

FUNDAMENTAL RIGHTS AND MIGRATION OF JUDICIAL MODELS IN THE CONDITIONALITY OF INVESTMENT TREATIES AND TRANSNATIONAL PUBLIC POLICIES. THE CAMBODIAN CASE

Jacopo Paffarini

Doutor em Direito Público pela Università degli Studi di Perugia (Itália). Mestre em Direito com a colaboração do Centro Tecnológico de Monterrey (Campus Ciudad de México). Bacharel em Direito pela Università degli Studi di Perugia. Pesquisador Visitante do Instituto Max-Planck de Direito Público Comparado - Heidelberg (Alemanha). Membro pesquisador do Grupo Internacional de Pesquisa “Corte, Doutrina e Sociedade Inclusiva: o impacto das fontes doutrinárias nas Cortes Superiores”, financiado pelo Ministério de Instrução, das Universidades e Pesquisa (Decreto n. 719/2012). Colaborador assistente na Cátedra de Direito Constitucional e Direito Público Comparado, de titularidade do Prof. Dr. Maurizio Oliviero, junto ao Curso de Direito da Università degli Studi di Perugia. Coorientador do módulo de Direito Transnacional no curso de Direito Público Comparado. Participante do Projeto de Lei Transnacional na London Law School of Economics (Inglaterra). Tem experiência na área de Direito, com ênfase em Direito Público, atuando principalmente nos seguintes temas: direito transnacional, constitucionalismo, direitos humanos, hermenêutica do direito e instituições judiciais.

ABSTRACT

Justice Reform in developing countries is one of the most important priorities of international economic organizations. Reform is frequently pursued by setting up new institutions *beyond* national authorities, in order to prevent national government interference with their functions. The theories linking economic growth and rule of law models offer legitimization to the legal transplants required to meet international standards. The Cambodian case shows that this connection is often unbalanced and the regulation of the new models seeks productive increase rather than better justice in the field of fundamental rights.

Keywords: Principle of Conditionality. Justice Reform. Transnational Constitutionalism. Cultural Hegemony. Fundamental Rights.

1. A TRANSNATIONAL PERSPECTIVE ON THE STUDY OF IMITATION CASES

The development of interaction dynamics between state legal systems – and between those and the normative standards settled by international organizations – is a common field of study for jurists of different legal branches. However, beyond the traditional collection of “assonance

cases” between different legal orders, it seems opportune that the legal scientists concentrate their survey also on the directions acquired by the migration of legal ideas.

By the end of last century, comparative studies highlighted a significant increase in the reception cases of Western legal models by the remaining areas of the world¹. Among developing

¹ For a critical approach to the subject, see U. MATTEI, L. NADER, *Il saccheggio. Regime di legalità e trasformazioni globali*, Milano-Torino, 2010.

countries the majority of the imitation of Western normative solutions have been grounded on the conditionality² imposed by the developed nations – on the commercial treaties – and by the international organizations – on the cooperation and development programs – rather than on the “prestige” of those models.

The itinerary of research that is going to be illustrated on the following pages assumes as reference point the promotion of arbitration through justice reform transnational policies addressed to the developing countries, especially by considering labor rights. The following exposure technique reflects a specific choice to distinguish the analysis of the *causes* that have stimulated to the migration of ADR models and the *results* occurred in recipient countries legal systems.

The case-study selected for this purpose is the experience of international cooperation that established the Arbitration Council of the United Kingdom of Cambodia, to which the jurisdiction on workers’ fundamental rights and liberties has been progressively conferred. Initially, the article will focus on the two most significant aspects by the comparative point of view: on one hand, the link between the dynamics of finance and

2 Since 1952, the principle of conditionality has been implicitly introduced by the International Monetary Fund (IMF) triennial grant policies to force the beneficiary states to adopt a specific balance approach, characterized by a restrictive orientation on public spending. The practice of financial conditionality has known a growing legitimation and diffusion among the lending policies due above all to its convergence function between the objectives of contracting parties: the beneficiary interest in obtaining the lending is bound to the implementation of the politics that the borrower considers more appropriate to ensure production growth and, with this, the successful conclusion of the relation with the restitution of the amount agreed, see M. GUITIAN, *Fund Conditionality Evolution of Principles and Practices*, Washington, 1981, pp.10-14; F.O. ANOUBI, *The Implications of Conditionality. The International Monetary Fund and Africa*, Lanham-New York, 1992, p. 160-161. After its extension to bilateral and multilateral archetype of non-lending agreements, the practice of conditionality was formalized by art. 60 of Vienna Convention on the Law of Treaties of 1969, which states that “the violation of a provision essential to the accomplishment or object or purpose of the treaty” represents a “material breach” that authorizes the parties to “terminate the treaty or suspending its operation in whole or in part”. Not every infringement authorized the suspension of relationships, but only those that interest the essential clauses identified by the parties or identifiable through the interpretation of the provisions.

international trade and the spread of *rule of law* institutes; on the other hand, the role of international organizations in the monitoring transplant process and the provision of “technical supply” to lead the legal model toward the predefined function. The second part of the analysis will focus on some statistical data concerning the activity of the Arbitration Council, by comparing them with the original targets of the *Labour Dispute Resolution Project* that started and sustained the institution-building experience.

Through the study of this experience is intended to emphasize the double-effect related to the progressive reception of ADR models by the developing nations legal orders. On one hand, the increasing number of cases connected with arbitral procedure transplants determines the disposal of “individualizing” and “specifying” characters of arbitral function, by maturing a growing focus on the matters of legal and hermeneutic consistency in the decision-making process. On the other hand, by the effects of those advancements, the arbitral function has been incorporated inside a path for the construction transnational judicial models inspired to the Western Rule of Law Tradition.

Before proceeding with the illustration of facts, here it is important to point out that in the following pages the legal experience is considered as a part of a (more complex) system for the production of an historically-predetermined model of social life. For that purpose, to avoid ambiguity and clarify the consequences of that theoretic approach, it is preferable to study the circulation of legal models in the specific point of view of the development cooperation promoted by the international organizations as main actors of the ongoing globalizing process. From this perspective the concept of law dismiss the usual *neutral sense* – on the basis of which it comes as a mechanism for the regulation of the social life – while emerges its function as an instrument for the domination of the multiplicity of reality available to an historically predetermined political power³.

3 See, N. IRTI, *L'ordine giuridico del mercato*, Roma-Bari, 2003, p. 8-10.

2. THE PRINCIPLE OF CONDITIONALITY: FROM FINANCIAL BALANCES TO CULTURAL HEGEMONY

The connection between the circulation of Western legal models and international commerce ties in a considerable way since the second post-war. During this historical conjunction, the regulation of economic relationships is subject of two opposite tendencies that simultaneously involve the state legal orders. On the one hand, as an answer to the Great Depression and in the wake of the Keynesian theories that represented the Western answer to that crisis, the constitutional law of European States restricted private liberty and added social provisions and so became the main stronghold for working class issues. On the other, immediately after the end of the conflict, a process of constitution of multilateral organizations started in order to offer legitimacy to the new international commerce and financial rules defined by winner States.

The increasing removal of obstacles to the full development of economic liberties *beyond* states boundaries – considered necessary for better working conditions⁴ – associate the statutory objectives of some of the most important institutions born in the early postwar: the International Bank for Reconstruction and Development (IBRD), the International Monetary Fund (IMF), the General Agreement on Trade and Services (GATT) and, last, the European Economic Community (EEC).

By the way of those supranational bodies, the industrialized countries have sought the construction of a *uniform commercial law* that has increasingly claimed its autonomy from the national political powers and generally the other “places intended for political and social negotiation where all the provisions of law take form”⁵.

4 See, for example, the *International Bank for Reconstruction and Development Articles of Agreement* (1944), which, in Article 1, aims “to promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labor in their territories”.

5 See, F. GALGANO, *Lex mercatoria*, Bologna, 2011, p. 12. This article shares the Authors point of view for which the “legal particularism” of

The law of the “transnational merchant class” – commonly denominated, in a more neutral terms, “*societas mercatorum*” or “business community” – today seems furnished of all the elements to be a proper legal order: a *plurality of legal subjects* (represented by the business corporations operating in the global market), a *set of rules* (embodied by generally recognized commercial uses), a *justice system* (composed by the network of international arbitration chambers)⁶.

In historical terms, the route of this progression starts with the end of the utopia of giving birth to an “international government of economy” that was the purpose of certain delegates to the Bretton Woods Conference⁷. The attempt to distinguish the global regulation of exchanges from the geopolitical interests of industrialized states is evident in the statutory provisions which forbid to IBRD and IMF to interfere with member states political affairs⁸. For these reasons, the grant suspension is admitted only for purposes concerning the success of the financial program and never for political or other non-economic considerations⁹.

commercial law is based both on the rule-making technique and on the limits of the area of human relationships covered by those rules. On the first side, the medieval and contemporary history of *lex mercatoria* testify to the continued ambition of commercial law to reach its autonomy from civil law “in order to be more rapidly and more easily amended, in correspondence to the changing needs of exchanges and to be a law, the most possible, a-national, in antithesis to the markedly national characterization of civil law”, *Ivi*, p. 10. Respecting to the limits of commercial law, what in doctrine is commonly called “commercial law” effectively regulate neither the *whole*, nor *only* commerce (*Ivi*, p.11). One the most important examples of this characteristic is the increasing number of relationships – and so, the subjective rights – ruled by contract statements or through procedures – such as arbitration – deriving from them.

6 See, F. GALGANO, cit., p. 248-9.

7 See, S. VEZZANI, *Gli accordi delle Organizzazioni del Gruppo Banca Mondiale*, Torino, 2011, p. 250-251. As the Author observes, the Yalta negotiations did not prevent the US State Department threatening in 1947 a veto on the French grant if the communist representatives wouldn't be all expelled from government offices. A similar policy was adopted toward the Latin American countries during the seventies and the eighties of the last century when, for example, the lending to Chile was interrupted during the Allende Presidency (1971-1973) and then was re-established when Pinochet formed a new government.

8 Art. IV, sec. 10 of the *Statute of International Bank for Reconstruction and Development*.

9 Art. III, sec. 5, lett. B), of the *Statute of International Bank for Reconstruction and Development*.

Once acknowledged the impossibility of a conciliation between the two contending block positions and that a common project of international development was impracticable, the role of IMF and IBRD economic conditionality was essential for the spread of the liberal-economics ideology, which has given birth to the present *lex mercatoria*. The Bretton Woods conditionality, indeed, has never limited itself to the financial profiles of the lending operation, but has immediately shown its “expansive character” by stimulating the addition onto the agreements of clauses without an immediately-productive scope¹⁰. The development path of *standby arrangements* of IMF represents good evidence of this tendency. The original version of this type of agreement found its scope in postwar-reconstruction lending to benefit of the most affected states which, in exchange, assumed the commitment to reform specific institutes concerning the regulation of commerce. The development target was associated, in particular, with the elimination of the existing limits to the freedom to conduct a business and external exchanges, to the institution of an internal market founded on the principles of competition with the removal of all the assistance measures for the national industry. The normative content of *standby arrangements*, moreover, became more complex in the seventies, when the consequences of the oil crisis on the balance of payments increased the member states’ pressure for more cash to the International Monetary Fund. More specifically, an extension of the term of the financial assistance program was granted (from one to five years) linked to more restrictive requests on “aggregate demand” policies. Consequently, those imbalances had been, not only the economic, but also the political basis for cutting the state services’ budget.¹¹

10 See, S. VEZZANI, *op.cit.*, p. 247-8. A turning-point in the policies on conditionality is identified by the author in the interior memorandum drawn up by the General Counsellor in 1984, which states that “the currently entertained conception of the term “project” with its engineering undertones unduly introduces a measure of rigidity which cannot be supported by the definition in the standard dictionaries of the Bank’s Articles”, see, *Project and Non-Project Financing under the IBRD Articles, Legal Memorandum by the General Counsel, I.F.I. SHIHATA, The World Bank Legal Papers, L’Aia*, 2000, p. 173-183.

11 See, F.O. ANOUBI, *The Implications of Conditionality*, cit., p. 162. The economic theories affiliated to the IMF lending policies have always declared the existence of a implied link between the excess of goods demand, inflation and desta-

In the aftermath of Soviet disaggregation, there was an increase of developing countries adhesions to the World Bank and IMF cooperation programs, of which the Western states are the main donors and promoters. The primary objective pursued by global institutions in this historical context is the adjustment of the East Europe and Asiatic economies which have quit the state-planning experience. Usually, the role played by the law in global market construction and investment made by Western States in the exportation of their legal models is not adequately acknowledged. From those considerations is possible to assert that the adaptation of the national “legal infrastructure” of any country to the world competition – from the promotion and implementation of private autonomy to the certainty of impartial dispute resolution procedure – does not starts “free” or “spontaneous”, but is imposed as a requirement to be part of the international exchanges supported by global institutions¹².

However, there is another totally original aspect that has arisen since the end of the last century, it is the acceptance of the theory asserting a connection between economic development and the constitutional principles promoted by liberalism. Under this influence, the content of conditionality is increasingly moving from the traditional area of commercial and financial law to the main representative aspects of the relationship between public authority and citizens¹³.

bilization of the states’ balance of payments. On this belief have found an explanation the usual requests of cuts on public spending (especially, those related to the medical assistance) that have been advanced in exchange for the subsidized rates grant by the Fund.

When the *standby arrangements* have a long-term duration, the lending conditions are stated in a “*Letter of Intent*” drawn up by the IMF representatives and subscribed by the Minister of Economy of the beneficiary state. After a long period of absence from the international scene, this typology of agreements have found a new life in the aftermath of the 2008 financial crisis, which has brought many IMF member states to make further demand on the assistance programmes.

12 See, U. MATTEI, L. NADER, *Il saccheggio. Regime di legalità e trasformazioni globali*, Milano-Torino, 2010, p. 13. The Authors point out the different ways of legal models migration: apart from military domination or the “prestige” of a normative institute, can be traced another way, the “conditional imposition”. This expression means that “the acceptance of a system of rules is not totally free. The interested countries are persuaded to adopt the legal structures which meet Western standards if they do not want to be excluded from the international market”.

13 The global institutions policies try to synchronize economic development and legal system

For that reasons, at the start of the new millennium the states accession to the main organizations of international commerce and finance is subject to the acceptance of specific standards of human rights protection¹⁴. This implies two very important consequences. First, the trade organizations can express their rating both on the level of economic liberty and the efficiency of national legal systems. Second, the States that aim to enter the system of international relations ruled by World Trade Organization and International Monetary Fund shall reform their normative and institutional framework in order to match the legal models recommended by the latter. Reflecting on this process, legal science has introduced the notion of “political conditionality” to indicate the set of principles and norms – derived from customary international law (*jus cogens*) and the main international bodies’ soft law – which shape the legal category of “human rights”, “democracy” and “good governance”¹⁵

3. JUSTICE REFORM IN DEVELOPING COUNTRIES: LEGAL TRANSPLANTS MEET A PROBLEM-SOLVING APPROACH

The intervention of the International Labour Organization (ILO) in the industrial dynamics of Cambodia is not an isolated event, but it

reforms: as is possible to read in the *World Bank Development Report*, of 1999 “Without the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible”. Available at: http://web.worldbank.org/archive/website01013/WEB/0_CO-87.HTM

14 See, M.R. FERRARESE, *Il diritto al presente. Globalizzazione e tempo delle istituzioni*, Bologna, 2002, p. 116.

15 See, P. UVIN, I. BIAGIOTTI, *Global Governance and the “New” Political Conditionality*, in *Global Governance*, 2 (1996), p. 377: “Yet political conditionality may also be more broadly defined as a set of specific state behaviors – respecting human rights, organizing multiparty elections, working in a good governance mode, and cutting military spending – that are internationally upheld as conducive to development and whose realization is promoted, inter alia, through that leverage instrument. The specific state behaviors that are promoted may be said to constitute a regime: sets of internationally dominant principles and norms around which expectations converge and that define acceptable state behavior for both recipient and donor countries”.

is a part of wider justice reform strategy started in the beginning of the new millennium by the common and coordinated action of the major international organizations¹⁶. Recently World Bank “activism” in financial and technical support of *judicial transplants* has conferred a preeminence to the theoretical approaches that pose the effectiveness of rights at the center of economic growth programs¹⁷.

The emergence of this trend is a reflection of a clear strategy prepared by the law offices of these organizations, who are asked to make an assessment of the impact of the law (public and private) on the economic performance. The results obtained are the basis for elaboration of the reforms required to initiate or continue a loan. Although the content of the agreements may therefore vary depending on the characteristics (political, social and legal) of the recipient country, the conditionality of the World Bank and the IMF follows consistent criteria that give to the support activity a certain uniformity in the results.

An overall view of soft law produced by the World Bank on the issue, the “*New Directions on Justice Reform*” is the document that summarizes best the “*modus operandi*” of international orga-

16 In the nineties a decisive turning point occurred in the lending policies of the World Bank and IMF. It is a moment of general exaltation of the models of liberal constitutionalism – of which is celebrated the rational superiority to the principles of “socialist legality”. For the financial institutions it is an opportunity to reaffirm the link between economic growth and the rule of law, and open a way for reconsider the prohibition of interference with the political affairs of the borrower states prescribed at Article IV, Sec. 10, IBRD Articles of Agreement. This is confirmed by the studies on the the progress made in carrying out the first eight projects for justice reform (1995-2007), commissioned by the World Bank itself: see, *Justice Reform Projects in Latin America: Lessons Learned (1995-2010)*, Working Paper No. 70755, 2011, p. 7.

17 Between 1994 and 2012 there were 36 the projects which aimed to support justice reforms, for an annual commitment of \$24 million. To this figure must be added the presence in many investment projects (388, to be precise) of significant items of expenditure (on average, at least 10% of the total amount of the loan) dedicated to the issues of “*law and justice*” or the “*rule of law*”. See, *New Directions on Justice Reform – A companion piece to the updated strategy and implementation plan on strengthening governance tackling corruption*, Working Paper no. 70640, 2012, p.3-4, available on line: <http://documents.worldbank.org/curated/en/2012/05/16706679/world-bank-new-directions-justice-reform-companion-piece-updated-strategy-implementation-plan-strengthening-governance-tackling-corruption>.

nizations. In this publication, the Legal Vice Presidency explains in detail why the judicial system of a State carries out functions critical to economic growth, highlighting three different profiles. First, the proper functioning of justice is considered necessary to prevent crimes and mitigate the level of conflict and violence in society, identified as the main barriers to development. Second, it attaches to the administrative and criminal jurisdiction a decisive role in the fight against corruption, theft of public property by the ruling *elites* in developing countries and, more generally, in the prosecution of crimes committed in the management of the economy by the public authorities of the State. Finally, the judicial system is recognized as an essential function of “driving” the economy, to the extent that it ensures the growth of the private sector in accordance with the framework traced by the political bodies of the country and the international bodies of the various business sectors. Therefore the Legal Vice Presidency believes that the predictability of the legal effects of contracts, the presence of legal protection of property rights and a system for resolving legal disputes are “key determinants of economic development”¹⁸.

The construction of a theoretical link between the spread of the rule of law and economic growth has also directed studies of legal science. In fact, when the concept of “development” – it has been declined during the decennial activity of report and technical assistance of the World Bank – entered in the reflections of comparative doctrine the same classification of legal systems came out transformed. The traditional divisions are based mainly on the *rule-making process* (common law and civil law) or on the degree of influence of political, religious or cultural factors in the functioning of the legal system of the country (democratic state, socialist state, authoritarian state, theocratic state). However, there are long-established approaches to the comparison that tend to divide legal experiences according to their adherence to the principles of “good governance” and “good government” derived from international humanitarian law and human rights theories¹⁹. It can be traced back to these assump-

18 See, *New Directions on Justice Reform*, cit., p.2.

19 See, V.C. JACKSON, *Comparative Constitutional Law: Methodologies*, in M. ROSENFELD, A. SAJÓ (edited by), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012, p. 55-56 e 60. The Author warns about the possibility of considering this type of study as real “classifiers”, even when the formal presentation is such. It would be appropriate to distinguish, therefo-

re, the case studies in which the real interest of the comparatist is the definition of constitutional models, rather than those in which the study of foreign law is aimed at the construction of a general theory capable of giving answers to the problems of contemporary democracies (such as the relationship between legality and equality, or between judicial review and democracy).

20 See, P.J. Mc CONNAUGAY, *The Scope of Autonomy in International Contracts and Its Relation to Economic Regulation and Development*, in *Columbia Journal of Transnational Law*, Vol. 39, december 2000, p. 601. It is interesting to read the Author’s word: “This Article distinguishes “developed” from “developing” nations in a purely functional way. Developed nations are those nations that enjoy fully developed legal infrastructures and the ability to effectively regulate commercial activity-principally the major industrialized trading nations of the West, perhaps along with the few most advanced industrialized nations of Asia. Developing nations are those nations whose judicial and commercial regulatory institutions lack the capacity to perform their prescribed or intended functions effectively, whether because the institutions do not exist, because they are under-developed, because they are under-funded, or because of some other disabling attribute, such as corruption”.

21 *Ivi*, p. 603.

22 “The risk of under-regulation occurs because, when a developed nation’s otherwise applicable public law is allowed to be displaced by private contractual election, the likelihood is that the contracting parties will elect a lesser or even ineffective regulatory substitute”, *Ivi*, p. 602.

That said, the presence of a “dialogue” between legal science and international institutions can be inferred from the detection of some key

determinants in the cooperation projects initiated by the World Bank in the field of justice. First, it can be observed that “*conditionality*” has been directed mainly towards the newly industrialized countries and has served to accomplish for the multiple actions of assistance and training personnel for the development of self-management skills of disputes and judicial services²³. The first “*lesson*” learned in the field by experts of the World Bank is that interventions to support reforms cannot aim at the “*rewriting*” of the constitutional principles of justice without taking account of the executive rules. The tendency is therefore to move from one action to support wide-ranging (“*multi-faced approach*”) to a cooperation to meet specific questions (“*problem solving approach*”). Therefore, most of the expenses incurred by the Bank (on average, two-thirds of the investments allocated for each project) are used in the construction of physical infrastructure (buildings and equipment for carrying material of the work of the courts) and logistics (information services and legal publishing, management tools)²⁴.

The conditionality of loans from the Bank in recent years has therefore shown a predilection for empirical approach: it follows not only that the object of the cooperation projects is restricted to specific questions (“*the needs of end users*”) emerged as a result of a “*diagnosis*” on the state of justice in the country, but also that the field of action is chosen by using “*economic criteria*”. As stated by the Legal Vice Presidency, the question is not how to reform the judicial system, but when and how the judicial system – with its inefficiencies – prevents proper development of the country²⁵. Following this approach, the cooperative action of the Bank develops in three steps. The first phase aims to identify the regulatory area (for example, criminal law, copyright law, protection of vulnerable groups, etc..) on which it is intended to act and which must necessarily have some connection with economic growth to fall into the Bank “*mandate*”. In the following step is requi-

red that the processing of the reform proposals is specific enough to produce significant results in the actual conduct of the legal relationship. The program of cooperation must focus an issue that represents a brake on economic growth of the country (for example, corruption or, as it has been for Cambodia, the high level of conflict in industrial relations) and propose an efficient solution. Finally, after an initial phase of implementation of the program, it is necessary to make an assessment of the impact of innovations – according to the predetermined standards and criteria – and provide the opportunity for the sector stakeholders (non-governmental organizations, local authorities, trade unions, etc..) to propose guidelines to amend the supporting actions²⁶.

Under this approach, focusing strongly on the themes of economic growth, there has been a decline in lending transactions with the sole objective of the development of judicial institutions in a country. The Bank’s intervention in this area, in fact, continued through investment projects in the private sector – especially in the manufacturing and agricultural industry of developing countries. As has already been highlighted above, most of these loan agreements contains components relating to the realization of specific judicial infrastructure in order to make possible the success of the investment. However, in many of these cases – as can be seen by simply reading cooperation projects – when those agreements talk about “*justice*” normally they do not refer to the national judiciary. The flight from the system of state institutions is justified in the light of the inadequacy and corruption of the ruling classes (including judicial): under the “*umbrella*” of a humanitarian intervention, is favored the creation of new institutions from involvement of civil society. In this way, on the one hand, it prevents the monetary aid granted from falling into the hands of the local governments and therefore diverted from purposes of cooperation projects, on the other hand, it try to remedy the lack of confidence of the population towards the courts.

The experience of the legal transplant which involved the field of industrial relations in Cambodia, fully summarizes the features mentioned above, and anticipates some possible scenarios that may derive from the activity of cooperation as it has developed in that case. First of all, the episode highlights how the principle of conditionality

23 For a thorough review of the cooperation projects in the field of justice sponsored by the World Bank, see, R. LAVER, *The World Bank and Judicial Reform: Overcoming “Blind Spots” in the Approach to “Judicial Independence”*, in *Duke Journal of Comparative and International Law*, Vol.22, 2012.

24 *Ivi*, p.199

25 “Rather than beginning with the question of how to modernize the court system, such efforts should begin by asking where failings of the justice system are constraint to equitable development”. See, *New Directions on Justice Reform*, cit., p. 9.

26 *Ibidem*.

works in trade agreements between industrialized and developing countries: it provides an example of how the economic interest becomes the engine of the processes of implementation of human rights and justice reform. Second, the definition of competences and the powers of the Arbitration Council testifies the character at the same time *pragmatic* (“problem-solving”) and *consensual* of the cooperation programs of international organizations. The effective performance of the functions of the AC is subject to acceptance by the parties, at first, of the jurisdiction (which is normal since it is an arbitration), subsequently, of the decision within eight days following its publication. Finally, the “Cambodian model”, unlike other attempts of transplant funded in previous experiences from the World Bank, had a continuity that has allowed it to enter into the social dynamics of Cambodia (where the textile industry is the main source of economy and of employment for the population). This has contributed to the gradual transformation of the AC into a permanent organ of the judiciary in Cambodia, with powers to intervene in the conduct of collective disputes, and basically “irresponsible” in relation to other powers of the Cambodian State (both executive and the judiciary). These will be the issues that will be dealt in the second part of our reflection.

4. THE CIRCULATION OF TRADE UNION RIGHTS THROUGH THE CONDITIONALITY OF COMMERCIAL TREATIES. THE LAUNCH OF A “REWARD MECHANISM” IN THE US-CAMBODIA TEXTILE AGREEMENT

During the nineties the reduction of manufacturing costs became one of the most important challenges for the companies facing global trade competition. With the mass exodus of Western companies to the Asian sweatshops, however, public attention was focused on working conditions in the textile sector in developing countries. Western companies were accused of supporting with their investments the dictatorships respon-

sible for the repression of trade union struggles in the factories of the countries in the developing world. Consequently, there has been a spread of the practice of linking the opening of trade negotiations to the willingness of partner country governments to engage in the protection of workers’ rights²⁷. The first significant example of this tendency is the North American Agreement on Labor Cooperation (NAALC)²⁸, a supplementary agreement to the treaty which regulates the commerce between the United States, Mexico and Canada from January 1, 1994 (North America Free Trade Agreement). The objective of NAALC is the promotion, “at the highest level possible”, of some of the fundamental trade union and worker rights identified in the text of the agreement itself²⁹. The same formula was repeated in other bilateral agreements signed by the United States³⁰ and Canada³¹ with some countries in the developing world, as a result of internal pressures exerted by the national unions, determined to put a stop to the relocation of production sites.

With the consolidation of a production system structured on a global scale, the fight against so-called *social dumping* has become a prerogative of the common commercial policy of Western governments and multinational companies in the textile sector. On the initiative of the European Union and the United States new programs were created to encourage the adoption of minimum standards for the protection of labor in the developing world. Among the privileged tools in the pursuit of this objective, the Generalized

²⁷ The practice of including dispositions related to the promotion of working conditions in trade agreements does not remain isolated in the area of established democracies. As noted by S. POLASKI, *Protecting Labor Rights through Trade Agreements: an Analytical Guide*, in *Journal of International Law and Policy*, July, 14, 2004, p. 14: “Canada and Chile have also included labor provisions in at least some of their bilateral trade agreements. Brazil, Argentina, Uruguay and Paraguay have included labor commitments and institutions as part of the architecture of the Mercosur common market”.

²⁸ The text of the Agreement is available at: <http://www.worldtradelaw.net/nafta/naalc.pdf>.

²⁹ Art.1: “The objectives of the Agreement are to: [...] promote, to the maximum extent possible, the labor principles set out in Annex 1”.

³⁰ U.S.-Jordan Free Trade Agreement; U.S.-Singapore Free Trade Agreement; U.S.-Chile Free Trade Agreement

³¹ The *Canada-Chile Agreement on Labor Cooperation* is a supplementary agreement to the free trade treaty between the two countries having similar objectives to the NAALC.

System of Preferences (GSP)³² – in derogation of the principles of free trade among nations promoted by the General Agreement on Trade and Tariffs (GATT) – grants a reduced-tariff entrance into the Western market to the products from countries that are committed to guaranteeing the internationally-recognized rights of workers. The program in question sees the industrialized countries adopting for the first time a common line of the limitations that should be imposed on competition in the name of the most basic human rights, such as freedom of association and to organize union activities or the prohibition of forced labor and child labor. It should be noted, however, that most of the expectations placed on the GSP have been circumvented and some have attributed the causes of this failure to the fact that the original objectives of the mechanism have subsequently been subordinated to the needs of economic and foreign policy of the United States³³. From a legal perspective, the weak point of the GSP, as well as the majority of trade agreements containing clauses relating to the promotion of determining standards for protection of workers, is the lack of tools to ensure their effective implementation. The system of penalties normally used in international trade agreements is unfit to cover this task and, especially in cases in which it has been implemented, has been more detrimental to the populations of the developing countries – for which orders from the West are an important source of employment – than for the governments or the multinational corporations which were actually responsible for the breach of the obligations to protect³⁴.

The dysfunctions of the GSP demonstrate the failure of the modern system of international relations to give an adequate response to the challenges posed by globalization of markets. First, in most of the experiences the cooperation relationship is non-existent because the implementation of the agreement depends almost exclusively on local institutions. A second problem can be traced to the limitations – in the name of the national sovereignty – of the commitment to protect labor rights according to national, rather than international standards.

The Cambodian case, although dating from the same period as the GSP, represents an exception. Firstly, because for the first time a “reward mechanism” was introduced consisting in the increase of quotas of products intended to have access to the American market in the event of proven improvements in the implementation of the provisions of the national Labor Code³⁵ and generally recognized international standards³⁶. Secondly, the program provides for regular monitoring of the progress made in working conditions and the effective enjoyment of trade union freedoms. It is carried out on an annual basis directly in the factories and, above all, it is not carried out by the parties to the agreement, but by the staff of International Labor Organization (ILO). Finally, the increase in export quotas is granted in the case of a positive performance of the entire manufacturing sector. Therefore, failure to adapt by one or more employers endangers the recognition of the trade benefits for the entire industry. The latter aspect activates a “horizontal mechanism of pressure” (from the workers and compliant companies to non-compliant ones) that has guaranteed, under the terms of the agreement, a general implementation of national

32 See, C. LANCE, J. VOGT, *Labor Rights in the Generalized System of Preferences: A 20 Year Review*, in *Comparative Labor Law and Policy Journal*, Vol. 2, Issue 3, 2001, p.199-238.

33 See, D. WELLS, “Best Practice” in the regulation of International Labor Standards: Lessons of the U.S.-Cambodia Textile Agreement, in *Comparative Labor Law and Policy Journal*, Vol. 27, 2006, p. 359-360. For a similar consideration of the Generalized System of Preferences, see, K. ELLIOT, R. FREEMAN, *Can Labor Standards improve under Globalization?*, 2003, p. 87.

34 See, S. POLASKI, *cit.*, p. 21: “A withdrawal of trade benefits could in some cases result in a diminution of employment that would harm the workers (the victims of the original non-compliance) as much or more than the employers (the perpetrators of labor law violations) and government (which tolerated the violations)”. Similar remarks are made on the implementation of the provisions relating to the protection of workers in bilateral free trade agreements between the United States, on the one hand, Chile and Singa-

pore, on the other by D. WELLS, *cit.*, p. 358: “In neither agreement is there is a process to enforce even the weak obligation that the countries take steps to comply with the International Labor Organization’s (ILO) fundamental (or core) international labor rights”.

35 Art. 10, lett. A) “The Parties seek to [...]promote compliance with, and effective enforcement of, existing labour law, and promote the general labor rights embodied in the Cambodian labor code”. The commercial agreement is available at: http://cambodia.usembassy.gov/uploads/images/M9r-zdrzMKGi6Ajf0SIuJRA/uskh_texttile.pdf

36 Art. 10, lett. B): “The Royal Government of Cambodia shall support the implementation of a program to improve working conditions in the textile and apparel sector, including internationally recognized core labour standards, through the application of Cambodian labor law”.

and international provisions on workers' protection without the need for coercive intervention by state institutions³⁷.

Furthermore, as an implementation of the provisions of art. 10 of the Trade Agreement, there are two distinct programs of cooperation undertaken under the direction and control of the ILO: the *Garment Sector Working Conditions Improvement Project* and the *Labor Dispute Resolution Project*. The first³⁸ promotes a training program aimed at educating workers and employers in trade union activities in an attempt to channel towards legal practice social conflict that often resulted in murders and attacks against activists. The second program, however, has given rise to the legally more significant aspect of this cooperation: the creation of a permanent arbitration tribunal, independent of other Cambodian institutions, and with functions of judgment in matters of trade union rights and collective disputes. The Arbitration Council (AC) was set up in May 2003 and then, after some fundamental modifications, it was re-established in December 2005.

37 The connection between the system of premiums constituted by the increase in export quotas and the overall performance of the manufacturing sector is, according to keen observers, the "trump card" of the experience of trade between the United States and Cambodia. See, S. POLASKI, *cit.*, p. 22. For a deeper analysis of the export quotas experience see, J. A. HALL, *The ILO's Better Factories Cambodia Program: A Viable Blueprint for Promoting International Labor Rights?*, in *Stanford Law and Policy Review*, Vol.21, No.3, p. 427-460. It should be noted, finally, that in the first report prepared by the ILO, two years after the entry into force of the trade agreement, are recorded significant improvements in the enjoyment of trade union freedoms: see, *First Synthesis Report on Working Conditions in Cambodia's Garment Sector*, November 2001, available on the ILO website <http://betterfactories.org/?p=3044>. On the same page are available all the other following Reports.

38 The *Garment Sector Working Conditions Improvement Project*, also known by the name of "Better Factories Cambodia", is structured in training courses on the application of the labor law rules, addressed to employees, workers and other intermediate figures of the organizational structure of the industry in Cambodia. The program also provides for the establishment of a Committee responsible for consulting on how to implement the legislation, as well as monitoring and evaluation of progress in adapting to international standards, the positive outcome of which is subject to the issuance of the export license to the company.

5. A NEW "JUDGE" FOR COLLECTIVE DISPUTES: AIMS AND APORIAS OF A "PROBLEM-SOLVING" JUSTICE REFORM

The AC model is unique in the international scene as it combines the key features of arbitration – the derivation from an investment agreement and the voluntary nature of jurisdiction – with a series of elements borrowed from the tradition of Western models of justice – providing legal guarantees for the independence of the components and the obligation to observe a consistent interpretation. The combination of these aspects is understandable in light of the major issues, which the introduction of the AC has tried to resolve.

The factual and legal context in which the project has been launched is, in fact, characterized by strong instability of social relations also caused – according to experts of the International Labour Organization³⁹ – by endemic corruption of judicial institutions and government that has fueled a general distrust towards the regulation of contractual business relationships and work. However, since the early years of the nineteenth century, Cambodia has become one of the leading nations in which Western companies of the textile sector invest, because, it is not part of the *Multi-Fibre Arrangement* (MFA) and there are no limitations on the amount of cotton that can be exported to Western markets (such as for China, Indonesia, Thailand and others).

With the increase in production volume, however, the problem of conflict in the workplace does not disappear. On the contrary, in the years following the signing of the US-Cambodia bilateral trade agreement the number of industrial disputes reached the maximum level⁴⁰. The need

39 See, H. van NOORD, H. S. HWANG, K. BUGEJA, *Cambodia's Arbitration Council: Institution-building in a developing country*, in *ILO Working Paper No.24*, Geneva, august 2011, p. 2.

40 By the study of the ILO documents and the Reports of the Arbitration Council may be inferred a direct relationship between the growth in the volume of business and number of collective disputes: while the first passed by an amount of \$ 26.5 million in 1995 to \$ 2.8 billion in 2007, the latter, from 17 to 80 during the same period. See H. van NOORD, HS HWANG, K. BUGEJA, *Cambodia's Arbitration Council: Institution-building in a Developing Country*, *cit.*, p. 3 and *The Arbitration Council Annual Report 2011*, p. 4, available, as the following and subsequent reports, at: <http://www.arbitrationcouncil.org/en/media/publications/annual-reports>

to bring the contrast inside the legal procedures and mutual recognition between the social parties – that is essential to engage in any form of negotiation – are the basis of the current features of the Arbitration Council. Its functions are set out in Article 310 and following of the Cambodian Labor Code, within the regulation of individual and collective labor disputes (Chapter XII) and of collective industrial action (Chapter XIII). The criteria for selection and training of the judging panel members, along with all aspects of the procedure and the issuance of the arbitration award, are subject to the regulation of Prakas 99 of 21 April 2004, issued by the Ministry of Labor⁴¹.

The analysis of the legislation relating to the capabilities of the AC and the time of the arbitration procedure allows us to make an initial framework that highlights the unique character of this organism. First, despite the establishment of the Arbitration Council originated from a cotton trade treaty, its functions of judgment are not limited to this area, but have been extended, since the beginning, to all collective disputes regardless of the productive sector within which have arisen. Even more significant, however, is the wording of the second subparagraph of Article 312 which establishes the authority to decide not only disputes concerning trade union rights deriving from Cambodian and international law, but also “other disputes”, i.e. those disputes from which collective benefits could potentially arise for one or other of the parties to the conflict⁴². The allocation of a decisive role in the control of labor relations, moreover, is reinforced by the provisions of Article 34 of Prakas, which gives to the Arbitration Panel “full powers of intervention” in the controversy. The latter is required to take appropriate action in order to stop violations of the rules and the negative effects that are derived: in particular, the AC may ask the reparation of the damages suffered by the parties, included the reinstatement of unfairly dismissed

employees (point A) and the interruption of on-going collective action (point C)⁴³.

The capacity to perform an effective task in litigation has undoubtedly helped to increase the credibility of the AC, paving the way to its settlement in the difficult context of Cambodia’s industrial relations. It should be noted, however, that also other components of this experience of institution-building proved decisive for this purpose. Firstly, it was crucial that the path of the *Labor Dispute Resolution Project* was not limited to the establishment of a judicial body, but took into account the problem of the effective start-up and the range of its activities. For this purpose, in order to overcome the initial distrust of unions and employers, the legislative framework has established that the parties – before the judgment – can also choose not to be bound by the outcome of the arbitration proceedings. If within eight days from the notification of the Arbitration Panel’s decision one of the parties notifies the Ministry its intention to file the opposition, the dispute would start a new course under the State justice (Article 313). A second feature of the arbitration process that has helped to make the AC “familiar” to the social partners is the *free access*, sanctioned at legislative range by Article 316 of the Labor Code.

The establishment of an Alternative Dispute Resolution body for collective disputes has been accompanied from the outset by the search for legitimacy, which, in a country where development has led to strong social polarization, could not be irrespective of themes such as the *voluntariness* of jurisdiction and the *democratization* of access to justice. These two components, however, do not seem to be enough to disprove the *economicist* structure of the institution-building operation, which emerges clearly in front of many more aspects of the arbitration procedure. The rapidity of the procedure is certainly one of the most significant: Article 313 of the Labor Code imposes a burden on the Panel to issue its decision within 15 days. It is not disputed that the

41 In the Cambodian legal system, the Prakas is a sublegislative source of law and one or more ministers jointly are competent for the emanation. Normally the Prakas contains provisions that specify the content of laws and therefore plays a vital role in addressing the choice of the court, especially in a country where the judicial class has not developed a “culture of independence” from political power.

42 “The Council of Arbitration legally decides on disputes concerning the interpretation and enforcement of laws or regulations or of a collective agreement. The Council’s decisions are in equity for all other disputes”.

43 Art. 34, *Prakas* no. 99: “In matters referred to the arbitration panel, the panel shall have the power and authority to fully remedy any violation of provisions provided in the Labour Law, implementing regulations under the Labour Law, collective bargaining agreements or other obligations arising from the professional relationship between employer and employee. Within the limitations of the Labour Law and this Prakas, it has the power and authority to provide any civil remedy or relief which it deems just and fair [...]”

brevity of this term contrasts strongly with the formulations that give full investigative powers to the arbitrators about the workplace conditions or that require them to examine all the documents brought by the counterparties in support of their demands⁴⁴.

The “problem-solving approach”, which denotes the entire operation of transplant, is not clear only with regard of the delimitation of the judicial area – as has already stated above – but also with regard to the objectives. Therefore, if fifteen days are a clearly too short a period of time to “do justice”, it is not a coincidence that the legislative provisions requiring the Panel to examine only the issues that have led to the failure of previous attempts of conciliation⁴⁵ and to seek, before opening the judgment, a new basis for a mutual agreement between the parties. Further confirmation of this reading can be traced in the annual-reports in which the Arbitration Council takes stock of its activities and their future developments: the insistence with which the statistics relating to the increase in cases submitted to the AC are contrasted with a substantial decrease of strikes aimed primarily to demonstrates a commitment to the pacification of industrial relations⁴⁶. This ideal of labor justice has never been questioned by the promoters of the two international projects that have given financial support to the activity of AC (*Labor Dispute Resolution Project*, directed by the ILO, until 2009, and *Demand for Good Governance Project*, directed by the World Bank, which was completed in March 2014). In contrast, the model of the Cambodian

arbitration tribunal is sponsored by the Legal Vice Presidency of the World Bank, “[as] an example of the application of an iterative, problem-solving approach to justice reform”⁴⁷.

6. STRENGTHENING THE FOUNDATIONS THROUGH SOCIAL-ISSUES MONOPOLIZATION: THE NEW PROCEDURAL RULES AND THE GENERALIZATION OF AC JURISDICTION.

It is necessary add to the description above the important turning point marked by the signing of the *Memorandum of Understanding on Improving Industrial Relations in the Garment Industry (MoU)* on 28 September 2010. The agreement, signed by some of the most representative unions of the country, has been promoted by International Labor Organization and by World Bank in order to ensure greater predictability of results in the application of legislative provisions and to encourage dialogue between the social parties, especially in the mean of arbitration proceedings⁴⁸.

The signatories expressly recognize the importance of a *conciliatory approach* to the dispute in order to ensure an improvement in working conditions and to prevent unlawful conduct by the employees or the employers⁴⁹. Significant are the provisions on negotiations at the enterprise level. In particular, it has been stated that no association of workers may give rise to strikes against the agreement reached as a result of the conciliation procedure in front of the AC when it has been signed by the most representative trade unions in the workplace⁵⁰.

44 Article 312, par. 3 e 4, of Labor Code: “The Council of Arbitration has a broad power to investigate the economic situation of the enterprises and the social situation of the workers involved in the dispute.

The Council has the power to make all inquiries into the enterprises or the professional organizations, as well as the power to require the parties to present any document or economic, accounting, statistical, financial, or administrative information that would be useful in accomplishing its mission. The Council may also solicit the assistance of experts”.

45 Article 312, par. 1, of Labor Code: “The Council of Arbitration has no duty to examine issues other than those specified in the non-conciliation report or matters, which arise from events subsequent to the report, that are the direct consequence of the current dispute”.

46 As recorded by the *Annual Report 2011*, p. 4: “As at the end of 2011, the correlation between the lowest strike record in the garment industry and the highest number of labour disputes received by AC suggests maturing of industrial relations in the Cambodian garment sector”

47 See, *New Directions on Justice Reform*, cit., p. 9.

48 The text of the agreement, translated into English, is available on the ILO website: http://www.ilo.org/wcmsp5/groups/public/---asia/--ro-bangkok/--ilo-phnom_penh/documents/genericdocument/wcms_145234.pdf

49 See point 2 of the *Memorandum of Understanding*: “Both parties support CBA [Council Bilateral Agreements] in order to achieve certainty and predictability and to protect rights and terms of work condition for both parties”.

50 See point 3 of the *Memorandum of Understanding*: “Both parties support the MRS [Most Representative Status] as the exclusive bargaining agent on behalf of all workers in the enterprise. Minority unions can participate in the process

The statements that have most contributed to increasing centrality of the Arbitration Council in the Cambodian industrial system, however, are those contained in points 5 and 6 of the *MoU*. The former establish the compulsory nature of any conciliation agreement reached in front of the Panel and the latter is recognized as the exclusive judicial body for any disputes which arise about its implementation. Therefore, a “*Council Bilateral Agreement*” has a general effect inside the workplace and the parties are bound to implement any relevant decision from the Panel. Point 6 repeats the same commitment towards all the future controversies that would arise between the signatory parties, regardless of the existence of any prior conciliatory agreement. This provision, *de facto*, introduces a binding arbitration for most of the collective labor disputes that will arise in Cambodia by refraining the parties from any appeal to the State courts⁵¹.

Reflecting on the potential consequences of the latter provision, perhaps even more than the formers, it is clear that main objective of the *MoU* is to guarantee that the benefits related to the rapidity of the arbitration (i.e. the smooth continuation of the production, the continuity of company’s profits and employment contracts) are not compromised by the opening of a trial. Consequently, it seems to be clear a subordination of the objective of “*good governance*” and guaranteeing social rights – pursued by the international projects that have given support to the reform of justice – to the main interest for the industrial growth of the country. A relief that is not even mitigated by the AC, for which the assurance of a decision within 15 days is a transversal advantage, therefore, is not limited to one party of the conflict: “[...] This speedy standard of AC dispute resolution enables both enterprises and their workers to focus on the productivity and income”⁵².

It is appropriate to consider part of this framework even the provisions that seem to introduce elements of eminently-legal rationality in the experience of institution-building in Cambodia. Thus, for example, the provisions of the *Prakas*

by choice but along with all employees must respect the authority of the MRS union, and have no right to initiate or disrupt bargaining or to object to any CBA reached by MRS union”

51 At point 6 of *Memorandum* it is settled, in fact: “[...] Where an arbitration decision on dispute of rights is given, the employer and workers and their representatives accept that the decision is final and binding on them.[...]”

52 See *Arbitration Council Annual Report 2011*, p.7.

99/2004 requiring the arbitrators to indicate the edicts of the law or the collective agreement which form the basis its decision (Article 38)⁵³ do not seem to play a substantial role in the spread of the rule of law in the face of the conciliatory and economist tendency of the procedure within the AC.

These considerations can be repeated also in the light of the subsequent *AC Procedural Rules* adopted pursuant to Article 31 of the *Prakas* by the Ministry of Labor on the advice of the Arbitration Council itself. These are divided into seven “Rules”, each of which is in turn divided into subsections: they shows no trace of formulations that engage the arbitrators to ensure the predictability of contractual effects or certainty of fundamental rights, whereas particular attention is paid to the outcome of the procedure and to reduce costs. With regard to the first profile, is established that in carrying out their activities arbitrators are required to conform to considerations of “fairness”⁵⁴ and, in approaching the study of the dispute, they must take into account that reconciliation “is always the desirable option”⁵⁵. The second profile is the most mentioned objective in the *Procedural Rules* and is consistently associated in the text with the need to reach a rapid decision⁵⁶. For this purpose, in order to ensure the effective short time limits for the composition of the Panel and the proper constitution of the party to the proceedings, is encourage the use of the telephone communication as legal notification⁵⁷.

A further level of guarantees, aimed at strengthening the judicial vocation of the Arbitration Council, is detectable in the context of the provi-

53 The importance of this prediction can be grasped if we consider that the Cambodian courts traditionally do not usually justify their judgments in law. See, in this regard, H. van NOORD, HS HWANG, K. BUGEJA, *Cambodia’s Arbitration Council: Institution-building in a Developing Country*, cit., P. 12.

54 Rule 4.8.

55 Rule 4.10: “Settlement through conciliation is always the desirable option and the parties at all times retain the right to settle on their own terms including during the course of the arbitration”.

56 Rule 4.9: “Postponements of arbitration hearings are costly and undesirable. Postponements will only be granted by the arbitration panel where all parties to the arbitration agree such postponement”.

57 See Rule 6.3: “Because time is of the essence in the conduct of proceedings of the Arbitration Council, the use of telephone communications is encouraged among all persons involved, unless the Labour Law, the *Prakas* or these Rules specifically require written communication. In any case, proof of such communication may be required”.

sions on the arbitrators appointment. The Article 311 of the Labor Code stated that they “shall be chosen from among judges, members of the *Advisory Committee of Labor*, and generally among prominent figures known for their moral qualities and their competence in economic and social matters”. The appointment of the 15 arbitrators is formally accomplished by an act (Prakas) of the Ministry of Labour but the choice is accomplished one-third by the associations of workers, one-third by employer unions and one-third by the Ministry of Labor. Only the associations who are part of the Consultative Committee of Labor, however, take part in the elections. The reform introduced by Prakas 99/2004 has maintained the annual term of office (Article 2), but has added the further requirement that each member must be renewed by the Minister unless preclude occurring reasons of health, criminal convictions or incompatibility (indicated in Article 7). The arbitrators, in fact, serve for life (“as they remain in good standing”⁵⁸), and this certainly contributes to the formation of an expertise in the field of dispute resolution. The latter provisions find a positive acknowledgement in the last Report of the AC, which shows both a substantial increase in the disputes examined by the Panel (from 145 cases in 2010 to 255 in 2012) and a high percentage of cases “successfully concluded”⁵⁹.

Finally, it is worth considering data on the use of the “*return-to-work orders*”, with which the AC has the ability to impact on the effective enjoyment of the rights enshrined at constitutional level⁶⁰. Also on this side, the Report 2012 points out that only 16% of the ordinances did not find implementation while in the rest of the cases the production continued normally pending the conclusion of the arbitration proceedings. The less

data reassuring – and on which the Arbitration Council, however, does not seem to express any concern – is that the number of orders for interruption of strike issued has more than tripled since the signing of the *Memorandum of Understanding* (from 14 in 2010 to 45 in 2012)⁶¹. This is an element that strengthens even more the consideration of this institution-building experience as a highly-intrusive attempt to intervene in the system of social relations of the country.

BIBLIOGRAPHY

- AGUILA GRADOS G.C., CAZZARO K., STAFFEN M.R., *Constitucionalismo em Mutação. Reflexões sobre as influências do Neocostitucionalismo e da Globalização Jurídica*, Rio do Sul, 2013.
- CRUZ P.M., STELZER J., *Direito e Transnacionalidade*, Curitiba, 2010.
- FERRARESE M.R., *Il diritto al presente. Globalizzazione e tempo delle istituzioni*, Bologna, 2002.
- GALGANO F., *Lex mercatoria*, Bologna, 2011.
- HALL A., The ILO’s Better Factories Cambodia Program: A Viable Blueprint for Promoting International Labor Rights?, in *Stanford Law and Policy Review*, v. 21, n. 3, 2010.
- IRTI N., *L’ordine giuridico del mercato*, Roma-Bari, 2003.
- JACKSON V.C., *Comparative Constitutional Law: Methodologies*, in M. ROSENFELD, A. SAJÒ (edited by), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012.
- LAVER R., The World Bank and Judicial Reform: Overcoming “Blind Spots” in the Approach to “Judicial Independence”, in *Duke Journal of Comparative and International Law*, Vol.22, 2012.
- MATTEI U., NADER L., *Il saccheggio. Regime di legalità e trasformazioni globali*, Milano-Torino, 2010.
- Mc CONNAUGAY P.J., The Role of Arbitration in Economic Development and the Creation of Transnational Legal Principles in *Peking University School of Transnational Law Review*, Vol.1, 2013.

58 Cfr. H. van NOORD, H. S. HWANG, K. BUGEJA, *Cambodia’s Arbitration Council: Institution-building in a developing country*, cit., p. 25.

59 Disputes are considered “closed positively” when a settlement agreement has been reached before trial (34% of the disputes submitted) or where the arbitration decision had actually lead to the normalization of business relation (36% of cases). See *The Arbitration Council Annual Report 2012*, p. 4.

60 Article 37 of the Constitution of the United Kingdom of Cambodia states that the right to strike and to demonstrate peacefully must be exercised within the limits defined by law. To this regard, Article 312 *et seq.* of the Labor Code dictate the general predictions regarding the strike, in which it is still considered illegal the strike accomplished when the arbitration procedure has not been completed yet (Art. 320).

61 See *The Arbitration Council Annual Report 2012*, p. 4.

- Mc CONNAUGAY P.J., The Scope of Autonomy in International Contracts and Its Relation to Economic Regulation and Development, in *Columbia Journal of Transnational Law*, v. 39, 2000.
- PAULSSON J., *The Idea of Arbitration*, Oxford, 2013.
- POLASKI, S. *Protecting Labor Rights through Trade Agreements: an Analytical Guide*, in *Journal of International Law and Policy*, July, 14, 2004.
- Van NOORD H., HWANG K., BUGEJA H. S., Cambodia's Arbitration Council: Institution-building in a developing country, in *ILO Working Paper*, n. 24, Geneva, august 2011.
- VEZZANI S., *Gli accordi delle Organizzazioni del Gruppo Banca Mondiale*, Torino, 2011.
- WELLS D., "Best Practice" in the regulation of International Labor Standards: Lessons of the U.S.-Cambodia Textile Agreement, in *Comparative Labor Law and Policy Journal*, v. 27, 2006.

Direitos Fundamentais e a Migração de Modelos Judiciais na Condicionalidade dos Tratados Transnacionais de Investimentos e Políticas Públicas. O caso Cambojiano

RESUMO

A reforma da justiça nos países em desenvolvimento é uma das prioridades mais importantes das organizações econômicas internacionais. Esse objetivo é frequentemente seguido pela criação de novas instituições para além das autoridades nacionais a fim de impedir que estas interfiram em suas funções. Teorias que ligam o crescimento econômico e a normatividade de modelos jurídicos oferecem legitimação às migrações legais necessárias para cumprir os padrões internacionais. O caso do Camboja, no entanto, destaca que esta ligação é, muitas vezes, desequilibrada e a regulamentação do novo modelo busca mais um incremento produtivo do que melhorar a Justiça no domínio dos Direitos Fundamentais.

Palavras-chave: Princípio da condicionalidade. Reforma judiciária. Constitucionalismo transnacional. Hegemonia cultural. Direitos Fundamentais.

Submetido em: agosto de 2014.

Aprovado em: novembro de 2014.