

Research on Burden of Proof in Multinational Corporation Corruption Related to China

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Abstract: At present, the world economy is interconnected, and multinational corporation are developing rapidly. In line with the development trend of the world, China has continued to deepen its opening-up policy and attracted major multinational companies to enter the country. However, in addition to active foreign investment, it is accompanied by increasing corruption in multinational corporations. In recent years, China has also paid attention to the legislation and judiciary to prevent corruption, but there are still many problems in practice. Among all issues, the burden of proof is one of the most vital one, which profoundly affects the process and efficiency of the trial, but it has been unresolved, triggering heated discussions among scholars at home and abroad. The distribution of the burden of proof in the judicial process of anti-corruption presents two main issues: the excessive burden of proof of the plaintiff and the unclear jurisdiction of corruption in China. Then proposes to solve the above problems by appropriately introducing the inversion and transfer of the burden of proof and the case diversion before trial are put out. By further improving the evidence chain, it is committed to promoting the further advancement of China's anti-transnational-corruption cause.

Keywords: Burden of Proof, Multinational Corporation, Corruption, China

1. Introduction

Before globalization, corruption was largely confined to domestic areas. However, Corruption has now transcended the boundaries of domestic criminal and administrative law, becoming a severe issue that extends across borders. It has become as transnational as organized crime and terrorism, due to the increased global economic connectivity and active multinational investments since the late 20th century [1]. MNEs' corruption inevitably impinges on the international investment order, rattling the economic interests of all parties. Decades ago, statistics showed that bribery could account for 5% to 30% of the total investment in construction projects across different countries, and this proportion has only increased since then. Developed countries, in particular, face even more serious challenges in this regard. The UN estimates that corruption costs the developing world \$1.26 trillion each year, which is a staggering nine times the amount of all the annual official development assistance [2]. Some international communities have taken active measures to address these issues. For example, the International Center for Settlement of Investment Disputes (ICSID) was the first to point out that bribery is contrary to the international public policy of most countries, and it encouraged states to strictly prevent corruption in all its forms [3]. China also responded promptly by signing a series of anti-corruption agreements with many countries, such as the Beijing Declaration on Fighting

Corruption. Furthermore, under the initiative of international organizations such as the UN and the World Bank (WB), countries have vigorously promoted cooperation in combating corruption. The regulation of MNEs' corruption has gradually developed into an international and domestic anti-corruption parallel, moving toward coordination.

In the Common Law System and the Civil Law System, both arbitration and litigation are based on evidence. Therefore, the burden of proof is recognized as the backbone of arbitral proceedings [4]. The distribution of the burden holds a high status in safeguarding justice. However, the burden is not clearly defined in several major international conventions against corruption. In a long term, Chinese law has placed emphasis on the management of public officials. However, MNEs' corruption has gradually become a major concern in recent years. The basic rules, such as the principle of who claims, who provides evidence and obligation of cooperation, are compared with the United Nations Convention Against Corruption (UNCAC) [5], and while they are not perfect, they do provide provisions on the burden of proof. The question about the burden mainly focuses on three aspects: Firstly, in practice, the applicant finds it difficult to meet the excessively heavy burden. Secondly, unclear applicable laws result in ambiguous rules. Third, the scope and limitation of China's jurisdiction over MNEs' corruption remain unclear. The paper will propose corresponding measures to address these three problems in order to promote the process of anti-corruption efforts in China.

2. Research Status

2.1. Common Allocation of Burden in Current International Arbitration about MNEs' Corruption

Although corruption has long-term existence since ancient times, it has gone through a long development cycle to form specialized forces and enact relevant laws. The first specialized convention, the Inter-American Convention Against Corruption, was adopted in 1996, when many of treaties were still regional. In 2003, a global convention, the United Nations Convention Against Corruption (UNCAC), was introduced and eventually become the most widely adopted in the majority of countries. Some international law instruments to counter transnational organized crime had been enacted earlier, including provisions dealing with corruption. In particular, the United Nations Convention against Transnational Organized Crime (UNTOC), which contains provisions on corruption (articles 8 and 9), was promulgated in 2000. Many countries have also enacted and implemented anti-corruption laws within their own countries, represented by the United States. The Foreign Corrupt Practices Act (FCPA), proposed the concept of long-arm jurisdiction for the first time, expanding the interpretation of territorial jurisdiction. With the onset of the 21st century, the rapid advancement of international trade has led to increased activity in anti-corruption legislation, with more developing countries, including China, joined the ranks. China has promulgated a series of laws containing Anti-corruption Law and Supervision Law to crack down on corruption. All these laws are mainly aimed at criminalization, prevention, and international cooperation. They frequently include review mechanisms, in order to monitor the implementation of conventional obligations [1].

In addition to the doctrinal writings that comment on all these regulations, there is also an increasing amount of research on fighting against corruption and other legal areas. Comprehensive research in areas such as the fight against corruption through relevant pacts and legislation, the impact of corruption (and anti-corruption) on market economic order, and the strengthening of the rule of law through anti-corruption initiatives has been conducted. Furthermore, numerous legal institutions, including national judicial departments, commercial bureaus, multinational law firms, and legal research societies, have also extensively commented on these international initiatives, from international organizations to private ones. In the practice of arbitration, the International Court of Justice places the burden of proof on the party making the factual claim [6], which basically conforms

to the principle of "who claims, provides evidence" in the Civil Law. This rule is also adopted by the WTO Appellate Body, where the responsibility lies with the party asserting a particular claim or defense [7]. However, both global conventions and the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL) lack provisions on the burden of proof.

In terms of jurisdiction, the scope of each treaty and law is distinct and specifically limited by contracting countries, the issuing nation's legal authority, and international influence. It is mainly divided into territorial jurisdiction, personal jurisdiction, and long-arm jurisdiction as represented by the United States. General national laws and treaties are limited by their ability to govern cases that occur locally and involve domestic companies. Building on these original types, the United States has expanded the interpretation such that if there is clear evidence that the US government intends to pursue a foreign person who violates the FCPA, even if the foreign person has limited connection with the US territory [8]. This expansion has led to a surge in the number of cases and the amount of funds involved. Under the influence of the US, Canada, Germany, the UK, France, Japan, South Korea and other developed countries have enacted laws and regulations similar to the FCPA [9], which govern not only companies registered in these countries but also those engaged in business in them, regardless of where the bribery occurs.

2.2. Current Allocation of Burden in China

Since the beginning of the 21st century, China has continuously consolidated the fruit of reform and opening up, devoting itself to the Belt and Road Initiative. China has continuously improved its level of economic openness. The transformations in the world market have provided more development opportunities for Chinese enterprises to go global, while global MNEs also attach importance to Chinese potential. In 2022, 38497 new foreign-invested enterprises were established, and the actual use of foreign capital approached 189.13billion yuan, which was up 4.5% year-on-year [10]. Meanwhile, China's corruption index has been climbing year after year, and it has now reached its highest level since 1995, close to surpassing the global average [11]. This indicates that corruption is an unavoidable issue in China's economic management and administrative governance.

China attaches great importance to corruption control at the legislative, law enforcement, and supervision levels. In the aspect of legislation, the State Council has promulgated the measures for supervising overseas Investment by central enterprises and other laws to urge them to fulfill investment management and prevent losses of overseas state-owned assets. Moreover, China has strengthened international legislative cooperation, supporting the role of UNCAC as the main channel for global corruption governance. China has also facilitated the adoption of the Beijing Declaration on Fighting Corruption by APEC, the G20 High-Level Principles on Cooperation on Persons Sought for Corruption and Asset Recovery, and launched multiple regional treaties, including the Beijing Initiative on a Clean Silk Road, making great contributions to the international anti-corruption cause.

In regard to law enforcement, China actively implements the guiding provisions of UNCAC on extradition, transfer of sentenced persons, judicial assistance, law enforcement cooperation and joint investigation, and carries out the "Skynet Operation" international anti-corruption campaign. Since 2014, China has returned 8,663 fugitives and recovered 21.531 billion yuan in stolen funds [12].

In terms of supervision, since 2016, China has carried out reforms of the national supervision system in many regions and translated the practices into law through the Constitution Amendment and the Supervision Law. We have gradually overcome the shortcomings of narrow scope of administrative supervision, decentralization of forces, and the lack of specialization and unification [13]. According to the statistics of the State Supervision Commission, in the first half of 2023, the discipline inspection and supervision organs across the country received 1.866,000 complaints, handled 828,000 problem clues, and punished 258,000 people [12].

China's current anti-commercial bribery legislation is scattered, without a unified code. In terms of legal sources, it mainly includes domestic legislation and international provisions. The domestic part is primarily concentrated in the fields of administrative law, criminal law, and supervision law, with the core management object being state staff. In the field of administrative law, the provisions on commercial bribery are mainly concentrated in the Anti-Unfair Competition Law and the Interim Provisions on the Prohibition of Commercial Bribery. In addition, other commercial sector laws are also partially involved, such as the Administrative Penalty Law, the Insurance Law, and the Commercial Bank Law. The Anti-Unfair Competition Law stipulates that the act of secretly giving kickbacks to the other party's units or individuals is regarded as commercial bribery, providing corresponding punishment. The Interim Provisions make the definition of commercial bribery more operational and further expand the content, involving cash, goods, and other forms of bribery. It also covers sponsorship fees, research fees, labor fees, commissions, or reimbursement of various expenses. In the field of supervision law, the Supervision Law regulates the functions of national supervisory organs, supervisory powers, procedures, responsibilities, and legal liabilities, aimed at strengthening supervision over all public officials exercising public power. In the field of criminal law, provisions regarding commercial bribery are mainly concentrated in the Criminal Law and related criminal legislation and judicial interpretation. The jurisdiction covers both active and passive corruption, encompassing state functionaries, non-state functionaries, units, foreign public officials, or officials of international organizations.

At present, China's anti-corruption law covers a wide range, cracking down on hard public officials, but there is still a lack of legislation and enforcement of commercial corruption. Meanwhile, the criminal procedure law is applicable to the proof, and the burden is handed over to the public power. The jurisdiction adopts eclecticism, which is based on territoriality, combining personal jurisdiction and protective jurisdiction. Whether to adopt long-arm jurisdiction has not yet been conclusively determined in academics discussion. Regarding the burden of proof, the current procedures also need to consider whether the burden should be reduced, whether corporate corruption should be addressed through commercial law, and whether long-arm jurisdiction should follow the model of the United States.

3. Research Issues

3.1. Unfairness in Proofing Burden Allocation

Despite the increasing demand for corruption arbitration involving MNEs, there still exist multiple procedural loopholes in current regulations, similar to those in the past. One of the principal causes is that the above-mentioned laws mostly focus on substantive ones and rarely address specific and systematic procedures. Consequently, the burden of proof has been neglected for a long time.

According to the Common Law, the burden of proof is divided into two components: submission and persuasion. Submission refers to the requirement for parties to submit relevant evidence to the court in order to establish a *prima facie* case. Persuasion, on the other hand, involves proving and explaining the necessary elements to convince the tribunal of their claims [14]. Both parties may have the responsibility to present evidence, and the execution and transfer of the burden of proof are decided by the court based on the proceedings and the quality of previous evidence. The burden of persuasion is bound to the parties and cannot be transferred. In the majority of cases, the burden falls on the party making the claims unless the opposing party raises an active defense [15]. The Common Law system places emphasis on flexibility and, to a certain extent, seeks to balance the pressure difference between the two parties.

The burden of proof in the Civil Law countries is relatively fixed, and the transfer of this burden is determined by specific cases rather than the court. In certain special situations closely related to

public interests, such as product liability, environmental protection, and unknown property, part of the burden of proving facts may be borne by the defendant [16]. The advantage of this system is the convenience it provides in practical operation, while reducing the court's discretion and establishing clearer expectations.

In practice, international tribunal generally adopt rules that combine elements from both legal systems. Taking ICSID as an example, in case of *Marvin Feldman Karpas v. Mexico* [17], it was clearly stated that if a party makes a positive claim or defense, they should bear the corresponding burden of proof. When a party establishes a *prima facie* case or presumption, the burden shifts to the other one. Otherwise, the party may suffer adverse consequences. The information mentioned above represents the general rules of evidence in arbitral tribunals.

China usually addresses corruption case under the jurisdiction of Criminal Law. In public-prosecuted cases, the prosecuting organ has the burden of proof. The victims do not have to prove the case on their own, as this arrangement aims to protect their interests and exercise state power to combat crime. Furthermore, it ensures equality between the prosecution and the defense, preventing the emergence of a joint force (combining public power and individuals) to oppress the defendant. Various entities representing public power, including the supervision committee, the procuratorate, and the public security organs, are actively involved in the process. Due to the significant participation of these entities, individual testimonies are rarely witnessed in China.

In summary, international arbitration maintains that the party making a claim bears the burden of proof, and this burden is not shifted based on difficulty or consequences. There is an obligation of cooperation and acting in good faith between the applicant and the respondent [18]. However, in practice, more complex situations can arise. Proving corruption requires expertise and a large amount of evidence, often involving public departments. Public power has a comparative advantage in information collection and financial support, placing pressure on individuals to provide proof. Corruption is a crime that involves both parties in the transaction, and even if the status between the two is relatively equal, requiring only one side to produce evidence lacks rationality. In extreme cases, it can be difficult to determine who the applicant is [19]. Regarding China's original rules, public power is highly influential and exhibits a lagging quality. Like Leviathan, a giant, public power permeates every aspect of society, and citizens are compelled to obey its force. However, due to its size, it often struggles to respond to social transformations. Excessive intervention of public power in the non-state-owned economic field limits the freedom of proof for companies. For example, in public prosecution, investigations are fully entrusted to state organs and private actions are strictly suppressed. As a result, it has been rare in previous cases for both parties to be corporations. Implicitly, national jurisdiction acts as a guard against corporate corruption. Therefore, some scholars advocate the introduction of special rules such as burden of proof inversion and shifting to address these loopholes.

3.2. The Dispute of China's Jurisdiction over MNEs' Corruption

MNEs involvement in corruption cases spanning multiple countries has been widespread. Anti-corruption laws place great importance on preventing and punishing global crimes, with the home country at its core. The determination and exercise of jurisdiction are crucial premises for punishment, making it particularly important to define their applicability and scope. Different countries have different jurisdictional designs when it comes to corruption, as represented by the UN and China. The long-arm jurisdiction of the US is now expanding globally, sparking heated discussions in academic circles. China does not completely reject long-arm jurisdiction. On the contrary, it has been attempted in personal information legislation. With the continuous improvement of national strength, the question of whether China should use long-arm jurisdiction for more intense supervision of corruption has become a focus of public opinion.

3.2.1. UNCAC Jurisdiction

Currently, widely utilized international regulations, such as UNCAC, divide jurisdiction into two parts: legislative jurisdiction and enforcement jurisdiction. The legislative jurisdiction established by UNCAC for corruption is based on territorial jurisdiction, supplemented by personal and protective jurisdiction, and also incorporates extradition or prosecution measures. In Article 42, paragraph 1, it is first stated that States Parties shall establish jurisdiction over crimes committed within their territory, including on board ships and aircraft. This provision clearly establishes territorial jurisdiction. Furthermore, paragraph 2 stipulates the jurisdiction of States Parties over citizens who have committed offenses against their own nationals or states. This provision reflects rationed personae and passive nationality principles, as well as protective jurisdiction. Moreover, paragraph 4 encompasses universal jurisdiction to some extent, as it grants states the right to establish jurisdiction over corruption in relevant circumstances. Paragraph 6 stipulates enforcement jurisdiction. It suggests that, without prejudice to general international law, states may exercise any criminal jurisdiction under their domestic law. According to the treaty, long-arm jurisdiction countries, represented by the US, can further expand their enforcement authority based on UNCAC.

3.2.2. Compromise Principle

In China, the Criminal Law provides jurisdiction for corruption. Article 6 stipulates that the Criminal Law applies to all crimes committed within our country. Article 8 regulates that foreigners who commit crimes against China and Chinese citizens outside China are also subject to China's jurisdiction. The above two articles demonstrate the compromise principle adopted in China, which means that the territorial principle is primary while other principles are also applied simultaneously. In other words, all crimes committed within the territory, regardless of nationality, are subject to domestic criminal law. Under certain conditions, the Criminal Law may also apply to offenders in areas beyond the state. This jurisdiction is conducive to safeguarding sovereignty and combating transnational corruption, aligning with China's actual situation and interests. Currently, this principle is also accepted by most countries worldwide. However, these jurisdictions have purely legal significance, and their specific implementation is carried out through various administrative organs and courts.

3.2.3. The Long-arm Jurisdiction

In United States law, long-arm jurisdiction specifically refers to the jurisdiction exercised by a judicial authority over residents and persons outside the territory. Under international law, the exercise of jurisdiction by a state over an extraterritorial person or entity generally requires a genuine and sufficient connection with the country. By exercising long-arm jurisdiction, the US takes advantage of minimum contact, continuously lowering the application threshold. In order to achieve the purpose, the US has further developed the effect principle. Namely, as long as an act occurring abroad produces the so-called effect in its territory, regardless of whether the perpetrator has nationality or residence, and whether the act complies with the law of the crime place, jurisdiction can be exercised. Meanwhile, the US has also continued to expand the scope, imposing excessive and unreasonable jurisdiction on non-US persons or entities outside the region. The US interferes in the economy and politics of countries around the world through anti-corruption and long-arm jurisdiction, punishing or threatening foreign companies by taking advantage of their dependence on dollar business, the US market, and technology. By introducing the FCPA, linking anti-corruption to national security, and establishing global anti-corruption coordinators, the US has used long-arm jurisdiction to suppress foreign companies and maintain its hegemony. For more than a decade, the United States has successfully dismantled many of Europe's largest multinational companies under the guise of fighting

corruption [20]. In essence, long-arm jurisdiction is an arbitrary judicial practice backed by its comprehensive strength and financial hegemony, exercising extraterritorial power over entities and individuals of other countries.

In recent years, there has been constant controversy in the academic circles over whether China should implement long-arm jurisdiction. In fact, jurisdiction of the kind must be supported by superpower status and international influence. It can be said that currently, apart from the United States, almost no country in the world has the ability to enforce the law globally. As the largest developing country, China's strength and legal scope are far from covering the entire world. At the same time, China has always adhered to the Five Principles of Peaceful Coexistence and refused to interfere in the internal affairs of other countries. On the sensitive issue of transnational corruption, China has always maintained a cautious attitude and advocated governance under the premise of respecting other countries' sovereignty. In summary, China will not imitate the US system for a certain period of time.

4. Suggestions for Improving the Burden of Proof System

4.1. Appropriate introduction of Special Rules of Proof

In concrete practice, the rules regarding who should claim and provide evidence in cases involving corruption by MNEs often encounter greater difficulties. The unequal status between the parties, as well as the lack of awareness and ability to provide evidence on the part of some victims, have led to many unsuccessful outcomes and case failures. Therefore, the appropriate introduction of inversion and transfer is conducive to reducing the burden of judgment, placing the plaintiff in a more powerful position, reducing the burden on the victim, and giving them some confidence in winning the case.

In addition to the advantages mentioned above, the essence of the special mode is the alienation of the original one. if it is used in non-special cases, there exists a fallacy in jurisprudence. When the court transfers the burden to the defendant, who is trying to refute the accusations and criticisms, they will unconsciously attach a preset label, which deepens the impression made during refutation. From the perspective of evidentiality, falsification is a negative fact that does not exist or is not dominant. It is more difficult to prove than positive facts (confirmation). If the burden is reversed, the defendant can usually only present evidence passively in court, that is, refute it according to the evidence enumerated by the plaintiff, which obviously erases the defendant's initiative.

Furthermore, transfer inadvertently connives illegal acts that contain libel and framing. If the plaintiff does not need to bear adverse consequences for their improper testifying, it is equivalent to expanding the plaintiff's interpretation of the corruption. Plaintiffs with bad motives can construct charges according to their own subjective understanding of the defendant, fabricate evidence, and interpret evidence at will. This gives ulterior motives the opportunity to take advantage of legal loopholes to file lawsuits at will. This not only makes the defendant tired of responding but also wastes judicial resources. Therefore, special rules of proof must be cautiously applied in the court. In the initial stage of the case, the traditional mode of proof should be first adhered to, clarify who the plaintiff is. The court should make a decision on the special rules based on the plaintiffs' clear demands, while also considering the defendant's willingness to provide evidence without being ignored.

4.2. Case Distribution Used Before Trial

In recent years, with the deepening of anti-corruption actions, the number of cases has remained high, especially the backlog of cases at the grassroots level and the shortage of personnel have become evident. The Central Committee has proposed exploring the application of summary procedures to eligible cases. Moreover, it has encouraged grassroots institutions to actively innovate trial methods

within the boundaries of existing laws. To improve the efficiency of handing anti-corruption cases and processing evidence, each investigation agency should prioritize simplicity facts and procedures. Based on the source of the case, evidence, and severity of punishment, cases should be classified into categories of light or heavy punishment. Simultaneously, the handling process should be streamlined as much as possible. For example, applying for a simplified approval procedure will be made more efficient, and a more concise hearing report plan will be developed, reducing the hearing period by over half.

However, case diversion does not imply blindly simplifying and pursuing high efficiency; measures must be taken to ensure that the quality of cases does not decline. This includes using a negative list to exclude cases that meet formal criteria but raise doubts about their substance or cases that are more complex. Additionally, a backflow mechanism should be implemented to convert summary procedures to ordinary ones when they are not applicable. Strengthening the evaluation of case quality through routine, key, and special evaluation, and implementing inspections and quantitative scoring are necessary to ensure the quality and efficiency of trial work.

5. Conclusion

Based on the above suggestions and strategies, the following issues should also be taken into consideration for practical implementation. Firstly, avoiding abuse should be taken seriously when introducing special proof. In the vast majority of cases, the arbitral tribunal should adhere to the basic rules of who claims and who provides evidence. Otherwise, it can be easy for the defendant to fall into the trap of self-evidence. The self-evidence trap is a logical fallacy where the defendant is unable to prove through evidence that they did not do or obtain something. Secondly, although China has implemented case diversion, there are still issues as unclear rights and responsibilities of organs and excessively long deadlines for case handling. The state shall divide cases between the procuratorate and the supervision committee based on the subject, amount, and penalty involved so that the two sides can restrict each other and carry out their respective duties to improve the efficiency of case handling. Finally, China must strictly limit the scope of jurisdiction and avoid resorting to long-arm jurisdiction in violation of China's consistent foreign policy of peace.

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