

The Host States' Regulatory Obligation to Human Rights Violations by Transnational Corporations

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Abstract. The increasing importance of multinational corporations in the process of economic globalization, but the increasing number of human rights violations in the context of the operations of multinational companies has led to an increasing amount of research and reflection by the international community on such cases. In cases of human rights violations by transnational corporations, the victims are usually people living in the host country, and the violations are committed in the host country, so the host country has the right and the obligation to regulate and manage such cases. The obligation of States to protect human rights, the principle of mutual non-impairment of sovereignty and the necessary international cooperation are the main theoretical foundations of this obligation. According to the concept of due diligence, the state must take preventive measures when it knows or should know the risk of human rights violations and when it has the appropriate means or resources to prevent them. This paper summarizes the current dilemma of the host country concerning the corresponding regulatory obligations and analyses the corresponding causes through the research method of case studies and comparative research. It also summarizes the current views on the relationship between the duty of prevention and legal responsibility in the host country and the solutions to the host country's jurisdictional dilemma.

Keywords: Human right; Host country obligations; Multinational corporations.

1. Introduction

Since World War II, the globe has become increasingly interconnected, and multinational corporations, as the endogenous driving force of economic globalization, have been expanding their scope of operations and investing across national borders and influencing the international community with their significant economic position.

Admittedly, it is true that the role of transnational corporations in driving global economic growth cannot be ignored. On the other hand, there have been numerous cases of MNCs harming the rights of individuals, such as the violation of workers' right to health in MNC factories. For example, the emergence of fires in textile mills in Pakistan and the forced overtime and even prohibition of water during working hours in Nike's factories in Southeast Asia have seriously undermined workers' human rights. In the face of these constant incidents of transnational corporations harming the rights of individual labour workers, how to provide reasonable and efficient remedies for the victims has become a growing concern of the international community.

However, according to the traditional prevailing general theory of international law, international human rights duties do not directly limit corporations as subjects, including transnational and local corporations. Yet the subject of direct obligations under international human rights treaties is the state. This provision explicitly includes the state's duty to protect individuals from human rights abuses by others, including third parties, business groups or other subjects. Currently, most scholars argue that the home state of a multinational corporation should oversee company's extra-territorial activities located in its jurisdiction (multinational subsidiaries) - the so-called 'extraterritorial obligations'. The critical contradiction, however, is that it is difficult for home countries to enforce their own laws or regulate the territory of other countries.

This paper will, therefore, specifically analyse the reasons for the host State's obligation to protect human rights, as well as the reasons and dilemmas of exercising this obligation, and make relevant recommendations and inspirations based on the current state of research.

2. The doctrinal basis

2.1 International human rights treaty

Up to now, International customary law and global or regional human rights conventions are the source and foundation of human rights norms at the international level as a whole [1]. Under the influence of this form, the strict limitation of the subject matter of public international law has led to the fact that these norms will formally affect only one states. International human rights law does not bind non-state actors, such as commercial enterprises, due to subject mismatch

This means that if one wants to control the specific business practices of multinational enterprises, it must resort to the power of the state. At the same time, the human rights protection must be based on national coercion, and the most practical way to achieve this is to rely on the implementation of national regulations to assist in checking multinational enterprises. For example, some countries may enact regulations that make it mandatory for businesses to provide fair employment opportunities and a qualified and reasonable working environment and working hours, thereby protecting the physical and mental health of workers and upholding their most basic human rights. From this point of view, host countries are well justified and entitled to be involved in regulating human rights violations arising from the transnational corporations' economic activities.

At the same time, it is now commonly accepted that the responsibilities of states arising from international human rights conventions are divided into three dimensions through contemporary human rights law theory: 1) the obligation to respect. 2) the obligation to protect and 3) the obligation to fulfil [2]. The obligation to respect means that the state is restricted from intervening directly in the sector of human rights protection, and the obligation to fulfil, obviously, means that the state must go about fulfilling the relevant provisions of human rights protection. In this context, the relevance of the duty to protect is paramount, as it forms the basis of a state's regulation of commercial activity in that country. It imposes a compulsory requirement on states to adopt substantial and effective initiatives to guarantee the security of human rights in the State, and also stipulates that the State cannot refuse a request for protection from the State after an individual's human rights have been harmed. This is almost a direct indication that the host state, where the corporate human rights abuse occurs, must meet the internationally required State duty to protect. This means that the host country is well placed to claim the protection of human rights against transnational corporations based in its territory through this doctrinal basis, which is an apparent regulatory power of the host country based on the principle of territoriality territorial jurisdiction and personal jurisdiction.

2.2 The principle of territorial sovereignty

The application of human rights is inseparable from national jurisdiction. Among the principles established for international civil jurisdiction, the most fundamental one is respect for the jurisdictional sovereignty of States. Under the principle of territorial jurisdiction, a state may exercise its jurisdiction over everything in its territory. Therefore, the host country should have the right and responsibility to rule on human rights violations that occur in its territory.

In addition, the UN Guiding Principles state that states are competent, but not obliged, to govern private actors in relation to their extraterritorial human rights obligations [3]. This is an essential source of the difficulty for home countries to intervene in the behaviour of MNCs and a side effect of the importance of host country management in such cases of human rights violations.

Of course, this is not a complete divestiture of the home country and the management of the parent company. The Committee on Economic, Social and Cultural Rights (CESCR) has stated that states parties' obligations under the Convention are not limited to territorial borders, Therefore, in order to deter human rights abuses by their own companies outside their jurisdiction, home states should also take the necessary measures to prevent them before they occur [4]. In actual cases, there are also such decisions. In September 2015, 1,826 residents of Chingola, Zambia, filed a civil tort action in the English courts against Vedanta Resources plc, the UK-registered parent company, and Konkola Copper Mines plc, a Zambian subsidiary. They claim that Vedanta Resources has breached its duty

of care to ensure that its Zambian subsidiary does not cause harm to the environment and local communities. The English courts have held that there is a bridge between the parent company and the subsidiary, namely the parent company's duty of care to the subsidiary. Where a subsidiary has committed an infringement of human rights, the parent company should be held responsible for that duty if it is the result of its neglect of it [5].

2.3 The Principle of validity of jurisdiction

The principle of effectiveness means that when determining international civil jurisdiction, a state needs to take in account the eventual recognition and enforcement of the judgment rendered by the determined jurisdictional court. Jurisdictional barriers between states are a reality, and in this case, the efficiency of the case is sacrificed if the balance between the powers of the State is taken into account, the protection of the interests of the parties and the victims will be neglected. The justice of a late trial is bound to be compromised.

Therefore, the effectiveness of the jurisdiction of the host country, as the place where the tort occurred, in the territory will be to a certain extent higher than that of the home country, which can better realize the legal system itself and better give timely protection and relief to the victims.

3. The current management dilemma faced by the host country

In contemporary times, the remedy for victims to rely on the state to seek human rights guarantees is the legal route, and the regulatory dilemma for the host state is the series of problems that currently arise from the law.

3.1 Legal deficiencies

The imperfection in the legal system is the most fundamental of these problems. It is evident that the vast majority of human rights violations tend to occur in countries with deficient levels of productivity and lagging economic development. For these countries, there are also often significant loopholes and gaps in the law, and corruption is prevalent and weak institutions are, to some extent, the main reason for these human rights problems. On the contrary, some large multinational corporations will be even more potent than these low-development level countries. Under such contradictory conflicts, these host countries simply do not have the ability to give victims judicial protection and remedies. The laws of the country not only fail to punish these violations but even provide certain conditions to facilitate its creation. In fact, these countries have the highest human rights but instead have the lowest effectiveness of human rights treaties [6].

For countries with relatively high economic levels, this problem is not absent. Multinational companies operating across national borders have always had specific international barriers and jurisdictional issues in the management. The legal perfection of the country is mainly directed to the subjects that are entirely attributed to the country, and there is a certain ambiguity and unsoundness in the legal system for multinational companies. At the same time, there are some problems, including the overlapping of management subjects, the unclear responsibilities of administrative agencies and the lack of specialized systems and technologies for regulating multinational corporations. All these factors increase the difficulty of managing the infringement problem of multinational corporations to different degrees, making it difficult for the infringed people to defend their rights and interests effectively.

In addition, the issue of international inter-power cannot be ignored. For countries that are relatively lagging in terms of economic level, it is necessary to offer favourable conditions to attract investment from multinational companies in order to develop the domestic economy rapidly. Some countries that rely too much on foreign investment may even sacrifice the environment and the rights of workers in the host country to achieve rapid economic development in the short term. Host governments use policies and laws as attractive conditions to ensure that MNCs invest in the country, promising to give companies the ability to reduce costs and increase profits at a minimal cost. If the

host country wants to amend the relevant policies to protect the domestic environment and labour, consumer and other human rights, propose to regulate the expansion of multinational companies or even restrict the activities of multinational companies through punitive measures, MNCs will also threaten the host countries by withdrawing investments to other countries with more lenient investment environments, forcing host countries to abandon the implementation of policies and laws that protect human rights [7]. In other words, many host countries that rely on MNCs to develop their own economic development do not have a voice in the management of powerful MNCs, which leads to difficulties in the management of host countries.

3.2 The complex characteristics of multinational companies

The properties of MNCs as subjects themselves are very complex. The United Nations Commission on Transnational Corporations defines a multinational corporation as follows, an enterprise with its physical presence in two or more countries is a multinational corporation. Although the areas of activity, modes of operation and legal structures of the entities of these divisions are not identical, the functioning of these enterprises as a whole is carried out through the decision-making centres they have developed, according to a fixed strategic model and system, and thus there is a consistent policy and a common strategy.

There are many linkages between a business as a whole, and because of ownership or other related factors, some of the decisions or activities of one or more entities in the business may involve other organizations, especially when knowledge, information, resources and responsibilities are shared.

From the above definition, it can be seen that there are relatively close links between multiple entities of multinational companies, and it is a coordinated business activity between multiple subjects. Although in the current law, MNC subsidiaries mostly have independent legal status and independent responsibility, in fact, the parent company is often able to interfere with the management business of subsidiaries through various means. At the same time, when an MNC subsidiary violates human rights in the host country, the damage caused is often very massive, and the huge losses and financial compensation are often unaffordable for a subsidiary. For this reason, the host country, in many cases, needs to hold the parent company accountable in judicial proceedings, and such legal prosecution across national borders is simply challenging to implement. In this case, the host country's justice is hardly practical and operable.

In short, MNCs as a single entity that no country can fully hold it responsible, which makes it extremely difficult for host country jurisdictions to regulate all the actions of MNCs. Thus, making host countries often deadlocked in regulating bad cases of human rights violations by MNCs.

3.3 Unevenness and ineffectiveness

Due to the serious difficulty of managing infringement cases of multinational companies, this also has a side effect on the efficiency of defending rights after infringement cases of multinational companies occur. We can recognize this through a case that has been called a marathon in the history of litigation - the U.S. Chevron oil pollution case.

In the early years of the joint venture between Texaco USA and Ecuador's state-owned oil company, Texaco committed to using modern oil extraction technology under an oil extraction contract between Texaco and Ecuador. However, Texaco did not comply with the standards, choosing to use outdated practices to save money. The company spilt approximately 17 million gallons of crude oil, discharged more than 16 billion gallons of toxic wastewater and released excess greenhouse gases into the environment by burning hazardous gases directly on the ground due to poor technology. In the 1980s, Ecuador's environment was severely damaged, tens of thousands of people fell ill and died due to pollution, and the whole country's finance was burdened with huge debts due to the plunge in oil prices. Between November 1993 and December 1994, approximately 30,000 indigenous Ecuadorians filed a class action lawsuit against Texaco in the Federal District Court for the Southern District of New York. In 1996, the Federal District Court for the Southern District of New York dismissed the plaintiff's suit, giving the reason that the case was not before it under the doctrine of

forum non- convenient. In May 2001, the Federal District Court for the Southern District of New York again ruled to dismiss the case on the same grounds. The plaintiff then appealed again to the Second Circuit Court of Appeal, which finally decided in 2002, which the case should be dealt in Ecuador. When Texaco withdrew from the project, the Ecuadorian government reached an agreement with the national oil company to take over the operation. Texaco was responsible for the portion of the field contamination under its ownership in the agreement and paid \$40 million to clean up the contaminants. And in 1998 the Ecuadorian government waived further claims against Texaco. Later, the U.S. company Chevron merged with Texaco. Chevron took over the litigation in this case when the plaintiff switched to a provincial court in Ecuador in 2003. In 2011, a local court in Ecuador issued a preliminary ruling finding that Chevron deliberately dumped tens of billions of gallons of toxic waste into the Amazon rainforest between 1964 and 1992 and awarded Chevron \$19 billion in damages and cleanup costs. Chevron appealed the ruling, and in November 2013, the Supreme Court of Ecuador upheld the decision but reduced the award to \$9.5 billion. Still, Chevron argued that it had already been dealt with in full and that it was the Ecuadorian government and its oil companies that did not want to be held responsible.

The case shows that due to the unique attributes of multinational companies, the jurisdiction of the case is shifted back and forth between countries, and it takes more than a decade to negotiate and deal with even through the law. Such inefficient judgments hardly allow victims to defend their rights and interests fully, and the evils and harms caused by infringement cases cannot be compensated by a long cycle of judicial decisions. All of these dilemmas are currently in urgent need of resolution and are real challenges facing host country management.

4. The current theoretical solutions and practical solutions

In contemporary times, as human rights awareness continues to awaken, more and more scholars have begun to focus on the issue of human rights violations by transnational corporations. However, the precise provision that transnational business operations do not limit State measures to safeguard the human rights interests of individuals is still not explicitly included in the existing international human rights treaties. Some states still provide some reference examples of state implementation of such a duty in practice. This chapter organizes these specific practices as follows.

4.1 Alien tort statute (ATS)

The Alien Tort Statute was originally a provision of the Judiciary Act of the United States passed in the first session of Congress in 1789. It was later amended three times and codified in the United States Code. Although the ATS can no longer be used against companies today since the U.S. Supreme Court ruled in two landmark cases, the significance of its creation remains significant[8]. It provides clear and effective judicial recourses for victims of violations of rights and interests, and proposes new ideas for the rational allocation of national diplomatic jurisdiction on a global scale, allowing the rules of jurisdiction to be revisited by the international community.

4.2 Disclosure obligations

In 2010, the United States passed the Dodd-Frank Act [9] and for the first time. It brought the duty to disclose to the attention of the world in terms of human rights. Provisions regarding similar requirements for transparency in the production of commercial activities are also explicitly stated in the UK Modern Slavery Act 2015[10]. Although they all require transparency and disclosure for specific production chains, we can adapt their lessons from them. It is an effective regulatory tool to require certain transparency in the disclosure of operational production and financial information of multinational companies that invest and operate in the country. Although limited, it allows host countries to impose specific regulations and restrictions on MNCs. However, its disadvantage is that it is somewhat invasive and has some procedural difficulties in practice.

4.3 Due diligence and restricted access

The UN Guiding Principles on Business and Human Rights have introduced the concept of human rights due diligence, which seeks to assess companies for human rights risks, investigate whether they have committed human rights abuses. The French law on due diligence for parent companies and transnational extraterritorial companies, enacted in 2017, is similar.

Although this system is not yet perfect, the concept it proposes is very innovative and can also be applied to the procedures for introducing foreign investment in host countries. The host country is investigating the entry of multinational companies into the country and limiting the entry of companies that pose human rights risks. This is a critical step to reducing the risk of human rights abuses in the country and improving the level of domestic regulation.

4.4 Establish an international-levelled cooperation mechanism

Based on the complexity of multinational corporations, a reasonable and effective international communication and cooperation mechanism is indispensable for its control. The form of cooperation mechanism can be based on the results of the construction of China's wisdom court, providing more convenient conditions for multinational companies to litigate against human rights violations [11]. It can break the time and space limitations of traditional court hearings and objectively limit the abuse of the doctrine of forum non-convenience, and help establish a long-term mechanism for international judicial cooperation. It also makes it possible for the judgment to be enforced, effectively providing relief for the rights of victims.

5. Conclusion

Multinational companies are now increasingly becoming essential players in the era of globalization. However, there are limits to host country regulation, which is constrained by international practice and the international political and economic environment. The aim of improving the quality of regulation in the host country is to minimize its side effects and enhance its locational advantages.

Governments also need to strengthen international cooperation and work together to regulate the conduct of multinational enterprises. Through continuous efforts, the business environment for international companies will be improved, and the political and economic problems caused by multinational companies will be solved to a certain extent.

References

- [1] Moeckli, D., Shah, S., Harris, D., Sivakumaran, S. (Eds.), *International human rights law*, Oxford University Press, 2014.
- [2] De Schutter O., *International human rights law*, Cambridge University Press, 2019.
- [3] De Schutter O., *Towards a New Treaty on Business and Human Rights*, *Business and Human Rights Journal*, vol. 1, no. 1, 2016, pp. 41-67. DOI: 10.1017/bhj.2015.5
- [4] Van Ho, T., *General Comment No 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (CESCR)*, *International Legal Materials*, vol. 58, no. 4, 2017, pp. 872-889. DOI: 10.1017/ilm.2019.33.
- [5] Zhu, L. (2019, April 26). *The UK Supreme Court: Jurisdiction over Infringements Committed by Foreign Subsidiaries of Parent Companies in International Law & Policy*. Retrieved July 28, 2022, from <https://mp.weixin.qq.com/s/pMmmg2PztwXpBMf3XdfO9g..>
- [6] Hafner-Burton, E. M., & Ron, J., *Seeing Double: Human Rights Impact Through Qualitative and Quantitative Eyes*, *World Politics*, vol.61, no.2, 2009, pp.360-401. DOI: 10.2139/ssrn.1287858.
- [7] Newman, D., *Wiwa v. Royal Dutch Petroleum Co*, *Sustainable Development Law & Policy*, vol. 2, no. 2, pp. 20.

- [8] Stewart, D. P., Wuerth, I., *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute*, *American Journal of International Law*, vol. 107, no. 3, 2013, pp. 601-621. DOI:10.5305/amerjintlaw.107.3.0601
- [9] United States. Congress, *Dodd-Frank Wall Street Reform and Consumer Protection Act: Conference Report (to Accompany HR 4173)*, US Government Printing Office, vol. 111, no. 517, 2010.
- [10] Turner, R. J., *Transnational Supply Chain Regulation: Extraterritorial Regulation as Corporate Law's New Frontier*, *Melbourne Journal of International Law*, vol. 17no. 1, 2016, pp. 188-209.
- [11] Liang Yu, *Home State obligations to regulate transnational corporations in the International Covenant on Economic, Social and Cultural Rights: A review of the recent practice of the Committee on Economic, Social and Cultural Rights*, *Global Law Review*, vol. 36, no. 6, 2014, pp. 160-172.