OS TERMOS DE AJUSTAMENTO DE CONDUTA E O CASO SAMARCO: UMA ANÁLISE À LUZ DAS DIRETRIZES INTERNACIONAIS DE RESPONSABILIDADE SOCIOAMBIENTAL CORPORATIVA[1]

TRANSACTION AND CONDUCT ADJUSTMENT TERMS AND THE SAMARCO CASE: AN ANALYSIS FROM THE PERSPECTIVE OF INTERNATIONAL THEORIES OF CORPORATE SOCIAL RESPONSIBILITY

Luísa Cortat Simonetti Gonçalves[2]
Doutora em Direito Internacional Ambiental (Universidade de Maastricht, Holanda)

Elda Coelho de Azevedo Bussinguer[3]
Doutora em Bioética (UNB, Brasília/DF, Brasil)

Marta Santos Silva[4]
Doutora em Direito (Universidade de Osnabruck, Alemanha)

---

1 Artigo originado de pesquisa financiada pela Fundação de Apoio a Pesquisa do Espírito Santo – Edital Universal FAPES nº 03/2017, denominada "A Samarco, o Estado e a Sociedade diante do desastre da barragem de Fundão".

2 Doutora com distinção em Direitos e Garantias Fundamentais pela Faculdade de Direito de Vitória, no Brasil. Atualmente, é pesquisadora visitante na Universidade ONU Flores, na Alemanha, com bolsa do governo alemão (BMBF) pelo programa Green Talents Awatd, é Pesquisadora Associada no Centro de Governança Global do Graduate Institute Geneva (United Nations University), e assistente para projetos em Direito Ambiental na Academia de Direito Europeu ERA. *E-mail*: luisacsg@gmail.com. Currículo: http://lattes.cnpq.br/4724335016193653. Orcid: https://orcid.org/0000-0002-2558-4909.

3 Livre Docente pela Universidade do Rio de Janeiro (UniRio). Pós-Doutora em Saúde Coletiva pela Universidade Federal do Rio de Janeiro (UFRJ). Mestre em Direitos e Garantias Fundamentais pela Faculdade de Direito de Vitória (FDV). Coordenadora do Programa de Pós-Graduação em Direito Mestrado e Doutorado em Direitos e Garantias Fundamentais da Faculdade de Direito de Vitória (FDV). Editora da Revista Direitos e Garantias Fundamentais – Qualis A1. Coordenadora do BIOGEPE – Grupo de Estudos, Pesquisa e Extensão em Políticas Públicas, Direito à Saúde e Bioética. Vice-presidente da Sociedade Brasileira de Bioética. Professora Associada II aposentada da Universidade Federal do Espírito Santo (UFES). *E-mail*: elda.cab@gmail.com. Currículo: http://lattes.cnpq.br/8933361259561564. Orcid: https://orcid.org/0000-0003-4303-4211.

4 Atualmente é Docente na Faculdade de Direito da Universidade de Maastricht, na Holanda (Maastricht University/Catholic University of Leuven) e investigadora sénior associada no Instituto de Direito do Consumo da Concorrência e do Mercado na Universidade Católica de Lovaina. É também membro nomeado do Grupo de Especialistas da Comissão Europeia em responsabilidade e novas tecnologias, prestando assessoria à Comissão sobre a aplicabilidade da Directiva sobre Responsabilidade do

ÁREA(S): Direito ambiental; responsabilidade corporativa; direito internacional; meios alternativos de resolução de conflitos.

RESUMO: A responsabilidade das empresas pelos impactos socioambientais causados por suas atividades é tema cada vez mais discutido internacionalmente. Também no Brasil o tema tem crescido em interesse, sobretudo após os recentes rompimentos de barragens de mineração em Mariana e em Brumadinho, no Estado de Minas Gerais. O recorte do presente artigo é na tragédia ocorrida no município de Mariana, em uma análise dos remédios propostos no termo de transação e ajustamento de conduta (TTAC) firmado por empresas e órgãos governamentais. O artigo analisa, então, se tal TTAC, firmado em 02.03.2016, em virtude do rompimento da barragem de Fundão em 05.11.2015, é compatível com as diretrizes internacionais de responsabilidade socioambiental corporativa no que diz respeito aos remédios adotados. Para tanto, apresenta a evolução da responsabilidade corporativa no âmbito internacional e o progressivo distanciamento entre discurso e prática corporativos; identifica os principais aspectos trazidos pelo TTAC com o propósito de remediar os danos socioambientais causados pela tragédia; e analisa, à luz da teoria de Karl Polanyi, a compatibilidade do TTAC com as diretrizes internacionais e, principalmente, com os compromissos assumidos pelas três empresas responsáveis pela barragem rompida. O papel da sociedade civil impactada, seja na teoria proposta pelo termo ou na prática dos reflexos sobre iniciativas globais, ganha especial relevância, em especial com a saída da Vale S.A. do Pacto Global.

ABSTRACT*: The responsibility of companies for the social and environmental impacts caused by their activities is a subject that is progressively discussed in the international context. Also, in Brazil, this subject is increasingly attracting attention, especially after the recent mineral dam disruptions in Mariana and in Brumadinho, in the Minas Gerais state. This article focuses on the tragedy occurred in the Mariana municipality. It analyzes the proposed remedies by the transaction and conduct adjustment terms (TTAC) signed by companies and state agencies. The article further analyzes if such a TTAC, signed on March 2nd, 2016 following the Fundão dam disruption in November 5th, 2015, is compatible with the international guidelines of corporate responsibility regarding the adopted remedies. In order to pursue such an analysis this article: presents the evolution of corporate responsibility in the international scenario and the increasing dettachment of corporate speech and practice from social and environmental concerns; identifies the main aspects of the TTAC with the purpose of remedying the social and environmental damages caused by the Fundão tragedy; and analyzes, from the perspective of Karl Polanyi's theory, the compatibility of the TTAC with international guidelines and particularly, the commitments of the companies who were*

Produtor no contexto da sociedade e economia digitais. Currículo: https://www.maastrichtuniversity.nl/m.santossilva. Orcid: https://orcid.org/0000-0001-6527-8327.

considered responsible for the dam's disruption. The role of the affected civil society is also important, both within Karl Polanyi's theory and in regard to practical repercussions in global initiatives, especially with the delistment of Vale S.A. from the UN Global Compact.

PALAVRAS-CHAVE: rompimento de barragem; termos de transação e de ajustamento de condutas; responsabilidade corporativa; preocupações ambientais; sustentabilidade ecológica.

KEYWORDS*: dam disruption; transaction and conduct adjustment terms; corporate responsibility; environmental concerns; ecological sustainability.*

SUMÁRIO: Introdução; 1 Distanciamento entre o discurso e a prática corporativa; 2 Os remédios do termo de transação e ajustamento de conduta de 02.03.2016: entre as previsões internacionais e o desastre de Mariana; Considerações finais; Referências.

SUMMARY*: Introduction; 1 Distancing between corporate discourse and practice; 2 The remedies of the terms of transaction and adjustment of conduct of 03/02/2016: between international provisions and the Mariana disaster; Concluding remarks; References.*

INTRODUCTION

The much-discussed current globalization generates many more effects than shortening of distances and cultural and commercial integration. On the one hand, from a corporate perspective, globalization opens up possibilities for internal structures and international partnerships. On the other hand, from the perspective of international law, it introduces new regulatory challenges, among which rules addressed to transnational corporations.

Companies only exist legally because national law establishes the rules and requirements for them to do so. However, their performance and, particularly, their social, environmental and economic impacts, go far beyond national borders. Companies' internationalization is not achievable, however, by international law, which is addressed – immediately – only to States. Filling this governance gap led, in the mid-twentieth century, to discussions about the socio-environmental responsibility of companies under international law.

Initially, the discussion about such responsibilities for companies was conceptual and theoretical, but it has become more practical ever since and extended to the draft of a taxonomy of different levels of bindingness ranging from strictly voluntary to binding measures. One of the most widespread

perspectives at the beginning of the 21st century is that of the referential framework introduced by the UN – Protect, Respect, Remedy – which is essential for ensuring that business activities do not harm human rights and the environment.

Several situations, especially infringements to the law, remind us of the relevance of these three rules. It is certainly so in Brazil, where irregularities concerning the dams of the mining industry have received significant attention due to recent events. This paper addresses specifically the break of the Fundão dam in Mariana/MG, on November 5th, 2015[5]. As this was a flagrant case of infringement of human rights, the paper is based on the pillar of remedies, represented by the transaction and adjustment of conduct term signed between the various public and private agents that were involved in the tragedy.

More specifically, this paper purports to answer the following research question: is the TTAC[6] signed on 03.02.2016 between government agencies and companies due to the break of the Fundão dam on 11.05.2015, compatible with the international guidelines for social and environmental responsibility with regard to the indicated remedies?

This paper thus aims to: (i) present the evolution of corporate responsibility at the international level and the progressive distancing between corporate discourse and practice; (ii) identify the main aspects brought by TTAC with the purpose of remedying the social and environmental damages caused by the tragedy; and (iii) analyze, in the light of Karl Polanyi's theory, the compatibility of TTAC with international guidelines and with the commitments assumed by the three companies which were deemed responsible for the broken dam. It should be noted that this paper deals only with the negative externalities caused

---

[5] The Fundão dam was a joint venture between Vale and BHP and was controlled by Samarco. It was used for disposal of mining rejections in the region. Located 35km away from the center of the city of Mariana, the dam broke on 5 October 2015, causing 47.3 m3 of mud to leak. The waste invaded the Doce River and several of its afluents, as well as harming villages, leaving millions of people without water, job, and home, and killing 19 persons.
See, e.g.: G1. Há 3 anos, rompimento de barragem de Mariana causou maior desastre ambiental do país e matou 19 pessoas. 25 October 2019. Available at: https://g1.globo.com/mg/minas-gerais/noticia/2019/01/25/ha-3-anos-rompimento-de-barragem-de-mariana-causou-maior-desastre-ambiental-do-pais-e-matou-19-pessoas.ghtml. Last accessed on 21 January 2021.

[6] TTAC is the acronym used to refer to a Term of Transaction and Conduct Adjustment (Termo de Transação e Ajustamento de Conduta, in the original name in Portuguese). It is a public policy tool used to remedy socio-environmental harms and relies on non-judicial agreements between the causer of the damages and its victims.

by the performance of these companies and not with their business motivations to act the way they did in relation to the management of the dam.

The approach is dialectical and based on a doctrinal method, both as far as the analysis of the TTAC itself and the theories of corporate responsibility are concerned.

1 DISTANCING BETWEEN CORPORATE DISCOURSE AND PRACTICE

Corporate responsibility for social and environmental impacts has been increasingly discussed at the international level due to the so-called global governance gap. The work of multinational companies goes beyond territorial boundaries, but the national laws which regulate them only produce effects within such boundaries. This regulatory challenge has been actively discussed and led companies to make commitments, but they do not always respect them. This is why, despite this paper focuses on remedies for the damage caused by corporate action, it has as its starting point the distancing between business discourse and practice.

The discourse and practices of Vale S/A, Samarco and BHP, the companies deemed responsible for the dams causing social and environmental damage[7], are at issue in the case of the dam disruption in Mariana. We assess them from a theoretical starting point and an international perspective, as at the time of the tragedy the Australian BHP and the Brazilians Samarco Mineração SA and Vale SA were signatories of the United Nations Global Compact, which will also be object of analysis of this paper.

Considering the degree of controversy about the definition of Corporate Social Responsibility (CSR[8]) – there are at least 37 definitions available in the literature[9] – we consider more pertinent to focus on its development rather then on the concept. We will start this contribution by a brief literature review on the topic, the rise and development of CSR, its different elements and the approaches available in the academic literature towards it. We will particularly

---

7 See *supra* note 5.

8 In this contribution we will use the acronym CSR to refer indistinctly to the terms Corporate Responsibility, Corporate Social Responsibility, Corporate Social and Environmental Responsibility.

9 DAHLSRUD, Alexander. How Corporate Social Responsibility Is Defined: An Analysis of 37. Definitions. Corporate Social Responsibility and Environmental Management, 2008, 15(1), pp. 1-13.

refer to its connection to the reference framework “Protect, Respect, Remedy” of the United Nations (UN) and carry a joint analysis of the CSR and the proposals and recommendations of both the Global Compact and the Organization for Economic Cooperation and Development (OECD).

1.1 CORPORATE RESPONSIBILITY IN THE INTERNATIONAL FIELD

In the 1950s it was accepted that “CSR refers to the obligation of businessmen to pursue those policies, to make those decisions, or to follow those lines of action which are desirable in terms of the objectives and values of our society”[10]. This means that the understanding started spreading that companies could be expected and demanded more than what they were expected to legally comply with. This was particularly so at the international level, where obligations cannot be directly created for them. Such an understanding goes against the prevailing perception of that the companies’ profit seeking is incompatible with concerns about the socioenvironmental impacts of their activities. Friedman[11] reinforced the disparity in this balance with his famous statement that “the social responsibility of business is to increase its profits” in accordance with the basic rules of society arising from the law and ethical customs.

The main international efforts directed at multinational companies took place within the United Nations. The initial milestone was a call, in 1972, for “the formation of a Group of Eminent Persons ‘to study the impact of multinational corporations on economic development and international relations[12]”. In 1982, the group delivered a preliminary version of an international investment regulation code addressed to states and transnational companies (TNCs). However, the idea of such a code was officially abandoned in 1993, mainly due to a prevailing resistance against creating obligations for companies under international law[13].

---

10 BOWEN, Harold R. *Social responsibility of the businessman*. New York: Harper & Row, 1953.

11 FRIEDMAN, Milton. The Social Responsibility of Business is to Increase its Profits. The New York Times Magazine, September 13, 1970. Available at: https://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html Acessed in: Apr. 13th 2018.

12 MORAN, Theodore H. The United Nations and transnational corporations: a review and a perspective. *Transnational Corporations*. Aug. 2009, Vol. 18, No. 2. p. 91-112. SAGAFI-NEJAD, Tagi. *The UN and Transnational Corporations*: From Code of Conduct to Global Compact. Bloomington and Indianapolis: Indiana University Press, 2008.

13 BERNAZ, Nadia. International soft law initiatives on business and human rights. In: BERNAZ, Nadia (Ed.). *Business and Human Rights*. London: Routledge, 2017. pp 164-207. p. 175.

The first concrete measure towards an international document guiding corporate behavior in the international scenario happened in 1996 with the UN Global Compact, whose signatory companies committed to following ten principles in the areas of human rights, labor, the environment and anti-corruption. Such principles were derived from the Universal Declaration of Human Rights, the International Labor Organization Declaration on Fundamental Principles and Rights at Work[14], the Rio Declaration on Environment and Development, and the United Nations Convention against Corruption[15-16]. Therefore, these principles are considered universal.

The Global Compact is not a regulatory mechanism, but instead a platform for companies to dialogue: "besides the commitment made by the company to respect the principles, and the light monitoring mechanism [...], the main point of the Global Compact is to provide a platform for companies to exchange good practices"[17]. Therefore, even if the UN Compact was an important step forward, it was not the proper platform for discussing a draft on the responsibilities of TNCs.

It was only in 1997 that a subcommittee (currently the Human Rights Council) was formed within the United Nations (UN), "with the task of preparing a document on the question of the relationship between the enjoyment of human rights and the working methods and activities of transnational companies"[18]. The proposal of the so-called "Norms", in 2004, was not accepted by the Human Rights Commission, as they were based on the controversial idea that companies could have obligations under international law.

---

14 ILO – International Labor Organization. *International Labor Organization Declaration on Fundamental Principles and Rights at Work.* Available at: https://www.ilo.org/public/english/standards/declaration/ declaration_portuguese.pdf Acessed in: apr. 30th 2019.

15 UN – United Nations. *Rio Declaration on Environment and Development*. 1992. Available at: http://portal.iphan.gov.br/uploads/ckfinder/ arquivos/Carta%20do%20Rio%201992.pdf. Acessed in: may 27th 2019.

16 UNITED NATIONS GLOBAL COMPACT. *The power of principles: Sustainability begins with a principles-based approach to doing business*. Available at: https://www.unglobalcompact.org/what-is-gc/mission/principles. Acessed in: apr. 11th 2018.

17 BERNAZ, Nadia. International soft law initiatives on business and human rights. In: BERNAZ, Nadia (Ed.). *Business and Human Rights*. London: Routledge, 2017. pp 164-207. p. 179.

18 BERNAZ, Nadia. International soft law initiatives on business and human rights. In: BERNAZ, Nadia (Ed.). *Business and Human Rights*. London: Routledge, 2017. pp 164-207. p. 185.

In 2005, the UN General Secretariat appointed a special representative for business and human rights. John Ruggie, who also participated in the team that structured the UN Global Compact, conducted an extensive consultation within a consensus-building process[19]. Such consultation resulted, in 2008, in the three-pillar reference framework "Protect, Respect, Remedy", which was unanimously accepted by the UN Human Rights Council[20-21].

The reference framework was soon followed by the "Guiding Principles on Business and Human Rights: Implementing the United Nations Framework of Reference 'Protect, Respect and Remedy'". Based on the three pillars and the remainder of the consultative process, they were endorsed by the UN Human Rights Council in 2011. The Guiding principles were incorporated by the Organization for Economic Cooperation and Development (OECD) through annex to the Declaration on International Investment and Multinational Enterprises (the OECD guidelines for multinational companies). In 2011, the Guiding Principles were updated, and began to have a more comprehensive focus on human rights and to align with the UN Guiding Principles.

The described developments demonstrate there were changes in perception regarding whether CSR is voluntary or not, but there was also an evolution of the concept of responsibility. From a legal perspective, the use of this term brings with it a series of related definitions and implies a number of consequences. However, Ruggie[22] himself clarified that the use of the term "responsibility" in the context of CSR actually created a new category of standards. The word "responsibility" within CSR should be placed in the social norms, between classical morality and legal norms. This means that "responsibility" should not be interpreted in a legal sense, but rather in the way it is commonly understood by the society.

---

19 BERNAZ, Nadia. International soft law initiatives on business and human rights. In: BERNAZ, Nadia (Ed.). *Business and Human Rights*. London: Routledge, 2017. pp 164-207. p. 191.

20 BERNAZ, Nadia. International soft law initiatives on business and human rights. In: BERNAZ, Nadia (Ed.). *Business and Human Rights*. London: Routledge, 2017. pp 164-207. p. 193.

21 RUGGIE, John Gerard. *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development – Protect, Respect and Remedy*: a Framework for Business and Human Rights. April 7th 2008. Available at: https://www.businesshumanrights. org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf. Acessed in: apr. 11th 2018.

22 RUGGIE, John Gerard. *The Social Construction of the UN Guiding Principles on Business and Human Rights*. Corporate Responsibility Initiative Working Paper Nº 67. Cambridge, MA: John F. Kennedy School of Government, Harvard University. Jun. 2017. p. 13-15.

More recently, CSR has been associated with more than voluntary standards, and the format of the rule has been considered irrelevant. As put by McBarnet[23], the CSR can go beyond the law, through the law, for law, or even against the law. CSR "beyond law" incorporates social expectations in the form of pressure from civil society, changes in consumer and investor expectations, post-scandal reactions, organizational values and culture, or business cases with competitive advantages. CSR "through law" consists of the implementation of CSR through the various forms of official regulation[24]. CSR "for law" can also go "beyond law", but it essentially means complying with its spirit and complementing the limitations of its legal field. CSR "against the law" is defended in legal systems where CSR can be seen as contrary to the law insofar it is interpreted as a breach of the administrative duty of business of maximum profitability[25].

1.2 COMMITMENTS OF THE INVOLVED COMPANIES FOLLOWING TO THEIR DECLARATIONS

One of the main criticisms of the CSR models is the supposed absence of consequences for non-compliance. This is in direct connection with between corporate discourse and corporate practice, and it comes from the fact that all policy and theoretical developments on CSR remain within international *soft law*. This means that, despite all the developments that CSR went through to date, it has still a non-binding character. In this chapter we purport to demonstrate, however, that the non-bindingness of the concept does not mean it is deprived of efficacy.

The essence of the criticism against CSR's non-binding nature is that it involves no legal consequences for non-compliant corporations: "although

---

23 MCBARNET, Doreen. *Corporate social responsibility beyond law, through law, for law: the new corporate accountability*. In: MCBARNET, Doreen; VOICULESCU, Aurora; and CAMPBELL, Tom (eds). *The New Corporate Accountability. Corporate Social Responsibility and the Law*, Cambridge: Cambridge University Press 2007. pp. 1-56.

24 For example, national or international hard law, national or international soft law, self-regulation, ou meta-regulation.

25 Anglo-American companies tend to use the CSR "against the law" perspective, while the German stakeholders' approach combines several perspectives.
MCBARNET, Doreen. Corporate social responsibility beyond law, through law, for law: the new corporate accountability. In: MCBARNET, Doreen; VOICULESCU, Aurora; and CAMPBELL, Tom (eds), The New Corporate Accountability. Corporate Social Responsibility and the Law, Cambridge: Cambridge University Press 2007. pp. 1-56. p. 23.

CSR models are still very popular, their efficiency is questioned from the legal perspective, as they are not legally enforceable and simply rely on goodwill of the companies"[26].

Such approaches usually go hand in hand with critical voices raised against initiatives that depend on reports made voluntarily by companies. Reports, even when mandatory, are based on awareness of and regulation through market players, so they end up having a similar effect to that of voluntary tools. In this sense, some authors say that "since almost all these initiatives are still selective and reporting criterias are vague, it is not an efficient way to force companies to act responsible"[27] (sic).

There are three main problems with these critical arguments.

The first problem is that the CSR comes as an alternative to the traditional, positivist, legal format, which would be unable to deal with the issue of global externalities. Such a traditional, positivist, legal approach, is the same one used to formulate the mentioned criticism. Therefore, the criticism creates a paradox that is difficult to overcome, as it means a logical impossibility. Starting from this perspective could mean entering a circular argument, which is fruitless.

The second problem is that this criticism is implicitly based on a concept that is being progressively overcome, namely the understanding of CSR as a set of voluntary norms. As discussed earlier in this contribution, not all CSR tools and approaches are voluntary and/or non-binding. Consequently, criticizing the CSR for being voluntary is a composition fallacy[28].

The third problem is that this criticism seems to forget the basic reason why the CSR was conceived, namely, to fill a governance gap. This means that purely state law or regulations lack the tools to address the issue of transnational externalities. In this sense, it is illogical to propose that these same (insufficient) tools are addressed with state regulation without external assistance. Furthermore, the main reason for the governance gap is the complexity of the

[26] EROGLU, Yrd. Doç Dr. Muzaffer. How to Achieve Sustainable Companies: Soft Law (Corporate Social Responsibility and Sustainable Investment) or Hard Law (Company Law). Kadin Has Universitesi, Hukuk Fakultesi Dergisi, Haziran 2014, Cilt: 2 – Say 1:1. pp. 87-108. p. 89.

[27] EROGLU, Yrd. Doç Dr. Muzaffer. *How to Achieve Sustainable Companies:* Soft Law (Corporate Social Responsibility and Sustainable Investment) or Hard Law (Company Law). Kadin Has Universitesi, Hukuk Fakultesi Dergisi, Haziran 2014, Cilt: 2 – Say 1:1. pp. 87-108. p. 94.

[28] A composition fallacy occurs when the argument considers a characteristic true for the whole just because it is true for a part.

legal context – as explained in out introductory remarks – where companies operate. One reason for this complexity is the lack of technical information, which often only corporations possess. Therefore, including them in voluntary efforts related to prevent harms to human rights and to the environment is also a strategy for accessing the missing information.

In addition to the structural problems that we have identified in the critical voices which have been raised against the CSR's, such criticism is also partially not true. Some academic literature[29] indicates we are moving towards mechanisms that transform initially voluntary instruments into enforceable ones. Although such mechanisms are not the focus of this contribution, acknowledging them and understanding the way they operate is crucial to the discussion.

There are possibilities of enforcing CSR within criminal law, if the duty of care is not fulfilled, but another way of enforcing CSR would be through private law[30]. For instance, contractual terms providing for CSR could be used in terms and conditions sent to suppliers. Another way would be to consider as an unfair

[29] EIJSBOUTS, Jan. Corporate codes, transforming from voluntary self-regulatory into mandatory co-regulatory instruments in corporate governance and responsibility. *Indiana Journal of Global Legal Studies* Vol. 24, Nº 1 (Inverno 2017), pp. 181-205.

MCBARNET, Doreen. Corporate social responsibility beyond law, through law, for law: the new corporate accountability. In: MCBARNET, Doreen; VOICULESCU, Aurora; and CAMPBELL, Tom (eds), The New Corporate Accountability. Corporate Social Responsibility and the Law, Cambridge: Cambridge University Press 2007. pp. 1-56.

[30] In this sense, see *e.g.*:
MITKIDIS, Katerina. Peterkova. Sustainability Clauses in International Supply Chain Contracts: Regulation, Enforceability and Effects of Ethical Requirements. Nordic Journal of Commercial Law 2014/1, pp. 1-30.
PONCIBÒ, Cristina. The Contractualization of Environmental Sustainability. European Review of Contract Law, (2016) Vol. 12, Nº 4, pp. 335-355.
BECKERS, Anna. The Regulation of Market Communication and Market Behaviour: Corporate Social Responsibility and the Directives on Unfair Commercial Practices and Unfair Contract Terms. Common Market Law Review (2017) Vol. 54, Nº 2.
BECKERS, Anna. Enforcing corporate social responsibility codes: On global self-regulation and national private law (International studies in the theory of private law, volume 12). Oxford: Hart Publishing, 2015.
EIJSBOUTS, Jan. Corporate codes, transforming from voluntary self-regulatory into mandatory co-regulatory instruments in corporate governance and responsibility. Indiana Journal of Global Legal Studies Vol. 24, Nº 1 (Inverno 2017), pp. 181-205.
DAM, Cees Van. Enhancing Human Rights Protection: A Company Lawyer's Business. Aula Inaugural Rotterdam School of Management, Erasmus University, 18 September 2015.

commercial practice the advertisement by a company of self-regulatory CSR practices that are in the end not complied with[31].

An additional aspect that weakens the criticism to CSR is the difficulty of resolving the governance gap at the international level through a binding instrument. The impossibility of reaching an agreement on a CSR treaty that we have demonstrated in the previous chapter is an example of how such an approach can delay the implementation of solutions[32].

The criticism seems also to depart from the assumption that a non-binding rule is necessarily ineffective. However, studies show that this is not always the case and that the efficiency of CSR standards depends more on other factors than on legal enforceability.

This is shown, for example, by empirical research on corporate due diligence on human rights conducted by the British Institute of International and Comparative Law and the Norton Rose Fullbright LLP Corporate Ethics and Anti-Corruption Group[33]. Here, data was collected through a survey answered by 152 companies[34] and concluded that twelve components can be synthesized for the process of implementing CSR within the business. "One or more of these components are being undertaken to varying degrees within all the companies [...] interviewed, although in many companies they are not expressly referred to as steps within a HRDD process"[35]. Moreover,

> there is, accordingly, a forward-looking, ongoing process of 'learning by doing'. As [the] research

31 Different countries already have jurisprudence considering unfair commercial practice when companies fail to comply with commitments made in their codes of conduct. See, for example, Kasky vs. Nike (USA – California Supreme Court), Verbraucherzentrale Hamburg vs. Lidl (Germany), and decisions by consumer authorities against Volkswagen in Italy, the Netherlands and the USA.

32 *Cf.*: CASSELL, D.; RAMASASTRY, A. White Paper: Options for a Treaty on Business and Human Rights, Notre Dame Journal of International and Comparative Law (2016), Vol. 6, Nº 1, pp. 1-50.

33 MCCORQUODALE, Robert; SMIT, Lise; NEELY, Stuart; BROOKS, Robin. Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises. *Business and Human Rights Journal*, 2 (2017), pp. 195-224.

34 MCCORQUODALE, Robert; SMIT, Lise; NEELY, Stuart; BROOKS, Robin. Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises. *Business and Human Rights Journal*, 2 (2017), pp. 195-224. p. 197.

35 MCCORQUODALE, Robert; SMIT, Lise; NEELY, Stuart; BROOKS, Robin. Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises. *Business and Human Rights Journal*, 2 (2017), pp. 195-224. p. 224.

> makes clear, this process of HRDD requires detailed knowledge of company practices to ensure that any developments in regulation assists both the companies and those affected by their human rights impact[36].

In general, empirical studies like this reaffirm the main argument we raised in this topic: voluntary norms alone do not solve the problem. Still, they must play a role in the regulatory mix that leads to the effectiveness and efficiency of CSR[37].

Finally, even those who support the criticism of the supposed absence of consequences for non-compliance agree that

> [...] these arguments should not lead to the conclusion that CSR or sustainability policies are not resourceful. It is worth mentioning that conducting business in line with moral norms is also a stakeholder value-increasing business approach. There is no doubt that these soft law additions to hard law considerably contribute to bringing important issues to the attention of companies and also altering management behavior[38].

Therefore, the evidence points, once again, to the need for a regulatory mix, where voluntary standards play an important role.

The considerations in this chapter show the complexity of corporate responsibility standards. They have a multifaceted nature and, even though there is often a mismatch between CSR theory and corporate practice, and it is difficult to implement several of the standards, CSR's standards are moving in

---

[36] MCCORQUODALE, Robert; SMIT, Lise; NEELY, Stuart; BROOKS, Robin. Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises. *Business and Human Rights Journal*, 2 (2017), pp. 195-224. p. 224.

[37] In this sense, see also, *e.g.*:
LOCKE, Richard M. The Promise and Limits of Private Power. London: Cambridge University Press, 2013.
LOCKE, Richard M.; ROMIS, Monica. The promise and perils of private voluntary regulation: Labor standards and work organization in two Mexican garment factories, Review of International Political Economy (2010), 17:1, 45-74.

[38] EROGLU, Yrd. Doç Dr. Muzaffer. How to Achieve Sustainable Companies: Soft Law (Corporate Social Responsibility and Sustainable Investment) or Hard Law (Company Law). Kadin Has Universitesi, Hukuk Fakultesi Dergisi, Haziran 2014, Cilt: 2 – Say 1:1. pp. 87-108. p. 98.

an optimistic direction. We build on these considerations while analysing the case study we have selected for this contribution, namely that of the rupture and overtopping of the Mariana/MG dams and the resulting TTAC.

1.2.1 Obligations of vale, BHP and Samarco within the protect-respect--remedy framework and the global compact

In order to assess what were the obligations of Vale, BHP and Samarco, it is important to briefly refer to content of the frame of reference and its three pillars. The first pillar – to protect – concerns the State's duty to protect human rights while reaffirming existing obligations already previously existent under international law. The second pillar – to respect – refers to the corporate responsibility of respecting human rights as a global standard of expected conduct. Last but not least, the third pillar – to remedy – focuses on access to remedies for those affected, and that includes both legal/formal and non-judicial/informal actions[39].

The frame of reference and the documents resulting thereof consist of a clear attempt to reconcile interests of ensuring support and consensus among all sectors after the failure of previous attempts to create legal obligations for companies. See, for example, that the language refers to duties only for the States, while the language used in the second pillar, focused on corporations, is deliberately ambiguous. In presenting his report to the UN Human Rights Council, John Ruggie clarifies that

> The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.[40]

---

[39] RUGGIE, John Gerard. *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development – Protect, Respect and Remedy*: a Framework for Business and Human Rights. 7 apr. 2008. Available at: https://www.business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf. Acessed in: 11 apr. 11th 2018.

[40] RUGGIE, John G. *Presentation of Report to United Nations Human Rights Council*: Professor John G. Ruggie Special Representative of the Secretary-General for Business and Human Rights. Genebra, 30

Principles 25 to 31 of the document adopted by the UN deal directly with the third pillar, and they will be described and discussed below.

Principle 29 is within the principles that establish standards of conduct for companies. This principle states that:

> To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.[41]

According to the explanatory part of the document, by allowing the affected parties to report the infringements and by allowing remedies to come in an an early stage, these reporting channels have the potential of being highly effective[42].

Principle number 30 states: "Industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available"[43]. This principle reflects a concern similar to that of Principle 29, but within Principle 30 but, this time, the obligation of ensuring availability of effective grievance mechanisms is directed at private institutions, which traditionally have more complex structures then public institutions. By imposing this obligation, Principle 30 seeks to ensure that the systems – especially those reported by the aggrieved parties – work collaboratively, both within the same institution or with partner

may 2011. Available at: https://www.ohchr.org/Documents/Issues/TransCorporations/HRC%20 2011_Remarks_Final_JR.pdf Acessed in: aug. 5th 2019.

41 UNITED NATIONS HUMAN RIGHTS. *Guiding Principles on Business and Human Rights*: Implementing the United Nations "Protect, Respect, Remedy" Framework – John Ruggie's final report – General-Secretary special representative. Mar. 2012. Available at: https://www.socioambiental.org/sites/blog.socioambiental.org/files/nsa/arquivos/conectas_principiosorientadoresruggie_mar20121.pdf Acessed in: jun. 11th 2019. p. 21.

42 UNITED NATIONS HUMAN RIGHTS. *Guiding Principles on Business and Human Rights*: Implementing the United Nations "Protect, Respect, Remedy" Framework. 2011. Available at: https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf Acessed in: nov. 13th 2018. p. 31-32.

43 UNITED NATIONS HUMAN RIGHTS. *Guiding Principles on Business and Human Rights*: Implementing the United Nations "Protect, Respect, Remedy" Framework – John Ruggie's final report – General-Secretary special representative. Mar. 2012. Available at: https://www.socioambiental.org/sites/blog.socioambiental.org/files/nsa/arquivos/conectas_principiosorientadoresruggie_mar20121.pdf Acessed in: jun. 11th 2019. p. 22.

institutions. The Guiding Principles' explanatory text includes, *inter alia*, codes of conduct, rules of conduct, global framework agreements between unions and transnational companies, so it focuses particularly in reporting violations[44].

The third and last principle related to remedies that are obligations of companies is Principle 31, which, in fact, deals with both judicial and non-judicial mechanisms for reporting. It describes, thus, the characteristics that such mechanisms must have, namely: legitimacy, accessibility, predictability, equity, transparency, compatibility with rights, constituting a source of continuous learning, based on participation and dialogue[45].

Although this contribution focuses on corporate obligations, in view of the nature of TTAC, which is the central object of our analysis, it is also important to go through the principles that deal with the States' duties and obligations in relation to remedies. In this context, Principle 25 seems to describe the principle of access to justice in a broad sense:

> As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.[46]

Principle 26 complements Principle 25 by seeking to guarantee the quality of said access to justice. It focuses on how to ensure effectiveness of remedies and avoid obstacles to them. The explanation of this principle in the document

[44] UNITED NATIONS HUMAN RIGHTS. *Guiding Principles on Business and Human Rights*: Implementing the United Nations "Protect, Respect, Remedy" Framework. 2011. Available at: https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf Acessed in: nov. 13th 2018. p. 32-33.

[45] UNITED NATIONS HUMAN RIGHTS. *Guiding Principles on Business and Human Rights*: Implementing the United Nations "Protect, Respect, Remedy" Framework – John Ruggie's final report – General-Secretary special representative. Mar. 2012. Available at: https://www.socioambiental.org/sites/blog.socioambiental.org/files/nsa/arquivos/conectas_principiosorientadoresruggie_mar20121.pdf Acessed in: jun. 11th 2019. p. 22-23.

[46] UNITED NATIONS HUMAN RIGHTS *Guiding Principles on Business and Human Rights*: Implementing the United Nations "Protect, Respect, Remedy" Framework – John Ruggie's final report – General-Secretary special representative. Mar. 2012. Available at: https://www.socioambiental.org/sites/blog.socioambiental.org/files/nsa/arquivos/conectas_principiosorientadoresruggie_mar20121.pdf Acessed in: jun. 11th 2019. p. 19.

lists several types of obstacles that must be avoided. One of them refers to "when State prosecutors lack adequate resources, expertise and support to meet the State's own obligations to investigate individual and business involvement in human rights-related crimes". The explanatory text emphasizes that on several occasions these obstacles are caused by inequalities between the parties involved in a case of human rights violations[47].

Principle 27[48] continues to complement this logic, but with emphasis on the importance of integrated and complete mechanisms or, in other words, mechanisms that are not restricted to the judicial sphere. As Principle 28 elucidates, such mechanisms must be easily accessible[49].

It was upon these principles that the Global Compact built their own ten principles that are binding upon the companies that sign it. Even though it is a non-binding document, it is a steady step forward in the recognition of the values embedded in such principles. Remember that the UN Guiding Principles were agreed by the States, although with informal support from the market. Thus, the Global Compact means a step forwards towards the involvement of companies in establishing corporate obligations under international law.

All ten principles deal with preventive conducts to be adopted by companies in the areas of human rights, labor, the environment, and anti-corruption[50]. Therefore, when addressing concerns regarding remedies for violations, they should be interpreted extensively from these ten preventive principles, namely:

---

47 UNITED NATIONS HUMAN RIGHTS. *Guiding Principles on Business and Human Rights*: Implementing the United Nations "Protect, Respect, Remedy" Framework. 2011. Available at: https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf Acessed in: nov. 13th 2018. p. 28-30.

48 UNITED NATIONS HUMAN RIGHTS. *Guiding Principles on Business and Human Rights:* Implementing the United Nations "Protect, Respect, Remedy" Framework – John Ruggie's final report – General--Secretary special representative. Mar. 2012. Available at: https://www.socioambiental.org/sites/blog.socioambiental.org/files/nsa/arquivos/conectas_principiosorientadoresruggie_mar20121.pdf Acessed in: jun. 11th 2019. p. 20-21.

49 UNITED NATIONS HUMAN RIGHTS. *Guiding Principles on Business and Human Rights*: Implementing the United Nations "Protect, Respect, Remedy" Framework – John Ruggie's final report – General--Secretary special representative. Mar. 2012. Available at: https://www.socioambiental.org/sites/blog.socioambiental.org/files/nsa/arquivos/conectas_principiosorientadoresruggie_mar20121.pdf Acessed in: jun. 11th 2019. p. 21.

50 GLOBAL COMPACT. *The Ten Principles.* Available at: https://www.pactoglobal.org.br/10-principios Acessed in: aug. 10th 2019.

1. Businesses should support and respect the protection of internationally proclaimed human rights.
2. make sure that they are not complicit in human rights abuses.
3. Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining.
4. the elimination of all forms of forced and compulsory labour.
5. the effective abolition of child labour.
6. the elimination of discrimination in respect of employment and occupation.
7. Businesses should support a precautionary approach to environmental challenges.
8. undertake initiatives to promote greater environmental responsibility.
9. encourage the development and diffusion of environmentally friendly technologies.
10. Businesses should work against corruption in all its forms, including extortion and bribery[51].

It is argued here that all of ten principles can suffer adaptations to address the damage already caused. This may be due to the aim of ensuring such principles are respected at the time where remedies are implemented or that these principles are not negatively impacted by corporate action.

2 THE REMEDIES OF THE TERMS OF TRANSACTION AND ADJUSTMENT OF CONDUCT OF 03/02/2016: BETWEEN INTERNATIONAL PROVISIONS AND THE MARIANA DISASTER

To enable the application of the theory presented to the TTAC[52] under analysis, a few preliminary, explanatory considerations are needed. The objective of the TTAC was to help remedy the social and environmental damage caused by the tragedy. It is thus natural that the analysis presented in this chapter

[51] GLOBAL COMPACT. *The Ten Principles*. Available at: https://www.pactoglobal.org.br/10-principios Acessed in: aug. 10th 2019.

[52] Union. *Termos of Transaction and Adjustment of Condut*. 02 mar. 2016. Available at: https://www.samarco.com/wp-content/uploads/2016/07/TTAC-FINAL.pdf Acessed in: apr 11th 2019.

focuses on the remedies for corporate violations, which is also the focus of this contribution. However, bearing in mind that the term consists of 260 clauses throughout 119 pages (not including attachments) the analysis will be limited to the aspects which are most relevant for the topic of this contribution.

A first observation is the long list of signatories to the term. The Federal Public Administration, represented by the Federal Attorney General: Union; the Brazilian Institute for the Environment and Renewable Natural Resources (IBAMA); the Chico Mendes Institute; the National Water Agency (ANA); the National Department of Mineral Production (DNPM); the National Indian Foundation (FUNAI); the Minas Gerais state organs that were represented by the Attorney General of the State of Minas Gerais: State of Minas Gerais; State Forestry Institute (IEF); the Minas Gerais Water Management Institute (IGAM); the State Environment Foundation (FEAM); the state organs of Espírito Santo, represented by the Attorney General of the State of Espírito Santo: State of Espírito Santo; State Institute of Environment and Water Resources (IEMA); the Institute of Agricultural and Forestry Defense (IDAF); the State Water Resources Agency (AGERH) and the companies Samarco Mineração S.A. (Samarco), Vale S.A. (Vale) and BHP Billiton Brasil Ltda. (BHP).

Starting by the first chapter, the central objective of the agreement (clauses 2 and 5) was the development of projects and programs – of a compensatory, as opposed to a punitive, nature – in the areas impacted by the tragedy, aiming at restoring the situation which existed immediately prior to 11/05/2015. Such programs were to be designed, developed and implemented by the Renova Foundation, which was also established under this TTAC. Clause 5, item XIV, described what such projects and programs should consider. Their items can be understood as binding principles:

a) transparency of the actions and the involvement of the communities in the discussions about the measures to be planned and executed;
b) preference for hiring and using local and regional labor to stimulate the economy of Minas Gerais and Espírito Santo;
c) carrying out socioeconomic actions in compliance with sectoral standards and public policies;
d) establishment of schedules, subject to time limitations imposed by administrative processes, indicating proposed dates for the beginning and end of the actions, goals and defined indicators;

e) dissemination of information about the EVENT and ongoing actions;

f) interlocution and dialogue between the FOUNDATION, the INTERFEDERATIVE COMMITTEE and the IMPACTED;

g) permanent monitoring of the actions contemplated in the PROGRAMS and PROJECTS under the terms of the Agreement; and

h) responsible and planned execution of the PROGRAMS, avoiding the environmental and social impacts resulting from the PROGRAMS themselves or, if impossible, mitigating them.[53]

Clauses 6 and 7 established similar principles, but such principles were focused on the elaboration and execution of projects, programs and other activities by the foundation and by the committed companies.

In Clause 9, all parties recognized that in all socioeconomic programs the aggrieved parties have a guarantee to repair, participation, information and restitution of public and community assets. Clause 10, in turn, deals with tools such as replacement, restitution, and indemnity.

The second and third chapters deal with socio-economic and socio--environmental programs, respectively, specifying areas and approaches to be adopted. At various times, especially with regard to socio-environmental programs, the amounts to be disbursed by the committing companies are also specified in the document.

The fourth chapter establishes general rules that must be observed by both kinds of programs and then the fifth chapter describes the nature, structure and organization of the program manager and executor, the foundation now established as the RENOVA Foundation. Several amounts are also specified therein.

Finally, it is worth stressing that the TTAC was signed with the purpose, as evidenced in clause 253 and other provisions, of extinguishing, with merit resolution, the case number 69758-61.2015.4.01.3400. Such case was then in the 12th Court of the Judicial Section of Minas General, which is the jurisdiction for the execution of the agreement.

---

[53] União. *Termos de Transação e Ajustamento de Condutas.* 02 mar. 2016. Available at: https://www.samarco.com/wp-content/uploads/2016/07/TTAC-FINAL.pdf Acessed in: apr 11th 2019. p. 15-16.

2.1 THE REMEDIES PROVIDED BY THE TTAC AND BY THE INTERNATIONAL LAW: AN ANALYSIS OF THE COMMITMENTS OF VALE S.A., BHP AND SAMARCO

The TTAC seems to assist in overcoming the main challenges for holding companies accountable for environmental and human rights violations at the international level, in particular by outlining the applicable law and jurisdiction. However, for the case in question, this does not mean great progress, as both action, violation and impacts occurred within the Brazilian borders.

Nevertheless, from the point of view of the obstacles to access to justice imposed by the magnitude of the tragedy – that is, the difficulties inherent in collective/class actions such as financial means, representation in court and obtaining evidence – it seems that the TTAC comes as a great benefit for facilitating access to justice the victims. A consensual solution to end procedural litigation not only speeds up attempts to redress those impacted, but also prevents such difficulties, which often prevent access to remedies against violations.

These two aspects are the most immediate and appear to be the most positive regarding the adoption of the TTAC. However, they do not exhaust the analysis, which must necessarily take into account the scenario of contradictions established in modern times by the advances in capitalism and the consequent tensions between States, markets and society[54].

A central issue is inequality between the parties involved in the issue. In the case of the Mariana disaster, the issue was the inequality between the three companies, the people affected and the State itself. With regard to civil society, its hyposufficiency is evident in all aspects, be it financially, organizationally or technically. Regarding the State, despite the number and diversity of organs represented in the TTAC, Public Prosecutors are responsible for the lawsuits, negotiations, representations, etc. Data are still lacking to affirm it categorically, but the very logic of the Public Prosecutor's Office, with limited apparatus but needing to act on several fronts, reinforces the perception that the State is also hyposufficiency in confronting the power of multinational giants.

In Brazil, as in several other countries, the imbalance between the parties is noticeable in the legislative gap. Here, "the processes of environmental depletion

[54] CORDEIRO, Isabela de Deus; BUSSINGUER, Elda Coelho de Azevedo. *Ecologia Crítica:* Estado, mercado e sociedade – uma análise para um retorno do metabolismo do homem com a natureza. São Paulo: Hucitec, 2018.

were related, among other factors, to public policies that, under the argument of national development, worked to destroy very traditional and specific forms of management of local communities"[55]. It is spoken of a state of exception – that is, a gap left by the State – that is destructive to the environment[56].

Something that draws attention to the TTAC is the belief that is placed in the Foundation that was established from it. In fact, it is precisely in this context that all the arguments that have been constructed in the CSR are being described and defended in this contribution. However, the Foundation was not only fully funded but also fully organized, managed and controlled by the companies. It couldn't be much different in terms of organization and finances, in the sense that the companies that caused the damage should be responsible for remedying them. However, the TTAC does not seem to contribute for balancing the aforementioned inequalities, as it does not significantly include civil society in the processes. What balances this equation is the constitution of the inter-federative committee as an external and independent instance of the Foundation, which monitors and inspects results.

One can also note that the TTAC has a largely assistential characteristic, since, with the passive position of recipient of actions and reparations, there is little room for civil society participation. This even goes against the predictions we have analyzed of the UN's Guiding Principles for Business and Human Rights. Such characteristics make it clear the (re)embedding[57] of the economy in society, as well as the limitations of the TTAC in correcting its harmful effects.

It is also Polanyi who remembers that "the founding category of the free market is theoretically and historically engendered", leading to "the need to expose the processes by which the market separated itself from other social

[55] CORDEIRO, Isabela de Deus; BUSSINGUER, Elda Coelho de Azevedo. *Ecologia Crítica:* Estado, mercado e sociedade – uma análise para um retorno do metabolismo do homem com a natureza. São Paulo: Hucitec, 2018. p. 211.

[56] GONÇALVES, Luísa Cortat Simonetti; FABRIZ, Daury César. Projeto do Novo Código Florestal Brasileiro: um estado de exceção permanente destrutivo do ambiente. In: ULHOA, Paulo Roberto; FARO, Julio Pinheiro (coords.). Vitória: Cognorama, 2014. p. 51-64.

[57] In the terminology proposed and disseminated by Karl Polanyi. See, *e.g.:*

POLANYI, Karl. A grande transformação. 2ed. Rio de Janeiro: Elsevier, 2000.
POLANYI, Karl. A nossa obsoleta mentalidade mercantil. Revista Trimestral de História das Idéias, nº 1, pp. 7-20. Porto (Portugal), 1977.
GARLIPP, José Rubens Damas. Marx, Keynes e Polanyi e a Riqueza no Capitalismo Contemporâneo. Econ. Ensaios, Uberlândia, 15 (2): 5-41, jul./2001.

institutions, intending to be self-regulating, in the wake of an autonomous economic sphere with the intention of dominating society". The solutions adopted within the scope of the CSR, however, do not yet disentangle themselves from historically consolidated perceptions.

In the same way that there are not such robust advances in relation to the claims made by the UN Guiding Principles, there is no realization of the Principles of the Global Compact. On the one hand, they are not realized *immediately*, because they deal with preventive conduct, which was clearly not complied with since the disaster. They are also not realized *mediately*, because, although they are reinterpreted to build principles for the remediation of damages, they do not find correspondence in the TTAC.

2.2 IMPORTANCE OF CIVIL SOCIETY

The entire construction and evolution of CSR takes place by preventing and remedying damage caused by transnational companies to individuals and groups of individuals. For this reason, it is natural the emphasis that international principles place on the affected parties. Even so, there is an imbalance in the treatment of the TTAC when comparing the roles attributed to companies, government and civil society.

In a nutshell, we can affirm that companies have a responsibility to remedy, either by repairing or compensating; state organs have a responsibility for monitoring the performance of these companies through the foundation established for the purposes of preparing and implementing projects and programs; and civil society has a passive role, as the recipient of private and public actions.

This criticism does not disregard the complexity of including the community in the post-tragedy process. In addition to the usual difficulties of representativity, there is the question of heterogeneity and the fact that the community was only established as a group of converging interests due to the event itself, meaning that there were no representative instances previously constituted specifically for this purpose. However, we consider that this complexity cannot serve as a justification for excluding those affected from the decision-making and the implementation process.

Furthermore, civil society has shown itself to be more capable than the complexity of the situation would indicate. The most visible and tangible example is that of Vale leaving the Global Compact.

On the initiative's official website, there is only information about Vale S.A. joining on September 12, 2007 and its status as excluded from the list of members at the company's own request[58]. The Vale website also contains information that the UN Global Compact is one of Vale's institutional partners[59]. But the available news[60] and documents lead to the understanding that the motivation for Vale's departure was the pressure from civil society.

Vale's departure is still a small step in solving the dispute in the case under analysis, as the practical impacts for the company are restricted to "blaming and shaming"[61] and CSR partnerships always bring some positive publicity for the parties involved. Furthermore, the pressure to leave was only possible because a second similar tragedy happened in Brumadinho/MG in January 2019. Nevertheless, such a departure demonstrates the capacity for mobilization, pressure and the provocation of changes that civil society has. With this, it is demonstrated that the community should receive more space in the processes of remediation of the damages caused by the rupture of the dam in Mariana, and that, regardless of the officially granted space, civil society should occupy the space that is rightfully theirs.

CONCLUDING REMARKS

In view of the way discussions and documents related to corporate responsibility have been evolving, we may no longer questions the importance of imposing obligations on companies in relation to the impacts they cause; only whether the assessment of the legality of the ways the use is controversial.

---

58 GLOBAL COMPACT. *Company Information:* Vale S.A. Available at: https://www.unglobalcompact.org/ what-is-gc/participants/2367-Vale-S-A. Acessed in: aug. 12th 2019.

59 VALE. *About Vale:* institutional partnerships. Available in: http://www.vale.com/brasil/PT/aboutvale/ institutional-partnerships/Paginas/default.aspx Acessed in: aug. 12th 2019.

60 See, *e.g.*:
REUTERS. Organizações pedem exclusão da Vale do Pacto Global da ONU. 12 fev. 2019. Available at: https://exame.abril.com.br/brasil/organizacoes-pedem-exclusao-da-vale-do-pacto-global-da-onu/ Acessed in: jul. 19th 2019.
CONECTAS. Após pressão, Vale se retira da rede de responsabilidade social criada pela ONU. May 28th 2019. Available at: https://www.conectas.org/noticias/apos-pressao-vale-se-retira-de-rede-de-responsabilidade-social-criada-pela-onu Acessed in: jul. 19th 2019.
CHADE, Jamil. Pressionada, Vale sai de pacto mundial de responsabilidade social. May 29th 2019. Available at: https://jamilchade.blogosfera.uol.com.br/2019/05/29/pressionada-vale-sai-de-pacto-mundial-de-responsabilidade-social/ Acessed in: jul. 19th 2019.

61 Expression used in the scope of international law to refer to the informal effects of embarassment with regard to the international market of conducts that breach the commitments made.

The pace of international normative progression is naturally slow, and in this case even more so because of the resistance to increase obligations directed at companies, and the formatting of international law, which prevents regulation of companies. Even so, new solutions are emerging within the scope of soft law and through indirectly binding norms. The later becomes even stronger because of the acceptance that transnational companies are showing to join voluntary initiatives.

The case of the Mariana/MG tragedy is, however, just another demonstration that there is often an abyss between discourse and corporate practices. In the case of the commitments made by Vale, BHP and Samarco, the commitment to the Global Compact, which should be read in conjunction with the UN Guiding Principles on Business and Human Rights, is particularly relevant. And in the context of this article, it is necessary to focus on the remedy pillar of the UN referential framework. In view of these assumptions, this article demonstrated that there is a great deal of compatibility between the TTAC signed on 03.02.2016 and the international CSR guidelines. However, it has also been shown that the term ends up failing in one aspect that is vital for an adequate implementation of CSR as intended by the international community: the effective participation of those affected.

The complexity of involving civil society in the remediation of damages is recognized when we are dealing with events of great magnitude. This cannot excuse, however, the non-observance of such an essential element as public participation. Furthermore, the role of civil society despite the TTAC confirmed the importance and feasibility of such a participation. In the specific case of the Mariana tragedy, this article even demonstrated the ability of civil society to influence the international network to promote the CSR.

REFERENCES

BECKERS, Anna. *Enforcing corporate social responsibility codes:* On global self-regulation and national private law (International studies in the theory of private law, volume 12). Oxford: Hart Publishing, 2015.

______. The Regulation of Market Communication and Market Behaviour: Corporate Social Responsibility and the Directives on Unfair Commercial Practices and Unfair Contract Terms. *Common Market Law Review* (2017) Vol. 54, Nº 2.

BERNAZ, Nadia. International soft law initiatives on business and human rights. In: BERNAZ, Nadia (Ed.). *Business and Human Rights*. London: Routledge, 2017. pp. 164-207.

BOWEN, Harold R. *Social responsibility of the businessman*. New York: Harper & Row, 1953.

CASSELL, D.; RAMASASTRY, A. White Paper: Options for a Treaty on Business and Human Rights, *Notre Dame Journal of International and Comparative Law* (2016), Vol. 6, Nº 1, pp. 1-50.

CHADE, Jamil. *Pressionada, Vale sai de pacto mundial de responsabilidade social*. 29 maio 2019. Disponível em: https://jamilchade.blogosfera.uol.com.br/2019/05/29/ pressionada-vale-sai-de-pacto-mundial-de-responsabilidade-social/ Acesso em: 19 jul. 2019.

CONECTAS. *Após pressão, Vale se retira da rede de responsabilidade social criada pela ONU*. 28 maio 2019. Disponível em: https://www.conectas.org/noticias/apos- pressao-vale-se-retira-de-rede-de-responsabilidade-social-criada-pela-onu Acesso em: 19 jul. 2019.

CONECTAS (tradutor). *Empresas e Direitos Humanos:* Parâmetros da ONU para proteger, respeitar e reparar – relatório final de John Ruggie – representante especial do Secretário-Geral. Mar. 2012. Disponível em: https://www.socioambiental.org/sites/blog. socioambiental.org/files/nsa/arquivos/conectas_principiosorientadoresruggie_mar20121.pdf Acesso em: 11 jun. 2019.

CORDEIRO, Isabela de Deus; BUSSINGUER, Elda Coelho de Azevedo. *Ecologia Crítica:* Estado, mercado e sociedade – uma análise para um retorno do metabolismo do homem com a natureza. São Paulo: Hucitec, 2018.

Corte de Justiça de Hamburgo. *Verbraucherzentrale Hamburg vs. Lidl*. 06 abr. 2010. Disponível em: https://www.vzhh.de/recht/30332/Lidl_Klage.pdf Acesso em: 14 jul. 2019.

DAHLSRUD, Alexander. How Corporate Social Responsibility Is Defined: An Analysis of 37 Definitions. *Corporate Social Responsibility and Environmental Management*, 2008, 15(1), pp. 1-13.

DAM, Cees Van. *Enhancing Human Rights Protection:* A Company Lawyer's Business. Aula Inaugural Rotterdam School of Management, Erasmus University, 18 September 2015.

EIJSBOUTS, Jan. Corporate codes, transforming from voluntary self-regulatory into mandatory co-regulatory instruments in corporate governance and responsibility. *Indiana Journal of Global Legal Studies* Vol. 24, No. 1 (Inverno 2017), pp. 181-205.

EROGLU, Yrd. Doç Dr. Muzaffer. *How to Achieve Sustainable Companies:* Soft Law (Corporate Social Responsibility and Sustainable Investment) or Hard Law (Company Law). Kadin Has Universitesi, Hukuk Fakultesi Dergisi, Haziran 2014, Cilt: 2 – Say 1:1. pp. 87-108.

FRIEDMAN, Milton. *The Social Responsibility of Business is to Increase its Profits*. The New York Times Magazine, September 13, 1970. Disponível em: https://www.colorado.

edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html Acesso em: 13 abr. 2018.

GARLIPP, José Rubens Damas. Marx, Keynes e Polanyi e a Riqueza no Capitalismo Contemporâneo. *Econ. Ensaios,* Uberlândia, 15 (2): 5-41, jul./2001.

GONÇALVES, Luísa Cortat Simonetti; FABRIZ, Daury César. Projeto do Novo Código Florestal Brasileiro: um estado de exceção permanente destrutivo do ambiente. In: ULHOA, Paulo Roberto; FARO, Julio Pinheiro (coords.). Vitória: Cognorama, 2014. p. 51-64.

Justiça Federal Alemã. *Capital Markets Model Case Act – KapMuG*. 23 jun. 2017. Disponível em: http://www.gesetze-im-internet.de/englisch_kapmug/index.html Acesso em: 14 jul. 2019.

LOCKE, Richard M. *The Promise and Limits of Private Power*. London: Cambridge University Press, 2013.

LOCKE, Richard M.; ROMIS, Monica. The promise and perils of private voluntary regulation: Labor standards and work organization in two Mexican garment factories, *Review of International Political Economy* (2010), 17:1, pp. 45-74.

MCBARNET, Doreen. Corporate social responsibility beyond law, through law, for law: the new corporate accountability. In: MCBARNET, Doreen; VOICULESCU, Aurora; and CAMPBELL, Tom (eds). *The New Corporate Accountability*. Corporate Social Responsibility and the Law, Cambridge: Cambridge University Press 2007. pp. 1-56.

MCCORQUODALE, Robert; SMIT, Lise; NEELY, Stuart; BROOKS, Robin. Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises. *Business and Human Rights Journal*, 2 (2017), pp. 195-224.

MITKIDIS, Katerina. Peterkova. Sustainability Clauses in International Supply Chain Contracts: Regulation, Enforceability and Effects of Ethical Requirements. *Nordic Journal of Commercial Law* 2014/1, pp. 1-30.

MORAN, Theodore H. The United Nations and transnational corporations: a review and a perspective. *Transnational Corporations*. Ago. 2009, Vol. 18, Nº 2. p. 91-112.

Northern District of California. *Class actions against Volkswagen*. 25 out. 2016. Disponível em: https://www.cand.uscourts.gov/crb/vwmdl Acesso em: 14 jul. 2019.

OIT – Organização Internacional do Trabalho. *Declaração da OIT sobre os Princípios e Direitos Fundamentais no Trabalho*. Disponível em: https://www.ilo.org/public/english/standards/declaration/declaration_portuguese.pdf. Acesso em: 30 abr. 2019.

ONU – Organização das Nações Unidas. *Declaração do Rio de Janeiro sobre Meio Ambiente e Desenvolvimento* (*Carta do Rio)*. 1992. Disponível em: http://portal.iphan.gov.br/uploads/ckfinder/arquivos/Carta%20do%20Rio%201992.pdf. Acesso em: 27 maio 2019.

PACTO GLOBAL. *Company Information:* Vale S.A. Disponível em: https://www.unglobal compact.org/what-is-gc/participants/2367-Vale-S-A- Acesso em: 12 ago. 2019.

______. *Os 10 Princípios*. Disponível em: https://www.pactoglobal.org.br/10-principios Acesso em: 10 ago. 2019.

POLANYI, Karl. *A grande transformação*. 2. ed. Rio de Janeiro: Elsevier, 2000.

______. A nossa obsoleta mentalidade mercantil. *Revista Trimestral de História das Idéias*, n.1, pp. 7-20. Porto (Portugal), 1977.

PONCIBÒ, Cristina. The Contractualization of Environmental Sustainability. *European Review of Contract Law*, (2016) Vol. 12, Nº 4, pp. 335-355.

REUTERS. *Organizações pedem exclusão da Vale do Pacto Global da ONU*. 12 fev. 2019. Disponível em: https://exame.abril.com.br/brasil/organizacoes-pedem-exclusao-da-vale-do-pacto-global-da-onu/ Acesso em: 19 jul. 2019.

RUGGIE, John G. *Presentation of Report to United Nations Human Rights Council*: Professor John G. Ruggie Special Representative of the Secretary-General for Business and Human Rights. Genebra, 30 maio 2011. Disponível em: https://www.ohchr.org/Documents/Issues/TransCorporations/HRC%202011_ Remarks_Final_JR.pdf Acesso em: 05 ago. 2019.

______. *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development – Protect, Respect and Remedy*: a Framework for Business and Human Rights. April 7th 2008. Disponível em: https://www.business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf. Acesso em: 11 abr. 2018.

______. *The Social Construction of the UN Guiding Principles on Business and Human Rights*. Corporate Responsibility Initiative Working Paper No. 67. Cambridge, MA: John F. Kennedy School of Government, Harvard University. Jun. 2017.

SAGAFI-NEJAD, Tagi. *The UN and Transnational Corporations*: From Code of Conduct to Global Compact. Bloomington and Indianapolis: Indiana University Press, 2008.

Suprema Corte da California. *Kasky vs. Nike*. 05 fev. 2002. Disponível em: http://reclaimdemocracy.org/wordpress/wp-content/uploads/2012/08/kasky_nike_decision.pdf Acesso em: 14 jul. 2019.

União. *Termo de Transação e de Ajustamento de Conduta*. 02 mar. 2016. Disponível em: https://www.samarco.com/wp-content/uploads/2016/07/TTAC-FINAL.pdf Acesso em: 11 abr. 2019.

UNITED NATIONS HUMAN RIGHTS. *Guiding Principles on Business and Human Rights*: Implementing the United Nations “Protect, Respect, Remedy” Framework. 2011. Disponível em: https://www.ohchr.org/documents/publications/Guidingprinciples Businesshr_eN.pdf Acesso em: 13 nov. 2018.

UNITED NATIONS GLOBAL COMPACT. *The power of principles: Sustainability begins with a principles-based approach to doing business*. Disponível em: https://www.unglobalcompact.org/what-is-gc/mission/principles. Acesso em: 11 abr. 2018.

VALE. *Sobre a Vale:* parcerias institucionais. Disponível em: http://www.vale.com/brasil/ PT/aboutvale/institutional-partnerships/Paginas/default.aspx Acesso em: 12 ago. 2019.

Submissão em: 12.01.2021
Avaliado em: 18.01.2021 (Avaliador A)
Avaliado em: 21.01.2021 (Avaliador D)
Aceito em: 21.01.2021