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HUMAN RIGHTS AND OVERSEAS INVESTMENT

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CAN THE RESPECT FOR HUMAN RIGHTS ENCOURAGE FOREIGN DIRECT INVESTMENT?

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1. Introduction

Foreign Direct Investment (FDI) is a very important component of the international economy and there is a consensus that FDI benefits the economy of host countries.

Despite this *"One of the most important challenges of the 21st century is to ensure that the increased flows of international investment and corporate activity do not contradict our commitment to human rights*[1]*"*.

For guidance purposes, we shall define the two words that constitute the topic of this article. When talking about Human Rights we refer to all civil, political, economic, social and cultural rights that are inter-related, inter-dependent and indivisible, and that represent the DNA of today's world civilization. FDI *"is a flow of economic resources that can convey political and social influence*[2]*."*

FDI benefits (or, for some authors, affects) millions of people around the world, particularly in countries where legal and regulatory systems are not sophisticated enough.

The globalization of the world economy presents new challenges and opportunities for all stakeholders involved (Governments, Investing Companies and Local Communities). Some say that governments play the most important role – except if we are dealing with big investments projects made by large multinational companies, also known as TransNational Corporations (TNC's[3]), in developing countries where the balance of powers can be the other way around – due to the fact that it is up to the States to approve and enforce national human rights laws.

However, whether the human rights responsibility of investing companies is the same as the obligations of governments is still a topic to be discussed.

"Today, the economic capacities of some TNC's go beyond the economic capacities of the countries in which they operate, and their correlative political muscle can be greater than the ability of some states to regulate them effectively[4]*"*.

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[1] ROY, Jean-Louis, 2007, Human Rights Impact Assessments for Foreign Investment Projects, Rights & Democracy, International Centre For Human Rights and Democratic Development, available on-line at http://www.dd-rd.ca/site/publications/index.php?lang=en (assessed on July 3, 2010). Rights & Democracy is an independent Canadian institution created by an Act of Parliament in 1988 in order to encourage and support the universal values of human rights and the promotion of democratic institutions and practices around the world.

[2] HENISZ, Witold J., 2008-2009, Concentrated Power, Foreign Direct Investment and Economic Growth, available on-line at http://74.125.155.132/scholar?q=cache:vr7lXEZTbRoJ:scholar.google.com/+Concentrated+Power,+Foreign+Direct+Investment+and+Economic+Growth&hl=pt-PT&as_sdt=2000&as_vis=1 (assessed on July 3, 2010).

[3] TNC's refer to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively, see footnote 8 below.

[4] For more details see United Nations Research Institute for Social Development ('UNRISD'): *Corporate Social Responsibility and Business Regulation*, Research and Policy Brief 1 (2004) available on-line at http://www.unrisd.org/80256B3C005BCCF9/(httpPublications)/F862A71428FAC633C1256E9B002F1021?OpenDocument&fromsearch=yes&query=research+and+policy+brief (assessed on July 3, 2010).

Investing companies must comply with national and international law, and this includes human rights law. According to the opening preamble of the Universal Declaration of Human Rights (UDHR), *"…every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance*[5]*…"*.

Whether the UDHR is directly applicable to companies is still to be determined. While some say it is, others argue that there is a *"human rights free environment in which some corporations seem to now operate"*[6].

According to the report submitted in 2007 by the Special Representative[7] of the Secretary General (SRSG) to the UN Human Rights Council, it is suggested that international human rights law is ambiguous in respect of the possibility of fighting human rights abuses committed by corporations beyond its jurisdiction. *"The Report suggests that while human rights treaties do not require states to exercise extra territorial jurisdiction over corporate human rights abuses, nor do they prohibit a state from doing so."*[8]

The Organization for Economic Cooperation and Development (OECD) adopted, on 21 June 1976, the Guidelines for Multinational Enterprises, for which the most recent revision was completed in June 2000. In accordance with the OECD[9] the *"Guidelines for Multinational Enterprises are the most comprehensive instrument in existence today for corporate responsibility multilaterally agreed by governments. Adhering governments - representing all regions of the world and accounting for 85% of foreign direct investment – are committed to encouraging enterprises operating in their territory to observe a set of widely recognised principles and standards for responsible business conduct wherever they operate."*.

Notwithstanding the above, the Guidelines are non binding for multinational companies and therefore do not impose direct human rights obligations on these companies.

On the contrary, self regulation of companies usually adopted by means of a company code of conduct can be an alternative. Also, companies investing in developing countries can set the human rights standards in jurisdictions where the competition for attracting FDI can defer human rights concerns.

And what role do the local communities play as recipient of FDI?

Usually, an FDI recipient community plays a minor role due to the lack of organizational capabilities and know-how skills, and in some cases, is only aware of the existence of a new investment project if it starts suffering from its negative impact. A way of changing this status could be the implementation of mandatory community human rights impact assessment during the approval process for new FDI projects.

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5 Universal Declaration of Human Rights, available on-line at http://www.un.org/en/documents/udhr/index.shtml (assessed on July 29, 2010).

6 SCHUTTER, Olivier de, 2006, Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations, available on-line at http://www.reports-and-materials.org/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf (assessed on July 3, 2010).

7 John Ruggie.

8 KINLEY, David and NOLAN, Justine, 2008, Trading and Aiding Human Rights: Corporations in the Global Economy, published in Nordic Journal of Human Rights Law (2008) Vol. 25, (4), pp. 353–377.

9 Available at OECD website at http://www.oecd.org/document/28/0,3343,en_2649_34889_2397532_1_1_1_1,00.html (assessed on July 31, 2010).

2. Key Factors for attracting FDI

Many different factors influence the level of attraction of a specific country when it comes to FDI, i.e. economic, social, political and legal factors.

From a theoretical point of view, the OLI (Ownership, Location and Internalization) paradigm is seen as the framework for foreign investment decisions (Dunning, 1993)[10].

- Ownership: a company is looking for ownership of specific advantages over other companies in other countries; the host State can grant ownership of advantages by helping a company keep its monopolistic advantage against local producers.

- Location: advantage must be gained by going abroad, like saving in transport costs; proximity to a large market; political situation and education level of the host country workforce; Natural resources and port access are two strong localization factors, but the host State can set up tax and financial incentives to make a certain location more attractive.

- Internationalization: instead of licensing or selling its specific advantages, a company decides to internationalize and take advantages across different markets.

3. Can the respect of Human Rights encourage FDI?

The expansion of the global economy has brought advantages and disadvantages in terms of the respect of human rights.

Economic growth brings the potential to increase many human rights, like economic and social rights to work, housing, food and water, health care and education. Also, other human rights may improve, such as the civil, political and religious rights and liberty of association. However, the global economic expansion does not necessarily mean that all benefit equally or that disadvantaged groups will benefit at all.

Globalization has made the world a smaller place. The reputation of a TNC is a very important asset that companies need to protect under any circumstances. A reputational damage can endanger the survival of a company. Recently a human rights issue arose in the Gulf of Mexico with the oil disaster. Independently of legal grounds and liabilities involved, BP has quickly assured the local community in the disaster areas that it will assume full responsibility.

There are different views on the relationship between human rights and FDI.

A traditional approach (Lenin, 1919[11]) considers that companies are driven to maximize profits and maintain their rates of growth, therefore they choose countries where local populations can be exploited as good locations for foreign investment. In the same line of thought, Stephen Hymer[12] (1971) adds that *"multinational corporations seek to keep the world's largest populations under*

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[10] BLANTON, Shannon Lindsey and BLANTON, Robert G., 2005, What attracts Foreign Investors? An examination of Human Rights and Foreign Direct Investment available on-line at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1065916 (assessed on July 3, 2010).
[11] For more details see article referred on footnote 10 above.
[12] For more details see article referred on footnote 10 above.

control", relying on repressive mechanisms of host countries and tending to support repressive regimes that control protests against inequalities.

According to Human Rights Assessment Report[13], *"In 2005, the Canadian company TVI Pacific Inc. officially opened the Canatuan mine on the island of Mindanao in the Philippines. The mining operations displaced many families; divided the local indigenous people, known as the Subanon; deprived thousands of small-scale miners of their livelihood; and negatively affected rice farmers and fishers living downstream because of increased levels of sediment and metals in local rivers and creeks. One of the most controversial aspects of the mine is that it is located on the peak of Mount Canatuan, which the Subanon living in the area consider as sacred. The research team focused heavily on the rights of Indigenous People as described in the UN Declaration on Indigenous Peoples. The central finding of this report is that the investment has had a negative impact on the ability of the Subanon to enjoy the human right to self-determination, to human security, to an adequate standard of living, to adequate housing, to work and to education."*

An alternative approach defends that respect for human rights facilitates a more efficient, productive and skilled workforce that enhances a higher level of attraction of a specific country to FDI.

4. <u>Conclusion</u>

In general terms, FDI does not directly imply a positive or negative impact on human rights.

Despite the SRSG's opinion that international human rights law does not permit the fight against corporations, TNC's cannot afford reputational damages and will take self regulatory measures in the form of company Codes of Ethics.

However if we go back to our main question - Can the respect of human rights encourage FDI? - and to the OLI[14] paradigm i.e. Location, a particular country that respects human rights is likely to have a stable political situation and an educated population, which makes this country a more attractive place for FDI.

Indeed, I believe that the respect of Human Rights is an additional advantage to attract FDI and that a TNC that does not respect Human Rights cannot survive in the long run in today's globalized world.

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[13] For more details see case study report referred on footnote 1 above.
[14] See section 2 above.