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**Access to justice through  
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**Acesso à justiça via direitos  
humanos e empresas: a  
experiência chilena na mineração  
transnacional**

Daniel Jacomelli Hudler

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OF HUMAN RIGHTS VIOLATIONS

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# Access to justice through business and human rights: the chilean experience on transnational mining\*

## Acesso à justiça via direitos humanos e empresas: a experiência chilena na mineração transnacional

Daniel Jacomelli Hudler\*\*

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### Abstract

The multilevel economic relationship between community-State-company gives rise to contexts of conflict and ruptures in the local social fabric. The access of local communities to justice requires new ways of dealing with the transnational phenomenon to resolve disputes beyond traditional judicial procedures within nation-States. Our main hypothesis highlights Business and Human Rights as a possible transnational legal instrument of access to justice. The objective is to understand access to justice in the perspective of Business and Human Rights, identifying their autonomy in relation to the voluntarism of Corporate Social Responsibility (CSR) and the practical application of this in the context of transnational mining activity in post-1970 Chile. The hypothetical-deductive method is used with bibliographic research. Conclusion: i) despite the existence of sustainable business ethics, it only becomes relevant to the Law when a certain normative framework is conjectured, establishing legal and semi-legal procedures and integrating a complex of specific obligations and rights; ii) the process of progressive conversion of CSR to legal responsibility is envisaged through a new gateway represented by the intersection of Business and Human Rights; iii) The pioneering Chilean experience is a result of internal and external political pressures and serves as an example for Latin America in its successes and mistakes, especially the attempt to consolidate the UN theoretical framework through National Action Plan on Business and Human rights with the active participation of representatives from academia, local communities, NGOs, and companies, which serves as a starting point for further research.

**Keywords:** access to justice; business and human rights; Corporate Social Responsibility (CSR); regulation of transnational companies (TNC); mining.

### Resumo

A relação econômica multinível entre comunidade-Estado-empresa dá origem a contextos de conflito e rupturas no tecido social local. O acesso das comunidades locais à justiça requer novas formas de lidar com o fenômeno

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transnacional para resolver disputas além dos procedimentos judiciais tradicionais dentro dos Estados-nação. Nossa hipótese principal destaca *Empresas e Direitos Humanos* como um possível instrumento jurídico transnacional de acesso à justiça. O objetivo é compreender o acesso à justiça na perspectiva do estudo das Empresas e Direitos Humanos, identificando sua autonomia em relação ao voluntarismo da Responsabilidade Social Empresarial (RSE) e a aplicação prática desta no contexto da atividade mineradora transnacional no Chile pós-1970. Emprega-se o método hipotético-dedutivo com auxílio de pesquisa bibliográfica. Conclusão: i) apesar da existência de uma ética empresarial sustentável, ela só se torna relevante para o Direito quando se conjectura um determinado marco normativo, estabelecendo procedimentos legais e semilegais e integrando um complexo de obrigações e direitos específicos; ii) o processo de conversão progressiva da RSE em responsabilidade jurídica é vislumbrado através de uma nova porta de entrada representada pela intersecção entre *Empresas e Direitos Humanos*; iii) a pioneira experiência chilena é resultado de pressões políticas internas e externas, servindo como exemplo para a América Latina em seus acertos e erros, especialmente a tentativa de consolidar o arcabouço teórico da ONU por meio do Plano de Ação Nacional sobre Empresas e Direitos Humanos com a participação ativa de representantes da academia, comunidades locais, ONGs e empresas, que pode servir como ponto de partida para novas pesquisas.

**Palavras-chave:** acesso à justiça; empresas e direitos humanos; Responsabilidade Social da Empresa (RSE); regulação de empresas transnacionais (ETN); mineração.

## 1 Introduction

The dilemma of the 21st century is to establish a balance in favor of sustainable development, that is, between the legitimate profit interest earned by transnational corporate activity and the multidimensional impacts on local communities. Sometimes this community-business-State relationship, far from being harmonious, gives rise to conflictive contexts and disruptions in the social fabric, whose resolution via traditional judicial

procedures<sup>1</sup> is quite difficult and time consuming for several reasons<sup>2</sup>.

From this perspective, overcoming obstacles to access to justice for local communities remains relevant. After all, *how can we guarantee the complex of rights<sup>3</sup> of a given community in its intricate and economically dependent relationship with transnational companies without considering the judicialization of conflicts?* This is a fundamental question, especially in the current conjuncture in which the solution of controversies is increasingly sought through alternative means that mitigate or even repudiate court judgments, without this necessarily denoting a weakening of democratic institutions or of the State itself.

In fact, access to justice, as a multifaceted phenomenon that aims at transforming social reality, can be analyzed from different points of view and angles. In the study of the legal field, it is no longer enough just to interpret the norms in light of their validity, but rather the need to understand the social reality in which the norm is applied. In this paper, an analysis of Business and Human Rights (as a normative field of study) is aided by the interpretation of studies from sociology, history, and reports on the community-business-State relationship, especially related to the Chilean context of transnational mining.

This methodological approach is justified because the analysis of local conflicts can no longer be conceived separately from a reading that conjugates the global economic context in which they are inserted. Social reality is sculpted by corporate economic activity within the global market economy, whose legal treatment encounters the difficult task of apprehending the multi-

<sup>1</sup> It is worth mentioning some of the latest disasters, of public knowledge, that directly and indirectly affected communities due to the conduct of companies in Brazil, highlighting the difficulty in judicial resolution due to the complexity of the cases: 1 - In 2000, oil leak in Guanabara Bay (RJ), from Barigui and Iguacu (PR), responsibility of the company Petrobras; 2 - in 2003, rupture of the Cataguases dam (MG), by the company Indústria Cataguases de Papel; 3 - in 2007, rupture of the dam Bom Jardim, in Mirá (MG), by the company Rio Pomba Mineração; 4 - 2011, oil spill in the Campos Basin (RJ), by Chevron; in 2015, fire in the Port of Santos (SP), by Terminal Químico de Aratu, a subsidiary of Ultracargo and, in the same year, rupture of the Fundão dam, in Mariana (MG), by Samarco; in 2019, rupture of the Mina do Feijão dam, in Brumadinho (MG).

<sup>2</sup> E.g.: diversity of subjects affected, complexity in the production of evidence, length of the process, lack of technical, financial and human resources, differences in culture and values, etc.

<sup>3</sup> For example: labor, civil, consumer, environmental, and even cultural rights.

dimensionality of the transnational phenomenon itself through the one-dimensional legal model of the nation-State – although this, paradoxically, remains the main lane to understand it, from a political and legal point of view.

The hypothesis put forward is that *Business and Human Rights*, through their legal mechanisms – which are not necessarily judicial, nor are they limited to the figure of the State as the only interlocutor – can be understood as a possible instrument of access to justice. In this sense, it is stated that *Business and Human Rights* assume this characteristic, in order to serve as a locus for the prevention and solution of conflicts between companies and communities – despite the still-current severe criticism of the voluntarism of UN Guiding Principles on Business and Human Rights and its leading role as a legal transnational framework<sup>4</sup>.

Intentionally, in order not to lose sight of social reality and concrete situations, we chose as the object of our study the economic niche of mining carried out by transnational corporations (TNCs) operating in Chilean territory since the 1970s. This choice is based on four reasons: 1) the pioneering aspect of the Chilean experiences in the last two decades on the subject that can serve as a real example for all Latin American legal thinking, being close to Brazil in terms of its political formation and economic model for mining exploration; 2) Chile has been considered one of the most attractive countries for foreign investment since the opening of Latin American markets and a model for attracting TNCs; 3) the economic activity of mining is considered one of the most violating of human rights, a context in which sustainability between productive, social, cultural factors and ethical-normative imperatives remains challenging; 4) symbolically, the milestone for the study of *Business and Human Rights*, is the emblematic accusation before the UN of the influence of US-based TNCs on Chilean domestic politics in the 1970s.

According to the justifications given, the general purpose of this study is to advance the understanding of access to justice from the lens of Business and Human Rights. In this sense, we also have as specific purpose: i) to verify the promotion of access to justice through Human Rights and Business; ii) to identify the autonomy of Human Rights and Business in relation to Corporate Social Responsibility (CSR) or Corporate

Responsibility (CR); iii) to briefly describe the cultural, political, and economic elements that have made Chile inviting for transnational business activity; iv) to indicate the state of the art regarding the Chilean experience for the promotion of Business and Human Rights; v) to detail the main criticisms of transnational mining activity in the Chilean territory.

The argument will be developed in three sections: a) on the possibility of access to justice through the regulation of transnational corporations, defending the autonomy of the matter in relation to *Corporate Social Responsibility (CSR)* or *Corporate Responsibility (CR)*; b) political-economic context and the possibility of development of *Business and Human Rights* in Chile; c) the main criticisms of transnational mining in Chile.

The hypothetical-deductive method is employed with bibliographic research. This is not intended to be an empirical study, only the reading and interpretation of economic and sociological studies and reports related to the topic, including reports by governmental and non-governmental organizations on *Human Rights and Business*, prioritizing those produced in the last two decades, in order to identify the main criticisms of transnational mining activity, combined with the critical analysis of judicial decisions and current norms in Chilean jurisdiction. The criteria for selecting the reports were those produced by Latin American experts or in partnership with them. The criteria for inclusion of judicial decisions started from the choice of specific words – such as “Derechos Humanos y Empresas”, “Responsabilidad Social Corporativa”, “Comunidad Local/Indígena”, “Minería” – selecting the results of the year 2022 on the subject under the Chilean Supreme Court.

## 2 Access to justice via regulation of transnational corporations: the business and human rights proposition

### 2.1 Relationship between access to justice and the scientific branch of Business and Human Rights

Transnational business activity as a phenomenon inherent to the global economy transforms human

<sup>4</sup> See section 4 of this study.

relations and becomes the engine of development by promoting, to a certain extent, the creation of jobs, tax collection, circulation of goods and services, as well as cultural exchange between people beyond the territorial limits of the nation-state. At the same time, it leaves a trail of human rights violations, so that the study of the legal regulation of transnational economic activities – especially from the perspective of the relationship between Economy and *Business and Human Rights* – has become indispensable in the new context of access to justice.

In academic studies on Civil Procedure, it has long been argued that access to justice is not limited to traditional techniques of dispute resolution through lawsuits – embedded in an individualistic, litigious model, cultural heir of 18th century bourgeois liberalism - while these have undergone changes with the emergence of social struggles and Human Rights during the 19th and 20th centuries, bringing in their wake new rights and mechanisms to guarantee these rights - of a more collective, plural and negotiating nature - especially for the consolidation of economic and legal institutions essential to democracy, in the so-called “third wave” or “access to justice approach”<sup>5</sup>.

In this way, not only the list of rights has increased, but also a genuine concern with how to make them effective. Therefore, the jurist is required, in addition to his technical knowledge of Law, a much deeper and multidisciplinary knowledge that allows him to grasp the social reality and the use of more effective procedures for the prevention and resolution of disputes. As stated by Garth and Cappelletti<sup>6</sup>:

[...] Scholars must now recognize that procedural techniques serve social functions, that courts are not the only means of dispute resolution that must be considered, and that every procedural regulation, including the creation or encouragement of alternatives to the formal court system, has a pronounced effect on how the substantive law operates – how often it is enforced,

in whose benefit, and with what social impact. A basic task of modern civil procedure scholars is to expose the substantive impact of various dispute processing mechanisms. They must consequently broaden their focus beyond the courts; they must utilize the insights of sociological, political, psychological, economic and other analyses; and they must learn from other cultures “Access,” therefore, is not only an increasingly recognized, fundamental social right; it is also necessarily a central focus of modern procedural scholarship. Its study presupposes both a broadening and deepening of the aims and methods of modern legal science.

Because it is a multifaceted phenomenon that is closely linked to a deep transformation of social reality itself, access to justice can be analyzed through different lenses. In this paper, an analysis of Business and Human Rights (as a normative field of study) is aided by the interpretation of studies from sociology, history, and reports on the community-business-State relationship, which aims at understanding it as a possible legal instrument for access to justice.

It is asserted that Business and Human Rights, beyond the discursive or persuasive task, takes on this feasible feature, by theoretically devising its own mechanisms and procedures – albeit through an embryonic and highly flexible legal framework by international declarations and treaties – at the very least, it stimulates the reproduction of a complex of rights and obligations to be incorporated by nation-states, and in this sense can serve as a starting point for the prevention and resolution of disputes between businesses and communities.

This methodological approach is justified because it is no longer possible to conceive the analysis of the dissent between the local community and the transnational company in isolation from the global economic context. Much less that these conflicts, whose nature becomes more and more complex, difficult to follow by the old dichotomy of public versus private, could only be solved exclusively through judicial courts in individual actions.

And this global context, in turn, is greatly influenced by corporate economic activity that operates at a transnational level, *e.g.*, that acts in a diffuse manner, from resources scattered around the globe, not limited to a particular territory, in a flexible manner and adapting to each local context in which it is inserted, with the aim

<sup>5</sup> GARTH, Bryant; CAPPELLETTI, Mauro. Access to justice: the newest wave in the worldwide movement to make rights effective. *Buffalo Law Review*, v. 27, p. 181-292, 1978. Available at: <https://www.repository.law.indiana.edu/facpub/1142>. Access: Feb. 2022.

<sup>6</sup> GARTH, Bryant; CAPPELLETTI, Mauro. Access to justice: the newest wave in the worldwide movement to make rights effective. *Buffalo Law Review*, v. 27, p. 181-292, 1978. Available at: <https://www.repository.law.indiana.edu/facpub/1142>. Access: Feb. 2022. p. 185-186.



of ensuring financial flow. In this sense, the possibility of a confluence of interests – which goes far beyond the financial, no doubt – still comes up against the difficulty of understanding the transnational phenomenon through the exclusive lens of the nation-State – even though this, paradoxically, is the main line of understanding it, insofar as it is the legal-institutional parameter or starting point.

Hence, access to justice for these communities cannot be envisaged without considering alternative means of conflict resolution that guarantees for an integration between people, cultures and different interests in order to ultimately seek the coexistence advocated by today’s democracies. This is where the study of *Business and Human Rights* fits in, as a specialized branch of Human Rights, aimed precisely as a new democratic channel to enable agreements between community-business-State.

## 2.2 Business and Human Rights: beyond Corporate Social Responsibility (CSR) or Corporate Responsibility (CR)

After these introductory explanations, the question is: *what, after all, would this intersection of Human Rights and Businesses be?* Human Rights, in general, are known for the history of struggles and advances of humanity, becoming a fertile field for new forms of legal protection from the so-called *dynamogenic process*<sup>7</sup> – that is, the dynamics in which transforms the social recognition of certain values into legal protection to new contents, which, in turn, expand the concept of human dignity that irradiates a complex of rights and obligations inherent to the Law.

It is in the current context of the transfer of economic activities from the State to the Corporation, accelerated mainly by the incorporation of neoliberal policies during the 20th century, that the (re)interpretations of the third dimension of human rights arise as an attempt to legally regulate transnational economic activity, oriented towards the fulfillment of globally established development goals. This movement, no doubt, is intrinsically related to the very object of access to justice.

This process is also influenced by other mechanisms of corporate culture – as, for instance, is the case of *Corporate Social Responsibility (CSR)* – which, although not originating from Law itself, share with Law the conception of the existence of actors that are distinct from the State and that should be liable to some extent based on the degree of positive and negative impacts they cause. Although this type of culture is closely linked to and serves as a rhetorical stimulus to the elaboration of policies embedded in sustainable development – which must be viewed with great attention in order not to fall into fallacies, according to the criticism of the openness and conceptual imprecision of sustainable development<sup>8</sup> – it gains greater reflection and depth when associated with the legal safety net built on human rights.

Historically, as Piovesan and Gonzaga<sup>9</sup> point out, the United Nations (UN) has taken a central role in the formulation of measures to consolidate the responsibility of economic agents, mentioning some allied initiatives: 1 - the creation, in 1974, of the United Nations Centre on Transnational Corporations (UNCTC); 2 - the establishment of the 1976 Guidelines for Multinational Enterprises by Organization for Economic Cooperation and Development (OECD); 3 - the adoption of the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, by the International Labor Organization (ILO), in 1977; altogether accompanied by the legal strengthening of CSR ideas through the United Nations Global Compact of 2000 and the Guiding Principles on Business and Human Rights of 2011 (also known as the “Ruggie Principles”), as well as practices motivated by international financial agents,

<sup>7</sup> SILVEIRA, Vladimir Oliveira da; SANCHES, Samyra Haydée Dal Farra Naspolini. Direitos humanos, empresa e desenvolvimento sustentável. *Revista Jurídica Unicuritiba*, Curitiba, v. 1, n. 38, p. 1-13, 2015. Available at: <http://revista.unicuritiba.edu.br/index.php/RevJur/article/view/1422/965>. Access: May 2021.

<sup>8</sup> BENACCHIO, Marcelo; HUDLER, Daniel Jacomelli. Globalização, empresa transnacional e direitos humanos: introdução crítica ao desenvolvimento sustentável na economia digital. In: SAYEG, R. H.; SELLOS-KNOERR, V. C.; BENACCHIO, M.; HUDLER, D. J.; GARCEL, A. (org.). *Globalização, empresa transnacional e direitos humanos*. São Paulo: UNINOVE, 2021. p. 12-31. Available at: [https://docs.uninove.br/arte/email/img/2021/dez/livro\\_Globalizacao\\_Empresa\\_Transnacional\\_e\\_Direitos\\_Humanos.pdf?\\_ga=2.9518069.1571993133.1643633153-392476667.1637065252](https://docs.uninove.br/arte/email/img/2021/dez/livro_Globalizacao_Empresa_Transnacional_e_Direitos_Humanos.pdf?_ga=2.9518069.1571993133.1643633153-392476667.1637065252). Access: Feb. 2022.

<sup>9</sup> PIOVESAN, Flávia; GONZAGA, Victoriana. Empresas e direitos humanos: desafios e perspectivas à luz do direito internacional dos direitos humanos. *Revista do Tribunal Regional Federal da 1ª Região*, v. 31, n. 1, p. 11-28, 27 mar. 2019. Available at: <https://revista.trf1.jus.br/trf1/article/view/9/7>. Access: Feb. 2022.

such as the Equator Principles<sup>10</sup> and the Principles for Responsible Investment (PRI)<sup>11</sup>.

From this brief history, it is already possible to indicate that there has been a direction of efforts to approximate the theoretical construction of the so-called Corporate Social Responsibility (CSR) to the context of legal responsibility inherent to Human Rights, embraced mainly in recent decades by the UN<sup>12</sup>.

By this reasoning, in order to understand the possibility of autonomy of the discipline Companies and Human Rights in relation to these theoretical constructions, the second question would be: *what does CSR mean and to what extent does it converge with the theoretical and legal construction of Human Rights and Companies?*

Despite its relevance at the turn of the century, CSR or CR is not recent, nor was it born in the legal field. Pedro Ramiro<sup>13</sup> reports that the term was first coined by the American economist Howard Bowen, in his work “Social Responsibilities of the Businessman” (1953), influenced by the mentality of welfarism and philanthropy and, since then, there has been no consensus on its meaning and scope, only that it is a new paradigm of behavior of large corporations, the result of a business adaptation to social changes that have emerged in the framework of economic globalization<sup>14</sup>.

For Aldo Olcese Santonja<sup>15</sup>, an enthusiast of the humanist strand of CSR, it would act in the vanguard of

the reformulation of the liberal capitalist model, from the adoption of a new cultural paradigm that values companies in the twenty-first century, namely, the responsible and sustainable company that, above all, aims at its perpetuity. This viewpoint, without a doubt, is based on an assumed ethical vision of the role played by TNCs’ in globalization. As stated by Olcese<sup>16</sup>:

Desde un punto de vista ético, el mayor poder de las empresas fruto del fenómeno de la globalización conlleva una mayor responsabilidad sobre el estado del sistema físico-social en el que operan. Asimismo, la sociedad en su conjunto, apoyándose en las posibilidades que les aporta el desarrollo de las tecnologías de la información y las telecomunicaciones, está exigiendo que las empresas se comporten de acuerdo a dicha responsabilidad. La empresa es, sin duda, una de las instituciones sociales más importantes y con un mayor poder de influir, positiva o no tan positivamente, en el sistema económico, natural y social. En este sentido, no cabe duda de que sobre la empresa recae parte de la responsabilidad de la situación actual de dicho sistema. Pero no podemos pensar que los impactos negativos de la empresa hayan sido conscientes ni culpabilizar a la empresa como institución. Lo que hemos de pensar es que la concepción tradicional de la empresa es hija de su tiempo, es decir, del paradigma cultural predominante. El nuevo paradigma de la empresa responsable y sostenible tiene unos claros antecedentes que es conveniente tener en cuenta.

From this point of view, the traditional values of the company would not be exclusive of a certain historical period, nor would they be excluded from the current business scenario, but they just cease to be preponderant in a new cultural context. The purely rationalist conception of business gains a new sense of awareness about feelings and interpersonal relationships.

Santonja influenced mainly by the concepts of “living company”<sup>17</sup> and “smart company”<sup>18</sup>, presents what

sariales, Universidad Autónoma de Madrid, Madrid, 2009.

<sup>16</sup> OLCESE SANTONJA, Aldo. *La responsabilidad social y el buen gobierno en la empresa, desde la perspectiva del consejo de administración*. 2009. Tesis (Doctorado) – Facultades de Ciencias Económicas y Empresariales, Universidad Autónoma de Madrid, Madrid, 2009. p. 22.

<sup>17</sup> As Santonja clarifies, the concept elaborated by Dutch executive Arie de Geus, known for his executive and planning role at ETN Royal Dutch Shell, who established in his study four characteristics for the Living Company: 1 - sensitivity to its surroundings; 2 - cohesion and a strong sense of identity and belonging; 3 - tolerance to new ideas; 4 - conservatism in financial matters, as Santonja clarifies.

<sup>18</sup> As Santonja clarifies, the concept elaborated by Peter Michael Senge, American systems scientist, professor at MIT, according to which there are five disciplines or personal domains necessary for an organization to be considered intelligent: 1 - mental models; 2 - building a shared vision; 3 - team learning; 5 - systemic thinking.

<sup>10</sup> An initiative carried out by the International Finance Corporation (IFC), the financial arm of the World Bank, which presents criteria for granting credit in a sustainable way.

<sup>11</sup> Created by institutional investors in partnership with the UN that has more than 1400 signatories in more than 50 countries.

<sup>12</sup> HERNÁNDEZ ZUBIZARRETA, Juan; GONZÁLEZ, Erika; RAMIRO, Pedro. Las empresas transnacionales y la arquitectura jurídica de la impunidad: responsabilidad social corporativa, lex mercatoria y derechos humanos. *Revista de Economía Crítica*, v. 28, p. 41-54, 2019. Available at: [http://revistaeconomiacritica.org/sites/default/files/JuanHernandez-ErikaGonzalez-PedroRamiro\\_Arquitectura-legal-de-la-impunidad.pdf](http://revistaeconomiacritica.org/sites/default/files/JuanHernandez-ErikaGonzalez-PedroRamiro_Arquitectura-legal-de-la-impunidad.pdf). Access: Feb. 2022.

<sup>13</sup> RAMIRO, Pedro. Las multinacionales y la responsabilidad social corporativa: de la ética a la rentabilidad. In: HERNÁNDEZ ZUBIZARRETA, Juan; RAMIRO, Pedro (ed.). *El negocio de la responsabilidad: crítica de la responsabilidad social corporativa de las empresas transnacionales*. Barcelona: Icaria Editorial, 2009. p. 47-78.

<sup>14</sup> RAMIRO, Pedro. Las multinacionales y la responsabilidad social corporativa: de la ética a la rentabilidad. In: HERNÁNDEZ ZUBIZARRETA, Juan; RAMIRO, Pedro (ed.). *El negocio de la responsabilidad: crítica de la responsabilidad social corporativa de las empresas transnacionales*. Barcelona: Icaria Editorial, 2009. p. 49.

<sup>15</sup> OLCESE SANTONJA, Aldo. *La responsabilidad social y el buen gobierno en la empresa, desde la perspectiva del consejo de administración*. 2009. Tesis (Doctorado) – Facultades de Ciencias Económicas y Empre-

would be a juxtaposition of the traditional values of the 20th century company with the new values brought by ethical questioning, which are expressed through a new paradigm of action of the companies, which balances the internal dichotomies<sup>19</sup> in hope to survive and achieve its perpetuity.

This new awareness or conformation of values that guide the Company's way of acting - which is also called business ethics - would be, for the legal universe, equivalent to a form of "self-regulation" or voluntary regulation, to the extent that the company or economic group itself would promote the direction and supervision of its own practices driven, at least, by the need to preserve its image.

<sup>19</sup> This juxtaposition of values is detailed by Santoja in relation to the following aspects: **a) Common good and private good:** there is a need for a synergy to, from an analysis of the benefits and harm brought to humans and the planet as a whole, verify how companies are contributing and how they can correct the course of their actions; **b) Collaboration and competitiveness:** there is a need for a greater emphasis on collaboration, exchange of ideas to bring new knowledge and solutions, so that the company must manage the tension between the need to compete and to collaborate; **c) Emotional and rational:** without forgetting the importance of rationality, there is a need for companies not to neglect the emotional aspect of human relations, which are essential for the development of important capacities for its members, such as creativity, commitment, enthusiasm, among others; **d) Trust and control:** although control is essential for the management of a company, its implicit idea is that there is no trust, so that it becomes necessary to avoid excesses in order to create an environment conducive to building trust among the members of the company and other people affected by the company's projects (stakeholders); **e) Learning and efficiency:** efficiency, despite being a foundation of economic theory, focuses on the present and obscures opportunities, since it delays the ability to live with the research, risk and uncertainty related to learning that, ultimately, is essential for companies that intend a greater longevity; **f) Coherence and image:** coherence and image are linked to reputation. The image value, which is an important strategic asset of the company, cannot eclipse the coherence (of its actions, values and principles) in its relationships. That is: the company, as well as people, should be concerned about their reputation, but should not seek formulas to "make up" the image they represent, as if it were a mere packaging; **g) Dialogue and communication:** communication should be done internally and externally with transparency, based on an open dialogue, among the different publics involved, about what it intends and what results it aspires to achieve; **h) Holarchy and hierarchy:** structure and hierarchy are essential to the company. However, in an environment of rapid change, there is a need for openness to temporary structures that can respond to demands, so that a responsible and sustainable company must combine a strong hierarchy with the possibility of the emergence and disappearance of temporary structures based on non-hierarchical leadership; **i) Diversity and uniformity:** companies need their members to share values and criteria. However, this does not mean the suppression of different cultures, values and understandings. Diversity itself ends up being beneficial to creativity.

At this point a new question arises: *would this change in the company's cultural paradigm be a solution to the residual problems of the TNCs' activity?* The answer is not as simple as it seems, so it is possible to point out some positions and reflect on them critically.

From a more optimistic point of view, even though the 1983 draft of the Code of Conduct on Transnational Corporations was not approved by the UN Human Rights Council, there is a whole range of international commitments (including those already listed) that strengthen the responsibility of companies with regard to human rights and move towards a new paradigm that, as understood by Piovesan and Gonzaga<sup>20</sup> is capable of transitioning from a business agenda focused on economic productivity to one influenced by the *human rights approach*.

About the possibility of this transition, it is explained by Ruggie, Rees and Davis<sup>21</sup> that:

Soft law instruments such as the UNGPs differ from treaties in ways other than legal status. Once a treaty text is adopted it is meant to be ratified in its totality, enforced by its States parties, and typically some oversight entity is established to monitor compliance – in the case of UN human rights treaties, each has its own Treaty Body to perform those functions. No oversight or enforcement mechanism exists for soft law instruments. Nor is there any expectation that one as comprehensive as the UNGPs would be adopted as hard law as a single instrument. Guiding principles authoritatively define a universe of discourse and establish its basic parameters and perimeters. Their constitutive elements achieve uptake to the extent that they have intrinsic persuasive power, inspire or justify prescribed conduct, engender shared expectations of ends and means, as well as other such normative and epistemic factors.

In this line of thought, CSR, initially voluntary, becomes progressively mandatory as it is incorporated by Human Rights from the progressive growth of shared responsibilities.

<sup>20</sup> PIOVESAN, Flávia; GONZAGA, Victoriana. Empresas e direitos humanos: desafios e perspectivas à luz do direito internacional dos direitos humanos. *Revista do Tribunal Regional Federal da 1ª Região*, v. 31, n. 1, p. 11-28, 27 mar. 2019. Available at: <https://revista.trf1.jus.br/trf1/article/view/9/7>. Access: Feb. 2022.

<sup>21</sup> RUGGIE, John; REES, Caroline; DAVIS, Rachel. Ten years after: from UN guiding principles to multi-fiduciary obligations. *Business and Human Rights*, v. 6, n. 2, p. 179-197, 2021. Available at: <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/CCC2D26AFED66E29865B1AB8D2D7219A/S2057019821000080a.pdf/ten-years-after-from-un-guiding-principles-to-multi-fiduciary-obligations.pdf>. Access: Jul. 2022.

It is beyond the scope of this paper to present in detail the structure of the Guiding Principles on Business and Human Rights. Nevertheless, it cannot be ignored that the assumption for its effectiveness is the functioning of three different spheres of governance, which reinforce each other, that is, the traditional system of public law and governance, at international and national levels; the civil governance system, which oversees the adverse effects of business conduct; and corporate governance, which internalizes elements of the previous two in order to apply strategies and policies related to risk management. The challenge is to find an alignment of these spheres and mutual reinforcement, so that corporate compliance becomes a focal point for assessing companies and involving them in order to reduce damages and seek solutions, as well as pressuring governments to make the process mandatory<sup>22</sup>.

Thus, the reflections made by Newton De Lucca<sup>23</sup> are also justified in relation to the amplitude of the social function of the company and CSR, e.g., the defense of the possibility of the legal incorporation of a business ethic, as well as the expansion of the already known social function of the company. According to Newton De Lucca<sup>24</sup> formal legal compliance is not enough (e.g. compliance with the provisions of the labor, tax or social security laws), since there is a need to assume a more complex *corporate ethical duty*, with full adoption of a business policy internally that provides the worker with a professional and human development, means to improve his living and family conditions, guaranteed participation in the company's profits and decision-making process, in addition to maintaining externally an ethical relationship with customers, suppliers, the community where it operates and the environment in which it interacts.

In fact, it seeks an expansion of CSR, even beyond the traditional and limited civil and administrative liability, to achieve greater social engagement that meets

the needs not only of shareholders, but of stakeholders (e.g: consumers, local community, suppliers, employees and their families). In this sense, there is a departure from the traditional sense of corporate governance centered on the shareholders, and of approximation to the stakeholders, at least in the speech of company representatives.<sup>25</sup> An attempt to legalize this line of thought, in the Brazilian sphere, was the draft law 7.160/2002, which provided for a modification to art. 966 (concept of entrepreneur) of the Brazilian Civil Code, drafted by Congressman Ricardo Fiuza.

This ethical vision of business created by CSR is appealing and there is no doubt that it can inspire many enterprises today. However, academically, there is some divergence and resistance to a reconciliation between the traditional branch of Human Rights and the “new logic” of CSR. It is worth noting the criticism, for instance, in Spain, directed at Aldo Olcese Santonja's position – both then<sup>26</sup> and now<sup>27</sup> – that CSR is merely a marketing technique for companies, that is, a new way of rebutting the social criticism directed at them without necessarily changing the essence of their practices – what has become commonplace today to call the greenwashing of sustainability or bluewashing when applied to human rights.

### 3 Political-economic context and the development of business and human rights in Chile

An important question is why a country like Chile – which does not represent the largest economy nor

<sup>22</sup> RUGGIE, John; REES, Caroline; DAVIS, Rachel. Ten years after: from UN guiding principles to multi-fiduciary obligations. *Business and Human Rights*, v. 6, n. 2, p. 179-197, 2021. Available at: <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/CCC2D26AFED66E29865B1AB8D2D7219A/S2057019821000080a.pdf/ten-years-after-from-un-guiding-principles-to-multi-fiduciary-obligations.pdf>. Access: Jul. 2022.

<sup>23</sup> DE LUCCA, Newton. *Da ética geral a ética empresarial*. São Paulo: Quartier Latin, 2009. p. 327.

<sup>24</sup> DE LUCCA, Newton. *Da ética geral a ética empresarial*. São Paulo: Quartier Latin, 2009.

<sup>25</sup> RUGGIE, John; REES, Caroline; DAVIS, Rachel. Ten years after: from UN guiding principles to multi-fiduciary obligations. *Business and Human Rights*, v. 6, n. 2, p. 179-197, 2021. Available at: <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/CCC2D26AFED66E29865B1AB8D2D7219A/S2057019821000080a.pdf/ten-years-after-from-un-guiding-principles-to-multi-fiduciary-obligations.pdf>. Access: Jul. 2022.

<sup>26</sup> RAMIRO, Pedro. Las multinacionales y la responsabilidad social corporativa: de la ética a la rentabilidad. In: HERNÁNDEZ ZUBIZARRETA, Juan; RAMIRO, Pedro (ed.). *El negocio de la responsabilidad: crítica de la responsabilidad social corporativa de las empresas transnacionales*. Barcelona: Icaria Editorial, 2009. p. 47-78.

<sup>27</sup> HERNÁNDEZ ZUBIZARRETA, Juan; GONZÁLEZ, Erika; RAMIRO, Pedro. Las empresas transnacionales y la arquitectura jurídica de la impunidad: responsabilidad social corporativa, lex mercatoria y derechos humanos. *Revista de Economía Crítica*, v. 28, p. 41-54, 2019. Available at: [http://revistaeconomiacritica.org/sites/default/files/JuanHernandez-ErikaGonzalez-PedroRamiro\\_Arquitectura-legal-de-la-impunidad.pdf](http://revistaeconomiacritica.org/sites/default/files/JuanHernandez-ErikaGonzalez-PedroRamiro_Arquitectura-legal-de-la-impunidad.pdf). Access: Feb. 2022.

population in Latin America – was considered by international investor to be one of the countries with the best conditions for transnational mining enterprises at the end of the 20th century.

In fact, it is imperative to recognize that Chile already had an infrastructure for transnational mining since the colonial period, in a relationship of dependence on the support of the Spanish Crown to private entrepreneurs. But it is from the 1970s onwards that the economic power of TNCs and their reverse influence on political relations became more evident. In this regard, it is worth mentioning President Salvador Allende's emblematic accusation to the UN General Assembly of the influence of US TNCs on Chilean domestic politics, followed by his deposition by the Chilean military coup, as well as the very conception and implementation of neoliberalism as a political-economic proposal for development. This was the beginning of the debates on Business and Human Rights within the UN in a more specialized way.

As Yves Dezalay and Bryant Garth<sup>28</sup> report:

The 1973 Chilean coup that brought Augustus Pinochet to power has a particular importance in the development and legitimization of new state expertises. Chile was a laboratory in which contenders for legitimate state expertise in the north invested heavily, whether through democratic socialism or liberal economics. What happened in Chile, therefore, played directly into northern debates fought in the media and in the universities and think tanks. *The Wall Street Journal*, for example, could trumpet the purported successes of Chicago-trained economists in Chile as a reason to give Chicago economics more authority in the United States (and elsewhere). *The New York Times* could fight back on the terrain of human rights, again emphasizing Chile. The battles in Chile were thus not only internationalized but also central to defining what the internationally legitimate state would be. What happened in the Chilean laboratory-written simultaneously in the north and the south became the model for export to other parts of the world. This was true both of human rights and neoliberal economics.

It is worth noting that even before the aforementioned coup – which, let us stress, is incompatible with all the basic elements of access to justice – there was already a cultural relationship of exporting technical knowledge (related both to the study of economics and

human rights) that was not necessarily limited to neoliberal thinking. The option for this model came about through selective importation and incorporation of this model by the local financial and intellectual elite itself. As explained by Garth<sup>29</sup>:

Until the end of World War II, Latin American importers looked mainly to Europe for such social capital. In the 1950s and 1960s, however, the import and export market shifted dramatically in favor of the United States. The shift has had important implications for the model of the state promoted within Latin America, since ideas associated with European social democracy lost value in relation to ideas associated with the relatively laissez-faire and market-oriented U.S. state. The major point, however, is that the influence of the United States on Latin American institutions and ideas is not just about what the dominant power imposes on Latin America but is also about what Latin American elites seek to import. The history of the human rights movement in Latin America is thus instructive about the workings of these kinds of import-export processes in general. 'Cutting-edge ideas' relating to democracy, as well as markets, have been promoted with pressure from the North, but also bought – imported – by both idealists and mercenaries in the South. This process is the 'soft' mechanism for promoting 'rules of the game' in the South that are consistent with orthodoxies in the North. With the human rights movement coming of age, the transformation of the U.S. government's foreign-aid programs and changes at the World Bank and other institutions in favor of formal democracy and the rule of law – as well as neoliberal economics – the 1990s became a kind of golden age for idealists of democracy reform. The stars were aligned for the import and export of democracy and the rule of law, and the efforts of that period undoubtedly had some impact, even if limited, in strengthening legal institutions.

This political and cultural relationship, in the economic field, triggered a progressive opening for direct international investments, mainly by Decree-Law 600/1974, which facilitated the exploration of products and services with foreign investments, as in the case of the megaprojects<sup>30</sup> in the mining field, especially copper, but not exclusively.

Noteworthy, in whole Latin America has been a trend toward the removal of trade barriers – e.g. elimina-

<sup>28</sup> DEZALAY, Yves; GARTH, Bryant. *The internationalization of palace wars: lawyers, economists, and the contest to transform Latin American states*. Chicago: The University of Chicago Press, 2002. p. 141.

<sup>29</sup> GARTH, Bryant. Exporting and importing democracy, law and human rights. *NACLA Report on the Americas*, v. 40, n. 1, p. 30, 2007.

<sup>30</sup> Albavera reports in his study that between 1990 and 1997, a total of \$4.7 billion was invested, with the following projects: Candelaria (Phelps Dodge-Sumitomo), Quebrada Blanca (Cominco-Teck), Zaldivar (Outokumpu - Placer Dome), Cerro Colorado (Rio Algom) and El Abra (Cyprus-CODELCO), just to mention a few.

tion of state monopolies, restrictions on financial flows, along with lower levels of tariff protection – elements that are, generally, positive for investments, especially for mining as an activity of international consumption that requires inputs and capital goods at the most competitive market prices but what is really relevant to understand is that Chile was a pioneer, beginning its liberalization process in 1974, when it eliminated non-tariff barriers and reduced nominal tariffs from an average of 94% to a flat rate of 10%. The 1982 crisis saw the latter rise again to 35%, but the rate had returned to 10% by January 1, 1999<sup>31</sup>.

In this sense, Decree-Law 600/1974 on foreign investments was one of the most relevant predecessor projects for economic liberalization (elimination of customs tariffs and non-discrimination of foreign investments) in Latin America, followed by the abolition of state monopolies and a prolonged low taxation in relation to the countries of the region, which resulted in a favorable competitive scenario for foreign investments<sup>32</sup>. In addition, a solid constitutional and legal system was established to protect private mining by establishing a concession regime that, even though it does not formally assign ownership to private investors, guarantees them property rights, legally reinforced by the 1983 Mining Code and subsequent modifications.<sup>33</sup>

Chile has traditionally been one of the lowest taxed mining jurisdictions at least until 2006, as mining companies were not subject to a special mineral or royalty tax. Although there is a 35% withholding tax on remitted profits, the general income tax regime is the lowest in Latin America, with a corporate rate of only 17%, and tax incentives have been introduced to accommodate the specific needs of the mining industry, including accelerated depreciation and deferred payment of customs duties on imported capital goods. In addition, as noted, qualified investors can enter into a stability agreement with the Chilean government to fix the tax

regime. The above factors combine to establish Chile as one of the jurisdictions with the lowest tax burden for mining activities<sup>34</sup>.

Thus, Chile, which has approximately 1/3 of the world's copper reserves, great quality and potential for exploitation of other ores, and the fact that there are already identified reserves – in the Escondida, Collahuasi, Sierra Gorda, and Andina regions, for instance – added to other factors already mentioned<sup>35</sup> only reinforced this potential.

On the other hand, despite the essentiality of this sector to economic development, it suffered from political and economic instabilities during the 1980s and into the 1990s, advancing also upon the return to the democratic scenario<sup>36</sup> in the last two decades<sup>37</sup>. Also, according to John Ruggie<sup>38</sup>, this sector is one of the leading in the number of complaints of human rights violations. The criticism of transnational mining companies is still valid today<sup>39</sup>.

At this pace, in the field of Business and Human Rights, there is an endorsement especially by the UN Working Group and with support from the historical organizations such as Danish Institute for Human Rights for the possibility of adopting public policies (e. g: National Plans) with content directed to the obligation of States to function as a bridge for companies to res-

<sup>31</sup> SANCHEZ ALBAVERA, Fernando *et al. Mining in Latin America in the late 1990s*. Santiago: United Nations, Aug. 2001. Available at: [https://repositorio.cepal.org/bitstream/handle/11362/6385/S0150381\\_en.pdf?sequence=1&isAllowed=y](https://repositorio.cepal.org/bitstream/handle/11362/6385/S0150381_en.pdf?sequence=1&isAllowed=y). Access: Feb. 2022.

<sup>32</sup> SANCHEZ ALBAVERA, Fernando *et al. Mining in Latin America in the late 1990s*. Santiago: United Nations, Aug. 2001. Available at: [https://repositorio.cepal.org/bitstream/handle/11362/6385/S0150381\\_en.pdf?sequence=1&isAllowed=y](https://repositorio.cepal.org/bitstream/handle/11362/6385/S0150381_en.pdf?sequence=1&isAllowed=y). Access: Feb. 2022.

<sup>33</sup> UNCTAD. *How to attract and benefit from FDI in mining: lessons from Canada and Chile*. New York; Geneva: United Nations, 2011. Available at: [https://unctad.org/system/files/official-document/diaepcb2010d11\\_en.pdf](https://unctad.org/system/files/official-document/diaepcb2010d11_en.pdf). Access: Feb. 2022.

<sup>34</sup> UNCTAD. *How to attract and benefit from FDI in mining: lessons from Canada and Chile*. New York; Geneva: United Nations, 2011. Available at: [https://unctad.org/system/files/official-document/diaepcb2010d11\\_en.pdf](https://unctad.org/system/files/official-document/diaepcb2010d11_en.pdf). Access: Feb. 2022.

<sup>35</sup> i) legislation favorable to foreign investment; ii) lower taxation; iii) reduced risk-taking in the business.

<sup>36</sup> 1 - KLINE, John M. The role of transnational corporations in Chile's transition: beyond dependency and bargaining. *Transnational Corporations Journal*, Geneva, v. 1, n. 2, 1 Aug. 1992. Available at: [https://unctad.org/system/files/official-document/iteitv1n2a5\\_en.pdf](https://unctad.org/system/files/official-document/iteitv1n2a5_en.pdf). Access: Feb. 2022.; 2 - SANCHEZ ALBAVERA, Fernando *et al. Mining in Latin America in the late 1990s*. Santiago: United Nations, Aug. 2001. Available at: [https://repositorio.cepal.org/bitstream/handle/11362/6385/S0150381\\_en.pdf?sequence=1&isAllowed=y](https://repositorio.cepal.org/bitstream/handle/11362/6385/S0150381_en.pdf?sequence=1&isAllowed=y). Access: Feb. 2022.

<sup>37</sup> 1 - UNCTAD. *How to attract and benefit from FDI in mining: lessons from Canada and Chile*. New York; Geneva: United Nations, 2011. Available at: [https://unctad.org/system/files/official-document/diaepcb2010d11\\_en.pdf](https://unctad.org/system/files/official-document/diaepcb2010d11_en.pdf). Access: Feb. 2022.; 2 - OLCA. *Derechos humanos, extractivismo canadiense y agua*. Santiago: OLCA, ene. 2020. Available at: [http://olca.cl/oca/informes/Olca-2020\\_Informe-DDHH-Extractivismo-Canadiense-y-Agua.pdf](http://olca.cl/oca/informes/Olca-2020_Informe-DDHH-Extractivismo-Canadiense-y-Agua.pdf). Access: Feb. 2022.

<sup>38</sup> RUGGIE, John. *Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse*. New York: United Nations, 23 may 2008. Available at: <https://undocs.org/en/A/HRC/8/5/Add.2>. Access: Feb. 2022.

<sup>39</sup> See section 4 of this study.

pect human rights – which, it is worth saying, integrate, *per se*, a complex and feasible proposal for achieving and realizing access to justice.

*How those plans function?* Firstly, they should promote means for awareness raising, clarification on best practices, and creation of an environment of continuous dialogue for the conformation of often divergent interests. In this sense, They seek, above all, to create democratic places for debate, intermediated by governmental bodies, in which goals are set, oversight through monitoring via reports, and the participation of representatives from the most diverse areas, with technical support from public and private sectors.

Specifically, Chile has both a National Human Rights Plan (of domestic policy orientation) and a National Action Plan on Business and Human Rights (of foreign policy initiative), the latter approved in 2017 – which, it should be noted, was the second in Latin America to incorporate the logic of the Ruggie Principles and OECD guidelines. It represents an opportunity to fill gaps in the regulation of economic activities so that they do not affect human rights as a centralizing unit, serving as a means to fulfill Guiding Principle 8, which seeks to ensure policy coherence, although this is not the only measure, nor is it sufficient<sup>40</sup>.

This plan is overseen by an Interministerial Committee on Human Rights and Business and supported by a Committee (Comité 360 de Derechos Humanos y Empresas) composed of a diverse range of civil society representatives, with representatives from the business sector, academic workers, human rights NGOs, community and gender equality NGOs<sup>41</sup>.

The committee itself represents a proposal for integration, which could serve as a locus or forum for debate – or, at least in theory, as a democratic channel that brings together and facilitates the flow of information with potential to reach new confluences and consensus, or at the very least, the legitimacy necessary for the es-

tablishment and use of legal and semi-legal procedures for settling disputes between companies and the local community.

Despite representing one of the most advanced public policy documents on the subject, the fact is that it also has weaknesses, both in its content and in its implementation, including during the year 2020. Some of these criticisms focus on the absence of public consultation directed at indigenous peoples in the form of ILO Convention 169 on Indigenous and Tribal Peoples ratified by Chile<sup>42</sup>, as well as the disregard of specific environmental impact studies (EIA) by Chilean administrative bodies<sup>43</sup>.

## 4 Critics on transnational mining in Chile: what we can learn?

If, on the one hand, there is no disagreement about the conditions that have led Chile to become one of the most inviting countries in Latin America for foreign investments, especially for mining activities by TNCs, on the other hand, there is pertinent criticism about the supposed good practices of these transnational corporations. Although they have contributed to the increase in the national GDP in recent decades through the boom in the commodities production cycle, they have been questioned by Chilean academia, NGOs specialized in the protection of human rights, and even in studies published by international organizations, which must be considered in order to achieve access to justice, especially through the instruments and mechanisms available through Business and Human Rights.

<sup>42</sup> OBSERVATORIO CIUDADANO. *Cartilla: estándares internacionales de derechos humanos y empresas*. Santiago: OC, ene. 2021. Available at: <https://observatorio.cl/wp-content/uploads/2021/01/cartilla-empresa-y-ddhh-2020.pdf>. Access: Feb. 2022.

<sup>43</sup> 1 - SCHLEEF, Felipe Andrés Guerra. Los tribunales ambientales en la implementación de los derechos indígenas durante la evaluación ambiental de proyectos de inversión en Chile. *Revista Justicia Ambiental*, Santiago, año 8, n. 9, p. 19-38, dic. 2017. Available at: <http://www.revistajusticiaambiental.cl/wp-content/uploads/2018/05/1-JUSTICIA-AMBIENTAL-N-9-19-38.pdf>. Access: Feb. 2022.; 2 - FRANCESCONE, Kirsten *et al.* *Analysis of the quebrada blanca expansion project phase II*. Ottawa: MiningWatch Canada; Santiago: OLCA, dec. 2020. Available at: [https://miningwatch.ca/sites/default/files/eng\\_-\\_quebrada\\_blanca\\_report.pdf](https://miningwatch.ca/sites/default/files/eng_-_quebrada_blanca_report.pdf). Access: Feb. 2022.

<sup>40</sup> SCHÖNSTEINER, Judith. O Plano Nacional de Ação sobre Direitos Humanos e Empresas do Chile: um balanço sobre o seu impacto discursivo e real. *Revista de Direito Internacional*, Brasília, v. 16, n. 3, p. 93-110, 2019. Available at: <https://www.publicacoesacademicas.uniceub.br/rdi/article/view/6231/pdf>. Access: Feb. 2022.

<sup>41</sup> CHILE. Ministerio de Justicia. Subsecretaría de Derechos Humanos. *Reporte de finalización: primer plan de acción nacional de derechos humanos y empresas: periodo 2017 – 2020*. Santiago: Gobierno de Chile, abr. 2021. Available at: <https://ddhh.minjusticia.gob.cl/media/2019/07/REPORTE-PAN.pdf>. Access: Feb. 2022.

Since the beginning of the 21st century, the complaints and reports published globally have been increasingly detailed about company's activities, in terms of their successes and mistakes in the human rights field, and have become a relevant source to foster greater visibility and participation by civil society. These reports serve as a starting point in legal proceedings to collect and register plural and dissenting voices. An example of this was the accusation on Canadian activity by the *Working Group on Mining and Human Rights in Latin America*<sup>44</sup> to the Inter-American Commission on Human Rights in 2012.

The *first criticism* refers to the precariousness of social and labor relations. In common sense, mining activities generate an indirect stimulus to the economy, which grows around these activities and also in auxiliary activities to serve them. In this sense, transnational corporate activity generates jobs and helps the circulation of goods and services in the region in which it carries out its activities, especially when it encompasses projects that require large investments impossible (at first glance) to be attained by small or medium-sized companies.

However, according to Román and Ojeda's study<sup>45</sup>, the mining clusters developed by TNCs' in Chile have generated comparatively fewer jobs and created "castes" of workers. A large part of the workforce is outsourced, with low wages, little formal education, and high flexibilization of labor rights, while a significantly smaller portion, with a higher level of education, has formal jobs with better conditions and wages. According to the authors, the reflexes of this also occur in interpersonal and family relationships, which helps in the distancing between groups of people and in the creation of a culture of discrimination and privileges.

Another relevant issue is the tax aspect, since there is no denying that mining is a relevant source of revenue.

In this regard, the second criticism refers especially to the delicate relationship and balance between the activity performed by the public and private sectors.

According to the studies promoted by Zerene within ECLAC<sup>46</sup> and the UNCTAD<sup>47</sup> report, the private sector collects comparatively less taxes for the activity, even though it represents 60% of the national production with the exploitation of the best and newest deposits and the participation of at least 10 TNCs', while the public sector is represented only by CODELCO and has the final stage or lower quality exploitations.

At this point, it is relevant to clarify the mining activity process, which is divided into two parts: 1 - in the first phase (exploration), a junior company with less financial capacity conducts a study with the objective of mapping/identifying deposits and the prospecting potential of certain locations; 2 - from that first project, a senior company with greater financial capacity and better relations with a given region acquires the project and makes investments in order to carry out the second phase (prospecting), which generally lasts years or decades<sup>48</sup>.

These phases are directly influenced by concession rules (e.g.: the cost for the company to carry out the activity) and tax regimes (whether the tax is on the exploitation/production or on the result/profit), which change the perception about the financial return risk of the activity. In practice, what has been concluded in these studies is that Chile for many decades endorsed inviting policies, with risk-return reversals and lower tax rates, allowing considerable returns to private enterprise as a policy choice.

This criticism is quite valid, especially if we consider that factors such as the taxation model, the reduction or transfer of business risks (to put it another way: the

<sup>44</sup> In 2010, seven NGOs formed this group to analyze mining activities in Latin America. The following NGOs were initially part of this project: Observatorio Latinoamericano de Conflictos Ambientales – OLCA (Chile), Colectivo de Abogados José Alvear Restrepo – CAJAR (Colombia), Fundación para el Debido Proceso –DPLF– (regional), Centro Hondureño de Promoción para el Desarrollo Comunitario – CEHPRODEC (Honduras), Asamblea Nacional de Afectados Ambientales – ANAA (México), Asociación Marianista de Acción Social (Perú) y Red Muqui (Perú).

<sup>45</sup> HERNÁNDEZ ROMÁN, Gerardo; PAVEZ OJEDA, Jorge. Neoliberalización y flexibilidad en el mundo del trabajo: notas sobre los trabajadores de la minería en Chile. *Sociedad Hoy*, Concepción, n. 23, p. 49-66, 2012. Available at: <https://www.redalyc.org/articulo.oa?id=90229346005>. Access: Feb. 2022.

<sup>46</sup> ZERENE, Gino Sturla *et al.* The wealth gifted to the large-scale copper mining industry in Chile: new estimates, 2005-2014. *CEPAL Review*, Santiago, n. 124, p. 99-119, apr. 2018. Disponível em: [https://www.cepal.org/sites/default/files/publication/files/43953/RVI124\\_Sturla.pdf](https://www.cepal.org/sites/default/files/publication/files/43953/RVI124_Sturla.pdf). Access: Feb. 2022.

<sup>47</sup> UNCTAD. *How to attract and benefit from FDI in mining: lessons from Canada and Chile*. New York; Geneva: United Nations, 2011. Available at: [https://unctad.org/system/files/official-document/diaepcb2010d11\\_en.pdf](https://unctad.org/system/files/official-document/diaepcb2010d11_en.pdf). Access: Feb. 2022.

<sup>48</sup> ZERENE, Gino Sturla *et al.* The wealth gifted to the large-scale copper mining industry in Chile: new estimates, 2005-2014. *CEPAL Review*, Santiago, n. 124, p. 99-119, apr. 2018. Disponível em: [https://www.cepal.org/sites/default/files/publication/files/43953/RVI124\\_Sturla.pdf](https://www.cepal.org/sites/default/files/publication/files/43953/RVI124_Sturla.pdf). Access: Feb. 2022.



sharing of these business “risks” with the State), and the amount of royalties charged, favored the private sector without good reason, that is, without proof that there was the corresponding social development of the region – which, in the final analysis, would be the main objective of the State in expressly adopting such policies.

The *third criticism* centers on the absence of economic diversification. Strictly speaking, the mining activity exploration model may have generated greater economic dependence on the sector without there being a transition in favor of an expansion of independent services and not directly or indirectly related to exploration, which is essential for medium and long term, given the gradual closure or reduction of the production cycle of the extractive sector<sup>49</sup>.

There is the *fourth criticism* related to disrespect for the environment and the rights of indigenous or indigenous peoples. Rights related, for instance, to the properties on which they are located, the maintenance of native livelihoods and cultures, etc. In recent years, despite attempts at convergence and greater dialogue, disrespect for the environment remains, especially in relation to direct and indirect aquifer exploitation, and repeated disrespect of the rights of local communities, who unfortunately, are excluded from the process of participation in the destination of the territories object of business activities<sup>50</sup>.

<sup>49</sup> CEPAL. *Minería para un futuro bajo en carbono: oportunidades y desafíos para el desarrollo sostenible*. Santiago: Naciones Unidas, 2019. Available at: [https://www.cepal.org/sites/default/files/publication/files/44584/S1900199\\_es.pdf](https://www.cepal.org/sites/default/files/publication/files/44584/S1900199_es.pdf). Access: Feb. 2022.

<sup>50</sup> 1 - OLCA. *Derechos humanos, extractivismo canadiense y agua*. Santiago: OLCA, ene. 2020. Available at: [http://olca.cl/oca/informes/Olca-2020\\_Informe-DDHH-Extractivismo-Canadiense-y-Agua.pdf](http://olca.cl/oca/informes/Olca-2020_Informe-DDHH-Extractivismo-Canadiense-y-Agua.pdf). Access: Feb. 2022.; 2 - OBSERVATORIO CIUDADANO. *Proyectos mineros canadienses en el territorio de la comunidad agrícola de los diaguítas huasco altinos en Chile*: evaluación de impacto en derechos humanos. Santiago, dic. 2016. Available at: <https://observatorio.cl/2199-2/>. Access: Feb. 2022.; 3 - OBSERVATORIO CIUDADANO. *Cartilla: estándares internacionales de derechos humanos y empresas*. Santiago: OC, ene. 2021. Available at: <https://observatorio.cl/wp-content/uploads/2021/01/cartilla-empresa-y-ddhh-2020.pdf>. Access: Feb. 2022.; 4 - SCHLEEF, Felipe Andrés Guerra. Los tribunales ambientales en la implementación de los derechos indígenas durante la evaluación ambiental de proyectos de inversión en Chile. *Revista Justicia Ambiental*, Santiago, año 8, n. 9, p. 19-38, dic. 2017. Available at: <http://www.revistajusticiaambiental.cl/wp-content/uploads/2018/05/1-JUSTICIA-AMBIENTAL-N-9-19-38.pdf>. Access: Feb. 2022.; 5 - GRUPO DE TRABAJO SOBRE MINERÍA Y DERECHOS HUMANOS EN AMÉRICA LATINA. *El impacto de la minería canadiense en América Latina y la responsabilidad de*

The terms inherent to Human Rights and Business were not identified in decisions available at the Chilean judiciary’s website<sup>51</sup>. However, this does not imply the necessary denial of rights related to them, such as the important instrument of consultation with local communities in cases of bidding for mining exploration, which is also an integral part of the non-judicial mechanisms suggested by human rights and business. This instrument is extremely relevant and is already being recognized as a judicially enforceable right.

Within the Chilean Judiciary, despite decisions in lower courts that have denied in practice the effectiveness of this right (for purely formal issues, such as accurate presentation of the delimitation of the area), paradigmatic are the recent decisions of the Chilean supreme court – Rol. 99.2022<sup>52</sup> and Rol. 8.507.2022<sup>53</sup>. These decisions authorized the participation and hearing of the communities of Camar and Coyo as part of the bidding processes due to the exploration of lithium in the Atacama region.

The *fifth criticism* specifically refers to the existence of investments from governments of developed countries, which often, despite the strong presence of a sustainability discourse and the implementation of public policies in their own territories, fail to consider them as criteria. for investments in developing countries<sup>54</sup>.

*Canadá*: resumen ejecutivo del informe presentado a la Comisión Interamericana de Derechos Humanos. Santiago, 2014. Available at: [http://www.dplf.org/sites/default/files/informe\\_canada\\_resumen\\_ejecutivo.pdf](http://www.dplf.org/sites/default/files/informe_canada_resumen_ejecutivo.pdf). Access: Feb. 2022.; 6 - FRANCESCO, Kirsten *et al.* *Analysis of the quebrada blanca expansion project phase II*. Ottawa: MiningWatch Canada; Santiago: OLCA, dec. 2020. Available at: [https://miningwatch.ca/sites/default/files/eng\\_-\\_quebrada\\_blanca\\_report.pdf](https://miningwatch.ca/sites/default/files/eng_-_quebrada_blanca_report.pdf). Access: Feb. 2022.

<sup>51</sup> The criteria for inclusion of judicial decisions started from the choice of specific words – such as “Derechos Humanos y Empresas”, “Responsabilidad Social Corporativa”, “Comunidad Local/Indígena”, “Minería” – selecting the results of the year 2022 on the subject under the Chilean Supreme Court.

<sup>52</sup> CHILE. Corte Suprema. *Rol N° 99-2022*. Rel. Ministro Sergio Manuel Muñoz Gajardo, Santiago, jun. 2022. Available at: <https://www.pjud.cl/prensa-y-comunicaciones/docs/download/40872>. Access: Jul. 2022.

<sup>53</sup> CHILE. Corte Suprema. *Rol N° 8.507-2022*. Rel. Ministro Sergio Manuel Muñoz Gajardo, Santiago, jul. 2022. Disponible at: <https://www.pjud.cl/prensa-y-comunicaciones/docs/download/40873>. Access: Jul. 2022.

<sup>54</sup> 1 - OLCA. *Derechos humanos, extractivismo canadiense y agua*. Santiago: OLCA, ene. 2020. Available at: [http://olca.cl/oca/informes/Olca-2020\\_Informe-DDHH-Extractivismo-Canadiense-y-Agua.pdf](http://olca.cl/oca/informes/Olca-2020_Informe-DDHH-Extractivismo-Canadiense-y-Agua.pdf). Access: Feb. 2022.; 2 - OBSERVATORIO CIUDADANO. *Proyectos mineros canadienses en el territorio de la comunidad agrícola de los diaguítas huasco altinos en Chile*: evaluación de impacto en derechos humanos.

An example of this is the investments made by the Canadian government in Chile. According to the *Observatorio Latinoamericano de Conflictos Ambiental - OLCA*<sup>55</sup>, there is a strong presence of Canadian capital through indirect subsidies to mining activities, such as Export Development Canada (EDC)<sup>56</sup>, including those aimed at CODELCO – with the objective of benefiting services from Canadian companies that serve said company, despite being on the list of human and environmental rights violators. In this regard, also the report carried out by *Observatorio Ciudadano*<sup>57</sup>, on the impacts on the community of the huasco altino diaguítas.

## 5 Conclusion

Business and Human Rights, worked globally (e.g.: in the debates established within the scope of the UN) and regionally (such as consultations and measures promoted within the scope of the Inter-American Commission on Human Rights), together with international declarations and treaties, although not fully binding on companies – and without prejudice to their becoming, in the near future – they offer, at the very least, relevant guidelines for conduct for transnational business activity. They are an interesting source for normative production, including the incorporation of legal and semi-legal mechanisms by the States themselves.

However, it is important to highlight that the approximation of the ethical content, through which there is

a cultural construction of sustainability, will only make sense to the exact extent that such values are truly incorporated by one of its main protagonists in the 21st century: the entrepreneur. The incorporation of this thought and its reproduction in the social reality could never be dissociated from the legal counterpart – which, by the way, integrates it in the context of the very consolidation of capitalism, as a way of preserving it, aided by the legal action of the State. Hence the importance of considering Human and Business Rights as a possible way to access justice today.

The potential of this continuous process of converting business ethics (with non-binding rules) into a complex legal framework (with both binding and non-binding rules) cannot be ignored, especially at a time when the use of different procedures for more inclusive and participatory dispute resolution is advocated for access to justice. Likewise, a less discursive and more active stance is increasingly required by all social actors as a criterion for legitimation.

And this process, although fragile from the point of view of enforceability and slow because it still relies heavily on voluntarism towards its main subject (the entrepreneur with decision-making power) also depends on the counterpart of the State – whether nationally for guidance, support, legislative implementation and monitoring of respect for Human Rights – whether at the international level – for auditing, rendering accounts of its activities to the international community and coordinating the efforts of multiple actors. And this active stance depends on the political interest of a given community and its relationships at the global level.

To put it another way, the relationship between Human Rights and CSR only becomes relevant if there are real economic, social and environmental consequences, especially guaranteed by Law (e.g. from the consolidation of the normative structure with the definition of obligations and rights), which is glimpsed through a new gateway represented precisely by the intersection Business and Human Rights that seeks to strengthen internal and external political ties.

This strengthening of political ties certainly involves a plurality of multilevel interests essential to the already frayed and difficult relationship between State-society-Company. As seen, in Chile, there is a diversity of ethnic and cultural groups within the national society that are not necessarily represented by the State, but are

Santiago, dic. 2016. Available at: <https://observatorio.cl/2199-2/>. Access: Feb. 2022; 3 - GRUPO DE TRABAJO SOBRE MINERÍA Y DERECHOS HUMANOS EN AMÉRICA LATINA. *El impacto de la minería canadiense en América Latina y la responsabilidad de Canadá*: resumen ejecutivo del informe presentado a la Comisión Interamericana de Derechos Humanos. Santiago, 2014. Available at: [http://www.dplf.org/sites/default/files/informe\\_canada\\_resumen\\_ejecutivo.pdf](http://www.dplf.org/sites/default/files/informe_canada_resumen_ejecutivo.pdf). Access: Feb. 2022

<sup>55</sup> OLCA. *Derechos humanos, extractivismo canadiense y agua*. Santiago: OLCA, ene. 2020. Available at: [http://olca.cl/oca/informes/Olca-2020\\_Informe-DDHH-Extractivismo-Canadiense-y-Agua.pdf](http://olca.cl/oca/informes/Olca-2020_Informe-DDHH-Extractivismo-Canadiense-y-Agua.pdf). Access: Feb. 2022.

<sup>56</sup> It is a credit and export agency for promoting trade between Canada and other countries through loans and insurance directly to Canadian companies or their buyers abroad. This agency acts as the financial arm of the government with the participation of the Canadian Crown, which is accountable to the respective parliament.

<sup>57</sup> OBSERVATORIO CIUDADANO. *Proyectos mineros canadienses en el territorio de la comunidad agrícola de los diaguítas huasco altinos en Chile*: evaluación de impacto en derechos humanos. Santiago, dic. 2016. Available at: <https://observatorio.cl/2199-2/>. Access: Feb. 2022.

vocalized, albeit partially, through specialized transnational networks promoted by NGOs and educational institutions.

Undoubtedly, in this movement of access to justice via Business and Human Rights, the approach of the academic community should be welcome, so that it stops being a mere spectator and starts to use useful skills for negotiation, treatment and publicity of information, strengthening of a democratic environment favorable to dialogue and technical clarification, in favor of the true process of sustainable development.

Clearly, this work is a reading of real relationships in a global market economy from a very specific perspective – after all, we are seeking to theoretically justify the effectiveness of a given legal model based on studies that focus on concrete economic, social and environmental relations in a given space and time – in an attempt to understand the feasibility of an intricate legal system and why one can (or should) advocate for the existence of Business and Human Rights as a possible way to access justice, recognizing their failures and successes so far, but above all, it proposes to understand how this new way of looking at legal relations affects business relations with the local community. At least, in the Chilean experience, Business and Human Rights has proved to be valuable as an experimental laboratory for Latin America.

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