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ARTICLES

TEN MEASURES TO PROMOTE RESPECT OF HUMAN RIGHTS BY NATURAL RESOURCE COMPANIES GROUNDED ON PHILOSOPHY, ECONOMICS AND THE LAW

Natural resource companies can - and must - promote policies that protect human rights, even if States or economic blocs do not provide good examples, following the concept that “human rights are the business of business” proposed in campaigns by Amnesty International, Ashridge Center for Business and Society and The Prince of Wales Business Leaders Forum.

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Introduction

Capitalism is one of several modes of production¹, characterized by the central role of business activities - developed within a country or transnationally - whose primary focus on profits generally culminates in the economic and social development of States, no doubt a positive outcome.² But in certain cases excesses disrupt the usual harmony between profits and economic and social development, when private economic interests subdue collective and social interest, for instance, in the violation of human rights, with severe negative consequences that must be controlled internally and externally through judicial relief - preventive or repressive - within each legal system.

In spite of the infinite number of business activities that can be distorted in several ways, this work focuses mainly on the reconciliation between the exploitation of natural resources and human rights, which, incidentally, are enshrined - to a greater or lesser degree - in several legal systems.

The matter can be analyzed looking at least two aspects: (i) internal, i.e., reconciliation of human rights by the company that exploits natural resources; (ii) external, unfolding in (ii.a) external national, i. e., the State where the distortion between human rights and natural resource exploitation occurs carries out this reconciliation and (ii.b) external supranational, i.e., international organizations or the economic blocs within which the distortion between human rights and the natural resource exploitation occurs carry out this reconciliation, subsidiarily to a reasonable/proportional response from the State.

Looking specifically at the internal aspect, we shall see that natural resource companies can and need to respect human rights, taking action to limit the consequences of potential violations grounded on philosophical, economic and legal-economic principles.

For that, we shall divide this work into two sections addressing: 1) human rights violations by natural resource companies, discussing some reasons - internal and external - and an actual case, so that the matter can be better understood; and ii) principles that justify respect for human rights by natural resource companies and measures to promote that. This will be followed by a brief summary of the ideas discussed.

Chapter 1. Human rights violations by natural resource companies

As in every business activity, the exploitation of natural resources - understood as resources found in nature and that can be commercially exploited - focuses mainly on profits (internal aspect); but in certain cases its focus can go beyond profits, involving other interests (external aspects), to wit, the interests of one or more States (national external aspect) or of economic blocs and international organizations (supranational external aspect). This is why

¹ Dobb, M. (1971). *Studies in the Development of Capitalism*. 2nd ed., University of Cambridge, p. 11/48.

² Gregory Mankiw, N. (2009). *Principles of Economics*. Principle #8: A country's standard of living depends on its ability to produce goods and services. 5th ed., Harvard University.

these companies potentially are great violator of human rights, understood as a set of rights and institutions - that may be acknowledged both on the national and on the international level - that can make human dignity, liberty and equality real.³

Corruption, fraud, war etc. cause environmental and human disasters that can be strictly local or not. Let us now examine some of the reasons for human rights violations and discuss some actual instances of violation by natural resource companies.

A) Reasons - related to internal and external aspects - for human rights violations in the exploitation of natural resources and their symbiosis

The first reason - an internal one - is the volition of the natural resource companies, the pursuit of their core goal: profit. Despite the relative restriction on the actual development of business activities, given that the location of natural resources depends on nature/geography, as a rule there is a certain room for discretion when determining the exact place where the business activity will be developed because the resource to be exploited may lay within more than one State. Within this specific discretion, the company chooses the place that allows it to better achieve its core goal: profit. A process of internal analysis then occurs seeking the lowest production cost when exploiting natural resources so as to magnify profits, taking into account, for instance, the costs of personnel, logistics, labor rules, environmental rules and their reflexes, political issues etc., laying bare the intimate connection between this aspect and the external one.

The second reason - related to the external aspect, national or supranational - encompasses elements outside the company's volition but that can have significant impact in the internal aspect because they stem solely from the efforts of the State or of economic blocs to achieve their political and economic interests. This brings us to the “race to the bottom”⁴ phenomenon, that is, the competition between States, between a State and an economic bloc or between economic blocs, each offering better conditions than the other for natural resource companies so that they can reduce costs and increase profits in the course of their activities. The consequence is “social dumping”⁵, the suppression of the most basic fundamental rights - such as, for instance, breach of labor laws by companies - in exchange for economic advantages, and the weakening or suppression of other human rights.

A vicious circle ensues in which antagonistic interests are achieved only through a distorted tolerance by both parties with little attention to the internal and external aspects of human rights violations. So much so that Amnesty International, for instance, has published several reports showing that most transnational oil companies - exploiters of natural resources

³ Canotilho, J. J. G. (2008). Estudos sobre direitos fundamentais. 2ª ed., Coimbra, p. 35/67; Peres Luño, A. (1995). Derechos Humanos, Estado de Derecho y Constitución. 5ª ed., Madrid: Tecnos, p. 48.

⁴ Davies, R. B., & Vadlamannati, K. C. (2013). A race to the bottom in labour standards? An empirical investigation. Journal of Development Economics (103), p. 1/14.

⁵ Vaughan-Whitehead, D. (2003), EU Enlargement Versus Social Europe? The Uncertain Future of the European Social Model, Edward Elgar Publications, Cheltenham.

– “tolerate these [human rights] violations by turning a blind eye”⁶ because they have the State's stamp of approval.

B) Actual case of human rights violation in the exploitation of natural resources: oil company Shell vs. Nigeria

We wish to highlight one of the many worldwide instances of human rights violation by a natural resource company, oil company Shell vs. Nigeria⁷, that clearly shows the symbiosis between internal and external aspects, helping us understand the matter.

In summary, that oil company violated human rights by causing extremely serious environmental damage (focusing solely on the internal aspect, i.e., to maximize profits at any cost) while evoking political and economic development in the interest of the State to try to minimize or quash the issue: this was demonstrated by the oil spill in the Niger River Delta without any effective repression by the State. And to preclude international repercussion (which could adversely affect the company and the State), Shell encouraged that State's army, leading to the death of several environmental activists.

We see that that human rights violation was at least twofold: (i) violation of the environment, which belongs to society (national aspect and, in certain circumstances, international aspect); (ii) violation of life, education, health, public safety, urban mobility etc. caused by the State's omission (or distorted interest) in not acting repressively, properly enforcing coercive measures that would become public revenues to be used to the benefit of society.⁸

Chapter 2. Making natural resource companies respect human rights

Kant⁹ saw Morality and the Law as two spheres of regulation of conduct. Morality is the internal one, not affected by coercion, while the Law is external and susceptible to coercion. Human rights are rights and as such can be the subject matter of judicial relief binding the State or economic blocs and natural resource companies.

But even when States and economic blocs admit that natural resource companies have violated human rights (reconciling the internal aspect and the external national/supranational aspect) and even if the matter is addressed in the light of the Law, the

⁶ “Sudan: The Human Price of Oil”, Amnesty International, London, May, 2000.

⁷ “NIGERIA: NO PROGRESS: AN EVALUATION OF THE IMPLEMENTATION OF UNEP'S ENVIRONMENTAL ASSESSMENT OF Ogoniland, THREE YEARS ON” (2014), Environmental Rights Action (Friends Of The Earth Nigeria), CEHRD, Friends Of The Earth Europe, Platform and Amnesty International.

⁸ A recent study showed that the corruption schemes of natural resource companies contribute to increase inequality in the States where they are perpetrated. “Corruption Perceptions Index 2016”. Transparency International, Berlin, 2017.

⁹ Kant, I. (1785). *Fundamental Principles of the Metaphysics of Morals*. Dover: Philosophical Classics.

sovereign rights of States and economic blocs render judicial relief innocuous. Attempts have been numerous. To give an example, the 26th Session of the UN Commission on Human Rights, in June 2014, passed by majority vote Resolution A/HRC/26/L.22/Rev. 1 calling for the elaboration of an international treaty on human rights and companies, but without any immediate effectiveness.

Let us then focus on the internal perspective of natural resource companies, discussing the grounds for adopting the measures that will be proposed in defense of human rights in the exploitation of natural resources.

A) Principles for adopting measures that can - and must - be taken in defense of human rights in the exploitation of natural resources

Before discussing the actual measures, we must first answer the question "why would a natural resources company adopt measures in defense of fundamental rights to the detriment of greater profits?".

For greater ease of understanding, the principles refer to three (3) spheres: (i) philosophical; (ii) economic; (iii) legal-economic.

The first principle comes from Kant's approach to morality as one of the spheres that regulate conduct, thus being an internal element that cannot be coerced. Under Kantian morality, natural resource companies should already respect fundamental rights (without abandoning the pursuit of profit).

The second principle stems from the concept of "value marketing": the natural resource company acquires a "seal" of respect for human rights that is advertised in order to enhance the company's brand and to increase its profits. On the other hand, not having such a "seal" or actually violating human rights harm the company, adversely affecting its profits or even causing losses. It would thus be better for a natural resource company to respect human rights - using that as a tool in its advertising campaigns - than to violate them and suffer a publicity and social media backlash (e.g. through the internet).

Finally, the third principle also originates from Kant's view of the Law. It is one of the other spheres or regulation of conduct, an external one: coercion. Human rights violations by companies may entail several liabilities (which are cumulative and may originate in the State where the violation occurred or in other States). These liabilities may be civil (obligations to do and to pay), criminal (imprisonment or restraint of rights) and administrative (fines and administrative sanctions) both for the company and for its stockholders. In the United States, for instance, courts will hear claims against a US parent company for violations committed by their foreign affiliates even if the State in which the human rights violation occurred has not prosecuted and tried the case.

Still focusing on the third principle, we emphasize the educational and punitive character of civil liability, whose main purpose is to specifically remedy the damage, preferably

“in natura”, returning to a pre-damage status, or to provide an “equivalent” remedy, which is extremely costly for companies. Shell oil company provides an excellent example. In its settlement with the US government, the company agreed to pay some 15 billion dollars to the families of the victims of human rights violations in Nigeria as a result of accusations of its complicity in the death of Nigerian environmental activists including the Literature Nobel Laureate Ken Saro-Wiwa, hanged in 1995. Another widely known case is that of mining company Samarco, that caused one of the worst human rights violations in the city of Mariana (Minas Gerais - Brazil) where a mining dam collapsed. An initial settlement agreement establishing that the company would pay an average of 400 million dollars for each of the following fifteen years was challenged in court because the penalty was minuscule in comparison to the damage caused.

Analysis of the three spheres shows it is better for natural resource companies to respect human rights, adopting measures to mitigate the consequences of a potential violation. Let us propose some such measures.

B) Measures companies should adopt to mitigate the impact of natural resource exploitation on human rights: internal perspective

Natural resource companies can - and must - promote policies that protect human rights, even if States or economic blocs do not provide good examples, following the concept that “human rights are the business of business” proposed in campaigns by Amnesty International, Ashridge Center for Business and Society and The Prince of Wales Business Leaders Forum.

Below we propose some measures, in addition to those already presented by international organizations¹⁰, that could be implemented by natural resource companies for the purpose in discussion.

- i) Adoption of corporate policies that respect human rights, including explicit support for human rights declarations and treaties such as the 1948 Universal Declaration of Human Rights;
- ii) Creation of corporate codes of conduct - compliance - based on respect for human rights including effective sanctions against agents that breach these rules;
- iii) Creation of channels allowing local populations - organized civil society - to be heard before any action is taken that can interfere with their rights (thus giving more legitimacy to corporate action);
- iv) Inclusion in their contracts - that could be based on items i and ii - of clauses ensuring respect for fundamental human rights and for international conventions;

¹⁰ OECD Guidelines for Multinational Enterprises (2011 Edition) – p. 31/35 (Human Rights). Organization for Economic Cooperation and Development.

v) Disclosure, whenever possible, of contract clauses that impact human rights (allowing international social control);

vi) Acceptance of reports from international organization that promote human rights (e.g.: UN, OECD, Amnesty International, Transparency International, Human Rights Watch, among others) that can provide a base for potential oversight;

vii) Commitment not to use local armed forces (known for their brutality) in armed conflict zones, regardless of purpose;

viii) Commitment not to submit to interests harmful to society - promoted by local government where natural resources are exploited;

ix) In the event of actual or threatened human rights violations, including by local governments, protest with the relevant international organizations (so that action can be taken against these governments);

x) Commitment to immediately cease and fully remedy any damage if human rights violations do occur.

Conclusion

Respect for human rights by natural resource companies has greatly advanced and continues to advance every day, but the harmony between profits and economic and social development is often disrupted. This struggle must then continue until a minimum level of respect for essential core rights is attained.

The local governments of natural resource producing countries very often do not give a good example, shielding themselves behind the concept of national sovereignty. This led us to propose some measures natural resource companies should adopt to harmonize the pursuit of profit with philosophical, economic and legal-economic principles, optimizing it.

In view of the foregoing, we conclude it is more economically beneficial and profitable to respect human rights and sustainable development as a whole - a goal that can be achieved with the measures proposed above - than to bear the risks of a catastrophic violation of human rights (whether at the moral, marketing or legal-damages level) that can thwart business activities or even render them unfeasible.

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