

Implementation of Social Responsibility of Mining Companies: Challenges and Prospects

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Abstract:

The implementation of CSR in the mining sector in the DRC is a crucial issue, given the importance of this sector for the national economy and the social and environmental impacts it generates. Although laws exist, their enforcement is often insufficient, hampering CSR initiatives. In the context of this research, it was found that CSR can be understood as an individual right for each member of the community and a collective right for the entire member of the community. Analyzing the law, CSR is a legal obligation but is voluntary, the possible recourse mechanisms are only administrative but for the judicial mechanisms there are still challenges. This is why it was proposed that first of all to designate those who must be considered as representatives of the local community to avoid any confusion and that the latter can have the possibility of seizing the judicial authorities for request either complete execution of the specifications, or terminate the contract given that CSR is a real contract and which must have the same effects of the contract.

Keywords: Social, responsibility, mining, companies, individual rights, collective rights, administrative, judicial.

I. Introduction

It is commonly known that fundamental rights and in particular social rights are rights opposable to public persons. Debates surrounding the justiciability and enforcement of CSR are turning around the enforcement of socio-economic rights. This research does not intend to analyse whether socio-economic rights are justiciable. However, most of the positions are related to the enforcement of the socio-economic rights against the state. There is not yet much data that clearly establish the enforcement of socio-economic rights against the companies and non-state actors. However, non-state actors can be seen responsible for the implementation of social rights, by natural or legal persons such as companies through Corporate Social Responsibility (CSR).¹ There is not an existing explanation about the enforcement of this category of rights against non-state actors such as companies. The enforcement of CSR depends on the specific rights entailed. CSR can involve both individual and collective rights.

This research aims to understand the challenges encountered on an individual and even collective level for effective implementation, in particular the possibility of seizing legal or even administrative authorities against mining companies once they fail to take into account their obligations. contained in the specifications and propose possible solutions. It will contain three point. The first analyses the

¹Marzo cl 'La responsabilité sociale des entreprises : À mi-chemin entre la soft law et le jus cogens : la question de l'effectivité de la protection des droits sociaux par les entreprises multinationales'(2012)1 La Revue des droits de l'homme at 409.

identification of rights involved in CSR, the second discusses the existing mechanisms and the last provides a conclusion.

II. Problems associated with the identification of the nature of individual and collective rights in CSR

The company's failure to fulfill its CSR obligations must in principle result in its liability before administrative or judicial authorities. However, these mechanisms can only be effective within the framework of the relevant procedure and requirements. The prerequisite for respecting human rights is a verification of the quality of the applicant which depends on the nature of the human rights violated. Thus, the requirement to implement CSR will depend on the rules of action which also depend on the right claimed.

1. CSR as the obligation to fulfil individual rights

The goal of development is first and foremost the man.² However, party seeking to demonstrate standing must be able to show the court sufficient connection to and harm from the law or action challenged.³ This standing depends on the specific subject matter of each case. Or, CSR has various obligations which entail various responsibilities. It touches the individual rights of members of the communities and on the other side; it involves the community's rights as a whole. The determination of standing depends on which right is claimed for having been infringed. Standing is defined as 'a sufficient stake in an otherwise justiciable controversy to obtain a resolution of that controversy.'⁴ Standing is defined as 'the ability of a party to bring a lawsuit in court based upon their stake in the outcome.'⁵

CSR cannot be dissociated with human rights. The latter are prerogatives that everyone individual holds, as a human being.⁶ They are the rights inherent in human nature, prior and superior in the order of purpose, but also in the order of the means.⁷ For instance, the right to life, liberty, and security of persons,⁸ the right to health and well-being,⁹ the right to different freedoms, particularly the right to circulate and to choose residence, the right to property reinforced by the right to restitution, compensation and rehabilitation¹⁰ etc.

The enforcement of individual rights against companies obeys various rules depending on either the nature of the right directly infringed and the requirement fixed by the law accordingly. For instance, in the matter concerning the CSR and the land property of an individual, article 281 of the Mining Code provides that 'any occupation of private land that deprives the beneficiaries of the enjoyment of the soil, any modification making the ground unsuitable for cultivation entails, for the holder or lessee of the mining and / or quarry rights, on request the beneficiaries of the field and their convenience, the obligation to pay fair compensation corresponding to either the rent or the value of the land at its

²Sanson H 'Developpement, Qu'est ce dire?' in A Pellet and J-M Sobez Le droit du developpement social et culturel (1997) at S15

³ US Legal 'Standing Law and Legal Definition' <https://definitions.uslegal.com/s/standing/> (accessed 25 September 2019)

⁴Scalia A 'The doctrine of standing as an essential element of the separation of powers' [Vol. XVII:881) Suffolk universitylawreview at 882.

⁵ US Legal (n20 above).

⁶H Leclerc 'Droits individuels et droits collectifs : comment les concilier ?' https://www.ldhfrance.org/IMG/pdf/H_L143_Dossier_6_Droits_individuels_et_droits_collectifs.pdf (accessed 24 August 2019)

⁷ M Escamilla 'Rights and Utilitarianism. John Stuart Mill's Role in its history' (2008)4 Revue d'étudesBenthamiennes at 7.

⁸ DRC Constitution, article 16.

⁹ DRC Constitution, article 43

¹⁰ ICJ The Right to a Remedy and Reparation for Gross Human Rights Violations: A Practitioners' Guide (2018)42.

occupation, increased by half. Or, the beneficiary is defined as any natural person of Congolese nationality who has the enjoyment of the land under customary law or any natural or legal person occupying the land under a land permit.¹¹

This provision applies to both collective and individual rights. Thus, the individual can seize the Court where the property is established. Based on article 1 of the procedural code, everyone wishes to assign, another provides to the Register of the jurisdiction where the application will be made all the necessary elements for the writing of the summons. If the applicant can write, he gives the register a signed statement.¹² As a necessary document, the individual will provide evidence establishing his property over the land occupied by the company for the compensation.

In addition to this aspect, the application of the traditional theory of civil liability according to the law of tort can be used against mining companies. The foundation of responsibility is the fault committed by mining companies or their organs. This principle is textually enshrined in Articles 258 and others of Congolese code of contracts¹³ providing that only a liable for the damage is the one for which it has arrived. According to the cited article, 'every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it'.

Regarding the requirement of proof of the direct fault of companies to establish their responsibility, this last mechanism cannot be strong enough. The traditional application of this rule requires the establishment of a direct fault with its direct damage. Or the mining activities are characterised by technical and industrial progress which, because of machinery, increases the number of victims due to direct or indirect faults with collateral victims. This justifies the examination of collective rights by the communities because the mining activities impact the entire community either at a local, national or global level. Besides, the mining activities have a social and environmental impact either in present and in the future. This leads to analyse CSR as social contracts that bound the companies to all the communities aimed to develop and promote the rights of the communities as a whole with its specific enforcement mechanisms.

2. CSR as an obligation to fulfil the right of groups

The realisation of the development of the community, in general, is a CSR par excellence. In fact, in addition to individual rights, there are rights related to the social nature of man and his life in the community. They involve the right to the community that the mining companies are obliged to promote. Those rights are the base of the aspiration of the local communities to flourishing, to social progress, to economic development and to the liberation of misery.¹⁴ It is, in particular, the right of every people to existence and determination, the right to development, right to resources, right to a healthy environment, right to participation, etc. In this perspective, the CSR is referred to as an obligation of mining companies to fulfil the rights of an entire group rather than individuals.¹⁵

The concept of collective rights emerged because individual human rights do not guarantee adequate protection for people living in a specific community as members of those communities. Individual rights cannot protect collective characteristics and aspirations. The communities' groups living in mining perimeters in DRC face 'various threats to their environments, to their health and their security, their livelihoods. Their maintenance in those areas depends on the attitude of mining companies to protect and

¹¹Article 1 (5) of the mining act (2018) entitled.

¹² Article 1st of the Decree - Code of Civil Procedure. (M.C., 1960, 961, erratum, 1351).

¹³ Decree of 30 July 1888 on Contracts and Conventional Obligations, B.O., 1888.

¹⁴ Allversity 'Collective Rights'<https://www.youtube.com/watch?v=m5enGIZrx1o>(accessed 24 September 2019).

¹⁵ Read Article 53 of the DRC constitution.

promote the environment and rights of those communities. CSR is the obligation towards the realisation of the collective rights of communities. It aims to guarantee the development and to preserve the community's cultural identities and its characteristics.¹⁶ However, with regards to their role for promoting the development of a whole community, 'collective rights from the CSR are enriched under a social contract which 'cannot be satisfactorily recognized without the existence of representatives of institutions designed to further a collective goal and so individual members collectively play subordinate roles. Collectively representatives of institutions have almost exclusive legitimacy to assert and manage the collective right'.¹⁷ This notion of community's representatives plays an important role in the establishment of a consistent CSR and its enforcement of because of the standing requirement to institute any legal lawsuit. And this is the real problem in the DRC, because although there may be this obligation to consult the local community to determine the projects that the mining operator will have to implement, the law does not indicate who must represent this community because we assume that we cannot meet the whole of society at the same time. In the investigations carried out, there is an imbroglio above, sometimes the local chiefs want to be the representative, sometimes those who have been chosen as members of the local development committee or even those who represent this community of the parliaments. This impasse only creates conflicts and legitimacy is no longer relevant. Therefore, the legislator or the administrative authority through a regulation should determine who are the persons authorized to discuss with the mining operator and that they also be given the right to refer the matter to the judges in cases where the agreed obligations have not been met respected.

3. Enforcement of CSR as a social contract with the communities

CSR is precisely the possibility for companies to make voluntary commitments and implement them. Analysts have argued that the CSR interest for companies is mainly due to its voluntary nature so that they have the possibility, if they wish, to commit to respecting social and environmental rights.¹⁸ They contended that as private actors, corporations are not designed to take on the responsibility to protect, promote and fulfil human rights and social welfare; they are not legally bound for the realisation of socio-economic rights.¹⁹

However, regarding the recent development of CSR, this position is no longer valuable because the most commonly accepted idea about the companies is that they are required to respond the short and long-term effects of their actions to ensure that their practices are congruent with current societal expectations, emerging and future.²⁰ CSR has a voluntary basis which is enforced under the law. The voluntary aspect of CSR consists of the fact that the law gives to companies the possibility to establish the plan for the development of the communities. In this perspective, the leaders of the companies voluntarily determine 'what CSR should be and the scope of such voluntary responsibility'²¹ However, it is realised that those voluntary engagements are in relation to the law and legal standards that touch the

¹⁶ Friends of Earth International 'Collective rights' <https://www.foei.org/what-we-do/collective-rights> (accessed 24 September 2019)

¹⁷ D Sander 'Collective Right'(1993)13 Human Rights Quarterly at 370

¹⁸ AJ Zerk Multinational and Corporate Social Responsibility: Limitations and Opportunities in International Law (2006) 42.

¹⁹ O Amapo 'Corporate Social Responsibility, Social Contract, Corporate Personhood, and Human Rights Law: Understanding the Emerging Responsibilities of Modern Corporations' (2008) 33 Australian Journal of Legal Philosophy at 2.

²⁰ DL Quynh 'La responsabilité sociale de l'entreprise, pourquoi et comment ça se parle?' (2005)26 La communication des nouvelles éthiques de l'entreprise at 2.

²¹ Cl M Dickerson, 'How Do Norms and Empathy Affect Corporation Law and Corporate Behaviour? Human Rights: The Emerging Norm of Corporate Social Responsibility' (2002) 76 Tulane Law Review at 1431.

conscience of the company vis-à-vis the communities.²² In addition, the law requires mining companies to provide a development plan when applying for a mining license. This development plan is established through formalities that involve the full participation of local communities. It is then agreed that CSR is based on legal obligations imposed on companies to contribute to the development of communities. Those obligations are enriched in a document considered as a contract between companies and communities. Although their commitment is based on a social charter to obtain the license permit, their implementation must be mandatory because the law attaches to legal consequences.

Thus, CSR is a social contract because of four main reasons. The first is because the mining operator is required to consult local communities in the establishment of the development plan.²³ The second is because the development plan must aim to contribute to the development of the communities, the third is because the local population must fully approve the development plan established by the companies²⁴ before companies get the mining license and the fourth is because the failure of the mining companies to implement the development plan of its CSR as provided and approved by the communities is punishable by the law.²⁵ In a contractual language, the development plan of the mining company or operator is an offer. The approval of the development plan by local community is an acceptance of the offer with the intention of the offerer to be in legal relationship with the communities as required by the legislator and the content of the development plan is a consideration in a contractual language and the capacity²⁶ relies on the standing as developed in the part relating to the group or collective rights.

Those elements were earlier discussed and lead to the conclusion that CSR is analysed under the theory of contract which must be performed under the domestic law of contracts unless the restrictions established by the law. Contracts are binding on the contracting parties. Persons who have consented and who have entered into the contract must scrupulously respect the obligations they are bound to. In the absence of such execution, the contracting party would be entitled to request a forced execution of the contract, to engage in a contractual liability action or to request the termination of the contract.

About the precedent development, the performance of the CSR can follow the law of contracts in the enforcement although some specificities established by the mining companies regarding the aim and specific nature of CSR. This aspect is demonstrated in the enforcement of collective rights.

III. The CSR enforcement bodies of mining companies in DRC

The enforcement of CSR is controversial. Empirically and theoretically, the only plausible path for CSR was to propose an external pressure force exerting counter-pressures that incites and forces companies to act in a more socially responsible manner.²⁷ In this aspect, riverine communities through local authorities, local NGOs, social movement were mobilised so that the exploitation of their natural resources contributes to the development of their region. These communities could militate for the realisation of infrastructures social networks such as roads, schools, health centres, etc. and create jobs. However, there are two main possibilities to adjudicate the CSR as a social contract of mining

²² Ch Parker 'Meta-Regulation: Legal Accountability for Corporate Social Responsibility?' in D McBamet, and others (eds) *The New Corporate Accountability: Corporate Social Responsibility and the Law* (2007) 208.

²³ Article 71 of the Mining Code relating to the requirements for granting the Exploitation License.

²⁴ Article 126 of the Mining regulation;

²⁵ Chapter IV of the Mining Regulation

²⁶ For the elements of contracts, read E Platsidaki 'Basic Principles Of Contract Law' <https://static1.squarespace.com/static/5347d859e4b0cbe1acbfecba/t/547752d7e4b06290caaa77dc/1417106135748/PRESENTATION+CONTRACT.pdf> (accessed 24 September 2019).

²⁷ As above.

companies. The first consists of seizing administrative bodies having in charge the specific aspect for which the enforcement is needed. The second way is to refer the matter to the competent judicial bodies.

1. Administrative procedure

The law does not specify the person empowered to seize the administrative bodies against mining companies for non-performance of their social responsibility. It merely sets out the procedure for investigating the reprehensible acts or omissions related to the non-compliance of the social and environmental obligations of mining companies. The administrative procedure for noncompliance with the CSR obligation is entrenched under article 288 (a) of the mining code.

From the purpose of the enforcement of CSR, the present section suggests that every person is entitled to denounce the violation of CSR obligations and report the violation to the Congolese Agency of the Environment or the Mining Environmental Protection Directorate. The two administrative bodies have jurisdiction over the CSR issues for administrative purposes. However, their jurisdiction is limited to conduct in-sites investigations to local communities and transmit the reports to the Mining cadastre. The mining cadastre has to post the reports transmitted to him in a room indicated by the Mining Regulations and order to receive the feedback from the pointed company. A copy of this minute shall be given to the holder of the license asking him to submit his defence in forty-five days from the posting period. Upon received the defence from the mining company, the Congolese Environment Agency, in collaboration with the Directorate of Environmental Protection conduct the second investigation and submit the technical advice to the Mining cadastre that transmits the case and raft of the decision to the Minister.

The Minister of Mines is competent to grant, refuse to grant or withdraw mining license,²⁸ and its services control mining and quarrying activities, as well as the protection of the environment.²⁹ There is nothing else as a formal administrative procedure after submitting the case to the Minister.

2. Problem of enforcement of CSR with judicial bodies

The Constitution gives competing jurisdiction over these matters to the provincial governments. The protection of the environment and the rights of local communities are in the domain of economic, social and cultural rights for which jurisdiction is devoted to national courts. If a local community wants to complain about a company, it can seize either the Courts of High Instance is still the Courts of Commerce, as the case may be. The law gives the Courts of Intermediate the competence to know the disputes which are not the competence of the courts of peace.³⁰ The Courts of Commerce know, in the matter of private law, disputes relating to acts of commerce, including acts relating to commercial companies and mixed acts, if the defendant is a merchant.³¹ This court knows, in the field of criminal law, infringements of economic and commercial legislation, whatever the rate of the penalty or the height of the fine.

However, article 316 of the mining code restricts actions to court against mining companies in case of the failure of companies to comply with their social obligations to local communities. The matters admissible to courts are listed by article 316 of the Mining code. Some CSR aspects admissible before courts are ‘disputes between the holders or with the occupants of the soil, the compensation litigation expropriation. Apart from individual rights as discussed earlier, the Congolese legislation does not

²⁸ G Delalieux ‘L’influence des idéologies dans le développement de la RSE’<http://ias2005.free.fr/Actes/Pdf/delalieux.pdf> (accessed 25 August 2019).

²⁹ Article 10 of the Mining Code

³⁰ Article 7 of Mining Regulation.

³¹ Article 112 of the Organic-Law n° 13/011-B of 11 April 2013 organization and functioning of the courts of the judiciary.

clearly allow local communities to access court in order to seek enforcement obligations enriched in the development plan established by companies.

For the environmental threat, the right to the environment is a fundamental human right constitutionally guaranteed, protected and enforceable. Its procedural nature implies the right to access environmental information, the right to participate in the process of deciding on the environment, the right of appeal to the courts in case of infringement and the right to compensation.³² The right to the environment remains the right individual and collective.³³ Article 134 of Forest Code allows NGOs to seize the Tribunal de Grande Instance against any infringement of environmental laws. The NGO must be a national (first condition) and agreed with environmental issues as one purpose (second condition).³⁴ In the same context, articles 71 to 79 establish the mechanism of enforcing environmental rights by individuals. Thus, the mining companies can be sued to Congolese courts by every person to influence decisions; actions or omissions harm to the environment or endanger the life of communities.

IV. Conclusion

The present research analysed the possibility to enforce the CSR of mining companies under the Congolese framework. It was essentially focused on the analysis of the mechanisms of conflict settlement in the mining sector as provided by the Mining Code. The research realizes that before Congolese courts, the development plan is not clearly enforceable with regard to the strict limitation of the type of mining conflicts that can be brought to Congolese courts. And therefore this provision must be reviewed and include the possibility of taking legal action once the ongoing obligations in the specifications relating to CSR have not been respected. A bit like what the forest code provides.

However, regarding the administrative procedure, the mining code seems to give the possibility to denounce the failure of the mining companies to comply with its social and environmental obligations. Yet, this procedure does not give any chance of prospect because it does not provide any remedy to local communities and the legislation does not clearly determine the type of decision that can take the Minister of mineral resources once the matter is submitted to him. In addition, as the decision of the minister will have a discretionary nature, this procedure cannot be considered as enforcement mechanisms that comply with article 1(2) of the ICESCR.

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³² Article 17, first paragraph, of (1) to (4) of the Law 00212001 du 03 July 2001 establishing, organizing and operating commercial courts.

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³⁴ As above, article 46.

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