difficult to achieve. As the largest developing country, China should actively participate in discussions related to multinational companies, clarify its own position, sign multilateral agreements, and establish a mutual recognition mechanism for judicial adjudication and enforcement. Avoid situations where the judgment is difficult to enforce.

4.3. Introduce a new overall theory of parent-subsidiary companies of multinational companies and extend the accountability mechanism

The United Nations Code of Conduct for Multinational Companies defines a multinational company as: "An enterprise composed of entities located in two or more countries, regardless of the legal form and scope of activities of these entities; the business of such enterprises is through One or more

decision-making centres, operating according to a certain decision-making system, can have consistent policies and common strategies; each entity of the enterprise can exert important influences on the activities of other entities, especially sharing knowledge, resources, and other entities with other entities. Share responsibility. “It can be seen that the relationship between the parent and subsidiary companies of a multinational company is very close. Although the subsidiary has an independent legal personality, its operation process and economic benefits are closely linked to the parent company. Therefore, the host country can introduce the overall liability into the legal relationship of the multinational company through legislation to compensate for the unfairness caused by the limited liability of the company.

The United States introduces overall responsibility into environmental pollution liability. Its "Comprehensive Environmental Response Compensation and Liability Act of 1980" (CERCLA) has established a relatively complete environmental damage liability system and determined the strict liability of the parties concerned. The parent company can be jointly and severally liable for its ownership or control over the subsidiary and its role as an “operator” [16].

4.4. Drawing on the domestic legal norms and supervision mechanisms of multinational companies in developed countries

After years of development in developed countries, their legal regulations have become more complete, and the protection of human rights has become more comprehensive. This undoubtedly provides ideas for the development of Chinese laws. The Alien Tort Claims Act is stipulated in Article 1350 of the United States Code, which establishes that the Federal Court has jurisdiction over civil infringement lawsuits brought by aliens under certain circumstances. In 2004, the U.S. Supreme Court heard the Sosa v. Alvarez-Machain case, and for the first time expressed its position on the "Foreign Tort Claims Act", arguing that the Act did not contain any substantive rights and only gave the U.S. Federal Court the jurisdiction to accept civil infringement litigation under specific circumstances. Although the U.S. legislation did not explain the specific manifestations of specific situations, merely indicated that it had close ties with the U.S., this undoubtedly expanded the jurisdiction of the U.S. courts.

Article 991 of the Chinese Civil Code stipulates: "The personality rights of civil subjects are protected by law, and no organization or individual may infringe upon it." The "any organization" does not clearly define its scope, and the corresponding judicial interpretation has not been issued. If we learn from the provisions on legal persons in the Civil Code, Article 991 may only apply to cases within China, and the parties involved may only be institutions established by multinational companies in China. In the future, China can try to learn from the U.S. "Foreigner’s Tort Requests Act", and in certain cases closely related to China’s interests, determine the jurisdiction of Chinese courts in the form of law. This will inevitably expand the jurisdiction of Chinese courts and become more effective. Hold accountability for violations of human rights that occur outside of China. At the same time, to a certain extent, the influence of multinational corporations not being the subject of international law is eliminated.

At the same time, China should build a preventive mechanism to prevent multinational companies from infringing upon human rights. In the case of Antong Holding Co., Ltd. and Ankang Business Trust Dispute in 2019, the Supreme People’s Court pointed out in accordance with the relevant guarantee provisions of the Company Law that the guarantee is not a matter that the legal representative can decide alone, but must be determined by the company’s shareholders meeting, the resolutions of the general meeting of shareholders, the board of directors and other corporate agencies serve as the basis and source of authorization. After the guarantee contract is determined to be invalid, the creditor cannot request the company to assume the guarantee liability. Still, it can be dealt with in accordance with the guarantee law and relevant judicial interpretations regarding the invalidity of the guarantee. The rights and interests of the company’s shareholders are protected in accordance with the law.

Between July 2018 and October 2020, the United Nations successively adopted the "Legal Binding Regulations Regarding the Activities of Multinational Companies and Other Industrial and Commercial Enterprises in the International Human Rights Law". The zero draft of the “Instrument” and its revised draft attempt to fully incorporate the human rights responsibilities of multinational enterprises into the scope of national human rights obligations for supervision. Among them, article 5 of the amendment is the amendment's core on preventing multinational companies from infringing human rights. It involves the state's obligation to prevent multinational companies from infringing human rights and its own due diligence obligation to prevent human rights infringements. According to this article, States parties should effectively regulate the activities of multinational companies in their territories or jurisdictions and ensure that their domestic legislation requires companies to respect and prevent violations of human rights in their territories or jurisdictions. The article also specifies the human rights due to diligence obligations of multinational companies, such as identifying and evaluating their own business activities or the possible human rights violations that may be caused by the business activities of other companies that have a

contractual relationship with them and requires contracting states to ensure that the company fulfills these obligations. China can use the amendment as a blueprint to build its own preventive mechanism. Still, it should also consider the actual situation of its own countries, such as how some companies that exist only electronically should be managed and the differences between these companies' human rights obligations and traditional companies.

5. CONCLUSION

In recent years, with the continuous development of multinational companies, the problems of human rights violations exposed by them have become more and more serious. This question has high research value and practical significance and requires more research to participate in it to comprehensively safeguard international human rights and promote world prosperity and stability. This article is just such an attempt. However, due to the insufficiency of the relevant provisions of international law and the imperfect legislation of countries in the world, especially the developing countries, the human rights issue cannot be solved well. In the context of the continuous development of international commercial trade, this article discusses how the host country can supervise multinational companies to better fulfill their human rights responsibilities. This article discusses from the perspective of China as the host country. It proposes the establishment of an international law association to establish the status of multinational corporations as the subject of international law, the introduction and signing of international treaties, the appropriate conversion of domestic laws, and the optimization of the relevant laws and regulations of developed countries. Due to the limitation of the article's length, this article only discusses the supervision of human rights issues of multinational companies, hoping to provide some ideas for related research. It is hoped that in future research, a comprehensive human rights protection system can be established based on the actual conditions of various countries in the world.

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